WIRTSCHAFTSKAMMER ÖSTERREICH

Position Paper on the Goods Package II

Regulation laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products (COM (2017) 795 final).

Regulation on the mutual recognition of goods lawfully marketed in another Member State (COM (2017) 796 final)

enterprise europe network

Wir stehen Unternehmen zur Seite

Executive Summary on the

1. Regulation laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products (COM (2017) 795 final)

Key elements of the proposed regulation on product compliance and enforcement of Union harmonisation legislation on products (COM (2017) 795 final)

- *The draft aims to tackle the growing number of illegal and non-compliant products in the single market, which distort competition and pose dangers to consumers. In particular, concerning e-commerce, market surveillance authorities, find it extremely difficult to trace non-compliant products imported into the European Union and to find the relevant economic operators in their respective areas of responsibility. Therefore, the proposed regulation intends to improve the exchange of information and coordination between market surveillance authorities and to establish a reinforced legal framework for controls on import of products into the single market. All these measures will also strengthen cooperation between customs and market surveillance authorities.*

- *Member States will be required to set up a single liaison office responsible for coordinating enforcement and market surveillance activities. In addition, a Union product compliance network will be established.*

- *It also aims to consolidate the existing framework for market surveillance activities and promote joint actions by national market surveillance authorities.*

- *A Union-based contact person shall be responsible for compliance information when placing a product on the market. This may be either the manufacturer, the importer or another economic operator appointed by the manufacturer.*

Executive Summary on the

2. Regulation on the mutual recognition of goods lawfully marketed in another Member State (COM (2017) 796 final)

Key elements of the proposed regulation on the mutual recognition of goods lawfully marketed in another Member State (COM (2017) 796 final)

The proposal aims to make cross-border trade in goods in the non-harmonized area more efficient and to facilitate the application of mutual recognition in the internal market. The proposal intends to replace the previous Regulation on the mutual recognition of goods (764/2008/EC).

A major innovation in the current proposal is the introduction of a voluntary mutual recognition declaration whereby the economic operator can demonstrate that a product has already been legally placed on a Member State's market. This should make it easier to provide evidence to authorities and reduce the administrative burden.

In addition, a non-judicial problem-solving procedure based on SOLVIT will be introduced in order to take action against administrative decisions refusing or restricting market access. The Commission shall have the opportunity to communicate directly with the national authorities and the enterprises concerned in order to assess the issue at stake. Furthermore, the tasks of the Product Contact Points will be extended.

Full Position

On 19 December 2017, the European Commission presented a package to improve the free movement of goods in the internal market (Goods Package II), consisting of two legislative proposals:

1. Regulation laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products (COM (2017) 795 final)

2. Regulation on the mutual recognition of goods lawfully marketed in another Member State (COM (2017) 796 final)

The Austrian Federal Economic Chamber, representing the interests of Austrian businesses, welcomes in principle the efforts of the Commission to deepen the European Single Market and to develop and seize appropriate measures to ensure its smooth functioning.

Regulation laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products (COM (2017) 795 final)

General remarks

In principle, the creation of a single framework for market surveillance should be endorsed. A uniform and general application of market surveillance rules in the Member States, better protection for consumers and other users, harmonized trade rules for economic operators, reduction of administrative burdens and improved exchange of information and better division of labour between market surveillance authorities are the first steps in the right direction. Only this way compliance with safety-relevant standards and regulations as well as fair competition take place.

However, the Austrian Federal Economic Chamber questions whether the proposed measures are actually needed to that extent in order to achieve better market surveillance.
The focus of this Regulation should be on the coordination and cooperation of market surveillance authorities in order to, for example, tackle the sales of non-compliant

products from third countries in e-commerce and not on intensifying compliance checks. Audit and control obligations for companies have immensely expanded in recent years. Therefore, we reject an additional expansion of bureaucratic burdens.

Market surveillance by national authorities entails important implications for small and medium-sized enterprises. SMEs in particular can hardly cope with additional administrative burdens. In addition, the majority of economic operators lawfully market their products and hence shall not have to carry the financial burden of disproportionate compliance costs in order to achieve the set goals.

We welcome the establishment of a single *liaison office as the* central and coordinating link between the involved administrations and the creation of a more cooperation-oriented EU-wide market surveillance system.

Specific remarks

1. Coherence with the existing rules

The Regulation shall apply to products subject to EU harmonized legislation listed in the Annex. However, it shall apply only insofar as there are no specific rules in existing or future EU harmonization legislation.

For reasons of legal certainty, we welcome this lex specialis provision in the proposal. This avoids any risk of overlapping or conflicting with sectoral or future legislation, and provides more legal certainty for manufacturers. Double track and conflicting requirements should be avoided at all costs.

The present proposal for a regulation therefore only marginally concerns the general product safety regime set out in Directive 2001/95/EC, and complements it where previously Regulation No 765/2008 had strengthened the general product safety regime. In addition, we would like to point out that the regime of Directive 2001/195/EC focuses on the non-harmonized area, whereas the present draft Regulation applies to products subject to the EU harmonized legislation listed in the Annex.

2. Person responsible for compliance information (Article 4)

In order to be able to place a product on the market, there should be a Union-based contact person responsible for compliance information. This may be either the manufacturer, the importer or another economic operator appointed by the manufacturer.

We see Art 4 (1) as a catch-up provision, which works if there are no special labelling requirements for the product. However, the implementation of the provision for online sales by third country producers to EU consumers seems to be difficult. It is virtually impossible for customs officers to check every small consignment for compliance.

3. Obligation to publish the contact details of the person responsible for the compliance information on a website (Article 4 (4))

Article 4 (4) provides that the manufacturer makes the information of the person responsible for the compliance information of the product publicly available. This is an additional requirement to Art 4 (5). This provision is incomprehensible because the contact details of the person responsible for the compliance information must also refer to the product/packaging/accompanying document.

Websites are often subject to change. Hence, set links might not be in place long enough. In addition, according to Directive 2000/31/ EC on certain aspects of electronic commerce in the single market, every company must provide information on its website that makes it clearly identifiable and contactable. We consider these requirements sufficient for this purpose. From the businesses' point of view, we are in favour of deleting Art 4 (4), since this double indication represents an additional burden without benefit.

4. Compliance partnership arrangements (Article 7)

We are very critical regarding Article 7 because it provides no added value. In reality market surveillance authorities hardly have means and resources to provide advice and support. Furthermore, we also do not recognize the need to delegate these tasks to the market surveillance authorities, since in many cases chambers, associations and consultancies offer these services.

Article 7 (4) provides that the Authority may charge the economic operator a fee e.g. for the costs incurred in the exercise of its advisory and assistance services. A potential conflict of interest must be considered in this context: Currently, the regulation empowers an authority - that acts as a sovereign authority within the scope of its supervisory powers – to perform and charge for private-sector services.

5. Powers and duties of market surveillance authorities (Article 14)

According to the proposal, the national market surveillance authorities will have far-reaching investigative powers, such as those provided by Regulation (EU) 2017/2394 of 12 December 2017 (the Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws) to the authorities responsible for the prosecution of consumer infringements in the single market. These significantly trench upon rights of enterprises (for example, through empowering dawn raids or ordering the recovery of profits).

The massive expansion of the powers of the market surveillance authority is not proportionate to our view. For example, in the case of applying actions such as an order for a refund of profits, the measure will affect the economic operators in the EU single market in individual infringements procedures, but not economic operators outside the EU due to the lack of enforcement.

6. Exchange of information – Union Rapid Alert System (Article 19)

The Austrian Federal Economic Chamber also approves the use of the current rapid alert system for dangerous products in the Union - the General Product Safety Directive (RAPEX).

7. Union testing facilities (Article 20)

In our opinion, the creation of EU testing facilities could be problematic. Such testing facilities could in fact gain a higher „rank“, thus greater credibility and eventually increasingly be used for audits. This could, on the one hand, displace existing testing facilities in the Member States, on the other hand, it could lead to higher inspection costs, which may be passed on to businesses.

8. Composition of the Union Product Compliance Network (Article 32)

The provisions on the establishment of a Union network for product conformity appear quite complex. It is questionable whether the added value that such a network can bring outweighs the bureaucratic burden of setting up and participating in this network. We propose to achieve a better coordination through a leaner organization.

9. Information and communication system (Article 34)

Where necessary for the enforcement of EU harmonized legislation and for risk minimization and the fight against fraud, customs authorities extract from national customs systems data on the application of the customs procedure “release for free customs circulation” for products as well as data on the results of controls on product safety and transmit them to the information and communication system.

The Commission is developing an electronic interface around the EU's central Customs contact point to allow the transmission of such data.

The system to be created must be linked to the existing or in-progress risk analysis of the customs administration, based on the EU Customs Code 952/2013. From a management-economic perspective, we reject the creation of two parallel systems.

Regulation on the mutual recognition of goods lawfully marketed in another Member State (COM (2017) 796 final)

General Remarks

In principle, we welcome the Commission's efforts to strengthen the principle of mutual recognition of goods and to simplify recognition procedures for businesses. Where possible, the principle of mutual recognition should have priority. In particular, it ensures compliance with the principle of subsidiarity by avoiding the systematic development of cumbersome regulation at Community level.

In practice, there are almost no complaints by our members with regard to barriers, delays and additional costs. In our view, this is due to the notification procedure under Directive 2015/1535 – a very effective instrument, which avoids potential obstacles to trade in advance. In the case of cross-border issues, the voluntary mutual recognition declaration, as provided for in Article 4, could be an appropriate instrument for businesses to prove that a product is already lawfully marketed in another Member State.

We also welcome the proposed non-judicial problem-solving procedure to take action against administrative decisions refusing or restricting market access and the envisaged strengthening of the role of Product Contact Points.

Specific comments

1. Mutual recognition declaration (Article 4)

We generally welcome the proposal for a voluntary mutual recognition declaration. The Mutual Recognition Declaration intends to facilitate the provision of evidence to authorities and to reduce administrative burden. However, it is important to ensure during further negotiations that Member States actually accept such a declaration without requiring further evidence. Otherwise, such declarations would only entail an additional administrative burden for businesses.

We fully support the Commission's proposal that the competent authorities are obliged to accept the declaration (Article 4 (7)). The burden of proof should lie with the competent authorities and not with the economic operator.
However, we fear that the wording used in subparagraph (a) "The declaration, together with any evidence reasonably required by the competent authority to verify the information contained in it…" could create a vacuum. In order to avoid unnecessary discussions between the competent authorities and businesses, the regulation shall clarify what the wording "reasonable" exactly entails.

Article 4 (8) applies in the absence of a declaration. There also seems to be a gap in subparagraph c "... any other information the competent authority considers useful for the purposes of its assessment". In order to avoid unnecessary discussions between competent authorities and businesses, we suggest amending the provision, for example, by obliging competent authorities to explain why they request further evidence.

2. Notification under the Rapid Information Exchange System (RAPEX)

According to Article 7, the enforcement regime of the proposal concerning notifications for rapid exchange of information will be based on the RAPEX system, as established by the General Product Safety Directive. This seems reasonable for the purpose of a one-stop-shop.

3. Problem-solving procedure (Article 8)

We welcome the introduction of a non-judicial problem-solving procedure in the framework of SOLVIT to facilitate the settlement of disputes between businesses and national authorities. In cases in which the informal approach of SOLVIT fails, the Commission, at the request of the SOLVIT centre, is entitled to investigate the evidence and to carry out an assessment, which shall be considered by the national authority (Article 8 (4)).

However, the Commission's opinion should be non-binding for SOLVIT centres. Firstly, SOLVIT is an instrument that seeks to find a solution for the business in an informal manner, but it does not replace national legal procedures. Secondly, a dispute might already have been settled by amicable agreement before the Commission's opinion is issued.

Taking into account that SOLVIT Centres set themselves the target to solve a problem within ten weeks, we consider the period of three months, as suggested in Article 8 (2), too long. Businesses would have to wait nearly half a year for a solution. Therefore, we propose to reduce the period within which the Commission should give an opinion to a maximum of 8 weeks.

4. Tasks of the Product Contact Points (Article 9)

We generally also welcome the envisaged strengthening of the role of Product Contact Points. In particular, the short deadlines within which the Product Contact Points have to provide information could help businesses gain rapid access to the markets in other Member States.