Verband der TÜV e.V.

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Successfully shaping European trade policy

Twelve VdTÜV Requirements for EU Trade Agreements

1. Success for international trade with “Bilateral and Multilateral Conformity Assessment” (one-stop shopping) – building trust and easing market access.
2. A uniform conformity mark from independent, accredited testing laboratories for products in the markets of trading partners – creating transparency and identity.
3. One accreditation body for the markets of trading partners (one-stop shopping) – efficient proof of competence.
4. Mutual recognition only when reasonable and useful – taking due account of different cultures and legal traditions, and thus, divergent regulatory systems.
5. Deciding whether product requirements are of equal value – evaluation with the help of independent third parties.
6. Legal harmonisation – with priority to be given to the goal of higher protection, as well as to a stricter conformity assessment procedure.
7. Legal harmonisation – without product authorisation performed by governmental bodies.
8. Legal harmonisation – with a preventive approach, maintaining the European precautionary principle and tried-and-tested protective standards.
9. Maintaining legislative independence alongside regulatory cooperation.
10. Ensuring a uniformly structured and transparent standardisation system.
11. Making consistent use of international standards without additional requirements – voluntarily and privately organised and financed.
12. Unlimited, discrimination-free market access, in both legal and real terms – no “one-way street” in the course of bilateral and multilateral trade agreements.

The European Single Market and international trade are important for Germany and for Europe as a whole – as guarantors of growth, they secure prosperity and employment. However, value creation chains are becoming ever more complex, and safety cultures vary between different economic areas. Despite this, products that are traded on the Single Market and worldwide must meet the relevant legal requirements and standards. In other words, they must conform and, in particular, they must be safe.

Reflecting the increasing internationalisation of trade, Technical Inspection Agencies (TÜV) operate globally and have a wide and interdisciplinary portfolio in their roles as industrial service providers. From motor vehicles, medical devices, toys, household appliances and sports equipment, all the way to pressure vessels, lifts, machinery, solar modules, sports boats, textiles and foods, TÜV organisations test and monitor almost all tradable products.

With their competence, neutrality and objectivity, TÜV organisations ensure that manufacturers, trading partners, official authorities and consumers can trust in the conformity of products. Independent conformity assessment is, therefore, an integral part of well-functioning trade. The Association of Technical Inspection Agencies (VdTÜV e.V.) and its members support ambitious EU trade agreements and seek to make these a success by contributing specific solutions.

What can we do to remove non-tariff trade barriers?

The main purpose of trade agreements is the reduction and eventual elimination of non-tariff barriers to trade. Recognised barriers to trade include, in particular, differing requirements for products and services. These differences arise from substantive law, standards and also conformity assessment and marketing access authorisation or procedures that are not mutually recognised.

This paper initially explains why the instruments of “legal harmonisation” (1. A.) and “mutual recognition” (1. B.) are not practical routes for the removal of trade barriers between the EU and other states in the short or medium term.

In addition, VdTÜV proposes a pragmatic approach in the form of **Bilateral or Multilateral Conformity Assessments** (2.), in order to ease trading significantly within the framework of trade agreements.

1. Legal Harmonisation or Mutual Recognition as steps towards a common market?

To establish a common trading market between the EU and other economic areas, the following regulatory possibilities could be imagined:

A. Legal Harmonisation

A uniform and common set of rules provides the ideal foundation for achieving a barrier-free internal market. This route has been followed by the European Community since 1985 with the New and Global Approach[1]. The prerequisite for this was a wide political consensus reached amongst the EU member states, which determined to follow in general this regulatory approach. In addition, corresponding institutional and common legislative bases were required (Council of the European Union, EU Commission and EU Parliament) for democratic legitimisation of the new rules of the game. The completion of the Single Market took around 30 years and is now a reality.

In contrast, other markets of EU trading partners are possibly more heavily fragmented due to the differences in legislation and standards between their regional authorities, and hence, these do not represent true internal markets for the marketing of products. Beyond this, other markets have clearly divergent economically relevant and regulatory conditions compared to the EU – due to historical, cultural and socio-political differences – as well as respective autonomous legal traditions. Therefore, the markets of respective trading partners in these situations are not system-related entities with harmonised legislation and do not provide an equivalent to the Single Market.

In order to achieve wide-ranging legal harmonisation between the two markets, democratic legitimisation in the form of a common institutional framework between the trade partner and the EU would also be needed. As “joint parliaments” do not exist, the parliaments of the respective trading partners would at least have to approve harmonisation measures for legislation in the relevant areas. After all, if the regulatory status quo is changed for individual product sectors, then fundamental regulatory goals and suitable protective measures for citizens are also inevitably at stake.

Although the appointment of shared committees to achieve stronger regulatory cooperation is conceivable within the context of trade agreements, it is not a viable option. Such committees

[1] See New Legislative Framework (NLF) on https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en

could not make legally binding decisions in place of a democratically legitimised legislation body. Improved "regulatory cooperation" could only be of an informal character and, additionally, is certainly not acceptable where fundamentally different safety regimes exist.

Against this backdrop, it is clear that wide-ranging and consistent legal harmonisation between the EU and its respective trade partners would inevitably reach its limits. There is normally insufficient compatibility between the legal systems, which would have to be harmonised, and a lack of common structure between institutions. The apparently ideal route of legal harmonisation is therefore not practicable for the foreseeable future and is not available as a "patent recipe" for trade agreements.

B. Mutual Recognition

An alternative route towards the creation of a common market, which at first sight appears simpler, would be to use the instrument of "mutual recognition". Again, this is an area where Europe has decades of experience. In areas of the single market where legal harmonisation has so far not been implemented at the European level, the following principle applies: a product that has legally been put into circulation in a member state may be sold within the entire EU (cf. the judgement on Cassis de Dijon). This fundamental principle, which applies to the entire Single Market, was developed by the European Court of Justice from Article 30 of the EEC Treaty (today Article 34 TFEU) on the "free movement of goods". It therefore has a democratic, clearly legitimised legal basis ("primary European law"), is consensually agreed on by all Europeans and has an almost constitutional character.

A basis as robust as the EEC Treaty would be needed to make use of the mutual recognition control tool in bilateral or multilateral trade agreements, especially with trade agreements that could potentially have wide-ranging effects on the everyday life of citizens. The principle of mutual recognition can also only be effective where and to the extent that the participants from the respective markets have sufficient trust in the product-specific rules and regulations and the resulting levels of protection which apply in the product's country of origin. However, experience in the EU shows that products with a particularly high hazard potential for people and the environment cannot be marketed according to the principle of mutual recognition. Rather, harmonised legislation was created for such products, in particular, based on directives and regulations. For example, the marketing of medical devices, motor vehicles, lifts, machinery and toys is now uniformly regulated throughout all of Europe.

Against this backdrop, it is clear that the wide-ranging and consistent application of the principle of mutual recognition within EU trade agreements would also certainly reach its limits. As an instrument for creating a common market between the EU and its trade partners, it is therefore not truly feasible.

2. Easing market access with "Bilateral or Multilateral Conformity Assessments"

Today, as in the future, products have to comply with legal provisions and the requirements of standards and regulations. This is the case both in the EU and in international target markets. The manufacturer must always ensure conformity with the relevant product-specific requirements. To the extent that legislation specifies independent third-party testing as a necessary prerequisite for proof of conformity, this is a legitimate and risk-based decision made by the relevant legislative body to fulfil its protective goals. It does not permit the possible renunciation of conformity assessment, as often suggested by a generally-defined negotiating objective of reducing "superfluous and costly testing and certification requirements". Products must conform to the requirements laid down by the legislators in the target territory for sales. The associated "time and expense" could, at most, only be reduced if the legal and standard-based requirements in both markets are in agreement or if they are mutually recognised as equivalent.

One-stop shopping for conformity assessment

Assessing the conformity of products for the markets of the contracting parties involved can, however, be made considerably easier. This can be achieved in the course of trade agreements if assessment bodies at the home location are also authorised to test products in accordance with the legal and technical (standard-based) requirements that apply in the other economic area (one-stop shopping). If this is the case, their test results must have unlimited validity in the other location. Assessment of the conformity of identical requirements would only be carried out by one single body and only once. There would then be no duplication of testing, and only deviating product requirements (Delta) would have to be additionally tested. This efficient approach was already established in the negotiated draft of the Trade Agreement between the EU and Canada (CETA)[2].

[2] See protocol on the mutual acceptance of the results of conformity assessment: https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-443-EN-F1-1-ANNEX-8.PDF

Scope of a "Bilateral or Multilateral Conformity Assessment"

The scope of a "Bilateral or Multilateral Conformity Assessment" is as follows:

a. In the first step, the negotiation partners agree, in the same way as within CETA, on a specific list (positive list[3]) of those product categories for which this instrument would be used, following the agreement coming into force. Among others, these would include toys, low-voltage devices, machinery, measuring instruments, radio equipment and telecommunications terminals, as well as sports boats. The parties allow for the possibility of extending the scope to include further product categories following several years of experience and consideration[4]. Such categories would include, for example, pressure equipment, gas-consuming installations and personal protective equipment.
b. This scope only applies insofar as the respective contractual parties delegate authority to non-governmental bodies for the task of conformity assessment in the respective product groups.
c. The scope – in a way similar to CETA – does not apply where one of the contractual parties delegates authority to one single private body, giving it a monopoly for the task of conformity assessment for the respective product group[5].

One-stop accreditation for the economic areas of contractual parties

The authorised conformity assessment body (a company in-house laboratory or test organisation laboratory) must reliably demonstrate its competence in testing the conformity of the product to the respective authorities, in line with the legal and standard-based requirements of the markets of the contractual parties. Only then can the market players in each economic area have the necessary confidence in the products that are brought to the market. The competence and impartiality of the conformity assessment bodies are ensured through their official recognition and accreditation and are continuously monitored by the state.

To avoid duplicated accreditation costs, the accreditation of the conformity assessment body for the respective economic area should only be carried out by the accreditation body of the home area – if appropriate, in close cooperation with the accreditation body of the target area. For this purpose, complete mutual recognition of the accreditation undertaken in either economic area

[3] See CETA Protocol on the mutual acceptance of the results of conformity assessment, Article 1 "Scope and exceptions", Para. 1, in association with Annex 1 http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
[4] See CETA Protocol on the mutual acceptance of the results of conformity assessment, Article 1 "Scope and exceptions", Para. 2, in association with Annex 2 http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf
[5] Refer to CETA Protocol on the mutual acceptance of the results of conformity assessment, Article 1 "Scope and exceptions", Para. 5

would be necessary. In the future, the ideal aim should be to have one single European accreditation body as well as one per trade partner, acting as central players for a uniform accreditation system across the common market. It would be useful here to have a central publication of all the relevant legally binding and standard-based requirements regarding products and their conformity assessment.

Successful conclusion of trade agreements with "Bilateral or Multilateral Conformity Assessments"

The route of "Bilateral or Multilateral Conformity Assessment" is an efficient instrument for ensuring the necessary trust in the products of the other economic area. It makes mutual market access immediate, direct and also unbureaucratic, and trade is truly accelerated. Existing instruments of conformity assessment and accreditation in each economic area only have to be harnessed for the respective trade agreements and specified accordingly, as described above.

Conformity assessment makes market access particularly easy for small and medium-sized companies, as it opens up the possibility of having the conformity of a product tested by an accredited body at the home location, against the requirements of the target market. There is no longer any need to take the slow and costly route of conformity assessment by a local body in the target market to achieve market access. This means that direct access to both markets is open without further testing, authorisation or approval. The method of "Bilateral and Multilateral Conformity Assessment" offers considerable potential for the removal of practical barriers to market access: travel costs, language barriers, cultural differences, different business practices, information deficits, the need for additional staff resources etc.

The instrument of "Bilateral or Multilateral Conformity Assessment" offers another decisive benefit when it comes to social acceptance and political enforceability of trade agreements: markets included in the trade agreements can retain their own regulations and standards, as well as their legislative sovereignty, without limitations. This addresses fears on both sides regarding possible reductions in the levels of protection with the loss of well-established regulatory systems, as well as concerns about negative impacts based on the possible "lowest common denominator". The conclusion of ambitious trade agreements for the reduction of non-tariff barriers to trade is made considerably easier with the core instrument of "Bilateral or Multilateral Conformity Assessment".

“Bilateral or Multilateral Conformity Mark” (TE-COM – Trans-European Conformity Mark)

If a product conforms to the European regulatory and standard-based requirements, as well as those of the target markets, and if this conformity has been assessed by an independent, accredited test organisation, a “Trans-European Conformity Mark” can be affixed.

The “Trans-European Conformity Mark”, to be newly created for the conformity assessment, could be used for products which must undergo an obligatory conformity assessment by an independent test body due to their increased hazard potential, or products which undergo such independent testing on a voluntary basis.

Such a conformity mark would offer manufacturers an additional incentive to develop their products in such a way that they comply with the requirements of the markets of the contracting parties. As the conformity with requirements beyond those of the home country is made visible, the product profile is raised against that of competitors and trans-European trade is also boosted.

The “Trans-European Conformity Mark” would be linked with the logo of the certification body. This link makes it easier to introduce such a mark to the market in a recognisable and acceptable form. In addition, the certification body – as the owner of the mark – can take steps against unauthorised or incorrect use and therefore relieve the market surveillance authorities of this responsibility. The TE-COM offers maximum transparency to enforcement authorities, manufacturers, suppliers, and consumers alike. With the help of this conformity mark alone, all players can reliably recognise that products fulfil both EU requirements and those of the contract partners, and no further testing or approvals are necessary.

Last but not least, a “Trans-European Conformity Mark” promotes widespread identification with the objectives of the trade agreement and expresses the acceptance of equal value protection requirements, which apply equally to both sides.

Minimum criteria for a “Trans-European Conformity Mark” granted by an independent test authority:

- The “Trans-European Conformity Mark” must be based on certification by an accredited, independent conformity assessment body which fulfils the ISO/IEC 17065 international standard on requirements for bodies certifying products, processes and services.

- The fundamental elements of such a mark are type testing, product testing, factory inspection and monitoring, and sample-based market surveillance.
- To provide transparent proof and traceability, the logo of the accredited certification body should be visually linked with the “Trans-European Conformity Mark”. The certification body is the owner of its logo. As a legal entity, it takes measures based on trademark and licensing law in the case of unauthorised use of TE-COM.
- Product liability, as in the EU and in the market of the contractual partner, rests with the manufacturer. The certification body only carries liability for its conformity assessment activities.