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DISCUSSION NOTE FOR THE TCMV MEETING OF 26 MARCH 2010

Item 4. Presentation and continued exchange of views on the possible impact of the New Legislative Framework – in particular its market surveillance provisions and practice – on the acquis in the automotive sector – Example: non compliant Powered Two Wheelers;

1. Aim:

Member States are invited to provide their views on the envisaged approach outlined below, in particular with regard to:

- 1) the **introduction of legal provisions on market surveillance and related matters in the automotive framework legislation**, and on
- 2) the **establishment of a forum for co-ordination of market surveillance activities between the Member States and the Commission services.**

2. Background:

At the TCMV meeting of 20 October 2009, the Commission services presented the legal acts adopted in July 2008 under the so-called "New Legislative Framework" (NLF), which are introducing clear Community rules aimed at improving the implementation of the Community's internal market legislation for goods. Particular attention was drawn to the new provisions on market surveillance which are designed to reinforce and bring more coherence in the implementation of internal market legislation for goods and to ensure a level playing field for economic operators by protecting them against unfair competition that may arise from non-compliant products being placed on the market.

A number of general market surveillance provisions and principles are contained in Regulation 765/2008/EC, which has entered into force on the 1st of January 2010. These provisions are in principle applicable across all product sectors covered by specific technical harmonisation legislation, unless such legislation does already contain provisions with the same objective, nature or effect.

For the TCMV meeting of 20 October 2009, the Commission services prepared a comparative document, in which the provisions of Directive 2007/46/EC were assessed against those of Regulation 765/2008/EC to establish to which extent the market surveillance provisions of the Regulation are already covered by provisions in Directive 2007/46/EC which have the same objective, nature or effect. (http://circa.europa.eu/Public/irc/enterprise/automotive/library?l=/technical_committee/meeting_october_2009/tcmv_meeting_2009rev/EN_1.0_&a=d)

From this assessment, the Commission services arrived at the conclusion that the Motor Vehicles Framework Directive already contains such provisions with regard to the general principles for taking restrictive measures (Article 16.2 of the Regulation), including the procedure for recalling products presenting a serious risk (Article 20 of the Regulation) and the notification procedure for restrictive measures (Article 21 of the Regulation). On the other hand, the assessment revealed that the Motor Vehicles Framework Directive does not contain specific provisions having the same objective as those of the Regulation with regard to the general requirements on market surveillance (Regulation 765/2008, Article 16, except for Article 16(2)), the information and organisation obligations (Articles 17 & 18), the market surveillance measures (Article 19), the exchange of information (Article 22), and the principles of cooperation (Articles 24 to 26).

With regard to the information and organisation obligations, the attention of the Member States has been drawn to Article 18(5) of the Regulation, which requires Member States to draw up either a general market surveillance programme or sector specific programmes, and to communicate these to the other Member States and the Commission by 1 January 2010. ¹

Member States have welcomed in general the approach followed by the Commission services and considered in particular that the Annex to the comparative document was a helpful instrument for assessing to what extent the market surveillance provisions of the Regulation are complementary to those already existing in the automotive technical harmonisation legislation and therefore eligible for being addressed whenever the Motor Vehicle Framework Directive would need to be amended.

The above mentioned comparative note also provided in its Annex II an example of a specific product category (tyres), identifying specific compliance problems encountered on the market and demonstrating the need for addressing these through dedicated market surveillance activities. The Commission services undertook to further explore the implementation of market surveillance in the automotive sector and to continue discussions with stakeholders on this subject.

Since the TCMV meeting of 20 October 2009, the attention of the Commission services has been drawn to the fact that also in the sector of motorcycles similar compliance problems have been identified (see the ACEM report in Annex), which indicate that a similar reflection should be made as to whether the implementation of the corresponding legislation could be improved through the introduction of more specific market surveillance provisions.

¹ See the attached document setting out interim guidelines for the communication of information and national market surveillance programmes between the national authorities and the European Commission.

2. Objectives of this note:

The objectives of this note are threefold:

1. To provide – based on the assessment made in the comparative note for the TCMV meeting of 20 October 2009 – a further, more detailed analysis on how the implementation of the Motor Vehicle Framework Directive could be improved through the introduction of market surveillance principles not yet addressed.
2. To assess the need for ensuring consistency between the approach proposed for the Motor Vehicle Framework Directive in relation to market surveillance, and other similar framework legislation under preparation for motorcycles and tractors.
3. To explore already possible ways and means to address the specific compliance problems flagged in the domain of tyres and motorcycles.

3. Further analysis of the market surveillance provisions of the New Legislative Framework:

In addition to the directly applicable market surveillance provisions of Regulation N° 765/2008, the New Legislative Framework also provides also a set of more specific reference provisions on market surveillance which are contained in Decision N° 768/2008 on the common framework for the marketing of products. The reference provisions of this Decision provide, amongst others, definitions and general obligations for economic operators, requirements for conformity assessment bodies, and procedures for dealing with products presenting a risk.

These reference provisions are intended to be incorporated into the specific sectoral technical harmonisation legislation, unless the specificities of sectoral needs may provide grounds for recourse to other regulatory solutions.

Building on the outcome of the comparative assessment between Regulation N° 765/2008 and Framework Directive 2007/46/EC presented at the TCMC meeting in October 2009, the Commission services have made a further analysis of the reference provisions of Decision N° 768/2008, with a view to ascertain to what extent their introduction into the motor vehicles framework directive could contribute to its better implementation, in particular through market surveillance. As a result of this analysis the Commission services consider that the following issues would merit to be addressed:

1) Responsibilities of the different economic operators in the supply chain:

a) Assessment:

In line with its scope, Directive 2007/46/EC addresses only the manufacturer and the manufacturer's representative as economic operators and specifies their responsibilities with regard to the approval of the vehicles, systems, components and technical units they are placing on the market. This approach may prove not to be sufficient to ensure that manufacturers established outside the European Union are complying with the requirements of the Directive. Although the Directive contains a provision that in such a case the manufacturer has to appoint a

representative established in the EU, it is questionable how and to what extent this requirement can be legally enforced upon a third country manufacturer.

The NLF decision 768/2008 addresses not only the vehicle manufacturer, but all the economic operators which are involved in ensuring the conformity and safety of the product. It therefore defines all possible economic operators in the supply chain (manufacturer, authorised representative, importer, and distributor) and specifies their respective responsibilities in relation to the conformity of the products they are placing on the market in the EU.

b) Proposed approach:

As the examples of problems with non-compliant automotive products encountered on the EU market demonstrate that they are often related to third country manufacturers, the Commission services consider it **essential to clearly define the responsibilities of the different players on the EU market and in particular to ensure that an economic operator established in the EU can be identified and addressed to for non-compliant products manufactured outside the EU**. The NLF decision 768/2008 addresses also the case in which the obligations of a manufacturer should apply to importers and distributors. The Commission services envisage therefore proposing to incorporate the relevant reference provisions of Decision 768/2008 (Annex I, Regulations R2 to R7) into the forthcoming proposal for amending Directive 2007/46/EC.

2) **Responsibilities and involvement of Member States' competent authorities:**

a) Assessment:

Directive 2007/46/EC refers solely to approval authorities and competent authorities. The latter are defined for the purpose of Article 42 only (assessment of the skills of technical services) to mean either the approval authority or a designated authority (without defining it) or an accreditation body acting on their behalf.

b) Proposed approach:

The Commission services consider that - for the much wider purpose of market surveillance, and in particular for the application of the safeguard clauses (Articles 29 to 33) - **the role of market surveillance authorities should be explicitly recognised and defined in Directive 2007/46/EC**, taking into account that Regulation N° 765/2008 has become applicable on the 1st of January 2010 and clearly defines market surveillance authorities and their responsibilities.

The Commission services envisage therefore proposing to include a definition of market surveillance authorities into the forthcoming proposal for amending Directive 2007/46/EC and to specify their involvement and responsibilities in the safeguard procedures (see point 3 below).

3) **Involvement and role of market surveillance authorities in the safeguard procedures.**

a) Assessment:

Due to its legal character as a Directive and its scope – type approval - the safeguard procedures of Directive 2007/46/EC are specified in a general manner as obligations for Member States, without specifying the respective competences of the different national authorities involved.

Again, in the light of the problems encountered with non-compliant products imported from outside the EU, the NLF Regulation is defining and specifying the respective role and responsibilities of the customs authorities and market surveillance authorities and the co-operation between them. On the other hand it is obvious that market surveillance authorities have also to co-operate with type approval authorities in particular to ensure that any remedial action undertaken will guarantee an adequate solution to the safety, environmental or compliance problem encountered (cf. Article 32 of the framework directive on the recall of vehicles).

b) Proposed approach:

The Commission services consider therefore that it is **necessary to re-assess the current safeguard procedures to clarify the role and responsibilities of the market surveillance authorities - and also the customs authorities - in this process.**

At the same time it is worthwhile assessing whether and to which extent the 2-step approach specified in the NLF decision 768/2008 for the safeguard measures could contribute in enhancing the implementation of the automotive technical harmonisation legislation. This 2-step approach provides for a simplified procedure for dealing with products presenting a risk at national level only, complemented by a more extended procedure at Community level in case the measures taken at national level would give rise to objections from other Member States or the European Commission (Articles R32 and R33 of Annex I to Decision 768/2008).

4) **Post-market safeguard procedure for compliant products representing a serious risk.**

a) Assessment:

Currently Directive 2007/46/EC specifies in its Article 29 that Member States may refuse to register compliant vehicles or to permit their sale or entry into service if they find that such products present a serious risk. However, no such provisions are specified for vehicles which after they have been registered or sold or entered into service are found to present a serious risk. Article 32 on the recall of vehicles addresses this situation to some extent, but focuses primarily on the procedure to be followed and the responsibilities of manufacturers and approval authorities in this process. However, the legal basis referred to in Article 32 for applying such recall procedure is limited to the General Product Safety Directive or a regulatory act, i.e. a separate directive or regulation or a UNECE 1958 regulation.

b) Proposed approach:

In view of the entry into application of NLF Regulation 765/2008 the legal basis for the procedure specified in Article 32 should be updated accordingly to **ensure that the recall provisions and the corresponding information obligations of Regulation 765/2008 are properly taken into account.**

The Commission services envisage therefore proposing to include a reference to Regulation 765/2008 as a legal basis for the recall procedure specified in Article 32 of Directive 2007/46/EC.

5) **Designation, obligations and competence of technical services**

a) Assessment:

Although **technical services** do not have a direct responsibility and role to play in the context of market surveillance, they are a key player in the conformity assessment procedure, through which they **may become involved in any safeguard measure for a product for which they have carried out conformity assessment**.

The NLF Decision 765/2008 contains explicit provisions to that extent as well as a set of detailed provisions relating to the designation, assessment, competence and operational obligations of technical services, including a procedure for handling cases where the competence of the conformity assessment body may be challenged. (Annex I, Articles R13 to R30).

b) Proposed approach:

The Commission services consider it necessary to envisage incorporating the principles of these specific reference provisions of Decision 765/2008 relating to conformity assessment bodies in the forthcoming proposal for amending Directive 2007/46/EC as part of the efforts to enhance its implementation and effectiveness and to **strengthen the current provisions relating to technical services**.

3. **Need for ensuring consistency and coherence in approach for all technical harmonisation legislation on automotive products:**

The assessment made by the Commission services so far has been focusing on improving the technical harmonisation legislation for motor vehicles, in particular framework directive 2007/46/EC. However, as evidence is available that also in the sector of motorcycles and tractors similar compliance problems on the market may be encountered as for motor vehicles, the Commission services consider it essential that **the main principles and actions that may be agreed upon with a view to improve the implementation of the motor vehicles framework legislation should also be introduced accordingly in the framework legislation that is currently under preparation for motorcycles and tractors**.

Only by doing so, consistency and coherence can be ensured in the implementation of the overall technical harmonisation legislation covering all automotive products, in particular by introducing the same provisions on market surveillance and related aspects.

Therefore the Commission services intend - taking into account the outcome of the exchange of views with Member States on this subject – to **elaborate specific proposals on market surveillance and related matters with a view to incorporating them in the draft framework legislation on motor cycles and tractors currently under preparation, as well as in the framework directive on**

motor vehicles, whose amendment is scheduled for the 2010 legislative work programme.

4. Addressing specific compliance problems encountered in the automotive sector through dedicated market surveillance actions:

In complement to and in parallel with the approach envisaged above to introduce specific provisions on market surveillance and related matters in the framework legislation on automotive products to improve its implementation, specific compliance problems which have been brought to the attention of the authorities by economic operators (such as the examples raised by ETRMA and ACEM) should be properly addressed.

As indicated above, Regulation 765/2008 is applicable since 1 January 2010 and provides the legal basis for the market surveillance of products and for controls on products from third countries. In particular, its Article 18.2 requires Member States to follow-up complaints or reports on issues relating to risks arising from products subject to technical harmonisation legislation and to verify that corrective actions are taken through market surveillance measures as specified in Article 19 and controls of products entering the Community market as specified in Article 27.

Moreover, Articles 24 and 25 set out the principles of co-operation between the Member States and the Commission in this respect and provide the possibility for the Commission or the Member States to set up market surveillance initiatives designed to share resources and expertise between the competent authorities of the Member States. In this context, the **setting up of an administrative co-operation group of market surveillance authorities (ADCO) in the automotive sector** should be considered, **to provide a forum for cooperation and coordination on market surveillance activities between the Member States and the Commission.** Experience with ADCO groups in other product sectors covered by technical harmonisation legislation has been positive and has proven to provide a useful and necessary complement to the role and activities of the corresponding technical committee, whose role is mainly to assist the Commission in preparing legislative implementing measures for adoption under Comitology.

5. Next steps

Taking into account the response received from Member States, the Commission services intend to start preparing draft legislative text proposals for introducing provisions on market surveillance and related matters in the framework legislation for automotive products (motor vehicles, motor cycles and tractors), as well as the setting up of an administrative co-ordination group of market surveillance authorities in the automotive sector.

Enclosures:

- 1) Interim lines of communication between the national authorities and the European Commission under Regulation No 765/2008/EC
- 2) ACEM report on non compliances found in sample motorcycles manufactured in the Chinese Peoples Republic (see

http://circa.europa.eu/Public/irc/enterprise/automotive/library?l=technical_committee/11th_meeting_2010/100126_compliant/EN_1.0_&a=d)



Brussels, 14 December 2009

Interim lines of communication between the national authorities and the European Commission under Regulation No 765/2008/EC

National authorities have to communicate to the Commission a number of documents and pieces of information by 1 January 2010 and thereafter, for the implementation of Regulation No 765/2008/EC (the "Regulation"). The corresponding informatics solutions will not be in place by 1 January 2010 due to various reasons (ex. the GRAS RAPEX platform will not be ready before April 2010; the negotiations with ICSMS will no doubt not be terminated by that date either). It is therefore suggested to follow the interim procedures set out below.

I. Information on market surveillance structure and programmes

> Communication under Article 17 of Regulation of information on national market surveillance authorities and areas of competence should be sent to the Commission by mail to Mrs. L. Brykman, Director ENTR C at the following address:

Mrs Liliana BRYKMAN
Director
EUROPEAN COMMISSION
DG Enterprise and Industry (Office B100 8/013)
B - 1049 Brussels

or via e-mail:
to entr-reg-approach-for-free-circ@ec.europa.eu

(please clearly indicate in the subject "Communication according to Article (e.g.)17 of Regulation 765/2008/EC")

> Communication of national market surveillance programmes pursuant to Article 18(5) of the Regulation should be submitted to the Commission through the SOGs MSG circa site (http://circa.europa.eu/Members/irc/enterprise/sogs_mktsurv/home).

II. Information on harmonised² products posing serious risks according to Article 22 of the Regulation (future GRAS RAPEX)

- > Notifications of measures concerning harmonised consumer products presenting a serious risk to the health and safety of consumers should be submitted to the Commission through the RAPEX on-line application 'REIS' (<https://reis.ec.europa.eu/reis/>).
- > Notifications of measures concerning
 - (i) harmonised professional products presenting a risk to health and safety (e.g. safety at work), and
 - (ii) all harmonised products presenting other risks than risk to health and safety (e.g. environment, security),as well as related communications (i.e. reactions of other MS and additional information), should be sent to SOGs MSG circa.

III. Information on harmonised³ products posing non-serious risks according to Article 23 of the Regulation (future ICSMS)

- > Notifications of measures concerning all harmonised products (consumer and professional) posing any type of non-serious risk (e.g. risk to health and safety of consumers, health and safety at work, environment, security) should be sent to the corresponding sectoral "Circa" web sites (or other sector-specific communication mechanisms currently in use). National authorities already in ICSMS shall continue to communicate to ICSMS. Those national authorities who use RAPEX for non serious risk consumer products can continue to use this route.
- > Communication of general information on market surveillance, e.g. training programmes joint actions, exchange of experience, best practices etc, should be sent to a new horizontal sub-section of the existing functional web site for market surveillance SOGs MSG (the sub section is under construction). National authorities already in ICSMS shall continue to communicate to ICSMS.

IV. Information on national sanction regimes and accreditation bodies

- > Communication of national sanctions regimes as required by Article 41 of the Regulation should be sent by mail to Mrs. L. Brykman, Director, ENTR C (see details in section I. above).
- > Communication of national accreditation bodies and their respective EA MLA scopes as required by Article 12(2) of the Regulation 765 should be sent by mail to Mrs. L. Brykman, Director, ENTR C (see details in section I. above).

² Notifications of measures concerning **non-harmonised consumer products** posing a serious risk to the health and safety of consumers remain unchanged (i.e. they are submitted to the Commission through the RAPEX on-line application 'REIS' - <https://reis.ec.europa.eu/reis/>). The legal basis of such notifications is Article 12 of the GPSD.

³ Notifications of measures concerning **non-harmonised consumer products** posing a non-serious risk to the health and safety of consumers remain unchanged (i.e. they are submitted to the Commission through the RAPEX on-line application 'REIS' - <https://reis.ec.europa.eu/reis/>). The legal basis of such notifications is Article 11 of the GPSD.