

REACH and Brexit

Brexit has several effects on trade between the UK and the EU, and between the UK and countries with which the EU has free trade agreements. The first, which you have just heard is the imposition of customs duties on UK exports to the EU and *vice versa* (cross-channel trade). The second, which you have also heard about, is the equivalent imposition of customs duties on UK exports to third countries and *vice versa* when these exports benefit from lower customs duties under free trade agreements. The third, which you have also heard about, involves EU exports under those same FTAs and *vice versa*, which may no longer qualify as EU or third country products for reduced customs duties because they contain UK content. I am going to talk about a fourth effect, which is the regulatory dimension. This is particularly an issue for the REACH Regulation.

Here, as with all regulatory requirements, there are two main issues. The first is the underlying regulatory requirement stating that a product can or cannot be marketed in the EU. Essentially, a product that does not meet the regulatory requirement is prohibited from sale. This is perhaps obvious for a field such as chemicals, but it applies also to all products, like chocolate that does not contain enough cocoa, for example, or sardines that are made from the wrong subspecies of fish (and there are a lot). The second issue is showing that the product at issue meets the regulatory requirement. This is known as conformity assessment, and for products like chemicals it involves testing and certification.

Both of these regulatory dimensions are affected by Brexit, and for all regulated industries. At the moment, most public discourse on Brexit focuses on the first, for both political and economic reasons. This is the question of regulatory divergence. At the moment, the legal framework for UK regulations is in two forms. The first is that the UK is bound by harmonized EU law. This can be as a result of directly applicable EU law, which is usually in the form of regulations, like REACH. When the UK leaves the EU, as Edouard said, the UK will initially incorporate this law into UK law via the Repeal Act. This can also be in the form of national law implementing an EU Directive, where there is sometimes some scope for variation. There is no need for this type of law to be included in the Repeal Act, because it already has the form of UK law even if this is implementing EU law.

For UK manufacturers of products exported to the EU, a continuation of this regulatory regime is a good thing because it means that products manufactured in the UK according to these forms of UK law will meet EU regulatory requirements. But there is a catch, and that catch is that EU law can change, both by ordinary legislation and by interpretative decisions of the European Court of Justice. This is one of the fault lines in the Cabinet in discussions on the form of a possible transitional arrangement with the EU. The softer members of the Cabinet would prefer the UK to mirror all of these changes during this period, while the harder members, like Boris Johnson, would prefer a freeze. Of course, if there is a freeze, UK and EU regulatory requirements will diverge, and products made under UK requirements may no longer meet EU requirements. I say 'may' because it is important to distinguish between two types of regulatory divergence. The first type of regulatory divergence is where the rules are simply incompatible. If one rule says that a car headlight has to contain halogen and another says, no, it has to xenon (for safety reasons) or LED (for environmental reasons), a manufacturer has to choose. The other type of regulatory divergence is where there are

quantitative differences. One rule might say a toy can only contain x% phthalates, while another might say it is enough if it contains 2x% phthalates. A manufacturer can meet both requirements by producing to the higher standard.

We do not of course know what will happen as far as the underlying UK regulations are concerned. It may be that they continue to mirror EU regulations; it may be that the sunlit uplands that await us involve regulatory competition, or that UK consumers do not need to be quite as protected as they are at present, or that the UK decides to converge with another country's regulatory regime, maybe that of the United States. And it may well be that different manufacturers have different interests. Time will tell, and, depending on what happens in the UK-EU negotiations, that may be sooner rather than later.

But this is not the end of the story. In sectors other than the chemical sector, but also those related to this sector, there is another framework for regulation within the EU. This is the framework of mutual recognition of national regulatory standards. Essentially what this means is that products made according to a national EU Member State standard (and indeed a standard of an EEA country, and of Turkey as well, must be permitted to be sold in any other of these countries, even if the standard is lower, or different – unless there is a justification for not doing so. The principle of mutual recognition should not be oversold, as it usually is. First of all, because of the possibility of justifying non-recognition, it really only amounts to a presumption of marketability. Moreover, some academic studies have shown that the principle exists more in theory than in reality. But even if only presumptive, and even if only theoretical, it is a key part of the single market (although it also shows that there is no such thing, really, as a single market, but rather a collection of 28 mutually recognising markets). And this is not so much because of the principle itself, but for what it – and the principle of harmonization – mean for the practical rules on when and how products can be sold.

The key point is that within the 'single market' (in quote marks) products traded between EU Member States are not checked for regulatory compliance at member state borders. They are instead checked at the point of production, or the point of sale, alongside national products. Upon Brexit, this checking will have to take place at the EU border. This has a number of implications for the chemicals sector.

First of all, UK chemicals manufacturers exporting to the EU will no longer be EU manufacturers for the purposes of registering their manufacture of chemical products. This means that they will have to find an importer who can register these products, or an 'only representative'. This is not fatal to exports to the EU, of course, but it does involve an administrative burden for exporters. One can look at the Swiss experience in this regard.

Second, there is the question of conformity assessment, which is to say, testing, inspection and certification of products as meeting EU regulatory requirements, including those imposed by REACH. At the moment, various UK agencies are entrusted by the EU to carry out a variety of REACH related activities involving conformity assessment and enforcement. That will stop upon Brexit.

To give you a flavour of what this means, both the EU and the UK have published negotiating position papers on what will happen to products that have been properly authorised for sale

within the EU but are still in the supply chain on Brexit day on 20 March 2019. The EU's position paper makes a special point of saying that such products can continue to be placed on the market. What this implies, of course, is that this will not be the case for any products that are manufactured after that date.

Now, the situation is not necessarily dire. There are so-called mutual recognition agreements between the EU and a variety of third countries that provide for the recognition of certifications of conformity assessment procedures. But these are of varying coverage, and by no means replicate the current situation for the UK. It is certainly technically possible for the UK to negotiate such an agreement with the EU, but it does have to be done. This is one of the many reasons why a transitional period – additional to the two-year transitional period that is built into the Article 50 notification – is a good idea. But it is also not something that can be taken for granted.

I want to end by now saying something about a framework that sits even above the EU framework, and that is the WTO framework. WTO law requires its Members, which include the EU, and all EU Member States, including also of course the UK, to ensure that their regulatory regimes, including their underlying regulatory standards and their conformity assessment requirements, are both non-discriminatory and no more trade restrictive than necessary to achieve a legitimate objective. Already REACH has been the subject of fairly intense discussions within the WTO. But the question is even more pertinent for the UK. At the moment, the UK's regulatory regime is deemed to be acceptable to achieve the EU's objectives. The legal question is then the following: if this regulatory regime remains the same after Brexit, how can the EU justify discriminating against the UK, and imposing new barriers to identical UK products. My answer – as a WTO lawyer – is that this is extremely difficult. So ultimately the issue may not be just up to the relative strengths and chumminess of David Davis and Michel Barnier. It may also be up to a WTO panel.

Thank you!