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Amending the EU Withdrawal Bill: a safeguard for health

Detailed analyses of the health consequences of Brexit have focused on its negative effects on the UK's National Health Service, food security, international cooperation to combat threats to health, medicines regulation, and medical research.¹ Faced with this depressing picture, it is natural to seek any glimmer of hope. Could there be any opportunities to improve health? The answer, invariably, is that leaving the European Union (EU) could allow the UK to go beyond existing European policies to strengthen protection in public health—eg, by introducing traffic light labelling on food or implementing stricter environmental standards.

This argument is difficult for several reasons. First, most EU law does allow member states to go beyond the minimum that has been agreed. An example is their ability to adopt plain packaging of cigarettes, as set out in the Tobacco Products Directive. [A: add a reference?] Second, given the UK's persistent inability to meet existing EU standards on environmental protection, [A: add a reference?] it is difficult to envisage a situation in which any future government would set even more ambitious targets. Third, if this or any future UK Government was to pursue free trade agreements with countries such as the USA, it is almost certain that they would be conditional upon removal of what, in trade terms, are described as non-tariff barriers, otherwise known as health and environmental protections. [A: add a reference?]

Some cabinet ministers seem unconcerned about such developments, with Liam Fox, Secretary of State for International Trade, questioning why anyone should worry about chlorine-washed chickens, [A: add a reference?] whereas others, such as Michael Gove, Secretary of State for Environment, Food, and Rural Affairs, have argued for a “green Brexit”, with high environmental and food standards. [A: add a reference?] So, if Brexit is to go ahead, what safeguards are possible to ensure that the vision of those such as Gove are realised? This question has become pressing as the EU Withdrawal Bill 2017–19 moves to the House of Lords [A: mention any dates here when known], where the government lacks a majority, and which has a constitutional role as a revising chamber to improve legislation.

Although it is sometimes criticised, the EU has a strong record in promoting public health. One important reason is that the EU is legally obliged to promote health: “A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities”.² This has allowed the EU to take action against many of the major determinants of health, such as tobacco, environmental pollution, and food, occupational, and transport safety. Crucially, the inclusion of health protection and promotion [A: edit correct here?] in the Treaty [A: specify which treaty Treaty of Lisbon? or do you mean in EU bilateral and multilateral treaties and agreements?] means that health issues [A: edit here

ok??] must be taken into consideration when, as sometimes happens, trade and health interests clash. This was seen in minimum unit pricing of alcohol. Although the alcohol industry launched a legal challenge against this policy in Scotland, it was dismissed by the European Court of Justice. **[A: add reference]** As with industry challenges to bans on tobacco advertising, all litigation could do was delay the inevitable.³ This is, however, a rare exception in international trade agreements. Few nations, **[A: correct?]** other than those within the EU, include requirements to protect and promote health. The consequences elsewhere are apparent, such as the increased consumption of energy dense food in Canada after it joined the North American Free Trade Agreement⁴ or challenges to health and environmental protection under Investor State Dispute Mechanisms in other trade deals.⁵

This experience suggests a solution to at least some concerns about health and Brexit. The approach is consistent with Prime Minister Theresa May's overall strategy, whereby on withdrawal, all EU law would, as far as is possible, be transposed into UK law, only subsequently being reviewed to determine what should or should not be retained. The solution would be to adopt the wording in the EU Treaty **[A: which treaty is this specify?]**, committing the UK Government and devolved administrations to ensure a high level of health protection in the exercise of all powers related to withdrawal from the EU. This approach would also be consistent with the high priority placed on health by the British public. Transposing the wording exactly has the further benefit of being able to draw on a body of case law when interpreting it **[A: what does it refer to here UK legislation after Brexit ?]**, consistent with the government's acceptance that, even after Brexit, UK courts would still draw on European jurisprudence.

As the EU Withdrawal Bill moves to the House of Lords, there is an opportunity to amend it to include such a provision. This amendment should be uncontentious. Would the UK Government argue that it will not use Brexit to improve health, or even that it might adopt policies that would undermine it? It is difficult to see how such an argument would be consistent with "the will of the people".

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- 2 European Union. Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. Article 168.1; 2007.
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