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Free movement of goods in non-harmonized area - Mutual Recognition Principle

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Seminar “ Legal Metrology & EU directives, New Legislative Framework”
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DISCLAIMERS:

- **the corresponding pieces of legislation are written in a rather heavy legal language and are relatively long – not all the articles will be presented, only the overall philosophy and relations to metrology, all of them available on the Internet**
- **the presentation contains a number of personal opinions and interpretations of the author, representatives of CEC might see the matters otherwise – the place of final resort is the European Court of Justice**

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The subject matter of this issue: the interpretation and implementation of one of the EC fundamental rights: **free movement of goods** (products, e.g. measuring instruments) on the Internal (Single) Market

The corresponding articles in the EC Treaties (**the Treaty establishing the European Community - TEC**) are articles 28 and 30, art. 28 being the principle and article 30 is the exception

Article 28/29 Quantitative restrictions on imports/exports and all measures having equivalent effect shall be prohibited between Member States.



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Article 30

The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

Jurisprudence of the European Court of Justice (ECJ):

- **provisions of Articles 28 to 30 EC take precedence over all contrary national measures**
- **national courts and administrations are obliged to guarantee the full impact of Community law by removing, on their own initiative, the conflicting provisions of national law**



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- general definition of **obstacles to trade** (Dassonville case): any measures on national level which is capable of hindering, directly or indirectly, actually or potentially intra-Community trade in goods
- **Mutual recognition** applies to products which are not subject to harmonization measures at the Community level (**non-harmonized regulated area**), in metrology the area outside old- and new-approach metrology Directives and Medical Devices Directive
- the principle of mutual recognition is one of the means of ensuring the free movement of goods within the EU
- basic idea: a Member State cannot forbid the sale on its territory of products which are lawfully marketed in another MS even if they were manufactured according to technical rules different to those which must be met by domestic products

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Only exceptions to this principle are **overriding reasons of public interest** specified as follows:

1. exhaustive and final **specification in art. 30 TEC** (they can even have a discriminatory character)
2. so called **mandatory requirements** like the **protection of consumers, the protection of environment, the maintenance of press diversity etc.** (it is a non-exhaustive, indicative list subject to possible extensions by ECJ case-law in relation to art. 28 and 30 of TEC, the first being the famous **Cassis de Dijon**)



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- the requirements ad 2 should not constitute a means of arbitrary discrimination or a disguised restriction of trade between MS
- furthermore, the principles of **necessity and proportionality** should always be respected (the least restrictive measure should always be used by national authorities)
- they have a direct relevance to legal metrology, to activities associated with putting measuring instruments subject to regulation on the market and into use (type approval, initial verification, **subsequent verification**)
- countries outside the EU can be exposed to this legislation by way of the so called **PECA agreement (now called ACAA)**

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Life situations to which mutual recognition is applicable in metrology:

1. putting on the market and into use of radar speedometers (recognition of their type approval and initial verification) + recognition of their subsequent verification
2. measuring systems for cryogenic liquids on road tankers (MID MI-005) travelling **naturally** among Member States (MS): recognition of their subsequent verification
3. weighing instruments (NAWI) **artificially** transported to another MS just for the purpose of their subsequent verification (and then brought back): recognition of their subsequent verification



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Current legal situation in this area (EC conformity assessment area) – 3 new EC legal acts called as a whole **New Legal Framework (NLF)** or are referred to as **revision of the new approach to technical requirements for products** :

1. **Regulation (EC) no. 764/2008 of the EP and of the Council of July 9, 2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another MS**
2. **Regulation (EC) no. 765/2008 of the EP and of the Council of July 9, 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products**
3. **Decision (EC) no. 768/2008 of the EP and of the Council of July 9, 2008 on a common framework for the marketing of products**



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- To get an insight in the background of mutual recognition lets us explore the situation preceding NLF
- The situation was basically governed by the case-law of the European Court of Justice
- ECJ interpreted EC law in individual cases and this case-law is an integral part of *acquis communautaire* (the institute of the so called **preliminary ruling** – current art. 234 of TEC)
- Roughly speaking, 4 such cases played an important role in relation to mutual recognition



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ECJ JUDGMENT no. 120/78 „Cassis de Dijon“:

- **subject: sale of French fruit liquor Cassis de Dijon in Germany (regulated there by law on state monopoly in alcoholic beverages)**
- **alcohol content was between 15-20 % whereas German regulation required at least 25 %**
- **German importer REWE filed a charge against the ban on importation issued by German authorities**



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ECJ JUDGMENT no. 120/78 „Cassis de Dijon“:

- **In the absence of common rules , obstacles to movement within the community resulting from disparities between the national laws relating to the marketing of a product must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy **mandatory requirements** relating in particular to:**

 - **the effectiveness of fiscal supervision**
 - **the protection of public health**
 - **the fairness of commercial transactions and the defence of the consumer**



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ECJ JUDGMENT no. 120/78 „Cassis de Dijon“:

- the requirement of a minimal alcoholic content does not fulfil the criterion of public interest (it is enough to convey the sufficient information to consumers by displaying them on the product – the origin and the alcohol content)
- the importance of this judgment: **general definition of obstacles to trade**
- exceptions from this rule are in technical and commercial regulations accepted only under strict conditions: the requirements have to be **necessary and proportional** (the least restrictive measure to trade should always be used by national authorities)



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ECJ JUDGMENT no. 120/78 „Cassis de Dijon“:

- **an impulse for increased efforts in Communitary harmonization (standardization, new approach)**
- **a basis for formulation of legislation at national level in non-harmonized area**



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ECJ JUDGMENT no. 212/97 „Centros Ltd.“:

- in 1992 a Danish couple wanted to start a private limited company but did not like to deposit a minimum paid-up initial capital of 200 000 DKK
- they therefore founded a „virtual“ company in the UK where the requirements were not that tough and applied for a registration of its branch in Denmark
- the Danish authority refused the application on the ground that this was a clear attempt at circumventing this requirement of the Danish commercial law
- ECJ: according to art. 43 and 48 TEC no company can be restricted in its right to establish its branches in EU Member States (freedom of establishment guaranteed by TEC)



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ECJ JUDGMENT no. 212/97 „Centros Ltd.“:

- a relation to metrology: it means that a branch of a foreign company would automatically get an access to authorization as an Authorized Metrology Centre in legal metrology if you do not prove that it is an exercise of public power
- it has a direct bearing on the application of the Service Directive



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ECJ JUDGMENT no. 272/80 „Frans-Nederlandse...“:

- the Netherlands, 1962: a ban on the use of antiparasitic plant protection products without a prior approval (protection of public health)
- the company concerned prosecuted for not abiding by the law (a ban on importation without an approval) ⇒ harmonized legislation did not exist ⇒ ECJ asked for a preliminary ruling (concerns art. 30 TEC)
- member state are free to take such measures under community law
- **however, it is not possible to require the same tests which have already been carried out in another Member State provided that the technical requirements are compatible with those of the importing member state**



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ECJ JUDGMENT no. 272/80 „Frans-Nederlandse...“:

- **furthermore, their results have to be available to those authorities or may at their request be placed at their disposal and have been carried out by a technically competent body (without any closer specification)**
- **otherwise, it would constitute a disguised restriction of trade under 2nd sentence of art. 30 TEC**
- **on the other hand, when no tests have been made they have to be carried out in the country of importation**



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ECJ JUDGMENT no. 220/81 „T.F.Robertson...“:

- a ban on sale in Belgium of silver-coated articles not properly stamped by a lawful Belgian hallmark
- in other member states such stamping was not required
- criminal proceedings against the importer of silver-plated articles (cutlery) ⇒ ECJ asked for a preliminary ruling



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ECJ JUDGMENT no. 220/81 „T.F.Robertson...“:

- art. 30 does not preclude to a Member State to introduce measures restricting a sale of goods (having been put lawfully on the market in another Member State) not marked as required by these measures provided that such articles have not been stamped , in accordance with the legislation of the Member State of exportation, with a hallmark containing information **equivalent** to that provided by the hallmarks prescribed by the rules of the member state of importation and **intelligible** to consumers of that State



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ECJ JUDGMENT no. 220/81 „T.F.Robertson...“:

- the judgment is about a hallmark but in application to legal metrology it could be used to metrological markings (type approval, verification of a measuring instrument)
- There might be 2 possible situations here:
 1. legally controlled meas. instrument bears no marking at all ⇒ interpretation of that equivalence (see the preceding judgment)
 2. legally controlled meas. instrument bears some national markings ⇒ interpretation of that intelligibility (consumer exposed to a variety of different markings)



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NATIONAL IMPLEMENTATION IN METROLOGY :

- in application to metrology the goods (products) under consideration are measuring instruments
- regulation over measuring instruments traditionally restricted to those playing a role in the protection of public interest (fair trade, protection of health, setting down of fees and fines etc.) – so called **legally controlled measuring instruments**
- the principle of **Caveat emptor – Buyer beware** is (or should be) observed as to the scope of the regulation (**the necessity of the measures**)



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NATIONAL IMPLEMENTATION IN METROLOGY :

- the free circulation of those instruments is restricted by requirements of type approval (conformity to technical requirements as given by national legislation) and initial verification (conformity to the approved type of every single manufactured instrument)
- the mutual recognition principles given by the above mentioned ECJ case-law implemented by a clause or clauses in national Laws on metrology existing in all the MS – so called **mutual recognition clauses**
- in practice the situation is facilitated by the fact that in metrology there is a fairly well harmonization of technical regulations worldwide as a result of OIML activities



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NATIONAL IMPLEMENTATION IN METROLOGY:

- **in practice, the acquis inclusive the case-law related to mutual recognition was implemented in a different way in various MS**
- **following are 2 examples of more and less restrictive approaches**



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Austria:

- given by Mass- und Eichgesetz having been successfully notified to CEC
- recognition for all the EEA is based on the requirement of comparable level of protection of public interests
- all the relevant documentation should be available to Austrian authority (BEV)
- to assess technical competence of the laboratory of the exporter on-site visits are carried out (initially and subsequently)



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Austria:

- if successful, an Austrian metrology markings are assigned to the importer to mark all the products, these are made available to consumers in an official journal
- the approach is very consequent (**more restrictive**) but 100 % compatible with the principles of mutual recognition given above



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Czech Republic:

the wording in the Law on metrology is as follows:

1. A regulated measuring instrument shall undergo a conformity assessment prescribed for that measuring instrument by virtue of Article 5 of the Law before it is placed on the market or put into use.



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Czech Republic:

the wording in the Law on metrology is as follows:

2. Measuring instruments that have been legitimately produced or placed on the market in another Member State of the European Union or in a State other than a Member State of the European Union which is a party to a treaty serving or partly serving this purpose that is binding on the CR and that have been **assessed by an equivalent body recognised by that State in terms of their conformity to the requirements laid down** shall be regarded as equivalent to measuring instruments that have undergone a conformity assessment as referred to in paragraph 1, provided that equivalent requirements have been met during that assessment.



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Czech Republic:

- the only condition is that the results of corresponding conformity assessment tests are available to CMI
- a **liberal approach** to the problem, requiring and assuming an equivalence **without any prior pro-active checks**: requirements of Frans Nederlandse case not clearly established by evidence, Robertson case neglected at all (consumers exposed to an unlimited number of various markings unknown to them)



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NATIONAL IMPLEMENTATION IN METROLOGY

Summary, conclusions:

- the implementation of mutual recognition principles in metrology is vastly different in MS, mostly quite a liberal approach is used at the expense of consumers
- with the accession of new members it has been expected by the metrology community that the detailed implementation would be subject of harmonization by the CEC which, however, never happened



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NATIONAL IMPLEMENTATION IN METROLOGY

Summary, conclusions:

- to a surprise to the metrology community the CEC (DG Enterprise and Industry) initiated a new project: drafting of a new Regulation
- instead of harmonizing the implementation of mutual recognition on national level the regulation is aimed at introducing new administrative procedures as regards to products (especially complex ones and dangerous for health are under spotlight)
- it is even more surprising when we take into account another EC legal act in support of mutual recognition: **Directive 98/34/EC**

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Directive 98/34/EC:

- in 1984 the Single European Act further strengthened by a Directive, now 98/34/EC
- a prevention-based approach to monitor the development of standards and national regulations
- the Directive requires **notification** of all new technical regulations to CEC with a standstill period enabling their review from the position of CEC and the MS



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Directive 98/34/EC:

- the aim: to prevent any measures which directly or indirectly require compliance of products with technical specifications being contrary to Community law
- all the relevant information is available in the so called TRIS database
- it has to be assumed that no new regulations being in breach of the principles of mutual recognition have been introduced on national level



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Regulation no. 764/2008:

- the reasoning behind this draft regulation is as follows: even if technical regulations are dutifully notified to the CEC on the basis of 98/34/EC it is necessary to ensure that mutual recognition is correctly applied in individual cases to specific products (MS have to justify on which technical or scientific grounds they refused a product)
- in the 1st half of 2004 the CEC conducted a consultation with stakeholders via „Your voice in Europe“ web site: out of 135 responses a majority was in favour of the motion
- the regulation should be a part of the legal acts on revision of the new approach in the sense that **results of conformity assessment procedures on products made by accredited bodies should be recognized**



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Regulation no. 764/2008 – problems in practice (as given by the CEC):

1. Lack of awareness of the principle (*businesses and administrations*)
2. Legal uncertainty about:
 - a) the scope of the principle and
 - b) the burden of proof(*businesses and administrations*)
3. Risk in another Member State (*businesses*)
4. The absence of a dialogue between authorities (*administrations*)



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Regulation no. 764/2008 - structure:

- **Chapter 1: Subject-matter and scope (*Articles 1 to 3*)**
- **Chapter 2: Application of a technical rule, i.e. rules and procedures for applying mutual recognition in individual cases (*Articles 4 to 8*)**
- **Chapter 3: Product Contact Points (*Articles 9 to 11*)**
- **Chapter 4: Final provisions (*Articles 12 to 15*)**



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Regulation no. 764/2008:

Chapter 1 – Subject-matter and scope

Article 1 – Subject-matter

- Regulation applies to (possible) **technical obstacles to a specific product** lawfully marketed in another Member State (→ Chapter 2) - lays down rules and procedures for administrative decisions on the basis of a technical rule, i.e. decisions taken with respect to individual cases
- Regulation establishes **Product Contact Points** in each Member State for the provision of information inter alia on the national technical rules (→ Chapter 3)



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Regulation no. 764/2008:

Article 2(1) – Scope

- applies to **administrative decisions** addressed to economic operators on the basis of a technical rule (Chapter 2)
- specifies the detailed kinds of direct or indirect refusal of market access [(a) to (c)]
- applicable to all industrially manufactured, agricultural and fish products (see Article 1(1) Directive 98/34/EC)
- excluded: decisions of a judicial nature [art. 2(3)] + art. 3



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Regulation no. 764/2008

Article 2(2) – Scope

- **technical rule:** see definition of “technical regulation” in Article 1(11) of Directive 98/34/EC (without services)
- (2a) those which are not the subject of harmonisation at Community level
- (2b) any provision of legislation which prohibits the marketing of a product or type of product in the territory of that Member State or compliance with which is compulsory when a product or type of product is marketed in the territory of that Member State
- (i) the characteristics required of that product or type of product...



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Regulation no. 764/2008:

Article 2(2) – Scope

- (ii) other requirement which is imposed on the product or product or type of product for the purposes of protecting consumers or the environment, **and which affects the life-cycle of the product after it has been placed on the market, such as conditions of use (!), recycling, reuse or disposal, where such conditions can significantly influence the composition, nature or marketing of the product or type of product.**

Note: CEC interprets it in such a way that it touches e.g. subsequent verification as well but the last underlined sentence above, to my opinion, is in contradiction with this line of thinking !



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Regulation no. 764/2008:

Chapter 2 – Procedure for the application of a technical rule

Articles 4 to 8 – Reversal of the burden of proof

- **Jurisprudence of the Court of Justice:**
 - **provisions of Articles 28 to 30 EC take precedence over all the contrary national measures**
 - **national courts and administrations are obliged to guarantee the full impact of Community law by removing, on their own initiative, the conflicting provisions of national law**



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Regulation no. 764/2008:

Chapter 2 – Application of a technical rule

Articles 4, 6 to 8 – Reversal of the burden of proof

- **it is up to the Member State which claims to have a reason justifying a restriction on the free movement of a product to demonstrate specifically the existence of a reason relating to the public interest, the necessity for the restriction in question and the proportionality of the restriction in relation to the objective pursued.**
- **everybody must have the right to effective legal recourse before the national courts against national decisions which infringe a right recognised by the Treaties or by secondary Community legislation.**



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Regulation no. 764/2008:

Chapter 2 – Application of a technical rule

Articles 4, 6 to 8 – Reversal of the burden of proof

- **this principle implies that those concerned should obtain information regarding the grounds for such decisions from the administration, before any recourse to law (art. 6 (1) – **overriding reasons of public interest**)**
- **art. 4 and 6 to 8 lay down a detailed procedure based on the above principles how to apply a technical rule with all the legal remedies (beneficial to economic operators)**



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Regulation no. 764/2008:

Chapter 2 – Application of a technical rule

- **Art. 5 – MS shall not refuse certificates or test reports issued by a conformity assessment body accredited for the appropriate field of CA activity in accordance with the EC Regulation no. 765/2008 on accreditation... on grounds related to the competence of that body.**
- **Verification = accredited inspection body (see later)**



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Regulation no. 764/2008:

Chapter 3 – Product contact points

- The obligation of any MS to establish (or designate) a Product Contact Point on its territory and to communicate its contact details to the other MS and the CEC
- Tasks: to provide on request from an economic operator or a competent authority of another MS the following information:
 - on technical rules applicable to a specific type of products
 - whether that type of product is subject to a requirement for prior authorization
 - on the principle of mutual recognition and its application on its territory
 - on contact details of competent authorities of MS
 - on the remedies generally available in the national territory in the event of a dispute between the authorities and an economic operator



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Regulation no. 764/2008:

Chapter 3 – Product contact points

- **an obligation to respond within 15 working days of receipt of any request**
- **no fees shall be charged for provision of such information**



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Regulation no. 764/2008:

Chapter 4 – Final provisions

- art. 12 – reporting obligations
- art. 13, 14 – Committee procedure, repeal
- art. 15 – entry into force: **the regulation was made effective on May 13, 2009**



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Regulation no. 764/2008 - comments:

1. as to the consultation one would expect that some **concrete examples of refused products** justifying those additional bureaucratic measures will be given by stakeholders (will result from the consultation), given the size of additional bureaucracy – instead, the consultation merely asked questions in support of the proposed measures (questions that simply cannot be answered negatively)
2. it is not clear **why the measures given in 98/34/EC are not sufficient**, the CEC itself praises it to be a major success: any product can only be refused on the basis of a technical regulation or a rule as a part of national legislation and all those rules had to have successfully undergone the notification procedure



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Regulation no. 764/2008 - comments:

3. it is absolutely clear that any action on the part of national authorities to refuse a product not supported by a technical regulation being in power would be simply unconstitutional in all the MS
4. administrative procedures used now on national level in such cases always have **all the procedural protections**: burden of proof, remedies, appeals etc., it is not necessary to introduce them by way of an EC regulation
5. **135 responses** is really not too much



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Regulation no. 764/2008 - comments:

6. it is most unfortunate that instead of harmonizing the implementation of mutual recognition the Regulation **introduces new administrative procedures** which are either superfluous or add additional administrative burden for MS



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Regulation no. 764/2008 – general conclusions:

- the scope of the Regulation has undergone a constant development: at the beginning there was an effort to lay down at least some common binding rules for mutual recognition on the basis of overriding public interests, accreditation etc. but finally the idea to lay down only **process rules for disputes associated with putting products on the market** has prevailed
- not a single word is lost in the Regulation on the **Directive 98/34/EC** - the Regulation is in fact fully decoupled from 98/34/EC system - a difference to common national legislation consists as well in the fact that even technical rules on national level successfully notified to the CEC and to MS on the basis of 98/34/EC are not excluded from application of the administrative procedure under the Regulation

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Regulation no. 764/2008 – metrology conclusions:

- technical rules are specified in such a way that they **cover not only putting products on the market but also their use** as well (art. 2, par. 2b,ii – under „any other requirements“) which is in legal metrology directly linked with **subsequent verification – is it right ?**
- not to accept legally controlled MIs subsequently verified in other MS by non-accredited bodies is therefore theoretically possible but in case of a ban the procedure under the Regulation will have to be used which will be quite difficult (given the high level of harmonization)
- mutual recognition in legal metrology cannot be based on calibration of measuring instruments (should be based on inspection – conformity to the approved type should be made by accredited inspection bodies)



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Regulation no. 764/2008 – metrology conclusions:

- subsequent verification in terms of CA has a character of an **inspection** → **subsequent verification made by an accredited inspection body has to be recognized in the other MS without any further action**
- even if any recognition of subsequent verification in the region of Middle Europe is totally unwanted some day in the course of time might have to be accepted on the basis of this Regulation
- **this applies to all the CA-type of activities made by corresponding accredited bodies: their findings (certificates, test reports) simply have to be accepted**



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Regulation no. 764/2008 – metrology conclusions:

- **the regulation is, at least from the viewpoint of metrology, unnecessary and undesirable and would considerably increase administrative burden for MS without any obvious positive effects - at any rate, the impact of new regulation on arrangements in metrology in MS will be rather negligible**



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Regulation no. 764/2008 – metrology conclusions:

- there is one more reason of concern coming from the area of metrology: MID Directive has, unfortunately, an optional character (it does not represent a total harmonization), probably the first and only directive in the new approach - MS can have a narrower scope of their regulation over measuring instruments
- but in fact it presents no problem: in MS where MIs are covered by MID (and regulation) any MIs not compliant with MID can be refused on the grounds of harmonized area, in MS with narrower scope of regulation than MID MIs have to be accepted because those MIs are not regulated there



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Regulation no. 764/2008 – metrology conclusions:

- **Practical example: Slovenia versus Italy**
- The reverification period of NAWIs in Italy is 3 years, in Slovenia 2 years → therefore, Slovenian users often come with their balances to Italy to get them subsequently verified.
- This is perfectly OK if the principles of mutual recognition just explained are honored.
- Question: what is the reverification period of those balances ?
Answer: balances are used on the territory of Slovenia so that the reverification period remains 2 years. It is, therefore, useless to take the pain and to go to Italy for just this reason.



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THANK YOU VERY MUCH
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