The Brexit Papers

Mutual Recognition

Paper 26

Mutual recognition as a principle for the UK-EU future relationship

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BREXIT PAPER 26: MUTUAL RECOGNITION

Mutual recognition as a principle for the UK-EU future relationship

1. Though the recent focus has been on the EU27's vision of the future EU-UK relationship, it is to the Prime Minster speech at the Mansion House on 2 March[1] that one needs to refer for Her Majesty's Government's most detailed vision to date. It made plain that the concept of mutual recognition would be fundamental to trade, particularly in goods, if the UK leaves the single market, as is the Government's plan. Indeed, the Prime Minister called for "a comprehensive system of mutual recognition".

2. The concept of mutual recognition in EU law allows for reciprocal obligations on Member States that facilitates free trade where the national authorities in one Member State may be obliged to accept the judgments of authorities in another Member State, rather than reaching a distinct and potentially conflicting judgment on the same issue. Such obligations can either be based on more or less detailed common rules set at the EU level, for example the common standards applicable to new medicinal products or cross-border broadcasts, or may extend to issues on which each Member State retains a degree of discretion under EU law, so that the national authorities in effect not only police compliance but set the relevant rules themselves.

3. Extending such an approach to cover the future relationship between the UK and the EU has an apparently attractive simplicity. But legally the position is more complex. As has already been pointed out by other commentators,[2] a *comprehensive* system would go beyond that which exists within the EU; and even in the partial and conditional form it currently takes in EU law, mutual recognition may conflict with the UK Government's red lines. In this paper we take a brief look at the principle of mutual recognition and consider how the UK and EU27 might adapt it as a basis for their future relationship.

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[1] https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union

[2] See, e.g. Professor Weatherill, Somerville College, Oxford http://eulawanalysis.blogspot.be/search?updated-max=2018-03-05T07:38:00-08:00&max-results=7. This article is drawn on more than once in this piece.

The principle of mutual recognition in EU law

4. Mutual recognition in primary EU law facilitates, to a greater or lesser extent, the free movement of goods,[3] persons and services. Thus, when something (be it an industrial good, food product, or professional service) is good enough for the market of one Member State, it is to be treated as good enough for the market of all the others. But there are caveats to this:

Conditional mutual recognition

- The first caveat is expressed in the Treaty itself: mutual recognition is a conditional, rather than an absolute, principle. It is open to the target State to refuse recognition on circumscribed grounds.[4] These grounds cannot be arbitrary, capricious or protectionist, or they risk being struck down in a court of law upholding the EU objective of trade liberalisation. By contrast, genuinely tougher standards of say, health, consumer or environmental protection, are likely to pass the test, and to stand as lawful non-tariff barriers to trade provided that the relevant standards have not been fully harmonised. The principle, and its conditionality, derives from the case law of the Court of Justice of the EU (CJEU), starting with the *Cassis de Dijon* case.[5]

The framework backing the operation of mutual recognition in the EU

- The second "caveat" is that free movement, particularly of goods, within the internal market occurs against the backdrop of an ever-increasing set of common rules and a centralised system of checks and balances. These include harmonised technical regulation and product standards, harmonised minimum standards of consumer and environmental protections, intellectual property rules, antitrust and state aid rules that apply across the entire EU territory. Many of these rules have in effect evolved as a codification of principles agreed between the Member States and endorsed by them in the form of directives or regulations. These rules are generally overseen by EU administrative bodies and further supported by EU `soft law' measures such as guidelines and the constraints imposed by the general principles of EU law such as proportionality, equal treatment and legal certainty. The Member States can be held to account for breaches, either through infringement actions brought by the Commission, or through proceedings brought by affected citizens or businesses, initially in national courts. Either way, the status of the CJEU as the final interpreter of EU law provides a backstop guarantee that the rules will be interpreted and applied uniformly across the territory of the EU.

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[3] The Treaty provisions in respect of the free movement of goods are Articles 34 – 36 Treaty on the Functioning of the EU (TFEU) – mutual recognition has been accepted as supplementing such rules by allowing each Member State a degree of discretion in the application of such rules and requiring the other Member States to afford a degree of respect to such exercises of discretion.

[4] For goods, see Article 36 TFEU.

[5] Case C-120/78.

5. These factors together create what is often referred to as the "level playing" field on which Member States trade and their citizens move freely. It is against this backdrop that Member States have the trust and confidence in each other's systems and regulatory decisions that facilitates the recognition of each other's products, qualifications, etc, in general[6] without further question.

6. That brings us to a further caveat, which does not affect the operation of the principle of mutual recognition within the EU but might well prove to be an impediment to its application beyond its borders. The constitutions of several Member States impose limitations on the application of the principle in relation to third countries, at least in certain areas, notably the field of criminal justice. For example, constitutional law may bar the extradition of Member State's nationals, but under the European Arrest Warrant this is permitted to another EU Member State, applying the mutual recognition principle. Whilst not an insurmountable obstacle, any *comprehensive* future UK-EU agreement, based in whole or in part on the principle, were it to cover areas like police and criminal judicial cooperation, would therefore likely require those Member States to be willing to change their national constitutions, traditionally something few will undertake lightly, especially for a third country.

7. Taking the above caveats together, and drawing on, and paraphrasing, Professor Weatherill, cited above, what occurs between the Member States of the EU in the single market "is not unconditional mutual recognition of difference. It is managed mutual recognition of carefully circumscribed difference." Moreover, whilst mutual recognition continues to provide the bedrock for judicial cooperation in both civil and criminal matters within the EU, the evolution of the internal market has seen its gradual displacement in favour of harmonisation of national rules and standards. And crucially, the overall system is based on common legal standards established by the EU's unique combination of national and supranational systems of law and judicial supervision.

The EU's view of the future EU-UK relationship

8. In defining its position on the future EU-UK relationship, in particular the terms on which the UK may trade with the EU in goods and services post-Brexit, the EU27 is seeking the guaranteed preservation of this level playing field. Although the UK's often stated ambition is to achieve a frictionless trading relationship of unprecedented closeness, building on the fact of the current degree of convergence within the internal market, the UK's stated red lines that it will leave not only the EU itself but also the single market, customs union and the jurisdiction of the CJEU make this harder to achieve. To bridge the gap, by way of example of what the EU is seeking, the European Parliament (EP)'s 14 March 2018 resolution on the future relationship[7] notes that, "as with the rest of the agreement, provisions on the level playing field will

[6] Case C-163/09 *Repertoire Culinaire* at para. 44 shows the standard to be reached by Member States for refusing to recognise regulatory decisions of other Member States: a finding that EU measures have been applied incorrectly "must be based on concrete, objective and verifiable evidence".

[7] http://bit.ly/2pnCUH7 See paragraph 45

require robust governance structures to include appropriate management, supervision, dispute settlement and enforcement mechanisms with sanctions and interim measures where necessary and with a requirement for both parties to establish or, where relevant, maintain independent institutions capable of effectively overseeing and enforcing implementation". Otherwise, goes the thinking, what is to stop the UK from changing its rules unilaterally after the EU has granted access to a UK-sourced product or service? However there would appear to be a similarity in approach according to a recent speech from the UK Chancellor of the Exchequer when he observed that mutual recognition could form an effective basis for a UK-EU partnership "provided it is objectively assessed, with proper governance structures, dispute resolution mechanisms and sensible notice periods to market participants".[8]

What form is the future relationship likely to take?

9. We are often reminded that the UK is seeking a special, bespoke relationship with the EU post-Brexit. It cannot be an off-the-shelf-model, due in large part to the unique starting position that the rules in both the EU and UK will be the same on Brexit day, and in most fields[9], during the transition period to the end of 2020 too. However, from the EU's point of view, against the background described above, the crux of the matter is how to prevent or manage potential divergence thereafter. The EU has often stated[10] that for so long as the UK maintains its red lines, a Free Trade Agreement covering the economic relationship is the only alternative to a cliff-edge Brexit.[11] In its resolution on the Framework for the Future Relationship, adopted on 14 March, the EP opened the door a little wider by suggesting a possible Association Agreement. Either way, the future relationship will need to extend beyond areas that are the sole competence of the EU, and as such will be a so-called "mixed agreement". The most likely model is the as yet uncompleted trade agreement with Canada – CETA, though both sides seek for more.

10. If one looks at the potential application of CETA in the field, say, of free movement of professional services, it does provide a framework for the negotiation of Mutual Recognition Agreements covering the recognition of professional qualifications. However, as explored in the Bar's Brexit Paper 1 (on Legal Services[12]), this merely encourages professional regulatory bodies in the EU and Canada to agree to reduce the number of steps involved in requalification in either direction, where possible. It is more a hope than a right and lacks for example any indication of the possible

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[8] https://www.gov.uk/government/speeches/chancellors-hsbc-speech-financial-services. In the context of financial services, the principles outlined are capable of general application.

[9] There may be some divergence, for example in the field of judicial cooperation in civil and criminal matters, where the UK will no longer be able to opt-in to brand new proposals.

[10] Most recently in the European Council Guidelines on the Future relationship, adopted on 23 March at the European Summit: http://www.consilium.europa.eu//media/33458/23-euco-art50-guidelines.pdf

[11] See Mr Barnier's slide: https://ec.europa.eu/commission/sites/beta-political/files/slide_presented_by_barnier_at_euco_15-12-2017.pdf

[12] http://live.barcouncil.netxtra.net/media/575165/brexit_paper_1_-_legal_services.pdf

parameters within which mutual recognition might operate.[13] This is a reminder that mutual recognition, divorced from a binding system of common and enforceable rules, may be of limited value when it comes to trade. By contrast, mutual recognition of legal or medical qualifications within EU law itself is based on extensive common rules and the underlying Treaty principles governing freedom of establishment and the freedom to provide services within the internal market, each of which is directly applicable in the national legal orders of the Member States.

11. That said, there are important, non-trade areas of the EU legal order where mutual recognition works successfully, and could perhaps do so beyond the EU's territory. Indeed, mutual recognition remains the backbone of the modern Treaty provisions on judicial cooperation in civil, criminal[14] and family justice. It is instructive to note that, for example, civil judicial cooperation began with the 1968 Brussels Convention as a purely intergovernmental regime, based on each State's agreement to recognise the application of common jurisdictional rules and the judgments of the others' courts. As between the EU and EFTA States, the same principle of mutual recognition has been applied successfully through the Lugano Convention. This operates entirely outside the EU Treaties and contains a `convergence mechanism' (to borrow the EP's vocabulary) that does not involve the binding interpretative jurisdiction of the CJEU. Judicial co-operation is a facet of the rule of law, quite separate from trade, which the Bar Council considers should be negotiated as a distinct topic.[15] But the way in which mutual recognition operates in this area could hold important lessons for the wider future EU-UK relationship.

12. A note of caution perhaps with regards non-trade relationships is that the EU Canada model is a useful reference point for what exists already. CETA covers the trade relationship, but less well known is the treaty that was signed alongside it: the Strategic Partnership Framework Agreement (SPA), which contains articles on terrorism, law enforcement, drugs, money laundering, cybercrime, migration etc. It is not prescriptive, but rather provides a framework for cooperation, with commitments to dialogues, exchange of best practice, etc There are also subject-specific arrangements in place, or being negotiated, such as to cover passenger name data, and border control. Both sides find these arrangements useful, but they fall a long way short of the level of cooperation that is sought as between the UK and the EU.

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[13] For legal services, a negotiating aim in the legal sector might reasonably be to incorporate into a mutual recognition agreement (MRA) the main elements from the lawyers' services directive and establishment directives which are in essence agreements on mutual recognition of professional titles and competence. Robust provisions on governance and dispute resolution would be an indispensable part of such an MRA.

[14] It should be noted however, that the conditionality of the principle referred to above applies to a greater or lesser extent in these areas too. For example, in the field of criminal judicial cooperation, mutual recognition operates against a specific framework of procedural standards, including judicial scrutiny and fundamental rights protections.

[15] The Bar has written to Mr Barnier, the EU's chief Brexit negotiator, and others on the EU27 side, as well as to HMG, in these terms. These, and other Bar Brexit position papers, can be found at: http://www.barcouncil.org.uk/media-centre/brexit/

Mutual ambition

13. It is worth looking at the detail of the European Council's newly adopted guidelines on the future relationship, referred to above. The EU-side ambition is clear:

> "The European Council restates the Union's determination to have as close as possible a partnership with the UK in the future. Such a partnership should cover trade and economic cooperation as well as other areas, in particular the fight against terrorism and international crime, as well as security, defence and foreign policy."

14. In paragraph 8, the guidelines go on to define what the FTA should cover, including:

- "[T]rade in goods, with the aim of covering all sectors, which should be subject to zero tariffs and no quantitative restrictions with appropriate accompanying rules of origin"
- Similarly ambitious customs cooperation
- "[T]rade in services, with the aim of allowing market access to provide services under host state rules, including as regards right of establishment for providers, ***to an extent consistent with the fact that the UK will become a third country and the Union and the UK will no longer share a common regulatory, supervisory, enforcement and judiciary framework***" (emphasis added), and
- A framework for the recognition of professional qualifications is also expressly mentioned.

15. As noted above, the most difficult aspect of this approach is likely to be agreement on what, if any, common standards can be agreed between the UK and the EU to substitute for the "common regulatory, supervisory, enforcement and judiciary framework" that the UK will have left, and how the principle of mutual recognition can be made to function within any such framework, including the assurances that the UK and the EU will be sufficiently aligned in their regulatory and judicial standards for such a principle to function effectively. That said, the situation is unique in that mutual recognition agreements with third countries are normally designed to engineer convergence whereas the starting point between the UK and EU is closely aligned regulatory systems, especially for lawyers.

Recommendation

12 The EU27 and the UK share a common 'ambition' to achieve a close partnership in the future relationship, an aspiration that requires an EU-UK FTA that goes well beyond the degree of integration achieved by CETA. With the UK's red lines in place, proceeding on the basis of mutual recognition could be an attractive solution, though the CETA model is not adequate. An imaginative approach to `convergence mechanisms' might adjust those limits, even within the UK's red lines, though probably only to a modest extent. Even with the red lines in place, some common principles would be needed to provide the legal framework for the degree of reciprocal

trust and cooperation that underlies any substantial concept of mutual recognition between sovereign states.

13 The EU has repeatedly indicated, and does so again in the European Council's 23 March guidelines, that were the UK to adapt some or all of its negotiating red lines, there would be scope for something more. Absent that, it seems clear that the EP's shopping list, outlined at para 8 above, will need to be addressed if the UK and the EU are to create the framework that would be needed to facilitate the Prime Minister's vision of a "comprehensive system of mutual recognition" to enable trade and judicial cooperation between the EU and the UK to flourish. Though a degree of common ground appears to exist as to the right approach, the Bar recommends that both sides urgently focus on developing and agreeing the core elements of that framework.

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