

UNICE POSITION PAPER
ON THE FUNCTIONING OF MUTUAL RECOGNITION
IN THE INTERNAL MARKET

Introductory comments

Mutual recognition is seen as one of the most important instruments for creating free movement of goods in the Single Market. During a large part of the 1990s, Council and Commission policy has been in favour of mutual recognition over harmonisation, the reason being that mutual recognition obviates the need for harmonisation of national legislation.

At the same time as the EU has relied heavily on mutual recognition to solve the remaining problems of free movement of goods between the Member States¹, the difficulty of applying the principle of mutual recognition has become increasingly obvious and a major problem for the proper functioning of the single market.

At the Cardiff Summit in June 1998, Member States recognised that the mutual recognition instrument must be part of a wider debate on future action with regard to the Single Market. The conclusions from this meeting state that “standardisation and a well-functioning principle of mutual recognition” must be part of future priorities. We understand that, as input to this process, the Commission (DGXV) is preparing a communication on, amongst other things, the mutual recognition instrument, for the Internal Market Council in June 1999.

In this context UNICE would like to submit its views on the role of mutual recognition, how it can be made more efficient, the global implications for industry of mutual recognition and harmonisation, where the most important conclusion is that a harmonised European market is in many cases a prerequisite for a multilateral dismantling of technical barriers to trade and for aligning regulations. A well-functioning principle of mutual recognition should be one of the top priorities for the new European Commission and Parliament.

The role of mutual recognition

Defining Mutual Recognition

The following types or levels of recognition can be distinguished:

- 1) recognition of *technical rules*, including standards and specifications;
- 2) recognition of conformity assessment *procedures* accepting each other's testing procedures, test report forms, accreditation systems as equivalent;

¹ According to the EEA Agreement, the EEA EFTA countries Norway, Iceland and Liechtenstein are subject to the same obligations and regulations in this matter. Accordingly, in this opinion, any reference to the EU, the Community, the Community Market and Member States is to be understood to mean the EEA, the EEA Market and the EEA Member States.

3) recognition of *results* of conformity assessment procedures which involves recognising test results, certificates of conformity, marks of conformity or inspections.

With articles 30 and 36 and the *Cassis de Dijon* principle as a base, mutual recognition has mainly been dealt with at regulatory level, i.e. recognition of the technical rules. In order for the internal market to function fully, it is however important for mutual recognition to function at all the above levels.

Problems with the functioning of mutual recognition

According to results from the business survey presented in the October 1998 Single Market Scoreboard, European firms identified a wide range of obstacles inhibiting their ability to do business in the Single Market. In defining the nature of these barriers, 41% related to differing national specifications/standards and 34% related to unusual testing, certification or approval procedures. In other words, companies still meet problems when marketing products outside their home markets, mainly due to prevailing drawbacks in the system of making these products encounter national requirements. A large part of these 41% could be expected to be tied to areas where there are no harmonised directives, or where the scope is limited for harmonised directives, and where mutual recognition is the guiding principle for assuring market access.

In December 1998, the Confederation of Danish Industries published a survey on the functioning of the Internal Market, based on the experiences of Danish exporters. The survey shows that one out of five companies still encounter technical barriers to trade on the internal market. 69% indicate different product requirements as the main problem and 58% also cite requirements for renewed testing and certification of their products. Again, these demands are primarily made within areas where harmonised standards are not yet available and where the principle of mutual recognition should be applied.

In many of these studies, it is interesting to note that the largest problems with mutual recognition can be found in sectors with strong safety and health concerns and differing regulatory objectives between Member States. The obstacles to implementing the principle are often found at conformity assessment level.

UNICE would like the Commission to take note of the following points when it addresses problems with mutual recognition. Many of these points have been highlighted by the Commission itself or by different Member States and regulatory agencies.

Problems/malfunctions with mutual recognition:

- Lack of confidence in each other's conformity assessment – i.e. accepting only national testing and certification bodies
- Lack of regulatory co-operation between government agencies in Member States on applying the principle
- Difficulty of applying the principle where there are differing national health concerns or differences in regulatory objectives - for example in areas such as foodstuffs, dietary supplements
- Difficulty of applying the principle in the environmental area where there are differing environmental concerns or regulatory objectives
- Lack of knowledge of the principle at regulatory level and level where it is to be applied
- Difficulty for government agencies to make the required assessments of proportionality and taking into account other Member States' rules; this requires a good regulatory knowledge of other Member States
- Difficulty of applying the principle and making the proper risk assessment in complex product areas requiring in-depth technical analysis
- Member States' ambitions to go ahead and set an example in consumer and environmental areas leads to differing requirements, overriding the mutual recognition principle
- There is an overlap and lack of efficiency in the notification/information procedures - some of them are not used or do not catch the trade barriers that they are designed to assess

- Inefficiencies in applying the principle include administrative delays and costs or red tape imposed on operators
- Where harmonised directives for different reasons do not work, e.g. in the construction equipment area, the principle of mutual recognition should be able to work as a base for giving products market access. The principle would in this case not be an alternative to harmonisation but could serve as a base and a guarantee for market access for products where harmonisation does not function properly. This is today not the case.

Views on how mutual recognition can be made more efficient

UNICE strongly supports the Commission's work to secure a more effective application of the mutual recognition principle. The problems listed above need to be addressed to make the principle more efficient.

Refining the notification system

We understand that the Commission is currently looking at refining notification systems in order to increase the efficiency of mutual recognition. Directive 98/34 (former 83/189) concerns notification of new national legislation and decision 3052/95 concerns ex-post notification when a Member State takes the product off the market or stops a product from being imported to or circulated on their territory. In this context, UNICE would like the Commission to make an assessment of why 3052/95 has been so poorly used and what can be done to develop this procedure to also include ex-post de-facto barriers in the standards and conformity assessment area; for instance, do testhouse requirements on retesting require notification?

UNICE has noticed with concern that the annual number of national notifications under 98/34 is about 700-800, which might lead to a re-fragmentation of the market. Even though such acts contain clauses on mutual recognition, the manufacturers have to comply with the technical requirements in each act. This should call for a process of new Community wide harmonisation initiatives and in addition call for a general discussion in the Community about the need to continue such extensive use of national technical legislation.

Promoting mutual recognition of certificates and tests

Standards and conformity assessment play a key role in both harmonised and non-harmonised sectors. UNICE suggests that strong focus be put on the conformity assessment procedure and the role played by testhouses, certifiers and standardisation bodies. It is evident that many of the trade barriers are to be found at this level. To this end we would like to underline the need for a stronger pan-European infrastructure tying the conformity assessment bodies to the mutual recognition principle – this could also include widening the current notification procedures obliging conformity assessment bodies to notify when duplicative tests are required. The role of product marking in this area needs to be looked at further.

Reinforcing exchanges of information and administrative co-operation

Exchanging information and administrative co-operation is closely tied to the notification procedures. One aspect of this is strengthening the regulatory co-operation between regulatory authorities of Member States. UNICE would like to see a progress report from the Commission on administrative co-operation as a follow up on the Council resolution from 1994.

In line with the Single Market Action Plan (SMAP) the Commission and Member States have established a framework for problem-solving through the designation of *co-ordination centres and the setting up of contact points for business and citizens*. These organs should also be able to play an important role in making mutual recognition work more efficiently. However, in its Overall Assessment of SMAP, presented in February this year, the Commission states “there is some way to go before the system established under the Action Plan becomes fully effective. Much will depend on the seriousness with which the Member States set about making economic operators aware of the possibilities for problem-solving.”

UNICE reiterates its comments made in its letter to Mr Monti dated 14 December 1998, above all stressing the need for a broad information campaign on how problem-solving structures function in different Member States, highlighting “best practice” examples.

Accordingly, UNICE would welcome a Commission survey among both the Member States’ co-ordination centres and contact points as well as “users”, i.e. economic operators, to find out whether these contact points and co-ordination centres are functioning efficiently to promote, amongst other things, mutual recognition.

UNICE is aware that the Single Market Observatory (SMO) under the Economic and Social Committee is conducting hearings with co-ordination centres, contact points and “users” in several Member States. To avoid “double work”, the Commission should consider co-operation with SMO on this matter.

One of the points made already above is Member States’ ambitions to go ahead and set an example in consumer and environmental areas leading to differing requirements, overriding the mutual recognition principle. UNICE calls for improved procedures to prevent fragmentation of the Single Market by the creation of new barriers through the increasing flow of new national regulations especially in the environmental and consumer areas. UNICE calls for greater co-ordination within the Commission and greater cooperation between Member States in ensuring that legislation, in harmonised as well as non-harmonised areas, is *sustainable*, not only from an environmental and consumer perspective but also taking into account industrial competitiveness.

Mutual Recognition and harmonisation in a Global Context.

In the Single Market Action Plan, in a final chapter dealing with the international dimension of the Single Market, the Commission states that the single market cannot be considered in isolation from its wider economic and political environment. “The creation of a large domestic market must allow the Union to play a stronger role in international fora”, and “particularly those responsible for the development of technical regulations and standards, and full exploitation of other frameworks, such as the Transatlantic Business Dialogue”.

The question of how the concept of mutual recognition fits into a global context, i.e. the new globalised structure of European industry, and relates to the Commissions external policy on technical barriers to trade (MRAs etc.) is in our view one of the most important questions to focus on in the process of revising mutual recognition. This global dimension has barely been touched upon in the current discussions on mutual recognition.

European industry is not only concerned with the inefficiencies of the functioning of mutual recognition but also finds that mutual recognition is not a sufficient base for taking further steps towards global dismantling of technical barriers to trade. A harmonised European market is in many cases a prerequisite for a transatlantic or multilateral dismantling of technical barriers to trade and for aligning regulations.

Moreover, the removal of technical barriers to trade in relation to third countries is more difficult in sectors where the free movement of goods depends on the principle of mutual recognition. Even in cases where the principle works within the internal market, the Commission will face difficulties in establishing credibility as a negotiator on behalf of Member States, when there is no influence at Community level over regulations at Member-State level.

Furthermore it is probably easier to assess the trade barriers in different Member States related to unusual testing, certification or approval procedures in the harmonised product areas.

The globalisation of European industry has greatly increased its need for global harmonisation/alignment of technical regulations, standards and conformity assessment schemes. European industry has expressed strong opinion on these matters in fora such as the Transatlantic Business Dialogue (TABD) and Industry Cooperation on Standards and Conformity Assessment, (ICSCA). Key messages which have been voiced by industry include "Approved once accepted everywhere" with "One Standard, One Test with Suppliers' Declaration of Conformity Accepted World-Wide". It is important to note that industry is not interested in lowering the levels for protection of environment, health and safety but rather focusing on areas where companies are forced to adapt to differing national product requirements with no value-added for protection of environment, health and safety.

Harmonisation as the preferred industry alternative

The bulk of harmonising directives in the area of goods are already in place in EU. Harmonisation has for many sectors proven to be a good basis for taking a step towards global alignment of standards and regulations. One important method for harmonisation used within the EU has been "new approach". The EU system of harmonising through "new approach" tied to mandated European standards is a good legal base for making the changes towards global alignment/harmonisation of regulations based on international standards.

The European system is flexible in many product areas by allowing a shift of reference from European to international standards. The Vienna (ISO-CEN) and Dresden Agreements (IEC-CENELEC) provide the assurance of linking European and international standards. Compared with the US system for example, the EU thus has legal ways of making its legislative system favour a certain standard, be it European, international or even a US-produced one.

Many of the EN standards tied to the new approach directives are however not ready, hampering harmonisation. Thus, EU harmonisation only leads to free movement of goods providing a base for global harmonisation if it is based on efficient, timely and relevant standardisation

The difficult task of re-engineering European and international standardisation bodies still lie ahead. Business (through channels like the Transatlantic Business Dialogue) is the initiator and main actor in this re-engineering process.

There are examples of sectors which have chosen other fora than the European standardisation bodies to harmonise their standards. The Automotive Industry, for example has a clear preference for harmonising directly in the global fora of UN/ECE under the "revised 58 Agreement" and the recently introduced "Agreement concerning the Establishment of Global Technical Regulations", the so called Global Agreement." The chemical sector works within the framework of the OECD for developing standards.

An important element in European harmonisation is, whenever possible from a safety, health and environment perspective, to base the directives on Manufacturer's Self-Declaration/Suppliers' Declaration of Conformity (SDoC) rather than third party certification.² SDoC is a main feature in many of the new approach directives. Using SDoC in conformity assessment allows industry to choose freely whether it wants to test its product with a third party and therefore reduces trade barriers related to unusual or otherwise divergent testing, certification or approval procedures.

The views presented above are in line with the EU goal of keeping legislation in the EU and its Member States to a minimum, making EU legislation more effective. Harmonisation in this case means going from more to less legislation, substituting different and disparate national rules for harmonised ones. This is especially important taking into account the enlargement process where "one set of rules is better than fifteen plus".

² This is module A of the Global Approach where it is called "Manufacturer's declaration".

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