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**Single Market Policy, Mutual Recognition and Surveillance**

### **POLICY DOCUMENT OF THE EXPERT GROUP ON THE INTERNAL MARKET OF PRODUCTS – MARKET SURVEILLANCE AND CONFORMITY ASSESSMENT POLICY (IMP-MSG)**

<b>Title:</b>	Cross-border cooperation		
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<b>Abstract:</b>			
<p>The document lays down the basic principles and procedures for the application of the mutual assistance procedure of Regulation (EC) No 765/2008 discussed and endorsed by Member States in the Expert Group on Internal Market of Products – Market Surveillance and Conformity Assessment Policy (IMP-MSG).</p> <p>The current revision takes into account the comments sent by Member States and ADKO Chairs on the previous version circulated in June 2015. In particular, this version of the document:</p> <ul style="list-style-type: none"><li>- distinguishes clearly between the specific form of cross-border cooperation based on Article 24 of Regulation (EC) No 765/2008 (i.e. mutual assistance) and other forms of cross-border cooperation (notably the approach of targeting the economic operator at the top of the supply chain to seek corrective action potentially for the whole Single Market as presented in this paper and the need for follow up to measures adopted by the authority of another Member State based on model Article R31 of Decision No 768/2008/EC);</li><li>- makes explicit that, while market surveillance authorities can and should contact foreign economic operators, nothing prevents the authorities of the two countries involved to actually agree among themselves on the allocation of the case to the authority of the country where the businesses are located;</li><li>- simplifies the last part of the procedure;</li><li>- addresses the comments discussed at the IMP-MSG meeting on 1 February 2016.</li></ul>			
<b>Keywords:</b>	Cooperation and mutual assistance among Member States; procedure for dealing with products presenting a risk; RAPEX and safeguard clause notifications		
<b>References:</b>	Article 24 of Regulation (EC) No 765/2008; Model Article R31 of Decision No 768/2008/EC		

## 1. INTRODUCTION

In the context of IMP-ICSMS discussions, the need emerged to clarify under which conditions market surveillance authorities can use the 'baton passing' functionality. The Commission believes that the question should be viewed from the broader policy perspective concerning the responsibilities of market surveillance authorities for cross-border cooperation. The relevant questions are:

- In which circumstances is cross-border cooperation needed?
- According to which principles should cross-border cooperation take place?

The current document attempts to answer these questions based on:

- the market surveillance guides developed by the Machinery and Pressure Equipment ADCOs and the reflections carried out within the R&TTE and EMC ADCOs<sup>1</sup>;
- the debates that took place on the Commission's proposal for a Market Surveillance Regulation<sup>2</sup> (notably Articles 9 and 23 of the proposal).

## 2. ESTABLISHING A MODEL FOR CROSS-BORDER COOPERATION UNDER THE CURRENT RULES

### 2.1. In which circumstances is cross-border cooperation needed?

The purpose of cross-border cooperation is to make sure that EU product legislation can be effectively enforced across the Single Market, where goods can move freely from one country to another, despite the fact that the enforcement powers of individual authorities are limited by national boundaries.

The need for cross-border cooperation among authorities across the EU can arise for virtually all products falling within the scope of EU harmonisation legislation, including goods supplied on-line.

The typical case where cross-border cooperation may be needed is when the market surveillance authority of country A (MSA A) finds a non-compliant product made available by local distributor(s), but where the economic operator responsible for product conformity (i.e. EU importer or manufacturer) is based in country B. The **assistance** of the authority in country B (MSA B) is necessary to obtain information needed to complete the compliance evaluation carried out by the authority in country A (e.g.; when the economic operator does not reply to MSA A's request for documentation or when MSA A has difficulties in finding the contacts of the relevant economic operator). The legal basis for this type of mutual assistance is set out in Article 24 of Regulation (EC) 765/2008.

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<sup>1</sup>See EMC and RTTE ADCOs' document "Follow up procedure for non-compliant products from another MS" of 7 March 2014 and RTTE ADCO's document "Contribution from ADCO RTTE on the function 'pass the baton' in ICSMS" of 15 July 2014.

<sup>2</sup> COM(2013)75 final.

A further form of cross-border cooperation can be envisaged when authorities discuss corrective action with businesses. Here there is an increasing need for surveillance authorities to seek '**cross-border voluntary corrective action**' from economic operators, i.e. voluntary measures aiming at correcting the non-compliance throughout the Single Market<sup>3</sup>. When the economic operator accepts to take corrective action, the competent authorities of each Member State will nevertheless need to verify that this has actually taken place on their territory.

Moreover, the procedure set out in Article R31 of Decision 768/2008 (and corresponding provisions included in 'aligned' legislation) already provides for cooperation between authorities in the Member States in so far as they are required to **follow up compulsory restrictive measures adopted** by MSA A to impose restrictive measures in their respective national territories. This further form of cross-border cooperation enables the enforcement of the initial measures across the Single Market. Follow up measures by the authority located in the same country of the economic operator (MSA B) will be particularly important in this regard.

Joint actions also constitute a form of cross-border cooperation, however they are not specifically addressed in this paper.

## **2.2. According to which principles and procedures should cross-border cooperation take place?**

### *2.2.1. Proposed general principles:*

- **Effective action to deal with non-compliance.** The market surveillance authority of country A (MSA A) is normally expected to address the (possible) non-compliance identified to the fullest possible extent within the limits of its powers. For this reason:
  - a. In order to tackle the non-compliance at its roots, action should be directed to the top of the distribution chain in country A and in the rest of the EU. In other words, MSA A - in addition to contacting the national distributor - should in parallel also contact the EU importer or manufacturer even if located in country B<sup>4</sup>.
  - b. Cooperative corrective action should be sought by the relevant economic operator in order to address the non-compliance:
    - (i) on the national territory of the authority conducting the investigation and also very importantly

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<sup>3</sup> Article 19(2) of Regulation No (EC) 765/2008 sets out that market surveillance authorities shall cooperate with economic operators regarding actions to reduce risks caused by products made available by those operators. Sectoral legislation aligned to model Articles R2(8), R4(7), R5(4) of Decision No 768/2008/EC contain a general obligation for the relevant economic operators to take corrective measures to bring products into conformity when they consider or have reasons to believe that a product is not in conformity with applicable Union harmonisation legislation. Furthermore, according to sectoral legislation aligned to model Article R31 of the same decision the economic operator shall ensure that all appropriate corrective action is taken in respect of all products concerned that it has made available on the market throughout the Union..

<sup>4</sup> Article 19(3) of Regulation No (EC) 765/2008 specifically sets out the obligation to contact the manufacturer located in another Member States.

(ii) on the rest of the EU market<sup>5</sup>.

- **Information exchange between authorities.** MSA A is expected to inform the market surveillance authority of country B (MSA B) as early as possible to make sure the latter is aware of the issues identified for products made available by the economic operator located in country B. Early information will facilitate assistance should the need arise at a later stage. The information would also allow MSA B to signal its willingness to take up the case instead of MSA A, if both authorities agree that this is appropriate.
- **Use of ICSMS.** Communication of information related to product compliance between authorities should be done via ICSMS to avoid duplication of effort and prevent information loss or improper disclosure. Where there is an ICSMS entry (which should include copies of relevant letters and product documents), such communication can simply be achieved by notifying MSA B of the relevant ICSMS Product Information Nr. It is then crucial to ensure that the relevant contacts in ICSMS are up-to-date.
- **Responsibility for proceedings.** When MSA A requests the assistance of MSA B to obtain information necessary to complete its investigation, it keeps responsibility for proceedings, unless both authorities clearly agree among themselves to transfer such responsibility. Only in this latter case should the 'baton passing' functionality be used.
- **Type of assistance.** When mutual assistance is requested, this should relate to tasks that MSA A cannot objectively fulfil due to lack of enforcement powers, unless otherwise agreed by the relevant authorities. MSA B is then expected to provide assistance. However, authorities should agree on what assistance (e.g. supply of information or documentation, carrying out investigations etc.), and how and when it will be provided in order to fulfil the requirements of MSA's proceedings.

Where there is a disagreement on the approach between MSAs, they could informally seek the advice of the ADCO (e.g. at meetings or simply via-e-mail). If appropriate, for example where the disagreement relates to the interpretation of EU legislation, the Commission should be informed and could provide advice.

- **Language during assistance:** In the case of mutual assistance requests, authorities in different Member States are expected to use a common language or agree on the use of a language that could be easily understood by each other. If no agreement can be reached, the solution set out in Article 12(4) of Regulation (EC) No 2006/2004 on Consumers Protection Cooperation should be used ("*If no agreement can be reached, requests shall be communicated in the official language(s) of the Member State of the applicant authority and responses in the official language(s) of the Member State of the requested authority*").

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<sup>5</sup> See previous footnote 3. The idea is that authorities aim at the resolution of the issue arising in the Single Market, although in practice it can happen that only part of the EU market is likely to be concerned by the non-compliance.

- **Measures at national level pending the assistance requested:** Pending MSA B's intervention, MSA A is not prevented from taking any necessary preliminary action against economic operators on its national territory.

### 2.2.2. Proposed procedure<sup>6</sup>:

#### **Case 1: MSA A needs the assistance of MSA B to complete the compliance evaluation<sup>7</sup> or to contact the economic operator<sup>8</sup>:**

1. MSA A requests the assistance of MSA B. No 'baton passing' occurs in ICSMS.
2. The MSAs discuss and agree about the type of assistance to be provided before action is taken.
3. MSA B provides the assistance agreed between the authorities.
4. MSA A completes the investigation on the basis of the input provided by MSA B. The procedure continues as described below in Case 2.

#### **Case 2: MSA A has already completed the compliance evaluation and contacts the foreign economic operator:**

5. MSA A contacts the economic operator responsible for the products (e.g. manufacturer/EU importer) based in country B to request a response to the non-compliance, as well as corrective action for the EU market as a whole.
6. MSA A informs MSA B by means of ICSMS of the non-compliance identified and of the request for voluntary corrective action to the EU importer/manufacturer based in country B. No 'baton passing' occurs in ICSMS.

*Note 1: Nothing prevents MSA A to informally invite MSA B to take up the case if it believes it can be held more efficiently by MSA B. Only if both authorities agree that allocating the case to MSA B is preferable the 'baton passing' occurs in ICSMS.*

*Note 2: MSA B may also spontaneously signal (within a delay of 10 working days) its willingness to handle the case. Only if both authorities agree that allocating the case to MSA B is preferable the 'baton passing' occurs in ICSMS. On the contrary, the absence of an answer by MSA B is to be considered as a tacit agreement that MSA B will not interfere, as parallel proceedings by the two MSAs should be avoided.*

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<sup>6</sup> The procedure focuses on the cross-border aspects and does not aim at providing a full overview of all relevant market surveillance steps, such as hearing of economic operators, etc.

<sup>7</sup> E.g. MSA A contacts the economic operator (e.g. manufacturer/EU importer) based in country B and requests the information needed but the economic operator does not provide the information or an inspection of the manufacturer's premises is necessary.

<sup>8</sup> E.g. MSA A has difficulties to identify the right address of the economic operator.

7. [When MSA A keeps responsibility for the proceedings:] two alternatives are possible:

7.1. If the economic operator answers and agrees to undertake *voluntary corrective action*, MSA A should inform all other Member States via ICSMS about the measures to be taken by the economic operator in order for each national authority to verify their implementation.

MSA A will also notify via GRAS-RAPEX IT application<sup>9</sup> voluntary measures for products presenting a serious risk (the planned link between ICSMS and GRAS-RAPEX will facilitate this in future)<sup>10</sup>.

In this case the procedure stops here.

7.2. If the manufacturer/importer does not answer MSA A or does not take appropriate corrective action, then MSA A will take *compulsory measures* concerning the products made available on its national territory regardless of whether the economic operator located in country B<sup>11</sup> and will then proceed to step 8. MSA A maintains the responsibility for the proceedings. No 'baton passing' occurs in ICSMS.

8. MSA A notifies the measures to the Commission and the other Member States for the purposes of the safeguard clause and RAPEX information exchange (the use of ICSMS for safeguard clause procedures and the planned link with GRAS-RAPEX will facilitate this in future).

9. If no objection is raised or if, after examining the measure, the Commission considers it is justified:

- MSA B contacts the manufacturer/EU importer and requests corrective action in relation to all relevant products. MSA B then makes a brief comment on any existing ICSMS record for this product regarding measures to be taken or any other relevant information.
- All other Member States verify in their respective national territories that corrective action has actually been taken and, if not, take additional compulsory measures against the manufacturer/EU importer concerning their countries.<sup>12</sup> All MSAs should make a note

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<sup>9</sup> General Rapid Alert System for RAPEX notification.

<sup>10</sup> It can happen that the economic operator uses the Business Application to inform all concerned markets surveillance authorities about voluntary action taken. In these situations, the RAPEX - Operational Guidelines (business level) suggest that in order to avoid unnecessary duplication, a RAPEX notification should be submitted only where the products in question are or have been marketed or otherwise supplied to consumers and by the Member State where the notifying economic operator is established ('Main Member State'). In this case, it is recommended that MSA A and MSA B discuss and agree among themselves who should submit the related RAPEX notification.

<sup>11</sup> This is without prejudice to the possibility of adopting in parallel also measures vis-à-vis distributors based in its own country in order to allow sanctioning businesses physically located within their territory.

<sup>12</sup> They may also need to address the local distributors to complement corrective action in their territory.

in any existing ICSMS record for the product, to update it with information about any local measures taken or any other relevant information.

### **3. NEXT STEPS**

This model will be reflected in the "Horizontal Good Practices on Market Surveillance" guidelines under preparation. The Task Force that is drafting the guidelines will be asked to develop *ad hoc* templates for requesting assistance with a view to facilitate the use of this procedure and address language issues.