

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT
ECONOMIC AND SCIENTIFIC POLICY **A**



Economic and Monetary Affairs	
Employment and Social Affairs	
Environment, Public Health and Food Safety	
Industry, Research and Energy	
Internal Market and Consumer Protection	

Market Surveillance in relation to type approval requirements

IMCO



DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY

INTERNAL MARKET AND CONSUMER PROTECTION

Market surveillance in relation to type approval requirements

BRIEFING NOTE

Abstract

The objective of this briefing note on 'Market Surveillance In Relation To Type Approval Requirements' is to answer two questions on whether market surveillance should be organised in a single overall system and how best to introduce market surveillance in L and T vehicles sectors in order to provide background information and advice for the members of the IMCO Committee from the European Parliament on priority measures and actions to be undertaken in these fields.

IP/A/IMCO/NT/2011-10

June 2011

PE 464.420

EN

This document was requested by the European Parliament's Committee on Internal Market and Consumer Protection.

AUTHOR

Mr Jacques Pelkmans
Ms Anabela Correia de Brito
Centre for European Policy Studies
1 Place du Congr e
1000 Brussels

RESPONSIBLE ADMINISTRATOR

Ms Helle Carlsen Nielsen
Policy Department A - Economic and Scientific Policy
European Parliament
B-1047 Brussels
E-mail: Poldep-Economy-Science@europarl.europa.eu

LINGUISTIC VERSIONS

Original: EN
Executive summary: DE/FR

ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its newsletter please write to: Poldep-Economy-Science@europarl.europa.eu

Manuscript completed in June 2011.
Brussels,   European Parliament, 2011.

This document is available on the Internet at:
<http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorized, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

LIST OF ABBREVIATIONS	5
EXECUTIVE SUMMARY	6
1. INTRODUCTION.....	9
1.1. Objective of the briefing note	9
1.2. Structure of the note	11
1.3. Selection of the Member States	12
2. MARKET SURVEILLANCE IN GENERAL.....	13
2.1. Overview of the EU Market Surveillance System	13
2.2. A Single Market Surveillance System.....	14
2.3. The idea of PROSAFE as a platform to ensure a unified market surveillance system	16
2.4. Coherence: the best fit between the New Legislative Framework, the General Product Safety Directive and the L and T vehicles draft proposal regulations	19
3. L-VEHICLES TYPE APPROVAL SYSTEM.....	23
3.1. The Current Legislative Framework	23
3.2. Overview of the current situation of market surveillance in relation to type approval for L-Vehicles, systems, components, or technical units (in selected Member States)	24
3.3. The draft Regulation on the approval and market surveillance of L-vehicles (COM(2010)542 Final)	26
3.3.1. The obligation to establish type approval authorities and to notify them to the European Commission and appoint market surveillance authorities as well as to notify those to the European Commission and the definition of the obligations of all economic agents.....	27
3.3.2. The obligation to organise and carry out market surveillance and controls	29
3.3.3. The safeguard clauses in Articles 48-55 of the proposed Regulation COM (2010) 542 Final	31
3.3.4. Reducing the complexity associated with the type-approval process.....	31
3.3.5. How to improve market surveillance systems and to promote an efficient cooperation between the different authorities involved in the process of type-approval at national and European level?	32
3.4. Conclusions.....	33
4. T-VEHICLES TYPE APPROVAL SYSTEM.....	35
4.1. The Current Legislative Framework	35
4.2. Overview of the current situation on market surveillance in relation to type approval for T-Vehicles, systems, components, or technical units (on the selected Member States)	35
4.3. The draft Regulation on the approval of T-vehicles (COM(2010) 0395 final)	36

- 4.3.1. The obligation to establish type approval authorities and to notify them to the European Commission and to appoint market surveillance authorities, to organise and carry out market surveillance and controls 37
- 4.3.2. The safeguard clauses in Articles 36-41 of the proposed COM(2010) 0395 final 39
- 4.3.3. Reduce the complexity associated with the type-approval process 40
- 4.3.4. How to improve market surveillance systems and to promote an efficient cooperation between the different authorities involved in the process of type-approval? 40
- 4.4. Repercussions of Article 63 of the proposed regulation (2010) 395 final, on the approval of agricultural or forestry vehicles..... 41**
- 4.5. Conclusions..... 43**
- REFERENCES..... 45**
- ANNEX I: LIST OF QUESTIONS 49**
- ANNEX II: OVERVIEW OF MEMBER STATES CONSULTED IN THE BRIEFING NOTE: 51**
- ANNEX III: OVERVIEW OF INTERVIEWS 52**

LIST OF ABBREVIATIONS

ACEM	The Motorcycles Industry in Europe
B2B	Business to Business
B2C	Business to Consumers
BEUC	The European Consumers' Organization
CEMA	European Committee of Manufactures of Agricultural Machinery
COP	Conformity of Production
DFT	The U.K. Department for Transport
EEA	European Economic Area
EMARS	Enhancing Market Surveillance Through Best Practice
EP	European Parliament
EU	European Union
FOPS	Falling Objects Protection Systems
GPSD	General Product Safety Directive
IMCO	Committee on Internal Market and Consumer Protection
ITUI	European Trade Institute
KBA	The German Federal Motor Transport Authority
NLF	New Legislative Framework
OPS	Protection of Driver Against Penetrating Objects
PROSAFE	Product Safety Enforcement Forum of Europe
RAPEX	EU Rapid Alert System for All Dangerous Consumer Products
RDW	National Service for Road Transport
REACH	Registration, Evaluation, Authorization and Restriction of Chemicals
ROPS	Roll-over Protection System
UNECE	United Nation Economic Commission for Europe
VDMA	The Agricultural Machinery Association
VWA	Food and Goods Safety Authority

EXECUTIVE SUMMARY

The European Union (EU) wants goods in the internal market to be “safe”. Nowadays, there are three EU regimes ensuring this: the General Product Safety Directive (GPSD) for (usually) unregulated consumer goods, the New Legislative Framework (NLF) (having arisen from the 2008 Goods Package, nowadays still mainly applicable to New Approach goods) and very specific sectoral EU regulation such as the type-approval systems for motorcycles (L vehicles) and tractors and forestry vehicles (T vehicles).

The Commission proposes draft regulations on type approval and market surveillance of motorcycles (L vehicles) and tractors (T vehicles). Given that type approval is based on a philosophy distinct from the idea of market surveillance in consumer goods (GPSD) and for New Approach goods (in the NLF, Regulation 765/2008/EC), the EP will have to address two principal questions: (a) can market surveillance be organised in a single overall system?; (b) how best to introduce market surveillance in L and T vehicles?

- Having three regimes seems overly complex, and even more so when there are potential overlaps. Hence, the demand for greater alignment between the three and ideas about a single market surveillance system. The European Parliament has expressed its interest in a single regime in its Resolution of 8 March 2011 on “**General product safety and market surveillance**”. Although greater alignment between the GPSD and the NLF, and thereby eventually covering specific sectoral regimes as well, is supported, for many stakeholders to have a single regime as such is not so important as to improve the effectiveness of market surveillance. For national authorities this depends principally on more resources and better coordination between Member States. For consumers, it hinges on more specific obligations in GPSD, better traceability and information as well as better enforcement of consumer protection. Market players in the L vehicles sector are not against a single regime as long as no additional burdens arise and pro-active policies are pursued. Only the T vehicles sector sees little need as they deal with non-consumer goods and their regime works well.
- Independently of what will be the political choice, one single regime for market surveillance or an alignment between the GPDS and the NLF, all the interviews agree that a better coordination at European level is needed. That could be done, for instance, by developing PROSAFE into a coordination platform at EU level. However, a solution has to be found to address the two main problems faced by PROSAFE currently. Indeed, it is necessary to change the statute of its members such that they could bind their countries and to improve the way of financing PROSAFE activities.
- A non-trivial problem in seeking coherence between what are now three EU safety of goods regimes is the distinct philosophies between the NLF and the specific sectoral regimes for e.g. L and T vehicles. The type approval system is very intrusive, goes into elaborate detail due to numerous technical specifications and includes a certified quality management system for the production sites which is sometimes even audited by national authorities themselves. These ex ante controls and tests are complemented by 'rectification' obligations for the manufacturer once a case of serious risk is detected in the market. Broadly, this has worked well so far. The high costs and considerable efforts involved and the knowledge that type approval works well, makes it difficult for industry to appreciate the gains from having market surveillance on top of it. The weakness is imports from small players or fly-by-night firms and non-traditional distribution channels (including on-line) as such approaches might simply avoid the type approval routes. There may also be alternatives to market surveillance such as periodical technical inspections, customary in the car sector.

- Since about a decade ago or so, the costly and elaborate type approval system in L vehicles is no longer as watertight as it used to be. Empirical evidence from EU based manufacturers as well as from national type approval authorities shows that a worrying and increasing number of motorcycles, scooters and mopeds imported from China are not compliant. Typically the non-compliant products are unbranded, hence, without any concern of losing reputation. However, it also happens that hobbyist European consumers change type approved products into variants which would no longer pass the approval route. In the light of these developments, both authorities and bonafide manufacturers are demanding more pro-active market surveillance as referred to in the NLF.
- The draft Regulation on L vehicles provides for enhanced market surveillance, besides drastic simplification (from 15 directives to a single Regulation) and some other objectives (e.g. on emissions reduction). The reactive part of market surveillance can only be effective if the authorities can be easily found and communicated with. The authors of the Briefing Note have experienced that this is not always the case. Some national type approval authorities were not even sure what authority is competent for surveillance and /or how to reach them. The list on the Commission website needs to be more consumer friendly. The crux of arriving at an effective surveillance is found both in a smooth reporting and complaint system for 'reactive' policies and, at the same time, resources and resolve for 'pro-active' market surveillance via tests of samples taken from the market. Resources could perhaps be saved by intensive cooperation between national authorities from different Member States. Also, the collaboration with customs authorities has to be good and permanent.
- The introduction of safeguard clauses on the draft Regulation COM (2010) 542 final are supported but not always wholeheartedly. One reason is found in Article 52 which is seen as insufficiently 'pro-active'. What the L vehicles producers want to see (for safety, if not in order to arrive at a level playing field) is an active programme of enforcement, such that the detection rate is a positive function of the endeavours of the authorities. Another reason is the fear that safeguard clauses may result in counterproductive effects: type approved products (hence, with free movement) might run into problems with market surveillance authorities in other Member States, thereby denying free movement. Others point out, however, that much greater precision (at EU level) about 'pro-active' market surveillance would be desirable. It seems that further debate and clarification is needed here.
- A conspicuous difference between the L and T vehicles proposals on market surveillance is that, in L vehicles, there is an articulate demand for more and 'pro-active' market surveillance, whereas in T vehicles that is not the case. Stakeholders, whether authorities or industry, see little or no evidence suggesting a need to introduce market surveillance in the sector. Nonetheless, it ought to be noted that there is no tradition whatsoever of open reporting of problematic cases, so any evidence is hard to come by. The T vehicles sector differs, however, from the market for L vehicles in that the latter witnesses strongly increasing imports, whereas the former market is dominated by European companies or well-established daughters of US companies. This greatly helps the type approval system to operate effectively.

- Market surveillance provisions are almost certainly going to be incorporated in the second version of the draft Regulation for T-vehicles. Even when national authorities do not oppose such provisions, they find it more important that more resources are given to them so that surveillance can be intensified in the market. The one authority which is sufficiently endowed (KBA, Germany) is opposed to market surveillance obligations as proposed. The T vehicles sector is equally opposed. The roots of the lack of enthusiasm about (if not opposition to) provisions of market surveillance is to be found in the very different philosophies of the type approval approach (ex ante, but highly intrusive, and with 'rectification' options ex post and good contacts directly with manufacturers) and the NLF. Some other authorities emphasise that it is more fruitful to develop common technical guidelines on the interpretation of the requirements.
- The safeguard clauses for T vehicles do not follow exactly those for L vehicles; in the former, it is the type approval authority which retains more decision making power, in the latter, this power resides with the surveillance authority, unless delegated. One might consider further alignment between the two proposals. Other aspects are very similar to L vehicles, and so are the objections of some (e.g. about resources, the fear for greater burdens, etc.). Some national authorities favor the reinforcement of the cooperation between authorities at the EU level. Finally, the confusing link between T vehicles legislation and the machinery directive, regarding health and safety on the workplace (the farm, for instance), is going to be severed.

1. INTRODUCTION

'The Commission proposes draft regulations on type approval and market surveillance of motorcycles (L vehicles) and tractors (T vehicles). Given that type approval is based on a philosophy distinct from the idea of market surveillance in consumer goods (GPSD) and for New Approach goods (in the New Legislative Framework (NLF), Reg. 765/2008), the EP has addressed two principal questions: (a) can market surveillance be organised in a single overall system? ; (b) how best to introduce market surveillance in L and T vehicles? Building on those two questions, the structure and approach of the Briefing Note is set out'

1.1. Objective of the briefing note

This The European Union (EU) wants goods in the internal market to be “safe”. Nowadays, there are three systems ensuring this. First, for consumer goods which are not regulated at the EU level, the General Product Safety Directive 2001/95/EC¹ (GPSD) introduced a market surveillance system, including the EU Rapid Alert System for Dangerous Products (RAPEX) alert reporting in case of 'serious risk'. This system operates entirely ex-post, that is, goods (as they are not regulated at EU level) can be brought to the market and, only when serious risk is found, goods are recalled or withdrawn/forbidden. Second, for goods under the New Approach, which are regulated in terms of safety (and other general interest) objectives but with details left to European standards (allowing room for innovation and variety), the New Legislative Framework² (NLF or, 2008 Goods Package) has elaborated obligations for market surveillance once the goods are in the market, besides greater precision and coherence with respect to testing, certification and European accreditation before the goods are brought to consumers and customers. Third, under the Old Approach, typically for goods regarded as of potentially high risk, elaborate requirements and strict testing instructions are incorporated in the EU legislation.

¹ See Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. The European Commission is in the process of reviewing the GPSD. See also Report from the Commission to the European Parliament and to the Council on implementation of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety, (COM(2008)0905); Commission working Document entitled “Revision of the General Product Safety Directive: Summary envisaged action”, DG Health and Consumers Protection, 18 May 2010; Roadmap entitled “Review of Directive 2010/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety GPSD”, DG Health and Consumers Protection, 25 March 2010; Commission Working Paper on the relationship between the General Products Safety Directive 2001/95/EC and the market surveillance provisions of Regulation (EC) No 765/2008, DG Health and Consumers, 2 March 2010; Commission working Document entitled “Revision of the General Product Safety Directive: Identification of the key Issues”, DG Health and Consumer Protection, 15 September 2009 and the European Parliament Resolution on the Revision of the General Product Safety Directive and market surveillance, from 8 March 2011 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0076+0+DOC+XML+VO//EN&language=EN>

² See Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008, laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State, Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008, setting up the requirements for accreditation and market surveillance relating to the marketing products and Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008, on a common framework for the marketing of products.

REACH³ is an example of such elaborate systems of safety filters. Another large group of goods under the Old Approach concerns vehicles. The EU tradition to date in vehicles is based on detailed and strict type approval, that is, only with a certificate of approval can companies enter the market. Note that the type approval is directly linked with a quality management system (i.e. capable of ensuring consistent quality and with traceability) of production via a Conformity of Production document from the Member State authorities.

The system applies for cars, trucks, tractors and motorcycles. For cars and trucks, it is complemented by “periodical technical inspections” after a grace period, usually an initial three years. For the other two categories, Member States decide on this (and differences do indeed exist).

However, Decision 768/2008/EC⁴ of the New Legislative Framework envisages market surveillance for all goods, in other words, once goods have been sold to other businesses or consumers in the market. This goal raises two essential questions:

- Should this market surveillance be organised more coherently, not via the GPSD 2001/95/EC⁵ for some goods and via various regulations or directives based on Decision 768/2008/EC⁶ for other goods (as has been applied already in Reg. 765/2008/EC⁷ for New Approach goods) but in a single system?
- How best to introduce market surveillance in vehicles, given the different philosophy of type approval which has proven its value over decades?

The European Parliament is now confronted with these two questions following the Commission's draft Regulations on tractors⁸ and motorcycles⁹.

The **objective** of this Briefing Note for the European Parliament Internal Market and Consumer Protection Committee (IMCO) is to provide background information for answering these two essential questions. Since the draft of the revision of the GPSD is not yet available and the two draft Regulations on tractors and motorcycles are far in the legislative process of the European Parliament (EP) and Council, the emphasis in the Briefing Note is on the proposed regulations for vehicles. This is also of greater immediate importance because, in the vehicles sector, there never was a tradition of market surveillance, given the far-reaching endeavours under type- approval. Therefore, a number of practical queries on current practices in tractors and motorcycles will have to be addressed. This boils down to a much larger number of questions, all listed in Annex I¹⁰. It is hoped that addressing all these sub-questions will be helpful for MEPs in their legislative work with respect to the two draft Regulations and, later, for considering the revision of the GPSD.

³ See Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006, Concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

⁴ See supra note 2.

⁵ See supra note 1.

⁶ See supra note 2.

⁷ See supra note 2.

⁸ See proposed Regulation COM (2010) 395 final of the European Parliament and of the Council on the approval of agricultural or forestry vehicles.

⁹ See proposed Regulation COM (2010) 542 final of the European Parliament and of the Council on the approval and market surveillance of two – or three-wheel vehicles and quadricycles.

¹⁰ See Annex I.

1.2. Structure of the note

The Note is mainly focused on the analysis of the draft Regulations from a point of view of market surveillance. Indeed, one of the novelties of the draft Regulations on type approval of motorcycles¹¹ (L vehicles, for short) and tractors or forestry vehicles¹² (T vehicles, for short) is the inclusion of market surveillance provisions. These provisions were incorporated by the Commission in the case of L vehicles and will probably be incorporated in a revised T vehicles draft. The legislative efforts call for an analysis of the current situation under the current framework directives on T and L vehicles. We try to examine the difficulties having been raised with respect to the current functioning of the market surveillance system. We attempt to assess whether or not the current system is effective, in the light of its distinct philosophy and practices driven by type approval traditions. We ask the questions whether a more effective and efficient market surveillance is required and whether and how to promote better cooperation between the different parties inside EU countries as well as between them.

The relation between the market surveillance provisions included in the two proposals and the requirements in the “New Legislative Framework” package (Regulation 765/2008/EC¹³ and Decision 768/2008/EC¹⁴) will also be examined. A brief paragraph will mention the relation between the proposed Regulation COM(2010) 395 final¹⁵ and the Machinery Directive¹⁶, which has to do with health and safety on the workplace (here, the farm).

In view of the European Parliament Resolution of 8 March 2011 on the “revision of the General Product Safety Directive and market surveillance”¹⁷, where the possibility to create a single EU market surveillance system for goods, based on one legislative act covering both the GPSD and the Regulation 765/2008/EC¹⁸ is addressed, we offer some remarks as well. Finally, a paragraph is devoted to the conditions under which the Product Safety Enforcement Forum of Europe (PROSAFE) could serve as platform managed by the Commission for an extended coordination between Member States' market surveillance authorities for all goods.

The present note is structured along the following lines: after the present introductory chapter, chapter 2 discusses the option of a single market surveillance system for all products. It also describes the relationship between the L and T vehicles draft Regulations and the New Legislative Framework and the General Product Safety Directive. A sub-chapter is dedicated to examine the possibility to develop the Product Safety Enforcement Forum (PROSAFE) as a platform to ensure a unified market surveillance system. Chapter 3 deals with the market surveillance in relation to type approval requirements for L-vehicles. First, we examine the current situation under the current framework Directives, including the difficulties having been raised about the actual functioning of the market surveillance system.

¹¹ See supra note 9.

¹² See supra note 8.

¹³ See supra note 2.

¹⁴ See supra note 2.

¹⁵ See supra note 8.

¹⁶ See Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on Machinery and amending Directive 95/16/EC.

¹⁷ See supra note 1.

¹⁸ See supra note 2.

Secondly, we analyse the market surveillance provisions in the proposed Regulation COM (2010) 542 final¹⁹, including the relation between those provisions and the provisions of Decision 768/2008/EC²⁰ and Regulation 765/2008/EC²¹ as well as the measures that to be taken in the approval process of the proposed Regulation in order to improve market surveillance. Chapter 4 is dedicated to market surveillance in relation to type approval requirements for T-vehicles, including the relation between the market surveillance provisions in the proposed Regulation COM (2010) 395 final²² and the requirements in the New Legislative Framework, an overview of the current situation under the current framework directives and stakeholders' views on the proposed Regulation. As noted, we briefly discuss the relation between the proposed Regulation and the Machinery Directive.

1.3. Selection of the Member States

The Briefing Note was based up on data collection, research and analysis. In attempting to present the views of all economic agents and authorities involved on market surveillance and type approval for T and L category vehicles, interviews with key stakeholders, national authorities and the European institutions were held²³.

Ten Member States were selected according to different criteria, such as including data from the main national producers of motorcycles and tractors, covering large and small Member States and EU countries having important sea ports normally used as entry in the EU of goods coming from third countries. The objective was to provide an illustrative picture of the way market surveillance and type approval authorities are organized and how those EU countries carry out their activities of type approval and market surveillance relating to T and L category vehicles. However, we faced many difficulties not only to identify the competent authorities in some EU countries but also to get in contact with them. It proved outright difficult, in some cases, to obtain the collaboration of the national authorities in the relatively short time span of the work for this Briefing Note. As a result, we are not capable to provide an in-depth survey of facts as much as we would have liked on how market surveillance in relation to type approval requirements in T and L vehicles sector is actually carried out in these 10 EU Member States.

From the ten EU countries contacted, we are only able to include data related to the following four countries:

- Germany
- Netherlands
- Italy
- Spain²⁴

¹⁹ See *supra* note 9.

²⁰ See *supra* note 2.

²¹ See *supra* note 2.

²² See *supra* note 8.

²³ See annex III of the present note "Overview of Interviews".

²⁴ See Annex II: Overview of Member States consulted in the Study.

2. MARKET SURVEILLANCE IN GENERAL

'The EU is, understandably, seeking greater coherence in EU risk regulation, especially for goods safety and its market surveillance. Greater alignment of market surveillance obligations in the GPSD and the NLF would exemplify such coherence, possibly even in a single system. However, this would be a partial view if very specific sectoral approaches, such as in L and T vehicles would not be incorporated. Given the elaborate and costly type approval procedures for vehicles and some complementary procedures, once vehicles and components have been placed on the market, a regime of market surveillance should be designed carefully, with attention for detail, the costs and the additional benefits.'

2.1. Overview of the EU Market Surveillance System

Free movement of goods and the removal of technical barriers to trade are key elements of the EU's single market. In a single European market, goods should be able to cross borders without national reinspection or retesting.

The proper functioning of the EU's single market depends first on the vigilance of manufacturers in ensuring that products meet essential health and safety requirements and credible conformity assessment (via European standards, testing, certification and the EA accreditation of Notified Bodies and certification bodies). All this before the good enters the market. Second, once goods have been put in the market, it depends on the product monitoring performed by national authorities (helped by market participants and consumers). This monitoring, called "market surveillance", is essential for maintaining consumer and business confidence in the merits of EU regulation. If such enforcement is not consistent and effective, businesses are put at risk by low consumer confidence and/or the lack of a level-playing field, and consumers are put at risk by unsafe products.

Market surveillance has gradually been introduced and tightened in the EU. The logical beginning was made with the goods not regulated by the EU, hence, entering the market without any prior assessment. In those goods, monitoring is the only (relatively light, because reactive) intervention. This was accomplished in the General Product Safety Directive (Directive 92/59/EEC, revised and replaced by Directive 2001/95/EC²⁵, in force since 15 January 2004) for consumer products. The GPSD applies to products intended for or likely to be used by consumers. The principal rule of the GPSD is that manufactures and distributors may only place 'safe' consumer products on the market. In order to ensure that only safe products are put on the market, the directive contains provisions on market surveillance activities, which enforcement authorities must carry out. The directive is horizontal in nature as opposed to sectoral consumer product legislation, which only covers certain product types. In the absence of provisions on market surveillance and product safety in sectoral legislation, the provisions of the GPSD apply. The same applies in most cases when the GPSD offers further protection than provisions in existing sectoral legislation. The EU Rapid Alert System for all Dangerous Consumer Products (RAPEX) reporting system and safeguard clauses form the basis for removing unsafe goods from the markets or recalling them.

²⁵ See supra note 1.

On 9 July 2008 the European Parliament and the Council adopted the so called “New Legislative Framework”, the modernisation of the new approach for marketing of products, which is applicable to all sectors for which there is harmonised legislation, because market surveillance problems are common to all harmonised legislation. The major principles and rules for market surveillance are found in Regulation 765/2008/EC²⁶ and more precise and detailed procedural elements in the Decision 768/2008/EC²⁷.

The Regulation, containing rights and obligations for the Member States but also for economic operators, is directly applicable. Decision 768/2008/EC sets clear obligations for manufacturers, importers and distributors as well as rules for traceability of products and economic operators. Moreover, the Regulation creates, for the first time, clear obligations for national authorities to act in relation to non-conforming or dangerous products. If national authorities do not act, economic operators can go to court. It applies not only to products made in the EU, but also to imported ones entering the EU. The Regulation also obliges national authorities to have the appropriate resources and means (human and budgetary) to carry out controls. It covers both consumer and non consumer products for which there is harmonized legislation.

Member States must have the necessary authorities and ensure coordination between the different authorities with market surveillance responsibilities, including customs. Member States need to draw up, organise and carry out national market surveillance programmes, cooperate with other Member States in order to coordinate activities, to ensure common approaches to risk assessment, (so-called 'joint') programmes and priorities and to share resources. Of course, this process takes time.

The new legislative framework represents a great step further. At the same time, the EU regulatory landscape on product safety and market surveillance has become complex and confusing. Since the entry into force of the Regulation 765/2008/EC on 1 January 2010, products are subject to different regulatory regimes in the EU depending on whether or not they are consumer products or non-consumer products and if they are subject to specific EU “harmonized rules”.

The greatest confusion arises for consumer products that are subject to harmonized EU rules, which fall both under the GPSD and Regulation 765/2008/EC, as well as the specific provisions included in the specific regulations in place. To determine which provisions of each of these three sets of rules apply, a case-by-case analysis is necessary to determine which provision is “more specific” than the other. Indeed, according to the principle of *lex specialis*, the sectoral legislation applies in first place. But there are cases where the sectoral law is absent or the GPSD or/and the Regulation offer further protection than provisions in existing sectoral legislation. This creates legal uncertainty.

2.2. A Single Market Surveillance System

The European Commission is in the process of reviewing the GPSD. A report on the implementation of the GPSD was published by the Commission on January 2009, followed by a public consultation²⁸. A legislative proposal is anticipated for the second half of 2011.

²⁶ See supra note 2.

²⁷ See supra note 2.

²⁸ See supra note 1.

The main objectives of the review of the GPSD are:

- Its alignment with the provisions of the NLF;
- To achieve a better coordination and cooperation between market surveillance authorities;
- Simplification of the RAPEX notifications procedures in order to facilitate compliance by Member States in their notifications and follow up obligations;
- To ensure a level of playing field for business;
- To establish simpler and clearer rules for more effective market surveillance activities;
- Harmonisation of the safety evaluations among Member States and;
- The need to establish specific provisions on goods sold online.

One of the key objectives of the GPSD review is its alignment with the provision of the NLF in order to establish a coherent market surveillance regime. Unfortunately, this may well be a partial view. According to several stakeholders and the European Parliament in his resolution of 8 March 2011 on the revision of the General Product Safety Directive and Market Surveillance²⁹, it is the entire legal framework on safety and market surveillance that requires streamlining. More precisely, it has been suggested that the market surveillance provisions of the GPSD and the NLF should be consolidated within a single regulation, affecting all types of products, whether they are consumer or non consumer products or harmonized or non harmonized products.

In general, the representatives of the consumer organisations and of the L-vehicles industry as well as the national authorities contacted agree that the current legal framework on safety and market surveillance is complex and needs to be aligned in order to establish a more coherent market surveillance regime. For the European Consumer's Organization (BEUC) an alignment between the GPSD and the NLF is absolutely necessary, mainly with respect to the traceability of products through the supply chain, clarity of specifications of the obligations of the different economic agents and authorities involved in the process as well as the assurance that national authorities take effective actions to ensure that only safe products are placed on the market. They point out that comparing the GPSD with the NLF in those issues, the provisions in the NLF are much more specific than those in the GPSD and as consequence it is necessary to enact further alignment. On the question whether market surveillance provisions of the GPSD and the NLF be consolidated within a single regulation, the consumers representatives point out that what is really important, more than the question of having two or one piece(s) of legislation, is to guarantee the effectiveness of the legal framework of the New Approach and the GPSD. This will depend on the ability of the Commission and Member States to identify and recognize, timely problems associated with unsafe consumer products. Such problems can be identified only through a regular surveillance.

Furthermore, from the consumers point of view, it is necessary to ensure a more effective market surveillance system and that could be done by the strengthening of the European framework for market surveillance, the improvement of product traceability, wider access to information about dangerous products, the creation of an European complaints handling and reporting point and by the creation of effective enforcement mechanisms. Another concern of consumers and consumer organizations is the current loophole in the European legislation since services quality is not covered in European legislation.

²⁹ See supra note 1.

The representatives of the L sector industry are not against market surveillance provisions of the GPSD and the NLF being consolidated in a single regulation, as long as it does not lead to additional burdens on manufacturers, importers and distributors and effectively ensures a streamlining of the entire process. Specifically, effective and efficient market surveillance should be carried out by market surveillance national authorities, including that national authorities really take action once a shortcoming is discovered. Moreover, having one central point to deal with all the recall notifications is regarded as positive by the European motorcycles manufacturer's representatives.

Some of the representatives of the T sector industry, in contrast, maintain that no further measures concerning market surveillance are necessary, since market surveillance on T-vehicles is functioning well.

The national type approval and market surveillance authorities contacted, in general, consider that the market surveillance legislation is getting quite complex, because in some cases all the existent legal framework applies together. In such cases, it would be helpful to integrate the GPSD into a single act together with market surveillance provisions on the Regulation 765/2008/EC. However, type approval authorities of some countries, like Spain and Italy, underline that significantly increasing financial and human resources is, probably, more important than to reform the procedures in order to strengthen market surveillance. Some sources in the European Commission fully support the idea that the market surveillance provisions of the GPSD and the NLF be consolidated within a single regulation. Others sources in the Commission do not take a clear position on whether the way forward will consist in to have a single piece of legislation or an alignment between the GPSD and the NLF. However, all them agree that the current legal framework on safety and market surveillance is complex and needs to be aligned in order to establish a more coherent market surveillance regime.

2.3. The idea of PROSAFE as a platform to ensure a unified market surveillance system

The Product Safety Enforcement Forum of Europe (PROSAFE) was created in 1992 to assist the Member States market surveillance officers in their work. This non-profit organisation is established entirely by national enforcement officers through the Union, dealing with the safety of consumer products and promoting informal discussions between market surveillance officers in order to share and learn from each other's experience and to develop best practices.

PROSAFE developed the Enhancing Market Surveillance through Best Practice (EMARS) project that aims to ensure a basic level of expertise and practical experience in market surveillance organisation of the Member States within the EEA by establishing a more coordinated and well-established best practice technique strategy throughout the single market. Moreover, a "Handbook to Best Practice in Market Surveillance" and a "Handbook Risk Assessment" were elaborated. EMARS I was run between 2006 and 2008 and followed by EMARS II which seeks to develop a strategy for the further enhancement of market surveillance in Europe³⁰.

³⁰ For more information, please see <http://www.emars.eu/>

The challenges, identified by PROSAFE, facing the market surveillance community in the short to medium term include overseas manufacturing, small operators, complexity of regulation and standards, effectiveness of corrective actions and adequate resources for surveillance. That strategy will be discussed in the PROSAFE EMARS II Strategy Workshop to be held on 15 June 2011.

In addition to the promotion of market surveillance amongst Member States and other countries in the European Economic Area (EEA), significant resources of PROSAFE have also been directed towards the cooperation between market surveillance authorities and customs authorities. PROSAFE is currently participating in the ongoing work of DG TAXUD dealing with guidelines for cooperation between markets surveillance authorities and customs authorities.

With the adoption of the NLF, market surveillance for products was given a new impetus with strengthened requirements for the Member States and enhanced cooperation between authorities. That makes it increasingly necessary to adopt a truly coordinated approach to market surveillance, by intensified cooperation between the Member States' market surveillance authorities.

Furthermore, in case the EU would move towards a single EU market surveillance regime or even merely an alignment between the GPSD and Regulation 765/2008/EC, the necessity to have a platform for an extended coordination between Member States authorities responsible for the market surveillance would undoubtedly increase. What would be the conditions under which PROSAFE could serve as platform for extended coordination between national market surveillance authorities for all products?

In general, all the interviewees agree that better coordination between national market surveillance authorities is necessary in order to not only promote coordination of programmers, joint visits, common training, assessing quality management systems and exchange of best practices, but also to accomplish better allocation and use of efforts and resources. Consumer representatives as well as the representatives of the L sector industry support the idea of a coordination platform at European level. The positions of stakeholders during the GPSD revision consultation are also consistent with this position³¹. The need for a central coordination body at European level is thus widely acknowledged. The representatives of the T sector industry, however, consider that PROSAFE current structure is more geared to consumer products than to products used predominantly by professionals such as tractors and forestry vehicles. One interviewee suggested that PROSAFE could also have the function of giving technical advice to the Commission.

Everyone agrees that, for PROSAFE to become an extended platform of coordination between Member States, the current structure and financing mode of PROSAFE should be reviewed. Broadly, there is a positive assessment about PROSAFE work. However, today PROSAFE action is restricted by its informal structure and limited resources. Indeed, representatives' officers on PROSAFE are self appointed by their Member States, but without any powers to bind their respective Member States. To effectively enhance the role of PROSAFE and turning it into an effective platform of coordination between Member States, it will be indispensable for PROSAFE representatives to have sufficient powers to engage their respective States. Another problem that must be solved is the way of financing PROSAFE and its lack of financial resources.

³¹ See supra note 1.

Indeed, the limited degree of participation in joint actions promoted by PROSAFE is a consequence of the fact that many market surveillance authorities do not possess enough human and financial resources, forcing PROSAFE and participating countries to cover all the start-up costs of joint actions (as the slow and cumbersome procedures of the Commission may take up to six months).

Moreover, there is always the risk that the Commission may not approve the joint action and in that case the resources used for the preparation of the application cannot be reimbursed³².

One of the interviewees proposed that one way to upgrade PROSAFE and to solve its financial problems could be achieved by using the formula described in the Regulation 765/2008/EC Articles 31 and following. These provisions provide the possibility of the European Union financing bodies pursuing the aim of the general European interest³³. According to Article 32 paragraph 1³⁴ the EU may finance the following activities in connection with the application of the mentioned regulation:

- Guidelines in the fields of accreditation, notification to the Commission of conformity assessment bodies, conformity assessment and market surveillance;
- Inter-comparison activities linked to the operation of safeguard clauses;
- Technical expertise for the purpose of assisting the Commission in its implementation of market surveillance administrative cooperation, including the financing of administrative cooperation groups, market surveillance decisions and safeguard clause cases;
- Preliminary or ancillary work in connection with various implementation questions³⁵;
- Activities carried out under various relevant "programmes"³⁶;
- Therefore, the Regulation 765/2008/EC provide the basis to effectively enhance the role of Prosafe as a platform of coordination between Member States and a mean of funding it.

³² For a more detailed explanation about the financial limitations faced by PROSAFE , see pages 54 and following of the briefing paper commissioned by the IMCO Committee on the Revision of the General Product Safety Directive and Market Surveillance, published in September 2010, available at <http://www.europarl.europa.eu/document/activities/cont/201010/20101008ATT86166/20101008ATT86166EN.pdf>

³³ About the Concept of Body of General European Interest, see Article 162 of the Commission Regulation (EC, Euratom) No 2342/2002, of 23 December 2002.

³⁴ See Article 32 paragraph 1 of the Regulation 765/2008/EC.

³⁵ These questions include conformity assessment, metrology, accreditation and market surveillance activities linked to the implementation of EU legislation, such as studies, programmes, evaluations, guidelines, comparative analyses, mutual joint visits, research work, the development and maintenance of databases, training activities, laboratory work, proficiency testing, inter-laboratory tests and conformity assessment work, as well as European market surveillance campaigns and similar activities.

³⁶ Such programs may include technical assistance, cooperation with third countries and the promotion and enhancement of European conformity assessment, market surveillance and accreditation policies and systems among interested parties in the Community and at international level.

2.4. Coherence: the best fit between the New Legislative Framework, the General Product Safety Directive and the L and T vehicles draft proposal regulations

For reasons of Better EU Regulation, in particular, *consistency* between various EU regulatory regimes of goods dealing with 'serious risk' (in terms of health and safety) of consumers and /or workers, as well as *simplification* by reducing or eliminating unnecessary differences, let alone, multiplication of obligations arising from distinct EU regulation having been enacted in different periods and for distinct or purely sectoral purposes, the EU seeks greater coherence in EU risk regulation. This may well apply to the three regulatory regimes for safety of goods now in place: GPSD, the NLF and sectoral regulation, especially on vehicles.

Such coherence will reduce or do away with confusion for authorities (if not, market players, perhaps, consumers, too) or differences between how distinct producers are treated differently, although the overall objectives of such regulatory regimes are not fundamentally different. The simplification also reduces the regulatory burden for manufacturers and hence – if markets are competitive, so that cost reduction is likely to be passed on – consumer prices, without in any way weakening the pursuit of health and safety in EU goods markets. Stronger coherence may even have additional advantages for business. One example in the New Legislative Framework is found in the equivalent quality requirements for voluntary testing and certification and compulsory conformity assessment. For European business, this is a direct practical advantage, because a given product is, more often than not, tested on both accounts in one series of tests in the same testing body.

It is therefore understandable and basically justified to seek coherence in EU risk regulation. The European Parliament and other EU bodies are rightly interested in how and how far one can and should push this coherence, what the qualitative benefits would be and whether and to what extent there might be additional costs or indeed explicit drawbacks in some specific instances. In its resolution of 8 March 2011 on the revision of the General Product Safety Directive market surveillance³⁷, the EP has shown a clear interest in bringing closer together the New Legislative Framework and a revised General Product Safety Directive. The NLF brings in the New Approach risk regulation, which is in a way "sectoral" but mainly for extremely broad categories of goods such as machines (some 45000 types), toys (over 50 000 on the market and much incremental product differentiation and some innovation every season) and pressure vessels (with incredible variation). What about very specific sectoral legislation?

The draft Regulations on T and L vehicles, as proposed in 2010, are of course also "sectoral", but there are two central differences with the NLF. First, L and T vehicles are characterized by much more narrow sector definitions than in the key New Approach markets. There is undoubtedly product differentiation in both sectors, but nowhere to the same extent as in machines or toys or pressure vessels. The two sectors are typical of the Old Approach for relatively 'high-risk' sectors. The "old approach" chosen decades ago is based on detailed requirements in directives (in future, in EU Regulations) as the basis for ex ante type approval of every type before it is allowed onto the market. In addition, there are inspections of quality management systems used by manufacturers in production, ensuring reasonably well that the type having been approved is going to be consistently brought into the market and, in case of problems, providing traceability.

³⁷ See supra note 1.

With the technical requirements uniform over the EU and the type approval process almost entirely harmonized, the certificates of approval are automatically mutually recognized in the entire internal market, an enormous advantage for producers and ultimately consumers as well. In other words, for free movement in T and L vehicles to become a reality, an intrusive and largely uniform EU system has been regulated, complemented by safeguard clauses and obligations for manufacturers to ensure 'rectification' in case something still goes wrong.

This intrusive ex ante approach is radically different in philosophy from the GPSD. The latter covers (consumer) goods which are neither subject to EU regulation (except for the very general obligation for producers to bring onto the market only "safe" products) nor scrutinized in a very detailed and laborious way, via testing and conformance checks, on compliance with numerous precise technical requirements both for the entire product as well as for components.

Under the GPSD, one might have concerns that, in an unregulated environment, without any ex ante control on safety and for the occasional non-bonafide business (or, indeed, by mistake), unsafe products may hit the market. The logical complement is then a reporting system (RAPEX) for detection of trends and facts and endeavours by Member States to conduct systematic market surveillance. Both can lead to follow-up actions inside the internal market or with third countries. All of this is by definition ex post, be it that some follow-up actions may have a structural, preventive nature (e.g. cooperation with China). The NLF stands in between the two approaches discussed above. It assigns clear responsibilities to enterprises, testing houses, certification bodies (voluntary and 'Notified'), EU accreditation and authorities. The main reference is, however, the New Approach risk regulation, which sets health and safety (and environmental) objectives, on the basis of which European standards are written and recognized. These standards are (by definition) not compulsory but, in actual practice, very often followed by European business, since they can be incorporated in their in-factory manuals, knowing that they will provide access to the internal market. In the large majority of cases, self declaration of conformity (backed up by test reports, in-house or by 3rd party bodies), liability and the affixing of the CE mark constitute the system guaranteeing compliance and hence health and safety. There is no ex ante control or testing which determines whether or not one can enter the market, although self declaration is of course a step into that direction (it requires that one maintains the technical proofs of conformity). The thrust of the NLF is that the typical goods under this type of EU risk regulation are on the whole less risky than T and L vehicles themselves or their use.

The different philosophies of these risk regulatory regimes are crucial when considering the pro's and con's of coherence. In L and T vehicles, type approval (and the related quality management) is costly and laborious. This is justified by safety of drivers and of others, given the nature of the products. It is indeed largely ex ante but with requirements which, normally, ensure safety for years. The rectification procedure (once a problem or failure is reported, type approval authorities get into contact with the manufacturer and compel him to adequately address the problem, short of withdrawing the approval) and periodical technical inspections (if compulsory, if not, many problems will still be detected by dealers and garages) are ex post, complementing the ex ante approach. There are powerful market mechanisms, too: well-known brands will fear the loss of reputation and will themselves organize recalls. Finally, some national type approval authorities conduct many factory audits every year, and not just in Europe.

This is important since what they assess is whether the quality management system (like ISO 9001, with 3rd party certification) factually leads to the production of exactly the type of L or T vehicles which were type approved. One might call this: production surveillance, again ex ante, but yet another effort to control safety.

These very considerable efforts by industry and authorities, based on detailed and strict safety requirements, and to some extent complemented by ex post aspects, are simply incomparable with the NLF, except perhaps in the very rare instances where conformity assessment of New Approach goods would rely on the heavier modules of Annex 2 of Decision 768/2008 (such as type approval). Imposing yet another layer of surveillance on top of this elaborate system should therefore be based on solid (safety) benefits. Thus, several interviewees underlined that more resources to conduct factory audits is, to them, more important than ex post market surveillance.

One could argue that, amongst the various measures one can envisage, there is some degree of substitutability. With more factory audits, ex post market surveillance might remain more 'reactive'.

After all, in case defects are discovered by others, the current sectoral legislation already has 'rectification' which seems to work well. For vehicles which are not subject to 'periodical technical inspections' after a grace period, the argument to conduct active market surveillance seems far stronger. However, no matter how sensible, there are limits to these arguments. Where imports from third countries, not via well-known supply chains, come in and/or where goods or components are bought on-line or in supermarkets (without the slightest expertise or registration), the type approval system may be circumvented and the case for market surveillance becomes stronger

2.5. Conclusion

The new legislative framework in Reg. 765/2008 and Decision 768/2008 is a great step forward with respect to market surveillance in the EU (EEA). Nevertheless, the upshot is greater complexity of, if not confusion about, the EU regulatory landscape on goods safety and market surveillance, with three distinct regimes in place which, at times, can overlap. One is market surveillance under GPSD which is the oldest of the three but with relatively general provisions. Another is the NLF with much more specific market surveillance obligations, applying in principle to all goods in the internal market, but at the moment mainly for New Approach goods. The third regime is the specific sectoral one e.g. for L and T vehicles based on type approval. Besides the simplification motives for proposing revisions of the L and T vehicles regulation in the EU, the draft regulations before the European Parliament (EP) might also solve another question: the priority for 'lex specialis' (e.g. for tractors and motorcycles) in the NLF does not apply to market surveillance as dealt with in the NLF since the current tractor and L vehicles legislation has no provisions on (post type approval) market surveillance. In the draft Regulations on L and T vehicles detailed provisions on market surveillance have now been incorporated.

Having three regimes seems overly complex, and even more so when there are potential overlaps. Hence, the demand for greater alignment between the three and ideas about a single market surveillance system. Although greater alignment between the GPSD and the NLF, and thereby eventually covering specific sectoral regimes as well, is supported, the insistence on a single regime as such is not so great. Stakeholders typically find the effectiveness of market surveillance more important. For national authorities this depends principally on more resources and better coordination between Member States.

For consumers, it hinges on more specific obligations in GPSD, better traceability and information as well as collective redress. Market players in the L vehicles sector are not against as long as no additional burdens arise and pro-active policies are pursued. Only the T vehicles sector sees little need as they deal with non-consumer goods and their regime works well. PROSAFE may be developed into a coordination platform at EU level if its legal and institutional position (can PROSAFE members bind their countries?) and its *meagre* financing (e.g. for joint actions) would be addressed.

A non-trivial problem in seeking coherence between what are now three EU safety of goods regimes is the distinct philosophies between the NLF and the specific sectoral regimes for e.g. L and T vehicles. The type approval system is very intrusive, goes into elaborate detail due to numerous technical specifications and includes a certified quality management system for the production sites which is sometimes even audited by national authorities themselves. These *ex ante* controls and tests are complemented by 'rectification' obligations for the manufacturer once a case of serious risk is detected in the market. Broadly, this has worked well so far. The high costs and considerable efforts involved and the knowledge that type approval works well makes it difficult for market players to appreciate the gains from having market surveillance on top of it. The weakness is imports from small players or fly-by-night firms and non-traditional distribution channels (including on-line) as such approaches might simply avoid the type approval routes. There may also be alternatives to market surveillance such as periodical technical inspections, customary in the car sector.

3. L-VEHICLES TYPE APPROVAL SYSTEM

'The current type-approval system for L vehicles is explained first, followed by the practical shortcomings mainly caused by (selected) third-countries' suppliers, especially from China. The draft Regulation for L vehicles is set out in some detail, with particular attention to market surveillance. The views or positions of market players and selected national authorities are presented. The safeguard clauses and their necessity in this form are discussed as well.'

3.1. The Current Legislative Framework

Type approval requirements for new vehicles of the L-category³⁸ (mopeds, motorcycles, tricycles, quadricycles) are currently set out in Directive 2002/24/EC³⁹ of the European Parliament and of the Council (the "Framework Directive"). In addition, 14 different directives⁴⁰ referred to in the Framework Directive contain detailed technical requirements relating to L-category vehicles. The Framework Directive applies to all two or three-wheeled motor vehicles intended to travel on the road, and to the components or separate technical units of such vehicles.

The Directive introduces harmonised norms concerning, in particular, the numbering of type-approval certificates as well as exemptions for end-of-series vehicles and for vehicles, components and separate technical units incorporating technologies which are not yet covered by EU arrangements.

A certificate of conformity is to be completed by the manufacturer or his authorised representative for each vehicle produced in conformity with the approved type and for each non-original technical entity or component manufactured in conformity with the type that has been component type-approved.

The Member States verify that each type of vehicle has undergone the checks provided for in the separate directives and has been issued a type-approval certificate. The manufacturers may prepare a certificate of conformity for all vehicles conforming to the type that has been approved. When a vehicle is accompanied by this certificate, it may be placed on the market, sold and registered for use throughout the Community.

Any vehicle produced in conformity with the approved type must bear a type-approval mark. The manufacturer of a vehicle and the producer of a technical entity or component are responsible for the manufacture of each vehicle or the production of each technical entity or component in conformity with the type which has been type-approved or component type-approved.

³⁸ L category vehicles currently comprise of L 1 two-wheel mopeds, L2 three-wheel mopeds, L3 two-wheel motorcycles, L4 two wheel motorcycles with side-car, L5 Tricycles, L6 light quadricycles and L7 heavy quadricycles.

³⁹ See Directive 2002/24/EC of the European Parliament and of the Council of 18 March 2002, relating to the type-approval of two and three wheel motor vehicles.

⁴⁰ See Directives of the Council 93/14/EEC, 93/30/EEC, 93/33/EEC, 93/93/EEC and Directives of the European Parliament and the Council 95/1/EC, 97/24/EC, 2000/7/EC, 2002/51/EC, 2009/62/EC, 2009/67/EC, 2009/78/EC, 2009/79/EC, 2009/80/EC, 2009/139/EC.

If a Member State finds that vehicles, technical entities or components constitute a road safety hazard, even though they are of a type which has been type-approved or component type-approved, it may ban the sale, placing in service or use in its territory for a maximum period of six months. It must immediately inform the Commission and the other Member States thereof⁴¹.

Member States may not prohibit the marketing, sale, bringing into service or use of new vehicles and new technical entities or new components conforming to the provisions of the framework Directive. Only vehicles, technical entities and components complying with the framework Directive may be marketed, sold and used in the Member States⁴²

3.2. Overview of the current situation of market surveillance in relation to type approval for L-Vehicles, systems, components, or technical units (in selected Member States)

Since 1992, EU Legislation on the type-approval of two and three-wheeled motor vehicles regulates and harmonized the construction requirements of L-vehicles. This process achieved a reduction in the overall extent of type-approval testing, compared to compliance with previous national regulation. The principal reason is to have a single set of requirements in the EU Member States.

However, the resultant EU Type-approval process remains complex and expensive. And yet, some cases have been reported where vehicles sold on the EU Market do not meet type-approval requirements, posing a threat to the health and safety of users and citizens.

According to the representatives of the European motorcycles industry and the Dutch type approval authority (RDW), over a period of several years strong evidence has been gathered indicating that a worrying number of motorcycles, scooters and mopeds imported from manufacturers based in the Chinese Peoples Republic do not comply with the requirements for the conformity of production in Directive 2002/24/EC. These observations are based on declarations of RDW, which is also responsible for the recall procedure of non-compliant and unsafe products from the market and which has a partnership with CQC, a major Chinese Certification body, as well as on a report⁴³ published by the Motorcycle Industry Association in Europe (ACEM) in collaboration with the national authorities from the UK, Spain and Italy, based on testing 4 samples from the UK market, 3 from Spain and 4 from Italy. In particular, the results indicate that (some) Chinese manufacturers are having great difficulty in complying with the limits for carbon monoxide (CO), for example.

According to the mentioned report, "in tests carried out in the UK during 2007 by the UK Department for Transport (DfT), four different types failed the emission test by 13%, 23% and 110% respectively. The fourth one, a moped, delivered with its restrictor removed, failed by 150%.

⁴¹ See Article 11 of Directive 2002/24/EC of the European Parliament and of the Council of 18 March 2002, relating to the type-approval of two or three-wheel motor vehicles.

⁴² See Article 15 paragraph 1 of Directive 2002/24/EC of the European Parliament and of the Council of 18 March 2002, relating to the type-approval of two or three-wheel motor vehicles.

⁴³ ACEM Report on "Non Compliances Found in Sample Motorcycle Manufactured in The Chinese People's Republic" – January 2010.

Tests on four CPR- origin machines in Spain also showed problems with emission controls, and finally tests carried in Italy in the autumn of 2009 confirmed that the samples test showed problematic non conformities, again including braking and emission control systems. Even more seriously, the braking performance of two of the samples tested in the UK were deficient, one taking 35% longer to stop than is permitted in the test, the other 18%. Three braking deficiencies in the machines tested during 2009 tests in Italy indicated that this problem persisted, and indeed were aggravated by mistakes in the final assembly”.

Some of those products (both built motorcycles and components and parts) are sold via the internet or via small garages, but not via reliable and easy-to-trace distribution channels, they typically have no branding (hence, no reputation to lose) and their importers might not exist longer than a season.

Furthermore, some of our sources of the European Commission have also declared to had been informed that L vehicles, systems, components or separate technical units have been imported which do not comply with the current safety and environmental type-approval requirements. The situation is even more worrisome if we consider that import volumes are increasing (prices are very competitive) and consumers (many owners of motorbikes see it as a hobby) or small garages use parts to alter approval models into models that are non-compliant.

Moreover, even when Chinese factories for a particular model have obtained type-approval, the actual model sold later in the market may not be the same and not compliant. One also encounters forged approvals papers.

All these practices pose a threat to consumers putting them at risk of buying potentially unsafe products. It is also problematic for bonafide manufacturers, incurring high costs of approval and quality management, and find themselves struggling with unfair competition. Non compliance with type-approval and fiddling with quality management are misused for cost reduction purposes, despite the already large differential in labour costs between China and the EU⁴⁴. Indeed, to industry, part of the cost differential is due to the avoidance of costly requirements, and attempts to exploit channels that are non-expert (hence, also avoiding costs), such as supermarkets with zero expertise or info, the internet, etc. Boxes, crates or kits have been found without even any instruction or manual how to build and what to avoid.

From various interviews, the contractants have also come to the conclusion that the process of type approval might run a risk of suffering from conflicts of interest. We cannot assess whether and to what extent this is actually the case. The point is that type approval authorities subcontract out a good deal of technical work, including testing. Bringing in competent market players is likely to serve efficiency, lower costs and speed. Nevertheless, insofar as authorities do not use their own technical services, that is, insofar as type approval technical services becomes “a business”, strict enforcement might sometimes be commercially unattractive to those agents.

⁴⁴ If the reader, understandably, wonders why Chinese companies persist with such practices despite a huge wage advantage, it is good to appreciate that there are many Chinese motorcycle (and components) factories – also for the enormous local market – and their perspective is often national rather than global. Hence, they try to outcompete Chinese competitors, not primarily European ones.

EU lawmakers and national authorities have to be aware of these potential and actual problems. Actual or potential deficiencies should be taken serious in order to avoid that type approval process, which worked well until recently, might gradually be devalued. This would be bad for consumers and other citizens in traffic, but eventually also disillusion bonafide manufacturers, who express fears of type approval becoming a costly bureaucratic exercise burdening them without sufficient guarantees for safety in the internal market.

3.3. The draft Regulation on the approval and market surveillance of L-vehicles (COM(2010)542 Final)

With the proposed Regulation on the Approval and market surveillance of two – or three-wheel vehicles and quadricycles (COM(2010) 542 final)⁴⁵ the European Commission aims to simplify the current legal framework, to contribute to a lower, more proportionate share of overall road transport emissions, to increase the safety for L-category vehicles and establish new requirements for market surveillance. The EU proposes new environmental and safety technical requirements, a legal framework for the new technologies and market surveillance provisions to better tackle the non-compliance of certain vehicles, systems, components or separate technical units imported in the EU market.

This proposal applies the ‘split-level approach’ used in other legislation for EU type-approval of motor vehicles, originally introduced at the request of Parliament. According to this approach the legislation is embodied in three layers of lawmaking.

The fundamental provisions and scope are laid down by the European Parliament and the Council in a Regulation in accordance with the ordinary legislative procedure (co-decision procedure).

The vehicle’s technical specifications associated with the fundamental provisions are laid down by three delegated acts, to be adopted via comitology in 2011-2012 (Article 290 of the Treaty on the Functioning of the European Union).

An implementing act sets out the administrative provisions, such as the information document, the definitions of the type approval certificate, the certificate of conformity and associated production conformity requirements, etc (Article 291 of the Treaty on the Functioning of the European Union).

Hence, the EU would switch from a Framework Directive accompanied by technical directives, to a Regulation, not allowing much room for Member States to implement. This seems to benefit a true single market. The Commission no longer needs to verify if a correct transposition was made by Member States and there is less risk of misinterpretations or slight differences in application (as is now the case).

The proposed Regulation establishes the administrative and technical, safety and environmental requirements for the approval and market surveillance of all new L-category vehicles, systems, components and separate technical units.

⁴⁵ See supra note 9.

The proposed Regulation also aims to improve market surveillance and to ensure an equal treatment of non-compliant products throughout Europe to protect compliant economic operators against unfair competition and restore confidence in EU legislation. For this purpose, the Commission also deemed it necessary to introduce enhanced market surveillance requirements in the draft Regulation. The role and responsibilities of the authorities in the Member States in charge of type approval and market surveillance are clarified, and the requirements relating to the competence, obligations and performance of the technical services conducting vehicle type-approval tests are reinforced.

The draft Regulation also establishes provisions to ensure that, in cases where a vehicle presents a serious risk for users or the environment, the manufacturer or any other economic operator in the supply chain takes effective protective measures, including the recall of vehicles. Moreover, in order to monitor the conformity of serial production, manufacturers should be regularly checked on site by the competent authority or by an appropriately qualified technical service appointed for that purpose (the factory audits discussed before, verifying the consistency of their quality management systems for all L vehicles produced).

Finally, an explicit reference to Regulations of the United Nation Economic Commission for Europe⁴⁶ (UNECE) is made. Since the EU acceded to their global automotive regulatory committee, their global technical requirements are followed whenever possible.

3.3.1. The obligation to establish type approval authorities and to notify them to the European Commission and appoint market surveillance authorities as well as to notify those to the European Commission and the definition of the obligations of all economic agents

The proposed Regulation establishes in Article 5 paragraph 1 the obligation for Member States to appoint (and notify to the European Commission) type approval authorities competent in such matters as well as market surveillance authorities with the proper competences. The notification of the type-approval and market surveillance authorities has to include their names, address, including electronic address, and area of responsibility.

This is in accordance with the obligations set up in the Chapter III of the Regulation 765/2008/EC and more specifically with the wording of the Articles 17. According to Article 17 paragraph 1 of the Regulation 765/2008/EC the "Member States shall inform the Commission of their market surveillance authorities and their areas of competence and the Commission shall transmit that information to the other Member States". Moreover, the second paragraph reinforces this requirement by establishing that "Member States shall ensure that the public is aware of the existence, responsibilities and identity of national market surveillance authorities, and how those authorities may be contacted".

When Member States use technical services⁴⁷ to carry out tests, the initial assessment and other tests or inspections, on behalf of the type approval authority, they shall also notify the Commission of the establishment and appointment of such authorities in accordance with the provisions of Article 68. The Commission shall publish on its websites a list and details of the approval authorities and technical services⁴⁸.

⁴⁶ See 97/866/EC Council Decision of 27 November 1997.

⁴⁷ A technical service, according to Article 3 paragraph 45 of the draft proposal Regulation "is an organization or body designated by the approval authority of a Member State as a testing laboratory to carry out tests or as a conformity assessment body to carry out the initial assessment and other tests or inspections, on behalf of the approval authority".

⁴⁸ See Article 68 paragraph 6 of the proposal Regulation 2010/0271 (COD).

The requirements relating to the competence, obligations and performance of the technical services that perform vehicle type-approval are reinforced⁴⁹.

Furthermore, the proposed Regulation also include a description of the general obligations of all the economic operators involved on the process of type approval (manufacturers, manufacturers' representatives, importers and distributors) in the Articles 7 to 15.

When prescribing the requirements relating to the competence, obligations and performance of the technical services as well as in the description of the obligations of the different economic agents involved on the process of type approval the European legislator followed almost verbatim the definitions and requirements proposed in Annex I of the Decision 768/2008/EC⁵⁰, with the necessary adaptations to the scope of the proposed Regulation. However, it should be noted that, in defining the obligations of the economic operators, whilst Decision 768/2008/EC and the Regulation 765/2008/EC use the concepts "making available on the market" and "placing on the market", in the draft Regulation that terminology is often replaced by the terms "sale", "register" and "entering into service" .

The obligations to establish type approval authorities and to notify them to the Commission and appoint market surveillance authorities as well as to notify those to the European Commission are not new obligations. Indeed, those obligations are already enshrined in Regulation 765/2008/EC, which is applicable to the L-category vehicles since they are consumer harmonised products. However, the introduction of those obligations in the text of the Regulation is seen as a good measure in order to make those authorities more consumer friendly, promoting ways to ensure that the public is aware of the existence, responsibilities and identity of national market surveillance authorities, and how those authorities may be contacted. Indeed, this seems a desirable initiative. The experience of the authors of this Briefing Note disproves the notion that these authorities are known and hence easy to reach. Unfortunately, in a majority of cases, the two lists on the Commission website do not provide elementary information on contacts and the contact information is seriously incomplete. The authors attempted to find out, from the national authorities responsible for type approval, what authorities are responsible for market surveillance of L and T vehicles, but this turned out not to be easy at all. Indeed, a number of national type approval authorities contacted declared to be solely responsible for the pre-market surveillance (via type approval) and revealed uncertainties about which entity is responsible for post-approval market surveillance. The list available on the Commission website, in compliance with the notification requirement in Article 17 of Regulation 765/2008/EC, proved not to be very useful for the identification of those entities. In interviews we were told that type approval authorities know one another well and they do have occasional meetings in Brussels. In the short period available, the authors have been unable to obtain greater details about the degree and nature of cooperation between the different authorities involved in type-approval requirements to L and T vehicles, not to speak of post-approval market surveillance in this market. As far as we have been able to ascertain, it seems that market surveillance authorities for L (and indeed T) vehicles have not been fully identified and have never met in any EU gathering (except where the market surveillance authorities are also the type approval ones).

⁴⁹ See Articles 64 to 72 of the proposal Regulation 2010/0271(COD).

⁵⁰ See Articles R2 to R7 and Articles R13 to R30 of the Annex I of the Decision 786/2008/EC of the European Parliament and of the Council of 9 July 2008, on a common framework for the marketing of products.

Specifying the obligations of all economic operators involved in the process of type approval is considered helpful by the representatives of the L-vehicles industry and the national authorities since that is expected to lead to a clarification of the obligations of the different economic operators and to promote better traceability. However, they consider that in practice it will be necessary to organize an effective control of these measures, because some EU importers operate in an "ad hoc" fashion and seek ways to evade the rules.

The reinforcement of the requirements relating to the competence, obligations and performance of the technical services that perform vehicle type-approval is also regarded by some as a good measure in order to promote more clarity and ensure that technical services perform their activity in a completely independent way.

3.3.2. The obligation to organise and carry out market surveillance and controls

An obligation for market surveillance authorities to organise and carry out market surveillance and controls of vehicles, systems, components or separate technical units entering the Union market, in accordance with the Regulation on Market Surveillance (EC) No 765/2008, is established in Article 5 paragraph 4 of the draft Regulation. This obligation is in accordance with the obligation established in the Article 19 paragraph 1 of the Regulation 765/2008/EC, which establishes that market surveillance authorities shall perform appropriate checks on the characteristics of products on an adequate scale, by means of documentary checks and, where appropriate, physical and laboratory checks on the basis of adequate samples. When doing so they shall take account of established principles of risk assessment, complaints and other information.

When implementing those obligations Member States have to:

- Ensure that they have the means, resources and the necessary authority;
- Ensure coordination between authorities;
- Draw up, organise and carry out national programmes;
- Co-operate with other Member States;
- Bring customs and market surveillance authorities closer together;
- Coordinate activities at national and European (EU and EEA) level.

The obligation of the competent national authorities to organise and carry out market surveillance and control of the vehicles, systems, components or separate technical units entering in the EU Market is regarded by the representatives of L-vehicles sector as an essential measure to ensure that only compliant products are placed on the market. However, it is necessary to ensure the effectiveness of this obligation. The question is whether 'reactive' or 'pro-active' policies are pursued. Indeed, according to the L-vehicle sector, due to budgetary constraints and the lack of the appropriate resources, post-approval market surveillance - in some, perhaps many, EU countries - is only made when a specific problem or incident is reported, hence, reactive only.

The type approval and market surveillance national authorities interviewed have different positions and experiences.

The German Federal Motor Transport Authority (KBA) is the competent national authority for type-approval of L and T vehicles and is also competent for the market surveillance of those products, mainly for the detection of non compliant products, recall procedures of non compliant products and the fight against counterfeited products. KBA runs a product safety and market surveillance office, which takes care of the complaints or reports from consumers, consumer organizations, distributors, manufacturers, the press, police, other authorities and RAPEX (reactive approach). They also are competent for pro-active policies or to initiate recalls and taking other safety measures. In its pro-active approach, KBA performs random tests quite often: an average of 700 market surveillance operations is carried out per year. Moreover, they consider having enough resources for this pro-active approach. In terms of cooperation between the different authorities involved in the process (type approval, market surveillance authorities and customs authorities), once the type approval and the market surveillance authority are the same, there are no problems of cooperation. The cooperation with the customs authorities is considered very good. The cooperation at European level is also considered satisfactory. However, KBA noted that periodical meetings for the exchange of the experiences of the national market surveillance authorities should be promoted in order to establish common standards for measures and decisions.

The National Service for Road Transports (RDW), the Dutch type approval authority, is the competent authority for type approval of L and T vehicles. The authority formally responsible to carry on market surveillance in relation to these products in Netherlands is the Food and Goods Safety Authority (VWA). However, by a delegate act, RDW is currently also responsible for recall procedures. In 2010, 22 recall procedures of L-vehicles were carried out. The remaining competences on market surveillance are with the VWA. This means that RDW does not have the competence to make inspections in shops or sample test products in the market. They only react when a complaint is presented by, for instance, consumers, a consumer organization or on their website. Most of the cases of vehicles representing a serious risk are reported to them by manufacturers or consumers. In financial terms, they consider that they would need more resources in order to widen their activity. In relation to the cooperation, they have a programme of targeted cooperation with the national type approval authorities from the U.K. and Luxembourg. They also make frequent visits to China, mainly for factory audits, a permanent source - according to RDW - of non-compliant products and unsafe products. The cooperation with the national market surveillance authority is good, whereas the cooperation with the customs authorities has only recently started to improve, but a closely collaboration is seen as necessary. They consider that the cooperation with type approval authorities from other Member States is good, but too sporadic. They only have well-developed contacts with few Member States. According to RDW there is no need to improve the cooperation at European level. What they need is to have more information about the practical interpretation of the legislation.

In Spain, the authority in charge of type approval for L and T vehicles is the Department of Quality and Industrial Safety from the Industry, Tourism and Trade Ministry. In terms of market surveillance competences, they share competences with regard to industrial products and premises but the Ministry of Health and Consumer Affairs is responsible for the rest of the products. According, to the competent national authority for type approval of L and T vehicles the cooperation among the different authorities is running smoothly in Spain but the authors received no further details.

3.3.3. The safeguard clauses in Articles 48-55 of the proposed Regulation COM (2010) 542 Final

One of the novelties of the proposed Regulation is the introduction, in Articles 48 to 55, of the so-called "safeguard clauses", according to which the national authorities shall take all the appropriate measures to withdraw unsafe vehicles, systems, component or technical units from the market, even though they have been manufactured according with the type approval requirements in the (draft) Regulation.

This is in accordance with Articles R31 to R33 of Annex I of the Decision 768/2008/EC, with the necessary adaptation to the sector legislation. Moreover, in the Articles 52 and 53 of the proposed Regulation, of safeguard clauses specific to system, components and technical units which pose a significant risk to the correct functioning of the essential systems.

The representatives of the motorcycles manufacturers as well as most part of the national authorities interviewed support the introduction of "safeguard clauses" in the draft Regulation. However, manufacturers representatives regard Article 52, concerning systems, components or separate technical units which pose a significant risk to the correct functioning of essential systems, as a problem. As was emphasized in interviews, what matters to them is credible enforcement, in other words, not merely rules how to 'safeguard' once a problem has been detected via incidents or by chance, but an active programme of enforcement so that the detection rate is a positive function of the endeavours of the authorities. Moreover, manufacturers' representatives argue that when, according to the Article 48 paragraph 1, the market surveillance authorities of one Member State have taken action pursuant to Article 20 of the Regulation (EC) No 765/2008, or where they have sufficient reason to believe that a vehicle, system, component or separate technical unit covered by this Regulation presents a risk to the health or safety of persons or to other aspects of the protection of public interests covered by this Regulation, they shall immediately inform the type approval authority that issued the approval in the first place, because this type approval authority should be best placed to handle all the technical information from the test reports and to give meaningful instructions to manufacturers.

However, one of the national authorities contacted is of the opinion that the safeguard clauses laid down in the proposed Regulation go too far and risk to create a huge administrative burden for manufacturers, importers and dealers. Moreover, they consider that the responsibility of the national authorities is not clearly defined and is overlapping, which will create competence troubles. According to them, manufacturers might get into a situation, that they first have to obtain a harmonized European type approval and might then have to defend it again in every single Member State against the national market surveillance authority, what will put in jeopardy the very achievements of harmonization for the purpose of genuine free movement. In their opinion what the Commission has been doing in the draft Regulation boils down to using the measures of the CE-self-certification system in the already sophisticated and more elaborate type-approval system.

3.3.4. Reducing the complexity associated with the type-approval process

One of the main objectives of the draft Regulation is to reduce the complexity associated with the type-approval process. Most of the interviewees believe that the current legal framework will be simplified with the proposed Regulation, not only because currently there are 15 different Directives, but also because the move from Directives to a Regulation has obvious benefits of legal certainty and uniformity. However, apart from the advantages inherent to the passage from a framework directive to the regulation, the type approval complexity will not be reduced.

Moreover, some concerns persist related to the date of application of the (draft) Regulation, since at the present moment nobody knows what acts of implementation will be adopted. For that reason, representatives of the L-vehicles industry suggest that it shall apply from 1 January 2014, or twelve months after the date of entry into force of this Regulation and all its delegate acts, whichever is the later, instead of on 1 January 2013 as provided in Article 2 paragraph 2.

3.3.5. How to improve market surveillance systems and to promote an efficient cooperation between the different authorities involved in the process of type-approval at national and European level?

Improving the market surveillance system and promoting effective cooperation between the different authorities involved in the process of type approval, are cited as the main challenges of the draft Regulation. This is to ensure that only vehicles, systems, components or separate technical units are imported into the EU market which comply with the current safety and environmental type-approval requirements. Market surveillance authorities have a key role in helping to maintain a level playing field.

None of the national authorities involved in the type approval process have proposed any concrete measures (to the authors) in order to improve market surveillance. However, all agree, except KBA, that market surveillance in relation to L vehicles needs to be improved. Indeed, according to them the cooperation among national authorities at European level needs to be strengthened besides clearer guidelines to promote a uniform application of the law in EU, to ensure that all the national type approval authorities use the same criteria and to avoid the duplication of actions and to promote a better use of the resources.

Increasing the traceability of the products and strengthening and broadening cooperation between market surveillance authorities and customs authorities are other of the main priorities referred to as essential to ensure that only safety products will be placed on the EU market. This is quite important given that the main cases of unsafe products found in the EU internal market are related to products imported from third countries, mainly from China. In that extent, the inclusion of the obligations of the all different economic agents in the draft Regulation is seen as an important improvement. However, these obligations have to be enforced and that can only be achieved, as pointed out by the majority of the national authorities, if Member States allocate enough resources, financial and human, to their market surveillance authorities enabling them to carry out reactive and proactive market surveillance actions. Otherwise, the effectiveness of including of those obligations in the draft Regulation will be low. Indeed, the new obligations may be futile.

The Dutch type approval authority and the representatives of the manufacturers also point out that the upstream phase of market surveillance is not properly addressed by the Commission proposal. Effectively, nothing is mentioned on how the detection procedure of (non)conformity should be set up, for instance, the number of samples that should be tested to prove a non-conformity.

Moreover, ACEM argues that different provisions should be set out respectively for components or spare parts subject to type-approval on the one hand and for components or spare parts not being subject to such type-approval (like tyres). Strengthening of market surveillance mechanisms should not only be considered with respect to the issues covered under the motorcycles type-approval legislation but also with respect to issues relating to motor vehicles and their components covered by other horizontal legislation.

This is the case, for instance, of hazardous substances used in the manufacture of motorcycles and banned under the REACH (e.g. in those cases the market surveillance authorities must carry out tests in order to check whether motorcycles' pads contain asbestos or not). Indeed, as the new regulation include specific market surveillance provisions and there are components that are not subject to type approval there is a risk that market surveillance will only be focused on components and parts subject to type approval by testing their compliance to type approval regulation, thereby neglecting the other ones which are not subject to type approval.

3.4. Conclusions

This chapter has dealt with the type approval system for L vehicles, the detailed proposals in the draft Regulation - also with a view to market surveillance - and the merits and perceived problems of these proposals. At the outset, it is good to remember that also in the current type approval regime, there are strong provisions of market surveillance (that is, if vehicles or components constitute a road safety hazard, type approved or not, national authorities may ban the good or force swift 'rectification' with the manufacturer) but only of a 'reactive' nature.

Since about a decade ago or so, the costly and elaborate type approval system in L vehicles is no longer as watertight as it used to be. Empirical evidence from EU based manufacturers as well as from national type approval authorities (including from two, paying regular visits to production sites for factory audits) shows that a worrying and increasing number of motorcycles, scooters and mopeds imported from China are not compliant. Sometimes, these vehicles or components are type approved, sometimes the type approval routes have been entirely avoided by using small garages or supermarket or outlet stores, without any expertise. Also, on-line purchases directly brought to premises take place. Although there are branded and reliable Chinese products, typically the non-compliant products are unbranded, hence, without any concern of losing reputation. However, it also happens that hobbyist European consumers change type approved products into variants which would no longer pass the approval route. In the light of these developments, both authorities and bonafide manufacturers are demanding more proactive market surveillance as referred to in the NLF.

The draft Regulation on L vehicles provides for enhanced market surveillance, besides drastic simplification (from 15 directives to a single Regulation) and some other objectives (e.g. on emissions reduction). The reactive part of market surveillance can only be effective if the authorities can be easily found and communicated with. The authors of the Briefing Note have experienced that this is not always the case. Some national type approval authorities were not even sure what authority is competent for surveillance and /or how to reach them. The list on the Commission website needs to be more consumer friendly.

The crux of arriving at an effective surveillance is found both in a smooth reporting and complaint system for 'reactive' policies and, at the same time, resources and resolve for 'pro-active' market surveillance via tests of samples taken from the market. Resources could perhaps be saved by intensive cooperation between national authorities from different Member States. Also, the collaboration with customs authorities has to be good and permanent.

The safeguard clauses are supported but not always wholeheartedly. One reason is found in Article 52 which is seen as insufficiently 'pro-active'. What the L vehicles producers want to see (for safety, if not in order to arrive at a level playing field) is an active programme of enforcement, such that the detection rate is a positive function of the endeavours of the authorities. Another reason is the fear that safeguard clauses may result in counterproductive effects: type approved products (hence, with free movement) might run into problems with market surveillance authorities in other Member States, thereby denying free movement. Others point out, however, that much greater precision (at EU level) about 'pro-active' market surveillance would be desirable. It seems that further debate and clarification is needed here.

4. T-VEHICLES TYPE APPROVAL SYSTEM

'The current type-approval system for T vehicles is explained first, followed by an exposition of the draft Regulation of T vehicles. Whereas the drastic simplification implied by the draft Regulation is seen as most welcome (from 24 directives to one Regulation), the demand for introducing market surveillance into the proposal is hard to detect; support for it is mixed. The safeguard clauses are shown to be somewhat different from those in L vehicles. Brief remarks on the occupational health and safety aspects, now decoupled from the machinery directive, are added'

4.1. The Current Legislative Framework

The technical requirements for the type-approval of tractors and other T vehicles with regard to numerous safety and environmental elements have been harmonised at the level of the Union in order to avoid requirements that differ from one Member State to another, to ensure a high level of road and occupational safety and environmental protection throughout the Community and to allow for a harmonised system of EU type-approval. Currently the existing type-approval legislation for tractors is regulated in 24 different Directives⁵¹.

4.2. Overview of the current situation on market surveillance in relation to type approval for T-Vehicles, systems, components, or technical units (on the selected Member States)

In contrast to L vehicles, there seems to be little empirical evidence suggesting an urgent need to introduce market surveillance in the T vehicles sector.

As far as the authors know, there seems to be no tradition of open reporting on type-approved T vehicles. Before starting production, it must be shown by a manufacturer to a technical service that a prototype of whatever tractor complies with all requirements. In addition, given the COP (Conformity of Production) requirements within type approval, the producer has to prove throughout the series productions lifetime that compliance is a permanent feature of the production run. Apparently, there is either a closed culture or too great sensitivities exist about possible damage to reputations. Of course, the initiative of market surveillance in the GPSD are all about consumer goods, whereas T vehicles are goods used mainly by professionals and/or off-road (if not on private premises or land) most of the time. Consequently, rather than B2C marketing, T vehicles are usually sold in a B2B relationship.

⁵¹ Council Directives 74/347/EEC; 76/432/EEC; 76/763/EEC; 77/537/EEC; 78/764/EEC; 80/720/EEC; 86/297/EEC; 86/298/EEC; 86/415/EEC; Council Directive 87/402/EEC; and European Parliament and Council Directives 2000/25/EC; 2003/37/EC; 2009/57/EC; 2009/58/EC; 2009/144/EC; 2009/59/EC; 2009/60/EC; 2009/61/EC; 2009/63/EC; 2009/64/EC; 2009/66/EC; 2009/68/EC; 2009/75/EC; 2009/76/EC

According to the national authorities from Italy, Spain, Germany and Netherlands as well as the European Committee of Associations of manufacturers of Agricultural Machinery (CEMA), the Agricultural Machinery Association (VDMA) and the European Organisation on Agricultural and Rural Contractors, very few cases of unsafe or non-compliant products have been detected in the market. Sporadic non-compliant components coming from Russia is all that has been found so far. For that reason, CEMA, VDMA and the KBA take the view that there is no necessity to strengthen market surveillance in the sector. In plain talk, "if it ain't broke, don't fix it".

It should also be noted that, while for L-vehicles there is a growing number of companies from third countries operating in the European market, especially Asian companies⁵², the market for T-vehicles is dominated by European companies or well-established European daughters of US companies.

4.3. The draft Regulation on the approval of T-vehicles (COM(2010) 0395 final)

On the 23 of July 2010 the European Commission presented a proposal for a Regulation on the Approval of agricultural or forestry vehicles (COM(2010) 0395 final).

The draft Regulation aims to reduce the complexity of the legal structure of the existing framework, solve the problems related with the transposition of the (many) Directives and the delays caused by the transposition, complete the type approval requirements envisaged in Directive 2007/37/EC⁵³ (which are not completed for categories T4, T5, R and S) and introduce some safety aspects related to type-approval requirements, in particular braking requirements, that needed to be updated.

This proposal significantly simplifies the type-approval legislation by replacing 24 Directives (and around 35 related amending Directives) in the field of agricultural and forestry vehicles and their technical requirements by one single Regulation. It aims to lay down harmonised rules on the manufacturing of agricultural and forestry vehicles (tractors, trailers and towed equipment) with a view to ensuring the proper functioning of the internal market while at the same time providing for a high level of road and occupational safety and environmental protection. The competitiveness of the industry should be served by this simplification of the existing vehicle type-approval legislation, improving transparency and easing administrative burdens.

The proposal uses the "split-level approach" which envisages two steps:

- 1) The fundamental provisions will be laid down by the European Parliament and the Council in a Regulation based on Article 114 of the Treaty on the Functioning of the European Union through the ordinary legislative procedure;
- 2) The technical specifications implementing the fundamental provisions will be laid down in delegated acts adopted by the Commission in accordance with Article 290 of the Treaty on the Functioning of the European Union.

⁵² According to ACEM the number of imported motorcycles from China is far above 300.000 units since 2007, representing a market shares in the range of 15%.

⁵³ See Commission Directive 2007/37/EC of 21 June 2007, amending Annexes I and II to Council Directive 70/156/EEC on the approximation of the laws of the Member States relating to the type approval of motor vehicles and their trailers.

In the original draft Regulation, no market surveillance provisions were incorporated, for the simple reason that the early drafts of the T vehicle proposal date back longer than the NLF. However, it is quite probable that the Council and the European Parliament (supported by the Commission) will introduce some provisions on market surveillance in T-vehicles, equivalent to those proposed for L vehicles.

4.3.1. The obligation to establish type approval authorities and to notify them to the European Commission and to appoint market surveillance authorities, to organise and carry out market surveillance and controls

The proposed Regulation establishes in Article 5 paragraph 1 the obligation for Member States to appoint and notify to the European Commission type approval authorities competent in T vehicles. The notification of the type-approval and market surveillance authorities shall include their names, address, including electronic address, and area of responsibility.

In general, the type-approval authorities do not oppose such obligations. Most of them consider that the collaboration between the different entities responsible for type approval works quite well. However, they favour a reinforcement of the cooperation between national type approval authorities. The main difficulty for type approval authorities seems to be the lack of resources, financial and human, to strengthen their activity. For instance, the Italian Ministry of Infrastructures and Transports, which is the competent authority for the type approval of L and T vehicles, is of the view that it is futile to reinforce EU law if they do not have enough resources to intensify surveillance activities. The only exception is the Germany KBA, stating to dispose of sufficient resources to carry their activities.

When it comes to market surveillance (as distinct from type approval) obligations, things are different. Even if at the moment there is no certainty about the Council and the European Parliament introducing market surveillance obligations in the draft Regulation on T vehicles, the authors included a question about this possibility in the questionnaire sent to the stakeholders and to the national authorities.

The representatives of the T vehicles industry as well as the German national authority responsible for type approval and market surveillance clearly oppose the introduction of any obligations on market surveillance in the present proposal.

According to them, the philosophy of reducing 'serious' or significant risk to tolerable levels is very different indeed from the philosophy underlying the GPSD and/or Regulation 765/2008/EC and Decision 768/2008/EC. We noted this point in section 2.1 above. And one can understand why. T and L vehicles have been regulated under the Old Approach, which was/is mainly concerned with relatively high-risk goods. With risks seen as potentially 'high', the bringing onto the market itself is regarded as the critical step and this is (in most instances) not the case under the GPSD or the New Approach (where, often, self declaration – under conditions, of course, and with non-trivial obligations – is utilized).

Moreover, once non-compliance or technical problems increasing risks are discovered for L and T vehicles, the type-approval authorities are held to undertake action (rectification), as a rule directly with the manufacturer(s), with whom they work anyway for approvals. Recalls are one way to address the issues. It usually works well, because of these close contacts, the inherent incentives (the manufacturer will need type approvals in future, or, even risks that existing approval is withdrawn) and market reputation. Thus, even when a need to add a layer of market surveillance is identified, bridging two philosophies and practices is bound to mark a major change.

These stakeholders hold that the “market surveillance” for products falling under type approval legislation already takes place long before the product is placed on the market. It is a completely different situation than with goods falling under the New Approach.

For that reason, according to the T-vehicles sector, no further measures concerning to market surveillance would seem to be necessary. The authors, while understanding the distinct philosophies of the type approval and the other approaches to safety of goods, do note that the term 'market surveillance' has to refer to goods already sold and used in the market, hence, post-type-approval. It is a matter of empirical observation and judgment whether or not the strict type approval (and the related quality management in factories) ensures safety of (farm) workers and possibly road users sufficiently for years to come, so that ex post activities of surveillance are not needed. As pointed out before, after a grace period, there is also the option of periodical technical inspections. On the other hand, farmers and forestry workers have a close relationship with (local) distributors who have an interest to ensure safety, during the life of the T vehicle, for their clients. In turn, the distributors are in frequent contact with the manufacturers and complaints and warnings can easily be filed. There are concerns, sometimes voiced by the sector, that greater local competition in the distribution of T vehicles (similar to what has occurred in the car sector) may lead low-margin distributors to become less attentive to such safety questions due to a lack of long-standing client relationships.

The national authorities from Spain, Italy and Netherlands do not oppose the introduction of such obligations in the draft Regulation. However, they underline the necessity of allocating more resources to the national authorities so that they can carry out effective surveillance of the market. Indeed, nowadays they just carry out some market surveillance operations, but reactively: the cases are typically reported to them. They would need more resources to initiate (pro-active) controls on their own initiative. Moreover, the Italian and Dutch type approval authorities point out that more and detailed guidelines about how to interpret the technical requirements are needed. They have observed, more often than not, that the law is not interpreted in the same way in the different Member States.

Legally, it is interesting to note that market surveillance obligations, at least for the T – vehicles currently subject to type approval already exist. Indeed, the national authorities have to comply not only with the requirements of the sectoral law, but also with the requirements in the NLF, in case of absence of the “lex specialis”. According to Article 19 paragraph 1 of the Regulation 765/2008/EC, which establishes that market surveillance authorities shall perform appropriate checks on the characteristics of products on an adequate scale, by means of documentary checks and, where appropriate, physical and laboratory checks on the basis of adequate samples. When doing so they shall take account of established principles of risk assessment, complaints and other information.

4.3.2. The safeguard clauses in Articles 36-41 of the proposed COM(2010) 0395 final

The draft Regulation introduces in the Articles 36 to 41 so-called “safeguard clauses”, according to which the national authorities shall take all the appropriate measures to withdraw unsafe vehicles, systems, component or technical units from the market, even though they have been manufactured according to the type approval requirements based on the mentioned Regulation.

Those safeguard clauses, contrary to the safeguard clauses included in the proposed Regulation COM(2010) 542 final on L vehicles, do not follow exactly the terms specified in the Decision 768/2008/EC. This is largely due to the fact that, at first, the draft Regulation for T-vehicles (as proposed in mid-2010) did not contain any provisions related to market surveillance. As a consequence, those provisions are about serious risks detected before the product is placed on the market. Indeed, whereas in the decision 768/2008/EC and in the draft Regulation COM(2010) 542 final on L vehicles employs the term “market surveillance authority”, the proposed Regulation for tractors or forestry vehicles uses the term “the national authority which has granted an EU type approval”. This is not merely a question of terminology. Effectively, in the draft Regulation for T vehicles, the competence to detect and decide whether a vehicle, system, component or separate technical units, compliant or not with the type approved, represents a serious risk to safety, environment or public health as well as to take the necessary measures, including the decision to withdraw the type-approval, belongs to the national type approval authority which granted the type approval. Moreover, as the articles 36 to 41 speak about “take the necessary measure, including the withdrawal of type-approval, to ensure that ... are brought into conformity with the approval”, it remains unclear whether that competence is to be exercised only before or also after the product is placed on the market. By contrast, given the text of the safeguard clauses on proposed Regulation on L vehicles, it is clear that this is a competence of the national market surveillance authority, that could be or not the same authority that is competent for type approval. Similarly, this authority is competent to compel the relevant economic operators to take all the appropriate measures before the product is sold, registered or even after its entry into the market as well as to withdraw or recall the product after it has been placed on the market.

From the text of the safeguard clauses in the draft Regulation for motorcycles, it appears that the evaluation of the risk could be done by the market surveillance authority and/or the type approval authority. Such differences may matter for the EU law making process, if one desires to have a coherent system and avoid confusion about the competences of the different authorities involved. It can therefore be argued that the two proposals should be still further aligned, not least because it is crucial to determine which institution is responsible for the market surveillance and for the type approval, knowing that, in most of the Member States, those competences belong to different entities and some of them may well lack the technical expertise required.

Furthermore, in the proposed Regulation for T-vehicles no reference is made to the Union safeguard procedure, in accordance with the Article R32 of the Decision 768/2008/EC.

The national authorities contacted by the authors are, in general, supportive about the introduction of the mentioned safeguard clauses in the text of the proposed Regulation. However, the German national authority KBA and some representatives of the industry are of the view that those measures will create a huge administrative burden for economic operators. Moreover, the obligations of the responsible authorities are not clear and overlapping, which will lead to problems of competence at the national level.

They think, as we noted before with L vehicles, that the Commission has taken measures from the CE-self-certification-system and transferred them to the already complex and sophisticated type-approval system.

4.3.3. Reduce the complexity associated with the type-approval process

There are no doubts that the proposed Regulation will simplify the actual legislative framework in place for T-vehicles, since in future the EU will have one single Regulation instead of the 24 different Directives for type approval of tractors. All the respondents agree that to move from a Framework Directive to a Regulation has obvious benefits of legal certainty and uniformity.

However, according to the representatives of the industry and national type approval authorities, even if currently it is difficult to anticipate the full effects of the new proposal (as it will depend largely on what will be lay down in the delegate acts), they believe that the type approval procedure will remain complex and expensive, since the new proposal will bring even more administrative requirements and the technical requirements will remain almost the same.

The explicit reference made to Regulations of the United Nation Economic Commission for Europe (UNECE) is seen by the T industry sector as an improvement in the view of further internationalisation.

4.3.4. How to improve market surveillance systems and to promote an efficient cooperation between the different authorities involved in the process of type-approval?

As mentioned above, in contrast to L vehicles, there seems to be little evidence suggesting an urgent need to introduce market surveillance in the T vehicles sector.

The only measures proposed by some national authorities are the reinforcement of cooperation between authorities at European level, the writing of clear guidelines at EU level to avoid different interpretations of the law in place (with different criteria and procedures) and the clarification of the obligations of the national authorities in the draft Regulation.

Most national authorities emphasise that effective enforcement of the newly proposed measures will depend largely on the resources that the Member States will allocate to the national authorities.

However, as mentioned above, it should be noted that a number of national type approval authorities contacted declared to be solely responsible for the pre-market surveillance (via type approval) and revealed uncertainties about which entity is responsible for post-approval market surveillance. Moreover, the authors have been unable to obtain greater details about the degree and nature of cooperation between the different authorities involved in type-approval requirements to T vehicles and market surveillance in this market. It seems that market surveillance authorities for T vehicles have not been fully identified in certain Member States.

4.4. Repercussions of Article 63 of the proposed regulation (2010) 395 final, on the approval of agricultural or forestry vehicles

The Machinery Directive⁵⁴, applicable since 29 December 2009, lays out harmonised health and safety requirements applicable to machinery and expressly excludes from its scope the agricultural and forestry tractors, for the risks covered by Directive 2003/37/EC⁵⁵, with exclusion of machinery mounted on these vehicles (Article 1, paragraph 2, alinea e)).

At the time that the Machinery Directive was adopted, Directive 2003/37/EC did not deal with all the risks associated with the use of tractors. For that reason and to ensure that EU legislation covered all the relevant risks, the Machinery Directive is still being applicable to the agricultural and forestry tractors for the risks not covered by the Directive 2003/37/EC.

This means that the manufacturers of tractors should therefore assess the conformity of the tractors with the essential health and safety requirements of Annex I of the Machinery Directive that deals with the risks concerned, affix the CE-marking to the tractors and establishing an EC Declaration of Conformity with these requirements.

When the Machinery Directive 2006/42/EC was adopted, a joint declaration was made by the European Parliament, the Council and the Commission, according to which, in order to cover all aspects related to the health and safety of agricultural and forestry tractors in one harmonising Directive the Directive 2003/37/EC will need to be modified to cover all the relevant risks of the Machinery Directive.

In this context, the Commission has identified a number of essential health and safety requirements of the Machinery Directive that are not fully covered by Directive 2003/37/EC.

Today, in order to separate occupational health and safety requirements applicable to agricultural or forestry tractors from the machinery safety legislation, these requirements are laid down in the Directives 2003/37/EC, 2009/144/EC⁵⁶, 2009/76/EC⁵⁷, 2010/52/EC⁵⁸ and 2010/62/EC⁵⁹.

The new draft proposal COM(2010) 395 on the approval of agricultural or forestry vehicles establish in Article 63 that agricultural and forestry tractors will be completely excluded from the scope of the Machinery Directive. That exclusion applies only to the tractors themselves and not to their trailers, to towed or pushed machinery or to mounted or semi-mounted machinery.

⁵⁴ Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006, on machinery, and amending Directive 95/16/EC.

⁵⁵ See Directive 2003/37/EC of the European Parliament and of the Council of 26 May 2003, on type-approval of agricultural or forestry tractors, their trailers, and interchangeable towed machinery, together with their systems, components and separate technical units repealing Directive 74/150/EEC.

⁵⁶ See Directive 2009/144/EC of the European Parliament and of the Council of 30 November 2009 on certain components and characteristics of wheeled agricultural or forestry tractors.

⁵⁷ See Directive 2009/76/EC of the European Parliament and of the Council of 13 July 2009 relating to the driver-perceived noise level of wheeled agricultural or forestry tractors.

⁵⁸ See Commission Directive 2010/52/EU of 11 August amending, for the purposes of adaptation of their technical provisions, Council Directive 76/763/EEC relating to passenger seats for wheeled agricultural or forestry tractors and Directive 2009/144/EC of the European Parliament and the Council in certain components and characteristics of wheeled agricultural or forestry tractors.

⁵⁹ See Commission Directive 2010/62/EU of 8 September 2010 amending, for the purpose of adapting their technical provisions, Council Directives 80/720/EEC and 86/297/EEC and Directives 2003/37/EC, 2009/60/EC and 2009/144/EC of the European Parliament and the Council relating to the type-approval of agricultural or forestry tractors.

The draft Regulation deals with the substantive requirements in the Chapter III.

Article 7 paragraph 2 specifies requirements on “functional safety”, which should minimize the risk of injury to the vehicle occupants and to other road users⁶⁰ and Article 8 lays down the requirements on occupational safety that shall be observed to minimize the risk of injury to persons working on or with the vehicle. Article 9 establishes the requirements for environmental performance.

Article 8 furthermore refers to the requirements on occupational safety. According to paragraph 2, the manufacturers shall ensure that vehicles, systems, components and separate technical units comply with the following occupational safety requirements:

- roll-over protection systems (hereinafter “ROPS”);
- falling objects protection systems (hereinafter “FOPS”);
- passenger seats;
- drive-perceived noise level;
- driving seat;
- operating space and access to the driving position;
- power take-offs;
- protection of driver components;
- seat-belt anchorage points;
- safety belts;
- protection of driver against penetrating objects (hereinafter “OPS”);
- protection of driver against hazardous substances;
- operators manual.

According to the Commission it is probable that, during the legislative process, other functional requirements on safety will be added to these, such as requirements related to mechanical couplings and controls.

These requirements shall apply to vehicles, systems, components and separate technical units intended there for, insofar as they are declared applicable to the relevant vehicle category by the draft Regulation.

⁶⁰ According to Article 7, paragraph 2, the manufactures shall ensure that vehicles, systems, components and separate technical units comply with the following functional safety requirements: (a) vehicle structure integrity; (b) system to aid the control of the vehicle by the driver, including steering and braking systems; (c) systems to provide the driver with visibility and information on the state of the vehicle and the surrounding area, including glazing, mirrors and driver information systems; (d) vehicle lighting systems; (e) vehicle occupant protection, including interior fittings, head restraint, seat belts, vehicle doors; (f) vehicle exterior and accessories; (g) electromagnetic compatibility; (h) audible warning devices; (i) heating systems; (j) devices to prevent unauthorized use; (k) vehicle identification systems; (l) masses and dimensions; (m) electrical safety; (n) rear protective structures; (o) lateral protection; (p) load platforms; (q) towing devices; (r) controls; (s) tyres; (t) and spary-suppression systems. According to the Commission it is probable that, during the legislative process, other functional requirements on safety will be add to these, such as, for instance, requirements related to reverse gear, tracks and mechanical couplings.

In order to ensure that a high level of occupational safety will be obtained, the Commission shall include these detailed technical requirements in a delegated act.

However, it should be noted that, according to the European Trade Institute (ETUI)⁶¹ Article 8 should also include the following requirements emerging from workers feedback and authorities risk studies:

- reasonably foreseeable misuse (attention to retractable ROPS);
- unintentional movement;
- rupture of flexible pipes carrying fluids and errors of fittings;
- risk of fire;
- ergonomic position and accessibility of controls;
- Unintentional activation of controls.

According to ETUI, in the event of an overturn if the tractor is equipped with a ROPS and seatbelt, and both are utilised, serious injuries rarely occur. The practical problem is, however, that foldable ROPS require too much time and effort to manually raise and lower them so that, more often than not, the retractable ROPS remains folded down. This can lead to serious accidents. ETUI calls for what it denotes as “good European engineering practice” and provides a simple, elegant solution for it, in this case. More generally, ETUI recommends that decision-making on delegate acts takes into account relevant feedback from the workplace in order to ensure a high level of occupational health and safety for tractors

4.5. Conclusions

This chapter has dealt with the type approval system for T vehicles, the detailed provisions in the draft regulation – also with a view to market surveillance - and the merits and perceived problems of the provisions. Similar to the chapter on L vehicles, strong provisions of 'reactive' market surveillance already exist in the current legislation.

Also similar to the L vehicles proposal, the draft regulation implies drastic simplification, indeed, even more so because a single EU Regulation would replace no less than 24 directives. However, other than this appreciable simplification, the complexity of the type approval system will remain the considerable.

A conspicuous difference between the L and T vehicles proposals on market surveillance is that, in L vehicles, there is an articulate demand for more and 'pro-active' market surveillance, whereas in T vehicles that is not the case. Stakeholders, whether authorities or market players, see little or no evidence suggesting a need to introduce market surveillance in the sector. In plain talk: if it isn't broke, don't fix it. Nonetheless, it ought to be noted that there is no tradition whatsoever of open reporting of problematic cases, so any evidence is hard to come by. The T vehicles sector differs, however, from the market for L vehicles in that the latter witnesses strongly increasing imports, whereas the former market is dominated by European companies or well-established daughters of US companies. This greatly helps the type approval system to operate effectively.

⁶¹ See Stefano Boy and Paolo Derosas, “Proposal COM (2010) 395 final: Concrete recommendations from the health and safety perspectives”, European Trade Union Institute (ETUI) – Health and Safety Department, Public hearing on “Agricultural and forestry vehicles: a new regulatory framework, 12 April 2011, European Parliament.

With a view to have more coherence between the three EU safety regimes for goods, market surveillance provisions were introduced in the L vehicles but not, at first, into the T vehicles draft. However, is quite probably for a question of coherence with the NLF and alignment between the two draft Regulations, that the new text of draft Regulation of T vehicles will be incorporate market surveillance provisions. Even when national authorities do not oppose such provisions, they find it more important that more resources are given to them so that surveillance can be intensified in the market. The one authority which is sufficiently endowed (KBA, Germany) is opposed to market surveillance obligations as proposed. The T vehicles sector is equally opposed. The roots of the lack of enthusiasm about (if not opposition to) provisions of market surveillance is to be found in the very different philosophies of the type approval approach (ex ante, but highly intrusive, and with 'rectification' options ex post and good contacts directly with manufacturers) and the NLF. Some other authorities emphasise that it is more fruitful to develop common technical guidelines on the interpretation of the requirements.

The safeguard clauses for T vehicles do not follow exactly those for L vehicles; in the former, it is the type approval authority which retains more decision making power, in the latter, this power resides with the surveillance authority, unless delegated. One might consider further alignment between the two proposals. Other aspects are very similar to L vehicles, and so are the objections of some (e.g. about resources, the fear for greater burdens, etc.). Some national authorities favour the reinforcement of the cooperation between authorities at the EU level. Finally, the confusing link between T vehicles legislation and the machinery directive, regarding health and safety on the workplace (the farm, for instance), is going to be severed.

REFERENCES

- ACEM Report on “Non Compliances Found in Sample Motorcycle Manufactured in The Chinese People’s Republic” – January 2010
- Briefing paper commissioned by the IMCO Committee on the Revision of the General Product Safety Directive and Market Surveillance, published in September 2010, available at <http://www.europarl.europa.eu/document/activities/cont/201010/20101008ATT86166/20101008ATT86166EN.pdf>
- Commission Directive 2007/37/EC of 21 June 2007, amending Annexes I and II to Council Directive 70/156/EEC on the approximation of the laws of the Member States relating to the type approval of motor vehicles and their trailers.
- Commission Directive 2010/52/EU of 11 August amending, for the purposes of adaptation of their technical provisions, Council Directive 76/763/EEC relating to passenger seats for wheeled agricultural or forestry tractors and Directive 2009/144/EC of the European Parliament and the Council in certain components and characteristics of wheeled agricultural or forestry tractors
- Commission Directive 2010/62/EU of 8 September 2010 amending, for the purpose of adapting their technical provisions, Council Directives 80/720/EEC and 86/297/EEC and Directives 2003/37/EC, 2009/60/EC and 2009/144/EC of the European Parliament and the Council relating to the type-approval of agricultural or forestry tractors.
- Commission Regulation (EC, Euratom) No 2342/2002, of 23 December 2002.
- Commission Working Document entitled “Revision of the General Product Safety Directive: Summary envisaged action”, DG Health and Consumers Protection, 18 May 2010
- Commission Working Paper on the relationship between the General Products Safety Directive 2001/95/EC and the market surveillance provisions of Regulation (EC) No 765/2008, DG Health and Consumers, 2 March 2010
- Commission Working Document entitled “Revision of the General Product Safety Directive: Identification of the key Issues”, DG Health and Consumer Protection, 15 September 2009
- Council Decision 97/866/EC of 27 November 1997
- Council Directive 74/347/EEC of 25 June 1974 on the approximation of the laws of the Member States relating to the field of vision and windscreen wipers for wheeled agricultural or forestry vehicles
- Council Directive 76/432/EEC of 6 April 1976 on the approximation of the Laws of the Member States relating to the braking devices of wheeled agricultural or forestry tractors
- Council Directive 76/763/EEC of 27 July 1976 on the approximation of the laws of the Member States relating to passenger seats for wheeled agricultural or forestry tractors.
- Council Directive 77/537/EEC of 28 June 1977 on the approximation of the laws of the Member States relating to the measures to be taken against the emission of pollutants from diesel engines for use in wheeled agricultural or forestry tractors
- Council Directive 78/764/EEC of 25 July 1978 on the approximation of the laws of the Member States relating to the driver seat on wheeled agricultural or forestry tractors

- Council Directive 80/720/EEC of 24 June 1980 on the approximation of the laws of the Member States relating to the operating space, access to the diving position and the doors and windows of wheeled agricultural or forestry tractors
- Council Directive 86/297/EEC of 26 May 1986 on the approximation of the laws of the Member States relating to the take-offs of wheeled agricultural and forestry tractors and their protection
- Council Directive 86/298/EEC of 26 May 1986 on near-mounted roll-over protection structures of narrow-track wheeled agricultural and forestry tractors
- Council Directive 86/415/EEC of 24 July 1986 on the installation, location, operation and identification of the controls of wheeled agricultural or forestry tractors
- Council Directive 87/402/EEC of 25 June 1987 on roll-over protection structures mounted in front of driver's seat on narrow-track wheeled agricultural and forestry tractors
- Council Directive 93/14/EEC of 5 April 1993 on the braking of two or three-wheel motor vehicles
- Council Directive 93/30/EEC of 14 June 1993 on audible warning devices for two-or – three motor vehicles
- Council Directive 93/33/EEC of 14 June 1993 on protective devices intended to prevent the unauthorised use of two- or three wheel motor vehicles
- Council Directive 93/93/EEC of 29 October 1993 on the masses and dimensions of two or three-wheel motor vehicles
- Decision No 768/2008/EC of the European Parliament and of the Council of 9 July 2008, on a common framework for the marketing of products
- Directive 2002/24/EC of the European Parliament and of the Council of 18 March 2002, relating to the type-approval of two and three wheel motor vehicles
- Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety.
- Directive 2006/42/EC of the European Parliament and of the Council of 17 May 2006 on Machinery and amending Directive 95/16/EC
- Directive 95/1/EC of the European Parliament and of the Council of 2 February 1995 on the maximum design speed, maximum torque and maximum net engine power of two or three –wheel motor vehicles
- Directive 97/24/EC of the European Parliament and of the Council of 17 June 1997 on certain components and characteristics of two or three – wheel motor vehicles
- Directive 2000/7/EC of the European Parliament and of the Council of 20 March on speedometers for two-or three-wheel motor vehicles and amending Council Directive 92/61/EEC on the type-approval of two-or three – wheel motor vehicles
- Directive 2002/51/EC of the European Parliament and of the Council of 19 July 2002, on the reduction of the level of pollutant emissions from two-and three-wheel motor vehicles and amending Directive 97/24/EC
- Directive 2009/62/EC of the European Parliament and of the Council of 13 July 2009 relating to the space for mounting the rear registration plate of two or three wheel motor vehicles

- Directive 2009/67/EC of the European Parliament and of the Council of 13 July 2009 on the installation of lighting and light-signalling devices on two or three wheel motor vehicles
- Directive 2009/78/EC of the European Parliament and of the Council of 13 July 2009 on stands for two wheel motor vehicles
- Directive 2009/79/EC of the European Parliament and of the Council of 13 July 2009 on passenger hand-holds on two wheel motor vehicles
- Directive 2009/80/EC of European Parliament and of the Council of 13 July 2009 on the identification of controls, tell-tales and indicators for two or three wheel motor vehicles
- Directive 2009/139/EC of the European Parliament and of the Council of 25 November 2009 on Statutory markings for two or three wheel motor vehicles
- Directive 2000/25/EC of the European Parliament and of the Council of 22 May 2000 on action to be taken against the emission of gaseous and particulate pollutants by engines intended to power agricultural or forestry tractors and amending Council Directive 74/150/ECC
- Directive 2009/57/EC of the European Parliament and of the Council of 13 July 2009 relating to the roll-over protection structures of wheeled agricultural or forestry tractors
- Directive 2009/58/EC of the European Parliament and of the Council of 13 July 2009 on the coupling device and the reverse of wheeled agricultural or forestry tractors
- Directive 2009/59/EC of the European Parliament and of the Council of July 2009 on rear-view mirrors wheeled agricultural or forestry tractors
- Directive 2009/60/EC of the European Parliament and of the Council of 13 July 2009 on the maximum design speed of and load platforms for wheeled agricultural or forestry tractors
- Directive 2009/61/EC of the European Parliament and of the Council of 13 July 2009 relating to the installation of lighting and light-signalling devices on wheeled agricultural and forestry tractors
- Directive 2009/63/EC of the European Parliament and of the Council of 13 July 2009, on certain parts and characteristics of wheeled agricultural or forestry tractors
- Directive 2009/64/EC of the European Parliament and of the Council of 13 July 2009 on the suppression of radio interference produced by agricultural or forestry tractors (electromagnetic compatibility)
- Directive 2009/66/EC of the European Parliament and of the Council of 13 July 2009 on the steering equipment of wheeled agricultural or forestry tractors
- Directive 2009/68/EC of the European Parliament and of the Council of 13 July 2009 on the component type-approval of lighting and light-signalling devices on wheeled agricultural or forestry tractors
- Directive 2009/75/EC of the European Parliament and of the Council of 13 July 2009 on roll-over protection structures of wheeled agricultural or forestry tractors
- Directive 2009/144/EC of the European Parliament and of the Council of 30 November 2009 on certain components and characteristics of wheeled agricultural or forestry tractors
- Directive 2009/76/EC of the European Parliament and of the Council of 13 July 2009 relating to the driver-perceived noise level of wheeled agricultural or forestry tractors

- Directive 2003/37/EC of the European Parliament and of the Council of 26 May 2003, on type-approval of agricultural or forestry tractors, their trailers, and interchangeable towed machinery, together with their systems, components and separate technical units repealing Directive 74/150/EEC
- European Parliament Report on the revision of the General Product Safety Directive and market surveillance of 24 February 2011, Committee on the Internal Market and Consumer Protection
- <http://www.emars.eu/>
- Proposal Regulation (EU) 2010/0212(COD) of the European Parliament and of the Council on the approval of agricultural or forestry vehicles
- Proposal Regulation (EU) 2010/0271 (COD) of the European Parliament and of the Council on the approval and market surveillance of two – or three-wheel vehicles and quadricycles
- Roadmap entitled “Review of Directive 2010/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety GPSD”, DG Health and Consumers Protection, 25 March 2010
- Regulation (EC) No 764/2008 of the European Parliament and of the Council of 9 July 2008, laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State
- Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008, setting up the requirements for accreditation and market surveillance relating to the marketing products
- Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006, Concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC
- Report from the Commission to the European Parliament and to the Council on implementation of Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on General Product Safety, (COM(2008)0905)
- Stefano Boy and Paolo Derosas, “Proposal COM (2010) 395 final: Concrete recommendations from the health and safety perspectives”, European Trade Union Institute (ETUI) – Health and Safety Department, Public hearing on “Agricultural and forestry vehicles: a new regulatory framework”, 12 April 2011.

ANNEX I: LIST OF QUESTIONS

The following questions will be covered in this study:

- Do you think that questions could be raised regarding the relation between the market surveillance provisions in the proposed Regulations on one hand, and requirements in the “New Legislative Framework package (Regulations 764/2008/EC and 765/2008/EC and Decision 768/2008/EC) and the General Product Safety Directive (2001/95/EC) on the other? If yes, please, explain.
- What is your opinion about the establishment of a single market surveillance system for all products, based on one legislative act covering both the GPSD and Regulation 765/2008/EC, which aim to achieve a high level of product safety and market surveillance, clarifying the legal basis and taking into account the provisions more fully developed in the two existing legislative acts?
- In your opinion could PROSAFE serve as platform managed by the Commission for an extended coordination between Member States for harmonised and non-harmonised products? If yes, under what conditions?
- What are the main difficulties currently experienced by EU manufactures in relation to type approval requirements on L and T vehicles, systems, components or technical units? The EU manufactures have experimented some kind of difficulties due to the fact that the national transpositions may differ slightly, for example, concerning dates of publication and entry into force or misinterpretations with regard to the substantive requirements. (Maybe we can eliminate this one, since the answers are not very relevant)
- Is the current market surveillance on T-vehicles and L-vehicles, systems, components or technical units effective? What needs to be improved?
- In your opinion do the different authorities involved in the process co-operate in an efficient way to ensure that only safe and legitimate T and L-vehicles, systems, components or technical units enter into the EU market? What could be done to promote a better cooperation among all the different parties involved (manufacturers, manufacturer’s representatives, importers, distributors, market surveillance authorities, type approval authorities, other national authorities, technical services)?
- As result of the proposed Regulations on type-approval Member States will be obliged to establish and appoint type approval authorities and to appoint market surveillance authorities. Furthermore, an obligation to organise and carry out market surveillance and controls of vehicles, systems, components or technical units entering the EU market is introduced. Do you think that the introduction of these obligations will help to improve the actual functioning of the market surveillance system and to promote in the future a better cooperation between the different parties involved?
- What do you think about the inclusion of the so-called “safeguard clauses” in the proposal Regulations

- Do you think that the proposal Regulations will reduce the complexity associated with type-approval process? Please explain?
- Should other measures be added in order to strengthen the rules on market surveillance?

Additional questions to the national authorities:

- Which competent authority is currently responsible for the market surveillance for the type approved of L-vehicles (**two- or three-wheel vehicles and quadricycles**) and **T-vehicles (agricultural or forestry vehicles)**, systems, components and technical units for:
 - discover non compliant products;
 - recall procedures of non compliant products;
 - fighting counterfeited products;
 - border controls.
- Could you, please, describe how the market surveillance in relation to **L-vehicles (two- or three-wheel vehicles and quadricycles)** and **T-vehicles (agricultural or forestry vehicles)** is carry on currently in your country? Can you, for instance, do random tests or set up a system of reporting via distributors or repair facilities? Could you, please, specify what you think can be done beyond your activities today?
- Do you have enough resources to address all possible problems of risky products in T vehicles and L vehicles in your country?
- How many market surveillance operations are, on average, carried out per year?
- How would you describe the cooperation among the different authorities involved in the process (type-approval, market surveillance and customs authorities) at National and at European level? Do you think that some improvements should be done in order to ensure that only safe and legitimate T and L-vehicles, systems, components or technical units enter into the EU market?
- In the new proposal Regulations from the European Commission, currently discussed by the Council and the European Parliament⁶², market surveillance authorities of Member States are likely to be assigned with surveillance of T and L vehicles already sold in the market and used by consumers and customers. Are the type approval and market surveillance authorities in your country already cooperating closely? How is this organized? Could this be tightened and improved, and if so, how? If they are not yet cooperating closely, is the government preparing a new coordination mechanism?

⁶² See notes 1 and 2.

ANNEX II: OVERVIEW OF MEMBER STATES CONSULTED IN THE BRIEFING NOTE:⁶³

Country	Size	Name	Competence on Market Surveillance	Competence on Type Approval
Germany	Large	Federal Motor Authority - KBA	YES	Yes, T and L vehicles
Italy	Large	Ministry for Infrastructures and Transport	No	Yes, T and L vehicles
Netherlands	Small	National Services for Road Transports - RDW	No, except for recalls	Yes, T and L vehicles
Spain	Large	Ministry of Industry and Trade	Share competence for industrial products and premises.	Yes, T and L vehicles

⁶³ Only the countries how send their answer were included.

ANNEX III: OVERVIEW OF INTERVIEWS

NAME	POSITION	ORGANISATION	COUNTRY
Andrea Vosinis	Seconded National Expert Legislative Officer Automotive Industry	Directorate-General for Enterprises and Industry	EU
Antonio Perlot	Public Affairs Manager	THE MOTORCYCLE INDUSTRY IN EUROPE - ACEM	EU
Claudia Schorler	European Officer Adviser	VDMA – The Agricultural Machinery Association	EU
Corinne Dreyfus Politronacci	Administrator	European Council	EU
Dimitrios Montzevelakis	Administrator	European Council	EU
Eric Drésin	Director	The European Organisation on Agricultural and Rural Contractors	EU
Giacomo Mattinò	Deputy Head of Unit – Automotive Industry	Directorate-General for Enterprises and Industry	EU
Guido Gielen	Legislative officer – Automotive Industry	Directorate-General for Enterprise and Industry	EU
Gunnar Wold	Prosafe Secretary	PROSAFE	EU
Iona Zlotila	Project Assistant	PROSAFE	EU
Ivo Hostens	Technical Manager	European Committee of Associations of Manufacturers of	EU
Jacques McMillan	Head of Unit C/1	Directorate General for Enterprises and Industry	EU
Maarten Balk	Manager Certification	National Services for Road Transports	Netherlands

Mark Wummel	Vehicle Technology	Federal Motor Authority - KBA	Germany
Poalo Ivan Turchetta	Ministry for Infrastructures and Transport	Ministry for Infrastructures and Transport	Italy
Sylvia Maurer	Senior Policy Officer for Safety and Environment	The European Consumer Organisation - BEUC	EU
Triin Molson	Administrator	European Council	EU
Timoteo de la Fuente Garcia	Deputy Director General of Quality and Industrial Safety	Ministry of Industry and Trade	Spain
Triin Molson	Administrator	European Council	EU

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT ECONOMIC AND SCIENTIFIC POLICY **A**

Role

Policy departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Economic and Monetary Affairs
- Employment and Social Affairs
- Environment, Public Health and Food Safety
- Industry, Research and Energy
- Internal Market and Consumer Protection

Documents

Visit the European Parliament website: <http://www.europarl.europa.eu/studies>

PHOTO CREDIT: iStockInternational Inc.



ISBN