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BUSINESSEUROPE's views on the Product Safety and Market Surveillance Package

KEY MESSAGES

- 1** The free movement of goods is the most highly developed of the four 'freedoms' that make up the single market. But there is still untapped potential that must be fully realised.
- 2** The various layers of EU product safety and market surveillance legislation currently lead to uncertainties and incoherence in the internal market. This is costly and burdensome for business.
- 3** Simplification of the legislative framework, if done well, will ease enforcement and contribute to growth, providing benefits for consumers and businesses alike.

WHAT DOES BUSINESSEUROPE AIM FOR?

- *A coherent approach to product safety and market surveillance leading to lower compliance costs for economic operators, better co-operation between national authorities and the elimination of unfair competition from unscrupulous traders.*
- *Better enforcement of the rules to obtain increased product compliance levels, boost consumer confidence and stimulate sales.*
- *Proportionate obligations for economic operators and more effective appeal procedures for companies to challenge wrongful decisions by the authorities.*

KEY FACTS AND FIGURES

75% of intra-EU trade is in goods. From 2008-2010 the volume of intra-EU trade for consumer products amounted to almost EUR 1 trillion.

In 2012, a total of 2,278 measures against dangerous non-food products were taken by member states and reported in the EU's Rapid Exchange of Information System (RAPEX).

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BUSINESSEUROPE'S VIEWS ON THE PRODUCT SAFETY AND MARKET SURVEILLANCE PACKAGE

INTRODUCTION

Approximately 75% of intra-EU trade is in goods. Although their free movement is the most developed of the four 'freedoms' that make up the single market, there is still untapped potential that must be fully realised. There is scope for lowering compliance costs for economic operators, enhancing co-operation between national authorities and eliminating unfair competition from unscrupulous traders. Enforcement of the rules can be strengthened and compliance levels of products on the market can be increased, boosting consumer confidence and stimulating sales.

Following the announcement in the Commission's Single Market Act (2011) and Single Market Act II (2012), the Commission adopted its 'Product Safety Package' on 13 February 2013. It consists of the following:

- A Communication on more product safety and better market surveillance in the Single Market for products.
- A Proposal for a Regulation on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC.
- A Proposal for a Regulation on market surveillance of products.
- A Communication on 20 actions for safer and compliant products for Europe: a multi-annual plan for the surveillance of products in the EU.

In principle, BUSINESSEUROPE welcomes the Package as it aims to clarify and simplify the current legal framework on product safety and strengthen market surveillance. The interplay between the various layers of EU product safety legislation is complex and currently leads to uncertainties and incoherence in the internal market. The same is true for the overlapping pieces of legislation on market surveillance.

Simplification of the legislative framework, if done well, will ease enforcement and contribute to growth, providing benefits for consumers and businesses alike.

However, BUSINESSEUROPE does have concerns about some of the proposed items and believes that certain parts of the Package should be made clearer. As the proposal enters the ordinary legislative procedure with the European Parliament and Council BUSINESSEUROPE urges the institutions to refrain from making burdensome amendments that would risk complicating the legislation and weaken rather than support the competitiveness of European business and industry.



CONSUMER PRODUCT SAFETY REGULATION (CPSR)

BUSINESSEUROPE supports the proposal's aim to clarify the regulatory framework for consumer products taking into account legislative developments over recent years. These include the New Legislative Framework (NLF) on the Marketing of Products adopted in 2008, the alignment of sector-specific Union harmonisation legislation to that new framework, and the entry into force in January 2013 of a new Regulation on European standardisation.

However, BUSINESSEUROPE is concerned about certain elements. Below we set out our views on the main issues that are of key importance to business.

Scope

BUSINESSEUROPE generally welcomes the draft Regulation's delimitation of scope. Whilst the general principle that all non-food consumer products must be safe applies across the board, the more detailed obligations on economic operators only apply to those operators that are not subject to corresponding obligations laid down in specific product sector harmonising legislation. In this context Chapters II on the 'Obligations of economic operators' and Chapter III on 'European Standards providing presumption of conformity' do not apply to products subject to safety requirements laid down in Union harmonisation legislation. Under no circumstances should this be amended during the ordinary legislative procedure by the European Parliament and Council.

To obtain even further legal certainty however, BUSINESSEUROPE believes that the legislator could also consider excluding products that fall under specific EU legislation from Chapter I. Otherwise the primary purpose of the package – to clarify and simplify the regulatory framework making it easier for companies to comply and thereby strengthening product safety in the EU – is undermined.

BUSINESSEUROPE does have some concerns. For instance, the draft Regulation's proposal to apply to products 'which are likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them' is too open to interpretation and it would be better to factor in the stated intent of the supplier. Also, the inclusion of second-hand products could be problematic if this means retroactive legislation for products placed on the market before the coming into force of the CPSR.

Obligations of economic operators

Effective market surveillance requires adequate instruments, some of which demand requirements from economic actors. However, the concept of proportionality is crucial. This is taken into account in certain articles, but needs to be added in others.

Traceability is essential to deny rogue economic actors an easy route to ignore the law and requirements do already exist in specific directives, rightly so. However, BUSINESSEUROPE believes it is essential that the legislator target its requirements to cases in which they are necessary. For example, requiring the manufacturer, distributor and/or importer's name/address to be printed on the product unless this is not possible (in which case the proposal states that it should be on the packaging or accompanying

documents) is disproportionate for a great number of small, low-value products that pose no or an inherently low risk such as pencils or coffee mugs.

Article 15 refers to a possible ‘traceability system’ for undetermined products that may ‘bear a serious risk to health and safety of persons’. BUSINESSEUROPE has several concerns here. Firstly, it is important to remember that because the CPSR proposal deals with products that are not subject to harmonising legislation, generally a lower level of risk should be assumed. Secondly, a traceability system, such as a database or supplementary labelling, could be very burdensome and there is little explanation as to when this would be of value. Thirdly, the introduction of a system of traceability should not be the subject of a delegated act but of the ordinary legislative procedure.

The proposal includes in Article 7 requirements for a mandatory indication on the product of the country of origin. In a time when companies to a large extent benefit from global sourcing, it may be a challenge to determine the real country of origin. Sector directives under the New Legislative Framework and Chapter II of the proposal clearly states that it is the economic operator who places a product on the market (i.e. by production or import of a product) that is responsible for a product’s compliance to EU legislation and that he must indicate an address where he can be contacted.

On the proposal for a mandatory indication on the product of origin issue, the views of the EU business community diverge.

Most BUSINESSEUROPE members see no added value in making the marking mandatory as it will not in itself lead to more product safety or better traceability, but will involve time-consuming procedures and thus lead to higher costs for manufacturers and importers.

Some BUSINESSEUROPE members support the Commission’s proposal for consumer products to bear a mandatory indication of the country of origin, believing that it would supplement basic traceability requirements.

Regarding the drawing up of technical documentation, BUSINESSEUROPE considers that for each non-harmonised consumer product this should not be a systematic obligation for the manufacturer as it would be an unnecessary burden. It could be done if a market surveillance authority were to request this information as a result of a product posing a problem. This needs to be made clearer in the current proposal.

In addition, Article 10.8 of the draft Regulation currently states that the importer ‘*shall keep...the technical documentation and make it available to the market surveillance authorities upon request*’. The technical documentation is the property of the manufacturer and often has a confidential character. As one of the purposes of the revision of the GPSD is to align it to the provisions stated in the NLF, this wording should also be aligned, i.e. as follows: ‘*Importers shall ensure that the technical documentation can be made available to those authorities upon request*’.

A more balanced approach towards the obligations of economic operators is also needed in the Market Surveillance Regulation.

European standards providing presumption of conformity

It is positive that the role of European standards in support of the implementation of the general safety requirement of the CPSR has been aligned with the newly adopted Regulation 1025/2012 on European standardisation.

BUSINESSEUROPE reiterates the importance of ensuring that the principle of voluntary standards applies to the CPSR too to ensure flexibility and innovation. Non use of a standard does not equal presumption of non-conformity. The supplier may have an alternative underpinning as to why the product is safe. It is important for mandates for standards to be public and that the consultation procedure fixed in the Regulation on European standardisation is followed.

MARKET SURVEILLANCE OF PRODUCTS REGULATION (MSPR) AND ACTION PLAN

A more concerted and determined market surveillance effort across the entire Union will help keep non-compliant products off the market. Improving cross-border cooperation, including with third countries, as well as strengthening controls at external borders is the key to making market surveillance more effective.

As a result of the various pieces of legislation adopted over the years, Union rules on market surveillance have become fragmented creating gaps, overlaps and difficulties for operators. In particular, consumer goods are subject to different rules in both consumer legislation and product harmonising legislation. This is seriously hampering the efforts of market surveillance officers and creating legal uncertainty for business.

This Regulation responds to BUSINESSEUROPE's call to aim at coherence of rules on market surveillance, covering all products placed on the market, whether consumer or professional products, whether in the harmonised or the non-harmonised domains, thereby providing a single legal basis for the market surveillance of all products.

Scope

BUSINESSEUROPE welcomes the fact that market surveillance under this Regulation should not be directed exclusively towards the protection of health and safety but should also be applicable to the enforcement of Union legislation which seeks to safeguard other public interests (e.g. energy efficiency).

Assessment of the risk

Market surveillance authorities need to be able to identify and correctly assess the compliance of a product. Currently the situation is not satisfactory, especially (but not solely) for compliance with safety requirements. A product might be deemed safe in one member state but not in another, creating a confusing situation for consumers and business, as well as unnecessary costs for the company.

In this context, BUSINESSEUROPE supports the Regulation's approach to oblige authorities to base their assessment on compliance with legislative requirements and harmonised standards, where these exist for the product in question.

It is also positive that the Regulation promotes the exchange and retention of information relating to market surveillance activities in an easily accessible database. This way the market surveillance authorities should not have to repeat tests and assessments already carried out in another member state.

However, despite these good intentions, legal certainty is not guaranteed for business. In particular, Articles 13 and 15 enable market surveillance or border control authorities to take action if the product, despite conformity or compliance with relevant legislation, presents a risk. This is to a certain extent acceptable as there can always be unforeseen risks, but it should be ensured that market surveillance authorities do not act disproportionately or arbitrarily. In cases of presumption of conformity, the authorities should be required to demonstrate the presence of a risk of a magnitude and urgency that justifies the intended measure.

On a general note, the definitions of 'product presenting a risk' and 'product presenting a serious risk' are blurred. BUSINESSEUROPE believes it is necessary to distinguish (safety) risk from other non-conformity issues, to have better definitions of the various degrees of safety risks and to distinguish material non-conformity of the product itself from formal non-conformity relating to flaws in the documentation or marking. Cases of formal non-conformity should be treated in the way suggested by the NLF (Article R34 of Decision 768/2008). Proportionality must be ensured so that the different categories of non-conformity do not lead to the same measures.

Measures taken by a member state towards products posing a risk should not pertain to a category of products as a whole. The assessment should be made on a case by case basis. Risk could be related to a certain batch of the product or certain products.

Finally, BUSINESSEUROPE stresses the need for more effective appeal procedures to give companies the possibility to challenge wrongful decisions by authorities. Currently the only remedy is to go to court, which can take years. Appeal procedures should be established, which would lead to an independent and binding assessment in an appropriate timeframe. At least, the information to be provided through RAPEX should include the arguments put forward by the relevant economic operator (if any) against the national measure, such as is required today in Decision 768/2008.

Supporting the Market Surveillance System

BUSINESSEUROPE believes that to conduct effective market surveillance, national authorities need a sound infrastructure, good organisation, appropriate legal powers, suitable facilities and skilled officers, benefiting from high quality training.

This requires considerable financial resources, which it is generally agreed are lacking.

The Regulation suggests at least partly financing market surveillance by fees charged to economic operators. BUSINESSEUROPE urges caution here. In no way should this

be used as an incentive for market surveillance authorities to take unnecessary corrective actions as a way of making financial gains.

The same can be said for penalties. These must be proportionate and dissuasive. Surveillance authorities must refrain from targeting economic actors on minor non-compliance issues such as insignificant editorial errors in declarations of conformity. Furthermore, the issue of penalties should only be included in the market surveillance proposal and not feature in the CPSR proposal.

BUSINESSEUROPE supports the idea of pooling resources as not all member states have the necessary infrastructure to conduct effective market surveillance. The proposal for the Commission to 'designate Union reference laboratories' via an implementing act to deal with 'specific products or a category or group of products or for specific risks related to a category or group of products' could be a positive step. However, given the levels of credibility and technical competence these laboratories need to have it is important that their role be clarified in the legislative text and that they be accredited in accordance with Regulation (EU) 765/2008.

BUSINESSEUROPE supports the establishment of a pan-European Injuries Database, which would provide a good basis for preventive actions and public-awareness campaigns and assist market surveillance authorities to make more informed risk assessment decisions, amongst others. This proposal is included in the Commission's multi-annual action plan for the surveillance of products but it is important to establish a legal basis for this database in the Market Surveillance Regulation.

Products entering the Union from third countries

BUSINESSEUROPE supports the proposal's aim to strengthen controls at external borders. Nevertheless, a speedy control at the external borders and an efficient release of the products is essential for business to fulfil their obligations on time.

BUSINESSEUROPE supports the proposal's aim to improve the level playing field related to both material and formal non-compliances but it would not be proportionate to suspend the release of a product solely for non-compliance with marking or labelling requirements. The importer must be enabled to remedy the lack of information in his premises.

The Regulation is right to explicitly exempt products entering the Union in the physical possession of natural persons and destined for their personal use. The company having sold the product in a third country would not know if the person who bought its product lives in another country and would then not be liable for the import.

Establishment of a European Market Surveillance Forum

The proposal on Market Surveillance foresees the establishment of a European Market Surveillance Forum, which will give business and other stakeholders the possibility to be heard and will contribute to ensuring common interpretations and risk assessments.



Stakeholder organisations, such as European business associations can be of great help in enforcement as they possess lots of market information through their broad base of members. The retail sector, which is in direct contact with consumers, also has a key role to play.

The up-to-date market intelligence gathered through this Forum would lead to better market surveillance programmes and would help direct market surveillance and customs efforts much better to the real points of tension. It should therefore be ensured that relevant stakeholder organisations are included in regular meetings.

EU product safety ‘emergency’ measures – Implementing powers

Under the new Regulation, it is suggested that the Commission be given more flexibility as regards the type and content of restricting measures in respect of dangerous products. To this end, it is proposed that the Commission should be in a position to adopt measures that are either addressed to the member states or that are directly applicable to economic operators. Such measures could either be limited in time or not.

In BUSINESSEUROPE’s view temporary measures adopted by the Commission can address individual products or narrow categories of products as the case may require, and should be enforceable until permanent measures take effect. While the urgency of incident handling can justify shortcut procedures, BUSINESSEUROPE urges for a single and democratic procedure to define permanent product requirements (through the European Parliament and Council giving stakeholders the possibility to comment).

On a general note, the proposal provides for implementing powers to be conferred on the Commission in relation to a number of measures that are of critical importance to business. BUSINESSEUROPE believes that stakeholders should be properly consulted during the preparation of such implementing acts, and that this should explicitly be stated in the legislative text.

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