Translating EU equivalence

Kay Swinburne argues for a future for UK financial services in the EU that is founded on shared principles and aims and not on political calculation

Within the EU institutions, words matter. An almost inevitable consequence of having 24 official languages is that precision can sometimes be lost in translation, replaced on occasions by connotation or inference. A mismatch, however slight, can result in two contrasting plans of action, and a term with insinuations in one language but not the other can set two contrasting tones.

The Brexit discussions are not immune to this – even negotiations relating to financial services, where the technical nature of the subject matter can often help to mitigate some misunderstanding. Here, the gap between the terms 'equivalent' and 'equivalence' is a clear example. To consider something equivalent is an evidence-based, definitive assessment. The term 'equivalence', meanwhile, is in the EU context a subjective and political decision. The task ahead for UK and EU negotiators is to marry these two ideas, and to ensure that any equivalence decision granting UK firms access to EU markets is based only on the consideration of their equivalent nature.

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If taken from a technical basis, the UK equivalence decision would be simple, swift and positive. It could be taken well ahead of March 2019, giving both jurisdictions the certainty that their respective markets require. A firm that is compliant with EU legislation the day before Brexit will remain compliant the following day. The UK has been transparent in its commitment to transpose and uphold the financial law, safeguards and standards adopted during its EU membership.

This decision would need to be a horizontal approach, covering all UK firms that currently have activity in the Union, rather than one that is entity or sector specific. To fully support the financial services industry, similar decisions must then be taken in all the affected areas, including on data. Once that initial decision has been taken, entity based and sector specific work can then be used to monitor any divergence that occurs subsequently.

The vision set out in the UK Government's Chequers plan supports this when it calls for an enhanced equivalence system with mutually agreed principles, a transparent process and extensive supervisory cooperation. The enhancements that are proposed seek to depoliticise the relationship following the initial decision, and work to provide a long-term solution that offers stability and autonomy to both the UK and the EU. But that first move is key.

Currently, the European Commission makes the initial equivalence decisions, albeit with technical input from the European Supervisory Agencies. Throughout my time in the European Parliament, I have watched numerous applications and decisions. Sometimes the process is smooth – often it is not. One dependably present characteristic, however, is the politicisation of these purely technical matters – an unfortunate tendency that I have always worked to neutralise. I have, for example, seen Swiss CCPs kept in the dark about their future access arrangements on account of entirely unrelated issues on immigration and freedom of movement. More recently, I have seen Swiss trading venues given an equivalence decision, under MiFID, lasting for only 1 year.

In order to avoid these pitfalls and ensure that the principles of an equivalent financial, legal and regulatory system serve as the sole deciding issue for market access, this decision should be taken at the European Council level. When considered alongside the overall framework of a future relationship built on shared principles and aims, it is an ambitious, yet achievable, goal. When we talk about an equivalence decision, it seems to many entirely logical that this should be about standards of investor protection and levels of regulatory compliance. However, this does not always translate. The challenge ahead is to ensure that the real meaning and spirit of the concept is maintained and adopted when considering our future relationship in financial services. ■

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