UNION EUROPEENNE DE L'ARTISANAT ET DES PETITES ET MOYENNES ENTREPRISES
EUROPÄISCHE UNION DES HANDWERKS UND DER KLEIN- UND MITTELBETRIEBE
EUROPEAN ASSOCIATON OF CRAFT, SMALL AND MEDIUM-SIZED ENTERPRISES
UNIONE EUROPEA DELL' ARTIGIANATO E DELLE PICCOLE E MEDIE IMPRESE

UEAPME's Position Paper on FREE MOVEMENT OF GOODS IN THE NON-HARMONISED AREA "MUTUAL RECOGNITION" Elements for a legislative approach

Introduction

Business organisations have received an explanatory note from the SME stakeholder meeting of 31st May 2006 and a background note on the free movement of goods in the non-harmonised area – "mutual recognition".

In the explanatory document the Commission explains the content of a possible future legislative instrument. Moreover, it sets out the options the Commission is considering in order to improve mutual recognition:

- **Option 1: Status quo**, i.e. to continue the current policy which basically consists of a case-by-case approach: voluntary self-removal of barriers by Member States, infringements and notifications;
- **Option 2: a non-regulatory approach**, i.e. through the creation of a specific website with a list of products to which mutual recognition applies, by emphasising simplification of national measures and by requiring high quality mutual recognition clauses, but without adopting European legislation;
- **Option 3: the regulatory approach**, i.e. the adoption of a regulation that organises mutual recognition in the non-harmonised field of products by setting out the procedural requirements for denying mutual recognition. In a nutshell, member states would remain obliged to allow the marketing of a product lawfully manufactured or marketed in another Member State. If, however, the recipient member state intended to refuse or to restrict the marketing of such a product, it should explain clearly for which technical or scientific reason. The regulation would oblige member states to establish one or several "special points of contact" in each Member State. Its main task would consist of providing information on technical rules on products to enterprises, as well as the contact details of the competent authorities.

Business organisations were asked to give their preference by 15th July 2006.

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UEAPME's position.

UEAPME warmly welcomes the early consultation of the SME stakeholders and also the quality of the detailed background information.

It seems well established that there are, almost three decades after the Cassis de Dijon ruling, quite a few cases where the principle of mutual recognition is not applied properly or not at all applied. Considering the large number of judgments from the ECJ, not to mention excellent literature, and the subsequent corrections introduced by the ECJ, notably via the Keck judgment, member states and their authorities ought to be able to handle these matters correctly. That not being always the case, a non-regulatory approach would be better than none, but the best solution would seem to be the use of a regulatory approach. Indeed, the regulatory approach ensures optimal practice of the principle of mutual recognition. In too many instances today SMEs still encounter real barriers to free trade through the use by member states of national norms or technical requirements as market protecting devices.

With regard to trade in goods a regulatory approach was adopted by the Community as early as 1969 when the Commission issued a directive (70/50) outlining a number of national measures held to be illegal under EC law. The directive dealt mainly with measures hindering import or discriminating against imported goods, but it also covered non-discriminatory measures and indicated some guidelines with regard to such measures. The directive probably helped authorities and enterprises to figure out how to behave. The directive, however, only dealt with the most obvious illegal national measures. Subsequently, of course, other types of measures have been found to be illegal by the ECJ. A new directive of similar nature might be issued and include new types of illegal measures and providing more precise guidance with regard to understanding and applying the principle of mutual recognition.

In would, however, be more difficult to indicate with some degree of precision, which types of national measures would come to be dealt with under the principle of mutual recognition. However some indications could be provided, and it would also be possible to indicate certain types of national measures, which could be upheld (e.g. for purposes of tax control).

Listing the kinds of products concerned could be quite difficult and could not be exhaustive, but, as mentioned in the explanatory note at 4.5., the creation of a website with a list of products, more or less broadly defined (possibly by reference to official products nomenclatures like the CPA or the CPS), could be helpful. Furthermore, the insertion of a reference to new EC legislation into draft national rules notified under Directive 98/34 would be useful.
In addition, the information procedure in the area of standards and technical rules and regulations according to the directive 98/34/EC could be strengthened: a detailed opinion of the Commission in the framework of this procedure could replace a letter of formal notice and thus result in a speeding up of the procedures.

It would be useful to set up a EU-wide network of contact points, as in the case of SOLVIT, and to establish a fast-track procedure to deal with individual cases. SOLVIT, for example, could also be strengthened by cutting one stage in the infringement procedure: in the case of an unsuccessful SOLVIT complaint, which is nevertheless justified according to the Commissions opinion, a formal request for information by the Commission would be superfluous.

Possibly, given the fact that the most dangerous products and product-related dangers are already subject to EU harmonisation and that we have the products safety directive, the procedure ought to institute a system whereby national authorities could not, unless the product safety directive would come into play, stop a product, but should allow it to be marketed, until, as the case may be, they have proven that the national measures are, in fact, necessary due to an overriding requirement of a general public importance which is proportional and necessary. That would, of course, amount to placing the burden of proof on the member state in question, but this would seem reasonable if, in fact, the product has been lawfully produced or marketed in another member state. It might be useful, and justified, to add a requirement that the importer should always be able, from the outset, to produce a certificate or other formal documentation showing that the product has been legally produced or marketed in another member state.

Although UEAPME is in favour of the regulatory approach, this does not mean that additional non–regulatory measures should be excluded. Parallel with the regulatory approach, priority should be given to motivate Member States to simplify national regulations while securing high quality standards. Awareness and legal certainty can, in addition, be increased by actively providing information about the "mutual recognition principle" and the products covered, e.g. by the creation of a specific website (as mentioned above), and better cooperation between the European Commission and the competent authorities. The efficiency of existing mechanisms to solve internal market problems could be improved by acceleration, cutting red tape, and increased transparency of the procedures that take place between the lodging of an internal market complaint and a judgment by the ECJ.

Brussels, 17 July 2006

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