AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Strengthening compliance and enforcement in the EU Single Market

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2016, directly supports more than 4.5 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

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Executive summary

The American Chamber of Commerce to the European Union (AmCham EU) supports and shares the objectives of the Commission's proposal to improve compliance and enforcement of Union harmonisation legislation. However, we hold reservations about the extent to which this proposal introduces disproportionate new burdens for reputable companies who, operating in good faith, already make significant efforts to ensure their products are compliant with relevant legislation. A risk-based and proportionate approach targeting rogue traders would be more appropriate.

Introduction

AmCham EU has long been a staunch supporter of the Single Market, which is crucial to attracting investment into Europe. The Single Market has greatly accelerated cross-border trade and investment since its introduction 25 years ago.

As American companies committed to and invested in Europe, AmCham EU members have first-hand experience of the huge benefits that a large, unified market can bring to businesses and consumers. However, we believe these benefits can only be maximised by a simple and effective regulatory framework which offers a level playing field for all actors. Rules made at the EU level should be interpreted, implemented and applied similarly across Member States. This will preserve the integrity of the Single Market and protect legitimate traders and consumers from those who disregard rules for their own gain.

We are therefore pleased to see the Commission take steps within its Single Market Strategy to improve compliance and enforcement of harmonisation legislation within the EU[1].

General comments

Businesses threatened by unfair competition have long called for moves to improve compliance and enforcement of EU legislation. The Commission's proposal goes some way to remedying the high numbers of non-compliant products on the Single Market.

We agree with the Commission that a risk-based approach is the most sensible way to address this complex issue. We call on the co-legislators to retain this approach. The focus of all market surveillance legislation should be on identifying products which pose a risk to consumers. Any provisions and/or obligations aimed at achieving this goal should be balanced and proportionate. This will ensure that legitimate and compliant traders are not unintentionally burdened.

We share the view that the proposal would benefit from a clearer distinction between *formal non-compliance* and *non-compliance which presents a safety risk to consumers*. We agree that market surveillance authorities should be able to act decisively to remove non-compliant products from the market. At the same time, we believe these efforts should be targeted at unsafe products, as opposed to those which, for example, have minor or accidental errors with their CE mark or documentation.

Finally, we believe all parties would benefit from greater clarity on the proposals to create new obligations for businesses and new minimum powers for market surveillance authorities. As currently drafted, these proposals appear inappropriate and/or disproportionate to their objective.

[1] European Commission, *Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products*

Designation of person responsible for compliance information (article 4)

We are concerned by the Commission's proposal to establish the concept of a designated natural or legal person responsible for compliance information for non-EU manufacturers. This provision introduces a new, considerable and disproportionate burden for third country manufacturers, which may well be considered a protectionist measure or non-tariff barrier to trade. It is also difficult to see how such an obligation would tackle non-compliance by rogue traders or how small and medium-sized enterprises (SMEs) could meet it in practice. There is a risk that those who do not play by the rules continue to do so, while good faith operators are deterred from selling to consumers in the EU. Finally, there is a significant risk of tit-for-tat retaliatory measures from economic partners, particularly given the fragile state of the international trading system.

Co-legislators should ensure that if such a provision is retained, the scope and responsibilities of the person are clearly defined and limited to what is necessary to achieve the policy goal.

Declaration of conformity (Article 5)

Declarations of conformity, which are already necessary in many sectors, are intended for market surveillance authorities rather than consumers. It is difficult to see how mandating manufacturers to publish these declarations online would be effective in meeting the policy objective.

This change could cause confusion for consumers and authorities since declarations can be different for the same products (e.g. due to updated standards). In some cases, they could also give access to counterfeiters and non-authorised importers to official documentation, making it much easier for them to place illegitimate and/or unsafe products on the market.

Policy-makers should consider alternative measures, such as allowing interested parties to contact the responsible person through an online form. This would give authorities easy access to declarations and reduce the burden and risk for companies.

Cooperation with industry (Articles 7-9, Article 33)

As compliant traders with presence across the Union, we welcome and support the idea of strengthening cooperation between market surveillance authorities and economic operators. Reputable companies, by their nature, possess valuable first-hand experience of their sector(s) and their product(s) and are well-placed to provide input and technical expertise to authorities.

Compliance partnership arrangements will allow businesses to obtain advice and guidance on Union legislation and help address differing levels of awareness amongst market actors – a key cause of non-compliance. However, these agreements should respect fair competition and ensure the continued independence of market surveillance authorities. Agreements should remain voluntary with no fees requested from companies.

To improve this cooperation, relevant business associations should be able to provide input to Administrative Cooperation Committees (ADCOs), which develop common approaches by enforcement authorities. The enforcement of harmonised legislation is often subject to interpretation. Allowing associations to provide technical expertise, which informs these common approaches, would make sense. Informing businesses of ADCOs' decisions, to allow them to adapt if necessary, would be also be a very welcome and sensible step.

Protection of confidential data (Article 12, Article 22)

Article 12(4) allows market surveillance authorities to make available 'any information' deemed relevant for the general public, while Article 22 obliges authorities to supply this information to authorities from other Member States on request.

Given the sensitivity of company data, the regulation should strive to protect confidential information, and ensure proportionality in the amount and type of data shared with the public and/or other authorities.

Powers of market surveillance authorities (Article 14)

It is important for market surveillance authorities to have sufficient powers to conduct enforcement activities against non-compliant traders and remove unsafe products from the market.

However, the Commission's proposal to define minimum powers for authorities is broad and vague in this regard. We believe that powers should exist within the limits of tackling non-compliance in the internal market.

Furthermore, market surveillance authorities should work on cases of non-compliance on a case-by-case basis. They should take into account the nature of non-compliance by distinguishing between 'formal non-compliance' (e.g. using an incorrectly sized CE mark) and cases where consumers are faced with a serious risk. This could be included in Article 12.

Finally, we have doubts about the viability of introducing minimum powers across the Union when Member States have such divergent legal regimes.

To ensure that powers are exerted proportionately to the risk, we recommend providing clear safeguards and guidance beyond the reference to proportionality in Article 14(5).

We also have concerns on the following specific powers:

Requirements to provide information, data or documents

Article 14(3)(a), 14(3)(d) and 14(3)(e) appear to grant market surveillance authorities the powers to conduct on-site inspections and require businesses to provide information and documents without a 'reasoned' request as set out in other harmonised legislation.

New legislation in this area should be coherent with existing legislation and include a condition that information be provided only following a 'reasoned request'. Only by doing so will the proposal remain consistent with the Better Regulation agenda and provide clarity for consumers, market surveillance authorities and traders.

Audits and samples

Article 14(3)(b) and 14(3)(f) allow market surveillance authorities to perform system audits of internal compliance procedures and take samples of products free of charge in order to detect non-compliance. Such powers go far beyond what is necessary and will constitute significant new burdens for businesses, particularly SMEs and those producing high-value or luxury goods.

Fines and sanctions

Article 14(3)(l) confers powers on market surveillance authorities to 'impose penalties on an economic operator, including fines or periodic penalty payments, for non-compliance or for failure to comply'. The importance of deterring non-compliant traders is clear and vital for consumer trust. However, it is important that these powers are more clearly defined in order to ensure that any fines and sanctions remain proportionate to the seriousness of the risk.

Financing and recovery of costs by market surveillance authorities (Article 21)

We are pleased that Article 21(1) states that Member States shall ensure that their market surveillance authorities are granted sufficient resources with which to fulfil their responsibilities. Authorities have become increasingly understaffed and under-resourced, and we look forward to national governments remedying this problem. In order to use these resources most efficiently, we also recommend that market surveillance focus its efforts primarily on suspected rogue traders.

Member States and authorities should be mindful that their powers to 'charge economic operators administrative fees in relation to instances of non-compliance' as laid out in Article 21(2) are exerted in a way which is proportionate to the seriousness and the risk posed by the non-compliance.

It should also be made clear that these fees should not be used as a means of plugging any shortfalls in funding from Member State governments.

Use of evidence and investigation findings (Article 25)

Finally, we are concerned that Article 25(3) would oblige Member States to presume non-compliance where products are deemed non-compliant elsewhere in the Union. This approach is too strict and fails to recognise that compliance or non-compliance is not 'black or white', but instead is often open to interpretation by authorities. Interpretations of harmonised legislation are not clear-cut and should not necessarily be immediately applied in other Member States.

The regulation should remain consistent with the safeguard clause procedure present in existing harmonised legislation. Furthermore, the Union Product Compliance Network proposed in the regulation should be involved, in order to develop considered interpretations on the basis of input from both local authorities and relevant stakeholders.