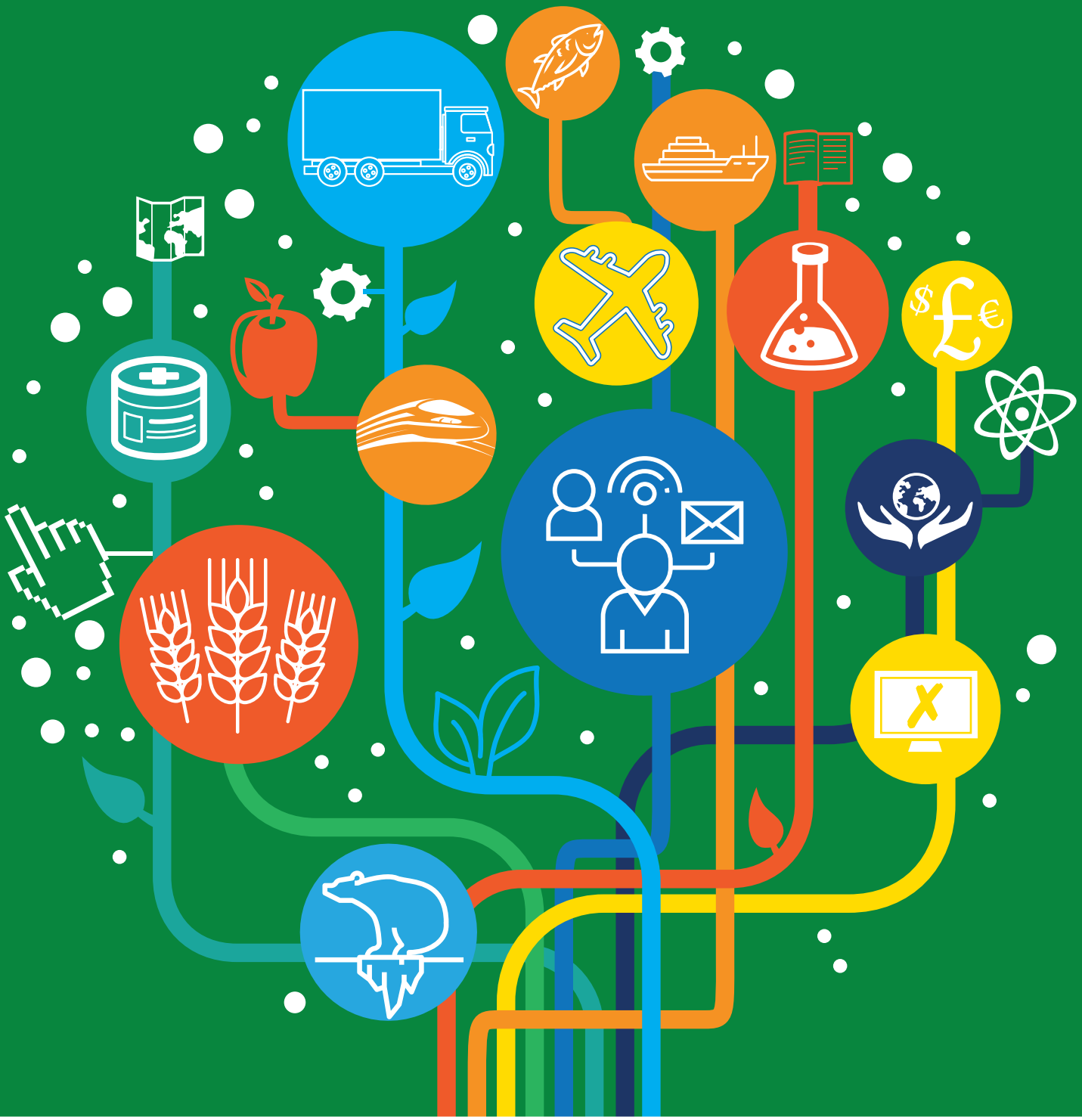
UK Regulation after Brexit *revisited*



BREXIT & ENVIRONMENT

CENTRE FOR COMPETITION POLICY

Negotiating the Future

UK IN A CHANGING EUROPE

UKRI Economic and Social Research Council

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Foreword

Regulation affects the daily life of citizens and businesses, but its importance is often overlooked in the post-Brexit context where attention has been directed mainly at the politics of Brexit and the tense relations between the UK and the EU. The report looks at how UK regulation has developed since EU rules ceased to apply to the UK, with the partial and highly significant exception of Northern Ireland, and the impact of both continuity and change in key areas of social and economic activity.

'UK Regulation after Brexit Revisited' follows and updates our earlier report published in February 2021, where we presented a first cut on the preparedness of the UK for the transfer of regulatory responsibility from the EU. Now, nearly two years after the UK assumed regulatory authority following the end of the transition period, it is timely to revisit the state of UK regulation post-Brexit. The chapters that follow are either new or have been completely re-written. Like the first report, it is collaborative undertaking by 'Negotiating the Future', the Centre for Competition Policy at the University of East Anglia, and Brexit & Environment. It once again brings together leading specialists in their respective fields.

As coordinators of the project, we want to thank Dr Pippa Lacey, administrative assistant on 'Negotiating the Future', for her work on the production of the report. We should also like to express our gratitude to Mr Richard Linnett and his team at Anchor Print. Above all, we are grateful to all our contributors, who have met the challenges we posed them with professionalism and good humour.

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Introduction

Hussein Kassim and Cleo Davies

This report looks at UK policy and regulation nearly two years after regulatory responsibility was transferred to the UK. Although the UK formally left the EU on 31 January 2020, it remained part of the single market and the customs union for a further eleven months as part of a transition period that had been negotiated to allow citizens, businesses, and public authorities in the UK and the EU to adapt to the new settlement. But, from 1 January 2021, EU rules no longer applied to the UK, except in Northern Ireland in some areas. The UK ceased to be part of the EU regulatory system, where it had decided rules jointly with its European partners for more than four decades and delegated regulatory tasks to EU agencies and other bodies.

Outside the EU, though linked to it by the Withdrawal Agreement and EU-UK Trade and Cooperation Agreement (TCA), the UK government had to decide what approach to take to regulation and policy, and what functions would be performed by UK regulators. It also had to reflect on the design, responsibilities, and powers of regulatory bodies.

The Leave campaign's call in 2016 for the UK to 'take back control' is echoed in government rhetoric, which celebrated the return to the UK of control over borders, law and money, and pledged the use of that control to shape regulation that would be tailor made to British interests. Through deregulation, a 'bonfire of red tape', and regulatory divergence, the UK would dramatically increase its economic competitiveness. Central to this enterprise is a review of 'retained EU law' – EU regulations incorporated into UK law under the European Union (Withdrawal) Act 2018 to make the UK's transition from EU member state to third country – aimed at enabling the UK 'to create a new pro-growth, high standards regulatory framework that gives businesses the confidence to innovate, invest and create jobs, thereby transforming the UK into the 'best regulated economy in the world'.

Written by a multidisciplinary team of specialists, this report looks at the current state of UK regulation and considers the prospects for its future evolution. Before examining developments in particular policy areas, it addresses a series of general questions. In her contribution, Kathryn Wright considers whether there is evidence of a change in the architecture of UK regulation. The two chapters that follow discuss the territorial dimension of how transfer of powers back from the EU has been managed. Michael Keating looks at Scotland and Wales, while Lisa Claire Whitten puts the regulatory issues that have arisen out of the Protocol on Ireland and Northern Ireland into historical perspective. Catherine Barnard then reflects on issues relating to 'retained EU law', including the government's review and its proposal of a sunset clause, before Joël Reland discusses 'regulatory divergence'.

The report then examines developments in a range of policy domains, sectors and sub-sectors, as well as how stakeholders have responded or reacted to the new regulatory environment. They include trade in goods (David Bailey), UK subsidiaries in the EU after Brexit (Meredith Crowley, Mar Domenech-Palacios, Elisa Faraglia, and Chryssi Giannitsarou), Authorised economic operators (Wanyu Chung, Robert J R Elliott, Yangjun Han, and Antonio Navas) competition policy and state aid (Andreas Stephan) and public procurement (Albert Sánchez-Graells), environment policy (Charlotte Burns, Viviane Gravey, and Andrew Jordan), digital regulation (Amelia Fletcher), data exchange (Karen McCullagh), and Intellectual Property (Sabine Jacques), financial services (Scott James and Lucia Quaglia), insurance (Michelle Everson) and medicines (Mark Dayan, Tamara Hervey, Mark Flear, and Nick Fahy), climate change (Brendan Moore and Andrew Jordan), and energy (Pierre Bocquillon), agriculture (Carmen Hubbard), food security (Tola Amodu), and fisheries (Christopher Huggins), aviation (Hussein Kassim), road haulage (Sarah Hall), and maritime sector (Martin Heneghan),

immigration (Catherine Barnard), consumer protection (Amelia Fletcher), and higher education and research (Ludovic Highman, Simon Marginson and Vassiliki Papatsiba). They were asked to address four questions in their chapters.

First, contributors were invited to discuss what has changed in regulation and in wider policy terms, including the territorial element. With respect to change, the 2021 report Regulation after Brexit had found that immigration policy and asylum were among the few areas marked by major change, although the government had also made pledges to transform policy in agriculture. The current text reflects on the evidence of broader and wider changes nearly two years after the transition period came to an end. It also examines how the transfer of regulatory responsibilities was managed within the UK as a devolved polity, where Scotland, Wales, and Northern Ireland have different and varying levels of competency. The 2021 report noted that territorial differences reflected in the 2016 vote had been exacerbated since the referendum due to London's non-inclusive approach to the negotiations, and particular discontent that despite the common frameworks put in place to ensure that the same rules applied to all four nations of the UK, Westminster remained able, and seemingly prepared, to legislate in devolved areas without the consent of the devolved legislatures. The constitutional and political principles of devolution came under particular strain with the UK Internal Market Bill. In the current study, the territorial dimension features importantly in environment (Charlotte Burns, Viviane Gravey, and Andrew Jordan), agriculture (Carmen Hubbard), energy (Pierre Bocquillon), fisheries (Christopher Huggins), and medicines (Mark Dayan, Tamara Hervey, Mark Flear, and Nick Fahy).

The second question contributors were asked to address concerns the design, powers and capacities of UK regulatory bodies – also the subject of a series of reports by the National Audit Office, which included a review of regulating after Brexit. Contributors look at whether responsibilities were assumed by an existing regulatory body or entrusted to a new regulator, the availability of resources, including qualified staff, and how well equipped they are to carry out enforcement. They consider the effects of the withdrawal of national regulators from EU structures, processes and communities, levels and channels of post-Brexit contact with EU authorities, and efforts made to create new international networks.

How the new regulatory settlement has affected stakeholders was a third question. The 2021 report found that in some sectors, notably agriculture, road haulage, and shipping, stakeholders faced new 'red tape'. In others, including chemicals, there were new costs, but also a duplication of standards, as firms wanting to trade in both the UK and the EU have to satisfy the requirements of two regulatory regimes. It also found in some sectors, such as aviation, that there was a concern about the effectiveness of UK regulators compared to their EU counterparts and how long it would take even established and expert bodies to catch up. The contributions to the current report make it possible to examine how or whether these challenges have been addressed.

The fourth and final question concerns the prospects for regulatory divergence. The UK's 'sovereignty first' approach to the negotiations with the EU was intended to deliver regulatory autonomy. Contributors were asked to assess the extent to which either 'de-Europeanisation' – the ability of the UK to set standards independently of the EU – or the stated aim of post-Brexit governments for the UK to 'set its own laws for its own people' have been or are likely to be achieved. As well as the constraints imposed by the TCA, especially the provisions relating to the 'level playing field' in competition policy, environment, labour, and social policy, the 2021 report identified limits imposed by wider international regimes, the 'Brussels effect' – the fact that in many areas, EU norms have been adopted as global standards, and sunk costs – businesses have made investments according to prevailing rules and will view regulatory change as costly. The current study examines whether these constraints still apply. It also notes that, although the government often presents EU law as though it were an external imposition, despite the fact that the UK was present in the Council of Ministers and rarely outvoted, the UK succeeded in many areas including aviation, energy, environmental policy, and financial services in exporting its preferences to the EU level. The assumption that UK interests are no longer congruent with existing EU law is therefore questionable.

Part I.

Frameworks

Architecture of regulation and regulatory agencies

Kathryn Wright

Since the end of the transition period on 31 December 2020, UK regulators have taken on new competences and responsibilities previously performed at the EU level. For example, the Health and Safety Executive has become the chemicals regulator, the Food Safety Agency (FSA) assesses food safety risks and standards, and the Competition and Markets Authority (CMA) has established the Office for the Internal Market and the Subsidy Advice Unit. At the same time, they have withdrawn from EU agencies and regulatory networks, thereby losing access to data sharing and cooperation arrangements. While the Trade and Cooperation Agreement (TCA) sets the framework for UK-EU policy discussions and specific cooperation arrangements in some areas, including food systems (Article 86), standards (Article 92), customs authorities (Article 119(4)), energy (Article 318(1)), competition (Article 361) and subsidies (Article 371(2)), most arrangements are still to be established. UK regulators have taken mitigating measures in the interim, though have sometimes faced operational challenges in the initial phases.

The Government's Benefits of Brexit paper published in January 2022, announces its aim for the UK to be 'the best regulated economy in the world'. A review of retained EU law is under way to identify individual pieces of legislation to replace, and the Retained EU Law (Revocation and Reform) Bill (aka the 'Brexit Freedoms Bill') includes expanded powers for ministers to amend retained EU law through secondary legislation.

The EU-UK Trade and Cooperation framework for regulatory cooperation

The TCA confirms that there is no longer UK participation in EU agencies. Instead, there is a piecemeal approach. Different policy areas are subject to different arrangements, including bilateral cooperation and information sharing, recognition of existing testing procedures, simplified procedures for EU and UK traders to demonstrate compliance with the other party's rules, and shared commitments to apply international standards.

As part of its governance structures, the TCA establishes 19 Specialised Committees, for example on regulatory cooperation and on the level playing field, in addition to sectors such as energy, aviation safety, and road transport. The Committees are due to meet at least once annually and are geared towards exchanging views on policy rather than technical links. There are also four technical working groups, including one on medicinal products, with prospects of adding further working groups on electricity trading and security of supply in energy. The TCA contains a general requirement for the UK and EU to keep a publicly available register of regulatory measures in force, to release information on planned 'major' regulatory measures at least once a year, and for those measures to include public consultation on drafts and impact assessments (Articles 345 and 349). The Specialised Committee on Regulatory Cooperation for one has discussed these obligations, together with the UK and EU's respective consultations on Better Regulation.

The TCA also establishes the Domestic Advisory Group (DAG) to enable the government to hear from those most affected by the TCA's implementation and is made up of NGOs, business and employers' organisations and trade unions, active in economic, sustainable development, social, human rights, environmental and other matters. The group's role is to liaise with its EU counterparts, make recommendations to government,

and submit observations when the Level Playing Field Specialised Committee monitors the outcome of any UK-EU disputes. To be effective, the DAG has called for advance notice of government decisions, and engagement from officials involved in the TCA Specialised Committees. It has also underlined the need for increased sectoral and geographical (particularly Northern Ireland) coverage, and a further membership call was launched in the summer. While the government acts as the DAG secretariat, the group has stressed its expectation of independence to hold the government's TCA implementation to account.

Muddling through

According to the National Audit Office's Regulating after EU Exit report published in May 2022, although budgets have increased with their new roles, UK regulators have been facing operational challenges. As well as difficulties in recruiting staff with specialist skills, they have lost access to databases and information-sharing which previously supported investigations, risk assessments and approvals. In many areas, regulatory cooperation between the UK and the EU that was provided for in the TCA has not yet been established. Examples of arrangements not yet in place include an agreement between the FSA and European Food Safety Authority (EFSA) on scientific cooperation, a memorandum of understanding (MoU) with the European Chemical Agency, and cooperation between the CMA, European Commission and member states' competition authorities in antitrust cases, as well as an MoU on financial services outside the TCA. In their absence, regulators have taken alternative action. In the case of food safety risks and standards, they have monitored less wide-ranging and more resource-intensive publicly available information. In merger cases, they have shared data on a case-by-case basis with other competition agencies where the notifying firms agreed. In chemicals, they have extended existing approvals.

Sector by sector or an overall model?

The government's retained EU law dashboard identifies individual pieces of legislation and groups them according to policy area. However, its prioritisation for reform is currently unclear. In addition, in practice many policy areas are linked, and cross-departmental coordination will be needed. The Retained EU Law (Revocation and Reform) Bill, introduced in September 2022, provides for certain categories of retained EU law to be automatically revoked at the end of 2023, applying a wide-ranging 'sunset'. After that point, retained EU law will be known as 'assimilated law', neatly doing away with the EU label (see 'Retained EU Law' in this report). The Bill allows ministers and devolved authorities to reform, replace, or codify retained EU law. There are also powers to extend the sunset no later than 23 June 2026 for named pieces of legislation.

The House of Commons European Scrutiny Committee inquiry report published in July 2022 before the introduction of the Bill supported sunset clauses and replacement of retained EU law through regulations, though recommended that these powers are subject to clear conditions. These recommendations include clear criteria set out in the Bill as to when the powers can be used; prioritisation, careful planning and resources for replacement legislation so as to avoid legal uncertainty and gaps; and interim reviews to allow Parliament to assess the use of these powers and whether changes need to be made to the government's approach.

In Benefits of Brexit, the government encourages 'bold, outcome-focused and experimental activity from regulators'. A focus on proportionate, outcomes-based solutions – which may include non-regulatory options – and the analysis of regulatory interventions to act according to 'what works' imply a need for increased evaluation capacity. Meanwhile, regulators are also expected 'to work collaboratively with businesses', raising questions about the relationship between the regulator and regulated.

The government also declares an intention to set standards at home and globally. However, constraints imposed by the TCA, especially, concerning the level playing field, the 'Brussels effect' in markets and the EU's influence on global standards, and the fact that in some areas norms are agreed in international forums, such an ambition needs to be treated with caution. The 'UK in a Changing Europe' UK-EU regulatory divergence tracker identifies and categorises active and passive divergence, procedural divergence, active convergence

and internal impact denoting different approaches between the four UK jurisdictions.

The UK Domestic Advisory Group, has made clear that 'divergence will continue to be a major theme and organisations want to understand the management of this'. At its first meeting, the Retained EU law Bill was flagged as a priority (see 'Retained EU Law' in this report).

Conclusion

The general sunset clause introduced by the Retained EU Law (Revocation and Reform) Bill brings the risk of gaps, and the timeframe of the end of 2023 is tight for government departments and devolved administrations to decide what should be done with individual pieces of legislation. Identifying priority areas, together with joined-up planning across departments, would give more legal certainty. Along with the focus on outcomes-based regulatory interventions heralded in the Benefits of Brexit paper, departments and regulators are likely to need further resources to increase evaluation capacity. In terms of wider regulatory capacity, UK regulators have faced challenges so far post-Brexit, and have needed to make their own mitigating arrangements. In terms of regulatory independence, post-Brexit arrangements suggest a move away from the traditional arm's-length model towards greater ministerial discretion. The relationship with regulated market players may also shift in some areas, particularly as UK regulators have lost formal relationships with their counterparts in EU markets, and cooperation arrangements foreseen in the TCA are not (yet) in place.

Regulation after Brexit: Scotland and Wales

Michael Keating

While the UK was a member of the EU, a number of regulatory competences were shared between the EU and devolved authorities. Where these should go after Brexit has been a matter of political contention. Attempts to centralise at UK level have been rebuffed so far but tensions remain. The Policy Frameworks designed to deal with shared competencies are inconsistent and work best for technical matters, while the treatment of international trade agreements, the UK Internal Market Act 2020 and legislation of subsidy control undermine the regulatory autonomy of Scotland and Wales. The real test will come if the UK diverges radically from EU regulations while the devolved governments resist. This chapter discusses Scotland and Wales. Northern Ireland is discussed in the chapter by Lisa Claire Whitten (see 'Regulation after Brexit: Northern Ireland' in this report).

Devolution and regulation

The devolution settlement created a fairly clear division of competences between the UK and devolved governments. Westminster can legislate in devolved matters but, under the Sewel Convention, will not 'normally' do so without the consent of the devolved legislatures. Statutory instruments, by contrast, are not generally subject to a consent provision (except those changing devolved competences). However, a number of consent provisions on statutory instruments have been inserted into post-Brexit legislation, though there is no standard formula.

Devolved governments have wide regulatory responsibilities, which vary from one to the other. Some of these include matters that, before Brexit, were subject to EU rules. The main areas in which devolved regulatory competences overlapped with EU competence are: agriculture, including sanitary and phytosanitary rules; fisheries; environment; and professional qualifications (in Scotland). In these areas, Scotland and Wales had the same discretion to shape policy derived from EU directives as did Member States. In addition, the transversal rules of the single market and competition policy impinged on devolved powers.

Legislative measures after Brexit

Several pieces of legislation have affected the allocation of regulatory competences after Brexit. The first draft of the European Union (Withdrawal) Bill proposed to take all EU competences back to Westminster, with powers then 'released' back to the devolved bodies where appropriate. The argument was that, because these were EU competences at the time of devolution, they were never devolved. However, the devolved governments insisted that, because they were not reserved in legislation, they must be devolved. The UK government retreated and amended the Bill. The default was that competences would remain with the devolved governments but could be taken back to Westminster on a time-limited basis where necessary. Ultimately, this power was never used and has since been repealed. Agreement was reached with the devolved governments that common frameworks should be negotiated to handle reserved EU law in devolved fields, with legislation as a last resort.

While the Scottish and Welsh governments have cooperated extensively in defence of devolved competences after Brexit, their approaches have sometimes differed. The Scottish government has sought to build its own regulatory frameworks and to remain as close as possible to EU regulations. The European Union (Continuity) (Scotland) Act 2021 gives ministers powers to retain dynamic alignment with EU regulations. One motive is to keep Scotland aligned with the EU in view of possible EU membership for an independent Scotland. Another is to give the Scottish government a choice of regulatory options. However, it is too soon to assess how this power will be used.

Furthermore, Scotland opted for its own Environment and Agriculture Acts. There were some arguments over the scope of the post-Brexit Environment Act 2021 and Agriculture Act 2020 at Westminster on the grounds that these trespassed on devolved competences, but these were resolved, which allowed the Scottish Parliament to give its legislative consent. There was less argument over the Fisheries Act 2020, which gives powers to Scottish ministers. Fisheries is in any case mostly a Scottish matter – though the negotiations on fishing quotas take place at UK level.

The Welsh government has tended to accept UK or Great Britain-wide regulatory provisions, on condition that it has a role in setting them. The Senedd also passed a Continuity Act, which it then repealed after the UK government stepped back from recentralising powers and moved towards common frameworks. Rather than adopting its own legislation, Wales had its own schedules inserted into the Agriculture Act 2020 allowing for detailed variations. Relations deteriorated, however, after the Johnson government introduced the United Kingdom Internal Market Bill (discussed below).

Professional qualifications have proved more difficult. The devolution settlement retained the historic provision whereby some professions, such as the law and teaching, were regulated separately for Scotland, while others, including medicine, were regulated at UK level, except for those created after devolution. The Professional Qualifications Act 2022, however, gives the UK Secretary of State for Business, Energy and Industrial Strategy powers over mutual recognition of qualifications with other countries, irrespective of whether those professions are devolved or not. The devolved governments only need to be 'consulted'. The Scottish Parliament refused to give its legislative consent to the Bill, but Westminster proceeded anyway.

Common frameworks

The main focus is now on negotiated common frameworks, which, it was promised, would give devolved governments at least as much discretion as they had within the EU. The devolved governments entered this process on the condition that no powers would be taken back without consent. An initial list of competences was identified and joint working groups established. By December 2021, 152 areas of intersection between former EU and devolved competences had been identified.

Frameworks would not be required in 120 of the 152 areas because there is a minimal risk of divergence, or existing intergovernmental arrangements are sufficient, or divergence would have minimal impact. The remainder were divided into areas where a legislative framework might be required and where it would not. Later, these were reframed as areas that required primary legislation or not. By September 2022, one Framework had been finalised, twenty had been provisionally agreed and five were outstanding. As the overall principle is that nothing is agreed until everything is agreed, many of these were put into effect provisionally. No frameworks have been imposed unilaterally by Westminster legislation.

Frameworks were intended as a practical measure to deal with a specific problem rather than a constitutional innovation, although they do in fact add to an already complex and crowded intergovernmental landscape. None of them have taken legislative form and they are to be implemented through cooperation, making reference to the existing practice of concordats and memorandums of understanding and to the system of interministerial committees, itself recently reformed.

In principle, they could serve two purposes: to make policy in a cooperative manner between the UK and devolved governments; or to allow for divergence. Most have concerned the latter although there is some

evidence of joint policy making, even going beyond retained EU law. The frameworks tend to be highly technical, aimed at depoliticising policy making, in a manner which, ironically, is not too dissimilar to much EU regulation. There is some vagueness over the criteria used to decide whether divergence would be problematic. The Agricultural Support Framework refers to divergence which is 'acceptable' and divergence which is 'problematic', 'harmful divergence', divergence in 'contravention of the common framework principles' and divergence which has 'unwanted impact'.

Transversal measures

Two broad, transversal measures cut across the division of regulatory competences. The first was the UK Internal Market Act 2021. This arose from a fear that with the loss of the EU internal market, undesirable regulatory differences might arise among the parts of the UK. This is, of course, a politically charged matter as the experience of the EU internal market has shown. The 'UK Internal Market' itself is a novel concept, referred to only in the Northern Ireland Act. Otherwise, it was implicitly secured only as part of the EU Internal Market.

There was an initial attempt to negotiate this legislation. There were discussions with the Welsh government and interested academics, but these were suspended early in 2021. The Scottish government had already declined to participate, insisting that voluntary frameworks was as far as it could go. In August 2020, a White Paper was issued, followed rapidly by the UK Internal Market Bill. This sought to reproduce the EU Internal Market by providing for non-discrimination and mutual recognition among the four jurisdictions of the United Kingdom, with provisions to conform to the Protocol on Ireland and Northern Ireland. There are, however, two key differences from the EU model. There is no provision for subsidiarity and proportionality; and the rules are set unilaterally by the UK Government, with no equivalent to the European Commission or the Council of the EU at the UK level. Exceptions to the provisions are more narrowly conceived than in the corresponding EU regime. Both the Scottish and Welsh Parliaments refused legislative consent, but Westminster proceeded anyway. There are, however, two key differences from the EU model. There is no provision for subsidiarity and proportionality; and the rules are set unilaterally by the UK government, with no equivalent to the European Commission or the Council of the EU at the UK level. Exceptions to the provisions are more narrowly conceived than in the corresponding EU regime. Both the Scottish and Welsh parliaments refused legislative consent, but Westminster proceeded anyway.

Following an amendment in the House of Lords, the UK Internal Market Bill was amended so that matters coming within an agreed framework could be excluded from its provisions. This is subject to the consent of the devolved legislatures. By September 2022, the only agreed exclusion was for Scottish legislation on single-use plastics. While this was a rather uncontroversial matter, and it is likely that the other UK territories will adopt similar regulations, its negotiation was quite prolonged and the Scottish government was not satisfied with the narrow scope of the exception.

The effect of the UK Internal Market Act is not to take regulatory powers away from the devolved governments, but rather to undermine their exercise. If the UK government, acting in respect of England, approves a good for sale in England (whether made there or imported) it is automatically allowed for sale in Scotland and Wales, irrespective of local regulations.

It is not clear how wide the scope of this provision will be in practice or how it will be used, as it is largely up to aggrieved vendors to take the matter to court. There is an Office for the Internal Market within the Competition and Markets Authority (see 'Competition policy' in this report), that is to have members from the devolved territories. However, these are not nominated by the devolved governments themselves.

The second transversal matter concerns the control of subsidies ('state aids' in European language). Initially, there was a disagreement among the governments about whether this was already reserved but this was resolved by the UK parliament explicitly reserving it. The Subsidy Control Act (2022) reinforces this by making the UK authority the ultimate authority on permissible subsidies.

Whither regulatory divergence?

The story of regulatory control since Brexit has been one of attempts by the UK government to centralise, curbed by resistance at the periphery and modifications to the original proposals. Brexit has been the occasion for multiple over-rides of the Sewel Convention, notably in the enactment of the European Union (Withdrawal Agreement) Act 2020, with all three devolved legislatures having refused consent. New consent provisions have been inserted in relation to statutory instruments in some of the legislation, but they have become progressively weaker. The (now repealed) provision in the European Union (Notification of Withdrawal) Act 2017 on taking back powers stipulated that if the devolved legislature consents, the instrument is valid; if it refuses consent, it is valid; and if it takes no decision, it is valid. By the time the UK government introduced the Professional Qualifications Bill in May 2021, consent had been replaced by 'consultation'.

The UK government has persistently argued for the need for unification or harmonisation of regulatory regimes in order to comply with international trade agreements, which are a reserved matter. Scottish and Welsh ministers are obliged to give effect to the UK's international obligations and UK ministers can instruct them to present any implementing legislation to their legislature. Although their legislatures are not obliged to comply (unlike with EU law before Brexit) there is in practice very little scope to defy them, given the other powers available to UK ministers.

Conclusion

To date, regulatory harmonisation and divergence have been accommodated by a strategy of depoliticization and technical cooperation. The test will come if and when there is substantial pressure for divergence. So far, there has been broad agreement on the general directions of policy on environment and climate change. In agriculture, there is a long tradition of Scottish management within broad UK lines, predating devolution and the policy communities are interlinked. After devolution, the Scottish and Welsh Governments made use of the discretion allowed to member state governments to modify the Common Agricultural Policy, with some significant differences of emphasis if not of principle. Recent developments indicate more of the same, within the common frameworks. Fisheries policy has, to a significant extent, been led from Scotland. The latest UK government proposals for repeal of retained EU law by the end of 2023 include many matters that are devolved. The proposals include the promise of cooperation with the devolved governments but it is not clear what form it will take, although there is provision for Scottish ministers to get some of the powers to change regulations that are given to UK ministers in retained areas. In future, it is likely to collide with the Scottish government's strategy of dynamic alignment with EU law. Finally, recent indications from the UK government that it may embark on a radical deregulation programme, suggest that it may come into collision with Scottish and Welsh governments, anchored on the centre-left.

Regulation after Brexit: Northern Ireland

Lisa Claire Whitten

Northern Ireland is a unique case when it comes to regulation in the United Kingdom after Brexit. The regulatory particularity of Northern Ireland can be explained with reference to three aspects of its governance: the devolution settlement and its history; North-South cooperation on the island of Ireland; and the Protocol on Ireland and Northern Ireland which was agreed as part of the UK-EU Withdrawal Agreement.

Taking each in turn, this chapter provides an explanation for and overview of the distinctive position of Northern Ireland in respect to UK regulation in the post-Brexit era.

Devolution and the Regulatory Architecture of UK(NI)

Northern Ireland's regulatory particularity can only be explained by reference to a long history of devolution. Unlike in Scotland and Wales, devolution in Northern Ireland first began in 1920. Under the Government of Ireland Act 1920 the 'power to make laws for the peace, order and good government' (s4) were granted to a newly established Northern Ireland Parliament and Government. The UK government retained supremacy and excepted powers in a stated list of areas that included matters of the Crown, the military and foreign relations (1920 Act s6). In practice, the competencies of these first devolved institutions included: education policy, planning, housing, local government, transport, law and order, civil and criminal law, minor taxation, appointment of local magistrates and judges, as well as health and social services. Devolved government in Northern Ireland operated under the 1920 Act for fifty years until the institutions were suspended in 1972 and abolished in 1973 amid the outbreak of violence and the beginning of what became a thirty-year conflict.

Devolved government in Northern Ireland was restored under the Northern Ireland Act 1998, which 'transferred' to the newly established Northern Ireland Assembly and Executive, powers to make policy in any areas that were neither 'excepted' (see Schedule 2) nor 'reserved' (see Schedule 3). The 1998 Act implemented in UK law the 1998 'Belfast/Good Friday' Agreement (1998 Agreement) which also provided for institutions and bodies to be set up to facilitate 'North-South' cooperation on the island of Ireland as well as cooperation 'East-West' between Ireland and the UK, including its devolved authorities and Crown Dependencies.

Since 1998 there have been some changes to the competency of the devolved government in Northern Ireland but today the Assembly and Executive have power to legislate in relation to: health and social services, education, employment and skills, agriculture, social security, pensions and child support, housing, economic development, local government, environmental issues (including planning), transport, culture and sport, the Northern Ireland Civil Service, equal opportunities, and justice and policing.

A number of regulatory bodies still currently in operation in Northern Ireland were set up in the post-1920, pre-1998 era of governance. Examples include the Health and Safety Executive for Northern Ireland which was created out of the Health and Safety Agency, one of the 'legacy regulators' established in the earlier period of devolution or direct rule. There are also sectors where regulation works differently due to the history of conflict and the 1998 Agreement on which its contemporary architecture for governance is based, including the Northern Ireland Human Rights Commission (NIHRC) and the Equality Commission (EC).

Table 1: Examples of Regulators in Northern Ireland and Great Britain

Sector	UK(NI) Regulator	UK(GB) Regulator(s)
Gas & Electricity	The Utility Regulator	Ofgem
Rights & Equality	The Equality Commission and The Northern Ireland Human Rights Commission	The Equality and Human Rights Commission
Health & Safety	Health & Safety Executive for Northern Ireland (HSENI)	Health and Safety Executive (HSE)
Elections	Electoral Office of Northern Ireland (EONI)	The Electoral Commission
Driving Licensing and Vehicle	Driver and Vehicle Agency (DVA)	Driver & Vehicle Standards Agency (DVSA)

NB: Content is non-exhaustive and illustrative.

As Table 1 indicates, in some sectors Northern Ireland regulators operate separately from those in Great Britain, in some cases one regulator acts for the whole of the UK, and in others there are different regulators in the four parts of the UK (England, Scotland, Wales, and Northern Ireland) or in the three legal jurisdictions (Northern Ireland, Scotland, and Wales/England). Northern Ireland has the most distinctive set up in the UK, even if different standards do not necessarily apply in Northern Ireland.

North-South Cooperation and Regulatory Divergence

Strand Two of the 1998 Agreement makes provision for 'consultation, cooperation, and action' between the governing authorities 'North and South' on the island of Ireland in areas of 'mutual interest' (S2(1)). To this end, the 'North-South Ministerial Council' (NSMC) was set up to bring together the executive authorities of Ireland and Northern Ireland to discuss and agree cross-border initiatives. The original text listed 12 areas for potential cooperation. Six 'North-South implementation bodies' were established to oversee cooperation in specific areas.

Table 2: Areas for N-S Cooperation and N-S Implementation Bodies in 1998 Agreement

Areas of North-South Cooperation		North-South Implementation Bodies
Agriculture, Education, Transport, Environment, Waterways, Social Security/Welfare,	Tourism, EU Programmes, Inland Fisheries, Aquaculture and Marine, Health, Urban and Rural Development	Waterways Ireland Food Safety Promotion Board InterTrade Ireland Special EU Programmes Body The Language Body Loughs Agency and Lights Agency

Since 1998, the scope of cooperation has expanded significantly. The 'Mapping Exercise' carried out jointly by the UK and EU during the negotiation of the Withdrawal Agreement, to determine the extent of North-South cooperation and the degree to which it was reliant on shared EU law and policy frameworks, identified 142 areas of North-South cooperation, 54 of which were classified as 'directly underpinned by or linked to' EU law or policy, 42 as 'partially underpinned by or linked to' and 46 as 'not underpinned or linked to'. If new regulations or regulatory practices adopted by the UK in any of the 142 areas of policy with a North-South dimension, this will have implications for cooperation on the island of Ireland.

While many policy areas devolved and regulated in Northern Ireland have some degree of North-South cooperation, certain sectors are more impacted than others. The electricity market, which operates on an all-island basis and is regulated by a joint committee of representatives from both jurisdictions, is a prominent case. See Exhibit 1 below.

Exhibit 1. The single electricity market

The Single Electricity Market (SEM)

On the island of Ireland, the electricity industry operates as a single wholesale market known as the SEM. What this means is that all electricity supplied on the island is bought and sold in a single pool – this has increased competition, efficiency, and security of supply. To function, the SEM requires that the grid in Northern Ireland is physically connected to the grid in Ireland.

The SEM is facilitated by a contractual joint venture between the system operators from the two jurisdictions – SONI in NI and EirGrid Plc in Ireland – together they have formed the Single Electricity Market Operator (SEMO) to oversee the operation of the SEM.

The SEMO facilitates market trading, coordinates financial transactions, and 'owns' the rulebook regarding the wholesale electricity market. The Utility Regulator for Northern Ireland together with the Commission for Regulation of Utilities (CRU) for Ireland regulate the SEM through a joint SEM Committee set up to monitor its operation and take action to avoid any abuse of market power as appropriate.

As Table 3 indicates, North-South cooperation takes place across multiple sectors. The delivery of cross-border services and/or the degree of established cooperation between industries and services North and South on the island of Ireland had important implications in the context of Brexit. As the next section details, the scope of North-South cooperation was a driving factor behind the development of the Protocol.

Cross-border cooperation is, of course, not the same regulatory equivalence. Different regulations and regulatory practices apply in Ireland and Northern Ireland in sectors where North and South work together. When the UK and Ireland were both EU Member States, the same general standards often applied in both jurisdictions, which made North-South cooperation easier, and some policy areas, such as electricity, are regulated on an all-island basis. Others, including the environment and transport, have obvious and unavoidable cross-border dimensions. Any new regulatory divergence between the UK (including NI) and the EU (including IRE) in areas of cross-border cooperation needs, therefore, to take account of the potential repercussions for political relations and policy practicalities on the island of Ireland.

Table 3: Areas of N-S Cooperation as identified in the UK-EU Mapping Exercise

Healthcare	Judicial and Legal	Environment	Transport	Trade
Movement of Medicines, Medical Devices and Healthcare Goods; Transport of Organs and Tissues; All-Island Congenital Heart Disease Network; North-West Cancer Centre; Middletown Centre for Autism; Mutual Recognition of Medical Professionals Qualifications; Major Emergencies and A&E Planning	Family Law and Child Protection Cases; Organised Crime Taskforce; Benefit Fraud Avoidance; Export Licensing Controls (on dual-use and military goods); Movement of Firearms, Civil Explosives, Offensive Weapons; Avoidance of Fuel Fraud.	Water Quality and Regulation; Air Quality; Flood Risk Management; Habitats and Wildlife; Landscape Monitoring; River Basin Management; Biodiversity Strategies; Plant Health Regulatory Checks; Animal Health and Welfare; Waste Management; Chemicals Regulation; Control of Invasive Alien Species; Fish and Aquaculture.	Commercial Vehicle Roadworthiness; Cabotage; Road Haulage; Vehicle and Driver Licensing; Motor Insurance; Vehicle and Driver Safety Checks; Bus and Coach Services; Ferries; Cross-Border Taxi Services; Cross-Border Enterprise Rail Service; Road Network	Customs; Market Surveillance of Goods; Import Licensing Controls; Excise Fraud Monitoring; Mutual Recognition of AEOs; Transit of Goods.
Telecommunications	**Economic**	**Energy**	**Culture**	**Education**
Irish Language Broadcasting; Mobile Roaming	InterTrade Ireland; Invest NI and Enterprise Ireland Cooperation; All-Island Public Procurement.	Single Electricity Market; Natural Gas Network	Sport; Movement of Cultural Goods; National Museums N-S Cooperation	Cross-Border Academic Partnerships; Mutual Recognition of Teacher Qualifications

NB: Content is non-exhaustive and indicative.

The Protocol and Northern Ireland as a Regulatory 'Place Apart'

As part of the UK-EU Withdrawal Agreement, the two parties agreed a Protocol on Ireland / Northern Ireland designed to address the 'unique circumstances on the island of Ireland'. Its stated purpose is to: 'maintain the necessary conditions for continued North-South cooperation, to avoid a hard [land] border and to protect the 1998 [Belfast/Good Friday] Agreement in all its dimensions' (Article 1(3)). The degree to which it achieves its objectives, particularly in respect to the 1998 Agreement, is contested.

In September 2022, the EU launched (and relaunched) legal proceedings against the UK for non-implementation of the aspects of the Protocol in the wake of the UK government's introduction of draft legislation – the Northern Ireland Protocol Bill – which would grant Ministers (extensive) powers to disapply provisions of the Protocol in UK law. Following elections on 5 May 2022, Northern Ireland is without a fully functioning government due to the refusal of the largest unionist party – the Democratic Unionist Party (DUP) – to support the election of an Assembly Speaker or formation of an Executive as part of a protest against the Protocol and its implications for trade between Great Britain and Northern Ireland.

While it is unclear how, or indeed whether, issues concerning its implementation will be resolved, the Protocol provides that Northern Ireland remains part of the UK customs territory (Article 4) but is subject to the EU customs code (Article 5(3)), EU VAT and excise rules (Article 6), EU technical rules and EU regulations on goods (Articles 5(4) and 7), EU state aid rules (Article 10) and EU regulations related to electricity supplies and energy markets (Article 9). Read together, these provisions made it possible to avoid checks and controls on goods on a land border between an EU Member State, Ireland, and a third country, UK(NI), while also protecting Northern Ireland's legal position in the UK customs territory. However, new checks and controls would be required on goods entering Northern Ireland from outside the EU, including from Great Britain, which thereby created an 'Irish Sea Border' between GB-NI in respect to goods.

Additionally, the Protocol makes provisions for the protection of certain individual rights set out in EU law (Article 2), the Common Travel Area (CTA) between the UK and Ireland (Article 3) and 'other areas of North-South cooperation' (Article 11) – that is, those not already covered by provisions for continued free movement of goods in Articles 5 and 7-10) – as well as commitments from both the UK and EU to allow for the continued receipt of funding from two EU programmes, EU PEACE and INTERREG (Preamble).

The text of the Protocol as agreed by the UK and EU in October 2019 included almost 350 EU law instruments that would continue to apply in Northern Ireland at the end of the Transition Period and thereafter. Moreover, the requirement for UK(NI) to align with this body of EU law is dynamic, so that any 'amendments or revisions' to relevant EU acts apply automatically, which further sets it apart.

As Table 4 indicates, the regulatory impact of the Protocol is particularly notable in relation to the trade and production of goods, including agrifood products, SPS standards, human/veterinary medicines, medical devices, and chemicals. For all areas within the scope of the Protocol, Northern Ireland is, in effect, a regulatory 'place apart' within the UK insomuch as different rules and standards apply and different arrangements for enforcement are in place.

Table 4: EU Law Applicable in UK(NI) under the Protocol

Protocol Provision	Area	Number and Scope of Applicable EU Acts (incl. Regulations, Directives, Decisions, Communications)	
Article 2, Annex 1	**Individual Rights**	**6**	Legislative protections against discrimination in employment / access to services on the basis of gender, race, or ethnicity.
Article 5, Annex 2	**Movement of Goods**	**261**	EU rules on: general customs; protection of financial interests; trade statistics; general trade; trade defence instruments; bilateral safeguards; general provisions for trade in goods; motor vehicles, including agricultural and forestry vehicles; lifting and mechanical handling appliances; gas appliances; pressure vessels; measuring instruments; construction products, machinery, cableways, personal protective equipment; electric and radio equipment; textiles and footwear; cosmetics and toys; recreational craft; explosives and pyrotechnic articles; medicinal products; medical devices; substances of human origin; chemicals; pesticides and biocides; waste; environment and energy efficiency; marine equipment; rail transport; food products; food hygiene; food ingredients, traces, residues, marketing standards; food contact material; GMOs; live animals germinal products and products of animal origin; animal disease control and zoonosis control; animal identification; animal breeding; animal welfare; plant health; plant reproductive material; official controls and veterinary checks; SPS controls; intellectual property; fisheries and aquaculture; rules on movement of: dual-use items, weapons, firearms, rough diamonds, cultural goods, tobacco products, cash, crude oil, defence-related products and goods which could be used for capital punishment, torture or degrading treatment.
Article 8, Annex 3	**VAT and Excise**	**19**	EU common system of VAT; rules on VAT refunds; cooperation to combat fraud; VAT exemptions; general arrangements on excise; rules on excise on alcohol/ tobacco; taxation of energy products and electricity; fiscal marking of gas and kerosene; rules on surveillance of excisable products.
Article 9, Annex 4	**Single Electricity Market**	**7**	EU rules on internal EU market in electricity and wholesale energy supplies as well as on industrial emissions and greenhouse gas emissions trading allowances – applicable insofar as they apply to the generation, transmission, distribution, and supply of electricity, trading in wholesale electricity or cross-border exchanges in electricity and are therefore necessary for operation of the SEM.
Article 10, Annex 5	**State Aid**	**19**	EU rules on State Aid including regulation of *de minimis* aid for services of general economic interest / agriculture / fishery and aquaculture; and EU compatibility rules on State Aid in respect to: agricultural aid, fisheries and aquaculture, regional aid, research and development aid, risk capital aid, rescue and restructuring aid, training aid, employment aid, energy and environmental aid, manufacturing aid, postal services, transport and infrastructure aid, audio-visual, broadcasting and broadband aid.

NB: as at: 1 July 2022 (see explainer).

Conclusion

Northern Ireland's alignment with EU rules in areas covered by the Protocol is (at least for now) automatic and legally required. Any divergence on the part of UK(GB) from pre-existing EU rules (now retained EU law) that still apply as Protocol-applicable EU law in UK(NI) is neither automatic nor legally required. As the UK as a whole seeks to forge new regulatory paths in the post-Brexit era, UK(GB) policymakers need to consider the implications that decisions to diverge from EU standards may have on UK(NI) policymakers for whom the regulatory landscape is somewhat different.

Retained EU Law: what is at issue?

Catherine Barnard

When Liz Truss became prime minister, she declared that she wanted all retained EU law removed from the statute book by the end of 2023. This process, which had been started by Lord Frost and advanced by Jacob Rees Mogg, has now culminated in the EU Retained Law (Revocation and Reform) Bill (known as the 'REUL Bill'), published on 22 September 2022.

To understand the significance of this legislation, it is necessary to go back a stage. Retained EU law is the entire corpus of EU-derived legislation which was incorporated into the UK statute book by the EU (Withdrawal) Act 2018. The idea behind the 2018 Act was to ensure that there would be a functioning statute book on Brexit day, whether the UK left the EU with or without a deal. The Act made this possible by taking a snapshot of all EU legislation then in force, together with key concepts such as the supremacy of EU law (EU law takes precedence over conflicting national law) and incorporated it into UK law as 'retained EU law'. The original plan was that once that law had been secured onto the UK statute book, the UK Government would be free to amend or replace that law as time and desire permitted. However, the current UK government has decided to fast track the process of removing or replacing retained EU law with the introduction of the REUL Bill. The Bill will substantially reinforce the powers of ministers and will generate uncertainty in the UK regulatory environment.

Ending Retained EU law: a political objective

The current government believes that the process for replacing retained EU law has been too slow. It considers that radical surgery - in the form of a 'sunset' clause - is the only solution to what it considers a major problem. Clause 1(1) of the REUL Bill introduces a sunset clause that brings an end to all retained EU law currently found in UK secondary legislation on 31 December 2023. This includes all statutory instruments, such as the Working Time Regulations, but not Acts of Parliament such as the Equality Act 2010, or retained EU law in the fields of tax, VAT, excise and customs duties which will be dealt with separately in a Finance Bill. The problem is that a lot of that legislation serves important social, environmental or other regulatory functions. Bringing an end to the entire body of EU-derived legislation – estimated to be about 2400 pieces of legislation – in such a drastic and abrupt manner could remove those protections altogether. Government departments and devolved administrations will, ahead of 31 December 2023, determine which retained EU law should be preserved and incorporated into domestic law. But there will not be time to consult on, draft, and adopt the UK's own equivalent – or different – measures. As such, the REUL Bill can be considered highly deregulatory. It is also causing great concern, not least with the Scottish and Welsh governments.

That said, the Bill allows ministers to keep retained EU law in one of two ways. First, under Clause 1(2) of the Bill, ministers can, by regulation, continue to apply existing legislation; legislation saved under this clause will not be subject to any sunsetting. Clause 2 does something similar but regulations adopted under this power will be subject to a sunset of 23 June 2026, ten years to the day after the Brexit vote. Retained EU law saved in this way will be stripped of its EU origins and become 'assimilated law' after the end of 2023. 'Assimilated law' will be interpreted by judges as they would a piece of domestic legislation rather than in line with the EU interpretative obligations, such as for instance, the requirement to ensure the legislation is 'effective'.

Second, there are extensive powers in the Bill to enable ministers to 'restate' retained EU law or assimilated law (Clauses 12-14) or to revoke or replace any secondary retained EU legislation with 'such alternative provision' the minister considers 'appropriate', but on condition that that replacement 'does not increase the regulatory burden' (Clause 15)..

The key question is what criteria will ministers use for deciding whether to save retained EU law, which of the legal routes will be used, what the internal processes will be for saving retained EU law, and how will the powers be used. For instance, can a Clause 1(2) measure simply list all existing EU-derived employment legislation and state that it is saved from being axed or will there need to be separate statutory instruments for each piece of legislation being retained?

What if ministers do not exercise the powers they have? The default position is that retained EU law ceases to function at the end of December 2023, which raises the question whether the UK government knows exactly what retained EU law is on the statute book. Huge amounts of civil service time has already been devoted to trying to determine the origin of all of the legislation, much of which can be seen on the government's dashboard. But what happens if something is missed? It will be the subject of the Clause 1(1) sunset and thus no longer part of UK law. This is the risk of unknown unknowns.

A Bill that seeks to depart from principles of EU law

The Bill does more than just sunset retained EU law. It turns off the principle of supremacy of EU law. This principle has been a powerful tool in the past, enabling litigants to argue, for example, that provisions in the Equality Act 2010, pre-Brexit legislation, contravened Article 157 of the Treaty on the Functioning of the European Union (TFEU) on equal pay for men and women, and so are unlawful. With the removal of supremacy of EU law, litigation of this sort will stop, although ministers can use the powers in Clause 12 to turn supremacy back on again if they so choose.

The REUL Bill also turns off the provisions on 'general principles' of law, such as the protection of fundamental rights, proportionality and legitimate expectations, but here again government departments can choose to turn those principles back on, using the powers in Clause 12. Some of those general principles have been incorporated into the case law of the Court of Justice of the EU and UK domestic courts, which have either applied them as EU general principles, or, in some cases as domestic principles of the common law and so will not be affected by the REUL Bill.

On the subject of the judiciary, the current UK government feels that the judges have not been sufficiently vigorous in departing from retained EU case law. Under the EU (Withdrawal) Act 2018, only the highest courts in the land – the Supreme Court, and the Court of Appeal and the Scottish and Northern Irish equivalents – can depart from pre-Brexit decisions, but only where they think it is 'right to do so'. There has, in fact, been a general reluctance by the courts to depart significantly from retained EU decisions of the Court of Justice, largely because they are still interpreting retained EU law which is based on EU legislation and the Court of Justice provides authoritative interpretation of this EU law .

Clause 7 of the REUL Bill contains a strong nudge to the courts to depart from EU case law with a bit more enthusiasm. It inserts a list of points that courts should bear in mind when deciding whether to depart from any retained EU case law, notably that 'decisions of a foreign court are not binding, circumstances have changed' – that is, Brexit - and, most oddly, that 'retained EU case law restricts the proper development of domestic law'.

There is also a mechanism to allow lower courts to make a reference to the higher courts to see whether they should depart from retained EU law. And the Bill includes a provision allowing the law officers to intervene in cases involving retained EU law or to make a reference to the higher courts at the end of a case on retained EU law. These elements put judges in the frontline of the Brexit wars, a position for which they have been pilloried by the Daily Mail and others in the past.

Conclusion

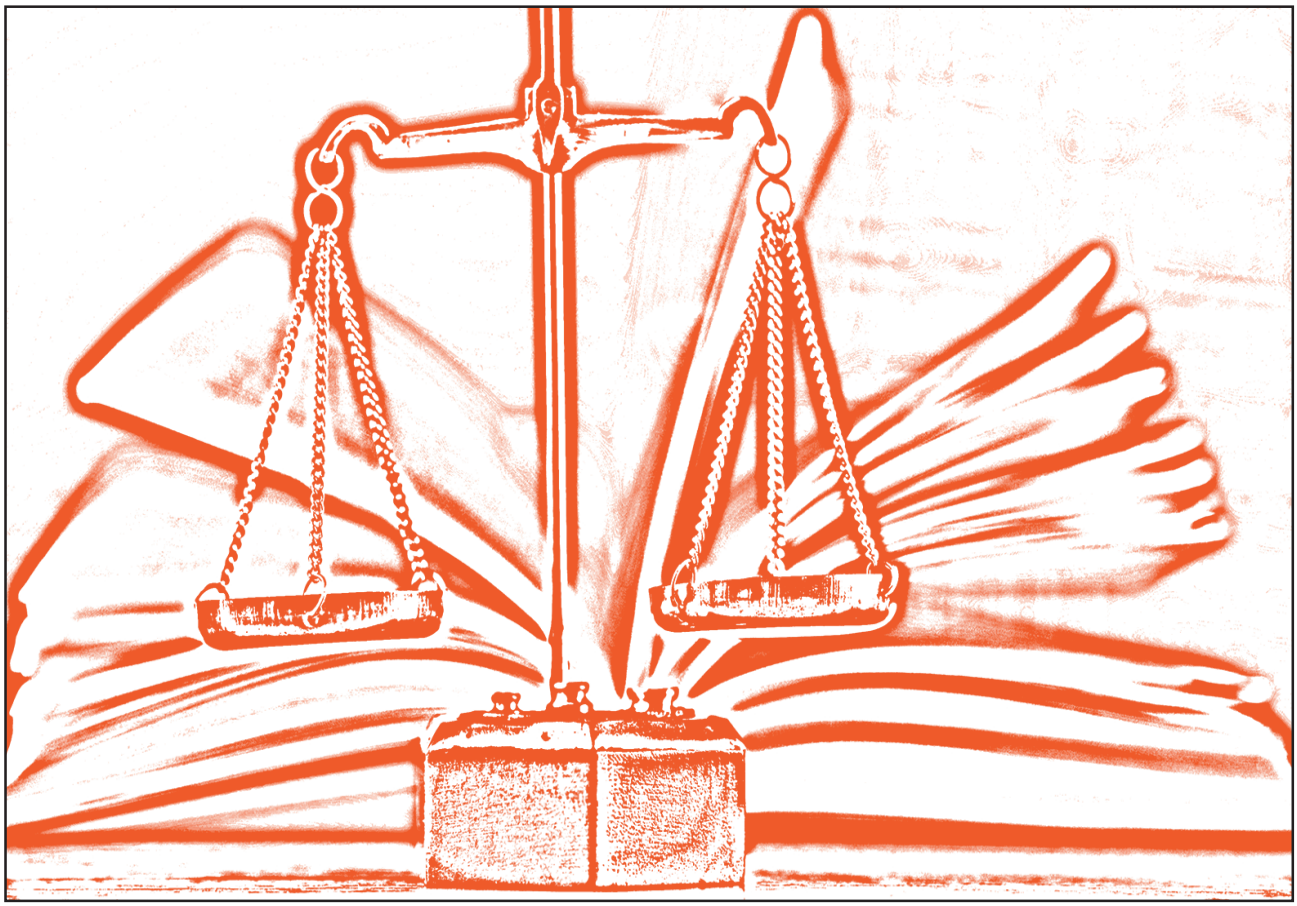
In summary, the REUL Bill is remarkable, first because it will dramatically change the statute book following the use of the sunset clause, and second because it gives dramatic powers to the executive which can be exercised with little effective control by Parliament. The government justifies this on the basis of the need

for swiftness and not to overburden the legislative process. But as as noted by Lord Judge, the House of Commons has not rejected a piece of delegated legislation since 1979 'when thousands and thousands of pages, in small print, are sent out to us every year, telling us all how we should live'.

The programme of reform envisaged by the Bill will put enormous pressure on civil servants. And it creates considerable uncertainty for workers, consumers, and businesses, just at the time when the government says that the country should be focusing on growth. Rearranging the deckchairs – redrafting laws without the benefit of consultation with those affected – seems at best a distraction to the growth agenda and at worst contradictory to it, not least because of the uncertainty it will create.

And while the government will trumpet regained 'independence and Brexit freedoms', the UK is not in fact that 'free'. Recent events have shown how markets respond when the UK steps significantly out of line with what its European neighbours. More specifically, the UK has entered commitments in the UK-EU Trade and Cooperation Agreement (TCA), which establishes the terms for trade between British businesses and the EU. These include level playing field commitments in respect to, for example, the environment and workers' rights. If the UK significantly departs from those commitments, the EU can start remedial processes under the TCA which could lead to the imposition of tariffs on UK goods. Sunsetting will also have implications for the Protocol on Ireland and Northern Ireland. The greater the divergence between Great Britain law and EU law, the greater the number of checks on goods going from Great Britain to Northern Ireland. This makes the issues around the Protocol more, not less, difficult to resolve.

Furthermore, if the government manages to pass this Bill, time will be of the essence to make decisions on those 2400 piece of legislation. The shorter the time scale, the more likely it is that the extensive executive powers will be used by government. 'Taking back control', it seems, means control by the executive and not the legislature.



Regulatory divergence

Joël Reland

Brexit was – famously – about taking back control from the EU. Yet, so far, the UK has not used its newfound sovereignty to diverge significantly from the EU's rulebook. Instead, it has stuck with the status quo in the majority of key policy areas. In part, this reflects a political context where other urgent issues like COVID-19 have taken priority. Yet it also hints at the complex processes involved in regulatory divergence, and the fact that it is hard for a country right on the EU's border to truly escape its regulatory shadow. 'Taking back control' is not as simple as it sounds.

What was promised and what has changed?

For the Leave campaign, divergence was synonymous with deregulation and a bonfire of red tape. A wide range of promises were made about EU rules which would be scrapped after Brexit, under the unifying argument that they were overly prescriptive and damaging to business and consumer interests. Based on this rhetoric, many predicted that post-Brexit Britain would become a low-tax, low-regulation 'Singapore-on-Thames'.

Yet, perhaps surprisingly, the government's divergence agenda has so far not been defined by deregulatory change. Although planned reforms of gene-editing and financial services regulations are about creating more permissive regulatory environments to foster innovation and competition (see 'Financial Services' and 'Insurance' in this report) in other cases the aim has been to bolster the power of the state to intervene in markets. In some senses the UK left the EU only to appear more European, more dirigiste; less 'Singapore-on-Thames', more 'de Gaulle-on-Tees'.

The EU's Common Agricultural Policy (CAP) for farming subsidies was long criticised for incentivising overproduction (see 'Agriculture' in this report). Yet DEFRA's planned reform – the Environment Land Management Scheme (ELMS) – is similarly interventionist, only it rewards farmers for meeting sustainability targets rather than the amount of land farmed. The government has also imposed a ban on the sale of new petrol and diesel cars by 2030 (compared to 2035 in the EU), backed up a new state aid regime which aims to accelerate 'levelling up' through investment in greener manufacturing.

This is hardly the 'bonfire' of red tape the then prime minister Boris Johnson once promised. Indeed much of the above would have been achievable without Brexit at all, even if government press releases trumpet 'bespoke' new 'world-leading' regimes. Giving the impression of transformational change while sticking to the status quo has been the fundamental characteristic of regulatory divergence up to now. This underlines that for the Johnson government the benchmark for successful divergence was a demonstration of sovereignty, not profound rewriting of regulation. It is reflected in the many new UK-branded regimes which largely replicate EU processes. The UKCA manufacturing mark denotes the same standards as the EU CE mark; so far the main function of UK's own chemicals regime is copying over swathes of registrations from EU databases; and new bodies like the Trade Remedies Authority and the Office for Environmental Protection do little to catalyse regulatory change.

There were, however, signs that this might change under Liz Truss's leadership. She, too, had promised a bonfire of red tape but, unlike Johnson, her driving principle appeared to be growth rather than sovereignty and deregulation is a central means of achieving this. Such thinking was reflected in her plan to remove the EU-imposed cap on bankers' bonuses and a more radical shake-up of financial services regulation, as well as the pausing of ELMS – which was one of the most notable, and interventionist, pieces of divergence under Johnson.

Barriers to divergence

Regardless of the government, divergence with a view to deregulate faces obstacles (see 'Conclusion', 2021 report). First, there are international obligations to consider. The plan for a 'bonfire of procurement red tape' would have fallen foul of WTO rules and was thus canned. Similarly, the UK and EU are developing separate frameworks for electric vehicles but their common adherence to World Forum standards suggests that they will move largely in simpatico. There are international regulations beyond the EU which also limit UK regulatory autonomy.

Second, the power of the EU market still matters. Where the UK does have realistic freedom to diverge, serious questions remain about whether it is in its economic interests. Last year the UK planned a lighter-touch regulatory regime for medical devices. Yet industry bodies were concerned this would mean devices disappearing from the UK market because manufacturers would prioritise compliance with EU regulations, even if they were more onerous, because it is a much larger market for healthcare spending. Updated UK plans are much more closely aligned with the EU's. Similarly, mooted plans to reform EU GDPR might reduce bureaucracy for small businesses but they would also likely end the UK-EU data adequacy decision, severely complicating life for companies which share personal data with EU counterparts.

Third, new UK-specific regulations create new responsibilities for UK regulators, and such transitions are typically bureaucratic and time-consuming. A recent report by the National Audit Office highlights widespread capacity issues among British regulators for food, chemicals and markets – in some cases spending a quarter of staff time on training – as they struggle to scale up to the size needed for their new responsibilities. In the meantime, they often function at lower capacity than EU equivalents. Greater divergence will only amplify the frequency of such challenges.

A UK strategy?

The upshot is that the long-term benefits of divergence need to be significant to offset the immediate costs. Yet there is little sense of such cost-benefit analysis being systematically done within Whitehall, nor of an overarching divergence strategy being in place.

The first strategy document of note was a September 2021 four-pager entitled Brexit Opportunities: Regulatory Reforms, an eclectic mix of symbolic changes (crown stamps on pint glasses) and those which did not require leaving the EU (modernising diabetes management for lorry drivers). This was followed in January 2022 by The Benefits of Brexit – in contrast, a vast 108-page document, which outlined a myriad of opportunities for reform but gave no clear sense of prioritisation or trade-offs. Nor did it display any analytical distinction between changes possible within the EU, those made necessary by the terms of the TCA, and divergence opportunities stemming from the UK's newfound regulatory freedom.

In defiance of these nuances, the UK government approach seems to make a virtue of scrapping EU legislation for its own sake, regardless of the consequences. Jacob Rees-Mogg became the Minister in the newly-created Brexit Opportunities Unit in the Cabinet Office, and has now taken the portfolio with him to the Department for Business, Energy and Industrial Strategy (BEIS). His landmark policy is the Retained EU Law Bill, under which most EU law copied onto the UK statue book will expire by December 2023, unless departments decide to keep or amend specific laws.

Not only does this create huge challenges with a real risk of poorly-designed new legislation (see 'Retained EU Law' in this report). It will also create a raft of sudden changes for businesses to adapt to, at very short notice. Experience from the new UKCA regime shows adapting to even a single new regime is a laborious and costly process – the uncertainty created by a raft of looming deadlines in 2023 could grind many businesses' planning and operations to a halt and likely deter international investment.

Whether the Bill is more symbolic posturing than serious strategy will be determined by the extent to which ministers use clauses to extend expiry dates to 2026, or even indefinitely; and by the extent that EU laws are simply re-badged as UK ones. For the time being, it is hard to detect a clear government plan for divergence and what kind of regulation it wants to replace expired EU law with.

Opportunities elsewhere

In the apparent absence of strategic direction from the centre, it has been left to individual departments to define their own divergence agendas. A few stand out for their depth of thinking. The Treasury has made some clear-eyed decisions about trade-offs, accepting a loss of integration with the EU financial services market and instead developing plans to simplify regulations to make the City a globally competitive financial centre and investment hub for emerging industries like green finance, fintech and cryptocurrency.

The Treasury's strategy is underpinned by its significant clout in Whitehall, the international heft of the UK financial services sector, and the support of the some of the best-staffed UK regulatory agencies. However, other departments do not have a pool of experts in arms-length bodies of comparable size. Yet others have followed its lead in looking to emerging industries as a fruitful avenue for divergence. In its planned regulation for the crypto-asset stablecoin, the Treasury has opted for a less comprehensive and restrictive regime than the EU, which in theory can more quickly adapt as technology evolves, making it a comparatively attractive environment for developers. BEIS and the Department for Digital, Media, Culture and Sport (DCMS) have now put those same principles at the heart of their approach to AI regulation.

The advantage of diverging in emerging sectors is twofold. First, there is minimal EU regulation to move away from, and thus fewer costs for businesses. Second, the UK's regulatory landscape is well suited to this 'testbed' role. The UK is too small a market to set the global rules of the game as the EU aspires to (using the 'Brussels effect' to force companies worldwide to comply with its stringent standards to access its single market). However, before companies launch new tech full-scale, they need an environment in which to develop it, one that preferably allows for greater innovation. Because the UK is already a key market for AI investment, able to more flexibly update its regulation than a 27-member bloc, and right on the doorstep of the EU single market, this could be a possibility.

The shadow of the EU

The EU is omnipresent in the divergence discussion, with its regulatory and market forces largely defining where the UK has the most scope to rewrite its regulation. But a related – and under-discussed – question is where it is in the UK's interests to actively pursue regulatory alignment with the EU.

Energy, climate and digital markets are critical policy areas where UK and EU regulatory approaches are similar and would benefit from more mutualised cooperation. Meanwhile, divergence is occurring by default in areas like chemicals and food where UK standards are not keeping pace with the EU's, creating the unwelcome risk of low-quality goods being dumped in Britain.

The situation is especially acute for Northern Ireland, which under the Protocol remains aligned to EU regulations in a range of areas. Over time, this is creating a growing corpus of small but significant regulatory differences between Northern Ireland and Great Britain in areas from food to pharmaceuticals and waste, which makes trade across the Irish Sea more complicated.

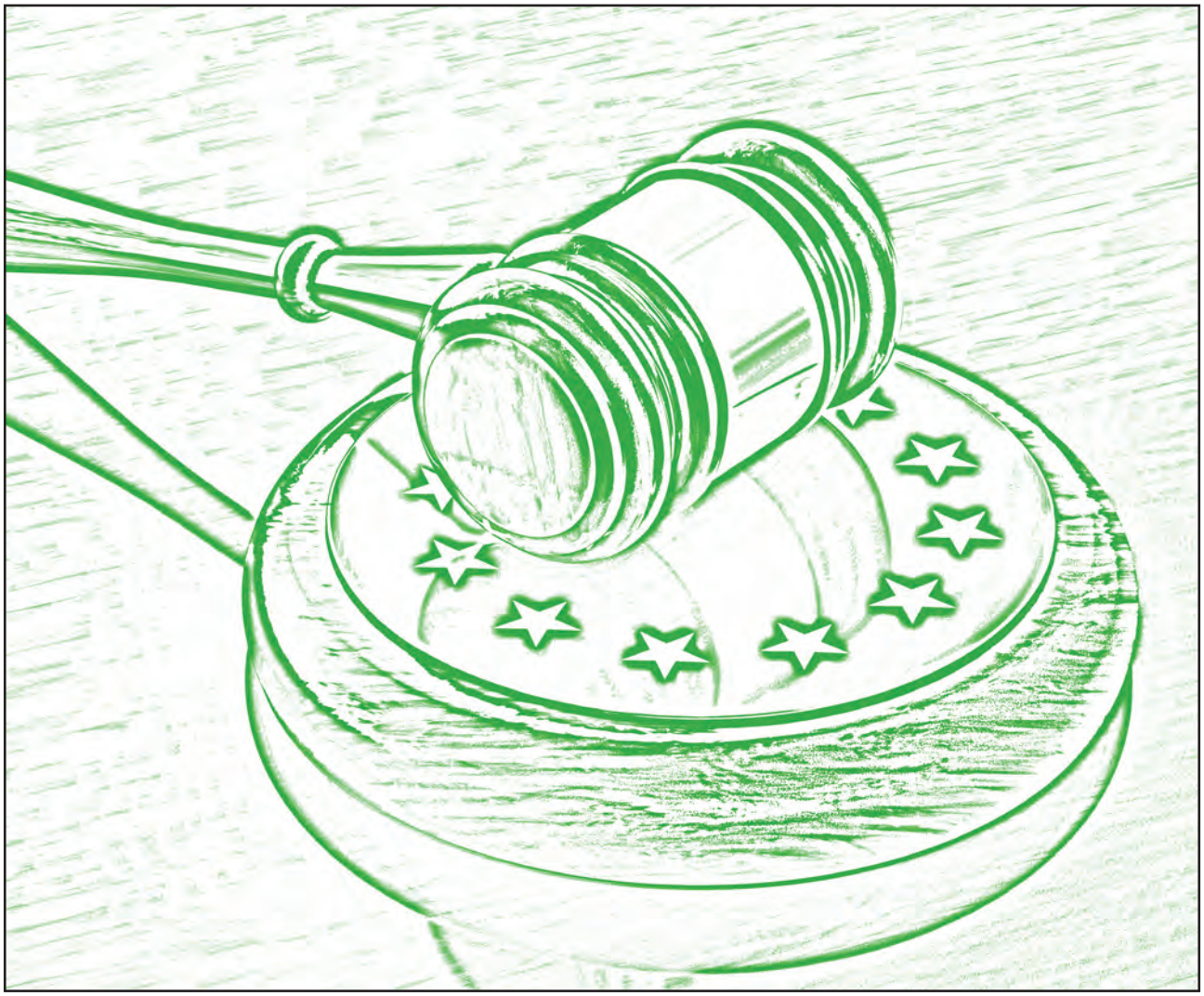
It is in the UK's interest to identify changes coming down the track from Brussels and decide where alignment is preferable. Yet, Whitehall processes appear highly reactive, with few efforts being taken to monitor and plug regulatory gaps before they appear. The UK Mission to the EU (UKMis Brussels) in particular seems little utilised as a resource for gathering intelligence and trying to mould EU thinking at the same time as the regulatory border in the Irish Sea continues to thicken.

Under Johnson, hope seemed to rest on using the Northern Ireland Protocol Bill to detonate and reset the regulatory context. Yet the Truss government – perhaps because Brexit is not her defining political issue – appeared more willing to return to negotiations with the EU. Moreover, she was tentatively supportive of the the fledgling European Political Community, which has already led to an agreement for renewed UK collaboration with EU partners on energy security in the North Sea.

This is the paradox of the Truss administration: at once planning an overhaul of inherited EU law while seeking to foster closer UK-EU cooperation. Perhaps, these elements are not in direct contradiction. The Retained EU Law Bill gives the impression of transformational change, and thus satisfies the Brexiteer caucus, but it could become essentially a rebadging exercise. It also gives political cover to pursue closer regulatory cooperation with the EU on critical issues around Northern Ireland, energy and security.

Conclusion

If the UK government does indeed take the above course, it would confirm the largely symbolic nature of the divergence agenda: a means for government to give the impression of an independent Britain, while beneath the surface it maintains far greater regulatory alignment with the EU than it would care to admit. How long this approach could be sustained is an important question and open to debate.



Part II.

Trade

Trade in goods

David Bailey

The EU is the UK's largest trading partner, accounting for some 46 per cent of UK goods exports and 53 per cent of UK goods imports. Key manufacturing sectors, like automotive and aerospace, have been highly integrated into EU-wide supply chains. Intermediate goods often criss-cross the borders of various EU countries and the UK multiple times, as they are shipped from factory to factory to undergo value adding processes, before being assembled into final products. In turn, the latter could then be sold in any EU country. Some sectors, such as chemicals, often need such intermediate goods delivered 'just-in-time' to save on the costs of stockpiling.

Whilst the UK-EU Trade and Cooperation Agreement (TCA) avoided tariffs and quotas, subject to compliance with rules of origin rules, it nevertheless introduced extra new costs for trade in goods between the UK and EU. The UK in a Changing Europe 2022 report 'Manufacturing after Brexit' highlighted the range of issues that impact on trade in goods even with the TCA. These include customs delays, the costs of completing customs forms, complying with rules of origin rules, regulatory alignment and data protection issues. So, despite the claim by Boris Johnson that the TCA ensured 'no non-tariff barriers', this was clearly not the case. In fact, non-tariff barriers are back, and in a big way.

Trade barriers: disruption and extra costs

Customs checks in particular, have introduced delays at the UK-EU border, adding to costs and disrupting tightly interwoven supply chains. Manufacturers have found ways to mitigate such risks – for instance, by stockpiling or changing supply or distribution routes, or both – but such actions have brought higher costs.

The UK has repeatedly delayed the imposition of full customs checks on imports in order to keep imported goods flowing. This has offered some relief for manufacturers in bringing in components, especially given the ongoing impact of COVID-19 on supply chains. However, challenges remain around exporting, such as the costs of completing declarations and other 'red tape', given that the EU has not waived customs checks and have implemented full checks at the border since 1 January 2021. As such, there is an asymmetry that disadvantages British manufacturers who have had to spend much time and money on complying with customs rules while EU competitors can still trade freely with the UK.

While firms are responding to Brexit in several ways, such as by switching to non-EU sourcing, recent work suggests that smaller firms really struggle with customs and rules of origin paperwork. In some cases, such firms have either ceased exporting or now stockpile at hubs in the Netherlands for instance or elsewhere. Supply chain disruption has been exacerbated by COVID-19 – such as chip shortages in manufacturing, skills shortages in certain sectors – and the war in Ukraine – through higher energy costs and shortages in key materials. British manufacturers have been exposed to risks in the supply chain and additional costs that are unlikely to disappear going forward in what can be considered a 'slow-burn' disruptive process.

Larger firms, experienced in trading internationally, are better placed to deal with these challenges, albeit again at a cost. For example, Make UK estimated an increase in the number of customs declarations that UK firms have to fill out from 55 million to 275 million, costing some £15 billion per year. These estimates were similar to those of HM Revenue and Customs (HMRC) published in 2019, which also put the overall cost of customs declarations at around £15 billion. On top of this, HMRC estimated that fulfilling rules of origin requirements likely increases costs by a further £5.5-6.0 billion per year. This includes both paying for rules of origin certificates and, for more complex products, the much higher costs of evidencing that the requirements have been met, which can include supply chain audits, legal advice, agents' fees and so on.

Provisions in the EU-UK Trade and Cooperation Agreement

The TCA offered some flexibility by allowing self certification on rules of origin along with an initial one-year grace period. Beyond this, however, some firms cannot or do not wish to claim zero tariff due to the complexity and cost of the paperwork involved. In the first few weeks of 2021, work by the UK Trade Policy Observatory showed that a significant number of firms did not claim zero tariffs when exporting to the EU, and estimated that 26 to 32 per cent of UK exports to the EU that could have entered under zero tariffs did not actually do so. While this may improve over time, more help is needed to support small firms to comply with the new rules.

With regards to rules of origin content, the UK had asked for a 'cumulation' agreement in the TCA. This would have allowed manufacturers to count not only all EU and UK content as local, but also lots of content from other countries with which Britain and the EU both had preferential trade deals, such as Japan. This would have ensured tariff preferences to products made using materials from these countries too. Unsurprisingly, the EU agreed to the former but not the latter, maintaining its traditional approach of requiring 55 per cent of 'local' content – that is UK and EU content – to qualify for free trade status.

The content requirement has been an issue for some auto assemblers in the UK importing high value components from outside the EU. A phase-in period in the TCA on local content for electric vehicles (EVs) through to 2026 allowed the auto industry some time to adjust on EV content. After 2026 the battery will have to be sourced in the UK or EU to avoid tariffs on the assembled vehicle. Assemblers have reacted in different ways. The decision by Nissan to source more batteries in the UK illustrates one course of action, while BMW's recent decision to end the production of electric Mini cars at Plant Oxford was another.

Furthermore, even after the TCA was signed, manufacturers still wanted clarity on a range of areas going forward. On data protection, a temporary six-month agreement was agreed to keep the previous rules in place until a new 'adequacy decision' was reached – the adequacy decision is now in place until end of June 2025. A range of issues remained pending, such as data sharing within the chemicals sector, and whether various UK regulatory agencies would be set up on time to take over work from their EU counterparts (see 'Trade in Goods' in 2021 report).

On regulation, the chemicals sector (see 'Environment and chemicals' in this report), for example, expressed relief that the TCA had avoided tariffs, but remains alarmed at the uncertainty and costs of the UK's own regulatory framework beyond the EU's chemical regulatory framework ('EU REACH'). A chemicals Annex to the TCA was short and did not secure access for British firms and authorities to the EU Reach database, in turn requiring duplication of work and huge costs to set up a new UK regime – 'UK REACH'. The UK government has been at odds with the British chemical industry. While the government has highlighted possible regulatory divergence as a benefit of Brexit, the industry sees it as a cost as it had already invested heavily to comply with the EU framework. Under EU membership, British firms had spent some £500 million complying with EU REACH which gave market access to 27 countries

A government impact assessment mid-2022 put costs for registering chemicals on the new 'UK REACH' database (often duplicating existing registrations with the EU) at between one and a half billion pounds and three and a half billion pounds. This is double previous estimates, and is a reflection of the government accepting that more substances will need to be registered than was previously recognised. A big chunk of the anticipated UK REACH costs relates to UK companies simply buying access to existing data, rather than having to repeat tests to generate the same data.

At the time of writing, it is not clear if the current October 2023 deadline for registering the UK's chemical supply chain will be met. DEFRA is thought to be exploring an 'alternative transitional registration model' to try to reduce the costs of transitioning to UK REACH. What that involves remains unclear as the government has ruled out a 'Swiss-style' approach whereby full registration data for chemicals registered in EU REACH are not required. A Swiss approach would reduce duplication costs for industry, but would keep regulations aligned with the EU, which is politically unacceptable to the UK government.

Aerospace was similarly concerned over the UK leaving the EU Aviation Safety regime, centred on the European Union Aviation Safety Agency (EASA) (see also 'Aviation' in this volume). This is critical as the aerospace industry has a highly regulated supply chain for safety reasons and the UK aerospace industry had relied on EASA membership to maintain common safety and certification standards that are acceptable in Europe as well to the US safety agency, the Federal Aviation Administration (FAA).

A transition period allowed for mutual recognition of certificates, approvals, and licenses until the end of 2022, implying a dual licensing or dual compliance regime in the future. UK aircraft and equipment manufacturers now, with a view to attaining subsequent approval from EASA, face extra costs. However, the government's decision in May 2022 that the UK will align its standards for new electric vertical-takeoff-and-landing (eVTOL) aircrafts with EASA's 'special conditions VTOL rules' has raises hopes that the UK's attitude may be softening.

Another concern for British manufacturers centres on changes to the safety product testing certification process or marking regime which has been delayed until January 2023. The marking of UK-made goods will transfer from the current Conformitée Européenne (CE) marking regime, for products that meet EU health, safety and environmental protection standards, to a new UK conformity assessed (UKCA) marking regime.

Concerns focus on whether there are enough conformity assessment laboratories in the UK to successfully implement UKCA marking, the additional costs for UK manufacturers in moving from CE to UKCA, and whether multinationals will choose to supply the UK if they have to create the same product twice just to comply with two different marking regimes.

Confusion was sowed earlier this year when the former Brexit opportunities minister Jacob Rees-Mogg appeared willing to relax UKCA requirements and unilaterally recognise CE marking and perhaps even other countries' labels. But Number 10 swiflty dismissed the idea.

Conclusion

Overall, despite UK manufacturing's welcome the TCA, there have nevertheless been significant extra costs in terms of non-tariff barriers on trade in goods which have impacted especially smaller firms. Going forward, much continues to depend on the degree of flexibility allowed and the degree of phasing in. There are early signs that the UK government may be prepared to review its ambitions to become a rule-maker as seen in the discussions over the shift from CE to UKCA kitemarks, and even to pragmatically align with the EU, as in the case of aviation. However, the post-Brexit trading arrangements for goods seems to be in a persistent transitory state. This can be seen in deadlines unilaterally being pushed back by the UK government multiple times. While this recognises the genuine difficulties faced by business in transitioning to new regimes, it also adds to uncertainty for such firms.

UK subsidiaries in the EU after Brexit

Meredith Crowley, Mar Domenech-Palacios, Elisa Faraglia, and Chryssi Giannitsarou

The June 2016 vote by the UK to leave the European Union ushered in a period of heightened uncertainty about future market access for firms in the UK and the EU. British firms engaged with the EU through the sale of merchandise, purchase of inputs, or provision or consumption of services suddenly found access to a key market at risk. One aspect of risk facing British firms concerned cross-border trade of goods; from the time of the referendum vote until the announcement of the EU-UK Trade and Cooperation Agreement (TCA), firms on both sides of the UK-EU border did not know if sales and purchases of merchandise would be subject to import tariffs and quotas. Another aspect of risk facing UK firms prior to the completion of the TCA was a lack of clarity regarding future policy over border management, including inspection of cargo, licensing of personnel to operate ground transport across borders, delivery times, and enforcement of regulations over merchandise, packaging, distribution, etc.

Ultimately, the TCA guaranteed that British merchandise exported to the EU would not face any import tariffs. However, the TCA increased the regulatory and paperwork burden for British firms. It introduced new requirements that British firms provide proof that their merchandise was made in Britain in order to qualify for tariff-free entry into the EU. The TCA also resolved much of the confusion arising from issues including border management and regulation of sales of goods and services in the EU, but this resolution often involved much higher costs in time and money for British firms. In October 2021, Sally Jones, the Trade Strategy and Brexit Leader at EY, explained one aspect of the changing costs of trade: 'Our [British] clients are telling us that the average amount of time it takes to complete all the formalities [for exporting to the EU] has increased from about 30 minutes per consignment to something more like seven hours'. In summary, prior to the TCA, British firms did not know by how much the costs of cross-border transactions would rise, but they understood new regulatory and trading frictions would be costly.

One way for British businesses to maintain their relationships with European customers and suppliers, and to manage the increased financial costs and trading frictions arising from Britain's exit from the EU was by setting up a subsidiary in the EU. A subsidiary is a company owned by another company, its 'parent firm' or 'headquarters'. Because subsidiaries are separate legal entities, they are responsible for their own financial accounts and business activities. Subsidiaries can be useful to corporate parents that import and export. For example, when exporting merchandise to a foreign country, the exporting firm must identify a 'consignee', a legal entity in the importing country that will take legal ownership of the merchandise, pay import or other taxes, and ensure compliance with local laws and regulations. For a UK-headquartered firm, a subsidiary in the EU can act as the consignee for goods imported from its UK production facilities, thus simplifying and streamlining the trading process.

When a subsidiary and its parent firm are located in different countries, the subsidiary is subject to the laws and regulations of the country where it is located, not where its parent resides. For a British firm that conducts significant sales in the EU, having a subsidiary with a full legal personality in the EU can simplify compliance costs related to EU consumer regulations and make it easier to engage with EU distributors and customers.

Much of the policy debate around Brexit has emphasized the importance of government initiatives and policies to minimise the costs of Brexit to UK businesses. In this chapter, we examine the actions taken by private sector UK businesses to ensure their continued access to and engagement with clients and suppliers in the EU. The analysis focuses on non-financial British firms that set up subsidiaries in the EU from January 2000 through December 2021. We are interested in learning whether UK firms may have used the incorporation of new subsidiaries in the EU to insure themselves against the possible increased trading frictions and costs that Britain's exit from the European Union would induce.

This chapter offers an initial analysis of British firms' incorporations in the EU. The analysis is based on identified changes in the pattern of incorporations of new and first subsidiaries – that is, the first subsidiary established in the European Union by a given parent in the EU between the pre- and post-Brexit referendum periods: January 2000 – June 2016 and June 2016 – December 2021. The impact of Brexit on trade and business behaviour can be difficult to establish as many factors combine – indeed successive government representatives have pointed to the pandemic and more recently to the war in Ukraine to explain uncertainty and risks for businesses. In order to gain insight into whether any changes were plausibly caused by Brexit, we examine changes in the pattern of incorporations for a useful reference group of firms. This reference group is the set of EU-headquartered firms that established new and first subsidiaries in an EU state *other than the European firm's home state*. By comparing incorporation patterns of firms headquartered in Britain versus the EU, we can highlight unique patterns among the British firms that might reasonably be attributed to Brexit, rather than underlying technical or institutional factors affecting the entire European or global economy.

Our analysis documents three important empirical facts. First, there was a substantial increase in the proportion of British-headquartered firms establishing a first subsidiary in the EU after the referendum vote. Second, there were substantial differences in the sectoral composition of British versus European headquarters establishing first subsidiaries in the EU before the referendum vote; the broad pattern of sectoral composition was largely preserved for both British and European firms after the referendum vote. Third, a small number of industrial sectors were characterised by disproportionate increases in first subsidiaries, but our overall conclusion is that the increased rate of incorporation of first subsidiaries in EU countries by UK headquarters was broad-based across all non-financial sectors of the economy.

In summary, a substantial number of British firms actively took steps to change their corporate structure in order to secure their presence in the EU in anticipation of Britain's exit from the European Union. We conjecture that one plausible factor driving the change in the rate of incorporations of first subsidiaries post-referendum was to mitigate the costs of new regulatory and institutional barriers to trade that Brexit would introduce. The analysis presented here, a straightforward comparison of simple summary statistics, enables us to identify important changes in practices of firms. Observed changes suggest, but do not prove, plausible causes. Interpreting the causes of these changes is a more complex task which requires more sophisticated econometric methodologies, which we will undertake in future work.

Data from Orbis Europe

To conduct our analysis, we use data from Orbis Europe on subsidiaries established by UK- and EU-headquartered firms. Orbis is a comprehensive database that includes information on 400 million private companies globally. For our purposes, the most important feature of Orbis is that it provides detailed information about an entity's ownership structure including shareholdings and subsidiaries, direct and indirect ownership, ultimate owners, and corporate groups. The unit of analysis we use is a Bureau Van Dijk firm identification number which is generally based on a unique and stable national identifier.

Firms headquartered in the United Kingdom

We begin by extracting from Orbis Europe all parent companies incorporated in the UK that established one or more subsidiaries in an EU member state. We have 30,881 parent firms in the data set that are headquartered in the UK. The year of incorporation of subsidiaries ranges from 1665 to 2022. Among those, 14,176 parent companies established a subsidiary in an EU country from the 1 January 2000 until the 23 June 2016, the date on which the Brexit referendum took place, and 10,812 UK firms incorporated a subsidiary in an EU country from that day until 31 December 2021. For some companies, the date of incorporation is missing and, for others, only the year and not the exact date of incorporation is available.

The data set contains the information of 58,913 subsidiaries. Among these, 24,631 were established between 1 January 2000 and the 23 June 2016, and 15,906 after that date.

To simplify our analysis of real economic activity, we begin by removing all firms whose primary area of

economic activity is in the financial sector. We focus on non-financial corporations because the financial sector might have been affected by and reacted to Brexit-related regulatory change in a very different way . This leaves us with a set of 21,339 UK parent firms that have established a subsidiary in the EU since 1 January 2000. From a perspective focusing on subsidiaries of non-financial parents, we have 20,438 subsidiaries established between 2000 and the date to the referendum and 12,889 subsidiaries established afterward.

Firms headquartered in the European Union

In order to create a benchmark against which we can compare the activities of British firms, we build a similar data set for EU subsidiaries established by EU parents in countries other than their own. This data set contains 162,243 EU parent firms, among which 75,222 have set up a subsidiary in another EU country between January 2000 and 23 June 2016 and 43,298 have set up a subsidiary in another EU country after the date of the Brexit referendum through the end of December 2021.

The EU data set contains 292,802 subsidiaries. Among those, 128,617 were established between January 2000 and the Brexit referendum and 67,254 were established after the Brexit referendum.

As with our analysis for British firms, we remove all parent firms whose primary sector is financial. This leaves us with a set of 88,267 EU parent firms that have established a subsidiary in the EU since 1 January 2000. From a perspective focusing on subsidiaries, we have 94,030 subsidiaries established between 2000 and the date to the referendum and 47,569 subsidiaries established afterward.

Differences in parent-firms' activities before and after the referendum

We present the aggregate data on establishment of new subsidiaries in the EU to identify differences in patterns over time and between UK- versus EU-headquartered firms. Figure 1 presents subsidiary incorporations for non-financial UK-headquartered firms, while Figure 2 presents the corresponding information for our reference group; that is, non-financial EU-headquartered firms.

Both figures depict the number of subsidiaries established by UK (Figure 1) and EU (Figure 2) non-financial parent firms from the first quarter of 2001 through the final quarter of 2021. The dark green bars depict the total number of subsidiaries incorporated in each period, while the light beige bars present the total number of 'first' subsidiaries in the EU ever established by a British (Figure 1) or European (Figure 2) parent firm. The red vertical line marks the date of the Brexit referendum. Despite the difference in the scale of activity, which reflects differences in the size of the originating economies, the time patterns of establishment of new subsidiaries by UK and EU-headquartered firms are similar. In both figures, there is a steady growth of new and first subsidiaries over time, with downturns in incorporations around the time of the global financial crisis of 2009 and Covid pandemic lockdowns in 2020.

In comparing Figures 1 and 2, the most notable difference between the pattern for the UK and the EU is the proportion of first subsidiaries established after the Brexit referendum vote. A greater proportion of all new subsidiaries established by UK parent firms are the first subsidiary ever established in the EU. When we restrict our analysis in both the UK and EU datasets to non-financial parent firms, we find that the percentage of first subsidiaries in the EU among all subsidiaries established by UK parent firms was 60 per cent in the post-referendum period of 2016-2021. In contrast, for the EU, the percentage of first subsidiaries of all new subsidiaries created in the post-referendum period was quite low, a mere 52 per cent (from Figure 2).

This disproportionate establishment of first, EU-based subsidiaries by British headquartered firms suggests that the high rate of creation of first subsidiaries was the result of Brexit rather than other, purely domestic changes in the economic environment. Perhaps one approach taken by British firms to maintain their EU presence was through the outlay of financial and organisation resources that would tie them more deeply to the EU.

In the next section, we review the sectoral distribution of the parent firms establishing their first subsidiary as well as the sectors of these first subsidiaries, both before and after the Brexit referendum vote.

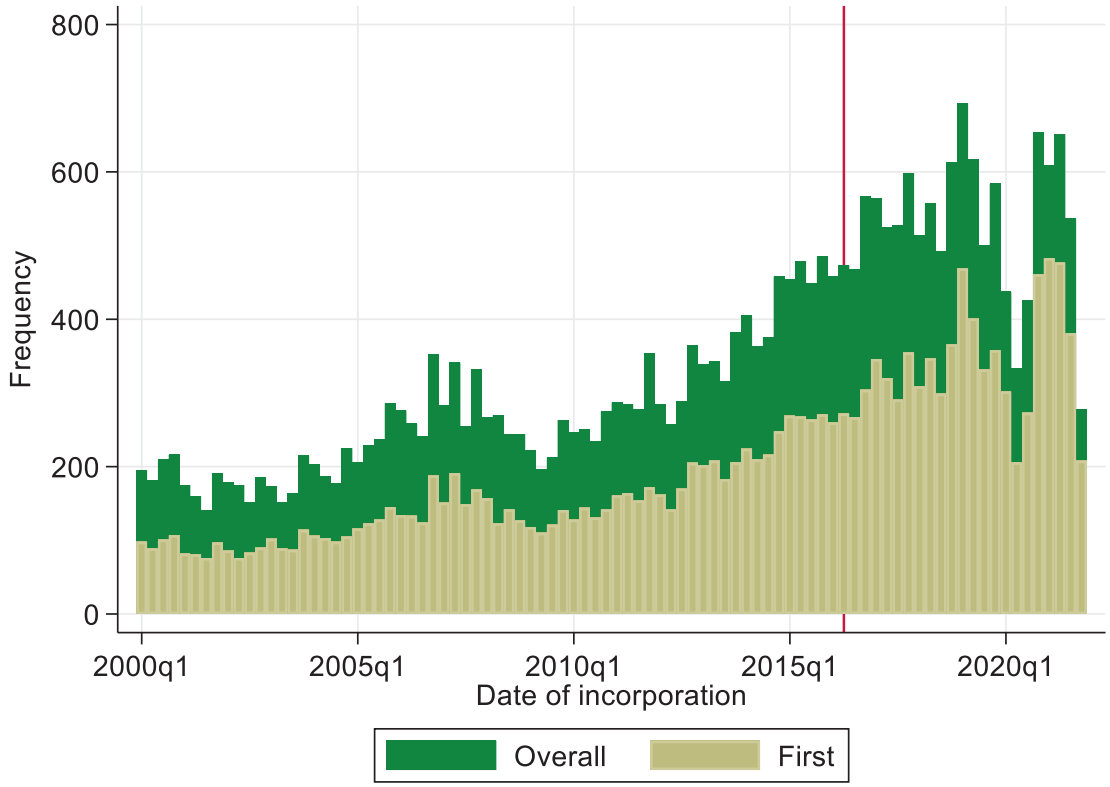


Figure 1: Subsidiaries established in the EU by UK-headquartered firms, 2001-2021

Notes: The dark green bars report the number of new subsidiaries established by UK-headquartered non-financial firms. The light beige bars report the number of new subsidiaries of UK-headquartered parents establishing their first subsidiary in the EU. The red line indicates the date of Brexit referendum. The frequency is quarterly.

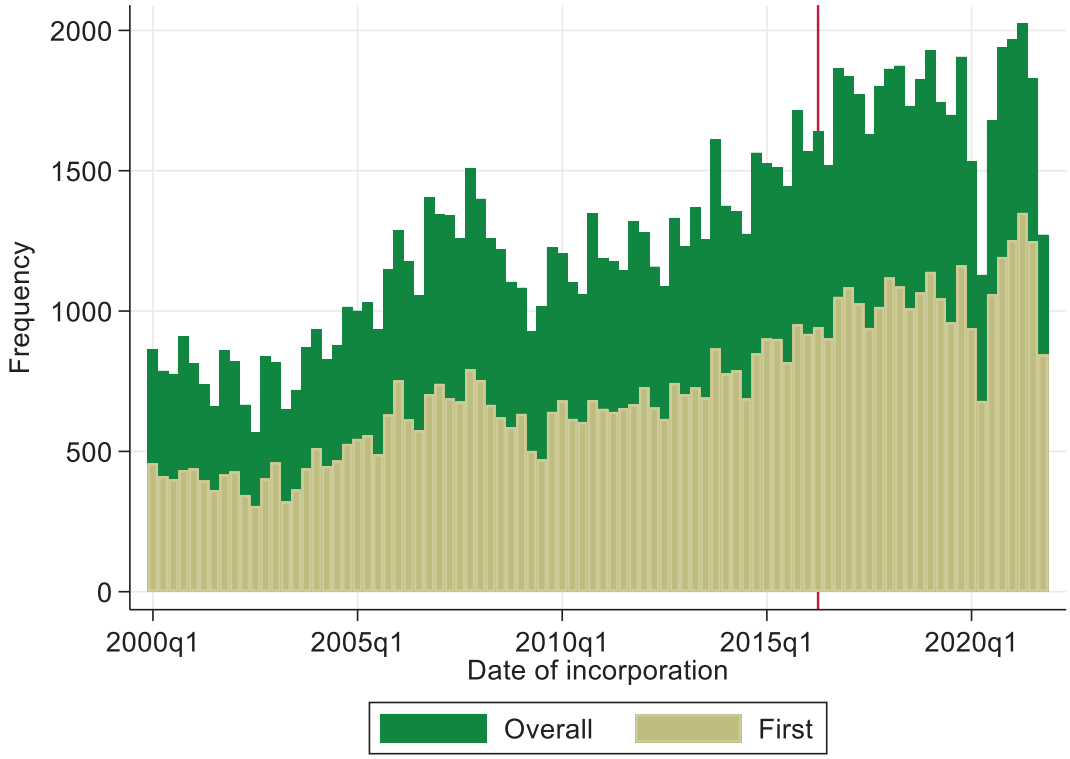


Figure 2: Subsidiaries established in the EU by EU-headquartered firms, 2001-2021

Notes: The dark green bars report the number of new subsidiaries established by EU-headquartered non-financial firms in an EU state other than their own. The light beige bars report the number of new subsidiaries of EU-headquartered parents establishing their first subsidiary in an EU state other than their own. The red line indicates the date of Brexit referendum. The frequency is quarterly.

The sectoral composition of UK headquarters setting up European subsidiaries

The sectoral composition of UK headquarters establishing a first subsidiary in the EU changed modestly after the Brexit referendum. Figure 3 displays, across ten sectors, the share of British parent firms that established a first subsidiary in the EU relative to all UK firms that established a first subsidiary in the EU. The rank ordering of sectors before (blue bars) and after (orange bars) the referendum was largely preserved. Interesting exceptions include the 'Information' and 'Retail' sectors, whose shares grew by 28 per cent and 23 per cent, respectively. The 'Administration' sector experienced the largest decrease; its share shrinking by 13.8 per cent.

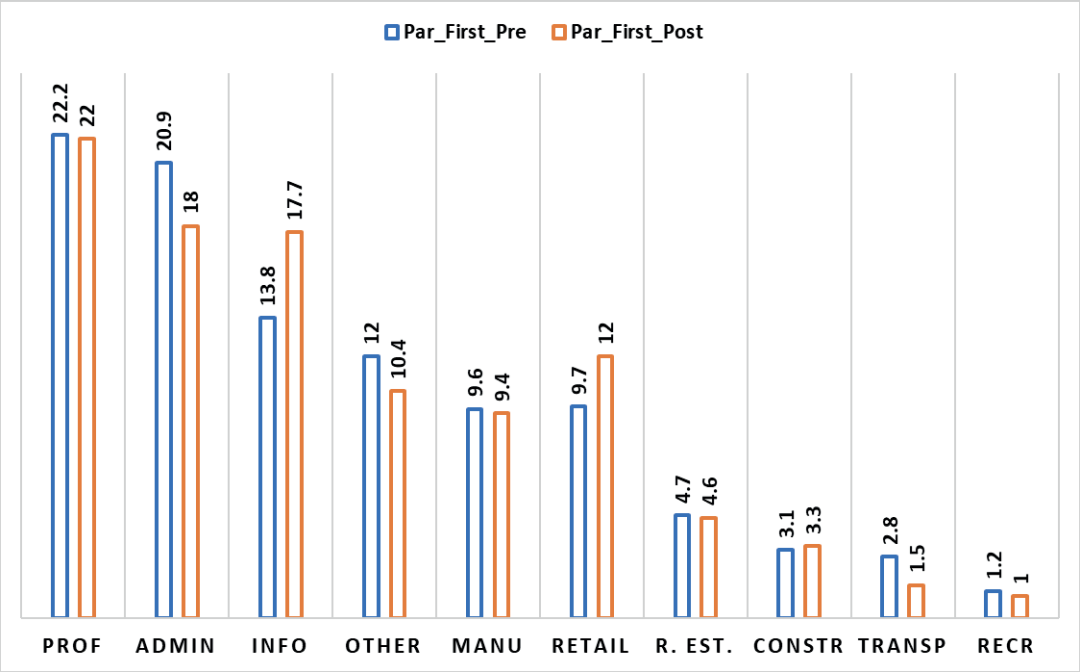


Figure 3: Percentage of UK parent firms establishing a first subsidiary in the EU by sector

Notes: UK parent firms operating in the financial sector or whose sector is unknown are excluded. Blue bars depict the pre-referendum share over 2001-2016. Orange bars depict the post-referendum share over 2016-2021. Every observation is a distinct firm. 'Other sectors' includes mining and quarrying; accommodation and food service activities; arts; entertainment and recreation; human health and social work activities; electricity; gas; steam and air conditioning supply; education; agriculture; water supply, sewerage, waste management; remediation activities; activities of extraterritorial organisations and bodies; activities of households as employers; undifferentiated goods and services; public administration and defence; compulsory social security.

We report corresponding statistics on the sectoral composition of EU-headquartered parent firms in other EU states in Figure 4. As it was the case for the UK, the rank ordering of sectors was largely preserved after the Brexit referendum. The sectors with the highest growth in share after the Brexit referendum were 'Information' (34 per cent) and 'Administration' (32.8 per cent). The notable sectors with shrinking shares in the EU post-referendum were 'Manufacturing' and 'Retail', with growth rates of -30.5 per cent and -10.4 per cent.

Comparing the sectoral distribution of UK and EU parents establishing first subsidiaries in the EU, three facts emerge. First, the relative importance of sectors was and is different for UK and EU parent firms. UK parents are predominantly engaged in professional, administrative and information sectors, while two of the three most important sectors for EU parents are retail and manufacturing. Second, both the UK and EU experienced an increase in the share of parents in the information sector post-referendum, possibly suggestive of a common factor driving the change for both economic areas. However, third, the share of activity by UK parents in retail and manufacturing grew or held steady after the referendum, while it shrank for EU parents.

The primary conclusion from these sectoral breakdowns is that the increase in the rate of establishment of first subsidiaries by UK-headquartered firms after the Brexit referendum was broad-based, with activity taking place among parent firms operating in all sectors of the economy.

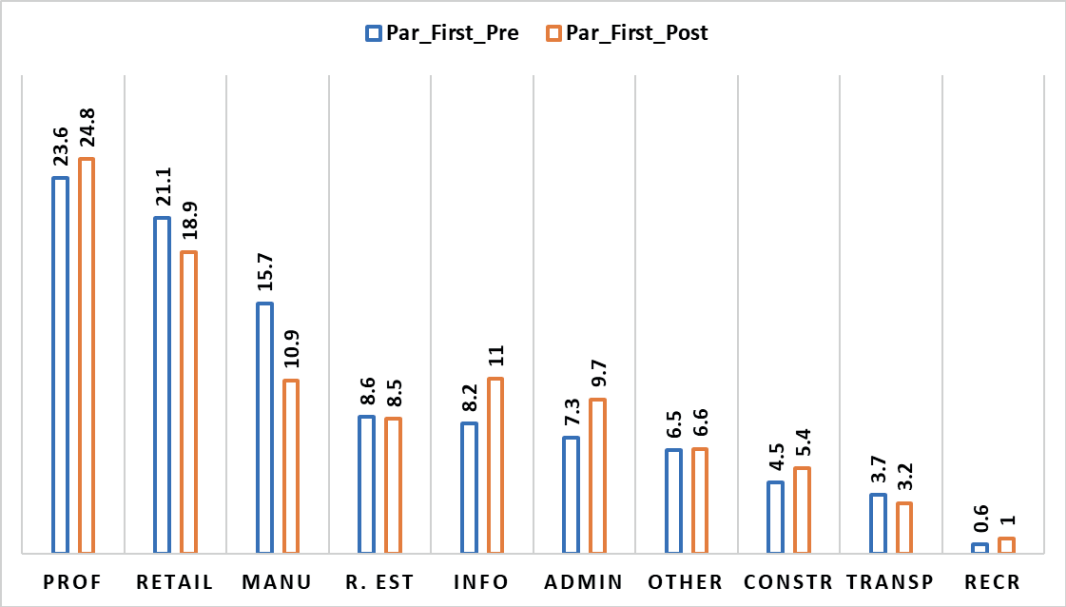


Figure 4: Percentage of EU parent firms establishing a first subsidiary in the EU by sector

Notes: EU parent firms operating in the financial sector or whose sector is unknown are excluded. Blue bars depict the pre-referendum share over 2001-2016. Orange bars depict the post-referendum share over 2016-2021. Every observation is a distinct firm. 'Other sectors' includes mining and quarrying; accommodation and food service activities; arts; entertainment and recreation; human health and social work activities; electricity; gas; steam and air conditioning supply; education; agriculture; water supply, sewerage, waste management; remediation activities; activities of extraterritorial organisations and bodies; activities of households as employers; undifferentiated goods and services; public administration and defence; compulsory social security.

The sectoral composition of first subsidiaries of UK-headquartered firms

Figure 5 shows the sectoral distribution of first subsidiaries of UK parent firms before (green bars) and after

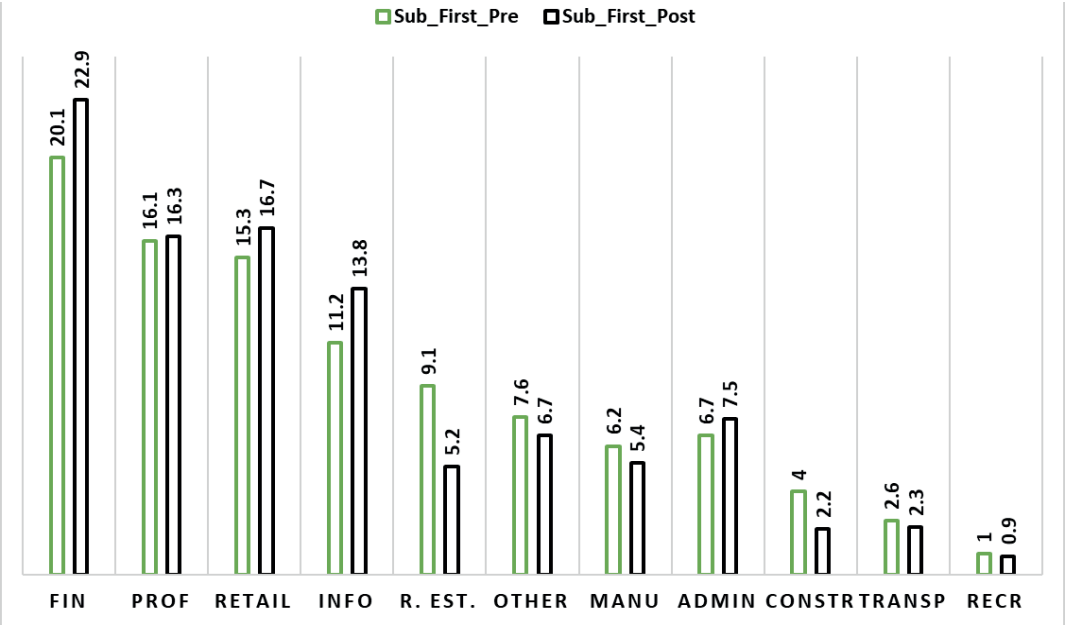


Figure 5: Percentage of first subsidiaries of UK headquarters, by subsidiary sector.

Notes: Subsidiaries established by parents in the financial sector and subsidiaries whose sector is unknown are excluded. Every observation is a distinct firm. 'Other sectors' includes mining and quarrying; accommodation and food service activities; arts; entertainment and recreation; human health and social work activities; electricity; gas; steam and air conditioning supply; education; agriculture; water supply, sewerage, waste management; remediation activities; activities of extraterritorial organisations and bodies; activities of households as employers; undifferentiated goods and services; public administration and defence; compulsory social security.

(black bars) the referendum. Again, as with the distribution of their parents, the rank ordering of sectors by share is largely stable over time. When we compare the two sub-periods, the biggest increases in activity are in the 'Financial' and 'Information' sector, whose shares grew by 13.9 per cent and 23.2 per cent respectively. Recall that British headquarters whose primary sector of operation is in 'Financial Services' are omitted from our sample. Thus, these British subsidiaries operating in the financial sector in the EU have parent firms operating in *other, non-financial sectors.*

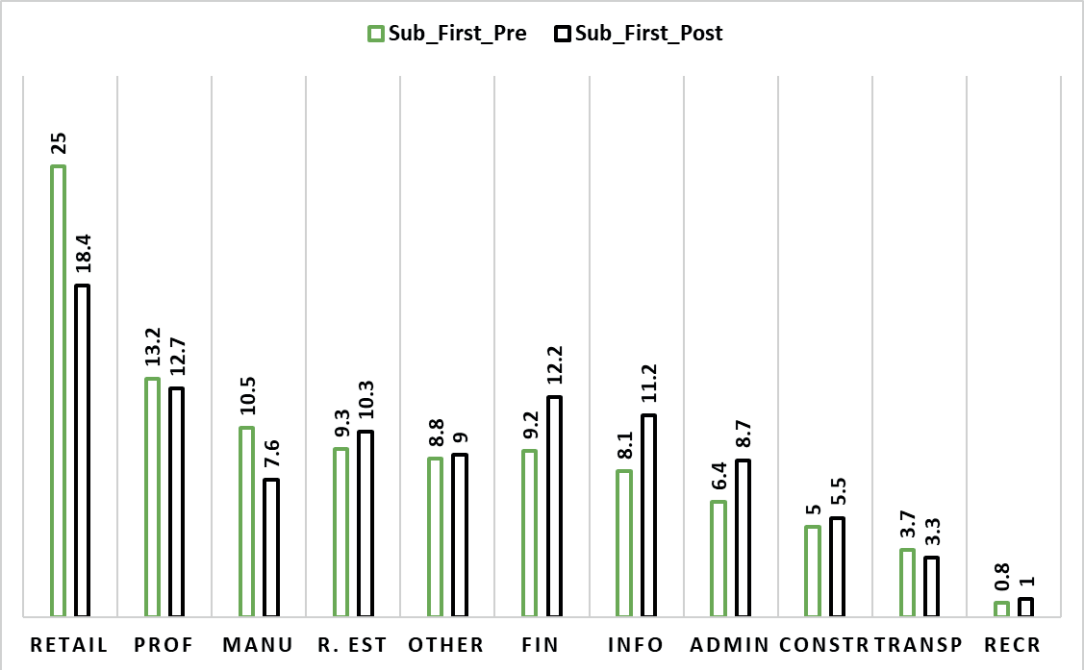


Figure 6: Percentage of first subsidiaries of EU headquarters, by subsidiary sector

Notes: Subsidiaries established by parents in the financial sector and subsidiaries whose sector is unknown are excluded. Every observation is a distinct firm. 'Other sectors' includes mining and quarrying; accommodation and food service activities; arts; entertainment and recreation; human health and social work activities; electricity; gas; steam and air conditioning supply; education; agriculture; water supply, sewerage, waste management; remediation activities; activities of extraterritorial organisations and bodies; activities of households as employers; undifferentiated goods and services; public administration and defence; compulsory social security.

Finally, Figure 6 presents the sectoral distribution of first subsidiaries established by EU-headquartered firms pre- and post-referendum. Once again, we see that the rank ordering of sectors' importance changes a bit after the Brexit referendum vote, but the broad pattern is of a relatively stable sectoral distribution over time.

Conclusion

This chapter documents that British firms established new and first subsidiaries in the EU at a higher frequency after the Brexit referendum vote of 2016. Our initial review provides evidence of an increase in the proportion of UK-headquartered firms establishing a first subsidiary in the EU. One interpretation is that British firms sought to mitigate future regulatory and institutional barriers to cross-border economic activity by adopting a new corporate structure and formal legal presence in the EU. We found that the sectoral distribution of first subsidiaries established by UK headquarters after the referendum vote was largely in line with the pattern established in the pre-referendum. We take this as evidence that the increase in establishment of first subsidiaries was broad-based across the UK economy rather than confined to a limited group of sectors.

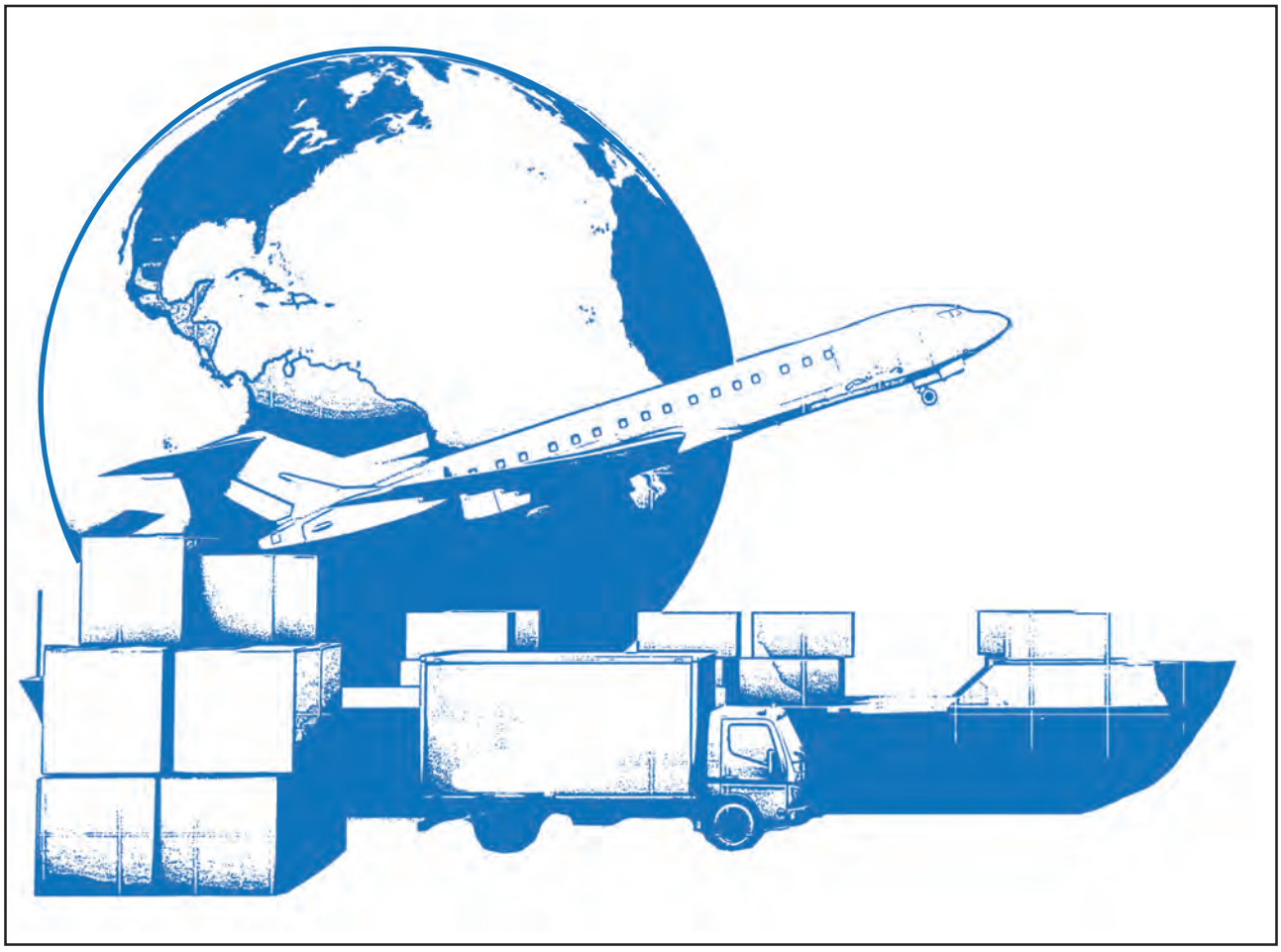
These findings demonstrate the role of the private sector in ensuring continuity in trade and cross-border economic activity after Britain's formal departure from the EU. Whereas much of the focus on 'managing Brexit' has emphasised how governments on both sides of the English Channel prepared for changes in the UK-EU relationship, the evidence presented here suggests that UK businesses directly contributed to activities

to mitigate disruption of cross-border economic activities.

The finding that many UK businesses set up their first subsidiary in the EU after the Brexit referendum has both positive and negative implications. To emphasize the positive, our results suggest that many British firms, likely those with relatively high revenues in Europe, understood the risks to their businesses that Brexit presented and pro-actively took steps to ensure the future success of their business activities in Europe. This is a positive message about the resilience of British firms and their capacity to adapt.

However, there are two negative implications of our research. First, setting up a subsidiary corporation in the EU costs money. American Express estimates the cost of establishing a subsidiary in France at around euro 37,000. Financial resources tied up in setting up an EU subsidiary cannot be invested in more efficient buildings and equipment for the UK headquarters or in training UK-based workers. For the UK economy overall, there is an opportunity cost arising from expenditures undertaken to maintain engagement in the EU market. Second, for smaller British firms, with lower EU revenues, an EU subsidiary is likely prohibitively expensive. By effectively costing these firms out of the EU market, Brexit may have eliminated one useful avenue for growth.

Our findings call for further research into the role of EU-based subsidiaries of UK-headquartered firms. Future work could examine the role of EU subsidiaries in facilitating trade of goods and services between the UK and EU and differences in patterns of EU subsidiaries established by large versus small British firms.



Authorised economic operators

Wanyu Chung, Robert J R Elliott, Yangjun Han, and Antonio Navas

Administrative barriers to trade are just as important as traditional trade barriers such as tariffs and quotas. Customs declarations have a sizable impact on businesses across the world because they impose administrative costs and time delays. The UK's post-Brexit border bureaucracy is a case in point. Before Brexit, goods, services, capital, and people moved freely between the UK and the rest of the EU. However, following the UK's departure from the EU and under the terms of the EU-UK Trade and Cooperation Agreement that become effective on 31 January 2021, new administrative barriers were created between the UK and the EU. One of the options highlighted in a policy paper by the UK government to help reduce the pressure and risk of delays at the post-Brexit border is the Authorised Economic Operator (AEO) certification.

In early 2021, there were already numerous reports of small businesses struggling to cope with the new procedures required to trade between the UK and the EU. A BBC headline referred to the '71 pages of paperwork' – catch and health certificates, rules of origin paperwork, customs forms, and so on – that had to be completed to transport '1 lorry of fish'. A year later, images showed long queues of lorries near Dover when the Goods Vehicle Movement System (GVMS) – a new customs system – came into force for lorries taking goods from Great Britain to the EU.

Brexit has increased the costs of cross-border trade by imposing extra administrative requirements and increasing the time needed to clear borders. Her Majesty's Revenue and Customs (HMRC) estimates that it will receive approximately 270 million additional customs declarations each year from UK companies for imports from the EU with a similar number expected on the EU side. It puts the cost of completing a single customs declaration at between £20 and £56 for imports and between £15 and £46 for exports, depending on the size of business and volume of trade. Recognition and licensing of authorised economic operators (AEOs) offer a means of mitigating these costs.

Authorised Economic Operators

The AEO concept, introduced by the World Customs Organization (WCO), aims to enhance international supply chain security and to facilitate global trade, by providing recognition to firms with reliable customs-related operations. If a firm is credentialised, it experiences less physical intervention at the border and achieves faster clearance. Different forms of licenses can be awarded, including, for example, Customs Simplification (AEOC) or Security and Safety (AEOS). Mutual Recognition of AEOs is a key element of the WCO's Framework of Standards to Secure and Facilitate Global Trade (SAFE) to 'strengthen end-to-end security of supply chains and to multiply benefits for traders.

The UK adopted its own AEO authorisation system at the end of the transition period. Although independent from the EU, the UK copied Article 38(2) of Regulation (EU) No 952/2013 when it incorporated the EU Customs Code into UK domestic law. In order to be accredited, AEO applicants need to meet criteria on tax and customs compliance, customs record keeping and financial solvency. Those applying for AEOC also need to show practical standards of competence or professional qualifications in customs matters and for AEOS must demonstrate extra security and safety measures. According to HMRC, firms that hold both types of licence benefit from 'a lower risk score which may reduce physical checks carried out on documents and goods'. AEOC holders also benefit from 'a faster application process for customs simplifications', and AEOS holders benefit from 'reduced declaration requirements for entry and exit summary declarations' as well as 'priority treatment for customs controls'. License holders in Northern Ireland have extra benefits, allowing them, for example, to move goods into temporary storage in different EU member states.

Concerns relating to new UK-EU customs changes prompted a surge in registrations with the HMRC for authorised economic operator (AEO) status after the 2016 referendum. Numbers more than tripled in 2016 compared to 2015. According to the Chartered Institute of Logistics and Transport (CILT) in 2017, 'Brexit is making AEO status a necessity for UK freight and logistics firms and is increasingly being demanded by customers'. As of 2022, around half of UK license holders – 50.2 per cent out of 1.236 total holders – hold both, 48.1 per cent have AEOC, and less than two per cent have AEOS only. However, this relatively small number of firms accounts for more than 50 per cent of total UK trade, acting as logistics or freight forwarding agents. As argued elsewhere, small and medium businesses could potentially benefit from the scheme through their agents.

Provisions in the Trade and Cooperation Agreement

UK license holders are partially recognised by the EU border agencies through the AEO Mutual Recognition Agreement (AEO-MRA), which is part of the EU-UK Trade and Cooperation Agreement (TCA). Under the AEO-MRA of TCA (Article 110 and Annex 18), the two customs administrations agree to recognise each other's license holders (AEOS only) and provide reciprocal benefits to foreign license holders in the domestic customs declarations process. All Northern Ireland AEO authorisations are, however, fully recognised in the EU.

It may seem at first glance that there has been a smooth transition from the EU AEO scheme to a UK-owned scheme that is identical. However, because mutual recognition is not automatic, there is an extra piece of 'red tape' that firms need to complete when trading with the EU, as opposed to zero administrative barrier when being part of the EU. To benefit from reduced controls and priority treatment for customs clearance at the EU border under the MRA, a UK license holder has to communicate its Economic Operators Registration and Identification (EORI) number to its business partner in the respective MRA country within the EU. The business partner then enters the EORI number in the declaration form for the import process into the EU.

Prior to Brexit, UK license holders could benefit from the EU's Mutual Recognition Agreements (MRAs) with Norway (2009), Switzerland (2009), Japan (2010), the US (2012) and China (2014). As of the time of writing, aside from the MRA incorporated in the TCA, the UK has negotiated AEO-MRAs – mostly replicating the EU's – with Japan, China, the US and Switzerland. These MRAs, however, are AEO programme-specific (AEOS only) and distinct from those concerning the conformity assessment of regulated products.

Conclusions

Brexit has increased the importance of the Authorized Economic Operator. However, whether the AEO scheme has reduced the negative impact of the administrative trade barriers introduced after 31 January 2021, or the extent to which it has mitigated more serious damages imposed on UK all businesses trying to conduct trade with the UK's largest trade partner, remains unclear.

Medicines

Mark Dayan, Tamara Hervey, Mark Flear, and Nick Fahy

On 1 January 2021, the UK regulations that implement EU legislation on medicines and medical devices become 'retained EU law' under the European Union (Withdrawal) Act 2018. The most important are Human Medicines Regulations 2012, the Medicines for Human Use (Clinical Trials) Regulations 2012 and the Medical Devices Regulations 2002. While the substance of EU law was thereby incorporated into domestic law, reference to EU institutions and processes was replaced by references to UK bodies and procedures.

A key change was the transfer to the UK regulator, the Medicines and Healthcare Products Regulatory Agency (MHRA), of responsibilities previously exercised by the European Medicines Agency (EMA). Also important was the Medicines and Medical Devices Act 2021, passed by the government in February 2021, which grants extensive powers to the Secretary of State (for England, Scotland and Wales) and to either the Department of Health in Northern Ireland, or the Department of Health in Northern Ireland and the Secretary of State acting jointly (for Northern Ireland), to amend through statutory instruments this retained law, and parts of the Medicines Act 1968 dealing with pharmacies.

Eighteen months after the end of the transition period, divergence between the UK and EU has started to emerge due to actions on both sides. The EU has adopted new regulations, so that differences now exist in areas such as clinical trials. Meanwhile, the shift of powers that were previously held by the EMA to the UK MHRA has seen the different regulators make different decisions about what to approve and when. While the UK government has used a rhetoric of competitive divergence, emphasizing its new freedom to enact changes that would have been impossible while the UK was a member state, significant changes in the substance of UK law have yet to materialise.

Approval

Within Great Britain, the MHRA continues to authorise medicines through processes and standards based on retained EU law. These include the appraisal and approval of products previously subject to the 'centralised procedure' at EU level. In fact, the MHRA has in the main continued to rely on EMA decisions and EU processes. It operates a 'reliance route' to accept EMA decisions on cutting-edge and novel drugs covered by the centralised procedure. Similar routes are used by other regulators outside the large US and EU markets, including the Health Sciences Authority in Singapore. MHRA also continues to accept the decisions of individual EU member states through processes modelled on those of the EU.

Although processes and standards remain the same, MHRA has approved some products that have not yet been approved by EMA and vice versa. Products approved by the MHRA prior to approval by the EMA include a number of COVID-19 vaccines (see Box 1 below). In a number of cases, including COVID-19 vaccines, approval took place while the UK was still subject to EU law during the transition period, and were therefore not the fruit of Brexit as such.

In March 2021, the UK introduced the Innovative Licensing and Access Pathway (ILAP), an initiative to bring together MHRA and bodies that decide whether medicines are cost-effective enough for the National Health Services. It aims to accelerate licensing and access by carrying them out at the same time, as well as by working with companies through the clinical trial phase. Cooperation with companies during clinical trials would have been compatible with EU membership: the Early Access to Medicines Scheme allowed innovative medicines to be used ahead of authorisation from 2014. However, MHRA would not have been able to link

up approval processes with those of cost-effectiveness, because, within the EU, responsibility for approving most of the relevant drugs was not at a national level.

Box 1: Vaccines for COVID-19 – a questionable flagship for divergence

In December 2020, the UK became the first country to approve a COVID-19 vaccine. Following a large-scale emergency trial, the MHRA used its 'rolling review' process to issue an emergency use authorisation for the Pfizer-BioNTech MRNA vaccine. The government had already decided that the UK would not participate in the joint EU vaccine procurement process where the European Commission negotiated the supply of vaccines with pharmaceutical companies on behalf of EU member states. The UK administered the first vaccine doses before than the rest of Europe, though it later hit delays and the EU caught up over the summer of 2021.

The then Secretary of State for Health Matt Hancock claimed that early delivery had been possible 'because of Brexit' – although others, even within the UK government, were more circumspect. Legally speaking, Brexit had little to do with the UK's early success in securing vaccines. It occurred during the transition period when EU law was still in place. Indeed, the emergency use authorisation was based on provisions that allowed the UK to react to infectious diseases under Regulation 174 of the 2012 Human Medicines Regulations, which put Article 5 of the 2004 EU Human Medicines Directive into UK law. Similarly, even without Brexit, the UK could have decided not to participate in the EU's joint procurement of COVID-19 vaccines. It could have been politically difficult, but the UK had a record of 'opting out'.

In August 2022, the MHRA was the first regulator to approve a bivalent Moderna vaccine that was targeted at both the original and Omicron strains of COVID-19. It issued a conditional marketing authorisation in Great Britain, a power previously held by the EMA, which could not have been exercised while the UK was a member state. It used the same emergency approach as it did in 2020 for Northern Ireland.

Clinical trials

This is an area where the UK and the EU have diverged significantly, not because of UK action, but because the EU has implemented new measures. The EU's 2014 Clinical Trials Regulation introduces important changes, including a single portal for applications to run trials across the single market. The Regulation, delayed in its implementation past the point of Brexit, will apply in Northern Ireland under the Protocol on Ireland and Northern Ireland, but not in Great Britain.

In early 2022 the MHRA held a consultation on proposed reforms for Great Britain. These align in some ways with EU reforms. Like the new EU measures, they set out maximum timeframes for decisions and responses. They create lighter touch regimes for less risky trials, and look to increase transparency by publishing trial data as a default However, they adopt a single-country approach to streamlining approvals. The MHRA seeks to make the UK a competitive place to launch trials by combining ethics and research approval. There is also a contrasting approach to safety notifications. Whereas the EU regulation imposes obligations to notify member states and regulators on safety incidents, the MHRA proposal requires fewer reports and notifications when a safety incident occurs. Risk assessment for the 'Good Clinical Practice' (GCP) stage is also to be amended to take look at projects as a whole.

The change to clinical trials arguably represents the most far-reaching concrete UK proposal to take a different path in governing medicines and life sciences. Industry bodies welcomed most aspects of the proposals, although the UK BioIndustry Association raised points in favour of limiting divergence. It criticised the suggestion to diverge on GCP in favour of retaining global standards, and called for 'international interoperability to conduct multinational trials since many sponsors conducting a trial in the UK would also be conducting the trial in EU countries and elsewhere.'

Product and manufacturing regulation

Since Brexit, some key UK procedures for the regulation of the manufacture or sale of approved medicines are no longer recognised in the EU. Like most jurisdictions, the UK system requires suppliers to have good manufacturing practice (GMP) or analogues for imports, based on inspections, and batch testing, where samples of medicines are examined to make sure they comply with what has been approved. Both processes are more or less globally standardised, with mutual recognition existing, for example, between the USA and the EU. Under the EU-UK Trade and Cooperation Agreement (TCA), GMP continues to be mutually recognised but batch testing is not. While the UK continues to accept EU batch testing, the EU does not accept Great Britain batch testing. Though as yet there has been no divergence of the standards themselves, in the absence of mutual recognition, it has become less attractive for manufacturers to have batches tested in Great Britain.

Control of the sale of fraudulent medicines is an area where divergence has been much sharper. The 2011 EU Falsified Medicines Directive was never fully and formally implemented until Great Britain left the single market. Its key provisions included a unique identifier on each medicine box which was activated and deactivated in line with legislation, and a device to prevent tampering. The Directive applies in the EU and Northern Ireland, but not in England, Scotland or Wales. The non-tariff barrier that results is significant, since deactivation and possibly reactivation are required when shipping to Great Britain. It also leaves Great Britain considerably less well protected against fraudulent medicines. The MHRA has confirmed that over 15,000 such products have passed through its inspection and enforcement divisions since Brexit, compared to none during the final ten months of EU membership when the Directive was being gradually implemented.

The position of medicines regulation in Northern Ireland is complex. The Protocol on Ireland and Northern Ireland has not been fully implemented, and a complex array of mostly 'grace periods', introduced unilaterally by the UK government, have delayed the rules from coming into force since January 2021. Although medicines are not subject to tariffs, requirements relating to batch testing and falsified medicines form an administrative barrier between Great Britain and Northern Ireland. This is highly significant for the NHS in Northern Ireland since 80 per cent of its medicines supply comes from Great Britain. The view of many in the health sector Northern Ireland is that it would be 'absolutely unacceptable' if a medicine is available in Great Britain but not in Northern Ireland.

Following an October 2021 proposal from the European Commission, adopted unilaterally by the EU in April 2022 in an attempt to ease difficulties arising from the Northern Ireland Protocol, batch testing in Great Britain can be accepted for medicines for the Northern Ireland market, provided that the UK ensures that the medicines in question are not allowed to enter the EU single market most obviously in Ireland. Full application of the Falsified Medicines Directive will be delayed for three years until 31 December 2024. The UK's position is now encapsulated in clause 7 of the Northern Ireland Bill 2022, which would allow compliance with either EU or Great Britain regulatory requirements. It is very difficult to see how this would be acceptable to the EU for FMD requirements.

Conclusion

The UK faces a serious dilemma after Brexit. On the one hand, it hopes to use domestic control over medicines regulation to make the UK a more competitive place to test and launch medicines. On the other, its small size compared to the EU makes it less attractive, and greater divergence increases the costs of launching and providing products in the UK.

In research conducted by the authors that was funded by the Health Foundation, interviewees from government and industry stated their preference for a mixture of alignment and divergence. This would allow the UK to become more innovative in certain favoured sectors, while it would benefit from alignment elsewhere. However, there is little evidence of UK plans to diverge for non-innovative medicines, which are the bulk of supply and use. The primary reform on the horizon in this area is the possible adoption of a UK

falsified medicines system, which may lead to closer alignment with the EU. As illustrated by decisions to establish the routes relying on EU decisions, and to leave regulatory law largely unchanged, the pull of EU models of approval and product regulation remains strong. Moreover, the inability to duplicate the offer of transnational regulatory approvals will remain a challenge for the UK.

The UK will face difficulties if it chooses to pursue divergence in order to compete in specific sectors. MHRA is in the process of reducing its staff headcount since the UK's departure from the EU. During the membership era, MHRA handled a substantial load. As its workforce shrinks, its ability to manage new and innovative models, such as the ILAP, will be challenged. Furthermore, due to its size, there is little incentive to launch first in the Great Britain market. Because approval standards diverge, meanwhile, the possibility of recycling for the larger EU and US markets is limited. Against this background, it is unsurprising that research conducted at Imperial College London found that the UK approved fewer new substances than the EU during 2021. At a more conceptual level, it remains unclear where innovation is likely to occur and whether it will be on a significant scale. ILAP, the most significant experiment with partial divergence to date, for example, applies only to a small number of products from across different areas.

The Truss government had emphasised a more ambitious agenda on divergence, pledging a Bill which would repeal all EU laws by the end of 2023 (see 'Retained EU Law' in this report). Medicines is likely to be a problem area, since the UK largely continues to rely on EU regulatory models. UK assessment of the policy options to date has concluded that continuity in the main with only targeted exemptions is the best approach. However, even building the capacity and attractiveness for targeted divergence is far from straightforward.

Part III.

Competition issues

Competition policy, including state aid

Andreas Stephan

Competition law is designed to prevent monopoly type outcomes that harm consumers through higher prices and fewer incentives for firms to innovate or improve service. It works in three ways: It prohibits cartels, where firms enter into a secret conspiracy to raise prices; It makes it illegal for dominant firms – those with a very high share of the market – to abuse their power so as to restrict competition. And it prevents mergers that would significantly reduce competition in the market, or to preserve competition, it imposes conditions on them, such as requiring the merging firms to sell some of their operations.

State aid, meanwhile, arises when a public authority confers on a selective basis an advantage to businesses in the form of a subsidy, tax break or loan that is not on commercial terms and may affect cross-border trade or investment. EU state aid policy aims to limit the subsidy – the non-commercial element – to where it is justifiable and does not distort competition. Key principles are that a subsidy must address a specific public policy objective, such as market failure or economic equity, must be proportionate, and the benefits must outweigh any negative effects on firms in other Member States. EU state aid rules apply to goods and services and are more far reaching than WTO rules on subsidy control, which govern only trade in goods.

Policy changes since the end of the transition period

In July 2021, the UK Government consulted on possible reforms to competition and consumer policy, specifically to explore whether either area could be strengthened in light of Brexit. The government's response, published in April 2022, was to not make any substantial changes to the competition regime and to instead focus on bolstering aspects of consumer policy. However, two important post-Brexit pieces of legislation have come into law.

The first is the UK Internal Market Act 2020, which is designed to ensure the effective operation of the UK internal market, in light of regulatory powers repatriated as a consequence of Brexit. These include areas like agriculture, health, animal welfare and food, which may fall under the devolved powers of the administrations in Scotland, Wales and Northern Ireland. These have been managed through common framework agreements (see 'Regulation after Brexit: Scotland and Wales', this report) – essentially a consensus between the relevant UK minister and the devolved administrations as to how matters previously governed by EU laws, would be regulated after 31 December 2020. The Act sets out two principles that apply to goods and services across the UK: mutual recognition, ensuring that regulations from one part of the UK are recognised across all other parts; and non-discrimination, which supports companies in the UK regardless of their location. The focus of the Act is on the direct and indirect economic effects of a divergence in regulation between the four nations, with a view to preventing distortions in competition, trade, or the effects on prices, quality of goods and services, or choice for consumers.

The second is the Subsidy Control Act 2022, under which a UK domestic system of subsidy control has been adopted for the first time. As noted above, the UK was bound by the EU's state aid rules until 31 December 2020. The fundamental principles of the UK's new subsidy control regime give effect to an important part of the EU-UK Trade and Cooperation Agreement (TCA). In contrast to the relatively non-prescriptive provisions on competition policy, the TCA requires the UK to implement a level of subsidy control that goes well beyond WTO rules, in particular by applying to both goods and services (see 'Competition policy' in 2021 report). Also, Article 10 of the Protocol on Ireland and Northern Ireland requires that EU state aid rules continue to

apply to the UK in relation to measures that have an actual or potential effect on goods (not services) between Northern Ireland and the EU. Despite these constraints, the intention was for the UK regime to be 'light touch' compared to EU state aid, in particular by showing a high degree of flexibility in relation to smaller subsidies. One key difference with EU state aid rules is that the new UK regime applies on a self-assessment basis. As a result, except in relation to 'subsidies of particular interest' where advice must be sought (see below), there is no requirement that the subsidy receive regulatory oversight or approval prior to its use.

Institutional changes since the end of the transition period

On 1 January 2021, the Competition and Markets Authority (CMA) became responsible for all competition enforcement – anti-competitive agreements, abuse of dominance and merger clearance – that affect UK markets. This includes the entire multijurisdictional caseload previously undertaken by the European Commission on behalf of the UK and all EU Member States. To meet this challenge, the government significantly increased the funding and size of the CMA, but a National Audit Office (NAO) Report published in May 2022, noted ongoing challenges in achieving capacity and technical expertise. The Competition Appeals Tribunal (CAT) will also likely face significant capacity related issues in the coming years, as it potentially deals with a higher volume of challenges to the CMA's work and also undertakes the role of reviewing cases under the new subsidy control regime.

In addition to preparing for a significantly increased competition caseload, the CMA now has three additional roles:

1. In April 2021, the UK government announced the launch of a new Digital Markets Unit (DMU) within the CMA to oversee a new pro-competition regime for digital platforms. The enhanced statutory powers of the DMU (which were still pending legislation at the time of writing) are intended to tackle anti-competitive practices and outcomes among the most powerful digital companies. In parallel the EU has adopted a Digital Market Act which introduces rules for digital platforms that act as 'gatekeepers' in the digital sector. It includes the power to undertake 'market investigations', similar to the market studies already available to the CMA under the Enterprise Act 2002.

2. The UK Internal Market Act described above, created a new Office for the Internal Market (OIM) within the CMA. The OIM is responsible for monitoring the UK internal market and can prepare reports or written advice at the request of any of the four UK administrations. An initial study published by the CMA (Overview of the UK Internal Market Report, March 2022) showed broad regulatory convergence across the four nations. This is unsurprising but serves to highlight how the OIM's role is likely to be focused on assessing the impact of future divergence, whether due to changes in policy that are not UK-wide, or other de facto restrictions on trade. While the OIM's role is advisory, it does have the power to request written information from businesses and can impose penalties if the request is refused.

3. It had been anticipated that the CMA might have a formal role in approving subsidies within the UK. The Subsidy Control Act instead gives the CMA a non-binding advisory role. The Act only requires that granting authorities request a report from the CMA before giving a subsidy 'of particular interest' (those subsidies worth at least £5m or £10m, depending on the sector). Even in relation to these larger subsidies, the public authority is not bound by the CMA's recommendation, but an award in clear contradiction of the CMA's advice would likely leave it open to challenge under judicial review. Despite the absence of an ex-ante system of approval, public authorities are likely to rely heavily on advice from the CMA even for the award of smaller subsidy values – especially while the new regime is in its infancy.

What are the prospects for regulatory divergence between the UK and the EU?

The severing of UK and EU competition rules makes regulatory divergence more likely in the longer term, but the prospects are fairly limited for the time being. Although there is no formal requirement for UK and EU competition policy to be closely aligned under the TCA, the rules are likely to apply in much the same way – especially in relation to merger control and anticompetitive agreements. This will be helped by the strong working relationship the CMA already has with the European Commission, which makes conflicting decisions – for example, in relation to a multi-jurisdictional merger or acquisition – less likely. It is also notable that the UK DMU and the EU's Digital Markets Act are broadly aimed at tackling the same regulatory problem, albeit with differences in monitoring and enforcement powers. Abuse of dominance is where divergence is most likely due to the sparse and fractured nature of the case law, but here too it is likely that the UK's CAT will see persuasive value (at least in the short-term) in judgments of the EU courts, given that UK and EU competition law continue to be so closely aligned.

While the UK Internal Market Act is not strictly speaking a competition legislation, its aim of preventing unjustified distortions to trade within the UK has some parallels with EU law. Yet the UK market arguably has an even greater level of integration and regulatory convergence than the EU Single Market. Much will therefore depend on the extent to which policy areas repatriated from the EU can and will be exercised in different ways across the four UK nations. One key challenge for the new Office for the Internal Market will be to ensure transparency and its focus on economic effects, while avoiding any suggestion of bias or interference in the democratic mandates of the devolved administrations. Difficulties could arise, for example, where the Westminster government decides to depart from EU regulation in respect to England, while the devolved administrations wish to continue mirroring EU standards.

In principle, significant divergence is very unlikely in relation to state aid/subsidy control, because of the strict provisions of the TCA and the Northern Ireland Protocol, and the fact the UK must also continue to abide by the relevant WTO rules. However, there is a question as to whether the UK has gone far enough in providing flexibility to public bodies wishing to award low value subsidies.

What are the consequences for UK businesses and consumers?

Generally speaking, any divergence in regulation between the UK and the EU is likely to raise costs for businesses who trade within both markets, with the result of higher prices and less choice for consumers. As the NAO report notes, regulatory divergence benefits no one where it is a default choice, but it can have benefits where there is good justification. Over time, it is inevitable that the CMA and UK courts will make carefully justified departures from the status quo, unrestrained by EU law, to best deal with competition issues affecting UK businesses and consumers. It is also likely that EU competition rules will continue to evolve in new directions, which will not always be to the UK's liking. The introduction of the Office for the Internal Market (OIM) will ensure that the powers repatriated from Brussels in areas such as agriculture, do not cause unjustified distortions to trade within the UK. Yet here too, there may be compelling policy reasons why one or more of the four UK nations wish to impose diverging regulatory requirements. The OIM will play an important role in advising on what the likely economic effects would be, so as to help the UK governments make informed political decisions about whether the change in policy should go ahead.

Subsidy control is an area where regulatory alignment is important to avoid costly subsidy wars between countries (as reflected in the WTO rules). It is therefore important that a mechanism exists in the TCA through which the UK and EU can challenge subsidy decisions that negatively impact businesses in either jurisdiction and avoid wasteful subsidy outcomes. Before Brexit, the UK was both a clear net beneficiary of EU State Aid rules and one of the most compliant EU Member States. Historically, the UK has been very poor at awarding targeted subsidies compared to other European countries. A number of commentators have suggested the UK can do a lot more, even within the existing EU rules manifested in the TCA, to commit targeted subsidies

in pursuit of important policy objectives, such as 'levelling up' economic disparities between different parts of the UK. Those same commentators called for maximum flexibility in the new UK subsidy control regime – especially in relation to low value awards. While the UK regime is designed around a less onerous process, there is a question as to whether public authorities have the technical expertise to undertake complex economic and legal assessments, even in relation to low value subsidies.

Conclusion

In each of the areas discussed in this chapter, the role of the CMA and its future performance are key. The speed with which UK and EU competition law will diverge depends to a great extent on the CMA's ability to expand capacity and the number of investigations it undertakes (including the work of the DMU), so as provide the UK with at least the level of enforcement it previously enjoyed as an EU Member State. An expanded case load will be good for UK consumers and businesses and will create opportunities for UK competition case law to evolve, either through the renewed enforcement priorities of the CMA or the precedents created by subsequent challenges of those decisions before the CAT, the Court of Appeal and the Supreme Court. The CMA plays a similarly crucial role in relation to subsidy control and the internal market. These regimes are entirely new and their effectiveness will be shaped by CMA advice in the early formative years. In relation to the OIM, the regulator must quickly establish its credibility among the four UK administrations and all UK businesses, if its advice is to be considered of value. In relation to subsidy control, the CMA's advice will shape precisely how the new self-assessed regime will be applied by public bodies and its advice could become a de facto system of approval, at least to begin with.

Consumer protection

Amelia Fletcher

The UK consumer protection regime remained largely unchanged on 1 January 2021. Although existing UK consumer law and policy was based largely on EU regulations and directives, the European Union (Withdrawal) Act 2018 ensured the continuing effect of these measures by incorporating them in the form of retained EU law. Domestic enforcement of consumer law was already carried out primarily by the Competition and Markets Authority (CMA) and the Trading Standards Service, although most sector regulators have concurrent consumer enforcement powers in their areas of responsibility. These arrangements were unchanged by the UK's withdrawal from the EU.

The main change to enforcement was the UK's exit from the EU Consumer Protection Cooperation (CPC) network, which facilitates cooperation between national consumer authorities, and places obligations on EU member states in relation to information sharing and coordinated enforcement. The UK authorities are no longer able to carry out joint enforcement with other EU authorities and have only limited ability to carry out coordinated enforcement. This is a particular issue in the context of larger transnational firms, where such joint or coordinated action can be especially effective.

The EU law on alternative dispute resolution (ADR) also ceased to apply to the UK following the end of the transition period. EU customers are no longer able to use the EU online dispute resolution platform to settle disputes with traders established in the UK, and UK consumers have no general right to ADR.

EU-wide product recalls are currently managed within the RAPEX system of weekly reports. The UK ceased to be part of this system after 31 December 2020 (see 'Consumer protection' in 2021 report).

Developments since EU withdrawal

Since EU withdrawal, consumer protection has diverged following changes in relevant EU legislation. Directive 2019/2161 on the better enforcement and modernisation of consumer protection rules has now been implemented across EU member states, but not the UK. This measure enhances existing EU consumer protection law, with a particular focus on digital services. It applies to UK firms when trading within an EU member state, including the Republic of Ireland.

The EU Digital Services Act, which is currently being implemented, will further enhance protection for consumers utilising online platforms – for example, through requirements for transparency around recommender systems and advertising, and special obligations for marketplaces such as vetting the credentials of third party suppliers.

For product recalls, the UK Office for Product Safety and Standards established a replacement site in April 2022. However, there is no legal obligation on UK authorities to notify EU authorities of product safety issues, or to act on the basis of the EU reports.

Future developments

The UK government has also announced plans to enhance consumer policy, although these do not yet have a legislative slot. Measures relating to enforcement, such as enabling authorities to impose fines, could have been implemented while the UK was an of EU member. However, there would have been no potential for divergence on consumer rights. Most EU consumer protection legislation is 'maximum harmonisation', which not only requires that member states implement agreed measures, but are prohibited from imposing anything additional.

Some of the UK Government's proposed changes, such as those around fake reviews, would in fact bring the UK regime back in line with the EU, following similar changes in the EU. But other changes are UK-specific, such as for 'subscription traps', which induce consumers to subscribe to services and then make exit difficult.

The UK's planned equivalent of the EU Digital Services Act – the Online Safety Bill – is currently going through Parliament. Unlike its EU counterpart, it contains very little on consumer protection. The only relevant requirement is that the largest platforms will need to put in place proportionate systems and processes to prevent the publication or hosting of fraudulent adverts on their service.

For ADR, the UK government has indicated that 'it intends to examine radical new ways to mainstream ADR for all types of disputes, including consumer disputes, so it operates as an integrated part of the justice system.' However, this process is ongoing.

Conclusion

Overall, there is no evidence of the UK government seeking to weaken general consumer protection following EU withdrawal. Indeed, there are plans to strengthen it. However, substantial enhancements made to the EU regime, especially in relation to online markets, has led to increasing UK-EU divergence in practice.

Under the EU-UK Trade and Cooperation Agreement (TCA), the UK and EU both commit to adopt or maintain measures to ensure the effective protection of consumers engaging in electronic commerce transactions – the most likely source of cross-border consumer protection issues – and endeavour to cooperate on consumer protection policy more generally. It remains to be seen whether the extent of divergence between the UK and EU regimes becomes severe enough to be viewed as a breach of this commitment.

Public procurement

Albert Sánchez-Graells

Public procurement regulation is the set of rules and policies that controls the award of public contracts for works, supplies, and services. Its main goal is to ensure probity and value for money in the spending of public funds – to prevent corruption, collusion, and wastage of taxpayers' money. It does so by establishing procedural requirements leading to the award of a public contract, and by constraining discretion through requirements of equal treatment, competition, and proportionality. From a trade perspective, procurement law prevents favouritism and protectionism of domestic businesses by facilitating international competition.

In the UK, procurement rules have long been considered an excessive encumbrance on the discretion and flexibility of the public sector, as well as on its ability to deploy ambitious policies with social value to buy British products made by British workers. The EU origin of UK domestic rules, which 'copied out' EU Directives before Brexit, has long been blamed for perceived rigidity and constraint in the allocation of public contracts, even though a 'WTO regime' would look very similar.

Capitalising on that perception during the Brexit process, public procurement was ear-marked for reform. Boris Johnson promised a 'bonfire of procurement red tape to give small firms a bigger slice of Government contracts'. The Johnson Government proposed to significantly rewrite and simplify the procurement rulebook, and to adopt an ambitious 'Buy British' policy, which would reserve some public contracts to British firms. However, although one of the flagship areas for regulatory reform, not much has changed in practical terms. Reforms are perhaps on the horizon in 2023 or 2024, but the extent to which they will result in material divergence from the pre-Brexit EU regulatory baseline remains to be seen.

Post-Brexit changes so far, plus ça change…

To avoid a regulatory cliff edge and speed up its realignment under international trade law, the UK sought independent membership of the World Trade Organisation Government Procurement Agreement (GPA) from 1 January 2021 on terms that replicate and give continuity to its previously indirect membership as an EU Member State. The UK's current individual obligations under the GPA are the same as before Brexit. Moreover, to maintain market access, the EU-UK Trade and Cooperation Agreement (TCA) replicates obligations under EU law that go beyond the GPA in substantive and procedural elements ('GPA+'), with only the exception of some contracts for healthcare services. The Free Trade Agreements (FTAs) with Australia and New Zealand, and the envisioned accession of the UK to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) foresee further GPA+ market access obligations and increasingly complicated constraints related to trade.

These commitments prevent the adoption of an expansive 'Buy British' policy and could in fact restrict it in some industries, although healthcare is explicitly excluded from procurement-related trade negotiations. Despite misleading claims to the contrary in UK governments reports, such as the January 2022 Benefits of Brexit report, which gives the impression that Brexit 'enabled goods and services contracts below £138,760 (central government), £213,477 (sub-central authorities) and £5.3 million (construction throughout the public sector) to be reserved for UK suppliers' (art 8), official procurement guidance makes clear that the situation remains unchanged. Contracts above the values quoted above – those covered by the GPA, the TCA, and Free Trade Agreements – remain open to international competition. In other words, the government has not achieved its stated Brexit aspiration of reserving 'a bigger slice' of procurement to domestic businesses.

A similar picture emerges in relation to procedural requirements under procurement law. While the UK Government declared that its aim was to 'rewrite the rulebook' (as discussed below), the pre-Brexit 'copy out' of EU procurement rules remains in effect as retained EU law. Brexit required some marginal technical adjustments, such as a change in the digital platform where contract opportunities are advertised and where

high value contract opportunities are published in the Find a Tender portal rather than the EU's official journal, or the substitution of the European Single Procurement Document (ESPD) with a near-identical Single Procurement Document (SPD). The main practical change following Brexit is the UK being disconnected from the e-Certis database. The lack of direct access to documentary evidence makes it more difficult and costly for businesses and public sector entities to complete pre-award checks, especially in cases of cross-border EU-UK tendering. However, TCA provisions seek to minimise these documentary requirements (Art 280) and could mitigate the practical implications of the UK no longer being part of the e-Certis system.

With Brexit, the Minister for the Cabinet Office assumed the powers and functions relating to compliance with procurement rules. Even if the bar was already quite low before Brexit, since virtually no infringement procedures had been opened against the UK for procurement breaches, this change is likely to result in a weakening of enforcement due to the lack of separation between Cabinet Office and other central government departments. The shortcomings of current oversight mechanisms are reflected in the proposed reforms discussed below, which include a proposal to create a dedicated Procurement Review Unit.

Future change

The government has been promoting the reform of the UK's procurement rulebook. Its key elements were included in the 2020 Green Paper Transforming Public Procurement. The aim was 'to speed up and simplify [UK] procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery', through greater procedural flexibility, commercial discretion, data transparency, centralisation of a debarment mechanism, and regulatory space for non-economic considerations. The Green Paper envisaged the creation of a new Procurement Review Unit with oversight powers, as well as measures to facilitate the judicial review of procurement decisions. Despite the rhetoric, the proposals did not mark a significant departure from the current rules. They were 'EU law+', at best. However, a deregulatory approach that introduces more discretion and less procedural limitations carries potential for significantly complicating procurement practice by reducing procedural standardisation and increasing tendering costs.

The 2021's government response to the consultation mostly confirmed the approach in the Green Paper and, on 11 May 2022, the Procurement Bill was introduced in the House of Lords, the day after the Queen's Speech. The Procurement Bill is hardly an exemplar of legislative drafting and it was soon clear that it would need very significant amending. As of 1 September 2022, the Bill had reached its committee stage in the Lords. Five hundred amendments have been put forward with over three hundred of those originating from the government itself. The amendments affect the 'transformative' elements of the Bill, and sometimes there are competing amendments over the same clause that would result in different outcomes. It is difficult to gauge whether the government's proposals will result in a legislative text that materially deviates from the current rules. It is also unclear to what extent the new Procurement Review Unit will have effective oversight powers, or enforcement powers.

The Procurement Bill, moreover, contains only the bare bones of a future regime. Secondary legislation and volumes of statutory guidance will be adopted and developed once the final legislation is in place. Given the uncertainty, the government has committed to provide at least six months' notice of the new system. It is therefore unlikely that the new rules will be in place before mid-2023. The roll-out of the new rules will require a major training exercise, but most of the government's training programme is directed towards the public sector. Business can expect to shoulder significant costs associated with the introduction of the new rules.

These legislative changes will not apply UK-wide. Scotland has decided to keep its own separate (EU-derived) procurement rules in place. Divergence between the rules in Scotland and those that apply in the rest of the UK is governed by the 2022 revised Common Framework for Public Procurement. The Common Framework allows for policy divergence, and has already resulted in different national procurement strategies for England, Wales and Scotland, as well as keeping in place a pre-existing policy for Northern Ireland. It is too early to judge, but different policy approaches may in the medium term fragment the UK internal market for public contracts, especially non-central government procurement.

Conclusion

The process of UK procurement reform may be the 'perfect Brexit story'. Perceived pre-Brexit problems and dissatisfaction were largely a result of long-lasting underinvestment in public sector capacity and training and constraints that mostly derive from international treaties rather than EU law. As an EU member state, the UK could have decided to transpose EU rules other than copying them, thereby building a more comprehensive set of procurement rules that could address some of the shortcomings in the EU framework. It could have funded a better public sector training programme, implemented open procurement data standards and developed analytical dashboards, or centralised debarment decisions. It decided not to opt for any of these measures but blamed the EU for the issues that arose from that decision.

When Brexit rhetoric had to be translated into legal change, reality proved rather stubborn. International trade commitments were simply rolled over, thereby reducing any prospect of a 'Buy British' policy. Moreover, the ongoing reform of procurement law is likely to end up introducing more complexity, while only deviating marginally from EU standards in practice. Despite all the effort expended and resource invested, a Brexit dividend in public procurement remains elusive.

Part IV.

Services

Financial services

Scott James and Lucia Quaglia

Financial services are a critical component of the UK economy, employing approximately 1.1 million people and contributing around £75bn in tax revenue. Access to the lucrative EU single market has been central to its position: in 2017, the EU accounted for 43.8 per cent of the UK's net financial services exports, constituting 23.6 per cent of total UK service exports to the EU, and contributing £26 billion to the UK trade balance.

The omission of financial services from the UK-EU Trade and Cooperation Agreement (TCA) in December 2020 was a severe blow to the industry – ultimately reflecting the UK's decision to prioritise agreement over goods and fisheries, and the EU's desire to attract post-Brexit business away from London. As a result, UK-based financial firms lost their lucrative 'passporting' rights providing privileged access to the EU single market. Instead, they would be forced to rely on existing EU third country provisions based on regulatory 'equivalence'. These legal provisions enable third country firms to conduct business with domestic customers without being subject to additional host-country regulation, provided that regulators determine home-country regulation to be 'equivalent'.

To date, however, the EU has only granted strictly time-limited equivalence rulings in the area of derivatives trading – for UK central clearing counterparties and central securities depositaries – reflecting the continued reliance of EU firms on London for euro- denominated clearing. In any case, EU equivalence provisions are either partial or non-existent for many critical financial services – such as deposit-taking, lending, direct insurance, investment services (retail), investment funds, and payment services. Hence, from 1 January 2021 the vast majority of UK-based firms were forced to request authorisation in the EU, or comply with the relevant national regimes, to continue serving EU customers.

Reforming the UK's financial regulatory framework

Brexit had profound consequences for UK financial regulation, necessitating the full transposition of EU legislation into UK law. The 2018 European Union (Withdrawal) Act incorporated all EU-derived domestic legislation – for example, directives – and directly applicable EU law – regulations – into the UK statute book. The government also launched a major review of the UK's financial regulatory framework in June 2019 to determine the process for making future UK financial regulation.

The package of reforms published in 2021 confirmed that, while government and parliament would set the broad policy framework for financial regulation, regulators in the Bank of England (incorporating the Prudential Regulatory Authority, PRA) and the Financial Conduct Authority (FCA) would be granted extensive new rule-making powers covering all retained EU law. These powers would be accompanied by strengthened accountability mechanisms, including: a statutory requirement for regulators to respond to the Treasury's recommendations; power for the Treasury to require regulators to review their rules in the public interest; and requirements that regulators assess the impact of their rule-making and supervision upon the UK's deference arrangements. Furthermore, the review proposed that UK regulators be given a new secondary objective for economic growth and competitiveness, alongside the primary objective of maintaining financial stability.

While broadly welcomed by the financial industry, firms nonetheless complained that under the new framework UK regulators would become 'an outlier internationally in having a very high-level of independence and significant rule-making powers, but with relatively little systematic scrutiny of their role in delivering the broader policy outcomes set by government and parliament'. The industry called for further changes to address this issue. First, Parliament should establish a dedicated Treasury Select Committee sub-committee on financial services regulation, a recommendation that was eventually adopted in June 2022. Second, and

more controversially, ministers proposed a new 'call-in' power that would permit the government to block or change decisions by financial regulators in exceptional circumstances. This proposal generated consternation among financial regulators, with Governor Andrew Bailey warning that it would potentially undermine the Bank's independence and financial stability mandate. Although the 'call-in' power was subsequently replaced by a weaker 'rule-review' proposal in the draft legislation published in July 2022, prime minister, Liz Truss, pledged to reinstate it.

Prospects for regulatory divergence: no Big Bang 2.0

The EU's ongoing refusal to grant more than temporary equivalence in a limited number of financial services has led to a ratcheting up of the government's rhetoric regarding the desirability of regulatory divergence from EU rules in order to exploit post-Brexit trading opportunities. In July 2021, the then Chancellor Rishi Sunak pledged to use new freedoms to 'sharpen our competitive advantage in financial services… boosting our competitiveness across both regulation and tax'. The government's post-Brexit strategy, *A New Chapter for Financial Services*, boasted of signing a new financial services partnership with Singapore, established a new US-UK Financial Regulatory Working Group, set out proposals to strengthen the UK's status as a centre for Islamic finance, and aspired to deepen financial services relationships with China, India and Brazil. More concretely, the strategy confirmed a package of equivalence decisions for EEA countries, pledged to pursue a Mutual Recognition Agreement with Switzerland, and committed to championing the inclusion of financial services in future trade agreements. Longer term, the government set out a vision for UK financial services that would be a 'world leader in green finance' and a 'global fintech hub' – building on the recommendations of the Kalifa Review to harness the benefits of cryptoassets and stablecoins.

Contrary to the much-vaunted 'Big Bang 2.0' in finance, the government has launched multiple regulatory reviews proposing a series of modest reforms designed to tailor EU rules to the UK's post-Brexit context. To date these have mostly related to capital markets and non-banking areas of finance: including reforms to the EU's flagship Markets in Financial Instruments Directive II; reforms to reduce 'disproportionate' regulatory requirements on investment firms and wholesale capital markets; and simplifications to the UK Listings Regime. Arguably the most significant proposed deregulation relates to the EU Solvency II directive for insurance firms, the reform of which it is claimed will unleash an investment 'big bang' by unlocking additional funds for infrastructure investment (see 'Insurance' in this report).

Importantly, UK regulators are reportedly less enthusiastic about the prospect of immediate regulatory divergence and have been accused of slowing the pace of reform. This sparked a public war of words between the government and Bank of England, particularly over Solvency II. Senior regulators have made clear that there would be no post-Brexit regulatory rollback and signalled that they intend to continue imposing stringent prudential rules on UK banks – by transposing the most recent Basel Committee capital standards in full – beyond those at the EU level. Regulators are also considering strengthening existing rules around governance and resolution for central counterparties, reflecting their increasing size and potential systemic risk.

Moreover, the financial industry itself is far from unified on the desirability of regulatory divergence. Broadly speaking, the most globally oriented financial firms, which tend to be represented by the largest trade associations, are the most vocal in advocating continued broad alignment with EU rules. Hence, leading financial bodies noted that 'few are calling for a fundamental change in regulation' and that the government should avoid 'change for the sake of change', while UK regulation should remain 'broadly in line with the global environment' and have regard to the UK's historic ties with the EU. By contrast, more domestically-focused financial firms tend to be more supportive of changes that will reduce their regulatory burden, and are frustrated at the government's failure to deliver.

Looking to the longer term, it is essential to note that the prospects for future regulatory divergence will be determined in large part by forces beyond the immediate control of Westminster. On the one hand, divergence is (arguably more) likely as a result of future changes to EU rules that depart from existing UK practices – notably in areas related to financial markets (MiFID II), insurance (Solvency II), and bank capital (CRR III / CRD VI). It is also likely that the UK and EU will seek to develop independently new regulations covering

fintech and cryptocurrencies. On the other hand, ongoing economic uncertainty may revive international regulatory coordination in finance, notably in shadow banking and digital finance. As such, the development of new global standards could potentially thwart UK government efforts to use deregulation to give the City of London a competitive advantage in these areas.

Conclusion

In summary, the UK's future financial regulatory framework has entailed important changes. This includes the repatriation of financial regulatory competences to Westminster, the delegation of substantial new rulemaking powers to regulatory agencies, and proposals to strengthen regulators' accountability to elected officials in government and parliament. Yet there has been little change in the substance of policy to date, in the face of significant resistance of both financial regulators and powerful voices in the industry.

Prime Minster, Liz Truss, re-affirmed the government's commitment to further financial deregulation to enable the City of exploit post-Brexit opportunities. But financial market turmoil following the government's fiscal event on 23 September 2022 has strained relations with the sector, while the Bank of England's emergency intervention has reaffirmed the importance of maintaining financial stability. For now at least, the political momentum behind 'Big Bang 2.0' looks once more to have stalled.

Insurance

Michelle Everson

Insurance is a prize, and the UK is a global centre. Although the size of the UK sector has dropped from third to fourth largest in the world over the last decade, the Association of British Insurers (ABI) notes in its 2022 'Key Facts' that its members hold £1.7 trillion in invested assets, contributed £30 Billion to HMRC in 2019 and underwrote business, valued in the billions of dollars, at global level, in particular, in the United States and in China. Since the insurance sector in the UK was largely untouched by the financial crisis – AIG was the exception – it holds a critical mass of investment capital that rivals the banks, and is a major contributor to the positive column in the UK's balance of payments calculation, it is little wonder that the Government is also seeking to optimise UK insurance regulation by diverging from EU provision.

The UK has pursed four goals in financial services since Brexit that are intended to maintain or establish the UK as:

- an open and global financial hub
- a sector at the forefront of technology and innovation
- a world-leader in green finance
- a competitive marketplace promoting effective use of capital

In practical terms, this has taken the guise of a reform of the so-called 'Solvency II' rules – the system of insurance regulation put in place by the EU after the 2008 financial crisis to safeguard against future crises in the financial sector. The government has claimed that the UK's freedom outside the EU to diverge from these rules will enable it to attract investment that can be used to further its 'levelling up' agenda. As John Glenn, MP, Economic Secretary to the Treasury notes in his introduction to the April 2022 Solvency II Consultation an increase in UK investment capital will be used for the long term good of the nation. According to Glenn, the benefits could be significant: 'The reforms could result in a material release of possibly as much as 10 per cent or even 15 per cent of the capital currently held by life insurers and unlock tens of billions of pounds for long term productive investments, including infrastructure'.

At first glance, the UK's proposed reforms to the Solvency II insurance regulation regime introduced by the European Union in 2015 are minor. The core responsibility for the regulatory regime which is still based on European Directives, the ability to set Binding Technical Standards, or technical solvency stipulations, was transferred smoothly from the European Insurance and Occupational Pensions Authority (EIOPA) to the UK Prudential Regulation Authority following Brexit. At the same time, the Bank of England became responsible for the oversight of 'systemic risk' within the sector.[1]

The UK insurance industry has likewise signalled its preference for maintenance of the broad regime in whose establishment it played a leading part.[2] Seen in this light, specific technical proposals such as cutting the 'risk margin' – the 'extra liability that firms must carry to make it more likely that another firm will agree to take on their insurance policies if the firm gets into trouble', recalculating the 'matching adjustment' – the degree to which long-term investments can be used to offset immediate liabilities, and raising the threshold at

1 Taking on the role of the European Systemic Risk Board and European central Bank (see, Regulation (EU) No 1092/2010 (ESRB Regulation); Regulation No 1096/2010 (ECB/ESRB Regulation); Regulation (EU) No 1095/2010 (ESMA); Regulation (EU) No 1093/2010 (EBA), as well as the EIOPA Regulation).

2 See on responses from the industry to the 2020 call for evidence, Julian Harris, 'Reform package aims to ensure a competitive financial services sector post-Brexit' 42(10) Comp. Law. (2021) 328-330.

which the regulatory regime should apply, indicate continuity rather than a breach in the regulatory system, especially as the EU is currently engaged with very similar reform proposals.[3]

Nevertheless, at least one commentator has suggested that, although the reform proposals are very similar and highly technical, 'divergence between the two regimes is now inevitable'.[4] In other words, insurance is a sector where 'the devil is in the details' and even apparently minor changes within technical oversight of the amounts of risk that insurers can carry could lead to a fundamentally different character and mission for the UK insurance industry, especially as regards creation of an 'inward-investment' model for insurance capital in the UK.

The idea that the reforms to Solvency II so far announced by the UK government are likely to generate significant change, however, is open to doubt on several grounds. First, even though Solvency II is highly cumbersome, modern prudential regulation for insurance is still founded within a market-friendly regulatory paradigm with which the sector, once hostile, has now demonstrated it is very willing to work. It is certainly curious that the EU choose to adapt a three pillar framework of solvency monitoring, self-reporting and market oversight, designed for post-financial-crisis banking services, for the purposes of insurance supervision within its legislation, when the International Association of Insurance Supervisors (IAIS) set out principles for international insurance regulation. However, Solvency II was also a continuation of the longstanding EU strategy of adapting European insurance markets 'to the pace of global financial market change.' Solvency II illustrates a global paradox: a manifesto for the increased competitiveness of the sector, where market liberalization is founded not in de-regulation, but in a substantial increase in regulatory standards and supervisory structures. The aim is not only to enhance consumer protection in the form of consumer choice, but also to make enhanced market operation possible across international boundaries.[5]

Indeed, the very wording of the UK strategy for divergence, described by Rishi Sunak, Chancellor under the Johnson government, only demonstrate how limited divergence can be in practice: 'We will maintain and build on the UK's attractive and internationally respected ecosystem for financial services across both regulation and tax. We will tailor this to reflect our new position outside the European Union, while ensuring we support and promote the interests of UK markets and maintain high regulatory standards in the face of new and evolving risks'.

In practice, three pillar oversight regulation dominates across financial services and across the globe. The UK industry may have lost passporting rights in the EU; namely, the right of a service provider in one member state to offer services in another on the same basis as a domestic provider. Nevertheless, the UK's ability to maintain its European and global business – often conducted through subsidiaries recognised within their local markets[6] – also depends upon continuing respect for internationally-accepted standards of risk oversight. Too great a degree of divergence from international standards will damage the global standing of the UK industry, especially where EU regulations reflect and enforce those wider norms.

Moreover, doubts must be raised about the inclusion by the UK government of the UK insurance industry in its levelling up agenda. Concerns have been raised that, in the absence of any concrete stipulations, the UK industry will merely redistribute capital gains from reduction in the risk margin and matching assets – which is what the proposed divergence from EU Solvency II enables – to its own shareholders.[7] Such concerns are

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3 See for UK proposals, Review of Solvency II Consultation, note 4; for European reform proposals, see Brussels, 22.9.2021, COM(2021) 582 final, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a framework for the recovery and resolution of insurance and reinsurance undertakings and amending Directives 2002/47/EC, 2004/25/EC, 2009/138/EC, (EU) 2017/1132 and Regulations (EU) No 1094/2010 and (EU) No 648/2012.

4 See Beth Dobson, also for an excellent in-depth review of technicalities, 'Regulation of insurance: proposed changes to UK and EU Solvency II and future divergence between the regimes', (Journal of International Banking Law and Regulation), 37(8) J.I.B.L.R. (2022) 274-281, at 274.

5 See M.Everson, Regulating the insurance sector. In: Moloney, N. and Ferran, E. and Payne, J, (eds.) The Oxford Handbook of Financial Regulation (Oxford University Press 2015)

6 A part of a global insurance practice which attempts to increase competition in insurance markets have largely failed to overcome, see Everson, note 15 above.

7 See, Julian Harris, 'Reform package aims to ensure a competitive financial services sector post-Brexit', note 10.

surely misplaced: UK insurance is still committed to financial stability, as a part of its reputational bulwark. The historic success of the UK industry can, primarily, be attributed to its lack of national sentimentality, its pursuit within a global setting of the investment and business strategies which have brought it remarkable success and stability. The industry dislikes Prudential Regulatory Authority (PRA) and Financial Conduct Authority (FCS) oversight, especially within a risk paradigm which it has spent centuries mastering.[8] Likewise, the ABI fairly reflects the views of its members when it asserts that PRA attitudes to matching assets are too restrictive.[9]

Nevertheless such a rejection of regulatory caution is born of the confidence of an industry which has never been prepared to put narrow national interest above its global pursuit of financial stability in cross border investment strategies: this is, after all, an industry which is rumoured to have used the substantial power it derives from being a net contributor to UK economy to persuade successive UK governments to rapidly rethink their approaches when they sought to nationalise insurance investments.[10]

In a final analysis, the EU will probably have a far greater degree of success convincing the European industry to 'strengthen European insurers' contribution to the financing of the [post-pandemic] recovery, thereby progressing on the Capital Markets Union and the channelling of funds towards the European Green Deal'[11]. Inward investment of insurance funds is a longstanding feature of powerful European markets.

Conclusion

The message for the UK citizen and UK insurance consumer is probably one of very little change for now. The UK industry will survive in its globally significant position, but not by changing its age-old strategies. Instead, the health of the industry and protection of the consumer – even in the absence of an insurance resolution scheme[12] - will continue to be secured by pragmatic, non-ideological pursuit of cross-border investment opportunities. UK insurance capital is not for turning. And neither, given a looming balance of payments crisis will any UK government seek to turn it.

8 See Everson, note 15 above, especially with regard to industry frustration with the application of behavioural economics by the FCA to policyholder protection.

9 HM Treasury Review of Solvency II: Consultation Response, the Association of British Insurers (ABI) July 2022 (available at:

10 Both on the late 1940s and the mid 1970s; for details, see Everson, note 15 above.

11 See, European Commission - Press release, 'Reviewing EU insurance rules: encouraging insurers to invest in Europe's future' Brussels, 22 September 2021.

12 EU proposals include establishment of a resolution scheme to match that applying in the banking system (see also note 22 above).

Energy

Pierre Bocquillon

The UK and EU are highly interdependent in energy. Their gas and electricity infrastructures are linked, and they take similar approaches to the sector. Importantly, energy was never identified by Brexiters as an area where Brexit would bring a dividend to the UK. The challenge has been to manage the UK's exit from the single energy market, while maintaining a high level of cooperation.

Retained EU law under the European Union (Withdrawal) Act 2018 and the terms of the UK-EU Trade and Cooperation Agreement (TCA) have ensured continuity in the short term. Although the TCA aims to manage energy interdependencies and lay the ground for future cooperation, the text is somewhat unspecific in a number of areas and leaves key aspects open for future negotiations. Since the UK's objective of regulatory independence is enshrined in the TCA, there is space for regulatory divergence in the future. The TCA also includes a termination clause of 30 June 2026, after which energy cooperation can be extended further by the Partnership Council to 31 March 2027. It then becomes renewable yearly. This clause implicitly links the continuation of commercially important and security sensitive energy cooperation with the agreement on fisheries, to be reviewed by the same date (see 'Fisheries' in this report), thus granting the EU political leverage.

The UK and EU share a similar outlook on energy. Both have pledged to reach net-zero greenhouse gas (GHG) emissions by 2050 and both remain committed to competitively regulated electricity and gas markets, as well as to market-based policies to achieve the energy transition from fossil fuels. As such, there is considerable scope for further cooperation on linking carbon emissions trading schemes, developing offshore wind in the North Sea, and managing and developing electricity and gas interconnections.

As part of its governance provisions, the TCA creates a Specialised Committee on Energy (SCE) to assist the TCA Partnership Council and Trade Partnership Committee in steering and monitoring implementation and future cooperation. The SCE has met three times since the TCA came into force and the minutes suggest points of tensions between the two parties, in particular with regards to progress on new electricity trading arrangements and the new relationship between UK and EU Transmission System Operators. Cooperation has been hampered by wider political issues, in particular over the implementation of the Northern Ireland Protocol (see 'Introduction' in this report).

Energy market interconnections, trade and regulation

The UK is linked to the EU's single energy market (including Norway) by five gas pipelines connecting it with the Republic of Ireland, Belgium (IUK) the Netherlands (BBL), and Norwegian gas fields (two pipelines). Cross-border trade in gas takes place under pre-existing regulations and through PRISMA, the private platform for moving gas across Europe. Although the UK has left the EU's single energy market, trade in gas has not been significantly affected

The UK is also linked to the Single Electricity Market (SEM) via seven electricity interconnectors. These high voltage electricity cables connecting the electricity systems of neighbouring countries enable power to be traded across borders. They provided 9 per cent of the UK's electricity in 2021. In contrast to gas, cross-border trade in electricity has been affected by the UK's decoupling. In the SEM, electricity is traded in real time within and between countries and supply and demand need to be instantaneously balanced. Since January 2021, day ahead trading in electricity no longer operates through the EU's common trading platform (EUPHEMIA) which is based on 'implicit trading arrangements' – where electricity volumes and transmission capacities are traded together and optimised on a pan-EU level. Instead, since the end of the transition period, the UK and

EU have used ad hoc arrangements based on 'explicit trading' – where volumes and transmission capacities are auctioned separately. This system is widely regarded as less efficient and therefore more costly. Existing studies suggest a significant but small impact on UK electricity prices – in the range of a few percentage points. This increase has been overshadowed by the rise in prices caused by supply chain disruptions post-pandemic and the impact of the war in Ukraine on energy prices.

Furthermore, despite cooperation between operators and networks – National Grid UK, the UK Transmission System Operators (TSO), with EU electricity and gas TSO networks (respectively ENTSO-E and ENTSO-G) – and between regulators – Ofgem, the energy regulator in the UK, and the EU Agency for the Cooperation of Energy Regulators (ACER) – UK bodies are no longer members of the EU-wide networks and agency. They no longer take part in their decision-making processes, notably for procedures on capacity allocation and congestion management.

The TCA does set out a framework for the development of more efficient electricity trading arrangements for all timeframes – forward, day-ahead and intra-day – between Great Britain and the SEM, while Northern Ireland remains within of the SEM as part of the Withdrawal Agreement. Moreover, an all-island arrangement for regulation applies in Ireland (see 'Regulation and devolution after Brexit: Northern Ireland' in this report). For day-ahead trading in particular, the TCA provides that the Specialised Committee on Energy will develop, then implement, the more efficient 'multi-region loose volume coupling' (MRLVC) arrangements by April 2022. However, strained UK-EU relations have hampered progress, despite the fact that the formal steps foreseen in the TCA have now been completed (see Annex 4). Indeed, EU and UK Transmission System Operators (TSO) have carried out the required cost-benefit analysis, which concludes that the MRLVC could be an improvement on current arrangements. And Ofgem has consulted energy stakeholders in Autumn 2021 on improving existing arrangements. To date, no agreement has been reached.

Clean energy

The UK and EU have remained closely aligned with regards to their climate and energy decarbonisation objectives, which are also reaffirmed in the TCA (e.g. Art. 355; Art 764). While in 2019 the UK was one of the first countries to adopt a net-zero emission target by 2050, the EU commits to the same objective in its recently adopted climate law (2021). The UK decarbonisation strategy is defined in its 2020 'Ten Point Plan for a Green Revolution', which includes the development of offshore wind, nuclear, and ban on new fossil fuel vehicles by 2030, and its Net-Zero Strategy published in 2021. The EU has launched its 'Green Deal' and embarked on an ambitious overhaul of its energy and climate legislative framework with the aim of achieving a 55 per cent net reduction in Greenhouse Gas Emissions (GHE) emissions by 2030 – the so-called 'Fit for 55' legislative package currently under negotiations. Against this background, appetite from both parties for policy cooperation on decarbonisation has remained high, although recent political changes in response to the current energy crisis, including the UK government's more cautious approach and promotion of gas – including fracking - could lead to divergence.

Furthermore, through the European Union (Withdrawal) Act 2018, the UK has retained most of the EU's energy efficiency standards. However, although both parties have signalled their intent to jointly contribute to the development of international standards in the TCA, the lack of mutual recognition of clean energy technology standards, including energy efficiency and eco-design, and renewable energy certificates may lead to trade barriers or regulatory divergence. Moreover, the UK is no longer subject to EU's energy efficiency and renewable energy targets as well as their associated processes for monitoring and enforcement. The nature and the strength of the UK domestic governance processes remain uncertain.

Another source of divergence could stem from insufficient linking of the UK and the EU Emission Trading Schemes (ETS). The UK left the EU ETS, which is a major GHG cap and trade system, at the end of the transition period. The UK developed its own ETS on the same model, which started operations in May 2021. If initially there was uncertainty on the price of emission allowances and possible impact on electricity prices, these fears have not materialised. UK and EU allowance prices have remained closely aligned. However, this could

change in the future depending on policy developments on both sides, with potentially significant impact on electricity trading due to the effect of diverging carbon prices on relative electricity prices. Though the possibility of linking the UK ETS and EU ETS in the future has been touted as beneficial to the UK, and is suggested as a possibility in the TCA (Art. 392) no firm commitment has been made due to the strained UK-EU relationship. This is problematic for the UK in particular as smaller schemes such as the UK ETS tend to be less liquid and more volatile. Furthermore, as part of its Green Deal, the EU is in the process of negotiating a Carbon Border Adjustment Mechanism (CBAM), a carbon tax at EU borders. Third, countries can benefit from an exemption if they have an Emission Trading linked with the EU ETS or equivalent climate protection measures. This might act as a further incentive for the UK to negotiate linking the two emissions trading schemes.

One area of particular interest for cooperation is the development of renewable energy infrastructure in the North Sea. Following Brexit, the UK is no longer part of the North Seas Energy Cooperation. Nevertheless, both parties have committed in the TCA to the creation of a new stakeholder forum with bordering countries, including the UK, to discuss offshore grid and renewable energy infrastructure development in the North Seas region (Art 321). This is crucial given the importance of offshore wind developments and transborder electric interconnections for the UK's and EU's decarbonisation strategy. Progress is still ongoing but both parties are talking and have made significant progress at technical level.

Security of energy supplies

Following the Russian invasion of Ukraine, concerns about rising energy prices and security of supply have moved to the top of the political agenda. In 2021, the EU was dependent on Russia for 45 per cent of its gas and 27 per cent of its oil. Following the war, it has adopted a wide-ranging plan, REPowerEU, to reduce its dependence on Russian oil and gas and mitigate price increases, with the aim to reach complete independence 'well before the end of the decade'. The UK is significantly less dependent on energy imports from Russia thanks to its North Sea production (40 cent of gas supplies in 2021), imports from Norway via two pipelines (39 per cent) and three Liquefied Natural Gas (LNG) terminals (17 per cent). The remaining 4 per cent come from continental Europe. The UK has committed to ending all imports from Russia by the end of the year and has even become a net gas exporter towards the continent via its two interconnectors with Belgium and the Netherlands. However, it has not been sheltered from price competition on European and international markets for its supply of oil and gas, and the subsequent soaring energy bills. With Brexit, the UK has lost the benefits of EU energy solidarity measures in case of severe disruption to supplies.

In the TCA, both parties commit to cooperate on energy network development and security of supply, notably through sharing risk preparedness and emergency plans for disruptions and crises in the security of supply. However, the TCA remains rather vague. Since the war in Ukraine, security of supply has become a priority area for discussion between the UK and the EU in the Specialised Committee on Energy. It has called for accelerating work on regular exchanges on security of supply and for facilitating early consultation in a situation of supply emergency, notably through the creation of a specific working group. These efforts appear welcome although perhaps not on par with the scale of the emergency.

In a geopolitical context with major implications for energy security, the UK has little influence on EU energy diplomacy. In March 2022, the EU agreed a new liquified natural gas (LNG) supply deal with the US to partially reduce its dependence with Russia, as well as a voluntary common gas, LNG and hydrogen buying strategy to take advantage of the greater negotiating power of the bloc. It remains to be seen how effective this strategy will be in practice given that energy supplies remain a jealously guarded national prerogative, but the UK risks isolation, with limited means to influence or mitigate the impact of the EU's energy diplomacy.

Broader governance issues

Brexit has also raised broader governance issues for the UK with regards to energy. First, it has diverted attention and resources away from tackling important issues such as decarbonising the energy system, a problem further exacerbated by COVID-19. As a result, there have been delays or only partial implementation of several policies. The UK has also lost funding for energy infrastructure available through the European Investment Bank and EU structural funds. Instead, it has created a UK Infrastructure Bank, a publicly owned company. It was launched rapidly and on an interim basis in July 2021. A report from the National Audit Office published in July 2022 underlines that it is too early to assess whether the Bank will be successful in delivering on the government's ambitions.

Brexit has also affected the relationship between the nations of the UK. Although Great Britain has left the single energy market, Northern Ireland remains coupled to the SEM. There is evidence that the regulatory barriers between Great Britain and Northern Ireland have led to under-utilisation of the interconnector between the two markets so far. Moveover, Northern Ireland has remained part of the EU ETS, while Great Britain has developed its own ETS, creating further regulatory divergence as there are effectively two carbon prices in the UK. More generally, the repatriation of certain competences back to the UK raises the question of who they will be allocated to and whether divergences might emerge within the UK itself, for instance on the promotion of renewable energy across Scotland and Britain. As a recognition of the need to involve the devolved administrations, representatives have been included in the UK delegation to the Specialised Committee on Energy.

Third, the renewed interest in regional industrial policy to reduce inequalities and support the development of poorer regions is the UK, including energy infrastructure in the North and coastal areas, could lead to a more active involvement of the state and local authorities. The ongoing reform of the UK's state aid policy through the State Control Bill suggests the possibility for more national and local subsidies to support the 'green industrial revolution', an objective that could fall under 'legitimate public policy objectives' as defined in the TCA. Signs of potential tensions are evident in the EU's recent challenge to the WTO in relation to the UK's local content requirements in the allocation of subsidies ('Contracts for Difference') for offshore wind projects.

Conclusion

In energy as in other areas, there is still close alignment between both parties and many UK policies tend to still mirror those of the EU. So far, the UK has used available discretion to diverge from the EU only sparingly. Yet, shifting domestic political dynamics and loss of UK influence on EU energy and climate policy development could lead to greater policy divergences in the medium to long term. The Specialised Committee on Energy provides a useful forum for cooperation on the various areas of mutual interest and to respond to challenging new circumstances, but its work to date has been hampered by wider issues. Only once they are resolved can cooperation take place on a firm footing.

Road haulage

Sarah Hall

Road haulage is vital in facilitating the national and international supply chains on which the UK economy relies. According to the Road Haulage Association, 89% of all goods transported by land within Great Britain do so by road. This figure rises to 98% for all food and agricultural products and 98% for consumer products and machinery shipped into Great Britain. Moreover, haulage and logistics is also an important economic activity in its own right. More than two-and-a-half million people work in the sector, making it the UK's fifth largest employer contributing £124 billion in gross value added to the UK economy.

For good reason, road haulage is also heavily regulated. Governments need to ensure that the vehicles and drivers on their roads are safe, and use customs checks to know the details of the goods that enter and leave the country. In the EU single market, which also includes the members of the European Economic Area (EEA), road haulage licenses are recognised by the governments of all EU member states. In the customs union, meanwhile, customs declarations are not required. In addition, the infrastructure along national frontiers in the EU single market has developed to reflect the liberalised regulatory environment. In Felixstowe and Dover, for example, the infrastructure developed during the UK's membership of the EU to accommodate a high volume of 'roll on roll off' (RORO) traffic.

The regulation of road haulage and its interaction with the UK border has changed significantly following the UK's departure from the single market and the customs union. The UK government has taken regulatory control of who drives on UK roads and the paperwork required to cross the new border between the UK and the EU and between Great Britain and Northern Ireland.

Provisions for haulier businesses

The EU-UK Trade and Cooperation Agreement (TCA) does not replicate the conditions that existed for hauliers when the UK was a member of the EU. Nevertheless, the TCA went further than was expected by many by not requiring permits for UK operators to work in the EU single market, or vice versa. As a result, UK hauliers can still use their UK driving licence to operate in the EU, as well as Iceland, Liechtenstein and Switzerland. There are some caveats, however. An international driving permit is needed in some countries if the driver holds a paper UK driving licence or if their licence was issued in Gibraltar, Guernsey, Jersey of the Isle of Man. An additional complication, which add to the costs for UK hauliers, is that restrictions vary among EU member states as to what expiry date they will permit in relation to drivers holding UK passports.

The big change, which has had a major impact on haulier business models, concerns cabotage. In road haulage, cabotage refers to the right of a haulier based in one country to carry loads in another country. For example, a British haulier taking a shipment from Lyon to Paris would be engaging in cabotage. When the UK was a member state, cabotage rights allowed UK hauliers to employ a flexible and responsive business model, since the number of trips they could make within the EU was unrestricted. Under the TCA, however, UK hauliers can only undertake one cabotage trip in the EU. Although even a single cabotage journey does make it possible for a lorry to return to the UK with a load rather than empty, it does require greater advance planning and reduces earning opportunities.

The UK government did temporarily adopt a more relaxed approach to cabotage. It lifted cabotage restrictions for EU hauliers in the UK between October 2021 and April 2022. This was a response, partly to supply chain disruption in the UK associated with the COVID-19 pandemic in the busy period running up to Christmas, and partly to cope with the shortage of drivers due to COVID isolation requirements and drivers, often from Eastern Europe, leaving the UK during the pandemic. Figures from the Office for National Statistics show that

there were 30% fewer EU nationals working haulage in June 2021, compared to June 2017, before Covid. The ONS also reports that over the same time period, there has been a 15% decline in the number of UK nationals working as HGV drivers. Following consultation, the government decided not to extend this measure, since take-up had been low.

Managing the border

Regulatory changes at the UK border as a result of Brexit have also had a significant impact on the haulage industry. When the UK was a member state, regulation of who and what crossed the UK-EU border was managed by the EU. These responsibilities have now been assumed by the Cabinet Office, HM Revenue and Customs, the Department for Environment, Food and Rural Affairs, the Home Office and the Department for Transport.

After Brexit, Great Britain and the EU no longer follow the same customs rules or regulatory standards of enforcement mechanisms. The cross-border transport of goods therefore requires custom checks. These checks are aimed at ensuring that goods meet the standards in areas such as food and product safety of their destination market. The movement of goods between Great Britain and Northern Ireland is governed by the Northern Ireland Protocol, which removed the requirement for border controls on the island of Ireland (see 'Regulation after Brexit: Northern Ireland' in this report). As in other areas of regulation related to haulage, the protocol is yet to be fully implemented and, at the time of writing, the UK and the EU have not reached agreement about how it should operate.

Border checks at the GB-EU border vary depending on the goods being transported, where they cross the border and who is transporting them. The TCA does not liberalise such checks significantly beyond what would have occurred under a no deal Brexit. As a result, hauliers and their customers now need to deal with additional costs and border requirements than was the case when the UK was a member state.

The government is working on the development of new border infrastructures as part of its 2025 Border Strategy. It is currently carrying out trials and consultation. The final outcome and the regulations with which hauliers will have to comply is not yet known. This uncertainty has typified the development of a new border model since the UK left the EU. It has led to strained relations between the haulage industry and the government during that time, with each party blaming the other for border delays. To try to minimise disruption, the UK government planned to phase in customs requirements – a programme that has been subject to further delays since Brexit. The EU adopted a different approach and introduced full customs requirements for GB exports from 1 January 2021.

Commenting in 2021 on the UK border post transition, the Public Accounts Committee was critical of the government's approach: 'the new controls in place over the movement of goods from the UK to the EU have created additional costs for businesses and affected international trade flows'.

Further changes at the border stem from regulatory changes made by the EU. The most significant change is the EU's Smart Borders Programme that will introduce a new Entry/Exit System (EES) and the European Travel Information and Authorisation System (ETIAS) from 2023 for all visitors to the EU from third countries, including the UK. The scheme will use biometrics rather than stamping passports, although at the time of writing, no plans have been released regarding what technology will be used in busy channel ports such as Dover or Calais.

Taken together these changes to both the regulatory requirements for the movement of people and goods at the new border between the UK and the EU has implications that are felt most evident at busy ports such as Calais and Dover. The ability of ports such as these to handle large volumes of freight quickly and reliably is central to their business model. Changes to border checks and the technology used to enforce these, both of people and goods, remain under development. As a result, the extent to which these ports will be able to accommodate new checks without increasing the time involved is still not clear.

Conclusion

Brexit is far from done when it comes to the haulage sector. The regulation of lorries and drivers has changed since the UK left the EU. Although some liberal arrangements remain – no requirements for permits to drive in the EU and vice versa – business faces additional costs due to the changes in cabotage. Most importantly, there is considerable uncertainty in addition to extra costs, as both the EU and the UK government adapt to the need to manage a new border between the UK and the EU.

Developing a new border infrastructure is a huge administrative and regulatory task. The UK government is seeking to manage this through its UK border strategy for 2025. One of the key objectives is to transform the current GB-EU frontier into the 'world's most effective border' by 2025 through the management of customs checks and the use of technology to reduce manual checks. Some logistics and haulage firms agree that taking additional time to develop the full border infrastructure is a pragmatic response to the additional uncertainty that has arisen since Brexit from COVID-19 and supply chain disruption. However, firms that have invested in meeting planned deadlines that have not been implemented were understandably less supportive.

Enhanced collaboration between UK and EU authorities alongside businesses would help to provide clarity over what the future border infrastructure will look like and the regulatory requirements that will ensue for the haulage sector. Greater dialogue would also help businesses plan and allow feedback from those 'on the ground' to be more effectively integrated into the regulatory development process as the haulage sector adapts to new domestic and border regulations.

Maritime transport

Martin Heneghan

The effects of the UK's withdrawal from the EU on the UK's maritime sector are becoming clearer as operators adapt to the new rules and conditions. In particular, new regulatory requirements under the UK-EU Trade and Cooperation Agreement (TCA) have had a negative impact on maritime traffic, affecting some UK ports more than others. The issues left unresolved at the end of the transition period are now being worked through bilaterally or through negotiations with the European Commission. Keen to demonstrate the benefits of its new freedoms, the government has proposed a number of changes to UK regulations.

The TCA and the UK maritime sector

The maritime sector is vital to the UK, accounting for 95 per cent of its international trade in goods. In addition, 20 million passengers travel by sea to and from the UK each year. The sector is largely governed by international law in the form of conventions, such as the United Nations Convention on the Law of the Sea (UNCLOS), and regulations and treaties of the International Maritime Organization (IMO). The liberal character of international maritime law shielded the sector from some of the uncertainty and potential disruption faced in other sectors, especially when it seemed possible that the UK could leave the EU without a deal. Nevertheless, the sector welcomed the TCA, which includes provisions for access to ports and preserves the use of port infrastructure and associated services on a 'commercial and non-discriminatory basis' (Article 191).

However, the TCA also left several issues unanswered (see Maritime transport in 2021 Report), including the recognition of UK qualifications for seafarers. When the UK was a member of the EU, these Certificates of Competency (CoCs) enabled seafarers who qualified in the UK to work on EU flagged ships as their qualifications were automatically recognised. This arrangement ended when the TCA came into operation. In the months following the end of the transition period, unions such as Nautilus International obtained assurances from a number of member states including Malta, the Netherlands, Norway, Ireland, Denmark, Germany, Italy, Bulgaria and Cyprus that they would continue to recognise the Certificates of Competency (CoCs) issued for UK qualified seafarers, which allowed the vast majority of UK seafarers to work on EU ships. Moreover, the European Maritime Safety Agency (EMSA) began the process of approving the UK training and certification system, which will authorise all EU member states to recognise UK Certificates of Competency (CoCs). This is a positive development for the industry, which had been warned that there were no guarantees about when the process would start. There had also been uncertainty surrounding the UK's access to SafeSeaNet/THETIS and CleanSeaNet. The UK continues to report information on maritime traffic to the European THETIS system – a single window system combining port call information – through its Consolidated European Reporting System. However, it has lost access to CleanSeaNet, the European satellite-based oil spill monitoring and vessel detection service. In sum, these measures have made it possible to avoid major disruption.

Changes to UK port activity

By contrast, new regulatory checks introduced after the end of the transition period have affected shipping from Ireland through the UK to the rest of Europe as well as from the EU to the UK. Before the UK left the single market, it was the main passageway between Ireland and the rest of the EU, with goods crossing the Irish Sea and arriving in British ports before making their way south via road to France or other parts of the EU. The Welsh port town of Holyhead, which had especially benefitted from this arrangement, has seen a dramatic drop in business since 31 January 2021. The Stena Line shipping operator, for example, reported a 30 per cent drop in traffic through Welsh Ports. RoRo traffic between Ireland ports in GB is between 15 and

20 per cent below pre-Brexit levels. Increasingly, ships transporting goods from Ireland to the EU are now bypassing the UK altogether, opting for direct shipping instead with the opening of several new routes to mainland EU. Conversely, the goods that may have once made their way to the UK through its southern ports are now increasingly coming through its northern ports to avoid the congestion associated with the Calais crossing. Meanwhile, goods that would have once been transported from Dublin are now being shipped from Belfast Harbour. Furthermore, sending containers to the UK from Asia now comes at a steep premium: the creation of a border between the UK and the EU, and the associated administrative costs, have pushed prices up compared to the costs of shipping between Asia and mainland Europe.

UK ports have invested huge amounts into new infrastructure to handle post-Brexit sanitary and phytosanitary border checks that were due to be implemented in July 2022. However, the date for these checks has been pushed back for a fourth time, affecting not only shipping, but road haulage (see chapter on road haulage). The border controls will not come into force this year. The government has now targeted the end of 2023 for the overhaul of the system of border checks. This has angered port authorities who fear the new infrastructure that they put in place may become white elephants and the staff they recruited to handle the checks could face redundancy.

New regulations for the industry

In March 2022, P&O ferries sacked all eight hundred British crew across its entire fleet. Staff were informed by Zoom that P&O 'vessels will be primarily crewed by a third-party crew provider and their final day of employment was today'. This move was widely interpreted as a way for the company to reduce its costs by hiring workers with fewer employment protection rights and lowering wages. In some quarters, Brexit was apportioned the blame although this action could have taken place when the UK was an EU member state. Unsurprisingly, the incident caused a strong political reaction. The government has moved to enforce seafarer welfare and employment protections 'to ensure they are paid and treated irrespective of flag or nationality, whilst closing down legal loopholes that could give employers the ability to avoid doing so'. It plans to change the law so that seafarers working on ships that regularly use UK ports are paid at least equivalent to the UK national minimum wage and will ask UK ports to suspend access to ferry operators which do not. It also proposes to develop a statutory code for fire and rehire strategies, welfare and employment protections 'to ensure they are paid and treated irrespective of flag or nationality, whilst closing down legal loopholes that could give employers the ability to avoid doing so'.

The government has also announced plans to repeal the EU Port Services Regulation (PSR) that came into effect in 2019 and applied to the UK when it was a Member State. The measure was supplemented by the Port Services Regulations 2019 in domestic legislation. The government argues these regulations were designed with the EU's predominantly publicly owned ports in mind and so are not appropriate for the UK. Since they were introduced in order to foster competition that already exists in the UK's port sector, their repeal would relieve UK ports of compliance costs and encourage more investment in port services and provisions. Port organisations, such as the UK Major Ports Group and British Ports Association to the PSR, had been outspoken about their opposition to the PSR.

Conclusion

The maritime sector is still working its way through the UK's new trading relationship with the EU. Whilst international law provided some continuity for ships accessing EU ports, and some issues have been ironed out since, new regulations on the trade in goods have created significant challenges for UK ports. The repeated delay in implementing sanitary and phytosanitary border checks, moreover, has created considerable uncertainty for port authorities. The sector made significant investments in infrastructure and human resources without the checks being implemented. In addition, new frictions in trade have opened up new maritime routes for goods and rediverted traffic between UK ports. Dublin and Holyhead ports have been the biggest losers as operators no longer use the UK as a land bridge. New regulations may make the port sector more efficient, but these will take a while to offset current expenditures. For those who trade in goods between the UK and EU, the border is fraught with problems. While some exporters and operators have changed their routes, others have ceased trading altogether. Meanwhile, the Office for National Statistics emphasises that the precise impact will take some time to establish.

Aviation

Hussein Kassim

In aviation, strenuous efforts on the part of the UK and EU sides to ensure the continuity of air services between the UK and the EU assured that a framework for cooperation was in place after the end of the transition period. The EU-UK Trade and Cooperation (TCA) devotes no fewer than 26 pages to the sector, not including an Annex concerning airworthiness, which allows for the mutual recognition of the UK and EU's aeronautical products and designs. Necessity was the driver here, since Airbus wings and Rolls Royce engines are valuable European assets. The TCA also includes a framework for agreeing further Annexes to allow for the recognition of UK and EU certificates, approvals and licences, as well as the monitoring of maintenance organisations, personnel licences and training, operation of aircraft, and air traffic management.

In preparation for the post-Brexit era, the UK incorporated much of the EU's aviation regime under the European Union (Withdrawal Act) 2018 as 'retained EU law'. Few substantive changes were made at the time, though the dates at which some provisions apply have been altered subsequently, but references to EU institutions and agencies were replaced by the names of UK bodies. Most of the latter were UK-wide, but responsibility for the regulation of airport noise was transferred to the devolved governments, which have competency for environmental policy.

Although these changes largely achieved their aim in ensuring stability for passengers, airlines and others, the transition from the EU regime to UK regulation has not been entirely smooth. Problems have arisen for the industry and the UK regulator, the Civil Aviation Authority (CAA), which has taken on broad-ranging responsibilities. Moreover, neither the aims identified by the government for the sector as recently as May 2002 in Flightpath to the Future, nor the changes that it has introduced since 1 January 2021 have lived up to government's pronouncements that the UK would no longer be a 'rule taker', but would become a 'rule maker' and would tailor regulation to suit the needs of the UK. Air transport is a highly regulated sector, based on close cooperation between states, with an established international regime centred on the Chicago Convention and the International Civil Aviation Organisation (ICAO), that limits the possibilities for significant divergence in respect of commercial operations.

From EU membership to the TCA

Within the global system, the EU has developed a regional regime that encompasses most areas of the industry. In the area of commercial rights, where in the rest of the world governments regulate international air services through bilateral agreements, the EU's single market in air services creates a multilateral system for the exchange of freedoms. Provided that they satisfy airworthiness and financial stability criteria, airlines that are majority owned and controlled by EU nationals and registered in a member state can operate services anywhere in the European Union – from, to, and between other members, and even on domestic routes in the territory of another member state.

Beyond the single market, EU regulation covers environmental policy, passenger rights, and slots at airport, as well as projects such SESAR, the technological pillar of the EU's single European sky policy, aimed at improving air traffic management. In addition, the EU negotiates international aviation agreements with third countries, including the United States. The EU also plays an important role in monitoring and enforcing safety. Indeed, under the Basic Regulation the EU has the power to issue fines. In this area of regulation, global norms are agreed in the International Civil Aviation Organization among the 193 signatory states to the 1944 Chicago Convention. Competent authorities in each state are responsible for ensuring compliance with the standard. The EU has given these standards legal force through EU law, the European Air Safety Agency (EASA) has

oversight over certificating and licensing pilots and flight crews, and certificating, licensing aircraft and aircraft maintenance. Member states can choose, if they so wish, to delegate these functions to EASA..

The TCA has allowed UK and EU airlines to continue to operate services to and from their respective territories, but the commercial freedoms it extends to air carriers is limited to basic connectivity. One important effect is that UK airlines no longer enjoy the freedoms to fly between member states or operate domestic services within them. On the technical side, although the TCA provides for the future recognition of UK and EU regulations (listed above) and a Specialised Committee on Air Transport for both parties to discuss aviation matters, the poor state of UK-EU relations since Brexit due to the failure of the UK to implement its obligations under the Protocol on Ireland and Northern Ireland has stalled any progress on that front.

Safety: from European Air Safety Agency (EASA) to the Civil Aviation Authority (CAA)

Since the UK ceased to be a member of EASA at the end of the transition period, regulatory responsibilities in safety, including design and certification, and issuing pilot licences, performed by that body on behalf of EU member states were transferred to the UK Civil Aviation from 1 January 2021. These are a demanding set of responsibilities, which required the recruitment of a significant number of new staff, with specialist training and expertise. To smooth the change for both sides, a transition period allows for the mutual recognition of certificates, approvals, and licenses until the end of 2022. However, the fact that UK continued to recognise EASA pilot licences, but that EASA no longer did the same for UK-issued licences was a cause of consternation within the UK industry.

More generally, the industry has had serious reservations about the UK's departure from EASA, since the government announced its decision. It has expressed concerns about duplication – that there would effectively be dual licensing or dual compliance regime, which from the end of 2022 would require operators serving routes between the UK and the EU to secure authorisation from both the CAA and EASA. One leading aviation lawyer refers to aircraft maintenance to illustrate the point: 'The classic example would be a European maintenance provider that held an EASA Part 145 certificate, and among its customers were UK registered airlines. It would no longer be able to continue providing those functions unless it also acquired a UK Part 14'. The same will apply to pilots.

A further concern, noted in our 2021 report, but still relevant, relates to the capacity of the CAA to carry out its new responsibilities effectively – whether it is sufficiently staffed and funded to carry out its remit, and in a timely manner.

The UK government's post-Brexit ambitions and actions

The government has identified aviation as an area where Brexit has afforded opportunities to shape legislation to better suit the UK. The Benefits of Brexit states, for example, that the UK can now provide 'a better experience for UK air travellers', support 'new opportunities for UK growth' and pursue 'greater climate ambition'. In the post-transition period, the government emphasized new technologies, greater efficiency to promote sustainability, and making the UK more user-friendly to business. Accordingly, it invested in research in order to establish the UK as a leader in drone technology. It took action to modernise UK airspace by 'updating its structural design, changing how the systems on which it runs work, and using new technology to improve how air traffic is managed'. It also aimed to make the UK 'the best place in the world for general aviation'– that is 'private flying consisting of personal transport, training, recreational and sporting activity, although it is unclear that general aviation will remain a focus following the departure of Grant Shapps as Secretary of State for Transport in September 2022.

More recently, the government has set out its medium-term strategy for the sector in the wake of earlier texts Beyond the Horizon and Aviation 2050. Flightpath to the Future, adopted in May 2022, outlines four strategic themes – enhancing global impact for a sustainable recovery, embracing innovation for a sustainable future,

realising benefits for the UK, and delivering for users – which is underpinned by ten aims. It places considerable emphasis on the UK's role as a 'global leader', which is 'well positioned to set the agenda on a range of key global issues'. It also makes a commitment to a sustainable aviation future, to be achieved through 'Jet Zero', a set of initiatives that includes a more efficient use of the UK aviation system (aircrafts, airports, and airspace), control of emissions and noise around airports, and incentivising users to take alternative forms of transport on short journeys. It also envisages the development of new technologies, including drones and electric vertical take-off and landing aircraft (see 'Trade in goods' in this report).

It remains to be seen how much of this agenda is practicable, and whether the government has the capacity or resources necessary to deliver the stated aims. The signs so far are not promising. There have been delays in the drone project, with issues concerning drone certification, and recognition of drone operators in the EU and the wider global marketplace, while arguably the key developments on drone technology are taking place in the rest of Europe and in the US. The promotion of general aviation also ran into difficulties. However, vertical aerospace does appear promising, though will require market access. Moreover, the UK has made a considerable investment in its work in ICAO. The government also played a key part in ensuring that a commitment was made to ambitious action on international aviation emissions when the UK hosted the UN Climate Change Conference (COP26) in Glasgow in 2021.

In terms of divergence, the UK has trodden carefully so far. As part of a much-heralded move, it used the powers regained from Brussels to relax slot allocation rules at UK airports to allow airlines greater flexibility over the summer season in support of the industry's post-COVID recovery. More recently, it has started to review the rules for passenger compensation. Although proposals have yet to emerge, there has been speculation that the level of compensation to which passengers are entitled for delays and cancellation domestic flights will be reduced.

Conclusion

Relative to the UK government's rhetoric on the UK's new found freedoms and on the opportunities made possible by Brexit, the changes it has introduced in aviation have been very modest. Meanwhile, the industry has borne significant costs and the CAA faces a formidable challenge as a consequence of the changes that have followed the UK's departure from the EU.

Nor do the UK's ambitions for post-Brexit aviation suggest that it is planning to diverge significantly from EU regulation. This is unsurprising in the light of the role the UK played in shaping EU policy and the influence it exerted over EU rules and regulation. Indeed, the UK was historically a champion of EU-led liberalisation and contributed considerable political and technical effort to the emergence of the common aviation policy. It succeeded in uploading its liberal outlook to the EU level, was a leading actor in EU aviation policy, and supplied significant technical expertise to EU institutions and agencies over several decades. Moreover it is not clear that the aims and objectives the UK government has set for itself post-Brexit could not have been pursued within the EU. Finally, in aviation, the scope for regulatory divergence is significantly limited by the weight and detail of international regulation, and by the emphasis on cooperation and consensus within the sector.

Part V.

Digital, data and IP

Digital regulation

Amelia Fletcher

At the time of EU withdrawal, the primary piece of EU legislation was the e-Commerce Directive. Implemented in the UK as the Electronic Commerce (EC Directive) Regulation 2002, this measure includes rules on issues such as transparency and information requirements for online service providers, electronic contracts and limitations of liability for intermediary service providers. None of this changed following EU withdrawal.

The Directive does, however, include a 'country of origin' principle, under which European Economic Area (EEA) firms that provided online services in the UK were exempted from some aspects of domestic UK law, provided that they followed the relevant rules in the EEA country in which they were established. From 1 January 2021, such firms were fully bound by UK legislation.

For financial services, this had the additional implication that EU-based providers active in the UK needed to be directly authorised in the UK rather than relying on home state authorisation. To ease the transition, the Financial Conduct Authority (FCA) adopted a Temporary Permissions Regime, which enabled firms to remain active in the UK while they negotiate authorisation. UK-based providers active in the EU have likewise been required to seek direct authorisation in an EU member state.

Developments since EU withdrawal

In the EU, there have been several very substantial developments since January 2021. In July 2022, the European Parliament approved the Digital Services Act and Digital Markets Act. These rules will apply from early 2024. The Digital Services Act focuses on content moderation, while the Digital Markets Act introducing pro-competitive regulation, designed to ensure contestability and fairness in the digital sector where the largest online 'gatekeeper' platforms are active. Both are major initiatives which are expected to have far reaching effects on digital markets in the EU. They are ground-breaking internationally and may have substantial extra-territorial effect, to the extent that global digital companies decide to introduce the required changes beyond the single internal market.

In June 2022, the EU adopted the Data Governance Act which provides a legal framework for data sharing. Intended to increase trust in sharing, it aims to allow the beneficial potential of data to be leveraged more effectively.

Future developments

The UK Government has also set out plans to introduce pro-competitive regulation for the largest online platform firms. Although the proposal has not yet received a legislative slot, the 2022 Queen's Speech includes a commitment to prepare legislation. The aim is to address the same concerns as the EU's Digital Markets Act, although the proposed regulatory approach differs. Under the UK legislation, only broad principles would be set, leaving the new Digital Marks Unit (located within the Competition and Markets Authority) to detail the final rules. The obligations of the EU Digital Markets Act, by contrast, are stipulated within the legislation.

The UK's Online Safety Bill is currently going through Parliament. OFCOM will become the online safety regulator. The legislation covers somewhat similar ground to the EU Digital Services Act, although again there are some differences.

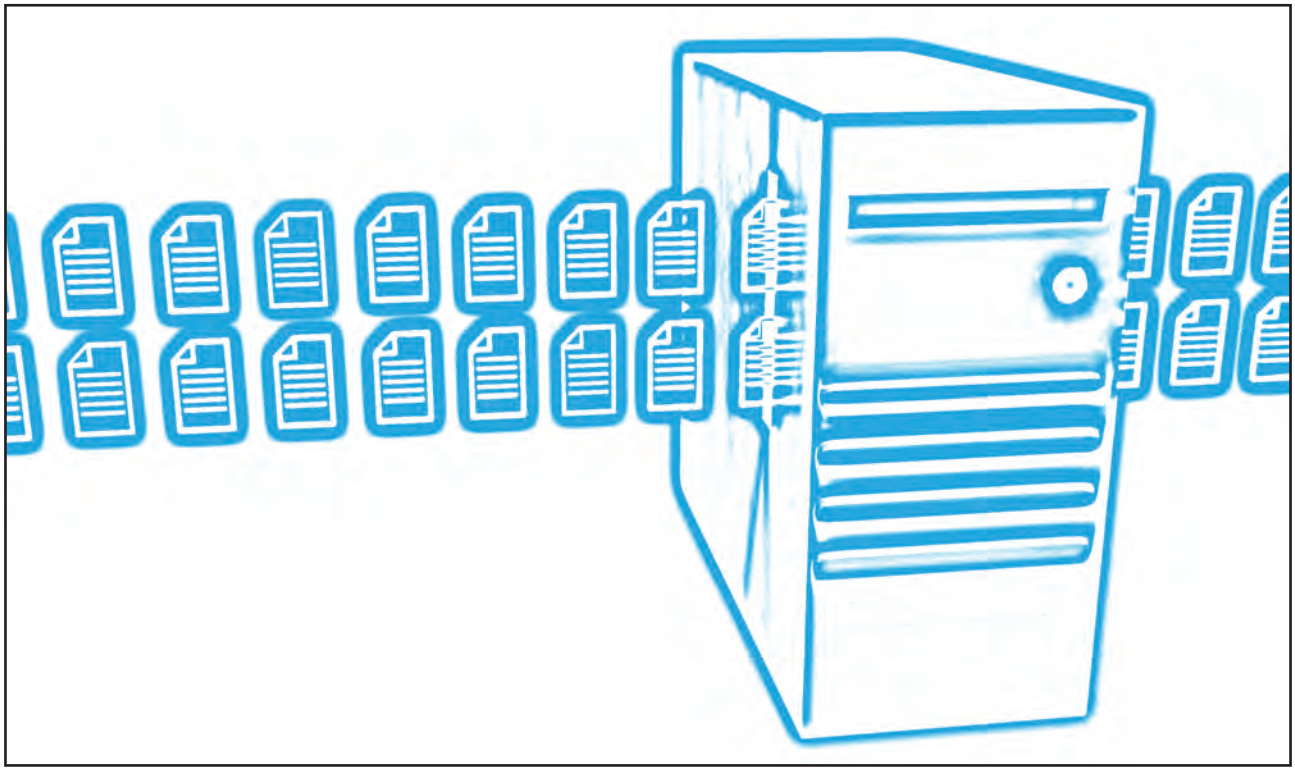
In addition to those measures mentioned above, the EU is planning a new Artificial Intelligence Act, which is designed to reduce the risks associated with AI and to promote trust. It will introduce new rules and prohibitions for 'high risk' AI across sectors, with a suggested maximum sanction of 6 per cent global turnover. For AI not considered high risk, the regulation requires only that individuals should be informed when they are interacting with AI systems, unless it is obvious. The EU is also proposing a new Data Act, which would open up third party access to the data generated by connected devices and facilitate switching between cloud services providers.

The UK, meanwhile, is proposing a light touch regulatory framework for AI. This provides six overarching principles. While these are referred to as an 'AI rulebook', they are in practice simply principles that regulators should consider when they are regulating AI. The UK is also proposing to enable the expansion of data portability through new 'Smart Data' provisions. These would give the Government broad 'enabling' powers to introduce smart data schemes, but specific schemes would still require secondary legislation. However, both of these initiatives are included in the Data Protection and Digital Information Bill, which has started the legislative process, but is currently on pause for further consideration following the change of Prime Minister.

Conclusion

The EU-UK Trade and Cooperation Agreement (TCA) provides that the UK and EU will preserve their decision-making autonomy but nevertheless endeavour to cooperate on digitalisation. On the current trajectory, there are likely to be significant differences between the two jurisdictions in this area due to new policy initiatives on both sides. These divergences will be more pronounced if the UK does not adopt or only partially adopts its proposed pro-competitive and online safety platform regulations.

In addition, some existing legislation relating to digital services is subject to review under the 'Retained EU Law Bill' (see 'Retained EU Law' in this Report). This includes the 2002 Electronic Commerce (EC Directive) Regulation, implemented in the UK as secondary legislation, and the 2019 Platform-To-Business Regulation, brought into UK legislation through the EU Withdrawal Act). Any sunsetting of such protections will further increase EU-UK divergence.



Data exchange

Karen McCullagh

The flow of personal data between the European Economic Area (EEA) and the UK is essential for trade and for cooperation in policing, security, and criminal justice matters. Following the UK's departure from the EU, the European Commission adopted two adequacy decisions for the UK on 28 June 2021, ahead of the expiry of a six-month time limited regime in the EU-UK Trade and Cooperation Agreement (TCA), under which data could flow freely from the EU to the UK. The General Data Protection Regulation (GDPR) adequacy decision confirms that the UK provides adequate protection for personal data transferred from the EU to the UK under the EU GDPR, whilst the Law Enforcement Directive adequacy decision makes the same assessment for personal data transferred from EU authorities responsible for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties. Both adequacy decisions include a 'sunset clause'. They will lapse on 27 June 2025 if not reaffirmed by the European Commission before then. During these four years, the European Commission will monitor the legal situation in the UK and could intervene at any time to withdraw these decisions if the UK deviates from the current level of data protection.

Trade

Following the UK's withdrawal from the EU, the GDPR was retained in UK law as the UK GDPR, with minor amendments to replace references to EU institutions with UK bodies. As the UK's data protection regime closely mirrors the principles, rights, and obligations of the EU GDPR, most personal data can flow freely from the EEA countries to the UK. However, the European Commission excluded transfers made for the purposes of UK immigration control from the scope of the GDPR adequacy decision in line with a recent judgment of the UK Court of Appeal, which ruled an immigration exemption in the Data Protection Act 2018 unlawful because it did not fully comply with the requirements of the UK GDPR. The Commission stated that it would reassess the need for this exclusion once UK law had been remedied.

On one aspect, the European Commission's adequacy assessment was heavily criticised, notably by the European Parliament. Its review of UK surveillance powers was considered to have glossed over UK deficiencies to conclude in favour of adequacy. This aspect of the adequacy decision may be vulnerable to legal challenge, with a risk that it is struck down. If this were to happen, organisations would have to rely on more adminstratively costly and burdensome alternative transfer mechanisms.

Once the GDPR adequacy decision was adopted, the UK government consulted on adopting a looser approach to data protection to 'unleash data's power across the economy and society' and enhance innovation and growth. Many respondents, however, called for caution and advised that proposed changes would need to be carefully balanced so that any divergence from EU legislation is sufficiently protective to ensure continuity in the EU adequacy decision. Too much divergence from its requirements risks the EU revoking the adequacy agreement with serious financial and legal consequences for British-based businesses.

When, following consultation, the UK government introduced its Data Protection and Digital Information Bill in Parliament on 18 July 2022, it did not propose radical divergence from the existing UK and EU data protection frameworks. The Bill was scheduled to have its second reading in the House of Commons on 5 September but this was postponed 'to allow ministers to consider the legislation further.' However, the government introduced the Retained EU Law (Revocation and Reform) Bill on 22 September. It proposes the 'sunsetting' (i.e. the repeal) of several data and information laws, including the UK GDPR, by the end of 2023. The Culture secretary Michelle Donelan declared early October 2022 that the government 'will

be replacing GDPR with [its] own business and consumer-friendly data protection system…whilst retaining data adequacy so businesses can trade freely.' It remains to be seen whether all reference to 'GDPR' or 'UK GDPR' will be removed whilst retaining core data principles in domestic law, when the Data Protection and Digital Information Bill proceeds. If the principles are not retained, the UK will be at risk of losing the EU-UK adequacy decision.

Policing and criminal justice

As regards cross-border information exchange and cooperation, the TCA sets out provisions that have been incorporated into UK law through the European Union (Future Relationship) Act 2020. Depsite these provisions UK agencies have found the clock turned back on them in some respects since the UK's withdrawal from the EU. They have lost direct access to certain sources of information and now rely on outdated mechanisms for dealing with current threats and modern policing environments.

Until the end of the transition period, the UK's policing and security databases were near-seamlessly integrated with those of EU member states. The UK made extensive use of the Second Schengen Information System (SIS II), which allows for real-time, frictionless sharing of information between enforcement officials and agencies of member states and automates alerts to police and border guards on wanted or missing persons. It was also part of the European Criminal Records Information System (ECRIS), which provides for standardised, electronic exchange of criminal records with set timeframes for requests and thus allowed UK authorities fast access to criminal records of EU residents. The UK no longer has access to SIS II or ECRIS. In place of SIS II, the UK has fallen back on the Interpol I-24/7 database. Whilst the UK is developing the Interpol I-24/7 system to make it faster and more efficient, its effectiveness will depend upon EU member states being willing to upload information to this database. And, in place of ECRIS the UK has developed the Criminal Records Information System (UK-CRIS) to connect with Member States' software and exchange criminal record data. As the twenty-day time limit for sharing criminal record data is longer than the ten-day period prescribed for data sharing via ECRIS, it is slowing down investigations. Nevertheless, the UK and Irish law enforcement agencies are striving to share such data with each other as quickly as possible to tackle cross-border criminality on the island of Ireland.

The TCA also provided that the UK could continue to exchange of information as regards DNA profiles, fingerprints and vehicle registration data on a temporary basis, and further provided for UK consultation on participation in the next generation of Prüm. If no agreement is reached, cooperation on these matters could be suspended. The TCA further established a cooperation agreement between the EU and the UK that ensures the transfer of passenger name records (PNR) to the UK by air carriers. Nevertheles, although retaining access to Prüm and passenger name records (PNR) is valuable, the loss of access to SIS II leaves a significant gap and will have major operational consequences.

The TCA also resulted in changes to the UK's access to the services of the European Agency for Law Enforcement Cooperation (Europol) and the European Union Agency for Criminal Justice Cooperation (Eurojust), bodies that facilitate cooperation between member states' police forces and prosecutors respectively. While the UK continues to cooperate with Europol and Eurojust, it is no longer a full member of either agency. Although UK representatives can attend certain Europol Heads of Unit meetings as observers, the UK can no longer influence the focus and prioritisation of operations for specialist analytical assistance. The UK has also lost direct access to the information held on the Europol Analysis Projects, although it continues to have access to the Secure Information Exchange Network Application (SIENA) messaging system. To remedy its loss of full Europol membership, the UK turned to bilateral cooperation with member states. During the transition period, the National Crime Agency (NCA) transferred several hundred live investigations onto bilateral channels and dispatched additional International Liaison Officers (ILO) to European capitals. Though significant, however, these efforts are insufficient to fill the gap left by the loss of full access to Europol.

Previously, the UK could send a European investigation order (EIO) – a legally binding request to gather evidence by a specific deadline – to EU countries but now relies on the Council of Europe's European Convention on Mutual Legal Assistance (1959), supplemented by provisions in the TCA, to facilitate the process. Indeed, the TCA provides timeframes for compliance (the MLA does not) and requests can continue to be made on an agency-to-agency basis with direct judicial supervision – the MLA system of states requires liaising indirectly through governmental departments. The TCA also gives agencies broad powers to obtain one-off binding requests for documents, records of witness interrogations by the police and formal court testimony from abroad. The new system continues to allow the cross-border use of covert surveillance and intelligence gathering.

The UK also continues to participate in Joint Investigation Teams (JITs) which enable member state authorities to coordinate and combine intelligence to facilitate complex, cross-border investigations, on condition that their operation is subject to EU law. However, communication channels are restricted from those previously available, which may impede the effectiveness of new and existing JITs and investigations.

Conclusion

TCA provisions allayed some concerns about the continued efficiency and effectiveness of cross-border policing and investigations, but significant challenges remain. Many of the capability gaps left by the loss of access to systems are being filled by alternative, less speedy systems and processes, and bilateral relationships. In the longer term, the UK will face an uphill battle to maintain its safety and security because of a loss of influence in Europol and Eurojust.

Intellectual property

Sabine Jacques

Although the UK government has sought to ensure continuity with EU rules in the post-Brexit framework for the protection of intellectual property (IP), a number of significant changes have resulted from the UK's departure from the EU. It is no longer possible, for example, for UK actors to seek EU-wide injunctive relief for infringement of EU trade marks (EUTMs) and Community Designs (CD) before a single domestic court or to take action in private international law that affects all civil law cross-border litigations. Copyright is the area where most activity has taken place, suggesting the path that the UK might take in relation to IP.

Modernising the legal landscape

As noted in 2021, the UK has chosen not to implement the Digital Single Market Directive (DSMD), adopted by the EU in 2019, when the UK was still a member. This instrument includes substantial provisions to regulate the control of creative works in the digital environment, facilitate activities carried out by cultural heritage institutions and improve contractual conditions for creators. Despite the UK's decision not to implement the directive's provisions, divergence between UK and EU regimes is likely be minor for two main reasons.

First, copyright had only partly been harmonised in the EU prior to Brexit. UK provisions already provided protections similar to those included in the DSMD, even if they were not identical in scope. This is the case, for example, for text-and-data mining, when the future is likely to be increasingly reliant on AI technologies requiring access to large datasets. Against this backdrop, identifying particular usages that do not require the prior authorisation of the copyright holder appears essential. Even if the UK does have a text-and-data mining provision in the form of Section 29A Copyright, Designs and Patents Act (CDPA) 1988, its scope differs from the DSMD. The UK Government has recently invited views on whether the UK provision should be amended (see below). Another example relates granting related rights for photographs or other visual works that already fall within the public domain. If the DSMD intends to eradicate this practice throughout the EU territory in Article 14, this had not been an option in the UK since before Brexit. Recent UK initiatives, such as the new copyright bill discussed below, include provisions that are similar to the DSMD. For instance, the new transparency obligation, contract adjustment and right of revocation provisions are comparable to articles 19-22, although the scope is more limited as it only applies to some authors and performers.

Second, the implementation of the DSMD has proven very difficult. Since the implementation varies so much between EU member states, the extent to which the UK and EU legal frameworks is difficult to discern.

The UK has also taken steps to reform copyright law, notably in regard to ensuring fair remuneration for the work of authors and performers. The 'Broken Record' campaign and the debate on the report produced by House of Commons Digital, Culture, Media and Sport Committee entitled Economics of Music Streaming and the Government's response are examples. At the time of writing, a cross-party group of MPs has held up the second reading for the Copyright (Rights and Remuneration of Musicians, Etc.) Bill. They want to keep the debate open and are inviting further economic evidence to support legal changes. If this Bill is adopted, it will introduce transparency, contractual adjustment, and revocation rights similar to those of the DSMD. It will also include stronger remuneration rights than in the EU.

Other changes concern moral rights for performances in audiovisual recordings and the extension of audiovisual performers' rights to nationals and residents of countries that are party to the Beijing Treaty on audiovisual performances. However, since the UK and the EU have only made a commitment to 'make reasonable efforts' to ratify this treaty, the exact divergence between the EU and the UK cannot yet be determined.

The UK Government has also held a consultation on the repeal of Section 52 CDPA which limits the term of copyright protection for industrially manufactured artistic works. In essence, if more than 25 copies of the work were industrially manufactured, then the term of protection was reduced to 25 years as opposed to the traditional term – creator's lifetime plus 70 years, generally applicable for creative works. During its review, the Government sought views on whether it should reinstate this provision, given that its repeal was originally motivated by EU harmonisation for works of applied art. Whilst the outcome of this consultation is unknown at the time of writing, there are mixed views on whether the UK can reinstate this provision given that the repeal was decided based on article 17 of the Design Directive which has made its way into Article 249 of the Trade and Cooperation Agreement.

Finally, in October 2021, the UK Intellectual Property Office launched a consultation on whether to amend the copyright and patent regimes in the light of AI activities. The consultation sought views on Section 9(3) CDPA on the protection of computer-generated works and whether to amend the text-and-data mining copyright exception. In its response, the Government chose not to change the protection of computer-generated works – the person making the arrangement enabling a machine to create a copyright protected work is deemed the author. However, the Government did announce its decision to amend the text-and-data mining exception to facilitate the use of copyright-protected works for machine learning. Whilst the exact scope of the provision is yet unknown, the UK seems to want to bring UK law in line with EU law (Article 4 DSMD). This could allow users to use copyright-protected works for commercial uses as long as these copyright works were lawfully accessed by the user and that the right-holders of works publicly available online have not objected to the use of their works for text-and-data mining purposes. However, it remains unclear.

Departing from EU case law

During the Brexit process there was some discussion as to whether the UK would still consider the interpretation of the Court of Justice of the European Union (CJEU) of EU concepts which have been implemented in UK law case law. Following Regulation 3(b) of the EU Withdrawal Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 and Section 6(6) of the European Union (Withdrawal) 2018 Act do provide for interpretation by UK courts. One party took advantage of this right to ask the UK Court of Appeal to depart from the CJEU's copyright case law on communication to the public in Warner Music v TuneIn. However, the Court of Appeal disagreed on the grounds that there have been no changes in either domestic or international legislation in this area and because of the complexity of the concept of 'communication to the public' (Section 20 CDPA). Without further interpretative guidance, the Court of Appeal decided it was best to recognise the experience of the CJEU in this regard and that departing from the EU acquis would not be appropriate at this point in time.

Further evidence that UK courts are unlikely to depart from CJEU case law anytime soon can be seen in the application of the recently introduced parody exception in UK law, which stems directly from the 2001 EU Information Society Directive. Given the formulation of Article 5(3)(k) of the Information Society Directive and the difficulties in its interpretation, the UK Court could have chosen to depart from the CJEU case law to endorse the interpretative historical development of the fair dealing exceptions. Yet, in Shazam v Only Fools, the Dining Experience, the sitting Deputy High Court Judge fully endorsed the CJEU decision in Deckmyn, thereby interpreting the parody exception for the first time. The Court of Justice of the European Union interpreted for the first time and the UK applied it for the first time.

Conclusion

Although the UK is now free to depart from the EU regulatory framework for IP, it does not have an entirely free rein. The UK's freedom to legislate is constrained by international treaties to which it is a signatory party, the TCA, and FTAs the UK has entered into. Furthermore, EU IP legislation and CJEU case law continue to have an influence on the development and application of UK IP law.

Part VI.

Agriculture, food and fisheries

Agriculture

Carmen Hubbard

Agriculture is one of the areas where policy change has been most dramatic following the UK's exit from the EU. Replacing the EU's Common Agricultural Policy (CAP) has already had an unprecedented impact on British farming according to Graham Redmond (2022) *The John Nix Pocketbook for Farm Management for 2023*[1], an authoritative source on farm business management, and change is likely to continue.

Businesses have been frustrated by changes introduced since the end of the transition period and despite the EU-UK Trade and Cooperation Agreement (TCA). The changes have hindered exports and imports, and created havoc at the borders. 'Red tape' and trade facilitation costs, such as additional veterinary certificates, have increased. The change has also brought border controls for dairy and meat products, and export bans on seed potatoes and live animals from the UK. The impact has been felt not only by farmers and others across the supply chain, but by consumers who have seen an increase in food prices and taxpayers who have to cover the bill for trade facilitation costs. Moreover, since agricultural policy is devolved, transition from the CAP to new domestic policies is likely to take place, 'at different speeds and policy will gradually diverge between each UK nation' (Redman 2022:142). Trade policy, whilst not devolved, will also have an impact on the industry post Brexit.

Key policy changes

Leaving the EU entailed leaving the CAP and the three-and-half billion pounds per year in subsidies received by UK farmers. CAP-type subsidies, including direct payments known as 'farm income support', will continue to be paid to British farmers at least until 2024. They will be phased-out by 2028 and replaced for example with schemes informed by the principle of 'public money for public goods' in England or by 'tracks' in Scotland. Farmers and other land managers will be paid for delivering (primarily) environmental benefits rather than the amount of land they farm. However, policies are different across the four nations. Delinking income support from land is specific to England, though Wales may adopt a similar approach, whilst Northern Ireland will continue direct payments linked to area base (see next section).

Central to the delivery of the new payment system in England is the Environmental Land Management Scheme (ELMS), the main tool for delivering the key elements of the government's twenty-five year Environment Plan including support for the government's net zero ambitions. ELMS aims to support farmers to provide public goods (e.g., better air and water quality, improved soil health, higher animal welfare standards, environmental outcomes, climate change management) – alongside food and fibre. In England, the government also envisages a transition to more sustainable land management practices, via three main ELMS components– the Sustainable Farming Incentive (SFI), the Local Nature Recovery Programme (LNRP) and the Landscape Recovery Scheme (LRS) – which should be fully operational by 2025.

There has already been some progress with a number of pilot projects. For example, the first stage of the SFI began at the end of June 2022 and the first round of LRS projects is under way. An exit scheme has also been introduced to encourage English farmers to leave or retire. The SFI also includes an Annual Health and Welfare Review, as the initial phase of the Animal Health and Welfare Pathway. The Pathway aims 'to push forward and support the gradual and continual improvement in farm animal health and welfare'. Farmers will be able to apply for an annual DEFRA-funded visit from a vet, who, amongst others, will prepare a written report with agreed recommendations for improving animal health and welfare. This is due to start towards the end of 2022 and run for three years. However, progress has been slow and there is little detail about how ELMS will support the sector, especially on whether it will fill the gap left by the end of direct payments.

1. Redman, G. 2022. *The John Nix Pocketbook for Farm Management for 2023*. 53rd Edition. Published: Melton Mowbray: Agro Business Consultants.

Regulating agriculture

Despite claims that leaving the EU, and implicitly the CAP, would end EU bureaucracy, the sector remains highly regulated. To illustrate, more than half of the 80,000 pages that form the EU legislation were dedicated to the CAP. Under the CAP farmers received subsides subject to 'cross compliance', a minimum set of rules and standards of good agricultural and environmental practices which farmers and land managers should comply with to receive CAP payments. As CAP-type subsidies are still available for British farmers, most of the cross-compliance rules were retained within the UK, forming a so-called 'regulatory baseline for agriculture'[2]. Although from 2024, cross-compliance will cease to be used as the main method to inspect farms, the rules will continue to apply. Currently, the regulatory baseline comprises around 150 laws and rules and is formed of primary legislation, such as the Agriculture Act 2020, and secondary legislation. Most of these rules (119 laws) relates to farm animals, particularly to disease prevention. The Agriculture Act sets out measures to increase farm productivity and fairness along the food supply chain and includes provisions regarding market intervention and compliance with the World Trade Organisation (WTO).

Moreover, since agricultural policy is a devolved competence, each UK nation has designed its own domestic policy. The Agriculture Act 2020 thus provides the primary legislative framework for future support mainly for England, with a single part (Part 7) covering Wales and Northern Ireland.

Scotland has published its own Agriculture (Retained EU Law and Data) (Scotland) Bill (November 2019), which allows the Scottish government to continue current CAP measures, including retention of direct payments in full, at least until 2024-2025. However, from 2025, the payments will be subject to some 'conditionality' related to environmental benefits, such as greenhouse gas emission, biodiversity, and soil, and animal health and welfare, and applied to half of direct payments. Scottish policy continues to be most closely aligned with the CAP and is framed to address climate issues, with new legislation expected in 2023, Redman (2022)[1].

In contrast, the Welsh government, which aligns more with Westminster, outlined its own proposals for a new Sustainable Farming Scheme (SFS) in July 2022. This led, to the adoption of the first Agricultural (Wales) Bill for the Welsh farming industry, on 26 September 2022. It aims to support sustainable food production while conserving the Welsh countryside, culture and language. This will be applied via SFS which is due to be in place from 2025. A transition period from April 2025 to the end of March 2029 is also envisaged for farmers who do not want to take part in SFS. However, direct payments will be phased-out during this period.

The absence of a stable government in Northern Ireland has made it difficult and slowed down the pace of policy change. The Future of Agricultural Policy Decisions in Northern Ireland, published in March 2022, will be delivered through fourteen workstreams, which cover, for example Resilience Measures, Farming for Nature Package, Farming for Carbon, Supply Chain Measures, and Environmental Assessments. An important aim is to continue to support farmers via a Farm Sustainability Payment, similar to CAP-type payment, but the current cross compliance will be replaced with a set of simplified farm sustainability standards.

Regulating Agricultural Trade

Although agricultural policy is devolved, trade is not. Following Brexit, the UK has set its own trade policy, which also has significant potential implications for the farming industry in the UK. First, this includes tariffs with countries with which the UK does not have a trade deal. The EU Common External Tariff (EUCET) was replaced with the UK Global Tariff (UKGT), which came into force on 1 January 2021. Despite some simplifications, the UKGT is very similar to EUCET, as most of the tariffs were kept at a level similar to the EU. Thus, the level of protection for the UK farming industry remains similar as under the EU single market. Nevertheless, maintaining high tariffs also makes imported goods more expensive and pushes up domestic prices.

As well as changing little in terms of trade with countries with which the UK did not have a specific trade deal before its departure from the EU, the UK replicated its post-Brexit free trade agreements (FTAs). The UK has signed new FTAs with Australia and New Zealand, two countries with which the EU does not have an FTA. Trade negotiations with the US, the Mercosur Trade Bloc (Argentina, Brazil, Paraguay and Uruguay), and India are also envisaged. The UK government has also started negotiations with the Comprehensive and Progressing Trans-Pacific Partnership (CPTPP) aimed to be finalised by the end of this year. Though post-Brexit

agreements have had a relatively modest impact on the UK farming industry so far, future trade deals with big players could put significant competitive pressure on sectors such as beef, lamb and dairy. In its assessment of the FTA with Australia, the House of Commons Environment, Food and Rural Affairs Committee pointed out that the farming sector will lose out. The National Farmers Union (NFU) has expressed concern about the cumulative effects of new trade deals on the farming industry in the UK over the medium term.

While trade between the UK and EU has certainly become more difficult for exporters since January 2021 due to non-tariff barriers – checks, paperwork, and delays at the borders – the UK has repeatedly postponed import controls on EU goods[2]. The UK's Border Operating Model, and full customs declarations and pre-notifications for importing agri-food products subject to Sanitary and Phytosanitary (SPS) regulations, due in January 2022, have been postponed. The requirement for further Sanitary and Phytosanitary (SPS) checks on EU imports currently at destination to be moved to Border Control Post, the requirement for safety and security declarations on EU imports, the requirement for further health certification and SPS checks for EU imports, and prohibitions and restrictions on the import of chilled meats from the EU were all supposed to come into force from 1 July 2022 but have been further delayed. The government also postponed introducing certification, ID and physical checks, by commodity groups for products of animal origin, animal by-products, plant and plant products from 1 November 2022. No further import controls on EU goods will be introduced this year. Instead, a Target Operating Model is expected to be published in autumn 2022 to set out a new border import controls regime that will be introduced by the end of 2023.

The Target Operating Model, which aims to apply the latest digital advanced technology, will apply to goods from the EU and the rest of the world. However, it will not cover the movement of goods under the Protocol on Ireland and Northern Ireland, which remains subject to EU rules and regulations covering agricultural production, food and animal welfare standards (see 'Regulation after Brexit: Northern Ireland' in this report). Interestingly, there has been a significant increase in trade between Northern Ireland and the Republic of Ireland, given the that Northern Ireland remained in the EU single market for these specific goods. For example, the Northern Ireland agri-food exports to Ireland have increased by 29 per cent in 2021 (January-August) compared to 2019.

Conclusion

Brexit has brought and will continue to bring significant changes to the UK farming industry. From a policy point of view, CAP has been replaced by new domestic policies that vary to some extent between the four nations. While there has been some progress, particularly in England, implementation of the new regime(s) is slow. ELMS 'remains a work in progress and is hugely experimental. Exactly what support will deliver public goods is subject to uncertainty and regarded with trepidation in some sub-sectors, particularly upland livestock'[3].

Research on Brexit has shown that hill farms, particularly beef and sheep, are likely to be the most affected given their heavy dependence on subsidies. A report by the Rural Business Research (autumn 2021) stressed that the reduction in basic payment schemes remains a particular concern to the upland areas. The report also points out that livestock farmers (e.g. beef) continue to be frustrated by the constant negative media coverage of red meat and links to climate change, when trade deals with countries such as Australia and New Zealand may increase the carbon footprint. However, not all farmers rely on subsidies – but farming is a business which should be viable and sustainable, and generates profit.

Agriculture does not exist in isolation; economic and geopolitical factors will have significant impacts on the future of farming worldwide in the medium and long term. This will compound the effects of Brexit in the UK. Any impact on the sector affects not only farmers and their rural communities, but the entire food supply chain, downstream and upstream. However, the extent of the impact on farmers, food suppliers, land use, the countryside and wider rural communities, and all of us as food consumers, remains to be determined.

2. Redman (2022). See supra footnote 1
3. Lord Curry of Kirkharle cited by Redman (2022: iii). See supra footnote 1

Food

Tola Amodu

Regulating food safety presents challenges that are not necessarily present in other domains. The main concern has been to ensure biosecurity in the food chain by monitoring and addressing emerging risks. In the EU, these requirements are harmonized to enable the free movement of food and feed. The aim has been to ensure maximum safety while minimizing costs to producers, consumers and retailers.

Although the UK's exit from the EU has created a new landscape, it would be difficult for the UK to reform food safety regulations without posing significant risks to food safety or increasing costs. Moreover, the Northern Ireland Protocol, notably in Annex 2, includes a number of food-related provisions intended to protect the integrity of the European internal market, notably in the area of sanitary and phytosanitary standards.

Regulating food safety

The EU's 'from farm to fork' regime, brought together within the General Food Law Regulation (EC) No 178/2002, sets out an overarching legal framework to ensure the safety of food and feed. The same Regulation established the European Food Safety Agency (EFSA), which provides scientific advice to the institutions of the EU. It includes rules on the traceability of food of animal origin, and governs the RAPID alert system for food and feed ('RASFF'), which provides control authorities with a tool for notifying risks to human health deriving from foodstuffs, how this information is transmitted to member states, and the information that food business operators must possess (see also Regulation (EU) 16/2011).

In the UK, the Food Safety Act 1990 was the cornerstone of the legislation which, together with other directly applicable EU regulations, gave effect to that approach. Sections 2 and 3 of the European Union (Withdrawal) Act 2018 sought to preserve EU derived domestic legislation and incorporate those applicable EU laws operative immediately before exit. EU-derived legislation relating to food safety, including the General Food Law Regulations continue to apply in the UK albeit with some changes reflecting the return of sovereignty to the UK. Due to the current alignment of the UK with the EU's sanitary and phytosanitary regimes, regulators see no increased risk to consumers in terms of safety in relation to EU imports despite the UK's departure. The FSA indicated in March 2021, for example, that it did not anticipate any imminent increase in food safety risk to UK consumers. However, the Withdrawal Act (Schedule 8) allows ministers to amend existing laws in the domains affected by Brexit through delegated legislation without full legislative scrutiny. Free trade negotiations with third countries are likely to be problematic, however, unless the country in question has existing arrangements with the EU as was the case with Japan with whom the UK concluded a Comprehensive Economic Partnership Agreement (CEPA) – the first trade deal to be made with a non-EU nation).

Domestic delegated legislation

The General Food Law (Amendment etc.) (EU Exit) Regulations 2019 amended the General Food Law Regulation 178/2002, and revoked Commission Regulation (EU) 16/2011, thereby ending the access to the RASFF for UK food regulators. Since food safety law is 'EU heavy', the prospect of future divergence at least exists in theory. The 2019 Regulations mirror EU regulation, but establish a 'new' market and make no reference to the EU. They open the possibility of a shift in substantive effects and the potential for future friction, especially if the EU introduces new rules for food safety but the UK chooses not to follow.

Enforcement

In the EU, risk assessment functions are centralised. The ESFA collects and communicates intelligence to the institutions of the EU, which takes decisions on risk management that it passes on to member states to implement. At the national level, they were implemented in the UK the Food Standards Agency (FSA), a non-ministerial government department, which works with local authorities in England, Wales and Northern Ireland, to enforce standards.

Following the UK's exit from the EU, the enforcement landscape has become more complex. The FSA must now work with UK rules, EU rules (which apply in Northern Ireland), and the devolved authorities, including Food Standards Scotland, and the Department of Agriculture, Environment and Rural Affairs (DAERA) in Northern Ireland.

The Food Standards Agency's (FSA) main responsibility is to ensure that food is safe, public health is protected, consumers can be confident, and future trade systems operate smoothly within and external to UK borders. Four key principles have underpinned the FSA's approach since Brexit. The system should:

- be at least as effective or more effective in protecting public health,
- maintain or increase confidence in the regulatory regime,
- minimise disruption to consumers and industry, and
- achieve as unified a system as possible in consumers' interests while respecting devolution arrangements.

For the most part the FSA continues to adopt a risk-based approach, a key component of EU regulatory strategy. Since Brexit, it now takes decisions on risk management decisions that were previously undertaken at EU level. However, the loss of full access to the RASSF, along with the loss of membership to EFSA, has dealt a significant blow since sharing scientific and evidential intelligence with other institutions is key to maintaining food safety and biosecurity. In 2017, RASSF issued over 3800 original notifications, 942 of which were classified as an 'alert and therefore presented a serious risk. Although it still receives information on notifications, including third country access for notifications concerning Northern Ireland, the FSA uses the World Health Organization/Food and Agriculture Organisation's International Food Safety Authority Network (INFOSAN) to issue notifications relating to UK food safety incidents and various surveillance dashboards to monitor and assess food risks.

The FSA has also sought to engage with third countries on food safety incidents and issues, as well as to monitor food supply chains to better understand possible food safety risks as they evolve. While the UK continues to rely on its European neighbours as a significant supplier of and trader in the global food market, standards are likely to continue to mirror one another, first to minimise transaction costs for market participants and second, because EU food standards are recognised as some of the highest in the world and divergence is likely to be harmful.

Conclusion

Food safety highlights several of the regulatory issues that confront the UK after Brexit. The FSA has seen its responsibilities increase, but it has lost access to important tools and resources. There are also constitutional questions. As well as the lack of parliamentary scrutiny on rule changes – and trade deals, which could include provisions relating to food – there is potential scope for conflict between London and the devolved governments. Finally, although the UK is able in theory to introduce its own rules, since EU food standards are highly regarded, divergence is likely to prove costly. Government's current ambition to distance itself further from existing EU regulations will inevitably prove problematic and in the extreme could result in both conflict in trading relations with EU countries and, more importantly a lowering of standards for UK consumers.

Fisheries

Christopher Huggins

Despite its relatively small size – fishing accounts for only around 0.1% of UK gross value added to the UK economy – fisheries was one of the key political issues in Brexit. Employment was one factor: 10,724 fishers and another 19,000 people-plus work in the seafood processing industry. The importance of coastal communities spread around the UK was another. But control over fisheries also became symbolic of national sovereignty. As a result, fisheries became a major issue in negotiations with the EU.

Although the UK left the EU Common Fisheries Policy (CFP) on 1 January 2021, the terms of the UK-EU Trade and Cooperation Agreement (TCA) provided for a phasing out period for reducing the number of EU vessels with access to UK waters. Moreover, new customs and paperwork requirements came into effect, which make exporting into the EU more costly and cause time delays for UK undertakings, creating discontent in the sector.

Meanwhile, the UK is still in the process of designing governance of fisheries policy post-Brexit, in particular in relation to the cooperation with the devolved authorities.

Regulation

Despite the political importance attached to fisheries and the call among many UK fishers to leave the EU's Common Fisheries Policy (CFP), the reality is that, at least initially, very little has changed from a regulatory perspective. Indeed, the European Union Withdrawal Act 2018 rolled many of the CFP's provisions over into UK law. While there have been some changes already, for example a ban on the controversial practice of pulse fishing, many of these changes were already planned under the CFP anyway. Overall, however, the technical regulations that currently govern day-to-day fishing activity are mostly unchanged, albeit packaged within a UK legal framework and at least until they are amended at the UK level.

Looking ahead, however, the future of this framework and the shape of UK post-Brexit fisheries policy are more unclear. The UK has set out broad aims for the future of fisheries policy in the 2018 Fisheries White Paper relating to the sustainability of fisheries, the use of scientific evidence to inform decisions and meeting international obligations, which are reflected in the 2020 Fisheries Act as overarching 'fisheries objectives'. But much of the detail about what a post-Brexit fisheries policy will look like has yet to be elaborated. Key debates – concerning, for example, how quota should be allocated across the UK's diverse fishing fleet – have not been fully addressed.

Governance

One reason is that fisheries policy is a devolved competence, with governments in Northern Ireland, Scotland and Wales responsible for fisheries in their respective territories, while the UK government through DEFRA and the Marine Management Organisation decides policy in England. From 1 January 2021, these four governments assumed responsibility for both making and implementing UK fisheries policy.

While there is a recognition that London, Belfast, Cardiff and Edinburgh need to work together to ensure a common approach and limited divergence in fisheries, the issue has become embroiled in the politics of devolution. The devolved governments have been keen to capitalise on the opportunity to increase their competencies in this area, especially Scotland, which by far dominates the UK's fishing industry in terms of the weight and value of fish caught. The fishing and aquaculture industry in Scotland contributed just under 70 per cent of the UK industry total in 2020. However, because of the need to work with neighbouring

coastal states and how dependent the fishing industry is on export markets, fisheries policy cannot operate in isolation from international relations and international trade. Although the devolved governments attend the TCA Specialised Committee on Fisheries and the annual quota negotiations with the EU, similar to how they were involved in fisheries council meetings while the UK was an EU member state, Westminster has nevertheless been keen to retain tight control over the areas that fall under its reserved competencies. To manage these competing interests the Fisheries Act 2020 made provision for a 'Joint Fisheries Statement, where the overall strategy could be agreed between the UK government and devolved nations. A draft joint statement for consultation was published in January 2022, but as of October 2022 there has been no progress in taking this forward.

This points to a wider issue affecting the development of post-Brexit fisheries policy. The UK has lacked sufficient administrative capacity to develop a longer-term vision beyond the high-level aspirations already set out in the Fisheries White Paper and Fisheries Act. Partly, this reflects a long-term lack of investment in staffing within DEFRA, which only started to increase after the EU referendum. More broadly, however, the UK government and its devolved administrations have had to slowly develop the necessary governance and policy-making capacities in fisheries policy, which hitherto rested at the EU level. This has been exacerbated by political instability, which has diverted ministerial attention away from developing a strategic approach.

UK-EU relationship

Although many day-to-day regulations are likely to remain unchanged in the short-term, there have been significant changes in terms of access to fishing waters. In 2021, EU vessels lost the automatic right to fish in UK waters and access will be determined by a licencing system, administered by the UK Single Issuing Authority on behalf of the four fisheries authorities (the devolved governments, and the Marine Management Organisation in the case of England). However, the same will apply in reverse. UK vessels, which caught £90.5 million worth of fish in EU waters in 2018, no longer have the automatic right to fish in EU member states' waters unless they have a licence. Although access is now licensed as part of the trade deal agreement reached with the EU, access to fishing waters is subject to a five-and-a-half year adjustment period. During this time, changes to access will be gradually phased in, with the UK gradually increasing the share of its catch in its own waters.

Furthermore, as a result of leaving the single market, fishers and seafood exporters have to negotiate a number of administrative burdens. Fishers wanting to export their catch need to maintain accurate records, log books, landing declarations and catch records. They have to apply for catch certificates from UK authorities. Fishers wanting to land direct into EU ports need to register with the North East Atlantic Fisheries Commission (NEAFC), and to declare their intention to land in advance, and even then are only able to land their catch in designated NEAFC ports. More broadly, customs checks and other non-tariff barriers can delay the transport of perishable seafood produce. These administrative burdens and potential barriers to trade lead to concern that fish and seafood exports could face delays of up to 48 hours, which would threaten the viability of exporting overseas. Around 80 per cent of the UK's catch is exported (with around 70 per cent of the seafood consumed in the UK imported), with France (19 per cent), the Netherlands (15 per cent), Spain (10 per cent) and Ireland (8 per cent) the largest markets. Seven of the UK's ten largest export markets for fish in 2021 were EU member states. There was significant concern among many in the fishing industry about the potential barriers to trade. Some of these concerns have already been borne out in reports of delays at borders and spoilt produce, and a recent report by the All Party Parliamentary Group on Fisheries on fishing industry perspectives noted Brexit has had a largely detrimental impact on business turnover, labour and exports.

Furthermore, businesses exporting to the EU have to adapt to comply with any changes in requirements when the EU updates its policies. As a result of the new EU animal health law that came into force in January 2022, businesses that export fishery and aquaculture products for human consumption to the EU and Northern Ireland must now use export health certificates (EHCs).

Leaving the CFP does not allow the UK to operate in isolation. Fish have no conception of international maritime boards and significant fish stocks in UK waters are in fact shared with the EU, as well as other

coastal states, including Norway and the Faroe Islands. The UN Convention on the Law of the Sea places expectations on coastal states to co-operate with their neighbours to ensure the sustainable management of shared fish stocks. This interconnectedness is reflected in the TCA itself. Despite the UK government's attempts to separate fishing from wider aspects of a trade agreement, it remains the case that fisheries is inherently linked to the UK's wider relationship with the EU. Indeed, while either party has the right to terminate the agreement on fishing, doing so also terminates agreements on other sectors within the TCA on including trade, aviation and transport.

And while an agreement has been reached with the EU and the TCA is now in place, local disputes such as that over the issuing of fishing licences to French vessels in Jersey waters during 2021, show that this new fisheries relationship with the EU remains unstable. And the fisheries part of the TCA is due to be reviewed in 2026 anyway. To this end, the UK and EU are likely to be engaged in sustained dialogue, negotiation and co-operation on fisheries for the foreseeable future. Indeed as a marker of this, of all the Specialised Committees set up under the TCA, the Fisheries committee has met the most. Not only do the UK and the EU have to negotiate on annual catch quotas, but, under the TCA, the whole agreement on fisheries will be reviewed in 2026.

Conclusion

Overall, the post-Brexit assessment on fisheries is mixed. On the one hand the primary objective of leaving the CFP and gaining control over the governance and regulations of fisheries policy has been achieved. Notwithstanding its international obligations, the UK can control who fishes in its waters and has the competence to establish its own regulations on what post-Brexit fisheries policy looks like. However several issues remain. Changes to fisheries access are being phased in under the TCA rather than introduced immediately as many were led to believe. And a long-term strategic vision for the future of UK fisheries policy is still lacking as government struggles to manage the relationship with the devolved administrations, a lack of administrative capacity, and wider political instability. In this context the fishing industry has struggled to contend with new export rules and processes and there is widespread discontent within the industry.

Part VII.

Environment and climate change

Environment and chemicals

Charlotte Burns, Viviane Gravey, and Andrew Jordan

In the period between the EU referendum and the end of the transition period on 31 December 2020, there was little substantive change to UK environmental policy derived from the EU. During four-and-a-half years of animated political debate and negotiation, moves were made to assuage concerns that the vote to leave would trigger a significant weakening of UK standards. Some of these were implemented quietly to ensure legal continuity. But others involved substantial items of primary legislation, introduced in response to concerted and effective lobbying by Greener UK, a coalition of environmental pressure groups, and pressure from EU trade negotiators.

'Retaining' 500 or so items of EU environmental law prevented the emergence of regulatory gaps after the end of the transition period, thereby assuring a strong degree of continuity. The UK government also implemented new measures to avoid 'governance gaps'. For example, the Environment Act 2021 provided for the setting of long-term targets, which would be overseen by a new regulatory body, the Office for – Environmental Protection (OEP).

Some of the changes were intended to respond to an electorate that had become increasingly concerned with environmental issues. In 2018, for example, the government of Theresa May government adopted a 25-five-year plan to 'improve the environment' within a generation. One of her last acts as prime minster was to commit the UK to a legally binding net zero target. In its 2019 election winning manifesto, the Conservative Party, led by Boris Johnson, promised to be a global environmental leader and undertook specifically not to weaken national standards after Brexit.

Finally, and independently of Brexit, the UK government is bound by numerous international environmental laws negotiated under the aegis of the United Nations.

What has changed since the end of the transition?

After a period of relative stability during the transition period, a range of options has opened up since January 2021 relating both to regulation – law and policy – and governance – the functioning of regulatory bodies – as politicians offer competing visions of UK policy outside the EU.

Regulatory changes

Harmonisation of standards has been a key driver of EU environmental policy, with the aim of preventing a deregulatory race to the bottom. In the EU, rules designed to regulate how environmentally relevant products such as cars, lorries and white goods were manufactured and marketed were adopted as single market measures. From the very start of the Brexit negotiations, the EU was concerned that the UK may in future weaken its standards in order to secure a competitive advantage for British businesses. In the UK, meanwhile, coalitions such as Greener UK, together with environmentally-focused businesses, implored negotiators to strike a trade deal that bound both sides into a pattern of policy progression – or what the then Secretary of State for Environment, Michael Gove, referred to as 'rivalrous emulation'.

In the negotiations on the future trading relationship, the EU pushed the UK to sign up to binding non-regression ('level playing field') commitments on environmental standards, insisting that the UK could not have the quota-free, tariff-free access for UK goods that it sought without such safeguards. However, the UK government held out until the end of the negotiations. At any point during the Environment Bill's passage through Parliament, it could have held to its commitment to preserve a high level of environmental protection whilst maintaining its 'sovereignty first' position by inserting a 'non-regression' clause. But the government steadfastly refused to do, despite repeated calls from opposition MPs and environmental groups. In the end, the environmental parts of the Trade and Cooperation Agreement (TCA) were some of the very last to be

finalised, and generally fell well short of the EU's expectations, although they go further than other trade agreements brokered by the EU, notably in relation to the range of retaliation measures that can be deployed to prevent environmental standards from regressing.

In early 2022, the UK set out plans for how it intended to regulate outside the EU in its Benefits of Brexit paper. The paper dealt mainly in generalities, but included specific plans for reforming habitat protections and introducing stronger actions to reduce single use plastics. Although the document sought to showcase the Benefits of Brexit in England, there was very little that the UK could not have implemented while still a member of EU.

In June 2022, Jacob Rees Mogg, the UK Minister for Brexit Opportunities, initiated a potentially more fundamental process by changing the 2,400 items of 'retained EU law' (see 'Retained EU law' in this report). He declared that only through this reform would the UK be 'finally' able 'to untangle [itself] from nearly 50 years of EU membership'. Crucially, 570 of the 2.400 items (24 per cent) are the responsibility of DEFRA, far more than any other department. Moreover, since environmental policy is a devolved competence, the Westminster government's remit only covers England.

Within the environmental sector there is very little appetite for wholesale deregulation envisaged by Rees-Mogg. Even the Secretary of State for Environment until September 2022, George Eustice, a strong supporter of Brexit, made clear his preference for a targeted approach, focusing on strategic priorities such as reforming habitat protections and facilitating new technologies such as gene editing.

The Environment Act 2021 includes a departure from EU norms in some respects in its application in England – devolved authorities in Northern Ireland, Scotland and Wales have competence in this field and have made their own choices (see below). In the EU, policy principles such as the 'precautionary principle' and 'polluter pays' are entrenched in the founding treaties. The Westminster government, on the other hand, has opted to enact them in England via administrative means (a policy statement), which has the effect of exempting some areas including defence and fiscal policy.

In other respects, Westminster is simply adapting the EU's approach by, for example, proposing long-term environmental targets – ten in total for England – in the Environment Act. These have taken time to adopt and have been extensively criticisedby environmental groups. Without the targets in place, Westminister cannot publish the next Environmental Improvement Plan for England – a successor to the 25-Year-Environment -Plan. Had the UK remained in the EU, it would have relied on the eighth Environmental Action Programme, which the EU formally adopted at the end of 2021.

Finally, the other home nations are charting their own policy paths. The Scottish Government wants to dynamically align with EU rules, while the Northern Ireland Protocol requires Northern Ireland to remain aligned to some environmental EU rules (see 'Regulation after Brexit: Northern Ireland' in this report). Wales, meanwhile, has decided that there is no need for a statement on policy principles.

The UK government's highly controversial Internal Market Act seeks to create a new, UK-wide level playing field, and could curtail the devolved nations' ability to chart their own regulatory paths. Gradually, common frameworks are being agreed between the four nations to ensure a harmonised approach, but progress has been slow (see 'Regulation after Brexit: Scotland and Wales' in this report). By mid-2022, DEFRA had struck provisional frameworks covering products that are physically traded across borders such as fertilisers, pesticides and ozone depleting substances. Many more difficult issues remain to be addressed.

Governance changes

Originally, the UK Government denied that Brexit would open up governance gaps but was eventually forced to create the OEP by a combination of weight of argument and parliamentary arithmetic.

The OEP has four responsibilities:

1. Enforcing environmental law: it has already started investigating the combined failure of Ofwat, the Environment Agency, and DEFRA to regulate combined sewer overflows under the Water Industry Act 1991.

2. Scrutinising improvement plans and targets: the Act requires DEFRA to report on its own progress annually and review its Environmental Improvement Plans. The OEP will eventually review these reports and the Government has a duty to respond to its recommendations. In 2022 the OEP fired a shot across its bows, advising that the draft biodiversity target was unlawful.

3. Advising government on environmental law. The OEP has already advised on the draft statement on environmental principles, suggesting areas where it can be strengthened.

4. Scrutinising and monitoring the implementation of environmental law. Between 1 January 2021 and October 2022 the OEP had received 39 complaints (four for Northern Ireland, 34 for England, one for Scotland) about suspected breaches, of which 15 were immediately closed but 13 remain open.

Although the OEP lacks the European Commission's power to fine governments, some environmental groups are hopeful that it may be nimbler and more targeted in its activities. But doubts remain about its administrative capacity and ability to hold the UK government fully to account.

As with regulation, the four nations have adopting different approaches to environmental governance. In February 2022, the Northern Ireland Assembly approved the OEP as the oversight body in Northern Ireland. The OEP is currently recruiting new staff in Northern Ireland so that it can work across what are in effect two relatively different regulatory systems. Wales still has no formal oversight body. An assessor has been appointed on an interim basis to consider public complaints about the functioning of environmental law in Wales.

Meanwhile, the European Union (Continuity) (Scotland) Act 2021 gave the Scottish government the power to establish a new oversight body, the Environment Standards Scotland (ESS). It is considerably smaller than the OEP and is accountable to parliament rather than government. It is also grappling with the additional logistical challenge of overseeing the Scottish government's commitment to dynamic alignment with EU rules.

Finally, the general policy to leave EU regulatory agencies has exacerbated emerging governance challenges. The UK opted to sever formal links with the European Environment Agency (EEA). Although the EEA has no regulatory powers – its role is to collect data and publish reports on the state of the environment – it plays a valuable role in assessing environmental trends and identifying new policy priorities. The UK could have retained associate membership but declined to do so. The UK continues, however, to report Northern Ireland-specific data to the EEA in areas covered by the Protocol on Ireland and Northern Ireland.

Chemicals policy

As a new regulatory framework slowly emerges across the UK, businesses that want to access the EU market face strong market-led pressures to follow EU rules. The chemicals sector has emerged as an area of particular concern. The EU system for the Registration Evaluation and Authorisation of Chemicals (REACH) requires substances manufactured in, or imported into, the EU to be registered with the European Chemical Agency (ECHA).

During the Brexit negotiations, the UK decided to end its membership of ECHA and leave the EU REACH process. The UK replaced the EU process with UK REACH, its own system of compulsory registration and licensing for chemicals supplied in the UK. Responsibility for the system was given to an existing UK body, the Health and Safety Executive (HSE). To ease the transition, the UK allowed some existing EU regulations and authorisations to be transferred to the UK system. It also extended the deadlines set in the initial transitional provisions for companies to meet the full data requirements of UK REACH.

The new system has attracted considerable criticism (see also 'Trade in goods' in this report). First, it absorbs significant resources. The budget of the HSE's Chemicals Regulation Division's increased by 39 per cent between 2018 and 2023 and its head count grew 46 per cent (2020-2022). No less than 25 per cent of staff time was spent on training in the first year of operation. Second, businesses have expressed concern about the spiralling cost of the new regime. A DEFRA impact assessment of a proposal to further extend the deadline

for companies to submit safety data put the additional cost at between £1.3bn and £3.5bn. In a recent report, the National Audit Office estimated that it will take another four years before the HSE reaches full capacity.

Third, businesses wanting to manufacture or supply chemicals face additional costs and duplication if they want to trade in both the UK and the EU. When the UK was part of the EU, businesses had to comply with a single regulatory regime and interacted with a single regulator. Since Brexit, they have to register with two authorities and pay the associated testing costs. Moreover, EU REACH is preparing to significantly expand the scope of its work and update its processes, which will have implications for UK businesses. The TCA provided for discussions to take place between UK and EU regulators on their respective work, but these have not yet started.

Conclusion

The UK faces at least two challenges in plotting a new strategic direction in environmental regulation post-Brexit. The first is that four nations of the United Kingdom favour different paths. While the Truss government in England was eager to diverge, the SNP government in Scotland prefers to remain aligned with EU regulation. Given the different underlying attitudes to EU membership, tension between the home nations on environmental issues has arguably never been greater. Second, environmental standards remain a flashpoint in EU-UK relations, especially when the Truss government voiced ever stronger support for a radical deregulatory approach, while the EU pressed ahead with the its European Green Deal. But if the UK regresses too much, the EU could suspend parts of the TCA, potentially triggering a full-scale trade war.

Climate change

Brendan Moore and Andrew Jordan

For decades, the UK has been an international leader in many fields of climate change policy. The UK Climate Change Act 2008 sets legally binding targets to cut greenhouse gas emissions by 78 per cent by 2035 and reach net-zero emissions by 2050. Internationally, the UK has made a wide range of commitments under the 2015 Paris Agreement and hosted the international climate negotiations in 2021 – a year-long diplomatic process known as 'COP26'. UK climate policy has also been strongly influenced by the EU, which has developed an extensive policy and governance system for addressing climate and energy issues. When it was a member state, the UK often pushed the EU to adopt more stringent targets and shorter implementation periods.

Brexit has changed the opportunities and challenges for future UK climate policy, against the backdrop of crises, such as the Russian-Ukrainian war, which has led to energy price increases, and the turmoil in UK markets around interest rates and the value of the pound.

Policy and regulation

Since 31 December 2020, when the transition period came to an end, UK climate policy has exhibited important elements of continuity. Under the European Union (Withdrawal) Act 2018, many EU climate laws, such as those governing carbon dioxide emissions from cars, were incorporated into UK law and thereby remained in force.

There have, however, also been significant changes. For example, the UK left the EU's Emissions Trading System (EU ETS), which manages emissions from EU-based power plants, industrial facilities, and air travel. Just weeks before the end of the transition period, the UK decided to replace the EU ETS with its own UK Emissions Trading System. Although the UK ETS mirrors many of the design elements of the EU ETS, divergence is likely as the EU moves to include maritime emissions in its system, creates a new ETS covering buildings and transport, and adopts a Carbon Border Adjustment Mechanism. The latter will impose a carbon price on imports of commodities such as steel, cement, and aluminium from countries that do not impose such a price themselves.

Even for EU climate laws that were incorporated into UK law, Brexit has ushered in important changes. By loosening the constraints imposed by EU law, Brexit has increased the UK government's ability to adjust domestic climate policy. At the time of writing, the resulting changes to climate policy have been relatively limited, but have included removing review and revision clauses from EU retained climate law.

However, it is unclear if this period of relative stability will continue for much longer. The Brexit Freedoms Bill, introduced in September 2022 by the Government, would sunset all retained EU law by the end of 2023 and give Westminster powers to 'amend, replace or repeal these laws through primary and secondary legislation (see 'Retained EU law', this volume). Furthermore, the government has commissioned a review of the net-zero target due by the end of 2022, which 'aims to identify new ways to deliver the legally binding target by 2050 in a way that is pro-business and pro-growth'. It is not yet clear what the review will eventually recommend or how the government will respond to it. In addition, the UK Prime Minister Liz Truss is reported to have advised King Charles not to attend COP27 in Egypt, after the latter consulted the prime minister over the matter. He gave a speech at the opening ceremony of the COP26 in Glasgow and Her Late Majesty Queen Elizabeth II also gave an address via video link.

Governance

Brexit also marks a major change for the governance and enforcement of UK climate law. In the EU, the European Commission and the Court of Justice of the EU can sanction and fine member states that fail to comply with their obligations. In addition, national 2020 targets for renewable energy and certain emission

reductions are automatically enforced with financial penalties under the EU's Renewable Energy Directive and the Effort Sharing Decision (for example, in Ireland).

After the end of the transition period, this legal framework ceased to apply to the UK. Although the UK's climate targets remain legally binding (under the Climate Change Act), they will not be enforced by an external authority or be subject to the same international political pressure to comply. To address possible 'governance gaps', the UK has created a new Office for Environmental Protection (OEP). The OEP's remit includes England, Northern Ireland, and UK-wide issues (see below regarding Scotland and Wales), but it lacks the same enforcement powers as the EU. For example, it will not have the power to levy fines. Its main areas of focus are enforcing laws, progress monitoring, advising government, and monitoring implementation (see 'Environmental and chemicals' in this report). The OEP will need to form a good working relationship with the UK Climate Change Committee (CCC) – the independent body created by the Climate Change Act that currently advises the Government on climate policy design and implementation. At present, it is not clear how the CCC and the OEP will work together.

In addition, the UK is no longer a member of the European Environment Agency (EEA). The EEA facilitates the exchange and analysis of environmental information among 38 European countries, some within the EU and some outside. The UK has declined to continue its participation in the Agency, even though membership is open to third countries. Associate membership of the EEA could in theory have been a relatively cost-effective way to share data on climate emissions, collaborate on automated monitoring using satellites such as Copernicus, and maintain a close dialogue on emerging scientific knowledge.

The devolution dimension

There is also an important devolution dimension to UK climate policy after Brexit. In the past, EU environmental law served as a shared baseline for the devolution settlements of the 1990s. In effect, this created a legal minimum from which the devolved administrations could 'diverge upwards' with more stringent policies, but not downwards. The UK's departure from the EU removes this baseline and it is unclear whether and how it will be replaced by UK-wide standards. The situation is rendered more complex because many of the sectors targeted by climate policy, notably energy, agriculture, transport and industry, have been unevenly devolved to governments in Scotland, Wales, and Northern Ireland.

With respect to governance, the remit of OEP does not extend to devolved policy areas in Wales or Scotland. Wales still has no formal oversight body – an assessor has been appointed on an interim basis to consider public complaints about the functioning of environmental law in Wales. In Scotland, the EU Continuity Act 2020 gave the Scottish government the power to establish a new oversight body – Environment Standards Scotland (ESS). It is considerably smaller than the OEP and unlike it, is accountable to parliament rather than government. It is also grappling with the additional logistical challenge of overseeing the Scottish government's commitment to dynamic alignment with EU regulations.

The situation in Northern Ireland is even more complex. The Protocol on Ireland and Northern Ireland stipulates that some EU climate-related policies – including laws on fluorinated greenhouse gases, energy labelling, and fuel quality – will continue to apply in Northern Ireland, adding further complexity to negotiations with the EU. To give one example, the UK will continue to submit Northern Ireland-relevant monitoring data to the EEA, even though it is no longer formally a member country of that EU agency.

Conclusion

In summary, as in many other policy areas, Brexit will increase the UK government's ability to adopt, modify and implement its climate laws and policies. Whether and to what extent it uses that flexibility remains deeply uncertain many years after the EU referendum. The fact that the UK has long been a leader in international climate policy suggests would argue against a sudden divergence from EU standards. However, recent political uncertainty in the UK makes predictions difficult, and a government less committed to climate policy would have much more flexibility than its predecessors to change the UK's approach. In addition, there remains the prospect of greater political disagreement between the four nations of the UK with respect to the pace and precise forms of decarbonisation that are pursued.

Part VIII.

Mobility and research

Immigration

Catherine Barnard

Free movement of persons is one of the four freedoms of the European Union and a core part of the single market. Free movement allows those who are 'economically active' – workers, the self-employed and temporary service providers – to move to another Member State to work and to enjoy equal treatment in respect of access to employment and in respect of social welfare benefits. It also allows students and 'persons of independent means' who have sufficient resources and comprehensive sickness insurance to move to another member state. EU migrants can bring their family members with them, even where the family members come from a non-member state, and those family members are entitled to work and enjoy equal treatment. The Court of Justice of the European Union has played a significant role in developing these rights.

Free movement was unpopular with parts of the British public. This was partly because of its perceived impact on both the jobs and of British workers and on the UK benefits system (although the evidence suggests such impacts were fairly small) and partly because it was the most visible manifestation of the lack of 'control' entailed by EU membership. For many Leave voters, it was the primary motivation for their vote.

Migration from the EU rose particularly sharply in the run-up to the referendum. According to the UK Office for National Statistics (ONS), the net migration figure for the year to June 2016 was over 300,000, close to the highest net migration on record, with net EU migration exceeding 200,000. It is likely that both figures, especially the EU one, were underestimates. This was the context for the Brexit vote with its highly effective call to 'take back control of our borders'.

What happened next

The government had to show that it was listening. Theresa May made stopping free movement a red line: 'we are not leaving the European Union only to give up control of immigration all over again. And we are not leaving only to return to the jurisdiction of the European Court of Justice.' So it was quite clear from 2016 that any future relationship with the EU would not be a close one, thus ruling out the 'Norwegian' European Economic Area (EEA) which is premised on staying in the single market and includes free movement of persons. In that sense, it was the perceived need to end free movement that made 'hard Brexit' inevitable. As Michel Barnier made clear, the UK's relationship would look a lot more like the one the EU has with Canada, despite the fact that Canada's main trading partner is the US, not the EU, and geography matters in trade.

And this is what came to pass in the Trade and Cooperation Agreement (TCA), the free trade agreement which is the basis on which the UK and the EU now trade with each other. There is no general mobility provision for economic activities. Instead, UK/EU nationals can move to provide services, as, for example short-term business visitors or intra-corporate transferees, and even in these cases their rights are limited.

Settled status

There was another major issue to address on Brexit: the status of the approximately 4-5 million (according to contemporaneous estimates) EU nationals and their family members living and working in the UK and the million or so UK nationals in the EU. The solution, provided by Part Two of the Withdrawal Agreement, is the establishment of the EU settled status scheme in the UK (and the equivalent in the EU). On the UK side, a new online system was set up through which individuals could apply for settled status (if they have been resident for five years) or pre-settled status (if they have been resident for less than five years) before 30 June 2021 (although the government is still accepting late applications where there are reasonable grounds).

For many, the EU Settled Status (EUSS) application was a simple process. With access to an online platform, and with the correct documentation, a historical record of residence in the UK and English language skills, the application could be done in approximately 10 minutes. And the Home Office can claim success: nearly 6 million applications have been made under the scheme, nearly two million more than the number of EU nationals estimated to be living in the UK, although this reflects in part the fact that a significant proportion of those who applied may no longer be resident. But for those on the margins of society, applying for settled status has been much more challenging. To avoid another 'Windrush' scandal, the UK is still being flexible about the deadline.

The EU Settlement Scheme is overseen by an Independent Monitoring Authority in the UK, which will consider complaints from EU citizens and their family members concerning breaches of their rights under the Withdrawal Agreement. The provisions of the Withdrawal Agreement are directly effective and take precedence over conflicting UK law. This means that EU nationals will be able to bring their claims in the UK courts and, for eight years after the end of the transition period, national courts will be able to refer questions to the Court of Justice. Theresa May's promise to end the jurisdiction of the Court of Justice has already been found wanting. An early test of this mechanism is the IMA's challenge to the Home Office's decision to require those who have 'pre-settled' status to make a further application to convert to full settled status.

For those EU nationals arriving after the end of the transition period (31 December 2020), a different legal regime applies. The free movement rules have been turned off by the Immigration and Social Security Co-ordination (European Union (Withdrawal) Act 2020), although Irish nationals will continue to enjoy the right to enter or remain without leave. In its place is a new approach to immigration which applies equally to all countries, a policy that prioritises those who can secure a job offer for a skilled and reasonably well-paid occupation, irrespective of their nationality.

The new visa regime now includes (see Figure 1):

- A (notionally) points-based system for skilled worker visa who have a job offer from an approved employer sponsor. The job must be at a required skill level of RQF3 or above (equivalent to A level), the individual will need to be able to speak English and be paid the relevant salary threshold by their sponsor. This will either be the general salary threshold of £25,600 or the going rate for the job, whichever is higher; a lower salary threshold is applicable in some circumstances (e.g. trainees)
- A Health and Care Visa (HCV) for those coming to work in skilled jobs in the NHS, including not just doctors and nurses but some other medium-skilled occupations; and those working in the care sector, including lower skilled and paid workers
- A Shortage Occupation List, which eases the rules for workers in particular occupations
- The Seasonal Agricultural Worker Scheme, which provides a quota for temporary visas for agricultural workers (similar, much smaller schemes also exist for some other sectors)
- A global talent visa for leaders in academia, the arts and the digital economy
- A student visa route for those who have been offered a place on a course, can speak, read, write and understand English and have enough money to support themselves and pay for their course; international graduates will be able to apply for a Graduate Visa to work, or look for work, in the UK at any skill level for up to 2 years after Graduation, or 3 years for a PhD graduate

In addition, the system has been streamlined in some respects. For example, there is no Resident Labour Market Test.

In all cases (except the HCV) there is a substantial fee for the visa and an obligation to pay £624 per person per year for the healthcare surcharge. These new immigration arrangements are, by the standards of other advanced economies, relatively liberal. In particular, it has been estimated that more than half of all jobs in the UK are in principle eligible for a Skilled Worker Visa – in other words, that if the employer is willing to navigate the bureaucracy and pay the fees, they can hire anybody from anywhere in the world for that job.

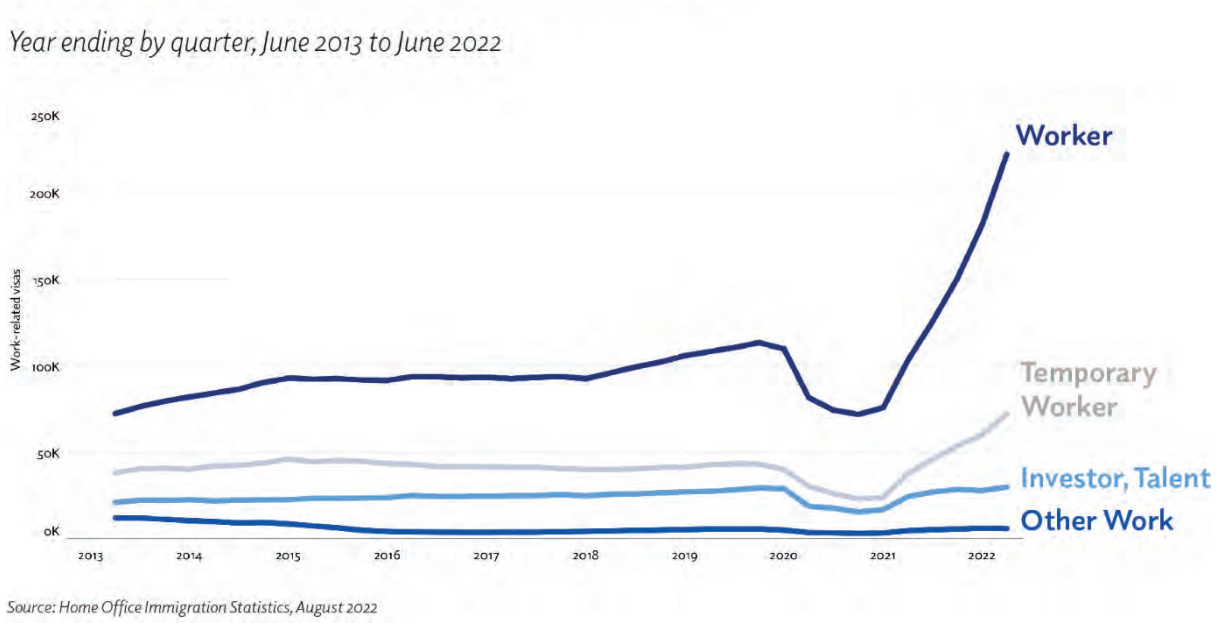
Nevertheless, compared to free movement, these new rules pose considerable difficulties for those sectors which have been heavily reliant on EU migrant labour – food processing, agriculture and social care - where wages fall below the skilled worker level.

Impacts

Subsequent to the introduction of the post-Brexit migration system, increases in non-EU migration have significantly exceeded expectations. The number of skilled worker visas has approximately doubled compared to pre-pandemic levels; this is driven by an increase in the number of visas granted to non-EU nationals, especially Indians, Filipinos and Nigerians (EU nationals now only represent approximately 10 per cent of work visas).

Similarly, there have been very large falls in the number of EU nationals coming to the UK to study, more than counterbalanced by a sharp increase in non-EU nationals, with particularly large increases in those coming from India, Pakistan, and Nigeria.

Figure 1: Work-related visas granted by visa type.



Source: Home Office Immigration Statistics, August 2022

Conclusion

While data is patchy, overall net migration to the UK for work and study appears to be roughly similar to pre-pandemic levels, but rising rapidly. Meanwhile, the introduction of a specific sub-category for workers in the health and care sector, combined with very high levels of vacancies, has led to large increases in international recruitment in this sector. This is visible in the sectoral profile of visas issued, with the vast majority accounted for by the health sector and high-productivity, high skill service sectors such as IT, finance, business and professional services. Meanwhile, other sectors, more dependent on EU workers in occupations that do not qualify for the new skilled work visa – especially the hospitality sector – are seeing significant labour shortages.

Science, research and higher education

Ludovic Highman, Simon Marginson, and Vassiliki Papatsiba

The consequences of Brexit have been significant for the higher education (HE) sector, for research and innovation, and for students and staff. The UK's departure from the EU has had financial consequences, which have affected the international activities of UK universities, their revenue streams, and the diversity of the student population.

Since the academic year 2021-22, EU students no longer pay home tuition fees or have access to the student maintenance loan scheme from the Student Loans Company. Only Irish nationals living in the UK or Ireland remain unaffected by these changes, since they are covered by the Common Travel Area arrangement, unlike other EU nationals. EU students now also require a study visa. On the research front, the continuity provided by rolling seven-year EU framework programmes is no longer guaranteed. EU funding programmes contribute to knowledge production and innovation, and the development of science. As well as undermining the motivation of researchers based at UK institutions, the change has made European partners nervous about including UK partners in their funding applications.

In addition, the EU has delayed UK association to Horizon Europe, which the EU-UK Trade and Cooperation Agreement (TCA) had provided for, apparently in response to the UK's failure to implement the Northern Ireland Protocol. The UK government began legal action against the EU in August 2022, claiming that the EU is 'in clear breach of agreement' over the UK's access to the EU's scientific research programmes. As well as Horizon Europe, which has a budget of £81 billion, the UK is yet to obtain formal access to Copernicus, which observes climate change, Euratom, the nuclear research programme, and services such as Space Surveillance and Tracking.

Student recruitment

In terms of student recruitment, intra-European degree-seeking mobility has taken a hit, with a 'sharp decline (40 per cent) in applications for undergraduate study in the UK from EU countries in 2021/22' and a pre-clearing deadline in 2022-23 by a further 18 per cent. However, recruitment from non-EU countries – notably India and Nigeria – has increased, although recruitment from China, the largest sending country to the UK dropped in 2020-2021 for the first time since 2007-2008. The UK and India signed a Memorandum of Understanding in July 2022 as part of the UK-India Enhanced Trade Partnership. Under this agreement, each country recognises the educational qualifications awarded by institutions in the other. The aim on the UK side is to make UK universities even more appealing to Indian students. The UK government estimates that the benefit to the UK of welcoming non-EU students is around £109,000 per person.

The UK government's International Education Strategy (2019) had already nudged UK providers in the direction of export opportunities in 'education markets' in 'high-value regions'. These are China/Hong Kong, the Association of Southeast Asian Nations region, the Middle East and North Africa, and Latin America. The Department for International Trade prioritises resources to support educational opportunities in these fast-growing education markets with growing middle classes.

According to the Office for Students, which regulates higher education providers in England, EU student numbers are expected to decrease by 37.3 per cent in the period between 2020-21 and 2024-25. However, the regulator expects the financial impact to be partly offset by increases in the fees charged to newly enrolled

EU students, who since 1 August 2021 have paid the same as non-EU students. To illustrate, the overseas fees for 2022 at the University of Oxford range between £27,840 to £39,010, (not including clinical medicine), compared to £9,250 for home students. The level of fees is in line with guidance issued by the UK Council for International Student Affairs, although it is the Department for Education who sets the rules determining who pays home fees for courses offered by English higher education providers. These rules are set out in the Higher Education (Fee Limit Condition) (England) Regulations 2017 (as amended) (S.I. 2017 No.1189) and the Education (Fees and Awards) (England) Regulations 2007 (as amended) (S.I. 2007 No.779).

Mobility

The UK government has reversed 'European internationalisation', which had focused on EU member states and the European neighbourhood and was supported by EU programmes such as Erasmus+. It is now actively promoting the new Turing Scheme which it tags as a 'truly global programme'. Administration of the programme has been outsourced to Capita, a consulting and digital services business, which appointed the Association of Commonwealth Universities as principal partner to lead on the assessment of applications and to support with monitoring and evaluation, thereby underlining its geographical reach.

Since it had previously promised to remain within Erasmus+, the UK government's announcement in December 2020 that it had decided to withdraw from the programme on cost grounds took the higher education sector by surprise. In announcing the decision, the then prime minister Boris Johnson suggested that Erasmus+ benefitted the EU more than the UK, noting that the 'UK is a massive net contributor to the continent's HE economy' by having 'so many EU nationals' studying in the UK'. The budget for its replacement programme, the Turing Scheme, is £110 million (2022/23), which is less than the total value of all Erasmus+ projects funded in the UK, valued at €144.69 million in 2019. In addition, in 2018-19, Erasmus+ provided funding for over 18,000 UK-based outgoing students and trainees, and more than 30,000 incoming students, which, according to estimates, contributed £440 million to the UK economy in 2018.

The Turing Scheme's four objectives include: advancing Global Britain, with over 150 countries involved; levelling up; developing key skills to improve employability; and the delivery of better value for UK taxpayers. In contrast to Erasmus+, the Turing Scheme is not based on the principle of reciprocity. Since it makes no provision for overseas students to study in the UK, it deviates from the principle of exchange diplomacy as a means by which states seek to accomplish foreign policy objectives by engaging with foreign publics and the idea that international learning experience should be mutually beneficial, with gains on both sides. As a one-way street, it also runs counter to understandings of soft power, where states achieve influence not only by sending home students abroad, but welcoming and educating students from overseas.

The UK government has singled out increased access to disadvantaged student groups as the key differentiator and measure of improvement. In August 2021, it calculated that 48 per cent of participants would come from disadvantaged backgrounds, whereas when the UK was part of Erasmus+, the most privileged were 1.7 times more likely to benefit from studying abroad. However, while the new scheme will enable 40,000 UK-based students to study and work abroad anywhere in the world for 2021-2022, only 39 universities were awarded grants to support these placements.

Funding for research and innovation

The uncertainty concerning Horizon Europe has been an ongoing concern for the higher education sector both in the UK and in the EU. Horizon Europe (2021-27) has a budget of €95.5 billion, compared to the €79 billion budget of its predecessor programme, Horizon 2020. According to the UK Office of National Statistics, the UK contributed €5.4 billion to EU research and development between 2007 and 2013, but received €8.8 billion in direct funding for research, development and innovation activities, mainly through Framework Programme 7 (FP7). Therefore, in contrast to other EU-funded programmes, the UK made a net financial return from the scheme. Significantly, the net €3.4 billion received roughly equates to more than a year's worth of funding from the UK's seven research councils. Under FP7, 13 UK universities were among the top 25 in Europe in

terms of the number of participations in FP7, while under Horizon 2020, Oxford, Cambridge and UCL were among the top ten most successful research organisations.

Formal association for the UK and Switzerland as non-EU member states is governed by Horizon Europe Regulation 2021/695, which allows higher education institutions from associated countries to participate under the same conditions as those based in EU member states. As of July 2022, 16 non-EU countries are currently associated to Horizon Europe, including Israel, Norway, Tunisia, Turkey and Ukraine. Although the UK's association to Horizon Europe was agreed as part of the TCA, access is uncertain due to the dispute between the EU and the UK over implementation of the Protocol on Ireland and Northern Ireland, a cornerstone of the Brexit Withdrawal Agreement. A parallel can be found in Swiss-EU relations, which are regulated by a series of bilateral treaties, which are considered mutually dependent, and which have been similarly jeopardized as a consequence of breaches of a wider agreement.

In the wake of its decision to withdraw from Erasmus+ and to launch the Turing Scheme, the UK government announced a Plan B to replace Horizon Europe, to 'ensure that the UK's science superpower and innovation nation ambitions are supported'. It is also developing domestic alternatives to Copernicus, the European Atomic Energy Community (Euratom) Research and Training programme and Fusion for Energy, even though the UK's participation was agreed in principle in the TCA.

Amidst the uncertainty, UK based researchers have been encouraged to apply to Horizon Europe. The government's 'Horizon Europe guarantee' launched in November 2021 enables UK applicants who successfully navigate the EU evaluation process to have access to funding regardless of whether the UK associates to Horizon Europe, provided they are signed on or before the 31 December 2022, with UKRI responsible for delivering the funding via its grant systems on behalf of the Department for Business, Energy and Industrial Strategy. This deadline was extended in July 2022 beyond the end of 2022 in order to avoid any gap in funding for eligible successful applications.

Conclusion

The UK's departure from the EU has led to far-reaching changes in student recruitment, mobility, and research funding in the UK. The number of EU students has fallen sharply, the Turing Scheme has replaced Erasmus+ and it looks likely that the UK will not be associated to Horizon Europe, unless a solution to the wider political dispute over the implementation of the Northern Ireland Protocol is mutually agreed. Nor, as association is currently unlikely, does there appear much prospect currently of another form or level of partnership. As a result, the outlook for the sector, an important source of revenue, prestige and soft power, is profoundly uncertain.

Conclusion

Cleo Davies and Hussein Kassim

This report took as its point of departure the stated ambitions of successive governments for the UK to 'set our own laws' and to shape regulation to suit British purposes – goals that directly echo the demand of the 'Leave' campaign to 'take back control'. In a series of papers, reports, and pronouncements, these governments have celebrated the achievements of Brexit, as well as the opportunity afforded by the UK's departure from the EU to make the UK the 'best regulated economy in the world'. While our 2021 report considered the preparedness of the UK for the transfer of regulatory responsibilities from the EU, 'UK regulation after Brexit revisited' has sought to assess the extent to which these ambitions have been achieved, what changes have taken place in the governance and substance of UK regulation, and the prospects for future divergence.

The preceding chapters have addressed these questions across a broad range of policy domains, sectors, and sub-sectors, including trade, economic regulation, regulation of the environment, and research. They have examined the impact on stakeholders. They have also looked at how regulation has taken place in the UK as a devolved polity, considered what is involved in the review of 'retained EU law', and discussed how firms have adjusted to the new border between the UK and the EU.

Four main findings emergence from the contributions. The first is that, as anticipated, there has been significant change in regulatory governance; that is, in the systems, structures, and processes of regulation. However, this has been accompanied by strong continuation in the substance of regulation, with some but limited evidence of regulatory divergence – the second finding. Third, few of the changes have been welcomed by stakeholders. Moreover, there is concern about the uncertainty of the future of regulation in many policy areas and sectors. Even if in its rhetoric the Johnson and Truss governments have often aligned themselves with business in their conception of regulation as a burden on firms that needs to be reduced in order to lower costs and make the UK an attractive destination for investment, companies themselves do not necessarily share the same understanding. The fourth finding is that the prospects for regulatory divergence are in practice more limited than suggested by successive UK governments. As well as the terms of the EU-UK Trade and Cooperation Agreement (TCA), there are important constraints, both domestic and external to the UK. The remainder of this chapter discusses these findings in more detail.

Regulatory governance

Across a full range of economic and societal activity, regulatory responsibilities that were previously exercised at the EU level have been transferred to regulators in the UK ('Architecture and regulation and regulatory agencies' in this report). In areas where the devolved authorities are competent – agriculture, the environment, and fisheries – functions have moved to Scottish and Welsh bodies ('Regulation after Brexit: Scotland and Wales' in this report). The process has sometimes been conflictual and relations between Cardiff and London, and especially Edinburgh and London, have often been tense. In the case of Northern Ireland, the situation is even more complex. As Lisa Claire Whitten shows ('Regulation after Brexit: Northern Ireland'), historically regulation was organised differently from the rest of the UK, even before the adoption of the Northern Ireland Protocol.

Many changes in regulatory governance were effected by or under the European Union (Withdrawal Act) 2018, which incorporated the substance of EU law into domestic law, but changing the referents from EU to UK bodies. In many cases, new tasks were entrusted to existing bodies – the Civil Aviation Authority, the Health and Safety Executive, the Competition and Markets Authority (CMA) and the Medicines and Healthcare products Regulatory Agency (MHRA), sometimes involving the creation of new departments or units, such as the Digital Markets Unit in the CMA. In others, a new regulator was established – the Office of Environmental Protection (OEP) for England, and in Scotland, the Environment Standards Scotland (ESS).

In comparing the national bodies with the EU agencies that they replaced, contributors have found that the powers and responsibilities of UK regulators have rarely expanded beyond the remit of EU bodies. Some

tasks that EU agencies performed have been dropped as functions have transferred to the UK. For example, in aviation, the CAA has not been asked to perform full range of functions carried out by the European Air Safety Agency. With respect to powers, loss or shrinkage is perhaps most observable in enforcement. The EU has a famously tough enforcement regime. Compliance with EU rules is a legal obligation, and regulations are enforced by the European Commission and the system of European Courts. Similar powers have not been replicated within the UK, which has led to concern on the part of at least some stakeholders. Environmental regulation offers perhaps the clearest example ('Environment and chemicals'). A downsizing is also evident in investigatory or oversight powers in compliance in procurement ('Public procurement'). Indeed, the design of regulatory bodies has attracted considerable criticism in some areas. Again, the OEP is a key example.

Formal powers are not the only resourcing issue related to UK regulators. A number of contributors report issues with staffing and expertise, similar to those reported by the National Audit Office (NAO) in its May 2022 report covering the Health and Safety Executive's (HSE's) role in chemicals regulation, the Food Standards Agency (FSA's) in regulating food safety and standards, and the Competition and Markets Authority's (CMA) enforcement of competition law and consumer protection. Some UK regulators have had to recruit highly qualified staff in significant numbers, which has proved challenging in many areas of specialism. The NAO report notes, for example, that in March 2022 the CMA had a vacancy rate of 25 per cent for legal roles and that the FSA has struggled to recruit experts in toxicology, as well as veterinarians, while 25 per cent of staff time in the HSE's Chemical Regulations Division is spent on training, while in 'Competition policy', Andreas Stephan notes that, although the UK subsidy control regime is designed around a less onerous process for low value awards, there are questions marks over whether public authorities have the technical expertise to undertake complex economic and legal assessments. The difficulties of finding suitable personnel, which has been compounded by the COVID-19 pandemic, is likely to affect capacity and has contributed to the perception of many that it will take years rather than months for UK regulators to achieve the same level of performance as their counterparts at EU level.

An important finding of the 2021 report was that UK regulators had lost access to other resources that they had enjoyed when they were part of EU systems. These included policy instruments, databases and other sources of information, and communities of expertise. The preceding cases present a more variegated picture. All UK agencies are outsiders, in the sense that none of them enjoy the full range of access that came with membership (see, for example, 'Consumer protection', and 'Data exchange', where UK regulators have lost importance to important resources). Most EU agencies limit membership to EU member states, but the UK decided not to be linked to the European Environment Agency (EEA), even though associate membership was available. There are some exceptions. A number of UK regulators do have contact with their EU counterparts, most notably the Competition and Markets Authority (CMA), where as Andreas Stephan notes there is a good working relationship with the European Commission. Others are less close, for instance between the FSA and European Food Safety Authority (EFSA), and the HSE and the European Chemical Agency, despite the provisions in the TCA aimed at encouraging cooperation in both these areas (see 'Regulatory architecture' in this report). In financial services, meanwhile, there is cooperation at technical but not political level. In some areas, UK regulators have decided to look beyond the European Union and have sought to strengthen their links to wider international networks. According to the NAO's May 2022 report, This is the case for the CMA, the FSA, and the HSE.

A final issue concerns the duplication and costs that now face companies that wish to trade in both the UK and the EU. A key example is chemicals, which was also highlighted in the 2021 study. The UK has created a system of registration and certification governing the production and supply of chemicals, UK REACH, which is modelled on EU REACH. Companies trading in the UK and the EU the border now not only have to meet regulatory requirements in both jurisdictions, but must also cover the costs of testing and certification, which can be substantial ('Trade in goods' and 'Environment and chemicals regulation'). Although the UK government has made some concessions, these have taken the form mainly of postponing deadlines in order to facilitate the transition, which offers some respite, albeit temporary.

Regulation: goals and methods

Regarding the substance of regulation, change is much less in evidence. In agriculture, Carmen Hubbard details the reforms that the UK government has already enacted, following an early decision to phase out

direct payments associated with the EU's Common Agricultural Policy, and those that it has pledged to introduce ('Agriculture'), but this sector, alongside immigration, where a new regime has been introduced by the UK ('Immigration'), are exceptions. In other areas, changes have been far more modest. Mark Dayan and his co-authors, for example, describe a reform to the way in which clinical trials are conducted with respect to human medicines (see 'Medicines'), which in practice only affects a narrow range of activity.

Contributors report that in most areas, from financial services and insurance, through competition policy, consumer protection, and public procurement, to food safety, energy, and air, road and sea transport, digital regulation, data exchange, and intellectual property, environment and chemicals and climate change, have been characterised by substantive continuity in UK regulation. Of course, this may change following the review of 'retained EU law' and the commitment to its 'sunsetting' announced by the Business Secretary in September 2022 (see below).

Relatively modest reforms in several cases have, nonetheless, been presented or celebrated by government as major policy changes that exemplify the UK's new found freedom outside the European Union. This was the case in the insurance sector, for example, where despite the framing of changes announced by the then Chancellor Rishi Sunak, the actual measures introduced were, as Michelle Everson described in the working title of her chapter, 'Much ado about nothing'. Indeed, Joël Reland (see 'Regulatory divergence') speculates whether this is in fact a strategy or at least an approach that has come to characterise the approach of post-Brexit government to regulation: soaring rhetoric, accompanied by relatively modest change.

Indeed, where there has been divergence between UK and EU regulation since the end of the transition period, it has occured less as a result of active engineering by the UK government, and more as a result of 'passive divergence'; that is, that the UK has chosen not to follow reforms enacted by the European Union. This has been the case in digital regulation, for example. It is also true in medicines, where the UK has not replicated new EU rules on clinical trials. Consumer protection offers another example where enhancements to the EU regime, notably in relation to online markets, have not so far been emulated by the UK.

Stakeholder experience and perceptions

The experience of stakeholders following Brexit that emerges from the case studies has rarely been positive. Aerospace manufacturers, airlines, consumer, farmers, financial institutions, firms that produce or supply chemicals, fishers, exporters and importers, road hauliers, shipping companies, Universities, and workers in multiple sectors have already been negatively impacted by the new a border between the UK and the EU. As well as no (or more) difficult access to the single market – the case for financial services, for example – UK businesses and other actors have lost access to EU programmes. In higher education, research and science, the UK is no longer part of Erasmus and the participation of UK Universities, students and researchers in programmes has been held up by the EU apparently in retaliation for the UK's non-implementation of the Protocol on Ireland and Northern Ireland.

For companies trading with the EU, access to the single marketmay be quota- and tariff-free, but it is not free of non-tariff barriers. Border formalities such as the certification of rules of origin, inspection of cargo, and enforcement of regulations over merchandise, packaging, and distribution. Firms are confronted with 'red tape', with extra costs also arising from delays, unpredictable delivery times, and, in the case of highly perishable produce, spoliation, as well as disrupted supply chains ('Trade in goods', 'Road haulage', 'Maritime transport' and 'Fisheries'). So far, there has been limited experimentation with schemes such as the promotion of 'authorised economic operators', which holds out one possibility for easing the burdens of companies and traffic at the border.

A quite different course of action has been taken by some UK companies in order to adapt to the new regulatory environment. Meredith Crowley and her colleagues report that a considerable number of British companies have set up subsidiaries in the EU so that they can continue to benefit from access to the single market. Yet, since such a strategy depends on both type of business and size, it is not viable for all companies.

As well as the direct costs associated with the new trade requirements, stakeholders have incurred significant costs as a result of the unpredictability of governments post-Brexit. Martin Heneghan notes how in maritime

transport the infrastructure in which government insisted port authorities should invest risks becoming white elephants as the government has repeatedly delayed the inspection of imports to the UK from the EU. Moreover, some operators have significantly reduced their operations, with Welsh ports particularly affected, as trade routes change by-passing the UK and thereby saving the extra costs and delays that have been introduced since Brexit, as a result of the UK leaving the single market.

More broadly, stakeholders have been unsettled by a general sense of uncertainty. At best, the government's strategy for the future of UK regulation is patchy and there is little evidence of strong central leadership. Moreover, as Catherine Barnard reports, the government's announcement that 'retained EU law' will not only be subject to review, but that the date for completion of the process falls so soon has created further anxiety. Mechanisms do exist for ministers to delay the sunsetting of legislation in their portfolio areas of responsibility, but anxieties have been expressed about the reliability of the process, the shortness of time available to consult stakeholders, and the default position, which is for the laws in question to lapse. As Barnard notes, the 'unknown unknowns' in mapping the full corpus of relevant laws are also a cause for concern.

Prospects for future divergence

The fourth finding is that the possibility of significant regulatory divergence on the UK's part is in fact limited. As in the 2021 report, they highlight the constraints imposed by the TCA, which include the 'level playing field' provisions. Should the EU judge that the UK has breached its commitments in the area of competition policy, environmental policy, or labour rights, it can trigger retaliatory mechanisms. Beyond the TCA, moreover, the EU has the power to decide unilaterally in some areas whether it considers UK rules to be adequate and thereby permit access to the single market. This applies to two key areas: the exchange of data, which is now fundamental to all aspects of areas of everyday life, and financial services, where the EU recognises UK rules as equivalent in a limited number of areas. Since recognition of standards as equivalent depends on the decisions taken by one party, it adds an element of precarity in the concerned areas, especially as they are dynamic fields.

Beyond the constraints imposed directly by the TCA and EU action in relation to the UK as a non-member state or third party, regulatory divergence in the UK is also likely to be more minimal than government rhetoric suggests due to the 'the Brussels effect'. US legal scholar, Anu Bradford, has argued forcefully that in many sectors EU regulations have been accepted as global standards. The UK is therefore doubly disadvantaged: outside the EU, it has little influence in shaping the rules that are adopted in Brussels, and business and investment are likely to suffer if the UK chooses to depart from EU regulations that have been adopted across the world. Amelia Fletcher observes of the EU's recent Digital Services Act and Digital Markets Act in her chapter on 'Digital regulation' that: 'both are major initiatives which are expected to have far reaching effects on digital markets in the EU. They are ground-breaking internationally and may have substantial extra-territorial effect'.

A further constraint applies in those areas where there is another centre or source of global standards, independent of the EU. In aviation, banking, and the insurance sector, opportunities for regulatory divergence on the part of the UK would involve departing from widely accepted international norms. further, Albert Sánchez-Graells suggests that UK procurement reform provides the 'perfect Brexit story'. He writes, 'Perceived pre-Brexit problems and dissatisfaction were largely a result of long-lasting underinvestment in public sector capacity and training and constraints that mostly derive from international treaties rather than EU law'. Moreover, any expectation of divergence is likely to provide ill-founded in an area such as procurement where international rules apply, as they do in the area of public procurement. In state aid, an area largely foreseen as potentially a benefit of Brexit, divergence is also unlikely not only on account of the strict provisions imposed by the TCA, but also, as in public procurement, due to international obligations under WTO rules.

Finally, there are domestic constraints. The UK is a devolved polity where governments in Scotland, Wales, and Northern Ireland exercise authority in key areas, including agriculture, environmental regulation, and fisheries. Against the background where the constitutional and political principles of devolution are already strained, Westminster cannot always impose UK-wide solutions. A further constraint comes from stakeholders

themselves. Firms based in the UK are reluctant about regulatory change which is likely to be costly, or that puts them at an international or competitive disadvantage. This is the case in insurance and financial services, for example, which do not necessarily share the government's preference for less regulation. Moreover, business is not alone. Farmers have expressed deep reservations about the UK government's plans for agricultural reform, as well as the possibility that the UK's post-Brexit trade agreements entered into by the UK government will lead to producers in the UK being undercut by imports of meat from countries with lower standards of animal welfare. In food safety, meanwhile, producers, suppliers and customers have become accustomed to high standards that were developed while the UK was an EU member state and are likely to oppose regulatory divergence if this would limit commercial opportunities or endanger public health.

Furthermore, it is unclear, as Catherine Barnard makes clear, how the review of 'retained EU law' will be carried out – the Retained EU law dashboard contains 'over 2,400 pieces of REUL, across 300 policy areas and 21 sectors of the UK economy' – and what measures will be used to evaluate EU rules. An unaddressed questions also concerns from where the UK's capacity to influence international regulation would derive.

As a number of the chapters show – on financial services, insurance, road hauliers, shipping companies, and the aviation industry – stakeholders do not necessarily share the view of the report of the Taskforce on Innovation, Growth and Regulatory Reform that regulation is in the first insstance a constraint on business, and therefore needs to be removed in order to 'unleash' the competitiveness – a view expressed in the Business Secretary's evidence before the European Scrutiny Committee in April 2022. Nor do they necessarily recognise that regulation developed while the UK was a member state should be viewed as an external imposition. In respect of the first, this view overlooks other rationales and understandings of the purposes for regulation, such as protection, security, safety, and sustainability. On the second, in aviation, energy, environmental regulation, and financial services, amongst other, the UK is widely regarded as one of the principal architects of EU regulatory regimes and a key influence over many of the EU rules that the UK government now views as a brake on its ambition of 'transforming the UK into the best regulated economy in the world'. In these areas and others, as some have testified the assumption that EU rules are innately hostile or inimical to the UK interests is highly questionable.

Conclusion

Although regaining control of rule-making powers was one of the stated reasons for Brexit, UK regulatory divergence has been rare and where it has occured, it has been modest. De-Europeanisation – the extent to which the UK has gained the ability to set standards independently of the EU – has been constrained by commitments under international agreements, including the TCA, as well as pressures to minimize duplication and the impact of trade barriers. The approach to regulation could change, however, with a shift towards more principle-based regulation and the sunsetting of retained EU law, when the principles informing EU law will no longer provide the basis for court rulings. Or, there is another possibility, as Joël Reland suggests ('Regulatory divergence' in this report); namely, that the divergence agenda may in fact be 'largely symbolic – 'a means for government to give the impression of an independent Britain, while beneath the surface it maintains far greater regulatory alignment with the EU than it would care to admit.'

Regulatory governance at domestic level is still being rolled out, including cooperation in devolved areas of competency, which has taken the UK into uncharted and unpredictable waters. The tense state of UK-EU relations has also played a role. The TCA provides a venue for cooperation on regulation in the form of the specialised committees, but difficulties since the end of the transition period notably concerning the UK's implementation of the Northern Ireland Protocol have inhibited cooperation between the two sides, and added even greater uncertainty in some areas. Irrespective of these political tensions, however, and despite the imposition of red tape and the formal withdrawal of UK bodies from EU agancies and networks, businesses continue to trade with the the EU, EU remains UK's largest trading partner, and UK regulators continue to seek out collaboration with their counterparts in the EU. In a context of heightened geopolitical tensions and budgetary constraints, pressures from business and other stakeholders may yet over-ride the political pressures to demonstrate newfound freedoms in the form of divergence, especially since it has become evident that there are few quick wins post-Brexit.

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