MINUTES OF THE CONFERENCE “SINGLE MARKET FOR PRODUCTS: FRESH IDEAS TO UNLEASH THE FULL POTENTIAL”
BRUSSELS, FRIDAY 17 JUNE 2016
CCAB, ROOM AB-0A

1. WELCOME AND OPENING OF THE CONFERENCE

The Chairman, Hans Ingels, opened the conference and welcomed the participants. A list of the participating national authorities, businesses, associations and other interested parties is attached (Annex 1).

2. KEYNOTE ADDRESS

Deputy Director-General Antti Peltomäki gave a keynote address setting the scene for the conference and workshops to follow. He stated that the Single Market is one of the greatest achievements of European integration accounting for over 500 million consumers and 21 million SMEs. The Commission's main goal is to guarantee the free movement of goods which ensure a high level of safety for consumers and protection of the environment. Therefore, compliance with common rules as well as more and better mutual recognition for lawfully marketed goods and effective enforcement are needed. However, Single Market rules are often not known or not implemented, or they are undermined by other barriers. The non-application or inadequate application of mutual recognition makes it harder for companies to access markets in other Member States and in addition to that, the increasing presence of non-compliant products on the market puts law-abiding operators at a disadvantage while also endangering consumers. He concluded by saying that typical barriers stem from a general lack of awareness and trust among parties and despite the high degree of market integration in the area of goods, this leads to lost opportunities for the economy at large. A common effort and determination to change the way things are done through better regulation are therefore necessary to achieve improvements. Finally, he invited all participants to participate actively in this unique event, by exchanging views and clearing the way for new and fresh ideas in an informal setting.
3. PRACTICAL INFORMATION

Hans Ingels outlined the structure of the conference. The first part would focus on presentations by various speakers discussing the topics of the conference from different angles followed by discussion. The second part would be dedicated to the different workshops, two on mutual recognition and four on compliance and enforcement.

4. WHAT'S WRONG WITH MUTUAL RECOGNITION?

Knut Sauerbier, responsible for product compliance and IP at BRITA, gave the first presentation (Annex 2). He discussed the topic of whether mutual recognition functions well for businesses providing examples from the area of drinking water treatment. He focused on the fact that EU law presently is limited and that all other regulatory competence to secure drinking water safety is still with the national authorities. This creates a lot of problems for businesses, since national regulations and certification requirements vary widely among Member States. He mentioned, however, that some Member States are already discussing with each other to overcome the problem and cut certification costs for products and substantially shorten the time need to bring new products to market. He then described why mutual recognition does not work in practice and what needs to be done. In his view, we should continue to harmonise product and testing regulations and standards, but also improve regulation to create new flexible instruments, oblige Member States to educate and guide their administrations and introduce a standardised form for traders to certify product conformity. All these actions would eliminate cost penalties for manufactures and traders while also permitting lower consumer prices and more investment in research and development. In addition, manufacturers and traders would feel more legal certainty and better, safer and more efficient, innovative products based on new technologies would be available sooner.

The second presentation was made by Camilla Hjermind, Head of Division of International Relations of the Danish Business Authority of the Ministry of Business and Growth. Her presentation (Annex 3) centred on the practical difficulties encountered while applying the principle of mutual recognition. According to her, the creation of the Single Market for products stands as one of the greatest achievements in EU history and the principle of mutual recognition is a fundamental cornerstone of the Single Market for products, safeguarding European businesses’ access to EU markets and protecting them against unjustified and unnecessary technical barriers. Nevertheless, in reality, businesses still face many barriers on the Single Market for products, and a great deal of legal uncertainty due to unclear national product requirements and differences in rules on, among others, testing methods and use of prior authorisation procedures. At the same time, Member State authorities find it difficult to apply the rules and procedures laid down in the Regulation on Mutual Recognition. In principle, derogations are only allowed under strict conditions, but the reasons for imposing a national product requirement are not always well justified. When a big company is faced with requirements of additional testing of their products, they either choose to retest their product, or challenge the national rules in the Member State of destination, if the market is important to them. Big companies often have the capacity to carry out such a challenge of a Member State decision against mutual
recognition – which would usually be by means of court proceedings. Small companies, however, do not always have the same capacity, so instead they would just have to adapt to the additional requirements in another Member State, if they want to enter that market. The Mutual Recognition Regulation should be fit for purpose. As it stands, the scope of the Regulation needs to be upgraded to ensure that the users better understand, and thereby apply, the rules and procedures. Furthermore, the reasons for justification of derogations could be clearer. Currently, the Regulation touches upon a selection of legitimate reasons, but they are very broad: For example “the protection of consumers”. The majority of the reasons derive from case law of the European Court of Justice. Thus, Member State authorities need help with their assessment of “proportionality”. In addition, there could be a greater level of transparency among the decisions that Member State authorities adopt contrary to the principle of mutual recognition. A better structure for the Member State notifications could be set up, so at least the Commission and the other Member States have access to follow the flow of decisions, and the justification of derogations. At the same time, businesses could have better access to challenge decisions adopted against the free movement of their goods. Businesses should not be left with one single solution – year-long court proceedings. They should be able to bring quicker clarity to obstacles that they meet cross-border, and reduce the burdensome costs that may follow from national requirements for, for instance, additional testing – which for small businesses can be potentially ruinous. Finally, Member State authorities could benefit from more sharing of best practice examples, to better assess and discuss difficulties and grey areas in connection with applying and living up to the Regulation. She concluded by stating that both the Commission and Member States should be ambitious and determined to reach an outcome that will, in fact, facilitate a better application and enforcement of the principle of mutual recognition of goods.

Jacques Pelkmans, Senior Fellow at CEPS in Brussels and visiting Professor at the College of Europe, spoke third. His presentation (Annex 4) focused on a different perspective of the mutual recognition principle. He referred to mutual recognition as the EU's greatest innovation but also he outlined the main problems faced. Member States have difficulties to achieve horizontal and hierarchical discipline as well as proper understanding at all times. Major progress has been achieved and also the regulation clarifies what a company and a Member State should do, but this is not always followed. The speaker mentioned that a proper application of mutual recognition requires a two-pronged strategy. On one hand a range of actions typical for the single market like highly specific measures are required. On the other hand, Member States have to assume their full ownership of their single market. Mutual recognition can only be accomplished as intended, if Member States regard the single market as their "joint asset", act as good custodians and agile asset managers. The evaluation of the mutual recognition in 2015 was useful for identifying product sectors and specific practices, where problems linger but also for enumerating the interpretation and uncertainty problems in particularly for small businesses. Some measures, such as the use of IMI in order to have swift and productive communication between competent authorities seem obvious. For businesses also, tighter deadlines, under stricter obligations are essential. Joint Member States' ownership will pre-empt many mutual recognition problems and reduce uncertainty over time. Single market centres in each Member State should incorporate a range of functions on the single market and enforcement. He concluded that a well-functioning single
market is critical for our prosperity but it requires explicit and visible Member State ownership by bringing the EU interest of our joint asset into the national domain.

Following the three presentations, the floor was given to the participants at the conference to discuss the topics.

The **Head of the Portuguese Institute for Quality** mentioned that we need to be clear and work towards a single market, which is an asset belonging to us all. We need to have the vision of the European market and businesses are important for this. Therefore, clear, transparent and shared rules are needed in order to be able to protect consumers at European level. He noted that without trust, the single market will disappear or even die. As to consumers, he concluded that they can make choices but they cannot create technical or legal barriers to products.

The **Head of the Italian Market Surveillance Authority** referred to the fact that Member States' sensitivities in some sectors can lead to obstacles to free circulation of products. A total and exhaustive list of all products circulating in the European Union is not easy to achieve. The right approach is to improve knowledge and provide information more widely, e.g. through a public European site, which could contain campaigns, rules for marketing, advertisements, etc. National Product Contact Points have rich databases, which however are not shared with the other Member States and a business needs to know what is needed to access a market from the administrative but also technical point of view.

**BusinessEurope's** representative stated that businesses suffer from exhaustion. They want to keep to the rules and be able to enforce their rights. Mutual recognition will work only if governance is improved, but also trust and transparency are enabled in a cooperative environment between authorities and businesses.

The representative of the **French Retail Federation** outlined that the multiplication of rules will lead to the multiplication of costs. Businesses need lawful measures, since in our times with the digital single market and despite geo-blocking, the purchase of any product – even if it's forbidden – can be achieved somewhere. She added that large companies are responsible towards their consumers and that there is a need for common interpretation of what is already in place. We need a framework with clear definitions so that all actors interpret the same rules the same way across Europe.

The expert from the **Confederation of Danish Industry** spoke about the TRIS database, where Member States must notify all their national rules. However, Member States do not have the resources to examine and object. Furthermore, there is a lack of transparency. She concluded by hoping that the new initiative will have clear specifications, since for businesses every time there is a national regulation, that means that there is no access to this specific market.

The representative of the **European Cutlery and Cookware manufacturers** (FEC) mentioned that mutual recognition does not work with individual customers with different needs and habits.

The representative of the **Communication Network Consulting AG** (CNC) confirmed that it is difficult to understand mutual recognition and its limits.
Mutual recognition requires also that in a particular context national rules need to be applied.

The expert from the Ministry of Economics of the Republic of Latvia stated that when mutual recognition works well, we do not even see it, since we see only the problems. The main issues stem from the lack of knowledge and information about the rules and their application.

Jacques Pelkmans added that the spirit of the regulation is to protect businesses right to exploit the single market. We should bring some refinements to the regulation, not many, but for sure better governance. Member States must talk with each other in a structured and regular form. Furthermore, the enforcement of the deadlines should be addressed in order to protect businesses.

The representative of EuroCommerce mentioned that there are many companies who comply with the rules and the procedures. Action however should be taken by removing existing national regulations which sometimes are also a breach of the European law.

The expert from FIGAWA (Companies in the Gas and Water sector) noted that mutual recognition should be on a special level in some sectors, as for example water where the safety of consumers is at stake. In Europe, there are different approaches to regulate these products and one should think of harmonising them.

5. MORE COMPLIANCE AND BETTER ENFORCEMENT IN THE SINGLE MARKET FOR PRODUCTS

The topic of more compliance and better enforcement in the Single Market for products was addressed by another set of presentations.

First, Pierre Selva, Director for Conformity Assessment and market Surveillance at Schneider Electric, discussed experiences from the business side (Annex 5). He pointed to the presence of several new brands unknown to most professionals, unsafe and unfair products in the field of energy management and automation. He mentioned that standards without conformity assessment are only good ideas and that conformity assessment without market surveillance is only a means to lose money. He then made a SWOT analysis of CE marking and noted that the professionals are willing to get involved actively and start working today to develop a public – private partnership to improve market surveillance. Concrete initiatives exist in some Member States by which industry associations help authorities to spot non-compliant products. However a legal framework is needed to address certain issues (e.g. antitrust, right of the parties, conflict of interests). According to the speaker, market surveillance controls are insufficient and the time needed by authorities made them irrelevant for many rogue operators, while stakeholders competencies and resources are under used. Furthermore, some tools – like the reliance of economic operators' postal address vs web address – are not adapted to today's circumstances. Therefore, he made three proposals to address the problem: 1) set up a public-private partnership to help fight non-compliant and hazardous products; 2) make a fundamental change in approach to market surveillance by chasing the rogue operators and helping the virtuous operators through training, education and simplification of rules; 3) use tools of the 21st century to improve efficiency of market surveillance activities.
Second, Michael Cassar, Head of the Market Surveillance Directorate within Malta's Competition and Consumer Affairs Authority, presented common issues national authorities are faced with in their daily work (Annex 6). Concerning the economic operators, he mentioned that some of them try to outsmart market surveillance authorities and continue selling dangerous products and providing misleading information, claiming unfair treatment by the authorities if action is taken against their products and ignorance of the law even after several years in the business. As to the testing, he remarked that there is a lack of screening equipment available to the authorities and inadequate funding for testing to ensure compliance of complex products. Furthermore, there is a lack of accredited labs within easy reach, which hinders surveillance operations. Sometimes consumers also misuse products and expect the authorities to take action, or they do not heed warnings and advice from the authorities and keep on using products even after a recall has been communicated and they often buy online without caring whether the product is safe or not. In addition to all that, ambiguous legislation leads to difficulty during enforcement and court cases, which in any case take much too long. Standards are also ambiguous and leave room for interpretation and lots of discussions with operators, while some standards also take too long to be drawn up or revised, resulting in new standard not reflecting the state of the art. He concluded by mentioning what has to be done to improve the situation. The message should get across clearly to all the economic operators and not only to the ones who want to listen. Each market surveillance officer around Europe should have the basic screening tools to carry out his work and a network of labs around Europe should be set up. The consumers should be informed about the risk of non-compliant products as the importation for personal use is increasing and results in possible unsafe European homes. Finally legislation and standards should respond promptly and clearly to new risks.

Third, Christopher Hodges, Professor of Justice Systems and Fellow of Wolfson College of Oxford University, gave a presentation from an academic angle (Annex 7). He discussed the importance of ethical business regulation to ensure more compliance in the Single Market for products. According to him, the main task is to get people to conform to the rules, and for regulators and enforcers to support compliance, performance, improvement, growth and innovation. The ethical regulation is an open commitment to the internal belief system, which is very effective. People will not break rules where they perceive that the risk of being identified is high. Social embarrassment and reputation are important. There are many reasons why people will do the wrong thing, so we have to take into account that people will obey the rules where the rule is made and applied fairly by also corresponding to the individual's internal moral values. Therefore, the design of the system should distinguish between those operators who are intrinsically legal or illegal. High penalties have limited effect on future behaviour, but people expect proportionate response to unfair behaviour. In addition, the operation of a compliance / regulation / supervision system has to be continuous with the objective to incentivise entities to adopt best practice in systems and culture. Modern regulatory systems can only work if they involve collaboration between public, management, staff, supplier, customer, investor, etc. The regulatory system will be most effective in influencing the behaviour of individuals where it supports ethical and fair behaviour. Regulators should adopt unimpeachable, consistent and transparent ethical practice. Businesses should be capable of demonstrating constant and satisfactory evidence of their commitment to fair and ethical behaviour that will support the trust of regulators and enforcers,
as well as of employees, customers, suppliers and other stakeholders. A blame culture will inhibit learning and an ethical culture, so businesses and regulators should encourage and support an essentially open collaborative ‘no blame’ culture, save where wrongdoing is intentionally or clearly unethical. On the contrary, regulatory systems need to be based on collaboration if they are to support an ethical regime, and to maximise performance, compliance, and innovation, since where people break rules or behave immorally, people expect to see a proportionate response.

Following these presentations, the floor was given to the participants for an open discussion.

The Director General of Toy Industries of Europe (TIE) stated that it is very important to focus on rogue traders, especially in the toy sector. Reputable companies suffer and 95% of the unsafe products come from unknown companies and not accidentally. Resources are a real problem for authorities; therefore smart market surveillance is needed. Some Member States focus on the reputation of the companies based on history data. The real need is a close collaboration between authorities and companies based on mutual trust.

The representative of BIC mentioned that the lighter market has similar concerns. Attention should be focused on the port of entry. He expressed the industry's willingness to work with authorities and even to fund activities if there is a way.

The representative of the French Retail Federation confirmed that there is a problem where no technical documentation exists but also recalled that this information cannot be expected from distributors. Refusing products at the borders if they are not compliant does not solve the problem since they are then re-imported via other routes. Authorities should build a relationship based on trust with companies and share more information.

The expert from the Austrian Federal Economic Chamber noted that the implementation of directives differs in Member States and that we should examine the need to create regulations instead of directives.

The Chair of the Pressure Equipment AdCo welcomed the public-private partnership idea and proposed that industry joins also the working groups in some sectors. As to the cooperation between Member States, he supported the view that Member States should send experts to the Administrative Cooperation Groups and meetings so that participation is enhanced and the work is promoted.

The Head of the Italian Market Surveillance Authority accepted that the complaints coming from industry are right but explained that it is difficult to carry out market surveillance in a pro-active way when there are many potential elements to check: only in area of construction, there about 450 000 products and there are about 30 product harmonisation directives. He added that there is need for a financial contribution from businesses, but he mentioned that the attempt to introduce a tax on non-environment friendly products in Italy was negatively received. He admitted that businesses often send reports but these reports lack evidence, which creates a further burden for authorities. He also mentioned the risk of conflict of interest as industry tends to focus investigation on products imported from third countries.
The representative of EuroCommerce mentioned that they support better coordination and cooperation between authorities and industry. She also added that the impact assessment should map and share best practices in fighting fraud in some Member States. The lack of resources should be addressed by enhancing cooperation with industry, exchanging information and gaining consumers' confidence. Rogue traders are outside the legal framework, so the best approach is to tighten enforcement.

Michael Cassar replied that the authority often asks for documentation and does not receive it or receives the wrong documentation. Concerning the participation in working groups and meetings he mentioned that, due to limited resources, sometimes they invite people to have these meetings in their own country.

Christopher Hodges concluded that there is a need to arrange collaboration between authorities and good companies. He mentioned the example of the UK primary authority scheme as a good, ethically-based model. He recalled that people are likely to be deterred if they believe that the likelihood of being identified is high. Therefore, there is an absolute need to work together, use data and collaborate to make people believe that it is not worth putting non-compliant products in the market.

6. WORKSHOPS

6.1. Workshop 1: Proving and assessing lawful marketing of products in other Member States: a more practical approach

The first workshop was held on the topic of proving and assessing the lawful marketing of products in another Member State. The participants were to discuss a more practical approach on this issue.

The workshop gathered around 30 participants and had a balanced representation of national authorities, businesses and associations. It was moderated by Tania Pauwels who is the Project and IT Business Manager as well as Quality Coordinator of the Federal Public Service Economy and also the Belgian Product Contact Point.

First, the participants discussed issues with mutual recognition in general and in particular highlighted the fragmented legal landscapes across Europe in many product sectors which lead to market access difficulties.

Following that, several business representatives described the often-faced problem of demonstrating lawful marketing in another Member State to the competent authority. Several participants proposed to introduce a type of European "free sale certificate" which would be issued by the local authority and which could make it easier to prove lawful marketing of a product.

Next, representatives of national authorities voiced their concerns as to not knowing if and how national inspectors apply mutual recognition and whether there is sufficient awareness of this principle. Despite the fact that mutual recognition clauses are inserted into national laws (often due to the need for Commission approval), the application of these clauses is often absent.
Following that, the question was discussed of what the stakeholders "need" in order to identify whether or not a product has been lawfully marketed. All participants agreed that it is necessary to know the manufacturer of the product and to have all the contact details available. Furthermore, representatives of national authorities expressed the view that it would make the assessment easier if the (national) standards or legislation the product is complying with were known to them. Another element could be the place where the product was put on the market (first market and possibly an updated list of current markets), a clear identification of the product and the test method used and the test results. It was proposed that such information could be elements of a sort of "declaration of conformity". The particularities of the declaration of conformity could be established by way of surveying stakeholders to come up with a template. One issue that remained uncertain is the language such a declaration should be made in. While many participants advocated that it should be done in English, others were in favour of having a template available in all EU languages to ease the burden on businesses.

It was also proposed to enhance communication and transparency among national authorities on the application of mutual recognition. For that, some of the existing tools, such as SOLVIT or IMI, could be used or adapted accordingly. In addition, greater awareness of already existing tools and what they can offer, was needed.

The three potential solutions identified by the participants were the following:

A. General awareness-raising on the principle of mutual recognition, especially amongst national authorities as well as individual inspectors could be a potential solution to improve the working of the mutual recognition principle on the level of assessment and proving of lawful marketing.

B. Enhancing communication and providing for more transparency as regards the functioning of the mutual recognition principle was seen as a potential solution. This should preferably be done by using and/or adapting existing tools such as SOLVIT or IMI.

C. A declaration of conformity could be another potential solution to provide more legal certainty and easier proof of lawful marketing of products. The participants proposed to have a harmonised template of such a declaration. The elements of such a template should be established by surveying interested parties and establishing what the actual 'needs' are.

Following the counting of the votes, option A proved to have the strongest support with 249 points, followed by option C (206 points) and option B (205 points). Annex 8 presents a chart with the total points per workshop and option.

6.2. Workshop 2: How to make mutual recognition a practical tool for businesses

The second workshop discussed how to make mutual recognition a practical tool for businesses.
The workshop involved **46 stakeholders**. Participation was **well balanced** among national authorities, businesses, associations and Commission services. The workshop was moderated by Annette Dragsdahl, Senior Adviser at the Confederation of Danish Industry.

Participants in the workshop began by highlighting **the main challenges of mutual recognition**.

Overall, businesses complain about the increasing number of national rules adopted every year, making very difficult to find the applicable requirements for a specific product. Many times, businesses are not aware of the principle of mutual recognition; mutual recognition clauses are drafted in very general terms, and often refer to the concept of a required "same level of protection" which is quite confusing and difficult to comply with. More information on national rules and how mutual recognition works in practice is needed. Education and training are welcomed, but considered insufficient to address the current problems.

Moreover, the situation of innovative products and new technologies remains problematic as regards mutual recognition. Most of the time, these products are not regulated and/or not well-known, and encounter **de facto** denial of market access. More flexibility in this area is needed.

Additionally, it is still very demanding for businesses to challenge national decisions denying market access. It is considered as time-consuming, costly and counterproductive. The lack of substantive justification when denying market access was also mentioned as an obstacle; very often, the justification briefly mentions the applicable national rule and the general interest it is intended to protect, without mentioning why, in a particular case, its application is needed, justified and proportionate.

As regards the **potential solutions** which might address these problems, these could be summarised as follows:

A. The aim of the mutual recognition principle, i.e. to grant market access to products lawfully marketed in another Member State, should be clearly stated and enhanced, in order to give more legal certainty to businesses who wish to use it and to increase awareness. European (non-harmonised) standards should also give market access.

B. Administrative cooperation among national authorities responsible for mutual recognition should be enhanced, by putting in place a strong Product Contact Points network. Such network would provide more transparency on the application of mutual recognition, prevent systematic market access denial and increase trust among authorities. An additional solution was highlighted by stakeholders, namely awareness-raising campaigns, which were considered as essential for an optimal application of the mutual recognition principle.

C. A speedy and transparent appeal mechanism is needed, when market access based on mutual recognition is denied. Businesses need a direct and rapid access to remedies. It was considered useful to have national authorities and the Commission involved in the appeal mechanism. SOLVIT as such is not seen as a useful tool; it lacks credibility and is not able to provide timely and positive solutions.
Following the counting of the votes, option B proved to have the strongest support with 244 points, followed by option C (215 points) and option A (191 points). Annex 8 presents a chart with the total points per workshop and option.

6.3. **Workshop 3: How could SMEs be helped to comply with EU product rules?**

The workshop was held with 9 participants who had registered to discuss ways by which SMEs could be helped to comply with EU product rules. There were representatives from small business federations, consulting companies and agencies. The discussion was moderated by Ms Catherine Van Reeth from the Toy Industries of Europe. To ensure a fruitful discussion with outcomes that could benefit SMEs in complying with the product rules, the first focus was on the challenges that face these companies (including micro-enterprises).

The most prevalent challenge SMEs face according to the participants is obtaining the information about product legislation and the accompanying technical standards and administrative requirements. The (perceived) complexity of product requirements exacerbates this. There are a lot of gaps between information supply and demand, there is source asymmetry and information should be better tailored.

SMEs often lack the resources to find the information and demonstration of product compliance could be highly simplified. Participants felt that even though the vast majority of SMEs are willing to comply, there is a lack of awareness within many SMEs because they are busy conducting their day to day business. They do not integrate the issues surrounding compliance in their business ventures most of the time; let alone actively apply the relevant rules.

In distilling three options that could help SMEs comply with product rules, focus was put strongly on simplifying the rules where possible, on accessibility and accuracy of information, on better tailored guidance and on 'Thinking Small First':

A. To actively involve SMEs more in raising their awareness of product rules, they could register themselves with national federations or associations so that follow-up is easier. This could be combined with active assistance and the sharing of knowledge of product requirements through created networks and guidance by national PCPs. It should always be ensured that information is translated and available in the required language.

B. Product legislation based on EU harmonised rules, the accompanying technical standards and administrative requirements should be simplified where possible. PCPs could for example cluster to form a European Group of Contact Points so as to better exchange information and a Single EU portal could be created facilitating the provision of relevant information on legislation to businesses and ensuring accuracy.

C. With resources under strain and time always a factor, the demonstration of product compliance could be facilitated through digitalisation. From certain procedural aspects to providing information online (e-guidance) on how to demonstrate compliance and further supporting information where required.
Following the counting of the votes, option B proved to have the strongest support with 246 points, followed by option A (218 points) and option C (184 points). Annex 8 presents a chart with the total points per workshop and option.

6.4. Workshop 4: How could market surveillance across borders be strengthened?

Workshop 4 was attended by almost 50 participants and was moderated by Anna Stattin, Senior Advisor at the Department of Legal Affairs and the Internal Market of the Swedish Board for Accreditation and Conformity Assessment. The discussion centred around three basic questions: How can cross-border market surveillance be made more effective? What can be done to facilitate cooperation? How can national restrictive measures be better applied throughout the internal market?

The moderator recalled the tools currently available to market surveillance authorities for cross border cooperation: horizontal and sectoral expert groups (e.g. Administrative Cooperation groups or ADCOs), exchange of information via Rapex, ICSMS, national plans and the safeguard procedure, mutual assistance obligations, the possibility of joint actions and numerous guidelines. She asked what could be improved or added. Participants stressed the importance of making better use of existing tools, in particular ICSMS, and the implementation of the mutual assistance and cross-border cooperation model developed in the IMP-MSG expert group.

However, the debate also showed the need for additional legal provisions to strengthen cooperation between authorities. Experience shows, for instance, that an authority may have an incentive not to take appropriate action against a business located on its national territory. The recent examples of legal provisions for cross-border coordination in the Consumer Protection Cooperation proposal (COM(2016) 283 final) and the already adopted General Data Protection Regulation (2016/679) were mentioned. Joint investigations coordinated by one authority, as well as the possibility of designating an authority to take enforcement measures on behalf of other competent authorities are envisaged in these acts. This could be particularly useful in the area of e-commerce. The creation of a forum as envisaged in the Market Surveillance Regulation proposal (COM(2013)75 final) was also welcomed as well as additional technical and administrative support from the Commission.

Building trust among authorities is important. It was stressed that market surveillance authorities should rely on each other’s assessments, test reports and decisions so that restrictive measures taken in one country are taken in all other countries, without the need to initiate from scratch new national investigations. The need to introduce a legal provision to make this possible should be considered.

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1 This is available via: http://ec.europa.eu/DocsRoom/documents/17108/attachments/1/translations/en/renditions/native
Furthermore, **interoperability between businesses’ product identification systems** was mentioned as a way to help authorities to make better use of the information on non-compliant products notified by other authorities in ICSMS.

The importance of having a good **dialogue between authorities and economic operators** was also stressed. Some business representatives felt that there was not sufficient cooperation; the possibility of public-private partnerships, acceptance of test reports from economic operators and the creation of a stakeholders’ forum were mentioned as tools to further enhance cooperation. It was also mentioned that cooperation with businesses would facilitate funding of market surveillance.

The following three options where mentioned in the plenary:

A. Implementing a voluntary model for mutual assistance among MSAs and additional legal provisions.

B. Reliance on other MSAs’ assessment and decisions, including the acceptance of test reports.

C. Better use of existing tools e.g. ADCOs, ICSMS, safeguard procedure.

Following the counting of the votes, **option B** proved to have the strongest support with 244 points, followed by option C (210 points) and option A (209 points). Annex 8 presents a chart with the total points per workshop and option.

6.5. **Workshop 5: How should controls on imports from third countries be improved?**

Workshop number 5 dealt with the issue of controls on imports from third countries and how these should be improved.

The workshop brought together 10 stakeholders and was moderated by **Katarzyna Bednarz**, Head of Unit, the Polish Office of Competition and Consumer Protection.

The moderator explained briefly the general context for further discussion. In essence, the market for non-food consumer products has changed and products manufactured in third countries are widely available on the EU market. Market surveillance has traditionally focused on products already on the market which is now actively supported by controls before products are released for free circulation.

With regard to the question how market surveillance on products imported from third countries (including online sales) can be made more effective, discussion focused on the **close cooperation** not only between the market surveillance and customs authorities in a Member State but also on cooperation between authorities in different Member States. As concerns the first form of cooperation, the main problem identified was that the authorities do not always "speak the same language": concepts used and the legal base for actions are different. One solution could be that both authorities dedicate specific personnel for cooperation. Furthermore, international cooperation between authorities and those in third countries was emphasised.
In order to enhance **identification of unsafe or non-compliant products**, one suggestion was that a **declaration of conformity** should be part of the documentation submitted within customs clearance. Furthermore, it was suggested that importers' obligations and the role of customs regulated by Regulation 765/2008 should be strengthened. In view of the scale of imports entering the EU, the basic question for controls at borders is how to identify high-risk and facilitate low-risk consignments. **Joint projects and active exchange of information** on the on-going projects between the authorities was emphasised. This could also be enhanced by a financial contribution from the EU. As concerns e-commerce, many goods coming from third countries are private imports outside the scope of harmonising legislation, and thus the authorities do not have a clear legal base for addressing those products.

As regards the **potential solutions** for addressing these problems, these could be summarised as follows:

A. As only fractions of incoming consignments are inspected, the work of customs has to be based on profiling and risk-based targeting. Project planning should be based on widely disseminated information.

B. In order to effectively protect public interests, active cooperation and exchange of information between the market surveillance and customs authorities should be the norm.

C. The effectiveness of market surveillance could be amplified by networking; not only within the national authorities but also between Member States and internationally.

Following the counting of the votes, **option B** proved to have the strongest support with 263 points, followed by option A (247 points) and option C (149 points). Annex 8 presents a chart with the total points per workshop and option.

### Workshop 6: What more could we do to deter rogue traders?

Concerning **deterrence**, participants highlighted that one should not only focus on rogue operators, but also on the **port of entry**, in order to cope with the problem at the source. Deterrence should be inspired by the competition rules; the size of fines is not as effective as the correct application of fines. Furthermore, participants pointed out that businesses care a lot for their reputation and thus should be taken into account. Some of them mentioned also the national economic barriers between Member States, which lead to the lack of efficient sharing of information. A participant argued that reputational damage does not work vis-à-vis rogue traders and that actions should focus on issues that affect them, like for example access-to-market sanction.

The main problem that came out of the discussion was the **lack of trust** between Member States, which often leads to time-consuming and costly procedures. All of the participants agreed that trust should exist between Member States concerning testing, reports, etc. The absence of data-flow between customs and market surveillance authorities even within the same Member State creates the view that no market surveillance system exists in the European Union.

As regards the **potential options** to address these problems, these could be summarised as follows:
A. Focusing on ports of entry.
B. Flow and recognition of data.
C. Limiting access to the market for rogue traders.

Following the counting of the votes, **option A** proved to have the strongest support with 250 points, followed by option B (220 points) and option C (192 points). Annex 8 presents a chart with the total points per workshop and option.

### 7. CONCLUSIONS AND NEXT STEPS

The Chairman, **Hans Ingels**, thanked the moderators and all workshop participants for the lively discussions and the new ideas, which the Commission will examine carefully and use in the Impact Assessments. He then gave details of the two public consultations: one on mutual recognition (open from 01/06/2016 till 30/09/2016) and the other on enforcement and compliance (open from 01/07/2016 till 31/10/2016). He asked the participants to publicise these consultations, whose results will be discussed towards the end of the year. He concluded by stating that the Commission needs stakeholders' experience to collect information in order to come up with the best options for the new initiative, since the single market is made by them and for them.

**Enclosures:**

- **Annex 1:** Participation list
- **Annex 2:** Is mutual recognition functioning well for businesses? Knut Sauerbier
- **Annex 3:** Applying mutual recognition: not an easy task. Camilla Hjermind
- **Annex 4:** Mutual recognition: a different perspective. Jacques Pelkmans
- **Annex 5:** Market surveillance in the EU: experiences from a business. Pierre Selva
- **Annex 6:** A day in the life of a Market Surveillance Officer. Michael Cassar
- **Annex 7:** More compliance in the single market for products: ethical business regulation. Christopher Hodges
- **Annex 8:** Overview of votes per workshop and option
### Participation list

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<tr>
<th>National Authority / Business / Business Organisation / Other stakeholders</th>
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Is mutual recognition functioning well for businesses?

Knut Sauerbier
BRITA, Germany
Structure of the Presentation

1. ICPCDW introduction
2. Regulatory Framework in the EU
3. Certification requirements in the EU
4. Mutual Recognition as presently applied
5. The Cost Penalty
6. Why does Mutual Recognition not work?
7. What needs to be done and why?
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EUROPEAN INDUSTRY CONSORTIUM FOR PRODUCTS IN CONTACT WITH DRINKING WATER

• Informal grouping of 24 European trade associations - formed in 2015

• EU manufacturers of materials and products in contact with water for human consumption (pipes, pumps, valves, fittings, water treatment equipment, vending and catering, domestic appliances)

• This industry sector provides employment for more than 100,000 people and generates annual sales values of far more than 40 billion €.
None of the products is fully regulated at EU level

EU law presently limited to two areas:


All other regulatory competence to secure drinking water safety is still with the national governments

- including the definition of „healthy“ in the Drinking Water Directive
- and concerning requirements for Construction Products, as long as no adequate European Standards are adopted
However, national regulations and certification requirements vary widely among MSs and involve e.g.:

- Disclosure of the material formulation
- Compliance with positive lists
- Testing:
  - Odour, flavour, colour, turbidity
  - Enhancement of microbial growth
  - General hygiene: TOC (Total Organic Carbon)
  - Chlorine demand
  - Specific determinants
  - Unsuspected substances (GCMS)
  - Cytotoxicity
Certification requirements in the EU

- More than 15 MSs identified with specific requirements

France (ACS) - The Netherlands (ATA) – Belgium (BELGAQUA) - Sweden (SWEDCERT) - UK WRAS (CPP) - Germany (DVGW) – Switzerland (SVGW) - Poland (PZH) - Austria (OVGW) – Hungary (NIEH) – Norway (NIPH) - Italy (MoH) - Denmark ETA (GDV) - Slovenia NIPH (RS) – Portugal (INSA) – Spain (MSC) - Finland (VTT)
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<td>EN 1420-1 EN 1622 TON ≤ 2 in the 3rd (KW) and ≤ 4 in the 7th (WW) testing period</td>
<td>EN 1420-1 EN 1622 TON &lt; 16 in the 3rd (KW + WW) testing period</td>
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<td>BS 6920-2.2 2. Dilution of the 7th extract was tasteless</td>
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<tr>
<td>TOC</td>
<td>EN 12873 1+2 ≤ 0.5 mg/l in the 3rd (KW) and 7th (WW) testing period</td>
<td>EN 12873-1+2 ≤ 0.5 mg/l in the 3rd (KW) and 5th (WW) testing period</td>
<td>EN 12873-1+2 2 mg/l after 30 days in the 10th (KW) and 22nd (WW) testing period</td>
<td>AFNOR XP 41 250-1 ≤ 1 µg/l for documented and quantified substance</td>
<td>-</td>
</tr>
<tr>
<td>Formula check</td>
<td>Yes - Positive list</td>
<td>Yes - Positive list</td>
<td>Yes - Positive list</td>
<td>Yes - Positive list</td>
<td>Partially</td>
</tr>
<tr>
<td>Migration</td>
<td>EN 12873-1+2 Guide values for contaminants found in materials, previously DWPLL = 1/20 SML</td>
<td>EN 12873 1+2 DWPLL = 1/20 SML</td>
<td>EN 12873-1+2 MTC values DWPLL = 1/20 SML</td>
<td>GC-MS Profile ≤ 1 µg/l for documented and quantified substance</td>
<td>BS 6920-4 Draft list of substances &gt; 1 µg/l, does not apply to installations in buildings)</td>
</tr>
<tr>
<td>Germ growth</td>
<td>DVGW W 270 ≤ 0.1 ml/800 cm²</td>
<td>DVGW W 270 ≤ 0.1 ml/800 cm²</td>
<td>Biomass Production Potential (BBP) &lt; 1000 pg ATP/cm²</td>
<td>-</td>
<td>Mean Dissolved Oxygen Difference; MDOD &lt; 2.39 mg/l</td>
</tr>
</tbody>
</table>

Source: SVGW, ZW 102/1 (July 2015), Regulation, Materials in contact with drinking water - hygienic assessment of plastics (unauthorized english translation by figawa e.V.)
The situation is further deteriorating as new or amended national regulations are introduced, e.g.:

- Danish GDV 2013
- Spanish UNE 149101 (RD 742/2013)
- Current Portuguese notification: 2015/234/P
- Slovenia 2016/150/SI
Mutual recognition?
Certification requirements in the EU

• Administrative practice in nearly all MSs is to require (national) certifications, according to national laws
• Acceptance of and understanding for requests for “mutual recognition” are the exception:
  – Discussions ongoing in the 4 Member States Group of France, Germany, Netherlands and UK (with Portugal as a 5th member)
  – Discussions between the Scandinavian countries within the MaiD project
  – Up to now the impact of all these efforts is trivial in comparison to the wide differences between the countries with the most complex national requirements
• 2016: Studies on the impact of differing requirements for the certification of products for drinking water applications set by MSs in implementing the Drinking Water Directive

• The companies targeted in the studies are those involved in production and trade of products that are used for drinking water distribution from source to tap
Total costs in 4 MS in Million

- **UK**: 13.9 Million
- **France**: 9.3 Million
- **Germany**: 16.9 Million
- **Netherlands**: 17.5 Million

- **Total**
- **Hygienic**
- **Mechanical Tests**
- **Audit**

Source: © figawa e.V.
Mutual recognition, only between these 4 countries, would:

- cut certification costs for ICPCDW products used in drinking water distribution systems by 55 - 60%, i.e. well over € 30 Million

- and would substantially shorten the times needed for bringing new products to market
No „Fortress EU“ but many „national fortresses“ in the EU
Why does “Mutual Recognition” not work (1) ?

• It still seems natural for national administrations to enforce national law also in intra-EU-trade, irrespective of whether this is lawful or justified

• The fact that Mutual Recognition overrules national law is not sufficiently understood

• National law is often not clear enough on the priority of Mutual Recognition over national law

• National administrations are not adequately trained and induced to apply Mutual Recognition
Why does “Mutual Recognition” not work (2)?

- Divergent definitions of the scope of application of EU- and national law and the absence of mutual recognition of them lead to confusion (e.g. the scope of application of EU Drinking Water Law)

- Businesses cannot afford long lasting and costly legal conflicts with national administrations – existing remedial procedures are not helpful enough
What needs to be done …

• Continue with EU-harmonisation of product and testing regulations and standards

• Make “mutual recognition” work:
  – Stricter control that new national laws do not create trade barriers, even if a MR-clause is inserted (render application of Directive (EU) 2015/1535 more effective)
  
  – Improve the Mutual Recognition Regulation (EC) No 764/2008 to
    • create new flexible instruments for the EU to intervene speedily when MR is not correctly applied by a MS
    • oblige MSs to educate and guide their administrations to effectively apply simple and harmonised MR procedures
    • introduce a standardised form for traders to certify the conformity of a product with the requirements in the export country (self-certification only, or endorsed by a third party)
Correct application of Mutual Recognition would:

- eliminate cost penalties for EU manufacturers and traders and permit lower consumer prices and more investment in R&D,
- provide EU manufacturers and traders with legal certainty and permit more efficient planning,
- speed up the availability everywhere in the EU of better, safer and more efficient innovative products based on new technologies.
Thank you for your attention
What’s wrong with mutual recognition?

Applying Mutual Recognition: not an easy task
The principle of mutual recognition aims to ensure the free movement of goods on the EU Single Market.

The Mutual Recognition Regulation sets forward the necessary rules and procedures for enforcing the principle.
European businesses still face many barriers...
A recent case study of a group of Danish companies shows:

- A vast majority simply accept to comply with additional national requirements.

- The cost of awaiting court proceedings about their right to mutual recognition is too high.

- And companies don’t report problems anywhere!
Gardening gloves:

- Difference in the interpretation of EU-legislation concerning the marking of “protective gloves”.

- The company was denied access to sell the gloves in another Member State due to the company’s choice of CE-marking.

- The company was required to change the CE-marking to a national marking regime before the gloves could be sold on that market.

- The gloves were withdrawn from that market.
High-tech solution for pest control:

- Difference in the interpretation of grounds of animal protection across the Member States

- The company was denied access to several Member States due to requirements of additional testing of the product, i.a. to test the level of animal protection.

- The extra tests and legal uncertainty imposed additional and burdensome costs upon the company.
When it comes to national authorities...
So, how do we go from here?
The Regulation should be fit for purpose
- Clarified scope
- Clarified reasons for justifications
- Greater transparency across the Single Market
- Structuring notifications of decisions
- Better access to challenge decisions
Better sharing of best practice examples
Sharing of assessments of scope, etc.
Clarifying grey areas, conflicting rules, etc.
Thank you for your attention!

Camilla Hjermind
Head of Division, International Relations
Danish Business Authority
The Danish Ministry of Business and Growth
Mutual Recognition
a two-pronged strategy

Jacques Pelkmans
CEPS & College of Europe

(revised)
EU’s best idea ever

• Mutual recognition hailed worldwide as
• EU’s greatest innovation
• in combining cross-border liberalisation (free movement) and common regulation
• but avoiding centralised regulation where MS SHEIC objectives are equivalent anyway
• also pursuing ‘better regulation’, i.e. objectives matter (market failures!), instruments less
EU’s best idea ever (2)

- The praise is greatest from those who know the least about how it works and what it takes
- Academic economists have naive dreams about MR
- Trade experts (WTO, ASEAN, etc.) speak about M.R.
- but are baffled once they grasp what ‘free movement’ [a right of access] really means
- M.S. have difficulties b/c it is a very tall order to achieve horizontal and hierarchical discipline as well as proper understanding at all times, ‘on the ground’
- Not speaking about the wide spectrum of sensitivities about market failures
- food/beer cases (first decade) are easy; building products or products in contact with drinking water are not
Glass more than half-full

• major progress has been achieved
• Since the 1980s, but even last two decades
• Evaluation report by Technopolis (2015): there is surely no massive problem anymore
• 98/34 mechanism (imperfect as it is) has helped a lot
• MR regulation 2008/764 reverses burden-of-proof and clarifies what firm and MS can do
• Even if, apparently, this is not always followed
Towards a two-pronged strategy

• Proper application of M.R. requires a two-pronged strategy

• 1. a range of actions typical for the single market, highly specific measures, some administrative, some technical, some harmonisation, infringement procedure and possibly anti-trust!

• collection of required actions makes strategy difficult – regular MR coordination inside DG Grow + inter-services?

• 2. highlight root of the problem: how Member States ‘cherish’ THEIR single market; MS have to assume full ‘ownership’ of THEIR single market
Two-pronged strategy (2)

• These two planks are very different indeed
• And require actions at different levels

• There will be little (although some) ‘Brussels’ and a lot of ‘Member States’ in this approach
• M.R. can only be accomplished as intended, if [and only if] Member States regard the single market as their “joint asset”, act as good custodians and as agile asset managers
First plank: many specific measures

• Evaluation Mutual Recognition (2015) useful for identifying product sectors and specific practices, where problems linger; occasionally a specific MS with a peculiar issue enumerating the (often already known) interpretation and uncertainty problems, in particular for SMEs

• Despite the “deja vu”, it is instructive reading
First plank: specific measures (2)

• The report makes clear (without saying so) that not all MR problems are MR problems
• Some are obvious **harmonisation** needs; MR can never solve that (enriched food; saga of construction products)
• Alas, harmonisation might be tough (so CJEU first?)
• But can we – in earnest – not harmonise ‘ship classification’ when IMO has full harmonisation of 49 types of marine equipment !?!
• Can fertilisers really not be solved? And is consumer protection in nursery/childcare products not too idiosyncratic? Can **risk assessments** demonstrate this?
First plank: specific measures (3)

• Some are **administrative**, detailed aspects of better ‘governance’ of the MR regime
• ‘what documentation’ for ‘lawfully marketed’ is understandable (sometimes)
• but why can’t this be solved by a **common** [not **national**] **guide** ?
• please, Member States **assume ownership** here; if one follows the guide, all MS ought to declare jointly that this creates a “presumption of ‘lawfully marketed’ ”; MS can only refuse if COM agrees
First plank: specific measures (4)

• Other admin measures such as the use of IMI [why must that take so long?] in order to have swift and productive communication between competent MS authorities seem only too obvious to outsiders.

• Tighter deadlines, under stricter obligations, again, are essential for SMEs; MR is there FOR THEM; MR is NOT a favour granted to them, at the speed a MS can afford.

• SPCs need an obligatory EU-wide minimum standard of quality-of-service and for accessibility.

• Awareness campaigns, yes, but connect to not-too-legalistic guides/encyclopedia on MR on all websites.
Second plank: MS’ ownership of S.M.

- responsibilities of COM & CJEU for the Single Market are well-defined and broadly work
- But the (highly ambitious and ‘golden’) asset that the Single Market is for all EU cannot and should not be the result of ‘Brussels’ (or Lux.)
- ‘smart enforcement’ is very much a MS thing
- Stronger, all MS to act as good custodians and stimulators of a wealth-creating single market
2nd plank: MS’ ownership of S.M. (2)

• This is the spirit of the EP High Level Panel for a Single Market Strategy (mid Jan. 2016)
• begins to be better understood
• but not anywhere near to the extent that a well-functioning single market requires
• MS ownership weak in services but the single goods market (esp. MR and market surveillance) also needs more MS ownership in \textbf{ALL} MS
Please, do not believe that we need more ‘leadership’ from PMs in the Eur Council.

Texts about what the EU should undertake (see overview in Annex V EP High Level report).

Needed for MR and related single market issues is what the Member States themselves ought to do and do better.

‘Joint MS ownership’ will pre-empt many MR problems, reduce uncertainty over time and has the potential of being solution-oriented for SMEs; greater effectiveness!

MS can do this well; knowledge in ministries, SOLVIT, SPCs, special agencies, is formidable; needs to be bundled inside each MS and exploited together for THEIR single market.
2nd plank: MS’ ownership of SM (4)

• Focus on two powerful governance issues
• 1. the single market is ‘owned’ by every MS, best expressed in a **Single Market Centre**
• 2. national laws, having a possible effect on the S.M. (like, for goods, under 94/38), should be subject to an **impact assessment**, based (among other things) on a ‘single market test’ (method of which jointly agreed by all MS, on a proposal of the COM) and this test in each I.A. must be available in english for **consultation** for all EU business (and others)
• in this way the EU interest will be properly embedded in all Member States : a single market begins at home
2nd plank: MS’ ownership of SM (5)

- Single Market Centres are a far more suitable form of governance of what MS have to do for the single market
- Mild advocacy in the MR evaluation, based on expertise
- SMCs should incorporate a range of functions on SM and enforcement; and be part of an EU network of SMCs
- Contact points under 2008/764 (MR), under 2006/123 (services dir.) and other ones
- SOLVIT teams; all reporting under 98/34, plus “MR desk”
- Organise consultations on single market test in every I.A.
- Annual report + website on single market issues/news
- Awareness campaigns on MR
- Links on market surveillance, national and cross-border
Final word

- Perfection is the enemy of the good
- no such thing as a ‘perfect single market’
- But a **well-functioning single market** is critical for our prosperity  [as even Brexiters agree]
- It requires explicit and visible MS ownership
- And bringing the EU interest of our JOINT asset  into the national domain
- Also MR can be better enjoyed in this set-up
Market surveillance in the EU: experiences from a business

Key issues and proposals

Presented by: Pierre SELVA

Fresh ideas to unleash the full potential - Brussels - June 17, 2016
Agenda

1. Schneider Electric
2. Status on Market Surveillance
3. 4 issues
4. 3 proposals
5. And now ?

Views from a manufacturer
Standards without Conformity Assessment are only good ideas,

Conformity Assessment without Market Surveillance is only a mean to loose money!
Schneider Electric, the Global Specialist in Energy Management and Automation

€26.6 billion
FY 2015 revenues

~5%
of FY revenues devoted to R&D

160,000+
people in 100+ countries

Four integrated and synergetic businesses
FY 2015 revenues

Buildings & Partner
Industry
Infrastructure
IT
45%
21%
20%
14%

Balanced geographies – FY 2015 revenues

27% North America
26% Western Europe
29% Asia Pacific
18% Rest of World

> 1 million commercial references available in Europe
Schneider Electric Global Business in Over 100 Countries

**North America**
- Employees: 33,700
- Factories: 38

**Western Europe**
- Employees: 47,600
- Factories: 92

**Asia Pacific**
- Employees: 61,500 (Including JV)
- Factories: 77 (Including JV)

**Rest of the World**
- Employees: 34,100
- Factories: 38

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1: Published figures in billion € restated to reflect country-market view;
2: Billion € pro-forma basis including LTM Sep 2014 revenue for Invensys
3: Including Invensys, excluding Defix and Fuji
Market Surveillance - Status
Few figures

MULTIPLICATION
> 90 brands of MCB installed in France
Source: ASEC - Fr

UNSAFE
> 6% of products are UNSAFE
Source: ASEC

UNFAIR
> 10% of our market is made with unfair products
Source: Estimation
• CE Marking / Regulations
• Standardization tools
• Conformity Assessment processus defined
• Competencies of stakeholders recognized to lead efficient fight
• Concrete initiatives exist and efficiency has been demonstrated (ASEC in Fr, ACI in UK, …)

• Loss of confidence from citizens and stakeholders
• Digitization (e-business)
• Increase financial loss (taxes, turnover, margins…)
• Increase of unemployments
• Loss of greater competitiveness
• Development of black economy
• Increased risks for the peoples and the goods (Health, safety, environment)

• More and more environmental issues (Societal awareness)
• Development of Public Private Partnership
• Optimization of fight thanks to digitization
• Will of the professionals to get involved actively
• New ideas to unleash full potential

• Insufficient resources (human and finance) within the authorities
• Insufficient harmonization
• Insufficient controls
• Under use of stakeholders competencies
• Rigidity of current legal framework
• Time of authorities # Time of rogue operators
  • Lack of awareness of economic operators and users

• Loss of confidence from citizens and stakeholders
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- CE Marking / Regulations
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Strenghts
Insufficient harmonization
Insufficient controls
Under use of stakeholders competencies
Timing of authorities # Timing of rogue operators

Weaknesses

- Insufficient resources (human and finance) within the authorities
- Insufficient harmonization
- Insufficient controls
- Under use of stakeholders competencies
- Rigidity of current legal framework
- Time of authorities # Time of rogue operators
  - Lack of awareness of economic operators and users
• More and more environmental issues (Societal awareness)
• Development of Public Private Partnership
• Will of the professionals to get involved actively
• What we start today!
• Loss of confidence from citizens and stakeholders
• Digitization (e-business)
• Increased risks for the peoples and the goods (Health, safety, environment)

Threats

• Loss of confidence from citizens and stakeholders
• Digitization (e-business)
• Increase financial loss (taxes, turnover, margins…)
• Increase of unemployments
• Loss of greater competitiveness
• Development of black economy
• Increased risks for the peoples and the goods (Health, safety, environment)
Market Surveillance Efficiency

3 required criteria

• Stakeholders legitimacy
  o Only public authorities today

• Stakeholders competencies
  o Shared between public authorities and professionals

• Adjusted resources
  o Not enough within authorities.
  o Available within professionals
4 Issues

• Market Surveillance of Industrial products (BtoB) is not efficient enough
• Some tools are not adapted anymore
• Required rules do not prevent the frauds
• Surveillance systems are not set up with the new regulations or are not adapted well enough
Blue guide (4.2.2): “In case of need, it allows market surveillance authorities to quickly get in contact with the economic operator responsible for the placing of an unsafe or non-compliant product on the Union market”. Further, this address should direct to a single point contact in Europe.
www.schneider-electric.com/contact

Less than 1 minute to be in contact with the economical operator
3 Proposals
3 Proposals

- Set up a Public / Private Partnership
- Make a fundamental change in approach
- Use tools of 21st century
• Recognition of **private initiatives** to help fighting against non compliant and hazardous products
  • What kind of status ?
  • Which stakeholders ?
  • Which processus ?
  • Which limits ?
  • Which communication ?
  • How to finance them ?

We are ready to help
We are ready to finance
We are ready to participate
Fundamental Change in approach

- Chasing the rogue operators
  - **Focus the resources** on the fight
  - Stop to add more requirements to honest operators
  - Adaptation of rules in order to recover efficiency

- Helping the virtuous operators
  - Train and educate
  - Simplify the rules

We are ready to help
We are ready to finance
We are ready to participate
• Modern tools can help to **improve efficiency** of MS activities

• We ask for a **full recognition of alternative means** (web address)

• We care about **Data Privacy and IP rights**
And Now ?

Let us work together and let us reach a consensus
THANK YOU
Ethical Business Regulation

*Integrating Theories of Regulation, Enforcement, Compliance, Culture and Ethics*

Christopher Hodges  MA PhD FSALS

*Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford*

*Head of the Swiss Re/CMS Research Programme on Dispute Resolution Systems*

*Honorary Professor, the China University of Political Science and Law, Beijing*
The Questions

- Why do people conform to or break rules?

So

- How do we get people to conform to rules?

- How can regulators/enforcers support compliance, performance, improvement, growth, innovation?

- How should we design enforcement policies and regulatory systems?
<table>
<thead>
<tr>
<th>Theory</th>
<th>Mode of action</th>
<th>Effectiveness</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deterrence</td>
<td>Fear</td>
<td>Traditional, ingrained, but very limited evidence or support</td>
</tr>
<tr>
<td>Economic rational profit calculation</td>
<td>Disrupt the calculation, incentivise by cost internalisation</td>
<td>Widely applied, significant flaws</td>
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<tr>
<td>Behavioural psychology</td>
<td>Human and group drivers, incentives and disruptors</td>
<td>Empirical findings, applied in some sectors</td>
</tr>
<tr>
<td>Responsive regulation</td>
<td>Advice, support, negotiation</td>
<td>Empirical support for psychology</td>
</tr>
<tr>
<td>Ethical Regulation</td>
<td>Open commitment to internal belief system</td>
<td>Very effective Being rediscovered! This is the fundamental concept</td>
</tr>
<tr>
<td>Supportive</td>
<td>Mixed – moving left</td>
<td>Deterrence</td>
</tr>
<tr>
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</tbody>
</table>
Assumptions

- Most people want to do the right thing most of the time
  
  "We believe that most businesses aim to treat their customers fairly and comply with consumer protection law and that OFT aims to enable and encourage them to do so, and to take enforcement action only where there is no better route to securing compliance."

  Statement of consumer protection enforcement principles (Office of Fair Trading, 2010), OFT1221.

- They might not know what to do, or how to do it, but could be helped

  Lightening the Load: The Regulatory Impact on UK’s Smallest Businesses (Department for Business Innovation & Skills, 2010); Consumer Rights and Business Practices (IFF Research, March 2013)

- A small number of people do bad things

  "An important finding from criminology is that the vast majority of crimes are committed by a small minority of people. The evidence tells us that there is nothing inevitable about criminality – no one is doomed to be a criminal by their upbringing. But there are some circumstances, like low levels of self-control, which are associated with a higher likelihood of offending. And we know that those characteristics can be influenced by what children experience growing up. So if we are to reduce the likelihood of future criminal behaviour, we need to build positive characteristics and resilience, particularly in young people at risk of harm or offending."

  Speech by Home Secretary Theresa May launching the Modern Crime Prevention Strategy at the International crime and Policing Conference 2016, 23 March 2016
1. People will not break rules where they perceive that the risk of being identified is high.
   - contrary to economic theory, the effect will not be much affected where penalties are increased;
   - social embarrassment and reputation are important;
   - constant surveillance (and enforcement), if practically achievable, would have huge economic and social costs
   - Constitutional objections to ruling by fear

2. There are many reasons why people will do the wrong thing: the brain’s two systems, heuristic patterns, inertia and procrastination, framing and presentation, social influences: Compliance is socially constructed, little feedback, difficulties in assessing probability and under-appreciating risk, risk taking: under-assessment WYSIATI.

TR Tyler, Why People Obey the Law (Yale University Press, 2006)
D Kahneman, Thinking, Fast and Slow (Allen Lane, 2011)
3. People will *obey* rules where:

i. The rule is made fairly

ii. The rule is applied fairly (and that includes evenly, and with a proportionate response, so there should be serious consequences for serious wrongdoing)

iii. The rule corresponds to the individual’s internal moral values.
Implications for System Design

1. *The rule is made fairly*
   - Process: predictable, fair, open, transparent, consultation, participation, democratic

2. *The rule is applied fairly*
   - Enforcement policy and practice: occurs when required, predictable, consistent, even-handed, proportionate responses

3. *The rule corresponds to the individual’s internal moral values*
   - Agreed, shared ethical principles
   - Substance of moral values is seen to be shared and applied
Implications for system design

1. Distinguish between those operators who are intrinsically legal or illegal.
   1. For the criminals, use strong enforcement.
   2. For the legal, support learning and improvement.

2. ‘Deterrence’ has limited effect on future behaviour. But people expect proportionate response to unfair behaviour.

3. The operation of a compliance/regulation/supervision system has to be continuous. So the ideal response to a problem should be:
   1. Identification (NB risk of attracting blame will deter reporting)
   2. Identification of the root cause
   3. Action to reduce the risk of repetition, individually and systemically
   4. Redress/repair damage
   5. Consider sanctions, and move on

4. The objective is to incentivise entities to adopt best practice in systems and culture.

5. Modern regulatory systems can only work if they involve collaboration between public, management, staff, supplier, customer, investor etc groups.
To achieve data flow, you need a no blame culture

Airation safety case study

- **Open culture** of questioning decisions and sharing knowledge of mishaps – extensive free sharing of information

- **Just culture** of no blame, non-punitive environment and response

- Maintain **accountability** by constantly, visibly *contributing*

- **Aims**
  - constant monitoring of *performance*
  - constant learning and improving the *system* and its human operation.

- ‘No blame’ must operate in every context: system regulation, professional regulation, employment discipline, liability for harm, social
FAA NMAC introduced an offer of immunity from prosecution: pilot reporting increased dramatically (from 559 in 1965 to 2,230 in 1968); when retracted immunity in 1972, reporting dropped (to 231 in 1987) and remained low.

Figure 2: Pilot Reports of Near Midair Collisions (NMACs) (1959 to 1989) and Under Federal Aviation Administration Grant of Immunity (1968-1971)
SOURCE: Adapted from U.S. Federal Aviation Administration, Office of Aviation Policy and Planning (1999), and U.S. Federal Aviation Administration, Office of Aviation Safety (1987).
NOTE: Data missing for 1966 to 1967.
Using feedback data to drive improvements in practice and reduce cost

Swedish Patient Insurance: settled claims involving serious birth injuries 2000-2014, per quarter
1. **A policy of supporting ethical behaviour.** The regulatory system will be most effective in affecting the behaviour of individuals where it supports ethical and fair behaviour.

2. **Ethical regulators.** Regulators should—self-evidently—adopt unimpeachable, consistent and transparent ethical practice.

3. **Ethical businesses.** Businesses should be capable of demonstrating constant and satisfactory evidence of their commitment to fair and ethical behaviour that will support the trust of regulators and enforcers, as well as of employees, customers, suppliers and other stakeholders.

4. **A learning culture.** A blame culture will inhibit learning and an ethical culture, so businesses and regulators should encourage and support an essentially open collaborative ‘no blame’ culture, save where wrongdoing is intentionally or clearly unethical.

5. **A collaborative culture.** Regulatory systems need to be based on collaboration if they are to support an ethical regime, and to maximise performance, compliance, and innovation.

6. **Proportionate responses.** Where people break rules or behave immorally, people expect to see a proportionate response.
Ethical Business Regulation: Understanding the Evidence

Christopher Hodges
Professor of Justice Systems, and Fellow of Wolfson College, University of Oxford

February 2016
# A Behavioural ‘Enforcement’ Policy

### Retrospective Effect

A fair, proportionate response to wrongdoing

In which the sum of state, professional, employment, reputational and social aspects are proportionate in total effect

An unfair, ‘deterrent’ response will prevent voluntary flow of information, prevent learning, and undermine an ethical culture

### Prospective Effect

Action that addresses root cause of a hazard and risk

- Identification of the harm and risk
- Identification of the root cause
- Analysis of the means of reducing recurrence
- Application of relevant action
- Rectifying harm caused (redress)
- [Sanction]
- Ongoing monitoring of need for further change
## Implementing EBR

<table>
<thead>
<tr>
<th>Actions for Government</th>
<th>Actions for Regulators/Enforcers</th>
<th>Actions for Businesses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support EBR</td>
<td>Encourage EB; not discourage it</td>
<td>Implement Ethical Business policy</td>
</tr>
<tr>
<td>- Mandate EBR</td>
<td>- Incentivise: EBR protocols</td>
<td>- Leadership, culture, training, reminders, feedback, checking, actions</td>
</tr>
<tr>
<td>- Promulgate and defend EBR</td>
<td>- Responses to issues raised by EBs</td>
<td>- Build means to <em>demonstrate</em> consistent EB culture and outcomes</td>
</tr>
<tr>
<td></td>
<td>- Enforcement/sanctions policies</td>
<td></td>
</tr>
</tbody>
</table>

### Pilots
- Civil aviation
- Medicines/devices
- Water
- Food
- Energy ...
A day in the life of a Market Surveillance Officer

Ing. Michael Cassar
Market Surveillance Directorate
Technical Regulations Division
Malta Competition and Consumer Affairs Authority

17th June 2016 - Brussels
Economic Operators

- Product is encountered on market and suspected to be unsafe
- Questions are asked to economic operator who replies with adequate documentation
- If product does not comply and poses a serious risk, economic operator carries out immediate recall
- Measures notified on Rapex and case closed
Testing

- Suspect product encountered. Operator hands over 3 samples for testing without raising issues
- Testing budget available
- Samples forwarded to inhouse accredited lab for testing
- Results issued within 5 days and measures taken in collaboration with operator
Consumers

- Consumers request and buy only safe products
- Consumers use product as foreseen by the manufacturer
- Consumers read the instructions and warnings
- Consumers respond to and heed advice from MSA when a dangerous product is recalled.
Legislation and standards

- Legislation is clear and does not allow room for differing interpretation
- Law courts understand gravity of situation and find operators guilty when charged
- Standards reflect the state of the art within the current market
- Standards are also very unambiguous and enforceable
Small Exercise!!!!
OK, the fairy tale is over.
Let us see how reality is.
Economic Operators

- Product is encountered on market and suspected to be unsafe
- Questions are asked to economic operator who replies with adequate documentation
- Problem solved
- If product does not comply and poses a serious risk, economic operator carries out immediate recall
- Operator collaborates with MSA

Some operators
- try to outsmart MSA and continue selling dangerous products
- provide misleading information after several reminders by MSA
- adopt a wait and see attitude
- try to re-introduce dangerous products some time after measures
- claim unfair treatment by MSA if action is taken against their products found dangerous
- claim ignorance of the law even after several years in the business
Testing

- Suspect product encountered. Operator hands over 3 samples for testing without raising issues
- Testing budget available
- Samples forwarded to inhouse accredited lab for testing
- Results issued within 5 days and appropriate action taken

- Lack of screening equipment at MSA does not assist officer
- Funding for testing not adequate to ensure compliance of complex products
- Lack of accredited labs within easy reach hinders surveillance operations
- Same product, same tests, but differing results
Consumers

• Consumers use product as foreseen by the manufacturer
• Consumers read the instructions and warnings
• Consumers respond to and heed advice from MSA when a dangerous product is recalled

Some consumers
• misuse products and expect MSA to take action
• do not heed warnings and advice from MSA and keep on using products even after recall has been communicated
• enter into a deal which evidently looks to be too good to be true
• buy online without caring whether the product is safe or not
Legislation and standards

• Legislation is clear and does not allow room for differing interpretation.
• Law courts understand gravity of situation and find operators guilty when charged.
• Standards reflect the state of the art within the current market.
• Standards are also very unambiguous and enforceable.

• Ambiguous legislation leading to difficulty during enforcement and court cases.
• Court cases take excessive time and courts do not always understand enough the risk posed by products.
• Standards also ambiguous and leave room for interpretation and lots of discussions with operators.
• Some standards take too long to be drawn up or revised, resulting in new standard not being state of the art.
Some possibilities for improvement
Economic Operators

- Product is encountered on market and suspected to be unsafe
- Questions are asked to economic operator who replies with adequate documentation
- Problem solved
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Some operators

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- Provide misleading information after several reminders by MSA
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In this globalised world and ultra busy operators, how can the message get across to those who do not want to listen?
• Suspect product encountered. Operator hands over 3 samples for testing without raising issues
• Testing budget available
• Samples forwarded to inhouse accredited lab for testing
• Results issued within 5 days and appropriate action taken
• Lack of screening equipment at MSA does not assist officer
• Funding for testing not adequate to ensure compliance of complex products
• Lack of accredited labs within easy reach hinders surveillance operations
• Same product, same tests, but differing results
• Can we arm each Market Surveillance Officer around Europe with the basic screening tools?
• Can we set up a network of labs around Europe and test for each other?
• How can we make Joint Actions more effective?
Consumers

- Consumers use product as foreseen by the manufacturer
- Consumers read the instructions and warnings
- Consumers respond to and heed advice from MSA when a dangerous product is recalled.

Some consumers

- misuse products and expect MSA to take action
- throw away instructions for use
- do not heed warnings and advice from MSA and keep on using products even after recall has been communicated
- search for a deal which evidently looks to be too good to be true
- buy online without caring whether the product is safe or not

Inform, inform and inform

Can we look at the issue of importation for personal use, which is increasing by the hour and which is resulting in possibly unsafe European homes?
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- How can we respond promptly to new risks?
- Market Surveillance Authorities are often the last users of standards, hence legislators and standardizers please take note.
- If a law or a standard is not black or white, then it is pretty useless for MSAs.
KEEP CALM AND ENHANCE PRODUCT SAFETY
Thank you for your attention

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Overview of votes per workshop and option

**Workshop 1 – Proving and assessing lawful marketing of products in other Member States: a more practical approach**
- Option A: Raising awareness of the principle of mutual recognition on the level of the authorities and the inspectors
- Option B: Enhance communication and transparency by using existing tools such as IMI / SOLVIT
- Option C: Declaration of conformity – a harmonised template, establish the elements of the template by surveying interested parties

**Workshop 2 – How to make mutual recognition a practical tool for businesses**
- Option A: Mutual recognition gives market access
- Option B: Administration cooperation on Mutual Recognition (PCP Network) + Awareness raising
- Option C: New speedy and transparent appeal mechanism

**Workshop 3 – How could SMEs be helped to comply with EU product rules?**
- Option A: SME registration to be combined with sharing of knowledge of product requirements and guiding towards national PCPs as well as a single EU Product Portal
- Option B: Creation of single product portal at EU level or European group of contact points – Simplification of requirements
- Option C: Facilitate compliance with product rules through digitalisation

**Workshop 4 – How could market surveillance across borders be strengthened?**
- Option A: Implementing voluntary model for mutual assistance among MSAs and additional legal provisions.
- Option B: Reliance on other MSAs’ assessment and decisions, including the acceptance of test reports.
- Option C: Better use of existing tools e.g. ADOC, ICMS, safeguard procedure.

**Workshop 5 – How should controls on imports from third countries be improved?**
- Option A: Better intelligence (tools for risk assessment)
- Option B: Better cooperation between CU & MSA
- Option C: Networking

**Workshop 6 – What more could we do to deter rogue traders?**
- Option A: Focusing on ports of entry
- Option B: Flow and recognition of data
- Option C: Limiting access to the market for rogue trade