Raising standards for consumers

The consumer voice in Europe

Position Paper on

European Commission proposal for a Regulation on market surveillance of products

Key issues from a consumer perspective regarding the Product Safety and Market Surveillance Package

June 2013

Contact: ANEC: Chiara Giovannini (cgi@anec.eu); Tania Vandenberghe (tva@anec.eu)
BEUC: Sylvia Maurer (safety@beuc.eu)
Ref.: ANEC-SC-2013-G-024
X/2013/033- 04/06/2013

ANEC, THE EUROPEAN ASSOCIATION FOR THE CO-ORDINATION OF CONSUMER REPRESENTATION IN STANDARDISATION
Av. de Tervueren 32, box 27 – 1040 Brussels - +32 (0)2 743 24 70 - www.anec.eu
EC register for interest representatives: identification number 507800799-30

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • Fax +32 (0)2 740 28 02 • consumers@beuc.eu • www.beuc.eu
EC register for interest representatives: identification number 9505781573-45

Raising standards for consumers

Executive Summary

On 13 February 2013, the European Commission published a product safety and market surveillance package which comprises a draft regulation on consumer product safety, a draft regulation on market surveillance and a multi-annual action plan on market surveillance[1]. In this position paper, we give recommendations on the provisions we believe need to be modified in the Commission's proposal for a regulation on Market Surveillance in order to ensure the highest level of consumer protection[2].

We call for:

- Clarification of the scope as far as environmental and food contact materials legislation is concerned;

- The precautionary principle to remain a must;

- Consumers to be informed immediately in case of danger;

- Business secrets not to take precedence over the right of consumers and the public to be informed;

- Penalties to be proportionate and dissuasive, taking into account various criteria such as the level of infringement, illegal profits and potential damage to consumers;

- Better cooperation between consumer organisations and market surveillance authorities;

- Internet sales to be covered;

- A pan-European accident and injuries database to be set-up.

[1] http://ec.europa.eu/consumers/safety/psmsp/index_en.htm

[2] We have also prepared an assessment of the MRS proposal against the joint ANEC-Orgalime Position Paper on Market Surveillance from 2009 and comments on the proposal for a Regulation for Consumer Product Safety. Both documents are available on our web-site: www.anec.eu

Introduction

For many years, consumer organisations and economic operators alike have emphasised the need to establish an effective market surveillance system in the EU Internal Market. Most consumers believe market surveillance will protect them from buying unsafe products. But this is not true as market surveillance means different things in different countries. Even the most stringent legislation and standards become worthless if they are not applied or enforced. Of course, once a product enters one Member State it should be free to circulate to all Member States. Hence the overall effectiveness of market surveillance throughout Europe is dependent on the quality of the market surveillance of the weakest Member State. Within the Internal Market, market enforcement authorities have the responsibility to protect consumers' health and safety. Market surveillance activities are undertaken by Member States exclusively and individually at the national level as market surveillance falls under shared competence[3]. This leads to inconsistencies and, above all, sees insufficient resources available to police the many products on the market. As a result, the consumer expectation for safe products is not always met[4].

We consider there is an urgent need to establish a European framework for market surveillance in order to ensure a coherent approach to market surveillance activities across all EU Member States and to make more financial and human resources available for market surveillance activities[5].

On 13 February 2013, the European Commission published a product safety and market surveillance package which comprises a draft regulation on consumer product safety, a draft regulation on market surveillance and a multi-annual action plan on market surveillance. This package gives an opportunity to introduce more demanding requirements on the national market surveillance activities in Member States. However, this would be useful only if the evident lack of resources of market surveillance authorities is addressed.

For this reason we welcome the proposal of the European Commission for a regulation on market surveillance[6] (MSR), which will in the future cover the oversight about consumer product safety in general, as well as of products that are subject to certain sector specific legislation such as toys and household appliances.

---

[3] Art. 4.2 TFEU

[4] See ANEC/BEUC joint position paper "Revision of the General Product Safety Directive: Key issues from a consumer perspective", BEUC X/031/2010.

[5] Such a call has also been made by ANEC and Orgalime in 2009: "Call for an effective pan-European market surveillance system", http://www.anec.eu/attachments/ANEC-SC-2009-G-014.pdf

[6] COM(2013) 75/2.

In this position paper we give recommendations regarding the changes that should be made[7] to the Commission's Proposal, as well as the elements that should be kept, in order to achieve a better protection of consumers from unsafe and non-compliant products.

Clarification of the scope is needed

Article 2: scope

The scope of the market surveillance regulation (MSR) needs clarification. We welcome that, in addition to safeguarding the health and safety of persons, environmental and public interests are included in the scope. However, certain product specific legislation which is relevant to achieve coherent market surveillance in these areas has not yet been included into the scope.

Environmental issues:

We recommend including at least the following consumer product related regulations and directives into the MSR:

- Ecodesign Directive 2009/125/EC and all relevant product specific and horizontal implementing measures;
- Energy Labelling Framework Directive 2010/30/EC and all product specific implementing measures;
- Ecolabel Regulation, 2010/66/EC.

Food contact material:

We note that the draft Consumer Product Safety Regulation (CPSR) will cover gaps in the Food Contact Materials Regulation 1935/2004/EC (see article 2 number 3 c of CPSR). However, the MSR excludes rules governing the manufacture and use of materials and articles intended to come in contact with food (see article 2 number 6 b of MSR). As the rules for inspection and control measures according to article 24 of Regulation 1935/2004/EC only cover the requirements of that Regulation, we emphasise the need to clarify who is going to be in charge of enforcing possible future measures that are taken with regard to food contact material based on the CPSR.

[7] Throughout the paper text which should be deleted is marked with a strikethrough. Newly added text is underlined.

The precautionary principle needs to remain a must

Articles 6, 9 and 11 on market surveillance activities

We strongly call for the MSR to be based on the precautionary principle as a key pillar of decision making in cases where there is evidence that consumers or the environment need to be protected but definitive scientific proof is missing[8]. We express our deep concerns at the deletion of the precautionary principle from the proposal for the CSPR[9] and its absence from the MSR proposal. The precautionary principle, which applies to risk management, is a fundamental principle for decision-makers on what to do if risk assessment is not conclusive for lack of scientific data. Moreover, deleting the precautionary principle could lead to reversing the burden of proof to public authorities and requiring them to demonstrate that a product is dangerous. This is not feasible and may adversely affect consumer safety.

We suggest adding and amending the following articles to reflect this very important aspect.

New recital (42)bis:

> "This Regulation respects article 191.2 of the Treaty on the Functioning of the European Union and is based on the precautionary principle in order to ensure a high level of human health protection, consumer and environment protection."

New Article 6.3 (bis):

> "Market surveillance authorities shall act in accordance with the Treaty in such a way as to implement their measures in a manner proportional to the seriousness of the risk, and taking due account of the precautionary principle'.

Article 9.1 products presenting a risk:

> "Where (…) market surveillance authorities have sufficient reason to believe that a product (…) may present a risk, they shall act based on the precautionary principle and carry out a risk assessment in relation to that product taking account of the considerations and criteria set out in Article 13."

Consumers need to be informed immediately in case of danger

[8] Communication from the Commission of 2 February 2000 on the precautionary principle (COM(2000) 1
[9] Article 8.2 GPSD.

Article 6: General obligations of market surveillance authorities

We welcome that the MSR aims to outline a coherent system for market surveillance in each EU Member State. However, articles 5 and 6, which set the requirements for the Member States with regard to the duties, powers and organization of market surveillance authorities and the controls, still leave too much leeway to individual Member States to decide on the financial and human resources of these authorities risking inconsistent enforcement across the EU.

In case of serious risk, it is crucial to inform consumers immediately about the risk and to give advice on how to react properly. Quick reaction can prevent injuries and save lives. For this reason, we ask to clarify the obligation on market surveillance authorities and economic operators to inform consumers as follows:

Article 6.2:

> "Where appropriate, market surveillance authorities shall alert users in their territories ~~within an adequate timeframe~~ without delay to the identity of products that those authorities have identified presenting a risk.

Article 6.6 - Add sentence to end of paragraph, so it reads:

> "Adequate procedures shall be established and made known to the public to enable market surveillance authorities to fulfil these obligations. In particular, surveillance authorities shall make available to the public on request - and through the website required in Article 10.6 – the identity of those products about which safety complaints have been received under Article 6.5(a), together with the nature of the safety defect and risk perceived in the product by the complainant and any hazardous incident or injury reported, appending any comments on the complaint made by the economic operators, and what (if any) follow up action the authority determined to be appropriate."

Article 9: Products presenting a risk

We strongly welcome the clarification in article 9.3 that economic operators need to ensure that corrective action is taken throughout the Union. In the past, it has not been clear whether that has been done or whether manufacturers continued to sell products in some countries where market surveillance did not follow-up RAPEX notifications on time.

Obligations of market surveillance authorities need to be more specific

We also think the Commission should be empowered to adopt implementing acts in order to clarify some aspects of the obligations on Member States arising from this Regulation. Terms such as "appropriate checks" on an "adequate scale" and with "adequate frequency" are unspecific. Such implementing measures should contain measurable parameters (minimum number of market surveillance officers related to the physical volume of goods; minimum number of product inspections related to the physical volume of goods).

It should also be clarified what "adequate procedures" are necessary for market surveillance authorities to fulfil their duties and what "adequate mechanisms" are needed to ensure that information is exchanged and that authorities cooperate effectively.

In addition, although we welcome the provisions of Chapter IV on controls of products entering the Union as many unsafe and non-compliant consumer products are imported from outside the Union, we emphasize that only checking the technical documentation may not be sufficient as the product information file could be subject to fraud.

Article 14.1: Checks and suspension of release

> "(Authorities in charge of external borders controls) shall carry out appropriate administrative, physical and ~~where necessary~~ laboratory checks on products before those products are released for free circulation".

Business secrets cannot take precedence over the right of consumers and the public to be informed

Article 10.6: Measures taken by market surveillance authorities

EU legislation should not be drafted in a way that protects non-compliant economic operators. Those who violate the right of consumers to health and safety, either by accident or deliberately, through putting dangerous products on the market should not be able to keep crucial information confidential when it is needed by consumers to identify such products. Such an approach would also prove a disadvantage to reliable economic operators who invest in product safety and respect the law.

We urgently call for a balance between the consumer's right to be informed and the business interest to keep certain information confidential. This is currently not the case. Hence, we call for changing the following provisions in the MSR that are addressed to both, economic operators and market surveillance authorities:

Article 10 number 6:

Market surveillance authorities shall publish information about product identification, the nature of a risk and the measures taken to prevent, reduce or eliminate that risk ~~on a dedicated website~~ without delay to the fullest extent necessary to protect the interests of users of products in the Union. ~~This information shall not be published where it is imperative to observe confidentiality in order to protect commercial secrets, preserve personal data pursuant to national and Union legislation or avoid undermining monitoring and investigation activities."~~

Article 4.3: Market surveillance obligation

The performance of market surveillance authorities should be monitored regularly by the European Commission and relevant information on the performance of different Member States should be made publicly available. We therefore suggest modifying article 4.3 to read:

"The implementation of market surveillance activities and external border controls shall be monitored by the Member States which shall report on these activities and controls to the Commission every year. The information reported shall include statistics regarding the number and results of controls of each type carried and their results. These statistics ~~This information~~ shall be communicated to all Member States and shall be made**.** ~~Member States may make a summary of the results~~ accessible to the public."

Better use of RAPEX needed

Chapter V: Exchange of information

Past experience has shown that, when a dangerous product is notified by a Member State to the Commission, the authorities and the Commission do not systematically inform consumers or consumer groups unless an action (e.g. a recall) is taken. The same failure of communication has been shown to happen when national authorities detect a dangerous product and negotiate an agreement with the producer either to remove the product from sale or modify it. In the latter case, from time to time, the authorities do not notify even other Member States of the voluntary agreement with the producer.

The success of any recall is dependent upon the communication of information to consumers. Hence we call for the early and widest possible dissemination of information relating to dangerous products. The results of a notification should be made publicly available in order to protect consumers' health and safety and to increase consumers' confidence in the Internal Market.

Currently the Commission publishes a weekly summary of RAPEX notifications which is available to the general public and which contains measures that have been ordered by authorities as well as voluntary action by economic operators.

We consider the weekly RAPEX reports an important instrument to inform the general public as well as consumer organizations about the level of non-compliances, the relevant product groups and risks as well as about which market surveillance authorities have notified the product and which follow up has been done in other countries.

Furthermore, consumer organisations should receive information beyond that made publicly available, e.g. in order to contribute the findings to standardisation.

Finally, requirements related to the content of recall notices should be defined so as to avoid recall notices being perceived by consumers as advertisements for the products notified.

We suggest the following changes:

Article 19 Union Rapid Information Exchange System – RAPEX:

> 5. (new): The EU Commission shall publish a weekly overview of the products posing a serious risk as reported by the national authorities. This weekly overview shall cover measures ordered by national authorities as well as measures taken voluntarily by producers and distributors.

The following derogation should be deleted as nowadays products are usually not restricted to the territory of only one EU Member State.

Article 20 number 1 c:

> "any refusal to release a product for free circulation pursuant to Article 16:
>
> ~~The first subparagraph shall not apply where the RAPEX contact point has reason to believe that the effects of the risk presented by a product do not go beyond the territory of its Member State."~~

The notification details should include contact points for consumers when part of the corrective action.

In Article 20.2 insert the following after (f) and re-number accordingly:

> "(g) website and alternative contact details for consumers if contact is required for the corrective action."

We applaud the provisions of article 21 on ICSMS as it is very important to have an effective and up-to-date system for information and communication about market surveillance activities.

Penalties must be used to finance market surveillance activities and be an effective deterrent against non-compliances

Article 31: Penalties

We noted with the utmost concern that a study conducted for the IMCO Committee of the Parliament[10], published in October 2009, concluded most Member States will not commit more resources to market surveillance, either because they think their national systems already meet the requirements of the Regulation or because they do not have the financial resources available.

We welcome that several proposals are made in the draft market surveillance regulation which aims at both establishing an effective deterrent for non-compliant companies and to provide market surveillance authorities with sufficient resources to carry out their respective tasks. Such an approach can potentially provide better justice as the non-compliant economic operators need to bear the consequences of their illegal actions. Although penalties should be used to fund market surveillance activities, we doubt penalties alone will provide sufficient resourcing and alternatives should be considered.

Penalties need to be an effective deterrent which today is often not the case. It is essential to target those economic operators who deliberately breach the rules to make unjustified revenues at the expense of consumers, and reliable manufacturers and retailers.

As in the past, the draft MSR also foresees that the rules and level of penalties are defined by Member States. We emphasise that such penalties must take into account several criteria such as being proportionate and dissuasive, the level of infringement, illegal profits and potential damage to consumers. The size of an undertaking alone is not the right criterion to decide on the level of penalties.

Article 31 second paragraph should be modified as follows:

> "Penalties shall be used to finance market surveillance activities**.**
>
> ~~The penalties referred to in the first subparagraph shall have regard to the size of the undertakings and in particular to the situation of small and medium-sized enterprises.~~" The penalties may be increased if the relevant economic operator has previously committed a similar infringement and may include criminal sanctions for serious infringements."

[10] "Market surveillance in the Member States", study by Committee on Internal Market and Consumer Protection of the European Parliament, October 2009.

Similarly, article 18 number 2 in the CPSR needs to be amended.

Better cooperation between consumer organisations and market surveillance authorities will create synergies

Article 25: European Market Surveillance Forum

We welcome the proposal to cooperate more closely between market surveillance authorities and consumer organizations as national consumer organizations are in direct contact with individual consumers on a daily basis. The benefits are several:

- Information from individual consumers may help to detect dangerous and non-compliant products earlier.
- The participation of consumers can complement the information that has been found by other parties such as market surveillance authorities and hospitals.
- Direct reporting from consumers enhances consumer involvement and empowerment.

However, it is important to emphasise that, in some countries, the consumer movement suffers from insufficient human and financial resources that hinder a deeper involvement into the day-to-day work of market surveillance authorities. Hence, the better funding of these national consumer organizations (e.g. through joint projects with market surveillance authorities) may increase their capacities and their possibilities to give meaningful input.

We propose changing article 7.1 in the MSR:

> "Each Member State shall draw up a general market surveillance programme (….) The programme shall cover market surveillance organization and related activities and take into account the specific needs of consumers and of business, ~~and of SMEs in particular~~, (…)"

We also believe that the EMSF could provide a forum of discussion about the implementation of relevant standards and related issues:

In Article 27 add:

> "(m) to alert the Commission and European Standardisation Organisations to deficiencies in a European standard that the EMSF perceives to impede market surveillance activities."

Additionally, the EMSF could provide a forum of discussion for an enhancement of information exchange among authorities regarding market surveillance addressing expressly product safety when products are used in the delivery of consumer services. Joint market surveillance actions already took place for solarium services for example.

Finally, we suggest setting up a standing Advisory Board composed of relevant EU stakeholders (including manufacturers and importers) to contribute to the European Market Surveillance Forum, following a similar structure as the European Accreditation Advisory Board.

Such a consultative body would enable a coherent and regular dialogue among European stakeholders, the Commission and market surveillance authorities.

Internet sales need to be covered

Articles 6 and 27 in relation to internet sales

The draft CPSR rightly states that product safety rules must apply to all products sold in the internal market, irrespective of the selling technique. Hence, distance selling is covered. However, there is no corresponding article in the MSR that explicitly requires Member States to address products sold over the internet.

Dedicated requirements on the surveillance of internet sales are needed. We therefore propose introducing new provisions in articles 6 and 27 of the MSR that will explicitly require Member States to control the safety of products sold through the internet.

Article 6 "General obligations of market surveillance authorities"

> Market surveillance authorities shall perform appropriate checks on the characteristics of products, <u>irrespective of the distribution channels and selling techniques</u>, on an adequate scale and with adequate frequency, by means of a documentary check and, where necessary, a physical and laboratory check on the basis of an adequate sample. They shall record these checks in the information and communication system for market surveillance referred to in Article 21.

Article 27 "Tasks of the EMSF"

The EMSF shall have the following tasks:

> <u>(I bis) to organise specific and regular market surveillance campaigns on products that are distributed on-line;</u>

Urgent need for a pan-European accident and injuries database

Articles 6, 21 and 26 in relation to the urgent need for a pan-European accident and injuries database

We were surprised and disappointed by the absence of a provision establishing a pan-European Injuries Database (IDB). 28 stakeholders reacted with a joint call in favour[11]. We firmly believe that such a database would:

- assist market surveillance authorities to make more informed risk assessment decisions;
- provide a basis for preventive actions and public awareness-raising campaigns;
- allow standardisers to develop more appropriate product standards;
- help manufacturers to adapt the design of safety into new products;
- evaluate the effectiveness of preventive measures and set priorities in policy making.

In response, the European Commission has committed itself to examine the costs and benefits of an EU accident and injury database in its multi-annual plan for the surveillance of products in the EU. This would unfortunately come too late to preserve the experience and benefits of the existing system, which will stop in March 2014, should there be no further EU funding[12].

Therefore, we call on the European Regulators to establish a legal basis for the IDB in the proposed Market Surveillance Regulation. More specifically, we suggest under:

- Article 6 "*General obligations of market surveillance authorities*", paragraph 5: reintroducing a missing provision from Regulation EU 765/2008[13] requesting Member States to establish adequate procedures in order monitor accidents and harm to health which are related to products;
- Article 21 bis (new): establishing a legal basis for a pan-European Injuries Database (IDB) which would further continue the implementation of the Council Recommendation on the Prevention of Injury and Promotion of Safety of 31 May 2007. Its scope should cover all types of injuries, and

[11] In March 2013, ANEC and BEUC, with 26 other European associations from across the economic & social spectrum, joined forces to call on the European Commission to establish a pan-European Accidents & Injuries Database. The Joint Call was formally presented to Commissioner Borg at the European Consumer Day Conference in Brussels on 14 March 2013, hosted by the European Economic and Social Committee (EESC).
[12] Currently funded via the Joint Action on Injury Monitoring in Europe (JAMIE).
[13] Cf. Regulation EU 765/2008, Article 18 paragraph 2, sub paragraph (b)

namely those related to products used at home and for leisure, transportation and work activities.

- Article 26 "*Commission support and executive secretariat*": Calling on the European Commission to support the co-ordination of the collection of data from Member States and the smooth operation of the pan-European Injuries Database (IDB).

The independence of reference laboratories needs to be ensured

Article 28: European reference laboratories

We welcome the proposal foreseeing the creation of European reference laboratories as this may bundle competencies and contribute to effective market surveillance through a network of very specialized laboratories.

However, the draft Regulation does not clarify who will be in charge of ensuring the independence and quality of these reference laboratories. Will the Commission be in charge or will be a peer review process among the reference laboratories themselves? This question is crucial to the development of a strong and credible system of European reference laboratories.

We suggest that reference is made to the provisions on accreditation from the NLF (Chapter II of regulation 765) or to the rules on Notified Bodies to (Decision 768).

Additional Issues:

Consumers' complaints

Article 6: General obligations of market surveillance authorities

We welcome point 5(a) for market authorities to be obliged to provide consumers and other interested parties with the opportunity to submit information about potentially non-compliant and dangerous products. Effective complaints handling procedures including the foreseen obligation for market surveillance authorities to follow up with economic operators on these complaints are welcomed as they will lead to more effective market surveillance.

However, we emphasise that market surveillance should put much more emphasis on measures which will ensure that unsafe products do not reach the consumer.

Traceability of products

Article 8: General obligations of economic operators

Apart from Article 8.2, the proposal fails to mention anything about product traceability. The CPSR deals with this but only for non-harmonised products. For harmonised products, there are rules in the specific directives.

In order for the withdrawal of unsafe products from the market to be done as efficiently and as quickly as possible, we ask for horizontal traceability rules to be mentioned in the MSR.

We had hoped that the proposal could pave the way to enabling individual consumers to participate and contribute to market surveillance, enforcement and product withdrawal (e.g. through smartphone barcode readers ('apps') linked to an authoritative database of products). During the lifetime of the Regulation, the Commission should consider how the individual consumer could contribute to this.

CE Marking

Consumer organisations in Europe have long criticised CE marking, as for most consumer products, it is only a self-declared claim from the manufacturer that the product complies with EU safety legislation[14].

Consumers are misled about the meaning of the CE marking as they believe it refers to a geographical origin (such as "Made in the EU") or they confuse it with an authorisation or independent safety testing[15].

In 2012, we expressed our concerns about the European Commission information campaign on toy safety which promoted the CE marking as a safety mark addressed to consumers. The campaign gave the impression that CE marking is only found on toys which are safe and have independently been checked. However, in the Single Market, the problem of falsely-affixed CE Marking continues to exist. A quick glance into the RAPEX system shows that hundreds of unsafe toys have been notified in 2012, many of them bearing CE marking.

[14] ANEC Position Paper on CE Marking "Caveat Emptor - Buyer Beware" (ANEC-SC-2012-G-026final)
[15] CEOC, the International Confederation of Inspection and Certification Organisations, carried out a study in 2012 that also clearly shows the weaknesses of self-declaration. In the context of the study, CEOC gathered data from products that were sent in for testing by manufacturers to ask for a voluntary certification mark and from products that were purchased in shops subject to CE marking based on self-declaration. For the products with a self-declared CE marking about 82% of the samples were non-compliant.

As the future market surveillance regulation will cover both, harmonised and non-harmonised products, CE marking will hold even less value for market surveillance authorities.

We propose removing CE marking from the products that require it and to include it in the related technical documentation. CE marking should not be visible to consumers as it is not intended for them and is often misunderstood.

END.