

**Introduction: an evaluation of the NLF is needed to make it future-proof**

- In December 2021, the Commission launched a consultation on the New Legislative Framework (NLF). The consultation addresses urgent and strategic topics regarding the functioning of the NLF and current and future developments.
- Through this non-paper the Ministry of Economic Affairs and Climate Policy from the Netherlands (hereafter: the Netherlands) wants to reflect on the topics of the consultation which it currently considers the most important.
- First, it discusses some general considerations on the NLF. In addition the Netherlands reflects on four focus areas of the NLF: (1) accreditation, (2) standardization, (3) CE-marking, (4) current trends: digital and refurbished products.
- To date, the Netherlands has not conducted a systematic evaluation to the functioning and added value of the NLF. Our assessment is based upon our own experiences and consultations with stakeholders.
- Overall, the Netherlands supports the NLF. However, current and future developments should be addressed in order to strengthen the NLF and to make the system future-proof. The Netherlands welcomes insights on the NLF from the Commission and other member states and is happy to exchange views.

**General considerations: NLF seems a strong framework, but current developments should be taken into account**

- In general, the Netherlands welcomed the introduction of the New Legislative Framework (NLF) in 2008<sup>1</sup>. The existence of a reliable framework is still of great importance, especially against the background of increased (direct) import from all over the world, e-commerce, refurbishment of products and a plethora of involved economic operators from manufacturing to final distribution. The Netherlands believes that trust in the conformity of harmonized products is essential for the functioning of the internal market. It is crucial that consumers and business users can trust a product that is placed on the internal market, despite the origin of the product and/or the responsible party for conformity assessment.
- The NLF is a powerful and well-designed framework:
  - The framework contains important guarantees for health and safety, consumer and environmental protection,
  - whilst securing a level playing field on the internal market,
  - and providing room for innovation.
- However, the developments mentioned above pose several challenges to the functioning of the NLF. The Netherlands would like to highlight general, albeit highly interconnected, considerations in this respect:
  - 1) The roles and responsibilities of the economic operators should be clear.
    - It is important to evaluate and update the definitions in the NLF to ensure a clear and proportionate distribution of obligations that fit in the current digital and circular economy as well.
    - It is important to clarify relationships between economic operators in the NLF and clarify the divisions of responsibilities amongst economic operators in the digital and circular value chains and ecosystems to ensure trust and fair competition on the internal market for goods and services.
    - Economic operators from third countries play an increasing role in our internal market, either through direct import, or through the classical chain from manufacturer to end-user. It is crucial to acknowledge those challenges for compliance and ex-ante and ex-post control.
  - 2) The Netherlands notices that businesses have to invest a significant amount to understand and implement product legislation. The burden this poses for business is

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<sup>1</sup> BNC fiche Verordening accreditatie en markttoezicht, 2007

increasing over time, since products are becoming more complex. There is a risk that products are unintentionally non-compliant. This also relates to the previous point.

- 3) The Netherlands believes the system can be vulnerable to opportunistic behavior. The complexity of the system might induce undertakings to take a calculated risk: anticipating the probability of accidents and/or inspections. Some parties might decide not to comply with existing legislation. Some concepts of the NLF also provide too much room for undesirable interpretation. Provision of accessible and comprehensible information is key. This also relates to the previous bullet. Compliance must be easy and circumvention of the system should be prevented. We must avoid a situation where compliant parties bear the burden of opportunistic behavior of non-compliant parties. The following paragraphs will provide some insights on this.
  - a) The Netherlands stresses the general need for better and especially more uniform application of Single Market rules, including the NLF. Divergent interpretation and application of the same rule within the EU pose an important barrier for many businesses.
  - b) The NLF should be the starting point for product legislation. If the Commission finds that a proposal for legislation for specific harmonized products is not fit for the NLF, the Commission should be committed to explaining why the NLF is not used in (parts of) the proposal.
  - c) It is crucial to take lessons from the COVID-19 crisis also in this respect.
    - o The Netherlands believes it is important to create European guidelines for conducting remote inspections on products by market surveillance authorities as well as notified bodies.
    - o The Commission mentioned market surveillance as one of the topics to be included in its proposal for a Single Market Emergency Instrument. The Netherlands would like to stress that a solid impact assessment is key as a basis for such an instrument. Furthermore, the instrument should have added value and should prevent barriers to free movement in times of crisis in a proportionate way without disrupting global value chains.
  - d) Further steps for strengthening the framework should be based on facts and needs from citizens, businesses and surveillance authorities in practice, including empirical data on the development of the free movement of goods. Tailored solutions should be found which should keep the user's perspective of citizens and businesses in mind<sup>2</sup>.

### **1 Accreditation and conformity assessment: an important instrument that should be consistently applied**

- For accreditation, the Netherlands notices that special attention is needed to secure the quality of notified bodies (i.e. ex-ante control).
  - o The accreditation requirements of notified bodies vary across EU Member States, among other things because harmonisation legislation does not stipulate which standard(s) have to be used. The multitude of accreditation requirements might impair the quality of notified bodies. The accreditation standard(s) should have a more compulsory character than it currently has within the Blue Guide<sup>3</sup>.
  - o In the NLF, accreditation is the preferred option to demonstrate competence of the notified body (for products where third party conformity assessment is required). The Netherlands believes that the current wording in the relevant regulations and directives provides too much room to use an alternative method. Hence, accreditation should have a more compulsory character. There must be room for exceptions, but this room should be limited.
  - o Furthermore, the Netherlands notices that notifying bodies increasingly use the opportunity to outsource activities to third countries. In this regard, it is important to protect vital Union interests and secure open strategic autonomy. Rules for

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<sup>2</sup> For instance, whilst the NLF requires an importer to check the technical file of the producer, in practice the producer may refuse to hand the technical file to the importer due to intellectual property regulation. The technical file is however a key document when it comes to demonstrating the compliance of the product with all applicable legislation.

<sup>3</sup> The 'Blue Guide' on the implementation of EU products rules 2016

establishment of notified bodies and for influence of third countries on these bodies should be stricter and clearer, among others to avoid too much undesirable influence from parties outside the EU.

- The Netherlands notices that the principles of conformity assessment are not always predictably and consistently applied across the relevant harmonized product regulations and directives. The conformity assessments should be consistent, a tailored approach must only be possible when this is a necessity. In this case, the need for a tailored approach should be explained. A particular example is that the choice for various conformity assessment procedures (i.e. modules) is not always clear and intuitive.

## **2 Standardisation: a well-functioning system is key to facilitate use of the NLF**

- The NLF can only function well if the European Standardisation System (ESS) functions well, namely: by delivering suitable harmonized standards that allow actors to comply with the connected legislation.
- To this end, the ESS should deliver standards reliably and fast. The interest of all stakeholders should be taken into account in the making of standards. Barriers to the participation in the development of standards, as well as costs connected to using them, should be as low as reasonably possible.
- All of these aspects are being addressed in the Commissions European Standardisation Strategy. The Netherlands supports the underlying objectives and will actively participate in the initiatives that will arise from the strategy in these fields.
- The Task Force of the Commission and the European Standardisation Organisations seems to have made a promising start to resolve some of the most pressing operational issues in the ESS. The Netherlands expects significant short-term results from this collaboration, effectively solving the most relevant obstacles to reliable and fast development and adoption of harmonised standards.
- For all future initiatives under the strategy, it is crucial that reliable, fit-for-purpose operational functioning of the system is recognised as a boundary condition. Also here, the Commissions positive attitude inspires the expectation of significant results.

## **3 CE-marking: clarity and credibility is key**

### *General observations*

- The Netherlands emphasizes the need for a credible marking that demonstrates product conformity. The Netherlands believes that the "CE-marking" as such is an established marking for market surveillance authorities and end-users. Changing the logo might cause confusion and would create an inconvenience for consumers and business users, as well as for other involved economic operators. Hence the Netherlands is not in favour of a new marking.
- The Netherlands believes, however, that there is a need to improve compliance. There is not enough surveillance on formal (administrative) requirements and technical requirements concerning products. Therefore, non-compliant products with the CE-marking can enter the internal market. This may create a false sense of security for consumers<sup>4</sup>. Two concerning developments are:
  1. It is indicated by market surveillance authorities that the number of identified non-compliant products has increased over time. In part this involves products that carry a CE marking<sup>5</sup>.
  2. The look-a-like CE-marking (often referred to as "Chinese export") is misleading.
- These developments deserve special attention. Some remarks on this from a perspective of ex-post control:
  - The Netherlands notices that information exchange among market surveillance authorities (both national and international as well as with customs) is crucial.

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<sup>4</sup> SER advies directe import, 2020

<sup>5</sup> The Dutch market surveillance authority NVWA has indicated that 20%-60% of products that carry a CE marking is non compliant. The product conformity may differ among product groups. The Dutch market surveillance authority ILT researched in 2021 conformity of fireworks and indicated 75% of fireworks does not comply to product safety regulation. Moreover, the Netherlands noticed that during the COVID-19 crisis a lot of non-compliant products were imported during the COVID-19 crisis, both, intentionally and non-intentionally.

Uniform application of regulation can only be achieved by close cooperation of Member States<sup>6</sup>. Important steps were taken with the introduction of the Market Surveillance Regulation 2019/1020, however there remains room for improvement.

- The Netherlands is home to the largest port in Europe and Europe's third largest cargo gateway. One of the Dutch challenges in the field of (ex-post control) market surveillance is the significant amount of products that are imported from third countries. Market surveillance authorities have to conduct risk based inspections. A relevant question for Member States is: who carries the burden of (increased) control? Multiple Member States, especially located at the external borders, face this challenge.
- At the outset, Member States should have an effective system of ex-post control. To strengthen risk-based inspections, end-users (consumers and businesses) should be able to easily notify market surveillance authorities with complaints about the safety of products that they have bought. Moreover, there are possibilities to complement ex-post market surveillance, for instance with more stringent ex-ante control.

#### *Desirability of digital improvements: CE-marking and product information*

- It is of utmost importance that the CE-marking serves end-users. The Netherlands believes that it might be useful to distinguish between hardware (physical) and software products.
- For hardware products it is important that the marking remains in any case physically attached to the product in a suitable manner, as enforcement authorities have to be able to easily check products in shops or at the border. Allowing a digital substitute, at this moment, would cause an inconvenience for market surveillance authorities and certain end-users.
- An additional digital CE-marking can be complementary to the analogue marking. This may be particularly convenient in the case of updated or refurbished products. Via a digitally updated marking consumers can easily verify whether the product still suffices.
- For software products, an analogue CE-marking is often not possible. They require a digital CE-marking that is easily accessible for users. A digital CE-marking for software products, such as AI-systems should be designed in a way that enables transparency about updates and modifications to the software at hand.
- Further insights into especially consumers' purchasing decisions based on a digital or analogue CE-marking are necessary. In addition, further research into the risks, details and feasibility of an (additional) digital CE-marking, as well as into the opportunities it may create regarding detection of unsafe products is necessary.
- It is crucial that product information and contact details of the responsible manufacturer (or importer or representative) is readily available for all types of users. At the moment, it is important that this information remains available in analogue form. However, the Netherlands has several arguments for also distributing this information digitally:
  - From a perspective of consumer empowerment and market surveillance, digital product information and contact details might facilitate the retractability of unsafe products.
  - Digital information can be user-friendly for consumers, because it is easy to search through.
  - Digital information might be convenient for updated and refurbished products. This would allow to easily update product information and contact details. The latter also applies for products under the proposed AI regulation.

#### **4 NLF and current trends: digital and circular developments**

##### *General comments: NLF not designed for "in-use phase"*

- The Netherlands believes the current NLF is not necessarily fit for products enduring life cycle changes, both for digital and refurbished products. The existing regulations and directives do not give adequate requirements, since 'the in-use phase' is not part of the

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<sup>6</sup> For instance, the Advisory Committees play an important role in this as well as the usage of Information and Communication System for Market Surveillance (ICSMS) by MSA's.

framework. The Netherlands highly recommends the European Commission to conduct thorough research into the matter.

- The Netherlands stresses the importance of conformity during the whole product life cycle. Still, it is crucial to keep in mind that conformity assessments and corresponding responsibilities should not hamper innovation or hinder the transition to a digital and circular economy<sup>7</sup>.
- Currently, certain products that are newly placed on the market after having been used already (due to modifications such as updates, repairs or refurbishment) need to be retested and thereby need to get a new CE-marking with corresponding documentation. It is important to create clear guidelines on when the placing of a new CE-marking is required.

#### *Digital products*

- The Netherlands notices that in the context of (upcoming) EU legislation, such as the AI Act, the Data Act, and the Cyber Resilience Act, the NLF framework will play an important role. The Netherlands is positive about the possibilities of the NLF framework for digital products. However, it is not possible to foresee all new developments and their implications. The Netherlands has several questions and observations in this regard.
- The Netherlands would like to know more about the envisioned framework, and the consistency with several pieces of EU legislation, such as the aforementioned, as well as for example the Radio Equipment Directive and the Cybersecurity Act.
- Lastly, it is of utmost importance that definitions and wording for digital products are precise, clear and future proof to determine which regulation applies to the specific product.

#### *Refurbished products*

- The Netherlands advises to create an European standard for refurbished products, similar to the already existing European standard for remanufactured products.
- The Netherlands further believes the NLF should consider introducing a "comprehensive products responsibility", which would mean a manufacturer will become responsible for a product after the product has been placed on the market. This could for instance make the manufacturer responsible for possible waste. Similar legislation already exists for consumer electronics. This might be relevant for products such as batteries and solar panels.

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<sup>7</sup> For instance, many new products are 'hybrid products' by design: a combination of hard- and software. The latter category might require several updates, that can effect the essential requirements, after the phase of (first) placing on the market. This can momentarily introduce the need for conformity assessments during the life cycle of a hybrid product.