CONSUMER PRODUCT SAFETY

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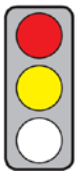
Centrum für Europäische Politik

KEY ISSUES

Objective of the Regulation: The Commission wants to introduce new rules on the safety of consumer products.

Parties affected: Consumers and companies.



Pro: (1) The simplification of legislation increases legal certainty.

Contra: (1) Mandatory indication of the country of origin is not reasonable for the traceability of a product. In fact it leads to higher consumer prices.

(2) A "system of traceability" provides no added value because there are currently hardly any situations in which it could be applied. The products or product categories to be covered by it, at least, should not be determined by the Commission by way of delegated acts but only by the legislator.

CONTENT

Title

Proposal COM(2013) 78 of 13 February 2013 for a **Regulation** on **consumer product safety** and repealing Council Directive 87/357/EEC and Directive 2001/95/EC

Brief Summary

- **New rules on product safety and market surveillance**
  The "Product Safety and Market Surveillance Package" proposed by the Commission includes
  – the Regulation on consumer product safety [COM(2013) 78, see this cep**PolicyBrief**],
  – the Regulation on market surveillance of products [COM(2013) 75, see cep**PolicyBrief**], which contains the responsibilities of market surveillance authorities,
  – the Communication on more product safety and better market surveillance [COM(2013) 74],
  – the Action Plan for the surveillance of products 2013-2015 [COM(2013) 76] and
  – the Report on the current implementation of market surveillance [COM(2013) 77].

- **Background and objective of the Product Safety Regulation**
  – The Regulation is to ensure that consumer products are safe. Where unsafe products are nevertheless offered on the EU market, they should be traceable.
  – With the new provisions, the Commission wants to simplify the different rules on consumer product safety. This Regulation replaces (Art. 22)
    - the Directive on food-imitating products (87/357/EEC) and
    - the Directive on general product safety (2001/95/EC).
  – The Regulation contains duties for manufacturers, importers and distributors (hereinafter: "companies").
  – EU harmonisation legislation applies to some products. This contains requirements issued for certain products such as rules on health and safety.
  – The Regulation will
    - clearly define when the provisions of the Regulation apply and when those of the harmonisation legislation apply and
    - bring the duties contained in the Regulation into line with the "common framework for the marketing of products" (Decision No. 768/2008, "common framework"). The "common framework" contains specimen obligations for harmonisation legislation.

- **Area of application**
  – The Regulation applies to "consumer products". These are products offered, i.e. placed or made available, on the EU market and [Art. 2 (1)]
    - which are intended for consumers or
    - which are likely, under foreseeable conditions, to be used by consumers, or
    - to which consumers are “exposed” in the context of a service.
  – The Regulation does not apply, in particular, to foods or medicinal products [Art. 2 (3)] but to products which "resemble" foodstuffs (food-imitating products) [Recital 12, Art. 6 (1) e].
  – The Regulation contains rules for products which
    - are subject to harmonisation legislation with obligations for companies ("harmonised products"),
    - are not subject to harmonisation legislation or only to that without obligations for companies ("non-harmonised products").

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– Non-harmonised products are subject to all provisions.
– Harmonised products are only subject to the general safety requirement (Art. 4) and the obligation to indicate country of origin (Art. 7).

- **General safety requirement**
  – A company is only permitted to offer safe products on the market (General safety requirement, Art. 4).
  – A product is "presumed" to be safe if it (Art. 5)
    - complies with provisions contained in harmonisation legislation, or
    - conforms to European standards which have been drafted or identified on behalf of the Commission by a European standardisation organisation (Art. 16), or
    - complies with the health and safety requirements – e.g. DIN standards – of the Member State in which the product is placed on the market.
  – The presumption of safety is rebutted if a risk arises which is not covered by these provisions. In this case, and where no provisions exist, the safety of a product is determined, in particular, according to [Art. 6 (1)]
    - its characteristics such as composition or packaging and
    - the categories of consumers likely to use it.

- **Traceability of products**
  – For traceability the manufacturer must ensure that either the product, or – where that is not possible due to the size or nature of the product – the packaging or accompanying documentation, bears:
    - an element allowing identification of the product [Art. 8 (6)],
    - their name and address [Art. 8 (7)] and
    - the country of origin (Art. 7); this information is intended to make traceability easier if the manufacturer cannot be contacted (Recital 21).
      - The country of origin is deemed to be the country where the "last, substantial, economically justified" processing took place [Art. 24 Regulation (EEC) No. 2913/92].
      - Where the country of origin is in the EU, the EU may be specified instead of the Member State.
  – In addition, the Commission may, by way of delegated acts, impose a "system of traceability" on companies for (non-harmonised, see above) products or product categories which potentially pose a "serious" risk to the health and safety of persons [Art. 15 (1) and (3)].
    For this the companies concerned must [Art. 15 (2)]
    - collect data enabling the identification of the product and the companies involved in its supply chain and
    - store this data on a data carrier attached to the product, its packaging or accompanying documents.

- **Product checking by the company**
  – The company must not offer a product if it knows or suspects that the product violates the Regulation [Non-conformity, Art. 10 (2), Art. 11 (3)]. Where it nevertheless has offered a non-conforming product on the market, it must [Art. 8 (9), Art. 10 (7), Art. 11 (5)]
    - take action to bring the product into conformity and
    - withdraw the product from the market or recall it from consumers.
  – Depending on the product risk, the manufacturer must [Art. 8 (3) and (4)]
    - draft technical documentation,
    - carry out sample testing of products and
    - keep a register of complaints, non-conforming products and product recalls.

- **Notifying the market surveillance authority**
  – The company must notify the market surveillance authority if it or another company in the supply chain has offered an unsafe product on the market [Art. 8 (9), Art. 10 (2) and (7), Art. 11 (3) and (5)]. This duty does not apply where [Art. 13 (1)]
    - only a limited number of well-identified products are unsafe,
    - the company can demonstrate that the risk has been "fully controlled" and
    - the cause of the risk of the product does not represent "useful information" for the authorities or the public.
  – The market surveillance authority may require that
    - the manufacturer makes available upon request the drafted technical documentation which he has to keep for a period of ten years after the product has been placed on the market [Art. 8 (4) and (5)], and
    - all companies submit the names of the previous or subsequent company in the supply chain, for up to ten years after having been supplied with, or having supplied, the product (Art. 14).

- **Additional duties for importers in the case of products from outside the EU and for distributors**
  – Where a product comes from outside the EU, the importer must
    - indicate their name and address on the product or – where that is not possible due to the size or nature of the product – on its packaging or the accompanying documentation [Art. 10 (3)],
    - keep the technical documentation for a period of ten years after the product has been placed on the market, and make it available to the market surveillance authorities upon request [Art. 10 (8)], and
    - depending on the product risk, carry out sample testing of the product and keep a register of complaints, of non-conforming products as well as of product recalls [Art. 10 (6)].

– In addition, the importer must ensure that the manufacturer
  - has attached an element allowing the identification of the product, its name and address as well as the country of origin [Art. 7, Art. 10 (1)] and
  - has drafted technical documentation [Art. 10 (1)].
– The distributor must "verify" that the manufacturer and importer have provided in particular their names and addresses [Art. 11 (2)].
– The importer and distributor are subject to all the obligations of the manufacturer if they (Art. 12)
  - place a product on the market in their own name or
  - modify a product such that compliance with the Regulation may be affected.

Main Changes to the Status Quo

Note: The comparison is based on the Directive on general product safety (2001/95/EC).

- New is the fact that the Regulation also applies to products to which consumers are "exposed" in the context of a service.
- New is the obligation to indicate country of origin.
- New is the fact that the importer must keep the manufacturer's technical documentation.
- New is the fact that the importer and the manufacturer based outside the EU must indicate their names and addresses.
- New is the fact that the market surveillance authority can require all companies to submit the names of previous and subsequent company in the supply change.
- New is the fact that the Commission can impose a "system of traceability" for certain products.

Statement on Subsidiarity by the Commission

Differing national product requirements can create obstacles to the internal market (p. 5).

Policy Context

The Commission announced in 2012, in the European Consumer Agenda [COM(2012) 225, see cep**PolicyBrief**] and the Single Market Act II [COM(2012) 573], that it was going to introduce new rules on product safety and market surveillance.

Legislative Procedure

13 February 2013	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Directorates General:	DG Health and Consumers (leading)
Committees of the European Parliament:	Internal Market (leading), Rapporteur Christel Schaldemose (S&D Group, DK)
Federal Ministries:	Consumer Protection (leading)
Committees of the German Bundestag:	Food, Agriculture and Consumer Protection (leading)
Decision mode in the Council:	Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes)

Formalities:

Legal competence:	Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence [Art. 4 (2) TFEU]
Legislative Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The simplification of legislation by combining the two product safety Directives, defining when the Regulation and when harmonisation legislation apply and bringing the obligations under this Regulation into line with the "common framework" **increases legal certainty.**

Impact on Efficiency and Individual Freedom of Choice

Better traceability of products increases consumer safety because market surveillance authorities can take unsafe products off the market or inform the manufacturer. Consumers can also better identify unsafe products where the manufacturer is specified.

Indicating the country of origin on the product, packaging or accompanying documentation **is not necessary for the traceability of a product**. **This, in fact, leads to** higher costs for companies and thus to **higher consumer prices.** For the traceability of a product, elements allowing identification of the product as well as details of the manufacturer or importer are sufficient. If they cannot be contacted, simply having details of the country of origin will not help to identify the manufacturer. Also, details of the origin are unsuitable as consumer information because they may mislead the consumer. From the consumer's point of view, the "last, substantial, economically justified" processing often does not correspond to a product's origin.

Setting up a "system of traceability" would involve major expense for companies. The possibility of setting up such a system for certain products **provides no added value because there are** currently **hardly any situations in which such a system could be** usefully **applied.** Instead, the Commission's right, not further substantiated, to require such a system for products presenting a "serious" risk leads to planning uncertainty and thus represents an obstacle to investment. Since it is not possible to predict which products would be made subject to such a system by the Commission. Nor is it justifiable to allow the Commission, rather than the legislator, to set up such a system for non-harmonised products by way of delegated acts: The "common framework", which contains specimen obligations for harmonised products, does not provide for this possibility. There should not be more obligations attaching to non-harmonised products than to harmonised products because non-harmonised products are not more dangerous per se.

The fact that the market surveillance authority can require submission of the company's technical documents and the names of the previous and subsequent companies in the supply chain is another sensitive issue because these documents and information often fall under business confidentiality. The potential duty of disclosure reduces the incentive to make innovations because secrets can leak out allowing other companies to profit from them. As regards harmonisation legislation, the applicable specimen obligation in the "common framework" provides that companies only have to submit technical documentation to the authority based on a reasoned request. That is sufficient in this case too.

Indicating the manufacturer's name on products from countries outside the EU may, on the one hand, take business away from smaller importers who specialise in discovering good manufacturers in countries outside the EU. Their customers will then be able to contact the manufacturer directly. On the other hand, the product can be traced more easily by way of the additional details.

Legal Assessment

Legislative Competency

The Regulation is correctly based on the approximation of laws in the internal market (Art. 114 TFEU).

Subsidiarity

Unproblematic. Regulating consumer product safety can only take place effectively at EU level.

Proportionality

The legal form of a Regulation is proportionate to ensure a uniform level of safety.

Compatibility with EU Law in other Respects

The mandatory indication of the country of origin constitutes interference with entrepreneurial freedom (Art. 16 Charter of Fundamental Rights of the EU) because it gives rise to more costs. **The interference is not reasonable and therefore not justified because it does not ultimately assist with traceability.** Details of the name and address of the manufacturer or importer already allow for sufficient traceability. In addition, the indication of the country of origin based on the "last, substantial, economically justified" processing may mislead consumers because they expect that "all substantial manufacturing stages" have taken place in the indicated country (cf. Düsseldorf Regional Appeal Court I-20 U 110/10).

The fact that the Commission is able to use delegated acts to impose a "system of traceability" for products which potentially pose a "serious" risk to health and safety **gives cause for concern**. Delegated acts are only permitted to supplement or amend certain non-essential elements of the legislative act (Art. 290 TFEU). **The decision as to which products or product categories are to be covered by the "system of traceability"** is essential and **must** therefore **remain reserved for the legislator**.

Impact on German Law

The German Product Safety Regulation (Produktsicherheitsgesetz, ProdSG) must be adapted.

Conclusion

The simplification of legislation increases legal certainty. Mandatory indication of the country of origin is not reasonable for the traceability of a product. In fact it leads to higher consumer prices. Setting up a "system of traceability" provides no added value because there are hardly any situations in which such a system could be applied. The products or product categories to be covered by it, at least, should not be determined by the Commission by way of delegated acts but only by the legislator.