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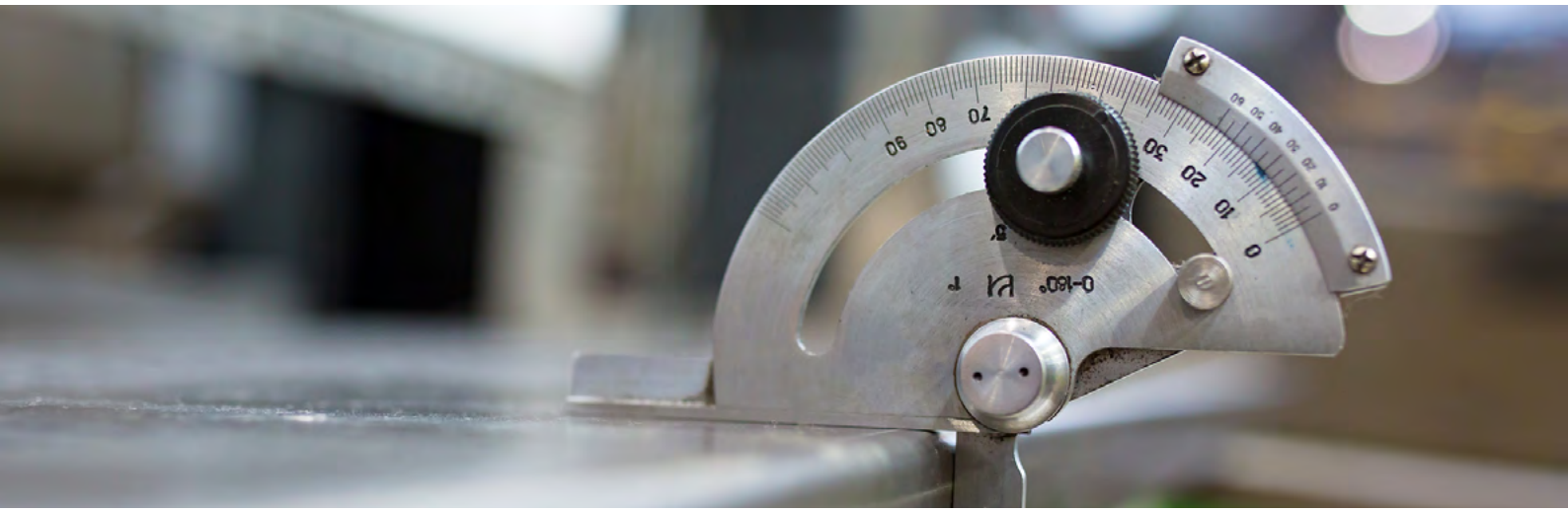

Should the UK pursue dynamic alignment with the EU?

by Aslak Berg, 4 July 2024

The EU's neighbours follow various models of dynamic alignment with its rules. Which model, if any, could suit the UK?

As one of the world's three dominant trading blocs, the European Union enjoys global influence through the so-called Brussels effect. EU regulations often become dominant global standards both because of the sheer economic weight of the European Union and because many of them are high-quality technical regulations that can be easily adopted by other countries.

In its neighbourhood, however, EU regulation has an even stronger impact. Countries formally commit to adopting EU legislation in return for increased market access in a process generally known as dynamic alignment. With Labour seeking a veterinary agreement with the EU and signalling an openness to alignment with at least some EU regulations, the debate about dynamic alignment is likely to be reopened. How do the different models of dynamic alignment work in Europe, and what are the implications for the UK?

Unilateral alignment

One form of dynamic alignment requires no agreement with the EU at all. Countries can simply choose to adopt EU regulations or recognise EU regulation as the equivalent of their national regulations without any formal concessions from the EU in return – an arrangement typically called equivalence or recognition. The EU also grants equivalence in a systematic way in a number of areas, for example in assessing that UK data regulations are the equivalent of EU ones. This does not mean that the EU is aligning with UK regulations: it is simply an acknowledgement that UK regulations are close enough to EU ones to functionally provide the same level of protection. The EU, as a regulatory superpower, sets the standard autonomously and has the power to decide whether other countries measure up to the standard it has set.

However, when the power relation is reversed, equivalence can in practice be tantamount to dynamic alignment. This happens when equivalence is granted because of an economic need to comply with the regulations of a larger country. In other words, the EU grants equivalence based on an assessment of

similarity with its own regulation, while smaller countries around it may adopt EU regulation based on their need to comply. There are a few reasons countries might choose to adopt such an arrangement. One is a lack of administrative capacity to formulate and enforce separate regulations. Another is that the national market size may be too small to entice businesses to go through the expense of complying with distinct national regulation, so enforcing national regulations only would mean that some products would not be available on the national market. A third is a desire to facilitate exports to the EU by not forcing local manufactures to comply with two different sets of regulation.

A good example of this is the British attempt to impose its own conformity assessment marking UKCA to replace the European CE marking. These markings show that the product meets regulatory requirements and has undergone a conformity assessment procedure to prove it. In some cases, this procedure can be a simple self-assessment, but other products require more extensive and expensive tests carried out by independent bodies. Companies' lack of interest in undergoing these procedures for a smaller market such as the UK forced the UK government, after repeatedly extending the deadline to transition to UKCA, to continue to accept CE marking for most products, in order to keep them available on the UK market. In practice, this means that the UK already practices dynamic alignment to improve market access and to reduce trade barriers: UK companies can simply choose to get CE marking certified in the EU to sell their products on both the EU and the UK market.

In some cases, this type of unilateral dynamic alignment can extend to regulation that is more controversial than CE marking. For instance, Switzerland has no regulatory agreement with the EU on chemicals but accepts EU chemicals regulation in a way that de facto extends it to the Swiss market. Swiss companies can thus get their products approved in the EU without the need for a separate process for the Swiss market.

There are also unilateral options that go less far than unilaterally recognising another country's standards while still providing some reduction in trade barriers.

For instance, the UK has very sensibly created a fast-track procedure for the approval of medicines already approved in other developed countries, including the EU, but also the US and others. In this way, the UK can ensure that medicines are available on its market and reduce costs, but also maintain a measure of control over approvals even though the bulk of the regulatory work has been done elsewhere.

Dynamic alignment agreements

Although unilateral measures can amount to de facto dynamic alignment, the term is more useful for situations where a country formally agrees to adopt EU regulation in return for increased market access. Such alignment is termed dynamic to distinguish it from a system like the Swiss-EU bilateral agreements which are static in nature. Under the Swiss-EU bilateral agreements, the adoption of each new EU directive by Switzerland has to be negotiated. The arrangement has proved so cumbersome in practice that both parties have agreed to switch to dynamic alignment in the ongoing negotiations for a new Swiss-EU framework agreement. The EU is therefore unlikely to ever offer this type of alignment again. If the UK wanted to accept alignment in return for a reduction or removal of border checks it would therefore necessarily be a dynamic system reflecting the current state of EU regulation. There are several ways this could be done.

One way is direct application: EU law is simply made directly applicable in the country's territory. This is for instance the case in Northern Ireland, where the Northern Ireland Protocol makes a list of EU laws

and regulations that apply in Northern Ireland, with provisions for adding new ones to maintain the necessary legal cohesion and avoid border checks on the island of Ireland. This is perhaps the most intrusive way to do dynamic alignment, since it makes a non-EU territory directly subject to EU law and the European Court of Justice. The political circumstances in Northern Ireland and the urgent need to keep the land border open may justify it, but applying this system to the UK as a whole might not be politically sustainable and therefore desirable.

Another system of dynamic alignment is the European Economic Area (EEA) that extends the single market to Norway, Iceland and Liechtenstein. The EEA countries do not apply EU law directly, but instead EU law is transposed into a separate set of EEA laws that mirrors EU law. EEA countries participate in technical meetings that prepare new regulation, where if new rules are deemed relevant for the EEA, there is a process in place for EEA countries to give comments, assess the impact of legislation, and engage in dialogue with the EU about how to adopt the regulation into EEA law.

This system has benefits for the EEA countries. First, they can exercise influence on EU rule-making through participation in EU committees and thus get what they call decision-shaping powers, though no vote. Although the practical impact of decision-shaping should not be exaggerated, it is appreciated by EEA countries both as an important avenue for lobbying and as a source of intelligence on forthcoming regulation. It is no coincidence that Switzerland is seeking similar decision-shaping access in its new agreement with the EU. Second, since EU law is not applied directly and has to be transposed into EEA law through a dialogue with the EU, EEA countries sometimes manage to achieve minor modifications to suit their circumstances. Third, the transposition process takes time, and can be used to buy time – sometimes delaying the adoption of controversial legislation by several years.

Under what is called the two-pillar system there is thus EEA law instead of EU law, an EFTA Court instead of the European Court of Justice and an EFTA Surveillance Authority instead of the EU Commission. These EEA institutions create a mirror image of EU institutions, and since EEA law is practically identical to EU law, EEA countries can fully participate in the single market. The EEA system gives these countries a voice and virtually guaranteed market access in return for a commitment to de facto follow EU law, albeit with occasional adjustments and delays. As with the UK and new rules applying to Northern Ireland, EEA countries can veto new regulation, but the process is untested: any veto could lead to suspension of market access by the EU. The veto has so far only been exercised once, by Norway, to stop the EU postal directive in 2011, and that veto was subsequently withdrawn by the next Norwegian government. Similarly, if the EU feels that EEA countries are dragging their feet on new regulation, it can threaten consequences for their market access – which has proven effective so far.

The EEA system is unique in the extent of integration. It would breach UK red lines under both a Conservative and future Labour government when it comes to single market membership. Setting up a two-pillar system for the UK would also require a significant amount of mutual trust. But the EEA is an example of how dynamic alignment can function in practice. The UK should note that Switzerland, which like the UK is seeking something less than full membership of the single market, has looked at some elements of the EEA for inspiration. If the UK wants removal of regulatory barriers, it would necessarily require harmonisation of rules, institutional mechanisms for monitoring compliance, and a court to enforce decisions. The UK should study both the EEA and the ongoing Swiss-EU negotiations, but perhaps less as models than sources of inspiration.

Deep and Comprehensive Free Trade Areas – an alternative model for dynamic alignment?

Another model for dynamic alignment is found in the so-called Deep and Comprehensive Free Trade Areas (DCFTAs) that the EU has concluded with Ukraine, Moldova and Georgia. The DCFTA model differs from the dynamic alignment seen in the cases of Northern Ireland, the EEA and Switzerland. The DCFTAs do not start from the assumption that EU/EEA law is applied and that border checks can therefore be removed. The DCFTAs instead state that the partner countries commit to approximating EU law at a point in the future, with the specific time-frame dependent on the product. Although in principle the DCFTAs could lead to a similar level of market access as the EEA, in practice the progress has often been quite slow, both due to weak institutions with low administrative capacity and high levels of corruption, as well as the outbreak of the war in Ukraine.

In the DCFTA model, the EU monitors the progress made by Ukraine, Moldova and Georgia. If a country makes good progress both in adapting EU law and in implementing it on the ground, the EU can reduce the level of checks required at the border. The ECJ decides on disputes on EU law, but the level of checks is decided by a committee set up by the free trade agreement. Conversely, if a country backtracks, the EU can increase checks. This arrangement is quite suitable for situations where the level of trust is lower and the need for flexibility is higher. Although the UK is in a very different situation compared to Ukraine, Moldova and Georgia when it comes to the state of regulation and quality of institutions, such a framework could still work well for a UK seeking to slowly rebuild relations with the EU; it is a system with lower expectations and higher flexibility than the EEA. The high quality of UK state institutions along with the de facto high degree of existing alignment that the UK still maintains as a former member-state could allow a much more rapid reduction of checks than for example what Ukraine has experienced. It is also a framework that is sturdy enough to withstand yet another political change in the UK should a future government seek to diverge as each side can withdraw equivalence and impose higher checks if needed.

Which sort of dynamic alignment for the UK?

The UK already de facto applies dynamic alignment with the EU, both for goods in Northern Ireland and for the UK as a whole in certain areas where the UK lacks the market size to impose its own regulation. The question then is not whether the UK should follow EU rules, but rather the extent to which it should do so and whether it makes sense to formally commit to doing so in return for increased market access. The EEA, Switzerland, and Ukraine all have different models that show how this can be done. The EEA and the model currently being negotiated by Switzerland offer more immediate benefits, but would also require more commitment. The Ukraine model also comes with a commitment to approximate EU rules, but it allows for more flexibility in implementation and might be more suitable for UK needs. For the UK, the imperative is to decide both where to align and how far to commit if it is to be a credible partner for the EU.

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