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Brexit and EU agencies

What the agencies' existing third country relations can teach us about the future EU-UK relationship

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Contents

Introduction	3
I. The EU's defined interest	4
II. EU agencies and their relevance to Brexit	5
The integrity of the single market	7
Relevance for Northern Ireland	8
Internal and external European security	11
III. EU agencies relationships with third countries	12
Full participation (EEA model)	12
Bilateral cooperation agreements	14
Fringe cases	20
IV. The UK and EU agencies during transition	23
Conclusions	25
List of Abbreviations	28
Overview: EU Agencies and their third country relationships	29

Introduction

The Brexit negotiations are amongst the most complex the European Union has conducted. After more than 45 years of membership the UK's exit from the EU is about more than leaving the Union's institutions and its major policy areas. It is also, crucially, about its disentanglement from the EU legal order as well as the rules and regulations governing the single market and beyond. One crucial example in order to understand how this disentanglement of the legal order will affect the future relationship, are the 36 agencies the EU has set up to help regulate its single market and support coordination between its members states across many different policy areas.¹

Almost two years after the UK's population voted to leave the EU and less than a year until its formal exit, legally set for 29 March 2019, the Brexit talks are entering the next crucial stage. In the first phase of the Brexit negotiations, the UK and the EU-27 agreed principally in three areas most relevant for the withdrawal of the United Kingdom, the outstanding British liabilities for the EU budget, citizen's rights after Brexit as well as a commitment to avoid a hard border between Northern Ireland and the Republic of Ireland.² They also in principle agreed on a transition period until the end of 2020. All of this will, however, only come into force if the full withdrawal agreement is signed and ratified by both sides. The most crucial question of Brexit – the future political as well as economic relationship between the United Kingdom and the European Union of 27 – will only be sketched as part of the withdrawal agreement, and is to be fully negotiated during transition after the UK has formally left the EU. In principle, therefore, the future EU-UK relationship still remains a very open question. The alternatives to membership, exemplified by the EU's broad spectrum of third country relationships, are by now well known.³ Equally well known is that the UK Prime Minister has announced her government's intention to leave both the single market and the EU's customs union, while at the same time rejecting a deep free trade agreement like the EU-Canada Comprehensive Economic and Trade Agreement (CETA) as insufficient, aiming instead for a bespoke 'deep and special partnership' with the EU.

It is here that EU agencies come into play. Tasked with supporting the EU in regulating its single market as well as coordinating between the member states in other policy areas such as justice and home affairs, almost all of the EU's 36 regulatory agencies have established arrangements for the cooperation or even participation of third countries. Norway for instance participates in 28 of the EU's agencies. Since the UK government has already voiced interest in participating in certain EU agencies like the European Aviation Safety Agency (EASA) or the European Chemicals Agency (ECHA), they are of special interest in evaluating the kind of relationship the UK may have in the future with the EU. This working paper will therefore analyse what kind of third country relationships the EU agencies have developed so far, what the requirements for these third country relationships are and what that implies for the future relationship with the UK. There are four special aspects in this regard:

¹ Notwithstanding that there are also 6 executive EU agencies that are set up on a temporary basis to help manage EU programs, which are excluded from this study.

² European Commission, "Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union". TF50 (2017) 19, 08.12.2017. Online: <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> (accessed: 15.03.2018).

³ cf. European Parliament, "Future trade relations between the EU and the UK: options after Brexit". 2018. Policy Department for External Relations, PE 603.866. DOI: 10.2861/395110
cf. Grant, C., "'Canada', 'Norway' or something in between?". 2018. Centre for European Reform

Firstly, whether the avoidance of a hard border in Northern Ireland would require UK participation in the EU agencies. Secondly, the prospect of future UK participation in the agencies linked to internal and external security. Thirdly, the UK's relationship to agencies linked to financial services, notably in the context of the EU's financial services equivalence regime. Finally, the implication of the transitional arrangements on the UK's role in the EU agencies.

I. The EU's defined interest

The starting point for the evaluation of the different kinds of UK cooperation and/or involvement with EU agencies should, from the point of view of the EU-27, be their interests in the Brexit negotiations. On 23rd of March 2018, the 27 laid down their guidelines for the next phase of the negotiations and agreed on transitional arrangements. These guidelines build on those already set out in April 2017 and include four core principles, which will also apply for the UK's potential role vis-à-vis EU agencies:

The first principle is the protection of the 'decision-making autonomy' of the Union and its legal order.⁴ This implies that no non-member state of the EU, including the UK as a future third country, may have a decision-making role in any of the EU institutions. Although EU agencies are not among the political institutions of the EU, some of them either prepare crucial decisions for the EU Commission or may even take binding decisions themselves. This principle would therefore bar the UK – regardless from the type of relationship it agrees with the EU – from any decision-making role within the EU agencies. In the same vein, the protection of the EU's legal order requires that any legally binding decision by any EU body, including its agencies, needs to be enforced by the EU's own enforcement procedures.

The second major principle laid down by the EU-27 is the integrity of the single market and the indivisibility of its four freedoms, i.e. of goods, services, capital and people.⁵ The EU-27 thereby both reject allowing the UK or any other third country to participate in the single market based on only three of the four freedoms (that is without the full free movement of persons) and also a sector by sector approach to single market membership. It is this last aspect, the rejection of 'cherry picking' that is most relevant when analysing Brexit and EU agencies, since the EU-27's rejection of cherry picking by sector also implies a denial of the UK government's ambition to pick and choose which EU agencies to participate in and which agencies to leave. Here, it will be interesting to analyse how flexible or inflexible the EU has been so far regarding the third country relationships of its agencies, especially given that the EU guidelines explicitly exclude UK participation within EU agencies.⁶

⁴ Christopher Hillion, "Withdrawal under Art. 50 TEU: an integration friendly process. In: Common Market Law Review (Forthcoming).

⁵ Pt. 1 of the European Council, "Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines", EUCO XT 20004/17 BXT 10 CO EUR 5 CONCL 2, 2017. Online: <<http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>> (accessed: 15.03.2018). p.3

⁶ Pt.6 of the European Council, "European Council (Art.50) (23 March 2018) – Draft guidelines", XT 210221/18, BXT 22, CO EUR-PREP

The third major relevant principle for the Brexit negotiations from the EU-27 is to ensure a 'level playing field' in the future relationship with the UK.⁷ In this vein, the EU-27 aim for any future trade relationship with the UK to ensure safeguards against unfair competitive advantages that London may be enticed to use as a non-member of the EU's single market, for instance, through state aid, tax, social, environmental and regulatory measures and practices.⁸ Due to their core role in either developing or supervising the implementation of these regulatory standards, this insurance of a level playing field may imply a role for the EU agencies in the future relationship.

Last but not least, the EU-27 want to ensure a consistent approach to third countries in their negotiation of a future relationship with the UK. This touches almost all aspects of the future cooperation – from the 'most favoured nation' clauses within EU free trade agreements, which rule that the EU cannot give the UK trade benefits sans obligation without giving them to its other trade partners,⁹ over the EEA, whose member states also closely watch the Brexit negotiations, to the area of security and defence, where the EU-27 are unwilling to give the UK a better access than current third countries like Norway or Switzerland. In short: any beneficial access granted to the UK, including with regards to the EU agencies, will also be demanded by other third countries. This is why the scoping of current third country relationships of EU agencies is so relevant – it will principally guide the negotiations in regards to the question where and how the UK may fit in the future.

II. EU agencies and their relevance to Brexit

Before analysing third country relationships with EU agencies, it is important to first understand what exactly EU agencies are and what functions they fulfil, in order to gain a better idea of their relevance to the Brexit negotiations.

The EU has 42 agencies, which form an important part of its institutional landscape. They carry out specific legal, technical or scientific tasks vital to the functioning of the EU.¹⁰ They help inter alia to implement EU policies, supervise the application of EU law and provide in-depth expertise to improve policy-making.

There are two broad categories of EU agencies, as defined by the European Commission: *executive* agencies and *regulatory* (or decentralised) agencies. The EU has 6 executive agencies and 36 regulatory agencies.

Executive agencies are set up for a limited time in order to help manage EU programmes.¹¹ They are all based in Brussels or Luxembourg and remain under the full control of the Commission. This paper, however, will focus on regulatory agencies, as they are most relevant to the Brexit negotiations.

⁷Pt.1 & pt.20 of the European Council, "Special meeting of the European Council (Art. 50) (29 April 2017) – Guidelines", EUCO XT 20004/17 BXT 10 CO EUR 5 CONCL 2, 2017 p.3, p.8.

⁸ Ibid. Pt. 20, p.8

⁹ Cf. Oppenheim, B., "the EU has 36 free trade deals with non-EU countries – will they roll over to Britain after Brexit?". 2017. Opinion piece, Centre for European Reform. Online: <<http://cer.eu/in-the-press/eu-has-36-free-trade-deals-non-eu-countries-will-they-roll-over-britain-after-brexit>> (accessed: 22.03.2018)

¹⁰ Cf. European Union, "The EU agencies working for you". 2006. Doi:10.2814/522644.

¹¹ The 6 executive agencies are: Education, Audiovisual & Culture Executive Agency; Executive Agency for Small and Medium-sized Enterprises (EASME); European Research Council Executive Agency; Consumers,

Regulatory agencies are independent bodies with their own legal personalities and are based across the continent. They perform a variety of different tasks linked to the functioning of the single market, the Schengen zone, to Justice and Home Affairs (JHA) and even the Common Security and Defence Policy (CSDP).¹² The specific mandate, budget and institutional set up of each agency is set out by its own founding regulation – including its possible relationship to third countries.¹³ Their budget stems primarily from funds provided by the EU (or its member states), and for some, also by direct payments and fees. Each agency has a type of Management Board, which is responsible for determining its programme and operational workings. Management Boards vary in size and composition but typically have representatives of each Member State, representatives of the Commission and, when applicable, non-voting observers.¹⁴

The decision-making powers of these regulatory agencies are nonetheless limited, being only of technical or preparatory nature with final decisions taken by the Commission. In addition, although they are independent bodies, agencies remain subject to a number of control mechanisms in order to closely monitor their actions: they are subject to the ongoing oversight of the Member States through the national representatives on the management boards,¹⁵ which take all key decisions on the functioning of the agencies usually by a two-thirds majority vote. Agencies are also required to present an annual activity report indicating how they implemented their yearly programme, which is reviewed by the Commission. For all agencies that have been granted rule-making powers, their decisions are subject to judicial review by a Board of Appeal made up of representatives of the Member States and to the CJEU.¹⁶ In addition, their finances are supervised by the Commission and the annual discharge for the implementation of their budget must be given by the European Parliament upon the recommendation of the Council.¹⁷

Health, Agriculture & Food Executive Agency (Chafea); Research Executive Agency; Innovation & Networks Executive Agency (INEA)

¹² cf. Keleman, D.R., "The Politics of 'Eurocratic' Structure and the New European Agencies", in *West European Politics* 25, no. 4. 2011. DOI: 10.1080/713601644

¹³ With the notable exception of the three Common Foreign and Security Policy (CFSP) agencies, which are established by Council Decision and for which Member State participation is voluntary – namely, the European Defence Agency (EDA), the European Satellite Agency (SatCen) and the European Institute for Security Studies (EUISS).

¹⁴ With the exception of the European Food Safety Authority (EFSA) where the management board members are not national representatives. Instead, they are nominated experts - which do not necessarily have to be EU nationals.

¹⁵ Cf. Busuioc, M. "European agencies & their boards: promises and pitfalls of accountability beyond design". 2012. *Journal of European Public Policy*, 19:5, 719-736, DOI: 10.1080/13501763.2011.646785

¹⁶ cf. Dehousse, R., "Delegation of powers in the European union. The need for a multi-principals model", in *West European Politics* 31, no. 4 (2008).

cf. Kietz, D., von Ondarza, N., „Sicherheit delegieren: EU-Agenturen in der inneren & äußern Sicherheit“. 2016. SWP-Studie 2016/S06. Online: < https://www.swp-berlin.org/fileadmin/contents/products/studien/2016S06_ktz_orz.pdf > (accessed: 15.03.2018)

cf. Wonka, A. and Rittberger, B. "How Independent are EU agencies?", in *RECON Online Working Paper Series*, (2009).

¹⁷ Article 208 of Regulation (EU, EURATOM) no 966/2012 of the European Parliament and of the Council "on financial rules applicable to the general budget of the Union". 25.10.2012. Online: < <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0966&from=EN> > (accessed: 22.03.2018). p.83.

Agencies are an increasingly popular format in the EU, as they enable the delegation of technical tasks from the Commission to specialised bodies – thus greatly facilitating the work of the Commission (which has a relatively small staff)¹⁸ – whilst also enabling Member States to maintain a high degree of control. 13 of the current 36 agencies were founded in the last 8 years, while others like Frontex or Europol have seen their budget and tasks rapidly expand. The Commission is also planning on creating a number of new agencies in the coming years. In March 2018, for example, it published a proposal for a regulation establishing a European Labour Authority.¹⁹

After the UK has withdrawn from the EU, it will cease to be a member of these agencies. There are at least three reasons why this should be of concern to both the UK and the EU-27:

The integrity of the single market

A number of EU regulatory agencies play a key role in preserving the integrity and proper functioning of the single market. They form part of the EU's supervisory and enforcement toolkit.

Some agencies issue binding decisions on third parties, authorising the circulation of certain goods/services within the single market.²⁰ The European Aviation Safety Agency (EASA), for example, is responsible for both shaping and enforcing EU rules on aviation. Amongst other things it certifies and validates which aircrafts, components or manufactures can operate within the EU.²¹ Thus, if no post-Brexit replacement arrangement were to be found, planes could not legally leave UK air space to cross the EU. The European Chemicals Agency (ECHA) is another example, as only chemical products that have been registered and approved by the ECHA can circulate in the single market.

Other agencies play key supervisory roles, reporting back to the Commission to ensure the correct application of EU law in their given fields. The Maritime Safety Agency (EMSA) falls within this category, as do the three finance-related agencies — also known as the European Supervisory Authorities (ESAs).²² Although the supervision of individual financial institutions remains in the hands of national authorities, the ESAs improve the functioning of the internal market by ensuring appropriate, efficient and harmonized European financial regulation and supervision.²³ The ESAs notably contribute to the creation of the European Single Rulebook in the banking and financial sectors by drafting the rules and technical standards as well as advising the EU institutions on legislative projects.

¹⁸ cf. Keleman, D.R., "The Politics of 'Eurocratic' Structure and the New European Agencies", in *West European Politics* 25, no. 4. 2011. DOI: 10.1080/713601644

¹⁹ European Commission, "Proposal for a regulation of the European Parliament and of the Council establishing a European Labour Authority", SWD (2018) 68 final. 2018.

²⁰ The following agencies can issue binding decisions: ACER (energy), CPVO (plants), EASA (aviation), EBA (banking), ECHA (chemicals), EIOPA (insurance), ERA (railway), ESMA (financial markets), and EUIPO (intellectual property).

²¹ The European Aviation Safety Agency, 2018, Online: <<https://www.easa.europa.eu/the-agency/the-agency>> (accessed: 15.03.2018).

²² ESAs: the European Securities and Markets Authority (ESMA), the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA)

²³ The European Securities and Markets Authority, 2018, Online: <<https://www.esma.europa.eu/about-esma/governance/european-supervisory-framework>> (accessed: 15.03.2018).

Thus, if the UK seeks a future relationship with the EU that goes beyond a Canadian style free-trade agreement — involving deeper access to the single market — the EU will want to ensure that the UK continues being bound to the decisions and authority of its agencies which are essential to ensure a level-playing field.

Relevance for Northern Ireland

The question of the UK's future participation in EU agencies also has relevance for Northern Ireland and the issue of avoiding a hard border with the Republic of Ireland.

The case of Northern Ireland is one of the trickiest Brexit challenges. Combining the UK's wish to leave the single market and customs union with its commitment to avoiding a hard border between Northern Ireland and the Republic of Ireland is a difficult conundrum. On the one hand, avoiding a hard border is crucial in order to protect the Good Friday agreement (1998) and the overall peace process, given that the abolition of the border was key to achieving reconciliation on the island, putting an end to strict border controls. On the other hand, if the UK is to leave the single market and the customs union, the reintroduction of a form of border control will be inevitable in order to protect the integrity of the single market, as Brexit will not reduce the Republic of Ireland's obligation to respect Union law.

Although the UK and the Republic of Ireland are part of a Common Travel Area (CTA), which predates EU membership, it only regulates free movement for British and Irish citizens.²⁴ Brexit could therefore nonetheless lead to tighter border controls in Northern Ireland, if the UK were to introduce tighter immigration controls post-Brexit. This would be a necessity in order to avoid Northern Ireland becoming a gateway for illegal immigration. In relation to the free movement of goods and services, however, maintaining an open border is enabled by virtue of the UK and Ireland's membership to the EU. Goods can flow freely, without border inspections, on a daily basis, thanks to single market rules and standards along with the abolition of trade barriers.²⁵

Furthermore, as an extra hurdle, any solution must respect the fragile political state in Northern Ireland, where the power-sharing arrangement between the Sinn Fein nationalist party and the Democratic Unionist Party (DUP) is in limbo since early 2017. Creating an East-West border – between Northern Ireland and the rest of the UK – in order to avoid a North-South border should also be avoided. It is strongly opposed by the DUP, which refuses to see any distance created between Northern Ireland and the rest of the UK and it poses the risk of exacerbating the existing tensions between the Nationalists and Unionists. The DUP has also threatened to withdraw its support for the minority government of Theresa May if its red lines concerning Northern Ireland were violated. In the same vein, an East-West border goes against the UK's further commitment to ensure that no new regulatory barriers are created between Northern Ireland and the rest of the UK and to protect Northern Ireland's place in the UK's internal market.²⁶

²⁴ The Republic of Ireland remained outside of the Schengen zone along with the UK specifically in order to preserve the Common Travel Area.

²⁵ Nicolai von Ondarza/Julia Becker, „Negotiating with a Dis-United Kingdom. The EU's Options Concerning Scotland and Northern Ireland in the Brexit Talks”, SWP-Comment, 7/2017.

²⁶ Pt. 50 of the European Commission, "Joint report from the negotiators of the European Union and the United Kingdom Government on progress during phase 1 of negotiations under Article 50 TEU on the United Kingdom's orderly withdrawal from the European Union". TF50 (2017) 19, 08.12.2017. Online: <https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf> (accessed: 15.03.2018). p.8

In order to find solutions to this conundrum, on December 8th 2017, the negotiators of the EU and the UK set out three different options for avoiding a hard border.²⁷ The first option, preferred by the UK, is to settle the issue through the overall deal on the future EU-UK relationship, most likely in the form of an extensive free-trade deal. The second option, is for the UK to propose solutions to maintain an open border (potentially through technological means) in case the first approach is insufficient. The third option, or so-called backstop solution, is for Northern Ireland to maintain full regulatory alignment with the EU's internal market and customs union. If the UK is committed to leaving both, however, the third option could ultimately lead to an East-West border between Northern Ireland and the UK, with only Northern Ireland being bound by EU rules.²⁸ In this case, as mentioned above, the UK would have to ensure that it also respects its commitment to protect Northern Ireland's place in the UK's internal market - so as not to upset the political stability in Northern Ireland.²⁹

Given the respective negotiating positions of both the UK and the EU, option one is currently unrealistic;³⁰ nor has the UK come up with a workable technical solution that is acceptable to the EU.³¹ In consequence, in February 2018 the EU published a draft withdrawal agreement which includes a protocol on Northern Ireland based on the "backstop" solution. Chapter III of this protocol provides for the establishment of a 'common regulatory area' comprising of the EU and the UK only in respect of Northern Ireland. The proposed common regulatory area would be an area without internal borders in which the free movement of goods is ensured.³² This is where EU agencies come into play, since under article 11 of the Protocol, Northern Ireland would still be bound by their decisions and authority.³³ The protocol sets out different sectors covered by the common regulatory area to which different agencies can be associated:

The first sector covered by the proposed common regulatory area is the free movement of goods, which implies being bound by the decisions of, inter alia, the European Chemicals Agency (ECHA) and the European Medicines Agency (EMA). The ECHA authorises the circulation of chemical products and verifies their compliance with EU law, notably in terms of labelling requirements. The EMA, for its part, makes recommendations on marketing authorisations for pharmaceuticals – which are then decided upon by the Commission - and monitors the side effects of drugs currently in circulation.

²⁷ Ibid. pp.7-9

²⁸ Ibid.

²⁹ Ibid. pt. 50. p.8

³⁰ Cf. Springford, J., "Theresa May's Irish trilemma". 2018. Centre for European Reform.

³¹ Foster, P., "Exclusive: EU rejects Theresa May's Brexit Irish border solution as doubts grow over whether UK can leave customs union". 2018. The Telegraph. Online: < <https://www.telegraph.co.uk/politics/2018/04/19/exclusive-eu-rejects-theresa-mays-brex-it-irish-border-solution/> > (accessed:24.04.2018)

³² European Commission, "European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community. TF50 (2018) 33", 28.02.2018. pp.98-105. Online: <https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf > (accessed: 15.03.2018)

³³ Article 11 of the Protocol on Northern Ireland in the Draft Withdrawal Agreement states: "As regards Chapter III, the institutions, bodies, offices and **agencies** of the Union shall in relation to the United Kingdom, [...] have powers conferred upon them by Union law. [...] Acts of the institutions, bodies, offices and **agencies** adopted in accordance to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which they produce within the Union and its Member States"

These two agencies are not without significance for the Irish case, as in 2015 chemicals and related products were the largest category of goods traded between the UK and Ireland.³⁴

The second sector covered by the proposed common regulatory area is agriculture and fisheries, in which the European Food Safety Authority (EFSA) and the European Fisheries Control Agency (EFCA) play a role. The EFSA carries out risk assessments and produces scientific opinions that form the basis for European policies and legislation in food safety, animal welfare and plant protection. The EFCA ensures the compliance of Member States with the Common Fisheries Policy by helping coordinate the work of national inspection authorities. It is important to bear in mind, that although the UK agrees in principle to the backstop solution, the exact terms are still up for negotiations, whereby in addition to the common regulatory area as a whole, fisheries may prove to be a particularly thorny point.³⁵

The third sector is the Single Electricity Market, by virtue of which Member States are part of the Agency for the Cooperation of Energy Regulators (ACER). This agency complements and coordinates the work of national energy regulators. It can also take binding individual decisions on issues of cross border energy infrastructure.³⁶ The energy sector is of particular importance to Northern Ireland given that the UK and Ireland are part of a bilateral Single Energy Market, which ensures energy security in Northern Ireland.

The fourth sector is the environment, which implies participation in the European Environment Agency. The EEA (agency) is a hub for environmental knowledge-sharing and capacity building at EU level. It is tasked with supporting sustainable development by providing reliable information to policy makers.

The fifth sector includes several other areas of cooperation, such as transport and telecommunications. The European Railway Agency (ERA) plays a role in facilitating the EU's transport policy by enhancing the interoperability of railway infrastructure and promoting common safety norms. The ERA can also issue single EU-wide safety certificates to railway companies as well as vehicle authorisations for operation in more than one country. The Body of European Regulators of Electronic Communications (BEREC) assists the Commission and national regulators in implementing EU laws in the field of electronic communications.

To sum up, part of the solution to avoid a hard border between the North and the South of Ireland may require the UK – or at minimum Northern Ireland – to remain bound by EU agencies, as close regulatory alignment is necessary. A key issue in this scenario is whether the UK as a whole – or indeed possibly the Northern Irish Executive – will be represented in the decision-making process of the agencies to which Northern Ireland may still be bound.

³⁴ Cf. Government of Ireland, "Brexit: Ireland and the UK in numbers". Central Statistics Office. 2016. Online: <<http://www.cso.ie/en/media/csoie/releasespublications/documents/statisticalpublications/Brexit.pdf>> (accessed: 15.03.2018)

³⁵ cf. Burke, E., "Ulster's fight, Ulster's rights? Brexit, Northern Ireland & the threat to British-Irish relations". 2017. Centre for European Reform. p. 2 for more information on potential difficulties that could arise between London and Dublin with regards to the UK's claim over the Lough Foyle sea waters.

³⁶ The Agency for the Cooperation of Energy Regulators, 2018, Online: <https://acer.europa.eu/en/The_agency/Mission_and_Objectives/Pages/Acts-of-the-agency.aspx>. (accessed: 15.03.2018)

Overall, however, the Northern Ireland issue remains unresolved. The backstop solution, as set out by the EU, is in its current form politically untenable for the UK and is thus still up for negotiations. In response to the EU's draft protocol, Theresa May stated in front of the British parliament that no British Prime Minister could ever agree to create a border separating Northern Ireland from the rest of the UK.³⁷ In a letter addressed to Donald Tusk on 19 March 2018, Theresa May nonetheless stated that she was "committed to agreeing in the Withdrawal Agreement operational legal text for at least the so-called 'backstop option' set out in the Joint Report, in parallel with discussions of the other scenarios". She also made clear, however, that workable solutions are yet to be developed and further highlighted the UK's commitment to avoid a North-South border, but crucially, also its commitment to protect Northern Ireland's place within the UK's internal market.³⁸

Internal and external European security

The question of the UK's continued participation within the agencies linked to internal and external European security is another area of concern to the Brexit negotiations.

When it comes to internal security, Brexit will not stop transnational criminal activities. It is therefore both in the UK and the EU's interest to continue close cooperation in aspects of Justice and Home Affairs (JHA), notably regarding the exchange of data to facilitate criminal investigations. The agencies Europol and Eurojust play an important role in this regard, as they enable close cooperation and coordination of the Member States' police and judicial branches. Europol supports law enforcement authorities in fighting against terrorism, cybercrime, drug trafficking or other forms of serious crimes by acting as a hub for data exchange. Eurojust supports the coordination of investigations and prosecutions between the competent authorities in the Member States, it notably helps implement extradition requests.

In her speech at the Munich Security Conference in February 2018, Theresa May stated that the UK would seek continued participation in EU agencies involved in JHA.³⁹ Crucially, she also stated that the UK would, to that end, respect the remit of the CJEU. On the other hand, she implied that the UK would want to be appropriately represented and play a role in shaping decisions on future collective actions. Allowing the UK, as a non-EU state, to have a say in the future decision-making process of EU agencies, however, goes against the EU's key negotiating priorities. As will be demonstrated in the next section, there is no precedence of a non-EU state having any form of voting-right within EU agencies.

Similarly, maintaining close military and defence cooperation is within the interests of the continent as a whole. At the EU level, it is the European Defence Agency (EDA) that supports Member States in improving overall defence capabilities. Theresa May has made clear in her Munich speech that the UK would seek continued participation within the EDA.⁴⁰

³⁷ May, T., "Prime Minister's Questions: 28 February 2018". 2018. Online:

<<https://www.parliament.uk/business/news/2018/february/prime-ministers-questions-28-february-2018/>> (accessed: 22.03.2018)

³⁸ May, T., "Prime Minister's letter to Donald Tusk: 19 March 2018". 2018. Online:

<<https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-19-march-2018>> (accessed: 22.03.2018)

³⁹ Cf.: Theresa May, "PM speech at Munich Security Conference", Gov.uk. 17.02.2018. Online:

<<https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>> (accessed: 15.03.2018)

⁴⁰ Ibid.

Yet, once again the UK wants to maintain influence in the decision-making of the agency, which goes against the EU's negotiation position. Tensions are all the more likely to arise in the field of military and defence, since on the one hand, the UK is the European country with the highest military expenditure, meaning that the EU has an interest in maintaining close ties.⁴¹ On the other hand, the UK has also had a very critical stance towards military operations at EU level and has been the strongest critic of the EDA, vetoing an increase in the agency's budget since 2010.

III. EU agencies' relationships with third countries

Determining the exact terms and conditions of future UK participation in EU agencies will therefore prove to be another difficult point within the Brexit negotiations, with both parties seeking to uphold different priorities. The types of existing third country relationships that EU agencies have developed so far can, nonetheless, provide an idea as to what the UK's future involvement may look like. The majority of agency-regulations provide for some degree of interaction with third countries, from full participation to simple cooperation.⁴²

Full participation (EEA model)

In order to accurately understand the ways in which third countries interact with EU agencies, it is important to highlight the distinction between *participation* and simple *cooperation*. Nearly all EU agencies have forms of cooperation with numerous non-EU counterparts, mainly consisting of the exchange of best practice.⁴³ At the same time, most agencies (23/36) also allow for the full participation of third countries, under certain conditions, as provided for by their regulation.⁴⁴ For the majority, this requires the adoption of EU law within the field covered by the agency or of legislation having been recognised as equivalent to EU law.⁴⁵ All of the agencies that allow for the full participation of third countries are linked either to the functioning of the Single Market or to the Schengen zone.

In practice, the only non-EU states that have been authorised to fully participate in EU agencies are those party to the European Economic Area (EEA) Agreement – that is, Norway, Iceland and Liechtenstein.⁴⁶ Their participation equates that of EU Member States, but, crucially, without voting-rights. As such, they gain the benefits of membership whilst also being bound by the decisions and the authority of the agencies. The exact terms of EEA states'

⁴¹ cf. Giegerich, B., Mölling, C., "The United Kingdom's contribution to European security and defence". 2018. The International Institute for Strategic Studies, the German Council on Foreign Relations.

⁴² Except of CPVO (plants), EFCA (fisheries), EUISS (security institute) and Translation Centre.

⁴³ Except CPVO, EFCA, EUISS, Translation Centre, ESMA (maritime), ENISA (network security), EU LISA (large IT systems) and SRB (resolution board).

⁴⁴ Exceptions: the EMA (medicines), the EEA (environment), the Cedefop (vocational training), Eurofound (living and working conditions), CPVO (plants), the FRA (fundamental rights), the EFCA (fisheries), Europol, Eurojust, the EU OSHA (occupational health & safety), the EUIPO (intellectual property), the Translation Centre, the EDA (defence) and SatCen - founding regulations have no provision for the participation of third countries.

⁴⁵ The exceptions are: the ECHA (chemicals), the GNSS agency (navigation system), EMCDDA (drug addictions), ETF (training foundation), BEREC (electronic communications) and CEPOL – whose founding regulations do not specify that the third country must adopt EU law or equivalent.

⁴⁶ With a few notable fringe cases: Switzerland participates in 6 agencies (3 of which are linked to the Schengen zone). Turkey, as an accession country, participates in 2 agencies: the EEA (environment) and the EMCDDA (drug addictions). More details on Switzerland will be given in the 'fringe cases' section.

participation are set out by an EEA Joint Committee Decision (one for each agency).⁴⁷ These terms are essentially the same from one agency to another: the EEA states have a seat on management board of the agency, when applicable they have representatives on the agency's Board of Appeal⁴⁸ and their nationals can be part of the agency's staff. In exchange, however, they are required to contribute to the budget of the agency (determined according to their GDP) and must ensure that in the relevant fields their national law equates EU law – whilst having no voting rights. With the exception of Frontex, which allows for limited voting rights to the EEA states (and Switzerland) due to their participation in the Schengen agreements. As a side note, the associate/candidate countries are also present as observers within the management board of 6 agencies (EASA, EMSA, EFSA, EEA, FRA and BEREC) in view of progressing towards future membership.

It is important to highlight, however, that the EEA model of participation only works due to the framework offered by the EEA agreement, which extends the single market and its four freedoms to Norway, Iceland and Liechtenstein. It is a 'dynamic' agreement, regularly updated to take in all new EU legislation in the fields that it covers⁴⁹ and it provides for adequate dispute resolution mechanisms through the EFTA court. In addition, the EFTA Surveillance Authority, mirror institution to the European Commission, plays a key role in insuring the compliance of the EEA states with the decisions taken by EU agencies (as the EEA states cannot constitutionally accept direct decisions from EU bodies). The EFTA Surveillance Authority therefore participates in the agencies that issue binding decisions and those which supervise the application of EU law. The EFTA Surveillance Authority is, for instance, present within the European Supervisory Authorities (ESA), whereby it takes decisions addressed to the competent authorities or to the market operators in the EEA states, on the basis of drafts prepared by the relevant ESA. This is true for instance with regards to the ESMA's direct supervision of EEA Credit Rating Agencies and Trade Repositories - all decisions are adopted by the EFTA Surveillance Authority on the basis of drafts prepared by ESMA.⁵⁰

The conclusion that can be drawn for the UK, is that in order for it to uphold its current level of participation in EU agencies, the UK would have to accept a rule-taking position and align its policies in the relevant fields. Just like the EEA states, the UK would still be bound by the decisions and authority of the agencies, gain the benefits of membership and have a seat at the decision-making table – albeit without voting rights. On the other hand, this would imply that the UK government cross all of its negotiation red lines - namely, accepting the jurisdiction of the CJEU, maintaining regulatory alignment with the EU and contributing financially. Moreover, the EU, for its part, will want to ensure that adequate mechanisms are put in place to guarantee that the UK adopts and applies relevant EU legislation in a timely

⁴⁷ See the European Free Trade Association, *EU agencies*, 2018, Online: <<http://www.efta.int/eea/eu-agencies>> (accessed: 15.03.2018). This webpage provides links to all of the Joint Committee Decisions that set out the terms on which EEA states participate in the agencies.

⁴⁸ The following agencies have a board of appeal: the EASA (aviation), the EMSA (maritime), the ECHA (chemicals), the ACER (energy), the CPVO (plants), the EUIPO (intellectual property) and the ESAs (financial).

⁴⁹ All internal market aspects are included in the EEA agreement except Agriculture and Fisheries (which explains why EEA states do not participate in the European Fisheries Control Agency and the Community Plant Variety Office). Moreover, the EEA agreement does not include the Customs Union, the Common Trade Policy, Justice and Home Affairs, CFSP or the Monetary Union.

⁵⁰ Council of the European Union, "Council Conclusions on the EU and EEA-EFTA Ministers of Finance and Economy. 14178/1/14 REV 1". 14.10.2014. Online:

<<http://www.efta.int/sites/default/files/documents/eea/eea-news/2010-10-14-EEA-EFTA-ECOFIN-joint-conclusions.pdf>> (accessed: 15.03.2018).

manner – as is ensured in the case of Norway through the EEA agreement. This type of participation is, however, incompatible with the UK’s current negotiation stance.

Bilateral cooperation agreements

Another way in which third countries relate to EU agencies is through cooperation agreements. The majority of EU agencies can enter into bilateral working agreements to establish forms of cooperation with counterparts all around the world.⁵¹ These agreements, however, lead to a very different type of relationship than that of the participation of the EEA states. Cooperation agreements do not enable third countries to send representatives on the management boards and the decisions taken by the agencies do not apply to the third countries.

With regards to bilateral working agreements, a distinction can be made between agencies related to the single market – with a sub-section on financial agencies – and agencies related to Justice and Home Affairs (JHA) / Common Foreign and Security Policy (CFSP).

Agencies related to the single market:

In the case of agencies related to the single market, the cooperation established with third country counterparts remains limited to exchanges of technical expertise and information (sometimes with confidentiality clauses), workshops and staff exchanges. These agreements, typically Memorandums of Understanding (MoU), are not legally binding and can be terminated by whichever party with very little notice. The European Food Safety Authority (EFSA), for instance, has entered into agreements with Australia, Canada, New Zealand, Japan and the US. As an example, the MoU between the Canadian Food Inspection Agency (CFIA) and the EFSA provides for ‘*mutual support and cooperation in the collection, analysis and sharing of technical data*’ to facilitate food safety risk assessments. It contains a confidentiality clause and states that both agencies are to designate a staff member as coordinator for the maintenance of close contacts.⁵² The majority of EU agencies do not need to obtain the approval of the Commission or the Council before entering into such agreements: out of 36 regulatory agencies only 9 require prior-consultation with one of the main EU institutions.⁵³

Agencies related to financial services (the ESAs):

Furthermore, special attention should be pointed towards the European Supervisory Authorities (ESAs) – namely, the European Markets and Securities Authority (ESMA), the European Banking Authority (EBA) and the European Insurance and Occupational Pensions Authority (EIOPA) – as they have a more extensive form of cooperation with the financial

⁵¹ See the table on page 28 for an overview.

⁵² Cf. Memorandum of Cooperation between the European Food Safety Authority (EFSA) and the Canadian Food Inspection Agency (CFIA), 2015. Online: <<https://www.efsa.europa.eu/sites/default/files/memorandum-efsa-cfia.pdf>>. (accessed: 15.03.2018). For another example see the Cf. Memorandum of Understanding between the Agency for the Cooperation of Energy Regulators (ACER) and the Federal Energy Regulatory Commission, 2015. Online: <<https://www.ferc.gov/legal/mou/2015/MOU-ACER.pdf>> (accessed: 15.03.2018)

⁵³ CEPOL, EASA, Eurojust, Europol, EMCDDA, ETF, FRA, Frontex, EDA.
cf. Ott, A., Vos, E., Coman-Kund, F., „EU agencies & their international mandate: A new category of global actors?“. 2013. Working Paper of the Centre for the Law of EU External Relations.

supervision authorities of third countries that have been granted equivalence on financial services with the EU.⁵⁴

Equivalence decisions on financial services facilitate the access to the EU's single market for certain third country financial services providers (not all sectors of the finance industry are covered by an equivalence provision).⁵⁵ Equivalence is granted following an assessment of the third country's relevant legislation on the basis of sector-specific criteria laid out in the equivalence provisions of the EU's legal acts.⁵⁶ Typically the assessment will verify whether the country's law produces the same outcome as the corresponding EU law and whether the financial service providers within the third country are subject to effective supervision and enforcement.⁵⁷ The European Commission (specifically DG FISMA)⁵⁸ assisted by the ESAs, is responsible for carrying out the assessments and is left with great discretion on the final decision, due to the vagueness of the legal benchmarks. The Commission can also decide to withdraw an agreement or limit it in time. To date, the EU has adopted over 200 equivalence decisions relating to different states in different financial sectors - most frequently to Canada, the US, Japan and Switzerland.⁵⁹

Once a third country has obtained equivalence on a type of financial service, it must collaborate with the ESAs, as each equivalence provision requires that the financial supervision authorities of the third country conclude a cooperation agreement with the relevant ESA. For example, under article 47 of Regulation 600/2014 on markets in financial instruments (MiFIR), the cooperation, in this case with ESMA, must include:

- Exchanges of information, with ESMA having access to all information regarding non-EU firms authorised within the third country;
- Mechanisms for prompt notification to ESMA when a third country firm infringes its obligations;
- Coordination of supervisory activities, including, when appropriate, on-site inspections carried out by ESMA.⁶⁰

⁵⁴ The founding regulations of the ESAs each contain an article stating the following: "2. The Authority **may cooperate** with the countries referred to in paragraph 1, **applying legislation which has been recognised as equivalent in the areas of competence of the Authority** referred to in Article 1(2), as provided for in international agreements concluded by the Union in accordance with Article 216 TFEU." - ESMA: article 74 of Regulation 1095/2010; EBA: article 75 of Regulation 1093/2010; EIOPA: article 75 of Regulation 1094/2010.

⁵⁵ For an overview of the sectors covered by equivalence see table p.3 in European Parliament, "Third-country equivalence in banking legislation", Briefing, PE 587.369, 2017. Online: <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI\(2016\)587369_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/587369/IPOL_BRI(2016)587369_EN.pdf)> (accessed: 15.03.2018)

⁵⁶ For an example of the conditions needed for equivalence, see article 47 of the European Parliament and Council Regulation (EU) No 600/2014, "on markets in financial instruments and amending Regulation (EU) No 648/2012", L 173/84. Online: <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN>> (accessed: 15.03.2018)

⁵⁷ Cf. European Commission, «EU equivalence decisions in financial services policy: an assessment », Commission Staff Working Document, SWD(2017) 102 final, 2017. Online: <https://ec.europa.eu/info/sites/info/files/eu-equivalence-decisions-assessment-27022017_en.pdf> (accessed: 15.03.2018)

⁵⁸ DG FISMA: Directorate-General for Financial Stability, Financial Services and Capital Markets Union.

⁵⁹ For an overview of the equivalence agreements see the Annex p.6-12 of the European Parliament, "Third-country equivalence in banking legislation", Briefing, PE 587.369, 2017.

⁶⁰ See article 47 2 (a) (b) (c) of the European Parliament and Council Regulation (EU) No 600/2014, "on markets in financial instruments and amending Regulation (EU) No 648/2012", L 173/84

In addition, even though the ESAs do not have direct supervision or enforcement powers over the firms of a third country, all third country firms operating in the EU must be registered with the relevant ESA.⁶¹

An ESA can also decide to withdraw a third-country firm from its registry at any time if: (1) it considers that the firm is infringing its obligations without appropriate redress from the third country authorities, or (2) cooperation with the third country's financial supervision authorities breaks down. The withdrawal of a third country firm from the registry is not without significance, as it prompts the Commission to reassess, and potentially remove, the equivalence (although there is no precedence of this).⁶²

Returning to the issue of Brexit, it is worth considering in more detail whether the equivalence regime is a credible basis for the post-Brexit EU-UK relationship in financial services. Firstly, due to the importance of the British financial services sector for the UK and the EU as a whole. Secondly, because the equivalence regime is an option considered both by British politicians and by the British finance industry – if it were substantially reformed. Already in 2017, for instance, TheCityUK, the industry led body representing UK-based financial services, sponsored a working group to assess the EU's third country regimes in financial services, notably the equivalence regime.⁶³ More recently, Prime Minister May mentioned systems of 'mutual recognition' during her speech on the 2nd March 2018.⁶⁴ Building on the Prime Minister's speech, the British Chancellor of the Exchequer, Philip Hammond, also directly referred to the EU's equivalence regime in financial services in a speech on the 7th of March 2018. He argued that the equivalence regime could be a basis for the future EU-UK relation - if it were developed into a system more akin to mutual recognition, including a binding mediation mechanism, thus with both sides effectively guaranteeing each other access to their financial markets.⁶⁵

Although equivalence would enable many British service providers to maintain access to the EU market, there are nonetheless a number of draw-backs to the procedure:⁶⁶

First, the equivalence regime is a piecemeal approach. It does not cover all financial services, meaning that the UK would not enjoy the same level of access as it currently enjoys.

Second, equivalence decisions are static, in the sense that they cannot be regularly updated and only take into account the legislation existing at the time of their signature. Thus, any future changes in legislation on either side could call into question the agreement as a whole. As such, the Commission is wary of granting equivalence given that it can lead to disparities and unfair competition in case of momentary regulatory dis-alignment.

⁶¹ See article 46 of *ibid.*

⁶² cf. European Parliament, "the UK's Potential Withdrawal from the EU and Single Market Access under EU Financial Services Legislation", IP/A/ECON/2016-13, PE 595.334, 2017. Online: <[http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/595334/IPOL_IDA\(2016\)595334_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/595334/IPOL_IDA(2016)595334_EN.pdf)> (accessed: 15.03.2018)

⁶³ International Regulatory Strategy Group (IRSG), "The EU's third country regimes and alternatives to passporting: Executive Summary". 2017. Online: <<https://www.thecityuk.com/assets/2017/Reports-PDF/the-eus-third-country-regimes-and-alternatives-to-passporting-executive-summary.pdf>> (accessed:22.03.2018)

⁶⁴ Theresa May, "Our future partnership", Conservatives. 02.03.2018. Online: <<https://www.conservatives.com/sharethefacts/2018/02/our-future-partnership>> (accessed: 15.03.2018)

⁶⁵ Hammond, P. "Chancellor's HSBC speech: financial services". 07.03.2018. gov.uk. Online: <<https://www.gov.uk/government/speeches/chancellors-hsbc-speech-financial-services>> (accessed: 15.03.2018).

⁶⁶ Hammond, P. "Chancellor's HSBC speech: financial services". 07.03.2018.

Third, the system is volatile, as the Commission can legally withdraw equivalence with very little notice. In addition, as mentioned above, the ESAs can trigger a reassessment of the agreement when they consider that cooperation with their third country counterparts has broken down.

Lastly, the process of granting equivalence can become just as political as technical. As an example: last year, the US and Canada both obtained unlimited equivalence for trading venues,⁶⁷ whereas the equivalence decision in regards to Switzerland was limited to one year only - sparking tensions between the Swiss government and the EU.⁶⁸ The Commission's press release following the decision on Switzerland justified the time limitation by highlighting the great interconnectedness of the Swiss and EU markets and thus the stronger impact Switzerland could have on the integrity of the EU financial markets.⁶⁹ Yet, another more political reason can also explain this decision, in the context of the current diplomatic standstill between Switzerland and the Commission over the establishment of a new treaty. This treaty aims to create a common institutional framework in order to replace the 120 bilateral agreements that currently govern Swiss-EU relations.⁷⁰ Recital 30 of the equivalence agreement (n°2017/2441) notably states that "*when deciding on whether to extend the applicability of this decision, the Commission should in particular consider progress made towards the signature of an Agreement establishing a common institutional framework.*" As such, there is no guarantee that the UK would be able to obtain equivalence, even though, in principle, UK laws would be very close to the EU's in the immediate post-Brexit years – both for economic reasons due to the high interconnectedness between UK and EU markets and for political reasons.

The equivalence procedure would therefore prove inadequate for the scale and complexity of the trade in financial services between the EU and the UK and would not provide sufficient stability for the finance industry. It is for this reason that Hammond called for the equivalence regime to be reviewed in order to include a more objective assessment procedure, a dispute resolution mechanism and a sensible notice period for market participants.⁷¹ In this regard, there is indeed some movement within the EU-27 itself to reform the equivalence regime:

⁶⁷ Cf. US decision: Commission Implementing Decision (EU) 2017/2320, "on the equivalence of the legal and supervisory framework of the United States of America for national securities exchanges and alternative trading systems in accordance with Directive 2014/65/EU of the European Parliament and of the Council", L331/94, 2017. Online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2320&from=EN>> (accessed: 15.03.2018)

⁶⁸ cf. Swiss decision: Commission Implementing Decision (EU) 2017/2441, "on the equivalence of the legal and supervisory framework applicable to stock exchanges in Switzerland in accordance with Directive 2014/65/EU of the European Parliament and of the Council", L 344/52, 2017. Online: <<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017D2441&from=EN>> (accessed: 15.03.2018)

⁶⁹ Full quote: "Switzerland differs from other jurisdictions which have been recently been granted equivalence in several ways. The scope of the Swiss decision is much greater, as the trading of Swiss shares in the EU – and vice versa – is more widespread than with the other jurisdictions – the US, Hong Kong and Australia – which were recently recognized. For example, every share in the Swiss top 20 index is traded in the EU. Therefore trading in Switzerland will have a bigger and more immediate impact on the integrity of EU financial markets, including in the case of prevention of market abuse." From European Commission, "MiFID II: Commission adopts equivalence decision on Swiss share trading venues", Press release, 2017. Online: <http://europa.eu/rapid/press-release_IP-17-5403_en.htm> (accessed: 15.03.2018)

⁷⁰ cf. Council of the European Union, "Council conclusions on EU relations with the Swiss Confederation", 6767/17 CH 23 AELE 23 MI 113, 2017. Online: <<http://data.consilium.europa.eu/doc/document/ST-6767-2017-INIT/en/pdf>> (accessed: 15.03.2018)

⁷¹ Hammond, P. "Chancellor's HSBC speech: financial services". 07.03.2018. gov.uk

First, because it is also in the EU's interest to avoid the fragmentation of the UK financial hub. Whilst maintaining market access for British financial services providers is a key priority for the UK government, the interests of the EU member states are also at stake.⁷² Given the high interconnected nature of the financial sector, the disruption caused by businesses relocating to the EU in order to maintain single market access, has the potential to lead to great financial instability in an EU still recovering from the last financial crisis.

Second, certain member states appear dissatisfied with the current equivalence regime. The reaction following the Commission's decision to limit the latest Swiss equivalence agreement to one year underlines this, as 11 member states issued a letter to the Commission in support of Switzerland, arguing that it had been unfairly treated.⁷³ In addition, some member states, most notably Luxembourg which hosts many British-based fund operations, are pushing for more generous market access for British financial service providers. In March 2018, Luxembourg and France, who have opposing positions on the issue, reached a compromise and co-drafted a new financial services provision that was adopted as a statement by the General Affairs Council in the Article 50 (EU-27) format. This statement calls for a "reviewed and improved equivalence" mechanism that allows for appropriate access to the EU's financial services markets. The provision, however, also states that the EU would retain unilateral control over how the equivalence mechanism works and that the integrity of the single market as well as the decision making autonomy of the EU are to be preserved.⁷⁴ How exactly that would look like is therefore still to be determined between the EU Commission and the member states – with added uncertainty whether these would be willing and able to reform the equivalence regime in time to be ready when the UK leaves the transition period.

As such, a form of equivalence mechanism could still be on the table for the future EU-UK relationship in financial services. This would, however, imply a close form of cooperation with the ESAs to which UK firms would still be subject to a form of indirect monitoring – and in which the UK would of course have no say.

Agencies related to JHA/CFSP

JHA/CFSP agencies also offer more extensive forms of cooperation with third countries than the agencies related to the single market. Although it falls short of membership, third countries are able to cooperate operationally with some of the agencies and exchange more sensitive information under certain conditions.

In the field of JHA, the cooperation agreements with third countries established by Europol can be given as an example. There are two types of cooperation agreements that Europol can enter into with non-EU countries: strategic and operational agreements.

⁷² PwC, "Brexit and the cost to Europe of fragmenting financial services", 160913-085451-IP-OS, 2016. Online: <<https://www.pwc.co.uk/the-eu-referendum/brexit-cost-to-europe-of-fragmenting-financial-services.html>> (accessed: 15.03.2018)

⁷³ Shields, M., Blenkinsop, P., Croft, A., "Eleven EU members back Swiss in dispute with Brussels", Reuters, 2018. Online: < <https://uk.reuters.com/article/uk-swiss-eu/eleven-eu-members-back-swiss-in-dispute-with-brussels-idUKKBN1FJ253> > (accessed: 15.03.2018)

⁷⁴ Macdonald, A., "EU primes UK trade offer, seeks Brexit transition endorsement", Reuters. 2018. Online: < <https://www.reuters.com/article/us-britain-eu/eu-primes-uk-trade-offer-seeks-brexit-transition-endorsement-idUSKBN1GW2QY> > (accessed: 23.03.2018)

Europol has 3 strategic agreements (with China, Russia and Turkey) and 17 operational agreements.⁷⁵ Both types of agreements are aimed at enhancing cooperation. The key difference is that strategic agreements are limited to the exchange of general intelligence, strategic and technical information, whereas operational agreements allow for the exchange of information including personal data.⁷⁶ Europol also hosts liaison officers from 13 of the countries with which it has concluded an operational agreement (including Canada, Norway, Switzerland and the US).⁷⁷ Liaison officers enable the law enforcement agencies of non-EU partners to be represented in Europol's headquarters, thus greatly facilitating communication and cooperation. The Europol agreements are, however, not legally binding and can be terminated by either party with little notice, with the exception of Denmark.

Denmark is an interesting precedence of "third country" participation in Europol for the UK. Since May 2017, with the entry into force of the new Europol Regulation 2016/794⁷⁸ and following a national referendum, Denmark is no longer a member of Europol and is considered as a third country, since it does not take part in measures pursuant to Title V Part Three of the TFEU. Despite Denmark's decision to leave, Europol has sought to 'minimise the negative effects of the Danish departure' by concluding an Operational and Strategic Cooperation Agreement with Denmark after having obtained the approval of the Council.⁷⁹ This agreement provides for a similar form of cooperation as described above (exchange of sensitive data along with a liaison officers), with two key differences. First, Denmark is admitted as non-voting observer on Europol's management board. Second, although Denmark, as a non-member, cannot directly access the Europol data processing systems, Europol must assign 8 Danish speaking staff with the task of inputting and retrieving data coming from the Danish authorities on a 24/7 basis. This includes the right to modify, correct or delete the said data.⁸⁰ On the other hand, however, as opposed to the other third countries, the cooperation agreement with Denmark is legally binding and subject to the remit of the CJEU. In addition, each year Denmark must contribute to the budget of Europol in accordance with its GDP⁸¹ and must apply a number of EU provisions, namely, the rules laid down by the European Directive 2016/680 on personal data and articles 28 to 48 of the new Europol

⁷⁵ With: Albania, Australia, Bosnia and Herzegovina, Canada, Colombia, Macedonia, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Ukraine and the US.

⁷⁶ Cf. EUROPOL, *Operational Agreements*, 2018, Online: <<https://www.europol.europa.eu/partners-agreements/operational-agreements>> (accessed: 15.03.2018). This webpage provides links to all the operational agreements between EUROPOL and its third country partners.

⁷⁷ With the exception of Bosnia and Herzegovina, Georgia, Liechtenstein and Ukraine, who have an operational agreement with Europol but no liaison officer.

⁷⁸ Europol was established in 1995 through the Europol Convention. In 2009, it became a full EU agency under the EU's competence with the entry into force of the Treaty of Lisbon - which brought most JHA policy areas under the so-called 'Community method' (CJEU remit, majority voting in the Council and co-decision by the European Parliament). Europol's new regulation (adopted in 2016) aligns its previous legal framework with the requirements of the Treaty of Lisbon.

cf. Regulation (EU) 2016/794 of the European Parliament and the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA (OJ L 135, 24.5.2016, p.53).

⁷⁹ Cf. Recital (3) of the Agreement on Operational and Strategic Cooperation between the Kingdom of Denmark and the European Police Office (EURPOL), 2017. Online: <<https://www.europol.europa.eu/publications-documents/agreement-operational-and-strategic-cooperation-between-kingdom-of-denmark-and-europol>> (accessed: 15.03.2018)

⁸⁰ Ibid. Article 8 + article 10 (6).

⁸¹ Ibid. Article 22.

regulation. Denmark must also recognise the role of the European Data Protection Supervisor.⁸²

In the field of the CFSP, third countries can, for instance, cooperate with the European Defence Agency (EDA). According to article 23 of the Council Joint Action (2004/551/CFSP) on the establishment of the EDA, third countries may contribute to a particular ad hoc project or programme of the agency and to the budget associated with it. In order to enable the participation of third states in specific projects and programmes, the EDA can enter into Administrative Agreements to facilitate the exchange of information and views. The EDA commits to providing the third country with the fullest possible transparency regarding the specific project or programme. For this purpose, a Consultative Committee is set up, it includes a representative of each participating state and of the Commission (article 25). The EDA – which includes all member states except Denmark⁸³ – has Administrative Agreements with Norway (2006), Switzerland (2012), Serbia (2013) and Ukraine (2015).

As such, in the field of JHA and of the CFSP, the type of cooperation that the UK could reach, without being a member, may prove satisfactory in its nature for both sides. It is important to bear in mind, however, that cooperation is necessarily inferior to membership - the loss of direct access to the Europol and Eurojust databases, for example, is a significant downgrade. There would also be no possibility for the UK to shape the future decisions taken by these agencies, as sitting at their management boards remains exclusively for EU member states. Even Norway does not participate as an observer on the management boards, given that the EEA agreement does not include JHA or CFSP.

Fringe cases

There are, however, some notable ‘fringe cases’, which do not fit the models highlighted above. These fringe cases are of particular interest with regards to Brexit, as they show that the EU has been known to offer more flexibility - if it is in its interests.

The first fringe case is Switzerland, whose relationship with the EU is based on 120 bilateral agreements that cover various sectors. This custom-made relationship is also reflected in Switzerland’s participation within EU agencies:

First, Switzerland participates to the same extent as EEA states in 6 out of the 36 regulatory agencies.⁸⁴ With one exception, it only participates in these agencies by virtue of a high level of harmonisation with EU law in the relevant fields:

Switzerland participates in Frontex (with limited voting rights) and in EU LISA as well as EASO (with no voting rights). These three agencies all relate to the functioning of the Schengen zone and Switzerland only participates because it has adopted the Schengen agreements. It is also a member of the European Aviation Safety Agency (EASA), as it has a bilateral agreement on air transport with the EU, by virtue of which it must apply many EU legal acts in the field of aviation.⁸⁵ Switzerland participates in the European Environment

⁸² Ibid. Article 10 (4).

⁸³ Denmark has an Opt-Out from the Common Security and Defence Policy of the EU.

⁸⁴ Notwithstanding that Switzerland also has *cooperation* agreements with many of the other agencies.

⁸⁵ The annex of the Agreement between the European Community and the Swiss Confederation on Air Transport, 2002, gives an overview of all the EU legal acts on aviation which Switzerland must apply. Online: <https://eur-lex.europa.eu/resource.html?uri=cellar:fbfce0d6-c474-436b-a29d-afe1752bd70.0004.02/DOC_1&format=PDF> (accessed: 15.03.2018)

Agency (EEA), once again because its environmental legislation is harmonised with the EU in a large number of sectors.⁸⁶ As an example, the EU and Switzerland have an agreement on greenhouse gas emissions trading schemes. The only exception is the Body of European Regulators for Electronic Communications (BEREC), where Switzerland has an observer status on the management board, even though its policies in the sector of Electronic Communications are not harmonised with the EU.⁸⁷

Second, Switzerland has been given great flexibility in its participation within the European Chemicals Agency (ECHA), where it only participates in certain areas. The ECHA helps enforce four key European regulations in the chemicals sector, which cover the following areas: registration, evaluation and authorisation of chemicals (REACH regulation), classification, labelling and packaging (CLP regulation), biocidal products (BPR regulation) and prior informed consent (PIC regulation).⁸⁸ Since November 2015, the Swiss Notification Authority for Chemicals has participated in the work of the ECHA in the area of biocidal products.⁸⁹ Its participation is based on an agreement on mutual recognition in relation to conformity assessments – applying inter alia to biocidal products – and concluded as part of a package known as the EU-Swiss “Bilateral agreements I”.⁹⁰ Since June 2017, Switzerland also participates as an observer in the CLP HelpNet after being admitted by the ECHA management board. In this case, Switzerland’s participation was accepted because it applies the Globally Harmonized System of classification and labelling of chemicals (GHS) in accordance with the CLP regulation, and also because the revised version of the agreement on biocidal products requires alignment with the CLP.⁹¹

Two points can be drawn from the Swiss model, which are of relevance to Brexit. (1) Switzerland’s participation in EU agencies is due to its regulatory alignment with the EU in the relevant fields, confirming that the UK will not escape this requirement. (2) On the other hand, the Swiss case also appears at odds with the EU’s narrative of ‘no cherry-picking’, as Switzerland participates in only a select few agencies where it has chosen to adopt EU legislation. Its position, however, has emerged from historical processes, whereby for a long

⁸⁶ An overview of the different harmonized sectors is available on the Swiss Federal Office for the Environment website. Online: <<https://www.bafu.admin.ch/bafu/en/home/topics/international-affairs/organisations/reasons-between-switzerland-and-the-eu-in-the-area-of-the-envi.html>> (accessed: 15.03.2018)

⁸⁷ cf. European Parliament, “Review of EU-Third Country Cooperation on Policies Falling within the ITRE Domain in Relation to Brexit”, IP/A/ITRE/2017, PE 602.057, 2017, p.53.

Online:<[http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602057/IPOL_STU\(2017\)602057_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/602057/IPOL_STU(2017)602057_EN.pdf)> (accessed: 15.03.2018)

⁸⁸ - Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (R-1907/2006)

- Classification, Labelling and Packaging (CLP) (R-1272/2008)

- Biocidal Products Regulation (BPR) (R-528/2012)

- Prior Informed Consent Regulation (PIC) (R-649/2012)

⁸⁹ The European Chemicals Agency, “Cooperation with Switzerland (REACH/CLP). 48th Meeting of the Management Board 14-15 December 2017”, MB/51/2017 final, 2017.

Online:<https://echa.europa.eu/documents/10162/2792271/mb_51_2017_cooperation_switzerland_en.pdf/dea29d08-bfde-a493-7df1-674070b338fb> (accessed: 15.03.2018)

⁹⁰ Swiss State Secretariat for Economic Affairs (SECO), “Mutual Recognition Agreements Switzerland-EU”.

2018. Online:

<https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Technische_Handelsbarrieren/Mutual_Recognition_Agreement_MRA0/MRA_Schweiz_EU.html> (accessed:22.03.2018)

⁹¹ The European Chemicals Agency, “Request from the Swiss authorities to participate in the CLP work of the HelpNet. 46th Meeting of the Management Board 21-22 June 2017”, MB/23/2017 final, 2017. Online:

<https://echa.europa.eu/documents/10162/2553226/mb_23_2017_swiss_authorities_clp_work_echah_helpnet_en.pdf/6982113a-2e0a-2b92-9892-3f8dd82b1786> (last accessed: 15.03.2018)

time it was assumed that it was progressing towards full EU membership. Although the case of Switzerland signals that the EU has been known to offer flexibility, the Swiss model is now rejected by the EU, not only as a basis for its future relationship with the UK, but also for Switzerland itself. As mentioned previously, the EU is seeking to reform its relationship with Switzerland by establishing a new common institutional framework.

The second fringe case is the European Aviation Safety Authority (EASA). Although the EASA relates to the functioning of the single market, it has extensive forms of cooperation with third countries:

First, the EASA carries out assessments of the safety standards of foreign operators and is mandated to grant them a single safety authorization, which is valid in all EASA members.⁹² As such, third country aviation operators that wish to perform commercial air transport operations within the EEA airspace must deal directly with the EASA.

Second, the EASA has concluded working arrangements with 33 countries around the world and is involved in technical cooperation activities with an additional 75 countries. Working arrangements are of technical nature, facilitating EASA's certification tasks or the validation by a foreign authority of the EASA certificates. Technical cooperation activities typically involve assisting countries in improving their regulatory capacities or cooperation projects to promote high safety standards. In addition, in order to further facilitate cooperation and support the implementation of agreements, the EASA has international offices in Washington, Beijing, Montréal and Singapore – i.e. in the most prominent partner countries in the field of aviation.

Lastly, the EASA is involved in a far reaching type of cooperation with its Brazilian, Canadian and US counterparts. In September 2015, the aviation agencies of these three countries and the EU created a formal governance structure to effectively manage their collaboration efforts – namely the Certification Management Team (CMT). The CMT structure aims to harmonize regulatory systems and effectively respond to common regulatory challenges. Through this structure, the agencies commit to aligning their certification policies and accept each other's aircraft approvals and findings. The CMT is based on mutual confidence amongst the senior management and technical working groups of the partners, and was set up in order to avoid duplicating safety assessment procedures.⁹³ The CMT agreement may thus present a window of opportunity for the UK to maintain a close relationship with the EASA. All agreements entered into by the EASA are, however, subject to close monitoring, as the EASA must obtain the prior-approval of the Commission. In addition, it is important to highlight that the US, Canada and Brazil have each entered into agreements in the field of civil aviation safety with the EU.⁹⁴

⁹² EASA members are EU member states & EEA states + Switzerland.

⁹³ European Aviation Safety Authority (EASA), Federal Aviation Administration (FAA), Transports Canada (TCCA), National Civil Aviation Agency of Brazil (ANAC), "ANAC-EASA-FAA-TCCA Certification Management Team Collaboration Strategy", 2016. Online: <<https://www.easa.europa.eu/sites/default/files/dfu/CMT%20Collaboration%20Strategy%20Signed.pdf>> (accessed: 15.03.2018)

⁹⁴ Cf. Brazil: European Union, "Agreement between the European Union and the Government of the Federative Republic of Brazil on civil aviation safety", L 273/3, 2011. Online: <http://eur-lex.europa.eu/resource.html?uri=cellar:24ed87ba-afba-42ca-9b9f-921a14777a0d.0010.02/DOC_2&format=PDF> (accessed: 15.03.2018)

Canada: European Community, "Agreement on civil aviation safety between the European Community and Canada", L 153/11, 2009. Online: <http://eur-lex.europa.eu/resource.html?uri=cellar:f6fec28-6912-405e-a248-0be35a2278c5.0006.01/DOC_2&format=PDF> (accessed: 15.03.2018)

IV. The UK and EU agencies during transition

Finally, before drawing conclusions as to what the existing models of third country relationships to EU agencies imply for the future EU-UK relationship, it is also important to consider what status the UK will have within the agencies during the planned transition phase.

After the UK formally leaves the EU in March 2019, neither the future relationship as a whole nor the UK's role vis-à-vis the EU agencies will be fully agreed. Instead, both the UK government and the EU-27 are in principle aiming for a transition period until December 2020,⁹⁵ during which the former will be completely bound by EU regulations, including in regards to the single market and the customs union. Although the details of the transition period will only be legally agreed upon as part of the withdrawal agreement, the conditions laid down by the EU-27 for transition boil down to a very simple principle – during transition the UK will be completely bound by EU rules and regulations, including the obligation to implement new EU regulations, pay into the EU budget, but without any kind of representation in the EU's institutions. In March 2018, the EU-27 and the UK politically agreed on the parts of the draft withdrawal agreement in regards to transition, in which the UK government fully accepted this arrangement.

This transition arrangement also extends to EU agencies in five important ways. First, EU agencies are included in the EU institutions that UK representatives have to leave on 30 March 2019, in particular the management boards which take the relevant decisions within the agencies.⁹⁶ In the draft withdrawal agreement, two exceptions to this rule are foreseen, according to which UK representatives may take part in EU agencies meetings if either (a) the discussion concern an act individually towards the UK or legal persons residing in the UK (i.e. UK companies) or if (b) the presence of the UK is necessary and in the interest of the Union. In those instance the UK representatives or designated UK experts may participate in the meetings, albeit without voting rights.⁹⁷

Secondly, according to the draft withdrawal agreement, during transition the UK shall not act as leading authority for risk assessments, examinations, approvals and authorisation procedures provided for in Union law.⁹⁸ This has a direct impact on the work of EU agencies, many of which are aimed at the coordination between national agencies and rely on their risk assessments, certifications etc. For instance, new biocidal products need to be authorised by the competent authority in any member state before they can be sold within the EU/EEA. During transition, this can no longer be done by UK authorities – with implication for where companies choose to register their chemicals, drugs etc. for the single market.

US: European Community, "Agreement between the United States of America and the European Community on cooperation in the regulation of civil aviation safety", L 291/3, 2011. Online: < http://eur-lex.europa.eu/resource.html?uri=cellar:64d9e1a2-633c-4e91-bbf5-053e5ab1b432.0010.02/DOC_2&format=PDF> (accessed: 15.03.2018)

⁹⁵ The current draft of the withdrawal agreement does not foresee the possibility of an extension of transition.

⁹⁶ Some exceptions where management boards are not composed of national representatives, such as the European Food Safety Authority (EFSA)

⁹⁷ Article 123 "institutional arrangements" of the European Commission "Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community", TF(50) 35 – Commission to EU27. 19.03.2018. p.76

⁹⁸ Ibid.

Thirdly, on the flipside of the coin, during transition the UK will still be bound by decisions of EU institutions, including those binding decisions of EU agencies primarily related to the single market or decisions by the Commission on recommendation of EU agencies. Although decisions of EU agencies are by design primarily of a technical nature, they may get high political weight in individual cases. Fourthly, the UK is bound to pay into the overall EU budget during transition, including the budgets for the EU agencies. This in turn gives agencies security in their planning until 2021.

Last but not least, the draft withdrawal agreement also envisions that there will be no phasing in for the future relationship of the UK with the EU (as the Prime Minister May originally envisioned), but rather it will put the UK firmly within the single market and the customs union during the whole transition. For the agencies that means that, from an EU27 perspective, the UK cannot enter into participation agreements with EU agencies during transition even if it may aspire to do so afterwards within the framework of the overall future relationship. The one exception to that is CFSP/CSDP, for which the EU and the UK foresee an earlier and separate agreement on the future cooperation, including in relation to the relevant CFSP agencies, in particular the EDA.

Taken together, during transition the UK will, in terms of sovereignty, be in a worse situation than the EEA countries. It will have all the obligations of full participation in EU agencies, including paying into the budget and being bound by their decisions or decisions of the EU Commission based on their recommendations, while at the same time its authorities will be barred from input into the EU agencies and its representatives will not sit at the table.

Conclusions

Six key conclusions can be drawn from the analysis of EU agencies and their existing relationship to third countries:

First, EU agencies are relevant to the Brexit negotiations. Although they do not have far reaching powers of their own, some play a key role in preserving the integrity of the single market by issuing decisions to third parties authorizing the circulation of certain goods/services or help monitor of the application of EU law. A number of EU agencies also facilitate the cooperation between member states in the field of JHA and the CFSP. The UK therefore has an interest in seeking continued participation in the agencies that are active in important sectors of its economy, as it would greatly facilitate its future access to the EU's single market and cooperation with other member states in internal and external security. Prime Minister May has already stated the UK's interest in maintaining participation in the EASA, the ECHA, the EMA, the agencies related to JHA and the EDA. Not by chance, these are also the EU agencies with the greatest importance for the single market as well as EU cooperation in internal and external security.

Second, on first sight there is a high degree of flexibility of the EU's agencies in their relationship to third countries. For instance, Norway participates in 28 out of the EU's 36 agencies, while Switzerland participates only in six. In the ECHA, the Swiss degree of participation differs even within one agency depending on which regulation is affected. At the same time, some EU agencies have no relations to third countries at all, while EASA has cooperation agreements with over 30 countries. On a closer look, however, the conditions for the different types of third country relations are quite clear, and can be divided into three models:

The first model is the **EEA model** (or Norwegian model), whereby the EEA states **fully participate** in the agencies linked to the single market – but with strings attached. Full participation in EU agencies is subject to strict unequivocal conditions: the adoption of relevant EU law or regulatory alignment with the EU, the acceptance of the CJEU remit and financial contributions to the budget of the agencies – all of which without voting rights. Moreover, only the agencies linked to the single market or the Schengen zone allow for this type of participation, the JHA/CFSP related agencies offer only extensive forms of cooperation. The UK, however, has already ruled out the EEA model for its overall relationship with the EU, given that it crosses all of its negotiation red lines. There are political signs, however, that it would accept this model for individual EU agencies, as long as it could pick and choose the respective agencies – thereby violating the EU-27's 'no cherry-picking' principle.

The second model is the **cooperation model**, which corresponds to the type of relationship Canada enjoys with the EU agencies. Canada has bilateral cooperation agreements with a large number of agencies. With regards to the agencies linked to the single market, these agreements are, however, limited to the exchange of information and best practice. Canada is not bound by the decisions of the agencies and does not have a representative on their management boards. In agencies related to JHA, such as Europol or Eurojust, Canada has a more extensive form of cooperation. It has a liaison officer posted in Europol, for example, and exchanges more sensitive types of information, such as personal data, to facilitate criminal investigations (Norway also has a similar type of relationship to the agencies related to JHA). The one fringe case is the EASA, which is of particular interest to the UK, where the Canadian, the US and the Brazilian aviation agencies are part of a Certification Management Team (CMT) structure with the EASA. This CMT allows for the mutual acceptance of aircraft

approvals, decisions and certificates. It does, however, require that the UK enter into a prior agreement on civil aviation safety with the EU. The UK has rejected a Canadian style free-trade agreement as the basis for its future relationship with the EU, this time because it does not provide a deep enough access to the single market. The UK seeks deeper integration and access to the EU in specific sectors important to its economy and hopes to continue participating and being bound by the relevant EU agencies.

The third model is the **Swiss model**, which is a mixture of the two previous models. The EU has shown more flexibility towards Switzerland, allowing it to participate in a select few agencies in the sectors where it chooses to align its national legislation with EU legislation. The Swiss model thus greatly resembles cherry picking and comes much closer to the type of future relationship the UK wants. Importantly, however, the flexibility enjoyed by Switzerland does not stem from the agencies themselves but rather the other way around. Switzerland does not get access to the regulatory space of the EU via its agencies, rather it participates in those agencies where it already accepts the rules of the single market or the Schengen agreement through its bilateral agreements. Yet, the Swiss model has been ruled out by the EU, as it poses a risk to the integrity of its legal order. Even if the UK were to align its policies in specific sectors, the EU would most likely not allow for UK participation in the corresponding agencies, given that the EU wants to prevent a sector by sector access to the single market. The EU is highly dissatisfied with its current relationship with Switzerland and is seeking to replace the existing bilateral agreements with a new treaty establishing a common institutional framework.

In short, EU agencies are no back door into the single market. The flexibility of the current third country relationships of EU agencies stems from the respective countries degree of access to the single market, not the other way around.

Third, compared to the existing models of third country relationships, the UK will be in a worse situation during transition. While it will continue to have full access to the single market, it will continue to be fully bound by EU rules and regulations, including direct or indirect decisions from EU agencies. The UK will also pay into their budgets. Unlike the EEA countries, however, the UK will no longer have representatives at the EU agencies' management boards, nor will its bodies be able to take on a leading role for certifications or risk assessments.

Fourth, the relationship third countries have with the agencies linked to financial services are of particular interest, given the importance of the British financial service sector for both the UK and the EU. The EU's equivalence regime in certain financial services enables third countries to gain market access to the EU and cooperate strongly with the relevant agencies. As shown in this paper, however, the equivalence regime in its current form would be woefully inadequate for the UK given the extent of the interconnectedness between the UK and EU markets. Equivalence only covers limited sectors of financial services, it is not dynamic and thus does not take into account changes in legislation and it can be terminated with very little notice. In addition, it can become just as political as technical, as the Commission takes the final decision after having consulted the relevant agencies. The equivalence regime would thus not provide the stability the financial industry needs.

Fifth, as in the general Brexit negotiations Northern Ireland and the British-Irish border may prove to be a particular sticking point. At the current stage of negotiations, both sides have committed to keeping the border open, but are in disagreement how that aim is to be achieved. The EU has proposed a backstop solution, which should ensure that the border

stays open even if this is not achieved via the overall EU-UK relationship (option A) nor technical solutions (option B). This backstop proposes inter alia the creation of a 'common regulatory area' with large parts of the EU's single market for Northern Ireland. It is here that EU agencies would come into play, as in areas such as food safety, chemicals, electricity market etc. Northern Ireland would then be bound to direct or indirect decisions from EU agencies – and no longer the respective bodies from the UK. On the other hand, the EU Commission's draft on the backstop does neither foresee the direct representation for Northern Ireland (or the UK as a whole) nor a lead role for certification or risk assessment in the affected EU agencies under these circumstances. If – and that remains a big if – agreement on the backstop comes to pass, there is therefore also need to clarify and negotiate what role EU agencies would play in regards to Northern Ireland as part of the overall governance scheme for the 'common regulatory area'.

Finally, the UK's future relationship to EU agencies will therefore be determined by the broader outcome of the negotiation and the type of deal the UK obtains from the EU, rather than the UK picking and choosing its relationships to individual EU agencies. Given the UK's current political trajectory, the only type of model it is likely to obtain is a Canada type FTA, involving a greatly inferior level of participation within the single market than the EEA states or Switzerland with its bilateral agreements. As long as the UK remains on this path, however, it will not be able to use the agencies as a backdoor into the single market in the specific sectors most important to its economy. It also means that even after the UK has concluded a general framework for the relationship to the EU, it will both have to duplicate the functions currently fulfilled by the 36 EU agencies and negotiate an individual cooperation arrangement with most of them.

List of Abbreviations

BPR: Biocidal Products Regulation
CETA: Comprehensive Economic and Trade Agreement
CFIA: Canadian Food Inspection Authority
CFSP: Common Foreign and Security Policy
CJEU: Court of Justice of the European Union
CLP: Classification, Labelling and Packaging
CMT: Certification Management Team
CTA: Common Travel Area
DG FISMA: Directorate-General for Financial Stability, Financial Services and Capital Markets Union
EEA: European Economic Area
EFTA: European Free Trade Association
FERC: Federal Energy Regulatory Commission
FTA: Free Trade Agreement
GDP: Gross Domestic Product
JHA: Justice and Home Affairs
MiFIR: Markets in Financial Instruments Regulation
MoU: Memorandum of Understanding
REACH: Registration, Evaluation, Authorisation and Restriction of Chemicals
TFEU: Treaty on the Functioning of the European Union
WTO: World Trade Organisation

Agencies:

ACER: Agency for the Cooperation of Energy Regulators
BEREC: Body of European Regulators for Electronic Communications
Cedefop: European Center for Development of Vocational Training
CEPOL: Police College
CPVO: Community Plant Variety Office
EASA: European Aviation Safety Agency
EASO: European Asylum Support Office
EBA: European Banking Authority
ECDC: European Center for Disease Prevention and Control
ECHA: European Chemicals Agency
EDA: European Defence Agency
EEA: European Environment Agency
EFCA: European Fisheries Control Agency
EFSA: European Food Safety Authority
EIGE: European Institute for Gender Equality
EMCDDA: European Monitoring Center for Drugs and Drug Addictions
EMA: European Medicines Agency
EMSA: European Maritime Safety Agency
ENISA: European Network and Information Security Agency
EOIPA: European Occupational Insurances and Pensions Authority
ERA: European Railway Agency
ESA: European Supervisory Authorities
ESMA: European Securities and Markets Authority
ETF: European Training Foundation
EU LISA: European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice
EUISS: European Union Institute for Security Studies
EU-OSHA: European Agency for Safety and Health at Work
Eurofound: European Foundation for the Improvement of Living and Working Conditions
EUROJUST: European Union's Judicial Cooperation Unit
EUROPOL: European Police Office
FRA: European Union Agency for Fundamental Rights
FRONTEX: European Border and Coast Guard Agency
GNSS Agency: European GNSS Agency
SatCen: European Union Satellite Centre
SRB: Single Resolution Board

Overview: EU Agencies and their third country relationships

	AGENCY	POLICY	NON-EU PARTICIPANTS	COOPERATION AGREEMENTS	3rd COUNTRY PARTICIPATION
Binding decisions	ACER (energy)	SM	EEA states	Yes: US, Montenegro	Yes if relevant EU law applied
	CPVO (plants)	SM	-	None	No provision
	EASA (aviation)	SM	EEA states + Switzerland + observers	Yes with 35 countries. <i>Commission approval</i>	Yes if relevant EU law applied
	EBA (banking)	SM	EEA states	Yes: US, Macedonia, Serbia, Albania, +3	If EU law applied + coop' if equivalence
	ECHA (chemicals)	SM	EEA states + Switzerland on BPR	Yes: Australia, Canada, Japan, US	Yes, no requirements
	EIOPA (insurances)	SM	EEA states	Yes: Switzerland, US, Brazil, Canada (+4)	If EU law applied + coop' if equivalence
	ERA (railway)	SM	EEA states	Yes: US	Yes if relevant EU law applied
Inspection reports / technical expertise	ESMA (finance)	SM	EEA states	Yes: US, Canada, Brazil, Argentina, Dubai (+5)	If EU law applied + coop' if equivalence
	EUIPO (intel. property)	SM	-	Yes: Japan, China, Montenegro	No provision
	BEREC (communications)	SM	EEA states + Switzerland + observers	Yes: US, Latin America	Yes for EEA + accession countries
	EFSA (food safety)	SM	EEA states + observers	Yes: Australia, Canada, US, New-Zealand	Yes if relevant EU law applied
	EMA (medicines)	SM	EEA states	Yes: US, Canada, Japan, Switzerland, (+3 others)	No provision
Operational activities	EMSA (maritime)	SM	EEA states (Iceland, Norway)	None	Yes if relevant EU law applied
	CEPOL	JHA	Switzerland + Norway + Iceland	Yes working arrangements, Serbia, Russia, +3	Yes, no requirements
	EASO (asylum)	Schengen	EEA states + Switzerland	Yes with neighbouring countries	Yes if relevant EU law applied
	EDA (defence)	CFSP	-	Yes: Norway, Switzerland, Ukraine, Serbia	Participation in ad hoc programmes
	EFCA (fisheries)	SM	-	None	No provision
	EU LISA (large IT systems)	Schengen	EEA states + Switzerland	Not provided for in regulation	Yes if relevant EU law applied
	Eurojust	JHA	-	Yes with 9 countries	Only cooperation
	Europol	JHA	-	Yes with 24 countries	Only cooperation
	Frontex	Schengen	EEA states + Switzerland	Yes with 18 countries	Yes if relevant EU law applied
	GNSS (sat. navigation)	SM	Norway	Yes: Latin America, Asia, Africa, neighbourhood	Yes, no requirements
Information gathering / networking	SatCen	CFSP	-	Yes: Norway. <i>Need Council approval</i>	Only cooperation
	Cedefop (work training)	SM	EEA states	Cooperation provided for in regulation	No provision
	ECDC (disease control)	SM	EEA states	Yes: US and Canada	Yes if relevant EU law applied
	EEA (environment)	SM	EEA states + Switzerland + Turkey	Yes, neighbouring countries, US, Canada, +7	No provision
	EIGE (gender equality)	SM	-	Provided for in regulation	Yes if relevant EU law applied
	EMCDDA (drugs)	SM	EEA states + Turkey	Yes (neighbouring states). <i>Commission approval</i>	Yes, no requirements
	ENISA (network security)	SM	EEA states	Not provided for in regulation	Yes if relevant EU law applied
	ETF (training)	SM	Only observers	Yes. <i>Commission opinion needed</i>	Yes, no requirements
	EUISS (security studies)	CFSP	-	None	No provision
	EU-OSHA (work health)	SM	EEA states	Yes neighbouring countries	No provision
	Eurofound (life conditions)	SM	EEA states	Provided for in regulation	No provision
	FRA (fundamental rights)	JHA	Only observers	With international organisations and neighbours	No provision
	SRB	SM	-	None	No provision
	Translation Centre	SM	-	None	No provision

Source: based on own compilation.