

# The Brexit Effect – Regulatory Policy Autonomy and Institutional Adaptation After EU Withdrawal

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Draft Working Paper not for citation without consulting the author.

## Abstract

EU membership imposes a disciplining effect on the regulatory policy autonomy of Member States. It is a discipline that emerges from binding primary and secondary law; from market forces; and from regulatory coordination and cooperation.

The Brexit Effect analyses the forces that will discipline the conduct of UK regulatory policy when the UK leaves the European Union. It evaluates the manner in which the regulatory space created by Brexit remains disciplined not just by the continuing reach of the kinds of forces that pertained during membership but also by domestic factors including issues of regulatory capacity.

This paper focuses particularly on the effects of EU withdrawal on UK non-departmental public bodies, executive agencies and non-ministerial departments carrying out key regulatory tasks. It highlights the implications of Brexit for their regulators functions as well as their regulatory capacities.

## I. INTRODUCTION

The process of withdrawing the United Kingdom from the European Union has been described by Pascal Lamy as trying to get the egg out of the omelette. The metaphor highlights the complex interlinkages between the European and domestic levels of governance. These connections are instrumental and institutional.

The challenge of Brexit is often conceived of in instrumental terms. At a European level, that instrumental dimension focuses on the text of the Withdrawal Agreement and Political Declaration and the discipline exerted by these legal texts on domestic regulatory autonomy as a substitute for the discipline of EU membership. Particular political attention has focused on the constraining effects of the so-called Irish ‘backstop’ and its potential impact on regulatory alignment. Looking beyond the immediacy of the Article 50 negotiations and the legal texts they produce, the instrumental analysis extends to the agreements that are to be negotiated once the UK has left the EU, including a future EU-UK trade and cooperation agreement and any new trade agreements between the UK and non-EU states. At a domestic level, the instrumental aspects focus on the role of the European Union (Withdrawal) Act 2018 in domesticating the corpus of EU law at the moment of the UK’s exit, while a European Union (Withdrawal Agreement) Bill would seek to give domestic legal effect to a Withdrawal Agreement. Other domestic legislation – providing ‘settled status’ for UK-resident EU citizens; customs and trade – will also be adopted. In the event of a ‘No

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Deal' Brexit primary and secondary legislation will be needed to ensure that regulatory gaps and deficiencies can be addressed.

However, there remains an important institutional dimension to Brexit's impact on regulatory policy autonomy. The 'software' of rules and regulations deriving from EU membership requires 'hardware' on which to run.

During its membership, the UK's public administration has experienced intensified interactions with EU institutions and, in more recent decades, EU-level agencies. To the extent that this has been recognised in the post-referendum domestic political debates, the implications of de-membership has focused on loss of access to important EU agencies like the European Medicines Agency (EMA) and the European Chemicals Agency (ECHA). In other words, attention has focused on the European level of agencies to the neglect of the implications of Brexit for domestic regulators. The aim of this article is to conceptualise and analyse domestic institutional adaptation to Brexit in the broad domain of regulatory policy.

Given the lack of clarity as to when the UK will leave the EU and whether it will do so with or without a withdrawal agreement, researching domestic level changes is not without its difficulties. The pressures for adaptation change depending on the type of EU withdrawal that the UK experiences. Nonetheless, there is much that can still be gained from analysis of the domestic institutional context in its mediation of different adaptation pressures. As will become clear, the impacts that Brexit will produce on the infrastructure of UK regulatory policy will come at the end of a decade of reform to public bodies which was itself preceded by earlier waves of change to the organisation of government and public administration. The ambition of this paper is to analyse that context and its implications for the conduct of domestic regulatory policy post-Brexit. Wherever the Brexit process ends up, it will have to contend with – as well as potentially drive – an on-going process of domestic institutional reform.

## II. THE CONCEPTUAL AND ANALYTICAL APPROACH

During its period of membership, institutional adaptation to EU policy-making has involved processes of 'reception' – adapting the institutional environment to meet functional demands to apply, implement and enforce regulatory frameworks derived from EU policies and legal obligations – and 'projection' – creating the capacity to influence the formation and modes of implementation of EU regulatory policy.<sup>1</sup> Scholarship has explored this 'Europeanization' dynamic across policy areas and across Member States.<sup>2</sup>

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<sup>1</sup> S Bulmer and M Burch, 'The Europeanization of UK government: From quiet revolution to explicit step-change?' (2005) 83 *Public Administration* 861-890

<sup>2</sup> TA Börzel, 'Member state responses to Europeanization' (2002) 40 *JCMS: Journal of Common Market Studies* 193-214, S Bulmer, 'Theorizing Europeanization' in P Graziano and MP Vink (ed.), *Europeanization: New Research Agendas* (Palgrave Macmillan, 2007), C Knill and D Lehmkuhl, 'The national impact of European Union regulatory policy: Three Europeanization mechanisms' (2002) 41 *European Journal of Political Research* 255-280, JP Olsen, 'The Many Faces of Europeanization' (2002) 40 *Journal of Common Market Studies* 921-952, CM Radaelli, 'The Europeanization of public policy' in K Featherstone and CM Radaelli (ed.), *The Politics of Europeanization* (Oxford University Press, 2003)

The process of de-membership provides a novel context in which to conceptualise and analyse the impact of EU withdrawal on the institutions and structures of domestic regulatory policymaking. Although withdrawal from the EU – especially when undertaken for reasons to do with enhancing domestic regulatory autonomy – could be conceptualised as a de-Europeanisation dynamic, the capacity of withdrawal to generate domestic adaptation pressures, can still be understood using the analytical approach of the Europeanization literature.

This study focuses on institutional changes at two levels:

- Functional competences of the domestic institutions;
- Regulatory capacities measured in terms of personnel and financial resources.

The ambition ultimately is to identify institutional developments among domestic regulatory structures and then to ask what explains the outcome. The study will analyse three hypotheses concerning change in the UK's public administration of regulatory tasks hitherto undertaken in the context of membership of the European Union:

- The terms of withdrawal create demands that instil domestic institutional change;
- The repatriation of tasks creates functional pressures that in turn result in domestic <sup>1; 2; 3</sup>institutional change;
- The context of withdrawal is utilised as an opportunity to address institutional issues that were apparent even before withdrawal.

For present purposes – given that the UK has not yet left the EU and uncertainty hangs over the Brexit negotiations – this paper is somewhat more speculative with a narrower focus on identifying potential patterns and explanations focused on the repatriation of tasks and the overall context of withdrawal. Future work will explore in more detail the formal terms of withdrawal and specific implications for domestic institutions.

### III. THE INSTITUTIONAL LANDSCAPE OF EUROPEAN REGULATION

If we are to understand the implications of repatriating or on-shoring regulatory tasks to domestic institutions, we need to be clear about what has been undertaken by, or transferred to, European institutions and agencies during the UK's membership of the Union.

The Union's administrative apparatus reflects the evolving tasks and functions of the Union.<sup>3</sup> The rise of EU-level regulatory agencies and other 'decentralised' bodies has long been understood as the result of changes and reforms in the EU's administrative and executive architecture driven by functional demands for impartial and expertise-driven risk regulation as well as more constitutionally-constrained aspirations for a clearer allocation of responsibilities and enhanced accountability.<sup>4</sup> As the Single Market has developed, the role of EU-level institutions in social and economic regulation has intensified.

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<sup>3</sup> D Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press, 2009)

<sup>4</sup> M Chamon, 'EU agencies between Meroni and Romano or the devil and the deep blue sea' (2011) 48 *Common Market Law Review* 1055-1075, E Chiti, 'An Important Part of the EU's Institutional Machinery:

While the organizational form of the EU's executive functions has a distinctive EU fingerprint, 'agencification' more generally is a phenomenon associated with the growth of the 'regulatory state' at national and transnational levels.<sup>5</sup> Paradigmatically, then, there is a certain fit between changes in administrative and executive form at EU and national levels.

Nonetheless, it would be highly misleading to characterise Union membership and de-membership as simply entailing a respective transfer of executive functions up from domestic to Union-level agencies and back down again. Rather, and within their own political and constitutional settings, national and EU administrations have co-evolved. Indeed, much of the administration of regulatory policy is truly decentralised in the sense of taking place at national level through designated national 'competent authorities'. This domestic implementation of national and Union regulatory policy has been steadily 'Europeanised' through the establishment of European networks of regulators as well as through interactions between national structures and Union-level agencies.<sup>6</sup> Where EU agencies are present, nonetheless, there are high levels of variation in the respective roles played by Union and domestic structures in different policy domains; from the purely advisory to the power to draft implementing rules and guidance, or to take authorisation decisions.<sup>7</sup> In short, the institutional landscape of European regulation is heterogeneous, notwithstanding the emergence of European agencies as distinct, independent legal entities.

Some examples usefully illustrate these points. The European Medicines Agency (EMA) has a monopoly of responsibility when it comes to the grant of market authorisations for certain medicines that go through a centralised authorisation procedure, including cancer and diabetes treatments. The EMA also facilitates a network of national regulators that offer market authorisations through decentralised national processes and mutual recognition of domestically-generated pharmaceutical licenses. Accordingly, the UK Medicines and Healthcare products Regulatory Agency (MHRA) performs a range of regulatory functions deriving from EU law and forms part of the European network of medicines regulators.

The European Food Safety Authority carries out scientific risk assessments of regulated products including genetically modified food and feed, food additives and biological hazards. However, decisions on risk management including the authorisation or prohibition

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Features, Problems and Perspectives of European Agencies' (2009) 46 *ibid.* 1395-1442, E Vos, 'Reforming the European Commission: What Role to Play for EU agencies?' (2000) 37 *ibid.* 1113-1134

<sup>5</sup> JA Caporaso, 'The European Union and Forms of State: Westphalian, Regulatory or Post-Modern?' (1996) 34 *Journal of Common Market Studies* 29-52, B Eberlein and E Grande, 'Beyond delegation: transnational regulatory regimes and the eu regulatory state' (2005) 12 *Journal of European Public Policy* 89-112, M Lodge, 'Regulation, the Regulatory State and European Politics' (2008) 31 *West European Politics* 280-301, G Majone, 'The rise of the regulatory state in Europe' (1994) 17 *ibid.* 77-101

<sup>6</sup> D Coen and M Thatcher, 'Network Governance and Multi-level Delegation: European Networks of Regulatory Agencies' (2008) 28 *Journal of Public Policy* 49-71, D Levi-Faur, 'Regulatory networks and regulatory agencification: towards a Single European Regulatory Space' (2011) 18 *Journal of European Public Policy* 810-829, W Weiss, 'Agencies Versus Networks: From Divide To Convergence In The Administrative Governance In The EU' (2009) 61 *Administrative Law Review* 45-70

<sup>7</sup> E Chiti, 'European Agencies' Rulemaking: Powers, Procedures and Assessment' (2013) 19 *European Law Journal* 93-110

of a product lies elsewhere and depends on whether that task falls to the European Commission - supported through expert and comitology committees – or lies instead with national authorities. In the area of competition law, mergers are regulated either by the European Commission – there is no distinct EU competition agency – or by national competition agencies and authorities where there is no EU dimension to the proposed merger. In short, there is no uniform pattern that dictates either the existence of an EU agency or its function within regulatory regimes that also engage domestic regulatory authorities.

Notwithstanding the significant variation in the functions and types of EU bodies and agencies and despite the continuing role played by the European Commission in formal decision-making, the idea that European agencies are the primary institutional location for regulation has – to the extent that it has been considered at all – dominated political and popular understandings of the regulatory institutional implications of Brexit. The consequence of this over-concentration on EU-level bodies and agencies has been that the domestic regulatory institutional implications of Brexit has largely gone unnoticed.

The foregoing analysis of the EU regulatory landscape suggests two important considerations when considering the domestic regulatory institutional impact of Brexit.

Firstly, UK bodies and agencies will tend to exist and already perform tasks associated with the execution of Union regulatory demands. In this way, Brexit raises issues of regulatory capacity for UK institutions more than it might the creation of new institutional structures, albeit that domestic institutions may assume novel responsibilities. Secondly, across different policy domains we will find variation in the capacities of Union institutions to undertake or monopolise certain regulatory tasks, creating stronger or weaker pressures on UK institutions to undertake novel regulatory functions.

#### IV. The UK Regulatory Landscape

In the preceding section, the architecture of the European regulatory landscape was outlined. A key conclusion was that domestic regulatory institutions – through their interactions with one another and with European institutions and agencies – form part of that landscape. In order to consider more directly the implications of Brexit attention needs to focus on the structures that make up the UK regulatory landscape and to whom tasks and responsibilities will be allocated once the UK leaves the Union. It is a landscape that evolved throughout the 20<sup>th</sup> century and in the 21<sup>st</sup> century experienced a further period of reform. It is in this context that we need to consider the effects of Brexit.

The Coalition Government of 2010-15 initiated a Public Bodies Reform Programme intended to shrink the size – and cost – of the public sector and to enhance the accountability of public bodies. More specifically, three tests were utilised to determine whether a body at arm's length from government was needed:<sup>8</sup>

- Does it perform a technical function?

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<sup>8</sup> See 'Progress on Public Bodies Reform' in *Public Bodies Reform 2013 Report*: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/286170/Progress\\_on\\_Public\\_Bodies\\_Reform\\_December\\_2013.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/286170/Progress_on_Public_Bodies_Reform_December_2013.pdf)

- Do its activities require political impartiality?
- Does it need to act independently to establish facts?

The Public Bodies Act 2011 empowered ministers to abolish, merge, transfer or modify the functions (and finances) of public bodies. Initially portrayed as an austerity-driven ‘bonfire of the quangos’, the outcome was a less dramatic downsizing of the state.

However, a clearer classification of arm’s length bodies was also sought to allow different types of body to be distinguished and to guide the establishment of new arm’s length public bodies.<sup>9</sup> In 2016 the outcome of a classification review was published. Bodies which are expected to perform functions at arm’s length from Government now fall into three categories:

- Executive agencies
- Non-ministerial departments
- Non-departmental public bodies.

Executive agencies do not have a separate legal personality and form part of the relevant Government department. Policy is set by the department and the minister is accountable. But executive agencies do exercise an autonomous function within the department and so are usually considered as part of the regulatory landscape of arm’s length public bodies. For instance, the Medicines and Healthcare products Regulatory Agency (MHRA) is an executive agency founded in 2003 with the Department for Health and Social Care as the parent Department. Another executive agency is the Animal and Plant Health Agency established in 2014 with the Department for the Environment and Rural Affairs as the parent ministry. As of 31 March 2017, there were 38 executive agencies.

Non-ministerial departments are distinct legal entities operating similarly to government departments but whose specialised functions do not warrant direct political oversight. They are fewer in number – 22 as of 31 March 2017 – and include some of the major regulatory authorities including the Food Standards Agency established in 2000. The Competition and Markets Authority – formed in 2013 from the merger of the Office of Fair Trading with the Competition Commission following the Coalition’s public bodies reform programme – is also constituted as a non-ministerial department. Although not the focus of this study, the economic regulators – the Office of Rail and Road; the Office of Gas and Electricity Markets; and the Water Services Regulation Authority – are also constituted as non-ministerial departments.

The vast bulk of arm’s length public bodies are non-departmental public bodies (NDPBs) of which there are over 250 such bodies. The Health and Safety Executive – whose wide-ranging responsibilities includes chemicals regulation as well as the health and safety protection of workers – was established in 1975 and operates as a non-departmental body sponsored by the Department for Work and Pensions.

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<sup>9</sup> Cabinet Office, *Review of the Administrative Classification of Public Bodies Within the United Kingdom: a Discussion Paper* (6 December 2014): [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/371650/Classification\\_Review\\_Discussion\\_Paper.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/371650/Classification_Review_Discussion_Paper.pdf)

The more recently constituted Financial Conduct Authority and Prudential Regulation Authority – like their earlier incarnation as the Financial Services Authority – are not public bodies but rather takes the corporate form of companies limited by guarantee.

The diversity of the UK regulatory landscape in constitutional and institutional terms is summarised in the table below:

Regulator	Type of 'Arm's Length' Public Body			Other
	Executive Agency	Non-Ministerial Department	Non-Departmental Public Body	Corporate Body
Medicines and Healthcare Products Regulatory Agency (MHRA)	X			
Animal and Plant Health Agency	X			
Food Standards Agency		X		
Competition and Markets Authority		X		
Health and Safety Executive			X	
Financial Conduct Authority and Prudential Regulation Authority				X

Another dimension of diversity concerns their finances, accounting and financial reporting obligations. Executive agencies form part of the ministry and their budgets are included in departmental budgets and estimates. So the Animal and Plant Health Agency accounts are governed by the Government Resources and Accounts Act 2000 which applies generally to government departments. However, the MHRA has a dual status in that it is also a 'trading fund' in recognition that it is highly dependent on fee income. Trading Funds are governed by the Government Trading Funds Act 1973. Accordingly the MHRA accounts are not consolidated alongside other arm's length bodies within the Department of Health accounts. The practice of establishing executive agencies as trading funds – in recognition that much of their work is financed directly through charges and fees – has been wound down. Non-ministerial departments are more similar to Executive Agencies but as departments in their own right they have their own budgets and can raise income through levies. Indeed, it was possible to constitute NMDs as EAs but this practice is no longer possible. Non-Departmental Public Bodies have a sponsoring department and their budgets are included in the sponsoring department's budgets and estimates and disbursed directly as grants in aid to the NDPB (which can also raise its own levies). Corporate bodies like the FCA are wholly reliant on the fees that they charge for their regulatory activities.

Where arm's length bodies are providing services – this includes requests for authorisations and other regulatory processes – HM Treasury requires fees and charges to be levied that reflect the full cost of providing such services. The imposition of charges normally requires

primary legislation but where regulatory policy also implements obligations to impose fees and charges derived from EU law, then section 2(2) European Communities Act has also been utilised. Section 56 of the Finance Act 1973 requires that fees and charges in pursuance of EU obligations are to be made by regulations with the consent of HM Treasury. For example, the fees charged by the MHRA are authorised by a combination of the Medicines Act 1971, the European Communities Act 1972 and the Finance Act 1973. Fees charged by the Food Standards Agency for meat hygiene and animal slaughter controls are authorised directly under the European Communities Act. Plant health fees are charged directly under the Finance Act. Merger fees are charged in accordance with the Enterprise Act (Merger Fees and Determination of Turnover) Order 2003 made under the Enterprise Act 2002.

We can now turn to the anticipated impact of Brexit in respect of: (A) the functional competences of national regulators and (B) the regulatory capacities of domestic regulatory structures.

### **A. Functional Competences**

One way that we might think of exit from the EU is to imagine that functional competences delegated to EU institutions will simply flow back to the withdrawing state. Yet this doesn't capture the impact of Brexit on the allocation and division of regulatory power. In part this is a function of the way in which regulation as an activity has expanded during the course of the EU's membership. Things that are regulated now may simply not have been regulated or regulated in a like manner at the time that the UK joined the EU. In other words, Brexit does not restore regulation to its domestic 'factory setting' at the time that the UK joined the Union.

A good example to consider is the regulation of state aid and mergers. Both of these functions have been undertaken by the European Commission during membership. State aid control by the European Commission has a long history and the transfer of this responsibility post-Brexit to the Competition and Markets Authority is truly a novel regulatory competence for a UK regulator. The EU (Withdrawal) Act 2018 domesticates a body of EU state aid law which will be enforceable at some point by the CMA depending on the state of EU-UK negotiations. The UK has made clear that the CMA will be charged with the independent regulation of state aid even in a 'No Deal' scenario and has prepared Statutory Instruments to that end. Merger control in the EU as a distinct regulatory activity dates back to the very end of the 1980s. There is a division of responsibilities between the European Commission and national regulators depending on whether there is an EU dimension to a merger. The EU will retain that jurisdiction for mergers with an EU dimension that includes a UK company due to the territorial extension of EU regulation to activities that have an effect on the EU internal market and provided EU economic turnover and activity thresholds are met.<sup>10</sup> It will be for the CMA to decide whether to continue to

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<sup>10</sup> On territorial extension see J Scott, 'Extraterritoriality and territorial extension in EU law' (2014) 62 *The American Journal of Comparative Law* 87-126



operate below or overlap with these thresholds,<sup>11</sup> so while in one sense the regulator could acquire a new functional competence for larger mergers, this is more of a development of an existing function than a wholly new activity.

When we look beyond these regulatory activities to those where EU agencies have centralised regulatory responsibilities, in an area like medicines, this nonetheless utilises the expertise of national regulators to act as rapporteurs and undertake risk assessments. As of April 2019, 370 central authorisation procedures had been reallocated from the UK to rapporteurs in other EU/EEA states. Within the decentralised system, while the MHRA will remain engaged in granting national authorisations for medicines for the UK market, it will lose its status as a leading authority for risk assessments and authorisations that are then recognised in other EU Member States. Likewise, the Health and Safety Executive will lose its status as a lead authority for biocides and pesticides regulation. The HSE like the MHRA will take over the centralised authorisation function namely that provided by ECHA for chemicals. In this way, UK regulators will acquire new functional competences for previously centralised authorisations but will also lose the functional responsibilities they previously carried out either as assessment leads and rapporteurs for centralised and decentralised authorisations.

Thus far we have focused on the role of regulators in applying and implementing a body of rules that, courtesy of the EU (Withdrawal) Act 2018 becomes a domestic source of law namely as 'EU derived' rules. Nonetheless, there is also a level of non-legislative guidance produced by EU agencies that is key to the application and implementation of EU rules.<sup>12</sup> Domestic agencies will need to consider how best to reproduce such guidance. Of course, some of the non-legislative activities of the EU do constitute formal 'tertiary' rule-making by the European Commission. These rules also form part of retained EU law. In the case of a No Deal Brexit, statutory instruments can be deployed to correct any problems in applying those rules to the UK. Typically that entails rule-making by the relevant Secretary of State. However the financial services regulators including the FCA are empowered to adopt 'Binding Technical Standards' to prevent, remedy or mitigate failures and deficiencies in retained EU law. The baseline approach adopted by the Treasury and FCA would be to treat EU and its Member States as if they were non-EU or third countries after Brexit. But the regulators have a discretion to adapt rules to meet functional demands and to avoid significant disruption and uncertainty. This gives domestic financial services regulators a potentially significant rule-making role after Brexit.

A potentially different effect of Brexit might be seen in the context of the Food Standards Agency. Looking more specifically at the risk assessment and risk management functions which have been carried out by the European Food Safety Authority and the European Commission, the Food Standards Agency will undertake an enhanced risk assessment role in respect of food additives, flavourings and GM food and feed where these activities have been carried out at an EU level. But in respect of risk management, the FSA is in a similar

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<sup>11</sup> See J Tomlinson and L Lovdahl Gormsen, 'Stumbling Towards the UK's New Administrative Settlement: A Study of Competition Law Enforcement After Brexit' (2018) 20 *Cambridge Yearbook of European Legal Studies* 233-251

<sup>12</sup> See S Vaughan, 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' (2015) 17 *ibid.* 66-91

position to EFSA itself namely that its function has been to provide scientific expertise for risk assessment with the risk management function undertaken by politically accountable institutions. Taking on a risk management role would change the function of the FSA and its political accountability post-Brexit.

We can summarise some of the changes in functional competence in the table below:

Regulator	Functional Competence		
	Novel	Same or similar	Loss
Medicines and Healthcare Products Regulatory Agency (MHRA)	Centralised medicines regulation	National market authorisation	Lead agency or rapporteur in assessing medicines for EU market
Food Standards Agency	Risk management	Risk assessment	[inspections]
Competition and Markets Authority	State Aid	Mergers	
Health and Safety Executive	Centralised chemicals regulation	National market authorisations	Lead authority in assessing biocides and pesticides
Financial Conduct Authority and Prudential Regulation Authority	Certain tertiary rulemaking	Authorisation of financial services providers	

## B. Regulatory Capacities

In this part of the analysis, the focus lies on the potential impact of Brexit on regulatory capacities both in terms of changing demands for personnel and any financial implications. Given that domestic regulators are regularly reviewed as part of public sector reforms – through triennial major reviews and more light-touch tailored reviews – Brexit implications can form part of that process. And as regulators develop business plans for the strategic management of resources, even at a very simple level, Brexit has introduced complexity and uncertainty into the regular cycles of planning and resource allocation. For example, in its Business Plan for 2019/20, the Health and Safety Executive directly addresses the Brexit implications of its capabilities, noting its intention to move from a ‘post-EU exit status of “interim operating capability” to “future operating capability”’.<sup>13</sup> For each regulator, that complexity and uncertainty is mediated by underlying domestic patterns of institutional development concerning sources of incomes and the distribution of human resources.

<sup>13</sup> HSE Business Plan 2019/20:

<http://www.hse.gov.uk/aboutus/strategiesandplans/businessplans/plan1920.pdf>

The trend since 2010 has been to reduce public spending and that has a particular impact on staffing given that regulatory bodies are typically staffed by civil servants. With reductions in public expenditure, regulators are often reliant on income from charging fees and, as intimated, the Treasury demands that regulators ensure a full cost recovery in terms of the fees charged for services. The Treasury may also make demands in respect of achieving operational surpluses.

Departments and their dependent regulators will be making their cases for government spending in the 2019 Spending Review that will cover the period during which the UK intends to leave the European Union. Leaving aside the specific cases for spending that Departments will make, the overall uncertainty about Brexit and the political attention it is taking, casts a shadow over all departmental and agency planning for Brexit. But a brief look at two different regulators – the MHRA and the HSE – do show that in the face of declining public expenditure and increased Treasury demands for full cost recovery for services-rendered, the effects of Brexit on domestic regulators will be mediated through the lens of its impact on fees and the financial balance between fees and other public sources of income.

Looking at the MHRA which holds the largest share of national European licencing (almost half of procedures), after an early period in its life in which it ran a significant deficit with cash flow problems that risked its solvency, the financial position of the agency steady improved and it now generates healthy surpluses. The Treasury requires the Agency to obtain a 3.5% return in the form of an operating surplus on ordinary activities over a 5 year period (2013-18). As to the level of fees, these must meet Treasury rules on full cost recovery.

Less than 20% of MHRA's budget comes from the Department of Health with the rest of its incoming coming from fees. More than a third of its fee income arises from medicines licensing. The triennial review of the Agency in 2015 indicated a possible rebalancing of the Agency's finances with its share of European licensing work declining.<sup>14</sup> Fee income from licensing rose between 2015/16 and 2016/17 to £50.2m but declined somewhat to £46.2m in 2017/18. A key risk identified by the Agency in its 2017/18 annual report is of losing income depending on the EU-UK negotiations.<sup>15</sup> The agency also has had to invest in contingencies for potential loss of access to European systems and data.

The triennial review indicated that the MHRA was anticipating an overall headcount reduction by 2017 of 125 posts but with a more specific reduction in its regulatory staff of around 100 posts (this following a similar sized reduction between 2010 and 2015). Looking at the annual reports the number of civil servants (excluding chairman and directors) permanently employed by the agency in 2015/16 stood at 1013 but actually grew to 1037 in 2016/17 and again to 1076 in 2017/18. There was also an increase in expenditure on

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<sup>14</sup> MHRA Triennial Review (July 2015):

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447306/MHRA\\_Triennial\\_Review\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/447306/MHRA_Triennial_Review_Report.pdf)

<sup>15</sup> MHRA Annual Report (2017-18), HC 1389:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/728543/2018\\_Annual\\_Report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728543/2018_Annual_Report.pdf)

consultants which rose from £15k to £87k. Without further investigation it is unclear what impact Brexit preparation has had in personnel terms but as the Agency's 2018/19 business plan notes it will develop a new workforce planning approach to match the Agency's needs in the short and longer term taking into account the implications of EU exit.<sup>16</sup>

The Health and Safety Executive – as non-departmental public body – is funded principally through grant in aid from the Department for Work and Pensions and by DEFRA for REACH-related registration work. Since 2010 it has made more than £100m in savings through cost-cutting and income generation. Between 2015/15 and 2019/20, taxpayer-funded income declined from £142.6m to £129.2m. Its budget for 2019/20 assumes Government funding 57% of its activities with the rest generated from income from its regulatory activities.

HSE derives income from operating the EU biocides and pesticides regime. In 2014/15, HSE received £12.74m in income for its biocides and pesticides regulation (against a cost of £12.59m). In 2015/16 that income rose to £13.47m but with an increased cost of £14.36m. The activity returned to profit in 2016/17 with increased income of £15.71m (against a cost of £15.38m) and income again rose in 2017/18 to £15.8m. While HSE is not as dependent on fee income as MHRA it is exposed to a changing economic environment caused by Brexit.

One regulator – the Competition and Markets Authority – is experiencing a phase of expansion. With the CMA taking on new responsibilities for state aid and an enhanced role in merger regulation, it is already in the process of expanding its personnel to take on key roles. Adverts for Directors – in the field of merger and in state aid – have already been made with Brexit cited as a key reason for advertising these posts. Aside from the senior roles there are a raft of legal and policy advice roles being sought as the responsibilities of the Authority change as a consequence of Brexit.

In respect of the FSA, the picture is more complicated. The FSA performs food inspection functions in line with EU food safety requirements. Local authorities play a key role in delivering inspections functions but in line with cost-cutting demands, the Regulatory Futures review suggested resort to 'regulated self-assurance' by the key market participants.<sup>17</sup> This entails a shift in responsibilities towards the companies being regulated and third-party assurance. In a crucial paragraph in the review – which was completed just as the referendum took place – the report notes that Brexit might make certain of its recommendations easier to implement. It noted:

“For example, there has been some uncertainty in the Food Standards Agency as to whether self-assurance in abattoirs would be permissible under existing EU regulations.”<sup>18</sup>

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<sup>16</sup> MHRA Business Plan 2018/19 (May 2018):

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/707594/Agency\\_Business\\_Plan\\_2018-19\\_\\_final\\_-\\_v1.0\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707594/Agency_Business_Plan_2018-19__final_-_v1.0_.pdf)

<sup>17</sup> Cabinet Office, *Regulatory Futures Review* (January 2017):

<https://www.gov.uk/government/publications/regulatory-futures-review>

<sup>18</sup> *Ibid* para 3.16.

Here and elsewhere, the referendum result is seen as creating opportunities to advance the outcomes of earlier review exercises including the Regulatory Futures programme and the more specific *Regulating our Future* report dealing specifically with reforms to UK food regulation.<sup>19</sup> The timescale of the UK's exit is seen as sharpening the focus on delivering reforms. Part of that reform entails reducing demands on public human and financial resources and transferring it to the private sector. Nonetheless, and somewhat more similarly to the CMA, new risk assessment responsibilities are likely to see an increase in regulatory capacities in human resource terms.

The implications of Brexit for domestic UK regulators are far from uniform and changes in function and responsibilities as well as underlying reform and cost-cutting initiatives, together with difference in their respective financial exposure to change, will produce a variegated pattern of change in regulatory capacities. There is no doubt that Brexit is forcing regulators to reassess their existing and future regulatory capacities, including what staff – and what type of staff – to deploy, cut or recruit.

## V. Conclusions

The instrumental level of treaties and domestic legislation has dominated the Brexit agenda. To the extent that the administration of regulatory frameworks has figured in the domestic arena it has been a concern with a loss of access to EU agencies. Important as that dimension is, it neglects what has always been a key aspect of EU governance, namely the role played by the domestic administration in implementing, applying and enforcing common EU regulatory frameworks.

With the aspiration still being to maintain regulatory alignment with EU rules after Brexit, it is at the administrative level that we will see some of the more significant changes. Studying these patterns of domestic change extends the work undertaken on the Europeanization of domestic policy in a novel and unforeseen direction. Whatever the utility of continuing to use the terminology of 'Europeanization' in what is, after all, a process of de-EU-isation, the conceptual repertoire remains of use. This paper has focused on adaptation pressures arising from the loss of EU membership and the role of domestic institutions in mediating those pressures.

UK regulators come in different forms with variation across their formal legal and constitutional status and their dependencies on public income and private fees. Recent domestic reform initiatives have sought to simplify the classification of different regulators and it is not yet clear whether Brexit will shine a further light on why some regulators fall into one classification or another or whether changes in function and funding will have implications for their formal designation. What is clear is that these agencies have already been the subject of triennial and other forms of review in recent years and so Brexit is often feeding into underlying domestic processes of adaptation and change.

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<sup>19</sup> Food Standards Agency, *Regulating our Future*, (July 2017): <https://www.food.gov.uk/sites/default/files/media/document/rof-paper-july2017.pdf>

We find examples of domestic regulators taking on functions that were previously exercised by EU agencies. Yet when those functions are accrued, they only are in respect of the UK market. On the other hand, domestic regulators are losing key functions – often associated with income generation – that served the EU Single Market. These changes have significant implications for regulatory capacities in terms of finance and staff profile.

What this paper has not explored is the ‘projection’ aspect of Europeanization. Domestic regulators have played key roles in leading on European rule-making on behalf of the UK. A key challenge for domestic regulators will be whether there are international forums and location through which to project UK influence in the international regulatory environment. But where that question does link with this paper is whether the more immediate focus on domestic change and adaptation forecloses the capacity to engage in more longer term strategies of building a capacity for external voice and influence outside of the EU.