Sieps
Swedish Institute for European Policy Studies

European Policy Analysis
JUNE · ISSUE 3–2007

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A New Proposal for a Regulation on Mutual Recognition of Goods – Towards a Harmonized Administrative Order?

Abstract

In February 2007 the Commission of the European Communities presented a new proposal for a regulation regarding the mutual recognition of goods in the Member States.[2] The proposed regulation is in line with other secondary legislative acts on free movement from recent years, introducing common administrative procedural rules for the national authorities to apply in connection to free movement matters, as well as obligations for the Member States to set up contact points to facilitate administrative work and cooperation between Member States.

National administrative procedures and bureaucracy is today one of the major obstacles to free trade and a well-functioning internal market. There is therefore a genuine need for reform in this area. However, national administrative law cannot merely be seen as a function of the internal market. The secondary legislation enacted so far lacks a coherent approach to national administrative law, resulting in legislative acts addressing different administrative aspects in the different areas of free movement. Instead of laying the basis for a common administrative legal order, there is a risk that the secondary legislation will disrupt the internal administrative system of the Member States. In the end, such a development will not be beneficial to the internal market.

1. Point of Departure: the Internal Market is Not Complete

As they transport goods from one corner of the EU to another, traders will encounter several different markets within the Common Market, which abide by different rules. There is still a widespread use in the Member States of national technical rules and standards applying to goods, rules laying down requirements regarding design, form, size, weight, composition, labelling and packaging. If these requirements are not based on secondary EC legislation, there is a great risk that the rules will vary from one Member States to another, putting demands on enterprises to change their products from one Member State to another.

The principle of mutual recognition

The problem of varying technical standards was addressed in the case-law of the European Court of Justice already in 1979, almost 30 years ago, in the famous *Cassis de Dijo*n case.[3] The European Court of Justice held that the right to free movement of goods entails an obligation on the Member States to recognise goods which had been lawfully marketed in another Member State, in accordance with the technical standards of the state, even if the goods did not meet the standard of the

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[2] See Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State COM (2007) 36 final.

[3] See 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) ECR 1979, p. 649, svensk specialutgåva IV, p. 377.

second Member State, the state of destination. The Member States should be able to trust one another and rely on the market regulation in the state of origin of the goods. The Member State of destination is only allowed to refuse market access if it is able to provide a mandatory requirement as to why the goods should not be accepted, e.g. a special concern of the Member State regarding the protection of the environment or consumers. This is the principle of mutual recognition.

Four fundamental problems

In practice, the principle of mutual recognition has not been able to solve the problem of different technical standards in the Member States. Several surveys have shown that the principle is often not applied correctly.[4] The Commission has pointed out four fundamental problems.[5]

- The lack of awareness of enterprises and national authorities about the existence of the mutual recognition principle.
- The legal uncertainty about the scope of the principle and the burden of proof.
- The risk for enterprises that their products will not get access to the market of the Member State of destination.
- The absence of regular dialogues between competent authorities in different Member States.

New strategies

Earlier efforts to tackle the problem by encouraging or obliging Member States to insert so-called mutual recognition clauses into their national technical standards and by obliging Member States to notify occasions when the application of mutual recognition has been refused[6] has not been successful. In the new proposal for a regulation presented in February 2007, the Commission has adopted a new strategy to encourage national authorities to take a greater responsibility for the application of the principle of mutual recognition. The regulation contains two basic ideas, to create a clear and easily accessible common administrative procedure for all occasions when national authorities apply the principle of mutual recognition and a common administrative organisation, to facilitate contact between authorities in different Member States.

The proposal will be discussed under section 3 and 4, after an account has been given of the case-law of the European Court of Justice regarding the use of national administrative procedures in free movement cases in section 2. In the last section, section 5, an analysis of the effect of the proposition in the Member States will be presented.

2. National Administration as an Obstacle to Free Movement

All national authorities in the Member States that implement national technical rules on goods, within market control, product safety tests, etc., have a duty to apply the principle of mutual recognition. As pointed out above, this has in reality proved to be a difficult task. There is a lack of awareness regarding the principle among both enterprises and national authorities, with the result that national technical standards are often taken for granted. In the cases where the principle of mutual recognition is invoked, there is often a legal uncertainty regarding its scope of application and the allocation of the burden of proof. For an enterprise facing an administrative authority of a Member State in a market it wishes to enter, the administrative burden may therefore be heavy. In effect, the choice of the enterprise may be to initiate a possibly costly and cumbersome legal procedure in a foreign legal system, to change the product, even though it is lawfully marketed in another Member State, or, as a last option, refrain from entering the market altogether.

The doctrine of procedural and institutional autonomy…

The European Community has not enacted a common administrative code for national authorities to apply when handling matters within the sphere of Community law. The national authorities shall implement all directly effective Community rules efficiently, such as the rules of free movement of goods, but in doing so the national authorities may apply their own national administrative procedural law. This notion is often referred to as the procedural autonomy of the Member States. Correspondingly, the Community as a main rule leaves it to the Member States to decide the body within the state that will be responsible for the implementation, the doctrine of institutional autonomy.

…and its limits

However, the term "autonomy" is somewhat misleading. Member States may only apply national procedural rules as long as the Community has not enacted any specific rules. Furthermore, it follows from the case-law of the European Court of Justice that national procedural rules must be applied in such a way as not to hinder the effec-

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[4] See UNICE report, *It's the Internal Market, stupid! A company survey on trade barriers in the European Union.*, Internal Market Strategy - Priorities 2003–2006, COM (2003) 238 final, The state of the internal market for services, COM (2002) 441 and Swedish Agency for Public Management report 2006:16 Förvaltning för fri rörlighet.

[5] See 2 of the preamble of the proposal for a regulation.

[6] The notification procedure is laid down in decision 3052/95/EC. According to the Commission proposal for a new regulation, the decision is to be repealed.

tive application of Community law.[7] When a Member State upholds technical standards that may hinder the market access for goods,[8] requires a prior administrative authorisation,[9] or in cases of national retail monopolies,[10] there is an obligation on the Member States to provide for an administrative procedure which is readily accessible and can be completed within a reasonable time, and, if it leads to a refusal, the decision of refusal can be challenged before the courts. There is further an obligation on the Member State, as well as on the national authorities themselves, to take an active approach in cases where goods have already been approved in order to avoid duplicate controls, for example by cooperating with approval bodies within or outside the Member State.[11]

It is difficult to extract from the case-law of the European Court of Justice, in precise and positive terms, what administrative procedure is acceptable for the Member States to apply. Rather it is a question of a minimum standard, often stated in negative terms; Member States may not hinder free movement by providing a costly, tedious and burdensome administrative procedure. This type of administrative procedure may in itself be considered an obstacle to free movement.[12] In this way, the administrative procedural rules will be closely connected to the substantive rules on free movement. The connection can be illustrated by using an example.

The Red Bull case

In the *Red Bull* case, the Commission brought an action against France due to its legislation on foodstuffs, requiring that all nutrients of a certain type that are used to fortify foodstuffs must be included on an authorised list prior to the marketing of the foodstuff in France.[13] The Commission had received complaints from enterprises in different Member States relating to difficulties encountered in marketing their products in France. For example, the enterprise marketing the energy drink Red Bull had had to wait seven months for acknowledgment of its application for authorisation to market its product and more than two years for the refusal. The European Court of Justice found that the French administrative procedural practice was contrary to EC law in two aspects. First, the procedure was not expressly provided for in a binding measure of general application, which is a requirement for the procedure to be readily accessible for enterprises. Secondly, the applications for authorisation submitted by enterprises were not dealt with either within a reasonable period or according to a procedure which was sufficiently transparent as regards the possibility of challenging a refusal to authorise before the courts.[14] France was thus found to have failed to fulfil its obligations under the EC Treaty.

3. Common Administrative Procedures for Free Movement

The issue of administrative burden for enterprises has been recognized by the EC legislator and several directives in the area of free movement enacted in recent years have included rules on administrative procedure. The directives lay down rules on how national authorities should handle cases relating to free movement, in order to facilitate the procedures in national authorities and making free movement easier for individuals and enterprises. To a certain extent these administrative procedural rules can be considered as a codification of the case-law of the European Court of Justice described above, but in many cases the directives go further. Three examples will be discussed briefly, before coming to the proposed regulation on the mutual recognition of goods.

Directive on Union citizens

The first example is the 2004 Directive on the free movement of Union citizens and their families, which contains comprehensive specified rules with regard to the supporting documents that shall be required by the national authorities when issuing residence cards, with the aim of avoiding divergent administrative practices.[15] The Directive also contains specified rules regarding what grounds shall be included in the reasoning of decisions restricting free movement and on expulsion of a Union citizen, and regarding what information shall be given on the right to appeal.[16] On the other hand, the Directive does not lay down any specific time limits for the decision-making of national authorities.

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7 See regarding the principle of effectiveness and the principle of equality in case 33/76 Rewe-Zentralfinanz v. Landwirtschaftskammer für das Saarland ECR 1976, p. 1989, and for a more recent example, C-432/05 Unibet v. Justitiekanslern ECR 2007, not yet published.

8 See case C-24/00 Commission v. France ECR 2004, p. 1277.

9 See 176/84 Commission v. Greece ECR 1987, p. 1193 and case C-385/99 Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA ECR 2003, p. I-4509, regarding services.

10 See case C-189/95 Franzén ECR 1997, p. I–5909 and case C-438/02 Hanner ECR 2005, p. I-4551.

11 See case C-432/03 Commission v. Portugal ECR 2005, p. I–9665, point 45-47.

12 See case C-205/99 Analir v. Administración General del Estado ECR 2001, p. I–1271.

13 See case C-24/00 Commission v. France.

14 See case C-24/00 Commission v. France, point 37 and 40.

15 See point 14 in the preamble and Article 8 of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

16 See Article 15, 30–31 of the Directive.

Directive on professional qualifications

The 2005 Directive on the recognition of professional qualifications includes similar rules regarding the right to establishment in another Member State for doctors, nurses, architects and other professions covered by the Directive.[17] The Directive contains several rules on time limits for national authorities in the process, and further states that even a failure to take a decision within the deadline shall be subject to appeal under national law.[18] In the case of free movement of services on a temporary and occasional basis, the Directive provides for an even simpler procedure. Professionals covered by the Directive do not have to apply for a permit to enter the services market, but may simply inform the national authority of their intentions in a written declaration giving details on insurances etc. listed in the Directive. The Member State may under certain circumstances check the professional qualifications of the service provider prior to the first provision of services. In this case the Directive states that the service may be provided in the absence of a reaction from the competent authority within the deadlines set in the directive.

Services Directive

The third example is the 2006 Services Directive.[19] In one sense this example is the most far-reaching so far, since it covers a wide range of situations in the Member States, and may affect the administrative procedure of several different national authorities. The Directive lays down rules and conditions for when and how Member States may make access to a service activity subject to an authorisation scheme, as well as minimum rules on how the procedure shall be construed. The Directive provides that all national authorisation procedures shall be clear, made public in advance and be such so as to provide the applicants with a guarantee that their application will be dealt with objectively and impartially. The Directive leaves it to the Member States to set appropriate time limits for different types of services, but on the basis of these, the Directive states that if the national authority has not reached a decision within the set time limit, authorisation shall be deemed to have been granted.[20]

Thus what these three directives have in common is that they lay down administrative procedural rules for the Member States to follow when handling free movement cases in the respective areas, even though the rules themselves are not set out in a uniform way.

The Commission proposal for a regulation on mutual recognition of goods

The proposal for a regulation on mutual recognition of goods differs from these three directives in some aspects. First and most obvious, the form is different. The three directives will be transformed into national law in the 27 Member States, integrating the EC administrative procedural rules in the national law governing the different areas. Regarding the procedural rules on goods, national authorities will apply them directly from the regulation. Another difference is that the regulation on goods does not contain anything but common rules on administrative procedure and a common administrative organisation. There are no substantive rules on free movement and mutual recognition among the thirteen articles contained in the proposition. The regulation is further suggested to be complemented by a list of products to which mutual recognition applies, published on a website.

Scope of application

The proposed regulation is to be applied in a very wide range of situations. In comparison to the Services Directive, where the common procedure rules only apply to national authorisation schemes, the proposed regulation covers all situations where a national authority decides to hinder the access to market of a product. The proposal distinguishes four types of decisions: [21]

- decisions to ban a product,
- decisions to refuse to allow a product to be placed on the market,
- decisions to require modifications of products,
- decisions to require withdrawal of product.

Burden of proof

The focus of the procedural rules in the proposed regulation is in a sense narrow, since it concentrates in particular on the allocation of the burden of proof. The proposal clarifies that it is always for the Member State to show that there is a legitimate ground to hinder the market access of goods. This is done by obliging the national authority, when intending to adopt any of the decisions listed above, to give the enterprise concerned a right to be heard on the grounds of the sought decision. The national authority shall give notice of its intention, specifying the technical rule on which the decision is to be based and setting out sufficient technical or scientific evidence that the intended decision is justified according

[17] See Directive 2005/36/EC on the recognition of professional qualifications.

[18] See Article 50–51 of Directive 2005/36/EC on the recognition of professional qualifications.

[19] See Directive 2006/123/EC on services in the internal market.

[20] See Article 13 point 4 of the Services Directive.

[21] See Article 2.1 of the proposal for a regulation on goods.

to the rules of free movement of goods of the Treaty. The national authority must then allow the enterprise at least twenty working days to submit comments. If the authority proceeds with the decision, it must notify the decision to the enterprise concerned, stating the reasons on which the decision is based, including the reasons for rejecting any arguments put forward by the enterprise. Information on available remedies and time limits for appeal shall be included. Even decisions not to proceed with a decision shall be notified to the enterprise, if the first step of notification has been taken.[22]

No time limits

In contrast to the Directives on services and professional qualifications, the proposed regulation does not contain any rules on time limits for national authorities, or any measures for enterprises to take in cases of long-drawn out administration. In an earlier draft of the proposed legislation, the Commission included a rule on the consequences of not upholding the procedure, by stating that a breach of the obligations would constitute a substantive procedural defect, such as to render the decision to deny market access for products inapplicable to enterprises.[23] The current proposal only includes a right to appeal an actual decision to refuse market access and nothing more.

4. Common Administrative Organisation – Product Contact Points

The second section of rules in the proposed regulation on mutual recognition on goods deals with the organisation of administrative authorities within the Member States, requiring Member States to designate one or more so-called Product Contact Points.

The purpose of contact points

The lack of communication and dialogue between national authorities in the Member States is common problem in the area of a non-harmonized field of free movement. This leads to an increased burden for both the individual economic operator and the national authority, since the only source of information regarding market regulations of state of origin will effectively be the economic operator itself. The bare translation of relevant acts may in itself be costly and time-consuming. Two of the directives on free movement discussed under section three, the Directives on services and professional qualifications, also include rules on the organisation of national authorities by requiring Member States to designate contact points, and by giving specified tasks to the competent authorities. The Directive on free movement of Union citizens does not in itself contain rules on administrative organisation, but there are other closely connected directives, on free movement of third country citizens who are long-term residents within the Union, that do.[24] As with the procedural rules, the purpose and function of the contact points vary between the different legislative acts.

Different contact points in the different secondary acts

In the proposed regulation on goods, the main purpose of the Product Contact Point is to facilitate market entrance for enterprises. Their task will be to provide information on technical rules on products to enterprises and national authorities in other Member States, and to help enterprises to find Product Contact Points in the other Member States. The proposal states that the Product Contact Point shall respond to all requests for information covered by the regulation within twenty working days.[25] The duty to inform is thus directed at the seller of the goods, and not the buyer.

The Services Directive provides for a contact point, called Point of Single Contact, that shall give both providers of services and recipients elaborated rights. The Member States shall make sure that it is possible for the providers to complete several different types of procedures through the Points of Single Contact themselves, saving the providers from having to contact a number of different authorities.[26] According to the Directive on professional qualifications, the contact points shall provide information on procedures etc., but will refer both providers of services and recipients to the relevant competent authority for the actual handling of the case.[27] Furthermore, both the Directive on Services and the Directive on professional qualifications give the recipients of the services a right to information, stating that the Point of Single Contact or the competent authority shall ensure that recipients of services obtain all the information that is necessary for the filing of complaints against providers of services, and other information regarding the regulations on authorisation etc. in the Member State of origin.[28] The contact points in the Directive on long-term residents from third counties, on the other

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[22] See Article 4 of the proposal.

[23] See Note to the Senior Officials Group on Standardisation and Conformity Assessment Policy. Elements for a possible legislative approach to mutual recognition in the non-harmonized area of goods, Doc.N: SOGS N548 EN., p. 8.

[24] See Article 25 Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents.

[25] See Article 8 of the proposed regulation.

[26] See Article 6 of the Services Directive.

[27] See Article 57 of the Directive on professional qualifications.

[28] See Article 9 of the Directive on professional qualifications and Article 7 of the Services Directive.

hand, are only required to transmit information between the contact points in the Member States regarding the type of permits the national authorities have granted the residents.[29]

The role of the Commission

The role of the Commission in the different networks of national contact points is not entirely clear. At first hand, it seems that the Commission will only play a limited role. In the Directive on third country nationals, the Commission is not participating at all. Within the three other systems, the Services and professional qualifications Directives and the proposed regulation on goods, the Commission shall function as a sort of collective address book, by keeping and updating all the contact details of the national contact points.[30] Furthermore, the Commission shall assist the contact points in different ways. In the Services Directive the Commission may take "accompanying measures", together with the Member States, in order to encourage Points of Single Contact to translate the relevant information documents.[31] The equivalent statement is set out in the preamble of the proposition on a regulation on goods, where it is also stated that the Commission should work closely together with the Member States to facilitate the training of staff employed at the Product Contact Point.[32] Both the Services Directive and the proposed regulation on goods permit the Commission to set up different electronic information systems or telematic networks.[33]

Implementing committees

All the three latter systems provide for the setting up of committees to oversee the implementation of the acts. In the Services and professional qualifications Directives, the committees shall follow the so-called regulatory procedure,[34] giving the representatives of the Member States the possibility to refer a proposal to the Council if the envisaged measures are not in accordance with the opinion of the committee. In the proposed regulation on goods, however, the suggested procedure for the committee is the advisory procedure,[35] which only gives the representatives of the Member States the right to deliver an opinion on the measures envisaged by the Commission.

5. Analysis: Effects in the Member States

The main objective of the proposed regulation should be welcomed; to lift the administrative burden from individual enterprises, and facilitate the work of the national administrations by laying down common procedures and organizing administrative cooperation between the Member States. As shown in section two, a national administration may in itself constitute a major obstacle to trade. The Commission has found that a lack of awareness of the principle of mutual recognition and real legal uncertainty on both the scope and the application of the principle, are two of the most important reasons why the principle of mutual recognition is still not functioning well almost 30 years after its introduction in the *Cassis de Dijon* case.

Towards a harmonized administrative order?

With the proposed regulation, the EC will take another step in the direction of developing a common administrative legal order for the Member States in the area of free movement. Already in several sector-specific secondary legislations,[36] as well as the three horizontal Directives discussed above, the Directive on free movement on Union citizens, services and professional qualifications, rules on administrative procedure and organisation has been enacted. The doctrine of procedural and institutional autonomy has in this area been replaced by a harmonized administrative order.

The risks entailed by harmonization – disruption of national systems

What effect will this have on the Member States? Even though the doctrine of procedural and institutional autonomy in its essence includes a risk of leading to an uneven implementation of EC law in the Member States, the doctrine also has its advantages. The constitutional, administrative and procedural systems of the Member States spring from different cultural and historical backgrounds. It is an area of law where legal traditions to a large extent have developed separately from each other and where national differences are important. By allowing the national authorities and courts to apply EC law within the familiar procedural context of the national le-

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[29] See Article 25 of the Directive on third-country nationals who are long-term residents.

[30] See Article 21 point 2 of the Services Directive, Article 56 point 4 of the Directive on professional qualifications (regarding coordinators in competent authorities) and Article 7 point 2 of the proposed regulation on goods.

[31] See Article 7 point 5 of the Services Directive.

[32] See point 22.

[33] See Article 8 point 3 of the Services Directive and Article 9 of the proposed regulation.

[34] See Article 5 of Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission.

[35] See Article 3 of Decision 1999/468/EC.

[36] See for example Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services and Directive 2001/83/EC on the Community code relating to medicinal products for human use. The different directives on public procurement as well as the so-called New Approach Directiveson technical harmonisation system, may also be mentioned in this connection.

gal order, EC law will become less of a foreign object in the internal legal system of the Member States and the integration within the legal systems of the Member States will be smoother.

There is a risk that by introducing common administrative procedural and organisation rules into the legal order of the Member States, the internal national systems may be disrupted, which in the end will not benefit the implementation of EC law. In Swedish administrative law, for example, the concept of having a specific remedy to take an authority to court because of its failure to act was unknown until it was introduced by way of EC law. The Swedish solution is instead that of non-judicial review, by the Parliamentary Ombudsmen, Justitieombudsmannen. Instead of going to Court for a declaration that an authority is running unreasonably late, Swedish people turn to the Ombudsman. In both case the court or the Ombudsman may not decide on the matter in substance, but the reviewing institution can make it clear that the authority is in breach regarding its obligations to act within reasonable time. Both systems have advantages. In the court system, a verdict on a failure to act may more easily be connected to the right to damages. The non-judicial system on the other hand, is perhaps less costly and more flexible and easily accessible for individuals. Mainly, it is a difference of legal tradition and a change from one to another is not done over night.

Finding the balance for further progress

There is therefore a need for legislators at both the European and national level to take a careful approach in the development of this new common administrative order. As very often is the case as concerns the implementation of EC law, it is necessary to find the appropriate balance between the need for an effective and uniform implementation of EC law and the respect for the different legal traditions of the Member States. On the other hand, the traditions of the Member States are not set in stone. The further the substantive integration of the legal order of the Member States proceeds, the greeter the need for a common procedural order. Procedural rules on administrative, civil and penal law, as well as other supplementary forms of law, have to follow the general development of society, where Europeanisation and globalisation are given facts today.

The need for an overriding and coherent approach

Two aspects must be stressed. Firstly, in order to develop a well-functioning common administrative order, there is an outspoken need for the European legislator to take an overriding and coherent approach on the matter. Today the administrative rules in different secondary legislative acts vary from one act to another with regard to the scope of application as well as content. With the new proposal, the EC legislator further introduces a new form for the act, a regulation instead of a directive. The advantage is of course that the rules will be immediately and uniformly applicable in all the Member States. For the national authorities, however, this means that the administrative procedural rules applicable in the matters before them will not just vary between different areas of law, but it also means that the rules will be set out in altogether different legislative acts, national laws as well as in EC regulations. This may lead to a fragmentation of the internal laws of the Member States, instead of a foundation of a common administrative law.

Secondly and correspondingly, the national legislators must do their share of the common work, by evaluating the national administrative system and taking the necessary steps and measures to adapt the national system to the European model. This does not necessarily mean exchanging core parts of national administrative law. Still, it is the responsibility of the national legislator to affirm the coherency of the national legal order. To make the national system compatible with the EC model might need more attention than merely implementing each new directive separately from the other. The current development within administrative law raises questions of a constitutional character. When national authorities apply common rules within a common procedural and institutional administrative framework, this will add a European dimension to national administration as such. To what extent is it legitimate for national authorities to take instructions from another polity than their national government? To whom shall national authorities be accountable? Also the national legislators need to take an overriding and coherent approach.

As for the current status of the proposal, negotiations in the Council are still ongoing and the European Parliament has not been asked to approve it as yet. ●

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