EUROCHAMBRES

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Reaction to the Commission's Goods Package: Proposal for a Regulation on Mutual Recognition COM(2017)796 and Proposal for a Regulation on Compliance and Enforcement Legislation COM(2017)795

EUROCHAMBRES welcomes the two proposals the Commission presented on 19 December 2017 and supports the measures that would constitute a step forward for a better functioning of the single market.

EUROCHAMBRES has been active in providing input to policy makers in recent years on the single market, mapping out the needs of businesses and proposing policy solutions. At our October 2016 European Parliament of Enterprises[1] (EPE), 84% of the participating entrepreneurs voted NO to the question *"Is the EU Single Market sufficiently integrated, allowing your company to operate and compete freely?"* This underlined why it is crucial that existing rules such as mutual recognition are enforced in an appropriate way.

To evaluate why so many business owners and managers consider that the single market is under-delivering, EUROCHAMBRES carried out a survey in 2015. This study focussed on the existing obstacles and solutions in the single market. The study revealed that the main obstacles encountered by companies that want to offer services or products cross-border are heavily interlinked:

- Differing national rules and requirements on products and services;
- A lack of information about these rules and requirements;
- Complex administrative procedures to demonstrate compliance with them.

Businesses are realistic and do not expect differing rules and requirements within the single market to be removed overnight. Nonetheless, they do expect that national administrations respect the rules that govern the single market. This requires a good functioning of the mutual recognition principle and a stern compliance policy with regards to the respect of safety requirements imposed by the many harmonisation regulations in order to allow for a truly honest competition.

[1] The European Parliament of Enterprises is organised every 2 years by EUROCHAMBRES. The last edition took place in October 2014: http://www.parliament-of-enterprises.eu/

MAIN RECOMMENDATIONS IN A NUTSHELL

MUTUAL RECOGNITION:

- Make the **voluntary mutual recognition declaration a reality** and ensure that the application and acceptance of a properly filled mutual recognition declaration works in practice and not just in theory;
- Strengthen the role of the **SOLVIT network**;
- **Test reports/certificates** issued by conformity assessment bodies, provided by an economic operator should be a crucial part of any assessment by a competent authority, and not just taken account of;
- Conduct an evaluation of the **effectiveness of the PCPs**.
- Deploy effective **awareness-raising campaign** on the mutual recognition principle.

MARKET SURVEILLANCE:

- **Enhance trust** between the market authorities of the member states. For instance, make sure the authorities work together instead of contacting the businesses, i.e. in case of doubts.
- Focus on enforcement and design rules that stand the test of time, especially in view of the **emergence of e-commerce**;
- The proposal does not do enough to ensure surveillance and control of distance/online **sales from outside the EU directly to the EU consumer**, when many of these products would not be compliant with EU rules;
- Make sure that market competent authorities receive **sufficient funding** to perform the tasks they were designed for.

Specific comments on selected parts of the Mutual Recognition proposal

On the chosen policy option

EUROCHAMBRES agrees with the approach the Commission has taken to combine soft law (policy option 2) with comprehensive legislative changes (policy option 4).

The issues identified in the impact assessment are similar to the ones identified by the European Chambers of Commerce. There is a clear need to increase awareness and knowledge about mutual recognition, increasing legal certainty on the application of the principle as well as a need to improve administrative cooperation and trust among member states. There is not a specific aspect that would take precedence over another. They all matter in a mutually dependent way.

Still too many companies are not aware of the rights granted to them by the Internal Market rules. (New) tools such as the Single Digital Gateway should help to fill that void. We therefore encourage the Commission propose similar initiatives that promote awareness among small businesses who do not (yet) reap the benefits of the Single Market as much as large corporations do. In this regard, we believe that funds should be made available for projects in the next multiannual financial framework post-2020. Chambers have as a traditional task to inform companies about the regulatory framework in which they operate and conduct their business, and are therefore well placed to assist the Commission in this objective.

There is also a big issue with regards to legal certainty as companies can have their products denied in the export market of their choice. As the only solution to challenge an access denial is through the courts, many SMEs who don't have the financial means to appeal against decisions, are obliged to give up their export plans. There is therefore a clear need to both reduce the time that it takes to deliver a final approval regarding market access and a need for a reduction of the costs that the challenge of a (unrightfully) taken decision might impose.

Rules and procedures need to be designed with the aim to increase trust among national authorities. It is unacceptable that companies are the victims of a lack of compliance with internal market rules. More oversight powers for the European Commission could contribute to make member states refrain from applying national regulation to the detriment of mutual recognition. There is no objective reason why the Intra EU trade (as a percentage of domestic consumption) would be higher for harmonized goods than for non-harmonised goods. Mutual recognition is a right for companies and national and European authorities should make sure this right can be used.

Chapter II: Procedures concerning application of the mutual recognition principle in individual cases

Article 4: The introduction of a mutual recognition declaration

The introduction of a voluntary mutual recognition declaration will help companies to demonstrate that a product has been lawfully marketed in another member state. EUROCHAMBRES therefore supports this new tool for companies which we believe could reduce the incorrect application of the mutual recognition principle. Companies in the chamber network report that his would be extremely beneficial in reducing the administrative burden of demonstrating that a product is lawfully marketed in another MS. What is crucial is that if a declaration is submitted, nothing more aside from the evidence supporting that declaration is asked.

Article 4 § 5 stipulates that the declaration may be provided in both paper or electronic format. It is good to leave the choice to the economic operator themselves, although it could be envisaged to encourage businesses to submit their information electronically as this usually ensures better traceability.

Article 5: Assessment of the goods

It is stated that *"Where a competent authority of a Member State has doubts as regards goods which the economic operator claims are lawfully marketed in another Member State, the competent authority shall contact the relevant economic operator without delay and shall carry out an assessment of the goods."*

A bona fide entrepreneur has no interest into making false claims with regards to the goods it wishes to sell in a foreign market. It is efficient for the competent authority of the member state of destination to directly contact an economic operator. The economic operator should also be notified why the competent authority has doubts with regard to the claims made about certain goods. This contributes to the transparency of procedures and allows companies to know where they stand.

There should be safeguards ensuring that the request made by the competent authority are not designed to slow down the import of a category of products in their market. Following this logic, the competent authority could at least contact the home authority at least at the same time of the completion of the assessment under paragraph 1 of article 5.

In order to give a business a fair chance of exercising its rights to challenge an administrative decision, the language used by the member state which took the decision, should be as plain and clear as possible. A mere reference to the procedure under article 8 could not prove enough. More ideal would be the inclusion of a clear explanation of the said procedure and how they can engage a procedure. SMEs in particular would benefit from better awareness raising.

Under article 5 § 2 the proposal states that competent authorities shall take *"due account of the content of test reports (…) provided by any economic operator".* We deem this wording to be somewhat weak, as such documentation should provide in itself already all the necessary information to show that a goods is lawfully marketed.

Article 6: temporary suspension of market access

The temporary suspension of market access can lead to severe economic damage for an economic operator. Even a short suspension could completely deteriorate the position of a product in a domestic market segment. Such decisions should therefore not been taken lightly.

The exemptions provided under article 6 are justified, but supplementary safeguards could be introduced in order for the described situations not be abusively used.

Article 8: increased power for SOLVIT

We welcome the proposal to enhance the role of SOLVIT, as it could save companies a considerable amount of time and money. SOLVIT consists of an informal network seeking to find a solution for companies without litigation. However, SOLVIT does not replace recourse to law before the national courts. For the moment, the only possibility for a company to challenge a decision that prohibits a good on a market is to go to the local courts.

Article 8 § 3 specifies that the Commission *"may issue an opinion identifying concerns that should, in its view, be addressed…"* . As the Commission can play a role of impartial arbitrator in these cases, we believe that the Commission should always issue an opinion and recommendations when the Home Centre asks for its take on a particular case. In the case the Commission, for which reasons this may be, would decide not to take stance, it should at least explain why it cannot. The Commission's opinion, however, should not be binding for SOLVIT centres. It might be the case that a dispute is settled by amicable agreement before the Commission's opinion is issued.

Taking into account that it takes the SOLVIT Centres 10 weeks to process a case, the 3 months period proposed in article 8 § 2 will be too long. Adding up the two periods, companies would have to wait almost half a year. Therefore we propose to drastically shorten the period within which the Commission ought to give an opinion to 6 weeks maximum.

Companies should also be given the possibility to request the SOLVIT Home Centres to ask the Commission to give an opinion to assist in solving the case. In case the SOLVIT Centre does not wish to do so, it should provide a justification to the requesting economic operator.

Chapter III: Administrative cooperation, monitoring and communication

Article 9: Tasks of the Product Contact Points

The Product Contact Points were set up through Regulation 764/2008. A brief assessment shows that the way the member states have implemented their obligations varied relatively greatly. It would make sense to carry out a more detailed analysis of the performance of the PCPs as to whether they are adequately equipped to meet the (information) needs of economic operators. EUROCHAMBRES conducted a similar exercise for the Points of Single Contact in 2015 (insert link and reference here).

EUROCHAMBRES welcomes the introduction of an obligation form PCPs to provide, at the request of an economic operator, complementary information such as *"an electronic copy of or an electronic link to the national technical rules applicable to specific goods…"* (art 9 § 3).

Chapter IV: Financing

Article 12: Financing of activities in support of this Regulation

The lack of knowledge on mutual recognition and the rights attached to it, underline the need to start a wide reaching information campaign to tackle this issue. The Commission should therefore, at the time it is thinking about the allocation of the next EU budget, consider to reserve budget lines for this objective. Chambers of Commerce, with their extended network to companies who could benefit from the underused mutual recognition principle, can be of assistance in such an exercise. Education and training should be seen as complementary activities to awareness raising.

Specific comments on selected parts of the Market Surveillance proposal

As with the proposal on Mutual Recognition, we believe that the retained policy option 3 could help in improving the overall product safety for consumers.

Non-compliance with EU harmonisation legislation is still too important and too often passes on unnoticed. This has been confirmed several times through surveys conducted by the European Commission. In fact, almost all sectors in industrial products are being confronted with the scourge of counterfeit and non-compliant goods which put the safety of consumers and the environment at risk. In Germany for instance, there is a marked trend towards an increase of third country imports not complying with European safety standards. These products enter into the market via fulfillment centers. The Bundesnetzagentur shows this with alarming figures: more than 10,000 suspicious consignments were reported in 2016, i.e. twice as much as in 2013, of which 88% were not approved for the European market[2].

With the emergence of e-commerce, the challenges for market surveillance authorities have become bigger than ever, emphasizing the need to make this Regulation as future proof as possible. E-commerce has made the spectrum of choice bigger than ever as well, but this should not be to the detriment of consumer safety or to the ambition of creating a fair level playing field whereby law-abiding businesses lose market shares to non-compliant third country manufacturers.

Chapter II: Compliance information

Article 4 : Person responsible for compliance information

In principle we support the idea of introducing the obligation for companies to appoint a natural or legal person established in the EU in charge for performing a number of tasks such as providing the necessary documents which would prove compliance with product legislation.

Certain questions remain however with regards to the liability incurred by the person in charge as well as to the procedures to change that person. There are also questions on the level of expertise this particular person should have. In short, the lack of information on these issues could lead to legal uncertainty.

We believe that article 4 § 4 will be difficult to implement as, if the manufacturer is located in a third country which is often the case, neither the importer nor the authority can enforce the request to identify the person responsible. In addition, the alignment package 2014 (alignment of several directives – New Legislative Framework) has justified strengthened needs for contact information by the argument that a website is not reliable or permanent. From a business perspective this double indication is an additional burden without added value.

While hard to monitor, the proposal does not go far enough to ensure surveillance and control of distance/online sales from outside the EU directly to the EU consumer, when many of these products would not be compliant with EU rules.

Chapter III: Assistance to and cooperation with economic operators

Article 6 : Information on economic operators

The product contact points should indeed play an increased role as described in article 6. In order to enable the PCPs to honour their obligations, they should be equipped with sufficient economic resources as well

[2] More figures from the Agency can be found here: https://www.bundesnetzagentur.de/DE/Sachgebiete/Telekommunikation/Verbraucher/WeitereThemen/Marktueberwachung/marktueberwachung-node.html

as technical expertise. Without the latter, it will become wishful thinking that the PSCs will be able to properly execute the tasks expected from them.

Article 7: Compliance partnership arrangements

While the objective of the partnership arrangements, namely to provide an economic operator with advice and guidance, is laudable, it is not clear how this would work in practice. The fact as well that the authority is given the right to ask for fees makes it less likely that SMEs will be very much incentivized to conclude such arrangements. In addition, practice shows that market surveillance authorities are barely enough funded to perform this type of tasks which are in many cases already performed by Chambers of Commerce. The Single Digital Gateway, proposed by the Commission under the Compliance Package in May 2017, should fulfil the role the partnership arrangements have presumably been designed for.

Article 8: Memoranda of understanding with stakeholders

As businesses or (sectorial) organisations representing them usually have an excellent overview of what is happening in a certain market, the introduction of the proposed memoranda could contribute to results that the market surveillance authorities might not achieve on their own.

Article 9: Publication of voluntary measures

The online portal mentioned in article 9 should be accessible through the Single Digital Gateway in order for it to receive maximum visibility and to beef up the Single Digital Gateway itself.

Chapter IV: Organisation and general principles of market surveillance

No specific comments.

Chapter V: Market surveillance powers and measures

Article 14 § 3 lists all powers that can be conferred to market surveillance authorities, including for instance *"the power to perform system audits of economic operators' organisations, including audits of procedures to ensure compliance with the Regulation".*

As stated in article 14 § 5, it is crucial that the powers conferred upon the market authorities are performed in a proportionate way. In particular, the right to perform audits should be handled with care.

Article 20: Union testing facilities

EUROCHAMBRES takes note of the Commission initiative to create Union testing facilities and the specific tasks they would be used for. These facilities could be of value for the Union Product Compliance Network to be set up by this Regulation as well. However, due attention should be paid to the risk that the Union testing facilities will not outcompete existing testing facilities. If that were to be the case choice would be reduced.

Article 21: Financing and recovery of costs by market surveillance authorities

It is unsettling to witness that the financial resources put at the disposition of the market surveillance authorities have been systematically cut in the past 10 years. This trend is inversely proportional with the new challenges that have surfaced with the emergence of e-commerce.

Therefore the proposal to allow market authorities to charge fees to non-compliant operators is more than justified. Nevertheless, as there are no signs that Member States are planning to beef up the expenditure

to market surveillance, it could be envisaged to confer to market authorities to impose penalties in the form of fines to non-compliant companies.

Chapter VIII: Coordinated enforcement and international cooperation

The creation of a Union Product Compliance Network within the Commission in order to enhance coordination among market surveillance authorities is interesting. It will have to be ensured that the added value it offers is proportionate to its creation and not in the least the efforts put in participating in it.

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