BUSINESSEUROPE

POSITION PAPER

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BUSINESSEUROPE views on the Commission's proposal… on mutual recognition[1]

EXECUTIVE SUMMARY

In today's Internal Market, the principle of mutual recognition is an essential tool for ensuring the free movement of goods. However, inadequate enforcement and widely diverging application of the principle have prevented its full benefits from being realised.

BUSINESSEUROPE supports the Commission's approach to resolving this impasse in its in the proposal (relating to the application of certain national technical rules to products lawfully marketed in another Member State).

This proposal is a positive step towards improving the working of the mutual recognition principle. However we do have a number of suggestions which we consider would provide some needed clarity and further improve text of the proposal:

- ☐ Reference to the basic right of the free movement of goods needs to be included in the main body of the regulation.

- ☐ Problems related to national requirements made on top of the requirements of so-called minimum-directives and extra requirements related to conformity assessment in the harmonised area needs to be addressed in the body of this regulation.

- ☐ Exclusion of articles of General Product Safety Directive from the scope of the regulation should be deleted. Instead wording should be included in Article 4 that provide for cases where dangerous products require rapid intervention, the 20 working days' standstill need not to be respected by the public authorities.

- ☐ Article 4 is essential to economic operators. It emphasises that the burden of proof rests on the side of the public authorities in cases where access to the market has been restricted. It needs to be clearly stated that the standard by which to judge whether or not a product should be denied access to the market should be the product itself.

- ☐ The proposed product contact points should also be open to public authorities and the system of contact points should be structured in a similar way to those which has been established in the Services Directive.

- ☐ Member States should report on the implementation of the regulation to the Commission once a year and, accordingly, the Commission should report on the use of the regulation once a year as part of the Internal Market Scoreboard.

- ☐ In our view establishing a list to identify products which would fall under the scope of the regulation is not an appropriate course of action. Such a list if it must be established must be in the form of indicative guidelines providing only examples.

[1] Proposal for a regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC. COM (2007) 36.

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GENERAL COMMENTS

The mutual recognition principle is one of the most important instruments for ensuring free movement of goods in the Internal Market[2]. The main belief that it enshrines is that a product which has been legally produced and marketed in one Internal Market Member State can be freely distributed in another Internal Market Member State.

Experience has shown that limits exist to the proper application of Mutual Recognition in the Internal Market. Inadequate enforcement and widely diverging application have prevented mutual recognition from having the intended effect on the free movement of goods in the Internal Market.

In particular the derogation which allows Member States to curb access to the market based on the grounds outlined in Article 30 of the Treaty or for overriding reasons of common interest restricts competitiveness and creates barriers to trade and legal uncertainty for economic operators.

The Commission's February proposal (relating to the application of certain national technical rules to products lawfully marketed in another Member State) aims to address these failings.

BUSINESSEUROPE supports the line taken by the Commission with this proposal. In particular we support the re-emphasising that the burden of proof rests with public authorities in cases where access to the market has been restricted. We believe that this proposal represents a positive step towards making the mutual recognition principle function as it was intended (i.e. by making it easier for economic operators to sell goods without having to undergo harmonisation of national regulatory frameworks). Therefore we believe that the scope of the regulation should be as wide as possible.

Saying that, we do have a number of recommendations which we believe should be applied to the proposal with a view to tying up a number of loose ends that we perceive in the text.

SPECIFIC COMMENTS

- A central concern is that reference to the basic principle of mutual recognition, i.e. *Articles 28* and *30* of the *Treaty*, has only been made in the recitals of the proposal. We believe that it should be possible (and indeed is necessary) to at least to indicate the **basic right of the free movement of goods** in the main body of the proposal (perhaps with a more clear reference to the Treaty and case law in the legal text). Our concern is that if this is not done then in our view the proposed regulation refers to mutual recognition in a way that highlights national requirements as a rule and not as an exemption.

- The explanatory memorandum and the annex to the proposal[3] refer to a **list of products** to be elaborated concerning the scope of the regulation. BUSINESSEUROPE has previously commented on this idea. We have previously stated that we do not believe that outlining a list of products which may be subject to the mutual recognition principle is an appropriate course of action for this regulation to

[2] The Internal Market consists of the 27 EU Member States plus the three EFTA European Economic Area countries Norway, Iceland and Liechtenstein.
[3] Characteristics and objectives, 5.1, page 21, Monitoring and Evaluation, 6.1, page 22

propose. It is impossible in whatever form is selected (be it website, official journals, etc.).

We believe that it is relevant to state again that such a list, if any, must only be in the form of indicative guidelines. In principle mutual recognition covers all products, tests etc. in the non-harmonised area as indicated in *Article 2*. A list structured along the lines as suggested by this proposal would limit the scope of mutual recognition given as already suggested the extreme difficulty in keeping any such list up-to-date and accurate.

□ We believe that this proposal requires further **clarification of the national requirements** (gold plating) made on top of the requirements of so-called minimum-directives which fall under the measures of this proposal and whether products in this area must conform to the extra national requirements. The same problem arises in the case of extra requirements related to conformity assessment in the harmonised area (such as requirements for new/extra testing or documentation beyond what is stated by the directive in question). Therefore conformity assessment bodies should be tied to mutual recognition principles and to this regulation.

□ **Article 2, point 2 (b)**, should be revised as we feel it may lead to the conclusion being drawn that other requirements may be permissible (e.g. for reasons of public order etc.) without a need to respect the procedures of this regulation. We would suggest a rewording along the following lines: *"any other requirement which is imposed on the product or type of product, and which affects the life cycle of the product after it has been placed on the market… etc."*

□ As with the other proposals that made up the overall Goods package in February we feel that there is a need for clarification regarding references to the **General Product Safety Directive** (GPSD, 2001/95/EC).

Recital 9 of the proposal goes into much more detail than *Article 3.2 (a)*. Compared to the wording of *Article 2* an impression is given that measures taken by public authorities under the GPSD (i.e. re dangerous products) are excluded from the proposed regulation. Given that the scope of the GPSD extends to all consumer products (in the broad definition of the phrase), this would result in the actual scope of the mutual recognition regulation being reduced to a relatively minor amount of areas.

While we unreservedly acknowledge the need for dangerous products to be taken of the market we do not believe that excluding products that also fall under the remit of the GPSD from the procedure laid down in this regulation in any way improves the situation for the consumer.

Against this background we suggest that instead of excluding some articles of the GPSD from the proposed regulation, the following sentences would be added in the article 4.1 as a third paragraph: “In cases of dangerous products (both consumer and non-consumer products or only consumer products as was in the original proposal?) which require rapid intervention, the authorities can take the needed measures without respecting the deadline of 20 working days for comments by the economic operator. In these cases, the authorities shall follow the procedures outlined in articles 4 and 5.”

- **Article 4** is important for economic operators. We believe that it is essential that the reference to the *burden of proof* resting firmly on the side of public authorities in the Commission's proposals is not watered down.

  We believe that it needs to be clearly stated in **Article 4** that public authorities have an obligation to examine the rules of the country of origin and more importantly the quality of the product to see if the product meets the objective of national rules i.e. that products are safe, even if they are manufactured according to other legislation. We firmly believe that the standard by which to judge whether or not a product should be denied access to a market should be the product itself i.e. whether it poses an unacceptable risk and not whether the requirements of the country of origin are similar to those of the host country..

  It is a very good idea to state in the text of the regulation that in cases where a product in question is lawfully marketed in any other Member State any decision to deny access should firstly explain why the mutual recognition principle is not considered appropriate and secondly explain the decision in terms of i) justification, ii) appropriateness and iii) proportionality.

  We also firmly believe that the standard to judge (whether or not a product should be denied access to a market) should be the product itself i.e. whether it poses an unacceptable risk and not whether the requirements

- It appears in the explanatory note that the proposed product **contact points** should also be open to public authorities. This suggestion is not however followed up in the legal text. The idea of having single contact points is good and should be supported. We would however suggest that the system be structured in a way similar to that which has been done in the services area, i.e. by including requirements of effective cross-border cooperation between authorities. This is even more important as it is stated that the administration of contact points can be delegated to private organisations. If this is to be the case then they too should participate in cross-border cooperation.

  We would suggest that besides just giving information on national technical rules and their application, the proposed contact points should also provide relevant information on the implementation of this regulation and on the operation of mutual recognition.

  We would also suggest introducing a specific time limit for the **application of the provisions regarding the product contact points**. We consider that the Member States should be given sufficient time for setting them up (e.g. six months after the entry into force of the regulation).

- Finally, with a view to ensuring meaningful **implementation of the measures in practice**, we would urge a refinement of *Article 10.1*. We suggest replacing 'upon its request' by 'once a year'. We also believe that the Commission should report on the use of this regulation once a year as part of the Internal Market Scoreboard and not after five years as suggested in the text (*Article 10.2*).