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For an efficient market surveillance of online trade

Suggestions for the better handling of fulfilment centres in the enforcement of EU harmonisation legislation

Executive summary

Orgalime calls on the Commission to incorporate into its expected proposal of legislation on *enforcement and compliance*¹, a means to enable the market surveillance authorities of the Member States to take action against non-compliant products found on their market, even if there is no economic operator established within the EU.

Such measures would enable authorities to take action against any organisation, such as a fulfilment centre, that facilitates the making available of products on behalf of the economic operator established outside the European Union. It is key to boost the European Single Market and safeguard the interests of legitimate manufacturers, especially the smaller ones.

Yes to legitimate e-commerce; No to rogue online trading

“Fulfilment centres” are logistics service providers to manufacturers or other economic operators as described in Regulation (EC) 765/2008 (New Legislative Framework – NLF) for the marketing of products. Sometimes they also offer marketing support via an online marketing platform.

They have gained in importance with the development of the digitalisation of trade or “online marketing”, which is increasingly globalised, to simplify and speed up the distribution logistics. Fulfilment centres enable non-EU based manufacturers to place products on the EU market without resorting to an importer or an authorised representative as defined in the NLF.

Fulfilment centres are **not manufacturers, importers, authorised representatives or distributors** as defined in the NLF, because even if they carry out some of the tasks of these market operators – for instance importing goods into the European market on behalf of the original equipment manufacturer –, they do not make products available on the Single Market **under their own name or on their own behalf**, which is a key legal requirement of EU product legislation. They never “own” the product and always **act on behalf of an economic operator**. Therefore, they could not be held liable for any of the obligations described in applicable product legislation.

¹ http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_grow_007_enforcement_compliance_en.pdf

Orgalime, the European Engineering Industries Association, speaks for 41 trade federations representing the mechanical, electrical, electronic, metalworking & metal articles industries of 24 European countries. The industry employs some 10.9 million people in the EU and in 2015 accounted for more than €1,900 billion of annual output. The industry accounts for over a quarter of manufacturing output and a third of the manufactured exports of the European Union.

As a consequence, market surveillance authorities face difficulties in enforcing EU product legislation when products are stored in a fulfilment centre's warehouse, especially with regard to:

- entering fulfilment centres' premises and controlling warehouse stocks,
- taking samples,
- requesting information, for example, for the purpose of traceability and
- the possibility of imposing prohibitions and sanctions.

This impacts the efficiency of market surveillance and the deterrence of enforcement measures and the feasibility of other legal requirements, such as disposal, redemption obligations or import turnover tax.

Contrary to traditional distribution channels, the use of fulfilment centres by product suppliers, especially from third countries, is a relatively easy option for bringing unlawful, non-compliant products onto the market in breach of EU law without fear of serious consequences. The only opportunity for carrying out controls is during import procedures at the external borders of the EU. Such controls could happen during a very short period of time, under the strain of massive imports, that do not allow customs authorities to deal efficiently with non-compliant products. Besides, if the products were found not compliant, penalties or general prohibitions would have to be directed at the supplier in the third country, which is impracticable for nationally bound authorities.

Bridging a legal gap without changing the New Legislative Framework

Therefore, Orgalime calls on the European Commission, to provide a legal basis for authorities to act in situations where products are being stored in a fulfilment centre's warehouse, although they have not yet been released for the first time on the Single Market, as required by NLF-like legislation. This could be provided by small regulatory changes to the rights and obligations of market surveillance authorities in charge of enforcing European harmonisation legislation.

In particular, without structural changes to the four types of economic operators under the NLF, authorities should be entitled to:

- Access the premises and warehouses of fulfilment centres
- Obtain samples of products and their respective declaration of conformity
- Get information to trace back the importer or the manufacturer established outside the EU/EEA from fulfilment centres
- Impose mandatory measures such as sales prohibitions in case the controlled products are not compliant with EU legislation.

We suggest the European Commission should consider amending Regulation 765/2008 with a European legislative proposal similar to the provision in the German law transposing the Electromagnetic Compatibility (EMCD), Article 23, which stipulates:

“If there is no economic operator established within the EU, measures can be taken against any organisation that facilitates the making available of products on behalf of the economic operator.”

This wording could be added as a new paragraph at the end of Article 19 clause 1 of the existing regulation 765/2008. The expression *“any organisation”* does not require a new definition for a new category of economic operators.

We believe that such a solution would provide a robust approach towards improving the market surveillance of products placed on the market via online fulfilment centres' platforms as well as any new future business models for placing goods on the Internal Market.

The currently proposed interpretation in the non-binding '[Blue Guide](#)' on the implementation of EU product rules, which erroneously, in our view, considers a fulfilment centre as either an importer or a distributor gives rise to legal uncertainties without providing solutions to address other future marketing models.

A win-win for making the new economy and the EU Single Market work together

In Orgalime's view, EU harmonisation legislation should not be distorted to address the challenge of new business models; it should enable both authorities and economic operators to meet their obligations in full while stimulating digital trade, thanks to the possibility for economic operators to resort to the support of fulfilment centres established in the EU/EEA.

We believe that such an improvement in national and European market surveillance provisions would contribute efficiently to keeping non-compliant products out of the market, thereby ensuring the safety of humans and the environment and creating comparable marketing conditions for all economic operators across the EU/EEA.

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