

'Mutual Recognition' or 'Mutual Evaluation'? Dealing with 'Behind the Borders' Barriers to Market Integration*

Anne McNaughton
Australian National University
Anne.McNaughton@anu.edu.au

Abstract

As economic integration continues to deepen across developed economies the barriers to further integration are revealed as those located behind rather than at the borders of integrating states. A concept that has, correspondingly, acquired increasing popularity in recent years is that of 'mutual recognition.' This concept is regarded by many as a way of furthering economic integration in sectors in which identified obstacles to integration are regarded as limiting productivity and economic development. Using the European Services Directive¹ as a case study, this article examines the concept of mutual recognition in order to better understand its limitations as well as its potential. It is suggested that the more significant innovation in the Directive is the process of 'mutual evaluation' introduced by the Directive in Article 39. Once again, the EU may be leading the way in dealing with barriers to trade.

Introduction: Mutual Recognition' or 'Mutual Evaluation'?

This article begins with a consideration of the concept of *mutual recognition* as it has developed in European Union law, particularly through the jurisprudence of the Court of Justice of the European Union (CJEU). Discussion then moves to examine the concept of *mutual evaluation* as set out in the 'EU Services Directive.'² It concludes by explaining why using *mutual evaluation* rather than *mutual recognition* may prove to be a more effective means of dealing with 'barriers behind borders', particularly in the area of services integration.

Mutual Recognition and the Jurisprudence of the CJEU

Cassis de Dijon and the Preliminary Ruling Mechanism

In its strongest form, the concept of 'mutual recognition' is contained in the 'Country of Origin Principle' (CoOP). In the field of EU law 'mutual recognition' was first set out as a

* I thank the two anonymous reviewers for their helpful comments on a previous version of this article.

¹ European Parliament and the Council of the European Union (2006) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L376/36.

² European Parliament and the Council of the European Union (2006) Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market [2006] OJ L376/36.

principle of EU law by the European Court of Justice in a case concerning the importation of a French liqueur, *Cassis de Dijon* into Germany.³ The following discussion deals in some detail with the procedural history of this decision and the Court's ruling. This is done to lay bare the idiosyncratic nature of the 'preliminary ruling' mechanism. It is this mechanism (if not solely then predominantly) that enables 'negative harmonisation' in the absence of 'positive harmonisation' (as explained below). It is argued that this mirroring of positive with negative harmonisation through the judicial means of a preliminary ruling is unique to the EU. Using the EU as a model for negative harmonisation is therefore unlikely to succeed because the preliminary ruling structure is never and can never be transplanted successfully from the EU system to any other system. The paper returns to this point below, in the discussion about 'mutual evaluation.'

Cassis was a 'preliminary ruling' matter. REWE had sought authorisation from the German Federal Spirits Board³ to import *Cassis de Dijon* into Germany. *Cassis* was in free circulation in France and had, at most, an alcohol content of 20%. Under German law however, spirits sold for consumption were required to have an alcohol content of at least 32%. The German authorities refused REWE the necessary permission to import *Cassis* into Germany and the latter sought judicial review of this administrative decision. The German court ultimately hearing this matter stayed proceedings and sought a preliminary ruling from the European Court of Justice, under what was then Art. 177 EEC⁴ on two questions. The first question is the relevant one for present purposes: whether a statutory measure fixing a minimum alcohol content for spirits came within the meaning of 'measure having equivalent effect' set out in what was then Art.30 EEC⁵. In effect, a national measure such as that in effect in Germany, would amount to a measure equivalent to an express quantitative restriction because goods that did not comply with this requirement would not be authorised for importation by the German authorities. The Court answered this question affirmatively. The 'mutual recognition' concept is contained in paragraph 14 of the judgment:

[14]...It therefore appears that the unilateral requirement imposed by the rules of a Member State of a minimum alcohol content for the purposes of the sale of alcoholic beverages constitutes an obstacle to trade which is incompatible with the provisions of Article 30 of the Treaty. *There is therefore no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State; the sale of such products may not be subject to a legal prohibition on the marketing of beverages with an alcohol content lower than the limit set by the national rules.* (emphasis added)

In other words, in the absence of overarching EU legislation, (to which Member State legislation would be subordinate: so-called 'positive harmonisation') Member States were required to recognise the legal framework governing the production and marketing of goods in the state of origin (so-called 'negative harmonisation'). This obligation however, was subject to what the Court referred to as 'mandatory requirements' (explained below).

It is important to note the way in which the Court developed its reasoning in this decision and to understand why care needed to be taken with it. The 'preliminary ruling' mechanism was and is the means by which a uniform interpretation of EU law (in the widest sense of that term) is safeguarded. The final arbiter on such questions, as a result of the operation of what is now Article 267 is the Court of Justice. It is settled, as a matter of EU law, international law and of Member State domestic law, that the CJEU has no jurisdiction to

³ Literally, the Federal Monopoly Administration for Spirits: English version of the *Cassis* judgment.

⁴ Now article 267 TFEU.

⁵ Now Art.34, TFEU.

rule on the validity or scope of domestic law measures. However, if we look closely at the language of Article 267 and the way it has been understood by both Member State domestic courts and the CJEU, this is less of a constraint on the latter than might first appear.

A domestic court is only obliged to ask for a preliminary ruling on a question of EU law in circumstances where ‘a decision on the question is necessary to enable it to give judgment.’⁶ Even then, there is a discretion allowed to intermediate courts (which *may* refer questions) that is denied courts of final appeal (which *must* refer such questions). As a matter of its own domestic law, a Member State court will not refer a question to the CJEU for a preliminary ruling unless a ruling on that point is necessary for the Member State court to make a decision on a matter before it. In making a preliminary ruling, such as in the *Cassis* case, for example, the CJEU will explain the meaning of EU law; stipulate the circumstances in which domestic measures will be incompatible with EU law; and explain the sort of behaviour on the part of Member States that would, and would not, be consistent with their obligations under EU law. Having set out its ruling on the question of EU law referred to it, the CJEU will often conclude by noting that it is for the referring court to determine whether, in the instant case, the domestic measure in question is compatible with EU law. In other words, the CJEU gives a ruling on a question of legal principle concerning the interpretation of EU law that is broader than the particular circumstances of the proceedings that gave rise to the reference for a preliminary ruling. However, given that the referring court considers such a preliminary ruling *necessary* in order for it to make a decision, the broader statement of principle is, ineluctably, narrowed in its application in the particular case before the referring court. As a matter of fact, if not law, a preliminary ruling on a question of EU law has the effect of altering the domestic legal landscape of the Member States.

This is what happened in the *Cassis* case. The CJEU set out the principle of ‘mutual recognition,’ in effect, as a principle of EU law. In the same decision, the court set out the concept of ‘mandatory requirements.’⁷ This is an inexhaustive list of policy areas in which Member States may derogate from observing the principle of ‘mutual recognition’ while ever there is no measure at the EU level, harmonising the relevant law and regulatory practices of the Member States. Derogating domestic measures, justified as ‘mandatory requirements’ were and are nonetheless subject to the EU principles of proportionality and non-discrimination.

A discussion of the practical challenges of giving effect to the principle of ‘mutual recognition’ must be left to another occasion.⁸ Suffice to say, for present purposes, the principle of ‘mutual recognition’ was formulated as a principle of EU law in the *Cassis* decision and became an essential tool of EU integration⁹. As already indicated, the concept of ‘mutual recognition’ was applied in the first instance, to remove obstacles to the free

⁶ TFEU Article 267, para 2.

⁷ See paragraph 8 of the *Cassis* judgment.

⁸ Apart from the work of the Commission on giving effect to mutual evaluation specifically, and to the Directive more generally, implementation of the Directive as a whole has already been the subject of academic consideration: see H F Koeck and M M Karollus, *The New Services Directive of the European Union: Hopes and Expectations from the Angle of a (Further) Completion of the Internal Market*, Nomos, Vienna, 2008; F Breuss, G Fink and S Griller, *Services Liberalisation in the Internal Market*, Springer, Vienna, 2008; U Stelkens, W Weiss and M Mirschberger, *The Implementation of the EU Services Directive: Transposition, Problems and Strategies*, TMC Asser, The Hague, 2012.

⁹ The concept has been the subject of considerable academic discussion, particularly since the promulgation of the Services Directive. See, for example, *Journal of European Public Policy*, Vol. 17, No. 5: Special issue: Mutual Recognition as a New Mode of Governance (Guest editor: Susanne K. Schmidt); F. Schioppa, *The Principles of Mutual Recognition in the European Integration Process*, Palgrave, USA, 2005; C. Janssens, *The Principle of Mutual Recognition in EU Law*, OUP, Oxford, 2013.

movement of goods between Member States. It was subsequently also applied to remove obstacles to the free movement of services and people. Whereas the EEC treaty provisions were directed to the removal of trade barriers located at the border, 'mutual recognition' was directed to trade barriers located behind the borders. The principle had greater relevance to domestic measures described as 'indistinctly applicable' measures: those measures that, in law applied to both domestically and imported goods alike but in practice placed a heavier burden on imported goods. More correctly, the burden of indistinctly applicable measures falls more heavily on the producers in other Member States than on domestic producers. Consequently, such producers are discouraged from trying to produce for markets other than their domestic market and this, in turn, inhibits economic integration and the development of the internal market.

Harmonisation from the EU Perspective

As noted above however, the concept of 'mutual recognition' comes into play in the absence of overarching EU measures directed to the harmonisation of law and regulatory practice across the internal market ie, between Member States. Harmonisation through the application of this concept has been referred to as 'negative harmonisation.' From the perspective of EU law, it is arguably, weaker than the process of 'positive harmonisation' by which the EU institutions develop measures to harmonise areas of law and regulatory practices across Member States. The aim, in turn, of such measures is to facilitate the free movement of goods, persons, services and capital, for the purpose of greater economic integration within the internal market; and for the corresponding welfare gains this ought to then generate more widely for EU citizens (and, indeed, third country nationals living in the EU).

Harmonisation from the Member States' Perspective

From the perspective of the Member States however, an absence of EU legislation means that Member States have ultimate legislative competence in the field in question (in the *Cassis* case, for example, the field of regulating the alcohol content of a particular type of beverage). This also means that they have a greater (but not an absolute) discretion concerning the extent to which they adjust their domestic law and regulatory practice according to the concept of 'mutual recognition.' The CJEU recognised this in the formulation of the judgment in *Cassis*. On the one hand, the Court set out the primary obligation of Member States to mutually recognise the regulatory frameworks of other Member States which governed the production and release of goods onto the domestic market. However, as noted earlier, the Court has no jurisdiction to pronounce on the validity or otherwise of domestic law and practice in the Member States. When exercising its jurisdiction in the context of a preliminary ruling, the Court is simply expounding the meaning and interpretation of EU law. The concept of 'mutual recognition' grew out of the Court's explanation of the meaning of the phrase 'measure having equivalent effect' that formed part of Article 30, EEC:

Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.

Following this process - from the reference to the Court to the latter's carefully worded judgment - the steps look like this:

The German Spirits Board refuses to authorise the marketing of the French liqueur, *Cassis de Dijon*, on the basis that the alcohol content does not comply with German statutory requirements, even though the goods are, of course, in free circulation in France.

The importer challenges the Board's decision in the courts, seeking administrative review of this decision on the basis that the treaty provision (Art. 30 EEC) has direct effect and provides the importer with a right *not to be impeded* that corresponds to the Member States' obligations *not to impede* imports.

This right, asserted by the importer (REWE) can only prevail in these circumstances however, if the prohibition set out in Article 30 applies to the German statutory provision stipulating a minimum alcohol content.

If this right prevailed, as a matter of German law understood as including the obligations set out in Art 30, the German court would need to set aside or annul the decision of the Spirits Board and, in some way, ensure that the importer received the necessary authority to market the *Cassis* in Germany. (Presumably, this would be achieved either by directing the Board to grant the authority to market the goods in Germany, or by setting out the law in this area, and thus the limits of the Board's competence to refuse the marketing authority).

Thus, one of the questions referred to the CJEU by the German court was whether the term 'measures having equivalent effect' (to a quantitative restriction) was to be interpreted as including domestic measures that imposed a minimum alcohol content on beverages. If the treaty provision were to be so interpreted, this would mean that Member States were prohibited from introducing such measures and certainly from applying them to goods originating in other Member States where that would amount to a quantitative restriction on the importation of such goods.

The CJEU confirms that the term does include such measures and refers its preliminary ruling on the interpretation of EU law (ie art. 30 EEC) back to the referring domestic court. The ruling forms part of the judgment of the domestic court. That court was bound by the EU doctrine of supremacy¹⁰ as well as that of direct effect. The direct effect doctrine gave REWE the right referred to above, that corresponded to the Member States' obligation not to impose quantitative restrictions and measures having equivalent effect. The supremacy doctrine required the domestic court to give effect to the right under EU law in preference to the right (of the German Spirits Board) under German domestic law. The domestic court did not rule on the validity or otherwise of the domestic measure. That was the responsibility of the German Constitutional Court and Parliament. The domestic court simply gave effect to the right granted to REWE as a matter of EU law, not to be subject to a measure equivalent in effect to a quantitative restriction. In terms of 'mutual recognition', this meant, in effect, that Germany was required to accept, or recognise, France's regulatory framework governing the production of alcoholic beverages.

Recognition of this sort is consistent with the 'Country of Origin Principle': the principle that the measures and regulatory arrangements of the country of origin of a good (or service) are preferred to those of the country or state 'hosting' the goods or services in question. This is 'mutual recognition' in its 'strongest' form and was at the heart of Commission's original draft of the EU Services Directive.

Background to the EU Services Directive

¹⁰ Established by the CJEU in the preliminary ruling matter Case 6/64 *F Costa v ENEL* [1964] ECR 585

The general consensus is that the EU Services Directive is one of the most significant, and contentious pieces of EU legislation in recent times.¹¹ There are several reasons for this. First is the challenge of trying to generally regulate a range of different services with one instrument rather than using sector-specific measures¹². Second is the point in time in the evolution of the EU that this directive was being formulated: the proposed treaty amendments introducing a Constitution for Europe.¹³ Third was the resistance posed to the Directive by a number of interest groups, particularly trade unions and NGOs, concerned with the implications of the Directive for labour standards, social dumping and welfare, environmental and consumer interests.¹⁴

In 2000, in response to a request from the Lisbon European Council, the Commission adopted a strategy to develop the internal market for services. As part of this strategy, the Commission prepared an extensive report, setting out the existing regulatory and administrative barriers to further integration of the internal market for services.¹⁵ The Services Directive was developed in light of this report. No one can seriously have thought it would be ‘the answer’ to the problems facing integration of the internal market for services. However, even in its final form, the Directive makes a good start at addressing these obstacles.

Mutual Recognition and the EU Services Directive

In its initial form, the Commission’s proposal for a directive on services¹⁶ was drafted around the country of origin principle, anchoring the chapter dealing with the free movement of services.¹⁷ It is not unreasonable to suggest that the Commission was wildly optimistic if it considered the directive in its original form had a serious chance of success. As an opening gambit however, it was certainly bold¹⁸ and radical.¹⁹ If, by the remotest of chances, the Commission had been successful in getting the directive through both the Council and Parliament in its original form then significant progress would have been made in promoting services integration in the EU. If however, as surely must have been expected as the more likely outcome, the ‘country of origin principle’ were rejected, whatever compromise were ultimately reached would be something more than the status quo. True, it was in the end a

¹¹ M. Jensen and P. Nedergaard, “From ‘Frankenstein’ to ‘toothless vampire’? Explaining the watering down of the Services Directive” *Journal of European Public Policy* Vol.19 No. 6, , pp.844 – 862, 884 citing S. Hix and A. Noury, ‘After Enlargement: voting patterns in the sixth European Parliament’ (2009) Vol. 34, No.2, *Legislative Studies Quarterly*, Vol.34 No.2, May 2009, pp.159 – 174, 169; J. Flower, “Negotiating European Legislation: The Services Directive” *Cambridge Yearbook of European Studies*, Vol. 9, 2006 – 7, p. 229.

¹² Flower, *ibid.*, p.222; C Barnard, ‘Unravelling the Services Directive’ *Common Market Law Review* Vol.45, 2008, pp. 323 – 394, p.327

¹³ C. Barnard, *ibid.*, p.330; K. Nicolaidis, ‘Trusting the Poles? Constructing Europe through Mutual Recognition’ *Journal of European Public Policy*, Vol.14 No.5, August 2007, p. 688;

¹⁴ Flower, *op.cit.*, p.223; R. Crauford Smith, ‘Old Wine in New Bottles? From the ‘Country of Origin Principle’ to the ‘Freedom to Provide Services’ in the European Community Directive on Services in the Internal Market’ *Mitchell Working Paper Series*, 6/2007, p.2; C. Barnard, *op.cit.*, p.329.

¹⁵ Commission for the European Communities (2002) ‘The state of the internal market for services. Report from the Commission to the Council and the European Parliament.’ *COM (2002) 441 final*, Brussels,. 5 March, 2004. See also, H. Badinger and N. Maydell, ‘Legal and Economic Issues in Completing the Internal Market for Services: An Interdisciplinary Perspective’ *Journal of Common Market Studies* Vol. 47 No. 4, pp.693 – 717.

¹⁶ Commission (2004) ‘European Commission’s Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market’ *COM (2004) 2 Final*, Brussels, 25 February, 2004.

¹⁷ Chapter III, Arts. 16 – 25.

¹⁸ K. Nicolaidis and S. Schmidt, ‘Mutual recognition ‘on trial’: the long road to services liberalization,’ *Journal of European Public Policy* Vol. 14 No. 5, p.722.

¹⁹ M. Jensen and P. Nedergaard, *op.cit.*, p.857. The authors ask whether the Commission deliberated developed ‘a radical proposal to have something to trade with, or did it miscalculate the positions of the various actors involved?’

very close call, with the Parliament ultimately brokering a compromise text²⁰. However, the hybrid provision finalised by the Parliament was indeed more than the status quo.

Article 16(1) stipulated that Member States respect the right of providers to provide services in a Member State other than that in which they are established. It required Member States to ensure free access to and exercise of a service within the host State; and prohibited them from imposing a range of particular restrictions on service providers from other Member States. The rest of the article in effect, reserved to Member States the right nonetheless to introduce measures regulating access to and the exercise of a service, provided such measures respected the EU principles of non-discrimination, necessity and proportionality.

At first glance, this arrangement might not seem that different to the situation prevailing prior to the entry into force of the Directive: Member States were already subject to the primary obligations under the treaty provisions of the TFEU moderated by the derogation provisions also contained in the TFEU and in the CJEU's jurisprudence recognising Member State measures that are justified on the basis of an overriding public interest.

Translating these obligations into an EU measure however serves at least two purposes. First, Member State obligations under the Directive are more specific, providing the Commission (as well as EU citizens) with a clearer set of criteria against which to test whether or not a Member State is meeting its obligations. Second, a consequence of EU legislation being introduced in this field is that the Member States' competence to legislate in this area as well is considerably tempered by principles of EU law. It is also subject to challenge by the Commission (or another Member State) under the infringement procedures set out in Arts.258 and 259 respectively of the TFEU. In other words, the cross-border trade in services to which the Directive applies is now regulated directly and indirectly by the provisions of the Directive.²¹

Nonetheless, it might be argued that, in the end, the Directive represented only a modest advance, given the original ambitions of the Commission. To accept this argument however, would be to underestimate the value of the negotiating experience itself. It would also be to disregard the lessons learned about the challenges of gaining the trust and confidence of the EU citizenry in the integration process. Notwithstanding these more diffuse lessons however, it is suggested that the significant advance introduced by the Directive is the process of 'mutual evaluation.'

Mutual Evaluation

The concept of 'mutual evaluation' was set out in the original draft of the Directive and passed unscathed through the often fraught negotiations around the Directive. The provision (Article 39 in the final version) was enhanced by a further paragraph. It is suggested here that this process, rather than the application of the principle of mutual recognition, is the true innovation in furthering the economic integration of services in the EU.

'Mutual recognition' is a policy instrument used for overcoming obstacles to economic integration that are identified behind sovereign borders. Such obstacles are usually

²⁰ See Flower, *op.cit.*, esp. at 232ff.

²¹ It is important to bear in mind that the Directive does not apply to all services. In order to have a clear sense of the regulatory landscape for services in the EU it is necessary to consider a number of other EU measures alongside the EU Services Directive.

regulatory measures that, although applying indistinctly in law to both domestic and imported goods or services alike, impose a heavier burden in fact on the imported goods or services. As economic integration proceeds, such obstacles are usually located ever further behind borders. They are also increasingly measures less concerned with imports (whether of goods or services) and increasingly woven into the domestic regulatory fabric; concerned with responding to imperatives from other policy areas (such as environmental, consumer or cultural protection; industrial relations; public policy, public security or public health for example) and less with economic and trade concerns. When these other policy areas provide a sufficient justification for the apparent obstacle, it becomes more difficult to successfully challenge the measure on economic grounds. This tension is classically illustrated in the preliminary ruling jurisprudence of the CJEU when a Member State defends domestic measures on the basis either of derogation provisions in the TFEU; mandatory requirements (in the case of goods); or overriding reasons of public interest (in the case of services).

As a consequence, it is arguably more difficult to successfully use the preliminary ruling mechanism to challenge a domestic measure as inconsistent with the freedom to provide services, if the measure can be successfully defended for overriding reasons of public interest (provided always of course, that the former is non-discriminatory and proportionate to the ends to be achieved). As economic integration deepens it must be expected that the imperatives of economic policy and of trade policy will increasingly come into conflict with imperatives from other policy areas. The initial stages of single market integration required the dismantling of regulatory measures that framed national markets; it required a reframing of the single market along EU borders, not Member State ones. It must also be kept in mind that, at the time of the seminal preliminary ruling decisions establishing the doctrine of direct effect²² and supremacy²³, the European Economic Community (as it then was) comprised only six Member States, with *relatively* homogenous legal and political systems.

When the principle of mutual recognition was established²⁴, EEC membership had only increased to nine. How much easier must it have been for negative harmonisation to occur across nine jurisdictions that were only beginning to build a single market among themselves. Fast forward nearly four decades and the EU is a far more complex creation. There were twenty-five Member States involved in negotiating the terms of the Services Directive; States with a much greater variance (in substance, if not in form) in their legal and political systems. More significantly, all Member States and their citizens had had the benefit of seeing the consequences, both positive and negative, of measures introduced to further European integration and the Single Market. In such circumstances, as already noted, it must surely have been unsurprising that the idea of service providers being governed by ‘home state’ rather than ‘host state’ regulation met with such resistance.²⁵

At the heart of this resistance was a lack of trust and confidence in the regulatory arrangements of ‘other’ Member States. At its most acute, this manifested, in part, in the caricature of France being inundated with poorly regulated plumbers from Poland!²⁶ The concerns raised during the debates around applying the ‘country of origin principle’ were reminiscent of many similar concerns in the past in relation to goods (British concerns for

²² Case 26/62 *N V Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Netherlands Fiscal Administration* [1963] ECR 1.

²³ Case 6/64 *F Costa v ENEL* [1964] ECR 585.

²⁴ Case 120/78 *REWE-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

²⁵ See, *inter alia*, the discussion in A. McNaughton and Furlong, “Services Trade Reform in the European Union – the EU Services Directive” and J. Flower, “Negotiating European Legislation: the Services Directive.”

²⁶ See, eg., E. Sciolino, “Unlikely Hero in Europe’s Spat: The ‘Polish Plumber’ New York Times, 26 June, 2005.

their sausages and prawn chips; Italian concerns for their pasta; French concerns for their cheeses; Danish concerns for their apples and so on).²⁷ Common to both sets of concerns is a lack of trust and confidence in the ability of 'the other' to regulate to an acceptable standard. In the case of the Services Directive, the fear, largely in the population of the 'old' Member States, was that the regulatory practices in the newer Member States (particularly, but not only, those admitted in the 2004 enlargement) were insufficiently rigorous and could not be trusted to protect the interests of service recipients in the 'old' Member States. Such distrust cannot be resolved by a centrally imposed requirement that Member States mutually recognise each other's regulatory regimes. Trust and confidence can, however, be fostered through dialogue and this is what the 'mutual evaluation' process facilitates. Writing in 2007, Professor Nikolaïdis examined the nature of mutual recognition, 'blind trust' and 'binding trust' in the process of European integration.²⁸ In this article, she also introduced the concept of 'managed mutual recognition.'²⁹ It is suggested here that 'mutual evaluation' can also be considered as a type of 'managed mutual recognition.'

Article 39 of the Services Directive sets out the obligations of the Member States and the Commission in relation to the mutual evaluation process. The process is more clearly established in relation to service providers seeking to establish themselves in a Member State other than their own. In relation to providers who wish to provide services transnationally within the EU from their home State, the process is more embryonic. In relation to services, there have always been two aspects to this fundamental freedom: the freedom to provide services³⁰ and the freedom to establish in another Member State.³¹ Freedom of establishment is dealt with in Articles 9 – 15 of Chapter III of the Directive. The Free movement of services is dealt with in Articles 16 – 21 of Chapter IV of the Directive. The changes to Article 16 (referred to above) also resulted in the expansion of Article 39 to include paragraph 5, discussed below.

Mutual Evaluation of Requirements Relating to Establishment

By 28 December, 2009, (ie., the end of the transition period for implementing the obligations of the Directive) each Member State was required to present to the Commission a report containing information specified in the following provisions of the Directive: Article 9(2) on authorisation schemes; Article 15(5), on requirements to be evaluated; Article 25(3), on multidisciplinary activities.

The information required was essentially the same: first, to set out what measures a Member State had in place for regulating the conduct of service providers from other Member States. Second, to show that such measures are proportionate; non-discriminatory; and can be justified for an overriding reason of public interest. The Commission was then required to distribute these reports to the Member States who had six months to submit to the Commission, their observations on the reports. In the meantime, the Commission was required to consult 'interested parties' on the reports. In other words, the Member States were to evaluate each other's regulatory measures and the justifications for such measures. While they were doing this, the Commission was, in effect, consulting with those affected by the measures on which the Member States were reporting.

²⁷ See, eg., "Why Brussels Sprouts" *The Economist*, 26 December, 1992, p.70.

²⁸ K. Nikolaïdis, 'Trusting the Poles? Constructing Europe through mutual recognition,' op.cit.

²⁹ *Ibid.*, p.685.

³⁰ Now dealt with under Articles 56 – 62 of Chapter 3, Services, in Title IV, Free Movement of Persons, Services and Capital.

³¹ Now dealt with under Articles 49 – 55 of Chapter 2, Right of Establishment, in Title IV, Free Movement of Persons, Services and Capital.

The Commission is assisted in this process by a Committee, established for the purpose under Article 40 of the Directive. The Commission submits the reports, and the Member States' observations to the Committee for its observations. (Presumably, the Committee is also provided with a report from the Commission concerning its stakeholder consultations). By 28 December, 2010 at the latest, the Commission was required to present a summary report to the European Parliament and the Council, taking into account the observations made by the Member States and the Committee. This summary report was also to be accompanied, where appropriate, by proposals for additional initiatives. In January, 2011, the Commission published the initial results of the mutual evaluation process, together with suggestions for additional measures aimed at continuing the integration process.³² The following year, the Commission published a communication on the implementation of the Services Directive.³³ This was accompanied by three extensive Staff Working Documents³⁴ These documents, taken as a whole, satisfy the reporting requirements set out in Arts. 39 and 41 of the Services Directive.

Mutual Evaluation of Requirements Relating to the Free Movement of Services

Apart from the reports referred to above, Member States were also required to report to the Commission on similar measures in relation to the free movement of services and to show that such measures are proportionate; non-discriminatory; and can be justified for an overriding reason of public interest. Member States are also required thereafter, to advise the Commission of any changes to such requirements, including any new requirements, together with the reasons for them.

Whereas in relation to measures concerning establishment, Member States are required under the Directive to make observations on each other's arrangements, there is no such requirement in relation to the free movement of services. Rather, the Commission advises all other Member States of any such changes in requirements as advised. The former is also required 'to provide analyses and orientations on the application of these provisions in the context of the Directive.'³⁵ Given the controversy around the passage of the Directive, it is unsurprising that the evaluation process around the free movement of services is more nascent than that concerning establishment.

Both the European Parliament and the Council have responded positively to the mutual evaluation process with each institution endorsing it for use in other policy areas, where

³² Commission of the European Union (2011) 'Communication from the Commission: Towards a better functioning Single Market for Services – building on the results of the mutual evaluation process of the Services Directive' *COM (2011) 20 Final*, Brussels, 27 January, 2011; Commission of the European Union (2011) 'Commission Staff Working Document: Detailed information on the implementation of Directive 2006/123/EC on Services in the Internal Market' *SEC(2011) 102 Final*, Brussels, 27 January, 2011.

³³ Commission of the European Union (2012) 'Communication from the Commission on the implementation of the Services Directive: A partnership for new growth in services 2012 – 2015' *COM (2012) 261, Final* Brussels, 8 June, 2012.

³⁴ Commission of the European Union (2012), 'Commission Staff Working Document with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive') *SWD(2012) 146 Final*, Brussels, 8 June, 2012; Commission of the European Union (2012), 'Commission Staff Working Document on the result of the performance checks of the internal market for services (construction, business services and tourism) *SWD(2012) 147 Final*, Brussels, 8 June, 2012; Commission of the European Union (2012), 'Commission Staff Working Document Detailed information on the implementation of Directive 2006/123/EC on services in the internal Market *SWD(2012) 148 Final*, Brussels, 8 June, 2012;

³⁵ Article 39(5).

appropriate.³⁶ Consistent with this exhortation, the Commission included a mutual evaluation process in the most recent amendment to the Professional Qualifications Directive.³⁷ In its current published form however, this Directive does not in fact give proper effect to the mutual evaluation process. Due almost certainly to a typographical error during version revisions, the Commission is only required to circulate reports from Member States on measures they have removed or made less stringent.³⁸ Directive 2013/55/EU amends the provisions of Directive 2005/36/EC. At paragraph 7 of the amended article 59 of the Professional Qualifications Directive (2005/36/EC), the Commission is required to forward reports referred to in paragraph 6. That paragraph refers only to reports of measures that have been removed or made less stringent; not to measures that remain in force and are justified by the relevant Member State as compatible with EU law. In the Commission's original proposal, the Commission was required to forward to Member States information on both sets of measures: those retained with justifications and those removed or made less stringent.³⁹ Paragraph 5 of amended article 59 requires Member States to provide the Commission with information on these measures by 18 January, 2016. It is to be hoped that the error in paragraph 7 will be rectified sooner rather than later, ensuring that the mutual evaluation process can be given its intended effect.

Conclusion

The Directive provides a model for dialogue among Member States in relation to different national requirements in respect of the establishment provisions in Chapter III; and the basis for developing further discussions in relation to the free movement of services dealt with in Chapter IV. The mutual evaluation provision establishes a process specifically for dialogue in relation to harmonising the regulatory environment in services across the EU. It is freely acknowledged that integrating the services market in the EU is a complex process. It is also an ongoing one. However, it is suggested that the mutual evaluation process is consistent with the underlying ethos of the EU itself: when people are talking, they are not warring. If Member States, and their citizens, are talking about the similarities and differences in services regulation across the EU, trust and confidence in one another must inevitably grow, even if only slowly.

An analysis of these reports and the responses of the EU institutions must wait for another occasion. Similarly, it will take some time before it is possible to assess the extent to which the mutual evaluation process has effected harmonising changes in the regulatory patterns of the Member States. However it is reasonable to hope that the process will lead to a more nuanced and sophisticated harmonising process the EU services sector and beyond.

³⁶ European Parliament, 'European Parliament Resolution on the Mutual Evaluation Process of the Services Directive' [2011] *OJ C131/46* Brussels, 25 October 2011; Council of the European Union, 'Conclusions on a better functioning Single Market for services – mutual evaluation process of the Services Directive' 3074th *Competitiveness (Internal Market, Industry, Research and Space) Council meeting*, Brussels, 10 March, 2011.

³⁷ European Parliament and the Council of the European Union (2013) 'Directive 2013/55/EU of the European Parliament and the Council of 20 November, 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') *OJ (2013) L354/132*

³⁸ See Article 1(49) Professional Qualifications Directive (2013/55/EU) which amends art.59 of the original Directive.

³⁹ See Commission, 'Proposal for a Directive amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System' *COM(2011) 883 Final*, Brussels, 19 December, 2011. The original version of the amendment to article 59 is set out at para.48 of the proposal. Note, particularly, art.59(4), (5) and (6) on p.50 of the Commission's proposal.

Obstinate and Unmovable? The EU vis-à-vis Myanmar via EU-ASEAN

Ludovica Marchi Balossi-Restelli¹
University of Reading
lmb7979@gmail.com

Abstract²

This article examines continuity and change in the European Union's interactions with the Association of South East Asian Nations (ASEAN) with regard to Myanmar. As the EU has used its connections with ASEAN to raise its concerns around Myanmar, the Association's behaviour also comes into focus. This investigation is linked to the evolution of the EU in world affairs via its political ties to ASEAN. It concentrates on the rather abrupt change introduced by the reform process launched in 2011-12, which marked the beginning of a new phase. The EU's concern that the Myanmar issue not destabilise its relations with ASEAN has remained constant, however changes in the dialogue can be seen as forming three distinct phases. It is maintained that the aspiration to escape from pervasive China and the desirability of attracting new partners were the catalyst for these changes. Official documents from the EU, the European Commission, and European Council Conclusions and Common Positions, declarations issued at ASEAN, Asia-Europe and other meetings, together with secondary sources and interviews conducted mostly in Myanmar, contribute to this work. While many scholars have hinted at the extent to which the issue of Myanmar has been problematic to the EU-ASEAN links, there has been no emphasis on the positive effect that Myanmar has had on EU-ASEAN relations. This research illuminates the extent to which this issue has conversely helped to reinforce the long-lasting EU-ASEAN relationship.

Key words: European Union, EU-ASEAN, ASEM, Myanmar, foreign policy analysis

Introduction

The Republic of the Union of Myanmar has recently generated increasing attention among scholars and observers alike.³ The 2011-12 reform process, the 2012 by-elections and the transfer of power to a civilian, military-sponsored government marked abrupt changes. President Thein Sein (a former general, Prime Minister since 2007, and President since March 2011) appears to be the architect of the transformation. The by-elections resulted in a landslide victory for the government's opposition party, the National League for Democracy (NLD), led by Nobel Peace laureate, Daw Aung San Suu Kyi. Sein's government released a number of political prisoners, concluded ceasefire arrangements with armed groups in the ethnic regions, signed peace agreements, made efforts to eliminate the use of

¹ The shortened pen-name 'Marchi' is used in the text and references.

² A first version of this article was prepared for the 2013 EUSA AP Annual Conference, Macau, 17-18 May, 'Reassessing the EU-Asia Pacific Relationship in the context of the EU crisis.' The author thanks the participants, John Leslie and Pascaline Winand, and also the participants in the discussion of this last version, in January 2014, at Singapore Management University, School of Social Science, in particular Paul Evans, Clara Portela and William Tov, and ANZJES' anonymous reviewers for their constructive comments.

³ For the country profile, see the EC/Burma/Myanmar Strategy Paper (2007-2013), pp. 5-46. <http://eeas.europa.eu/myanmar/csp/07_13_en.pdf>, accessed 19 September 2013.

forced labour, recognised labourers' right to strike, and amended the censorship laws.⁴ In January 2013, an international conference was organized in Myanmar, at which the Sein government's timetable for reform over the next three years was unveiled. Yet, the government is facing challenges including the need to reform the Constitution, which preserves the military's supremacy over the Cabinet and Parliament⁵ as it places the National Defence and Security Council above the *hluttaw*, the Burmese Parliament, with 10 of its 11 members being officers or former officers.⁶ Sein's restructuring has been unmatched by any previous government leadership since the coup d'état of 1962. The latter brought to power a military junta (under the official name of the State Peace and Development Council, SPDC, successively changed into the State Law and Order Restoration Council, SLORC, and again into the SPDC) which ruled the country until 2011. The SLORC/SPDC suppressed domestic dissent and exercised absolute power, despite 20 years of sanctions imposed by the EU and other international actors. The new developments have been acknowledged by the EU as 'historic improvements,'⁷ and as 'a significant step towards further democratisation in Myanmar' by the Association of South East Asian Nations (ASEAN).⁸ ASEAN is the regional group of which Myanmar has been a member since 1997. Within ASEAN, the European Union raised its concerns about Myanmar and 'encouraged positive changes.'⁹

The transformations in Myanmar gave way to a new phase in the relations with the European Union. The European Council suspended the visa ban on cabinet members and other high ranking officials in 2011, and placed Myanmar under the Everything but Arms (EBA) regime. High Representative Ashton opened a EU Office in Yangon, which was later upgraded to a Delegation. The European Union has more than doubled the development aid (to about 150 million euros for 2012-13), explored the feasibility of a bilateral investment agreement, and reinstated the system of generalised tariff preferences with Yangon in mid 2013. It expanded bilateral trade with Myanmar (226.37 million dollars in 2012) as well as Myanmar's exports to the EU (43.54 million dollars) and imports from the EU (182.83 million dollars),¹⁰ all of which are vital to Myanmar (with a GDP of US\$ 876 in 2010).¹¹ It allocated initial funds to the Myanmar Peace Centre in Yangon (EUR 700,000) in 2012, and further contributed EUR 30 million in 2013 to the ethnic peace process.¹² It has agreed to the building up of a lasting EU-Myanmar partnership.¹³ To turn commitments into reality, a joint Task Force met in Myanmar in November 2013,¹⁴ following the first Myanmar-EU Forum in Nay Pyi Taw in

⁴ Council conclusions, 3159th Foreign Affairs Council Meeting, Luxemburg, 23 April 2012. Censorship laws, however, still exist and are enacted; see: T. Myint-U, 'Help Myanmar's peace talks to transform Asia,' *Financial Times*, 22 November 2013.

⁵ Myanmar's military (the Tatmadaw) is constitutionally protected and exempted from civilian oversight. Article 20(b) of the Constitution gives the military complete authority over the ministries of defence, interior and border affairs, as it appoints all three ministers. Article 109(b) and 141(b) reserve 25 % of parliamentary seats for the military, which in effect gives them a veto over any attempts to alter the Constitution because of the supermajority required for revision. D. Tonkin, *EastAsiaForum*, 3 May, 2013.

⁶ A. MacDonald, *EastAsiaForum*, 1st May, 2013. <<http://www.eastasiaforum.org/2013/05/01/the-tatmadaws-new-position-in-myanmar-politics/>>, accessed 19 September 2013.

⁷ Council Conclusions, 23 April 2012.

⁸ Chairman's Statement, 20th ASEAN Summit, Phnom Penh, 2012, (paragr. 87). ASEAN is formed by Indonesia, Malaysia, the Philippines, Singapore and Thailand, which are the five founding states, to which later Brunei, Vietnam, Laos, Myanmar and Cambodia also joined, totaling ten members.

⁹ EEAS Myanmar, <<http://eeas.europa.eu/myanmar/index.en.htm>>, accessed 14 November 2012.

¹⁰ Myanmar, EU agrees to use forum to advance ties. 20 June 2013. <<http://www.globaltimes.cn/content/790343.shtml#.UdrvwpX3AfE>>, accessed 19 September 2013.

¹¹ United Nations, National Accounts Main Aggregates Database, <<http://unstats.un.org/>>, accessed 19 September 2013.

¹² European Commission, IP/12/1167.

¹³ Joint statement, Brussels, 5 March 2013, EUCO 58/13. <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/135830.pdf>, accessed 19 September 2013.

¹⁴ <http://europa.eu/rapid/press-release_MEMO-13-176_en.htm> accessed 19 September 2013.