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Dear Ms. Prendergast

ISPAI is the trade association representing providers of Internet access, hosting and communications service in Ireland. Our members include household names such as eircom, Irish Broadband, Vodafone, UTV-Connect and many small and medium providers around the country. The full list of members is available at <http://ispai.ie/members.htm>.

I am writing to express the concerns of ISPAI members regarding the legislative process to develop the Regulations on Market Surveillance and Product Safety. If written effectively, these Regulations will go a long way to improving and streamlining the EU's system for ensuring that consumers are protected from unsafe products. However, a range of amendments submitted to the Internal Market Committee significantly distort the scope and intention of these Regulations and would have far-reaching consequences affecting online commerce and acting against the interests of the consumers these Regulations are designed to protect. We urge you and other Members of the Internal Market Committee to take the concerns I describe below into account during the ongoing deliberations.

This is of particular importance to Ireland. We are promoting the country as a location for establishing innovative Internet-based businesses. Our members provide the underlying Internet infrastructure that supports these businesses. We also have many international companies providing electronic commerce services from this country who are major employers. We also want to attract further foreign direct investment by companies developing the digital economy. It is vital that we retain an environment and legal framework that is attractive to such businesses and the jobs they create. If regulations are imposed that require them to implement complex preventative measures for detection of intellectual property infringements as outlined in these amendments, it could well result in such companies having to locate the sections of their services which would be affected outside of Ireland and the EU.

1) Amendments specifically highlighting Intellectual Property are not appropriate

While the protection of intellectual property rights (IPRs) is important to the European economy, this is not the appropriate legislation to achieve that aim. Authenticity does not equate to product safety, as is reflected in the frequent need for manufacturers to recall products. During debate on the Anti-Counterfeiting Trade Agreement, the European Parliament gave a very clear signal on how important it is that stakeholder views are taken on board and that these are



carefully considered in the legislative process. Simply adding intellectual property to these Regulations during the legislative process does not meet that standard.

Intellectual property is protected by numerous pieces of existing and pending legislation, including, amongst others:

- IPRs generally: Directive 2004/48/EC (the IPR Enforcement Directive) and Regulation 608/203 (Customs and IPR Enforcement)
- Trademarks: Directive 2008/95/EC (on trade marks in general) and Regulation 207/2009 (Community trade mark) and their ongoing recasts
- Copyrights: Directive 2001/29/EC (on harmonizing copyrights across the EU)
- Voluntary 'Memorandum of Understanding on the sale of counterfeit goods over the internet' to which many industry players have signed-on.

Such specific legislation is necessary because of the complexity of this subject area, resulting from: the vast array of products on the market; the wide variety of intellectual property rights applying to certain products; and the fact that the distribution in the EU of perfectly authentic products may be in breach of certain intellectual property rights. Adding such a complex subject to legislation focused at its core on promoting product safety seriously risks creating confusion and undermining legal certainty.

Moreover, the level of expertise required to identify authenticity is beyond the means of market surveillance authorities and most private sector stakeholders, and may only be possessed by the relevant Rights Owners. Making the protection of intellectual property, including, for instance, copyrighted films and music, a key objective of the legislation would place an excessive burden on limited resources of the industry as well as the surveillance authority and divert them from the objective of insuring product safety.

2) Amendments which undermine e-commerce

A number of amendments undermine the principle of technology neutrality and have a marked anti-e-commerce bent, singling out 'online' trade and seeking to impose far-reaching and inappropriate obligations on intermediaries. It is vital not to stifle online intermediaries and the online economy, due to the many benefits they provide for:

- the EU economy: intermediaries' activities in the EU contributed around €430 billion to the GDP of the EU27 in 2012. This is comprised of a direct GDP contribution of €220 billion and a long-term indirect GDP contribution due to the productivity impact of intermediaries on other firms of €210 billion. ([Copenhagen Economics](#), 2013).
- consumers: online intermediaries provided a value of free services to European consumers corresponding to an additional €35 billion in 2009.
- European SMEs: an economic study commissioned by eBay (Sidley Austin LLP & Professor Marcelo Olarreaga, 2012) reveals that 81% of the smaller commercial sellers on eBay export to at least five foreign countries.



While intermediaries should, and do, act when they receive “actual knowledge” about a problematic product on their site, they cannot be held liable for such products coming onto their site in the first place, and must not be subjected to a general monitoring obligation. These concepts are enshrined in Directives 2000/31/EC and 2004/48/EC (on e-Commerce and IPR Enforcement, respectively). ECJ case law must take into account and reference the limitations placed on filtering and monitoring obligations outlined in *Sabam vs. Scarlet* (2011) and *Sabam vs. Netlog* (2012).

- Indeed, asking private sector entities to police the internet is entirely inappropriate and against the interests of European citizens. However, several amendments attempt to do just that by imposing far-reaching obligations on intermediaries. One amendment (nr. 76) attempts to introduce the concept of ‘duty of care’. While poorly defined, the ‘duty of care’ concept is designed to ensure that online and offline intermediaries are obliged to take preventative steps to ensure that IPR-infringing products do not enter distribution chains. Taking such steps would inevitably lead to a general monitoring and filtering of online activity of European citizens, which directly conflicts with key fundamental rights as laid down in the European Charter of Human Rights as well as with leading principles laid down in the e-Commerce Directive (Directives 2000/31/EC) in particular.

The amendments contained in the Annex accompanying this letter are against the interests of Irish citizens and would seriously compromise growth and innovation within Ireland’s online economy at a time Ireland and Europe urgently needs to catch up with other trading blocks in this area. We strongly urge these amendments should be rejected.

Yours sincerely,

Paul Durrant

CEO ISPAI

Annex. Problematic amendments to the EU Market Surveillance Package

In the context of the revision of the EU Market Surveillance regime a political movement has emerged that seeks to impose market surveillance obligations on internet intermediaries and to expand the scope of the Regulation to the enforcement of Intellectual Property Rights. There are a number of particularly problematic amendments that we would like to see stricken from both legislative Proposals:

1. Market Surveillance Regulation

Amendment	Justification
<p>Amendment 67</p> <p>(1) In order to guarantee the free movement of products within the Union, it is necessary to ensure that they fulfil requirements providing a high level of protection of public interests such as health and safety in general, health and safety in the workplace, fair trading practices, protection of consumers, protection of the environment, protection of intellectual property rights and public security. Robust enforcement of these requirements is essential to the proper protection of these interests and to create the conditions in which fair competition in the Union goods market, both offline and online, can thrive. Rules are therefore necessary on physical and digital market surveillance and on controls of products entering the Union from third countries.</p>	<p>This amendment would expand the scope of the Regulation to the enforcement of intellectual property rights, obliging market surveillance authorities to put public resources into the enforcement of right holders' private economic rights. Including Intellectual Property Rights in the Regulation would introduce new measures to enforce IP rights through the back door – after numerous consultations and impact assessments in the field of IP, the Commission has concluded that there is no need to change the current legal framework. Furthermore, it could potentially mean that market surveillance authorities would need to invest public resources in assessing whether e.g. software in products is correctly licensed, music stored in sold in devices not illegally downloaded, or prevent consumers from purchasing e-readers with electronic books sold in other markets.</p>
<p>Amendment 66</p> <p>Proposal for a regulation</p> <p>Recital 1</p> <p>(1) In order to guarantee the free movement of products within the Union, it is necessary to ensure that they fulfil requirements providing a high level of protection of public interests such as health and safety in general, health and safety in the workplace, protection of consumers, protection of the environment, intellectual property rights and public security. Robust enforcement of these requirements is essential to the proper protection of these interests and to create the conditions in which fair competition in the Union goods market can thrive. Rules are therefore necessary on market surveillance and on controls of products entering the Union from third countries.</p>	<p>Same as above.</p>

<p>Amendment 68</p> <p>(8) This Regulation should therefore integrate the provisions of Regulation 765/2008, Directive 2001/95/EC and several sector-specific acts of Union harmonisation legislation relating to market surveillance into a single regulation which covers products in both the harmonised and non-harmonised areas of the Union legislation, regardless whether they are intended for use, or are likely to be used, by consumers or professionals and whether they are sold offline or online.</p>	<p>This is an example of a number of amendments clarifying that the Regulation should apply online and offline. The Regulation should be technology and sales channel neutral, as clearly stated in the Commission’s proposal. Therefore, there is no need to point out whether a specific provision applies online, as that is the case anyway. Furthermore, adding references to online / offline creates legal uncertainty and confusion should this not be mentioned specifically in an article – or even in a different piece of legislation.</p>
<p>Amendment 103</p> <p>Proposal for a regulation</p> <p>Article 3 – paragraph 1 – point 8</p> <p>(8) 'economic operators' means the manufacturer, the authorised representative, the importer, the distributor and the intermediary service provider;</p>	<p>This amendment is of most concern: by including intermediary service providers in the definition of 'economic operator', the amendment brings along a number of obligations for intermediaries (see below). Creating market surveillance obligations on intermediaries seriously prejudices the existing legal framework established in the e-Commerce Directive (2000/31/EC). Online intermediaries rely on a liability regime in order to provide these services openly and in an efficient manner. This liability regime is enshrined in Articles 12-15 of the EU’s e-Commerce Directive, protecting online intermediaries from liability for the misuse of their services by users and third parties. This enables them to operate open platforms where users and third parties can search and exchange goods, services, and information. At the same time, for certain types of activities, in order to obtain the benefits of this limitation, the intermediary must act expeditiously to remove or disable access to illegal information upon receiving actual knowledge of it.</p>
<p>Amendment 102</p> <p>Proposal for a regulation</p> <p>Article 3 – paragraph 1 – point 7 a (new) (7a) 'intermediary service providers' means any natural or legal person who enables the placing or making available on the market of a product via electronic means, such as by operating e-commerce platforms or hosting websites;</p>	<p>This amendment defines the term 'intermediary service provider' for the purpose of the above and should for the above mentioned reasons not be included.</p>

<p>Amendment 76 Recital (15) Market surveillance should be based on the assessment of the risk presented by a product taking all relevant data into account, and on a duty of care for all relevant economic operators, regardless of whether the products are traded online or offline. A product that is subject to Union harmonisation legislation which lays down essential requirements relating to protection of certain public interests should be presumed not to present a risk to those public interests if it complies with those essential requirements.</p>	<p>This amendment aims to introduce a general principle of duty of care for all relevant economic operators. Duty of care is not a defined legal concept and would hence create considerable legal uncertainty if introduced in the Regulation.</p>
<p>Amendment 245 Proposal for a regulation Article 10 – paragraph 1 1. Where the identity of the relevant economic operator cannot be ascertained by the market surveillance authorities or where an economic operator has failed in its duty of care or has not taken the necessary corrective action pursuant to Article 9(3) within the period specified, market surveillance authorities shall take all necessary measures to deal with the risk presented by the product.</p>	<p>See above.</p>
<p>Amendment 252 Proposal for a regulation Article 10 – paragraph 3 3. Prior to taking any measure under paragraph 1 in relation to an economic operator who has failed in his duty of care or has not taken the necessary corrective action, market surveillance authorities shall allow him at least 10 calendar days within which to be heard.</p>	<p>See above.</p>
<p>Amendment 219 Proposal for a regulation Article 9 – paragraph 2 – subparagraph 1 – point b a (new) (ba) the product or any presentation of the product bears, without authorisation, a trade mark that is identical or similar to the registered trade mark for this product, thereby preventing its authenticity or origin from being firmly established;</p>	<p>This has been added to the section dealing with ‘products presenting a risk’.</p>

<p>Amendment 218 Proposal for a regulation Article 9 – paragraph 2 – subparagraph 1 – point a a (new) <i>(aa) the product or any presentation of the product bears without authorisation a trade mark that is identical or similar to a registered trade mark for this product, thereby not allowing to guarantee its authenticity or origin;</i></p>	<p>This amendment proposes to add trademark infringements to the section dealing with ‘products presenting a risk’. This is simply misplaced – trademark protection is covered in the EU Trademark Directive, EU Trademark Regulation, IP Enforcement Directive, and Customs IPR Enforcement Directive. Furthermore, trademark rights are private rights – hence the responsibility to enforce such rights should remain with the rights holders, and not public authorities – in particular market surveillance authorities. If this provision were to be included in the Regulation, market surveillance authorities could even be forced to spend resources on tracking and taking actions against genuine goods that have been re-sold without the trademark holders’ consent.</p>
<p>Amendment 302 Article 14 – paragraph 3 – subparagraph 2 – point b a (new) <i>(ba) the product or any presentation of the product bears, without authorisation, a trade mark that is identical or similar to the registered trade mark for this product, thereby preventing its authenticity or origin from being firmly established;</i></p>	<p>This one is in the context of external border controls. The issue of trademark enforcement at borders is regulated in the Customs IPR Enforcement Regulation.</p>
<p>Amendment 303 Proposal for a regulation Article 14 – paragraph 3 – subparagraph 2 – point b b (new) <i>(bb) the product or any presentation of the product bears without authorisation a trade mark that is identical or similar to a registered trade mark for this product, thereby not allowing to guarantee its authenticity or origin;</i></p>	<p>Same comment as above.</p>

2. Product Safety Regulation

The following amendments clarify that the Regulation should apply online and offline. The Regulation should be technology and sales channel neutral, as clearly stated in the Commission’s proposal. Therefore, there is no need to point out whether a specific provision applies online, as that is the case anyway. Furthermore, adding references to online / offline creates legal uncertainty and confusion should this not be mentioned specifically in an article – or even in a different piece of legislation. We therefore request that the following amendments are rejected:

<p>Amendment 12 Recital 10</p> <p>(10) The scope of this Regulation should not be limited to any selling technique of consumer products, and thus also cover distance selling <i>such as online electronic selling.</i></p>

Amendment 13
Recital 10 a (new)

(10a) Given the number of products from third countries bought online by consumers which may not be in compliance with European standards, thus endangering the safety and health of consumers, the Commission should focus on strengthening consumers' confidence in e-commerce through education and awareness campaigns. The Commission should also explore the possibility of introducing an e-Trustmark by means of which manufacturer indicates on its website that it is aware of the provisions and requirements of this Regulation.

Amendment 57
Article 8 – paragraph 9 a (new)

9a. Warnings which determine the decision to purchase the product, such as those specifying the minimum and maximum age or weight for users and other important warnings, shall appear on the packaging of the product or be otherwise clearly visible to the consumer before the purchase, including in cases where the purchase is made online.

Amendment 60
Article 11 – paragraph 5 a (new)

5a. Warnings which can determine the decision to purchase the product, such as those specifying the minimum and maximum age or weight for users and other important warnings, shall appear on the consumer packaging or be otherwise clearly visible to the consumer before the purchase, including where the purchase is made online.

Amendment 79
Recital 10

(10) The scope of this Regulation should not be limited to any selling technique of consumer products, **and thus also cover distance selling, such as electronic selling, online sales and sales platforms.**

Amendment 80
Recital 10 a (new)

(10a) With reference to on-line trading, greater attention should be focused on the difficulties facing market surveillance authorities in taking measures against dangerous products sold over the Internet. This is particularly important because the number of products from third countries sold over the Internet which do not comply with European standards is rising and therefore jeopardising the health and safety of consumers. In order to tackle these challenges, appropriate forms and methods of surveillance need to be developed for imported goods. Special methods should be developed for customs authorities, and greater cooperation between them and the law enforcement authorities should be made a priority. Customs checks and market surveillance should be increased and standardised in relation to products sold over the Internet.