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Single Market Policy, Regulation and Implementation

Single Market Policy, Mutual Recognition and Surveillance

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Minutes

Meeting of the Expert Group "Internal Market for Products (IMP) – Market Surveillance"

Brussels, Friday 21 October 2016

CCAB, ROOM AB-1C

1. Approval of the agenda and of the minutes of previous meeting

The Chairman welcomed the participants, and the draft agenda (*Document: 2016_IMP_MSG_09rev02*) was adopted.

2. Nature of the meeting

The meeting was attended by representatives of market surveillance authorities of the Member States, EFTA states and Turkey, as well as Chairs of the Administrative Cooperation Groups.

3. List of points discussed

3.1. *Implementation of safeguard clause procedure (incorporated in all Union harmonisation legislation aligned with Decision 768/2008) into ICSMS – State of play (Document 2016-IMP-MSG-10)*

The Commission introduced the paper by informing the participants of the state of play of the implementation by Member States of the new IT procedure launched in May. The Commission pointed out that there are still important gaps in the definition in ICSMS of users and rights, where numbers ranged from 19 Member States having indicated at least one user for the Toys Directive to only 3 Member States having indicated at least one user for the Marine Equipment Directive. Furthermore, 5 Member States have not yet defined any user with safeguard clause rights. DG GROW then informed the participants of the number of safeguard clause notifications launched in ICSMS up to 30 September 2016: 60 notifications, 37 reactions, 4 withdrawn notifications. Technical improvements planned by the end of 2016 include practical usage features and corrections. If required, they could also include additional validation steps in the workflow. It was pointed out that this procedure is currently implemented only for harmonisation legislative acts that have been aligned to Decision No 768/2008/EC and that the information regarding the presence or non-presence of the product on national markets is relevant and should be indicated in the reactions to a safeguard notification. Finally, all Member States are required to complete the definition of their users in ICSMS and to use

ICSMS for their notifications. If there are significant issues preventing them from doing so, these should be raised.

The participants welcomed the use of ICSMS for the implementation of the safeguard clause procedure; however the use of parallel systems of notifications should be avoided. Participants responded that there is no need for additional evaluation steps, since the current system is sufficient: validation of a notification depends on the national organisation and should be handled by Member States.

Many participants stressed the need to clarify whether the use of ICSMS is mandatory for the safeguard clause procedure; in that regard, the Commission will address a letter to all authorities, pointing out the provisions of the aligned directives and informing them that ICSMS is the system referred to by Article 23 of Regulation 765/2008 and that therefore Member States should notify the safeguard clauses through ICSMS.

3.2. *Member States assessment and review of the functioning of market surveillance activities according to article 18(6) of Regulation (EC) No 765/2008 (Document 2016-IMP-MSG 11)*

- *Outcome of work of the Task Force on Development of Key Indicators for Market Surveillance*
- *Member States Assessment and Review for Period 2014 – 2015*

The Commission presented the results of the work of the Task Force to facilitate the transmission of information on market surveillance activities and to ensure the comparability of that information, while taking into account as best as possible the various ways in which market surveillance is organised across Member States and to make sure that no administrative burdens are needlessly created. The outcome of this work is a template currently being incorporated and developed in EU Survey, consisting of three sections: information on resources available for and expenditure on market surveillance activities, inspections and their outcomes, effectiveness of the general organisation and sector-specific market surveillance activities. The aim is to launch the data collection exercise for the period to 2014 and 2015 as soon as possible. The Commission thanked the Task Force for the very important and highly relevant work carried out.

The delegates confirmed that collecting information according to the structure of the new template is an important exercise since it enables the effective monitoring of the market. Some of them pointed out that it would be good if the review and assessment templates, as well as the national market surveillance problems, were incorporated in ICSMS, so that it would be easier to collect but also to assess the information provided. The participants expressed different views on the frequency of this exercise. Some of them preferred a yearly exercise, while others proposed the coverage of a two-year or even a four-year period. An ADCO Chair mentioned the further possibility of having two different deadlines for collecting data: an operational one every year, establishing the yearly targets with yearly market monitoring codes and assessment, and then a strategic one for analysing the strategy over a period of several years. Some Member States representatives pointed to the administrative burden linked to data collection. One Member State noted that for market surveillance authorities to have information on the number of economic operators and to reduce administrative burden linked to assessment, it would be helpful to launch EU market studies.

The Commission clarified that the time-frame of the exercise had been discussed within the Task Force and it had been already decided that it would cover 2014 and 2015. If necessary this can be reassessed for the subsequent period. Concerning the indicators, the Task Force had tried to find a consensus on them, providing a firm basis on which Member States could review and assess their activities and avoid including unnecessary information. The Commission added that to further reduce the administrative burden whenever the information might be not directly available, there is always the possibility of providing estimates and clearly indicating the methodology used.

3.3. *National market surveillance programmes (Document 2016-IMP-MSG-12)*

The Commission presented the overview of the information contained in the latest market surveillance programmes for 2016, also giving some feedback on the timing of submissions and the top sectors covered by Member States in these programmes in 2016. Remarkable progress has been made by Member States in the timing of submission of the national programmes and also in the use of the common template. Member States are requested to prepare and send the draft sectoral programmes by the end of September, and the general programmes by the end of December, for the previous planning year. Furthermore, the use of the common template for the sectoral programmes is important to ensure that data from all these programmes can be merged into one single and easily consulted document. The Commission concluded by noting that the reference list of sectors was updated in August 2016 to include the new directives and regulations.

The participants welcomed the work done by the Commission on the national programmes, and especially the collection and combination of information from all Member States. However, some of them were unhappy with the timing of the submission, arguing that while the sectoral programmes can be easily completed, the general ones are very time-consuming and create more administrative burdens for the authorities. They questioned the necessity to have both a *general* and *sectoral* programme. Some delegates suggested aligning the template of the national market surveillance programmes with the one dealing with the assessment and review of the activities.

The Commission restated the intended purpose and use of both sectoral and general programmes, as had been extensively discussed during previous meetings in 2014 and 2015. The programmes containing general information on the organisation of market surveillance and non-confidential information on sectoral priorities are for the public, while the confidential information on product categories or risk being targeted in specific sectors is needed for market surveillance activities and discussion within the Administrative Cooperation Groups. The Commission also suggested that the public programmes should not be re-written every year from scratch but could be updated with new information.

3.4. *Call for Proposals and Joint Actions 2014, 2015, 2016 (Document 2016-IMP-MSG-13)*

The Commission outlined the willingness of the Commission to finance joint market surveillance actions and other projects that contribute to more efficient and effective market surveillance for products within the internal market. The first call for proposals was launched in 2013 leading to an award for joint action in the field of metrology. In 2014, two proposals in the field of machinery safety and EMC-LVD were awarded funding. No proposals were granted funding in 2015 and 2016.

The Co-Chair of Measuring Instruments ADCO presented a brief summary of the joint project in Market Surveillance of Measuring Instruments in 2014-2016, which aims at, among other things, promoting the use of risk assessment in the definition and implementation of market surveillance programmes and promoting consistency of interpretation and application of normative documents in Europe. The project focused on electrical energy meters and heat meters, which constitute most of the products on the EU market. 9 out of the 22 electricity meters assessed and 11 out of the 18 heat meter assessed were found to be non-complaint, including non-conformity to formal requirements. Interesting cases were detected such as the problem of multiple manufacturers, possible problems with the application of tests according to the relevant harmonised standards, as well as the "installation seals". The main conclusions were that information interchange and communication between the participants must be improved, interpretation and application of normative documents are far from uniform across Europe, and that joint projects help to strengthen personal ties between market surveillance authorities, thus increasing their confidence in each other.

The participants welcomed the principle of joint actions financed through grants, and also their outcomes. They also thanked the Commission for making the financing available. However they pointed out the administrative complexity of managing these projects (e.g. heavy administrative requirements, problems in coordinating work by partners in other Member State authorities, and taking financial commitments on their behalf). They pointed out that the Commission should offer an administrative framework for the management of these actions and of the available money - money is not enough if it is not accompanied by some sort of infrastructure to allow for the management of the project. The administrative secretariat provided by the Commission for Administrative Cooperation Groups was mentioned as a positive model. Another solution would be to focus financing on laboratory tests and categories of important costs that do not require fulfilling administrative requirements (e.g. filling in hourly worksheets). Furthermore, a delegate stated that the model contract contains a couple of provisions which are for private enterprises and not public authorities, which created problems with their legal department. Another stressed that despite the significant investment needed to fulfil administrative requirements, joint actions are fundamental in developing joint assessment.

The Chair concluded that the Commission will try to correct what up to now has not been functioning properly. The financing of the authorities and the resources are important elements, and will also be discussed in context of the new legislative proposal.

3.5. *Evaluation of market surveillance provisions of Regulation (EC) No 765/2008*

3.5.1. *Contractor, methodology and state of play (Document 2016-IMP-MSG-14)*

The Commission informed the participants about the contractor, the methodology and the state of play of the ongoing evaluation of the market provisions laid down in Regulation (EC) No 765/2008. The scope of the evaluation is to assess the relevance, effectiveness, coherence, efficiency and EU-added value of the Regulation through assessing the results and impacts of its implementation. Concerning the methodology, the contractor will carry out both desk (existing literature, national reports and programmes, other policy-related documents, impact assessment, documents provided by the Commission) and field research (surveys and a set of in-depth interviews). The draft final report of the study is expected to be available in spring 2017.

3.5.2. Targeted consultation of market surveillance activities (Document 2016-IMP-MSG-15)

The representative from Ernst & Young presented the stages of the project of the evaluation of the market surveillance provisions of Regulation (EC) No 765/2008 and especially the questionnaire addressed to national authorities responsible for coordinating and carrying out market surveillance activities. She then explained that the survey would be launched in the following days and closed on 30 November. She also described the survey content in detail. Finally, she addressed some questions to the group, specifically to confirm their availability to take part in the survey and to be interviewed, as well as to have their first reactions on the implementation of the Regulation.

Member States were in general willing to be consulted through the targeted survey, but raised the issue of the tight time schedule as well as the need for a decision regarding participation in the consultation. Some Member States affirmed that their replies have to be validated in their hierarchical chain and this could create time problems. A delegate pointed out that in some Member States there are different authorities dealing with various issues - for example, the authority dealing with sanctions is different from the market surveillance authority. Thus, variable answers could be expected to this specific consultation.

The Commission clarified that in order to cope with these issues EY will address the survey directly to all IMP-MSG contact points who would then be in a position to identify all national authorities (in charge of market surveillance coordination and/or sector-specific control activities) to be involved in the consultation. Similarly EY will address the survey to ADCO Chairs that are expected in turn to identify additional ADCO members willing to participate.

3.6. Enforcement and compliance initiative launched under the Single Market Strategy

3.6.1. State of play

The Commission informed the participants of the state of play of the enforcement and compliance initiative. The public consultation was launched on 1st July 2016 and ends on 31st October 2016. After this, the Commission will start drafting the Impact Assessment which needs to be adopted by the middle of next year.

3.6.2. Discussion of options to address problem identified in the Inception Impact Assessment (Document 2016-IMP-MSG 16)

The Commission presented to the participants the reflections advanced for possible actions in the key areas identified in the Inception Impact Assessment for the Enforcement and Compliance initiative launched under the Single Market Strategy. The Commission explained that the purpose is to brainstorm and receive feedback on the suitability of various ideas under examination.

Coordination of cross-border market surveillance in the EU:

The market is now fragmented along national borders. Cross-border cooperation should be achieved based on the principle "one problem – one solution". This could be achieved through:

- a European Product Compliance and Enforcement network
- more joint investigations

- an EU body to coordinate joint investigations plus powers to issue decisions to remove products from the EU following investigation by the network
- the applicability of national decisions through the internal market

The participants expressed their support for joint actions and for a stronger role for the Commission to coordinate work, but some pointed out that the Commission should not directly manage market surveillance against the will of the Member States or directly carry out enforcement activities. The creation of a supranational body either for monitoring the activities or taking decisions does not appear to be a good solution, since it creates concerns around the issue of transfer of sovereignty.

A delegate stressed that the existing tools for collaboration (RAPEX, ADCO, and safeguard clause) should be properly used, capitalised on and perhaps strengthened before taking further steps. The policy document on cross-border cooperation agreed during the previous meeting should be kept in mind. The added value of any new principles with respect to current tools and in particular the safeguard clause procedure should be assessed and clarified. According to an ADCO chair the applicability of national decisions through the EU could be improved if, based on mutual trust among authorities, a measure taken by one of them would enter into force in all Member States. However, according to a delegate, issues concerning businesses' right to appeal would need to be addressed. The Commission clarified that the essential aim is to share work, so there is a need to design a model which would allow as far as possible that authorities do not duplicate the work done by other authorities. If a national decision could be applied everywhere in Europe, it would facilitate the work of the other authorities as they would not have to test the same product again at national level, starting from scratch. The possibility for businesses to demonstrate that non-compliance only affects parts of the goods made available in EU should also be preserved. As to the EU body, the Commission mentioned that its task would rather be to support coordination and facilitate joint investigations by national authorities than to centralise powers and decisions. The reflections shared by the Commission are consistent with previous discussions on cross-border cooperation, but also aim at facilitating the cooperation envisaged in that context.

More resources for market surveillance in the EU

Limited resources for market surveillance are a fact. It should be ensured that all national authorities are equipped with the resources needed to carry out adequate checks and this could be achieved by:

- Clarifying market surveillance tasks in relation to carrying out checks (adequate sampling), so that sufficient resources are provided,
- Making efficiency gains, possibly also through peer evaluations or audits of enforcement authorities, building on relevant market knowledge
- Promoting voluntary public-private partnerships
- Taxing rogue traders by means of administrative fees
- Establishing an EU financial support system

Member States agreed that the Commission were to commit resources and budgets for the activities, it should be in a position to carry out monitoring checks, but how to finance market surveillance should be entirely decided by the national authorities. Peer reviews may be useful to improve the efficiency of market

surveillance. According to one Member State it is necessary to ensure that the results of audits do not give rise to disproportionate administrative burdens.

The ability of the market surveillance authorities to rely on risk-based approach when choosing products to check should be assured. A delegate questioned the mention of minimum number of samples, by asking whether this would give more resources to the market surveillance authorities. A Member State that uses specific targets for market surveillance checks stressed that this provided valuable experience - using targets is very useful to work out the number of samples to be checked, the corresponding work programme and human resources, and therefore to justify requests for an appropriate budget. Furthermore, having targets for checks is not in contradiction with the risk-based approach. One ADCO Chair argued that any initiative to increase capacity would be welcome; however it is important to recognize that market surveillance should be able to prove its effectiveness and not only effort. Another participant stated that taking samples is not the most efficient way to reinforce market surveillance - systems inspections of companies provide more effective results. However, other delegates voiced reservations about systems controls, not least because they are not feasible vis-à-vis economic operators outside national territory.

Some delegates noted that there would be some legal and ethical problems with public-private partnerships if the impartiality of the company providing the results is not guaranteed.

A Member State mentioned that it has the power under national law to recover the costs of checks from rogue traders.

A new toolkit for enforcement

Apart from resource constraints, additional limitations such as the new challenges created by innovations in the digital economy hamper the effectiveness of authorities. Market surveillance authorities should be able to rely on a better toolkit in order to efficiently and effectively detect non-compliance and take corrective action. This could be achieved through a minimum list of powers for authorities to:

- Easily monitor the market
- Obtain the cooperation of relevant economic operators
- Put in place effective corrective measures
- Increase public awareness
- Sanction serious wrongdoers

As regards powers, participants agreed that there is a need for powers to oblige all the relevant categories of traders to collaborate and provide information or to clarify that they can be considered as 'economic operators'. One ADCO Chair stated that sometimes the authorities have to order products to be checked, and they are not sure if the samples received represent the real product or are especially made for the inspection.

In some Member States a number of powers are already in place; therefore the formulation with respect to national legislation must be carefully examined. Proportionality in the use of certain powers should also be ensured.

In relation to sanctions, one Member State noted that while national inspectorates make use of comparable and appropriate sanctions, the authorities apply them

differently - some of them issue an administrative fine for non-compliant products while others use only warnings.

The need for simpler and shorter procedures to address easy-to-spot types of non-compliance (e.g. missing traceability information) was mentioned.

Another delegate underlined the need to increase awareness on non-compliant by making the information included in ICSMS public.

On-line sales of non-compliant products and checks on imported products

The tracing and interception of non-compliant products crossing the EU external borders is challenging. It is essential to close the various loopholes between customs checks and market surveillance controls. Furthermore, effective sanctioning of businesses established outside the EU is not easy. These issues could be addressed to some extent by:

- Making a better connection between customs risk management and market surveillance systems
- Appointing an authorised representative in the EU
- Establishing cooperation arrangements with third countries
- Tackling online sales of non-compliant goods effectively through coordinated and joint investigations

Concerning online sales, a participant mentioned that there is no way for customs to control all the parcels received, so they invest in making consumers aware by showing concrete examples of products that are not compliant with the European legislation. Another delegate noted that although education of consumers is a necessary step, this cannot be regarded as sufficient to address the problem of non-compliant products ordered online.

According to various participants an obligation to appoint an authorised representative in the EU would help the work of market surveillance authorities. However, it would require enforcement and it could not solve the problem entirely. World-wide web shops will not be shut down because there is no representative of EU authorities. Authorities need somebody responsible for the product, not least the person handling customs formalities. Also, it would be necessary to have the power to take restrictive measures when the actual economic operator does not respond.

Carrying out controls at the border remains essential. A stronger involvement of the customs authorities in market surveillance activities would facilitate the work - customs, when needed, should be able to instantly refuse importation and turn goods back without necessarily involving the market surveillance authorities. One ADCO Chair stressed that there is a need to establish cooperation with third countries, and also to invite them to be present in ADCO meetings.

3.7. *The lack of batch compliance quality systems: a gap in the NLF? (Document 2016-IMP-MSG-17)*

The delegate from the Netherlands presented his discussion paper to the participants. According to this paper, one of the more imminent problems market surveillance authorities face in the area of products coming from China is that

batches do not comply with the tested original model/type and underlying technical file. This would be the result of a lack of provisions for mandatory batch quality control systems in the New Legislative Framework package. Cultural differences are possibly also at play at managerial level in China, compared to European manufacturers. The NL delegate requested views from other participants on possible directions for solutions: while the introduction of new requirements across the NLF may not be needed, formal guidance (e.g. in the Blue Guide) could make it more explicit that (mandatory) quality systems need to secure batch compliance with the tested model/type of every product. Other solutions could be digital marking on each individual product and the introduction of a data system to support this digital marking approach.

One ADCO Chair replied that there is a structural problem with some directives, and although quality would be improved if a batch compliance procedure was mandatory, it is not certain that it would solve the problem. Manufacturers who already do not wish to comply with current rules will not be incentivised by yet more specific rules. A system of registering the devices and attributing them to a specific manufacturer would facilitate the work of the market surveillance authorities, but it will not be easily accepted by the industry.

3.8. *Structural Reform Support for market surveillance in the single market for non-food products (Document 2016-IMP-MSG-18)*

The Commission (SRSS) introduced to the participants the Structural Reform Support Service which is responsible for steering and coordinating support for Member States in relation to growth-enhancing administrative and structural reforms. This service is a tool at the disposal of Member States to address implementation challenges, including in the area of market surveillance in the single market for non-food products. This service covers the entire technical support process, from inception to completion and is provided both directly (through experts from the SRSS, other Commission services and embedded experts) and mediated (through experts from the public sectors of Member States, international organisations, Member-State Agencies and the private sector). An EU programme endowed with 142.8 million euros over 2017-2020 is expected to be adopted by the end of the first trimester of 2017.

4. Conclusions/recommendations/opinions

Due to time constraints, the last point on the new collaborative spaces was not presented; the participants will receive the questions by e-mail and will be asked to send their contributions by Tuesday 15 November 2016.

The Chair concluded that the evaluation of the Regulation concerns the past – what is functioning well and needs to be kept and what is not functioning at all and needs to be rejected. The new initiative represents the future of market surveillance and many options should be assessed in order to see the entire picture.

5. Next steps

Following the public consultation and the evaluation of the Regulation, the Commission will draft the Impact Assessment which needs to be adopted by the middle of next year. The group will be regularly consulted on the options to be assessed during this procedure.

6. Next meetings

Next meetings are scheduled as follows:

- Mutual Recognition on 25 November 2016,
- Accreditation on 2 December 2016 and
- Meeting of ADCO Chairs on 14 December 2016.

7. List of participating countries

Austria

Belgium

Croatia

Czech Republic

Denmark

Estonia

Finland

France

Germany

Iceland

Ireland

Italy

Latvia

Liechtenstein

Lithuania

Luxembourg

Netherlands

Norway

Poland

Portugal

Romania

Slovenia

Spain

Sweden

Switzerland

Turkey

United Kingdom