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## **THE POSSIBLE REGULATION OF THE PRINCIPLE OF MUTUAL RECOGNITION FOR GOODS**

### **SUMMARY**

In today's Internal Market, *Mutual Recognition* is a vital tool for ensuring the free movement of goods. However, inadequate enforcement and widely diverging application of the principle prevent the full benefits from being achieved.

Given the Commission's intention to bring forward proposals to improve the working of the *Mutual Recognition* principle before the end of 2006, UNICE would like to suggest the following measures with a view to improving its functioning:

- A common market with a uniform sophisticated market surveillance system needs to be forged. This requires real Member State responsibility and a joining of forces to achieve a more balanced, more efficient and predictable market surveillance;
- The burden of proof lies with the public authorities if they decide to deny access to their market. Member States' must perform a proper risk assessment and when a decision is taken to restrict a product's access to a given market this decision must be fully and properly justified to all concerned;
- Provisions should be introduced outlining the supervisory authorities' role and how they should adhere to the principle of *Mutual Recognition* and conduct their work in a transparent and efficient manner;
- Member States should be required to conduct an Internal Market Compatibility Test on all national regulations in order to ensure that they do not conflict with either existing Community laws, or the principle of *Mutual Recognition*;
- Strong focus should be put on the conformity assessment procedure and the role played by test houses, certifiers and standardisation bodies. Conformity assessment bodies must be tied to the *Mutual Recognition* principle;
- Concrete and effective measures designed to increase knowledge of the principle of *Mutual Recognition* must be introduced;
- An effective and simple dispute-solving system needs to be established. The SOLVIT System should to be extended and publicised;
- National SOLVIT centres should be used as "special points of contact" in Member States;
- A regulation of the principle of *Mutual Recognition* must facilitate cross-border trade and not introduce new administrative burdens for companies.

We do not believe that establishing a website with a list of products which might fall under the *Mutual Recognition* principle would be an appropriate action. It is impossible to adequately cover all possible products on any one single website.

## **MUTUAL RECOGNITION IN THE CONTEXT OF THE INTERNAL MARKET**

UNICE sees the Internal Market as a cornerstone of Europe's prosperity and one of its greatest achievements. At the same time action is still needed as the Internal Market remains incomplete and is, to some extent, even threatened.

*Mutual Recognition* is a vital tool for ensuring the free movement of goods in the Internal Market. However inadequate enforcement and widely diverging application of the principle prevents the full benefits from being achieved.

UNICE has identified some key concepts for the renewed Internal Market strategy in general. Our approach during the Commission's 2006 review of the functioning follows these principles, which include:

- Completion of the Internal Market, because the integration of European markets has lost momentum;
- Enforcement of existing rules and a stronger focus on Member States' responsibilities, and;
- Efficiency, for example the limitation of harmonisation to essential requirements and an ambitious and broad programme of better regulation.

## **INTRODUCTORY REMARKS**

*Mutual Recognition* is one of the most important instruments for ensuring free movement of goods in the internal market. The principle that it enshrines is that a product which has been legally produced and marketed in one Member State can be freely distributed in another Internal Market Member State<sup>1</sup>.

However limits exist to the application of the principle of *Mutual Recognition*. In particular the derogation which allows Member States to restrict access to the market based on overriding reasons of common interest limits application and creates legal uncertainty.

The intention of *Mutual Recognition* is to make it easier for manufacturers to sell their goods without having to undergo harmonisation of national regulatory frameworks. A number of surveys conducted by the Commission, by several Member States and by stakeholders<sup>2</sup> have shown that businesses still encounter numerous barriers to the free movement of goods within the Internal Market.

Given this UNICE is encouraged by the Commission's current initiative<sup>3</sup> to consider concrete measures designed to make this principle better function in practice. On the whole UNICE agrees with the Commission's approach. In particular we endorse the Commission's attempt to establish the procedural requirements for denying *Mutual Recognition* and to organise administrative cooperation.

We believe that it is consistent with the 'better regulation' principle for the Commission to propose and adapt legislation whose purpose is to de-regulate and facilitate the free movement of goods. We believe that a more comprehensive approach to *Mutual*

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<sup>1</sup> I.e. in the European Economic Area which consists of the 25 (and soon to be 27) European Union Member States plus Norway, Iceland and Liechtenstein.

<sup>2</sup> See UNICE Free movement of goods working group publication: [It's the Internal Market, Stupid!](#).

<sup>3</sup> As outlined in 'Elements for a possible legislative approach to mutual recognition in the non-harmonised area of goods', SOGS N548, DG Enterprise & Industry - Unit C4, March 2006.

*Recognition* is required. This should result in a common Internal Market with a uniform sophisticated market surveillance system, taking in, for example the supervisory authorities' role and how they should adhere to the principle of *Mutual Recognition*, recognition of the results of conformity assessment procedures in different Member States' and facilitating an extension of the SOLVIT System to name but three possible additional actions.

## THE MAJOR PROBLEMS

The majority of barriers listed in the above-mentioned surveys on the functioning of the Internal Market relate to different national specifications, standards and requirements relating to new tests, certificates and approval procedures in areas where no harmonised laws or obligatory standards exist.

There are several reasons why the principle of *Mutual Recognition* does not function in accordance with its intentions. In the Commission discussion document<sup>4</sup> three reasons are identified in particular:

- lack of awareness of the principle as such both by authorities and by business operators;
- uncertainty with regard to content and interpretation of the principle, and;
- lack of efficient mechanisms to avoid disputes.

In addition to these, UNICE would like to point out that the above-mentioned surveys identify the *lack of application of the principle most often occurs in the procedures relating to conformity assessments* as also being a significant reason why *Mutual Recognition* does not function properly. UNICE stated in 1999 that this is an issue which hinders the proper functioning of the *Mutual Recognition* principle<sup>5</sup>. We restate this point. A lack of knowledge and trust in the procedures for conformity assessments in other Member States results in their tests and certificates being disregarded. This leads to new testing and issuing of new certificates which constitute barriers to the free movement of goods.

Manufacturers do not possess sufficient knowledge about the principle of *Mutual Recognition* and the rights under it. Enterprises looking for business opportunities in another Member State, in particular SMEs, very often take the technical rules of the Member State of destination for granted and adapt their products to meet local requirements, including possible retesting, or in the worst case, they refrain from entering that national market altogether. This is costly for business as well as for society. These are costs which can be avoided if the principle of *Mutual Recognition* is applied as intended.

Furthermore, it is a fact that many businesses that are familiar with the legal framework and the *Mutual Recognition* principle still choose to comply with the demands for new national certificates and tests instead of challenging these demands in order to avoid prolonged and costly formal complaints procedures that delay market access for their products.

The lack of follow-up with regard to requirements related to notification and information represents another problem area. This applies to both procedures in accordance with Directive 98/34/EC on notification of proposals for new national, technical regulations, and procedures in accordance with Decision 3052/95/EC which require Member States

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<sup>4</sup> *Ibid.*,

<sup>5</sup> UNICE position paper on the functioning of Mutual Recognition in the Internal Market, 18th June 1999.

to notify the Commission when adopting a decision to either withdraw or ban a product manufactured in another Member State from their national markets.

### **MARKET SURVEILLANCE**

Market surveillance, whilst being the prerogative of the Member States, is a procedure which is vital to ensuring that the overall aim of the Internal Market is advanced. The Internal Market requires a uniform, sophisticated market surveillance system which results in the best possible, effective and efficient level of surveillance in all Internal Market Member States.

This requires amongst other things, common equivalent, comprehensive provisions relating to control and sanctions, the allocation of sufficient resources by national authorities to ensure implementation and, most importantly, the correct and consistent implementation and enforcement of the agreed common framework.

Compulsory 3<sup>rd</sup> party certification does not compensate for the lack of real market surveillance.

Without an effective market surveillance system with efficient sanctions, there is little risk involved in marketing non-compliant (unsafe) products. Consequently, those manufacturers who obey the rules are placed at a competitive disadvantages to those who break the rules.

It is necessary that all Member States take responsibility for ensuring that market surveillance is conducted in a consistent and homogenous manner. The right approach, in our view, would be to join forces to achieve a better, more efficient and predictable market surveillance.

### **THE BURDEN OF PROOF LIES WITH THE AUTHORITIES**

Given that the *Mutual Recognition* principle applies in areas without common EU legislation, it is important that Member States have confidence in each other's safety level and market surveillance procedures.

The easiest thing for a civil servant to do is to enforce his/her own national product requirements. It must therefore be stressed and re-stressed in any EU regulation on *Mutual Recognition* that if public authorities decide to deny access to their market to a particular product, the burden of proof lies with them.

Member States must therefore perform a proper risk assessment to prove that it would be proportionate to take measures against the product in question and, if a case is shown to exist, must prove that the product (or the legal rules in question) is not considered safe enough.

Member States of destination, as is suggested in the Commission's SOGS N548 document, should be obliged to contact the economic operator both to obtain the necessary information to allow an informed judgement be made and to also inform the operator of any decision that is taken and why it was taken. When a decision is taken to restrict a product's access to a given market this decision must be fully and properly justified to all concerned.

The standard to judge from should be the product itself i.e. whether it poses a risk, not whether the requirements of the country of origin are similar to those of the host country.

### **REGULATORY APPROACH – A POSSIBLE SOLUTION**

The Commission's discussion document<sup>6</sup> suggests different measures for achieving a more effective understanding and application of the principle of *Mutual Recognition*. In UNICE's opinion, the document covers the problem areas adequately, with one significant exception. The document does not deal with the *Mutual Recognition* of government mandated test results and conformity assessment procedures, i.e. national tests and certificates<sup>7</sup>.

The majority of problems arise due to lack of application of the principle of *Mutual Recognition* in the government mandated conformity assessment procedures.

UNICE suggests that strong focus be put on the conformity assessment procedure and the role played by test houses, 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. Systematic retesting should not be allowed. The role of product marking in this area needs to be looked at further".

This Commission's discussion document also provides a list of areas<sup>8</sup> for which any possible regulation should not apply, among them market surveillance activities. In this context we would like to stress that market surveillance authorities play a key role in relation to allowing products market access. UNICE holds the opinion that any draft regulation must therefore also include provisions on the supervisory authorities' role and how they should adhere to the principle of *Mutual Recognition* and conduct their work in a transparent and efficient manner.

The same paragraph also states clearly that a possible regulation of the principle of *Mutual Recognition* should not apply to problems related to market access due to requirements stipulated by private actors. This is clear to the extent that we understand that this applies to private actors that are totally independent of public authorities.

Naturally, UNICE agrees that it is not possible to regulate by law the requirements which private customers stipulate with regard to quality and technical specifications. Nevertheless, UNICE is of the opinion that a regulation of the principle of *Mutual Recognition* must contain guidelines for cases where public authorities play a vital role for example by granting financial support to purchasing for example, by private hospitals, schools etc. or for special equipment (whether for reasons of energy efficiency, healthcare etc.) or where public authorities for example are financially involved in certification (e.g. eco-labelling). There are a number of examples of cases where public authorities have granted support for such purchases, provided that the products comply with national/technical regulations and have the required national certifications. Similar examples also exist in connection with *national* approval schemes (for instance within the construction sector).

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<sup>6</sup> 'Elements for a possible legislative approach to mutual recognition in the non-harmonised area of goods', SOGS N548, DG Enterprise & Industry - Unit C4, March 2006.

<sup>7</sup> *Ibid.*, page 4, footnote 4.

<sup>8</sup> *Ibid.*, paragraph 4.2, page 7.

Based on the above, and depending on the inclusion of conformity assessment procedures, tests and certifications, UNICE would support a regulation of the principle of *Mutual Recognition*, as outlined by the Commission in their SOGS N548 discussion document. UNICE also supports the draft outline in this document, and will in particular emphasise the importance of placing the burden of proof on the national authorities in the various Member States in cases where a product is denied access to a market.

A regulation in our view should also stipulate that Member State, apart from obeying Directive 98/34 be required to conduct an Internal Market Compatibility Test on all national regulations in order to ensure that they do not conflict with either existing Community laws, or the principle of *Mutual Recognition*.

### **ACCOMPANYING ACTIVITIES**

UNICE would also like to stress the necessity of flanking follow-up actions by means of concrete and effective measures designed to increase knowledge of the principle of *Mutual Recognition*. Information on the principle must be made available to all relevant supervisory authorities and surveillance bodies, i.e. local inspectors and notified bodies etc, as well as manufacturers.

An effective and simple dispute-solving system needs also to be established. Having to go through a formal complaints procedure and involving the court system are both costly and time-consuming with the result as previously mentioned that many of those enterprises who are familiar with the principle of *Mutual Recognition* more often than not refrain from challenging authorities that stipulate additional requirements. They tend to refrain from challenging because this usually means additional burdens and delayed marketing of the product.

UNICE believes that an extension of the SOLVIT System along with better information about this system might perhaps be a possible solution for creating a quick dispute resolution mechanism. National SOLVIT centres could perhaps also serve as a “special point of contact” as the Commission suggests in its paper<sup>9</sup>.

The Commission has also suggested that a website with a list of products which might fall under the *Mutual Recognition* principle would probably be necessary<sup>10</sup>. UNICE does not believe that such a “positive” list be made. To our mind, it seems practically impossible to adequately cover all possible products which might fall under the *Mutual Recognition* principle on one single website. The value of *Mutual Recognition* is that the principle covers all products that are not covered by harmonised legislation.

Finally, UNICE would like to stress the importance of ensuring that any regulation in this area is given a form and a content that serves to safeguard the overriding objective of creating a well-functioning Internal Market which can contribute to increased growth and employment throughout the entire European Economic Area. It is essential that such regulation facilitates cross-border trade and does not introduce new administrative burdens for companies.

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<sup>9</sup> *Ibid.*, paragraph 4.4, page

<sup>10</sup> *Ibid.*, paragraph 4.5, page