Opinion of the European Economic and Social Committee on the 'New Legislative Framework (NLF) Alignment Package (Implementation of the Goods package)'

COM(2011) 764 final — 2011/0358 (COD)

COM(2011) 765 final — 2011/0351 (COD)

COM(2011) 766 final — 2011/0352 (COD)

COM(2011) 768 final — 2011/0350 (COD)

COM(2011) 769 final — 2011/0353 (COD)

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COM(2011) 772 final — 2011/0356 (COD)

COM(2011) 773 final — 2011/0357 (COD)

(2012/C 181/19)

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On 20 December 2011 and 30 November 2011, respectively, the Council and the European Parliament decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the

New Legislative Framework (NLF) Alignment Package (Implementation of the Goods Package)

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COM(2011) 772 final — 2011/0356 (COD)

COM(2011) 773 final — 2011/0357 (COD).

The Section for the Single Market, Production and Consumption, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 9 March 2012.

At its 479th plenary session of 28 and 29 March 2012 (meeting of 28 March) the European Economic and Social Committee adopted the following opinion by 115 votes to 4 with 10 abstentions.

1. **Conclusions and recommendations**

1.1 The Committee welcomes the adoption by the European Commission of proposals amending ten technical harmonisation directives implementing the Goods Package by aligning them with Decision 768/2008/EC [1] on a common framework for the marketing of products.

1.2 It would be appropriate to define the nature of, and a minimum threshold for, sanctions for which provision has to be made in the laws of the Member States, as this package of measures merely requires the national governments to lay down sanctions for this kind of conduct, without categorising them or dealing with further punitive measures, as established at supranational level.

1.3 The Commission should take into account the remarks made by the EESC in its opinion of 13 December 2007 on a common framework for the marketing of products [2] regarding the need to improve coordination and step up market surveillance activities.

[1] OJ L 218 of 13.8.2008, p. 82; EESC opinion OJ C 120 of 16.5.2008, p. 1.

[2] OJ C 120 of 16.5.2008, p. 1.

1.4 As regards legal protection in the EU market, there should be a move towards a new system for determining the origin and traceability of products, so as to improve information for consumers.

2. **Introduction**

2.1 The free movement of goods is one of the four basic freedoms on which the internal market is based and is expressly recognised in the treaties (Articles 28 ff. TFEU), and giving rise to extensive ECJ case law which has been incorporated into the Community *acquis*.

2.1.1 The adoption in 1985 of the legislative technique of the 'new approach', which limits legislative requirements to what is essential and tackles detailed technical aspects via harmonised European standards, has helped to speed up the process of harmonisation, making it possible for entire industrial sectors to benefit from free movement.

2.1.2 In terms of secondary legislation, Council Decision 90/683/EEC ([3]) introduced the new approach and was subsequently replaced by Decision 93/465/EEC ([4]) which lays down general guidelines and detailed procedures for conformity assessment which have to be used in the alternative approach directives.

2.2 In July 2008 the European Parliament and the Council adopted a new legislative framework aimed at improving the marketing of goods in the internal market, adopting Regulation No (EC) 765/2008 ([5]) on accreditation and market surveillance and Decision 768/2008/EC on a common framework for the marketing of products.

2.2.1 The purpose of the 2008 package was to promote the free movement of safe goods, thus boosting the effectiveness of EU legislation on product safety, strengthening consumer protection and creating fair conditions of competition for economic operators. As regards the free movement of goods, this new common marketing framework of 2008 should be supplemented by legislation on product standardisation.

2.2.2 These legal instruments go much further than a simple re-examination of the new approach, and in effect establish a new legislative environment for the harmonised area; they are complementary documents which are inextricably linked with each other and with sectoral legislation, which they support and complement.

2.3 Regulation No (EC) 765/2008/EC consolidates the rules on accreditation and market surveillance so that non-conforming products can be easily identified and withdrawn from the market. The main objective is to guarantee the free movement of goods in the harmonised sector by:

— strengthening European cooperation so that accreditation can effectively perform its function as the final level of control of the proper operation of Community legislation;

— establishing a framework for the recognition of an existing system, European Cooperation for Accreditation, in order to ensure rigorous evaluation by national accreditation bodies;

— establishing a Community framework for market surveillance and control of products entering the Union market, ensuring closer cooperation between national and customs authorities, the exchange of information and cooperation between national authorities on products present on the market of more than one Member State;

— ensuring clear and uniform standards in all sectors, the legal certainty and coherence of the measures, greater flexibility over the requirements to be met before products are placed on the market and reduction of the costs of conformity assessment.

2.4 Decision 768/2008/EC is a *sui generis* act which reflects the intentions of the European legislative authorities to apply its content as systematically as possible to all legislative texts on products (past, present and future) and thus to facilitate its application by all those concerned.

2.4.1 The decision establishes a general horizontal framework consistent with the law on free movement of goods, including:

— harmonised definitions, common obligations for economic operators, selection criteria for conformity assessment bodies, criteria for national notifying authorities and rules for the notification process;

— rules for selecting conformity assessment methods and a series of harmonised procedures aimed at preventing costly duplication;

— a single definition of the CE mark (with corresponding responsibilities and safeguards);

([3]) OJ L 380 of 31.12.1990, p. 13.
([4]) OJ L 220 of 30.8.1993, p. 23.
([5]) OJ L 218 of 13.8.2008, p. 30; EESC opinion OJ C 120 of 16.5.2008, p. 1.

— a market information and surveillance procedure as an extension of the system established by the directive on product safety;

— harmonised provisions for future safeguard mechanisms to complement the provisions on market surveillance.

2.5 In its opinion on both proposals the EESC stressed:

— the importance of ensuring full application of the principle of the free movement of goods, so that products lawfully marketed in a Member State can also be marketed without hindrance throughout the EU;

— that the free movement of goods is an essential driver for competitiveness and the economic and social development of the European single market and that reinforcement and updating of the requirements for the marketing of safe, high-quality products are key factors for consumers, businesses and European citizens.

To sum up, the EESC supported the Commission proposals, making a series of comments and suggestions on both instruments.

2.6 Regulation No (EC) 765/2008 entered into force on 1 January 2010 and its provisions have been directly applicable since that date and are being implemented by the national authorities, with coordination from the Commission.

2.7 Decision 768/2008, which is addressed to the Union's institutions, is a legal act without binding force for companies, physical persons or Member States. It is intended to operate as a horizontal framework for the provisions common to the technical harmonisation of legislation. These standardised provisions should be included in all new or revised legislation.

3. **Obstacles to the free movement of goods**

3.1 The purpose of both instruments is to tackle various problems observed in various industrial sectors regulated by European technical harmonisation legislation, i.e. legislation laying down common requirements for the marketing of products.

3.2 The main concern was to ensure public safety and to reduce the number of products present on the market which did not meet the requirements of Community law. Another aim is to improve the quality of the work of product inspection and certification bodies. Moreover, this new horizontal framework should bring greater coherence to the whole product regulation framework and simplify its application.

3.3 *Problems of non-compliance with current requirements:*

3.3.1 A large number of products on the market do not meet the detailed requirements of the directives. Some companies simply attach the CE mark to their products, although they do not meet the requirements.

3.3.2 Not all importers and distributors carry out the checks needed to ensure that they are only marketing products which comply with the rules. It is difficult for the market surveillance authorities to find the economic operators handling these products, especially when they are located in third countries.

3.4 Member States are also imposing different obligations on importers and distributors to ensure that they check that products meet the applicable requirements. Moreover, the action being taken by the national authorities on products which do not comply with the rules sometimes differs from one Member State to another.

3.5 *Problems arising from the actions of certain bodies entitled to perform tests:*

3.5.1 Some directives require the certification of products by bodies entitled to test, inspect and certify products. Although most of these bodies carry out their work in a conscientious and responsible way, there have been a number of cases which have cast doubt on the suitability of certain bodies and the credibility of the certificates they award.

3.5.2 There are differences in the methods and the level of stringency with which the Member States assess and check the suitability of the bodies entitled to perform tests. There are particular concerns regarding the suitability of branches and subcontractors located outside the EU.

3.6 *Specific inconsistencies in current legislation:*

3.6.1 The directives on free movement of products often follow a risk-based approach and sometimes apply several directives to the same product. This means that manufacturers have to apply all the requirements to the product.

3.6.2 The simultaneous application of several directives to the same product can impede the procedure for assessing conformity, particularly when directives use the same module, but with text which differs from one directive to another.

4. **The Commission proposal**

4.1 As a result of the adoption of the new framework in July 2008 the Commission's departments looked for product legislation instruments which would need to be revised in future years, for reasons relating to their sectors, most of these being individual revisions appearing in the Commission's work programme.

4.2 With this proposal the European Commission is seeking to update the 'new approach' legislation in force in some of the sectors concerned, in connection with the new standards laid down by Decision 768/2008/EC of the European Parliament and of the Council. In order to achieve this, the following ten directives are to be aligned with the decision:

— Directive 2006/95/EC on the harmonisation of the laws of Member States relating to **electrical equipment designed for use within certain voltage limits**;

— Directive 2009/105/EC relating to **simple pressure vessels**;

— Directive 2009/23/EC relating to **non-automatic weighing instruments**;

— Directive 93/15/EEC on the harmonisation of the provisions relating to the placing on the market and supervision of **explosives for civil uses**;

— Directive 94/9/EC on the approximation of the laws of the Member States concerning **equipment** and protective systems intended **for** use in potentially **explosive atmospheres**;

— Directive 95/16/EC on the approximation of the laws of the Member States relating to **lifts**;

— Directive 97/23/EC on the approximation of the laws of the Member States concerning **pressure equipment**;

— Directive 2004/22/EC on **measuring instruments**;

— Directive 2004/108/EC on the approximation of the laws of the Member States relating to **electromagnetic compatibility** and repealing Directive 89/336/EEC;

— Directive 2007/23/EC on the placing on the market of **pyrotechnic articles**.

4.2.1 The main common feature of these directives is their similar structure: definitions, basic health and safety requirements, references to harmonised European rules, requirements for manufacturers, traceability requirements and requirements for conformity assessment and safeguard mechanisms.

4.2.2 The regulated sectors are very distinct industrial sectors facing intense international competition, which means that simplification and a guaranteed level playing field in the EU market will be very beneficial to them.

4.2.3 However, the Commission proposes to align with Decision 768/2008/EC a series of directives which were not going to be revised now but which would benefit from the adoption of provisions on market surveillance and other cross-sectoral issues, without entering into purely sectoral considerations.

4.2.4 The aim of this package is to amend these directives with the sole purpose of integrating the horizontal provisions of the decision, in one go and using a simplified process, and without re-examining sectoral aspects, in order to obtain the immediate benefits of the new legislative framework in the greatest possible number of sectors. Their content is strictly limited to bringing the following into line with the decision: definition, traceability requirements, obligations of economic operators, criteria and procedures for the selection of conformity assessment bodies and conformity assessment requirements.

4.2.5 In order to ensure maximum legal quality, the Commission has opted for the legislative technique of a recast which consists of 'the adoption of a new legal act which incorporates in a single text both the substantive amendments which it makes to an earlier act and the unchanged provisions of that act. The new legal act replaces and repeals the earlier act'. The texts will also have to be adapted to the terminology and provisions of the Lisbon Treaty.

4.3 *According to the Commission, the adaptation of the ten directives can be summarised as follows:*

4.3.1 Measures intended to address the problem of non-compliance:

— obligations for importers and distributors;

— manufacturer obligations;

— traceability requirements;

— reorganisation of safeguard clause procedure (market surveillance).

4.3.2 Measures intended to ensure the quality of notified bodies' work:

— reinforcement of the notification requirements for notified bodies;

— revised notification process;

— requirements for notifying authorities;

— information obligations.

4.3.3 Measures intended to ensure more consistency among the directives:

— alignment of commonly used definitions and terminology;

— alignment of the texts of the conformity assessment procedures.

4.3.4 The proposal does not, however, include provisions on the application of EU standardisation policy, which could have repercussions for the application of the directives it affects, and which will be dealt with in another legislative initiative.

5. **General comments**

5.1 The Committee welcomes the adoption by the European Commission of proposals amending ten technical harmonisation directives implementing the Goods Package by aligning them with Decision 768/2008/EC on a common framework for the marketing of products.

5.2 Decision 768/2008/EC, adopted together with Regulation (EC) No 765/2008 (on accreditation and market surveillance), established models for improving the operation of the internal market by means of an approach more consistent with the technical harmonisation policy in relation to product safety, together with a more effective surveillance system for all products introduced onto the market coming from the EU or third countries, and improving consumer protection in the single market.

5.2.1 As the decision does not itself have any legal effects which are binding on third parties (which does not exclude the possibility of the ECJ checking its legality) - it is a *sui generis* act reflecting an institutional agreement - the adaptation of some of its provisions to the directives referred to above will make the market surveillance system more efficient without the need to amend each of the directives.

5.2.2 In this way the legal effects of the rules in question will be clarified in a flexible and simplified way, using the technique of recasting, while adapting the package of directives to the terminology and certain provisions of the Lisbon Treaty.

5.3 The Committee also stresses the contribution of the amendments to achieving other relevant EU policy objectives such as strengthening the competitiveness of European companies and the strategies of economic operators in the affected sectors, as well as improving the guarantees of a high level of protection for consumers, *inter alia*.

6. **Specific comments**

6.1 In view of the specific legislative technique used by the Commission here, and of the fact that it applies to an area of shared competence (internal market – Articles 4(2)(a) and 114 TFEU), comments should be made on the terminology used in certain provisions of Decision 768/2008/EC, the application of the subsidiarity principle and the role of organised civil society in the future implementation of the package of ten directives.

6.2 There is a certain lack of precision in the use of the terms 'general principles' (Article 1 of the Decision and Article R11 of its Annex 1) and 'common principles' (recitals 5 and 6 of the Decision) without distinction, without the meaning of either term, or the difference (if any) between them, being defined either in the text of the Decision or in any of the directives amended by its provisions. Similarly the term 'public interest' is used (recital 8 and Article 3 of the Decision and Articles R31 and R33 of its Annex 1), without any definition of its meaning in the context of application of the rules in question.

The welcome flexibility offered by this method of amending the directives certainly need not stand in the way of precise and detailed definition of terms relevant to their implementation.

6.3 One of the advantages of the entry into force of the directives will be to strengthen the surveillance mechanisms and the arrangements for the reporting of irregular or illegal practices by market operators themselves. However, it would be appropriate to define the nature of, and minimum threshold for, sanctions for which provision has to be made in the laws of the Member States, as this package of measures merely requires that national governments lay down sanctions for this kind of conduct (see recital 24 of COM(2011) 773 final).

6.3.1 In the regulatory and administrative legal environment of the Member States, which is fragmented in this area, there is a serious risk of the relevant objectives not being effectively achieved, unless the obligations are defined in more specific terms at supranational level.

6.3.2 The EESC calls on the Commission to resolve this problem, which is currently affecting the operation of the internal market, and to present proposals, as for other Community policies.

6.4 The changes to the rules do not strengthen or enhance the role of consumer organisations in the areas of supervision, information and reporting, which paradoxically is left mainly up to market operators.

6.5 The mandate to strengthen horizontal subsidiarity, deriving from the TEU and the TFEU, and ultimately the principle of participatory democracy and the role of organised civil society in the EU, is hardly likely to be served by the single provision of the Decision (recital 35) which assigns a passive role to consumer organisations in this respect (the right to be informed by the Commission on campaigns to raise awareness of the CE mark) and which should be identical to that assigned to producers.

6.6 The current mark system does not ensure that a product has undergone a process guaranteeing its quality and safety, thus failing to meet consumers' expectations. The Commission, producers and consumers should look into the possibility of creating in the future a new mark system for determining the origin and traceability of products, so as to improve information for consumers.

Brussels, 28 March 2012.

The President
of the European Economic and Social Committee
Staffan NILSSON