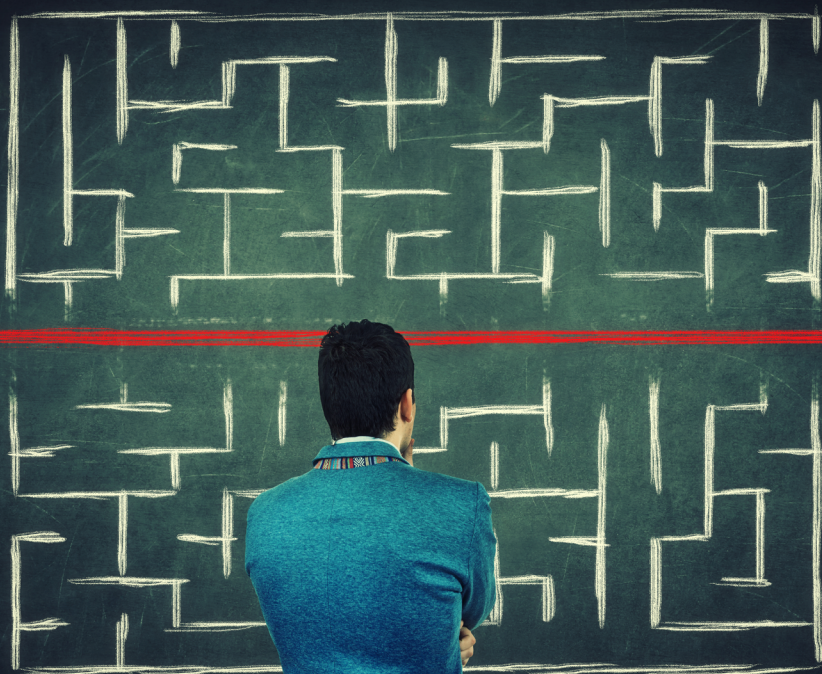


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BRIEFING

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CHANGING the RULES

A unilateral approach to non-tariff barriers

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About the author

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Summary

In framing its ongoing relationship with the EU, and a new external trade policy, the UK is in a unique position to adopt one particular, radical free trade policy: a policy of unilateral recognition of the regulations of other territories for the acceptance of goods for the UK market. But such a policy has gone almost without consideration. This briefing sets out the basis for this policy and suggests some benefits that it could bring.

Recognition of regulation and conformity assessment

Regulatory differences between jurisdictions are a type of barrier to international trade. Regulatory, or 'non-tariff' barriers can increase the cost of imports, and can effectively block certain goods from entering a market at all or make it difficult for these products to be sold once they have. Non-tariff barriers on trade in goods between the UK and the EU have been estimated to be the equivalent of an average tariff of up to 20 per cent (Dhingra et al, 2017). This has anti-competitive and distortive effects, raising prices for consumers and stifling innovation. Non-tariff barriers limit the gains from trade generally, and reducing them would contribute to the realisation of the benefits from free trade identified by Adam Smith and Ricardo (see for example, Boudreaux, 2018). The advantages of unilateral elimination of trade barriers in Ricardo's model apply to tariff and non-tariff measures.

One useful response to this problem is mutual recognition of regulations, so that the costs arising from differences between countries are eliminated. However, such mutual recognition has been limited and inconsistent. Countries have historically been reluctant to recognise the regulations of other territories for reasons including preservation of autonomy and protectionism, as well as substantive concerns about the rules and procedures in the country of origin and different approaches to the perception and management of risk. An alternative, unilateral recognition is rare, as the possibility of working towards compatibility and recognition is seen as a bargaining chip in negotiations for other objectives or to achieve reciprocity. If recognition is granted without reciprocity, then it cannot be used to pressure the granting of equivalent concessions. Nevertheless, it is an approach with much to recommend it.

Having left the EU, the UK is in a unique position as a third country with substantive compatibility with EU rules across the board. To reduce the burden on businesses in the UK, and the costs faced by consumers, the UK could unilaterally recognise EU regulations and conformity assessment. Arguments against this include the risks of compromising the autonomy of UK regulators and sacrificing leverage that could be used to the benefit of British exporters, but as explained in this briefing, the gains from unilateral recognition would outweigh these potential disadvantages.

Unilateral recognition of EU rules would also mitigate some of the issues faced in relation to the Irish border, and could be the first step towards similar liberalisation with other trusted trade partners.

The problem

Regulatory barriers arise both from substantive regulations and standards that set out requirements that a product must meet to be allowed into a market, and from testing and certification requirements (known as conformity assessment). If requirements are different between markets this increases the cost of production and sometimes it can be impossible for suppliers to meet two incompatible sets of requirements for their home and export markets. It is also possible for a good to meet all of the applicable regulations for a market, but for the cost and inconvenience of conformity assessment to still deter an exporter from supplying it. In any case, those costs will raise the price paid by consumers (Singham et al., 2018).

Routes to recognition

The World Trade Organization (WTO) agreements on Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary (SPS) measures include commitments in respect of both substantive regulations and conformity assessment. The TBT Agreement, for example, commits members to ensure ‘whenever possible that results of conformity assessment procedures in other members are accepted, even when those procedures differ from their own, provided they are satisfied that those procedures offer an assurance of conformity with applicable technical regulations or standards equivalent to their own procedures’.

Free trade agreements (FTAs) for the establishment of a free trade area between countries¹ also often include some mutual recognition and (often non-binding or ‘best endeavours’) commitments by the parties to both follow good regulatory practice in their domestic lawmaking, and to work towards compatibility and recognition. There are also many examples of mutual recognition agreements (MRAs) that do not deal with tariffs at all where parties agree to recognise certain aspects of their respective regulations. Usually these MRAs only cover conformity assessment, allowing conformity assessment bodies (CABs) in the country of origin to test and certify that goods meet the requirements of the import market so that goods can be tested and certified in the exporter’s country. There are also many examples of recognition of substantive regulations, either on the basis that the respective regimes meet equivalent standards or after some harmonisation has been achieved. Examples include the agreement between the EU and New Zealand on sanitary measures for trade in animals and animal products, where conformity to the substantive regulations in New Zealand will be taken as compliance for the EU market, and vice versa.

¹ In the technical sense, as defined in the WTO General Agreement on Tariffs and Trade, meaning those that remove tariffs on substantially all trade between the parties.

Internally, the EU takes this a step further, with a default assumption of acceptance of goods and services across all member states (subject to various exceptions and caveats) that, together with the customs union, allows free movement of goods across national borders within the bloc.

The UK and EU: the present position

When the UK left the EU, this recognition ceased and the EU declined to continue MRAs with the UK. While automatic recognition of regulations for goods and services and their conformity assessment ended as a natural consequence of leaving the EU's internal market, it was possible for the EU to accord the kind of recognition it gives to third countries in other FTAs and its MRAs of the kind described above. The Trade and Cooperation Agreement (TCA) between the UK and the EU includes some provisions for working towards recognition in the future, and limited recognition in certain sectors, such as some kinds of legal services. The EU has made separate arrangements recognising UK regulation in, for example, some areas of financial services, to allow EU firms to continue to access the UK market, and the European Commission has recognised, for now, UK data protection law as adequate for the purposes of international data transfers under the General Data Protection Regulation.

The TCA does not, however, include mutual recognition of CABs and the UK has established a new national register of accredited British CABs and a UK accreditation mark: UKCA (the equivalent of the EU's CE mark). Since the end of the post-Brexit transition period at the end of 2020, the UK has been operating a transitional arrangement under which EU conformity assessment and the CE mark are recognised for goods on the market in Great Britain (in Northern Ireland, EU regulations for goods continue to apply directly pursuant to the Protocol on Ireland and Northern Ireland in the 2019 Withdrawal Agreement). This transitional period is due to expire in January 2023, after which time the CE mark will not be accepted for the Great Britain market and certification by

EU CABs will not be recognised² (Office for Product Safety and Standards, 2021).

This will mean that EU suppliers will need to certify and mark their goods separately for the Great Britain market. Where independent conformity assessment is required, it will have to be carried out by a British registered CAB or one in a territory with which the UK does have an applicable MRA, such as Canada, Japan or South Korea.

² In Northern Ireland, under the protocol to the Withdrawal Agreement between the UK and the EU, all goods must meet EU regulations. Certification with the CE mark and by EU CABs must be accepted, but goods certified in the UK can also be placed on the market in Northern Ireland with a new UKNI marking.

The case for unilateral openness

Instead of remaining on this course, British policymakers should recognise the clear advantages of the UK continuing unilaterally to recognise the CE mark and certification by EU CABs for goods permitted on the whole of the UK market.³ This could operate alongside the new UKCA mark. As, over time, UK regulations begin to diverge from the EU's, British regulators and standards bodies will be able to assess whether recognition should be withdrawn, for example if the EU rules are no longer considered to meet the expected levels of safety or if there have been problems with monitoring and enforcement. Ultimately, the market would decide through regulatory competition which assessment mark and underlying regulations are preferred, and this could inform improvements in regulation. For example, some consumers in the UK may prefer CE marked goods if they perceive that they are safer or of better quality, whereas some producers and consumer may wish to take advantage of more innovative or cheaper goods that may become available as the regimes diverge (always assuming that the UK will require baseline standards of safety and quality, in accordance with sound science and good regulatory practice). In the meantime, and most importantly, the approach would realise gains from trade that are available from acting autonomously.

A further benefit of this approach is that it could help to ameliorate the difficulties over the Northern Ireland Protocol. The British government has already announced that there will be no customs checks on goods moving from the island of Ireland to Great Britain. The UK has also put forward proposals for a significant reworking of the Protocol that would eliminate declarations and checks on goods moving from Great Britain to Northern

3 Such preferential recognition for particular territories is permitted under the WTO Agreements as long as it is applied in a non-discriminatory way. See for example Article 2.7 of the TBT Agreement and Article 4 of the SPS Agreement.

Ireland as well, with both UK- and EU-regulated goods being accepted on the market in Northern Ireland (HM Government 2021).⁴ Logic, economic theory and the interests of the UK internal market suggest that if this were implemented, the same approach to accepting EU goods should be adopted for those imported to Great Britain.

Even if the Protocol survives and Northern Ireland remains bound to EU rules, rather than bind the rest of the UK to those rules, the British government could unilaterally recognise EU goods and SPS standards to minimise barriers on supply of goods from Northern Ireland to Great Britain. There is already asymmetry of border controls and non-tariff barriers between the UK and the EU, as the UK has waived many such controls on imports from the EU for an extended transition period, which was not reciprocated. Concerns have been raised about this by domestic producers (European Affairs Committee, 2021), and while of course it would be preferable for the EU to recognise UK regulations and operate a light-touch border (as well as in keeping with its commitments under WTO agreements), British consumers and importers of intermediate goods should be prioritised. This will in turn protect UK competitiveness more than retaliatory border controls could.

There are particular issues about food and agriculture, because in this area, rules and border checks are among the most burdensome. Since leaving the EU, the UK has been operating light-touch border controls on compliance in this area. Controls are due to be stepped up in spring 2022, including a requirement to pass all imports of such goods through a border control post where veterinary and documentary checks can be carried out. In light of the low risk and continued high level of alignment between UK and EU rules, a policy of unilateral recognition and openness should also be adopted here. Traceability across supply chains for safety and market surveillance can be achieved through the import of products, animals, food and feed system (Import of products, animals, food and feed system (IPAFFS), the UK's version of the EU's TRACES system) without the need for border checks, other than on an exceptional basis of spot checks for audit purposes.

Such unilateral recognition and minimisation of checks should not violate non-discrimination commitments in WTO agreements if they are based on risk assessment, and similar risk-based facilitations made available to

4 The July 2021 Command Paper proposed a 'dual regulatory regime'.

imports from other territories. Countries with regulations that could feasibly be considered to achieve similar objectives to EU rules recognised by the UK could make a case that the UK would be obliged to offer similar recognition to them. This could be seen as a risk that should count against a policy of unilateral recognition, but in practice, if a country's regulations in a particular field are in fact equivalent then it is the argument of this paper that it would be beneficial to recognise them, rather than hold back in the expectation of potential future negotiated gains. If they are not equivalent, or do not otherwise deliver the required standards, there would be no legal obligation to recognise them. This also means that there is still potential for negotiated recognition in exchange for reciprocity (of equivalent regulations or perhaps regulations in other fields), as it may be unlikely that any territory other than the EU will have economy-wide regulation that would meet the UK's requirements without further action.

Global outlook

The EU is the most obvious territory for the UK to accord wide-ranging recognition to, due to regulatory alignment and consumer trust in EU standards and oversight. However, there are many more territories that also have high standards of regulation and institutional oversight where unilateral recognition should also be considered. The same arguments of asymmetry and loss of leverage would no doubt be raised, but so too should the arguments in favour of consumer welfare and overall competitiveness from such liberalisation. While there would, no doubt, be political resistance based on even the possibility of recognition of regulations from certain territories, unless those regulations (and the oversight and enforcement of them) could be objectively determined to meet the requirements of regulation for the UK market, the UK would not be bound to recognise them.

Efforts to achieve standardisation and recognition through international agreements are held back by collective action problems and heterogeneity of interests, as well as protectionist and anti-competitive forces (Genschel and Plümpert, 2011) and different cultural approaches to risk. The UK has an opportunity as an open economy with trading interests around the world. Eventual membership of the Comprehensive Progressive Trans-Pacific Partnership (CPTPP) would provide a new platform for pursuing bilateral and plurilateral MRAs with several countries at once, but the government should not wait for this to start exploring opportunities for unilateral steps.

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