

Preliminary Observations on the Goods Package by the PROSAFE Office

Summary of main points

The new Commission proposal contains a number of improvements over the 2013 Product Safety and Market Surveillance Package (PSMS) which has languished in the Council since 2015. In particular there is greater clarity about the Member States obligations with respect to market surveillance, for example concerning the financing of activities and with the definition of a minimum set of powers, which should be granted to authorities. These provisions are very much welcomed.

Less positive is the greatly reduced role that the Member States would play in the European Compliance Network (EUPC) which the Commission proposes. In contrast to the European Market Surveillance Forum (EMSF) contained in the PSMS, the new proposal hands a much bigger role directly to the Commission and provides financing for a secretariat for the network within the Commission, which, save for this location, would otherwise appear be no less than a new agency.

The proposal also emphasises the role of the Administrative Committees (ADCOs) to such a degree that it might undermine efforts to coordinate market surveillance and ensure the consistency and coherence of the entire system, thereby increasing uncertainty for business and detracting from a high level of consumer protection. The danger is exacerbated by the Commission's decision not to withdraw the PSMS proposal but to restrict the scope of its new proposals to harmonised product sectors only. This singularly fails to address the concerns previously expressed by the European Parliament and stakeholders about the fragmented nature of the market surveillance framework. Ultimately, this is a major flaw that detracts from any benefit the other provisions might otherwise bring about.

The PSMS proposal should be withdrawn and the scope of the new proposal revised to include the GPSD, and the other provisions should be amended as necessary to address the other concerns expressed in this paper. This should be accompanied by a proposal for the revision of the GPSD that omits the contentious provision for country of origin marking.

Background to the proposal

In 2013, the Commission proposed a package that included proposals for a regulation on market surveillance of products (aimed at replacing Regulation (EC) 765/2008), and for a regulation on consumer product safety (to replace the GPSD).

The current set of market surveillance rules is spread across the GPSD, Regulation 765/2008 and a range of sector-specific legislation (which is increasingly based on the reference provisions of Decision 768/2008). This '3-tier' system causes problems for market surveillance authorities and economic operators alike and was expressly targeted for criticism by the European Parliament.

The market surveillance Regulation proposed as part of the PSMS in 2013 (COM(2013)75) would have dispensed with the distinction between consumer and professional products for market surveillance purposes. It would also avoid making a distinction between harmonised products and non-harmonised products except where this is unavoidable in applying certain specific provisions. To the greatest extent

possible the applicable rules would be the same for all products. This would make it simpler for both the economic operators and the national market surveillance authorities.

Unfortunately, Member States have repeatedly failed to reach a common approach in the Council, the main issue being a disagreement between Member States over the Article 7 of the proposal on consumer product safety, which would have introduced a requirement for products to bear an indication of the country of origin. This has led the Commission to conclude that any progress is 'highly unlikely'. Nevertheless, the Commission has decided not to withdraw the 2013 proposal, considering that it could be brought into line with new legislative developments, should the political deadlock on the 2013 proposal end.

The Commission in its wisdom has therefore decided to restrict the new proposal to harmonised legislation only. A list is given in an annex to the proposal and the General Product Safety Directive is of course not included. Therefore, whilst the provisions will apply to product sectors like toys, PPE, gas appliances and LVD products the provisions do not apply to the countless other consumer products that do not fall under the harmonised directives but depend entirely on the GPSD.

The Commission in its new proposal suggests that if the legislative discussions on COM(2013)75 were to resume, an analysis of the Union harmonisation legislation that applies at that moment, taking into account the developments since 2013, and the present proposal, could feed into the progress made by the co-legislators on the proposal, in accordance with the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making. It goes on to say that the present proposal contains 'lex generalis provisions' in order to avoid any possible risk of overlapping or contradictory provisions with the 'market surveillance proposal' COM(2013)75. This statement undermines the PSMS which was also intended as "lex generalis" and simply makes no sense.

The narrow scope of the new proposal represents a major step backwards once again opening up a rift between the enforcement of the harmonised and non-harmonised product sectors. This can only serve to confuse market surveillance authorities and economic operators alike and detracts from the provision of a level playing field and a high level of consumer protection. It seems incomprehensible that the Commission have not sought to withdraw the 2013 PSMS. Instead, the Commission have sought to re-establish the artificial boundaries between different product sectors which are predicated solely on the organisational structures of the Commission and have little or no bearing on the reality in the market place or in the organisation of market surveillance authorities in the Member States. For this reason and this reason alone, PROSAFE is of the opinion that the proposal is seriously flawed and should be rejected in its current form.

Lastly, the restricted scope of the proposal means that it does not address the revision of the GPSD. The need to revise the GPSD is pressing and cannot be allowed to languish in the Council indefinitely. The Commission has to resolve the problem of the stalemate on the PSMS in the Council and not simply table another proposal containing an approach that inadequately addresses the concerns of all stakeholders.

With this caveat in mind, we can go on to examine the main provisions of the proposal.

Main provisions

The main provisions of the proposal as summarised by the Commission are the following:

- The concept of a **person responsible for compliance information** established within the Union as a necessary condition for making the products available on the market. The person responsible for compliance information can be the manufacturer, the importer or any other economic operator designated by the manufacturer. The tasks of the person responsible for compliance information are essentially to provide information on the product to market surveillance authorities and to cooperate with the authorities;
- It defines how to designate **competent authorities and single liaison offices** for this Regulation and clarifies the roles of the single liaison offices;
- It sets out the **Member States obligations as regards organisation of market surveillance** within their territory and lays down the procedures they must establish to follow up complaints or issues relating to risks; monitor accidents and harm to the health of end-users; verify corrective actions taken by economic operators; and follow up scientific and technical knowledge of safety issues;
- A **set of powers for market surveillance authorities** is defined with the view to ensure effective enforcement of Union harmonisation legislation on products. These powers include the power to access data and documents related to an instance of non-compliance, to require economic operators and public entities to provide all information related to an instance of non-compliance; to carry out on-site inspections; to initiate investigations or procedures aimed at ceasing non-compliance; to prohibit the supply of products, or withdraw and recall and destroy them; to impose penalties and order the recovery of profits obtained as a result of non-compliance; and to publish decisions;
- It provides for the **exchange of information** on illegal products and on-going investigations so that governments can take effective action against non-compliant products;
- It imposes stricter **mutual assistance** obligations and the legal presumption that products declared to be non-compliant in one Member State are also non-compliant across the EU;
- It provides for a strengthened framework for **controls on products entering the Union market** and strengthens the exchange of information between market surveillance authorities and customs authorities, in particular through procedures for releasing products, suspending and refusing of release for free circulation;
- It establishes a **Union product compliance network** (the network) within the Commission to coordinate enforcement tasks, thereby boosting market surveillance cooperation at EU level.

Person responsible for compliance information

This is a new provision that aims to improve traceability and greater transparency for authorities who struggle to deal with manufacturers abroad. This would appear to be a positive development. The added value of this provision has to be more clearly demonstrated so that it is not merely an additional burden. It would be difficult to see any added value if the new person has no economic or legal responsibility and is only responsible for documentation. Moreover, if they bear no responsibility for the product they would not be subject to action by the authorities. In addition, the proposal does not address the introduction of traceability schemes for specific product as was proposed under the PSMS. Whilst this provision in the PSMS was still somewhat ambiguous in the absence of any specific examples, the issue of traceability is of major concern to authorities and also has a major impact on recall effectiveness.

Competent authorities and single liaison offices

The new proposal seems to go further than the PSMS which talked more vaguely about the Member States being required to establish appropriate mechanisms so that authorities cooperate and coordinate their activities. The greater clarity the new proposal provides is to be welcomed.

Member States obligations as regards the organisation of market surveillance

Again, the new proposal goes into greater detail than the PSMS did, which directed more vague entreaties towards the Member States. The new proposal for example specifically requires that Member States shall ensure that market surveillance authorities within their territory are provided with the necessary financial resources for the proper performance of their tasks. We know from practical experience that many national authorities have experienced financial difficulties in recent years and this provision appears to have been welcomed by many PROSAFE members.

Set of powers for market surveillance authorities

This is the most significant improvement over the PSMS. Whereas the PSMS stated without going into any detail that Member States shall entrust market surveillance authorities with the powers, resources and knowledge necessary for the proper performance of their tasks, the new proposal establishes a minimum set of powers all authorities should have. These has been well-received by PROSAFE members; obviously their enthusiasm reflects their own current national situation and how that stacks up to the proposed suite of powers to be conferred on them. From PROSAFE's own experience with the Joint Actions, there are practical problems posed by the authorities possessing different powers.

Of particular note is the inclusion of mystery shopping, the right to take free samples, to impose penalties and order the recovery of profits obtained as a result of non-compliance. The right for authorities to recover the costs of their activities with respect to these instances of non-compliance contained in the PSMS is also included. The establishment of this minimum set of powers can only improve the efficiency of market surveillance across the EU and is to be welcomed.

Exchange of information

In contrast to the PSMS the new proposal removes explicit reference to RAPEX but refers rather to the Article 12 procedure of the GPSD. Does this mean that the new proposal does not encompass Article 11 notifications to RAPEX? There is also no explicit mention of the Commission's own Information and Communication System for Market Surveillance (ICSMS) in the text of the regulation. One of the recitals to the regulation states that the Regulation should be without prejudice to the functioning of RAPEX, but it seems it would have been better to address that more explicitly within the text of the regulation itself. Another recital states that it is necessary to maintain and further develop the existing ICSMS. Once more, it would seem appropriate to address this in the text of the regulation itself.

Mutual assistance

The new proposal goes into much greater detail concerning how mutual assistance should be applied in practice. This greater clarity is to be welcomed although the exact provisions need to be scrutinised by the authorities who will have to put them into practice.

Controls on products entering the Union

The new proposal appears to largely follow the PSMS and perhaps provides some greater clarification on some points. There is however no mention of personal imports.

Union Product Compliance Network (EUPC)

The equivalent provision of the PSMS was the creation of a European Market Surveillance Forum (EMSF) for cooperation between authorities and between authorities and businesses and other stakeholders, such as consumer groups. The proposal for the EUPC is very different from that of the EMSF. The EMSF, composed of national representatives was very much the focus of the tasks identified in the PSMS. In the new proposal the EUPC is relegated to a much smaller set of tasks with the majority of tasks being entrusted directly to the Commission or left with specific product sectors in the form of the ADCOs. The role of the Commission especially is set to grow enormously with a budget allocation for the secretariat of the EUPC estimated at 52 officials by 2024. This represents a considerable difference in philosophy and accords the Commission a much stronger role in market surveillance and relegates the role of the Member States themselves. Moreover, the more devolved allocation of tasks and responsibilities threatens to undermine the coordination of market surveillance and the application of best practices. It seems that this would detract from the consistency and coherence of the European market surveillance as a whole and threaten to undermine the level playing field and potentially compromise the high level of consumer protection expected.

Assistance to economic operators and access to data

The new proposal contains a number of provisions with respect to the assistance market surveillance authorities should offer to economic operators. It introduces the concepts of compliance partnership arrangements and memoranda of understanding with stakeholders, provisions that go further than the PSMS did. They may place a not insignificant burden on market surveillance authorities depending on the extent to which economic operators are aware of this provision and have recourse to authorities for information.

The nature and scope of the new concepts of compliance partnership arrangements and memoranda of understanding with stakeholders may also require further study. The independence and impartiality of the authorities is of great importance and should not be undermined by these provisions. It should also be noted that these provisions provide for better access for business to the authorities and to information, but there are no provisions for improved information that consumers and market surveillance authorities would find useful.

The proposal clearly states that market surveillance should be risk-based and based on scientific and technical evidence. However, it is not at all clear where this evidence should come from. There is no provision for an injury database nor any other database gathering the information necessary to make risk-based priorities. Furthermore, it is not certain what then will be the basis of the decisions. In contrast, well-developed injury accident data collection systems and incident reporting schemes can be found in many of the EU's major trading partners who already have well-developed product safety regimes.