

What we talk about when we talk about divergence

Blog post by Senior Director Stephen Adams, 2 February 2021

Since the UK's vote to exit the European Union in 2016, the question of UK 'divergence' from EU regulation has been central to the debate about the future of the EU-UK relationship. From different perspectives this has been presented both as a rationale for EU exit and an unfortunate and inevitable consequence of it. It has been a concern bordering on a neurosis for Brussels negotiators. Divergence in the years ahead is going to mean a range of things, all with different practical and political implications.

Because regulatory harmonisation is central to much of the EU's internal market, models of closer post-Brexit integration such as that pursued by Prime Minister Theresa May focused heavily on limiting the UK's scope to diverge from EU regulation. The sharp change in strategy under the Johnson government has seen the UK accept a model in which it trades participation in the internal market for more practical and political autonomy as a regulator. Against this backdrop we can identify three main types of divergence to track in the months and years ahead. It is useful to distinguish between them because they are different in their motivations, their practical impacts and their political ramifications - domestically and in the EU-UK context.

The first are situations in which the EU chooses to evolve the *acquis* in a way that the UK is no longer bound to follow. The absence of the UK from the EU is itself likely to facilitate this. The EU is planning new steps in labour market regulation, cryptocurrency and AI regulation and considering a range of trade and supply chain-related measures under its strategic autonomy agenda. These measures are unlikely to be reflected in the UK and would in some cases have looked different with the UK involved.

A second type of divergence will emerge from the UK's proactive choices. There are many areas where the British government is clearly interested in exploiting its new freedom as a question of policy, not least as a way of driving post-covid-19 recovery. But it is important to recognise that divergence is likely to emerge chiefly as a side effect of policymaking rather than its strategic aim. Designing regulation to suit different practical conditions, different preferences and different regulatory structures, without the trade-offs and prescriptive approach to secondary rulemaking that often defines the Brussels process, will produce different approaches in the UK. This divergence will creep in, rather than being put there as a matter of strategy.

A third kind of divergence will happen not at the level of headline policy aims or regulatory 'pathways', but at the level of regulatory implementation. The UK will choose alternative ways of achieving aims that remain broadly in line with the *acquis* that it has inherited from its forty years of EU membership. It will adopt different means to an established end, and will make the most of the greater speed and flexibility with which it will be able to regulate and adapt regulation.

One reason why it is useful to distinguish between these three types of divergence is that it helps suggest some likely paths of least resistance in regulatory change in the UK in this and subsequent parliaments. Areas where the UK is proactively choosing to diverge from EU practice, especially in sensitive areas like food regulation, will be most contested. The SNP administration in Scotland has already made it clear on the question of reviewing UK approaches to gene-editing and novel foods that it will demonstrate its fealty to the EU by resisting high profile divergence.

These are also areas where the EU, if it cannot regulate UK goods imports through its own domestic regulation, will scrutinise UK action for any potential breach of level playing field commitments or grounds for triggering the ‘rebalancing mechanism’ in the EU-UK Trade and Cooperation Agreement.

They are also key to the small number of areas in which UK regulation will probably underpin important recognition determinations by the EU of UK rules. The most important of these relate to personal data protection under the EU GDPR, where protecting a future adequacy determination by the EU will inevitably be a factor in future UK changes. In financial services, the EU has signalled that it has little interest in activating equivalence-based contracting rights for UK firms, which may in fact remove an important potential check on divergence in financial services regulation.

By contrast, choosing not to follow regulatory changes in the EU will be less of a political issue in the UK. Much of this kind of change will fall below the political radar in Britain. Exceptions might be EU changes that leave EU policymakers concerned about existing equivalence determinations or to the implications for trade competition of raising regulatory requirements where the UK does not. In principle, the TCA rebalancing mechanism exists for just such scenarios.

Divergence in regulatory means rather than ends may be attractive precisely because it is less likely to trigger these kinds of domestic and EU anxieties. To be sure, the distinction can be a blurry one. But across a wide range of areas - from reform of the technological underpinnings of the UK customs system, to the transposition of multilateral capital standards, to the UK’s hydrogen strategy it is real enough. In these areas the chief effect of being outside the EU’s regulatory process may simply be a UK that can move faster and exploit more scope in flexibility in regulatory implementation without straying far from the broad regulatory strategy of the EU that in many cases it helped define.

As the transition period ends and the UK starts regulating for itself while the EU regulates without it, these three strands of activity are all going to raise interesting questions for both businesses and policymakers. Above all they will emphasise that the divergence debate is much more complex and interesting than a simple question of how much - or little - Brexit will reveal the UK’s taste for regulatory arbitrage.