Monograph 13: International quasi-legislation and the EU.

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Introduction

In the 1990s, and through to the turn of the century and beyond, it was not uncommon to observe EU legislative and other initiatives being announced by ministers as if they were solely of domestic origin. Only on further scrutiny did it become evident that EU requirements were being implemented.

One small example was the design of the (then) new driver's licence which, according to a leaflet from the Driver and Vehicle Licensing Agency, had been "decided by ministers". Yet every detail of its format had been based on the "Community model driving license" made mandatory by Directive 91/493/EEC. The failure to disclose its origin was, we thought, part of an attempt by the UK government to conceal **the growing power of Brussels**. For domestic political reasons, Ministers needed to pretend they were still in charge.

By early 2008, however, we were becoming aware of a similar phenomenon being played out at the global level. We were finding that the true origins of many measures stemmed not from the EU but from a growing **"alphabetical soup" of international organisations**. Many of these organisations were scarcely known to even senior politicians, much less the general public.

The instruments by which these bodies exercised their powers are known as as international quasi-legislation. A great deal of the legislation in the EU *acquis* either derives from international quasi-legislation, or has the potential so to do. Furthermore, quasi-legislation covers far more than simple technical standards, and increasingly dominates EU law-making.

The nature of quasi-legislation

In general terms, it can be said to be something which resembles a law or which is seemingly law – and which has the effect of a law. Crucially, though, it is not actually legislation.

At an international level, a distinction is made between legislative powers, which are binding on states, and quasi-legislation. **International legislation** is produced by "competent organs", by **majority vote**. It **does not require ratification** or any other act of individual acceptance, and generally there is **no provision for an opt-out procedure.** On that basis, the European Union, with its right to bind Member States, has legislative powers.

On the other hand, **quasi-legislation is taken to be non-binding.** It is produced by a **staggering array of international organisations,** through a **variety of different mechanisms**. At one level, it can comprise codified standards, codes of practice, guidelines, recommendations or advice. At another, it can comprise full-blown legislative templates, ready for adoption by legislatures as binding law, with minimal changes. But, **in theory, a state or bloc may accept or reject it**, almost as the mood takes it.

However, **the line between binding and non-binding is by no means clear-cut**. At times, the distinction is not even helpful. For instance, technical standards promulgated by the "three sisters" of Codex[1], OIE[2] and the IPPC[3], under the aegis of the FAO[4], are not binding on members. On their own, their primary role is to provide **a reference point in disputes** concerning international trade in food and related products.

1 The Codex Alimentarius is a collection of internationally recognized standards, codes of practice, guidelines, and other recommendations relating to foods, food production, and food safety.
2 World Organisation for animal health.
3 Intergovernmental Panel on Climate Change.
4 Food and Agriculture Organization of the United Nations

What marks out the adoption process, though, is that as a party to the WTO Agreement on Technical Barriers to Trade (TBT Agreement), and the parallel Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), **the EU is obliged** (subject to certain exemptions) **to use "relevant international standards" as a basis** for their own technical regulations.

Once the EU has converted the standards into EU law, adoption by Member States becomes mandatory. In practical terms, therefore, there is no difference between international legislation and this type of quasi-legislation. For EU Member States, the adoption of both is mandatory.

In other areas, **quasi-legislation does not even have to be formally adopted in order to become binding at state level**. **UNECE fruit and vegetable marketing standards** have no direct binding effect in the form that they are produced. However, the EU has repealed all but ten of its own detailed standards, in favour of a "general marketing standard" (GMS), to which all but exempted products must comply.

A completely different mechanism is used in **vehicle type-approvals**. Five years before the Treaty of Rome UNECE established a Working Party on the Construction of Vehicles, known as **WP.29** "to initiate and pursue actions aimed at the worldwide harmonisation or development of technical regulations for vehicles". In March 2000, WP.29 became the "World Forum for Harmonization of Vehicle Regulations", working to three sets of Agreements, lodged respectively in 1958, 1998 and 1997. These Agreements have treaty status and, as the EU is a signatory to all three, it is bound under international law to adopt relevant standards into its own *acquis*. In this respect, UNECE has become an integral part of the law-making apparatus of the European Union.

As regards quasi-legislation, what starts of as being non-binding can, through a series of steps, become binding.

Coalitions of the willing

Standard-setters act as service-providers for their "clients". There is no question of, nor any need for, compulsion. The "clients" in the first instance define their preferred outcomes, and the general mechanisms by which they wish to achieve those outcomes. These "service-providers" then produce legislative models or templates which their "clients" adopt and process into legislation to apply within their own separate jurisdictions.

1. An example of a "service-provider" is **the Basel Committee on Banking Supervision (BCBS),** established by the G-10 group of countries in 1974 to enhance financial stability by improving supervisory knowhow and the quality of banking supervision worldwide. It recommends sound practices "in the expectation that individual national authorities will implement them". There is no question of any compulsion. But its quasi-legislation is treated as binding by BCBS members and has been adopted by many countries in the world, including the United States.

   The most recent output of the BCBS is the so-called Basel III package on capital adequacy., which has also been adopted by the EU and implemented as the CRD IV package, even though the EU is not formally a member of the BCBS.

2. The BCBS is a member of t**he Financial Stability Board (FSB)**, set up by the G20 Group "to develop, coordinate and promote the implementation of effective regulatory, supervisory and other financial sector policies". From this a “compendium” of some 14 other bodies setting standards for all sorts of banking activities. This constitutes a vast regulatory hub, defining regulation for a global industry which filters down to regional, sub-regional and national levels, affecting every sector and activity. It amounts to a regulation "factory", building an emerging corpus of global administrative law. And the effective tool of this system is quasi-legislation. Whether binding or not, no international trading nation can afford to ignore it.

3. Another emerging regulatory hub is the **WP.6 Working Party on Regulatory Cooperation and Standardisation Policies**.WP.6 is a forum where a wide range of issues is discussed, including technical regulations, standardisation, conformity assessment, metrology, market surveillance and risk management. It makes recommendations that promote regulatory policies to protect the health and safety of consumers and workers, and preserve our natural environment, without creating unnecessary barriers to trade and investment. While they are non-binding, they are widely implemented in UNECE member states and beyond.

4. For **the telecoms industry**, **the "International Model"** relies on the WTO Technical Barriers to Trade Agreement, creating a framework for the practical implementation of technical harmonisation. At this stage, the "Model" provides a set of voluntary principles and procedures for sectoral application for countries that wish to harmonise their technical regulations. A wide range of telecom standards have now been agreed, in relation to personal computers (PCs); PC peripherals, legacy Public Switched Telephone Network (PSTN) terminals; Bluetooth, Wireless Local Area Network (WLAN); Global Standard for Mobile Telecommunication (GSM); and International Mobile Telecommunications. Further sectoral initiatives have been concluded on earth-moving machinery, equipment for explosive environments and pipeline safety.

Where standards are promulgated by the international standards bodies, specifically the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), **these are then adopted as European (EU) standards,**

Implications for Brexit

The question is whether the UK government on securing withdrawal from the EU would wish to be bound to the same extent by quasi-legislation. Parliament will still be by-passed and the accountability will be limited. Given the scope and increasing extent of quasi-legislation it is hard to see that its grip on the legislative process could be allowed to slacken when the UK reclaims its independence.

Nevertheless, **from a national perspective, withdrawal does confer advantages.** Where, for instance, the EU assumes exclusive rights of **representation on global bodies**, and control over votes cast, the UK will be free once more to state its own case and vote in accordance with its interests. It can also form **coalitions with non-EU partners**, seeking to frustrate EU ambitions, where it is to our advantage to do so. Further, **the UK regains its right of initiative**, being able to make its own proposals to international bodies, without having to abide by a "common position" agreed with the EU Member States.

Where obligations arise from international agreements, the executive is bound to implement them regardless of Parliament. As long as we see the increasing globalisation of regulation, removing EU law simply exposes its global origins, without reducing its impact.

Conclusions.

The impact of global measures is scarcely recognised. Even when regulations arise entirely from the intervention of global bodies, they are still attributed to the EU. Outside the EU, exposed to the howling gale of globalisation, the UK will once more have to stand up for itself, without the protective barriers of the EU institutions and the political and economic strength of the other 27 Member States.

Even acting as a bloc, the EU itself has struggled to make its voice heard. On its own, the UK is in no better position, other than enjoying greater flexibility – with a commensurate speed of response – and the ability to form permanent or ad hoc coalitions to strengthen its own bargaining positions.

Globalisation itself does bring advantages. This, however, comes at a price, and it is one where risks and rewards are to some extent proportionate to the degree of engagement. It will be for a post-Brexit UK to decide whether it wants to match or exceed that degree of engagement. As an alternative, it can retreat into isolation and a more nationalistic agenda. On the other hand, legislative freedom will be circumscribed if it seeks enthusiastically to embrace globalisation.

Quasi-legislation is now the dominant force in globalisation and will be a central issue for parliament and the nation to confront in a post-Brexit world,