

Brexit and public health: policy, planning and preparedness

UK Faculty of Public Health webinar

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Note. This analysis must not be treated as formal legal advice, not least because its authors are not insured to give such advice. Anyone seeking such advice should consult a solicitor.

Brexit: the latest legal implications

Objectives

- Clarify the latest legal implications for regulatory divergence / No Deal.
- Understand the emerging rules for the internal market.

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Why do the legal implications matter? The EU perspective

The European Union is a rules-based organisation. It is of course the case that the politics matter too, but in order to understand the EU it is important to think about it in terms of the rules that bind the EU and the EU's legally mandated processes.

The process of negotiating with the UK is taking place under the ordinary EU rules for negotiating with 'third countries'. Unlike the Withdrawal Agreement, where special (and at the time untested) procedures and processes applied, this is very much a standard negotiation for the EU. The EU is concerned, as usual, to secure a trade deal in its interest. The EU is attentive to the history, the geography and to existing patterns of trade (see revised [political declaration](#) on future relationship 17 October 2019). The UK is a large, proximate and significant trade partner. Supply chains for many products involve the EU-UK border, sometimes multiple times. Many services are also regularly supplied across that border.

What are these rules and process? The Commission negotiates on behalf of the EU, on the basis of the Council's negotiating directives. If agreement is reached, Council adopts a formal Decision concluding the Agreement. This Decision has to have the consent of the European Parliament. All of these are formal legal steps, that have to take place. That is why the timeline to 'Deal or No Deal' is not a timeline to 31 December 2020, but to round about the end of October 2020.

So far, there have been nine rounds of negotiations, and – despite the rhetoric at the end of last week and over the weekend – negotiations are ongoing. We understand that key sticking

points are fisheries, 'level playing field', and the governance of the agreement. It also seems to be the case that – unlike in a usual negotiation – the EU has kept all the parts of the agreement (the so-called 'chapters') open. This means that there is still room for give-and-take over these sticking points. The Irish news channel [RTE](#) reported at the weekend, for example, that a possible way forward on the fisheries sticking point is to trade off access to the EU's energy market against fisheries.

Will there be an EU-UK Trade Agreement?

It is in the interests of both sides to reach an Agreement. But that does not mean that an agreement is the default. And so that means that the status quo is not the default – something that I fear many ordinary people in the UK may not quite understand at present. On the contrary, the default is no trade agreement. That would mean the UK is treated by the EU as a country with which it does not have a trade agreement – sometimes said to be the 'Australia option'. This means the EU and the UK immediately imposing tariffs at WTO rates onto goods crossing the EU-UK border – with associated increases in prices for some products, and delays while electronic paperwork (also concerning regulatory standards) is completed. In the short term, though, the legal arrangements would be even less than those between the EU and Australia, because, although the EU does not have a single, all-encompassing trade deal with Australia, it does have a number of sector-specific agreements.

In terms of the negotiation, if the UK does not take seriously the EU's rules and processes, there is a danger, I think – notwithstanding the *intention* and *desire* on both sides to reach an agreement – that we will end up in a No Deal scenario almost by mistake.

What will happen if there is no Agreement?

To this end, the European Commission, and especially proximate countries like France, are preparing for the ramifications of a possible 'No Deal'. The Commission is reviewing – and where necessary updating – the over 100 sector-specific [stakeholder preparedness notices](#) it published during the Article 50 negotiations with the United Kingdom. What these notices do is point out to economic operators what the legal implications of No Deal will be. The conditions of access to the EU's market will be very different from the current position, as the UK will no longer be part of the internal market, the EU customs union or the VAT and excise duty area. We'll hear more about the implications of No Deal for specific public health points as the webinar continues.

And we will hear more about the UK preparedness arrangements – and what we learned from COVID-19 in terms of preparedness in the UK for disruptions to supply chains.

What about if there is an Agreement?

But there are also implications for public health even if an Agreement *is* reached between the UK and the EU – at least as far as we know in terms of the negotiating texts released so far by both sides. Both the EU and the UK negotiating positions conceptualise public health matters

quite narrowly - as concerned with food safety, animal, and plant health. The EU-UK trade agreement will prevent use of food safety, animal, and plant health standards to protect domestic markets. It will require that both the UK and the EU base such standards on scientific assessments, though a similar obligation has not prevented disputes in the WTO context, for example about genetically modified food. This is why the dispute resolution arrangements of the EU-UK Agreement are important from a public health perspective.

The EU and the UK will undertake to cooperate in relevant international fora, including through sharing public health information. This arrangement will reduce the ability of health stakeholders to hold the UK government to account, because these fora are less transparent than the EU, and because many of them, for example, the WTO, do not prioritise health.

Setting aside Northern Ireland, which is covered differently in the Withdrawal Agreement, nothing in the EU-UK Agreement will require the UK to align with the EU's food safety, animal, and plant health standards, leaving the UK scope to adjust its public health regulation in the future. The EU seeks control over safety standards for imported food. By contrast, the UK seeks equivalence recognition along the lines of the EU-Canada trade agreement (CETA) or the EU's draft text for an agreement with New Zealand on veterinary standards, which would reduce border controls and certification. In this area there is a major complication as it is likely to be difficult to reconcile US demands for a future trade deal with the UK with those by the EU.

In the negotiating texts that we have seen, there is no provision for cooperation on broader public health matters, such as tobacco regulation or communicable disease control. The implication is that continued cooperation will take place only within the framework of the World Health Organisation and other specialised agencies, where the UK's soft power as a relatively small state is likely to be diminished in comparison with its power as part of a common EU voice.

What about the UK's internal market?

On a domestic level, the UK government is also seeking to reduce the scope for Northern Ireland, Scotland or Wales to diverge from English public health standards for a range of products and services. This will be the effect in practice of the Internal Market Bill, if it is enacted as it currently stands.

Because of the size of the English market, a requirement to permit goods to be sold in Northern Ireland, Scotland or Wales if they may be sold in England (known as a 'country of origin principle' in ordinary trade law) will make it very difficult for Northern Ireland, Scotland or Wales to adopt more stringent regulatory standards. The position in Northern Ireland will be even more complex, because of the alignment rules in the Withdrawal Agreement.

But certainly for Scotland and Wales, there is a stated intention to seek to improve public health standards on repatriation of such powers from the EU, in a range of areas like minimum tobacco pricing, food labelling for calorie information and the like. Leaving the EU creates an

opportunity for public health experimentation, from which other countries can learn, and for attuning policy and law very closely to population needs in Scotland and Wales, where health is a devolved power. But the Internal Market Bill takes away this opportunity, and disrupts the UK's devolved constitutional settlement in a way which it is difficult for the devolveds to challenge legally, given the way that the Supreme Court treats these constitutional rules.

Although there is a standstill clause in the Internal Market Bill, even existing rules, like Scotland's minimum alcohol pricing rules, [could be at risk](#). While EU law allows – and even requires – public health concerns to be considered when rules restricting market access are at issue, the Internal Market Bill does not provide for this assessment. It is not even clear how the rules in the Internal Market Bill will be able to be enforced, or contested.

Conclusion

So – to summarise. The legal implications for public health are in one sense the same as they have always been. Brexit is [bad for the NHS](#) and [bad for public health](#).

In theory, there is a potential opportunity for the UK to take a regulatory path that secures *better* public health standards than as a Member State of the EU. But in practice the path to that better regulation is highly dubious, not least because health is not seen as a central element to trade negotiations, and health expertise is not included as a matter of course. [Health is not central](#) in the negotiations. Although the UK government promised to 'do no harm' to health post-Brexit, there is no legal accountability for that promise.

Note:

[Council Conclusions](#) 15-16 October 2020:

The European Council reaffirms the Union's determination to have as close as possible a partnership with the United Kingdom on the basis of the negotiating directives of 25 February 2020, while respecting the previously agreed European Council guidelines, as well as statements and declarations, notably those of 25 November 2018, in particular as regards the level playing field, governance and fisheries. (para 5)

As regards the Internal Market Bill tabled by the UK government, the European Council recalls that the Withdrawal Agreement and its Protocols must be fully and timely implemented. (para 7)