

What is Mutual Recognition?

Mutual recognition is a principle applying in the field of free movement of goods. Where no harmonised rules exist at European level, products lawfully marketed in one Member State can be sold in other Member States regardless of complying or not with the national technical rules of these Member States. Member States mutually recognise that national technical rules are equally protecting the public interests pursued. As an exception, a Member State can deny market access for a product lawfully marketed in another Member States, if he demonstrates that the protection of the public interest pursued is not equivalent and that its own national technical rules are necessary and proportionate in order to achieve protection of that public interest.

What is Regulation (EC) No 764/2008 ('the Mutual Recognition Regulation')¹ ?

The application of the mutual recognition principle proved to be quite demanding in the actual practice, for both businesses and national authorities. The Regulation introduced a procedural framework to minimise the possibility that non necessary and non-proportionate national technical rules create unlawful obstacles to the free movement of goods between Member States. This was done mainly by (1) creating Product contact points and a Products database to know if mutual recognition is applicable and by (2) asking national authorities to notify and justify a decision denying market access based on mutual recognition.

Shortcomings in the application of the Regulation and potential options for further boosting its application

Based on an external evaluation² carried out in 2015, it appears that the application of the mutual recognition principle is not yet optimal; many businesses and national authorities are still not very familiar with the mutual recognition principle and indicate that awareness campaigns would be useful. Because mutual recognition is sub optimally used, businesses may support additional non justified costs in order to enter on a new market or may even lose market opportunities. Consumers don't benefit from more choices on the market and thus from lower prices. The external evaluation identified the most recurrent bottlenecks impeding the principle of mutual recognition to reach its full potential. Other shortcomings were identified in light of the experience with the application of the Regulation and through input by relevant stakeholders.

Overall, these shortcomings (and the potential solutions) can be summarised as follows:

First, it is sometimes difficult, both for businesses and for responsible national authorities, to assess if mutual recognition can be applied to a specific product. The scope of the Regulation is unclear as regards the products and situations covered by mutual recognition; for example, prior authorisations to placing on the market are not fully covered. The product list established by the Regulation and intended to provide a picture of the products which can be covered by mutual recognition is not very efficient in providing the necessary information and lowering the efforts companies and national authorities put in assessing if the principle is applicable or not. This problem is particularly affecting certain specific sectors such as constructions, fertilisers, etc. Mutual recognition could be made easier to apply if:

- 1) The scope of the Regulation is clarified. The clarification would refer to the products to which mutual recognition could apply and will cover, among others, clarifications as regards the prior authorisation procedures.*
- 2) The Product list mentioned under article 12.4 of the Regulation, including non-exhaustively products not covered by harmonisation legislation is updated and made more user-friendly. The list will never be exhaustive, but if regularly updated and well promoted, it will reduce initial uncertainty.*

Second, in situations where mutual recognition could be applied, the application of the principle is sometimes knowingly disregarded because potential users don't find it reliable enough. Businesses and national authorities have difficulties in demonstrating that the product was lawfully marketed in a given Member State Furthermore, national authorities often tend to privilege their own rules (with

¹ Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008 laying down procedures relating to the application of certain national rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC (Text with EEA relevance), OJ L 218 of 13.8.2008, p. 21-29. In accordance with Article 12(1) of the Regulation, Member States have an obligation to send the Commission an annual report on the application of the regulation. Pursuant to Articles 6(2) and 7(2), Member States have to notify administrative decisions addressed to economic operators and concerning the prohibition of the placing on the market, modifications and additional testing of a product or the withdrawal of the product from the market.

² <http://ec.europa.eu/DocsRoom/documents/13381>

whose cultural and historical background they are well acquainted) and insist on applying them at the cost of mutual recognition. Also, companies cannot easily challenge decisions hindering market access and this creates a lot of legal uncertainty. Companies as well often consider that nothing good can come from challenging national authorities and prefer to comply with national rules instead of relying on mutual recognition and take the risk of having market access denied. Transforming mutual recognition into a reliable tool could be achieved by:

1) A declaration indicating compliance with the technical rules of the Member State where the product is being lawfully marketed, to facilitate the way businesses demonstrate that their product is lawfully marketed in a member State. The declaration could be voluntary, to be issued by the economic operator himself. It will harmonise the means to demonstrate that a product is lawfully marketed, by introducing minimum requirements as regards what needs to be indicated in order to show compliance with national rules in a given Member State. Such declaration can be provided upon request, for example when the product is already on the market and is being inspected by market surveillance authorities, or when requesting a prior authorisation. The declaration could be also issued by a body designated by the Member State in which the product is legally marketed, e.g. by the national Product Contact Point established in accordance with Regulation 764/2008.

2) Introducing dissuasive means to ensure that the obligation for national authorities to notify administrative decisions denying or restricting mutual recognition is respected. This means that any administrative decisions taken in order to deny market access based on national technical requirements should always be justified and notified to the concerned party and the Commission, to allow transparency and the possibility of a better mapping of the application of the mutual recognition principle. The decisions should also be taken within a reasonable deadline and be open to an appeal before competent national bodies, so businesses can defend their case and challenge decisions addressed to them. Finally, any non-notified administrative decision should be not enforceable, to protect businesses and provide extra incentives to national authorities for notifying.

3) Ensuring that effective remedies are available to economic operators who wish to take action against an administrative decision denying mutual recognition. Most of the time, available procedures to challenge such decisions are very long and costly, dissuading businesses from taking any actions against these decisions. More user friendly procedures can be envisaged, such as an assessment at EU level, to thus reduce the impact of costly and lengthy court procedures.

Lastly, there is a lack of efficient communication among all players involved in the application of the mutual recognition principle. This applies to communication inside the national administrations, between administrations of different Member States, between Member States and the Commission and also to communication between businesses and administration. On the one hand, the communication among Product Contact Points is not optimal, as there is insufficient cooperation among the involved / responsible national authorities dealing with mutual recognition. On the other hand, the communication between Product Contact Points and companies is not satisfactory either, as there are long delays for replying to the inquiries received. Finally, communication between Product Contact Points and the Commission is not optimal as there are flaws in notifying the decisions hindering market access to the Commission. Language related issues add further difficulties to proper communication. Communication to better support the application of mutual recognition could be improved by:

1) Strengthen the role of Product Contact Points, to become a "first port of call" for information on products (i.e. to also cover harmonized products), to integrate them into a wider network and to provide online information through the 'Single Digital Gateway'. The current role of Product contact points would be reinforced, to better define their obligations and responsibilities, as well as the minimum content as regards the information to be delivered to businesses. The integration into wider networks would allow to the product contact points to be more visible and easier identifiable for businesses.

2) Using new IT tools for notifying decisions hindering market access and for communication between Product Contact Points such as the Internal Market Information tool (IMI) or ICSMS (i.e. the general information support system referred to in Article 23 of Regulation (EC) No 765/2008). The use of IT tools will make notifications easier and will provide more transparency and better monitoring of the application of the mutual recognition principle.

3) Strict deadlines to reply to requests made from one authority to the other. While remaining reasonable, deadlines will improve the flow of communication between authorities and thus the final response expected by businesses.

Another solution to suboptimal application of mutual recognition could be having further harmonisation. Several options could be envisaged, such as:

- 1) Harmonising technical requirements in specific fields where mutual recognition does not appear sufficient to ensure free movement of goods. Such option implies a good monitoring of the application of the mutual recognition principle, to identify problematic sectors where harmonisation is necessary.*
- 2) Harmonising certain basic requirements a product would need to satisfy. This option implies that only certain specific requirements would be harmonised, such as, for example, minimum traceability requirements.*
- 3) Ensure that products lawfully marketed in one Member State and complying with European standards effectively enjoy the right of free movement in the EU. This option refers to the use of European standards as a common basis for demonstrating equivalence with national technical rules.*