EMOTA
The European eCommerce & Omni-Channel Trade Association

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# EMOTA Position on Compliance & Enforcement

## In brief

- EMOTA supports the European Commission's ongoing efforts to combat the sale of unsafe products in the EU, recognising that one of the main bottlenecks to market surveillance implementation and deterrence is the lack of resources dedicated to the national authorities.
- An increased focus on e-commerce requires a 21st century approach to market surveillance. The most effective approach is one that is risk-based, using data and algorithms, developing new technologies and focusing on a scalable means of furthering customer safety.
- The powers of the Market Surveillance Authorities should be exercised uniformly and proportionately, focused on the highest risk categories to truly ensure consumer safety and appropriately targeting resources for the best outcomes for consumers.
- The product compliance network should include stakeholders as permanent members to facilitate cooperation and ensure that expertise from all elements of the value chain can contribute to a better functioning system.
- Memorandums and all communications between businesses and the market surveillance authorities should remain confidential and be protected from disclosure to foster voluntary engagement and continued cooperation. Moreover, businesses should have the option to conclude these memorandums at EU level.
- The identification of the responsible person requires clarification and further examination of how this will work in practice. More specifically, the long-term impact of the regulation on bi-lateral trade should be considered, including for SMEs.

### *Background*

On 19 December 2017, the European Commission published its proposal for a Regulation on Compliance and Enforcement, as part of its goods package. The stated aim of the proposal is to prevent unsafe products from being sold to European consumers and create a level playing field between EU and third country sellers.

### *General Remarks*

EMOTA strongly supports the European Commission's efforts to combat the sale of unsafe products in the EU. We also support attempts to close any enforcement gaps or loopholes which endanger customer safety and for stronger coordination of the market surveillance and customs authorities across individual Member States and at the European level. However, we remain concerned about whether these intentions are fully addressed in the proposal and indeed whether the proposed Regulation will reduce the number of unsafe products on the EU market, as well as greater enforcement of rogue traders. For instance, the Commission's own impact assessment reveals the lack of resources for national authorities is the main bottleneck to market surveillance implementation and effective deterrence[1] and due to this there are doubts on the ability of market surveillance authorities to perform checks on an adequate scale[2]. This is likely to be further impacted by the shift from high-risk product categories and safety issues towards issues of technical compliance – these are important but must be treated as lower risk than an imminent safety risk.

### *A Risk-Based Approach to Market Surveillance*

Given the recognised lack of resources dedicated to the national market surveillance and customs authorities in the EU, it is essential that the shift to address new developments in retail, such as e-commerce, also reflects developments in the most effective ways to ensure and promote product compliance. Thus, we urge policy-makers to consider an approach to product safety that takes advantage of new technologies, such as block chain and

[1] SWD (2017) 496 Part 1/3 (Page 67)
[2] SWD (2017) 496 Part 1/3 (Page 66)

artificial intelligence, and focuses on a scalable means of furthering customer safety (e.g. e-labelling versus labelling physical products, using data to identify problems instead of checking every box for a CE/responsible person indication). We continue to advocate that a focus on high-risk products, rather than all products (given the inclusion of REACH, namely Annex XVII)[3], will lead to better outcomes for consumers.

- **Policy-makers should consider a risk-based approach to market surveillance, as well as using technology to help identify unsafe and thus non-compliant products.**

## *Responsible Person (Article 4)*

The proposal provides that *'the identity and contact details of the person responsible for compliance information with respect to the product shall be indicated on or identifiable from information on the product, its packaging, the parcel, or accompanying document'*[4]. However, this provision lacks sufficient clarity and we question whether the designation of a responsible person inside the EU as a mandatory condition for making products available on the EU market will lead to greater enforcement against rogue traders, given limited resources. Customs screening is already limited, adding an additional 'obligation and identification mechanism' only risks less scrutiny/screening of those manufacturers that are not following the rules and importing products which pose a substantive safety risk.

In addition, we would question the consequences of indicating or identifying the responsible person on the product, packaging, parcel for screening and how this should be done in practice, as failure to do so results in grounds for withholding and restricting goods at customs under the proposal. As this was not adequately addressed in the impact assessment and the fact that the responsibilities and liabilities are unclear, we question how effective or proportionate this would be in practise, especially with parcels. For instance, the provision overlooks the fact that when sending or receiving postal consignments from outside the EU through the postal network, the sender must complete a customs declaration (CN23 or CN22) which is fixed to the package. These paper-based forms are designed and agreed at the global level and do not tell postal operators/public authorities who the responsible person is, the data is limited and of poor quality. The number of barcodes you can attach to a parcel is also limited.

Further clarity is also required on definitions, such as what constitutes an *'accompanying document'* or what the provision means by *'parcel'*, as well as clarification as to how this requirement will interact with other EU legislation and to the practical workability on how the concept will work across all product categories. It is more appropriate to limit such a requirement to specific high-risk sectors or product categories, which may be better dealt with in those specific pieces of legislation. We also have concerns with how this requirement would work in practice, with one potential impact being that downstream logistics service providers would need to be aware of the COO and adjust their systems when handling these products in their supply chain. Alternatively, they would need to mention the RP on each package as a default also during intra-EU transport which will create additional burdens that may not have been foreseen.

- **Clarification is needed regarding the responsible person provision, with further examination of how this will work in practice.**

## *Proportional Powers & Measures of Market Surveillance Authorities (Articles 14-21)*

We welcome the Commission's intention to tackle enforcement gaps in the EU by equipping the market surveillance authorities (MSAs) of all the Member States with a minimum set of powers, however we do have some concerns about the practicality of these measures:

- Firstly, as the exercise of these powers and sanctions are left to the national laws of the Member States, such as whether they can be exercised by the MSA directly, through another authority[5], or via a national court, this can impact enforcement efforts. For instance, in Malta and Finland, only the court has the power to impose fines[6]

[3] Annex 1 - COM (2017) 795 final
[4] 2017/0353 (COD) (Page 28)
[5] SWD (2017) 496 Part 2/3 (Page 140)
[6] SWD (2017) 496 Part 2/3 (Page 177)

- Secondly, the regulation lacks any clear guidance on how MSAs are supposed to apply them, especially those powers regarding the suspending of websites, sampling products free of charge, and taking restrictive measures without giving the operator the right to be heard.
- Thirdly, enabling restrictive measures without the economic operator being afforded a chance to be heard is highly prejudicial, as this can lead to reputational damage to legitimate sellers and a situation whereby compliant goods are restricted.
- Fourthly, due to resource constraints of MSAs, the enforcement of these powers is linked to the recoverability of costs. However, the legislation does not contain a transparency provision on the charging process nor a redress mechanism for sellers when incorrect decisions are made.
- Fifthly, the concept of a "serious infringement" of Union harmonised legislation that could result in criminal sanctions has not been clarified – it is appropriate that an imminent risk to consumers be treated differently to a technical non-compliance issue.
- Lastly, the provision that products considered to be non-compliant in one country will be presumed non-compliant in others creates an environment that leaves companies vulnerable to incorrect decisions of local authorities. This also risks that multiple market surveillance authorities will be able to recover their costs for the same non-compliance, which goes against the principle of a single market approach.

➢ **Powers and measures of the market surveillance authorities must be exercised uniformly and proportionately, ensuring the safety of consumers as a paramount, without disproportionately impacting the operations of legitimate businesses.**

### *Potential Banning of Compliant Products*

The legislation is based upon the underlying principle that products deemed to be non-compliant by a decision taken by a market surveillance authority in one Member State are presumed to be non-compliant by a market surveillance authority in another Member State, unless the economic operator can provide evidence to the contrary. As product safety rules can be different across the Member States, this could result in a situation whereby products that are found as non-compliant in one country will be banned from distribution in other countries where they would have been considered as compliant. Some examples are e-bikes (Austria v German national requirements and different definitions); construction products; luminaires (Denmark requires special marking of an open power cord[7]); and lighting equipment. Moreover, this underlying principle risks companies being subject to 'fines or costs' by multiple market surveillance authorities, even if the product is deemed compliant in another EU market.

➢ **MSAs should exercise sufficient discretion to avoid the banning of 'compliant' products in other markets.**

### *Cooperation between Business Authorities & Market Surveillance Authorities (Articles 7-8)*

We welcome the inclusion of provisions which recognise and initiates greater cooperation between the market surveillance authorities and business representatives, including memorandum of understandings and proposed written partnership agreements between a market surveillance authority and an economic operator established on a specific territory. However, given that market surveillance authorities number over 500 within the European Union, the memorandums and all communications between business and the market surveillance authorities should remain confidential and protected from disclosure to foster voluntary engagement aimed at enhancing public safety, without raising concerns that legitimate businesses would be targeted with follow up enforcement actions. In addition, we would also call for these cooperation agreements to be concluded at EU level.

From our understanding, memorandums of understanding (MoU) will only be foreseen at the national level and not at EU level. This may lead to non-harmonised enforcement mechanisms, with potentially different MoUs and different agreements within a country or between countries. In our submission, it is more effective for MoUs to be concluded at EU level to avoid further fragmentation and different levels of enforcement between Member States.

[7] Annex ZB Standard EN 60598

- Memorandums and all communications between businesses and the market surveillance authorities should remain confidential and protected from disclosure to foster voluntary engagement. MoUs at EU level should be prioritised, allowing for harmonised and more effective actions.

### *Scope of Economic Operator (Article 3)*

The proposal gives wide scope to the term 'economic operator', from meaning the manufacturer, the authorised representative, the importer or the distributor, and including economic operator defined in specific legislation, as well as any other natural or legal person established in the Union and other than a distributor who warehouses, packages and ships products to or within the Union market. We caution policy-makers in expanding the definition of economic operator, without undertaking a study on how this will impact operators and level of compliance. We also have concerns that different definitions between the proposal and existing sectoral legislation will lead to implementation confusion for the many market surveillance authorities.

- Policy-makers should consider undertaking a further impact assessment on widening the scope of the definition on economic operators, in view of existing sectoral legislation.

### *Product Compliance Network (Articles 31-33)*

To foster greater cooperation between market surveillance authorities, the European Institutions and businesses, business groups must be given a permanent seat on the envisioned Product Compliance Network. This would enable a best-practice sharing mechanism through the value chain, drawing on insights and expertise to advance better oversight of the issues at hand.

- The Product Compliance Network should have permanent stakeholder members to foster greater cooperation between the private sector and market surveillance authorities.

### *Products Entering the Union (Articles 26-30)*

It is essential, given the aim of the Regulation, that customs continue to perform risk-based controls on goods entering the EU, which is coherent with the existing rules under the Union's Customs Code.

- The proposal should be fully aligned to the Union Customs Code

### *Domino Effect*

The proposal on compliance and enforcement could be viewed by the EU's trading partners as a significant protectionist measure. Various provisions, such as the need to appoint a responsible person as a mandatory element for placing goods upon the EU market and to indicate and identify the responsible person may lead to third countries adopting retaliatory measures. As a result, the legislation could create a domino effect, by which EU exporters face additional costs and burdens exporting to third countries in the longer-term.

- The European Commission should consider the effects on bi-lateral trade including for SMEs.

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