Centre on Regulation in Europe
Improving network and digital industries regulation

CERRE EXECUTIVE SEMINAR

'Brexit in energy and climate: Implications for the UK, EU-27 and its Member States'

22 November 2017

Keynote Speech by former MEP Andrew Duff

The United Kingdom's own regulatory framework has been shaped for over 40 years by the need to respond to the necessities of European Union law and public administration. Now Britain is leaving the large common regulatory space for a small national space of its own. What on earth will happen?

Fresh start for regulators

Britain's participation in the single market for gas, electricity, carbon and nuclear energy is fairly typical of its wider EU involvement. Its main characteristics are:

- the UK is a relatively small player in the market;
- the market is deeply integrated and intensely regulated;
- the UK played a big part in building the internal market and in shaping energy and climate change policy;
- the UK is an active participant in the EU regulatory agencies (in this case, ACER) and other EU-approved trade and professional networks;
- a fall-back on WTO rules would mean chaos for regulators, high costs for consumers and an immediate end to security of supply;
- EU 27 is aiming for modernisation and rationalisation through greater interconnection of energy supply;
- the EU and UK together are already investing in projects to this end (interconnections and new nuclear) via 'Connecting Europe' facility and EIB.

Existing British regulatory structures have been created essentially to serve the EU's requirements to police its internal market. Before EU accession, the British government was running large, centralised nationalised industries – of which only the NHS is left.

Since UK accession to the European Community, and especially since the creation of the single market, Whitehall, regional and local government across Britain and numerous quangos have been monitoring standards for and reporting to the European Commission.

I take it for granted that regulators, both by instinct and profession, want there to be a successful outcome of the Article 50 negotiations, and one which is ratified on time both by the European Parliament and the UK parliament. No deal would be catastrophic for both the UK and the EU. (In passing, one recalls that the regional parliaments in Edinburgh, Cardiff and Belfast may have recourse to legislative consent motions in order to give effect to Brexit

within their jurisdictions. Their potential leverage, especially that of Scotland, on shaping Brexit should not be underestimated.)

Brexit means that a fresh apparatus of regulators has to be created (or recreated) across the UK, both in London and in many (but as yet undetermined cases) in the devolved administrations of Scotland, Wales and Northern Ireland as well. The fact that there is a single wholesale electricity market in the island of Ireland run by a joint British and Irish regulator is a particular complication. (I make no reference here to the not insignificant issue of the crown dependencies and overseas territories.)

Those of us who favour keeping as close to the EU as possible post-Brexit must aim to ensure that the new domestic regulatory system replicates in so far as is possible the European one Brexit forces us to abandon. This means that British business and NGOs must have a role in monitoring compliance with the law (in many cases, EU 'retained' law) and in raising complaints if necessary in the courts (which will, in their turn, wish to follow jurisprudence of the European Court of Justice when and in so far as they are not explicitly forbidden from doing so by new UK law).

Mirroring EU practice is desirable not only for its own sake (because EU norms are generally good ones) but also because the UK has to try to avoid accusations from the EU 27 that its ex-partner is embarking on a campaign of unfair competition. Britain's new regulatory framework must also be empowered to find remedies that are equivalent to those deployed under EU law. A certain and explicit independence from government – especially from certain government departments run by anti-EU ideologues – is therefore essential.

While the House of Lords Europe Committee has drawn attention to the importance of settling these governance issues as part of the Article 50 process, the UK government's own contribution has, so far, been vague to the point of evasion. Its 23 August paper on 'enforcement and dispute resolution' was academic and lacked prescription. The EU (Withdrawal) Bill does not transpose into UK law some essential elements that underpin EU law – such as the precautionary principle or the doctrine of polluter pays or those modern principles enshrined in the Charter of Fundamental Rights in areas such as scientific research, data protection or the digital economy.

As we know, Westminster parliamentary scrutiny of the executive activities of government is lamentably weak. The scope of judicial review in England is limited, remedies few, and costs of litigation high. And in any case, quangos such as Natural England are incapable of taking independent action against the government.

Too little recognition is paid in Britain to the role of the Commission (independently from the Council and Parliament) in driving up standards and enforcing compliance. This role includes granting derogations from EU standards on a case-by-case but (one hopes) objective basis. The Commission fully deploys its general powers to scrutinise the application of the EU's primary and secondary law. In that context, it receives complaints, initiates inquiries and publishes its findings.

The EU's insistence on open government (in the jargon, transparency) is not a mere indulgence: the bureaucracy of Brussels is much more open than that of Whitehall. The Court of Auditors has its role to play. The EU's parliamentary Ombudsman has been a welcome and useful additional tool — as has OLAF, the EU's anti-fraud body.

The invention of the EU citizen is also taken seriously. The concept of EU citizenship (especially as developed in case-law of the ECJ) has been instrumental in enhancing the responsiveness to consultation and the representative capability of the EU's democratic institutions (see, for example, Articles 9, 10 and 11 TEU).

Unfortunately, issues of governance have scarcely been addressed yet in the Article 50 process. They will become increasingly relevant — not least on the question of protecting EU citizens' rights and in ensuring overall the decent application of the terms of the Article 50 'withdrawal agreement'.

As far as the UK is concerned, it proposes to fall back on international law to apply its EU secession treaty. Under the British common law 'dualist' system, international law has no standing in the British courts unless and until it is transposed by national law. So international law cannot and will not replicate the force of EU law, having neither primacy nor direct effect.

Models, templates and options

The EFTA members of the European Economic Area (EEA) get over this problem by agreeing in advance to accept and apply EU law. This they do, if a bit tardily. An EFTA Surveillance Authority receives complaints and cooperates with the Commission in resolving issues. In fact, the dispute mechanism of the EEA Joint Committee has never had to be used. The EFTA arrangement mirrors that of Article 258 TFEU – under which the Commission can bring an errant government to court for failing to fulfil a treaty obligation: that's the EFTA court for the three non-EU EEA states, and the European Court of Justice for the EU member states. And the EFTA court agrees to follow the ECJ systematically in a suitably fraternal fashion.

We know, however, that the EU is not proposing EEA membership for the UK because the UK will not accept the free movement of peoples. Nor would Norway welcome the intrusion of the UK into its delicately balanced EFTA arrangements. And the British government, backed it seems by a large parliamentary majority at Westminster, is not seeking EEA membership on the grounds that it would:

- imply the payment of large financial contributions to EU member states for the privilege;
- hamper Britain's global trade ambitions;
- be a denial of the referendum imperative to 'take back control'.

At the other end of the scale, the FTA with Canada (CETA) has weak governance and no common policy objectives in, say environmental or energy policy, save the need to respect international law. Although NGOs are allowed to raise complaints under CETA, disputes are

to be resolved in a classic state-to-state manner. As Michel Barnier keeps insisting, Britain can't expect to have the rights of Norway with only the obligations of Canada.

Mid-way between Norway and Canada, as it were, is Ukraine – whose Association Agreement of 2014 provides a useful template for what the UK now needs. Articles 216, 217 and 218 TFEU provide for the legal basis and the political process. As Ukraine proves it respects EU rules, sector by sector (including services), access to the single market is improved. (The first regulation since the entry into force of the AA liberalising significant aspects of EU-Ukraine commerce has just been passed.)

One hesitates to press the analogy between Ukraine and the UK too far – not least because whereas the former is attempting to converge on the EU acquis, the latter is intent on divergence. But the Ukraine AA and the EU's comparable FTAs create a precedent: we all know how to do it.

Trade mechanisms under the Ukraine AA are similar to CETA. But in other areas where policy harmonisation is required — such as the Habitats and Birds directives — the institutional connection is both formal and strong. The association council can amend the annexes to the agreement to keep policy in line with EU law. Ukraine is not obligated to follow EU in all respects, but ructions are kept to a minimum by political and technical collaboration and by a joint judicial tribunal (one judge each and a neutral chair) if litigation is needed to arbiter disputes. Each party monitors its own compliance with the agreement but can raise complaints with the other — and aggrieved individuals have guaranteed access to both EU and Ukrainian courts.

Ukraine's AA has important chapters on mutual collaboration in both internal and external security matters. The raft of joint EU-Ukraine institutions includes annual summit meetings, a ministerial council, technical committees, a parliamentary mixed committee and a civil society platform.

The UK's hoped for 'deep and special partnership' will be something like that, although substantially closer and more functional — upgraded proportionately to reflect the volume of trade and the quality of integration. Thought has to be given – as well as concessions made on both sides – to the nature of the joint court: the ECJ will have to accept sitting alongside UK judges; the British judges will have to accept that their privileged status cannot rival the position they held, or give more advantages than they had, when they were full members of the ECJ. (The EU might demand that its judges should have an in-built majority of, say, 3 to 2 on the joint tribunal.)

As we all know, Switzerland is a member of EFTA but not of the EEA, with its participation in the single market limited to the terms of about 120 bilateral agreements with the EU and dependent on the degree of regulatory equivalence that it (and the Swiss people *ad referendum*) are prepared to accept. The nub of the problem is Switzerland's inhibitions about accepting a role for the ECJ — not unlike the British Brexiteers.

After its 2014 referendum on free movement of people, the EU-Swiss arrangements have gummed up. Uncertainty is the order of the day, leaving many things, including the future of

the EU Emission Trading Scheme (ETS), uncertain. The EU, understandably, is anxious not to repeat the Swiss experience with the UK. Britain would be foolish to be tempted to follow the Swiss example.

One word on the European Energy Community – an EU agreement of 2006 with nine East European and Western Balkan countries to encourage convergence in matters of energy supply (and away from Moscow). Ukraine is a party to this treaty, so the energy chapter in its later EU association agreement is very thin. The institutional machinery of the Energy Community is much looser than Ukraine's AA. There is no court, but a ministerial council has the power to suspend the agreement if the national regulatory authorities do not comply with its terms.

Lessons learned

Some lessons can be drawn from these examples. First, it behoves the European Union to respect the injunction of the Treaty of Lisbon that it "*shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation*" (Article 8(1) TEU).

For the Union, Brexit will not solve its British problem. The UK will still be there, its largest and in many ways its most valuable neighbour. Britain should be treated not just like any other third country but, rather, as a privileged (if irksome) partner.

The UK will have to work hard after the Brexit crisis to regain the trust of its erstwhile partners. First, it must rebuild its own administrative capacity so that it can regulate its affairs fairly and efficiently in a way that will convince Brussels that the cross-Channel playing field is level.

Second, the UK will have to legislate in terms of primary law to establish the principles that will underpin its energy, environmental and climate change policies. From what I detect, this will not be achieved by the EU (Withdrawal) Bill. So another standalone act of parliament is called for — in addition to the Bills already specifically scheduled for agriculture and immigration etc. One hesitates to use the term 'back to basics' — but Brexit demands that the British state takes a cool long look at its machinery of government and the strategic direction in which it is set.

An Energy and Environment Bill could establish the framework for a UK policy on the ETS as well as recast the mandates of the relevant regulatory authorities. In many cases, existing bodies such as the Office of Gas and Electricity Markets (Ofgem) will simply need to be given more resources and greater autonomy in order to ensure compliance with the terms of any new EU partnership or association agreement. Across the board, the UK state may need up to 30 home-grown bodies to replace the EU's regulatory framework in order to monitor divergence from the European acquis and to deal with problems of competitive deregulation.

Without this band of powerful independent British regulators it will be impossible for the UK to seek re-admission to the EU's agencies where common sense suggests that it should — for example, in the field of energy, to the Agency for the Cooperation of Energy Regulators (ACER). The same strictures apply to Natural England and the European Environment Agency.

The nuclear industry, notably, requires a bespoke national regulatory authority to interact with Euratom and the IAEA. As part of the reinvention of the British state post-Brexit, the UK needs to create a nuclear trade and safeguards agency that will replicate the powers of Euratom. Nuclear is not unusual in that the UK is party by virtue of its EU membership to an international treaty organisation and has obligations both to it and to the EU more directly that will have to be unpicked and put back together again as part of the laborious Brexit process. (There are about 750 such international treaties!)

The EU, as Mr Barnier says, will "judge some UK rules as equivalent, based on a proportional and risk-based approach" (20 November). The greater the level of equivalence, the more privileged will be Britain's future access to EU trade in goods and services.

Whether or not the UK can negotiate and conclude a new trade and investment partnership agreement with the EU 27 will depend on its own willingness to comply with EU rules of origin and to apply as near as is possible EU standards in competition, state aid, tax, safety, social and environmental policies.

Whatever happens between the UK and the EU post-Brexit, it will be rules-based. Or it will not be.

———————