ORGALIME

Position Paper

Brussels, 03 June 2013

Consumer Products Safety:
More consistency needed across the board

Orgalime Comments on the Commission's proposal for a Regulation on Consumer Product Safety [1]

1. EXECUTIVE SUMMARY

Orgalime welcomes the European Commission's ambition to improve the General Product Safety Directive (2001/95/EC – "GPSD") with its proposal for a Regulation on Consumer Product Safety (**CPSR**). However, we believe that ensuring **consumer product safety would be simpler and more consistent** with European harmonisation legislation pursuing consumer safety **if**:

1. **The CPSR scope is clearly restricted to non-harmonised consumer products** only;
2. 'Consumer products' and "**products for exclusive use by professionals**" are distinguished;
3. The principle of **non-retroactivity** of the law is confirmed;
4. Aspects for assessing the safety of products are improved, and in particular by providing:
   - A **definition of "safe product"**,
   - **Prioritisation of aspects for assessing product safety**,
   - **Clarification of "*vulnerable consumers*"** and consumer expectations concerning safety;
5. The indication of origin is removed;
6. Administrative requirements for manufacturers of non-harmonised products are significantly lightened, and especially by **removing or limiting**:
   - The **requirement of "technical documentation**", which is bureaucratic overkill for most non-harmonised consumer products,
   - **Identification elements**, which should apply only for some few categories of products after assessment of their cost-effectiveness for improved traceability;
   - Article 15 on a **product traceability system** is deleted;
7. The European Commission's decisions are addressed to manufacturers (not only standardisers), for whom standards should remain a voluntary tool;
8. Penalties are removed because they are redundant as they are included in the draft Market Surveillance Product Regulation (MSPR), or at least these should be aligned with it.

[1] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0078:FIN:en:PDF

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2. INTRODUCTION

Orgalime welcomes the European Commission's ambition to improve the General Product Safety Directive (2001/95/EC) with its proposal for a Regulation on Consumer Product Safety (**CPSR**). This is a significant step towards the improvement of the legal framework contributing to the safety of consumers.

Together, with the proposed Regulation on Market Surveillance of Products (MSPR), we believe that the future CPSR should be part of a coherent and easy-to-apply legal framework for the marketing of products in the EU. For products covered by Union harmonisation legislation, this framework already establishes a comprehensive set of rules for a high level of safety for consumers, such as the Low Voltage Directive (electrical safety), the Machinery Directive, or the Simple Pressure Vessels Directive.

However, in order to achieve these goals, we believe that there is a need for improvement in several areas of the Commission's proposal.

3. GENERAL COMMENTS

a. The scope should be restricted to non-harmonised consumer products only

We appreciate the improvement of the '*lex specialis'*, which specifies under Article 5 (a) that market surveillance authorities (MSAs) should assess risks for consumers against the health and safety requirements of Union harmonisation legislation first.

The objective of this revision is to ensure clarity and consistency of the CPSR's scope with the different pieces of Union legislation applying to consumer products. However, we regret that there is still an unnecessary overlap between the proposed CPSR, which continues to apply to all consumer products, and sector-specific Union harmonisation legislation which, for much of it, also aims at ensuring a high level of consumer protection.

In our view, the simpler the legislative framework, the wider and better its application by market operators will be. This is the most cost-efficient way to achieve the best possible compliance rate of products placed on the market.

➔ Therefore, we believe that it should be clarified under Article 1 and/or under Article 2 § 4 that "*This Regulation shall not apply to products subject to requirements designed to protect human health and safety laid down in Union harmonisation legislation or pursuant to it*."

There are three reasons to support this:

- safety requirements and traceability and compliance requirements are already specified in applicable sector-specific harmonisation legislation, often with a much higher level of precision and accuracy for each product category concerned than in the proposed CPSR;
- The definition of "*safe product*" in Article 3 § 1 is redundant and could give rise to legal uncertainty for products subject to the health and safety requirements of Union harmonisation legislation;
- It would provide a much clearer legal framework for manufacturers (their products would be either within or outside the scope of the CPSR) and would consequently be much simpler to apply, especially for SMEs (for example. art 5, art. 6.1). Consequently, it would remove the obligation for manufacturers of harmonised products intended for consumers to monitor yet another piece of legislation, as is the case today with the GPSD. This would truly contribute to regulatory simplification, which we believe is essential, as the cumulative weight of EU legislation is increasingly difficult for companies, and in particular SMEs, to

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manage. Moreover, a simpler and clearer legal framework is also much easier to apply by market operators and to enforce by market surveillance and other enforcement authorities.

b. Clarify the distinction between consumer products and products for exclusive use by professionals

Orgalime believes that the provision of article 2 paragraph 1 (b) about products "*which are likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them*" should be more specific. This is necessary because of the variety in structure and complexity of the distribution chain and the varying interpretation of such a provision by the national authorities under the current GPSD.

➔ Consequently, we recommend adding a sentence in Article 2 to explicitly specify that "*products are not likely to be used by consumers if they are intended, under reasonably foreseeable conditions, for the exclusive use by professionals and explicitly labelled and presented as such*."

This would help to ensure much-needed legal certainty for manufacturers of professional products, who have clearly indicated in the safety information and user instructions, that these are intended to be used by professionals under specified conditions, for example by trained adults, under the supervision of their employer. For instance, this could include professional tools or installation equipment, whose sale in do-it-yourself retail shops was never intended or only allowed on special conditions of presentation by the manufacturer.

c. Confirm the principle of non-retroactivity of the law

Orgalime acknowledges the Commission's intention to regulate the making available to consumers of used or reconditioned products (article 2.1).

Nevertheless, we believe it is necessary to confirm the general principle of non-retroactivity the law. Otherwise, distributors would not be in a lawful position to supply products that have been placed on the market, before the date of application of the CPSR. Indeed, non-harmonised consumer products are not subject to obligatory identification requirements under the current GPSD. This would adversely affect, for a number of years, the sale of second-hand products, including by non-profit associations. Moreover, it would undermine efforts on waste efficiency.

4. ASPECTS FOR ASSESSING THE SAFETY OF PRODUCTS (ARTICLE 6)

In line with our general comments on the scope (see above), Orgalime suggests further improvements to the proposed aspects for assessing the safety of products.

a. The definition of "safe product" should be improved.

Such a definition should be consistent with the definition of "product presenting a risk" under the proposed Market Surveillance Regulation (see MSPR Article 3 (13)). Besides, it should acknowledge that aspects for assessing the safety of products are usually more specific in applicable Union harmonisation legislation. Consequently these aspects, as specified in harmonised legislation, provide for a clearer legal basis and ensure a higher level of consumer protection than the generic guidance provided under Article 6.

b. Prioritisation of aspects for assessing product safety

Article 6 should give in a linear manner the hierarchy of aspects to be taken into account when assessing the safety of a product. The existence of two paragraphs can be confusing and may lead to companies disregarding some of the aspects.

c. Vulnerable consumers and consumer expectations concerning safety

We are wary about vague concepts referred to without clear definition such as "vulnerable consumers" (Article 6.1.d) and "reasonable consumer expectations concerning safety" (Article 6.2.h). These concepts cover too wide a spectrum of situations which escape the normal conditions of liability, which should be proportional to the applications intended and described as such by the manufacturer in the product's safety instructions.

It would be disproportionate to require manufacturers to ensure that products are safe for all situations of involving vulnerable consumers, without having due consideration for the responsibilities and supervision or training obligations incumbent upon family members, service providers or employers. Where necessary, reasonably foreseeable circumstances of misuse could be mitigated by adequate warnings, for example: "*keep away from young children, risk of suffocation*" for plastic bags, etc…

It is also public authorities' responsibility – and not only that of the manufacturers' – to ensure adequate education, training and proper conditions for helping children, elderly and consumers with disabilities in appropriate risk mitigation approaches.

Therefore we caution the European legislator against introducing these subjective concepts in the CPSR, because they are prone to discretionary and varying interpretation by local enforcement authorities which would undermine the consistency of the internal market. MSAs' risk evaluation should consider in priority the product's use according to its intended purpose, as specified by the manufacturer.

5. INDICATION OF ORIGIN (ARTICLE 7)

Orgalime is against the requirement to indicate the origin of consumer products, although some of its members see potential benefits in this. This provision has neither been addressed by the impact assessment, nor is it contained in the New Legislative Framework, and would in most of our members' view:

- not improve either consumer safety or product traceability, which are already ensured by other means in harmonised legislation and in the CPSR (for example: Article 8 point 7);
- create confusion for consumers of products that result from a complex worldwide supply chain, whose representation in a single indication of origin would be difficult and costly;
- add yet another task for understaffed and under-resourced enforcement authorities.

Furthermore, this proposal is based on Regulation (EEC) No 2913/92 establishing a Community Customs Code. The Commission's proposal for a Union Customs Code (UCC) is currently under discussion. This proposal (article 55) suggests that the Commission would have the right to adopt delegated acts on rules of origin, which could further complicate the application of rules of origin, which were initially defined for a completely different reason, that is tariffs on imports.

➔ Therefore, Orgalime suggests deleting article 7 of the CPSR on the "indication of the origin".

6. ADMINISTRATIVE REQUIREMENTS FOR MANUFACTURERS OF NON-HARMONISED PRODUCTS

a. "Technical documentation" is bureaucratic overkill for most non-harmonised consumer products

Orgalime acknowledges the Commission's intention to request manufacturers to carry out sample testing and investigate consumers' complaints in an effort to improve their awareness of possible safety shortcomings (article 8 point 3).

However, the new general obligation for manufacturers to draw up a technical documentation (article 8 point 4) would lead to them having to establish and maintain a filing and reviewing system. This would create unnecessary administrative costs and burden for most companies and in particular SMEs. It is disproportionate and even superfluous for most non-harmonised consumer products, which entail no risks or only risks which are easy to handle by a careful consumer (for example manipulating a knife).

➔ Therefore, we suggest subjecting this requirement to draw up a technical documentation further to a reasoned request from MSAs, should they suspect the product to be hazardous.

Moreover, the CPSR should not be stricter than harmonised legislation. Consequently, importers should not be obliged to keep the technical documentation, but to provide it to the authorities upon request (article 10.8).

b. Identification elements

Orgalime acknowledges the powers to be conferred on the Commission to determine through implementing acts the list of products for which manufacturers are not obliged to indicate their name, registered trade name or registered trademark and the address at which they can be contacted (article 13.3).

However, as most non-harmonised consumer products entail few/low risks (for example metal binders or tableware), we suggest inverting the reasoning adopted in the proposal: there should be no obligation to indicate the manufacturer's address and contact details on each consumer product, except if explicitly decided otherwise by the Commission in an implementing act, subject to impact assessment. Of course such a Commission Decision should be published in the OJEU, to enable its application by concerned manufacturers.

c. Product traceability system

Article 15 empowers the Commission to establish for categories of products a system for the "*collection and storage of data by electronic means enabling the identification of the product and of the economic operators*".

➔ Orgalime calls for the deletion of this provision which would cause disproportionate costs to legitimate manufacturers and widen the gap in sales prices with unfair competitors, which would deliberately ignore or circumvent such a system.

We believe that identification and traceability requirements laid down in article 8 should be effective enough to assist Member States in their tasks and duties. We do not see the need for such a bureaucratic system, even less so in the non-harmonised area. Again, more effective and efficient market surveillance across the EU is the only way to improve the safety of products.

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7. STANDARDISATION MANDATES (ARTICLES 16 AND 17)

Orgalime welcomes the alignment of the CPSR with the new Regulation 1025/2012 on European standardisation (Articles 16 and 17).

However, contrary to what is stated in Article 16.1, a European standard does not primarily "aim at ensuring that products that conform to such standard comply with the general safety requirement". The manufacturer must respect the law. It must, however, remain the manufacturers' free choice whether or not to use a European standard. Any new specific safety requirements decided by an implementing act should be addressed to all manufacturers concerned, as is currently the case under Union harmonised legislation.

Orgalime is concerned that the European Commission could use its implementing powers to turn voluntary European standards into de facto mandatory requirements. Therefore, the Commission should clarify the legal nature of the EC standardisation requests, which contain the safety "*criteria or requirements*" that European Standards Organisations will have to "satisfy" in identifying or developing European standards.

➔ Orgalime calls on the European Parliament and the Council to further align the CPSR with the NLF, and to explicitly require:

- the Commission to determine in the text of an implementing act any relevant consumer safety requirements. The resulting Commission Decision should be addressed to all manufacturers concerned, not only to European standards organisations;
- the publication in the OJEU of any such act adopted by Commission Decision.

8. PENALTIES (ARTICLE 18)

In principle, Orgalime supports the use of penalties as a deterrent to deliberately unlawful market operators. Fair and well-meaning businesses are more likely to succeed if they know that they operate in a level playing field where competitors who flout the rules are sanctioned.

Nevertheless, we do not understand why the CPSR should contain provisions on penalties when these are already foreseen in the MSPR.

➔ Orgalime recommendation: delete Article 18 or, at least, align it in full with the provisions of the MSPR. In the latter case, like for the MSPR, the size of the undertaking in this context is irrelevant. **Rather, sanctions should be proportional to the seriousness of the infringement and the amount of illegitimate revenues** generated by the placing of non-compliant products on the market.

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