



DIGITALEUROPE



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JOINT INDUSTRY RESPONSE TO IMCO DRAFT REPORT ON THE PROPOSAL FOR A MARKET SURVEILLANCE REGULATION

The undersigned associations acknowledge the report drafted by Ms Pietikäinen, Rapporteur to the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) on the Commission Proposal for a Regulation on Market Surveillance of Products (MSPR).

In particular, we welcome the fact that the report strengthens the role of the European Commission for the co-ordination of Member States' market surveillance activities, with a view to ensure their effectiveness. It also acknowledges the importance of involving relevant stakeholders at all levels, including industry.

Nevertheless, we remain concerned that a number of key issues for the legal certainty and proportionality of the enforcement have not been adequately addressed; in particular, industry would like to highlight the following points:

1. Formal versus substantial non-compliance

Instances of formal non-compliance (such as an incorrect sizing of the CE-marking) should not, as such, give sufficient reason to believe that the product may present a risk¹.

The original wording in the Commission's proposal, which unfortunately remains unchanged in the draft IMCO report, unnecessarily deviates from the concept of formal non-compliance introduced in Decision 768/2008/EC. As a consequence it may lead to disproportionate measures, contrary to the objective of simplifying market surveillance.

More importantly, it would dilute the general concept of risk conveying a material hazard in relation to the public interest at stake.

It also sends the wrong signal to market surveillance authorities, which might concentrate their efforts on detecting formal non-compliance issues, rather than on material safety/non-compliance problems.

Therefore, we urge the European Parliament and the Council to adopt the concept of "formal non-compliance" as foreseen in the New Legislative Framework (NLF) and replace Articles 9.2 and 14.3 with Article R34 of Decision 768/2008/EC, and to further improve the definition of "*product presenting a risk*".

¹ Nevertheless, customs authorities, who trace counterfeit products during their administrative checks, should consider them as suspicious for presenting non-compliance or a risk. Counterfeit products are often accompanied by counterfeit CE marking and have neither undergone conformity assessment, nor been declared by the original manufacturer to be in conformity with the applicable EU legislation. Therefore, we agree that Regulation 5129/2013 and the Product Safety and Market Surveillance Package (PSMSP) should promote cooperation between market surveillance and customs authorities so as to enhance the physical controls on counterfeit products both at the point of entry to the EU and after they have been placed on the internal market.

2. Penalties

Industry fully supports the use of penalties to ensure that all economic operators comply with all applicable Union legislation. To that effect, the size of a company should not be the determining factor (as proposed by the Commission in Article 31) for the applicable penalty. To be effective and dissuasive, sanctions should rather be proportional to the seriousness of the infringement and the amount of illegitimate revenue generated by the non-compliant product(s).

However, Ms Pietikäinen's suggestions of amendments aim on the contrary at:

- creating a *"Union-wide blacklist of non-compliant companies"* (amendments 11 and 64);
- setting *"minimum penalties"* including *"administrative penalties for the relevant economic operator of at least 10 % of its total annual turnover in the preceding financial year"* (amendment 62).

In industry's view, these amendment proposals are neither appropriate nor proportionate. They may indeed, if endorsed, prove to be counterproductive. It is our belief that these proposals would be ineffective, for instance, against rogue economic operators that frequently establish new temporary companies with a view to escape liability. On the contrary, such measures may prove highly dissuasive to diligent companies that have been supplying the market with large volumes of compliant products for years with the exception of a few cases of formal non-compliance by mistake.

We strongly urge the European Parliament and the Council to replace the company size criterion of Article 31 with the seriousness of the infringement and the undue revenue derived from it. Amendments 11, 62 and 64 are not supported by industry.

3. Precautionary Principle

Industry is worried about the introduction of the precautionary principle in the MSPR (Amendments 14 and 28). This would open up the ground for arbitrary bans and marketing restrictions from local inspectors, raise new barriers to intra-Community trade, and on the long run risk to stifle innovation to the detriment of the European Union's competitiveness. As clearly stated in Article 114.3 of the Treaty on the Functioning of the European Union (TFEU), the precautionary principle is for use by the legislator only in the face of scientific uncertainty². Local authorities have neither the means, nor the legitimacy to devise at the place of the legislator the acceptable level of protection for safety or other public policy objectives.

We strongly call on the European Parliament and the Council to refrain from introducing the precautionary principle (Amendments 14 and 28) in the MSPR.

² See also the Commission Communication on the Precautionary Principle ([COM/200010001 final](#))

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DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies.

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ORGALIME speaks for 38 trade federations representing some 130,000 companies in the mechanical, electrical, electronic, metalworking & metal articles industries of 23 European countries. The industry employs some 10.3 million people in the EU and in 2012 accounted for some €1,840 billion of annual output. The industry not only represents some 28% of the output of manufactured products but also a third of the manufactured exports of the European Union.

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TechAmerica Europe represents leading European high-tech operations with US parentage. Collectively we invest Euro 100 bn in Europe and employ approximately 500,000 Europeans. TechAmerica Europe Member companies are active throughout the high-technology spectrum, from software, semiconductors and computers to internet technology, advanced electronics and telecommunications systems and services. Our parent company, TechAmerica, is the leading voice for the US technology industry worldwide.