

UK Regulation after Brexit

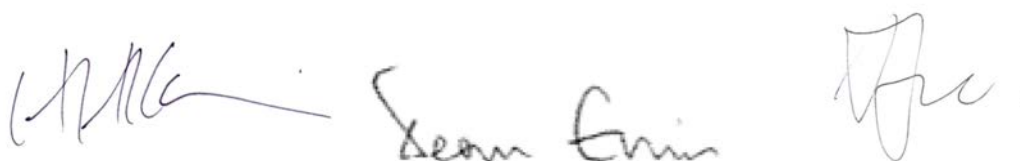


Foreword

How has UK regulation changed since the transition period came to an end on 31 December 2020? Has the UK diverged from EU policy or does continuity prevail? What functions and responsibilities transferred from the EU to UK regulators after 1 January 2021, and are the UK authorities ready? What are the long term prospects for UK alignment or divergence?

This report takes a first step to mapping the new regulatory settlement in the wake of the UK's withdrawal from the EU. A joint initiative by 'Negotiating the Future' – a project undertaken as part of ESRC's 'UK in a Changing Europe' programme – together with the Centre for Competition Policy, and Brexit & Environment, it brings together leading specialists in policy and regulation to examine the impact on UK regulation of decisions taken by the UK government and the Trade and Cooperation Agreement. The assessment is inevitably provisional. Developments are fast-moving, and although we have endeavoured to ensure that information is as up-to-date as possible at the time of publication, we cannot be certain that we have always succeeded.

As coordinators of the project, we want to thank Dr Cleo Davies, Senior Research Associate, and Dr Pippa Lacey, Administrative Assistant, on Negotiating the Future, for their work in putting this publication together – Cleo for her indefatigable research efforts and skills in sub-editing, and Pippa for her input at all stages of its production. We continue to admire Mr Richard Linnett and his team, for their professionalism, proficiency and patience. Our greatest thanks is, of course, to our contributors, who have met the challenges of short deadlines and the demands of an interventionist editorial team with professionalism and good humour.



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Introduction

Hussein Kassim

A new era began for the UK on 1 January 2021. With its formal departure from the EU on 30 January 2020, the UK had ceased to participate in EU decision making, although it remained part of the single market and the customs union until the transition period ended on 31 December 2020. Only then did the UK move outside the EU's regulatory system. The UK government assumed responsibility for regulation across the full breadth of public policy. It had to decide on arrangements at the national level to manage diverse and often wide-ranging regulatory tasks that, as an EU member state, it had delegated to EU institutions and agencies. The terms of the future partnership between the UK and the EU, set out in the Trade and Cooperation Agreement (TCA), also have important implications for UK regulation.

This report, written by a multidisciplinary team of specialists, looks at UK policy and regulation after the end of the transition period. It focuses on the policy choices made by the UK government, especially on whether to retain the substance of existing EU policy through minimal changes under the European Union (Withdrawal) Act 2008, or to enact radical policy reform, and its decisions on the structure and organisation of UK regulation. Specifically, the report asks:

- In key policy areas, sectors and sub-sectors, did the government decide to maintain, alter or diverge from EU policy aims and instruments, and if so, why?
- What regulatory powers and responsibilities, previously exercised by EU institutions and agencies on behalf of the UK, have been transferred to UK authorities? Did the government adapt an existing regulatory body, or did it create a new agency?
- How well resourced are UK regulators, and how well prepared were they to take on their new tasks?
- How well equipped are they for enforcement, or is there likely to be an enforcement gap? To what EU resources have UK regulators retained access, and which resources are no longer available to them? What are the likely consequences?

Since the UK government choices are only part of the picture, the report also looks at the requirements imposed by the TCA, which regulates trade and other interactions between the UK and the EU. Although it removes some of the barriers to trade created in the wake of the UK's departure from the EU, it does not bring about frictionless trade. For each policy domain, contributors were asked:

- How does the TCA affect UK regulation and regulatory governance?
- How do the rights and obligations of UK public authorities and stakeholders under the TCA compare to those that existed before 1 January 2021?
- To what extent does the TCA provide for further agreement, transitional arrangements or reviews, and what are the possible consequences for the UK?

More broadly, the authors were invited to consider the prospects for future policy change. They were asked:

- Is UK policy likely to diverge in the future, and how easy is policy change to enact?
- To what extent do the provisions of the TCA or other EU-related factors, such as the EU's status as an international standard setter in any particular policy domain, limit the possibilities for policy divergence or experimentation on the part of the UK?
- What constraints on the range of choice, if any, arise from international laws, conventions or bodies other than the EU?

The answers given by the contributors to these questions make it possible to assess and compare continuity and change in UK regulation in a number of key policy domains and to examine the impact of the new regulatory settlement on stakeholders. They look at trade in goods and services, competition and environment policy, digital regulation and data exchange, financial services and medicines, climate change and energy, agriculture and fishing, aviation, road and maritime transport, immigration and asylum, and consumer protection and labour rights.

The contributions to the report thereby provide the basis not only for an assessment of UK regulation after the UK's departure from the EU, but also for reflections on more general themes.

First, the UK has been a pioneer of the arms-length regulator. Kathryn Wright and Michael Harker consider to what extent adaptations following the UK's departure from the EU are likely to result in change, or fuel existing challenges, to the traditional model of regulation in the UK.

Second, tensions between the four home nations have been high since the UK referendum, not only because Scotland and Northern Ireland voted a different way from England and Wales, but also due to a perception in Belfast, Cardiff and Edinburgh that London failed to consult them enough. Although, in anticipation of the end of the transition period, the UK put in a process to adopt common frameworks to ensure that the same rules applied to all four nations of the UK, which according to Cabinet Office estimate could cover around 160 areas, Westminster remains able to legislate in devolved areas without the consent of the devolved legislatures. The territorial dimension is discussed in environment (Charlotte Burns and Andrew Jordan), agriculture (Michael Cardwell; Mary Dobbs and Ludivine Petetin), energy (Pierre Bocquillon) and fisheries (Christopher Huggins).

Third, because it involves an all-Ireland arrangement, energy (Pierre Bocquillon) raises an additional set of concerns. Meanwhile, the impact of new arrangements governing the Irish border on trade in goods are discussed by David Bailey and, on agricultural regulations, by Ludivine Petetin and Mary Dobbs.

Finally, the analyses make it possible to offer a tentative and provisional assessment of the extent to which the UK has achieved or, indeed, can achieve 'de-Europeanisation' – the removal of the UK from the influence of the EU, its rules and policy agenda – that were a 'red line in the UK government's negotiating position on the future relationship and the objective of some Brexit advocates.



The architecture of regulation and regulatory agencies

Michael Harker and Kathryn Wright

The end of the transition period saw important changes in UK regulation. In many fields and across multiple policy domains, UK rules have developed or co-evolved with EU regulations over more than four decades. Some, like the competition rules, are cross-cutting. Others, such as the rules that regulate aviation safety, are sector-specific. A number cover economic activities, but regulation also extends to policing and judicial cooperation, protection of the environment, and the transfer of data. In many of these areas, UK regulators have worked closely with EU level bodies, including the European Commission and EU agencies, as well as with national counterparts in the member states. For the most part, these relationships came to an end on 31 December 2020, with significant consequences for the UK, as well as for the EU. In the UK, the need for legal and policy certainty may be a driver for the continuation of EU derived regulatory norms. The regulatory independence of agencies, a key feature of the UK's model of regulation, is no less important post-Brexit than it was before. Nevertheless, as UK regulators withdrawal from the EU's regulatory networks, their capacity is likely to be a key concern in the coming years.

The architecture of EU regulation

There are around [thirty-five regulatory agencies at EU level](#). They work with and alongside the main EU institutions, notably the European Commission, as well as with standardisation committees, and networks of national regulators. Agencies were not part of the EU's original design, but emerged in the 1990s initially as part of the project to complete the single market. Over time, they have become an established presence in most policy areas. Their responsibilities, as well as their organisation, vary significantly from agency to agency and sector to sector, but typically they include sharing information and expertise, conformity assessment and certification, licensing, and enforcement cooperation.

Membership of these bodies extends only to EU member states and countries that have signed up to particular agreements with the EU, as set out in the founding legislation of each agency. However, all involve the ultimate oversight of the Court of Justice of the EU, which was explicitly ruled out by the UK as one of its red lines. Since the end of the transition period, the UK no longer participates in any EU regulatory agencies. The new situation will impact UK regulation in three principal ways:

- the transfer or duplication of competences from the EU level
- equivalence or mutual recognition of standards; and
- information exchange and cooperation.

Moreover, the EU's regulatory framework will continue to evolve. These issues will lead to important changes in the UK's regulatory architecture.

The road to the EU-UK Trade and Cooperation Agreement

At an early stage of the negotiations, voices in the UK, among them [parliamentary select committees](#), several regulators, [the CBI](#), and other business leaders and representatives, as well as NGOs, identified an ongoing relationship with EU regulatory bodies and agencies as a priority area for the UK. In July 2018, a White Paper on the future relationship adopted by the May government called for participation in EU agencies, and stated London's preparedness to '[accept] the rules of these agencies and contribut[e] to their costs, under new arrangements that recognise the UK will not be a Member State'. That position had changed by February 2020, when the Johnson government published its approach to the negotiations. That [document](#) made clear that the UK "w[ould] not agree to any obligation for our laws to be aligned with the EU's...". However, in the

[Political Declaration on the Future Relationship](#) agreed by the two sides in October 2019, the UK and EU committed to 'explore the possibility of cooperation' between agencies such as the European Medicines Agency (EMA), the European Chemicals Agency (ECHA), and the European Aviation Safety Agency (EASA) on the one side and UK authorities.

The [Trade and Cooperation Agreement \(TCA\)](#) confirms that there is no UK participation in any EU agencies. Instead there is a more piecemeal approach in different areas through 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. There are various references to links between EU agencies and designated UK regulatory authorities. For example, in aviation there are transitional arrangements for the recognition of design and environmental certificates, and a framework for future cooperation and information-sharing between EASA and the UK Civil Aviation Authority. In judicial cooperation in criminal matters, the UK will not have full access to Eurojust and Europol information and case management systems, but there is provision for secondment of liaison officers and prosecutors and common operations. Working Groups on Medicinal Products and on Chemicals are established, and there is mutual recognition of results of pharmaceutical testing but the UK is no longer a member of the EMA and ECHA.

Even before the UK had left the EU, the EMA and the European Banking Authority (EBA) had moved from London to Amsterdam and Paris respectively, as only EU member states can host EU agencies. Moreover, since the UK formally became a third country on 1 January 2021, UK authorities were not able to take the lead in respect to risk assessments, examinations, approvals or authorisation procedures in medicines or chemicals. However, under the terms of the Withdrawal Agreement, goods placed on the market before the end of the transition period are allowed to circulate without the need for further certification and information exchanges about testing will continue.

Regulatory independence post-Brexit

Since privatisation in the 1980s, the [UK model of regulation](#) has been underpinned by regulatory independence, where sector regulators are functionally separated from their sponsoring departments in Whitehall, and ministers have only limited influence over regulatory decisions and policy-making. The principle of arm's length regulation promotes legal and regulatory certainty on the part of regulated firms by reducing the risk that governments will, at some time in the future, seek to fundamentally change the rules of the game. This model encourages investment in crucial infrastructure, while ensuring that essentially technocratic decisions are made by experts rather than politicians.

Yet there have always been problems. Parliamentary sovereignty has hindered the extent to which regulatory policy can be insulated from changes in government, questions concerning [the legitimacy of the regulators](#) to make decisions which often have important distributional or societal consequences have been raised, and the ability of parliament to effectively scrutinise and hold accountable regulatory agencies has never been fully resolved. In the past, amendments to the statutory duties of regulators have been the principal means by which regulatory priorities have been changed by government. In 2000s, the Labour government strengthened the influence of ministers to guide regulatory policy through the use of social and environmental guidance, while also replacing individual regulators with regulatory boards. The Conservative-Liberal Democrat coalition, meanwhile, used primary legislation to steer the energy regulator's approach to climate change, and the May government legislated a price control on energy retail prices.

What is the likely effect of Brexit on the UK model of regulation?

The UK's departure from the EU will affect some areas of regulatory policy more than others. Following the preservation of a significant corpus of EU-derived UK law as 'retained EU law' under the European Union (Withdrawal) Act 2018, much of the gathering body of pre-transition EU legislation and case law will now form part of the UK's domestic law, even if the Government has sweeping powers to correct 'deficiencies' concerning references to EU institutions.

Substantial work is now underway to transpose EU regulations which prescribe detailed rules for the regulation of markets. We offer two illustrative examples. The first is the [REMIT regulation](#), which aims to control market abuse and manipulation in wholesale energy markets. The UK energy regulator, Ofgem, has made several [announcements](#) concerning its continued reliance on the European Energy Agency (ACER) guidance, while taking responsibility for the collection of trade data in Great Britain (GB), which were previously collected by ACER. The second example is the [EU Electronic Communications Code \(EECC\)](#), which regulates electronic communications and services, though it is complemented by several other directives and regulations. The Directive translates EU recommendations on issues concerning price and network access into EU law. [The Government announced](#) in July 2019 that it would implement the Code noting that ‘the UK [had] played an active part in EECC negotiations’. These two cases illustrate a strong presumption in favour of continuity, at least in some areas. Indeed, the legislation ‘retaining’ EU law on the UK’s statute book is designed to ensure legal stability.

By contrast, the need for domestic regulators to assume some, many or all of the functions previously carried out by supranational institutions suggests that regulatory capacity could become a significant issue following the end of the transition period, as the [National Audit Office](#) has signalled. In some areas at least, monitoring the extent of regulatory alignment will require technical and detailed assessments, which would suggest an enhanced role for UK regulators. In the longer term, specific powers for ministers to issue directions to regulators would require a fundamental recasting of the relationship between Whitehall and independent regulatory agencies. While the principle of regulatory independence was hardwired by membership of the EU, the UK’s departure does not in principal undermine the fundamental and continued rationale. In some areas at least, monitoring the extent of regulatory alignment will require technical and detailed assessments, which would suggest an enhanced role for UK regulators.

[The TCA](#) makes clear that as of 1 January 2021, the UK and the EU are two separate regulatory and legal spaces. Nonetheless, research on the EU’s international influence on standards and ‘the Brussels effect’, as described by [Anu Bradford](#), presenting the EU as a regulatory superpower, suggests that the prospects for the UK setting its own standards are more limited than some voices in the UK assert. In addition, differences between UK and EU regulations will lead to increased costs for business, as well as potential uncertainty. Continued engagement within regulatory networks is likely to be beneficial for the UK in terms of coordination, sharing of technical expertise and opportunities for influence.





The level playing field: regulation of trade in goods and services

Meredith A. Crowley

The EU-UK Trade and Cooperation Agreement (TCA) has established a complex structure for managing trade between the two parties. This is an important achievement. According to the UK Government's estimates in its [2018 White Paper](#), long run UK GDP will be approximately 2.2 per cent higher at a ten-year horizon under this type of free trade agreement than it would have been under no deal. Of particular importance is the way in which the treaty lays out how the two parties will maintain a 'level playing field' for competition between the two sides.

In January 2020, the President of the European Commission, Ursula von der Leyen, laid out the EU's position:

'Without a level playing field on environment, labour, taxation and state aid, you cannot have high quality access to the world's largest single market. The more divergence there is, the more distant the partnership has to be.'

The EU's strong stance reflected its desire to ensure sets of domestic policies – for example, food standards, environmental policies, and labour market laws – that create conditions of market competition that are 'fair' to both EU and British firms on both sides of the English Channel. There are two distinct areas – trade and investment - where an unlevel playing field can induce shifts in economic activity across borders, creating a loss relative to the initial expectations of a party to the agreement.

Where trade in goods is concerned, if the commitment to free trade in one party is accompanied by domestic policies such as tax cuts that reduce the production costs of domestic firms, then these domestic firms might be able to pass-through the cost reductions into lower prices and crowd-out potential imports. In this way, the benefit of free trade to exporters in the other party is effectively eliminated. Similarly, if one party introduces a domestic policy that benefits exporting firms, such as an industrial subsidy, then the other party might feel aggrieved due to an unexpected contraction in its own industry that must compete with goods that receive the foreign industrial subsidy. In both examples, changes to domestic policies influence trade flows in ways that can be seen as violations of the level playing field commitment.

In the investment realm, the EU had been concerned that foreign direct investment – particularly large outlays to build or expand manufacturing plants – would be directed toward the UK if it established lower taxes or less regulation.

On the UK side, there was a strong insistence that the UK retain sovereignty to sets laws, regulations, and industrial policies freely. However, throughout the negotiation, there was never a clear statement from the UK government of what precisely they envisioned for a post-Brexit industrial policy.

The TCA includes an extensive section covering 'The level playing field for fair and open competition and sustainable development.' A complex agreement that is working to balance the twin goals of high economic integration and national sovereignty, the TCA is more wide-ranging than the World Trade Organization's Agreement on Subsidies and Countervailing Measures. In this area, the TCA seems to bind both sides to level playing field commitments that are stronger than the WTO's commitments to discipline the use of subsidies (see '[Competition policy and state aid control](#)'). Interestingly, however, the TCA's chapter on subsidies makes explicit reference to the fact that some subsidies serve the broader public interest, thus carving out some areas from the level playing field section. This feature is absent from the WTO agreement. This seems to suggest that the TCA's commitments to level playing field on subsidies could in some areas or under some circumstances be less stringent than those of the WTO.

Under the TCA, there are dispute settlement processes available to both parties to enforce the maintenance of a level playing field in the future. Specific processes exist regarding ‘non-regression’ of existing regulations as well as ‘rebalancing’ trade and investment if future regulations or policies have material impacts on trade and services. Such dispute resolution processes could be triggered if either side downgrades, or, in some cases such as social and environmental standards (see chapters in this volume), changes, its regulations in ways that stimulate its exports to the other party. Moreover, policies such as industrial subsidies that attract foreign investment away from the other party could be examined under the treaty. If material impacts on trade or investment can be linked to the policy, then there is the possibility for economic retaliation, such as import tariffs, to be applied.

Overall, the obligations to a ‘level playing field’ are more expansive in the TCA than those the EU and UK have committed to under the WTO. What remains to be seen is whether the two sides will try to vigorously enforce the level playing field by raising concerns about the other party’s policies or whether the relationship will evolve to embody a substantial degree of divergence in regulations and policies that are not contested under the agreement.

The creation of a level playing field for trade in services proved to be a contentious issue and the degree of market access under the TCA is far more limited than what the UK had hoped to achieve. Services are an important component of UK trade: they represented about 44 per cent of total UK exports of goods and services and just more than one-quarter of total UK imports (goods and services) in 2018. On the export side, historically, slightly more than 40 per cent of these services exports went to the EU. About half of the UK’s services exports in recent years have been ‘other business services’ such as management consulting or engineering services (around 33 per cent) and financial services (around 20 per cent). Recently released [experimental statistics from ONS](#) found that two-thirds of all services exports and 89 per cent of financial services were sold via cross-border supply, that is, an entity in Britain selling the service abroad without sending a person to the foreign country.

Although the TCA includes a lengthy chapter on trade in services and there are commitments to important principles such as national treatment, the commitments to free trade in the important area financial services are minimal (see chapter on ‘[Financial services](#)’). British firms wishing to provide financial services in the EU can establish operations in a member state and commitment to the national treatment principle entitles them to non-discriminatory treatment relative to domestic EU firms.

An additional challenge for service providers in the UK and EU concerns the [recognition of professional qualifications](#). As a member of the EU, UK professional qualifications were subject to mutual recognition agreements that allowed UK qualified accountants, architects, and other professionals to provide services via cross-border supply or by traveling to an EU country. Under the TCA, British professionals largely must go through a burdensome process of seeking recognition of their qualifications in individual member states.

While the loss of access to the EU market for services on the part of British firms and workers is disappointing, the TCA lays a groundwork and establishes principles upon which future, deeper agreements over trade in services could be founded.



Trade in goods

David Bailey

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

Whilst the deal agreed between the UK and the EU at the end of 2020 [avoids tariffs and quotas](#) (subject to complying with Rules of Origin rules), there will still be lots of extra new costs when it comes to goods trade between the UK and EU. Our [report](#) on Manufacturing and Brexit flagged a range of issues that will impact on trade in goods even with the thin trade deal; think of customs delays, the costs of completing customs forms, complying with rules of origin rules, regulatory alignment, data protection, and state aid. So despite Prime Minister Boris Johnson claiming that [the deal ensures "no non-tariff barriers"](#), this is clearly not the case. In fact non-tariff barriers are coming back, and in a big way.

Customs checks in particular are likely to introduce delays at the UK-EU border, adding to costs and disrupting tightly interwoven supply chains, with manufacturers having to stockpile components, in turn adding to costs. For example, Honda estimated that every 15-minute delay at the border would add around £850,000 to their costs per year as compared to pre-tax profits of just £9 million in 2016-2017. In the pharmaceutical sector, there are products that have to be delivered within 24 hours or they become unusable. Manufacturers can find ways to mitigate such risks but such actions necessarily imply higher costs.

The UK has said that it will not initially impose full customs checks (in order to keep goods flowing. This will offer temporary relief for manufacturers at a time when they are struggling with the impact of the Covid-19 crisis. However, challenges will still remain around the training of customs agents, the costs of completing declarations and in also in making preparations to export (the EU hasn't said that it will waive customs checks).

Costs relating to customs declarations can in fact be substantial. Large manufacturers, such as the auto-component supplier GKN, have said that this would have a significant impact on them. A customs declaration when importing into the UK costs in the region of £35. To put this in context, Ford alone has stated that it will need to submit 115,000 customs declarations per year for its imported components (e.g. for making engines). The costs can also be significant for manufacturers exporting goods to the EU. Make UK [estimates](#) that the number of customs declarations that UK firms need to fill out will increase from 55m to 275m, costing some £15 billion per year. The [aerospace sector alone](#) would accrue additional costs of around £1.5 billion per year. The Make UK estimates are similar to [those of the HMRC](#), which also put the overall cost of customs declarations at around £15 billion.

On top of this, the HMRC estimates that fulfilling 'rules of origin' requirements will increase costs by a further £5.5-6 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 (supply chain audits, legal advice, agents' fees and so on). Such '[Rules of Origin](#)' are critical in industries like automotive where an assembled car might be made up from as many as 30,000 'bits' with extended supply chains crossing borders many times. As a result, it's not easy to work out where value has been added and hence where the end product has really been 'made'. That is where Rules of Origin come in, being used to decide whether a product assembled in a country should be counted as a product from that country or as an imported product. The deal offers some flexibility on this – at least temporarily. '[Self certification](#)' on Rules of Origin has been allowed in the deal and should help to a degree, as does a twelve month 'grace period'. Nevertheless, firms need to start work on gathering the evidence to show that their future exports qualify given that such compliance work is usually done well in advance.

The UK asked for a ‘cumulation’ agreement that would allow manufacturers to count all EU and UK content as local, as well as [lots of content from other countries](#) with which Britain and Brussels both had trade deals — such as Japan. The EU agreed to the former but not the latter, and has stuck to its traditional line in trade deals that there should be 55 per cent ‘local’ content (that is UK and EU content) to qualify for free trade status. This may be an issue for some auto assemblers in the UK importing lots of high value components from, say, Japan; certain models may struggle to reach this local content figure and may face tariffs, even with the trade deal. A phase in period on local content for electric vehicles (EVs), through to 2026, offers the auto industry some time to adjust on EV content but there will now be a scramble to put local EV supply chains in place. The decision by [Nissan](#) to source more batteries in the UK is an illustration of some the challenges auto makers will face.

Even with the trade deal, manufacturers will want clarity on a range of areas going forward. Think of data protection after Brexit, data sharing within the chemicals sector, whether various UK regulatory agencies will be set up on time to take over work from their EU counterparts, and so on.

On data flows a [temporary six-month agreement](#) has been agreed to keep the current rules in place for six months until a new ‘adequacy decision’ is sorted.

On regulation, the chemicals sector (see chapter on [‘Environment’](#)) for example has expressed relief that the trade deal has avoided tariffs in the sector, but is [concerned over the uncertainty](#) around what regulatory framework will be adopted post Brexit, as the UK has left the EU’s chemical regulatory framework (‘REACH’).

While the UK government highlights possible regulatory divergence as a benefit of Brexit, at the moment [industry sees it solely as a cost](#) given that it has invested heavily in complying with the current framework. A specific chemicals Annex to the deal was very short and did not secure access for British firms and authorities to the REACH database, in turn suggesting duplication of work and a big bill (in the hundreds of millions of Euros at least) in setting up the new UK regime.

It should be noted that the UK chemical industry has made progress in preparing for at least some of the potential disruptions to trade that Brexit will cause. [By 2019, 52 per cent of UK companies registered with the Registration, Evaluation, Authorisation and Restriction of Chemicals Regulation \(REACH\) had transferred their registrations to an EU27 entity.](#) A significant number of firms have also reported to the Chemical Industry Association that they plan to set up subsidiaries in the EU to make business post-Brexit easier.

Aerospace has been similarly concerned over the UK leaving the EU Aviation Safety regime, centred on the European Union Aviation Safety Agency (EASA) (see also chapter on [‘Aviation’](#)). Since the UK has refused to accept any role for the Court of Justice of the European Union (CJEU), the UK’s continued membership of EASA was not possible without some sort of compromise as the CJEU has ultimate jurisdiction over EASA’s rulings. This is critical as the aerospace industry has a highly regulated supply chain for safety reasons and the UK aerospace industry has relied on EASA membership to maintain common safety and certification standards that are acceptable in Europe as well as to the US safety agency, the Federal Aviation Administration (FAA). The deal offers encouragement in that the UK and EU will accept findings of compliance made and certificates issued by each side’s authorities and approved organisations. While this should pave the way for mutual approval, the deal does not imply that each side accepts each others’ standards; nevertheless this can be made to work as long as standard remain broadly converged.

Overall, the deal has been welcomed by UK manufacturing in as far as it goes – after all this deal really is better than no deal for the sector when it comes to trade in goods. There will be significant extra costs in terms of non-tariff barriers but things could have been much worse. Much will depend on the degree of flexibility allowed and the degree of phasing in. The devil will be in the detail but on early inspection the deal has been welcomed by manufacturers engaged in goods trade.



Authorised economic operators (AEO) and trade

Wanyu Chung and Antonio Navas

Since the UK ceased to be part of the EU Customs Union as of 1 January 2021, customs formalities required under Union law will apply to all goods entering the EU from the UK or leaving the EU to the UK. Although there are some special provisions for Northern Ireland (NI) businesses, including firms headquartered in Great Britain (GB) with operations in NI, as set out in the Northern Ireland Protocol, goods shipped from GB to NI will be subject to new declaration requirements. These new requirements have prompted HMRC to advise businesses to [‘to hire a person or business to deal with customs’](#).

Concerns relating to disputes over payment or compliance with customs changes, and the potential cost implications of customs delay in a post-Brexit world, are reflected in [a surge in registrations](#) with Her Majesty’s Revenue and Customs (HMRC) for Authorised Economic Operator (AEO) status after the 2016 referendum. Many firms consider that such [‘trusted trader’](#) status – an EU-wide scheme – could help to alleviate or minimise disruptions in preparation for Brexit. By HMRC’s definition, an AEO is an economic operator which, because it satisfies certain criteria, is certified as reliable in their customs related operations throughout the EU and is therefore entitled to the benefits of simplified customs procedure and lowered frequency of physical customs checks, both of which are associated with reduced trade costs such as warehouse storage fees for business. The UK’s AEO authorisations have ceased to be valid in the EU since the end of the Brexit transition period.

In preparation for the end of the transition period, the UK Government established its own AEO programme in line with the EU existing regime, hoping to maintain current license holders’ status and benefits at the UK border. As of July 2020, there were over 1,000 [approved AEO](#) registrations in the UK, accounting for more than two-thirds of UK total trade. A recent [UK in a Changing Europe blog](#) highlighted how small and medium business could benefit from the scheme through their logistics or freight forwarding agents as trade facilitators who hold an AEO license.

The benefits of the AEO scheme can also be extended when there is a bilateral mutual recognition agreement (AEO-MRA) in place, whereby two customs administrations agree to recognise each other’s AEO licenses and to provide reciprocal benefits to foreign license holders in domestic customs clearance process. The EU has such arrangements in place with Norway (since 2009), Switzerland (2009), Japan (2010), the US (2012) and China (2014). Even though the AEO benefits would certainly apply at the UK border post-Brexit, whether the UK AEO status receives mutual recognition from existing trading partners would depend on the UK’s current and future bilateral trade negotiations.

The UK and the EU have agreed to mutually recognise each other’s AEO status under the [EU-UK Trade and Cooperation Agreement \(TCA\)](#). Among the EU’s existing AEO-MRA partners, the UK had by the time of writing signed a bilateral AEO-MRA with Japan only, as part of the [Japan-UK Comprehensive Economic Partnership Agreement](#), which replicates customs provisions in the EU-Japan Agreement.

Current AEO holders in the UK therefore face two options. First, they can re-apply for AEO accreditation in an EU member state or partner with an agent with an EU license. In doing so, they could maintain EU authorisation post-Brexit and continue receiving benefits at the EU border as well as at the borders of the EU’s existing partners with an AEO-MRA in place. This option is likely to entail substantial application or search costs. Few firms could afford the administrative efforts necessary to obtain their own license, which takes on average 7-16 months. The second option is to retain their UK AEO license or continue partnering with an agent with UK AEO status, while remaining attentive to administrative obligations and potentially longer timeframes resulting from new formalities and procedures post-Brexit.

Although the EU-UK trade deal has been achieved to recognise each other's AEO holders, trade disruptions will be inevitable for certain businesses, particularly small and medium-sized enterprises (SMEs) that have been trading with only the EU and unfamiliar with customs requirements or benefits of the AEO status.

While the UK Government committed in a policy paper on [future customs arrangements](#) to 'look at options to reduce the pressure and risk of delays at ports and airports, for example by [...] negotiating mutual recognition of Authorised Economic Operators (AEOs), enabling faster clearance of AEOs' goods at the border,' it is imperative that the UK Government should also pursue their efforts to raise awareness among SMEs.

The Government has made available a number of other facilitations that will make processes smoother for traders, including a new creation of a [£200m](#) Trade Support Service (TSS) for firms trading in and out of Northern Ireland, to ease the administrative burden after January 2021. There is also detailed guidance for simplified declarations for [imports](#) and [exports](#) when trading with the EU.



Medicines and medical devices

Mark Dayan, Nicholas Fahy, Tamara Hervey, and Matthew Wood²



New regulations and their effects

On 1 January 2021, the Regulations that implement EU legislation on medicines and medical devices become a ‘retained EU law’ under the [EU \(Withdrawal\) Act 2018](#). These include the [Human Medicines Regulations 2012](#), the [Medicines for Human Use \(Clinical Trials\) Regulations 2012](#) and [the Medical Devices Regulations 2002](#). [The Medicines and Medical Devices Bill 2019-21](#), awaiting Royal assent at the time of writing, gives powers to amend these Regulations, and the parts of the Medicines Act 1968 on pharmacies, 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). The Bill includes powers to amend or supplement Regulations on clinical trials; manufacture, marketing (including advertising) and all aspects of supply and distribution of medicines and medical devices (including imports); falsified medicines; fees and criminal offences; and emergency medicines and devices supply.

The European Medicines Agency (EMA) has ceased to interact with UK regulatory authorities, or to recognise decisions of the UK’s Medicines and Healthcare Products Regulatory Agency (MHRA). The MHRA will take over the relevant regulatory activities for UK marketing of medicines. The UK government has stated in [Guidance adopted on 27 October 2020](#) that it will continue to recognise EMA decisions until at least 1 January 2023 by adopting them into UK law. The government has also indicated that it will change licensing routes to include a new accelerated route and a rolling review route for novel medicines. Medical devices must be certified as safe for the UK market by a UK approved body ([all UK-based EU notified bodies will automatically become such](#)) and [new UK Conformity Assessment marks](#) came on stream on 1 January 2021. [Medical devices for the Northern Irish market must have either CE or UK\(NI\) marking](#).

Powers to diverge from EU regulatory standards are limited in England, Scotland and Wales by the UK’s obligations in the EU-UK Trade and Cooperation Agreement (TCA). Limitations arising from other international agreements into which the UK enters (especially with the EU) are at present unknown. For Northern Ireland, however, the Northern Ireland Protocol to the UK Withdrawal Agreement will require continued regulatory alignment with the EU’s rules on medicines and medical devices (although not with the EU’s Falsified Medicines Directive, which is not listed in the NI Protocol).

The effects of these regulatory changes are likely to be slow, and difficult to track, as regulatory drift will take time and will interact with other policies including biosciences investment and industry incentives. The worst short term, consequences for stakeholders including businesses, the NHS, consumers, patients and citizens have been avoided by the trade agreement between the UK and the EU, although to some extent unilateral UK decisions (such as to recognise EMA medicines authorisations) simply delay effects of the UK leaving the single market. But even so, supplies of some medicines and medical devices to the UK were disrupted, though which and by how much remains very difficult to assess from information available in the public domain (a problem in itself). [The industry](#) criticised the contingency planning approach used for essential supplies in the run up to earlier “no deal” deadlines as inappropriate in the COVID-19 context.

The long-term consequences will depend on the choices made by government and by industry. [The EU and the US are the two largest markets for medicines in the world](#), and logically enough companies prioritise those large markets over others. This could lead to delays in new products reaching the UK or parts of the UK – Northern Ireland is in a uniquely complicated situation, compounded by the small size of its market – or a narrower range of available products. The UK could attempt to make the UK a higher priority for industry by adapting its regulatory approach or changing the way the UK market works.

² The support of ESRC Health Governance after Brexit ES/S00730X/1 and The Health Foundation Brexit Health Monitor project is gratefully acknowledged.

Uncertainties and possible scenarios

The EU-UK Trade and Cooperation Agreement covers mutual recognition of good manufacturing practice for medicines. But it does not include other regulatory matters, such as the mutual recognition of medicines batch testing; or [the assessment of whether medical devices conform to relevant rules](#). These would significantly reduce barriers to trade and the associated costs to firms and health systems. The EU [reportedly](#) rejected the inclusion of such provisions in the negotiations. There are also significant uncertainties about medicines and devices supply to Northern Ireland. The practicalities of customs arrangements for trade between Great Britain and Northern Ireland remain unclear, in particular whether any or all medical products will be deemed “at risk” of onward travel into the EU, or whether, after the MHRA’s continued recognition of EMA-approved medicines ceases, Northern Irish medical products will be “qualifying goods” under the Internal Market Act 2020, and therefore legal to sell anywhere in the UK.

More broadly, it is unclear what impact these changes will have for stakeholders in the UK, and these impacts depend on many different elements of the UK’s changed regulations and policies. Figure 1 below outlines a simple pipeline of how rules and regulations related to medicinal products and medical devices may affect UK stakeholders. The UK is a world leader in the research, development and trials phases of this process (in yellow in figure 1). These phases take place within a largely domestic regulatory framework but with significant European cooperation in research and development (supported by the European research programmes) and with clinical trials that frequently draw on a wide range of European collaborations and depend on other regulations, in particular on data protection. There is no necessary link between these phases and the formal licensing processes, but in practice the informal and early exchanges between licensing authorities and manufacturers carrying out clinical trials are facilitated by proximity. The licensing process itself has been primarily determined by European regulation and processes.

The assessment of the effectiveness and cost of new health products and consequent purchasing (in red in figure 1) has remained a matter for each of the four NHS systems in the UK to decide individually, and so rules and regulations will not change substantively. However, the processes of manufacture are heavily regulated at European level and frequently depend on long and complex supply chains (in green in figure 1). Changes in both regulation and practice may affect prices and availability which will indirectly affect the cost-benefit analysis of particular products. The relatively slow uptake of innovative products within the NHS is a long-standing issue which already depends primarily on national legislation and funding, but which will be affected by the wider impact of Brexit on available funding.

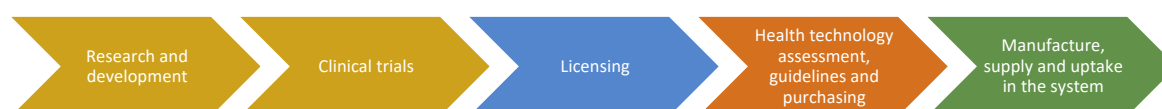


Figure 1: Elements of regulation of medicinal products and medical devices affecting UK stakeholders

The impact of changes on what products are available, when and at what price for the NHS and patients at the end of this pipeline therefore depends on a wide range of different rules, regulations and potential responses. There are [indications](#) that the UK intends to explore “regulatory innovation” to try to attract investment and growth in pharmaceuticals, but details remain unknown and might apply to any or all of these stages. For example, the UK might choose to increase funding for research and development; allow different clinical trials or with different rules; license products more quickly, more cheaply or according to different standards; loosen cost-benefit requirements; allow wider routes of supply such as licensing online pharmacies or giving powers to dental hygienists to supply medicines, or provide additional NHS funding for purchasing health products. The scope of these possible changes makes it impossible at this stage to predict the consequences of regulatory changes for patients and the NHS.

UK trade agreements with the rest of the world may also have important implications. [Trade negotiating objectives](#) and [leaked documents](#) show that the United States is aiming to extend the period for which biological medicines are protected from competition, and may seek to challenge UK cost control measures as it has done in other recent trade negotiations. [The UK’s trade agreement with Japan](#) includes processes

for mutual recognition of good manufacturing practices of pharmaceuticals where GMP requirements are “equivalent”. Market access rules apply for medical devices, which are not subject to reservations on the UK side.

Linkages with European and international regulatory authorities

The most critical EU regulatory agency with which the UK will retain linkages is the European Medicines Agency (EMA), which authorises medicines and medical devices for distribution within the EU single market. Historically, the EMA has worked closely with the UK's Medicines and Healthcare products Regulatory Authority (MHRA) in assessing healthcare products. It also provided a source of expertise and serves as a link to the UK as a global hub for the pharmaceutical industry. As a result of the UK's departure from the EU, EMA headquarters moved from London to Amsterdam. As of January 2021, the UK is no longer involved in the assessment of medicines and medical products by the EMA, nor unlike Norway, Liechtenstein or Iceland, does it have “observer status” on the EMA's Management Board. This is despite that fact that Northern Ireland in effect, remains subject to EU regulatory standards in the single market.

UK links with the EMA continue since the end of transition as a result of the UK's unilateral recognition of EMA guidance and practices. For two years from 1 January 2021, the UK will “[adopt decisions taken by the European Commission on the approval of new marketing authorisations in the community marketing authorisation procedure](#)”. Unless there is a change, products approved by the EMA will be authorised in the UK. In what appears at least initially to be minimum divergence from EU regulatory procedures, the UK will also replicate EMA rules for the eligibility of medicines for accelerated assessment, and pharmaceutical companies seeking regulatory approval in the UK will be required to submit the documents and data they submitted to the EMA.

Furthermore, the government has stated that “[The UK will also have the power to take into account marketing authorisation decisions of EU Member States when considering applications for marketing authorisations for products that have been approved in decentralised or mutual recognition procedures](#)”. Where EU law requires that medicines marketing authorisation takes place via the authorisation procedures of the member states, the MHRA will be able to transfer those decisions into its own rule books as well.

The future of informal linkages between the UK and the EMA is more difficult to assess. The UK shares highly integrated transnational networks of expertise with the EU in the field of medicines and medical products. However, where the UK government has indicated a desire to develop international linkages, its ambitions have been projected away from the EU's orbit. UK Government [decided to apply](#) to join the ‘Access Consortium’ in October 2020, alongside Australia, Canada, Singapore and Switzerland. From 1 January 2021, the UK jointly reviews and approves medicines with other members of the group.

Joining Access’ (the new name given to the Consortium) is a clear sign of UK intent to exploit regulatory linkages elsewhere rather than re-establishing EMA links. The UK could also establish informal linkages through other international networks, such as the International Council for Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH). The EU is also a member of the Council, which produces recommendations for regulatory standards of medicines. Several stakeholders, as well as the House of Commons Health and Social Care Committee, recommended the UK join as a member in its own right.

The MHRA could also reconnect with EU partners through the International Medical Devices Regulatory Forum. The IMDRF convenes a taskforce on harmonising and driving convergence in medical product assessment standards. The German, French and Irish medicines agencies work on IMDRF's Management Committee, although the European Commission's Directorate General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) represents EU institutions on the Committee, rather than EMA.

Competition policy and state aid control

Andreas Stephan¹



UK Competition policy has largely remained unchanged after 31 December 2020 except in the highly contentious area of state aid rules. The EU-UK Trade and Cooperation Agreement (TCA) contains an obligation to maintain a competition law regime in relation to anti-competitive agreements, abuse of dominance and anti-competitive mergers. The key difference is that the work of the Competition and Markets Authority (CMA) will include all anticompetitive enforcement action and merger regulation work that has both a UK and a Community (EU) dimension. As a result, businesses operating in both the EU and the UK will have to comply with two regulatory regimes, where previously cases were dealt with either by the European Commission or the CMA, but never both.

The TCA also contains detailed provisions on state aid that require the UK to adopt a domestic subsidy control regime and a relevant authority for overseeing that regime.

Competition law (antitrust) enforcement

At the end of the transition period, EU and UK rules on anti-competitive agreements (cartels) and abuse of dominance were essentially the same by virtue of [Regulation 1/2003](#) and [Competition Act 1998](#), (now amended). The TCA provisions on competition policy do not contain any detail or minimum requirements. Nor are they subject to dispute settlement, which suggests there is little to prevent the UK from diverging from EU rules in this area. Significant divergence is unlikely in the short-term, however, especially as future EU case law and guidance will be strongly persuasive on UK agencies and courts, given the close similarity of the two regimes. Nevertheless, the amended Competition Act 1998 allows for departure from even pre-Brexit case law, where there is a strong justification for doing so, and divergence will occur through the longer term decisional practice of UK agencies and courts.

The CMA will be free to expand its enforcement powers to include international infringements. Indeed, it will be important that the authority replicates the enforcement efforts of the European Commission, to ensure the UK economy continues to enjoy the same level of protection from anticompetitive conduct and to continue recovering corporate fines for Her Majesty's Treasury, which at the EU level are higher than for just about any other form of corporate wrongdoing.

It is also notable that the CMA will have the power to enforce dominance rules against some of the world's most powerful tech companies, including Google and Amazon, and their approach may be different to that of the EU because dominance cases are relatively rare and many aspects of the rules are still evolving. The CMA has already conducted an internationally influential market study and a Digital Markets Unit will be set up within the authority to enforce a new code of conduct for these dominant platforms.

Merger control

As with antitrust, the UK and EU merger control regimes are very closely aligned and both involve an economics analysis of whether the proposed merger will significantly reduce competition in the relevant market. This along with a broader global trend towards harmonization means that divergence in merger enforcement is also unlikely, especially if there is significant continued cooperation between the two agencies, as discussed below. A notable difference is the obligation for pre-notification of mergers in the EU, which does not exist in the UK regime.

¹ This contribution is based on Barry Rodger and Andreas Stephan, *Brexit and Competition Law*, forthcoming in 2021 as part of the Legal Perspectives on Brexit series, published by Taylor and Francis.

Proposed mergers will need regulatory clearance from both the CMA and Commission, where they meet the relevant turnover thresholds in both jurisdictions. This will constitute a very significant increase in the CMA's workload and delays could be experienced if the authority is not properly resourced for this change or if the process for UK merger clearance is considerably slower than that of the EU. It is [estimated](#) that even if only a third of Commission cases trigger UK merger control, that will result in a 50 per cent increase in merger workload for the CMA. Dual clearance will add to the administrative costs associated with mergers and acquisitions.

One immediate consequence of the end of the transition period is that many merger situations that previously met the EU merger regulation threshold, will now fall short by virtue of the fact the firms' UK turnover is no longer counted as being within the EU and EEA. This means that the case load of regulators in Member States with close trading ties with the UK (such as Ireland, Belgium and the Netherlands) could see merger clearance cases falling to them that would previously have been dealt with by the European Commission. Indeed, it is likely that the thresholds for merger clearance in the EU will need to be adjusted down, to reflect this.

State aid

State aid arises when a public authority confers any advantage to businesses (e.g. subsidy, tax break or loan) on a selective basis, that is not on commercial terms and may affect cross-border trade or investment within the EU. Unless there is a strong justification for such aid, it has the effect of distorting competition, for example by protecting inefficient and failing firms, or sparking wasteful subsidy wars between governments keen to attract international investment.

Unlike antitrust and merger control, responsibility for enforcing state aid rules lies exclusively with the European Commission (through a system of notification and clearance) and the Court of Justice of the European Union (CJEU). As result, the UK had no domestic state aid regime at the end of the transition period. Neither could the UK simply adopt the relevant state aid provisions (Articles 107-9) into domestic law, as these relate to trade between EU member states. Historically, the UK was one of the most compliant EU member states in this area and was a clear beneficiary of enforcement action taken by the Commission against Germany, France and others.

Contrary to popular perception, EU state aid rules allowed the UK to significantly expand state assistance and even nationalise previously privatised industries. UK governments simply chose not to. State aid became a sticking point for the future relationship because it constituted an important element of the 'level playing field' set out in the October 2019 [Political Declaration](#). The EU's fear was that the UK would distort competition and allow its industries to undercut EU competitors, by giving out very generous targeted subsidies and tax breaks. Its original negotiating position – that the UK would continue to be subject to EU state aid rules and the jurisdiction of the CJEU – was entirely unacceptable to the UK government, which favoured WTO rules on subsidies that are more typical to free trade agreements. While these have the same objective as EU state aid rules, they lack effective powers of enforcement and rely on retaliatory trade measures, such as tariffs.

The TCA chapter on subsidy control was a significant compromise on both sides and goes well beyond the [EU-Canada Comprehensive Economic and Trade Agreement](#) (CETA) or other major free trade agreements. The UK has avoided any oversight by the CJEU and is not be required to replicate the EU's system of ex ante notification and clearance of subsidies. Instead, it must apply a set of principles that closely mirror EU state aid rules, establish an independent authority with an 'appropriate role' and publish outline details of subsidies on an official website, alongside a justification in terms of key principles. The UK and EU can request to intervene in each other's proceedings as a third party. A Specialised Committee on the Level Playing Field will be available to help resolve disputes informally. However, if either side still feels aggrieved, it may unilaterally and rapidly take remedial measures (e.g. impose tariffs) in advance of a binding arbitration tribunal that is to be set up to ensure the overall TCA is enforced. The UK government launched a public consultation on the design of the new subsidy regime in February 2021, with many aspects (including the identity of the independent authority) remaining uncertain.

The final agreement differs from WTO rules in three important respects. The first is the ability to intervene and also the strong dispute resolution mechanism that underpins the subsidy control chapter of the TCA. The

second is that interested parties will be able to challenge unlawful subsidies in the UK (as in the EU), that must be paid back, and will have the possibility of claiming damages. The third is that services are included in the TCA subsidy control provisions, even though they are not covered by WTO rules and despite the fact the TCA does little to facilitate access to services between the UK and the EU. However, the fact it covers both may help facilitate greater cooperation on services down the road.

The subsidy control provisions also help alleviate tensions created by Article 10 of the Northern Ireland Protocol, which require EU state aid rules to apply fully to the UK in relation to measures that have an actual or potential effect on trade in goods (and the electricity market) in Northern Ireland. Without some sort of parallel regime applying similar principles, the UK would have found itself under continued de facto EU state aid regulation, because most aid granted to goods and services in Great Britain is likely to have a potential effect on goods in Northern Ireland, (for example, subsidies in transport or banking).

Cooperation

The CMA and the European Commission have a very close working relationship that will continue well into the future. In particular, cooperation in relation to merger regulation, antitrust enforcement and subsidies were the CMA to become the relevant authority will be crucial to the effectiveness of both regulatory regimes, but the level of cooperation will be weaker in one important respect. The CMA currently enjoys the exchange of confidential information with the Commission and with national Competition Authorities of Member States, through the [European Competition Network \(ECN\)](#). This information is exchanged to facilitate better decision making but also on the basis that the Commission and a national competition authority will not investigate the same case in parallel. As a third country competition authority, the CMA has lost its membership of the ECN and with it access to much of the confidential information. The EU was understandably unwilling to continue allowing such access, as it would risk undermining its enforcement actions – in particular in relation to cartel cases which rely very heavily on information submitted by the businesses under investigation, in return for leniency and expedited settlement of cases.

The CMA will therefore have to do its own police work and run its own leniency and settlement procedures effectively, if only to collect evidence that the European Commission may already have. However, such duplication of effort is unlikely to be an issue in merger control, which does not generally involve a finding of wrongdoing and is therefore largely a consensual process in which information is freely exchanged by the parties.

Finally, the CMA already has bilateral links with other competition authorities around the world, but these will need to be strengthened to reflect its new, international jurisdiction.



Public procurement regulation

Albert Sánchez-Graells



EU public procurement law creates a regulatory regime that is best understood as comprising two tiers. The lower tier is largely procedural and creates specific obligations for contracting authorities running procurement procedures. The higher tier imposes substantive obligations on the member states that aim to ensure the proper functioning of the internal market for public contracts. EU procurement law also creates mechanisms for the gathering and sharing of information across Member States, such as the [Single Market Scoreboard](#) and, especially, [e-Certis](#). While the lower regulatory tier is enforced domestically, though preliminary references can be made to the Court of Justice of the European Union for its interpretation of particular provisions, the higher regulatory tier and the system as a whole is monitored by the European Commission.

The [UK has transposed EU public procurement law](#) through two sets of regulations: one applies in England, Wales and Northern Ireland, the other in Scotland. The UK Government has consistently limited the transposition of EU public procurement rules to a very strict '[copy-out](#)' [approach to avoid gold-plating](#), i.e. to avoid going beyond the minimum required by EU rules. The close alignment of UK and EU rules has the benefit of ensuring compliance with the World Trade Organisation Government Procurement Agreement (GPA), of which the UK was, until the end of the transition a member through its membership of the EU.

What changes after the end of transition?

The UK Government has attempted to keep the regulatory status quo as unchanged as possible. However, since the mechanisms for collaborating with EU member states have disappeared, the UK has [introduced secondary rules](#) to replace EU-wide platforms, and to reallocate powers and functions previously assigned to the European Commission. The [Public Procurement \(Amendment etc\) \(EU Exit\) Regulations 2020](#) included the creation of a UK e-notification service to replace the current EU-wide publication of procurement notices through the Official Journal of the EU ([TED](#)), and the reallocation to the Minister for the Cabinet Office of the powers and functions of the European Commission.

The issue of the platform where contract opportunities are published has become less important in an age of open data, since a common standard will facilitate automated processing. Also, most of the powers of the Commission are limited to adjusting EU rules to changes in the GPA, which the UK will have to carry out as well, and to monitoring compliance with the EU rules. This has probably kept the reallocation of the Commission's powers to the Cabinet Office relatively unnoticed, although it can result in diminished scrutiny of the exercise of ministerial discretion—which [the Covid-19 crisis has already evidenced](#). The key operational change is the decoupling of the UK from e-Certis and the associated system of European Single Procurement Document (ESPD). The effect will be to raise the administrative costs of EU companies seeking to tender for contracts in the UK and UK companies wanting to tender for contracts in the rest of the EU—although the EU-UK TCA seeks to minimise this impact by providing that 'procuring entities [should] not require suppliers to submit all or part of the supporting evidence ... unless this is necessary to ensure the proper conduct of the procurement' (Art PPROC.5). This opens the door to mutual recognition of the EU's ESPD and the UK's new Single Procurement Document (SPD).

Limited change?

The UK gained [GPA membership on its own right](#) on 1 January 2021. To facilitate that process, the UK 'Government has sought to replicate the EU's coverage schedules under the GPA ... in a form that is as close to the form of the EU's agreements as possible'. The same strategy has been followed in other bilateral agreements between the EU and third countries, which the UK is also seeking to reproduce. Here, too, the UK Government's approach is to minimise change, at least as it concerns its access to non-EU procurement markets, and the openness of its own markets to third countries.

The UK's accession to the GPA already guaranteed a high level of continuity in EU-UK procurement-related trade (safe in utilities and defence), because the EU is also a GPA member. Beyond that, in the [Political Declaration](#), the UK and the EU agreed that they 'should provide for mutual opportunities in [their] respective public procurement markets beyond their commitments under the GPA in areas of mutual interest, without prejudice to their domestic rules to protect their essential security interests.'

The EU-UK TCA indeed creates GPA+ market access, as detailed in Section B of Annex PPROC-1, including a range of services but with the explicit exclusion of healthcare. That high level of mutual access to procurement markets can only be subjected to future modifications, but not reductions (Art PPROC.15). Crucially, the EU-UK TCA requires national treatment beyond covered procurement for 'suppliers of the other Party established in [one Party's] territory through the constitution, acquisition or maintenance of a legal person' (Art PPROC.13), which effectively ensures a continuation of current requirements for procurement below EU/GPA-thresholds where there is a 'domestic' presence of suppliers engaged in EU-UK procurement-related trade. This may however trigger the need to legally incorporate existing business branches on both sides of the Channel, for those suppliers previously relying on general free movement rules.

Any disputes regarding market access will be dealt with by a newly created Trade Specialised Committee on Public Procurement (Art INST.2). The EU and the UK have also agreed to cooperate 'in the international promotion of the mutual liberalisation of public procurement markets' (Art PPROC.19), which is more likely to be productive if their own market access commitments remain aligned.

Lastly, there is the issue of the more detailed regulation of public procurement – the lower tier of EU procedural rules or 'procurement law'. The wording of the commitment in the Political Declaration 'to standards based on those of the GPA ensuring transparency of market opportunities, public procurement rules, procedures and practices' had suggested that the UK might move away from the detail of EU procurement law, albeit within the [narrow margin of variation allowed by the GPA](#). The UK Government repeatedly expressed a willingness to reform (and deregulate) UK public procurement law. There is nothing in the EU-UK TCA preventing that, save for some explicit procedural rules eg on the use of electronic means (Art PPROC.3), on selective tendering (Art PPROC.8), or procurement remedies (Art PPROC.11). The UK Government [recently published a green paper laying out reform options](#) that will be open to public consultation until early March 2021.

Although the green paper formulates some ambitious proposals and there have been calls from some [involved in the shaping of the green paper to introduce a significant reform](#), it is uncertain whether the UK Government will end up pushing for a model significantly different from the existing one not least because the green paper follows an 'EU law+' approach. The current EU-based regime is highly flexible and the introduction of a radically different set of rules would raise the barrier for companies looking to tender across borders. It could also lead to greater divergence between the four nations of the UK, even if the UK Government expects public procurement to be covered by the ['common frameworks'](#) that it is developing with the devolved administrations.



Digital and data regulation

Amelia Fletcher



The system of digital and data regulation in the UK remained largely unchanged on 1 January 2021. The two primary pieces of EU legislation are the e-Commerce Directive and [the General Data Protection Regulation](#) (GDPR). The former, implemented in the UK as the [Electronic Commerce \(EC Directive\) Regulation 2002](#), 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 has changed.

This Directive does, however, include a 'country of origin' principle, under which EEA firms that provide online services in the UK, are exempted from some aspects of domestic UK law, so long as they follow the relevant rules in the EEA country in which they are established. From 1 January 2021, such firms are fully bound by UK legislation, while UK firms will no longer benefit from this exemption when providing services into the EU.

For financial services, this has the additional implication that EU-based providers active in the UK will need to be directly authorised in the UK rather than relying on home state authorisation. To ease the transition, the Financial Conduct Authority (FCA) has adopted a [Temporary Permissions Regime](#), which will enable firms to remain active in the UK while they negotiate authorisation. This also allows the FCA to smooth its authorisation work over time, reducing the additional resources required. UK-based providers active in the EU will likewise need to seek direct authorisation in an EU Member State.

The provisions of [the EU General Data Protection Regulation](#) (GDPR) ceased to apply directly after 1 January, but the UK regime that replaces it is materially the same. The UK system combines the existing [Data Protection Act 2018](#) with an EU withdrawal-related [statutory instrument](#). Moreover, the GDPR has extra-territorial effect. It applies to data controllers and processors, irrespective of their own location, when they process data from EU citizens. To the extent that UK firms are holding data on EU citizens, therefore, they will be bound to follow EU GDPR, irrespective of the UK legislative framework.

The key material issue relates to transfers of personal data between the UK and EU. Over the longer term, as a 'third party', transfer of data between these jurisdictions is only possible if the UK is granted a data adequacy agreement (see chapter on ['Data protection'](#)). This is important for firms, but also for law enforcement purposes. Given that the UK GDPR will mirror the EU GDPR, as at 1 January 2021, it might be thought that this would be uncontentious. However, negotiations on adequacy decision continue. In the meantime, the UK-EU Trade and Cooperation Agreement (TCA) includes a time-limited (to six months) interim provision whereby transmission of personal data from the EU to the UK is not considered a transfer to a third country under EU law.

In addition, from 1 January 2021, the Information Commission's Office (ICO) may face an increase in its scope. Under the EU GDPR, enforcement is carried out on a 'one stop shop' basis, whereby the conduct of trans-European companies is addressed by the data protection authority in the country of their main establishment, irrespective of where the harm occurs. The ICO will take on responsibility for the UK-related behaviour of such trans-European firms.

The position over time

There have been calls, on both sides of the Channel, for significant enhancements to digital services regulation. On 15 December 2020, the EU published its proposals for a new [Digital Services Act and Digital Markets Act](#). The Digital Services Act will be focused on content moderation, while the Digital Markets Act is focused on introducing pro-competition regulation, designed to ensure contestability and fairness in the digital sector where the largest online 'gatekeeper' platforms are active.

This split is mirrored in the UK, where the Government has set out plans for [new legislation to address online harms](#) and to introduce [pro-competitive regulation for the largest online platform firms](#). Ofcom will become the online harms regulator, while the Competition and Markets Authority (CMA) will take on the

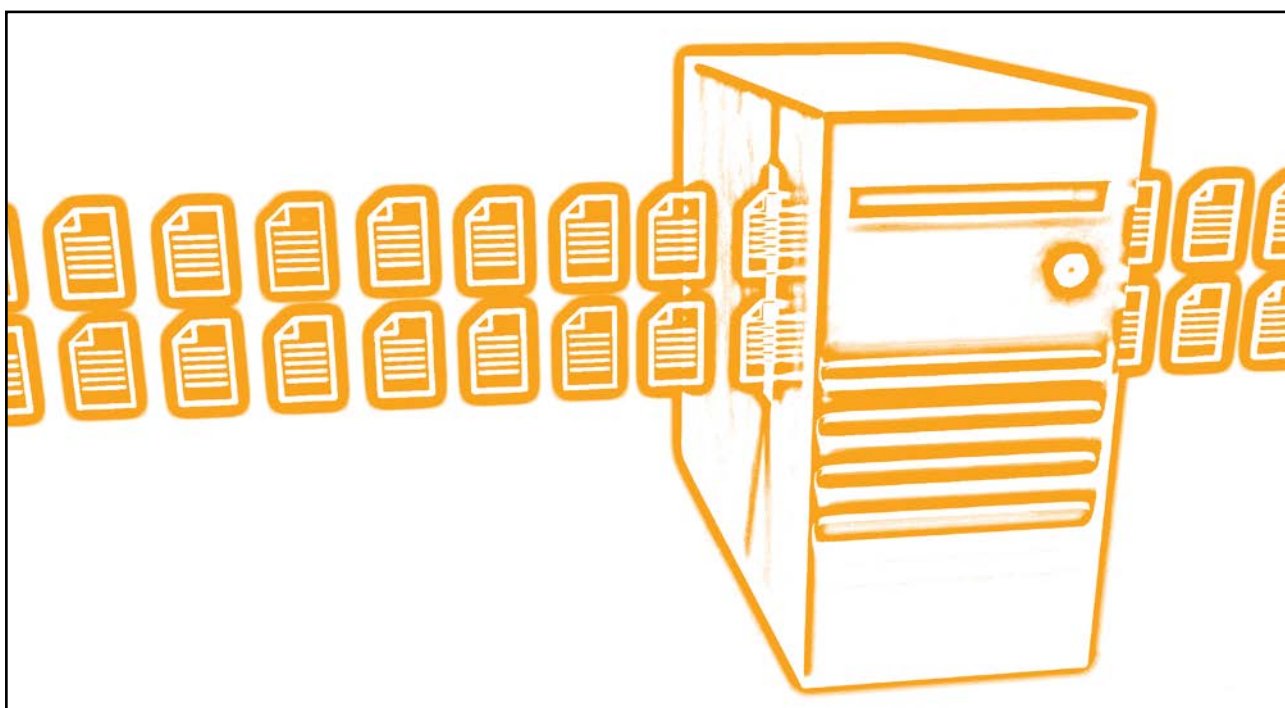
functions of the Digital Markets Unit, which will lead on pro-competitive regulation. Both bodies will require additional funding and resources to carry out these functions, but they will have time to build this up before the legislation is enacted.

For these two areas of legislation, the overarching objectives are similar in the UK and EU. There is also substantial similarity in proposed regulatory design, with the EU proposals adopting some of the UK's proposals originally set out in the 2019 [Furman Report](#). For example, in relation to the pro-competition regulation, both the UK and EU regimes will involve designating certain large online platforms, which will then be required to abide by a set of requirements in their core markets.

The TCA sets out that the UK and EU will preserve their decision-making autonomy but nevertheless endeavour to cooperate on digitalisation. Nonetheless, unless a deliberate attempt is made to ensure convergence, there may well be differences of detail between the two regimes. This could affect both which firms are in scope, and precisely what their obligations are. The major digital platforms are likely to remain active in both the UK and EU. To the extent that there are differences in regulation, they will face a choice between providing differential services, which may be costly, or providing services which meet both sets of regulation. In the latter situation, the more intrusive regulation will typically be the set to which businesses adjust. There is also a risk of gaming by firms across jurisdictions.

The GDPR is increasingly becoming the global standard for data protection law, partly due to its extra-territorial effect. However, over the longer term, both the EU and UK may wish to revisit the GDPR. Its provisions are arguably too weak in some parts, such as in relation to the choice architecture employed for privacy consent, and it lacks clarity in others, creating risks to competition. The TCA does not prevent this, but does set out that each Party recognises the need for high standards of personal data and privacy protection. It also states that serious and systemic deficiencies as regards personal data protection could lead to the suspension of sharing of key data relevant to policing and security (passenger name data and anti-money laundering data). It is likely that the UK and EU will separately make a data adequacy decisions as regards each other, within six months, which attest to there being adequate consumer data protection. These could impose (implicitly or explicitly) further constraints on regulatory divergence. All of this suggests that, while the UK would be free to enhance or clarify the existing law in this area, it may be inhibited from significantly relaxing it.

Finally, while the ICO is no longer part of the one-stop shop for EU-wide enforcement of GDPR, the TCA expressly sets out that the Parties may engage in regulatory cooperation activities on a voluntary basis. This potentially leaves the door open to greater cooperation on GDPR enforcement in the future.



Data protection

Karen McCullagh



Cross-border personal data flows are essential for trade and for cooperation in policing security and criminal justice matters. Under a temporary agreement, the status quo has been maintained for data transfers under the European Union's [General Data Protection Regulation](#) (GDPR) [Law Enforcement Directive](#) (LED) whilst adequacy assessments are conducted. Even though the Commission is expected to find that the UK provides an adequate level of protection, it has become more onerous for business location, and since the UK's access to data for security and policing purposes is reduced under the [Trade and Cooperation Agreement](#) (TCA), the UK's capacity to fight crime and terrorism has been reduced (see chapter on '[Security and cooperation on Crime](#)'), despite contrary claims by the [Home Secretary](#).

Trade

Many UK-based services sector businesses process high volumes of personal data – for example, in the form of customer and employee records that use cloud-based email and file storage systems – which is often transferred across borders. Most transfers to and from the UK are to EEA countries and the US. The TCA includes commitments by the EU and UK not to enact measures that would restrict cross-border data flows between the EU and the UK or otherwise act as data localisation requirements.

The UK has transitionally recognised all EEA countries and institutions, as well as Gibraltar, as providing an adequate level of protection. It has preserved existing adequacy decisions made by the Commission so that data flows from the UK to these countries can continue in the short-term without additional regulatory checks or safeguards. Going forward, the UK Secretary of State for Digital, Culture, Media and Sport has the power – by a negative resolution with no input from the UK's national data protection authority (DPA), the Information Commissioner's Office (ICO) to revoke existing adequacy decisions and to conduct its own adequacy assessments in respect of transfers outside the UK.

In order to ensure that EEA-UK personal data transfers continue unimpeded, the UK government has retained the EU General Data Protection Regulation (GDPR), renaming it the [UK GDPR](#), and applied for a GDPR adequacy assessment by the European Commission. To facilitate such transfers during the adequacy assessment is process, the TCA contains transitional provisions which provide that transfers of personal data to the UK will not be considered transfers to a third country during the Specified Period, and as such, will not be prohibited by the GDPR. The Specified Period began on 1 January 2021 and ends either on the date on which an adequacy decision is adopted by the European Commission or four months after the Specified Period begins, extendable by two months by agreement. The Specified Period will also end prematurely if the UK makes changes to its data protection legal framework during it unless the EU agrees to such changes.

The Commission is expected to issue a draft adequacy decision that will be adopted in the coming months. The adequacy decision will be subject to periodic review, but will allow EU-UK data transfers to continue unimpeded.

Whilst an adequacy decision will be welcome, the UK has become a more onerous business location because, UK data controllers without an establishment in EU that offer goods or services, or which monitor the activities of individuals in EU countries must appoint a representative in an EU country unless their processing of personal data is occasional and does not include, on a large scale, processing of special categories of data a burdensome requirement for small and medium-sized entities that lack appropriate financial and legal resources. Similar obligations to appoint a UK representative apply in respect of EU data controllers without an establishment in the UK.

And the compliance burden for data controllers that process personal data in both the UK and EEA has increased because a data breach that has a multi-country dimension could require notification of both the

ICO and at least one EU supervisory authority of the breach, and each supervisory authority could investigate and impose sanctions, including fines. This change has already prompted some US-owned companies such as Facebook and Google to transfer all their UK users into user agreements with the corporate headquarters in California, moving them out of the control of European Union data protection regulators rather than face potential legal action in both the EU and UK.

Furthermore, since the ICO no longer has full membership with voting rights of European Data Protection Board, the UK will have less opportunity to influence the development of EU data protection law in the future. As the UK Government has on occasion expressed an intention to diverge from the GDPR, that might not seem like a loss. However, the UK Government's powers to diverge may prove illusory because the UK will remain obliged to provide an essentially equivalent level of protection to initially secure and thereafter retain an adequacy decision. Continuing alignment will be welcomed by individuals seeking a high level of data protection rights, and those data controllers who do not favour an additional regulatory burden but will disappoint those who were hoping for an immediate lowering of UK data protection standards, and to use this as a bargaining tool in other trade negotiations, for example, with the US.

Policing and criminal justice

Data flows are also important for policing and criminal justice matters, and the EU and UK have agreed to maintain close cooperation to the extent possible for a third country outside the Schengen area. Therefore, in addition to seeking an adequacy decision under the GDPR framework, the UK has also applied for an adequacy assessment under the [LED](#), to facilitate the processing of personal data of individuals in the EU for criminal law enforcement purposes by competent authorities in the UK, including the police, criminal courts, prisons, and non-policing law enforcement bodies.

Although the UK is no longer a full member of the EU agency for Law Enforcement Cooperation (Europol), or the EU agency for judicial cooperation in criminal matters (Eurojust), it can attend the Europol Heads of Unit meeting and operational meetings as an observer, and can take part in operational analysis projects. The UK can also second liaison officers to Europol (and vice versa) and second to Eurojust a prosecutor who will be able to attend strategic and operational meetings if invited. Likewise, Eurojust is permitted to post a liaison magistrate to the UK. Supplementary agreements directly between the UK and each agency will be established in due course.

The exchange of criminal record information and cooperation between law enforcement authorities continues, though in a slower, more cumbersome way. For instance, DNA and fingerprint records of suspected and convicted persons continue to be shared (though not in real time) under the [Prüm Convention](#). Exchange of Passenger Name Records (PNR) between UK and EU airlines continues because the TCA is supplemented by joint declarations relating to PNR. And a surrender agreement, which takes the place of the European Arrest Warrant, allows the UK and the EU to avoid reliance on the much more cumbersome 1957 European Convention on Extradition.

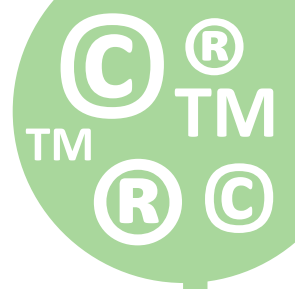
However, the UK's request to participate in the law enforcement aspects of Schengen Information System (SIS II), a database of 'real-time' alerts about missing and wanted individuals and stolen property, including firearms, to EU law enforcement agencies, was refused as the UK is not a Schengen country. So too was its request for access to Europol's databases EIS, a central criminal information and intelligence database, and SIENA, which enables the exchange of operational and strategic crime-related information. Instead, UK police and border forces are to rely on the Interpol database. In recent months UK police forces have sought to duplicate records in the SIS II database onto the Interpol database to increase its utility. Even so, they readily admit that it is less useful because it contains fewer records, and that cooperation will be slower because not all police forces across the EU automatically search the Interpol database. Moreover, Interpol Notices and Diffusions are also slower and more cumbersome to effectuate than SIS II alerts which are communicated in real-time.

Two further points are important. First, the TCA is underpinned by commitments to both human rights, including the European Convention on Human Rights and Universal Declaration of Human Rights, and to ensuring a high level of protection for personal data. Accordingly, this part of the agreement can be suspended or terminated in the event of serious and systemic deficiencies regarding human rights or data protection by the UK or an EU member state. Second, a Specialised Committee on Law Enforcement and Judicial Cooperation will be established to oversee the functioning of this part of the agreement and the provisions can be reviewed if both sides agree. It will also oversee any disputes.

In sum, lost access to some data exchange mechanisms and slower response times for others, and diminished representation on EU bodies has created both a loss of influence and a capability gap for UK law enforcement authorities making it more difficult for them to fight terrorism and crime and to cooperate on cross-border policing matters.



Changes to intellectual property law



Sabine Jacques

The EU has played a key role in protecting creations of the mind – inventions, trade names, trade symbols or images used commercially, literary and artistic works and designs – to enable a return on investment, foster innovation, and safeguard cultural diversity. The end of the transition period saw differing levels of change between areas. The change was minor with regard to copyright, possibly significant with respect to patents and important concerning trade marks, and designs, where, the UK no longer has access to the EU Intellectual Property Office.

Copyright

Influenced by the minimum standards derived from international treaties and the partial harmonisation of copyright at EU level, UK copyright law shares commonalities with other EU member states. As a result, most UK works meeting the protection criteria will still be protected in both the EU and the UK. An exception is the [Digital Single Market Directive](#) recently adopted by the EU, which modernises the copyright framework for the digital era, especially in terms of responsibilities for online intermediaries, a new right for press publishers and improved rules on research, education and cultural heritage. The UK has not so far given any indication that it intends to implement this measure. However, the Trade and Cooperation Agreement (TCA) does specify that both parties are now able to legislate over copyright exceptions and limitations domestically as long as the international three-step test is satisfied, ensuring that exclusive rights are not too curtailed.

Patents

Since as a signatory to the [European Patent Convention](#) the UK continues to participate in the European Patent Office after the end of transition there has been little change in how the UK treats the examination and grant of patent applications from contracting states. However, although it delivers national patents, the EU has a Unitary Patent scheme with its own international court, the Unified Patent Court, where EU member states deal with the validity and infringement procedures of both Unitary Patents and European Patents. As a result, one ruling is valid throughout the entire territory of the EU. In its negotiating objectives, the UK government stated that it would not seek to align its provisions with EU laws or to allow EU institutions to have any jurisdiction in the UK. Since the Unified Patent Court system requires abiding by EU law, the UK could not remain a signatory.

Trade marks

Although national trademarks did cease to exist after 31 December 2020, EU trademarks and international trade mark registrations designating the EU territory will no longer be protected in the UK as a result of the UK's decision to leave the single market. This is an area where the UK had to legislate in order to enable current EU trademarks and international applications designating the EU to receive protection in the UK as well.

Designs

As for EU trademarks, registered community designs and unregistered community designs used in the outer appearance of a product, particularly in the fashion industry, are no longer protected in the UK. To ensure the protection of these rights in the UK, the UK Intellectual Property Office (IPO) will create comparable rights

through new legislation. These new domestic titles will be fully independent from the community registered design system in relation to future transfers and challenges. In essence, EU registered and unregistered designs existing prior to 1 January 2021 receive comparable protection in the UK through corresponding rights, some of the qualifying criteria will change to reflect the fact that the UK has left the EU.

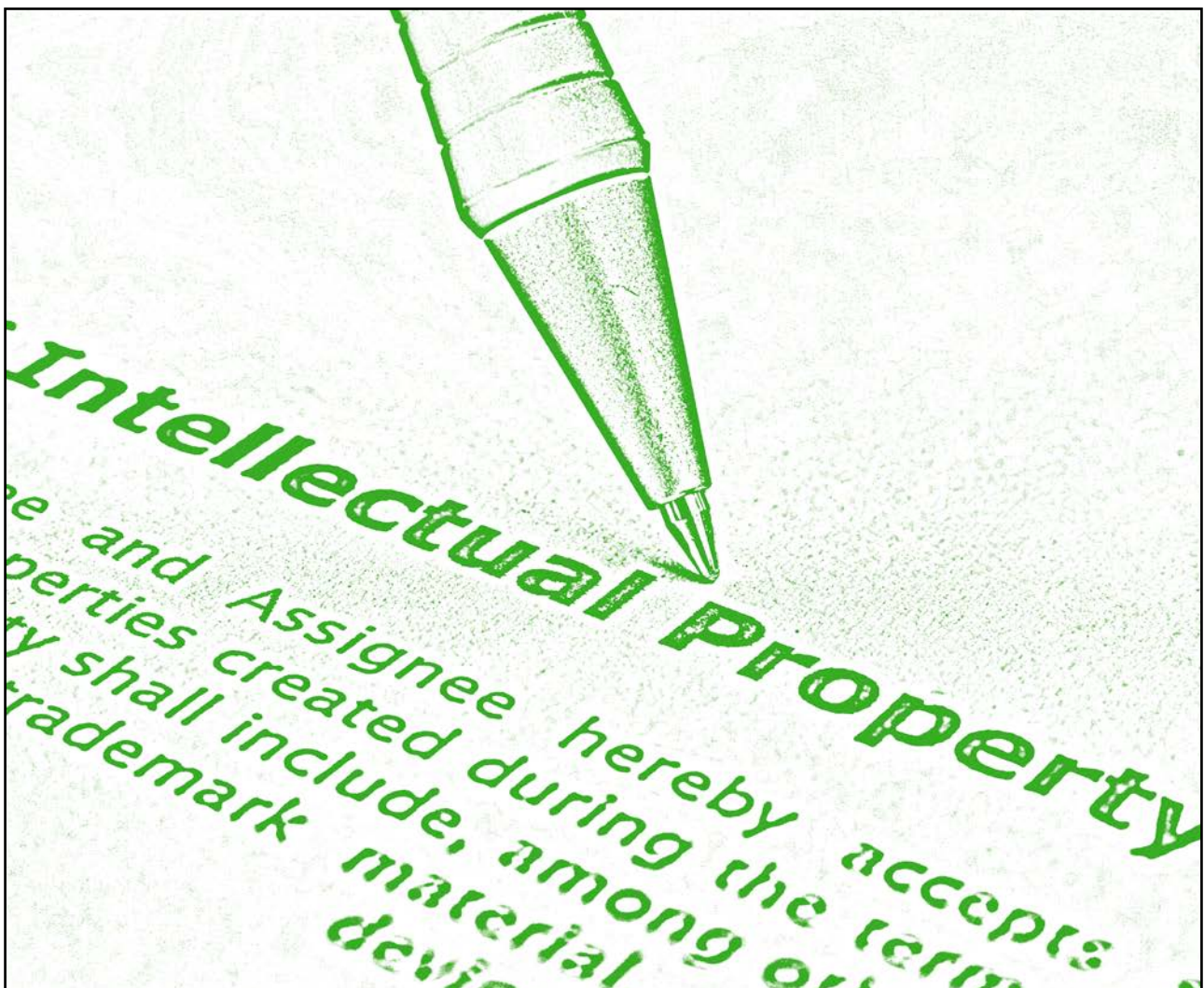
Geographical Indications

Geographical indications (GIs) protecting products with a specific geographical origin or with qualities or a reputation that are due to this origin seem to have been left for future discussion. GIs are particularly dear to the European Union. The TCA does mention border measures concerning these goods but leaves the agreement of specific rules on the protection and effective domestic enforcement of GIs to a later date.

Conclusion

Changes in the UK regulation of intellectual property following the end of the transition period vary between different areas. The TCA also leaves some business unfinished.

More broadly, although the UK may want to depart further from EU rules in the future, it will remain constrained by other European agreements such as the European Patent Convention in the field of patents and international agreements such as the [Berne Convention](#) and the [Trade-Related Aspects of Intellectual Property Rights](#) (aka TRIPS Agreement), which lays down minimum standards for intellectual property rights.



Consumer protection

Amelia Fletcher



The UK consumer protection regime remained largely unchanged after 31 December 2020. Although UK consumer law and policy is based largely on EU regulations and directives, the European Union (Withdrawal) Act 2018 ensures the continuing effect of these measures. Enforcement of consumer law is already carried out domestically, primarily by the Competition and Markets Authority (CMA) and the Trading Standards Service. Most sector regulators have concurrent consumer enforcement powers for their sectors. These arrangements are unchanged by the UK's withdrawal from the EU, and the workload of the UK enforcers is thus unlikely to be significantly increased.

The main change to enforcement has been the UK's exit from the EU Consumer Protection Cooperation (CPC) network. This mechanism, recently strengthened in [EU Regulation 2017/2394](#), is designed to facilitate cooperation between national consumer authorities, and places obligations on member states in relation to information sharing and coordinated enforcement. The network is especially useful for tackling EU-wide issues, such as those that arise in global digital platforms. Members also have access to the CPC knowledge exchange platform.

The [EU law on alternative dispute resolution](#) (ADR) no longer applies to the UK following the transition. EU customers are no longer able to use the EU online dispute resolution platform to settle disputes with traders established in the UK. Indeed, UK consumers will not have access to any form of ADR unless the UK Government decides to create its own domestic replacement.

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. The UK is establishing a replacement domestic regime, but there will be no obligation on the UK authorities to notify the EU authorities, or to act on the basis of the EU reports. UK manufacturers selling into the EU and wishing to recall a product will need to do so through its first importer into the EU. Moreover, any UK distributor of EU-manufactured products is formally an importer and thus assumes additional responsibilities and liabilities in relation to product safety.

The position over time

The EU is currently in the process of adopting [Directive 2019/2161](#) on the better enforcement and modernisation of consumer protection rules, which is expected to take effect in 2022. This measure will enhance to existing consumer protection, with a particular focus on digital services. It will extend the scope of consumer rights law to cover services that are provided to consumers for free in return for personal data. It will also prohibit businesses providing information to consumers via search results from taking payment to display adverts or to boost rankings without clearly disclosing that commercial arrangement. It will require business to tell consumers when the price they have been shown has been 'personalised on the basis of automated decision-making'.

Under the UK-EU Trade and Cooperation Agreement (TCA), the UK and EU will preserve their decision-making autonomy on consumer protection issues. However, the agreement also states that each side will 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 will be a matter for the UK Government whether the UK adopts this new measure, or indeed any future EU consumer protection legislation, based on these overarching principles. However, EU law applies directly to any UK firms trading with an EU member state. UK firms active in the Republic of Ireland or continental Europe will need to meet EU rules for sales in those territories, even if UK rules differ. In the future this could result in a strong business lobby for greater cross-national consistency.

The CMA has been pressing for reform of the UK consumer regime. Some of the changes it advocates could be implemented whether or not the UK had ceased to be an EU member state, since they do not relate to aspects of consumer law that were ever specified at EU level. This includes proposals to reform the CMA's decision-making and sanctioning powers. However, other proposals are more substantive, relating, for example, to stronger requirements on digital platforms which host advertising and intermediate sales. These are contingent on EU withdrawal, as much of EU consumer protection legislation took the form of maximum harmonisation so that the UK was not able to impose stricter rules. Such changes are likely to be consistent with the TCA.

The TCA stipulates that the two sides recognise the importance of cooperation between their agencies in order to protect consumers and enhance online trust. It states that the parties shall exchange information on regulatory matters in the context of digital trade which address consumer protection, and that they may engaged in regularity cooperation activities on a voluntary basis. This may eventually open the door to the UK re-joining the Consumer Protection Cooperation network at some point in the future.

Finally, under the TCA, the UK and the EU agreed, ideally within six months, to employ their best endeavours to establish an arrangement that enables the UK to continue to receive alerts from, and provide information to, the EU RAPEX alert system.



Financial services



Scott James

Over the past three decades, the City of London has expanded to become one of the world's leading international financial hubs, 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](#). By disrupting these links, Brexit will have far reaching implications for the UK's finance-led growth [model](#), and poses a profound challenge to [regulators](#) seeking to uphold financial stability.

Unlike many other economic sectors, financial services was largely left out of the EU-UK negotiations on the future relationship. In the Political Declaration, UK and EU leaders agreed a 30 June deadline for completing unilateral 'equivalence' assessments covering financial regulation. These legal provisions enable financial firms outside a jurisdiction to conduct business with domestic customers without being subject to host-country regulation, in addition to home-country regulation, provided that regulators determine that the legal and regulatory system of the third country as 'equivalent'. However, EU regulators did not complete these assessments by the end of 2020, [citing](#) the need for further information in order to assess the UK's intentions to diverge from EU rules in the future. Furthermore, the UK-EU Trade and Cooperation Agreement (TCA) agreed on 26th December makes no new [provisions](#) for financial services. As a result, UK-based financial firms lost their lucrative 'passporting' rights permitting them to trade in other EU member states on the same basis as home-based services. From 1st January 2021, they are instead subject to existing EU third country rules, with important implications for the structure and strategy of financial firms, their ability to serve EU customers, to access EU market infrastructure, and relationships with regulators and supervisors.

Although the TCA made no progress on the 28 outstanding areas of equivalence, the European Commission has [identified](#) future determinations as one of the unilateral measures that the EU can adopt within a wider set of 'pillars of cooperation' with the UK. Yet both sides have been keen to stress that this does not constitute a continuation of passporting rights on the same terms as UK firms enjoyed under EU membership. It is widely acknowledged that equivalence provisions are deficient in many respects. Most importantly, they provide only partial coverage: while equivalence provisions exist for derivatives trading and central counterparties (CCPs), hedge funds, reinsurance, and investment services (wholesale), they are either partial or non-existent for deposit-taking, lending, direct insurance, investment services (retail), investment funds, and payment services. Moreover, EU equivalence assessments tend to be complex, lengthy, highly politicised, and can be revoked at 30 days' notice.

The end of the transition period has profound consequences for the UK's financial regulators in the Bank of England, the Prudential Regulatory Authority (PRA), and the Financial Conduct Authority (FCA). As EU law ceased to apply from 1 January 2021, UK regulators put in place a new financial services regulatory [framework](#). The EU (Withdrawal) [Act](#) 2018 functions to retain EU law and legislation, and provides powers to amend it as appropriate for the UK legal environment. Parliament passed a number of Statutory Instruments (SIs) amending retained EU financial services legislation, and UK regulators made EU Exit Instruments to amend their rules and relevant Binding Technical Standards (BTS).

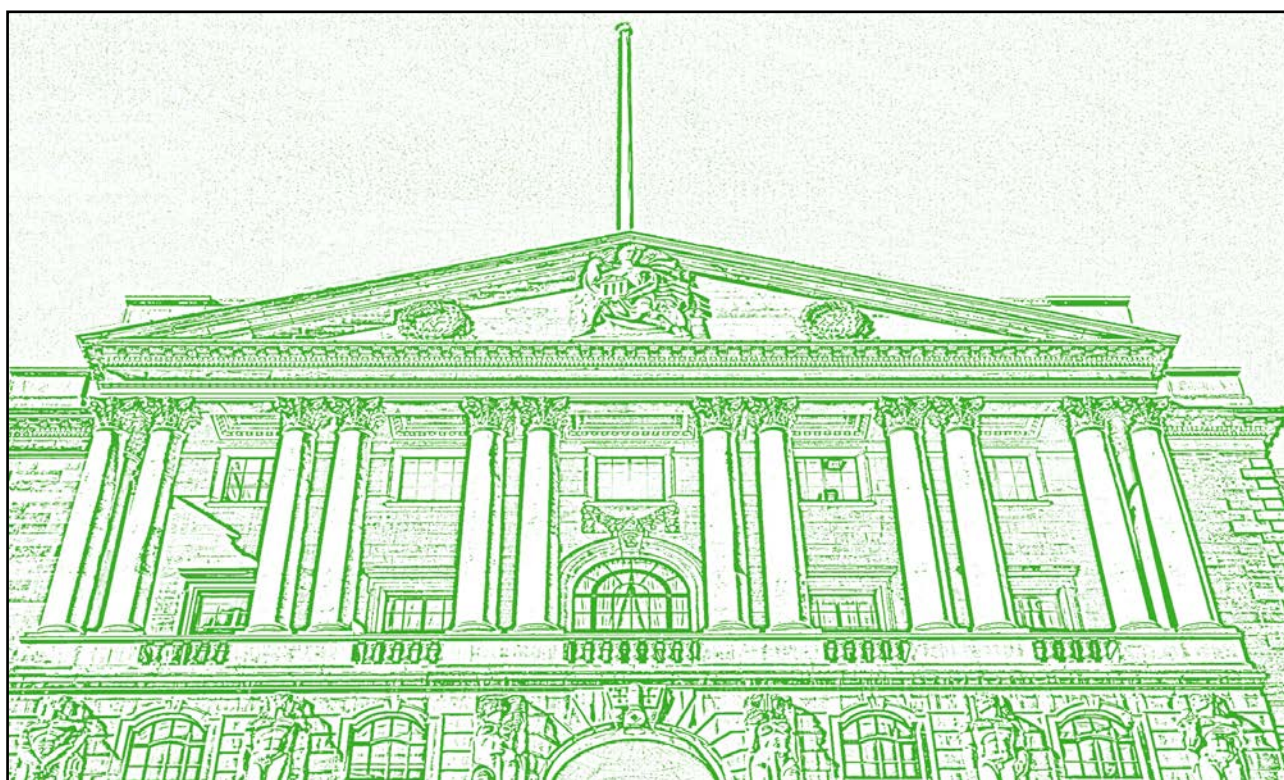
To mitigate the impact of the end of transition, UK regulators signed Memoranda of Understanding ([MoU](#)) with the European Supervisory Authorities (ESA) 'to ensure continued good cooperation and exchange of information'. UK regulators also extended a range of temporary [arrangements](#) beyond 31 December, including: the Temporary Transitional Power (TPP) to waive or modify new rules to grant firms greater flexibility in complying with UK regulatory obligations up to 31 March 2022; and the Temporary Permission Regime (TPR), enabling incoming firms and funds to continue operating for a limited period while they seek authorisation from UK regulators. In November 2020, Chancellor Rishi Sunak [announced](#) that the UK would unilaterally recognise many areas of EU financial regulation as equivalent to UK rules, enabling UK-based

banks and fund managers to continue accessing EU exchanges, investment firms, credit rating agencies and clearing houses. Furthermore, the TCA is accompanied by a non-binding Joint Declaration committing UK and EU regulators to future cooperation, to be underpinned by a new MoU agreed by March 2021.

Nonetheless, UK firms faced significant disruption from 1st January 2021. In order to continue servicing EU customers, they must request authorisation in the EU or comply with all the relevant national regimes in the member states where they continue to be active. The impact on the banking sector is particularly significant. The European Banking Authority (EBA) [warned](#) that UK banks must ensure that they have appropriate authorisations from the EU-competent authorities in place, and that EU operations must have the associated capacity commensurate to the magnitude, scope and complexity of their activities. To guard against UK banks establishing 'empty shell' legal entities in the EU, the European Central Bank (ECB) also [specified](#) that UK banks would be deemed non-compliant if they fail to hire staff without 'sufficient seniority and skills', refuse to transfer 'necessary assets', and 'unduly split trading desks' across multiple entities.

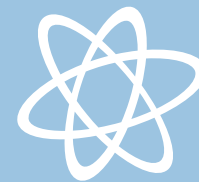
In the non-banking sector, the European Securities and Markets Authority (ESMA) [adopted](#) a similar approach, expecting all financial market participants to have fully mitigated any risks stemming from the end of the transition period. Importantly, however, EU regulators did grant a strictly time-limited equivalence ruling in the important area of derivatives trading (eighteen months for UK central clearing counterparties, and six months for central securities depositaries) reflecting the continued reliance of EU firms on London for euro-denominated [clearing](#). Despite this, UK regulators warned of several 'cliff edge' risks on 31 December related to derivatives trading, the transfer of personal data, and service provision to EU customers. This was [confirmed](#) by ESMA's refusal to relax rules for swaps trading by EU banks based in London, thereby threatening the UK's position in derivatives markets.

Looking to post-Brexit regulatory arrangements, UK regulators have stressed the need for institutionalised mechanisms of regulatory cooperation, a stable and secure basis for equivalence decisions, and a neutral dispute resolution mechanism. To date, however, senior EU officials have shown less enthusiasm, [insisting](#) that the future regulatory relationship should be based on 'a voluntary framework for dialogue among regulators and supervisors that would allow for intensive exchanges on regulatory and prudential issues'. As a result of the failure to overcome this impasse in the UK-EU TCA, the prospects for UK-EU trade in financial services remain highly uncertain.



Energy

Pierre Bocquillon



Energy has been a challenging area for the UK in negotiating its withdrawal from the EU. First, energy is a highly complex sector. Second, EU energy policy is wide-ranging. In the European Atomic Energy Community (Euratom), member states cooperate on civil nuclear energy matters. Electricity and gas fall within the EU Internal Energy Market (IEM) and competition rules. Third, the UK was deeply embedded in the EU system. Not only did the UK play a key role in shaping the Internal Energy Market (IEM), but it has become increasingly dependent on the EU for its energy security and has ongoing investment in international infrastructure with European partners. Exchanges of electricity and gas with the EU are growing, with trade between the EU and UK [estimated](#) at about 6 billion euros in 2015. Imports of gas have increased, and the UK is also a net importer of electricity. In addition, a number of new interconnectors that physically link the UK to EU or EEA member states are under construction or planned.

For these reasons, the UK sought a close relationship with the EU after its departure. Retained legislation under the European Union Withdrawal Act (2018) has assured some continuity since 1 January 2021, and the conclusion of the Trade and Cooperation Agreement (TCA) ensured that the cliff edge of no deal was avoided. While respecting the regulatory independence of both parties, the TCA chapter on energy provides a framework for the management of energy interdependencies and lays the ground for future cooperation in priority areas.

Even though the UK was able to assure a degree of continuity after 31 December 2020, important changes have also taken place, affecting civil nuclear energy, energy market regulations and cross-border trade, as well as clean energy provisions. Moreover, discussion on a number of issues, notably the technical details of future trading arrangements for interconnectors in electricity markets, are set to continue since not all business was finished when the TCA was concluded. As part of its governance provisions, the TCA creates a Specialised Committee on Energy to assist the Partnership Council and Trade Partnership Committee in monitoring implementation and future cooperation.

Civil nuclear energy

With the end of the transition period, the UK ceased to be part of Euratom – the European Atomic Energy Community – the body that regulates how nuclear material is used, transported, sold and disposed of within the EU's nuclear common market. In preparation for its withdrawal on 31 December 2020, the UK assumed responsibility for meeting its obligations as part of the International Atomic Energy Agency (IAEA) and various international treaties to which it is a signatory. The Withdrawal Agreement required the UK to apply a safeguard regime equivalent in effectiveness and coverage to the one provided by Euratom. Safeguard monitoring aims to ensure that signatory states comply with obligations not to use nuclear materials for nuclear weapons, transfer nuclear weapons or support manufacture or acquisition of weapons by non-nuclear states. Since 1 January 2021, civil nuclear energy is covered by [the agreement on cooperation on the safe and peaceful uses of nuclear energy](#), a dedicated 18-page text signed by the UK and Euratom, which is separate from the main Trade and Cooperation Agreement (TCA).

The UK established safeguard measures through the 2018 Nuclear Safeguards Act, which expanded the remit of the Office for Nuclear Regulation (ONR) as the UK regulator along with the Department for Business Energy and Industrial Strategy (BEIS) and allowed the government to adopt regulations and implement international agreements on nuclear safeguarding. The [Nuclear Safeguards Regulations](#) was adopted in 2019 and established a [domestic nuclear safeguards regime run by the ONR](#). Licenses for import of nuclear material are delivered by the ONR, while exports of nuclear material or wastes to Euratom require [new EU licenses and authorisations](#). Plans for the reporting and notification of the transboundary impact of radioactive waste disposals are now to be submitted to the UK's Environmental Agency instead of the European Commission, while BEIS notifies EU partners.

Extra community rules, including authorisations and approvals of contracts by the Euratom Supply Agency and information of the Commission about shipments of nuclear material or nuclear waste, have replaced Euratom internal rules. Since it ceased to be part of EU Nuclear Cooperation Agreements (NCAs) with non-EU member countries, including the US, Canada, Australia, Canada, Japan, Kazakhstan, Ukraine, and Uzbekistan, which allow nuclear materials and equipment to be imported without a special procedure or prior consent from the government of the exporting country, the UK [concluded replacement bilateral NCAs](#) with Australia, Canada and the US to ensure continuity of civil nuclear trade. The UK's departure from the single market, which allows for the free movement of products, highly skilled staff, and companies involved in the construction of nuclear installations ended on 31 December 2020, raises potential barriers to ongoing and future nuclear projects. The TCA partially addresses these issues, since free movement of good is largely guaranteed but not the free movement of people or mutual recognition of standards and qualifications.

[The agreement on nuclear energy](#) includes a commitment to facilitate transfers and trade of nuclear material and non-nuclear material, equipment and technology, within the framework of existing safeguard regimes. It reaffirms the commitment of the two sides to international nuclear treaties, conventions and standards, strong and equivalent safeguards regimes, and non-regression on issues ranging from nuclear safety, to radiation protection and to emergency preparedness following the end of the transition period. The UK and EU will continue to exchange information and expertise and the UK may be invited to take part as third country in Euratom's existing groups and platforms. The agreement provides that the UK will be able to participate as a third country in Euratom research and training programmes, including on nuclear fusion. It establishes a Joint Committee to exchange information, coordinate and develop further cooperation. The Joint Committee can establish working groups, make recommendations for decisions, supervise the implementation of the agreement, amend it and adjudicate disputes. Any dispute that cannot be settled by the Joint Committee will be subject to arbitration. The agreement can be terminated by both parties in case of serious breach, after consultation and failing any corrective measures.

Updating of UK electricity and gas market rules and regulations

To ensure legislative continuity after the end of the transition period, the UK adopted [five Statutory Instruments \(SIs\)](#) under the European Union Withdrawal Act 2018 directly relevant to the effective functioning of electricity and gas markets. Ofgem and the respective code administrators under the regulator's supervision similarly amended [licences](#) for market participants in GB wholesale and retail markets as well as [industry codes](#) – i.e. the technical rules defining the terms under which markets participants can access the electricity and gas networks. [The final modifications were published in February](#) which had led to some uncertainty in the industry.

During the transition, UK energy companies and traders active on EU markets were advised to register with the relevant national regulatory authority in whichever EU member state they wanted to continue operations, a process supervised by the EU's Agency for the Cooperation of Energy Regulators (ACER). Under the EU's Regulation on Energy Market Integrity and Transparency (REMIT), registration allows regulators to monitor markets and avoid market manipulations and unfair practices, such as insider trading. The UK government retained most of the REMIT regime to guard against wholesale market abuses without creating 'new domestic administrative requirements'. Ofgem continues to recognise the registration of market participants already operating in the GB market or already registered with an EU national regulatory authority. It also monitors the GB market for possible breaches of market integrity, but without collecting additional transaction data.

International interconnections and trade in electricity and gas

Although it is no longer part of the EU single market, the UK remains physically linked to the EU. Five cables carrying electricity connect the UK to Ireland (Moyle and East-West interconnectors), Belgium (Nemo Link), France (IFA) and the Netherlands (BritNed), while three more are under construction with France, Denmark, and Norway. Norway is not an EU member state, but as a member of the European Economic Area (EEA) it applies EU single market legislation. Although the electricity carried through these [interconnectors](#) represented only 8 per cent of total energy consumption in GB in 2019, the UK is a net importer and even

these small quantities are important to balance supply and reduce the need for back-up generation when extreme weather strike or there are unplanned generation outages. With the growing share of intermittent renewable electricity, interconnectors and trans-boundary exchanges are expected to become increasingly important in the future.

Similarly, in gas, the UK remains [connected to the EU and the EEA](#). Three pipelines link the UK to the Republic of Ireland, Belgium (IUK) and the Netherlands (BBL), and two, accounting for 57 per cent of UK gas imports in 2019, to Norwegian gas fields. Britain also has three Liquefied Natural Gas (LNG) import facilities ([39 per cent of all imports in 2019](#)), with Qatar the main source. LNG imports have been growing over recent years and the three terminals have a capacity equivalent to 50 per cent of the UK's annual demand. The UK also exports gas via pipelines, primarily to Belgium and the Republic of Ireland.

The EU does exchange electricity and gas with non-member states; as a result, the GB regulator, the Office of Gas and Electricity Markets ([Ofgem](#)), did 'not expect Brexit to interrupt the flows of electricity and gas across GB's interconnectors'. But, before the end of the transition period, interconnector owners and operators needed to ensure that they were certified as Transmission System Operators (TSO) by EU national regulatory authorities under internal energy market rules, while the UK government guaranteed existing TSO certifications. Yet, at the end of the transition period, there was a risk that increased regulatory frictions could affect the cost and the flexibility of energy supplies.

Trade in electricity and gas between the EU and the UK remains tariff free, though this is due to the fact that the EU does not impose a tariff on electricity or gas imports from other WTO members rather than to do with any specific arrangement with the UK. However, as the UK is no longer part of the customs union, customs declarations are now required for imports and exports with the EU at interconnectors (which involves registering with a broker for electricity). The general trade provisions of the TCA do, however, ensure that there are no tariffs or quotas on energy plants or materials that cross EU-UK borders.

A number of transitional arrangements were put in place while the negotiations were ongoing in order to limit disruption after 31st December 2020, including in the event of a no deal. In gas, UK operators continue to use the privately-operated [PRISMA gas capacity trading platform](#) for the allocation of capacity at interconnections. Countries on both sides [recognise and use the EU Network Code](#) on Capacity Allocation Mechanisms as the regulatory framework for cross-border trade. The TCA provides for longer term cooperation between gas TSOs on market-based capacity allocation mechanisms and congestion management procedures at gas interconnectors.

In electricity, the IEM aims to develop an EU-wide wholesale electricity market, in which electricity markets are fully 'coupled' – where electricity trading and the allocation of cross-border transmission capacities are integrated. The use of integrated trading and balancing platforms increases the efficiency of resource allocation and transmission. During the transition period, UK and EU electricity markets remained coupled, with trading at interconnectors continuing to operate under IEM rules under the principle of implicit auctioning where electricity supplies and transmission capacities are traded together. However, in leaving the internal market and customs union, third country status applies to GB. [The UK government decided](#) to replace, from 1 January 2021, the IEM's more flexible 'implicit single day-ahead coupling' and 'intraday market coupling' arrangements by 'explicit trading arrangements', where transmission capacities are auctioned separately from electricity supplies. Interconnector transactions remain free of network charges and both parties will aim for a rapid agreement on compensations for the costs of hosting cross-border flows of electricity.

However, these arrangements are transitional, and the TCA sets out a framework for the development of new electricity trading arrangements for all timeframes: forward, day-ahead and intra-day trading. For day-ahead trading, in particular, the TCA provides that the Specialised Committee on Energy will develop, then implement, 'multi-region loose volume coupling' arrangements by April 2022. The arrangements for EU-GB interconnectors will remain distinct from EU rules on electricity interconnections and do not imply the UK's participation in the IEM or its trading and balancing platforms. Ultimately, the future trading arrangements that emerge are expected to be [less efficient and flexible](#), and [more costly](#) than the day-ahead market coupling that applies in the IEM.

Renewables and clean energy

The UK's renewable energy targets and support schemes for renewable energy have remained unchanged since the end of the transition. The UK government continues to operate the Feed-in-Tariffs and Contracts for Difference schemes, as well as the Renewables Obligation. The TCA reiterates the UK's and EU's respective commitments to their renewable energy and energy efficiency targets – in the UK's case, as enshrined in [the National Energy and Climate Action Plan](#).

As part of the EU framework, Guarantees of Origin for electricity generated from high-efficiency cogeneration and Renewable Energy Guarantees of Origin are used to track and account for the production and supply of renewable or cleaner electricity. The mutual recognition of Guarantees of Origin (GOs) no longer applies after the end of the transition period and recognition now depends on unilateral measures taken by the UK and the EU. In order to avoid short-term disruption, the UK agreed to continue to recognise GOs already granted. However, the government will review its decision in 2021 and it has [stated](#) previously that it will only recognise GOs issued in EU countries on a reciprocal basis.

The TCA commits both sides to take steps to integrate renewable electricity in electricity markets and to define clear standards and regulations for renewable equipment and systems to benefit from support measures. Although the UK and EU signal their intent to jointly contribute to the development of international standards, the lack of mutual recognition of clean energy technology standards, including energy efficiency and eco-design, or renewable energy certificates may become a source of trade barriers or regulatory divergence. Moreover, since the UK is no longer bound by EU rules or their enforcement by the European Commission or the Court of Justice of the European Union, the design of the domestic governance system will be crucial for monitoring and enforcement of clean energy commitments and to avoid a 'governance gap' (see [chapter on Environment](#)).

As the UK is no longer a member of the [North Seas Energy Cooperation](#), the TCA provides for the creation of a multi stakeholder forum for technical cooperation on the development of offshore renewable energy in the area. Offshore wind has been booming in the North Sea and neighbouring countries have a shared interest in cooperating on planning, joint projects and interconnections to facilitate the rapid development and integration of new capacities into their grids.

Managing regulatory divergence in energy markets

The UK has been a trailblazer in the introduction and promotion of liberalisation and competition in energy markets and has actively shaped the rules and regulations of the IEM. The TCA reiterates a (relatively uncontroversial) joint commitment to the existing liberal regulatory model for energy markets. It commits both sides to maintaining consumer choice, competitive markets, and transparent and non-discriminatory regulatory regimes. Provisions include:

- the separation (or 'unbundling') of supply, transport and distribution activities along the supply chain;
- non-discriminatory third-party access to transport and distribution networks;
- independent regulation;
- a general commitment to free markets and free price formation for electricity and gas; and
- monitoring to prevent market manipulation and insider trading.

The TCA provides for exceptions for 'legitimate public policy objectives', such as environmental or social purposes, including electricity and gas consumer price regulation (e.g. energy price caps) or the continued subsidising of generation for system security and environmental reasons (e.g. renewable energy subsidies).

The TCA also commits the two sides to cooperation on energy network development and security of supply, notably through the sharing of risk preparedness and emergency plans for security of supply disruptions and crises, even if the text is rather vague and weak. While the Transmission System Operators (TSOs) and

energy regulators are enjoined to cooperate on a wide range of issues including market regulation, trade on interconnectors, network development, and security of supply, including the development of technical procedures on UK-EU interconnectors, the TCA also explicitly denies UK TSOs the same formal status as their EU counterparts as part of ENTSOE (electricity) and ENTSOG (gas) – the EU’s TSOs associations – which contribute to the design of EU electricity and gas network codes. Network codes are important because they decide common rules on issues such as interconnections, the balancing of supply and demand for energy, and congestion management. Similarly, the British regulator Ofgem will not have equal status to its counterparts as part of the European energy regulatory agency ACER, which is central in the design of market regulations, including EU network codes. Other UK energy stakeholders will be mainly as lobbyists, notably through industry associations such as Eurelectric and Eurogas.

The specific situation of Northern Ireland

A final issue concerns energy governance among the four nations of the UK. Energy is only a partially and unevenly devolved competence. [Scotland and Wales mostly fall under GB rules and regulations](#) including the authority of the regulator Ofgem, a situation that is distinct from Northern Ireland (NI), which has its own energy regulator, the Utility Regulator for Northern Ireland. Moreover, Northern Ireland and Ireland cooperate in an all-island Single Electricity Market, in which they share a wholesale energy market and their markets are coupled. As part of the general commitment to keep open the whole Ireland economy and the Belfast Agreement, the Irish Protocol guarantees the continued operation of the Single Electricity Market, within the framework of key EU rules on electricity markets. While the UK considers that market participants in NI can stay registered with a Utility Regulator, including for the purposes of REMIT, the Commission argues that NI participants should be registered with the Commission for Regulation of Utilities (CRU) of the Republic of Ireland, a divergence of views that [needs to be resolved urgently](#). To guarantee frictionless trade of energy products, NI also applies selected EU energy efficiency labelling and eco-design legislation. Since 31 December 2020, due to the concurrent implementation of the Protocol in NI and TCA in GB, the position of Northern Ireland partially differs from the rest of the UK, effectively resulting in regulatory divergence between the two.

UK-EU energy cooperation over the long term

The UK government has sought to remain as closely aligned as possible with the IEM and Euratom while ensuring that it can set its own rules and regulations. The TCA and the agreement on cooperation on the safe and peaceful uses of nuclear energy largely achieve these goals. However, if the UK is no longer tied to IEM rules and regulations, its influence will diminish. Although committed to cooperation, there is no mechanism to maintain UK-EU alignment in terms of market regulations, competition rules, network codes or renewable energy certification, leaving open the possibility that barriers to trade or conflict may emerge.

[Reports on the negotiations](#) suggested that the UK attempted to use fisheries as leverage for access to the IEM. In the end the energy chapter in the TCA includes a termination clause of 30 June 2026 – that is, when the agreement on fisheries is to be reviewed and quotas renegotiated (see [chapter on ‘Fisheries’](#)). Then, energy cooperation can be extended further by the Partnership Council to 31 March 2027, and becomes renewable yearly after that. This clause links the continuation of energy cooperation with a future agreement on fisheries, [thereby granting the EU’s leverage](#) on account of the commercial and security importance of energy.

Road haulage

Sarah Hall and Martin Heneghan



Road haulage is a critical infrastructure, facilitating the UK's international trade and domestic distribution in goods. [Eighty-nine per cent](#) of all goods transported by land in Great Britain are moved directly by road. Trade that is shipped or moved by rail will also need road haulage at the end point of ports and rail terminals. The sector is the UK's fifth largest employer, employing [2.54 million](#) people. It contributes £124 gross value added (GVA) to the UK economy. However, the majority of goods imported to and exported from the UK are handled by overseas hauliers, mostly by vehicles registered in Ireland, Poland and Romania. Poland accounts for 17 per cent of road haulage activity in the EU. The UK by comparison accounts for 8 per cent.

The sector is heavily regulated. Governments want to ensure that the vehicles and drivers on their roads are safe, and to know the details of what is being brought in and out of their country through customs checks. In the EU's single market, which extends to all members of the European Economic Area (EEA) and not only the European Union, road haulage licenses are recognised by EU member states and, within the EU customs union, 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 has been adapted to accommodate a high volume of "roll on roll off" (RORO) traffic.

The Trade and Cooperation Agreement (TCA) has applied provisionally since the 1 January 2021 and ensures continued market access for UK and EU road haulage operators to move goods between each other's territories without the need for a permit. UK drivers moving goods to the EU are still bound by the current restrictions on driving hours, vehicle weight and dimension limits and must be in receipt of relevant professional qualifications. The TCA provides a mechanism to manage differences in national regulations if they emerge, although this is considered to be unlikely. UK drivers now need at least six months on a UK passport to travel to the EU, but will be able to continue to operate in the EU without the need for a visa, providing they do not spend more than 90 days in the EU within any 180-day period.

Since the EU and UK were able to reach agreement and thereby avoid no deal, some of the greatest fears concerning the curtailment of access have not materialised. For example, it was possible that UK driving licences would no longer have been recognised by EU member states after the end of the transition period. As a member of the EU and during the transition period, the UK's Driver and Vehicle Licensing Agency (DVLA) was able to issue EU Community Licences for drivers in possession of a standard international vehicle operator licence in order for them to transport goods to the EU/EEA. Under a no deal scenario, UK drivers would have needed to apply for international driving permits to undertake cross-border work between the UK and EEA countries. The permits required from the European Conference of Ministers of Transport (ECMT) are limited in number and the UK's Road Haulage Association (RHA) had warned that there could be a considerable shortfall in the number available. As a result of the TCA, the UK Licence for the Community has replaced the EU Community Licence for UK drivers. It allows UK drivers to transit goods to the EU, Liechtenstein, Norway and Switzerland.

A significant change to road haulage is that the TCA only permits basic cabotage. Whereas when the UK was an EU member state, UK hauliers were able to offer road haulage services in other EU member states on an unrestricted basis, UK hauliers are now only able to undertake one cabotage operation on any journey. This provision limits the risk of having to travel back to the UK without a load. In addition, since the UK is no longer an EU member state, UK hauliers need to complete a customs declaration when they enter the EU. The UK government is developing border infrastructures, including IT systems, which are designed to ensure that hauliers comply with controls between GB and the EU, as well as, under the terms of the Northern Ireland Protocol, between GB and Northern Ireland.

One of the most important of these systems is the Goods Vehicle Movement System (GVMS), which the government has built from scratch. The GVMS allows operators to file relevant paperwork to secure advance approval to cross the border in order to avoid long delays at the border. The System came into operation for GB-NI trade in January 2021 and will be available for GB-EU trade from July 2021.

Even the slightest delay at the border that results from incorrect reporting is extremely costly for sectors that have been developed on the premise of seamless movement for goods, as the delays for lorries in Kent in December associated with new Covid-related border controls demonstrated. For example, in the automotive industry, delays in the arrival of components at car plants are measured in minutes. It has been estimated that every minute of a delay could cost [£50,000](#) in gross value added to the industry, which amounts to over £70 million per day.

Dover is the UK's busiest ferry port. Up to 10,000 lorries pass through Dover each day. Whereas only around 500 were subject to customs checks when the UK was an EU member state, a majority are now subject to checks. In a reasonable worst-case scenario, the UK government estimated that between 40 and 70 percent of trucks will not have the correct paperwork for the new border controls, and will face two-day queues to board ferries at Dover if the new checks result in a queue of 7000 port-bound trucks. As a mitigating measure, the government has launched a new online service 'Check an HGV' so that hauliers can self-certify that they have the correct paperwork before they arrive at the border. If they complete this process successfully, drivers will have a permit to drive to the border in Kent. Drivers need to have considerably more knowledge about their loads than is currently the case.

The [Road Haulage Association](#) had prepared for the possibility of significant delays as trade volumes resume to normal levels in late-January. It warned that trade volumes at the beginning of January were 85 per cent down on the average 2019 levels. When volumes of freight reach something approximating normal levels is the moment the "real extent of the impact this red tape is having on industry and businesses" will be clear. However, there have already been examples of early disruption as a result of the extra regulatory burden for hauliers. For example, the parcel delivery service [DPD](#) suspended delivery services to the EU because of the increased burden of customs declarations. [Evidence](#) of delays for freight at the GB-NI border following implementation of the TCA with some firms unaware of the new paperwork requirements which had caused delays.

Trade volumes at the UK border are also down as a result of the additional regulatory burdens and anticipated delays at the border. [Data](#) from the Cabinet Office showed that the outbound flow of lorries in January 2021 was only 67 per cent of January 2020 levels and in February 2021 it was 85 per cent of the level in February 2020 – a significant fall. Moreover, the UK government calculates that usually 30 per cent of these are empty lorries at this time of year, whereas this year the figure is 50 per cent. The reduced flows of lorries and increase in the number of empty lorries suggests British exports to the EU may have been significantly impacted by the new border arrangements.

Conclusion

Road haulage experienced dramatic change following the end of the transition period, resulting from increased paperwork and checks. Although new facilities are being developed, the [manufacturing](#) sector is adopting a 'wait-and-see' approach to how new regulatory obligations will impact imports and exports to the EU.

Maritime transport

Sarah Hall and Martin Heneghan



The UK is heavily dependent on sea transport for its trade in goods. According to the UK Chamber of Shipping, [95 per cent](#) of the UK's trade is transported by sea, while 20 million passengers travel by sea to and from the UK each year.

The maritime sector is largely governed by international law in the form of international conventions, which include the United Nations Convention on the Law of the Sea (UNCLOS) and the treaties and regulations of the International Maritime Organization (IMO). The EU has sought to make these conventions enforceable by incorporating them into EU law, often in the process strengthening IMO regulations, particularly on pollution and environmental standards. The rules are monitored by the European Maritime Safety Agency (EMSA) in cooperation with national authorities, which included while the UK was a member state the Maritime and Coastline Agency (MCA).

The UK government takes the view that the liberal character of international maritime law is likely to minimise the impact of the UK's departure from the EU. In its [White Paper](#) on the future relationship with the EU the government noted that: "The maritime sector is liberalised at a global level. On that basis, UK ship operators will be able to serve EU ports largely as now, following the UK's withdrawal from the EU." The TCA also includes provisions for access to ports, the use of port infrastructure and associated services to be preserved on a "commercial and non-discriminatory basis" (Article 5.46).

These provisions, coupled with the reach of international law in sea transport mean that the impact of the UK's withdrawal from the EU will not be as great as in other transport sectors. However, the UK's departure from the EU has implications for the provision of services for the transport of goods and passengers, for cooperation on matters of safety, and for the professional qualifications of seafarers. And beyond the immediate implications for maritime transport, there are also major implication for supply chains with the introduction of paperwork at ports.

First, in the EU's single market, cabotage is liberalised. In other words, operators from one member state enjoy the freedom to transport goods or passengers between two locations in another member State. UK operators have lost this freedom as access will now not be as extensive as it was under membership. Second, as the UK has become a third country, UK shipping companies have to submit security information prior to entering an EU port. This requirement has created a new administrative burden for UK exporters to the EU, as well as logistics operators using UK transporters. Third, certificates of competency for seafarers issued by the UK are no longer recognised automatically by the [EU](#). As a result, UK-trained seafarers cannot continue to work on EU-flagged ships once their certificates expire, which makes employing UK-trained seafarers much less attractive to operators. On welcoming the Trade and Cooperation Agreement (TCA), Nautilus, the seafarers' union, [warned](#) that much of the detail still needs to be resolved before the full impact on the UK maritime sector, and UK seafarers and the legality of their professional certification, can be fully assessed. The UK government has [stated](#) that it is working to ensure that the EU, Norway, Iceland and Liechtenstein will continue to accept UK certificates of competency.

Agency links

The Political Declaration stated that the future relationship should facilitate cooperation on maritime safety and security, including exchange of information between the European Maritime Safety Agency (EMSA) and the United Kingdom Maritime and Coastguard Agency (MCA), consistent with the United Kingdom's status as a third country. However, there is no further mention in either the UK's negotiating [mandate](#) or the text of the Trade and Cooperation Agreement.

ESMA allows for third country observer status. Representatives from the UK's shipping industry have cautioned against the UK's withdrawal from EMSA, in particular the participation in SafeSeaNet, CleanSeaNet and THETIS, which are systems to share safety, security and environmental information. They have [argued](#) that whilst the MCA could gather that information, it would be duplicating a process that is already in place, and it would not necessarily be as inclusive, widespread or efficient as the current arrangements. In evidence to the select Committee on the European Union, the UK Chamber of Shipping [argued](#) that if the MCA were to take on this role, a new IT infrastructure and associated reporting practices would need to be developed.

The long term

The UK government had envisaged significant delays at ports in the event of a no deal due to the need to carry out customs and regulatory checks, and had signed a deal with four ferry operators to ship critical goods such as medical supplies to eight less frequently used ports. The introduction of customs formalities was a particular concern for RORO services that were not previously stopped for border checks. Even a slight increase in time for custom clearance to be undertaken would cause significant disruption to traffic at the border.

The issue has already impacted RORO traffic into Ireland with a significant number of British businesses not having the correct paperwork completed before shipping goods. In particular, safety and security declarations have not been submitted with the movement of goods. The disruption caused the Irish ferry operator, Stena, to cancel 12 sailings in the second week of January. In order to alleviate this, the Irish revenue service is giving shippers a special [code](#) to use for their Pre-Boarding Notification when they can't complete one in the normal way because of missing information. This easement allows them to complete customs requirements and board ferries. The use of the number will signal to the Irish revenue service that support is needed.

The move by the Irish authorities coincides with other measures to reduce port disruption in the early phase of the new arrangements. For the first twelve months of the TCA, businesses will not be required to submit rules of origin paperwork when shipping goods. However, they will still have to abide by rules of origin during the grace period, meaning goods must be locally sourced or have had sufficient work carried out on them in the UK. Any goods that don't meet rule of origin requirements will be subject to tariffs.

Although disruption has been reported, it is too early to assess how much the TCA will lead to delays at ports. Increased freight capacity plans were required in late January and early February when normal trade flows resumed as Christmas and no deal stockpiling inventories wind down.



Aviation

Hussein Kassim



The end of the transition period marked a rupture in a sector where historically [the UK had been an advocate](#) of EU involvement. Although measures taken unilaterally by the UK government, as well as the terms of the EU-UK [Trade and Cooperation Agreement](#) (TCA) ensures continued connectivity, the UK's departure from the EU has also seen [important changes](#), which have led to reduced commercial opportunities for economic operators, additional bureaucracy, and major uncertainty, leading to widespread concern among stakeholders and less choice for consumers.

The EU aviation system

After 31 December 2020, the UK ceased to be part of the regional regulatory system that the EU has developed since the 1980s. This system extends to virtually every aspect of aviation and in the form of the [European Common Aviation Area](#) (ECAA) includes several neighbouring countries as well as EU member states. The EU system is rooted in, but also supplements, strengthens and transcends the international regime that has governed aviation since the 1944 Chicago Convention and the International Civil Aviation Organisation (ICAO).

In safety, the technical norms are agreed within ICAO on the basis of consensus are given legal force within the EU. EU member states plus Switzerland, Norway, Iceland and Liechtenstein, moreover, have delegated tasks for which they are responsible as the ICAO 'States of Design' to the European Air Safety Agency (EASA) to carry out on their behalf. EASA applies and enforces the standards and recommended practices (SARPs) adopted within ICAO, as well as certificates aeronautical products, parts and appliances designed, manufactured, maintained, and used within the EU. It has also been charged with certificating design organisations, authorising operators from non-member countries, air safety analysis and research, monitoring, implementation, inspections, technological standardization, and enforcing the EU's ground handling rules.

The EU has also created an internal market in air services. Whereas in the rest of the world, the commercial opportunities of airlines are regulated by bilateral agreements between signatory states, the EU has created a multilateral system, where an EU-registered airline that meets technical and ownership requirements can operate services anywhere in the internal market. As well as the freedoms that airlines typically enjoy under traditional bilateral air services agreements – namely, to overfly, land in, or to carry cargo and passengers from their home state to or from the other state – in the single market EU airlines have additional rights. They can fly cargo and passengers between other EU member states and operate domestic services in another member state. Beyond the ECAA, the EU concluded a number of agreements with 17 non-EU countries, including the US, that grant traffic rights to all EU-registered carriers.

After the transition: continuity and change in UK regulation

The UK sought to ensure substantive continuity after the end of the transition period by incorporating virtually the entire body of EU aviation rules into UK domestic law. The government adopted no fewer than 15 air transport-related statutory instruments (SIs) in 2019 and 2020 under [the European Union \(Withdrawal\) Act 2018](#). As well as [air traffic management](#), [security](#) and elements of economic and environmental regulation (e.g. [competition policy](#), [passenger compensation rights](#), [noise emission](#), etc.), the SIs cover many of the areas which in the EU fall under the responsibility of EASA, since after 31 December 2020 the UK ceased to be part of the EASA system. The government of Theresa May had sought to remain an EASA member, but the aim was dropped by the Johnson government and, in any case, EASA membership is restricted to members of the EU and the European Free Trade Association (EFTA).

Under the [Aviation Safety SI](#), where EU regulations have legislated for ICAO compliance in the EU, their provisions have been amended and incorporated into UK domestic law. Since the UK assumed its role as ‘State of Design’ on 1 January 2021, [the UK Civil Aviation Authority \(CAA\)](#) will take over the tasks performed by EASA. As well as enacting ICAO standards and recommended practices, the CAA has taken on many of the other functions relating to [safety](#) performed by EASA, including design certification, and has been testing new processes and recruiting staff in preparation. The UK also adopted [transitional measures](#) to ease the move into the post-Brexit era. For example, certain categories of certificates issued on or before 31 December 2020, and all other certificates, approvals and licences issued in accordance with EASA requirements in effect on that date, will remain valid under UK law for two years unless they are due for earlier expiry.

Although the UK is committed to maintaining aviation safety standards ‘as rigorously as before’, concerns have been expressed by stakeholders and other actors about the cost involved, including to [business](#), and the available technical expertise. The CAA will need to perform regulatory functions, but ‘[without having EASA as a technical agent and without having access to EASA and EU-level capabilities](#)’. Airline executives have [voiced concerns](#) about the ability of the CAA to match EASA’s expertise, and a former chief executive of the CAA [pointed to](#) the unnecessary duplication of work, and business uncertainty caused by multiple regulators as personnel, operators, manufacturers and others providing services between the UK and the EU will need to secure licences, approvals and certificates from two regulatory authorities [once the transitional arrangements come to an end](#). The chief economist for the Aerospace, Defence, Security and Safety Group (ADS), the trade body for British aerospace [warned](#), meanwhile, that it would take 10 years to create the necessary certification infrastructure.

The EU-UK Trade and Cooperation Agreement (TCA) does include a framework for future cooperation between the two sides, as well as a process for the reciprocal acceptance of compliance in areas including airworthiness, operation, air traffic management, and personnel training and licensing. Annexes will be developed by the Specialised Committee on Air Transport, which will set out the terms and conditions for the recognition by each side of compliance and certification practices by the other. Currently, the only Annex covers airworthiness and environmental certification, which outlines a process for the recognition of future design and environmental certificates.

The provisions of the TCA only partially allay fears expressed by shareholders, however.

The risk to the UK, where aviation is an important area of economic activity, is significant. The UK is a major global player, has the largest aviation industry in Europe, and the second largest aerospace industry in the world. According to [the government](#), aviation ‘directly contributes at least £22 billion to the UK economy each year – with around £14 billion from air transport and £8 billion from aerospace’. It directly provides over 230,000 jobs, consisting of around 4,500 businesses, and is an important pillar of UK tourism, which ‘contributed £68 billion to the UK economy in 2016’.

In economic regulation, since traffic rights are traditionally only granted to airlines that are majority owned and controlled by nationals of the contracting parties, both UK and EU carriers took action to adjust their shareholdings in anticipation of the end of the transition period – and to prepare for the event of a no deal – in order to continue to have full access to the single market as EU carriers. UK airlines, including easyJet, set up a carrier in the EU, while EU airlines [Ryanair \(Ireland\) and Wizz Air \(Hungary\)](#) decided to remove voting rights from its UK shareholders. The TCA did not quite revert to the standard nationality clause, since it provides that UK carriers will need to have the UK as their principal place of business, and be majority UK-owned and controlled, but allows UK airlines that are majority UK/EEA or Swiss-owned on 31 December 2020 to continue to operate. EU carriers must be under EU/EEA/Swiss majority ownership and control, and respect the same condition on licences and place of business.

In addition, the UK government now assumes responsibility for negotiating traffic rights for UK airlines. The UK has come full circle since the 1980s when the UK government championed EU intervention in air transport as a route toward multilateral liberalisation after running up against the limits of bilateralism. Under the TCA, UK airlines can continue to operate cargo and passenger services to and from the EU, but can no longer carry either cargo or passengers between EU member states, or serve domestic routes in the EU. Although

UK airlines are permitted to fly cargo from the EU to third countries, they can only carry passengers on such routes where the UK government has negotiated a bilateral agreement with the EU member state concerned and on a reciprocal basis.

Another dimension of change concerns aviation agreements that were signed by the EU with non-member countries that lapsed on 31 December 2020. These agreements cover traffic rights and safety arrangements, usually involving the mutual recognition of licences, approvals and certificates between jurisdictions. The UK has sought to re-negotiate replacement arrangements since these agreements ceased to cover UK operators after the transition period. The UK had negotiated [replacement air services agreements](#) with several of these countries, including Canada, Israel, Norway, Switzerland, and the US before the end of the transition. It also concluded Bilateral Air Safety Agreements (BASAs) or similar with the USA, Brazil, Canada and Japan, covering mutual recognition of licences, approvals and certificates. Traffic rights for UK airlines operating services to non-EU countries covered by existing UK bilaterals rather than EU-level agreements are unaffected. The UK has 111 such bilateral air services agreements, including with China and India.

Conclusion

The end of the transition period has brought about significant change in the regulation of UK aviation. Despite UK efforts to ensure continuity and stability, and the commitment of both the EU and the UK to future cooperation, the UK has withdrawn from a tightly integrated regional system where regulatory responsibilities were shared and UK airlines enjoyed EU-wide freedoms. Although measures have been put in place to limit disruption, there are anxieties about the UK's capacity to perform at the same level as EASA, uncertainty about the future interaction between the CAA and EASA, and broader concerns about the implications for the UK aviation industry after 1 January 2021.



Farming policy

Michael Cardwell



Following Brexit, UK agriculture has become subject to a level of change consistent with its departure from a Common Agricultural Policy that not only imposed detailed regulation but also provided high levels of support which underpinned financial viability. [Recent estimates for 2019](#) indicate that direct payments accounted for £3,296 million in calculating total UK income from farming of £5,278 million. And, more widely, the free movement of agricultural products within the Single Market was central to agri-food policy at a time when the UK remains only 64 per cent self-sufficient in foodstuffs and the EU is the greatest source of imports. [In 2019](#), over £5 billion worth of food, feed and drink was imported from the Netherlands alone. Any new regulatory framework which may be implemented after 1 January 2021 will therefore have an important impact on both the domestic industry and food security at a point when the fragility of the food chain has already been thrown into sharp relief by the Covid-19 pandemic. In this context, focus will first be trained on the proposed financial assistance regime for farmers before broader consideration of the effects of Brexit on agricultural trade.

Financial assistance for farmers

The [Agriculture Act 2020](#) grants enabling powers to the Secretary of State to give financial assistance to English farmers for a range of ‘public goods’ which are not provided by the market. Particular emphasis is accorded to the environment, including climate change objectives. And there is a clear determination to move away from the area-based subsidies of the Common Agricultural Policy which did not target support according to need, with direct payments to be phased out by 2028. To take forward this redirection of financial assistance, the government set out its flagship Environmental Land Management Scheme in November 2020 in the policy document, [The Path to Sustainable Farming](#).

Several issues, however, remain to be resolved, among them the following. First, the Agriculture Act 2020 puts in place only a regulatory framework. Notably, the Secretary of State is granted an enabling power to give financial assistance as opposed to being placed subject to any duty. And the details of the schemes to put the ‘public goods’ model into operation remain work in progress, with a range of pilots undertaken, and more envisaged. A sector that traditionally operates with long horizons has been swift to [articulate concern](#) at the uncertainty. Moreover, this relative imprecision as to the parameters of the new regime is accompanied by a clear commitment to commence the planned phasing out of direct payments in 2021, albeit at a low rate initially.

The ensuing possibility that a funding gap might arise would now appear to have been recognised by the government’s decision to incorporate the Sustainable Farming Incentive (SFI) as a component of the Environmental Land Management Scheme, with early implementation in 2022 so as to act as financial bridge until a full roll-out in 2024. The SFI is to be readily accessible to all farmers and payment is to be made for prescribed actions as opposed to achieving higher-level, targeted outcomes. In many ways, therefore, it has similarities with the EU Basic Payment Scheme which it replaces.

Second, there is [a strong argument](#) that the range of ‘public goods’ to be delivered under the Agriculture Act 2020 does not reflect the increasing importance of nutrition and diet in both policy-making and the perceptions of consumers. In particular, it was enacted before the [National Food Strategy](#) has been fully elaborated, while food poverty, which has been highlighted during the Covid-19 pandemic, does not feature prominently. Following amendment to the Bill, Section 19 now requires the Secretary of State to prepare and lay before Parliament a report containing an analysis of statistical data on UK food security at least once every three years, and this report may include data on household expenditure on food, but there is no mandated pathway to take action in response to any problems revealed. A contrast can thus be drawn with the provisions of the [Climate Change Act 2008](#), which places the Secretary of State under a statutory obligation to take into account the advice of the Committee on Climate Change when setting carbon budgets.

Third, since agriculture is a devolved matter and the administrations in Scotland, Wales and Northern Ireland (NI) are each entitled to design their own support regimes, and NI also has special status following Brexit,

a distinct possibility arises that farmers will be treated differently across the UK. There are indications that [Scotland will retain direct payments](#) in the form of income support even after 2024 and in [NI an option to be explored](#) is the role for a basic, area-based resilience payment to provide a safety net. In addition, it would now seem [likely that EU farmers will benefit from Basic Income Support for Sustainability until 2027](#). English farmers may, therefore, have legitimate concerns that they will face a structural disadvantage, with the unlocking of financial assistance being [\(see Agriculture chapter\)](#) dependent upon extra effort in the delivery of ‘public goods’.

Trade in agriculture

In the arena of world trade, agriculture has traditionally attracted high tariffs. For example, the EU average Most Favoured Nation [applied tariff rate for dairy products is 37.5 per cent](#). Besides, agriculture is a sector where significant non-tariff barriers are applied to address such matters as food safety (under the [SPS Agreement](#)) and food labelling (under the [TBT Agreement](#)). The conclusion of the [EU-UK Trade and Cooperation Agreement](#) (TCA) between the EU and the UK has been a [source of considerable relief for farmer](#), since, as a general rule, it allows tariff-free and quota-free trade for agricultural products. The EU has also [accepted the UK organic regime as equivalent](#) for the purposes of exports of organic food and feed to the EU until 31 December 2023. And, recognising high levels of biosecurity and animal welfare in the UK, the EU has further granted the UK [‘listed status’](#), so facilitating exports to the EU of live animals and products of animal origin, although a ban on the export of seed potatoes remains in place.

That said, several challenges remain, two of which are highlighted here. First, notwithstanding that the TCA has delivered, in principle, tariff-free and quota-free access for agricultural products, trade will not be without friction. As with non-agricultural products, complex rules of origin must be satisfied in order to secure such access. And, in the agri-food context, specific hurdles are created by sanitary and phytosanitary (SPS) rules (see chapter on Agriculture: environmental, food and animal health standards) and technical barriers to trade. That said, there is an overarching policy decision to ensure a ‘light touch’ in the implementation of these obligations the use of ‘approved establishments’ for SPS purposes is an illustration - and emphasis is placed on ‘cooperation’ throughout. Ultimately, however, the fact that traders face new barriers is inescapable. Not least, [export health certificates](#) have become necessary in the case of exports or movements of live animals and animal products to the EU or NI from England, Scotland and Wales.

An additional level of complexity is generated by the bespoke arrangements for NI, since status as a constituent part of the UK customs territory must be reconciled with the continued application of a range of single market rules, including the [General Food Law Regulation](#). Again these issues have heightened resonance in the agri-food sector due to both the [NI’s dependence on the sector](#) and the need in the case of perishable products for rapid transportation. The decisions taken by Cabinet Office Minister Michael Gove and Commissioner Maroš Šefčovič, as subsequently agreed by the Joint Committee on 17 December 2020, do provide some comfort as to the future quality of access between NI and Great Britain, but the [agreement could be characterised as work in progress](#). For example, in light of the importance of agri-food movements, authorised traders (such as supermarkets and their trusted suppliers) will be exempt from official certification for, inter alia, products of animal origin, but only for a ‘grace period’ period until 1 April 2021.

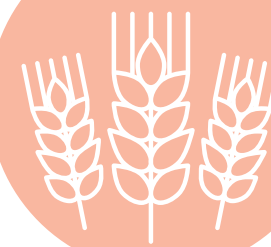
Second, concerns persist around food standards. During the passage of the Agriculture Bill through Parliament, a concerted effort was made to guard against the possibility that future trade agreements would see the introduction of imports produced to lower standards than those imposed upon domestic producers, with steady focus on chlorine-washed chicken and hormone-treated beef. In the event, Section 42 of the Agriculture Act 2020 incorporates amendment to provide, as a general rule, that a free trade agreement including measures applicable to trade in agricultural products may not be laid before Parliament unless the Secretary of State has first complied with a reporting requirement. More precisely, a report must be laid before Parliament explaining whether, or to what extent, such measures are consistent with the maintenance of UK levels of statutory protection in relation to human, animal or plant life or health, animal welfare and the environment. Although an advance on the original Bill, this falls short of the ‘lock out’ of imports produced to lower standards which had been [sought in earlier amendments](#).

And concerns have likewise been expressed as to the degree of discretion accorded to government in respect of marketing standards. Section 37 of the Agriculture Act 2020 confers on the Secretary of State the ability to make regulations which may cover not only technical definitions and labelling, but also the type of farming and production method and the place of farming or origin, with powers of enforcement extending to the imposition of monetary penalties and creation of summary offences punishable with a fine. While noting some narrow improvement of these provisions during the passage of the Agriculture Bill through Parliament, the [House of Lords Delegated Powers and Regulatory Reform Committee](#) stated forcefully that this was ‘an inappropriately wide delegation of power’.

With regard to policy development for standards post-Brexit, differing directions of travel may be detected. On the one hand, an early initiative is the [proposal to ban the export of live animals](#) for slaughter and fattening – an objective which, as was made clear by the ruling in the [Compassion in World Farming](#) case, experienced difficulties under EU law. In addition, the TCA itself provides a framework for ‘raising the bar’. Article SPS.16 expressly recognises that animals are sentient beings and more generally promotes cooperation in respect of animal welfare. Article SPS.17 similarly promotes cooperation in respect of anti-microbial resistance. And, operating on a more holistic level, Article SPS.18 provides that ‘[e]ach Party shall encourage its food safety, animal and plant health services to cooperate with their counterparts in the other Party with the aim of promoting sustainable food production methods and food systems’. On the other hand, the commencement of a [consultation on gene-editing](#) and [the grant of emergency authorisation](#) for use of a product containing a previously banned neonicotinoid may indicate a different UK appetite for risk as [compared to the EU](#) and, indeed, a different vision of ‘sustainability’, with any regulatory divergence liable to generate trade friction.

In short, the TCA has limited the application of tariffs and quotas in so far as they apply to trade in agricultural products between the EU and UK, although the effect of rules of origin should not be [under-estimated](#). There is also a strong emphasis on the need for future cooperation. Yet the landscape for farming policy has still changed. There will be scope to develop new forms of financial assistance for farmers, including positive focus on measures to combat climate change, but non-tariff barriers have been created and there is considerable uncertainty as to both the detailed operation of these non-tariff barriers and the precise form of ongoing farm support. Moreover, the government’s [commitment to maintain levels of funding](#) to the sector extends only to the current Parliament and it is not unreasonable to expect that pressure to reduce funding will emerge thereafter.





Agriculture: environmental, food and animal health standards

Mary Dobbs and Ludivine Petetin

Although it creates opportunities for the UK and devolved administrations to design tailored and future-oriented agricultural policies, the UK's departure from the EU also raises key questions concerning devolution, standards, funding, trade deals, market access, and administrative resources. The end of the UK's membership of the EU and the UK government's response to these challenges are likely to have far-reaching impact. Many of the likely effects were raised in debates on the [Agriculture Act 2020](#), the [Internal Market Act 2020](#) and the [Trade Bill 2020](#).

Hardening borders

As the trade relationship between the UK and the EU is being re-written, so are border customs, checks and inspections. In early 2020, the UK Government [finally acknowledged](#) that UK-EU 'frictionless trade' would not materialise, and that customs checks would take place at UK borders. This has indeed materialised in the [UK and EU Trade and Cooperation Agreement](#) (TCA) and is clearly visible in the European Commission [checklist](#) on the differences between EU membership and the scope of the TCA. Although [customs formalities](#) are themselves an imposition when none previously were in place, non-tariff barriers are arguably even more problematic. As well as submitting customs declarations, hauliers and commercial drivers will face multiple [administrative burdens](#) at the border. For instance, they will have to produce security declarations, as well as appropriate permits and licenses (see chapter on '[Road haulage](#)'). We are already seeing the consequences of inadequate paperwork for hauliers travelling from Great Britain (GB) into Ireland, with a [small proportion of lorries turned away from ferries](#).

Although the [Northern Ireland Protocol](#) excludes checks from Northern Ireland (NI) into the EU, checks will take place for goods travelling into NI and from GB into EU in accordance with the UK's status as a [third country](#). In particular, there will be reinforced biosecurity checks and inspections on agricultural products, including live animal, plants, food and feed, to comply with [SPS measures](#) intended to prevent the spread of diseases and pests.

Checks and inspections for live animals and animal products are carried out at designated border check posts (BCPs), which will consequently be required between GB and NI and between GB and the EU. However, firstly, whilst the UK Government and the NI civil service have undertaken considerable efforts ([despite the NI Minister's strong reluctance](#)), through building infrastructure at NI ports, recruiting and training staff, and generally enhancing logistics, these simply remain insufficient. This will lead to significant bottlenecks. Secondly, although there is now enhanced capacity at BCPs along the GB/EU border [in the EU](#) (and [planned in the UK](#)), there is still [no BCP at ports or airports in Wales](#), which has implications for trade with Ireland, especially in relation to Irish beef imports. Until such capacity is in place, trade will have to be re-routed through other entry points around the country, which raises concerns about the ability of other ports and BCPs to cope, and the impact on the Welsh economy.

Whether between GB and the EU or going from GB into NI, intensified administrative procedures, checks and inspections will lengthen the time spent at the [border](#) dramatically. As a result, the costs of transportation (e.g. driver time) and insurance will rise, the distress to the live animals being [transported](#) will increase, and the perishability of products will be impacted. The repercussions are already being felt across the agri-food supply chain. Additional costs will inevitably be passed on to consumers in the UK and the EU, especially in sectors with very low profit margins, as supply chains become more complex. Therefore, GB products in the EU and EU products in GB are likely to become less competitive. The same could occur for NI products in

GB and for GB products in NI. Small changes in the agri-food supply chain can have a major domino effect. According to a [2020 LSE report](#), when importing into the EU, compliance with rules of origin checks could cost around 8 per cent of the value of the good, with 85 per cent of that figure due to the increased paperwork, and import declarations alone could amount to an extra £4 billion a year to UK and EU traders.

It is also worth noting that some suppliers may not have the logistical abilities to meet these new hurdles and others may simply decide it is not financially worthwhile, e.g. in particular with GB suppliers [no longer supplying to NI](#) or to the EU. This to date includes garden centres where requirements of individual plant ‘passports’ have led to [decisions not to continue supplying](#). This has considerable knock-on effects for both downstream producers and consumers, forced to source goods elsewhere or go without. It is also seen in the context of grocers, where it has been suggested that export health certificates from GB to NI or to the EU could cost [an extra £40,000 for every shipment of animal products](#).

Agri-food policies and imports/exports responsibilities will be generally be shared across the Department for Environment, Food and Rural Affairs (DEFRA), the Food Standard Agency (FSA), the Agriculture/Rural Affairs Departments in the devolved administrations, Animal and Plant Health Agency and Border Force. The FSA for Wales, Northern Ireland and England and Food Standards Scotland will be the main regulatory bodies handling food imports. To cope with the incoming responsibilities, the [capacity of the FSA](#) has been increased with the risk assessors doubling since 2017, the ability to draw expertise from 100 scientific experts and support staff and the recruitment of 35 additional members to its advisory committees.

The UK (effectively GB) is no longer be part of [TRACES](#). TRACES is the European Commission’s online system that requires sanitary and phytosanitary certification, pre-notification and tracking (importation, exportation and intra-EU trade) of most agri-food products. Imports into NI must continue to be notified via TRACES due to the NI Protocol and GB products exported to the EU must comply with TRACES too.

The UK system replacing TRACES is the ‘Import of products, animals, food and feed system’ ([IPAFFS](#)). Notification of imports of live animals (including Export Health Certificates (EHCs)) will be handled by the Animal and Plant Health Agency ([APHA](#)) for GB or the Department of Agriculture, Environment and Rural Affairs ([DAERA](#)) for NI. Health controls at sea and airports of imported food will be undertaken by the [Association of Port Health Authorities](#) who represents local authorities and Port Health Authorities. Audits will be carried out at BCPs by APHA in GB and the Food and Veterinary Office of the European Commission in NI. EU products exported to GB will have to comply with the IPAFFS requirements.

As such, SPS responsibilities and controls will largely remain spread over multiple agencies and departments – the approach has not been streamlined by Brexit. Arguably, it is even more difficult for businesses to trade due, first, to the costs attached to comply with the new IPAFFS system and, second, to the existence of two systems in the UK: one for GB with IPAFFS and one for NI with TRACES.

Driving standards – but where?

The impact of the UK’s departure from the EU will affect several interlinked agricultural, environmental and food issues. EU regulatory frameworks, including standards, processes and governance mechanisms, which ensured a minimum level of protection, will no longer bind the UK since regulatory divergence is possible under the TCA for as long as obligations on the level playing field to achieve fair competition are fulfilled – unless they are provided for in international agreements, including the NI Protocol and any future relationship agreement (going beyond the TCA). As a result, the UK, including the devolved administrations in principle, has [scope for choosing to diverge](#) from EU SPS standards.

Despite an obligation of non-regression in environmental matters, a common objective to achieve net zero by 2050, and agreed cooperation on animal welfare, antimicrobial resistance and sustainable food systems, the UK can diverge from EU standards for as long as this will not negatively impact on trade. Further, neither the [EU Withdrawal Act 2018](#) nor the TCA, replicates the [corresponding EU governance mechanisms](#). Despite efforts by the [devolved administrations](#) and also for instance within the [UK Environment Bill](#), rules can be altered over time and their role is likely to be considerably weakened.

Divergence between markets can increase hurdles, resulting in restrictions or checks, internationally and nationally. This concern is reflected in the Internal Market Bill 2020, which introduces UK principles of mutual recognition and non-discrimination that will now apply across Great Britain. Simply put, to facilitate trade, the introduction of new standards in one part of GB cannot prevent the use or sale of goods there that are authorised in another part of GB, even if standards differ. The UK Internal Market (and facilitating external trade deals) has been [prioritised](#) both over devolution and the potential to raise standards. Considering Scotland's stated intention (contrary to Westminster's position) to [maintain alignment with EU standards in the future](#), including [environmental](#) and human health standards, not to mind their general protective stance on devolution, it is hardly surprising that Scottish politicians especially have [responded aghast](#) to such proposals. It is worth noting that the Westminster Parliament [rejected proposals by the House of Lords](#) to extend the areas excluded from the market principles under Schedule 1 to cover proportionate measures to achieve legitimate aims - akin to the EU's approach. One relatively narrow but significant [concession](#) was adopted in light of Wales and Scotland positions: where common frameworks are adopted, these will be exempt from the market principles. However, this only applies to areas previously governed by EU law and where a Minister of the Crown is in agreement with at least one devolved administration, and is dependent on the Secretary of State making regulations to amend Schedule 1. This does not facilitate unilateral devolved actions to protect standards.

[Concerns](#) about standards have also been raised in relation to UK trade deals and especially [food](#) (see chapter on '[Food safety](#)'), where it has been feared that the UK might permit lower quality imports or dilute rules on consumer information and protection, to facilitate trade deals. Although these changes could lower prices for consumers and importers, they would do so at the risk of quality, health, and choice. They could also potentially undermine domestic producers, who continue to adhere to existing standards. It is notable in this respect that the [UK government has blocked efforts](#) to protect standards in the Agriculture Act 2020 and Trade Bill.

Northern Ireland (NI), of course, occupies a very particular position. Even after the transition, NI remains bound by EU laws covering agricultural production, animal welfare and food standards. This was the solution agreed by the UK and the EU, and incorporated in the NI Protocol in the Withdrawal Agreement, to maintain an open border between NI and Ireland in compliance with the Belfast Agreement (the "Good Friday Agreement"), despite the UK's departure from the customs union and single market. Broader environmental issues are largely not covered by the Protocol, although there are a number of exceptions, including invasive species.

Conclusion

Overall, sanitary and phytosanitary issues, controls on imports/exports and internal standards are closely intertwined. How they will develop in future remains uncertain, but there is already disruption for all parties. and this is likely to last. Standards and governance mechanisms will likely diverge both within the UK and between the EU and the UK since the TCA has led to limited positive outcomes in these areas. In conjunction with the introduction of border controls between GB and the EU and to an extent between GB and NI, the divergence is and will keep on leading to substantial delays at the frontier and costs for industry. It will also come with a cost to the public purse and is likely to result in higher prices for consumers.

Fisheries policy

Christopher Huggins



Despite a Brexit trade deal now being secured, fisheries continues to dominate the headlines. Despite only accounting for a small proportion of the UK's economy (around 0.1 per cent of UK GVA) and employment (11,961 fishers, with 19,191 working in the seafood processing industry), fisheries became one of the key political issues in Brexit. This political significance, as well as the fishing industry's dominant status in a number of coastal communities spread around the UK, meant fisheries became a major hurdle in the negotiations with the EU.

Yet, 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. There have been some changes already, with a ban on the controversial practice of pulse fishing already put in place, though in this case an EU-level ban was due to come into effect in July 2021 anyway. Overall however, the technical regulations governing 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.

The future of this regulatory framework and the shape of UK post-Brexit fisheries policy remains unclear. While 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, and while these objectives are featured in [the 2020 Fisheries Act](#) as overarching 'fisheries objectives', much of the detail about what a post-Brexit fisheries policy will look like has yet to be elaborated. Key debates, for example how quota should be allocated across the UK's diverse fishing fleet, have not been fully addressed.

One of the reasons is that fisheries policy is a devolved competence, with devolved administrations in Northern Ireland, Scotland and Wales responsible for fisheries in their respective territories, and the UK government through DEFRA and the Marine Management Organisation in the case of England. From 1 January 2021, these four fisheries administrations became responsible for both making and implementing UK fisheries policy.

While there is a recognition that the UK's four fisheries administrations 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 administrations 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 weight and value of fish caught. 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. Here, the UK government in Westminster is keen to retain tight control over these areas of fisheries policy which fall within its reserved competencies.

More broadly, however, the UK has lacked sufficient administrative capacity to develop a longer-term vision for the future of fisheries policy beyond the high-level aspirations already set out in the Fisheries White Paper and Fisheries Act. Part of 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 have hitherto rested at the EU level. For the short term, at least, the day-to-day operation of fishing in the UK will still be determined by rules made under the CFP.

Although many day-to-day regulations are likely to remain unchanged in the short-term, there are significant changes in terms of access to fishing waters. After 31 December 2020, 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 administrations (the devolved administrations, or 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 licenced, 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.

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) being the largest markets. Therefore, [there is 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.

Furthermore, 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. To this end, the UK and EU are likely to be engaged in sustained dialogue, negotiation and cooperation on fisheries for the foreseeable future.

A failure to co-operate coupled with unilateral decisions on how much fish can be caught, will likely lead to overfishing and the unsustainable management of fish stocks, which will ultimately threaten the fishing industry's viability. Overall, if the goal is to ensure fishing in UK waters is sustainable, then the UK's future fisheries policy, rules and regulations are still going to be determined by the relationships between the UK and EU, even if indirectly.



Food safety

Tola Amodu and Andrew Fearn



The UK's largest manufacturing sector, the food and drink industry contributes over £28 billion to the UK economy and employs over 400,000 people. Add to this the UK's dependence on food imports, which account for over 40 per cent of consumption, and it is unsurprising that food safety and food security have attracted so much attention since the UK referendum. However, headlines about UK food businesses throwing caution to the wind and the UK government trading off food security for food safety in the rush to sign trade deals with countries outside the European Union (EU) have limited grounding in fact.

In practice, the UK food industry has largely retained the structures and processes for managing food hygiene and food safety that have evolved decades within the EU. This is particularly so for large supermarkets with global supply chains. The shift from a command-and-control approach to food safety regulation already seen in the EU to a more risk-based approach as exemplified by the hazard analysis and critical control point approach to food hygiene and safety (HACCP) is likely to continue, with a limited role for government in some contexts and a more influential role for business in others. The overall impact on food safety and the regulation for the largest players will be negligible.

The same might not be said for the small to medium-sized enterprises (SMEs) in the food service sector, which is much more fragmented than the food retail sector. It is more reliant on wholesale distribution, in which traceability throughout the supply chain is more difficult to maintain, quality control systems are less well developed and responsibility for monitoring food safety compliance rests almost entirely with local government.

The regulation of UK food safety and hygiene standards

Much of the existing UK food law derives from the comprehensive system of food safety and hygiene regulations put in place by the EU, which has been transposed into UK law in accordance with provisions enshrined in the 1990 Food Safety Act. The Act is split between food safety, which is directed at protecting the consumer from unsafe food, and food hygiene, which focuses on the microbiological aspects of food manufacturing and distribution via retail or catering service. Section 7 of the Food Safety Act creates an offence of rendering food 'injurious to health'. Prosecution is the key enforcement mechanism. By contrast, food hygiene regulation is based on risk assessment throughout the food chain from 'farm to fork', with appropriate and proportionate interventions at critical control points. Food business operators (FBOs) are required to provide evidence that they have adopted hygienic practices on premises suitable for the purpose, compliant with the principles of 'due diligence' enshrined in the Food Safety Act. The system relies on the relevant stakeholders – commercial businesses, regulatory bodies and inspection – sharing intelligence and good practice.

The Food Standards Agency (FSA) is responsible for setting standards and protecting public health and consumer interests in England, Wales and Northern Ireland and maintaining the integrity and reputation of food business both at home and abroad. The onus of inspection falls on local authorities, which play a vital role in securing compliance. However, the capabilities and capacities of the FBOs largely shape the compliance approach. Large businesses, especially supermarket chains, have made significant investments in the development of quality assurance and food safety processes, in response to the due diligence requirements of the Food Safety Act and in defence of their brand reputation. The same cannot be said of small businesses, many of which lack the capacity to do all that is necessary to comply with what is required of them by the Act. Thus, local authorities invest a significant time and effort educating local businesses and helping them to implement compliance strategies in the interests of public health and the health of the local economy.

UK strategy after 31 December 2020

Much of the law relating to UK food safety and hygiene derives from the EU, on which the UK relies heavily for food imports. It is very unlikely that UK supermarkets that have invested so heavily in systems and process to protect the integrity of their food supply chain and that consumers place considerable trust will alter their approach to quality assurance and food safety. Private monitoring and certification schemes are the norm in supermarket supply chains and will continue largely as before in alignment with the UK's EU trading partners and food sourced from around the world.

There is some concern that huge pressure on the public purse in the wake of the Covid-19 virus will reduce local authority capacity and increase reliance on to self-regulate. However, in this context a co-consolidated market structure – fewer, larger businesses with the ability to enforce (privately) high standards regarding food quality and safety and market power – can be a force for (public) good. The UK grocery industry takes the view that food safety should not be a basis on which businesses compete and regulatory compliance may be higher today than it has ever been. The cost, however, is that small-scale operators cannot compete on price, are unable to comply with food standards that are among the highest in the world, and so far forced out of business. It is here that the impact of Brexit may be felt most acutely.

After the transition period, the pressure on SMEs to remain competitive may result in a driving down of standards in the pursuit of cost saving. Although not in the long-term interests of consumers or society more broadly, it could be the thin end of the wedge for the independent retail sector and large parts of the food service industry. It is certainly the case that 'one size does not fit all' and past food scares such as e-coli, salmonella and listeria show that a more relaxed approach on the part of small operators can result in major adverse impacts.

While the labelling of products of animal origin (POAO) will be used to identify UK products intended for the EU or Northern Ireland, high safety standards and effective food safety management systems will remain in place. From a regulatory perspective, the FSA maintains its priority of ensuring the highest standards of food safety and consumer protection, and its commitment to having a robust regulatory regime focused on risk-based analyses continues. What remains less clear is whether in assuming the role played hitherto played by the EU in standard setting, the Agency will have the resources necessary to ensure that at the critical points sufficient resources are available to ensure both a robust system of standard setting, and support and monitoring of small business, locally and nationally.

Within the UK, non-compliance with existing standards would present significant reputational risks. However, the picture is less clear for markets beyond the EU or where business is under financial pressure.

More 'red tape'

Although the substance of regulation is unlikely to alter in the short term and consumers can continue to expect high quality food, the same may not be said for regulatory requirements. The end of the transition period has been accompanied by the imposition of 'red tape'. Withdrawal from the EU and the creation of a new economic and social partnership have given rise to counterproductive effects that are already being felt by companies, large and small. By creating, ['two separate markets; two distinct regulatory and legal spaces'](#), new barriers to trade in goods and services and to cross-border mobility have been brought into existence. Zero tariffs and zero quotas on all goods that comply with the appropriate rules of origin clearly does not equate to frictionless trade, since compliance with certification requirements is burdensome and costly. Delays resulting from the need to complete and produce import and export documentation have already resulted in shortages and created barriers to entry for certain types of produce. The impact has already been felt on both large and small companies, and consumer choice could be affected in the longer term.

Environmental regulation

Charlotte Burns and Andrew Jordan



At first glance, there was very little change to UK environmental regulation when the transition ended on 31 December 2020. A series of calculated moves had been made to assuage widespread [concerns](#) expressed during the EU Referendum that Brexit would weaken UK standards. Hence, in 2018 the UK government adopted a [twenty-five year plan](#) to ‘improve the environment’ within a generation. In their 2019 [manifesto](#) the Conservatives promised to be a global environmental leader and undertook not to weaken national standards after Brexit. Theresa May had previously committed the UK to adopt legally binding targets to achieve net zero greenhouse gas emissions by 2050.

The 500 or so major items of [EU environmental law](#) will thus continue to apply or be ‘retained’ in UK law in the short term. The UK government also took many other steps to prevent policy and [‘governance gaps’](#) from suddenly opening up on 1 January 2021. For example, it tabled a wide-ranging Environment Bill that will eventually establish a new domestic system for setting and achieving long-term targets and create a brand new regulatory body - the Office for Environmental Protection (OEP) – to oversee the enforcement of UK and EU retained law.

However, dig a little more deeply and a more nuanced picture emerges. A key driver of EU policy was the desire to harmonise standards to prevent a deregulatory race to the bottom. Many EU rules were adopted as single market measures; they facilitate fair competition by shaping the way products are manufactured and marketed. The EU is understandably concerned that the UK will seek to [weaken](#) its standards to secure an unfair trading advantage.

Whilst the UK Government could have alleviated this concern by inserting a ‘non-regression’ or non-weakening clause into the Environment Bill it has refused to do so. Yet many businesses want the UK to strike a trade deal with the EU that binds both sides into a pattern of ongoing policy progression. The EU has stated its willingness to do this, but, during the negotiation of the Trade and Cooperation Agreement (TCA), the UK Government continually refused to sign up to specific, strict non-regression and ‘level playing’ commitments.

The Political Declaration that the EU and the UK signed before the UK left the EU committed both sides to put in place ‘appropriate mechanisms’ to ensure environmental policy is adequately implemented and enforced. However, the UK Government was eventually forced to concede that the OEP - will [not be up and running](#) until at least mid-2021. In January 2021, the environment ministry (DEFRA) announced that because of COVID-19, the Bill would not receive Royal Assent until the Autumn. Even if it is adopted by 1 January 2022 (by then it would be a year late), environmental interest groups are likely to remain [fearful](#) that the OEP will not be sufficiently independent to hold the Government fully to account. [Research has also shown](#) that the environmental law retained from the EU is at risk of not being routinely updated after 1 January 2021.

On 1 January 2021 (and with the possible exception of activities in Northern Ireland), the UK cut all formal environmental links with EU regulatory authorities. The EU has a dedicated environmental agency (the European Environment Agency) which has no regulatory powers (its primary role is to collect data and publish reports on the state of the environment). The UK could have retained associate membership of that Agency, but declined to do so. The UK will, however, continue to be bound by international environmental law, having first completed the not inconsiderable task of extricating itself from its collective membership of key environmental treaties as an EU member state.

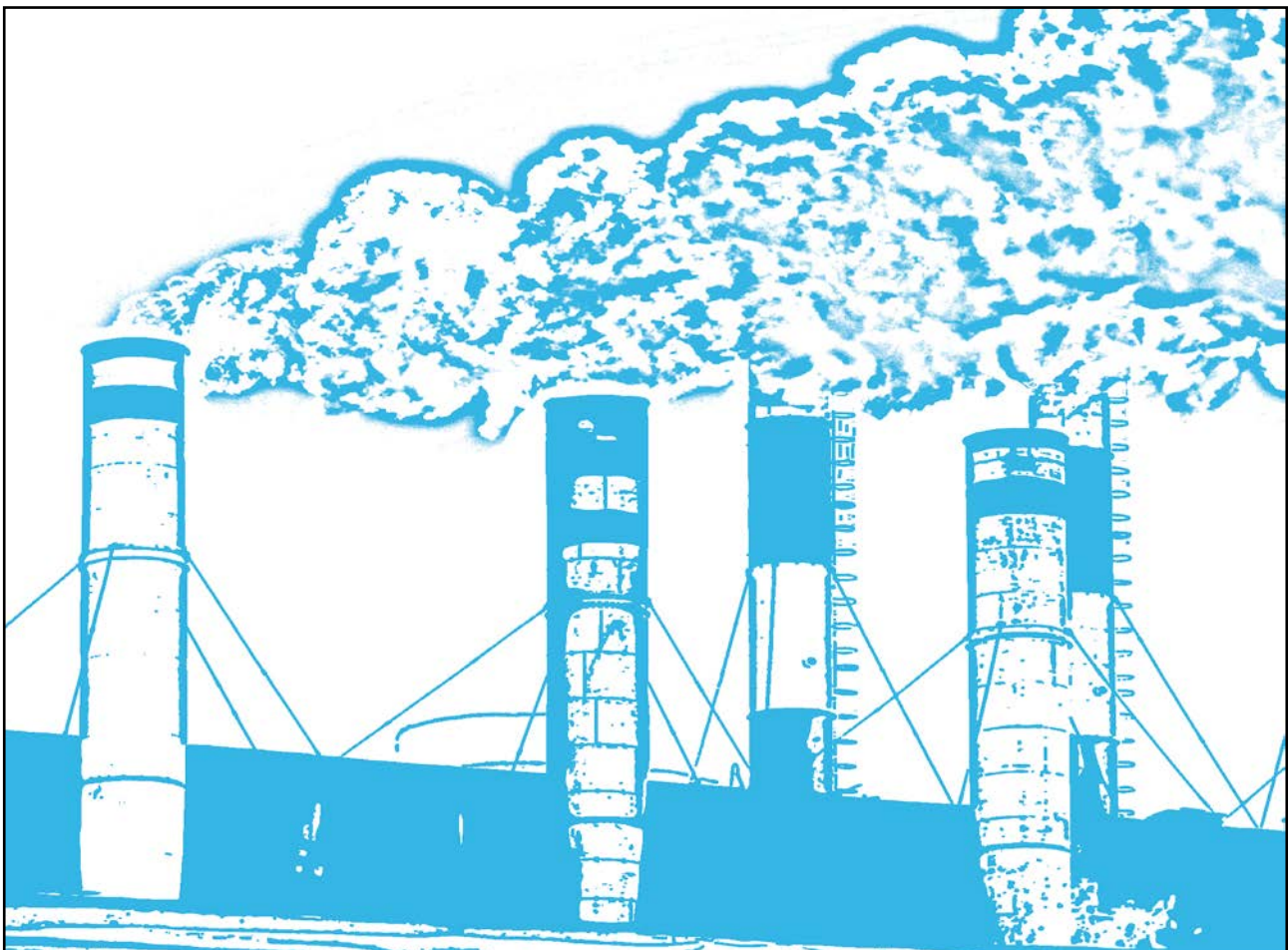
Businesses based in the UK that want to access the EU market will still face acute market-led pressure to abide by EU rules. Chemicals regulation has emerged as an area of [particular concern](#). The EU system for the Registration Evaluation and Authorisation of Chemicals (REACH) requires substances manufactured in, or imported into, the EU to be registered with the European Chemical Agency (ECHA). The ECHA then decides how to control or restrict the marketing and use of those substances.

After 1 January 2021 companies based in Great Britain that are registered with EU REACH will no longer be able to sell on the EU market unless they transfer their registration to an EU-equivalent organisation (dubbed 'UK REACH'), the UK Government having decided to terminate its membership of ECHA. [Doubts have been expressed](#) about whether UK REACH will have sufficient resources to do its job properly.

For larger corporate entities, the increased costs of having to deal with two systems and registering within the EU will be an additional burden. But for smaller businesses, the cost of dealing with two systems could be even more burdensome. Similar considerations apply to manufacturers and operators that are currently subject to EU environmental regulations. After the transition UK companies wanting to trade with the EU will still need to comply with its rules but will have little opportunity to shape those rules.

A final complication, the extent of which only became apparent after the EU Referendum, is that most environmental rules in the UK are devolved. Thus, the Environment Bill is mainly England facing, leaving Scotland, [Wales](#) and Northern Ireland scope to develop their own bespoke systems. The Scottish Government has expressed its determination to [dynamically align](#) with EU rules. However, the highly contentious [Internal Market Bill](#), which seeks to create a new UK-wide level playing field, may limit the freedom of action of the devolved nations. They have voiced their fear that the rules of the largest market, England, will drive standards across the whole of the UK.

To conclude, in the short term the measures that the UK Government has put in place prevented a sudden discontinuity in environmental regulation after the transition period came to an end. However, businesses that are not prepared may find trading with the EU more difficult after 1 January 2021. Over the longer term, there is nothing to prevent UK-wide environmental standards from being weakened. And there is a markedly greater risk of new conflicts flaring up between the devolved nations over the ambition and scope of regulation. Finally, the environment was one of three main sticking points in the negotiations of the TCA. There is every possibility that it remains a flashpoint, especially if the UK pursues a deregulatory approach – the so-called 'Singapore-on-Thames' model – whilst the EU surges ahead with its ambitious [European Green Deal](#).



Climate policy

Brendan Moore and Andrew Jordan



The UK is in many ways an international leader in climate change policy. For example, the [UK Climate Change Act](#) sets a legally binding net-zero greenhouse gas emissions target for 2050, one of the most demanding in Europe. Internationally, the UK has made far-reaching commitments under the United Nations Framework Convention on Climate Change and the 2015 Paris Agreement, and will host the next international climate negotiations in 2021 (COP26). When it was an EU member state, the UK often pushed for [more stringent targets and shorter implementation periods](#).

UK climate policy has nevertheless also been strongly influenced by the EU, which has developed an extensive body of policy addressing climate change, energy and environmental protection. Many EU rules, such as those governing [carbon dioxide emissions from cars](#), were incorporated into UK law through the European Union (Withdrawal) Act 2018, and hence will remain in force following the transition.

Despite these important elements of continuity, there remains a potential for major change to occur after 31 December 2020. By [loosening the constraints](#) imposed by EU law, Brexit has increased the ability of the UK government to adjust domestic climate policy. Moreover, several UK policies that were underpinned by EU law will not continue after the transition. This includes the EU Emissions Trading System, which currently addresses greenhouse gas emissions from UK-based factories and industrial facilities. Just weeks before the end of the transition, the UK decided to replace it with [a 'UK emissions trading system'](#). The Trade and Cooperation Agreement (TCA) commits both sides to search for a common pricing system.

Brexit also presents the UK with opportunities and challenges related to governance and enforcement. The European Commission and the Court of Justice of the European Union can sanction and fine member states for failing to comply with EU obligations. After the end of the transition period, this governance framework no longer applies to the UK. Although the UK's climate targets under the Climate Change Act are legally binding and in fact stricter than the EU's, they will not be enforced by an external authority or subject to the same pressures compliance.

In addition, following the UK's departure from the EU on 31 January 2020, the UK is [no longer a member](#) of the European Environment Agency (EEA). This Copenhagen-based agency facilitates the exchange and analysis of environmental information among 38 member and cooperating countries. During the negotiation of the TCA, the UK declined to maintain its participation in the EEA, despite the fact that membership is open to non-EU countries. Associate membership of the EEA could in theory have been a relatively cost-effective way in which to share data on climate emissions, collaborate on automated monitoring using satellites such as Copernicus, and maintain a close dialogue on emerging scientific knowledge of climate impacts.

The exact scope and powers of the new Office for Environmental Protection (OEP) that will be established to replace these mechanisms [were still being actively discussed in parliament](#) a month before the end of the transition. The OEP was not even officially vested with regulatory powers by that point, so instead a small interim body had to be established. Once created, the OEP is unlikely to have the same enforcement powers as the EU institutions. It will not, for example, have the power to levy fines. Doubts have been expressed about its independence: until it is up and running, an interim body will be physically located within the environment ministry, DEFRA, and will be funded from that ministry's core budget. The OEP will certainly need to form a good working relationship with the UK Climate Change Committee (CCC) – the independent body that currently provides advice to Government on climate policy and its implementation. At present, it is not entirely clear how the CCC and the OEP will work together.

Issues of policy and governance were an important flashpoint during the negotiations of the TCA. The EU insisted that in order to secure tariff and quota free access to the Single Market, the UK should sign up to strong policy commitments – 'environmental non-regression' – and establish an independent, well-resourced environmental watchdog to enforce them. The UK refused to add specific and binding non-regression clauses

to the new trade agreement. Given these disagreements, it is unclear how effective any [level playing field commitments on climate](#) will be for the UK.

There are also important devolution dimensions to the UK's climate policy post-Brexit. In the past, EU environmental law has served as a [shared baseline for the devolution settlements of the 1990s](#), acting as a legal minimum from which the devolved administrations could 'diverge upward' with more stringent policies. The UK's departure from the UK removes this point of reference and it is unclear whether and how it will be replaced by UK-wide standards.

The challenge of devolution is accentuated because many of the sectors affected by climate policy (including energy, agriculture, transport and industry) have been [unevenly devolved](#) to the administrations in Scotland, Wales and Northern Ireland. Politicians and civil servants in the four nations must now find new ways to collaborate to reduce emissions (mitigation) and adapt to the impacts of a changing climate (adaptation).

The situation in Northern Ireland is even more complex. The Ireland/Northern Ireland Protocol added to the Withdrawal Agreement 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 to stay in line with EU regulations and prevent a hard border on the island of Ireland, adding further complexity to internal UK policy negotiations. To give one example, the UK will continue to submit NI-relevant monitoring data to the EEA, even though it is no longer formally a member country of that EU agency.

To conclude, 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 actually uses that flexibility still remains deeply uncertain many years after the EU referendum.



Workers' rights

Catherine Barnard



There is a chance that employment rights might become the new front line in the Brexit conflict. The business secretary, [Kwasi Kwarteng](#) has confirmed in January 2021 that his department is reviewing how EU employment rights protections could be changed after [Brexit](#), while insisting they will not be watered down. He subsequently retracted the review. Does this matter? Surely Brexit was about the ability to take back control of 'our' laws. Well, yes, up to a point.

Article 6.2(1) of the Trade and Cooperation Agreement provides 'The Parties affirm the right of each Party to set its policies and priorities in the areas covered by this Chapter, to determine the labour and social levels of protection it deems appropriate and to adopt or modify its law and policies in a manner consistent with each Party's international commitments...'

But then come the caveats. Article 6.2(2) concerns *non-regression*: 'A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period' (emphasis added). This includes failing to effectively enforce its law and standards. What if a Party does so? What if, as is rumoured, the UK decides to cut some of the protections in the Working Time Directive?

There is a remedies provision for breach of the non-regression clause – based on convening a Panel of Experts (not very tough). However, buried elsewhere in the text, is the possibility for parts of the agreement to be suspended in the case of non-compliance by the UK.

Article 9.4 concerns *rebalancing*. Rebalancing concerns *future* measures in the field of labour or social policy. Article 9.4 provides 'If *material* impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation.' It continues that such measures must be restricted with respect to their 'scope and duration to what is strictly necessary and proportionate in order to remedy the situation'.

Article 9.4 applies where one party significantly improves its labour standards or the other significantly reduces theirs. Even if the UK does not go down the route of deregulation, it is possible that the EU will go further in developing its social policy as a result of the European Pillar of Social Rights (EPSR). Its proposal for a Directive on an adequate minimum wage would set a framework for EU member states based on the [Kaitz](#) index which describes the relationship between minimum and median or average wages. If adopted, this Directive would be a radical step for the EU (and raise difficult questions about its legal basis). Would it have material impacts on trade? Well, given that the UK already has a minimum wage which is regularly examined by the Low Pay Commission which makes annual recommendations on the future level of the National Living Wage and National Minimum Wage rates, it seems unlikely that this will constitute a significant divergence. What if the UK government did not give equivalent protections to those found in the Transparent and Predictable Working Conditions Directive adopted in June 2019 (EU Member States have until 2022 to transpose the new rules into their national legislation)? There are suggestions that this would be enough to trigger the rebalancing provisions. If the rebalancing measures are engaged, the mechanism is swift and results in proportionate action including suspending part of the agreement.

The UK Government's recent change of heart regarding revision of employment law highlights the lack of clarity over what the future policy direction may be. Employers have indeed complained about aspects of the Working Time Directive and the Court of Justice's generous reading of its provisions. But the backlash against the government's intentions to deregulate aspects of employment regulation stemmed from widespread criticism not from the EU but the UK. The TCA does provide for sovereignty in setting labour laws and standards. The UK government now has the option to engage in a deregulatory agenda, if it chooses to do so. Under the TCA, the EU would have to demonstrate that those changes have a (material) impact on trade and investment

in the EU. Yet, as the government knows, it was elected in 2019 not on the basis of a deregulatory agenda but on the basis of levelling up. Widespread deregulation of employment standards does not fit this mould. So the Secretary of State was left [insisting](#) that he's in favour of 'a really good high standard for workers in high employment and a high-wage economy. That's what I'm focusing on. And so the idea that we're trying to whittle down standards, that's not at all plausible or true.' Is this really a threat to the EU?



Immigration policy

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 States. 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 has played a significant role in developing these rights.

The Conservative government, already committed to reducing immigration, wanted to show that it was listening to these voters. Theresa May made it 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 that any future relationship with the EU would not be a close one, like the Norwegian-style European Economic Area (EEA) which is premised on staying in the single market. 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.

But before that there was another major issue to address: the status of the 4 million or so EU nationals and their family members already 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 has been set up through which individuals can 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).

For many, the EU Settled Status (EUSS) application is 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 can be done in approximately 10 minutes. And the Home Office can claim success: [4.5 million applications](#) have been made under the scheme, nearly a million more than the number of EU nationals estimated to be living in the UK. But for those on the margins of society, applying for settled status has been much more [challenging](#) and there is a real fear that the UK may face another Windrush situation when the deadline for applying for settled status expires on 30 June 2020. It is widely thought that many EU nationals who are [vulnerable](#), homeless or simply unaware have failed to apply. As Brandon Lewis, Secretary of State for Northern Ireland [put it](#), Failure to apply to the scheme by the deadline, without good reason, could lead to deportation.

The EU Settlement Scheme will be overseen by an [Independent Monitoring Authority](#) in the UK, which [will](#) ‘protect the rights of EU and EEA EFTA citizens ...in the UK and Gibraltar... by monitoring UK public bodies to make sure they implement the rights of these citizens and by identifying any underlying issues’. The provisions of the Withdrawal Agreement are directly effective and takes precedence over conflicting UK law. This means that EU nationals will be able to bring their claims in the UK courts and, for 8 years after the end of the transition period, national courts will be able to refer questions to the Court of Justice. Despite protestations by former Prime Minister Theresa May to the contrary, the Court of Justice still has jurisdiction in the UK.

For those EU nationals arriving after the end of the transition period, a different legal regime will apply. The free movement rules end although Irish nationals will continue to enjoy the right to enter or remain without leave. By ending free movement, the government has fulfilled its commitment to Leave voters that the UK has taken back control of its borders. It also paves the way for a new global policy which prioritises those with skills sought by the United Kingdom coming to the UK, irrespective of their nationality. Anyone now wishing to work in the UK will need a visa. Anyone now wishing to work in the UK will need a visa. The visa regime has been overhauled. It includes:

- A [global talent](#) visa for leaders in academia, the arts and the digital economy
- A points-based system for [skilled workers](#) 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 your sponsor. This will either be the general salary threshold of £25,600 or the going rate for the job, whichever is higher.
- A [seasonal worker](#) visa for six months for farm work.
- 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 work, or look for work, in the UK at any skill level for up to 2 years, or 3 years for a PhD graduate.

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, intentionally, a far cry from free movement but they will 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. The Trade and Cooperation Agreement contains only the most limited provisions on mobility. The implications of this for the [creative](#) and other industries, which have relied on free movement, are only just beginning to be felt.





Asylum and refugees

Steve Peers

Since the late 1990s, the EU has developed a Common European Asylum System that has two main components: a series of common standards and mechanisms of cooperation; and the ‘Dublin system’ which allocates responsibility for asylum applications between EU member states. Asylum has always been a highly sensitive issue amongst EU member states and a politicised one in the context of the Brexit process too.

Asylum up to the end of the transition period

The UK has had an opt-out on EU asylum law from the outset. When the EU adopted the ‘first phase’ of legislation to establish the ‘Common European Asylum System’ in 2003-05, the then Labour government agreed to opt in to all the measures concerned. However, subsequent governments mostly opted out of the ‘second phase’ proposals adopted between 2010 and 2013, as well as proposals and emergency measures to deal with the so-called ‘refugee crisis’ in [2015-16](#) and [2020](#).

Until the end of the transition period, the UK was still bound by a number of first phase measures. First, the [Qualification Directive](#), which defines the substance of being a ‘refugee’, interpreting the [UN Refugee Convention](#), and ‘subsidiary protection’ – mainly people fleeing civil wars, if they do not qualify as a refugee – applied until then. So did the [procedures Directive](#) (defining the process of applying to be recognised as a refugee), and the [reception conditions Directive](#), which sets out the status of asylum seekers before their asylum application was decided one way or another (i.e. access to benefits and housing).

The second phase laws applicable to the UK included three EU regulations:

- the [Dublin III Regulation](#), concerning which Member State was responsible for asylum applications;
- the [Eurodac Regulation](#) which backs up the Dublin system by sharing fingerprints of asylum seekers and irregular border crossers; and
- the [Regulation setting up the European Asylum Support Office](#).

When the UK was a part of the EU legal system, the UK courts dealing with asylum law cases were able to ask the CJEU to interpret this EU legislation to determine how to decide cases before them – for instance a case about [torture victims](#). Since 1 January 2021, UK courts can no longer seek the opinion of the CJEU regards asylum cases, although the CJEU can still issue rulings in cases sent by UK courts before the end of that period. For instance, the CJEU delivered a ruling in a case concerning [Somali asylum seekers](#) on 20 January 2021, following a request made by the UK Upper Tribunal in March 2019.

What has changed?

The UK’s withdrawal from the Dublin system and the EU’s Common European Asylum System has implications for access to data, where it can only consult the [Eurodac](#) database containing the fingerprints of asylum seekers under very limited circumstances, access to resources through the European Asylum Support Office, and the transfer of asylum seekers, including for family reunion. Moreover, should it so decide, the UK could lower the standards in its asylum law below those set in the first phase EU laws on qualification, procedure and reception conditions. Nevertheless, since the UK is still bound by the UN Refugee Convention, there are limits on the extent to which it can diverge. Furthermore, the case law of the European Court of Human Rights, as applied in the UK by the Human Rights Act, also contains some guarantees for refugees and asylum seekers.

The UK is also now unable to transfer asylum seekers to EU Member States under the [Dublin system](#). Equally, asylum seekers cannot be transferred from the EU to the UK under those rules. Such transfers were often for family reunion reasons. The EU did not wish to discuss UK [proposals](#) on [readmission](#) of people, including both EU and non-EU citizens or admission of child asylum-seekers. Instead, the TCA includes a [declaration](#) noting the UK's intention to hold bilateral discussions with Member States on these issues. Time will tell whether this leads to the extension of bilateral treaties, such as the Le Touquet Treaty with France, to cover asylum seekers that have arrived in the UK, or the negotiation of further bilateral treaties and what impact they have. Bilateral treaties could make it easier for the UK to persuade EU countries to accept returns of asylum seekers from UK territory. In the absence of such treaties, it will be difficult.

As a consequence of these changes, the UK has [amended its immigration law](#) to say that asylum claims can now more easily be rejected based on whether an asylum seeker could have applied elsewhere. However, it is now harder to transfer an asylum seeker to the EU because the legal framework for this has lapsed without replacement.

In practice, the likely upshot is that more asylum claims will be rejected on the grounds that the asylum seeker should have applied elsewhere, which is different from saying that the asylum seeker did not face persecution in their country of origin. Yet, contrary to claims of Brexit advocates, it is harder, not easier, to remove asylum seekers from the country.



Security and cooperation on crime

Steve Peers



The UK's withdrawal from the EU and the end of the transition period has led to important changes in criminal law cooperation. Although the conditions it enjoys under the UK-EU Trade and Cooperation Agreement (TCA) are better than they would have been under a no deal, the UK is in a less advantageous position than it was as EU member state, despite some claims to the contrary. The UK had been able to develop and maintain a special arrangement within the EU. Although it remained outside of Schengen and had negotiated an opt-out on other obligations and commitments in the Area of Freedom, Security and Justice, the UK did cooperate with member states and shared access to a number of important databases.

In EU criminal law, the UK had a veto until the Treaty of Lisbon, and then an opt-out after that. The UK was not bound by measures adopted by the EU in the Area of Freedom, Security and Justice, by international agreements, or rulings of the Court of Justice of the European Union (CJEU), but was able to 'opt in' to instruments or particular measures. The UK participated in the EU police intelligence agency ([Europol](#)), the prosecutor support agency ([Eurojust](#)), and much of the legislation concerning fast-track cooperation between national authorities on criminal matters – for instance, the [European Arrest Warrant](#) (EAW), along with rules on mutual assistance (that is, the transfer of evidence), the transfer of prisoners, the transfer of sentences, and recognition of orders for freezing or confiscation of assets. It also participated in a number of measures on information exchange between law enforcement authorities.

The TCA cuts back the previous degree of cooperation, but still provides for more cooperation in this field than would usually be extended to a non-EU member state outside the Schengen area. It includes cooperation with Europol and Eurojust, albeit without participation in running the agencies. Information-exchange now excludes the widely used [Schengen Information System](#) (SIS), which includes real-time information on wanted persons and stolen objects. This is likely to leave the UK with a significant data gap, since UK officials had used the SIS II over 600 million times a year, and the system is used to alert agencies when a EAW has been issued.

But the agreement includes versions of exchange of information on passenger name records (PNR), criminal records, vehicle registration, DNA and fingerprint data (see chapter on ['Data protection'](#)).

For criminal judicial cooperation, there are no longer rules on transfer of prisoners although the UK had sought them, or on transfer of sentences, even if for the former issue, a Council of Europe treaty covers some of the same ground, but it does not go as far as the EU measure. There are still arrangements on orders for freezing or confiscation of assets, and the TCA commits the UK to remain signed up to basic anti-money laundering principles. There are stripped-back commitments on transfer of evidence. However, the UK has lost access to the European Criminal Records Information System (ECRIS), even if the TCA does provide for a strengthening of the 1959 European Convention on Mutual Assistance in Criminal Matters.

For extradition, there is a fast-track system similar to the EU's treaty with Norway and Iceland that retains some features of the EAW, with exceptions – so still providing for special rules as compared to the Council of Europe treaty on this issue. Most notably, as compared to the EAW, there is a possibility of refusing to extradite a country's own citizens; it is possible to refuse to extradite for 'political offences', although this is limited as regards terrorism cases; the waiver of the 'dual criminality rule' – for some offences it is not necessary to show that the alleged behaviour was criminal in both countries might not apply; a proportionality rule, already present in UK law, expressly applies to extradition requests; and it is explicitly possible for a court to ask for human rights guarantees before extraditing.

The UK will no longer be covered by the jurisdiction of the CJEU in this area – although national courts in the EU member states might still ask the CJEU about the interpretation of the treaty. In any event, UK courts have rarely asked the CJEU questions about criminal law measures; and the CJEU still retains jurisdiction to answer

questions referred from UK courts before the end of the transition period (such as this [fast-tracked case](#) about whether Bulgarian prosecutors are independent enough to issue EAWs). Furthermore, extradition requests sent from the UK may be impacted by [CJEU case law](#) that says that before one Member State extradites a citizen of a second Member State to a non-EU country, it must first contact the second Member State to see if it would prefer to prosecute the person concerned.

The criminal law part of the treaty will not be subject to the general rules on dispute settlement involving arbitrators and possible trade retaliation. Instead the agreement provides for only a more political form of dispute resolution. It is subject to possible fast-track termination or suspension if the UK or a Member State denounces the European Convention on Human Rights or some of its protocols (including those concerning the death penalty), or due to other concerns about human rights protection or data protection standards. More broadly, although the UK had a strong preference for several separate agreements, the TCA brings the various areas outlined in the Political Declaration within a single governance framework.

Finally, the EU (Future Relationship) Act, which gives effect to the treaty in UK law, has made a number of changes to the law to give effect to the rules on information exchange and extradition in particular, thereby ensuring continuity since the end of the transition period.

Overall, the TCA limits the extent to which criminal law cooperation between the UK and EU would revert to multilateral or to existing or future bilateral treaties, as it provides for a number of special rules compared to the situation that would have applied in a no deal scenario. But the Brexit process has nevertheless reduced the level of cooperation compared to the UK's position as a Member State. Also, since it only has limited access to EU databases, the UK could face a data gap. Moreover, under the TCA, as part of its wider monitoring to ensure domestic compliance, the EU will be looking at whether the UK continues to adhere and give effect to the European Convention of Human Rights.



Conclusion

Cleo Davies and Hussein Kassim

This report offers a provisional assessment of the outcome and impact on UK regulation of the decisions taken by the UK government and the [Trade and Cooperation Agreement](#) (TCA) following the end of the transition period on 31 December 2020. Four main findings emerge from the analyses in the foregoing sections.

First, there is significant variation between policy areas, sectors and sub-sectors regarding policy continuity. However, the government has enacted major change in only two of the domains considered in this report; namely, [immigration](#) and [agriculture](#). In several others, including [data protection](#) and [fisheries](#), the UK has rolled EU regulations into domestic law with minimal change – often simply limited to replacing references to the EU with the names of UK bodies. This could give the appearance of policy continuity if viewed only from a domestic perspective, but in fact there has been significant and sometimes important changes, either because the TCA has imposed new regulatory requirements, or stakeholders have lost freedoms that they enjoyed when the UK was an EU member state, or both.

Second, the UK gave new or existing UK bodies responsibility for regulatory tasks that had previously been carried out by EU institutions and agencies. However, in some cases, preparatory legislation was not passed early enough to allow regulators sufficient time to become operational before the end of the transition period. More generally, the government was selective in the powers and responsibilities it transferred or entrusted to UK regulators, and the resources it allocated to them. As a result, some UK bodies were not ready to take on regulatory functions after 1 January 2021. There is also a question mark over whether UK authorities are well enough equipped to carry out their responsibilities, either because they have lost access to EU instruments, databases or regulatory networks, or because the appropriate infrastructure is not yet in place.

A third finding is that, although the TCA ensured that a ‘no deal’ cliff edge was avoided after 31 December 2020, it did not resolve all matters once and for all. In fact, the TCA itself is subject to review every five years. In some domains, business remains unfinished and, in this sense, the new regulatory settlement is incomplete. They include some areas where agreement still needs to be reached by the two sides, and some where a decision is still awaited from the EU. There are also places where the TCA provides for grace periods or another form of transitional arrangement, and reviews, where change of some degree is likely to follow. In some areas, moreover, the UK has yet to take decisions pursuant to the Agreement.

Fourth, if the aim of Brexit was to ‘de-Europeanise’ UK regulation, the findings show that that ambition has only been partly realised. Indeed, the analyses suggest that it may not materialise, even over the longer term, due either to the terms of the TCA, constraints arising from non-EU international law and conventions, or other pressures militating against policy change.

Continuity and change in UK policy

In preparing for the end of the transition, the UK government had to decide whether to continue with existing policy aims and instruments, which were aligned with the EU, or to change direction. The table in annex 1 gives an overview of the decisions taken. In many areas, including [competition policy](#) in anti-trust and mergers, [consumer protection](#), [food safety](#) standards, [copyright](#), [gas and electricity](#), and [environmental policy](#), the UK opted for a high level of domestic policy continuity. In environmental policy alone, the government retained more than 500 items of EU environmental law in UK domestic law under [the European Union \(Withdrawal\) Agreement 2018](#). Furthermore, UK regulations often replicated the substance of the EU rules that they superseded. The [EU General Data Protection Regulation](#) (GDPR), for example, was replaced by a UK regime that is materially the same.

In the above areas, the UK used statutory instruments under [the European Union \(Withdrawal\) Agreement 2018](#) to retain the substance of policy, while removing the references to EU institutions and inserting the names of UK bodies. In some, however, its broad policy continuity was accompanied by an important element of change. For example, the UK’s new [public procurement](#) system essentially replicates the EU system, except that the

UK e-notification service has replaced the EU-wide publication of procurement notices, but healthcare has been excluded. On [climate change](#), the government largely retained EU rules on carbon dioxide emissions from cars in UK law, but while the [UK emissions trading system](#) (ETS), which replaces the [EU ETS](#), imposes a lower cap, it lacks [an automatic adjustment mechanism](#) and is therefore likely to require constant tinkering.

In two areas, the UK has signalled its departure from existing policy. In [immigration](#), the UK government has used the control taken back from the EU to enact a major policy reform. Following the pledge made in the [2019 Conservative Party manifesto](#), it replaced the free movement of persons with new UK visa regime. EU citizens, like the nationals of other countries who wish to study or work in the UK, can apply for a student visa or a global talent visa aimed leaders in academia, arts and digital economy, or under a points-based system for skilled workers. Irish nationals, however, continue to enjoy the right to enter or remain without leave. In [agriculture](#), meanwhile, also following a manifesto pledge, the UK has declared an intention to depart from the high levels of support and area-based subsidies associated with the [Common Agricultural Policy](#). In an implementation process that will take several years, it plans to phase out [direct payments to farmers](#) by 2028 in England.

Other changes in UK regulation result from the TCA and the negotiating positions of the two sides. Since the UK decided to leave the single market and the customs union in order to have the regulatory autonomy that would allow it to diverge from EU rules, and the EU refused to compromise on the integrity of the single market, the UK's departure has led to the return of a border between the UK and the EU. Although the TCA is a free trade agreement that allows trade between the two sides to flow more easily than would be the case under [WTO rules, free trade is not the same as frictionless trade](#). For example, even though the TCA gives UK goods tariff-free and quota-free access to the single market barriers remain. Those impeding the movement of capital, services and persons are even greater.

Non-tariff barriers to trade in goods may take a number of forms. As well as the customs declarations they have to complete, showing that their payload originates in the UK or the EU, hauliers and commercial drivers have to produce security declarations, and appropriate permits and licenses. When they transport live animal, plants, food or feed, they also have to undergo biosecurity checks and inspections to ensure they meet sanitary and phytosanitary conditions imposed by the EU on imports. Requirements apply to cross-border traffic between the UK and the EU, but also due to the status of Northern Ireland under the Irish Protocol, between Great Britain and Northern Ireland. These have led to [disruption](#), and [delays](#) at the border. UK exporters of perishable and highly perishable [foodstuffs](#), such as fish and shellfish, have been severely affected, with reports that some businesses are ceasing activity. In the case of Northern Ireland, the requirements have affected the supply of goods to supermarkets.

In some domains, there has been no explicit policy change as such, but rights or freedoms that were previously enjoyed by UK firms or citizens while the UK was a member of the EU have been lost or reduced as a result of the UK's withdrawal. This is particularly true for services. In [financial services](#), UK firms no longer have the [passporting](#) rights that allowed them to supply products and services across the EU. Instead, they are subject to EU 'third country' rules, which severely restrict their operations. In [maritime transport](#), UK service providers in the maritime industry have only limited access to the single market and need to complete paperwork to cross the border. In [aviation](#), airlines can no longer operate services between EU member states, on domestic routes within them, or, without a bilateral agreement with the state concerned, on routes from an EU member state to a non-EU member. In [road haulage](#), meanwhile, UK drivers can transit goods to the EU, Liechtenstein, Norway and Switzerland, but on any one journey are restricted to a single cabotage operation – that is, carrying a load between two points in any one EU member state.

UK regulatory institutions

The UK's withdrawal from the EU has had a dramatic impact on the institutional architecture of UK regulation. Outside the EU, it now falls to the UK government to [create structures and systems of regulation](#) to carry out tasks that were previously performed by EU institutions and agencies. The table in annex 2 shows the UK bodies that have taken over from EU institutions. In some areas, it has given new responsibilities to existing bodies, in others it has established new agencies. In the case of the European Environment Agency, the UK

government has left the EU without creating equivalent new bodies or functions at UK level, though the Department for Environment, Food and Rural Affairs (DEFRA) will continue to submit relevant data concerning Northern Ireland to the EU. The process has been costly, since the UK previously shared the funding burden with its erstwhile partners. Also, because it raises questions of budget, staffing, design, independence and accountability, as well as how regulatory competences are distributed among the four nations of the UK, the process has been politically sensitive. [Chemicals](#) exemplifies [all these points](#), but staffing is a concern in regard to several UK authorities that have assumed additional responsibilities, including DEFRA, the Competition and Markets Authority, and the Food Standards Agency.

The preceding sections highlight a number of issues. The first is the preparedness of the UK's regulatory machinery at the end of the transition period. Despite the volume of amendments made to retained EU law and the government's widespread use of transitional arrangements, many UK bodies were not ready to assume their regulatory responsibilities on 1 January 2021. [Environment](#) perhaps provides the most striking example. Although the government signaled its intention to create an [Office of Environmental Protection](#) (OEP) to oversee the enforcement of UK and EU retained law in 2019, the Environment Bill was not adopted prior to the end of the transition period, and the OEP has not yet been set up, [though a chair has been appointed](#). Since the [Interim Environmental Governance Secretariat](#) is little more than a postbox situated in DEFRA, there is an important gap in the UK government's accountability in this area.

Readiness is not only confined to new regulators. Stakeholders have made clear their doubts about the length of time [it will take for the UK Civil Aviation Authority \(CAA\)](#), or the Health and Safety Executive (HSE), which will replace the [European Chemicals Agency \(ECHA\)](#) at the centre of UK's chemicals regime, to develop the necessary expertise. Some ask not when, but [whether](#), UK bodies will rival their EU-level counterparts.

A number of authors note that the responsibilities of UK authorities are more narrowly drawn than those of the EU agencies that they have replaced – the case in aviation – and the powers granted to them are less wide-ranging. Enforcement is a particular area of concern. EU agencies are backed by EU law and by the European Commission and the CJEU, which gives them considerable strength. It is doubtful that UK regulators will be backed by the same threat of legal sanction. In environment, for example, ministers promised that [the OEP will be world-leading](#), but stakeholders are concerned that there will be a ['governance gap'](#) on account of the limited range of powers it is likely to have at its disposal.

Several authors anticipate adverse impacts from the withdrawal of UK bodies from EU regulatory structures. In some cases, the concern relates to instruments to which UK authorities will no longer have access, such as [competition policy](#). In others, data and information sharing is the main worry. In a few instances – the [Prüm](#) database (DNA, fingerprints and vehicle registration) and [passenger name records](#) – the UK can still consult EU databases. In most areas, however, access has been lost. UK bodies can no longer consult the Consumer Protection Cooperation (CPC) network or [e-Certis](#), which provides users with information about applying for contracts in EU member states and the associated [European Single Procurement System](#) (ESPD). In environment, now that it is no longer a member of the European Environment Agency, the UK has lost access to information on trends and pressures that provide a vital resource for new policy making. It also can no longer access the [Schengen Information System](#) (SIS II), a database of 'real-time' alerts about missing and wanted individuals and stolen property, including firearms, which, according to the Metropolitan Police's deputy assistant commissioner, British officials checked more than 600 millions times in 2019. The same is true of the two Europol's databases – [European Information System](#) (EIS), a central criminal information and intelligence database, and [Secure Information Exchange Network Application](#) (SIENA), which enables the exchange of operational and strategic crime-related information, can also be added to the list.

More broadly, UK regulators have also lost access to communities of experience and expertise. These include networks, such as the [European Competition Network](#) (ECN), and the [Consumer Protection Cooperation](#) (CPC) network, where UK bodies could call upon their counterparts for information or assistance, and agencies, including the [European Air Safety Agency](#) (EASA), the [European Medicines Agency](#) (EMA), and [Agency for the Cooperation of Energy Regulators](#) (ACER).

The transfer of regulatory functions to UK bodies presents challenges to businesses and other stakeholders, who have to register, or apply anew for licences, certification or approvals. In the chemicals industry,

[companies are required to register manufactured or imported chemicals with the UK Chemicals Agency](#). However, [because there is no data exchange provision with the European Chemicals Agency \(ECHA\)](#), they cannot retrieve existing information and have to complete registrations afresh, sometimes with associated testing, which some estimates have costed at [£1 billion](#). Feelings of grievance in the industry are acute, since businesses consider they are being required to pay a second time after already funding the original [EU REACH](#) system.

The duplication of regulatory authorities is costly, especially in heavily regulated industries, where companies wanting to serve both the UK and the EU markets will have to satisfy requirements in two jurisdictions. In [aviation](#), this applies to pilots, flight crew, individual aircraft parts, production and design organisations, and training bodies, who all have to be licensed and certificated by both the UK CAA and EASA. The same is true in [chemicals](#). [Businesses](#) and [regulators](#) have pointed to the waste in setting up parallel systems when previously a single regulator served as a one-stop shop covering all EU member states or mutual recognition obtained, but also to the uncertainty the co-existence of two regulators engenders. In [digital services](#), double regulatory compliance has prompted some US-owned companies such as Facebook and Google to transfer all their UK users into user agreements with the corporate headquarters in California rather than face potential legal action in both the EU and UK. Others wonder whether, given the costs of submitting to regulators in two markets, whether producers will begin choosing to [‘stop registering a percentage of their product portfolio’](#) and distribute their product in one market only.

Authors also considered whether there is evidence of a fundamental change in the UK regulatory model, with regard to arrangements for parliamentary scrutiny, ministerial discretion, and political guidance to regulators. With respect to parliamentary scrutiny, there have been intense debates, particularly where new bodies have been created, about the role of MPs. In some areas, notably, [trade](#), the [environment](#), [agriculture](#), and [transport](#), the UK’s withdrawal from the EU has led to greater responsibilities for government departments, and in some areas – procurement is an example – ministers have gained important discretionary powers. However, as yet, despite concern about the [design](#), organization, and powers of UK regulators and [regimes](#), there is no systematic evidence of an erosion of arms-length regulation.

Finally, competences are returning to the UK as a devolved rather than a unitary state. As contributions on [climate policy](#), [farming](#), [environmental policy](#), [energy](#) and [fisheries](#), and [public procurement](#) underline, there is considerable scope for divergence within the UK. There is an additional dimension of complexity in some areas. As Andrew Jordan and Brendan Moore note, ‘many of the sectors affected by climate policy, including energy, agriculture, transport and industry have been unevenly devolved to the administrations’ in Scotland, Wales and Northern Ireland. Moreover, the return of competencies is taking place in a context of tension that were further enflamed by the [Internal Market Bill](#), and that are likely to play in further political tussles. While the position of Northern Ireland with respect to trade and customs formalities is highlighted throughout the report, several authors discuss the impact and implications of the requirement under the [Withdrawal Agreement](#) for continued regulatory alignment with EU rules. As Andrew Jordan and Brendan Moore note, ‘some EU climate-related policies, including laws on fluorinated greenhouse gases, energy labelling, and fuel quality, continue to apply in Northern Ireland in order to align to stay in line with EU regulations and prevent a hard border on the island of Ireland’.

Unfinished business?

Despite the scale and scope of these changes, the process of regulatory adjustment is still not over, as illustrated in Table 1. In some instances, this is due to the scope of the TCA. A number of areas that featured in the [Political Declaration](#) agreed by the UK and the EU were entirely left out of the agreement. This was the case for defence and foreign policy, where after the UK government announced that it was not interested in institutional cooperation with the EU, the issue was omitted from the agenda of the negotiating rounds. Another example is judicial cooperation in civil and commercial matters, where the UK chose to fall back on existing international treaties and agreements.

Table 1. ‘Unfinished business’ following the Trade and Cooperation Agreement (TCA)

Areas that fall outside the TCA	Areas under TCA where agreements between the two sides are outstanding	Ongoing implementation of TCA provisions	Time-limited transitional arrangements in the TCA (including reviews)	Unilateral transitional arrangements enacted by the UK	Pending UK decisions
Defence and foreign policy	Financial services: non-binding Joint Declaration committing UK and EU regulators to future cooperation to be underpinned by new MoU agreed by March 2021	TCA governance: provisional application to allow for European Parliament ratification	Rules of origin (non-tariff barriers): TCA introduced twelve-month grace period for presenting evidence on rules of origins	Customs: grace period to EU imports; checks for some products on 1 April 2021 and from 1 July 2021 for remainder	Fisheries: quota allocation across the UK fishing fleet
Judicial cooperation in civil and commercial matters	Consumer Protection: UK and EU to use best endeavours, ideally within six months, to allow continued data exchange through the EU Rapid Alert System for non-food products (RAPEX) alert system	Non-tariff barriers: TCA has strong emphasis for future cooperation but considerable uncertainty on the detailed operation of these non-tariff barriers (NTFs)	Data: time-limited continuity in transfers of personal data between the UK and EU of up to six months	Medicines: UK adopts the European Medicines Agency's decisions into UK law until 1 January 2023	Intellectual property: rights pertaining to designs and trademarks
	Electricity: Specialised Committee on Energy will develop the technical rules for access to the electricity and gas networks by April 2022	Aviation: Specialised Committee on Air Transport to develop annexes for the recognition by each side of compliance and certification practices by the other	Electric vehicles (EVs): phase in period on local content for EVs through to 2026	Air transport: UK has recognised licences and approvals that were valid on 31 December 2020	Maritime transport: UK still to decide how to replace SafeSeaNet, CleanSeaNet and THETIS systems for sharing share maritime safety, security and environmental information
	Asylum and refugees: TCA includes a declaration noting the UK's intention to hold bilateral discussions with Member States on transfer of Asylum seekers		Organic products regime: EU has accepted the UK organic regime as equivalent until 31 December 2023	Financial services: firms allowed up to 31 March 2022 to comply with UK regulatory obligations; incoming firms and funds to continue their operations for a limited period while they seek authorisation from UK regulators	Environmental Bill setting up Office of Environment Protection still going through Parliament Climate Policy: UK Emissions Trading System in process Chemicals: UK still to set up equivalent of EU REACH
	Geographical indications (GIs): specific rules on the protection and effective domestic enforcement of future GIs left to a later date	Areas where action by the UK following the TCA is outstanding	Fisheries: phasing out of quotas over five-and-a-half years + review clause attached to review of cooperation on Energy	Renewable energy: UK has recognised Renewable Energy Guarantees of Origin (GOs) already granted; but will review its decision in 2021	Agriculture: Decision on whether Trade and Agriculture Commission becomes permanent
		State Aid: UK must legislate to establish a domestic UK subsidy control regime, including establishing independent authority	Energy: termination clause of 30 June 2026; energy cooperation can be extended further by the Partnership Council to 31 March 2027, and becomes renewable yearly after	Unilateral transitional arrangements enacted by the EU	Border infrastructure: physical infrastructure at ports in NI and no designated border check posts (BCP) at ports and airports in Wales
			TCA: to be reviewed after five years	Financial services: The EU has granted central counterparties in the UK equivalence for eighteen months from 1 January 2021	Customs and NTFs: Goods Vehicle Movement System (GVMS) still being rolled out

*The table does not the Withdrawal Agreement and the Northern Ireland Protocol

In some key areas, decisions remained pending even after the end of the negotiations. The [EU's approval](#) of the adequacy of the UK data protection regime, with its implications for UK business, is a case in point. The future of financial services has also not been settled. The TCA has set a deadline for adoption of a memorandum of understanding between the two sides for the end of March 2021. Moreover, the EU has still to complete its assessment of the UK's intentions to diverge from EU rules in the future on which its decision whether to approve equivalence regime will depend. Uncertainty about equivalence is likely to make the UK a less attractive for business location.

In some places, although agreement was reached by the two sides, the relevant measures will only be implemented throughout 2021. Indeed, the TCA itself applies only provisionally until the European Parliament has scrutinised and ratified the deal. Rules of origin checks, for example, will come into force later in 2021, allowing companies that export into the EU to self-certificate in the interim. In the area of [state aid](#), the principles that will inform a UK subsidy control regime were agreed, but the authority has yet to be created. In [electricity](#), the TCA provides that the Specialised Committee on Energy will develop the technical rules defining the terms under which markets participants can access the electricity and gas networks by April 2022, while in [consumer protection](#), the TCA envisages agreement on an arrangement that will allow the UK to continue to receive alerts from RAPEX, the rapid alert system for unsafe consumer products, ideally within six months.

Elsewhere, the TCA included time-limited measures in order to ease the transition. For example, the Agreement provides for a grace period of six months during which personal data can continue to be transferred from the EU to the UK. In [agriculture](#), the UK organic regime is recognised as equivalent, but until 31 December 2023 only, while with respect to electric vehicles the TCA includes a phase-in period on local content through to 2026. In [fisheries](#), the new distribution of volumes will be phased in over five-and-a-half years, pending a review. Importantly, moreover, the TCA links the review on fishing, where the EU has a very strong interest, to energy cooperation, where the UK wants to retain close links to the single market.

The UK also took several unilateral decisions to ensure continuity in trade following the transition period, which are also time limited. It has applied a grace periods to imports from the EU, with checks introduced for some products on 1 April 2021 and from 1 July 2021 for the remainder, after which full paperwork – customs declarations, together with UK Safety and Security declarations – will be required upfront. The UK has also granted automatic recognition in a number of areas. The decision to adopt the European Medicines Agency's decisions into UK law until at least 1 January 2023 has already been mentioned, but the UK has also agreed to recognise licences and approvals in [air transport](#) that were valid on 31 December 2020; and in [financial services](#), UK regulators agreed to allow firms up to 31 March 2022 to comply with UK regulatory obligations, and incoming firms and funds to continue their operations for a limited period while they seek authorisation from UK regulators. Also in financial services, the EU has granted certain operators (central counterparties) in the UK temporary equivalence for eighteen months to ensure continuity and financial stability.

Finally, the UK government is still in the process of taking key decisions about the post-Brexit future. It has yet to decide quota allocation across the UK fishing fleet, for example, or in the area of intellectual property on rights pertaining to designs and trademarks. In [maritime transport](#), the UK has not decided how it will replace the SafeSeaNet, CleanSeaNet and THETIS systems for sharing share maritime safety, security and environmental information, which are provided by the European Maritime Safety Agency. The government also has important legislation, including the Environmental Bill, to navigate through parliament, and several decisions to take on the design and resourcing some of UK regulatory bodies. The OEP has already been mentioned, but there is the question of whether responsibility for subsidy control will be entrusted to the Competition and Markets Authority (CMA), and whether the Trade and Agriculture Commission will become a permanent feature or not. Similarly, UK authorities continue to develop policy instruments, including an Emissions Trading System, and the Goods Vehicle Movement System (GVMS), scheduled to be ready in July 2021, which will allow operators to file relevant paperwork to secure advance approval to cross the border. The UK government is also still in the process of building physical infrastructure at ports in Northern Ireland, and designated border check posts (BCP) at ports and airports in Wales. Development of common frameworks to ensure consistency across the devolved administrations is also ongoing.

De-Europeanisation

The UK is no longer part of the EU system to the extent that it has ceased to share decisional authority with other EU governments and EU institutions, develop rules collectively, or delegate regulatory responsibilities to EU agencies or institutions. It has removed all references to EU bodies in the law that it has retained or incorporated in UK law, withdrawn from European agencies, and put in place new domestic regulators or expanded the responsibilities of existing ones. However, there is a question mark against the degree to which it has detached itself or whether, in the long term, it can remove itself from EU influence or even diverge significantly from EU standards, still less emerge as a powerful and independent rule maker.

Despite the new impediments to trade, the EU remains the UK's largest trading partner. Although the UK presented itself as a sovereign equal in negotiations with the EU, there is clear asymmetry in the size of the respective economies and the EU is widely recognised as a formidable trade negotiator. As Andrew MacDougall, former spokesperson to the Canadian PM, Stephen Harper, who negotiated the Comprehensive Economic and Trade Agreement (CETA) with the EU has remarked, 'The EU is a large body that has a vast experience with trade negotiations. They know how to uncouple the issues, they like to tie them altogether and make one result contingent on another'.

Both the asymmetry and the EU's expertise is reflected in the TCA, where, even if the EU has never granted as much to a third country in a trade deal and has allowed the UK to remain a very close trading partner, it has nonetheless ensured the protection of the single market. Moreover, although the TCA allows for UK divergence over time, it also safeguards the EU's interests. This is exemplified by the EU's insistence on the level playing field and a single governance framework that allows for cross-retaliation. Not only has the UK committed itself to non-regression in environment, climate change, and labour standards, but the TCA establishes remedies for any breach of non-regression. The coupling between energy and fisheries is another example. The TCA both imposes constraints on UK divergence and creates the potential for the UK to remain in a state of constant negotiation, a position that is familiar to the EU's neighbours.

Beyond the direct limitations imposed by the TCA, there are constraints and pressures that are likely to limit the latitude for regulatory divergence on the part of the UK. These apply even to domains such as data protection and pharmaceuticals, where the UK government has previously declared its intention to change, food standards, which could feature in the UK's trade agreements, and policies, such as the environment, where the EU's Green Deal could lead to higher standards than in the UK. These constraints derive from the international treaties or international law that apply in certain areas, such as procurement, (World Trade Organization Government Procurement Agreement), and copyright (TRIPS and the European Patent Convention). The same is true in particular sectors, such as aviation (the Chicago Convention), maritime transport (international maritime law), financial services (the Basel rules on capital requirements), and pharmaceuticals, where standards are set in the International Council for Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH).

There are also more pragmatic considerations which are likely to limit the extent of UK divergence. In a number of domains, [the EU itself is the global standard setter](#). In these areas, any departure from EU standards is likely to place UK producers at a competitive disadvantage. This is the case in digital regulation, where the GDPR is 'increasingly becoming the global standard for data protection law, partly due to its extra-territorial effect: it applies to data controllers and processors, irrespective of their own location, when they process data from EU citizens. If UK firms are holding data on EU citizens, they will be bound to follow EU GDPR, irrespective of the UK legislative framework'. Another constraint may arise from sunk costs and business pressure. As David Bailey notes: 'While the UK government highlights possible regulatory divergence as a benefit of Brexit, at the moment industry sees it solely as a cost given that it has invested heavily in complying with the current framework'.

Looking forward

The contributions to this report suggest that, although UK regulation has already undergone considerable change since 31 December 2020, the process of adjustment is far from complete. Further change is likely to follow when various transitional measures expire. There are issues where decisions still need to be negotiated by both the UK and the EU, and, on the UK side, and gaps where regulatory arrangements are not yet in place. More broadly, the impact of the change in UK regulation on trade between the UK and the EU, on UK (and EU) governance, and on the quality of life for citizens and businesses remains uncertain. However, [the UK's emphasis on sovereignty at all costs](#) and the asymmetric pattern of interdependence, which is reflected in the EU's ability to safeguard its interests in the TCA, are likely to ensure that 'Europe' will continue to be a salient issue in UK politics and that UK-EU relations continue to be friction-filled.

Annex 1. UK regulation before and after expiry of the transition period on 31 December 2020

	UK domestic regulation	Terms of UK-EU trade
Trade in goods	<ul style="list-style-type: none"> • Change: UK Government established its own Authorised Economic Operators (AEO) programme in line with the EU existing regime, to maintain current license holders' status and benefits at UK border • Change: Department for Transport sees a huge increase in tasks to manage new border formalities and infrastructure 	<ul style="list-style-type: none"> • TCA allows tariff-free, quota free movement of goods, but rules of origins apply, with self-certification for six-month grace period • UK ceased to be part of the Customs Union + NI Protocol means that goods shipped from GB to NI will be subject to new declaration requirements • TCA on AEOs provides for the mutual recognition of the Parties' respective AEOs • Phase-in period on local content for electric vehicles through to 2026
Competition policy and state aid control	<ul style="list-style-type: none"> • Continuity: UK competition policy in anti-trust and mergers • Pending: UK to adopt domestic subsidy control regime 	<ul style="list-style-type: none"> • TCA requires level playing field: UK to adopt domestic subsidy control regime, with an independent authority • Strong dispute resolution mechanism with intervention possible before arbitration
Public procurement	<ul style="list-style-type: none"> • Continuity: EU procurement law retained in England, Wales and NI, and in Scotland • Continuity: UK has replicated the EU's coverage schedules under the World Trade Organisation • Change: UK e-notification service has replaced the EU-wide publication of procurement notices • Change: UK no longer has access to e-Certis database or the European Single Procurement Document (ESPD); the UK's has new Single Procurement Document 	<ul style="list-style-type: none"> • TCA opens the door to mutual recognition of the European Single Procurement Document (ESPD) and the UK's new Single Procurement Document • TCA creates 'GPA+' (Government Procurement Agreement of WTO) market access including a range of services • Disputes on market access will be dealt with by Trade Specialised Committee on Public Procurement • High level of mutual access to procurement markets subject to future modifications, but not reductions
Medicines and medical devices	<ul style="list-style-type: none"> • Continuity: UK to replicate European Medicine Agency rules for the eligibility of medicines • Change: UK no longer part of European Medicine Agency (EMA) 	<ul style="list-style-type: none"> • TCA allows tariff-free, quota free movement of goods, but rules of origins apply, with self-certification for six-month grace period (Northern Ireland Protocol requires continued regulatory alignment with the EU's rules on medicines and medical devices)
Digital and data regulation	<ul style="list-style-type: none"> • Continuity: UK regime materially the same as EU General Data Protection Regulation (GDPR) 	<ul style="list-style-type: none"> • TCA states that serious and systemic deficiencies as regards personal data protection could lead to the suspension of sharing of key data relevant to policing and security (passenger name data and anti-money laundering data)

Data protection	<ul style="list-style-type: none"> • Continuity: for data transfers, provided EU recognizes UK data adequacy and until UK makes changes to its data protection framework • Change: Information Commission's Office (ICO) no longer has full membership of European Data Protection Board 	<ul style="list-style-type: none"> • TCA is underpinned by commitments to human rights, including the ECHR, and to ensuring a high level of protection for personal data. This part of the agreement can be suspended or terminated in the event of serious and systemic deficiencies regarding human rights or data protection • A Specialised Committee on Law Enforcement and Judicial Cooperation will be established to oversee the functioning of this part of the agreement and the provisions can be reviewed if both sides agree • TCA includes commitments on both sides not to restrict cross-border data flows
Changes to intellectual property law	<ul style="list-style-type: none"> • Minimal change: copyright, but UK has left EU Intellectual Property Office • Change: trademarks and designs, pending through rights created by the UK Intellectual Property Office (IPO) • Change: patents 	<ul style="list-style-type: none"> • Both parties can legislate over copyright exceptions and limitations domestically • Pending: UK must legislate in order to enable current EU trademarks • Pending: TCA leaves the agreement of specific rules on the protection and effective domestic enforcement of Geographical Indicators to a later date
Consumer protection	<ul style="list-style-type: none"> • Continuity: UK consumer protection regime • Changed: UK exit from Consumer Protection Cooperation network 	<ul style="list-style-type: none"> • Pending: two sides to use best endeavours to enable the UK to continue to participate in the EU Rapid Alert System for non-food products (RAPEX)
Financial services	<ul style="list-style-type: none"> • Continuity: EU measures retained in UK law 	<ul style="list-style-type: none"> • No passporting rights for UK firms in the single market • Pending: equivalence assessments by EU regulators awaited • Pending: TCA is accompanied by a non-binding Joint Declaration committing UK and EU regulators to future cooperation, to be underpinned by a new MoU agreed by March 2021
Civil nuclear energy	<ul style="list-style-type: none"> • Change: UK adopted regulations and implemented international agreements on nuclear safeguarding • Change: introduction of a domestic nuclear safeguards regime run by the Office for Nuclear Regulation (ONR). Licenses for import of nuclear material are delivered by the ONR, while exports of nuclear material or wastes to Euratom require new EU licenses and authorisations 	<ul style="list-style-type: none"> • Civil nuclear energy is covered by the Agreement on Cooperation on the Safe and Peaceful Uses of Nuclear Energy, a dedicated 18-page text signed by the UK and Euratom, which is separate from the main TCA • Exports of nuclear material or wastes to Euratom require new EU licenses and authorisations • UK ceased to be part of EU Nuclear Cooperation Agreements (NCAs) with non-EU member countries, and concluded replacement bilateral NCAs with Australia, Canada and the US to ensure continuity of civil nuclear trade.

Electricity and gas	<ul style="list-style-type: none"> • Continuity: EU law on electricity and gas markets retained • Continuity: REMIT unchanged • Change: UK has left the EU Emissions Trading System (ETS) regime and EU's Agency for the Cooperation of Energy Regulators (ACER) 	<ul style="list-style-type: none"> • Tariff free trade • Pending: TCA provides for longer term cooperation between gas TSOs and a framework for the development of new electricity trading arrangements for all timeframes • TCA: lack of mutual recognition of clean energy technology standards; recognition depends on unilateral measures by UK and EU
Road haulage	<ul style="list-style-type: none"> • Change: the UK Licence for the Community has replaced the EU Community Licence; allows UK drivers to transit goods to the EU, Liechtenstein, Norway and Switzerland 	<ul style="list-style-type: none"> • Non-tariff barriers in form of customs checks and paperwork • Grace period for upfront paperwork on rules of origin • TCA permits only permits basic cabotage (significant change from single market in services)
Maritime transport	<ul style="list-style-type: none"> • Limited change: United Nations Convention on the Law of the Sea (UNCLOS) and treaties and conventions of the International Maritime Organization (IMO) ensure degree of continuity 	<ul style="list-style-type: none"> • Limited single market access • Customs formalities and other declarations • Pending: twelve-month grace period for 'rules of origin' paperwork
Aviation	<ul style="list-style-type: none"> • Continuity: UK incorporated EU aviation rules into UK domestic law • Change: UK ceased to be member of the European Aviation and Safety Agency (EASA) 	<ul style="list-style-type: none"> • UK airlines can no longer fly between EU member states or provide domestic services in the EU • Traffic rights from the EU to non-member states to be negotiated bilaterally by the UK with the member state concerned • UK ceased to be covered by EU international agreements and negotiates its own bilateral safety and air services agreements with non-EU member states • TCA reiterates both parties' commitments to their renewable energy and energy efficiency targets • TCA: framework for reciprocal acceptance of compliance in safety-related areas. Annexes will be developed by the Specialised Committee on Air Transport. Currently, the only Annex covers airworthiness and environmental certification
Farming policy	<ul style="list-style-type: none"> • Change: UK has left the Common Agricultural Policy (CAP) 	<ul style="list-style-type: none"> • End of the free movement of agricultural products within the single market • Tariff-free and quota-free trade for agricultural products, but non-tariff barriers (grace period on rules of origin) • TCA provides a framework for 'raising the bar' on future cooperation on animal welfare, anti-microbial resistance, food safety, animal and plant health

		<ul style="list-style-type: none"> • EU has accepted the UK organic regime as equivalent until 31 December 2023 • Pending: the agreement could be characterised as work in progress concerning NI • NI: for agri-food movements, authorized traders (such as supermarkets and their trusted suppliers) will be exempt from official certification for products of animal origin, but only for a 'grace period' period until 1 April 2021
Agriculture: environmental, food and animal health standards	<ul style="list-style-type: none"> • Change: UK (effectively GB) no longer part of TRACES, EU online system that requires sanitary and phytosanitary (SPS) certification, pre-notification and tracking 	<ul style="list-style-type: none"> • Customs formalities and non-tariff barriers • Reinforced biosecurity checks and inspections on agricultural products, including live animal, plants, food and feed, to comply with sanitary and phytosanitary (SPS) measures • TCA includes an obligation of non-regression in environmental matters, a common objective to achieve net zero by 2050
Fisheries	<ul style="list-style-type: none"> • Continuity: many provisions of the Common Fisheries Policy rolled over into UK law 	<ul style="list-style-type: none"> • Non-tariff barriers apply to imports/ exports of fish • UK increase in catch • Restrictions on export of some live shellfish to EU • TCA: phasing out of quotas over five-and-a-half years • Review attached to review of cooperation on energy
Food safety	<ul style="list-style-type: none"> • Continuity: in law and approach, structures and processes, concerning food safety and hygiene 	<ul style="list-style-type: none"> • Non-tariff barriers
Environmental regulation	<ul style="list-style-type: none"> • Continuity: 500+ items of EU environmental law in retained EU law • Change: UK cut links to European Environment Agency (EEA) • Change: UK has left EU REACH • Continuity: creation of UK Registration Evaluation and Authorisation of Chemicals (REACH) 	<ul style="list-style-type: none"> • TCA includes rebalancing measures if parties diverge from their commitments, including principle of non-regression
Climate policy	<ul style="list-style-type: none"> • Continuity: EU rules, including carbon dioxide emissions from cars, in retained EU law • Change: EU Emissions Trading System replaced with UK emissions trading system • Change: UK no longer member of European Environment Agency (EEA) 	<ul style="list-style-type: none"> • TCA principle of non-regression, including on carbon pricing, so that neither side can reduce their commitments • Pending: TCA commits both sides to agree a common pricing system • TCA binds both sides to their commitments, with rebalancing measures if they diverge

Workers' rights	<ul style="list-style-type: none"> • Change: UK no longer bound by EU law 	<ul style="list-style-type: none"> • TCA includes non-regression for labour and social levels of protection. Remedies provision for breach could include tariffs and rebalancing
Immigration policy	<ul style="list-style-type: none"> • Change: UK visa regime for EU nationals (global talent visa for leaders in academia, arts and digital economy; points-based system for skilled workers; and student visa) • Continuity: Irish nationals will continue to enjoy the right to enter or remain without leave 	<ul style="list-style-type: none"> • End of freedom of movement
Asylum and refugee policy	<ul style="list-style-type: none"> • Change: UK has withdrawn from the Dublin system • Change: UK has left the Common European Asylum System • Change: limited access to Eurodac database and loss of access to the European Asylum Support Office 	<ul style="list-style-type: none"> • UK is unable to transfer asylum seekers to EU Member States
Security and cooperation on crime	<ul style="list-style-type: none"> • Change: full membership of EU agency for Law Enforcement Cooperation (Europol) and EU agency for judicial cooperation in criminal matters (Eurojust) ends • Continuity: DNA and fingerprint records of suspected and convicted persons shared under Prüm Convention, but not in real time • Continuity: Exchange of Passenger Name Records (PNR) between UK and EU airlines continues • Change: end of participation to European Arrest Warrant • Change: access to Schengen Information System (SIS II), and Europol databases – EIS and SIENA 	<ul style="list-style-type: none"> • TCA provides for possible fast-track termination or suspension if the UK or a Member State denounces the European Convention on Human Rights (ECHR) or some of its protocols or due to other concerns about human rights protection or data protection standards • European Arrest Warrant is replaced by a surrender agreement

Annex 2. UK regulation after the transition period: From EU to UK regulators? (Selected policy domains only)

Policy domain	EU institutions, agencies and networks	UK authorities	Comments
Medicines and medical devices	<ul style="list-style-type: none"> European Commission European Medicines Agency 	<ul style="list-style-type: none"> UK Medicines and Healthcare Products Regulatory Agency (MHRA) has assumed regulatory activities for UK marketing of medicines Powers to amend regulations transferred to the Secretary of State (for England, Scotland and Wales) and to either the Department of Health in NI, or the Department of Health in NI and the Secretary of State acting jointly (for NI) 	<ul style="list-style-type: none"> UK Government decided to apply to join the 'Access Consortium' in October 2020, alongside Australia, Canada, Singapore and Switzerland. A sign of UK intent to seek regulatory linkages elsewhere rather than re-establish EMA links
Competition policy including state aid	<ul style="list-style-type: none"> European Commission European Competition Network (ECN) 	<ul style="list-style-type: none"> Competition and Markets Authority (CMA) remains responsible for anticompetitive enforcement action 	<ul style="list-style-type: none"> CMA keeps close working relationship between and the European Commission, but is no longer part of European Competition Network (ECN) and will do its 'own police work and run their own leniency and settlement procedures' Concerns about staff numbers and workload in CMA
Digital and data regulation	European Commission	<ul style="list-style-type: none"> Information Commission's Office (ICO) is responsible for the UK-related behaviour of trans-European firms when the UK is the main country of establishment Office of Communications (Ofcom) has become the online harms regulator Digital Markets Unit has been set up in the Competition and Markets Authority (CMA) to regulate dominant platforms 	<ul style="list-style-type: none"> Brussels effect: GDPR is 'increasingly becoming the global standard for data protection law'
Data protection	<ul style="list-style-type: none"> European Commission European Data Protection Board 	<ul style="list-style-type: none"> ICO is supervisory authority of breaches, and can investigate and impose sanctions, including fines UK Secretary of State for Digital, Culture, Media and Sport has the power, by a negative resolution with no input from the ICO to revoke existing adequacy decisions and to conduct its own adequacy assessments 	<ul style="list-style-type: none"> ICO no longer has full membership of European Data Protection Board
Changes to intellectual property law	European Patent Office	<ul style="list-style-type: none"> UK Intellectual Property Office (IPO) 	<ul style="list-style-type: none"> UK will remain constrained by other European agreements such as the European Patent Convention in the field of patents and international agreements such as the Berne Convention and the Trade-Related Aspects of Intellectual Property Rights ('TRIPS')

Consumer protection	<ul style="list-style-type: none"> European Commission EU Consumer Protection Cooperation (CPC) network 	<ul style="list-style-type: none"> Competition and Markets Authority (CMA) and the Trading Standards Service remain responsible for the enforcement of consumer law 	<ul style="list-style-type: none"> Proposals to reform the CMA's decision-making and sanctioning powers
Financial services	<ul style="list-style-type: none"> European Commission European Central Bank European Supervisory Authorities (ESA) including: <ul style="list-style-type: none"> the European Banking Authority (EBA) the European Securities and Markets Authority (ESMA) the European Insurance and Occupational Pensions Authority (EIOPA) 	<ul style="list-style-type: none"> UK regulators include: the Bank of England, the Prudential Regulatory Authority (PRA), and the Financial Conduct Authority (FCA) 	<ul style="list-style-type: none"> UK regulators signed Memoranda of Understanding (MoU) with the European Supervisory Authorities (ESA) 'to ensure continued good cooperation and exchange of information'
Civil nuclear power	<ul style="list-style-type: none"> European Commission European Atomic Energy Community (EURATOM) 	<ul style="list-style-type: none"> Remit of the Office for Nuclear Regulation (ONR) as UK regulator extended along with the Department for Business Energy and Industrial Strategy (BEIS) 	<ul style="list-style-type: none"> ONR runs the domestic nuclear safeguards regime and issues licences for the import of nuclear material
Electricity and gas	<ul style="list-style-type: none"> European Commission Agency for the Cooperation of Energy Regulators (ACER) 	<ul style="list-style-type: none"> OFGEM responsible for the technical rules defining the terms under which markets participants can access the electricity and gas networks 	<ul style="list-style-type: none"> OFGEM is longer part of ACER UK no longer a member of the North Seas Energy Co-operation (NSEC); TCA provides for creation of a multi stakeholder forum for technical cooperation on the development of offshore renewable energy in the area
Maritime transport	<ul style="list-style-type: none"> European Commission European Maritime Safety Agency (EMSA) 	<ul style="list-style-type: none"> UK Maritime and Coastguard Agency (MCA) 	<ul style="list-style-type: none"> The UK is no longer part of EMSA
Aviation	<ul style="list-style-type: none"> European Commission European Air Safety Agency (EASA) 	<ul style="list-style-type: none"> UK Civil Aviation Authority (CAA) has taken on tasks previously carried out by EASA UK Department of Transport, with input from CAA, assumes responsibility for negotiating traffic rights for UK airlines 	<ul style="list-style-type: none"> Concerns have been expressed about the resources available to CAA and the time will take the CAA to develop the expertise to compare with EASA

<p>Farming policy</p>	<p>European Commission</p>	<ul style="list-style-type: none"> • Department for Environment, Food and Rural Affairs (DEFRA) • Secretary of State has power to give financial assistance to English farmers; the devolved administrations are each entitled to design their own support regimes 	<ul style="list-style-type: none"> • Government has a lot of discretion overall in relation to trade, policy direction and financial assistance • Parliamentary scrutiny over future trade agreements exists, but does not exclude the possibility that standards should be lowered. On marketing standards, the House of Lords noted ‘an inappropriately wide delegation of power’
<p>Agriculture: environmental, food and animal health standards</p>	<p>European Commission</p>	<ul style="list-style-type: none"> • Agri-food policies and imports/exports responsibilities shared by DEFRA, the Food Standard Agency (FSA), the Agriculture/Rural Affairs Departments in the devolved administrations, the Animal and Plant Health Agency (APHA) and the Border Force • FSA for Wales, Northern Ireland and England and Food Standards Scotland are main regulatory bodies handling food imports • Notification of imports of live animals is handled APHA for GB or the Department of Agriculture, Environment and Rural Affairs (DAERA) for NI. Health controls at sea and airports of imported food will be undertaken by the Association of Port Health Authorities who represents local authorities and Port Health Authorities • Audits are carried out at BCPs by APHA in GB and the Food and Veterinary Office of the European Commission in NI 	<ul style="list-style-type: none"> • UK Government and NI civil service have undertaken considerable efforts through building infrastructure at NI ports, recruiting and training staff, and generally enhancing logistics, but capacity is insufficient for the checks and inspections of live animals and animal products
<p>Fisheries</p>	<p>European Commission</p>	<ul style="list-style-type: none"> • DEFRA, UK Marine Management Organisation, devolved administrations • UK Marine Management Organisation (MMO) acts as the UK Single Issuing Authority (SIA) to issue fishing vessel licences 	<ul style="list-style-type: none"> • Government sets quotas, but administrations in NI, Scotland and Wales have competency over fisheries in their respective territories, the UK government through DEFRA, and the MMO is responsible for fisheries in England
<p>Food safety</p>	<p>European Commission</p>	<ul style="list-style-type: none"> • Food Standards Agency (FSA) remains responsible for setting standards and protecting public health and consumer interests in England, Wales and NI and maintaining the integrity and reputation of food business; local authorities have role in securing compliance 	

<p>Environmental regulation</p>	<ul style="list-style-type: none"> • European Commission • European Environment Agency (EEA) • European Chemicals Agency (ECHA) 	<ul style="list-style-type: none"> • Office of Environmental Protection • Health and Safety Executive (HSE) to replace ECHA at centre of UK system for registration, evaluation and authorization of chemicals 	<ul style="list-style-type: none"> • It is unclear what the exact scope and powers of the new OEP will be, but it is unlikely to have the same enforcement powers as the EU regime • The UK could have retained associate membership of the EEA which has no regulatory powers (its role is to collect data and publish reports on the state of the environment), but declined to do so. UK has cut all formal links with EU regulatory authorities. • Chemicals: UK is still in process of setting up HSE capacity; doubts have been expressed about whether UK REACH will have sufficient resources
<p>Climate policy</p>	<ul style="list-style-type: none"> • European Commission • European Environment Agency (EEA) 	<ul style="list-style-type: none"> • Office of Environmental Protection 	<ul style="list-style-type: none"> • UK Climate Change Committee (CCC) is the independent body that currently provides advice to Government on climate policy and its implementation. It is not clear how the CCC and the OEP will work together
<p>Security and cooperation on crime</p>	<ul style="list-style-type: none"> • European Commission • EU agency for Law Enforcement Cooperation (Europol) • EU agency for judicial cooperation in criminal matters (Eurojust) 	<ul style="list-style-type: none"> • Home Office 	<ul style="list-style-type: none"> • UK is no longer full member of Europol or Eurojust, but can attend Europol Heads of Unit meeting and operational meetings as an observer, and can take part in operational analysis projects



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