Introduction

In 2016 the European Commission launched a public consultation on Market Surveillance and the extent of non-compliance in the internal market for goods[1]. Furthermore, the Dutch Court of Audit (Algemene Rekenkamer) performed a study on the operation of and trust in the system of CE-marking in the Netherlands. The outcomes of this study have been published recently on the website of the Dutch Court of Audit[2], where an English version[3] of the report will be available as well. Amongst others, the Court of Audit advised the Dutch Minister of Economic Affairs to provide the European Commission with suggestions for improvement of trust in the internal market for goods. This position paper can be regarded as extra input for the Commission's public consultation on Market Surveillance and the extent of non-compliance in the internal market for goods.

The new legislative framework (NLF)

The NLF is a well-considered and future proof way of organising legislation. The effectivity of the new approach directives depends on the solidity of the framework and, maybe even more important, on how well Economic Operators (EOs), Notified Bodies (NBs) and Market Surveillance Authorities (MSAs) play their roles in it. Improving the effectivity means strengthening the framework itself by addressing possible weaknesses and helping all players in their respective roles.

The Netherlands would like to present nine suggestions related to the framework itself and to the different players in the field:

Framework

1. Improving end-user involvement
2. Introducing more clarity for cross-border interventions of MSAs
3. Raising the efficiency of controls of products imported from third-countries
4. Searching for effective ways of dealing with e-commerce
5. Improving the connection between Regulation 765 and other legislation
6. Introducing clear requirements for batch compliance in production

Economic Operators

7. Supporting EOs in applying legislation

Market Surveillance Authorities

8. Harmonisation of market surveillance throughout the EU
9. Encouraging the sharing of data and reports

[1] http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8865

[2] http://www.rekenkamer.nl/Publicaties/Onderzoeksrapporten/Introducties/2017/01/Producten_op_de_Europese_markt_CE_markering_ontrafeld

[3] http://www.courtofaudit.nl/english/Publications/Audits/Introductions/2017/01/Products_sold_on_the_European_market_unraveling_the_system_of_CE_marking

1. Improving end-user involvement

European legislation on CE marking does not define end-users, nor does it give them any rights, responsibilities or obligations. The governments of the individual Member States represent the end-users. End-users of CE marked products are either professional end-users or consumers. Both types of end-users should be able to rely on the CE mark for the product to comply with the applicable European legislation.

Research reveals that the majority of consumers cannot tell what the CE marking stands for[4]. Moreover, there is a limited awareness concerning the fact that unsafe products are offered on the EU-market and the risks associated with these products. And even if consumers are aware of these issues, it is very difficult for them to find comprehensive information on recalls of unsafe products. Better involvement of end-users could have a positive effect on the functioning of the system of CE marking. In line with the general consumer policy, more involvement could lead to more empowered consumers. Another reason for more end-user involvement is that end-users could assist market surveillance bodies to track unsafe products. At the moment end-users are often not aware that they can file a complaint on an unsafe product and even if they are aware of the possibility to file a complaint, they do not know where to do it.

Therefore we invite the commission to explore possibilities to improve end-user involvement, taking into account the needs of end-users. We suggest that DG Justice and Consumers will be involved due to their responsibility for consumer policy.

2. Introducing more clarity for cross-border interventions of MSAs

According to the Blue Guide and the latest guidance from the Commission[5] any MSA should treat non-compliances preferentially to the fullest possible extent, i.e. on the European level. Action should be directed to the top of the distribution chain in the EU. To tackle non-compliance, the MSA should not exclusively contact the local distributors, but should also try to contact the EU importer or manufacturer even when located in another country. Corrective action should be sought by the relevant economic operator in order to address the non-compliance, not only on the national territory of the authority conducting an investigation but on the whole EU market. And, as long as the manufacturer takes the necessary corrective actions, the case remains under the responsibility of the initiating MSA.

In practice, it proves to be a huge step or even a barrier for MSAs to address economic operators outside their own country and national jurisdiction. It would be very helpful if the framework in one way or the other could more clearly and formally address the cross-border powers of individual MSAs.

3. Raising the efficiency of controls of products imported from third-countries

As stated earlier, the majority of products on the EU-market is imported from third-countries and reaches the EU through a limited number of major channels, e.g. the harbours of Rotterdam,

[4] European Commission (2011). *Special Eurobarometer 342 'consumer empowerment'*. ANEC (2013). *Leaflet on CE marking.*

[5] Crossborder cooperation_2015-IMP-MSG-02_rev03

Hamburg and Antwerp. There are two important aspects associated with this specific import nature: firstly, there is a strong need for harmonisation of market surveillance at the points of importation to prevent 'shopping' by selecting the weakest point; and secondly, the capacity of MSAs at the prime points of importation should be adequate for the work load associated with the imports. The Netherlands has two suggestions for dealing with these challenges.
The first idea we have is that the information position of MSAs on the import of goods from third countries can be significantly improved by making the data that are already delivered on a daily basis by the Customs to DG TAXUD available for MSAs. This will give MSAs more opportunities for targeting their controls.
Secondly we invite the commission to see if the system that is in place for food and feed has elements that could be used for non-food as well. Import of food and feed faces the same challenges but the system of controls differs. There is for example a system of mandatory sampling of certain specified high risk products. This system seems effective in decreasing the amount of non-compliant food and feed products entering the union. An in-depth discussion on import from third-countries is welcomed.

4. Searching for effective ways of dealing with e-commerce

E-commerce is booming and European end-users (professionals and consumers) get more and more used to ordering their products directly from third-country suppliers. Third-country suppliers either send the product directly to the end-user who ordered it or they distribute it to an intermediary in Europe who sends the product to the end-user. This trend challenges the way in which market surveillance is organised in Europe as the import of these products is beyond the span of control of individual MSAs and Customs. In addition, it raises questions as to whether products sent to intermediaries can be considered to have entered the internal market from a legal perspective. When discussing the way market surveillance is organised, the effects of e-commerce should therefore be investigated and discussed. The need for an update of the set of definitions to accommodate e-commerce should be evaluated. Further development of guidelines on to how to deal with intermediaries would also be welcomed.
On this specific topic there is also a link to the improvement of end-user involvement (item 1). Potentially, the end-user could take the lead when he is made aware of the risks of buying directly from third country web-shops and the possibilities of reporting non-compliant or unsafe products.

5. Improving the connection between Regulation 765 and other legislation

Currently, the provisions for market surveillance can be found in different pieces of legislation. Some provisions are in the specific product directives or regulations and the more general provisions are in a horizontal regulation (765/2008). The Netherlands would like to emphasize the importance of a good connection between the different pieces of legislation that form the basis for market surveillance. The scope of the current regulation 765/2008 is not completely clear which sometimes leads to discussions whether the provisions of regulations 765/2008 are applicable for a certain group of products or not. Another example is the fact that in the current framework the connection between article R31 of Decision 768/2008 and article 21 of Regulation 765/2008 is confusing. Article R31 says that article 21 is applicable in the situation that an MSA requires the

relevant economic operator to take appropriate corrective action. But article 21 is written in such a way it seems applicable to measures an MSA takes and not to measures taken by the economic operator.

6. Introducing clear requirements for batch compliance in production

The system of CE marking is based on the premise that when one batch of products is considered to comply with the applicable EU law and therefore eligible for a CE marking, the next batch of products will be identical and therefore also compliant and eligible for CE marking. It appears that this premise does not always hold especially for products that come from third-countries. And what's more, this phenomenon occurs regardless whether there is a NB involved in the production phase (e.g. Module D) or not (e.g. Module A, A1, A2, C). In other words: batches are not identical to each other and are not always complying to the technical documentation, the type or the essential requirements. Therefore there is a risk that non-compliant products bear a CE marking. A disturbing thought as more than 80% of the products on the EU-market are manufactured outside the EU.

The Netherlands is of the opinion that it should be investigated whether the current European legislation suffices to require batch compliance. Furthermore, guidelines on how to ensure batch compliance should be developed and distributed amongst stakeholders. Seeing the great challenges MSAs and Customs are facing at the end of the distribution chain, it is of the greatest importance that the legal obligations for manufacturers are absolutely clear for them and correctly interpreted and handled wherever they are located.

7. Supporting EOs in applying legislation

The first step to prevent non-compliant products circulating on the European market, is that economic operators are aware of the fact that the products they are manufacturing, importing or selling are subject to (EU) legislation. The Netherlands therefore believes that it is important that the Commission launches non-legislative actions contributing to the awareness of economic operators as well as ways to support economic operators in applying the legislation.

There is already a lot of information available and documents such as the 'blue guide' are important tools. A specific issue that needs attention is the fact that several directives or regulations can be applicable for one product. This means that economic operators should always check if there is legislation applicable for their product(s). And if so, which of the directives and regulations are relevant. The Netherlands believes that an approachable tool to support economic operators in determining which legislation is relevant would be of great benefit. Additionally such a tool could also be helpful for raising the awareness of end-users (item 1).

In view of the enormous amounts of products entering the EU-market from third-countries specific efforts directed at these countries should be undertaken, e.g. in the form of compliance assistance.

8. Harmonisation of market surveillance throughout the EU

The benefits of the system of national authorities are that national authorities have good knowledge of local markets and that relevant differences (e.g. the absence of certain types of instruments) between Member States can easily be taken into account. On the other hand the

effect of market surveillance to prevent non-compliant products on the market should be comparable throughout the European market. To check if this is the case the current system relies on obligations for MSAs to make and share work programmes and evaluate their activities. This results in great amounts of data that are difficult to compare and is not suited for conclusions on the level and quality of market surveillance on a European level. While on the other hand creating administrative burdens for MSAs.
Therefore the Netherlands believes it would be useful to explore whether there are alternatives that would be more effective in creating insights in the level and quality of market surveillance, give MSAs the opportunity to improve their market surveillance and stimulate MSAs to share information. One of the possible alternatives to explore could be a system similar to the system in place in the field of food and feed safety, animal health, animal welfare and plant health[6]. This system relies on audits on national competent authorities (with similar roles and responsibilities as MSA's) and analyses of the information derived from these audits. In a pilot it could be tested if such a system would be possible and useful in the field of non-food as well. One of the important questions that should be answered in such a pilot is if the benefits are higher for MSAs and the burden for MSAs is preferably lower or at least not higher than in the current system.

9. Encouraging the sharing of data and reports

The exchange and availability of data on products and their safety is crucial for a good-working CE system. On the European level there are two information systems related to product safety: ICSMS enables national market surveillance bodies to exchange information on product safety in general and RAPEX facilitates the exchange of information on dangerous products found on the internal market. In addition, Member States' authorities often have their own systems for collecting and exchanging information related to product safety. Aforementioned research by the Dutch Court of Audit showed that the co-existence of these different systems and the differences in the use of the European systems by the national market surveillance bodies leads to insufficient exchange and use of data on product safety. The Netherlands therefore believes it is necessary to investigate which barriers –if any- MSAs encounter in using the different systems, to initiate actions to improve the exchange of information between Member States' authorities (through the different systems) and to investigate to what extent systems could be integrated. It would be worthwhile to investigate how end-users can better find their way to the public information available in both systems.
In addition, MSAs can be encouraged to share (at least a summary of) their reports in English.

[6] https://ec.europa.eu/food/audits_analysis_en