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# Brexit: UK Regulatory Agencies



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## Introduction

Outside the European Union the UK needs to establish systems of regulation for parts of economic activity and public policy that were previously regulated through the EU. In addition, the UK has withdrawn from the EU agencies, such as the European Aviation Safety Agency and the European Medicines Agency, and must either adapt existing regulators or establish new ones. The extent of the impact on business will depend on whether the future relationship treaty (if agreed) provides for an ongoing relationship between UK and EU regulators. However, given the UK Government's overriding priorities of sovereignty and regulatory autonomy it seems unlikely that these relationships will be very deep.<sup>1</sup>

This paper looks at the UK's needs in terms of regulatory agencies and the progress made so far in establishing them. It updates and adds to a previous Senior European Experts paper published in 2017.<sup>2</sup>

## Background

The European Union has almost 50 agencies and bodies responsible for the oversight and implementation of a wide range of regulations and policies. They include large and well-known agencies, such as the European Medicines Agency, European Aviation Safety Agency and the European Police Office (Europol) but they also include other bodies like the European Maritime Safety Agency that are less well known but still important.

A key policy requirement set by the UK government for Brexit was that after leaving the EU the United Kingdom should no longer be bound by decisions of the Court of Justice of the European Union (ECJ). This requirement made it difficult for the UK to remain involved in most EU agencies as they come under the jurisdiction of the ECJ. Since the 2019 general election policy has shifted further with increased emphasis on the UK "recovering sovereignty" and "regulatory autonomy".

The consequence of the Government's approach is that the UK needs to establish new arrangements for regulation of many industrial and commercial sectors by the end of the transition period. The Government is trying to make use of established UK agencies and public bodies in order to reduce costs and utilise existing skill sets but nonetheless the UK will be bearing the full costs of these agencies and bodies rather than sharing the cost as we did when an EU member. The additional costs of these agencies will tend to fall on business, which could well pass them on to consumers. This will be on top of the as-yet unknown (but undoubtedly significant) economic impacts of the Covid-19 pandemic.

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<sup>1</sup> An example would be mutual recognition of UK and EU certificates and authorisations which would lessen the impact. This outcome now seems in doubt given the UK Government's prioritisation of regulatory autonomy.

<sup>2</sup> *Brexit and EU Regulatory Agencies*, September 2017

UK businesses wishing to export to any of the EU Member States will find it necessary to comply with the relevant EU regulations. This means that they (and often their suppliers) will have to comply with two sets of regulations in future and be accountable potentially in two different legal jurisdictions. This will increase the costs of doing business in the UK compared to being in the Single Market.

## **Future regulation by sector**

### Aviation

The European Union Aviation Safety Agency (EASA) is responsible for certifying that each type of commercial aircraft (and other aeronautical products) operating in Europe complies with the EU's safety standards. Membership of EASA also ensures mutual recognition of certificates of air worthiness, authorisation of maintenance organisations, pilot licences and cabin crew certificates. The agency is also responsible for ensuring the safety of aircraft and operators from third countries as well as the EU's involvement with global aviation safety regulation.

The aerospace sector in the UK is the second largest in Europe and the third largest in the world. In 2017 it employed 120,000 people directly and a further 118,000 indirectly with a turnover of £31.8 billion, of which 90 per cent by value is exported.<sup>3</sup> In terms of civil aviation, in 2018 Heathrow Airport was the second busiest in the world with over 75 million passengers and 436,000 aircraft movements.<sup>4</sup> Eight out of 10 of the countries whose citizens visit the UK most frequently come from the EU with all EU visitors contributing £11.7 billion to the UK economy in 2016.<sup>5</sup>

The UK Government announced in March 2020 that it would be withdrawing from EASA on 31 December 2020 and that the Civil Aviation Agency will be responsible for its regulatory roles in the UK thereafter.<sup>6</sup> This decision was widely criticised by those in the aeronautical and airline sectors in the UK, including by the owner of British Airways, the International Air Lines Group, and by the trade body for aerospace in the UK, ADS. The industry were concerned not only at the additional costs, some of which will be indirect and which will certainly exceed the cost of participating in EASA, but also at the loss of UK influence in one of the world's major regulators with possible negative impact on the UK's ability to attract investment and sustain its manufacturing base.<sup>7</sup>

### Chemicals

Chemicals used in industry and commerce in the EU are subject to approval by the European Chemicals Agency under a set of regulations known by the acronym REACH. In 2019, Parliament agreed to regulations under the *European Union (Withdrawal) Act 2018* transferring responsibility for regulatory approval of chemicals in the UK to the Health and Safety Executive (HSE).<sup>8</sup>

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<sup>3</sup> Philip Brien & Chris Rhodes, *The aerospace industry: statistics and policy*, House of Commons Library Briefing Paper SN00928, 8 November 2017, p. 6

<sup>4</sup> HM Government, 'Aviation statistics: data tables (AVI)', Table AVI0301: Traffic at major airports, worldwide, 17 December 2019

<sup>5</sup> House of Commons Exiting the European Union Committee, *HM Government Aviation Sector Report*, 21 December 2017, p. 7, para 18

<sup>6</sup> 'UK will leave EU aviation safety regulator at end of 2020', *BBC News*, 7 March 2020

<sup>7</sup> 'UK aerospace industry warns of risk from leaving European agency', Peggy Hollinger, *Financial Times*, 7 March 2020

<sup>8</sup> See *REACH etc. (Amendment etc.) (EU Exit) Regulations 2019*, no. 758

Chemicals is a key manufacturing sector in the UK, accounting for nine per cent of total UK goods exports. Trade in chemicals is highly intertwined with the EU; 57 per cent of chemical exports in 2018 went to the EU and 72 per cent of chemicals imports came from the EU.<sup>9</sup> Industry stakeholders argue that separate UK and EU regulatory systems would lead to extra costs to business that would compromise the competitiveness of the UK chemicals industry. Chemicals safety campaigners have also expressed concern about possible lowering of safety standards.

The HSE employs around 250 people in its chemicals regulation division based in York and in Bootle. Policy responsibility for chemicals including detergents, pesticides and biocides rests with the Department for Environment, Food and Rural Affairs.<sup>10</sup> As in other areas of regulation, the Government incorporated existing EU regulations, in this case the REACH regulations, into UK law until such time as the UK adopts its own regulations in this field. This has cost over £14 million so far and additional costs year-on-year will be about £13 million.<sup>11</sup> In Northern Ireland the EU's REACH regulations will remain in force in order to ensure an all-Ireland single market (as with other relevant Single Market rules).

### Maritime rules

Under the rules of the International Maritime Organisation seafarers must have certificates of competency to carry out various roles at sea. The EU's Maritime Safety Agency has overall responsibility for maritime safety issues in the EU and the certification rules for EU seafarers. National regulators issue their seafarers with certificates. Once issued with a certificate of competency by one EU Member State, the EU seafarer is then able to work on ships flagged to any Member State because of mutual recognition. UK seafarers may continue to serve on board an EU vessel of which they were a crew member before Brexit but they can no longer transfer to a ship flagged to another EU Member State as of right.

The UK's Maritime and Coastguard Agency has responsibility for the issuing of seafarers certificates in the UK. The Government's position is that it will maintain co-operation with the EU's Maritime Safety Agency but will not participate in its environmental programmes (designed to reduce pollution from shipping) and may start to differ from the EU in terms of port and shipbuilding regulation in future.<sup>12</sup>

### Railways

From June 2019 the EU Agency for Railways (ERA) became responsible for setting the technical standards for interoperability (TSIs) that apply in the Single Market. It is also responsible for the European Railway Traffic Management System (ERTMS), the new standard for signalling on railway tracks involving in-cab signalling.

The Government has announced that it will not participate in the ERA or have any agreement on rail with the EU and will make bilateral agreements with Ireland, France and other countries with which the UK has international rail services.<sup>13</sup>

<sup>9</sup> Georgina Hutton, *Brexit and chemicals regulation (REACH)*, House of Commons Library Briefing Paper CBP 8403, 1 May 2020, p. 10

<sup>10</sup> See Health and Safety Executive, 'Chemicals Regulation Division', 21 October 2019

<sup>11</sup> HM Government estimates: see Georgina Hutton, *op. cit.*, pp. 23 and 28

<sup>12</sup> House of Lords European Union Committee, *39th Report of Session 2017–19: Brexit: road, rail and maritime transport*, HL Paper 355, 21 May 2019, p. 52, para 193

<sup>13</sup> *Ibid.*, p. 41, para 143

## Energy

The UK, through its energy regulatory body Ofgem, is a member of the EU's Agency for the Cooperation of Energy Regulators. This body enables co-operation between energy markets within the Single Market and particularly the operation of cross-border interconnectors in electricity or gas. The UK will not be remaining in ACER as it is leaving the internal energy market but Ofgem has responsibility for maintaining trading relationships and has agreed interim trading rules with the relevant national regulatory authorities.<sup>14</sup> Future energy trading rules will depend on what agreement the UK reaches with the EU (and will need to take account of the special circumstances of the all-Ireland energy market). The Government had predicted in 2017 that 22 per cent of the UK's electricity needs would be met through the interconnectors with EU countries by 2025.

## The Environment

As the Government has stated: "Most of the UK's environmental law and policy derives from the EU, and EU structures and processes provide for oversight and enforcement."<sup>15</sup>

Section 16 of the European Union (Withdrawal) Act 2018 placed various requirements on the Secretary of State in respect of the environment. In compliance with these provisions, a draft environment Bill was published for consultation in December 2018. The final version was brought before the House of Commons as the Environment Bill 2020 in January 2020.<sup>16</sup>

Clause 21 of that Bill establishes a new regulatory body, the Office for Environmental Protection (OEP), to be responsible for ensuring that the UK meets certain environmental objectives. To some extent this new body will replace the European Commission's role as the upholder of environmental standards in the UK.

The importance of the OEP lies in the concerns expressed at the time of the Brexit referendum that outside the EU the UK would be likely to adopt lower environmental standards, particularly relating to air quality, an area where the UK had consistently failed to meet EU standards. The extent to which the OEP is truly independent of government and the effectiveness of its enforcement powers will be important topics of debate during the Bill's passage through Parliament this year. Will it have the power to take people to court, including ministers? In the environment (as in other areas of regulation) a system of independent EU regulation overseen by the Court of Justice is being replaced by one that may well have weaker powers, fewer resources and potentially less exacting legal oversight.

## Food safety

The European Food Safety Authority (EFSA) is an essential element of the EU's food safety system. It undertakes the scientific risk analysis on which policy decisions (risk management) are taken by the EU institutions (Commission, Council and Parliament). As EFSA provides analysis and advice, and the UK has its own Food Standards Agencies (one for Scotland, the other for the rest of the UK), the consequences of Brexit will largely be felt in duplication and potentially in trade. EU countries are unlikely to accept FSA advice on, say, the disease or human health risks associated

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<sup>14</sup> See Ofgem, 'Preparing for Brexit', 2 May 2020

<sup>15</sup> See *Environment Bill: Explanatory Notes*, 30 January 2020, pp. 13-14, para 17

<sup>16</sup> See Parliament, *Environment Bill 2019-21*

with a British product without insisting on independent EFSA assessment. The UK Government may adopt a similar approach as regards imports. Non-EU countries can have observer status at the EFSA but the Government has given no indication that it plans to seek this.

A key element in the EU food safety regime is the system of alerts to warn of a particular danger – the Rapid Alert System for Food and Feed. Ministers have told Parliament that the UK will have access to the alerts but on a more limited basis and that the Food Standards Agency has been strengthening its own capability as a consequence.<sup>17</sup>

### Pharmaceuticals

Medicines, medical products and clinical trials have been regulated at the EU level since 1995 through the European Medicines Agency, which was based in London prior to Brexit and is now located in Amsterdam. The UK is no longer a member of the agency but is seeking an agreement on co-operation with it as part of the current negotiations. The Medicines and Healthcare products Regulatory Agency (MHRA) will take on the EMA's function of regulating UK produced medicines and medicinal products and clinical trials.

Pharmaceuticals is a large UK economic sector, turning over £41.8 billion in 2017 and employing (directly and indirectly) over 100,000 people. The EMA is important to many UK businesses because it authorises medicinal and healthcare products, which can then be sold across the Single Market without national approvals being required (in 2016 UK exports to the EU were worth £11.9 billion).<sup>18</sup> UK exports of medicines and medicinal products to the EU will have to seek separate authorisations in the UK from the MHRA and from the EMA to export to the EU if no agreement on mutual recognition is reached as part of the current negotiations.

### Intellectual Property (Patents, Trademarks etc.)

No non-EU country is a member or an observer at the EU's Intellectual Property Office. The Government has said that it wishes to reach agreement with the EU on intellectual property (IP), including on co-operation and information sharing on IP issues.<sup>19</sup> Without such an agreement UK businesses will have to register their trademarks and designs with the EUIPO in order to get EU-wide protection for them.

The UK Intellectual Property Office continues to be the national regulatory body for trademarks and other IP. The UK will continue to be part of the European Patents Office as this is not an EU agency.

### Financial services

The UK has left the EU's three financial services regulatory bodies: the European Banking Authority (which was based in London and is now located in Paris); the European Securities and Markets Authority; and the European Insurance and Occupational Pensions Authority. When the UK was a member of the EU, regulatory responsibility for these sectors was shared between EU agencies and national regulators; the latter will now takeover full responsibility. Some non-EU countries have observer status at the EU agencies but the Government has given no indication that it will seek this.

<sup>17</sup> House of Lords EU Energy and Environment Sub-Committee, *Letter from Steve Brine MP, Parliamentary Under-Secretary for Public Health and Primary Care, to Lord Teverson, Chair of the EU Energy and Environment Sub-Committee*, 19 March 2019

<sup>18</sup> Statistics in this paragraph from House of Commons Business, Energy and Industrial Strategy Committee, *Ninth Report of Session 2017–19: The impact of Brexit on the pharmaceutical sector*, HC 382, 8 May 2018, p. 5, para 1 and p. 8, para 10

<sup>19</sup> HM Government, *The Future Relationship with the EU: The UK's Approach to Negotiations*, CP211, 27 February 2020, p. 16, paras 71-72

## Crime & Justice

The UK has left the EU's primary crime and justice agencies, Europol and Eurojust. It is also no longer part of the European College of Policing. There is no precedent for a non-EU country being a member of Europol or Eurojust and the Government has said it is not seeking membership of either. But it is seeking extensive continuing co-operation with the EU, including on extradition and access to databases maintained by Europol and Eurojust, in order to facilitate co-operation and the fight against crime. This will be complicated by the UK's insistence on having full regulatory autonomy over data protection.

Leaving Europol and Eurojust will increase costs for UK police forces as they will have to make alternative arrangements for the exchange of data unless the EU agrees to similar arrangements to those currently in place. The loss of the European Arrest Warrant (EAW) will reduce efficiency because of the longer time it will take to extradite suspects from other European countries (from roughly 3 months to 12 months) and increase costs because of the need to monitor national extradition procedures. It will have particular, and potentially serious, implications for extraditions from Ireland, where the EAW has been invaluable in de-politicising the extradition process. There will also be delays in extraditing wanted persons from the UK which will lead to an increase in foreign citizens being held in UK prisons and therefore an increase in costs.

## **Future UK policy**

The outcome of the December 2019 general election was a shift in UK policy on its future relationship with the EU. The government of Theresa May had proposed a closer relationship than that now being sought in the negotiations by Boris Johnson. In respect of agencies and regulatory matters, this implies a more distant relationship with the UK seeking to co-operate with some but not all EU agencies but not staying as a member or having observer status. The focus of UK policy is now on having regulatory autonomy, although in practice that will be constrained by the need of many UK businesses to comply with EU rules in order to export to the Single Market. Non-EU countries are also likely to want to constrain the UK's regulatory freedom when the UK seeks a trading agreement with them; this is particularly true of the United States. The UK could become caught in a tug of war between the EU and the US over regulatory policy, which could have messy (and expensive) consequences.

The costs of the UK's withdrawal from EU regulatory bodies include the direct costs of setting up and skilling new UK regulatory functions, albeit using existing UK bodies in most cases, and the direct costs to UK exporting businesses of obtaining dual authorisations. But there will also be indirect costs in terms of increased trade friction and duplication, possible transfer of operations from the UK to the EU, loss of influence in pan-European (and sometimes global) standard setting and the potential loss of regulatory expertise. In addition, the loss of the European Commission's "one stop shop" for merger control and a coherent approach to anti-trust policy will lead to extra costs and uncertainty for UK businesses.

Many of the costs will not emerge until it is too late to change policy.

**May 2020**



## Senior European Experts

The Senior European Experts Group is an independent body consisting of former high-ranking British diplomats and civil servants, including several former UK ambassadors to the EU, and former officials of the institutions of the EU.

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 [senioreuropeanexperts.org](https://senioreuropeanexperts.org)

 [info@senioreuropeanexperts.org](mailto:info@senioreuropeanexperts.org)

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