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NOTE

From:	Presidency
To:	Permanent Representatives Committee/Council
Subject:	Preparation of the Competitiveness Council Better Regulation - Exchange of views

Delegations will find attached a Presidency note "A Better Regulation Agenda for Less Regulatory Burden and More Internal Market" with a view to the exchange of views on Better Regulation which will take place at the Competitiveness Council on 1 October 2015.

A BETTER REGULATION AGENDA
FOR
LESS REGULATORY BURDEN AND MORE INTERNAL MARKET
PRESIDENCY BACKGROUND PAPER

The need for better and more efficient EU rules was at the centre of discussions at the informal meeting of Ministers responsible for Competitiveness on 20 July in Luxembourg. At the meeting –in which also some CEOs and think-tanks participated- there was a large consensus about the fact that well designed EU regulation can deliver great benefits in terms of strengthening the international competitiveness of EU businesses, in particular through a fully integrated internal market that allows businesses to scale up and to reach 500 million customers across the 28 EU Member States. A wider use of mutual recognition was mentioned as an efficient tool in this respect. The discussions led the Presidency to conclude informally that there is an urgent need for more “good” EU rules that are able to achieve high market integration and reduce burden for businesses.

In light of the recent presentation of the Commission’s new Better Regulation package and ahead of the adoption of a new Single Market Strategy, the Presidency considers it crucial for the Competitiveness Council to explore how the obvious synergies between Better Regulation and Single Market policy can be further maximised to deliver concrete results for European businesses and citizens.

Background to the discussion

The new Better Regulation Agenda is setting out an ambitious programme to make EU rules more efficient and fit for purpose. The achievement of stronger growth through more intelligent, less burdensome EU regulation is a key component of this Agenda.

These objectives match the two overall priorities of the Luxembourg Presidency: 1) maximising EU added value through initiatives, including of a regulatory nature, that produce tangible benefits for European citizens and businesses and 2) mainstreaming competitiveness across all policy areas through consistent, mutually reinforcing policies.

The most obvious area for improvement is the EU Single Market. All has been said about its great untapped potential, but the EU's growth engine has stalled. Numerous barriers remain and most businesses and consumers cannot make use of the Single Market: according to the Commission's 2014 Competitiveness report¹, only 14% of EU businesses are trading across borders. The EU is clearly struggling to use its main growth engine - the Single Market.

The Commission is expected to put forward a new Single Market Strategy before the end of October 2015. This important initiative needs to be supported by a more efficient design of EU rules – when reassessing existing rules and when developing new ones.

To put our economy back on track, we urgently need to make life easier for businesses and help them seize all the opportunities of the Single Market through a legal framework that is simple, fit for purpose and effective. Compared to the situation today, we urgently need *more* internal market and *less* unnecessary regulatory and administrative burden. This is required to generate much needed growth and to help SMEs, in particular micro-enterprises, scale-up across the EU.

In order to get there, we need to reconcile those who call for *more internal market and a stronger EU* with those who wish to *reduce the regulatory burden of Europe and make legislation lighter and less costly*. We need to design new, pragmatic tools to *create the right framework conditions*, including the regulatory framework. *We desperately need a new Single Market method.*

¹ <http://ec.europa.eu/DocsRoom/documents/6706/attachments/1/translations/en/renditions/native>

In light of the above an in-depth reflection on the *method* and on the most effective *tools* to be used in future policy seems indispensable. The costs resulting from the absence of EU rules - or from rules that are impeding the development of the internal market - have also been illustrated in a number of other existing studies. Some examples regarding the costs of fragmentation:

- A study shows that the direct costs of a pan-EU contract for a business seeking to trade in other member states to be at least €10,000 per market – or **€280,000 for all EU Member States**.²
- An engineering company needed to spend around **3% of its annual turnover** on legal research regarding national legislations that could potentially apply to its activities³.
- A producer of electronics equipment had to spend **100.000 euros on legal research** into the national rules on advertising applicable in only 5 Member States⁴.

For large companies the existing complexity involves important additional costs. For small ones, it often *simply means that they are not using the Single Market* – while consumers are facing higher prices, less choice and, very often, simply *have no access to cross-border goods or services*. The potential *economic benefits* of a fully functioning Single Market are huge: a recent Commission study suggests that reducing barriers in services alone could add around €230 billion to the EU GDP per year (corresponding to around 1.5% of additional GDP growth).⁵ In-depth analysis carried out by the European Parliament to calculate the “Cost of Non-Europe” –the cost of the “Non Single Market”-, concludes that an ambitious approach could deliver benefits of around €800 billion or, in other words, up to 5% of additional growth⁶.

A. STATE OF PLAY: WHY IS OUR REGULATORY APPROACH NOT WORKING?

After decades of regulatory efforts, EU businesses can still not make full use of the Single market. As soon as they want to export, establish, buy or sell services, including online, in another EU country, they have to deal with the large diversity of 28 “mini-markets”. Why is that so? What have we done wrong?

² CBI : Legal Costs Under Article 5 of the Rome I Regulation

³ http://ec.europa.eu/internal_market/services/docs/services-dir/impact/2004-impact-assessment_en.pdf

⁴ Ibid.

⁵ <https://www.gov.uk/government/publications/reforming-the-single-market>

⁶ <http://www.europarl.europa.eu/the-secretary-general/resource/static/files/files/mapping-the-cost-of-non-europe--march-2014-.pdf>

As a regulatory technique “minimum harmonisation” is creating – and indeed explicitly allowing – barriers to cross-border trade. Experience also shows that “maximum harmonisation”, for its part, has proved not to be feasible politically, technically, legally and economically since it has been a source for complexity involving important compliance costs for all businesses –including those who do not trade across border⁷ In practice, the strive for maximum harmonisation in legislative proposals generally leads to a wide range of derogations and exclusions that are added in the course of negotiations – with the effect of creating and “legitimising” further barriers to the internal market.⁸ *The fact that the internal market is not working in areas falling under exclusions clearly shows that it is indispensable to put in place rules to make the Single Market work in practice.*

B. HOW TO SOLVE THE REGULATORY JIGSAW? THE WAY FORWARD

We must overcome the fragmentation of the internal market resulting from diverging national rules. There is, obviously, a need for a new, *rigorous methodology* and for *pragmatic solutions*. **How to strike the right balance between *regulation* and *deregulation*, between *freedom* and *protection*?**

1. THERE IS A NEED FOR EU RULES

The objective of creating a Single Market *cannot* be attained at national level: it requires putting in place common rules at EU level. In the absence of such common rules, EU businesses are faced with 28 “mini markets” due to 28 different national rules they have to comply with –which is impossible and/or extremely costly.

We need EU rules imposing, inter alia, a prohibition of national law that create barriers.

⁷ “Harmonising everything is “not a panacea (...) as it would imply building a vast regulatory regime over many decades, amounting to a *de facto* centralization, with all the costs that it would entail”, see Jacques Pelkmans: “Mutual recognition: regulatory logic in goods and services”, p.7.

⁸ Ibid., p.5: « A huge number of regulatory barriers (are) still in place because the general prohibition (of barriers) is undermined by countless derogations, invoked by MS almost without discipline, whilst harmonisation proved costly and very slow".

2. EU RULES MUST BE SIMPLE, CLEAR AND EFFICIENT

EU rules should open up possibilities rather than close them off. We do not need just « any » rules: we need rules that guarantee access to the Single Market. The *quality* of legislation must be given precedence. EU rules have to be clear, simple, and they have to offer businesses the *legal certainty* they need when expanding their activities in other EU countries. Furthermore, the EU needs to focus on those measures that have a *real added value* for businesses, without imposing unnecessary burden.

Wherever possible, EU rules must remove burden rather than creating additional one.

3. MAKING BETTER USE OF THE MOST EFFECTIVE TOOLS: MUTUAL RECOGNITION

As legal certainty is key for businesses to enter new markets, rules must *clearly tell* businesses which obligations they need to comply with in order to access the Single Market. And, the benefits of greater market access provided by these rules need to outweigh the regulatory costs incurred. These objectives can be attained, for example, by combining *targeted harmonisation* with a *mutual recognition clause* in EU legislation. In this approach the right to freely access the internal market is the counterpart of the obligation to comply with certain common essential requirements – which should be proportionate and as light and clear as possible. Besides providing the indispensable legal certainty, it also allows striking a balance between protecting important general interest objectives (such as health, safety, security, etc.) and not creating excessive red tape.

In economic terms, a wider use of mutual recognition would significantly boost intra-EU trade flows.⁹

⁹ The 2014 OECD economic survey of the EU quotes research by Kox and Lejour (2005), who estimated that if the EU made more use of mutual recognition, bilateral trade in commercial services among EU countries could increase by 30 to 60%, using conservative estimates. See p.61 in: http://www.keepeek.com/Digital-Asset-Management/oecd/economics/oecd-economic-surveys-european-union-2014_eco_surveys-eur-2014-en#page5

4. REFIT SHOULD BE USED TO IMPROVE THE FUNCTIONING OF THE INTERNAL MARKET

While there is an urgent need for a new approach to future legislation, we should also look at the *existing legal framework*, which the Commission is assessing in the context of REFIT. The Commission could use REFIT to evaluate the opportunity to align harmonisation directives to a new regulatory approach, in particular by including “mutual recognition” clauses, where appropriate. Furthermore, by doing so, the Commission should look beyond the burden created by EU legislation and also take into account the *regulatory and administrative costs caused by the mere crossing of the national borders (“cost of non-Europe”)*.

REFIT should address the cost of complying with other Member States' national rules and carefully look at national law and transposition of EU rules.

5. A STRONG POLITICAL COMMITMENT IS NEEDED – AT ALL LEVELS

Throughout the last decade, the importance of completing the Single Market has been omnipresent in political declarations and there is a broad agreement as to the fact that more needs to be done *urgently*. This political commitment now has to be translated to the concrete, operational level, when regulations are being *designed, negotiated or reviewed*.

We should not shy away from defending the principles of a fully functioning Single Market when discussing specific directives and regulations.

CONCLUSION: TOWARDS A NEW METHOD FOR THE INTERNAL MARKET

The EU urgently needs to take the necessary measures to unleash the growth potential of the Single Market. Minor changes or adaptations to the current situation will not be enough: there is a need for a new regulatory approach, supported by a strong political commitment. EU rules must provide a real added value and help businesses expand their activities.

- ***Committing to essential principles:*** EU rules must be clear, simple, provide businesses with legal certainty and strengthen the development of the Single Market. They should include, where necessary, a prohibition of national measures that create restrictions. They should create added value for businesses and citizens.
- ***Promoting the use of the “mutual recognition principle”***, by combining targeted harmonisation with a mutual recognition clause in EU legislation, starting on the basis of specific sectors and areas with a high potential for growth and reduction in compliance cost.
- ***Using REFIT to improve the functioning of the Internal Market*** by promoting regulatory quality and systematically taking into account the compliance costs incurred by businesses when carrying out cross-border activities and by assessing how the efficiency of existing legislation could be improved through the use of mutual recognition clauses.
- ***Exploiting the potential of the future Commission reports on “mutual recognition” and on the internal market for services*** which should deliver a state of play as regards the remaining internal market barriers and provide the Commission with the evidence base needed for future policy making.

Question for discussion:

Whereas it is urgent to find ways to make the Single Market work better in order to create growth and jobs;

Whereas the Better Regulation agenda, and in particular REFIT, are at the heart of the Commission’s future action, and therefore will directly determine the future EU action -which is indispensable to reach this objective;

How can we make use of the Commission’s new Better Regulation Agenda, and in particular the REFIT programme, to improve the functioning of the Single Market and to create growth?

To achieve this, what is the first concrete priority action that should be implemented?

For example:

- **A more in-depth analysis of national law and the implementation of EU legislation, in particular of those measures that can cause barriers to the Single Market?**
- **Making more use of targeted harmonisation and/or mutual recognition clauses in EU regulation to reduce regulatory burden for businesses and to increase legal certainty?**
- **Other actions?**

Ministers are invited to elaborate briefly on one single priority action.