

Mutual recognition - mutual incomprehension?

Blog post by Senior Associate Guillaume Ferlet, 12 March 2018

The UK government has finally started to flesh out what sort of future trade and regulatory relationship it wants to negotiate with the EU. Central to this are a revised set of market access and product standard recognition rights in the EU single market based on what the UK often calls 'mutual recognition'. This suggestion has been rebuffed in a number of places and ways by the EU. Why is this?

Various forms of recognition are, of course, common enough in trade relationships. States permit the recognised conformity assessment bodies of other countries to carry out product safety assessments against their own rules. In some cases, they recognise the rules of exporting countries as being sufficiently 'equivalent' to their own as to accept products assessed meeting them as meeting their own standards also. The EU, uniquely, goes even further by making this process of recognition between its national authorities mandatory, and underpinning it with a system of shared rules, enforced by the EU itself.

The UK appears to want a mix of these approaches in its future relationship with the EU, with a clear emphasis on a system that preserves "as now... one series of regulatory approvals in one country". But the UK also wants some discretion on the precise form of future UK rules: they should remain "substantially similar... [but] UK law may not necessarily be identical to EU law, but it should achieve the same outcomes".

The UK rightly notes that the EU (like others) makes use of equivalence and other recognitions throughout its trade policy – including in FTAs. But for Brussels, the issue with the UK approach is not the approach but the scale on which the UK appears to be proposing to use it. The difference between granting discretionary equivalence provisions for a small number of agricultural and industrial goods, such as in the EU-Canada FTA (CETA), and using it to underpin the bulk of EU-UK industrial goods trade is a very big one. As seen from Brussels, the potential for such an approach to become de facto a more flexible and discretionary form of single market participation is clear.

It is instructive that the EU has accepted a recognition-based framework on this scale with an external partner before. The Turkish customs union for industrial goods with the EU has a similar underpinning in recognition of Turkish standards in the EU. But for this, the EU required that Turkey essentially adopt its own 'embedded' model of recognition: full and binding transposition in Turkey of the EU acquis for goods standards and state aid. The UK has described its parliament as having discretion to undo any alignment and recognition in the future if it chooses. Turkish rule makers can only do this by walking away from customs union.

So, is this what the UK is implying it would accept, at least in some areas? UK language about 'constraining' itself and suggestions that it might continue to participate in technical rule-making agencies in areas such as chemicals, medicines and aviation, and abide by ECJ interpretations of

rules in these sectors suggest that it might in some areas. But the language of 'similar but not the same' generally pulls in the other direction. This reflects the underlying tension in the UK government as much as any attempt to draw clear demarcations.

If the UK proposal has much hope of a serious hearing, its wide a la carte approach will almost certainly need rethinking or reframing. The EU will be now looking for a few key answers from the UK: how broadly does the UK see this model applying? How bound is the UK proposing to be and how much discretion is it expecting on divergence? How will any commitments to alignment be arbitrated and enforced? The answers need a more elaborated UK position.