



Mutual Recognition in Goods

10 May 2016

CONTEXT

The Commission announced the revision of the Mutual Recognition Regulation 764/2008 in its Single Market Strategy COM(2015) 550. An EU-wide Action Plan to increase awareness of mutual recognition in goods will also be presented within the current legislature.

The principle of mutual recognition for goods requires Member States to allow lawfully marketed products in another Member State to be marketed in their Member State without applying additional restrictions or other methods having equivalent effect. Born in the Treaty of Rome, EU jurisprudence developed the principle now enshrined in the Treaty on the Functioning of the European Union (Articles 34–36 TFEU).

Member States may only derogate from this principle for justified public interest reasons that are proportionate to achieving an intended aim. The Mutual Recognition Regulation establishes the procedure for this derogation.

Following Competitiveness Council conclusions of December 2013, an evaluation was finalised in June 2015 and concluded that the mutual recognition principle is not fully achieving its intended objectives in practice. Solutions are needed to enhance the application of the principle of mutual recognition in the field of goods.

This strategy paper constitutes BUSINESSEUROPE's initial contribution to the Commission's proposed action to revise Regulation 764/2008 and present an EU-wide Action Plan on mutual recognition.

EXECUTIVE SUMMARY

- *National technical rules are being used as a basis to deny mutual recognition.*
- *No effective mechanisms exist for businesses to question national decisions denying mutual recognition.*
- *More ambition is needed to improve trust among Member States.*
- *Improving transparency of national decisions will alleviate this lack of trust.*
- *The "quick assessment procedure" has the potential to be the mechanism that leads to a better understanding of the principle and improve the functioning of Regulation 764/2008.*
- *The overarching principle of mutual recognition should take precedence in existing grey areas for harmonised goods.*

Background

The principle of mutual recognition should support the free movement of goods, lower remaining trade barriers and promote trade across the single market. It should also enable remaining technical differences to coexist among Member States without restricting the free movement of goods in the single market.

The Mutual Recognition Regulation establishes how the principle is exceptionally denied. Usually supported by a national technical rule, decisions can derogate from the principle due to an overriding public interest. Competitiveness Council conclusions of December 2013 called for the effectiveness of this framework to be evaluated.

The Commission finalised an evaluation report in June 2015 that displayed the economic advantages of the principle. It also stated that the principle is still not fully achieving its objectives effectively or efficiently.

25% of intra-EU trade is in non-harmonised products¹

While some recommendations of the evaluation report, such as: creating a voluntary self-declaration document as a mechanism for businesses to prove 'lawful marketing' of products, could prove useful, we do not believe that these recommendations go far enough to ensure future application of mutual recognition in practice.

National technical regulations would still apply additional requirements to products that are already being lawfully marketed. These requirements fragment the single market through applying additional criteria for businesses to gain market access. In 2014 alone, 700 national technical regulations were notified to the Commission. This means further rules for businesses to apply to their products in practice, such as additional labelling, testing, packaging and design requirements.

Full application of mutual recognition would increase EU GDP by 1.8%²

Some authorities even require parts of harmonised products to undergo additional requirements. Grey areas for harmonised products are growing as authorities are interoperating applicable rules differently, especially for innovative products.

While we acknowledge Member State discretion to implement EU legislation, gold plating can lead to increased costs, regulatory burdens, fragmentation of rules and competitive disadvantages to the free movement of goods.

As a result, predetermined markets are abandoned or costly additional measures endured. SOLVIT is ineffective in addressing these cases. It is not only too slow to be effective (e.g. alongside marketing campaigns or investment strategies) but cannot involve itself in solving decisions that follow national technical regulations.

As a result of misapplication of Mutual Recognition, 60% of businesses adapt products, 22% retest products and 19% take 'other steps'.³

As no effective form of remedy exists, businesses cannot currently question decisions derogating from the principle. The only option available is lengthy and costly court procedures.

The revision of the Mutual Recognition Regulation grants the opportunity to support a mechanism that ensures effective and efficient application of Mutual Recognition in practice.

The “quick-assessment procedure” (QAP)

A change in mentality and trust is needed among Member States and their authorities applying the EU’s framework for goods. Yet Member States are not prepared to lose their discretion to use national technical rules to further public policy objectives. At the same time, the Commission has limited tools to enforce the principle in practice (infringement procedures are a last resort and take too long to effectively aid businesses willing to sell products across borders).

The “quick-assessment procedure” (QAP) could assess whether the principle should apply when a Member State exerts a national technical rule on a product that is already being lawfully marketed in another Member State.

The procedure would produce a non-binding opinion. This could give the economic operator further insight before contentious proceedings and also aid transparency of national decisions (helping similar business sectors make informed choices).

It would also demonstrate particularly problematic areas to the Commission and act as a deterrent to Member States. Not to mention improve transparency among Member States not directly involved in the first instance. As decisions taken by authorities in one Member State effect the functioning of the entire single market, all Member States would benefit from greater transparency of decisions, especially due to the sectoral impact these decisions have.

The procedure could be used for decisions taken with regard to both non-harmonised products as well as harmonised products. It should also be open for assessment if a national regulation in itself restricts the market access of a product lawfully marketed on other EU-markets.

The QAP would promote better application of mutual recognition in goods overtime as transparency of national decisions would be improved.

Please find detailed information on the working process of the QAP at Annex 1. The stages of the procedure are depicted in a chart at Annex 2.

Further comments on strengthening Regulation 764/2008

Harmonised goods

The scope should be clarified to include non-harmonised aspects of harmonised goods (currently only considered in recital 3). It would also be important to include procedures for decisions taken on harmonised goods that are not fully covered by harmonised requirements.

Experience shows that national market surveillance authorities are determining applicable rules for harmonised goods in various manners. Disputes arise due to fragmented interpretation of whether harmonised standards achieve applicable legislation. In some cases, even the validity of applying harmonised requirements to fulfil market access is questioned.

This creates fragmented market access conditions among Member States. As a result, businesses cannot fully rely on applying harmonised rules in practice to grant market access. This impacts harmonised goods through questioning the validity of standards, including test procedures, to achieve applicable legislation. Non-harmonised parts of harmonised goods are also influenced by national rules that are subsequently applied.

This is an ever growing area as harmonised goods are increasingly incorporating non-harmonised elements.

We recommend that in these grey areas, the overarching principle of mutual recognition should take precedence through the Treaty on the Functioning of the European Union (Articles 34–36 TFEU). This would make for a better functioning of the single market for harmonised goods.

Overriding mutual recognition

The Regulation is unclear on when a national technical rule would override the mutual recognition principle. Recital 23 broadly lists justified reasons but remains ambiguous about how these are determined and justified. This is enabling the wide use of Regulation 764/2008.

For example, including ‘protection of consumers’ as a justified reason to deny mutual recognition is presenting the single market with a great challenge. Many national technical regulations are loosely based on this reasoning. A better definition is needed as disclaimers relating to ‘non-discrimination’ and ‘proportionality’ are not enough to ensure correct application in practice. Without such specification and due justification of the need, the door is open for special national requirements to the detriment of free movement.

The burden of proof

The burden of proof should lie with Member State authorities to justify the decision taken to deny mutual recognition on a product already being legally marketed in another Member State. However, experience suggests that it is often businesses that have to prove that their products should gain market access, such as demonstrating consumer safety.

Businesses should only have the burden of proof to demonstrate that their product is lawfully marketed in another Member State. However, Regulation 764/2008 is unclear on how businesses should actually document ‘lawful marketing’ in practice.

Demonstrating ‘lawful marketing’

Developing an EU-wide form to demonstrate lawful marketing may be of use towards strengthening the principle of mutual recognition. However, this should be used in practice on a voluntary basis and remain the property of the manufacturer. It should not be submitted or registered in a centralised database.

This self-declaration could refer to conformity with national or European Regulations and standards. It might also include a list of Member States where the product is already being sold. The self-declaration would only be used when a business wants to challenge a decision taken to deny mutual recognition. It could even be used as preliminary evidence for applying to use the QAP (as described in the Annexes below).

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¹ Page 31, *Evaluation of the Application of the mutual recognition principle in the field of goods*, European Commission (2015)

² Page 47, *Ibid*

³ Page 51, *Ibid*

Annex 1: The procedure in practice

The procedure would be carried out by a forum of Member States on a rolling basis (composed by representatives from product contact points). Product contact points already exist within each Member State and are therefore best positioned with the required knowledge to carry out such a procedure. This would also achieve the Commission's aim of strengthening these services through its Single Digital Gateway Initiative. The forum should meet quarterly and its administrative tasks should be prepared by a Secretariat (Commission service). An exchange of opinion might also take place through written procedure.

The procedure should last no more than six months and be triggered following Commission screening of an economic operators' written application. This could be based on whether the case is well-founded and if no similar cases have already been dealt with.

The written application could include: a standardised complaint (along the lines of the SOLVIT form) explaining the barriers and consequences (referring to Decisions/Regulations), a copy of the Decision (if any) taken by the Member State, and documented evidence of "lawful marketing". The landing page of the envisaged Single Digital Gateway Initiative could be the input for collecting these applications.

The non-binding opinion would be based on a peer assessment by the forum on the decision to restrict mutual recognition. A dialogue would then be entered into between the forum and the Member State in question. This would assess the justification for the national decision in light of mutual recognition and practices in place where the product is lawfully marketed.

Generic criteria for the application (and thus misapplication) of mutual recognition should be drawn up by the forum to aid discussions. This could be held accountable by the Commission and evolve overtime.

The Commission would report the opinion of the forum to the economic operator. It could then be drafted in an anonymous manner and published in a central public database to improve transparency with other economic operators and Member States. The Single Digital Gateway Initiative could facilitate this publication as an output. Little by little such cases will help create a better understanding of the principle and the basis for free movement, both among authorities and economic operators.

Annex 2: Stages of the procedure

