

Elimination of technical barriers to trade

Principle of mutual recognition

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Elimination of technical barriers to trade

The underlying principle

➤ Article 28 EC:

➤ “Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”

Elimination of technical barriers to trade

The underlying exceptions

➤ Article 30 EC:

➤ “The provisions of Article 28 (...) shall not preclude prohibitions or restrictions (...) justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”

➤ Mandatory requirements (ECJ case law)

Elimination of technical barriers to trade

Notion of technical barriers to trade

- **A technical rule =**
 - **A technical specification defining the characteristics required of a product, such as**
 - **its composition,**
 - **its presentation, or**
 - **testing and test methods within conformity assessment procedures**

 - **Which is obligatory, in law or in fact, to market or use the product in the MS of import**

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Notion of technical barriers to trade

- **A technical rule may impede access of product to another MS!**
 - **If the MS of import imposes its own technical rules in the product, the economic operator may be obliged to:**
 - **withdraw from the market of MS of import**
 - **adapt his products according to MS of import**
 - **incur additional costs**
- **In that case, it is a barrier to trade**

Elimination of technical barriers to trade

Examples of technical barriers to trade

- **German purity law for beer: rules banning additives in beer**
- **Cheese must have a prescribed minimum fat content**
- **Margarine must be sold in cubic packaging so as to distinguish it from butter**

Elimination of technical barriers to trade

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➤ **European Court of Justice, « Cassis de Dijon » (Case 120/78):**

no MS may prohibit the sale of a product lawfully manufactured or placed on the market in another MS, even if this product is manufactured according to technical or qualitative rules which are different from the rules which it imposes for its own products

➤ **In other words: products lawfully manufactured or placed on the market in a MS must move freely between MS**

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Qualification

- **However,**
restrictions imposed by the MS of import are possible, provided that they are justified for the reasons given in Article 30 EC or for the mandatory requirements recognised by the ECJ
- **Member States remain competent to decide on level of protection to afford to their population**

Principle of mutual recognition

Back to the principle

- **But, if the product provides an equivalent level of protection of the legitimate interests involved (cf. Article 30, mandatory requirements), then the MS of import must allow the placing on its market of the product**
= principle of mutual recognition

- **This does not only apply to products manufactured or placed on the market in another MS, but also to:**
 - **Products manufactured in EFTA States**
 - **Products manufactured or placed on the market in Turkey**

Principle of mutual recognition

MS right of scrutiny

- **Mutual recognition does not apply automatically in all cases**
- **MS of import has the right to verify equivalence of level of protection provided by the product compared with level of protection offered by its own national rules**

How to apply the MS right of scrutiny

- **Collecting the necessary data**
 - From the economic operator in the first place
 - Cannot duplicate controls that have already taken place
- **Verification of the equivalence of levels of protection**
 - Conformity of product with rules of MS of origin: level of protection of those rules may help, but is not decisive: product may offer higher level
 - Identify applicable national rules of MS of import
 - Applying those rules must be justified, necessary, proportionate
- **Results of the assessment and communicating them to the applicant**
 - Communicate as soon as possible with all the facts of the case
 - Demonstrate the legitimate interest, necessity, proportionality
 - Right to submit comments and to have legal recourse

Mutual recognition clauses

- **A useful tool to ensure the application of the principle of mutual recognition:**
 - **Ensuring application of the principle**
For importers, exporters and national officials that have to implement the legislation
 - **Transparency for economic operators**
 - **Legal certainty**

Model of a mutual recognition clause

(1)

« The requirements of this law do not apply to products lawfully marketed and /or produced in other MS or in Turkey or to products legally produced in EFTA states which are signatories to the EEA Agreement, provided that they provide a level of protection equivalent to that sought by this law.

Model of a mutual recognition clause

(2)

If the competent authorities have proof that a specific product lawfully manufactured and/or marketed in another Member State of the European Union or in Turkey, or lawfully manufactured in an EFTA State that is a contracting party to the EEA Agreement, does not provide a level of protection equivalent to that sought by this law, they may refuse market access to the product or have it withdrawn from the market, ...

Model of a mutual recognition clause

(3)

... after they:

- have informed the manufacturer or the distributor in writing which elements of the national technical rules prevent the marketing of the product in question, and
- have proved, on the basis of all the relevant scientific elements available to the competent authorities, that there are overriding grounds of general interest for imposing these elements of the technical on the product concerned and that less restrictive measures could not have been used, and
- have invited the economic operator to express any comments he may have within a period of (at least four weeks or 20 working days), before issuing an individual measure against him restricting the marketing of this product, and
- have taken due account of his comments in the grounds of the final decision.

The competent authority shall notify the economic operator concerned of individual measures restricting the marketing of the product, stating the means of appeal available to him ”

Benefits of mutual recognition approach

- Economic operators are not obliged to adapt their products to the technical specifications of each MS
- Economic operators can continue to produce according to the technical specifications of the MS of origin
- Variety of products within the Single Market can be maintained, while their free movement is assured
- National laws and regulations may continue to govern national production, respecting the principle of subsidiarity

For more information

« Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition »

– Official Journal C 265/2 of 4.11.2003

– Also available at

http://europa.eu.int/comm/enterprise/regulation/goods/mutrec_en.htm