

# Enforcement in the Internal Market

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A businesswoman in the USA telephoned the author in London late one evening a couple of years ago to complain that French Customs officials had seized a consignment of helmets made by her company for a customer in France. She could not understand the reason for this action and was even more bemused when she was told that it was because the helmets did not conform with the requirements of the Personal Protective Equipment Directive (PPE) 89/686/EEC, as amended. Not only had she not heard of the directive, she could not understand why the goods had not received similar treatment in the company's other EU markets. Most seriously, how could she place the CE marking on the goods within the short time allowed by the French? Panic struck – the order was a very valuable one which her company could ill afford to lose. Failure to bring the goods into line with the requirements of the directive would result in their being destroyed. Fortunately, there is a happy ending to this story because the manufacturer was able to arrange for the helmets to be properly CE-marked and so disaster was avoided. Moreover, the manufacturer ensured the experience would not be repeated elsewhere. Steps were taken to understand the directive and to comply with it and thus the *new* European legislation concerning the goods in question.

Later, another (British) PPE manufacturer complained that having had his goods tested and the CE marking affixed in accordance with that directive, he could not sell them as they were more expensive than items still freely available on the market which did not conform with the directive.

Sadly, these examples are not unique. They demonstrate one of the major problems being encountered as the Internal Market (formerly called the Single Market, 'the market'), which opened formally for business on 1 January 1993, settles into place. Politicians and administrators who thought their work was done when the directives they had painstakingly negotiated were transposed into national law, found that the real work only began when directives were implemented in practice and manufacturers and others started to comply with their requirements. They were surprised to find that words and phrases agreed after lengthy debate, were interpreted differently as those affected by them started to make and supply products in accordance with the relevant directive(s).

Questions were therefore asked of many different sources in the quest for a definitive view. Depending upon the nature of the question put and the expertise of the authority consulted, various answers were possible – even to the simplest of queries. This heightened concerns and encouraged scepticism and criticism of the Internal Market and anyone and anything concerned with it. Clarity and certainty were demanded. In some instances, these were relatively easily provided. In others, experience had to be gained and various possibilities explored before any view could be formed. Given the nature and magnitude of the changes involved in establishing the Internal Market, is that so unreasonable? Compare that Market with, say, the USA. Each comprises areas of different cultural and political make-up. Each is also made up of states with established different laws. The US model appears to work better. But does it? Certainly, it has had time to settle. Perhaps that has allowed the US to develop a more harmonised system of federal law. Or perhaps experience has simply taught us to understand, accept and work with that system better. (Maybe trade benefits from opportunities offered under slightly differing systems?) In the case of the Internal Market, it is still very new. We are still adapting to it and the changes it involves. Therefore, is it wise to jump to conclusions and make judgements so early? Common-sense would probably support that view. Commercial pressures dictate otherwise. Businesses are irritated when *the level playing field* appears absent to them and this encourages them to question the Internal Market. Because their immediate concern is likely to be the directive with which they are currently having 'problems', they initially seek clarity and certainty in matters concerning that directive. But, where is such clarity and certainty to be found?

Leaving the issue of clarity to one side, the short answer to the second point is that only the text of the relevant directive(s) and the implementing national legislation are authoritative in law. But, full circle has been turned as we return to the matter of how, why and to what extent interpretations differ within and between the Member States. Currently, there is insufficient scientific evidence on which to base conclusive views about the nature of this problem – or indeed if a fundamental problem really exists. It may be that what is being experienced is no more than teething problems, which will disappear as further experience is gained. Whatever the truth, there seems to be a general expectation that everything should be equal within the Internal Market and that *the level playing field* is laid

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from the beginning. Because some experiences, like those summarised in the opening paragraphs above, found differently, a perception grew that things were not working well. Consequently, feelings developed of having been let down by 'the system'. And because bad news spreads faster than good, attentions were turned to 'the problem(s)' which started to develop lives of their own. It is debatable whether this is either valid or reasonable. But, it gave rise to the assumption that 'proper enforcement' of the directive(s) concerned would iron out the wrinkles and provide the necessary answers.

What actually does 'enforcement' therefore mean and how is enforcement action applied across the 15 markets of the European Union? From the foregoing, readers will understand that these questions are frequently asked by administrators and businesses seeking to benefit from *the level playing field* promised by the EU technical harmonisation process designed to abolish barriers to trade. Apparently, from the above and similar examples, the term 'enforcement' is understood differently across the EU and beyond. Consequently, actions taken in its name also differ. This may or may not be in business' and the Market's interest. It is too soon to tell. Further investigations and consideration are required before any conclusions should be drawn. But first, a clear definition of the term (and what it involves) has to be agreed. Such are the concerns being expressed about these and related issues, that the EU Presidencies of Luxembourg (until 31 December 1997), the United Kingdom (currently), Austria (second half of 1998) and Germany (from 1 January 1999) are co-operating closely for the achievement of a more effective Internal Market.

Clearly, there needs to be continuing and increasing awareness about the Internal Market and of the directives which help to cement its base. Whilst it is true that ignorance is no defence in the eyes of the law, one cannot help but sympathise with those who genuinely find it difficult to understand or discharge their new obligations. However, the directives in question here have been in force for some time and the transitional arrangements provided under them to assist businesses etc. to adapt to the changed requirements have largely expired. So, why do difficulties persist and what is being done to overcome them?

In the first place, it is important to determine whether the opening experiences are truly representative of deeper, more fundamental concerns – or is it simply that more is known about them because of the publicity they attract? It has to be said that for the most part, many directives appear to be working as intended and well. This is mainly due to the co-ordination and co-operation efforts of the parties involved, often at the encouragement of the European Commission. But, naturally, increasing practical experience of working to the requirements of directives has raised a number of questions of interpretation.

These issues may be settled reasonably during meetings of expert technical working groups. Where

significant policy issues are involved, it may be that meetings will have to be convened of the committee of expert officials established under the relevant directive to consider questions of interpretation and application.

But, should no forum be able to resolve the issue(s) in question, it may be that recourse to law is necessary. Because of the cost and time involved, most hope that legal proceedings can be avoided. But, if they are to be avoided, other mechanisms must be in place and function properly to provide the required clarity and certainty. Simpler (easier to understand and follow) legislation may help. But, effective, uniform enforcement of EU directives arguably holds the most important key to establishing confidence in the Internal Market. That is why the new UK government is committed to using its Presidency to speed up the completion of the Internal Market, making June 1998 the deadline. The aim is to see all Member States effectively implementing directives *and* introducing systems for remedy and enforcement.

Such is the importance of the latter, that when the UK Prime Minister, Tony Blair, gave a lecture in the Netherlands last January on his European policy, he repeated his call for 'better enforcement (of market rules) through faster and more rigorous complaints procedures, underpinned by more effective sanctions'. Only time can tell how these words and aims will be translated into reality. But, there should be no doubt that they *will* become reality. Therefore, all of the parties involved should be liaising with each other now, nationally and across the EU and wider, to ensure that what develops will be both fair and reasonable.

There is no question that directives oblige those affected by them to satisfy their requirements properly. For governments, this means that directives have to be implemented faithfully in national laws – and that only products complying with the relevant requirements *including* the affixation of the CE marking will be allowed to be placed on the market. Anything less (particularly unsafe items) should normally be removed from the market. This is probably the closest that directives generally come to addressing the issue of enforcement. Perhaps that is why the term is open to such wide interpretation and why there is currently no uniform approach to enforcement action across the EU?

Whatever the reason(s), EIPA considered this to be such an important new policy issue that it held a two-day Colloquium dedicated to the subject on 12 and 13 January and, unusually, invited representatives from industry and commerce to join Ministers and administrators to consider enforcement issues generally. About 70 participants from 10 EU Member States as well as from Cyprus, Hungary, Norway and the USA gathered to hear 17 speakers explain their understanding of what enforcement means and, from their personal experiences, what difficulties are currently being encountered with regard to it.

Building on the *Conference on Market Surveillance* (which addressed only consumer safety issues),

organised by the Swedish Ministry of Industry and Trade, the European Commission and the Swedish Board for Accreditation and Conformity Assessment (SWEDAC) and held in Stockholm in October 1997, Nigel Griffiths, Minister for Competition & Consumer Affairs at the Department of Trade and Industry in London gave the keynote address in which he thanked EIPA for giving him the first opportunity under the UK Presidency to emphasise his government's commitment to the above aims, which are widely supported and shared across the EU and beyond.

Graham Watson, UK Member of the European Parliament for Somerset and North Devon, told the audience of the importance attached by the European Parliament to proper enforcement, on which the success of the Internal Market depends. Noting its absence, he suggested the formation of an all-Party Group of MEPs to liaise with enforcement agents, industry and others on enforcement matters. Acknowledging the progress made in establishing the Internal Market, he encouraged consideration of new ideas to make it work better e.g. establishing a sophisticated system for monitoring enforcement (a role for specialised agencies?); transforming Europe Information Centres into redress and compliance centres and the need for an Internal Market Ombudsman.

Speaking for the European Commission, Jacques McMillan Head of Unit, DG III/B/4 – Quality, Certification & Conformity Marking, said that one of the main problems concerning enforcement was that the Commission did not know who was actually responsible in each of the Member States for enforcement policy issues under each of the *New Approach* directives in question. Aware that enforcement issues were of topical political and public concern, the Commission was considering what needed to be done. Senior colleagues were drafting a possible directive on Market Surveillance in order to achieve the desired certainty. But that may be unnecessary if the same ends might be achieved through informal guidance and voluntary co-operation, training and co-ordination of activities.

The Colloquium then went on to hear a succession of speakers tell of their organisations role in making the Internal Market work by assisting in the enforcement process. Starting with the enforcement agencies, LACOTS in the UK, the Swedish Consumer Agency and Prosafe explained how they saw and undertook their work. They repeated their request for adequate resources (financial and human) to fulfil their role properly, including the need for collaboration and co-operation – encouraged by the Commission.

George Hongler, Secretary-General of CEN in Brussels, spoke of the role and responsibilities of standards-makers in ensuring that directives requirements were met properly by good (i.e. clear and unambiguous) harmonised European standards. The standardisation bodies (CEN, CENELEC and ETSI) had expensive and heavy workloads. Success depended upon the availability, dedication and expertise of

participants – some of the most knowledgeable were unable to participate personally because of commercial and budgetary constraints. Reaching a balanced, representative view was a constant aim but never easy to achieve. Increasing financial and time constraints added to the pressures, but cannot be ignored.

Other speakers talked of the roles played by implementing administrations in issuing guidance and sharing views and experiences. And businessmen added their voices to the growing call for central guidance to encourage uniformity of approach. Without that, they felt the *level playing field* would never be properly achieved.

Finally, a complete hush fell while Georg Haibach (a lawyer and lecturer at EIPA) gave a lawyer's impressions of what had been heard over the two days. His inclination was that a new directive was required to achieve the desired aims of uniform interpretation and application of relevant directives. Such an instrument was also needed to ensure that the Member States met their obligations to implement directives properly and to suffer the appropriate sanction(s) if they failed to ensure they were properly enforced. This may be inevitable. But, such a directive would take some time to draft, negotiate, formally adopt, transpose into national laws and enter fully into force. Industry demanded action now!

In the concluding Open Forum, many added their support for the central themes which emerged. SMEs again urged dispensation wherever possible as unnecessary burdens fell heavier on such businesses than their bigger counterparts. Brian Prime, President of the European Council for Small and Medium-Sized Independent Enterprises felt that a Legislative Audit Commission was needed to scrutinise European legislation to ensure that directives were not over-implemented or unnecessary burdens placed on business.

Whilst it is always difficult to summarise such a wide-ranging debate, the main conclusions reached by the participants were that because those responsible for the enforcement of each of the *New Approach* directives in each of the Member States have not been identified, it was recommended that the British Presidency should seek a commitment from the Council of Ministers that those details will be given to the Commission within three months of that meeting. Thereafter, having identified those persons, they should be called together for an analysis to be made of their current practices (including any inaction) and the reasons therefor. This should show where harmonisation already exists. It should also reveal significant differences and common problems, which can then be evaluated and appropriate action(s) considered.

Summing up for the participants, the author noted that their other significant points were:

- further legislation should be avoided and existing legislation simplified to increase understanding of and assist proper compliance with relevant directives;
- the Commission might consider issuing Guidance to

promote a common understanding of the term 'enforcement' and encourage uniformity in its application, perhaps through the joint training of those involved;

- hopefully, much of the above might be advanced voluntarily through increased and improved informal co-operation and co-ordination. But, *if necessary*, the Commission should propose a specific directive on enforcement to provide clarity and legal certainty; and finally
- the need for a Legislative Audit Commission and an Internal Market Ombudsman (to consider complaints from consumers) should be considered, as appropriate.

EIPA has been pleased to facilitate discussion on the above issues and its Director-General, Isabel Cortes-Real, has offered all possible support to continuing the

European harmonisation process. As a result, the author will shortly visit interested MEPs to inform them of the outcome of the Colloquium. He will also produce a report on the proceedings, which, when published, may be obtained (for a charge) from EIPA. He is already liaising with the Commission, Ministers and others to ensure that the impetus is not lost. However, to ensure the participants' conclusions are representative across the EU, EIPA plans to take a shorter version of the Colloquium later this year to Spain or Portugal, Greece and Strasbourg, as the Southern Mediterranean countries, France and Germany were conspicuous by their absence at the January event. Ideally, a concluding event might be arranged in Stockholm in early 1999 to round off the current deliberations and pave the way forward. Readers interested in any of these events should contact the author at EIPA for further details. □

*Nigel Griffiths, Minister for Competition and Consumer Affairs at the Department of Trade and Industry (UK)  
delivering his keynote address at the colloquium 'Enforcement in the Internal Market' held at EIPA, Maastricht  
on 12-13 January 1998*