Country report of the Netherlands

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Study for the preparation of an Implementation Report of the General Product Safety Directive

Final report

Part 2: Country reports

Prepared by Civic Consulting
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Justice and Consumers

EUROPEAN COMMISSION

Directorate-General for Justice and Consumers
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COUNTRY REPORT THE NETHERLANDS

I. Implementation of the GPSD

1. Implementation legislation of GPSD

National implementation legislation of the GPSD

The amendments to the existing Commodities Act[393] and the Decree on General Product Safety (hereafter the Decree on GPS)[394] implement the provisions of the GPSD. The amendments to the Commodities Act were published on 18 October 2005, and entered into force on 1 December 2005. The Decree was published on 27 October 2005 and also entered into force on 1 December 2005. Since the implementation of the GPSD, the substantive articles of both the Commodities Act as well as the Decree have hardly changed. (Legislative changes regarding the appointed authorities, enforcement and sanctions will be addressed under section I, subsection 4.)

The safety requirement under article 2 (b) GPSD as well as the benchmarks from art. 3(3) GPSD are implemented through the already existing and very general article 18, introduction and point a thereof, of the Commodities Act, which holds (unofficial translation): 'Without prejudice to the provisions under or pursuant to the preceding articles, it is prohibited: a. to market goods, other than food and drinks, of which the person who trades them knows or must reasonably suspect that their use may, due to their intended use, pose particular risks to human safety or health, or if concerns technical products, to the safety of objects.'

This article also forms the basis for enforcement in the non-harmonised sectors, as well as for the implementation and enforcement of vertical EU regulations and directives if specific norms regarding certain risks are missing.

The presumption of conformity from article 3 (2) GPSD, which applies when the manufacturer is complying with harmonised standards, is implemented through article 18a of the Commodities Act, which holds (unofficial translation):

'1. Goods that comply with standards designated by regulation of our Minister are, with regard to the risks regulated in those standards, not suspected of presenting any hazards as referred to in Article 18, under a.
2. Our Minister only designates standards that transpose European standards whose references have been published by the Commission of the European Communities in the Official Journal of the European Communities.'

Article 21 (1) Commodities Act enables the Minister to issue a measure to a trader to inform the holders of a product of its dangers (warning). Article 21 (2) Commodities Act enables the Minister to issue measures to order traders to cease trading goods or to take all necessary measures to take goods back (read: withdrawal and recall).

Article 21a Commodities Act holds the obligation for the Minister to make information relating to products and their risks to consumer health and safety available to the public. Article 21b (1) implements article 5 paragraph 3 GPSD and holds the obligation for a person who trades or has traded a product who knows or should know professionally on the basis of the information available to him that a product presents a danger to human safety or health, to inform the Minister thereof and to inform him of the measures which were taken to protect those interests. Article 21b (3) includes the duty for economic operators to cooperate with governmental actions.

The structure of the Dutch implementation differs from the GPSD in a sense that it holds a prohibition rather than an order (art. 3 (1) GPSD: producers shall be obliged to place only safe products on the market), but this does not appear to be an issue in practice.

Moreover, as the previous rapporteurs have mentioned, the Decree contains a drafting error regarding the implementation of article 1 (3) GPSD, by providing: 'this Decision [read: the Decree] does not apply to products if specific provisions of Community law have been adopted for the same purpose as the requirements laid down by this Decision.' The Explanatory Notes, however, do correctly speak of 'in so far as' (see also under 12 of the GPSD). Based on the interviews conducted as well as our own professional opinion, not all actors involved in market surveillance are aware of the exact scope of the GPSD, as explained in article 1(2) and preamble under 12 GPSD.

[393] *Warenwet*
[394] *Warenwetbesluit algemene productveiligheid*

Another implementation issue is the lack of explicit implementation of the criterion and benchmarks as mentioned in article 2(b) (i to iv) and 3(3) GPSD. The Explanatory Notes indicate that it was not considered necessary to explicitly implement the criterion and benchmarks as mentioned in art. 2(b) and 3(3) GPSD in the Decree (Explanatory notes, p. 3, 9 and 10). Therefore, in practice, the open standard that is mentioned under article 18 (and point a thereof)Commodities Act in combination with the European duty of consistent interpretation should warrant correct application of these benchmarks in case vertical EU legislation is absent, incomplete or when national regulations/norms and/or standards are not available. Article 18 (and point a thereof) Commodities Act functions as a safety net or catch-all clause because of its open wording. The lack of explicit implementation is not considered a problem from the perspective of market surveillance authorities (see paragraph II, subsection 7). At the same time, it is unclear to what extent the market surveillance authorities are actually aware of this inconsistency in implementation and the exact wording of the directive with regard to its definition of safety. At the same time, one can see that the factors that follow from article 2(b) (i to iv) and 3 (3) GPSD are taken into account when assessing the risks that are not addressed explicitly by the current legal framework other than article 18 (and point a thereof) Commodities Act. What the open wording of article 18 (point a thereof) Commodities Act further implies in practice for businesses in individual cases would require further investigation. For some findings regarding the absence of norms and the risks thereof from other reports, the interviews and other research, please see hereafter under section I, subsection 3. .

2. Application of Art 5 GPSD regarding traceability

Application of Art 5 GPSD regarding traceability in the Netherlands

Article 5(1) GPSD is implemented through article 2(1)(b) in conjunction with 2(2)(a) of the Decree on GPS.

Article 2 reads as follows (unofficial translation):

'1. The producer shall within the scope of his activities:

(..) b. take measures adapted to the characteristics of the product provided by him, to:

be informed of the possible safety and health risks of these products;

be able to take appropriate measures to avoid any possible health and safety risks, including:

- the withdrawal of the product concerned;

- the appropriate and effective warning of the consumer;

- the recall of the product concerned.

2. The measures referred to in paragraph 1 under b should be understood to include amongst other:

a. the indication, on the product or on its packaging, of the identity and contact information of the producer and the product reference, or if applicable, the batch of the product to which it belongs, unless omission of that indication is justified;

b. in all cases where applicable:

1˚ the carrying out of sample testing of marketed products;

2˚ investigation of complaints;

3˚ if applicable, keeping a register of complaints;

4˚ if applicable, informing the distributors of the monitoring of products.

The wording of Article 5 (1) (b) GPSD is ambiguous in a sense that it leaves open whether other measures would also suffice as measures within the meaning of art. 1 paragraph 3 GPSD. Although the wording of the Dutch implementation varies slightly from the English and Dutch official translations of the GPSD, the wording of the Dutch implementation holds almost the same ambiguity. In our view, a teleological interpretation of article 5 (1) (b) GPSD – in light of the goals and principles that underlie the directive – would indicate that article 5 (1) (b) GPSD at least holds some minimum requirements. In that case, the indication, on the product or on its packaging, of the identity and contact information of the producer and the product reference or, if applicable, the batch of the product to which it belongs, should be required under the national implementation, unless the omission of this information is justified. Article 2(2)(a) of the Decree on GPS should subsequently be interpreted in conformity with the directive, which would imply that art. 2(2)(a) holds (some) requirements. The Explanatory Notes to the implementation also hold the view that the indication of the identity and contact information of the producer is a

mandatory requirement. At the same time, the product reference or, if applicable, the batch of the product to which it belongs, is not mentioned.[395]

Neither the GPSD nor the national rules specify under what circumstances it may be justified not to apply the 'indication' as a measure. Apart from the example of the prayer card mentioned above, the Dutch legislative proceedings are silent on the issue and there are no decisive court decisions. It is questionable whether the nature and the potential risk of a product – as mentioned in the Explanatory Notes – is a suitable criterion to determine whether omission of 'the indication' is justified, especially since a products actual risk will often show itself after it has been placed on the market. Barcodes or electronic identification are not required under the Dutch implementation legislation but they may certainly constitute 'good practices'.

The traceability obligations of distributors mentioned in Article 5(2) GPSD are implemented by article 2(3) of the Decree on GPS, which reads as follows (unofficial translation):

'3. The distributor shall take part in the monitoring of the safety of the products placed on the market, especially by:

a. passing on information on the product risks;

b. keeping and providing the documentation necessary for the tracing of the origin of the products.'

The general duty of care that is mentioned in the first part of article 5(2) GPSD not explicitly mentioned in the Explanatory Notes but may be assumed to be implemented through article 18 (and part a thereof) Commodities act.

3. Definition of safety in Art 2(b) GPSD and benchmarks for assessing safety in line with Art 3(3) GPSD

Existence of specific definition of safety used for the application of the national implementation legislation of the GPSD in the area of new technologies

There is no specific definition of safety used for the application of the national legislation of the GPSD in the area of new technologies as far as the Commodities Act and underlying Decrees are concerned. New technologies are however included in market surveillance.

Coverage of emerging threats related to new technologies (e.g. cyber security/software related threats) in the national implementation legislation of the GPSD

Because of the wide scope of article 18 (and point a thereof) of the Commodities Act, new technologies, cyber security and other software related product threats are covered by the Commodities Act insofar as they result in physical health and safety risks and risks to other things. In practice, however, these risks remain a challenge for market surveillance authorities, not only because specific norms often are missing, but also because it is not always clear which authority is competent with regard to these risks. As explained below, a refrigerator with Wi-Fi falls under the competence of the Radio Communications Agency Netherlands (AT), a fridge without falls under the competence of the Netherlands Food and Consumer Product Safety Authority (NVWA).

It is uncertain whether risks regarding the loss of data, pure economic loss, lack of privacy and damage to honour and good name are covered by the Commodities Act. The latter risks may be covered by other legislation, but these instruments have not been included in this report. At this moment, article 18 (and point a thereof) Commodities Act does not appear to be used actively as a ground for action regarding these risks. More often, as follows from the conversations with authorities, it appears that authorities try to bring these risks under the existing vertical regulations and directives (essential requirements) and use this for a ground of action. Regarding the Internet of Things (IoT) with respect to internet connected devices, the official policy statement is that the Netherlands would like to see new norms under the Radio equipment directive (Roadmap Digitally Safe Hard and Software, p. 25).

[395] 'In Article 5, first and second paragraph, of the GPS directive, the aforementioned derived obligations for the producer and distributor are extended. For example, producers must take measures with regard to their products and operations that, if necessary, they will not only be able to warn the consumer but also to recall the product that is already with the consumer. These measures include the obligation to state the identity and the «contact information» (name and address but also: e-mail address, correspondence address, telephone number) of the producer on the product, «unless omission of that information is justified» (Article 5 (1) (b) (a)). During the negotiations in Brussels, the Commission mentioned a prayer card as an example of a product on which this information may be omitted. It may be clear that the identity of the producer is mandatory unless the nature of the product makes this unnecessary because no unacceptable risks can arise with the product in question.'

Benchmarks used for assessing the safety of a product (in line with Art 3(3) GPSD) if European standards referenced in the EU Official Journal do not exist

Art. 3(3) GPSD leaves room to use national technical regulations for risks or categories of risks that are not covered by vertical legislation and/or harmonised standards.

In the Netherlands, new initiatives to national rules and regulations regarding the Commodities Act and underlying decrees are discussed in the General Commodities Act Consultation Group.[396] The last published meeting regarding the GPSD was in 2013 when the Product Safety Package was launched. Since then, various meetings have taken place regarding diverse risks and product problems, most outside the ambit of the GPSD. Areas of consumer products that are addressed by national legislation are for example legislation on tattooing inks and the safety of fairground and playground equipment.

The NVWA tries to include new risks to health and to the safety of objects in its market surveillance activities through various means. If no national legislation is created, policy measure may still address new risks. The art. 3 (3) (e) GPSD refers to the state of the art and technology as a benchmark in case any other norm or standard is missing.

The NVWA may use the advice of the Risk Analyses and Research Bureau[397] to identify and analyse new emerging risks. Also, universities and other experts may be consulted with regard to general risk analysis, although the resources of market surveillance authorities in that regard are limited. Furthermore, the NVWA has its own mechanical and chemical labs that are used to identify new risks to be included in market surveillance, but they may also help translate the knowledge gained into new and adjusted testing procedures. For certain risks, the existing harmonised product rules and standards or other technical standards may be used by analogy. Moreover, existing testing protocols may be adjusted to include new technologies that are not covered. Such new benchmarks may result in policy advice and adjusted policy or may form the basis of new market surveillance projects. In the latter case, such new benchmarks are often communicated with the industry involved before a new project is started. After a project is finalised, the research outlines including the standards and benchmarks used are published online with the project surveillance outcomes. Any internal testing procedures that have been applied but that have not been published may be requested from the NVWA. In this way, risk analysis and management based on the state of the art are fully integrated in market surveillance regarding non-harmonised consumer products.

As the analysis of case law regarding other product areas will show, this type of use of the state of the art and risk analysis where norms are absent appears to be accepted by Dutch national courts, as long as the risk analysis is sound (see section I, under 4).

One interviewee indicated that product safety codes of good practice (art. 3 (3) (d)) other than standardisation are also used, but a quick scan did not show any examples thereof. Reasonable consumer expectations concerning safety as a benchmark under art. 3 (3) (f), which is also used as defectiveness-criterion under the product liability directive, do not appear to be benchmark that is used for market surveillance, probably because it is too vague. Reasonably foreseeable use and misuse, however, are taken into account.

4. Administrative measures available, penalties foreseen under Art 7 GPSD, and relevant case law

Administrative measures at the disposal of market surveillance authorities in the Netherlands in case there are consumer product(s) on the market which are found unsafe under the GPSD

The market surveillance authorities as administrative bodies have inspection powers as mentioned in article 5:13 t/m 5:20 of the General Administrative Act (Awb),[398] as well as specific powers as mentioned in the Commodities act (articles 26 to 32 a to k Commodities Act) and in the future also the ones mentioned in the Regulation (EU) 2019/1020 on market surveillance.

The authorities may require a business to provide relevant information on the product and on the supply chain and distribution of the product (art. 5:16 Awb). For business, there is a general duty to cooperate (art 5:20 Awb and 21 under b of the Commodities Act). Authorities may carry out unannounced inspections on site (art. 5:15 Awb and 29

[396] *Regulier Overleg Warenwet*
[397] *Bureau Risicobeoordeling & onderzoek BuRo*
[398] *Algemene wet bestuursrecht*

Commodities Act), in transportation vehicles (art. 5:19 Awb), perform physical checks of products (art. 5:18 Awb and art. 27 Commodities Act) and take product (batch) samples that may be tested (art. 5:18 Awb and art. 31 Commodities Act). Compensation has to be awarded if the product/property is damaged (art. 26 Commodities Act). The authorities may require insight into business information, administration and paperwork and are allowed to make copies (art. 5:17 Awb). They may perform mystery shopping and block websites if needed.

Each Market Surveillance Authority acts in accordance with its own specific Market Surveillance Policy. The NVWA's surveillance policy consists of the Market Surveillance Framework NVWA,[399] the General Intervention Policy[400] and the Specific Intervention Policy on Product Safety.[401]

The type of intervention depends on the type of violation. Violations are categorised in classes A to D as indicated in the General Intervention Policy.

A or B violation: A violation that under a realistic scenario may result in serious injury or serious damage to health.

C violation: A violation that under a realistic scenario may result in injury or damage to health.

D violation: A violation that does not concern a risk for injury or damage to health (such as formal non-compliance).

Annex 2 to the Specific Intervention Policy Product Safety holds the policy for enforcement of obligations regarding quality assurance for production.

The intervention policy documents are very extensive and the types of interventions are very diverse. These consist of informal interventions, corrective interventions or sanctioning interventions. Some interventions will be highlighted here.

The NVWA may use informal interventions that are not based on a decision. For example, the NVWA may provide a warning to an economic operator or feedback after inspection or investigation. The NVWA can carry out a re-inspection after feedback, provide compliance assistance by providing information about compliance with rules and issue warnings. The prevention of imminent reputational damage is an important motivation for market participants follow up on warnings. The NVWA may also use corrective interventions, such as an order to warn, recall or withdraw subject to a penalty payment[402] or an order subject to administrative enforcement (art. 32 Commodities Act).[403] The power of the Minister to issue measures to order a recall in case of danger to the safety or health of a human has been implemented through the amendment of article 21(2) of the Commodities Act. In case of an order subject to administrative enforcement, any costs regarding the administrative enforcement may be reclaimed in theory (art. 5:25 Awb). In practice, this option is hardly used. An order subject to a penalty payment, which means that the initiative is on the offender, is used more often.

The minister may issue a prohibition of trade of a product (art. 32k Commodities Act) or confiscation/seizure of goods (art. 32L Commodities Act), or order the destruction of goods (art. 32m Commodities Act). The costs of seizure or destruction may be claimed from the economic operator under art. 32n Commodities Act.

Recently, a new article 13d (1) Commodities Act was introduced that adds a procedure for mutual recognition in line with ECJ 27 April 2017, C.627/15 (Noria). Furthermore, a new art. 21d Commodities Act was added which gives the authorities the power to issue an export declaration for products which are destined to non-EU/EEA-countries and which are not in transit. Moreover, art. 32k Commodities Act, which implements article 8 (1) d GPSD, now allows the order of suspension of trade to be mandated to the market surveillance authorities to save time and make it more effective (in this case to the NVWA). When these changes will take effect has not been determined yet. (Collecting Law on Public health, Welfare and Sport 2018, Verzamelwet VWS 2018).

Individual decisions and decisions of the NVWA are not always disclosed, but as part of the active disclosure policy, more and more data are becoming available on its website, in particular summaries of inspection results. The publication procedure still falls under art. 8 paragraph 1 of the Law on Public Administration (Wob), the General Administrative Code (Awb) and established policy rules. To improve transparency, the Health Act and the Youth Care Act were amended in 2016, which will have major consequences for the NVWA's disclosure policy. It is expected that in the future about 200 000 documents per year will be made public. Publication of company or

[399] *Toezichtkader NVWA*
[400] *Algemeen interventiebeleid*
[401] *Specifiek interventiebeleid productveiligheid*
[402] *Last onder dwangsom*
[403] *Last onder bestuursdwang*

production data is not permitted under the Health Act, just like under the Wob. (Decision on active publication of market surveillance and execution of the Health law and Youth law,[404] and the decision on its entry into force).

Penalties foreseen under Art 7 GPSD, according to the national implementation legislation of the GPSD or other relevant provisions (types of penalties, their level/amount)

Different penalties or sanctions are available, such as the administrative fine mentioned in the Commodities Act Decree on Administrative Fines[405] in connection with Articles 32a and b paragraph 1 of the Commodities Act, and criminal sanctions under the Economic Offences Act.[406]

The administrative fines under the Commodities Act may vary from EUR 525 to EUR 820 000. The Decree on Administrative Fines under the Commodity Act and its Annex[407] hold the categories of fines. The size of the company is relevant. Fines for companies with more than 50 employees are twice as high (Cat. 2) as fines for smaller companies (Cat. 1). Cat. 3 is a turnover-related fine. If an X is mentioned in the Annex under Cat.3, the turnover-related fine is applicable.

Article 18 under A Commodities Act is mentioned under A-1.1 of the Annex. The Decree on General Product Safety is mentioned under B-1 of the Annex.

The following fines may be imposed:

A-1.1 Violation of art. 18 under a Commodities Act: Cat 1. EUR 795, Cat. 2 EUR 1 590, Cat. 3 X

B-1.1 and B-1.2 Violation of art. 2 (1) (a) in conjunction with art. 2a (1) of the Decree on GPS: Cat 1. EUR 795, Cat. 2 EUR 1 590 Cat. 3 X

B.-1.3 Violation of art. 2 (3) in conjunction with art 2a (1) of the Decree on GPS: Cat. 1 EUR 525, Cat. 2. EUR 1 050, Cat. 3 X

B-1.4 Violation of art. 2a (3) of the Decree on GPS: Cat. 1 EUR 525, Cat. 2 EUR 1 050, Cat. 3 X

The turnover related fine was introduced in 2016 and entered into force on 1 July 2018, but is hardly applied in practice in non-food cases. Two additional cumulative requirements must be met to impose a turnover-related fine. Firstly, it must be established that the offence was committed with intent or gross negligence. Secondly, the offender must be a company with an annual turnover of more than 10 million euros per year. The turnover-related fine amounts to one percent of the annual turnover in the financial year prior to the offence if the behaviour referred to in the offence was committed with intent, with a maximum equal to the amount of a fine of the sixth category (Article 23 of the Criminal Code, being per 1 January 2016: EUR 820 000), or half a percent, if the behaviour referred to in the offence was committed with gross negligence. It is striking that the fine had never been imposed until October 2017. Although up until that point there were 55 offences that were eligible in general, the cumulative conditions were not met in any case. The council of state pointed earlier on the ambiguity of the requirements. Furthermore, it is uncertain when a violation of Article 18 of the Commodities Act is punished with a regular fine from the point of view of proportionality and when a turnover-related fine is imposed. This can in practice prevent the imposition of the fine. Although recent numbers were not provided, it was indicated that the turnover-related fine is hardly used in consumer product cases. It is used more often in food cases.

The Directive for the Criminal Procedure for the Commodities Act[408] forms the policy framework for the criminal enforcement of the Commodities Act. Criminal offenses/crimes against the Commodities Act (art. 32a, paragraph 3 of the Commodities Act) are classified as economic offences (art. 1 under 4 and art. 2 (4) of the Economic Offenses Act (WED)). The maximum penalty that can be imposed for this is six months' imprisonment or a fine of the fourth category (Article 6, paragraph 1, subsection 5 of the WED). In the aforementioned advice of the Council of State, it was already pointed out that with the introduction of the turnover-related fine, the administrative sanctioning would go beyond the criminal sanctioning. Up to now, this inconsistency has not been corrected.

Recent case law in the Netherlands with respect to or relevant for the GPSD/the national implementation legislation.

[404] *Besluit openbaarmaking toezicht- en uitvoeringsgegevens Gezondheidswet en Jeugdwet*
[405] *Warenwetbesluit bestuurlijke boete*
[406] *Wet economische delicten*
[407] *Warenwetbesluit bestuurlijke boeten en de bijlage daarbij*
[408] *Richtlijn Strafvordering warenwet*

Not all court cases are being published in the Netherlands. Among the court cases published between 2013 and 2018, three cases of courts in first instance mentioned article 18 (under a) Commodities Act.

Rb. Rotterdam 4 April 2013, ECLI:NL:RBROT:2013:BZ8322 regarded wishing balloons. The court found that a violation of norms which were developed by the NVWA in consultation with stakeholders, may constitute a violation of article 18 (and paragraph a) Commodities Act. Therefore, the decision holding an administrative fine of EUR 525 was upheld. Two other decisions were annulled on the basis of incorrect information in the formal reports.[409]

Rb. Rotterdam 1 May 2018, ECLI:NL:RBROT:2018:3492, regarded candle bags. Based on tests applying the flammability criteria for toys by analogy (NEN-EN 71-2:2011 + A1:2014), the NVWA issued a decision holding an order to recall subject to a penalty payment of EUR 1 000 per week with a maximum of EUR 15 000 (art. 32 Commodities Act). According to the judge, the decision of the NVWA was not manifestly unjust or incorrect.

Rb. Rotterdam 23 October 2014, ECLI:NL:RBROT:2014:8551 regarded nitrosamine in balloons. The court held that a decision of the NVWA in which the trader is informed that no penalties shall be imposed may be classified as a formal decision.

There was only one lower court case that explicitly mentioned the Decree on General Product Safety: Rb. Middelburg 13-04-2005, ECLI:NL:RBMID:2005:AT4286.[410]

The lack of published cases mentioning article 18 (under a) Commodities Act and/or the Decree on GPS is probably due to the fact that a lot of products and decisions fall under vertical EU legislation. Moreover, a lot of the published cases under the Commodities Act regard food and feed.

The legal department of the NVWA has provided a judgement in interim proceedings that has not been published as well as a decision of the Minister of Health, Wellbeing and Sports – under whose responsibility the NVWA formerly operated -after a declaration of objection by an economic operator regarding the Decree on GPS which – like other decisions – has not been published, which will be discussed below.

The court case Rb. Rotterdam 14 August 2013, ROT 13 / 4577 BC WILD (not published) regards a recall of table fireplaces on the basis of article 18 (under a) in conjunction with art. 2a (2) of the Decree on GPS and art. 21 Commodities Act. A total recall was found disproportionate by the judge in interim proceedings because a warning together with an adjustment to the fireplace – a metal ring – to be put in place by the consumer would take away the risk.[411]

The decision by the Minister on a declaration of objection by an economic operator concerns a high-chair for children with a double table top that carried the risk of entrapment of fingers. The product was assessed by NVWA under the responsibility of the Minister on the basis of NEN-EN 14988-1;2006+A1:2012 and was found in violation of art. 18 (introduction and part a) Commodities act. Because it concerned a low risk, the violation was classified by the NVWA as a C violation after which the economic operator was directed towards its existing obligations to take corrective measures (e-mail of 7 September 2015). This required it to stop selling the product, inform its customers and provide a list of buyers of the chair to the NVWA. The economic operator was subsequently warned by the NVWA by a letter holding that if the economic operator would not comply with the aforementioned legal obligations, administrative or criminal proceedings could be initiated (18 September 2015). The economic operator objected to this warning, stating that both the e-mail as well as the letter qualified as an administrative decision subject to objection and appeal, which should make the objection admissible and that the decision was unjust. The Minister found the objection inadmissible with reference to existing case law. From case CBB 21 July 1998 (AB 1998, 437) and CBB 2 March 1999 (AB 1999, 168 it follows that a request for documents by the authorities does not

[409] In 2009 the NVWA organised a market surveillance project on wishing balloons. No specific norms were available at the time regarding this type of product. Therefore, the NVWA made its own risk analysis and developed norms after consultation with stakeholders. The norms that resulted from this analysis were communicated to the industry, stating that wishing balloons not complying with these norms were prohibited as of 1 January 2010 and that this prohibition would be actively enforced from 1 May 2010 onwards.

[410] It was a criminal lawsuit against a manufacturer of play houses that had a gap between the house and the connected slide. A child had died using this slide because the string of his hoody got trapped in the gap after which he choked. The manufacturer had received earlier complaints regarding the slide, but did not follow up on them. The court uses the Decree on GPS in the reasoning leading to the conviction of the manufacturer to criminally negligent homicide/involuntary manslaughter.

[411] This alternative solution was put forward by the importer of the fireplace. It substantiated its argument with reference to a test performed by KIWA in accordance with DIN 4734, which was accepted. The order to recall subject to a penalty payment was adjusted accordingly by the judge.

qualify as an administrative decision.

Furthermore, the Minister refers to three cases, the first two being of the highest administrative courts and the last one of a court in first instance (Rotterdam): CBB 27 February 2007 (ECLI:CBB 2007:AZ9917), Afdeling bestuursrechtspraak van de Raad van State 8 July 2009 (ECLI:NL:RVS:2009:B]1862) and Rb. Rotterdam 30 June 2011 (ECLI:NL:RBROT:2011:BX8131). Mere warnings by authorities to economic operators directing them to their existing obligations under law in principle do not qualify as decisions as defined in the General Administrative Act because they do not constitute in themselves any legal effects. According to the CBB in its case, an independent and definitive decision on the applicability of a legal provision in a given situation by an authority, may in very special cases be regarded as the performance of a separate legal act under public law, which can be challenged before the competent administrative court. However, such a qualification is not justified in cases in which the decision on the legal position anticipates an administrative decision concerning the person regarding application of legislation which can be challenged in court without there being any question of a legal disproportionately burdensome way to court. In other words, only in case it is disproportionately burdensome for the economic operator to wait for an administrative decision, the initial letter/warning is subject to objection and appeal. In the case of the CBB, the mere notification to an economic operator of its infringement of the Toys decree was insufficient to constitute an administrative decision.

According to the Minister in the decision of 28 April 2016 regarding the high-chair, a mere interest in judicial proceedings/review is insufficient. Furthermore, the Minister does not find the way to court disproportionately burdensome because the chairs may still be traded without the table top. Therefore, the Minister found this part of the objection inadmissible. Superfluously, the objection was also found unfounded because the norm was applicable, applied correctly by the authority after which the economic operator was found in violation thereof. The decision of the authorities to publish the findings regarding the product was also not considered unlawful.

It is interesting to note that an internal committee of the Ministry advised differently in the case of the high-chair.[412] As far as we know, the decision regarding the high-chair by the Minister on the objections was not challenged in court.
It is worth noting that outside the ambit of the GPSD, the legal status of warnings and other letters by authorities to economic operators not aiming at producing legal effects are often discussed in legal proceedings.[413]

There are also cases that do not concern the implementing legislation of GPSD directly, but which still might be relevant for the GPSD and/or the national implementation legislation.

A case which might be of interest in light of the questions regarding alternative benchmarks for assessing safety is Rb. 05-11-2018, ECLI: NL: RBROT: 2018: 8990.[414]

In CBB 09-09-2015, ECLI: NL: CBB: 2015: 311 the Highest Administrative Court accepted the adjustment of an existing test by the NVWA lab with regard to a risk that is not covered by the applicable standards in line with the state of the art.[415]

[412] This committee can be consulted as an advisory board by the Minister regarding submitted objections, before deciding on them. In this case, the committee was consulted by the Minister and it gave an advice to the contrary. Unlike the Minister, the committee found that – based on the same case law – both the e-mail and the letter should qualify as administrative decisions subject to an objection: 'Any other interpretation would lead to the unacceptable result that an economic operator would have to wait for a long time until it can challenge a decision that clearly has consequences for its position. In light of the current prohibition to trade the product, it is impossible for the economic operator to trade the product other than without the alleged table top, or else the economic operator would be forced to provoke a decision including penalty payments. Meanwhile the economic operator has to inform its customers of the prohibition which may cause reputation damage and may trigger possible claims. In light of these circumstances, the economic operator has a real interest in a judicial decision on the applicability of article 18 (introduction and under a) of the Commodities act.'

[413] In CBB 28 December 2016, ECLI:NL:CBB:2016:405 the highest administrative court also held for example that a letter of the Minister holding that it is prohibited in the Netherlands to market a supplement with 100 microgram vitamin D, is not a decision subject to objection and appeal because if regards the observation of an already existing legal situation. See also CBB 23 August 2012, ECLI:NL:CBB:2012:BX6798 regarding a letter of the Minister pointing the economic operator at his recall obligations under art. 19(1) Regulation (EG) 178/2002 regarding meat. This was not considered an administrative decision, neither was a letter by the NVWA holding that it will not pay damages because it contacted customers of the economic operator with the request of destroying the products.

[414] In this case, the court of first instance decided that the NVWA, in assessing whether the manufacturer has classified toys the right way, may rely on documents that are not generally binding regulations, just as so-called NEN standards are not binding regulations. The relevant documents, including CR 14379: 2002 (E) "Classification of toys - Guidelines", may provide a guide for explaining legal standards. That document lacks specific guidelines for the age classification of toy music boxes and toy parking garages. NVWA could therefore reasonably use the document CEN-ISO / TR 8124-8 "Age determination guidelines".

Rb. Rotterdam 24-11-2016, ECLI: NL: RBROT: 2016: 9046 regarded imitation products and the assessment of the risk of (among other things) suffocation, poisoning, perforation or blockage of the digestive tract. Neither the Directive nor the Commodities Act Decree on Imitation Products prescribed how that danger must be determined. According to the court, it was desirable that the assessments by EU countries did not differ because the Decree was the implementation of a directive. Because a PROSAFE report, in which 21 countries participated, expressed a preference for the bite test of NEN-EN 716-2, the court considered it reasonable that the NVWA applied that standard in its tests. The court ignored the test results submitted by the plaintiff, which would indicate that that standard was considered unsuitable, because this test did not show that this was the case. The fact that the choking hazard for children when eating certain cookies, sweets and apples would have been greater was not considered relevant. According to the court, the risk of putting, imitating or swallowing imitation products in the mouth could not be compared with the danger of putting, sucking or swallowing food.

With regard to the use of harmonised standards, ABRvS 28 October 2015, ECLI:NL:RVS:2015:3295 under 3.2 is worth mentioning. This judgement from one of the highest administrative courts confirmed that a market surveillance authority may never issue a measure on the sole violation of a harmonised standard. Measures always need to be based on a legally binding provision.

In CBB 17-05-2016, ECLI: NL: CBB: 2016: 136, another one of the highest administrative courts pointed out that harmonised standards are not binding and that alternative ways of demonstrating conformity with essential requirements must be accepted.[416]

5. Problems and safety issues encountered, potential improvements of the legislative framework

Practical problems encountered in the Netherlands concerning traceability, definition of safety etc./ Emerging safety issues with particular categories of consumer products not addressed by current safety legislation

Not all economic operators are aware of their obligations with respect to traceability and/or can provide details of their suppliers/buyers up and down the supply chain.

It was indicated that the definition of safety in the GPSD is too wide. Because of the fact that the criteria as mentioned in art. 2 (b) and 3 (3) GPSD are not explicitly included in the Decree on GPS and because article 18 (under a) is not limited to consumer products, it is indeed a very wide definition. At the same time, the advantage of the broad safety requirement under article 18 (under a) Commodities act is that virtually any risk created by a product to health and safety of people and/or things is covered. As stated before, it is unclear whether risks other than risks to health and to the safety of objects are covered by the material scope of the GPSD (like risks to economic loss, violations of honour and good name). At this moment, the GPSD appears not to be used actively as a safety net regarding new types of risks regarding risks other than health or safety of objects.

Possible improvements to make the implementation of the GPSD in the Netherlands more effective

The suggestion to introduce a requirement for business operators to keep supply chain records – 'one up one down' traceability – was very much welcomed by the relevant authorities (see also RAPEX below). Some also opted for the suggestion to add a barcode. An obligation to place a batch number on a product was seen as useful. At the same time, its usefulness must not be exaggerated in terms of market surveillance. Taking samples of a certain

[415] It concerned standards applicable to the contact plug part of a battery charger. The court was of the opinion that when testing the battery charger, the predecessor of the NVWA (VWA) took sufficient account of this specific product by adjusting the fall drum test with regard to the number of revolutions. According to the court, the Minister rightly argued that it would be going too far to refer to paragraphs 16-1 and 16-4 of standard EN / IEC 61558-1 (in which it is stipulated for safety transformers) that bending of the pins should be ignored also with regard to the assessment of the test result of the fall drum test of a battery charger. If it had really been the intention that the bending of the pins in the fall drum test for a product like this should be ignored, one would expect, in the opinion of the court, that this would be explicitly stated in the applicable basic standard (EN / IEC 60335-2-29) for the battery charger. The argument of the company that traded the battery charger that the battery charger in question is equivalent to a safety transformer in such a way that the more flexible requirements of EN / IEC 61558-1 and 61558-2-6 with regard to the assessment of the test result of the drop drum test could suffice did not convince the court. The appeal lodged by the Minister was well-founded. The judgments under the appeal were annulled.

[416] The case concerned Christmas lighting candles and the Commodities Act Decree on electrical products. Article 4 (1) of the Decree on electrical products allows the safety standard contained in Article 3 of the Decree to be met through means other than by complying with the standards included in § 5.2.10 of EN 60598- 1 and § 20.10.2 of EN 60598-2-20. It is not decisive whether the legal presumption within the meaning of Article 4, first paragraph, of the Decree is met. What is important is that at least the essential requirements listed in the appendix to the Decree are met. The company had sufficiently demonstrated that the electrical product according to the rules of good workmanship that apply in the EEC / EEA, with proper installation, use according to their destination, and proper maintenance, did not endanger persons, pets or goods. The Minister had not made a plausible case to the contrary. The proceedings were reopened in connection with the determination of the damage.

batch that prove to be non-compliant does not mean that other batches of the same product are also not compliant. Even within one and the same batch, products can differ.

In our professional opinion, a barcode or a unique product code may drastically improve market surveillance with regard to traceability, but to determine its feasibility and possible effectiveness a further assessment would be required. Also, one should determine the possible information that would be linked to this unique product code as well as the persons to whom this information is accessible (also other economic operators for example). At the same time and as indicated before, non-compliance of one product does not automatically result in non-compliance of another product from the same batch which also puts the usefulness of a barcode a bit into perspective. With regard to national market surveillance, it is important that the needed IT is in place with market surveillance authorities as well as economic operators to make such a system a success.

The overall impression is that market surveillance is easiest when specific product norms are available. As soon as a product or technology is not covered by specific technical regulations and/or harmonised standards, the authorities have to resort to other technical regulations and/or standards (national or from other countries), application by analogy or the state of the art. This is explicitly allowed under the GPSD and is also a practice in the Netherlands which the NVWA uses, even though these benchmarks are not implemented explicitly. At the same time, applying the state of the art requires a lot of time, effort and resources at a national level (consultation with scientific expertise, testing facilities as well as industry and stakeholders), while resources are often lacking in this regard. Enforcement requires some specification by the authorities as soon as they want to take specific action. Any knowledge gained in this regard or lack of standards is addressed already in the Administrative Cooperation Groups (ADCOs) regarding specific product groups. Most new IT technologies have clear connections with LVD, Radio equipment and/or EMC. Within the already existing EU regulatory landscape it is hard to determine which role the GPSD has to play, and whether, and if so how, this flow of information regarding new technologies has to be institutionalised.

In the view of the authors of this report, it would be desirable to make use of the knowledge that already exists under vertical instruments (existing ADCOs etc.) next to providing more guidance regarding the exact scope of the GPSD regarding risks that do not concern risks to consumer health and physical safety. Whether the GPSD will be used as a safety net in practice regarding these new types of risks depends on much more than clear scope and definitions. It is unclear whether the national authorities have the capacity to include the state of the art regarding these new types of risk in the policy and project-based market surveillance the way the NVWA sometimes does with regard to new risks that concern physical health and safety of objects.

II. Functioning of market surveillance of consumer products

1. Organisation of market surveillance of consumer products and priority setting

Organisation of market surveillance in the Netherlands.

At the national level:

Market surveillance on all products is split between six national surveillance authorities, each entrusted with its own sector of products. Market surveillance on the safety of consumer products within the ambit of the GPSD rests with one surveillance authority, the Netherlands Food and Consumer Product Safety Authority (NVWA). The NVWA falls under the responsibility of the Ministry of Agriculture, Nature and Food Quality. Three other national authorities are also involved with market surveillance on consumer products, but only for very specific and limited categories of products: The Radio Communications Agency Netherlands (AT, for RED, EMC and Measuring instruments), the Public Service on Road traffic[417] (for type approvals for road vehicles) and the Human Environment and Transport Inspectorate (ILT, for machines, pyrotechnic articles, construction products and recreational crafts). They do not have any explicit competences with regard to the implementation – the Commodities Act and the Decree – and therefore the enforcement of the GPSD.

Because of the revision of the Radio Equipment Directive and ECM Directive, which were implemented in 2016, Low Voltage Directive products (LVD products) with IoT-applications are now under the supervision of AT. This implies that a refrigerator which is connected to Wi-Fi falls under the authority and supervision of AT and a regular fridge falls under the authority of the NVWA. With regard to aspects that are not covered by vertical EU legislation that are covered by the GSPD, the NVWA is the competent authority. This requires a lot of cooperation between

[417] *Rijksdienst Wegverkeer*

these two authorities. The full picture on how this cooperation functions in practice is uncertain.

The NVWA is responsible for the vast majority of consumer products. In practice and in addition to these two authorities, customs have a very important practical role in the border control of products.

There are not market surveillance authorities at sub-national (regional/provincial/local) level

Plans/programmes in place which define priorities for market surveillance of consumer products

Market surveillance is founded on risk-based surveillance. It is focused on the product groups and risks (product and compliance behaviour) that can have the largest impact in terms of impairing and undermining (harming) the public interests protected by European product legislation if the statutory requirements are not met. A number of factors play a role in determining this impact: product volumes (exposure); the extent of the anomalies within the product group (compliance level); the defects that have occurred (serious risk) and the types of suppliers of these products.

The NVWA annually sets its priorities in its annual plan that also concerns food and feed. The annual plan of 2019 mentions that 6% of the NVWA's capacity concerns safety of non-food products. Internet sales have been identified as a horizontal area that requires special attention, which was a priority in 2019. Furthermore, sectoral market surveillance programmes were drawn up.

Accident registration and reports, complaints, market developments, developments in legislation and regulations, signals from (international) colleague supervisors and knowledge institutes and information about (potentially) risky consumer products or (poor) compliance of companies lead to analyses on the basis of which the NVWA makes a risk assessment and prioritisation for supervision. The NVWA then determines the supervision type and a research plan. When an action has been taken and/or a project has been rolled out, the NVWA reports and publishes the results and/or provides policy advice. The NVWA also processes complaints from consumers or companies in its supervision.

The following information was retrieved from the surveillance plan over 2015/2016 which was drafted for the European Commission in light of Regulation (EC) 2008/765, which still is applicable for the NVWA and is also relevant with regard to the GPSD. It is partially based on the Market Surveillance Framework NVWA 2015, which is still applicable, and this approach is also reflected in the 2016 report called the Status of Product Safety. Furthermore, these findings also return in the report for 2014-2017 which was provided to the European Commission in light of art. 18 Reg. (EC) 2008/765:

'The surveillance is risk-based. It focuses on tackling those businesses which, because their products do not comply with product safety legislation, have the greatest impact on the health and safety of consumers. For this purpose, the NVWA uses a priority matrix incorporating the conduct of businesses and types and volumes of their products. As a result, proactive surveillance has gone from being purely product-oriented to more business-oriented in recent years. This is for reasons of efficiency. The target group for proactive surveillance – identified with the use of the matrix – is a core group of around 3 000 enterprises that:

- Are together responsible for 85% of relevant products placed on the market (high-risk products that regularly involve anomalies and therefore present real risks to the consumer); and

- Regularly exhibit failings in terms of compliance.

Many of these businesses are EU importers with large commercial volumes of a huge range of different types of high-risk products. The majority of these products come from China. The specific group of operators needs to ensure compliance for all these product groups. Business-oriented surveillance focuses on encouraging compliance at these companies. This is done, for instance, by checking as many types of products as possible at the same company (business-oriented product surveillance). Another form of business-oriented surveillance that has grown massively is system surveillance. This involves using audits to check a company's quality system, if it has one, and to check whether it is geared to assuring compliance with product safety legislation. Companies with a demonstrably well-functioning system are subjected to less surveillance.

The NVWA helps companies to develop such systems (compliance assistance). System surveillance yields good results at companies those want and are able to invest in compliance and that also trade in many different types of product groups. A good system ensures that all those products comply with the legislation. This is explicitly not a form of ex ante supervision. The surveillance is intended to encourage business compliance with the product safety legislation (requirements that products have to meet and any conformity procedures). For example, there are controls to see whether the business operator ensures that the specifications of the product ordered match the

applicable statutory product and conformity procedures and/or whether he/she checks whether the products supplied meet the specifications, for instance by spot checks. The surveillance also looks at whether the business has a complaints procedure in place. Elements of such a system are to be found in the General Product Safety Directive (Directive 2001/95/EC).

However, not all companies are able to put this kind of system in place, so for those companies supervision takes the form of product testing. Samples of various product groups are taken at the same company wherever possible. Not only does this make the sampling more efficient, it also provides a picture of the general standard of compliance in the company. The capacity saved in this way is used to concentrate on identified recurrent offenders (the 'hard-line where necessary' approach).

Alongside this business-oriented approach – which focuses on the conduct of significant players – there is also purely product-based surveillance. Its purpose is to gain a national picture of the safety of a particular product or product group. The samples needed for this are taken not only from the core group of 3 000 enterprises but rather from as broad a spectrum of operators as possible, including retail outlets and market traders.

Less product-oriented surveillance means less sampling and fewer laboratory tests and more audits and monitoring. The decision has also been taken to concentrate more on external border checks rather than market surveillance.'

To date, the proactive surveillance of the NVWA still takes up approximately 60% of the agency's capacity. The remaining 40% is dedicated to reactive surveillance (RAPEX notifications and consumer complaints, etc.). The NVWA is still involved in European and international ventures with a view to improving the surveillance chain (coordinating export and import checks). The internet sales through web shops and other online platforms appear to have increased.

2. Market surveillance regarding new technologies, online sales and C2C products

Market surveillance activities in the Netherlands with respect to the safety of products containing new technologies (such as Internet of Things, connected devices), products sold online and C2C products

Market surveillance on products that contain IoT-technologies is mostly conducted by AT, the authority responsible for IoT and the related vertical instruments (RED, EMC etc.). As indicated before, AT does not have any competences with regard to article 18 (under a) Commodities Act and/or the articles from the Decree on GPS that implement the GPSD.

On a national level, the Ministry of Economic Affairs and Climate together with the Ministry of Justice and Safety have published a report in April 2018, a Roadmap for Digital Safe Hard- and Software, with measures regarding new technologies. The focus is on new standards and certification at the EU level of connected devices partially through the RED Directive. In addition to this, more monitoring on digital safety of products, better market surveillance and information campaigns and empowerment of consumers are on the agenda. The government wants to start a pilot on a shared testing platform, together with business, government and TNO (a Dutch research and advisory organisation). Market surveillance on these products that goes beyond the existing vertical directives and regulations appears to be very limited at the moment.

Market surveillance on C2C products is not actively included in the projects because of budgetary constraints. Any market surveillance regarding C2C products is mostly reactive, based on complaints. A lot of C2C products are offered through the website Marktplaats.nl. The NVWA has entered into a partnership agreement withMarktplaats.nl.

Market surveillance of products sold online (frequency, sales channels covered, organisation, use of mystery shopping)

All market surveillance activities try to include products that are sold online. The estimates regarding the percentage of market surveillance activities that focus on products online differ quite a lot, from 6 up to 40 percent. Exact data are lacking. Products are bought by the NVWA through online retailers' websites, comparisons websites, social networks and online marketplaces. According to most interviewees, products sold online in the Netherlands are included more than once a week, products from other Member States once every six months, and products from outside the EU once a week. A lot of the market surveillance is project-based, which makes it hard to give an estimate.

Most market surveillance of online products is project-based: online samples are taken together with offline samples. Online market surveillance is fully integrated in all NVWA's product-focused projects. All projects are risk-

based, focusing on products that can cause serious damage to health and safety when not in compliance with requirements and businesses offering those products that have a track record of non-compliance. For online sales, this means that the NVWA target expected low compliance shops and platforms and buys samples there. Chinese suppliers and especially platforms like AliExpress and Amazon are part of that selection. With these types of sales, mystery shopping is hardly necessary to get the right i.e. representative and non-manipulated samples (not being golden samples). Mystery shopping is rarely used (once a year or less). It is used when buying through social networks. In exceptional cases, mystery shopping is necessary. There is a small niche: small manufacturers that produce chemical products/substances. In those cases, it is possible that a golden sample is provided.

The bought products are assessed in the laboratories and in case of non-compliance, the website, for example, is informed of the results. Corrective action may be demanded and fines may be imposed.

The biggest challenges regarding online sales are the limited enforcement options and lack of staff and resources. It is hard to find experienced officers with the right internet and machine search skills. The EC Notice on market surveillance of online products and the product safety pledge are seen as helpful.

3. Market surveillance cooperation with public authorities, including through RAPEX/Safety Gate and cross-border

Functioning of cooperation with other relevant authorities in the Netherlands (except customs) with respect to product safety

The Dutch market surveillance authorities and the customs authorities discuss topics and activities in a permanent national forum (Alliance working group on product market surveillance and external border checks), which was set up for this purpose in 2008 and is chaired by the NVWA. This is where, amongst other things, the positions of the market surveillance authorities and the customs authorities for input at the EU level (indicative multiannual programme on market surveillance, horizontal issues in ADCOs are agreed upon. The Alliance concerts cooperation at a more strategical level. Meetings with other authorities in the Netherlands are organised once every three months. The NVWA is the RAPEX contact point for other market surveillance authorities such as the AT and ILT. The other authorities are included in preparing the national market surveillance programmes. Furthermore, there is regular exchange of information, meetings and informal cooperation. NVWA does lend expertise and offers laboratory capacity to do sample tests. Furthermore, there are workshops, conferences and joint market surveillance authority (MSA) projects.

Cooperation with customs authorities in the Netherlands with respect to product safety

The NVWA has a long-standing working agreement with customs.[418] Next to this agreement, a list of priority products, countries of origin and - when possible - economic operators is concluded every year between customs and the NVWA. On the bases of digital loading bills, customs duly informs the NVWA when a ship or plane carrying cargo that corresponds with the mentioned priority list is coming in. The NVWA then decides whether or not to inspect the goods in question. The market surveillance authorities then inspect the products upon import (i.e. before they are released for free circulation). Cooperation may also be more on a project basis. This is an efficient solution for the situation in the Netherlands, given the large volume of goods imported into the EU every day through the Port of Rotterdam.

Cooperation with authorities in other countries (EU/EEA and non-EU/EEA countries) with respect to product safety

Cooperation with other EU/EEA countries takes place through RAPEX and ICSMS, coordinated actions at EU level, mutual assistance requests outside of RAPEX, joint training sessions, regular exchange of information and meetings. In specific cases, the authority contacts the economic operator directly, but mostly they communicate via the economic operator in the Netherlands. In cases where an economic operator is from another Member State, the authority gets in contact with the economic operator by mail or letter pointing out that it is offering a product that does not comply with EU legislation/national legislation and urging it to alter or stop offering the product. If there is no adequate reaction from the economic operator, the authority contacts a colleague MSA in the country of the economic operator and asks them to intervene. Authorities in other countries are contacted in cases where a specific product that was found was manufactured in that country, for instance, to see whether they have more

[418] *Het samenwerkingsconvenant NVWA/Douane*

information on the product or manufacturer.

Cooperation with non-EU/EEA countries is only through informal cooperation. In general, no action is taken against economic operators outside the EU/EEA or action is taken knowing that the success rate will be very low. Therefore, the NVWA tries to invest in educating e-shoppers instead. It can also lead to making a specific arrangement with customs targeting their inspections towards a specific product or supplier. The NVWA communicates with economic operators outside the EU/EEA only in cases where economic operator asks them to have contact.

Coordination between RAPEX and national market surveillance systems (in terms of timely notification of dangerous products, non-safety risks notified through RAPEX etc)

Market surveillance authorities indicated that when a product is found during market surveillance that may pose a risk for a serious injury or a serious health hazard, an official report is drawn up. At the same time, all information to fill in the RAPEX form is collected. Laboratory testing is often part of this process. The RAPEX form is filled and a risk assessment is made. If the result of that risk assessment is a serious risk, then the RAPEX form is sent to the RAPEX contact point. This process in general takes more than two weeks. It takes some time to collect all the information that is needed to fill in the RAPEX form.

There appear to be no particularities regarding the cooperation between the RAPEX contact point at the NVWA and the persons involved in market surveillance.

4. Cooperation with stakeholders and awareness raising for product safety

Cooperation of market surveillance authorities with business associations/businesses and consumer organisations on product safety (regarding businesses: other than for requesting corrective action)

The NVWA has stakeholder meetings with associations 2 to 3 times a year. In light of previous experiences however, stakeholder associations do not always have a representative view on the problems their individual members encounter. Therefore, the NVWA also sometimes contacts individual companies and market leaders next to stakeholder associations. The biggest challenge is to include SMEs in the process: they are less organised and more difficult to reach. About 90% of all businesses involved in consumer products are SMEs.

Moreover, in the framework of inspections, there is a continuous information flow between the inspector and the company on product safety issues and how to improve compliance. The NVWA also tries to organise stakeholder meetings when projects are being launched and/or measures are being imposed, because in their experience this increases the willingness to comply.

The NVWA also uses company-based inspections (as an alternative to product inspections) focusing on the quality systems of the economic operator, which means a dialogue on how to optimise the system to ensure that only safe products are being distributed or placed on the market. At the same time, the NVWA does not have the capacity to provide extensive guidance, nor is it in the position to act as a consultant.

It was also indicated that businesses and their associations are reluctant to cooperate with the NVWA.

Partnership agreements are also being used, for example with Marktplaats.nl, an online platform for the sales of consumer products and second hand products, and with bol.com, the biggest online shop and platform in the Netherlands for consumer products. These partnership agreements are similar to the EU product safety pledge that has been drawn up at the EU level in cooperation with the four biggest international online platforms.

The NVWA meets with consumer associations once a year. It processes complaints they issue about products and/or follow up on products that they have tested. The association sometimes provides its tests results which may also be used for the basis of the NVWA testing.

Market surveillance authorities' activities to raise awareness of businesses and consumers with respect to product safety

In addition to the cooperation methods mentioned above, awareness of businesses is raised through the NVWA website. All relevant information is there, but the accessibility of the website and its design may be improved. In light of the new Market Surveillance Regulation 2019, the NVWA is currently discussing the ways in which it will further design the product contact points in the Netherlands with the Ministry.

Awareness of consumers is raised through publications on market surveillance projects, such as the hoverboard project in March 2019, which are picked up by media. Other examples of projects were hand disinfectants (April

2019), balloons (February 2019), lighters (September 2018), floating devices for children (July 2018), baby dolls (November 2017), leather gloves (October 2017), painted wooden toys (July 2017), UV-protective swimming gear (July 2017), eye creams (June 2017). A full list can be found on the website.

The NVWA website also includes notifications on dangerous products and other information campaigns, for example on e-shopping. The NVWA has its own Facebook page and Twitter account. A recent information campaign on online sales of products from outside the EU was launched in light of the holiday season and just before Black Friday (national sale) through social media. It was picked up by the news and other media as well (laatjenietinpakken.nl).

5. Recalls and other corrective measures

Organisation of recalls and other corrective measures in the Netherlands (including cooperation and information exchange with businesses, existence of codes of good practice on product recalls)

In general, economic operators cooperate when a non-compliant product is found. In case of a serious risk, an order to withdraw or recall the product is given if an economic operator does not perform a recall voluntarily. If the economic operator is not willing to recall voluntarily, the economic operator is ordered by an administrative warrant often under a penalty payment in case the economic operator still refuses to take action.

The authorities indicated that it is difficult to provide uniform benchmarks or a standardised procedure because the supply chains, types of products and risks differ. For example, web shops are able to contact their buyers directly through email, but regular shops often have to use social media and traditional media. NVWA does check whether an advertisement is adequate, for example, and through which channels it is communicated. NVWA does assess the overall recall strategy of an economic operator. The focus is on how to remove the risk/product from the market as effectively as possible. This requires a different approach in each case.

With regard to the communication to consumers, a recall when done by the economic operator is communicated by placing the recall from the economic operator on the NVWA site and communicating through social media.

A code of good practice regarding recalls does not exist. NVWA does have an internal working instruction (werkvoorschrift) in place that provides some benchmarks. This document is not publically available.

Monitoring of effectiveness of product recalls by market surveillance authorities

The NVWA monitors the recall and requires information from the economic operator on the results. In general, regarding mandatory recalls, the NWVA requests proof of the notifications and advertisements, proof of the recall and of the destruction (e-mails, letters, invoices etc.). If necessary and if a recall takes longer, an economic operator may be asked to provide monthly updates and overviews of the products returned. The results in absolute number of product returns are requested as well as a percentage. Spot checks are also performed.

6. Availability of statistics relevant for market surveillance

Availability of statistics in the Netherlands that is relevant for market surveillance (e.g. concerning dangerous products, related consumer complaints and injuries)

Injury and accident figures from the injury recording system of the Safe Netherlands Foundation (veiligheid.nl) are used to verify the priorities. This database contains data on all injuries in the private sphere obtained from the accident and emergency departments of 15 hospitals spread over the whole country. It shows whether a product was involved in the injury sustained and what role the product had in the circumstances. Other monitoring data on injuries and the products involved come from the National Information Centre on Poisoning (NVIC), the Burns Foundation and Statistics Netherlands (fatalities).

In the NVWA's publication the Status of Product Safety, these sources of information are combined with data on market surveillance over 2012-2015 and contain the number of samples taken and the amounts of measures taken with regard to certain product groups.

The NVWA does not have statistics on recalls readily available. NVWA started the implementation of a new ICT system, but due to serious budget overruns the implementation was stopped by the Minister in April 2019.

7. Problems or impediments to effective market surveillance encountered, potential improvements

Practical problems or impediments to effective market surveillance of consumer products encountered in the Netherlands (incl. regarding market surveillance in general and online, RAPEX, cooperation with stakeholders,

recalls)

Regarding overall market surveillance and online:

Online sales remain the biggest challenge for market surveillance at this moment. It is not possible to check each package/shipment at the border.

Furthermore, SMEs remain a challenge. 90% of the economic operators have less than 9 employees. Due to its complexity, EU legislation is a challenge for companies that have no quality or legal units, especially when they have a wide assortment of product groups. As also indicated in the market surveillance report on sector specific market surveillance over 2014-2017, the authorities have the experience that the majority of non-compliance is caused by the economic operator being unaware of the legal requirements.

According to an interviewee, consumers are still unaware of the fact that products on sale could be unsafe and the seriousness of the consequences. They are under the assumption that if products are unsafe, they would not be for sale ("somebody checks this"). They are also often convinced that an unsafe product cannot really do serious harm ("happens to other people"). In combination with the extremely low prices of Chinese web shops and platforms, these assumptions can result in dangerous scenarios. This image also follows from a report published by the NVWA in 2016 on the status of product safety.

Regarding RAPEX:

Overall, RAPEX/ICSMS, currently Safety Gate, are/is considered to function rather well. The problems indicated are:

- The lack of human or financial resources;

- The fact that some products mentioned in RAPEX are still offered online;

- The lack of information or inaccessible information on the risk assessment provided by authorities (no risk assessment at all, poor risk assessment or test results in languages other than English, French or German);

- The lack of information from the authority issuing the notification on the economic operators involved up and down the chain.

These problems make it hard to follow up on notifications at a national level.

Regarding recalls:

Product recalls are considered to be rather effective, but statistics or other information that confirms this is missing. In general, the success rate is considered to vary a lot, depending on the type of product and the risks. For instance, when it concerns a cheap toy, the recall rate is low; consumers probably throw it away or keep using it anyway. When it concerns an expensive gas appliance, the recall rate is high (85%).

Areas to make market surveillance of consumer products in the Netherlands/the EU more effective

Regarding overall market surveillance:

The suggestion to introduce a requirement for business operators to keep supply chain records – 'one up one down' traceability – is welcomed by the authorities. If this information is subsequently added to Safety Gate, it would also make market surveillance in other Member States easier.

It was suggested that it is important to detect hypes and other short-selling products or very popular products at an earlier stage, to be able to anticipate rather than react (too slowly).

It was also suggested that with regard to online sales, the Commission should start talks with the Chinese authorities on possibilities to improve the compliance of products offered by platforms to EU consumers or otherwise stop supplying these goods.

Regarding RAPEX:

It was indicated that test reports from MSAs should be in English. Sometimes the authorities receive test reports in languages that they can't read. The risk assessment is often missing or not extensive enough. Risk assessment is still a developing skill in many countries.

Regarding recalls:

Some interviewees indicated a need for common denominators or general criteria on when a recall may be considered adequate. This was mentioned with regard to the GPSD, but probably also regarding vertically

harmonised product areas. An internal working document on recall (werkvoorschrift) is available at the NVWA, but it is not publicly available.

More information, on applicable benchmarks would be desirable, also for economic operators and also with regard to transparency and proportionality in light of the use of public powers. The corrective action guide from 2005 provides some guidance for industry itself, but is very general in nature and a bit outdated.[419]

III. Overall trends, market surveillance tools and best practices

1. Level of safety of consumer products

Views of the interviewed market surveillance authorities on how the level of safety of consumer products has developed in the Netherlands since 2013

The NVWA has published a report in 2016 called the Status of Product Safety (de Staat van Productveiligheid) in which it combines a couple of indicators to give an indication on how safe consumer products are. The indicators are:

- The number of accidents with injuries and other damage to health related to the use and safety of consumer products;

- The extent to which consumer products meet the legal requirements;

- The extent to which companies take their responsibility to market safe consumer products;

- The signals from society (reports from companies and consumers).

Due to the fact that market surveillance is project- and risk-based, any data on market surveillance in general does not say anything about overall numbers of unsafe (consumer) products on the market.

Consumer product-related accidents are registered on a national level. It is however very difficult if not impossible to quantify the causality between unsafe products and injuries. This is due to the fact that many injuries occur as a result of the behaviour or even misconduct of the consumer. The exact chain of events resulting in the injury is often obscure in the registered data. Many of the consumer complaints that reach the NVWA do not relate to the lack of safety of the product but to the quality of the product or even the conditions of the contract between the consumer and the economic operator.

The impression of all interviewees is that the level of safety of consumer products is largely unchanged. However, it was considered that because more and more harmonised standards under the GSPD are available, one could indirectly say that the level of consumer product safety has increased.

2. Tools for market surveillance and best practices

Views of market surveillance authorities in the Netherlands whether they have the tools at their disposal to address new challenges (e.g. related to e commerce, C2C sales, platform economy, new technologies etc) their market surveillance activities

Based on the interviews and research conducted, the overall impression is that all authorities try to address safety issues regarding these new technologies as best as possible, but the budget and means are very limited. Internet purchases and online platforms are areas that are fully included in market surveillance. The interviewees state that more advanced technologies like web crawlers, web scraping and data miners are being used. NVWA is investing in these tools. At the same time, the introduction of a new ICT system of the NVWA was withdrawn, which was a major setback. Furthermore, new ICT tools and in-house as well as external experts are expensive.

New technologies also create uncertainty as to which authority will be made responsible for market surveillance in a new area and will be provided with the relevant budget. This carries the risk of providing unhealthy incentives and competition between authorities with regard to new and existing product groups under their supervision, which could get in the way of the cooperation which is desperately needed.

Views of market surveillance authorities whether approaches in the Netherlands can be considered best practice implementation of the GPSD, which could be of interest to other countries

[419] See https://ec.europa.eu/consumers/archive/cons_safe/action_guide_nl.pdf

Two best practices were indicated:

- The integration of online market surveillance in all projects;

- The way in which consumers are held responsible for not using common sense when buying extremely cheap items by informing them of risks and how to identify the probability of the product being unsafe.

Furthermore, the use of risk based and system market surveillance are actively used and promoted by the authorities in the Netherlands. These approaches may also be considered best practices, as long as governments and authorities stay aware of the fact that good quality assurance is not a watertight guarantee for safe products. Therefore, random unannounced proactive product surveillance will always be necessary.

This research was conducted on the basis of interviews and government documents and reports that are publicly available. Statistical data and internal documentation are not available to assess the current practices as stated by the authorities in further depth.

Annex

A. Number of staff (FTE) working on market surveillance of consumer products (current, or for the last available year).

	Harmonised consumer products (e.g. toys, cosmetics, electrical appliances and equipment under LVD)	**Other (non-harmonised) consumer products under GPSD**	**Total** (all consumer products)
Responsible authority/ies at the national level	*95*	*n.a.*	*95*
Total (country)	***95E***	***n.a.***	***95***
Notes:	*Due to the risk-based approach it is not possible to make a distinction between harmonised and non-harmonised. This will change every year. Online sales are incorporated in all of NVWA's product-focused projects. 10 to 15 % of the samples are taken from pure or mainly online sellers*		

B. Number of inspections of consumer products (last available year)

	Harmonised consumer products (e.g. toys etc)	**Other (non-harmonised) consumer products under GPSD**	**Total** (all consumer products)
Total number of inspections	*n.a.*	*n.a.*	**7 000**
Total number of consumer products inspected	*n.a.*	*n.a.*	6 500
Total number of consumer products tested in laboratories	*n.a.*	*n.a.*	4 500
Notes:			

C. Number of recalls of consumer goods (last available year)

N.a.

D. Key sources

Legislation	Commodities Act (Warenwet, https://wetten.overheid.nl/BWBR0001969/2018-11-17) The Decree on General Product Safety (Warenwetbesluit algemene productveiligheid, Stb. 1993, 499, last updated through Stb. 2016, 525) https://wetten.overheid.nl/BWBR0006158/2016-12-28 Regulation on General Product Safety (Warenwetregeling algemene productveiligheid, Stcrt. 2005, 228, last updated through Stcrt. 2012,

	83,https://wetten.overheid.nl/BWBR0019074/2012-01-19) The Decree under the Commodities Act on Administrative Fines (Warenwetbesluit bestuurlijke boeten, https://wetten.overheid.nl/BWBR0011841/2018-07-18) Explanatory notes to the implementation of the GPSD, Kamerstukken II 2004/05, 29 982, nr. 3, p. 6. Economic Offences Act (Wet op de economische delicten WED, https://wetten.overheid.nl/BWBR0002063/2019-11-14) Act on Public Administration and Disclosure of Information (Wet openbaarheid van bestuur, Wob https://wetten.overheid.nl/BWBR0005252/2018-07-28) The General Administrative Code (Algemene Wet Bestuursrecht, Awb https://wetten.overheid.nl/BWBR0005537/2019-11-14) Collecting law on Public health, Welfare and Sport 2018 (Verzamelwet VWS, Stb. 2018, 356: https://zoek.officielebekendmakingen.nl/stb-2018-356.html) Decision on active publication of market surveillance and execution of the Health law and Youth law, (Besluit openbaarmaking toezicht- en uitvoeringsgegevens Gezondheidswet en Jeugdwet, Stb. 2016, 448 https://zoek.officielebekendmakingen.nl/stb-2019-9.html) and the Decision on its entry into force (Besluit van 15 januari 2019, houdende vaststelling van het tijdstip van inwerkingtreding van de wet van 14 november 2016, tot wijziging van de Gezondheidswet en de Jeugdwet teneinde een mogelijkheid op te nemen tot openbaarmaking van informatie over de naleving en uitvoering van regelgeving, besluiten tot het opleggen van sancties daarbij inbegrepen (Stb. 2016, 448) en het Besluit openbaarmaking toezicht- en uitvoeringsgegevens Gezondheidswet en Jeugdwet, Stb. 2019, 30; https://zoek.officielebekendmakingen.nl/stb-2019-30.html) Policy documents: Market Surveillance Framework NVWA (toezichtkader NVWA https://www.rijksoverheid.nl/documenten/richtlijnen/2015/10/16/toezichtkader-nvwa) General Intervention Policy NVWA (Algemeen interventie beleid NVWA https://www.nvwa.nl/over-de-nvwa/documenten/nvwa/organisatie/hoe-de-nvwa-werkt/publicaties/algemeen-interventiebeleid-nvwa Specific Intervention Policy Product Safety, applicable as of 1 September 2017 (Specifiek Interventiebeleid productveiligheid geldig vanaf 1 september 2017: https://www.nvwa.nl/over-de-nvwa/documenten/export/veterinair/ks-documenten/interventiebeleid/specifiek-interventiebeleid-productveiligheid) Annex 2 to the Specific Intervention Policy Product Safety applicable as of 1 September 2017 (Bijlage 2 bij het specifiek interventiebeleid productveiligheid geldig vanaf 1 september 2017: https://www.nvwa.nl/over-de-nvwa/documenten/export/veterinair/ks-documenten/interventiebeleid/bijlage-2-bij-specifiek-interventiebeleid-productveiligheid-geldig-vanaf-1-september-2017) Directive for the Criminal Procedure for the Commodities Act (Richtlijn strafvordering warenwet, https://wetten.overheid.nl/BWBR0030963/2012-01-01)
Studies/reports/articles	Parliamentary reports, Second Chamber, year 2018/2019, 33 835, no. 121, on the position of the NVWA in policy making, and Letter of the Ministers of Agriculture, Nature and Food quality and the Minister of Healthcare of 18 April 2019 (retrieved on 14 November 2019, from: https://zoek.officielebekendmakingen.nl/kst-33835-121.html. Roadmap Digitally Safe Hard and Software (Raport Digitaal veilige hard- en software, retrieved on 25/11/2019 from: file:///C:/Users/Gitta%20Veldt/Downloads/Roadmap+Digitaal+Veilige+Hard-+en+Software.pdf) Annual Plan NVWA 2019 (retrieved on 25/11/2019 from: https://www.nvwa.nl/documenten/nvwa/organisatie/jaarplannen/2019/jaarplan-2019-nederlandse-voedsel--en-warenautoriteit-nvwa) NVWA Report - The Status of Product Safety 2016 (de Staat van Productveiligheid 2016), https://www.staatvan.nl/productveiligheid/ Collection of National Surveillance Data and Assessment 2014-2017, as provided to the Commission: https://www.rijksoverheid.nl/documenten/rapporten/2018/10/29/collection-of-national-surveillance-data-and-assessments
Websites	General Commodities Act Consultation Group (Regulier Overleg Warenwet), website with the minutes of the meetings: https://www.row-minvws.nl/row-nl/productwetgeving-niet-

	levensmiddelen-dpnl/vergaderstukken-dpnl NVWA product based projects, findings and research outlines: https://www.nvwa.nl/onderwerpen/productonderzoeken-op-merknaam NVWA safety notifications: www.nvwa.nl/onderwerpen/veiligheidswaarschuwingen NVWA website on e-shopping: https://www.nvwa.nl/onderwerpen/webwinkels NVWA Facebook: https://www.facebook.com/NVWAonline/ NVWA Twitter: https://twitter.com/_nvwa NVWA partnership agreement with Marktplaats.nl (https://www.rijksoverheid.nl/documenten/convenanten/2019/07/02/samenwerkingsprotocol-nvwa-en-marktplaats) NVWA partnership agreement with Bol.com (https://www.rijksoverheid.nl/documenten/convenanten/2019/07/02/samenwerkingsprotocol-nvwa-en-marktplaats) Press release: NVWA ICT project Inspect dropped: https://www.rijksoverheid.nl/ministeries/ministerie-van-landbouw-natuur-en-voedselkwaliteit/nieuws/2019/04/15/minister-carola-schouten-stopt-implementatie-en-ontwikkeling-ict-systeem-inspect-bij-nvwa
Interviews	5 interviews with NVWA The unpublished case law and decision provided by NVWA