



Mr. Thierry Breton
Commissioner for Internal Market
European Commission
1049 Brussels

By email

Brussels, 9 November 2022

Subject: A logical, practicable and clear division of responsibilities of operators

Dear Commissioner,

On behalf of EuroCommerce, Independent Retail Europe and Euro Coop, which together represent over 5 million companies in Europe employing 26 million people, we are writing to raise our concerns about a legislative trend which manifests itself in a number of recently proposed legislative measures, under which the burden of compliance of those who *place* products on the market (manufacturers or importers) is extended to those who make these products *available* on the market (retailers/traders/distributors). **This trend is putting at risk the future of many distributors** who are already reeling under the cumulative impact of crippling energy prices, increased price pressure from large suppliers and consumers spending less in view of the current crisis.

We write to ask you to review all proposals where the hitherto logical and proportionate division of responsibilities among economic operators has been ignored, and to ensure that obligations remain with those in the supply chain best placed to comply with them – i.e. those who place products on the market, and take this into account in all impact assessments for future legislation.

Recent examples in this trend include the proposals for legislation on Corporate Sustainability Due Diligence, Forced Labour, Deforestation, Construction Products, and the Cyber Resilience Act.

This shift does not reflect the practical realities of the market. It often leads to a duplication of tasks – and consequently legal uncertainty as to who is ultimately responsible for the task. This leads to a loss of supply chain efficiency and unnecessary costs, which are likely to add further to inflation. It unduly piles administrative and legal burdens on a sector operating at very low margins (in food typically 1-3%) and already straining under the burden of regulation. This, while seeking to provide an essential service both to Europe's 450 million consumers and almost all industrial ecosystems which rely on retailers to get their products to the consumer.

Our sector is dependent on consumers trusting that what it is selling is ethical, safe, sustainable and complies with all relevant regulation. Our companies therefore take care to ensure this, by devoting considerable resources to legal compliance and, additionally, participating in voluntary private sector initiatives. When distributors are resellers of branded products, they have no knowledge of the intrinsic qualities and ingredients/parts of those branded products and do not have access to the full product specifications or full technical documentation related to a product – often for reasons of commercial secrecy. They have to be able to rely on the manufacturer or importer to have met their obligations under EU law and provide them with the necessary assurance thereof.

It is important to understand that making distributors liable for responsibilities which they are unable to fulfil is impractical, inefficient as well as disproportionate, given the huge numbers of different products they deal with. Hence the need for regulation to be proportionate and targeted at where it is most effective. In EU product law it is a firmly established principle that it is the manufacturer who is responsible for product compliance and safety assessment whereby it is the responsibility of the distributor to ensure that this has been done on the basis of the statement of the manufacturer. Each economic actor has responsibilities that correspond and are proportionate to its activity and level in the chain, to avoid any unnecessary repetition of tasks, and to avoid any legal uncertainty about who is ultimately responsible for a certain task.

The distribution sector takes its responsibilities very seriously, and of course fulfils conscientiously its obligations in its dual role of both placing and making available its own brands. However, in respect of other products, the sector is not equipped to take on responsibilities that are better placed with those who control production and standards. It is neither in a position to police the whole supply chain which is clearly the role of public enforcement authorities.

Our organisations will jointly organise a webinar on this subject later this year and hope that your services will be able to take part in the debate there.

In the Annex to this letter, we provide details to the logic of the current regime and the instances in recent EU proposals where this logic has been breached.

Yours sincerely,



Christel Delberghe
Director General
EuroCommerce



Else Groen
Director General
Independent Retail Europe



Todor Ivanov
Secretary General
Euro Coop

Cc:

Björn Seibert, Head of Cabinet of President von der Leyen
Commissioner Reynders
Commissioner Sinkevičius
Ilze Juhansone, Secretary General
Kerstin Jorna, Director General DG GROW
Ana Gallego Torres, Director General DG JUST
Florika Fink-Hooijer, Director General DG ENVI
Valère Moutarlier, Head of Cabinet of Commissioner Breton

ANNEX 1

The division of responsibilities among economic operators as established in EU law

EU harmonized product legislation clearly defines and distinguishes between the responsibilities of the “operators” who **first place** a product on the EU market (manufacturers and importers) and the “traders” who **subsequently make those products available** on the market –ultimately to consumers- (distributors (trader/retailers), fully proportionate to their role.

The manufacturer *“has the ultimate responsibility for the conformity of the product”*¹. As the creator of the product, who first places a product on the EU market, he is best placed to carry out the obligations that correspond to this role:

- *“carry out the applicable conformity assessment”*
- *“draw up the required technical documentation”*
- *“draw up the EU Declaration of Conformity”*
- *“accompany the product with instructions and safety information”*

When a product is imported into the EU, the one who first places the product on the EU market is the importer. This is reflected in the Blue Guide, which states that *“the importer must ensure that the manufacturer has correctly fulfilled his obligations. The importer is not a simple reseller of products, but has a key role to play in guaranteeing the compliance of imported products.”*²

This results in the following obligations, which fully correspond to the degree of responsibility of the important role of the importer, as the entity which decides to place a product on the EU market:

1. *“Ensure that the appropriate conformity assessment procedure has been carried out by the manufacturer.”*
2. *“Ensure that the manufacturer has drawn up the technical documentation, affixed the relevant conformity marking (e.g. CE marking), fulfilled his traceability obligations and accompanied, where relevant, the product by the instructions and safety information in a language easily understood by consumers and other end-users, as determined by the Member State concerned.”*
3. *“Indicate the following two elements: his name, registered trade name or trademark and the address at which he can be contacted on the product.”*
4. *“Keep a copy of the EU declaration of conformity for 10 years after the product has been placed on the market or for the period specified in the relevant Union harmonisation act.”*³

In a nutshell, those who bear the responsibilities entailed with placing a product on the market, the manufacturer, and the importer, are also those that know and should know the intrinsic qualities of their products and that are closest to the source of the product and therefore in the best position to ascertain the conformity of a product.

¹ The ‘Blue Guide’ on the implementation of EU product rules 2022, p.35

² Ibid., p.39

³ Ibid., p.40

According to the EU harmonized legislation and the Blue Guide, the distributor is a “*natural or a legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market.*”⁴

Making available means supplying for “*distribution, consumption or use*” after it has been placed on the market. This refers, for instance, to the sale of products to end-users (consumers).

Regarding the distributors’ obligations, the Blue Guide very clearly states:

*“Conformity assessment, drawing up and keeping the EU declaration of conformity and the technical documentation remain the responsibility of the manufacturer and/or importer in the case of products from third countries. It is not part of the distributor’s obligations to check whether a product already placed on the market is still in conformity with the legal obligations that are currently applicable in case these have changed.”*⁵

Consequently, the obligations of the distributors are different from those of manufacturers and importers, though not less important, particularly when taking into account that they deal with a far larger volume of products than manufacturers or importers. In essence, distributors must verify that the necessary conformity documents/markings are present, in the right language and, in case they have concerns with regard to the conformity or the safety of a product, they must take corrective measures and cooperate with authorities.

This approach and clear division of responsibilities are used coherently and successfully across all existing EU product legislation. This is the case for instance in the New Legislative Framework⁶, EU General Product Safety Directive (and the proposal to revise it), the Machinery Product Directive (and the proposal to revise it), the EU Toy Safety Directive, the Artificial Intelligence Act, the proposed new EU Regulation on Ecodesign for Sustainable Products, or the Food Information to Consumers Regulation, to name a few.

⁴ Ibid., p.41

⁵ Idem.

⁶ DECISION No 768/2008/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC

ANNEX 2

Maintaining the right level of responsibility for distributors

Giving distributors – in addition to their existing responsibilities – the same responsibilities as importers (draft Construction Products Regulation) or as manufacturers and importers (draft Deforestation Regulation) will result in an overlap of responsibilities, hence in legal uncertainty as to whom is ultimately responsible, and will have an important inflationary effect due to the duplication of responsibilities (and costs) along the supply chain.

Distributors are not in a position to efficiently ascertain the conformity of products (and their production process) with EU law because:

- at the end of supply chains products accumulate for distribution to consumers. Distributors therefore deal with many importers and manufacturers and a multitude of products (e.g. even small distributors offer for sale hundreds or thousands of different products);
- distributors do not only have to assess the conformity (and their risk) of the products they are actually distributing, they also have to do this for products they may be interested to distribute;
- products and their ingredients/parts may come from/pass through a multitude of different sources, only those involved in the production process can check their conformity;
- in the supply chain, distributors are farthest removed from the source of the products and their parts/ingredients/production process;

Making distributors responsible and liable for manufacturers' and importers' obligations (e.g. ensuring conformity, drawing up conformity statements or assessing the safety/sustainability or the origins of a product or its ingredients or the production process) constitutes an **unnecessary burden** as it actually means requiring them to repeat the obligations of the operators that should, and can much more efficiently, carry out these tasks.

Moreover, this constitutes a **disproportionate burden** on distributors, who already have to comply with their own responsibilities and for a much larger number of goods than manufacturers or importers.

Importantly, this also leads to **legal uncertainty** as to whom is ultimately responsible for carrying out the task.

Ultimately, this will inevitably lead to an enormous loss of efficiency in supply chains, to the detriment of the global competitiveness of EU supply chains and, due to the exponential duplication of cost this entails along the supply chain, to consumers (facing higher prices).⁷ In addition, this could well lead retailers to refrain from dealing with small operators, and to further verticalization of supply chains.

⁷ The Commission recognises in the Explanatory memorandum to the Proposed Regulation that “*the main driver for costs of due diligence obligations is the complexity of supply chains*” p.9

In conclusion, only manufacturers and importers can efficiently ascertain the conformity of products with EU law and draw up the necessary conformity documents and attach the necessary labels, and pass these on along the chain in a chain of custody. As part of their due diligence, distributors can, in line with the EU acquis, ensure that operators up the chain -following a **chain of custody**- have provided the necessary conformity documents, check the presence of the required documents and labels, and take corrective measures and inform the authorities if, on the basis of the information provided by the operators, they suspect a product to be non-conform. In this way, distributors can play an important role in ensuring that commodities and products are deforestation-free.

Only this clear and fair allocation of tasks can ensure the highest level of supply chain efficiency, to the benefit of EU competitiveness and consumers.

ANNEX 3

Instances in recent proposals where distributors are asked to duplicate responsibilities of manufacturers

a. Proposed Deforestation Regulation⁸:

“Traders which are not SMEs shall be considered operators (placers on the market) and be subject to obligations and provisions in Articles 3, 4, 5, 8 to 12, 14(9), 15 and 20 of this Regulation with regard to the relevant commodities and products⁹ that they make available in the Union market.” (Article 6.5)

b. Proposed Construction Products Regulation¹⁰:

“When making a product available on the market, the distributor shall fulfil the obligations incumbent on importers in accordance with Article 24(1) to (5) whilst references to “placing on the market” shall be understood as “further making available on the market.” (Article 25.2)

c. Proposed Directive on Corporate Responsibility (Due Diligence)¹¹

“This Directive lays down rules on obligations for companies regarding actual and potential human rights adverse impacts and environmental adverse impacts, with respect to their own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship.” (Article 1.1 (a))

d. Proposed Regulation on Forced Labour¹²

Forced labour falls under adverse impacts of human rights, and consequently the above-mentioned article from the proposal on due diligence applies.

As of now, there is not yet clarity on how due diligence for Forced Labour will be applied, as the Commission is entrusted to provide Guidelines on due diligence within 18 months from the entry into force of the Regulation (Article 23). However, Article 4.6 of the proposed Regulation seems to suggest that each economic operator (including distributors) shall carry out due diligence in the whole supply chain:

*“The competent authority shall duly take into account where the economic operator **demonstrates that it carries out due diligence on the basis of identified forced labour impact in its supply chain**, adopts and carries out measures suitable and effective for bringing to an end forced labour in a short period of time.”*

⁸ COM(2021) 706

⁹ Note that this proposed Regulation not only applies to wood and wood products, but also to commodities such as cattle, cocoa, coffee, oil palm, soya and products containing or having been fed with such commodities.

¹⁰ COM(2022) 144

¹¹ COM(2022) 71

¹² COM(2022) 453

e. Proposed EU Cyber resilience Act¹³

The proposal includes an obligation for manufacturers of products with digital elements to inform the market surveillance activities and the users of their products when they are about to cease their operations, and as a result, will no longer be able fulfil their obligations under this Regulation¹⁴. The proposal however imposes the same obligation on distributors when they become aware that a manufacturer ceased its operations (and cannot fulfil its obligations as manufacturer)¹⁵.

Since the manufacturer is already obliged to inform both the market surveillance authority and the users of its products, this is a clear duplication of a responsibility (applied to distributors) that pertains to the manufacturer concerned. Moreover, a retailer which no longer has a distribution contract with a manufacturer, has no means of knowing that that manufacturer ceased its operation.

¹³ COM(2022) 454

¹⁴ See article 10(14) of the Cyber Resilience Act - COM(2022)454 final

¹⁵ Ibid – article 14(6).