

Health and Safety Executive Board		Paper No: HSE/09/72	
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BIS proposal for a Statutory Instrument (SI) to give extra powers to market surveillance authorities, including HSE, under EU Regulation N^o 765/2008 on Accreditation and Market Surveillance (RAMS)			

Purpose of the paper

1. The Board is requested to agree that HSE be included in an umbrella Statutory Instrument proposed by BIS (formerly BERR) to give UK Market Surveillance Authorities (MSAs), of which HSE is one, extra enforcement powers. The powers are required to ensure the UK's full response to a direct-acting EU Regulation, and are required to be in place by January 2010. BIS has formally offered to take the lead in drafting and enacting the new Statutory Instrument and requires a response from HSE agreeing to the inclusion of additional powers for HSE inspectors.
2. The Annex provides background on HSE's current approach to market surveillance and outlines how the EU Regulation will affect our work.

Background

3. There was a debate in the EU on the level and disparity of market surveillance between Member States, following a review of the EU system of supply legislation, referred to as "The New Approach Review".
4. Market surveillance is necessary to ensure minimum standards for products supplied across the EU (in HSE's case, safety standards for work equipment), as well as to maintain manufacturer and end user confidence in the single European market.
5. Central to the debate was a comparison of "risk-based" and "target-based" approaches (setting percentages for numbers of products checked). The UK and others were successful in maintaining the line of a risk-based approach.
6. Despite this, the Commission remains somewhat concerned at the level of Member States' commitment to effective market surveillance, and reserves the right to undertake further detailed scrutiny.
7. One of the actions following the New Approach Review was the enactment of the EU *Regulation on Accreditation and Market Surveillance* (RAMS). The Regulation seeks to increase harmonisation of Member States' arrangements for the exchange of information and the enforcement of the requirements of Directives, including a set of minimum powers for officers of the MSAs¹. For HSE the powers are already largely covered by the Health and Safety at Work, etc Act, but there are some limited gaps that need to be addressed to implement the Regulation.

¹ MSAs include HSE, the Vehicle Certification Agency, Trading Standards Offices, National Measurements Office, Ofcom, and the Medicines and Healthcare products Regulatory Agency.

8. Other provisions in the Regulation cover the accreditation of Notified Bodies and other players, such as testing laboratories; these will have negligible effect on HSE.

Argument

9. There are some gaps in HSE inspectors' powers in comparison with RAMs, including to require withdrawal of defective products, and require their recall from the end customers and their destruction
10. To date, inspectors have managed to use HSW Section 6 and enforcement Notices to deal with this type of issue, together with persuasion and the cooperation of stakeholders. However, this does not constitute a match to the requirements of RAMs. Whilst HSE would not, of itself, proactively seek these extra powers, they could provide Inspectors with more bespoke tools for product safety work.
11. BIS – as the relevant Competent Authority - propose an overarching Instrument to deal with the gaps in the powers of the various MSAs. Taking no, incomplete, or belated action is not considered an option as it would risk the UK being found in contravention of RAMS. BIS wish to move swiftly to eliminate any risk of infraction proceedings by the EU. In addition any delay in introducing powers under RAMS may encourage the EU to give the UK approach closer and earlier scrutiny and, in doing so, reopen the debate about volumes of market surveillance work being the best indicator of performance in preference to a risk and outcome-based approach (although there is no evidence to suggest that any work equipment products presenting significant risks are not being identified and dealt with in the UK).
12. The BIS offer of legislating across the piece looks cleaner and is likely to save HSE over £50k in staff costs in comparison with HSE producing its own bespoke Regulations to ensure compliance with RAMS (estimated costs of £9,247 for the BIS option and £62,574 for a standalone HSE approach).
13. The BIS offer also carried the advantage of a common set of powers being available to all MSAs. This could assist HSE in better liaison with Trading Standards on products that are on the boundary between industrial and consumer products (e.g. power tools and ladders) and the development of a more flexible legal boundary. BIS have also undertaken to cover all supply legislation HSE enforce, including domestic regulations on the supply of explosives.
14. Officials see no identified advantages in HSE undertaking separate implementation. In either case, some limited re-issue of Inspector warrants will be needed.
15. RAMs will not, in itself, require any increase deployment of HSE resource on market surveillance work. HSE do not propose any policy change in relation to its approach or resource deployment in this area. The new powers will not introduce new enforcement situations, but will help HSE inspectors enforce on existing issues. Should BIS, as the Competent

Authority, seek additional HSE activity (for example as part of a UK response to any strengthening of the EU's position) we would seek full cost recovery.

Presentation and consultation

16. BIS will lead on presentational and impact aspects, with the cross-MSA, UK-wide changes most likely introduced at the UK Industry/Stakeholder Forum and announced in a press release. All HSE Directorates and Legal Advisors are content with implementation via the BIS legislation.

Action

- 17. The Board is invited to give its endorsement to the recommendation that HSE should respond to BIS agreeing to the inclusion of extra powers for HSE inspectors in its Statutory Instrument.**

Clearance of paper

- 18. The recommendations in this paper were cleared by the SMT on 29 June 2009.**

Annex: HSE's product safety work and the consequences of RAMS

1. HSE has long enforced legislation concerning the supply of products and substances for use at work. Legal provisions include section 6 of the Health and Safety at Work Act (HSW Act) and the Supply of Machinery (Safety) Regulations 1992, as amended.
2. HSE's market surveillance activity relates to the safety of products used in the workplace (e.g. machines). It is risk-based and has three strands:
 - a. Field work arising from incident and complaint investigations
 - b. Proactive projects taken forward by combinations of Sector staff, specialist inspectors and field inspectors in the FOD/HID 'virtual' Product Safety Teams (ie small, locally based, multi-disciplinary teams who spend a proportion of their time on product safety work).
 - c. Participation and support for work at EU level on committee and working groups covering harmonised standards and product safety directives.
3. HSE work in this area is mainly spread between FOD (both inspector and administrative staff), HID and the Sectors. FOD traditionally expects around 1% of its Inspector time to go on reactive and proactive product safety work (which would equate to around 4.3 staff-years in 2009/10). Time on product supply aspects of incident investigations is difficult to distinguish and will vary, but at least five major investigations in 08/09 included very significant product supply elements.
4. Work under (a) is part of our mainstream activity to prevent injury and ill health. As part of investigations, inspectors normally consider whether any equipment involved met basic safety standards, including any harmonised standards.
5. Any failings will be referred to the virtual Product Safety Teams, established in 2005, for action in line with the Enforcement Policy Statement and severity criteria developed and maintained by Services Transportation and Safety Unit (STSU), who co-ordinate activity. STSU also lead on any resulting action at EU level, e.g. Safeguard activity which leads to products being declared non-compliant across the whole EU.
6. Proactive projects are targeted at areas of concern (for example tower cranes) and are agreed with, and funded by, BIS under a Service Level Agreement (SLA). The SLA was recently reviewed and now allows for a much wider range of work to be cost-recovered than previously, including testing work by HSL, up to £120,000 per annum ².
7. Our work in Europe centres on fora, such as Advisory Committees (ADCOs) on product safety directives. We have also been in the lead of developing a database to enhance cross-border cooperation, ICSMS ³, a system already used internally by HSE.

² Previous years have recovered less than 25% of this sum. Projects for 09/10 will recover £60K

³ Information Communication System for Market Surveillance

8. RAMS will require other work of HSE, but the resource requirements are small, and much of this work will be funded under the SLA:
 - Participation in the Market Surveillance Co-ordinating Committee (MSCC);
 - Improved sharing of information across Member States;
 - Improved market surveillance at the border.
9. The MSCC includes all the major MSAs, and recently held an open meeting with external stakeholders. The MSCC cannot direct the efforts or resources of individual MSAs, which continue to be governed by their existing internal planning processes and investigation selection criteria etc.
10. Its key activity to date has been to support BIS to prepare the UK's Market Surveillance Programme for submission to the EU by December 2009. HSE's submission to the MSCC included an outline of the three strands set out in paragraph 1 of this annex, together with a re-iteration of our risk-based, outcome-led philosophy.
11. Historically, this risk based approach to Market Surveillance was viewed with some suspicion by the EU, with a feeling that the UK should be doing more. Infraction proceedings were threatened in 1999 over "grey imports" of construction equipment. HSE, working with DTI (now BIS), deflected the infraction proceedings by proactive research in this area in cooperation with the Netherlands.
12. Since then HSE with BIS have countered by being much more proactive and fully involved in other high level European fora. This displays our commitment and yields real results, such as the adoption of ICSMS as the pan-EU system for data sharing; as HSE already uses ICSMS internally, the information sharing requirements of RAMS will be easily met.
13. Working through the fora, we have also successfully secured cross-border projects on areas of interest, such as noise of machinery and footwear (PPE and slip resistance).
14. HSE's internal recording systems do not necessarily do justice to the work carried out. HSE staff already undertake considerable market surveillance work as part of their mainstream inspection and investigation, but we struggle to retrieve and therefore demonstrate much of this activity. The establishment and consolidation of the Product Safety Team has partially solved this problem, as will better tracking of our proactive work in 2009/10 and beyond. We are looking at how to get a better estimate of our inputs without making any changes (which would be likely to be disproportionately costly and disruptive) to our work recording systems.
15. Work has started to improve market surveillance at the border. This includes discussion of "gateways" to provide information on key points in the supply chain where products can properly assessed in a sufficiently assembled state, rather than as a set of separate components at the port. Any proactive work is likely to be drawn up as projects under the SLA with BIS – i.e. it will be funded, and targeted only at those products where we are concerned that relevant safety standards are not being met, and serious consequences might result.

16. Suspicion within the EU of Member States' efforts remains in both the Commission and Parliament, and RAMS is one product of this. The EU continues to develop its thinking on the detail of Member States' obligations, including recent efforts to discuss and set percentages for the number of products checked. These efforts were successfully countered by the UK (HSE and BIS), along with other Member States.
17. However, HSE's close working relationship with BIS, and a proactive approach to engagement in Europe has enabled us to show both the impact and effectiveness of our work and our commitment, and it is clear we are held in good regard by the present desk officers and unit heads in the Commission.
18. We fully expect project work under the SLA will meet the proactive element of any RAMS requirements. If more proactive work is required in the future this will be carried out under the SLA and will be funded. The most likely type of any new work will be "testing" and this will take minimum inspector resource and will be carried out by HSL or outsourced.