STUDY

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European Parliament

Contribution to Growth

Free movement of goods: Delivering improved rights to European citizens and businesses

Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
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Contribution to Growth

Free movement of goods: Delivering improved rights to European citizens and businesses

Abstract

Following a brief overview of the legal mechanisms provided for in the Treaty on the Functioning of the European Union (TFEU), this study summarises and analyses the Directives and Regulations in the harmonised and non-harmonised areas of the free movement of goods, adopted during the 7th and 8th electoral periods of the European Parliament (2009–2019). It will also highlight the rights that businesses and citizens enjoy under the current legislation, and ways in which the legislation could be improved.

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This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection (IMCO).

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EXECUTIVE SUMMARY

Background

Free movement of goods is one of the 'four freedoms' provided for in the Treaty on the Functioning of the European Union (TFEU) for the creation of the internal market. To bring about free movement of goods, Articles 34 and 35 TFEU prohibit quantitative restrictions and measures having equivalent effect. Article 36, however, allows Member States to justify restrictions or prohibitions of imports and exports on a limited number of grounds.

Beyond the grounds in Article 36, Member States may invoke any public interest ('mandatory requirements'). These are capable of justifying national provisions that apply equally in law to both imports and goods made in the Member State that imposes the restriction, but that are in fact more difficult to comply with for imports. The same is true where national law prohibits a type of product altogether that is lawful in other Member States.

Member States must assess whether products lawfully made in other Member States meet the standards of healthiness, fairness, environmental protection, etc., laid down in the legislation of the importing Member States. Where compliance with the rules of the Member State of manufacture in substance meets the requirements of the importing Member State, that Member State must allow the products onto its market.

Member States may deny such 'mutual recognition' of products from other Member States only if they can invoke a ground of justification in Article 36 or a mandatory requirement. National legislation must also observe the principle of proportionality. In cases where Member States have been able to justify trade restrictions, the Union can decide to harmonise national legislation by way of Directives (or, occasionally, to create a uniform regime through the adoption of Regulations). The decision to harmonise an area is in the EU's political discretion: there is no legal automatism. There will, therefore, always be harmonised and non-harmonised areas of the law. The former will be governed by the applicable Directives and Regulations, the latter by the principle of mutual recognition. Both can apply to different aspects of the same product.

EU legislation in the non-harmonised area aims at increasing transparency for market participants, Member States, and the Commission. This is achieved partly by subjecting restrictive national legislation to preventive controls at Union level, partly by harmonising the national procedures that allow individuals to vindicate their rights under the Treaty's provisions on free movement of goods.

The centrepiece in this area is Directive 2015/1535, the recast notification directive of 1983 and 1998. It obliges Member States to notify draft technical regulations to the Commission. Member States must also not enact any regulation before the Commission and the other Member States have had the opportunity to comment on the draft. Failure to observe either of these obligations renders the regulations inapplicable. Individuals may invoke this inapplicability even in litigation against other individuals, not only vis-à-vis the Member State. Regulation 1025/2012 on European standardisation provides for similar mechanisms with regard to (voluntary) standards, but has not nearly had as much of an impact as the Directive.

Regulation 2019/515 contains provisions for the national procedures that lead to the extension of mutual recognition to a product from another Member State, or to a decision to deny it. Centrepiece is a 'mutual recognition declaration' by the producer to the effect that the goods are lawfully marketed in another Member State. On making this declaration, marketing of the goods may begin. The denial of mutual recognition is the exception. It requires the Member State to take the initiative. If it does nothing, lawful marketing may continue by default.

The Regulation also mandates the creation by the Member States of Product Contact Points to which citizens and businesses can turn for information and advice.

The legislation is complemented by several online platforms, such as SOLVIT and the Internal Market Information System (IMI) pursuant to Regulation 1024/2012, for the exchange of information between national authorities and with the Commission, for the solving of problems that private parties experience in buying or selling goods in or from other Member States, and for the creation of transparency about national technical regulations that have been notified to the Commission. All these platforms are now accessible for citizens and businesses through the Single Digital Gateway 'Your Europe' pursuant to Regulation 2018/1724.

Legislation in the harmonised area of the free movement of goods largely consisted (as in the non-harmonised area) in further developing older rules, with few genuinely new acts over the reference period. Central areas of legislative activity were motor vehicles and craft, electricity and electrical equipment, and food. Compliance with harmonised standards gives rise to the presumption of safety a product, so that businesses and citizens may freely import and export, and buy and sell the product. The problem of a proliferation of authorities, procedures, and channels of communication occurs in the harmonised area, too.

The movement of goods between Member States is freer than between any other developed sovereign countries. Individuals and traders have unparalleled opportunities easily to buy and to sell, to compare and to find the best offer, at home and abroad. The internal market in goods is a resounding success.[1] On top of this, the EU gains considerable weight in international trade and trade negotiations through a customs union and common commercial policy among Member States with, between them, half a billion consumers (who are also among the most affluent in the world).

The legal regime that underpins free movement of goods constantly develops. This allows experimentation and competition, combined with democratic legitimacy and respect for national and local preferences. Nevertheless, diversity also brings challenges. These have been addressed by Union legislation in both the harmonised and the non-harmonised area, but problems persist. In the legislation in the non-harmonised area, there is a confusing multitude of channels of communication as well as of enforcement-, supervisory, and information bodies.

Some rules in the non-harmonised area turn on fine distinctions of a conceptual nature rather than of substance (for instance the different treatment of technical rules and outright prohibitions).

In the harmonised area, too, there is a proliferation of mechanisms of cooperation and information exchange. All of these mechanisms require resources that individual Member States will be hard pressed to find. Uneven enforcement of the harmonised rules across the Member States is the foreseeable consequence. While there are a number of informal and consensual mechanisms for settling disputes, litigation remains for private market participants as indispensable, but also as burdensome as ever.

[1] Putvaara et al., Contribution to Growth: Free Movement of Goods. Delivering Economic Benefits for Citizens and Businesses, Brussels 2018, p. 13 *sub* 2.1.1: "Under the counterfactual scenario also trade flows between old EU, new EU and non-EU countries would be affected due to less accessible gains from trade. Ending the Single Market would reduce intra-European trade by approximately 30% (see Figure 3). This in turn means that the Single Market has had a positive impact on intra-EU trade of 569 billion euros (manufacturing and agriculture), which is made up of a positive trade effect of 547 billion euros for the manufacturing sector and 22 billion euros for the agricultural sector."

1. GENERAL ACHIEVEMENTS OF THE FREE MOVEMENT OF GOODS

KEY FINDINGS

- Free movement of goods is one of the 'four freedoms' of the internal market that citizens and businesses enjoy under the Treaty on the Functioning of the European Union (TFEU).
- Articles 34 and 35 TFEU prohibit quantitative restrictions and measures having equivalent effect. Article 36, however, allows Member States to justify restrictions or prohibitions of imports and exports on a limited number of grounds.
- Beyond the grounds in Article 36, Member States may invoke any public interest ('mandatory requirements'). These are capable of justifying national provisions that apply equally in law to both imports and domestically made goods, but are in fact more difficult to comply with for imports. The same is true where national law prohibits a type of product altogether that is lawful in other Member States.
- Member States must assess whether products lawfully made in other Member States meet the standards of healthiness, fairness, environmental protection, etc., laid down in the legislation of the importing Member States. Where compliance with the rules of the Member State of manufacture in substance meets the requirements of the importing Member State, that Member State must allow the products onto its market. Citizens and businesses can vindicate this right in the courts of the Member State.
- Member States may deny such 'mutual recognition' of products from other Member States only if they can invoke a ground of justification in Article 36 or a mandatory requirement. National legislation must also observe the principle of proportionality.
- In cases where Member States have been able to justify trade restrictions, the Union can decide to harmonise national legislation by way of Directives (or, occasionally, to create a uniform regime through the adoption of Regulations).
- The decision to harmonise an area is in the EU's political discretion: there is no legal automatism. There will, therefore, always be harmonised and non-harmonised areas of the law. The former will be governed by the applicable Directives and Regulations, the latter by the principle of mutual recognition. Both can apply to different aspects of the same product.

1.1. The Fundamental Provisions: Articles 18, 26(2), and 34–36 TFEU

The starting point for the following are the two provisions in the Treaty, Articles 18 and 26(2). These lay the ground for the law of the internal market, of which the free movement of goods is but one part. Article 18 TFEU prohibits any discrimination on grounds of nationality, special provisions in the Treaty notwithstanding. Article 26(2) describes the internal market as an "area without internal frontiers" in which the free movement of, among others, goods is ensured.

One of the 'special provisions' to which the text of Article 18 refers is Article 34 TFEU. It prohibits quantitative restrictions on the importation of goods between Member States, and all measures having equivalent effect. Article 35 stipulates the same for exports. Article 36, however, allows the Member States to restrict or even to prohibit the free movement of goods if they can invoke one or several of the grounds of justification listed in the first sentence of the article. Nevertheless, the second sentence adds that such prohibitions shall not constitute a means of "arbitrary discrimination" on trade between Member States. The provisions of Articles 34 and 35 therefore prohibit discrimination, i.e. unequal treatment without objective justification.

With this, another distinction is connected, namely that between distinctly and indistinctly applicable national measures (laws, regulations, administrative acts). This appears most clearly in Article 52(1) TFEU, the parallel provision to Article 36 in the chapter on the right of establishment. The article allows "special treatment for foreign nationals" on a small number of grounds. 'Special treatment' denotes national provisions that apply only to nationals of other Member States, and that are more burdensome than the rules that apply to the Member State's own nationals. The same is true in the area of free movement of goods.

Such measures, singling out nationals or goods from other Member States, are diametrically opposed to the idea of creating one, continent-wide market to which everyone everywhere has, in principle, free and equal access. Member States' ability to adopt such measures must therefore be tightly controlled. The Treaty does so by recognising only a limited number of permissible aims that Member States may pursue with distinctly applicable measures. To the grounds listed in Article 36 and the equivalent provisions on the other freedoms, none may be added, and the ones that are enumerated must be interpreted narrowly.

These changes with the other type of national provisions, indistinctly applicable measures: the same rules apply to all goods coming from or going to other Member States, as well as to those made and sold within the borders of that Member State alone. With such rules, there is no 'special treatment' of goods etc. from other Member States *in law*. *In fact,* however, it may turn out that foreign goods find it specifically more difficult to comply with the rules than goods made in that Member State. Products made in accordance with the rules in force in other Member States may not conform to the rules applicable in that Member State. The producer and/or its distributors will then be left with the choice either to adapt the product at potentially great expense, or not to market it there at all.[2]

[2] IP/A/IMCO/2015-06 / PE 578.966, European Parliament (LE Europe – Godel, MI, Harms, A, Jones, S, Mantovani, I), Reducing Costs and Barriers for Businesses in the Single Market, 2016, p. 15: "Product market regulation differs across member states: while some European countries have highly liberalised product markets (AU, DK, NL, UK) by international standards [on which, see figure 11 on p. 48], others still maintain substantial restrictions. Both the level of restrictions and the differences between member states are barriers to the Single Market", 'barriers' being understood as, "a cost which must be borne by a firm which seeks to enter a market, and which is not borne by firms already in the market," p. 29. Several examples come to mind: "Much cross-border trade is inhibited due to consumer discrimination based on the country from which goods and services are ordered. As many as 61% of cross-border purchases could not be fulfilled in a mystery shopping evaluation in 2009.29 The discrimination frequently happens during online sales and commonly takes the form of simple refusal to sell, automatic re-routing to a domestic provider, and providing adverse sales conditions due to foreign residency. The discrimination is often based on consumers' IP-addresses," p. 38.

The best-known example can be found in the *Cassis de Dijon* judgment of the Court of Justice of the European Union ('the Court').[3]

It is this factual inequality that makes indistinctly applicable national measures problematic from the point of view of the internal market and the free movement of goods. Some inequality, however, is unavoidable with all legal rules. As soon as the legislature stipulates any conditions for a particular legal consequence to arise, some people will meet the conditions, while others may not: those whose beverage contains less than 25% alcohol must not call it 'fruit liqueur', but those may whose drink contains more (the example of *Cassis de Dijon*); those who fail to rescind a contract within the statutory period are stuck with the contract and must pay for something they no longer want, while those are free who rescinded in time. Some are 'in': they benefit from the rule; some are 'out', they are denied the benefit, or they have to shoulder a (heavier) burden.

In the case of *distinctly* applicable measures, the inequality is intentionally created. With *indistinctly* applicable measures, by contrast, the inequality is the unavoidable consequence of any and all legislation. That has consequences for the Member States' ability to justify the different types of measures. With *distinctly* applicable measures, Member States are limited to what the Treaty expressly allows as grounds of justification. If on these grounds, however, distinctly applicable measures can be justified, then the grounds must also be available for the *prima facie* less harmful *indistinctly* applicable measures.

What is more, in the case of indistinctly applicable measures Member States are not limited to the grounds written in the Treaty. The rescission period in the example above will have been enacted by the Member State to give consumers a window during which they can change their mind. Afterwards, however, the reliability of contractual relationships (*pacta sunt servanda*) must prevail. In the interest of that reliability, the legislator accepts that those who miss the deadline cannot get away from the contract, while those who keep it can. In other words, the policy motivation that underlies the legislation doubles as the ground of justification for the inequality that the rule necessarily entails.

The Court in *Cassis de Dijon* coined the phrase 'mandatory requirements' for such grounds of justification beyond Article 36, and defined them in the same judgment as, "a purpose which is in the general interest and such as to take precedence over the requirements of the free movement of goods". These policy motivations are potentially endless in number: anything is permissible that is not incompatible with the Treaty or any Directives, Regulations, or other binding secondary Union law adopted on the basis of the Treaty. As long as Member States observe the principle of proportionality, they are free to seek to achieve anything that they have identified as the public good. Member States enjoy legislative autonomy.

Lastly, a national rule may apply to all goods, domestic and from other Member States, and it may also be equally difficult for all goods or traders to comply with that rule. This may be the case because, for instance, the national rule is based on a (non-binding) European standard. The rule may, however, stipulate that goods must not be marketed if they do not conform to the standard, or that they may only be marketed after conformity is established.

The rule might also impose a blanket prohibition on sales of the product in question. Rules of this type stipulate universal bans. Most such bans are conditional or temporary, as in the first two examples; few are absolute and definitive, as in the third.

[3] Case 120/78 *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein*, ECLI:EU:C:1979:42, paras 8, 14. The judgment is available under https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61978CJ0120.

In this situation, there will be no unequal treatment in law or in fact. The question of discrimination will therefore not arise. Article 26(2) TFEU, however, defines the internal market as an area 'without internal frontiers'. A Member State that imposes a universal ban thereby erects a frontier between itself and those Member States in which the product may (still) lawfully be marketed. Universal bans therefore require a justification. Because these bans apply indistinctly, grounds of justification can be found in Article 36 or beyond, as 'mandatory requirements'.

If, on the other hand, an indistinctly applicable rule makes marketing equally more difficult for all goods irrespective of their origin, and if the rule imposes no universal ban, it will not require a justification at all: this is the gist of the judgment in *Keck*.[4] Such rules merely reduce turnover across the board, but otherwise leaves the market equally open for everyone. Examples from the Court's case law are shop opening hours, the prohibition of retail at a loss, and zoning legislation. Table 1 illustrates this, using the Court's seminal judgments.

Table 1: Scheme of the case law on Articles 34–36

	Treatment of imports in law	*Effect of the rule on domestic / imported goods*	*Justification*
Dassonville[5]	Different (distinctly applicable)	Different	Art. 36
Cassis de Dijon[6]	Same (indistinctly applicable)	Different ("dual burden", adaptation required: composition, labelling, promotion schemes)	Art. 36 + "mandatory requirements"
Keck[7]	Same (indistinctly applicable)	Same (no adaptation costs) + no bar to market access (= no universal ban)	Not required

1.2. The Regulatory Scheme of the Internal Market

As seen above, the Member States have the ability to justify national rules that hinder the free movement of goods. This has repercussions on the allocation of legislative competences between the Member States and the EU. The Treaty provides for two basic legal mechanisms to bring about economic integration, here understood the combination of the several national markets into one single, internal market by removing 'internal frontiers' (or synonymously, 'obstacles' or 'restrictions') to free movement, Article 26(2) TFEU. These mechanisms are commonly referred to as negative and positive integration.

Negative integration works by way of prohibitions in the Treaty articles on free movement: Member States must not discriminate (i.e. they must not treat unequally without justification), and they must not without justification impose universal bans. Member States may, however, justify restrictive legislation on various grounds. In the case of rules that apply indistinctly to all economic transactions, cross-border between Member States as well as purely internal within the Member State in question, Member States can invoke a practically unlimited number of grounds of justification. Member States have a limited choice of grounds for the justification of distinctly applicable rules, that is, those rules

[4] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard*, ECLI:EU:C:1993:905, paras 13–17, available under https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991CJ0267.

[5] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61974CJ0008.

[6] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61978CJ0120.

[7] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991CJ0267.

that specifically target cross-border transactions. If a Member State has pursued any of these policy objectives with proportional means, its legislation stands. (If not, the legislation cannot be applied to those who derive rights from the Treaty, but otherwise continues to apply in purely internal situations.) As a consequence, negative integration will never be complete.

This is when positive integration becomes relevant. Where national legislation has withstood scrutiny under the Treaty articles, the Union's legislative organs may decide that the national restrictions are weighty enough to warrant legislation at European level to harmonise Member States' laws by way of Directives, or to create a uniform legal regime through Regulations. There is no automatism to that effect, because the question calls for careful analysis.[8] To the extent that an area is harmonised, Member States may no longer invoke the exception clauses in the Treaty, nor 'mandatory requirements'.

The Treaty offers several specific legal bases, and in Article 114 TFEU one general legal basis for legislation aimed at the establishment and functioning of the internal market (with the exception of the free movement of persons, para 2). Article 114 is also the only legal basis for secondary Union law concerning the free movement of goods. The resulting scheme is illustrated in Table 2.

Table 2: Regulatory scheme of the internal market

General prohibition of DISCRIMINATION based on nationality, Art. 18, & an area without INTERNAL FRONTIERS to the …	… FREE MOVEMENT of, Art. 26(2)	NEGATIVE INTEGRATION (prohibitions addressed to the Member States)	EXCEPTIONS (grounds MSs may invoke to justify suitable & necessary restrictions)	For indistinctly applicable measures additionally 'mandatory requirements/imperative reasons in the public interest': consumer protection, environment, coherence of the tax system, & any other policy not incompatible with the TFEU	POSITIVE INTEGRATION (legal bases for the adoption of Directives & Regulations, Art. 288)	Carve-out in 114(2)	Art. 352 TFEU
		Art. 30: no customs duties or charges having equivalent effect	**None:** EU is a free trade area + common external tariffs (customs union) + abolition of non-tariff barriers between MSs = internal market		**None:** CCT, Art. 31, for *external* tariffs vis-à-vis 3rd countries/WTO		
	Goods	**Art. 110**: no discriminatory or protective taxation	**None:** strict prohibition of distinctly applicable fiscal burdens / Art. 30		**Art. 113** (indirect taxation only)		
	Persons – **Workers**	**Art. 34/35**: no quantitative restrictions or measures having equivalent effect	**Art. 36**: public morality, policy, and security; public health; intellectual property		**Art. 114, 115**		
	Persons – **Workers**	**Art. 45(1), (2)**: no discrimination against migrant workers from other Member States	**Art. 45(3), (4)**: public policy, security, and health; public service		**Art. 46, 48**		
	Persons – **Establishment**	**Art. 49/54**: no restrictions on the establishment of nationals or companies from other MSs	**Art. 51, 52(1)**: special treatment for foreign nationals on grds of public policy, security, health; exercise of public authority		**Art. 50, 52(2)–55**		
	Services	**Art. 56**: no restrictions on the provision of services across the borders between MSs	**Art. 62, 51, 52(1)**: as above		**Art. 59, 62, 52(2)–55**	**Art. 114, 115**	
	Capital	**Art. 63**: no restrictions on capital movements between MSs, and betw MSs and 3rd countries (!)	**Art. 64(1), 65**: prudential supervision, statistics, public policy, public security, etc.		**Art. 64(2)**		
		NON-HARMONISED AREA: Dir 2015/1535; Reg 2019/515 – 'Mutual Recognition'			**HARMONISED AREA**		

[8] LE Europe (n2), p. 58, point out that, "EU-level regulation, including the measures characterised as burdensome in the top-10 consultation, typically reduces regulatory barriers to intra-EU trade by harmonising fragmented national regulation. National-level regulation, even if it successfully addresses market failures, can still cause regulatory failure from a Single Market perspective by maintaining or even exacerbating legal fragmentation. As discussed previously, additional analysis to distinguish adequate regulatory costs and unnecessary administrative burdens taking into account any single-market effects is essential."

1.3. Harmonised and Non-Harmonised Areas of the Free Movement of Goods, and the Principle of 'Mutual Recognition'

Under the current constitution of the EU, by default it is the Member States who are competent to regulate the production and marketing of goods on their territory, in pursuit of objectives in the public interest which they remain free to define. Although this legislative autonomy of the Member States can lead to restrictions of free movement, the resulting diversity is desirable on democratic grounds, and it also has some economic benefits. What is more, the present arrangements are unlikely to change in the foreseeable future.

For these reasons, and because its resources are limited, the Union must confine itself to selecting those areas in which its legislation can have the greatest impact for the creation and functioning of the internal market. It cannot hope to be able to harmonise each and every area of the law in which differences between Member States emerge, nor should it.[9] As a consequence, some rules governing the free movement of goods will always remain non-harmonised. Also, some aspects of the same product may be subject to harmonising legislation, while others are not: with regard to the latter aspects, the principle of mutual recognition applies, as described in the following.

Not all divergences between national rules will constitute insurmountable obstacles to free movement. While each Member State remains free to pursue policies of its own choosing, it cannot fail to notice that other Member States share many if not all of its concerns for a healthy environment, product safety, consumer protection, and so forth. The other Member States might simply seek to achieve the same objectives in different ways, and products made and marketed there will reflect these concerns in substance. The importing Member State must take this into consideration when it assesses the proportionality of enforcing its own rules vis-à-vis products from other Member States.

The Court locates the requirement of proportionality in the second sentence of Article 36. It means that national measures must be capable of achieving whatever public interest (one from the list in Article 36, or a 'mandatory requirement') motivated their adoption (they must be 'appropriate'). Member States must also not restrict the free movement of goods further than is necessary to this end.

If, therefore, an imported product, complying with the legislation of the Member State of origin, achieves essentially the same protection of the public interest, nothing would be gained in substance by insisting on compliance with the rules in force in the Member State of importation.

It would not contribute to the protection of whatever public interest the Member State pursued with those rules. Such insistence would, hence, not be 'appropriate' ('adequate' and 'suitable' have the same meaning).

Alternatively, one could phrase this as saying that compliance with the rules of the Member State of origin is equally effective for protecting the public interest in the Member State of importation, but less intrusive than enforcing the rules of the importing Member State instead, necessitating costly adaptations. Such enforcement would, in other words, not be 'necessary'. In that case, citizens and businesses can vindicate before the national courts their right to buy and sell the products in question.

[9] This tallies with the Commission's view in COM(2017) 796 final, p. 3 under (e) that, "EU harmonisation legislation covering every product and aspect of products is neither a feasible nor a desirable objective. It is a costly and time consuming process, where a balance needs to be struck between different approaches and should be reserved for those products and aspects of products where there are significant barriers to the free movement across the Single Market which cannot be addressed otherwise."

This application of the principle of proportionality to the enforcement of national law is usually referred to as 'mutual recognition'. Member States must give imported products credit for the guarantees they offer with regard to public health, consumer protection, the environment, etc. Where these guarantees are equivalent to what a Member State seeks to achieve domestically, it cannot enforce observance of its own rules. Such equivalence is a question of substance, to be determined case by case. There is no automatism. Member States are free to set the level of protection they want to attain. There is no presumption that one Member State's rules are excessive merely because another Member State has decided that less protection will be enough, and legislated accordingly for its own territory.[10]

This is why the term 'mutual recognition' is somewhat misleading: there is no mutuality – the legislation of the exporting Member State merely serves as a point of reference, but does not itself come under scrutiny – and the 'recognition' is only conditional, namely on the goods' offering equivalent protection of the importing Member State's public interest.

Nevertheless, mutual recognition allows free movement of goods even when national rules differ, or where not all Member States have rules on a given product (yet). It is a universal mechanism that applies irrespective of the specific nature of the goods in issue and of the Member States involved. The Union will therefore seek to bolster it by legislative means. In so doing, it can avoid being drawn into the much more complex task of substantive harmonisation. Harmonisation is the preserve of the Union; each of the millions of market participants in the EU, by contrast, has it in their hands to enforce the principle of mutual recognition in the national courts. This is also illustrated in Table 2. The following Table 3 summarises the legislation that will be analysed in the subsequent chapters.

Table 3: Technical Harmonisation

<table>
<tr><th colspan="4">TECHNICAL HARMONISATION</th></tr>
<tr><th>Non-harmonised Products</th><th>Harmonised Products</th><th>Sectoral Provisions</th><th>Standardisation</th></tr>
<tr><td>Notification Directive 2015/1535</td><td>Decision 768/2008 on a common framework for the marketing of products</td><td rowspan="3">Motor vehicles and craft:[11] sound levels & silencing systems (2014); roadworthiness tests (2014); roadside inspection of roadworthiness (2014); recreational craft & watercraft (2013); approval & market surveillance of agricultural & forestry vehicles (2013); approval & market surveillance of two- or three-wheel vehicles & quadricycles (2013); type-approval of motor vehicles & engines with respect to emissions from heavy duty vehicles (Euro VI) & on access to vehicle repair & maintenance information (2009); type-approval requirements for the general safety of motor vehicles, their trailers & systems, components & separate technical units intended therefor (2009).</td><td>European Standardisation Regulation 1025/2012</td></tr>
<tr><td>Mutual Recognition Regulation 2019/515</td><td rowspan="2">Regulation 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products (2008)</td><td rowspan="3"></td></tr>
<tr><td>Regulation 2679/98 on the Functioning of the Internal Market</td></tr>
<tr><td>General Products Safety Directive 2001/95</td><td>Directive on ecodesign requirements for energy-related</td><td>Fuels and fuel-burning appliances:[12] reduction in the sulphur content of certain liquid fuels (2016); appliances burning gaseous fuels (2016).</td></tr>
</table>

[10] From the case law of the Court, see for instance Case C-384/93 *Alpine Investments BV v Minister van Financiën*, ECLI:EU:C:1995:126, para 27.

[11] See text under 3.1.1, and full references in the annexe.

[12] See text under 3.1.2, and full references in the annexe.

	products (re-cast) (2009)		
Internal Market Problem Solving Network (SOLVIT)	Energy Labelling Framework Regulation 2017/1369	Measuring equipment:[13] making available on the market of measuring instruments (recast) (2014); non-automatic weighing instruments (2014); metrology (2011).	
Internal Market Information System Regulation 1024/2012		Electricity and electrical equipment:[14] framework for energy labelling (2017); pressure equipment (2014); electromagnetic compatibility (recast) (2014); simple pressure vessels (2014); electrical equipment designed for use within certain voltage limits (2014); restriction of the use of certain hazardous substances in electrical & electronic equipment (2011); transportable pressure equipment (2010); framework for the setting of ecodesign requirements for energy-related products (2009); common rules for the internal market in electricity (2009).	
		Explosives:[15] making available on the market & supervision of explosives for civil uses (recast) (2014); equipment and protective systems intended for use in potentially explosive atmospheres (recast) (2014); pyrotechnic articles (recast) (2013); explosives precursors (2013).	
		Food:[16] caseins & caseinates intended for human consumption (2015); scientific examination of questions relating to food (2015); food intended for infants & young children, food for special medical purposes, & total diet replacement for weight control (2013); indications or marks identifying the lot to which a foodstuff belongs (2011); natural mineral waters (recast) (2009).	
		Other products:[17] personal protective equipment (2016); cableway installations (2016); clinical trials on medicinal products for human use (2014); lifts & safety components for lifts (2014); biocidal products (2012); textile fibre names & related labelling & marking of the fibre composition of textile products (2011); construction products (2011); cosmetic products (209); seal products (2009); safety of toys (2009).	

[13] See text under 3.1.3, and full references in the annexe.

[14] See text under 3.1.4, and full references in the annexe.

[15] See text under 3.1.5, and full references in the annexe.

[16] See text under 3.1.6, and full references in the annexe.

[17] See text under 3.1.7, and full references in the annexe.

2. SPECIFIC ACHIEVEMENTS OF THE FREE MOVEMENT OF GOODS: LEGISLATION IN THE NON-HARMONISED AREA

KEY FINDINGS

- EU legislation in the non-harmonised area aims at increasing transparency for citizens and businesses, Member States, and the Commission.
- This is achieved partly by subjecting restrictive national legislation to preventive controls at Union level, partly by harmonising the national procedures that allow citizens and businesses to assert their rights under the Treaty's provisions on free movement of goods.
- The centrepiece in this area is Directive 2015/1535, the recast notification directive of 1983 and 1998. It obliges Member States to notify draft technical regulations to the Commission. Member States must also not enact any regulation before the Commission and the other Member States have had the opportunity to comment on the draft. Failure to observe either of these obligations renders the regulations inapplicable. Citizens and businesses may invoke this inapplicability even in litigation against other private parties, not only vis-à-vis the Member State. Regulation 1025/2012 on European standardisation provides for similar mechanisms with regard to (voluntary) standards, but has not nearly had as much of an impact as the Directive.
- Regulation 2019/515 contains provisions for the national procedures that lead to the extension of mutual recognition to a product from another Member State, or to a decision to deny it. Centrepiece is a 'mutual recognition declaration' by the producer to the effect that the goods are lawfully marketed in another Member State. On making this declaration, marketing of the goods may begin. The denial of mutual recognition is the exception. It requires the Member State to take the initiative. If it does nothing, lawful marketing may continue by default. The Regulation also mandates the creation by the Member States of Product Contact Points to which citizens and businesses can turn for information and advise.
- The legislation is complemented by several online platforms, such as SOLVIT and the Internal Market Information System (IMI) pursuant to Regulation 1024/2012, for the exchange of information between national authorities and with the Commission, for the solving of problems that private parties experience in buying or selling goods in or from other Member States, and for the creation of transparency about national technical regulations that have been notified to the Com-mission. All these platforms are now accessible for citizens and businesses through the Single Digital Gateway 'Your Europe' pursuant to Regulation 2018/1724.

2.1 Mutual Information among the Member States about Draft Technical Regulations: Directive 2015/1535

Directive 2015/1535 is the third iteration of legislation enacted in 1983 and updated in 1998. The amendments concerned an extension of the procedures established by the Directive to national rules concerning services and to internet-based business activities, as well as minor modifications and clarifications to the procedures themselves.[18] A notable development took place, by contrast, in the interpretation of the Directive by the Court of Justice.

The Directive obliges Member States immediately to communicate to the Commission any draft technical regulations, including amendments to existing regulations (Article 5). (At an even earlier stage, Member States have to let the Commission know whenever they request a standards institution to draw up a standard subsequently to be used in national technical regulations, Article 4.) The Commission notifies all other Member States of the draft (translated into each Member State's official language). The other Member States may then address comments to the first Member State. That Member State must take the comments into account 'as far as possible', and report to the Commission, which in turn comments on the Member State's reaction.

In order for the other Member States and the Commission to have sufficient time to form a view of the draft legislation, the Member State must postpone its adoption for an initial period of three months, Article 6. The period can be extended in various circumstances, up to a maximum of eighteen months, should the Commission initiate legislation which progresses to its first reading in Council. In two very narrowly drawn circumstances may the Member State enact technical regulations immediately, namely where emergencies arise with regard to some of the public interests mentioned in Articles 36 and 52 TFEU, or in the event of a bank run and similarly grave crisis on the financial markets.

When Member States finally adopt the legislation, the Commission encourages them to insert a 'single market clause' in national technical regulations, and will develop specific guidance for the use of the clause: 'Goods lawfully marketed in another Member State of the European Union or in Turkey, or originating and lawfully marketed in an EFTA State that is a contracting party to the EEA agreement are presumed to be compatible with this measure. The application of this measure is subject to [Reg. 2019/515, discussed below]'.

These mechanisms have been substantially bolstered by the Court of Justice. Since 1996 the Court has held in a series of judgments[19] that technical regulations are unenforceable if the Member State in question has adopted them without either notifying the Commission, or without observing the subsequent standstill period. This in effect freezes the *status quo ante*. The Member State can regularise the situation by abiding by the Directive afterwards, but until then the law remains as before the introduction of the new regulations. In the meantime, however, the enactment and any enforcement of the technical regulations is in breach of EU law, and lays the Member State open to action by the Commission under Article 258 TFEU.

Citizens and businesses, by contrast, cannot sue the Member State for damages under the *Francovich* case law of the Court.

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[18] The Commission reported on the operation of Directive (EU) 2015/1535 from 2014 to 2015 in COM(2017) 788 final. This contains comprehensive statistics, including a break-down by industrial sector. (In fact, most of the report relates to the time when Dir. 98/34 was still in force.)

[19] The Commission has compiled the case law under the Directive at http://ec.europa.eu/growth/tools-databases/tris/en/about-the-20151535/case-law/.

This is because the Directive is not meant to confer rights on individuals; it merely governs the procedures between Member States and Commission.[20] If, however, the enactment and enforcement of the legislation constitutes an unjustified breach of Articles 34 or 35 TFEU (this is a separate question of substance, not merely of procedure), individuals can sue for any damages that they suffer from that breach.

Independently of the question of Member State liability, individuals (natural persons and companies) can invoke the 'freezing' effect of the Directive in litigation with other individuals.[21] Non-compliance of goods or services with technical regulations that were adopted in breach of the Directive does not amount to breach of contract; the other party to the contract must accept and pay for the goods. The inverse is true where the goods or services comply with the irregularly adopted national legislation.

The Commission maintains a publicly accessible website that records notifications and shows the applicable standstill periods.[22] There are also regular statistics concerning notifications in the Official Journal of the EU.[23] It can be presumed that few individuals or companies follow these regularly, but that industry associations, chambers of commerce, and specialist law and consultancy firms do, and are able to offer advice.

[20] Case C-98/14 Berlington Hungary and Others, EU:C:2015:386, paras 108, 109.

[21] This was recently confirmed in Case C-122/17 Smith v Meade, ECLI:EU:C:2018:631, paras 52, 53, although the Court in the same judgment considerably restricted the ability of individuals to invoke Directives other than Dir. 2015/1535.

[22] The TRIS (Technical Regulations Information System) database is at http://ec.europa.eu/growth/tools-databases/tris/en/. Statistics on its use are in COM(2017) 788 final under 1.12, p20.

[23] See most recently, Information provided by the Commission — Statistics on technical regulations notified in 2016 under the Directive (EU) 2015/1535 notification procedure, OJ C 162, 23.5.2017, p. 4–8.

2.2. Standardising European Standardisation: Regulation 1025/2012

Regulation (EU) No 1025/2012 on European standardisation[24] is based on the 'founding principles' of coherence, transparency, openness, consensus, voluntary application, independence from special interests, and efficiency, as explained in the Regulation's Recital 2. It institutes regular information exchange between the national standardisation bodies, the European standardisation organisations, and the Commission. In this way, it can serve to stimulate innovation.[25] These are to keep each other informed about their current and future standardisation activities. Similar to the rules of Directive 2015/1535 (see above), a standstill principle is applicable to the national standardisation bodies vis-à-vis the European standardisation organisations: national standards are to be withdrawn after the publication of a new European standard, Recital 14.

The Regulation also makes uniformly applicable the procedure that is provided for in the Decision on CE-markings[26] in case of objections against harmonised standards. To this end, it abrogates the multitude of differing procedures in a range of Directives, as listed in Recital 29. For the first time, the European Parliament can raise such objections if it thinks the standards fail to offer the protection that EU legislation seeks to achieve.[27]

More specifically, the Regulation establishes rules with regard to the cooperation between European standardisation organisations, national standardisation bodies, Member States, and the Commission in the establishment of European standards for products and for services in support of Union legislation and policies, Article 1. Standards are defined in Article 2(1) very similarly to Directive 2015/1535, as technical specifications, adopted by a recognised standardisation body, for repeated or continuous application, with which compliance is not compulsory. (The standards may, of course, be declared compulsory by EU legislation, while this would not be lawful for national legislation to do.)

The Regulation's procedures for communications between the participants are also similar to those of the Directive. Each European standardisation organisation and each national standardisation body annually draws up its work programme and notifies it to the other organisations and bodies as well as to the Commission which, in turn, relays the information to the Member States, Article 3. Draft standards are circulated likewise, albeit only on request. All recipients can send comments, of which the sender must take 'due account' and reply within three months, Article 4.

The Regulation provides for a similar procedure at the level of the Union. When so empowered under EU law, the Commission may request one or several European standardisation organisations to draft a European standard, and publishes a reference to the standard in the OJ if it is satisfied that the standard meets the requirements as set out in Union harmonisation legislation, Article 10. Member States or the European Parliament may, however, send a detailed explanation to the Commission why they consider the standard insufficient. The Commission must in that case decide whether it wants to publish or not (and if necessary with restrictions) further references to the standard, and to maintain (again with restrictions if need be) or withdraw such references that it has already published, Article 11.

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[24] Regulation (EU) No 1025/2012 … on European standardisation …, OJ L 316, 14.11.2012, p. 12.

[25] IP/A/IMCO/2014-04 / PE 518.762, European Parliament (Civic Consulting – Kara, S., Alleweldt, F., Mcspedden-Brown, N., Fielder, A., Zuleeg, F., & Osinski, A.), *Contribution of the Internal Market and Consumer Protection to Growth*, 2014, p. 55.

[26] Decision No 768/2008/EC …on a common framework for the marketing of products …, OJ L 218, 13.8.2008, p82–128.

[27] Presumably, the objection will have been inspired by complaints from within the business community, civil society, national administrations, or academia.

The EP and any Member State can challenge the Commission's decision before the Court under Article 263 TFEU: this is not specifically mentioned in the Regulation, but follows from the Treaty Article's overarching scope of application.

2.3. Internal Market Information System: Regulation 1024/2012

As Recital 2 of Regulation 1024/2012[28] explains, the Internal Market Information System ('IMI') is a software application accessible via the internet. It has been developed by the Commission in cooperation with the Member States. Its purpose is to assist Member States with the practical implementation of information exchange mandated by Union acts. It does so by providing a centralised communication mechanism to facilitate cross-border exchange of information. In particular, IMI helps competent authorities to identify their counterpart in another Member State, to manage the exchange of information on the basis of simple and unified procedures, and to overcome language barriers by offering pre-defined and pre-translated workflows.

In particular, each Member State appoints one national IMI coordinator to act, *inter alia,* as the main contact point for IMI actors of the other Member States for issues relating to IMI, Article 6(1)(b). The Commission is responsible for the running and the security of the platform, and provides a multilingual system and assistance for users, Article 8(1). External users may also be allowed to 'interact' with IMI (although they are not thereby supposed to 'gain access' to it) if a Union act already provides for such interaction or if the Commission allows it in implementing measures.

2.4. The Internal Market Problem Solving Network (SOLVIT)

In its most recent form,[29] the Internal Market Problem Solving Network (SOLVIT) functions on the basis of a Commission Recommendation.[30] It is meant to offer a fast and informal means of resolving problems that citizens and businesses encounter when exercising their rights in the internal market, Recital 3. By contrast with an earlier, more narrow definition, cases that can be submitted to SOLVIT now encompass "all cross-border problems caused by a potential breach of Union law governing the internal market by a public authority, where and to the extent such problems are not subject to legal proceedings at either national or EU level", Recital 9. As a consequence of the cross-border nature of the problem, a SOLVIT case is handled by SOLVIT centres in two Member States, Recital 11.

More specifically, the Recommendation defines in I.B(2), (3) as 'cross-border problem', "a problem an applicant in one Member State encounters involving a potential breach of EU law governing the internal market by a public authority in another Member State".

Following long-established case law of the Court on so-called 'returners' (not a technical term),[31] this definition includes "problems caused to applicants by their own public administrations, after having exercised their free movement rights or when trying to do so".

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[28] Regulation (EU) No 1024/2012 … on administrative cooperation through the Internal Market Information System …, OJ L 316, 14.11.2012, p. 1–11, as last amended by Article 38 of Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012, OJ L 295, 21.11.2018, p. 1–38.

[29] On the development of SOLVIT since its inception in 2002, see Compliance Package – Commission Staff Working Document – Assessment of the Performance of SOLVIT, SWD(2017) 210 final, 2.5.2017, p. 8 et seqq.

[30] Commission Recommendation of 17.9.2013 on the principles governing SOLVIT, COM(2013) 5869 final.

[31] See, for instance, Case C-19/92 *Kraus v Land Baden-Württemberg* ECLI:EU:C:1993:125, paras 15–17.

The service offered by SOLVIT (III.) is impressive, if everything goes by the book:[32] applicants should be enabled to contact SOLVIT centres by all modern forms of communication, receive a first reaction within a week, and within a month, confirmation whether the case is accepted and thus opened as a SOLVIT case. No later than ten weeks from then on, the applicant should obtain a solution to its problem. Especially in the case of structural problems, however, the case can be kept open for a further ten weeks. If, by contrast, it becomes apparent that a case will not be resolved within SOLVIT, the applicant is to be informed as soon as possible, with reasons, and pointed towards other means of redress, national or European.[33]

All SOLVIT cases should be handled by two SOLVIT centres, the Home centre and the Lead centre, which are to co-operate in an open and transparent manner towards fast and effective solutions for applicants, V.A.1., 2. All proposed solutions must always be in full conformity with Union law, V.A.5. For this reason the Commission is to provide case-handling assistance at the request of SOLVIT centres, including, in complex cases, informal legal advice. The Commission also generally monitors the quality and performance of SOLVIT centres and the cases they handle, VI.1.(c), (e). SOLVIT has been promoted to a central role in the new Mutual Recognition-Regulation 2019/515, Article 8, see below.

Via IMI (see preceding),[34] SOLVIT is now accessible through the Single Digital Gateway (SDG) established by Reg. 2018/1724.[35] This Regulation brings about a major consolidation of the various online support services for traders and others. Council and Parliament have come to understand, as Recital 11 explains, that "as a result of the sectorial nature of those Union acts, the current provision of online information and of assistance and problem-solving services together with online procedures for citizens and businesses remains very fragmented. There are discrepancies in the availability of online information and procedures, there is a lack of quality in relation to the services and a lack of awareness regarding that information and those assistance and problem-solving services."

According to Article 15 of Reg. 2018/1724, "where the technical system, or other systems for the exchange or verification of evidence between Member States are not available or are not applicable, … competent authorities shall cooperate through the Internal Market Information System (IMI) where this is necessary in order to verify the authenticity of evidence that was submitted to one of them in an electronic format by the user for the purpose of an online procedure." This condition is fulfilled because Article 11(1) of Reg. 2019/515 does not list Article 8 among the provisions to which the information exchange as provided for in Article 23 of Reg. 765/2008 applies.

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[32] In 2017, the Commission summed up its empirical findings in to the effect that, [m]inimum operational and quality standards are outlined in the 2013 SOLVIT Recommendation. Respect for these standards throughout the network is important for the applicants and the cooperation between the centres. The application of these standards varies across the network as explained in the assessment accompanying this Communication [see n29]. Action is therefore needed to improve the overall quality of SOLVIT notably in terms of administrative capacity, handling of complex and sensitive cases and legal expertise": Action plan on the Reinforcement of SOLVIT: Bringing the benefits of the Single Market to citizens and businesses, COM(2017) 255 final, 2.5.2017, p.4, penultimate para. The detailed findings are under 5.1.3. (p. 18–21) of the Commission's Assessment of the Performance of SOLVIT (n29).

[33] Action plan on the Reinforcement of SOLVIT (n32), p. 5, penultimate para: "The mutual recognition of non-harmonised goods is potentially a good case in point. Here, if SOLVIT's informal approach fails, the Commission will look at the possibility of introducing an appeal procedure for businesses, as part of the review of enforcement of the mutual recognition principle." As will be seen below on Reg. 2019/515, the Commission has not yet taken this step.

[34] Assessment of the performance of SOLVIT (n29), p. 3 by fn. 4: "Although there is a SOLVIT centre in each country, the complaints are mostly submitted directly through an online complaint form linked to the Internal Market Information System (IMI system)."

[35] N28. – In its Assessment of the performance of SOLVIT (n29), p. 30, ante-penultimate para, the Commission found that, "being part of the IMI substantially improves the effectiveness of SOLVIT."

Article 2(2)(a) brings SOLVIT within the ambit of the Regulation when it stipulates that the gateway shall give access to "information on rights, obligations and rules laid down in Union and national law that are applicable to users exercising or intending to exercise their rights derived from Union law in the field of the internal market in the areas listed in Annex I", which Annex lists under M.4. "mutual recognition of products not subject to Union specifications".

2.5. Mutual Recognition between Member States: Regulation 2019/515

Regulation (EU) 2019/515 on the mutual recognition of goods lawfully marketed in another Member State [36] applies in the absence of Union harmonisation. This follows from the reference, in Article 2(1)(a), to 'national technical rule[s] applicable in the Member State of destination', defined in Article 2(2)(a) as 'any provision … of a Member State which … covers goods or aspects of goods that are not the subject of harmonisation at Union level'. The Commission publishes a list of products that are not subject to harmonising EU legislation.[37] As seen above, according to the principle of mutual recognition if products from other Member States offer equivalent protection, it is incumbent on the national executive authorities to exempt these products from the enforcement of the rules of the importing Member State. Only if they refuse, will importers or traders contemplate resorting to litigation or recourse to other means of redress. The Regulation contains provisions for the national procedures that lead to a decision to deny mutual recognition to products from other Member States. The rules have been much simplified, to the advantage of traders, by comparison with the predecessor Reg. 764/2008.[38]

The Commission first reported on Reg. 764/2008 in COM(2012) 292 final. It concluded that the Regulation worked by and large in a satisfactory way, and that there was no need for amendments at the time, p. 4.[39] One recurring problem, however, was lack of legal certainty about the burden of proof, which had been one of the reasons in the first place for adopting Regulation (EC) No 764/2008, and for repealing Decision No 3052/95/EC (p. 5): that burden is on the national authorities which intend to deny market access, p. 6.

The Commission had also by then published the contact details of the PCPs (see above) and made them available on the internet,[40] together with the database containing the list of products which are not subject to EU harmonisation legislation, p. 7.

From the annual reports submitted by the Member States, the Commission learned that the majority of decisions, requests for information and complaints received by the national administrations concerned a limited number of specific categories of goods.[41]

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36 Regulation (EU) 2019/515 … on the mutual recognition of goods lawfully marketed in another Member State …, OJ L 91 of 29.3.2019, p. 1–18.

37 At https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition/products-list_en, and more generally, http://ec.europa.eu/growth/single-market/goods/free-movement-sectors_en.

38 Regulation (EC) No 764/2008 … laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State …, OJ L 218, 13.8.2008, p. 21.

39 N25, p. 15: „The Mutual Recognition Regulation is the main legislative achievement serving to uphold the principle of mutual recognition. According to the impact assessment that accompanied the initial proposal, successfully ensuring the perfect operation of mutual recognition inside the EU could produce a maximum possible one-off increase in EU GDP of 1.8%."

40 At https://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition/contacts-list_en.

41 These were: articles of precious metals, foodstuffs, food additives and food supplements, construction products, fertilisers, automobile spare parts, electrical products, and spring water.

It also became clear that the national authorities were not always communicating to the Commission the negative decisions they had actually adopted, p. 10.

As a consequence, the Commission published a series of nine guidance documents about the relationship between Directive 98/34/EC (now Dir. 2015/1535, see above)[42] and between the general product safety Directive 2001/95/EC, respectively, and the Mutual Recognition Regulation;[43] the application of the Mutual Recognition Regulation to articles of precious metals, to food supplements, to narcotic drugs and psychotropic substances, to prior authorisation procedures, to weapons and firearms, to fertilisers and growing media, and to non-CE-marked construction products, p. 11. These documents are still valuable under the new Regulation. Unlike the guidance document on the concept of 'lawfully marketed' in the Mutual Recognition Regulation:[44] the new Regulation contains its own definition in Article 3(1), (2), (13). Another guidance document concerns the role of prior authorisation procedures.[45] This too has now been absorbed into the Regulation, viz. Article 2(4).

The guidance documents in particular informed COM(2017) 796 final,[46] in which the Commission proposed the successor to Reg. 764/2008. With some amendments, Council and Parliament have has since adopted the Commission's draft as Regulation 2019/515.

The Commission's second assessment of Reg. 764/2008 was more sober than in the first evaluation. This time, the Commission concluded that mutual recognition was not functioning as it should, and that the principle and the Regulation had had limited effects in meeting the foreseen objectives in terms of raising awareness and of increasing legal certainty and administrative cooperation. Even worse, it found that the majority of businesses wishing to sell products in another Member State checked the applicable rules in that Member State, and, if these rules prevent them from selling the product, they do not rely on the principle of mutual recognition, but most of them instead adapt the product to those rules, p. 6 and draft Recital 5.[47]

The Commission therefore proposed "several ambitious measures": firstly, to clarify the scope of mutual recognition, by clearly defining when it is applicable; secondly, the introduction of a self-declaration to facilitate the demonstration of a product's previous lawful marketing, and of a problem solving system to deal with decisions denying or restricting market access; lastly, the setting-up of administrative

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42 "The two acts apply at different stages in the life cycle of a technical rule. While the Directive is a preventive mechanism which precedes the adoption of a technical rule, the Regulation is a corrective measure once the rule is in force, ensuring on a case by case basis that the rule is being applied correctly", pt. 4(b).

43 "The Mutual Recognition Regulation should apply where the competent authorities of a Member State intend to prohibit the marketing or use of a non-harmonised consumer product, lawfully marketed in another Member State, on the basis of a technical rule and for reasons *other than a risk to the health and safety of consumers*. This is the case, for example, when a product is not allowed to be marketed for reasons based on the denomination, size, composition or packaging, or for environmental reasons", pt4.2. (emphasis added). The Directive applies when there the authorities purport to act on a risk to the health and safety of consumers.

44 COM(2013) 592 final.

45 All guidance documents are available at http://ec.europa.eu/DocsRoom/documents/5822/attachments/1/translations.

46 COM(2017) 796 final is accompanied by an impact assessment in SWD(2017) 471 final, containing rich empirical material on the practical problems that have arisen under Reg. 764/2008, and with the application the principle of mutual recognition in general.

47 For an example, see Assessment of the Performance of SOLVIT (n29), p. 24, 4th para: "according to the December 2015-January 2016 panel survey on the European Internal Market conducted by the Netherlands Chamber of Commerce, the 80% of Dutch entrepreneurs who are doing business in the internal market have never heard of the listed online information and advisory services (including SOLVIT). Among them, 35% of entrepreneurs who did experience such problems (n=150), do what the government asks, even when they know it is not in accordance with EU law, 26% give up and 1,1% contact SOLVIT." Similarly Putvaara et al. (n1), p. 32, 2nd para: "As non-tariff barriers are mostly independent of firm size, SMEs will benefit disproportionally from removing those barriers to trade. The existence of those barriers is reflected in the strong national localisation of SMEs. By conducting interviews in the construction sector, they estimated compliance costs in this sector to be 5,000 to 25,000 euro per country per product. Furthermore, national labelling takes relatively long (between 3 and 12 months)."

cooperation, and putting in place an IT tool to enhance communication, cooperation and trust among national authorities, p. 2.

The new Reg. 2019/2008 lays down rules and procedures to be followed when a national authority intends on the basis of a non-harmonised technical rule to prohibit the future or continued marketing of a product lawfully marketed in another Member State. Crucially, there is no separate stage of positively granting mutual recognition anymore. Save where a prior authorisation is required, marketing may commence immediately on filing of the new 'mutual recognition declaration' pursuant to Article 4. 'Technical rules' are those that either prohibit the marketing of a product (note the difference with Directive 2015/1535 above, which will be discussed more fully below under 4.1.) or are compulsory to observe for products to be marketed in that Member State. These rules must concern either the characteristics of the product, or its life cycle after it was put on the market (such as provisions on recycling), Article 2(2)(c). Not within the scope of the concept of technical rules, therefore, are technical specifications drawn up for public procurement procedures, and requirements to use official languages in the Member States, as Recital 10 clarifies.

The most notable improvement over Reg. 764/2008 is the introduction of a self-certification into the Reg. 2019/515, Recitals 17, 18. Accordingly, the producer of the goods may draw up a 'mutual recognition declaration' pursuant to the Annex to the Regulation. This demonstrates lawful marketing in another Member State, Article 4(1). The competent authority in the importing Member State must accept this declaration, "together with any evidence reasonably required by the competent authority to verify the information contained in it," as proof of such marketing, and must not demand information beyond it, Article 5(4).

(Only) where a mutual recognition declaration in accordance with the Regulation is not supplied, and the authority of the Member State of destination intends to force the economic operator (defined in Article 2(8)–(12)) to withdraw or to recall the product, must the authority contact the relevant economic operator without delay, and carry out an assessment of the goods, Article 5(5).[48] This is complemented by Articles 5(7) and 10(3), according to which the authorities in the Member State(s) in which an economic operator claims to be lawfully marketing his goods must provide the competent authorities of other Member States, upon request and within 15 working days, with "any information relevant for verifying data and documents supplied by the economic operator during the assessment under Article 5" relating to those goods. The authority in the Member State of destination can draw on the support of the Product Contact Points in the other Member States to obtain this information from the authorities there. In that context, pursuant to Article 5(8) the authority in the Member State of destination must not refuse test reports or certificates that were issued by a conformity assessment body accredited for the appropriate field of conformity assessment activity in accordance with Regulation (EC) No 765/2008[49] on grounds related to the competence of that body.

The authority must communicate its decision following the assessment without delay to the economic operator, Article 5(9). The Regulation does not prescribe the length of the assessment, nor how soon after its completion the authority must make its decision, but merely that the decision must be communicated without delay. Reg. 764/2008 stipulated in its Article 6(4) the default assumption that

[48] In the draft, the Commission let it suffice that the competent authority had doubts with regard to the goods' conformity. In a separate place, the Commission conceded that, "Many economic operators disregard the rules either through lack of knowledge or intentionally to gain a competitive advantage. More deterrence is needed, and the responsible market surveillance authorities are often underfunded and constrained by national boundaries, while economic operators are active at European or even global level", COM(2015) 550 final, Upgrading the Single Market, pt. 4.3., p19.

[49] Regulation (EC) No 765/2008 … setting out the requirements for accreditation and market surveillance relating to the marketing of products …, OJ L 218, 13.8.2008, p. 30.

marketing was deemed lawful if the authority did not declare it unlawful within a given time-period. Reg. 2019/515 achieves the same effect through the combined effect two provisions. By virtue of Article 5(13), the decision shall not take effect before it has been notified to the economic operator. Meanwhile, according to Article 5(3), the goods may be made available on the market in the Member State of destination while the competent authority carries out the assessment, and marketing may continue unrestricted unless the economic operator receives an administrative decision to the contrary.

Reg. 2019/515 also offers economic operators redress against a negative decision. The Commission's draft provided that economic operators should have to rely on SOLVIT before the problem-solving mechanism under the Regulation could be triggered, draft Recital 33. Reg. 2019/515, by contrast, in Article 8 makes provision for the use of SOLVIT independently of whether an economic operator has recourse to other procedures besides.[50] Under Article 8, the Home Centre (in the exporting Member State) or the Lead Centre (in the Member State of destination) may turn to the Commission with a request for an opinion to assist in solving the case. The Commission then has 45 days to consider the administrative decision notified in accordance with Article 5(9) and the documents and information provided within the SOLVIT procedure. Any days required for it to obtain any necessary additional information from the operator via one of the Centres involved do not count towards the 45 days.

Within that period, the Commission shall identify any concerns that should be addressed in the SOLVIT case, or make recommendations to assist in solving the case, Article 5(4). The Commission does not, however, 'solve' the case: its opinion shall (only) be taken into account during the SOLVIT procedure, Article 5(6). Under the principle of sincere co-operation as laid down in Article 4(3) TEU, however, the national authorities are unlikely not to follow the Commission's opinion. Recital 40 highlights that the Regulation is without prejudice to the Commission's powers under Article 258 TFEU and the Member States' obligation to comply with Union law.[51]

This has to be seen against the background that in mid-2015, around 1090 infringement proceedings were pending in the area of the Single Market, and that on average, national administrations, with the help of the Commission, needed almost 30 months to resolve infringement proceedings.[52]

The 45 days pursuant to Article 8 of Reg. 2019/515 would bring about a considerable acceleration. There is not yet any practical experiences with the new procedure, though, because according to Article 20, the Regulation only applies from April 2020. This is, according to Recital 51, so as to allow competent authorities and economic operators sufficient time to adapt to the requirements laid down in the Regulation.

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[50] Under the new Regulation it remains true, as the Commission observed in its Assessment of the performance of SOLVIT (n29), p. 3 last para, that „ submitting a case to SOLVIT doesn't suspend any formal or administrative deadlines under national law."

[51] In this context, the Commission has proposed a Regulation that would empower it to collect from market participants information on problems in the realisation of the internal market: Proposal for a Regulation of the European Parliament and of the Council setting out the conditions and procedure by which the Commission may request undertakings and associations of undertakings to provide information in relation to the internal market and related areas, COM(2017) 257 final (2017/0087 (COD)), 2.5.2017.

[52] COM(2015) 550 final, Upgrading the Single Market, pt. 4.1., p16. This point, however, is not entirely clear: M Egan and MH Guimarães, "The Single Market: Trade Barriers and Trade Remedies", (2017) 55 JCMS 294, 304, argue that, [use of] "SOLVIT has become more frequent as a mechanism to address trade barriers than infringement proceedings reflecting a shift towards informal governance to deal with political impasses in the EU", and back this up with specific figures. At 305, the authors come to a positive assessment of SOLVIT: "the average time to close Solvit cases is 81 days, with free movement of goods cases taking an average of 92 days. ... since its inception Solvit has consistently been performing well in finding rapid voluntarily negotiated solutions."

Finally, Member States must establish one or several Product Contact Points (PCPs).[53] Their task is to provide citizens and economic operators, within 15 days of a request and free of charge, with information regarding the principle of mutual recognition, the applicable technical rules, the contact details of the competent authorities, and the remedies available in that Member State in disputes with national authorities, including SOLVIT, Article 9. The Commission establishes an 'information and communication system' with the aim of facilitation cooperation between PCPs, Articles 10, 11.

[53] In addition, Regulation (EU) No 305/2011 on construction products, OJ L 88, 4.4.2011, p. 5, provides for the setting up of Product Contact Points for Construction (PCPCs); PCPs and PCPCs have been merged "in numerous Member States", as the Commission found in COM(2017) 796 final, p3 under (c).

3. SPECIFIC ACHIEVEMENTS OF THE FREE MOVEMENT OF GOODS: LEGISLATION IN THE HARMONISED AREA

KEY FINDINGS

- Legislation in the harmonised area of the free movement of goods largely consisted (as in the non-harmonised area) in further developing older rules, with few genuinely new acts over the reference period.1 These rules give businesses and citizens the certainty that they can freely buy and sell compliant goods in all Member States.
- Central areas of legislative activity were motor vehicles and craft, electricity and electrical equipment, and food.

3.1. Motor vehicles and craft

In the area of motor vehicles and craft, some harmonisation legislation of the 1970s was still in force in the reference period. This had, of course, been updated regularly, but the pedigree indicates that this is a central area of Union legislation.

The acts adopted were Regulation (EU) No 540/2014 on the sound level of motor vehicles and of replacement silencing systems;[54] Directive 2014/45/EU on periodic roadworthiness tests for motor vehicles and their trailers; Directive 2014/47/EU on the technical roadside inspection of the roadworthiness of commercial vehicles circulating in the Union; Directive 2013/53/EU on recreational craft and personal watercraft; Regulation (EU) No 167/2013 on the approval and market surveillance of agricultural and forestry vehicles; Regulation (EU) No 168/2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles; Regulation (EC) No 595/2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information; and Regulation (EC) No 661/2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor.

3.2. Fuels and fuel-burning appliances

Two acts addressed fuel and fuel-burning appliances, respectively, namely Directive (EU) 2016/802 relating to a reduction in the sulphur content of certain liquid fuels, and Regulation (EU) 2016/426 on appliances burning gaseous fuels.

3.3. Measuring equipment

Measuring equipment is one of the less conspicuous areas of the internal market, but it is important for fair and reliable commercial transactions between parties in all (soon) twenty-seven Member States. The EU adopted Directive 2014/32/EU on the harmonisation of the laws of the Member States relating to the making available on the market of measuring instruments (recast); Directive 2014/31/EU on non-automatic weighing instruments; and Directive 2011/17/EU which repealed several older directives on metrology.

[54] These can be found in chronological order, with complete titles and references, in the annexe.

3.4. Electricity and electrical equipment

Electricity and electrical equipment was another focus of legislation in the reference period, resulting in Regulation (EU) 2017/1369 setting a framework for energy labelling; Directive 2014/68/EU on the making available on the market of pressure equipment; Directive 2014/30/EU on electromagnetic compatibility (recast); Directive 2014/29/EU on simple pressure vessels; Directive 2014/35/EU on electrical equipment designed for use within certain voltage limits; Directive 2011/65/EU on the restriction of the use of certain hazardous substances in electrical and electronic equipment; Directive 2010/35/EU on transportable pressure equipment; Directive 2009/125/EC establishing a framework for the setting of eco-design requirements for energy-related products; and Directive 2009/72/EC concerning common rules for the internal market in electricity.

3.5. Explosives

Apart from their industrial application, explosives have security implications. Here too, a good deal of older legislation was updated. Explosives were the subject-matter of Directive 2014/28/EU on the making available on the market and supervision of explosives for civil uses (recast); Directive 2014/34/EU on equipment and protective systems intended for use in potentially explosive atmospheres (recast); Directive 2013/29/EU on the making available on the market of pyrotechnic articles (recast); and Regulation (EU) No 98/2013 on the marketing and use of explosives precursors.

3.6. Food

The importance of the agri-food industry for the European economy is reflected in the number of acts adopted in its regard, most of which build on pre-existing legislation. These comprise Directive (EU) 2015/2203 on caseins and caseinates intended for human consumption; Directive (EU) 2015/254 repealing an older directive on assistance to the Commission and cooperation by the Member States in the scientific examination of questions relating to food; Regulation (EU) No 609/2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control; Directive 2011/91/EU on indications or marks identifying the lot to which a foodstuff belongs; and Directive 2009/54/EC on the exploitation and marketing of natural mineral waters (recast).

3.7. Other products

A number of products were the subject of only one act over the reference period, namely Regulation (EU) No 2016/425 on personal protective equipment; Regulation (EU) No 2016/424 on cableway installations; Regulation (EU) No 536/2014 on clinical trials on medicinal products for human use; Directive 2014/33/EU on lifts and safety components for lifts; Regulation (EU) No 528/2012 concerning biocidal products; Regulation (EU) No 1007/2011 on textile fibre names and related labelling and marking of the fibre composition of textile products; Regulation (EU) No 305/2011 on construction products; Regulation (EC) No 1223/2009 on cosmetic products; Regulation (EC) No 1007/2009 on trade in seal products; and Directive 2009/48/EC on the safety of toys.

4. THE POTENTIAL OF THE FREE MOVEMENTS OF GOODS

KEY FINDINGS

- The movement of goods between Member States is freer than between any other developed sovereign countries. Individuals and traders have unparalleled opportunities easily to buy and to sell, to compare and to find the best offer, at home and abroad. The completion of the Single Market benefits some businesses, namely the most competitive and innovative ones, but all consumers through lower prices and increased choice.
- In the legislation in the non-harmonised area, there is a confusing multitude of channels of communication as well as of enforcement, supervisory, and information bodies. These should be simplified and reduced in number.
- Some rules in the non-harmonised area turn on fine distinctions of a conceptual nature rather than of substance, for instance the different treatment of technical rules and outright pro¬hibitions. Outright prohibitions should be treated on a par with technical regulations, and thus be subject to the rules in Directive 2015/1535.
- While there are a number of informal and consensual mechanisms for settling disputes, litigation remains as indispensable, but also as burdensome as ever for private market participants. To mitigate this, SOLVIT should become a compulsory pre-litigation stage whenever citizens and businesses assert their rights under the free movement of goods vis-à-vis Member States.
- In the harmonised area, too, there is a proliferation of mechanisms of cooperation and information exchange. All of these mechanisms require resources that individual Member States will be hard pressed to find. Uneven enforcement of the harmonised rules across the Member States is the foreseeable consequence.
- The current lack of transparency in matters of compliance and enforcement could be helped if the Commission combined its proposals of 2013 and 2017 on this question in a single document. This should be the beginning of an overall codification of the area of harmonised standards and their enforcement. Within this framework, there should only be a small number of standardised modes of enforcement with few exceptions for individual types of goods.
- A simplified legal regime would not only promote legal certainty in the interest of citizens and businesses, it would also allow for speedier enforcement than envisaged in the Commission's current drafts, especially as these provide for a trebling of the period before enforcement action is taken from 20 to 60 days.
- The extent of the harmonisation in a given area can be unclear, raising further questions with regard to the consequent co-existence of harmonised and non-harmonised rules.

4.1. Potential in the non-harmonised area

As seen above, the principle of mutual recognition greatly reduces the need for harmonisation but does not entirely remove it. Even so, it allows Parliament, Council, and Commission to choose legislative priorities, rather than be overwhelmed by the constant flow of trade-restricting national legislation. The movement of goods between Member States is freer than between any other developed sovereign countries. Individuals and traders have unparalleled opportunities easily to buy and to sell, to compare and to find the best offer, at home and abroad.[55] The first priority in the non-harmonised area must therefore be to bolster the functioning of the principle of mutual recognition[56]. The substantive aspect is catered for by Directive 2015/1535. This prevents restrictive legislation from coming into existence, and helps reduce the obstacles that follow from the divergences among the technical regulations that Member States do adopt. Regulation 2019/515 looks after the procedural aspect of individuals' vindicating their rights under the Treaty (as interpreted by the Court in *Cassis de Dijon*).

Nevertheless, a fuller implementation of the principle of mutual recognition has the potential to contribute to increased trade flows between Member States, and thus to economic growth.[57] In its most recent initiative for enhancing the free movement of goods, the Commission envisages that "enforcement authorities will work more closely together through single liaison offices. Use of another Member State's evidence, test reports and decisions will be made easier. There will be a presumption that if a product is found not to comply with EU product rules in one Member State, the evidence and decisions can be transferred to another, to facilitate enforcement across the EU."[58] This vision is in contrast with the current multitude of channels of communication, as well as of enforcement, supervisory, and information bodies.

This problem is compounded by the existence of rules that turn on fine distinctions of a conceptual nature rather than of substance. A case in point is Dir. 2015/1535. The definition of 'technical regulation' in Article 1(1)(f) has become ever more intricate over the three versions of the Directive.

Still not covered, however, are rules in the Member States 'prohibiting manufacture in so far as they do not impede the free movement of products', Article 7. 'Free movement', however, means free movement *between* Member States, not within one and the same Member State, as is clear from Articles 26(2) and 34/35 TFEU. Member States are, therefore, not bound to communicate prohibitions of the manufacture and also not of the sale on their territory of those products.

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55 On the theoretical advantages of the single market, see Civic Consulting (n25), p. 26 et seq.; for empirical figures concerning the development of the EU's internal since 1992, Communication from the Commission to the European Parliament, the Council and the European Economic And Social Committee – A vision for the internal market for industrial products, COM(2014) 25 final, 22.1.2014, *sub* 2., pp. 3–5.

56 Civic Consulting (n25), p. 100: "Evidence indicates that full market integration of the goods markets could contribute significantly to economic growth. In particular, one study shows that integration of goods markets in the internal market has yielded 2.2-3.3% higher per capita GDP in the EU. If the current level of integration of goods continues, GDP per capita in the long run could increase by between 2.2-8.8% in the EU. Moreover, full removal of existing non-tariff barriers (NTBs) and barriers to foreign direct investment (FDI) could lead to the creation of 4.6 billion [it can be assumed that this must read, "million"] jobs, according to another study."

57 Putvaara et al. (n1) summarise their findings on pp. 30–33 thus: "Nevertheless, unreaped potential benefits of the free movement of goods can be identified for a number of areas. The current legislation on mutual recognition, for example, has not yet achieved its full potential. New proposed legislation could help to achieve the full GDP gains of 1.8% resulting from a successful implementation of mutual recognition. A complete elimination of all intra-EU non-tariff barriers would entail potential unreaped export benefits of approximately 6%", p. 6.

58 COM(2017) 787 final, The Goods Package: Reinforcing trust in the single market, p4.

This is counter-intuitive, to say the least: the further-reaching restriction escapes a regime that encompasses the lighter restriction, merely because an outright prohibition is not a 'technical regulation'. This purely semantic obstacle should not stand in the way of a future extension of the notification regime to universal bans.

Like Directive 2015/1535, Regulation 2019/515 also does not apply to a requirement of authorisation before a product may be marketed, provided the requirement is not connected with technical rules (for instance, mere registration requirements, or those placing demands on the qualification of traders), Recital 11: Article 2(4) stipulates that, "a prior authorisation procedure does not itself constitute a national technical rule for the purposes of this Regulation." This is ultimately harmless, because the Court is strict with regard to requirements of registration that do not provide for any control in substance. This, however, presumes that someone challenges these requirements in the first place. They should instead be caught earlier, ideally before they are even enacted. They should, in other words, fall under the obligations imposed by Directive 2015/1535.

What is more, there is no shortage of informal and consensual mechanisms for settling disputes. The requirement to establish Product Contact Points in Article 9(1) Reg. 2019/515 illustrates this. As long as the numbers of PCPs remain not far above one per Member State, the potential for simplification is beyond doubt. As the Commission found in a separate document, however, "there are over 500 distinct market surveillance authorities (from 1 to over 200 per Member State) policing one Single Market for specific products. Businesses are more often than not based in a different place from the market surveillance authority that detects a problem."[59] The potential for confusion as to who does what is obvious: the PCPs join a busy crowd.

Informal mechanisms will, however, only ever help so far. When the goodwill runs out, litigation is the last resort. In principle, the individual or trader is in a good position. The Treaty gives private parties a right to trade freely, and the Court has further bolstered this right. Litigation, however, remains as burdensome as ever for private market participants. What is more, goodwill on the part of traders and authorities is indispensable for the daily running of mutual recognition. For this reason, traders will be naturally reluctant to engage in the confrontation that litigation entails, to say nothing of its cost when profit margins may be slim, at least initially, on the hoped-for market expansion.

SOLVIT[60] provides an example. It now also captures 'structural problems', that is, breaches caused by a national rule running counter to Union law, I.B(6). It is, however, hard to see how legislation should be amended through (or even only as a consequence of) informal discussions between private parties and some branch of the national administration.[61]

What is more, SOLVIT comes with the provision. that it can only be activated, "where and to the extent such problems are not subject to legal proceedings at either national or Union level." This *lis pendens*-exception will limit the number of cases submitted to SOLVIT.

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[59] COM(2017) 787 final (n58), p4.

[60] N30.

[61] Similarly, Assessment of the Performance of SOLVIT (n29), p. 24, 2nd para: "Most goods and services cases are about the justification of a national measure restricting the marketing of a good or the provision of a service. It is often very hard to analyze, prove and convince a national authority in an informal way that a given measure is disproportionate, especially where large sums are involved", and p. 27, 1st para: „Although this can be justified by the informal nature of SOLVIT, this can also be attributed to the fact that there is currently no systematic and structured set-up for the handling, follow-up and reporting of 'structural problems' detected in SOLVIT linked to breach of EU law by the Member States and unresolved SOLVIT cases." On p. 42, the Commission acknowledges that, "In addition, although being part of the IMI substantially improves the effectiveness of SOLVIT, further adaptations in the SOLVIT database to handle, monitor and report structural and recurrent problems in a more systematic way would enhance the administrative capacity of the SOLVIT centres and increase transparency of actions undertaken to address these issues."

One of the unique features of the EU's legal order, starting in 1963 with the Court's judgment in *van Gend en Loos*,[62] is that some of its provisions give individuals rights which they can invoke in the national courts against national authorities (and in some cases also against individuals). This is known as 'direct effect'. The freedoms of the internal market, as listed in Article 26(2) TFEU, all have this effect, among them Articles 34 and 35. Nevertheless, litigation is costly, confrontational, and time-consuming. National authorities may, of course, voluntarily engage in conciliation procedures outside court. Any such procedures will, however, not be governed by the Recommendation, and hence not offer the same amount of transparency.

Ultimately, the Commission can intervene under Article 258 TFEU where persistent problems appear in a Member State, even if the provision(s) breached do not have direct effect. This further narrows the scope of recourse to SOLVIT, because the Commission's intervention presumably amounts to "legal proceedings at … Union level": the wording of the Recommendation is not limited to proceedings brought by private parties, and its purpose does not necessitate such an interpretation, either.

To be fair, these limitations have not escaped the Commission: according to III.5, "[a]pplicants should be informed about the informal nature of SOLVIT … This information should include … a warning that handling a case in SOLVIT does not put on hold national deadlines for appeal, and that solutions offered by SOLVIT are informal and cannot be appealed." If that is so, one may wonder why the Member States should go to the envisaged lengths of staffing, equipping, and connecting within their administration the national SOLVIT centres (the details are laid out in IV.): it is foreseeable that their business and its impact will be limited. It might be worth trying SOLVIT as a universal, later maybe even compulsory, pre-litigation phase in all matters that involve the internal market. Article 8 of Reg. 2019/515 has taken a first step in this direction. Anything more would, arguably, require the upgrading of the (non-binding) Recommendation to a Directive or Regulation. This is not in the Commission's gift alone, but would require the cooperation of Council and Parliament.

4.2. Potential in the harmonised area

In the harmonised area issues arise not from the divergence of national rules, although divergences do not disappear altogether. This is because not all harmonisation is exhaustive, that is, pre-empts the adoption of any autonomous Member State law on the same product or with respect to the same public interest. The problem here is, rather, one of robust and uniform enforcement of the rules and, to an extent, the costs that the rules themselves engender.[63] The Union has created a framework for this in the shape of Directive 2001/95/EC on general product safety,[64] Regulation (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products,[65] and Decision No 768/2008/EC on a common framework for the marketing of products.[66]

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[62] Case 26/62 *Van Gend en Loos v Administratie der Belastingen*, ECLI:EU:C:1963:1.

[63] „ The Single Market for goods represents 25% of EU GDP and 75% of intra-EU trade (amounting to a value of €2,900 billion in 2014). Costs of compliance with product standards across different Member States are still high and could be substantially reduced. The total estimated annual costs of compliance for eight harmonised product areas (electric motors, laptops, domestic refrigerators/freezers, lifts, gardening equipment, petrol pumps, air conditioners and integrated circuits) amount to €342 million," LE Europe (n2), p. 69, and table 11 on p. 70.

[64] OJ L 11, 15.1.2002, p4–17.

[65] N49.

[66] N26.

These establish mechanisms for the cooperation between the Member States *inter se,* and with the Commission, as well as databases to match.

The same is true, however, of some sectoral legislation, most recently for instance Regulation (EU) 2017/1369 setting a framework for energy labelling.[67] Each of these mechanisms of cooperation and information exchange make perfect sense in themselves, but their proliferation is bound to be confusing. What is more, all require resources, and although the rules permit the sharing of authorities between Member States, the concomitant questions of international administrative law and legal protection are left to the Member States to work out.

The legislation discussed above establishes harmonised standards to be met by goods in the interest of the safety of users, consumers, and the environment. These public interests will only be protected, however, if products actually comply with the standards. For this reason, there must be mechanisms of market surveillance. The current legal regime has three elements. Firstly, there are the specific measures (some of) which have been introduced earlier. Many of these contain their own rules on compliance and enforcement. Secondly, there is the General Product Safety Directive (GPSD) of 2001[68] and thirdly, the Accreditation and Market Surveillance Regulation 765/2008.[69]

The purpose of the GPSD is, "to ensure that products placed on the market are safe", Article 1(1). This is achieved, in a first step, by imposing a corresponding obligation on producers, Article 3(1). In a second step, "Member States shall ensure that producers and distributors comply with their obligations under this Directive in such a way that products placed on the market are safe", Article 6(1). To this end, Member States establish or nominate authorities whose task it is to monitor compliance with the general safety requirements, and which have the power to take coercive measures against unsafe products, Articles 6(2) and 8. These authorities cooperate with their counterparts in other Member States and with the Commission in a European network, Articles 9 and 10(1). Within that network, all participants exchange information on dangerous goods via the RAPEX (European rapid alert system for dangerous non-food products for the rapid exchange of information requiring rapid intervention) database and communication system, Articles 10(2), 11–13.

Crucially, the Directive's provisions, "shall apply in so far as there are no specific provisions with the same objective in rules of Community law governing the safety of the products concerned. Where products are subject to specific safety requirements imposed by Community legislation, this Directive shall apply only to the aspects and risks or categories of risks not covered by those requirements", Article 1(2). This definition of the Directive's scope introduces considerable uncertainty: it requires the identification of 'specific provisions' pursuing 'the same objective' in the sectorial measures. It can be hard to tell whether a provision in a more recent Directive addressing, say, the 'producer' of a good is specific or simply different, when its wording deviates from the older GPSD. One might distinguish 'different' from 'specific' by contemplating the purpose of the rules in their respective contexts. The purpose, however, is already the second criterion stipulated in the GPSD, so that the interpretation comes dangerously close to turning in a circle.

The Directive applies to goods regardless of whether they are subject to harmonised standards, but goods that are in conformity with those standards are ipso facto deemed safe, Article 3(2), whereas

[67] OJ L 198, 28.7.2017, p1–23.

[68] Directive 2001/95/EC … on general product safety, OJ L 11, 15.1.2002, p. 4.

[69] N49.

goods not subject to harmonised standards do not benefit from such a presumption of safety but have to be assessed on their individual merits, Article 3(3).

The provisions on market surveillance in Regulation 765/2008, by contrast, "shall ensure that products covered by Community harmonisation legislation … are withdrawn…", Article 16(2). Then again, the Directive encompasses only products "intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers", Article 2(a). The Regulation applies to any product, as long as it is supplied in the course of a commercial activity, Article 2 Nr. 1. In other words, the two acts partially overlap. Economic operators, their customers, and national authorities need to be aware of both acts, and additionally of the existence or absence of harmonising legislation, in order to determine which one of the two (or even three) applies in a given situation. Considerable complexity reigns in this area.

Again similarly to the Directive, the Regulation's enforcement rules, "shall apply in so far as there are no specific provisions with the same objective in Community harmonisation legislation", Article 15(2). What is more, the application of the Regulation, "shall not prevent market surveillance authorities from taking more specific measures as provided for in Directive 2001/95/EC", Article 15(3). This cascades the application of the *lex specialis* principle from the Regulation to the Directive, and from there to the sectorial legislation. As a foreseeable consequence, "overlap of market surveillance rules and obligations of economic operators laid down in various pieces of Union legislation (the GPSD, the Regulation (EC) 765/2008 and sector-specific Union harmonisation legislation) has led to confusion on the part of both economic operators and national authorities and has seriously hampered the effectiveness of market surveillance activity in the Union."[70]

The Directive and the Regulation fall outside the temporal scope of this survey. In the intervening years, numerous specific measures for the harmonisation of product standards have been adopted by the Union. The conditions under which goods are made and marketed have evolved, as has the understanding of the legal requirements of the new situation. In 2013, therefore, the Commission unveiled its 'Product Safety And Market Surveillance Package'. It proposed a new Product Safety Regulation to replace the GPSD and an even older directive.[71] Part of the package is also a proposal for a Regulation on Product Market Surveillance,[72] to apply instead of the provisions on enforcement in Reg. 765/2008 (in fact, to delete these from the Regulation). The Commission's aim is to "produce a one tier system in which all of those rules are brought together in a single instrument", but it added immediately that the new Regulation "may be complemented by sector-specific rules laid down in the relevant Union harmonisation legislation."[73]

In other words, there was never going to be a one-tier system with a single instrument. Such an instrument could, of course, formally be produced simply by consolidating all existing legislation into one document. Internally to that document distinctions would still have to be drawn on substantive grounds. This, however, is due to the current technique of choosing a product for harmonization, and then tailoring procedural and enforcement requirements around it. The alternative approach would be to whittle the existing models down to, say, three or four, and to allocate products to whichever is or

[70] Proposal for a Regulation of the European Parliament and of the Council on market surveillance of products …, 13.2.2013, COM(2013) 75 final – 2013/0048 (COD), p. 0, last para.

[71] Proposal for a Regulation of the European Parliament and of the Council on consumer product safety …, 13.2.2013, COM(2013) 78 final – 2013/0049 (COD).

[72] N70. See on this the European Parliament legislative resolution of 15 April 2014, OJ C 443, 22.12.2017, p. 746, with numerous suggestions for amendments.

[73] Draft Market Surveillance Regulation (n70), p. 2, 3rd para.

are considered most suitable, with an emergency catch-all for all goods, together with a unified database for all goods, accessible through the Single Digital Gateway (see above).[74]

Once a rational codex were in this way established, the main driver for the current lack of coherence and transparency would be removed, namely the piecemeal approach to harmonisation.

It would not be impossible but much less likely that the 'general part' of the codex (the function currently fulfilled by the GPSD and Reg. 765/2008, if imperfectly) would be overtaken by legislative developments in the 'specific parts', and ultimately become redundant. Such a tendency would be immediately apparent on the face of the document. Legislators would instead be forced to think of the whole every time they tinker with one of the parts (or add new ones).

Meanwhile, in 2014 the legislative process came unstuck[75] and has since made no progress.[76] Undaunted, in 2017 the Commission took the initiative again with a proposal for a Regulation on the compliance with, and enforcement of, harmonised standards.[77] All the same, the Commission never formally withdrew the 2013 draft. It explained that the more recent draft, "contains 'lex generalis provisions' in order to avoid any possible risk of overlapping or contradictory provisions with the 'market surveillance proposal' COM(2013)75."[78]

This would only potentiate the problems of the current legal regime, by stratifying the general part of the edifice into a general-general part (the Regulation that would result from the 2017 draft Compliance and Enforcement Regulation), and a special-general part (the 2013 draft Market Surveillance Regulation as amended, if ultimately enacted). Besides these, Dir. 2001/95 would continue to apply by virtue of Article 2(3) of the 2017 draft, and below all three, the multitude of procedures in the acts covering goods exempted from the new regime by Article 4(7) of the 2017 draft, and Article 2(3)–(5) of the 2013 draft.[79] The difficulty of deciding which Regulation's provisions apply when is compounded by the large areas of overlap between them. A few examples must suffice:

The definitions in Article 3 of each draft are largely identical, but the 2017 draft has a much more extensive definition of 'economic operator' in Nr. 12 than the 2013 draft in Nr. 8. Presumably therefore, and contrary to the Commission's intention as stated above, the 2017 draft here contains the specific provision, and the 2013 one the general.

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[74] This process has begun with the stripping out of enforcement provisions from the harmonising act amended by Articles 39–60 of the 2017 draft Compliance and Enforcement Regulation (n77), but so far it stops there.

[75] This may be seen as an example of what LE Europe describe in their study (n2), p. 16, as ‚the cost of slow Europe': „The 'cost of slow Europe' is the cumulative 'cost of non-Europe' accrued between the identification of the need for policy action and regulatory measures having an impact on businesses operating in the Single Market. Given often vague initiatives by the EC, the lengthy legislative process, and the common delays in transposition and implementation of Directives, the cost of slow Europe adds up to large multiples of the headline figures familiar from the cost of non-Europe reports."

[76] The controversy was primarily about the designations provision (‚Made in ...'), Art. 7, of the Consumer Safety draft regulation (n71), see the excerpt from the Council's minutes of 2016 in Commission Staff Working Document – Refit Evaluation – Accompanying the document 'Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products …, 19.12.2017, SWD(2017) 469 final, Part 1/3, p. 10, 1st para, and IP/A/IMCO/NT/2013-11 / PE 518.740, European Parliament (F Maniet), *The Product Safety and Market Surveillance Package*, 2014, comparing Article 7 to the US system of origin marking. For an impression of the controversial discussion especially in Germany, 'Neuer Angriff auf "Made in Germany" – Das EU-Parlament will neue Regeln für die Herkunftsbezeichnung und verärgert die deutsche Wirtschaft', Frankfurter Allgemeine Zeitung, 17.4.2014, p. 11.

[77] Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products …, 19.12.2017 COM(2017) 795 final – 2017/0353 (COD).

[78] Draft Compliance and Enforcement Regulation (n77), p. 2 last para.

[79] Article 2(6) concerns agricultural goods in the widest sense, which more plausibly warrant a separate set of rules.

The establishment, tasks, and powers of market surveillance authorities in Articles 5(1), (2), 6, 10 (2013) and in Articles 10, 12, 14, 15, 17 (2017) are similarly, but not identically described. Under Article 7(1) (2013), "[e]ach Member State shall draw up a general market surveillance programme and shall review that programme, and update it if necessary, at least every four years", whereas under Article 13(1) (2017), "[e]ach Member State shall draw up a national market surveillance strategy, as a minimum, every 3 years". The provisions on the exchange of information – Articles 11, 19 (2013), 19 (2017) – are again similar but not identical, and not complementary, either. While the 2013 draft has a single and short Article 23 on cooperation, the 2017 one has much detail on this in Articles 22–25. These are clearly the specific rules, so much so that the general one ("There shall be efficient cooperation and exchange of information…") is all but redundant. There is also institutional inflation: the 2013 draft proposes to establish a European Market Surveillance Forum (Articles 25 et seqq), the 2017 one, a Union Product Compliance Network (Articles 31 et seqq) – each with similar but not quite identical composition and tasks.

The examples could be multiplied. This is not where the problems end, though. There is also the worry that a coordinated response across the Member States to unsafe goods will be rather cumbersome. Under Article 11 of the 2013 draft, Member States have 60 days from a notification under RAPEX by the Commission that the authorities of another Member State have taken action against a product. During this period, the other Member States may object to the measures of the first Member State where they relate to a product subject to Union harmonisation legislation. If no objection is raised, the measures taken by the original notifying Member State are deemed justified. In that case, each Member State must also take restrictive measures without delay regarding the product in question. If objections are raised, the matter devolves to the Commission. It consults the economic operators concerned, and either confirms or rejects the justification proffered by the first Member State. The other Member States will then either have to follow suit with restrictive measures, or withdraw the measures they have already taken.

A delay of sixty days means that the action eventually taken can hardly be described as 'rapid'. The provision in the 2013 draft is all the more perplexing as under the GPSD, Article 13(4) (which continues to apply for the time being), Member States have to implement within less than 20 days a decision by the Commission that action needed to be taken against a product. Within one month, according to Article 13(5), the Member States must give the parties concerned an opportunity to submit their views. That duty, however, is independent of the obligation to act, as laid down in the preceding paragraph. Granted, this is stipulated in the context of the Commission taking the initiative after consulting the Member States beforehand. Under Article 12(2) GPSD as much as under Article 11(2) of the 2013 draft, however, the Commission vets the legality of the national measures drawn to its attention by the incoming notifications (if anything, this is clearer under the 2013 draft than under the GPSD). Although the 20 days do not apply to a Member State's initiating restrictive measures under the GPSD, it is not clear why the 2013 draft should treble the reaction time allowed to the other Member States in that case.[80]

From all the above follow two recommendations: firstly, the separate drafts should be combined into one, stripping out all duplications (by settling for the 2017 text on any given matter).[81]

[80] There is no explanation in the few paragraphs under „Dovetailing the RAPEX and Union evaluation procedures", n70, p. 2–3.

[81] This would also be in keeping with the Commission's REFIT initiative in accordance with Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Regulatory Fitness and Performance (REFIT): Results and Next Steps, COM(2013) 685 final, Brussels 2.10.2013; for a short overview, see LE Europe (n2), p. 74 *sub* b.

Ideally, this should be the beginning of a more ambitious codification of all harmonisation of standards for non-food goods, with few or preferable no deviations for individual products from a strictly limited number of modes of intervention, and a single channel of communication.

Such a leaner set of rules should, secondly, also allow the retention of the 20 days' reaction time for Member States, as presently under the GPSD.

4.3. Potential in the areas partially harmonised

Where harmonisation is only partial, harmonised legislation and the principle of mutual recognition come to apply simultaneously, but to different aspect of, or concerns regarding, the same product. Deciding which type of harmonisation is embodied in a given act adds to the questions that arise subsequently. The jurisprudence of the Court of Justice offers some guidance. Nevertheless, before the European Court becomes involved, the matter must *ex hypothesi* (see Article 267 TFEU) have come before a national court. All of this takes time and money. Fortunately, many if not most of the problems might be avoided if the harmonising legislation spelled out clearly whether all or parts of it are meant to be exhaustive. Going by the small number of cases (admittedly an imprecise measure) this seems to be one of the lesser problems in practice.

The legislation discussed above is of necessity complex and voluminous. This should not, however, distract from the big picture: the Treaty (Articles 34, 35 TFEU) gives citizens and businesses rights which they can enforce against trade restrictions established or maintained by Member States. 'Member State' encompasses anybody vested with public authority in the Member States, and any private organisation to which the Member States have delegated the power to make binding rules.[82] What is more, in case of conflict, EU law renders national law inapplicable to those who derive rights from the Treaty.[83] These twin characteristics of supremacy and direct effect[84] are unique to the EU's legal system. The level of integration through law in the internal market is without parallel elsewhere in the world.

In all, therefore, the EU has achieved a lot when it comes to the free movement of goods. As a study for the European Parliament found in 2016, "the completion of the Single Market benefits some businesses, namely the most competitive and innovative ones, but all consumers through lower prices and increased choice."[85] It is firmly established that individuals have the right to trade freely within the single market that anyone anywhere is allowed to seek opportunity everywhere in the Union. Many of the problems and shortcomings highlighted above call for fine-tuning rather than fundamental overhaul, and this is reflected in the legislation of the 7th and 8th European Parliament. Again, this has to be seen in perspective: the deeper the inroads of EU law, via the principles of supremacy and direct effect, into the national legal orders, the greater the potential for friction. If the nationals of one Member State could not demand, in another Member State, more than national treatment (as is the norm in international economic law: no *Cassis de Dijon* there), many of the problems would not arise that EU law faces. Even more of the opportunities of the internal market, however, would not present themselves, either.

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82 On the last point, see Case C-171/11 *Fra.bo*, ECLI:EU:C:2012:453, paras 24–32, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-171/11.

83 Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61964CJ0006.

84 Case 26/62 *van Gend en Loos*, ECLI:EU:C:1963:1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61962CJ0026

85 LE Europe (n2), p. 11.

ANNEX

LEGISLATION ON THE FREE MOVEMENT OF GOODS ADOPTED OR PROPOSED, 2009–2018

Legislation in the Non-Harmonised Area

Legislation Adopted

Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, OJ L 91 of 29.3.2019, p. 1–18.

Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1–15

Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council, OJ L 316, 14.11.2012, p. 12–33 Latest consolidated version: 02012R1025-20151007

Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation'), OJ L 316, 14.11.2012, p. 1–11 Latest consolidated version: 02012R1024-20170101

Legislation Proposed

COM(2017) 796 final – 2017/0354 (COD), 19.12.2017, Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of goods lawfully marketed in another Member State [now adopted as **Reg. 2019/515**, above].

Legislation in the Harmonised Area

Legislation Adopted

Regulation (EU) 2017/1369 of the European Parliament and of the Council of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU, OJ L 198, 28.7.2017, p. 1–23

Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels, OJ L 132, 21.5.2016, p. 58–78

Regulation (EU) 2016/426 of the European Parliament and of the Council of 9 March 2016 on appliances burning gaseous fuels and repealing Directive 2009/142/EC, OJ L 81, 31.3.2016, p. 99–147

Regulation (EU) 2016/425 of the European Parliament and of the Council of 9 March 2016 on personal protective equipment and repealing Council Directive 89/686/EEC, OJ L 81, 31.3.2016, p. 51–98.

Regulation (EU) 2016/424 of the European Parliament and of the Council of 9 March 2016 on cableway installations and repealing Directive 2000/9/EC, OJ L 81, 31.3.2016, p. 1–50.

Regulation (EU) 2015/2284 of the European Parliament and of the Council of 25 November 2015 repealing Council Directive 76/621/EEC relating to the fixing of the maximum level of erucic acid in oils

and fats and Council Regulation (EC) No 320/2006 establishing a temporary scheme for the restructuring of the sugar industry, OJ L 327, 11.12.2015, p. 23–24

Directive (EU) 2015/2203 of the European Parliament and of the Council of 25 November 2015 on the approximation of the laws of the Member States relating to caseins and caseinates intended for human consumption and repealing Council Directive 83/417/EEC, OJ L 314, 1.12.2015, p. 1–9

Directive (EU) 2015/254 of the European Parliament and of the Council of 11 February 2015 repealing Council Directive 93/5/EEC on assistance to the Commission and cooperation by the Member States in the scientific examination of questions relating to food, OJ L 43, 18.2.2015, p. 1–2

Directive 2014/68/EU of the European Parliament and of the Council of 15 May 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of pressure equipment, OJ L 189, 27.6.2014, p. 164–259

Regulation (EU) No 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC, OJ L 158, 27.5.2014, p. 1–76 Latest consolidated version: 02014R0536-20140527

Regulation (EU) No 540/2014 of the European Parliament and of the Council of 16 April 2014 on the sound level of motor vehicles and of replacement silencing systems, and amending Directive 2007/46/EC and repealing Directive 70/157/EEC, OJ L 158, 27.5.2014, p. 131–195 Latest consolidated version: 02014R0540-20170922

Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers and repealing Directive 2009/40/EC, OJ L 127, 29.4.2014, p. 51–128

Directive 2014/47/EU of the European Parliament and of the Council of 3 April 2014 on the technical roadside inspection of the roadworthiness of commercial vehicles circulating in the Union and repealing Directive 2000/30/EC, OJ L 127, 29.4.2014, p. 134–218, Latest consolidated version: 02014L0047-20140519

Directive 2014/35/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits, OJ L 96, 29.3.2014, p. 357–374

Directive 2014/34/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to equipment and protective systems intended for use in potentially explosive atmospheres (recast), OJ L 96, 29.3.2014, p. 309–356

Directive 2014/33/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to lifts and safety components for lifts, OJ L 96, 29.3.2014, p. 251–308

Directive 2014/32/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of measuring instruments (recast), OJ L 96, 29.3.2014, p. 149–250 Latest consolidated version: 02014L0032-20150127

Directive 2014/31/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of non-automatic weighing instruments, OJ L 96, 29.3.2014, p. 107–148

Directive 2014/30/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to electromagnetic compatibility (recast), OJ L 96, 29.3.2014, p. 79–106

Directive 2014/29/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of simple pressure vessels, OJ L 96, 29.3.2014, p. 45–78

Directive 2014/28/EU of the European Parliament and of the Council of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market and supervision of explosives for civil uses (recast), OJ L 96, 29.3.2014, p. 1–44

Directive 2013/53/EU of the European Parliament and of the Council of 20 November 2013 on recreational craft and personal watercraft and repealing Directive 94/25/EC, OJ L 354, 28.12.2013, p. 90–131 Latest consolidated version: 02013L0053-20131228

Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009, OJ L 181, 29.6.2013, p. 35–56 Latest consolidated version: 02013R0609-20170711

Directive 2013/29/EU of the European Parliament and of the Council of 12 June 2013 on the harmonisation of the laws of the Member States relating to the making available on the market of pyrotechnic articles (recast), OJ L 178, 28.6.2013, p. 27–65

Regulation (EU) No 168/2013 of the European Parliament and of the Council of 15 January 2013 on the approval and market surveillance of two- or three-wheel vehicles and quadricycles, OJ L 60, 2.3.2013, p. 52–128 Latest consolidated version: 02013R0168-20160101

Regulation (EU) No 167/2013 of the European Parliament and of the Council of 5 February 2013 on the approval and market surveillance of agricultural and forestry vehicles, OJ L 60, 2.3.2013, p. 1–51 Latest consolidated version: 02013R0167-20170101

Regulation (EU) No 98/2013 of the European Parliament and of the Council of 15 January 2013 on the marketing and use of explosives precursors, OJ L 39, 9.2.2013, p. 1–11 Latest consolidated version: 02013R0098-20170301

Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L 167, 27.6.2012, p. 1–123 Latest consolidated version: 02012R0528-20140425

Directive 2011/91/EU of the European Parliament and of the Council of 13 December 2011 on indications or marks identifying the lot to which a foodstuff belongs, OJ L 334, 16.12.2011, p. 1–5

Regulation (EU) No 1007/2011 of the European Parliament and of the Council of 27 September 2011 on textile fibre names and related labelling and marking of the fibre composition of textile products and repealing Council Directive 73/44/EEC and Directives 96/73/EC and 2008/121/EC of the European Parliament and of the Council, OJ L 272, 18.10.2011, p. 1–64 Latest consolidated version: 02011R1007-20180215

Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment, OJ L 174, 1.7.2011, p. 88–110.

Regulation (EU) No 305/2011 of the European Parliament and of the Council of 9 March 2011 laying down harmonised conditions for the marketing of construction products and repealing Council Directive 89/106/EEC, OJ L 88, 4.4.2011, p. 5–43 Latest consolidated version: 02011R0305-20140616

Directive 2011/17/EU of the European Parliament and of the Council of 9 March 2011 repealing Council Directives 71/317/EEC, 71/347/EEC, 71/349/EEC, 74/148/EEC, 75/33/EEC, 76/765/EEC, 76/766/EEC and 86/217/EEC regarding metrology, OJ L 71, 18.3.2011, p. 1–3

Directive 2010/35/EU of the European Parliament and of the Council of 16 June 2010 on transportable pressure equipment and repealing Council Directives 76/767/EEC, 84/525/EEC, 84/526/EEC, 84/527/EEC and 1999/36/EC, OJ L 165, 30.6.2010, p. 1–18.

Directive 2009/125/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for the setting of eco-design requirements for energy-related products, OJ L 285, 31.10.2009, p. 10–35 Latest consolidated version: 02009L0125-20121204

Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products, OJ L 342, 22.12.2009, p. 59–209 Latest consolidated version: 02009R1223-20171225

Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, OJ L 286, 31.10.2009, p. 36–39 Latest consolidated version: 02009R1007-20151018

Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information and amending Regulation (EC) No 715/2007 and Directive 2007/46/EC and repealing Directives 80/1269/EEC, 2005/55/EC and 2005/78/EC, OJ L 188, 18.7.2009, p. 1–13 Latest consolidated version: 02009R0595-20140101

Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p. 55–93

Regulation (EC) No 661/2009 of the European Parliament and of the Council of 13 July 2009 concerning type-approval requirements for the general safety of motor vehicles, their trailers and systems, components and separate technical units intended therefor, OJ L 200, 31.7.2009, p. 1–24 Latest consolidated version: 02009R0661-20160701

Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters (Recast), OJ L 164, 26.6.2009, p. 45–58

Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys, OJ L 170, 30.6.2009, p. 1–37 Latest consolidated version: 02009L0048-20171124

Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC, OJ L 218, 13.8.2008, p82–128.

Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ L 218, 13.8.2008, p.30.

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.1.2002, p. 4.

Legislation Proposed

COM(2017) 795 final – 2017/0353 (COD), Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products and amending Regulations (EU) No 305/2011, (EU) No 528/2012, (EU) 2016/424, (EU) 2016/425, (EU) 2016/426 and (EU) 2017/1369 of the European Parliament and of the Council, and Directives 2004/42/EC, 2009/48/EC, 2010/35/EU, 2013/29/EU, 2013/53/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU, 2014/68/EU and 2014/90/EU of the European Parliament and of the Council, 19.12.2017.

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Following a brief overview of the legal mechanisms provided for in the Treaty on the Functioning of the European Union (TFEU), this study summarises and analyses the Directives and Regulations in the harmonised and non-harmonised areas of the free movement of goods, adopted during the 7th and 8th electoral periods of the European Parliament (2009–2019). It will also highlight the rights that businesses and citizens enjoy under the current legislation, and ways in which the legislation could be improved.

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