



**DIRECTORATE GENERAL FOR INTERNAL POLICIES**  
**POLICY DEPARTMENT A: ECONOMIC AND SCIENTIFIC POLICY**

# **The Product Safety and Market Surveillance Package**

## **NOTE**

### **Abstract**

In view of the trilogue negotiations on the European Commission's two proposals, for a regulation on market surveillance of products and on consumer product safety, this briefing note aims at contributing to and strengthening the EP's position on Article 7 of the proposal for a regulation on Consumer product safety relating to origin marking, and the provisions relating to sanctions and penalties proposed in both files.

The briefing note presents a comparative table, showing provisions from the EU Customs Code in relation to Article 7 of the proposal for a Regulation on Consumer Product Safety and the US system of marks of origin.

It also analyses existing EU legislation containing identical or similar types of provisions on sanctions and penalties as proposed in the final IMCO reports on Consumer Product Safety and Market Surveillance of Products.

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## **EXECUTIVE SUMMARY**

### **Marks of origin: comparison between the EU Customs Code and the US system**

The system for indicating origin put forward in the EU proposal for a Regulation on consumer product safety is quite similar to the American “country of origin” claim. One of the main differences between these systems relates to scope for their application.

First of all, the EU-proposed system is not restricted to imported goods, but covers all imported and non-imported products, while the American system imposes the indication of origin requirement to imported goods only, the Made-in-the-USA label being optional (except for textiles, wool, fur and cars). Secondly, the European system only covers consumer goods, while in theory the American system does not distinguish between consumer and industrial goods. However, this difference may not prove to be significant in practice.

Despite its potential benefits, the country-of-origin labelling system in the US faces important challenges that stem from problems regarding its practical implementation and an insufficient legal framework. The complexity inherent to determining a country of origin within the context of globalised production chains is one of the main problems facing the current US system. This determination is made on the basis of a similar rule in the EU, even if the wording of the legislative provisions is somewhat different.

### **Provisions relating to sanctions and penalties: analysis of existing EU legislation**

In some EU sectors, the European legislator has begun to introduce more detailed and stringent sanctions, listing what powers the European Commission or the national authorities should have in their ‘toolkit’: power to impose fines of up to a certain percentage of annual turnover, to set up a minimum level for fines or to take certain criteria into consideration when establishing the fines, such as the seriousness, duration or intentional nature of an infringement. Also, the publication of sanctions at a national or EU level and the setting up of a blacklist.

The anti-trust and competition policy is the best example of this will to develop a list of sanctions that may be applicable to undertakings that violate the law. That said, most of the provisions relating to the penalties applicable in antitrust and competition law concern those that can be imposed by the European Commission itself, and not by the Member States’ competent authorities.

These initiatives are, however, still in their infancy and Union institutions have, up to now, been reluctant to enter into too much detail in a field in which Member States wish to maintain their sovereignty.

While the amendments proposed by the IMCO reports go further than any existing or proposed EU legislation, they offer a good synthesis of the tools that currently exist, albeit in a scattered way, in some sectorial legislations or proposals currently under discussion at Union level. In particular, they are in line with the ideas debated at the occasion of the revision of the financial sector.

The interest at stake, which is to say the safeguarding of consumers’ actual well-being, fully justifies the introduction of a more precise and detailed set of sanctions in the field of product safety.

# 1. COMPARISON BETWEEN THE EU CUSTOMS CODE IN RELATION TO ARTICLE 7 OF THE PROPOSAL FOR A REGULATION ON CONSUMER PRODUCT SAFETY AND THE US SYSTEM OF MARKS OF ORIGIN

Elements of comparison	Indication of origin as proposed in article 7 of the proposal	American system of indication of origin	Made in USA label
<b>Main objectives of the system</b>	1) to supplement the basic traceability requirements concerning the name and address of the manufacturer  2) to inform consumers about the product chain  3) to bring the Union into line with the international trade regime	1) to apply the taxation of goods  2) to inform the ultimate purchaser (= "the last person in the United States who will receive the article in the form in which it was imported" 19 CFR § 134.1), that is either the final consumer or the manufacturer/processor	1) to give a competitive advantage to American manufacturers by promoting the attractiveness of American products in the eyes of the consumer.  2) to inform consumers
<b>Product scope</b>	All <u>consumer</u> (non food) goods placed or made available on the market, that is : (i) imported goods and (ii) domestic production for the internal market	"Every article (food and non-food) of foreign origin imported into the USA" (Tariff Act, 19 USC, § 1304 a)	All products (food and non food) manufactured in USA
<b>Exclusion from the system</b>	Food, medicinal products, materials in contact with food, feed, living plants and animals, animal by-products and derivatives, plant protection products, equipment on which consumers ride or travel, antiques	1) A few particular cases: - articles imported for use by the importer and not intended for sale in its imported or any other form. (Tariff Act, 19 USC, § 1304 a 3 F) - articles to be processed in the United States by the importer or for his account (...) and in such manner that any mark of origin would necessarily be	No exclusion

Elements of comparison	Indication of origin as proposed in article 7 of the proposal	American system of indication of origin	Made in USA label
		<p>obliterated, destroyed, or permanently concealed. (Tariff Act, 19 USC, § 1304 a 3 G)</p> <p>- articles that the ultimate purchaser in the United States, by reason of the article's character or the circumstances of its importation, must necessarily know the country of origin even though the article is not marked to indicate it. (Tariff Act, 19 USC, § 1304 a 3 H)</p> <p><u>However</u>, it seems that the courts give a broad sense to these exceptions, so that imported components or semi- finished goods need not be individually marked with the country of origin provided that: (1) they are shipped in a properly marked container, and (2) the importer or user is considered an "ultimate purchaser" under the law.</p> <p>2) Special treatment for goods imported from NAFTA countries (Tariff Act, 19 USC, § 1304 a 3 K)</p>	
<b>Specific sectorial provisions</b>	Some food and agricultural products	<ul style="list-style-type: none"> <li>- Textiles and wool</li> <li>- Furs</li> <li>- Cars</li> <li>- Meat</li> </ul>	<ul style="list-style-type: none"> <li>- Textiles and wool</li> <li>- Furs</li> <li>- Cars</li> <li>- Meat</li> </ul>
<b>Status</b>	Mandatory (Art. 7 Proposal for a Regulation on consumer product safety)	Mandatory (Tariff Act, 19 U.S.C. § 1304 )	Voluntary (except for Textiles, wool and cars)

Elements of comparison	Indication of origin as proposed in article 7 of the proposal	American system of indication of origin	Made in USA label
<b>Place of the marking</b>	The marking has to be on the product itself or, if the size or nature of the product does not allow it, on the packaging or in a document accompanying the product.	<ul style="list-style-type: none"> <li>- On the product itself, in "a conspicuous place as legibly, indelibly, and permanently as the nature of the article will permit." (Tariff Act, 19 USC, § 1304 a)</li> <li>- In some cases (list of products), marking on the container will be sufficient (Tariff Act, 19 USC, § 1304 b)</li> <li>- Some goods need a special way of marking (ex: goods in metal) (Tariff Act, 19 USC, § 1304 c to h)</li> </ul>	<ul style="list-style-type: none"> <li>- No specific requirement</li> </ul>
<b>Mention and language</b>	<ul style="list-style-type: none"> <li>- No particular mention is foreseen by the proposal, which only states that, when the country of origin is a Member State of the Union, manufacturers and importers can choose to refer either to the Union in general, or to the Member State in particular</li> <li>- No precise specification is given in the proposal concerning the language to be used on the label. The IMCO has proposed an amendment specifying that "Manufacturers shall be authorised to indicate the country of origin in English alone (made in "country"), since this</li> </ul>	<ul style="list-style-type: none"> <li>- English name of the country of origin of the article. (Tariff Act, 19 USC, § 1304 a)</li> <li>- Foreign country of origin to be preceded by "Made in," "Product of," or words of similar meaning</li> <li>- The Secretary of the Treasury may by regulations determine the character of words and phrases or abbreviations and prescribe any reasonable method of marking (printing, stencilling, stamping, branding, labelling, or by any other reasonable method), and a conspicuous place on the article (or container) where the marking shall appear. (Tariff Act, 19 USC, § 1304 a)</li> </ul>	<ul style="list-style-type: none"> <li>- No standard mention</li> <li>- can be express or implied.</li> <li>- can be U.S. symbols or geographic references</li> <li>- can be unqualified (total) or qualified</li> <li>- example of unqualified claim: "Made in USA"</li> <li>- Example of "qualified claims": "60% U.S. content."</li> <li>- qualified claims can appear beside the indication of a foreign country of origin.</li> </ul>

Elements of comparison	Indication of origin as proposed in article 7 of the proposal	American system of indication of origin	Made in USA label
	is readily comprehensible for consumers" (amendment 62 CPSR).	(1)) - It can also require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article. (Tariff Act, 19 USC, § 1304 a (2))	
<b>Determination of country of origin</b>	<p>1. Wholly obtained products: country of production (goods naturally occurring; or live animals born and raised in a given country; or plants harvested in a given country; or minerals extracted or taken in a single country)</p> <p>2. Goods incorporating material and/or processing from more than one country : "shall be deemed to originate in the country where they underwent their last, economically justified processing or working, in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of " (art. 601 of the</p>	<p>19 CFR § 134.1</p> <p>1. Wholly obtained goods: country of production (goods naturally occurring; or live animals born and raised in a given country; or plants harvested in a given country; or minerals extracted or taken in a single country)</p> <p>2. Goods incorporating material and/or processing from more than one country: the country of origin is the last country in which a "substantial transformation" took place.</p> <p>- A substantial transformation is a manufacturing or other process that results in a new and different article of commerce, having a new name, character and use that is different from that which existed prior to</p>	<p>Unqualified claims :</p> <p>- "all or virtually all" the product has been made in the US (contains only a de minimis, or negligible, amount of foreign content).</p> <p>- Different factors of appreciation used:</p> <p>(i) The product's final assembly or processing must take place in the U.S.</p> <p>(ii) How much of the product's total manufacturing costs can be assigned to U.S. parts and processing,</p> <p>(iii) how far removed any foreign content is from the finished product.</p> <p>- these requirements apply to U.S. origin claims included in labelling, advertising, other</p>

<sup>1</sup> Amendment 61 of the IMCO report on CPSR suggests the reference to article 52 to 55 of Regulation no 952/2013 of 9 October 2013 laying down the Union Customs Code. However, it seems that the relevant articles defining the notion of non-preferential origin are rather article 60 and those that follow.

Elements of comparison	Indication of origin as proposed in article 7 of the proposal	American system of indication of origin	Made in USA label
	Union Customs Code, Reg.952/2013)	<p>the processing.</p> <ul style="list-style-type: none"> <li>- Country-of-origin determinations using the substantial transformation test are made on a case-by-case basis through administrative determinations by the Customs Service.</li> </ul>	<p>promotional materials, and all other forms of marketing, including marketing through digital or electronic means such as the Internet or electronic mail.</p>
<b>Enforcement</b>	<ul style="list-style-type: none"> <li>- Chapter II, III and IV of the proposal on market surveillance deal with enforcement of the provisions of the Regulation on consumer product safety. However, the proposal does not contain any specific provision related to the enforcement of the indication of origin.</li> <li>- Article 6 of the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market applies in case of false information or presentation likely to deceive the average consumer</li> </ul>	<ul style="list-style-type: none"> <li>- Mainly: Customs and Border Protection officials at customs ports of entry are responsible for verifying the accuracy of the declarations during the clearance of goods through customs. (Customs Modernization Act (Title VI of P.L. 103-182))</li> <li>- Accessorily: Federal Trade Commission could pursue a case if there was a deception about the country of origin. It has also jurisdiction over foreign-origin claims in advertising. (Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended))</li> </ul>	<ul style="list-style-type: none"> <li>- The Federal Trade Commission is verifying that the "Made in USA" claims on products are truthful and accurate.</li> <li>- It has brought several times these types of cases in the past.</li> <li>- It offers a free line + complaint form on its website to any person, economic operator or consumer who believes that a product promoted as "Made in USA" is not America-made or contains significant foreign parts or processing.</li> </ul>
<b>Sanctions</b>	Art. 18 (CPSR proposal) and 31 (MSR proposal) refers to the sanctions to be imposed in the case of infringement of	<ul style="list-style-type: none"> <li>- According to the Tariff Act, if the article or its container, when the container and not the article must be marked is not properly marked at</li> </ul>	<ul style="list-style-type: none"> <li>- Section 5 of the Federal Trade Commission Act prohibits unfair and deceptive practices in trade and allows the FTC to impose</li> </ul>

Elements of comparison	Indication of origin as proposed in article 7 of the proposal	American system of indication of origin	Made in USA label
	<p>the provisions of the regulations. However, there is no specific provision related to the sanctions in the case of an absent, wrong or misleading indication of origin foreseen in the proposal.</p>	<p>the time of importation, a marking duty equal to 10 percent of the article's customs value will be assessed unless the article is exported, destroyed or properly marked under Customs and Border Protection supervision before the entry is liquidated. (Tariff Act, 19 USC, § 1304 i)</p> <ul style="list-style-type: none"> <li>- Incorrect country of origin information may lead to delays and detentions and denials of entry.</li> <li>- In addition, negligent or fraudulent country of origin information can lead to monetary penalties or, in certain cases, to criminal sanctions. (Tariff Act, 19 USC, § 1304 I)</li> </ul>	<p>sanctions upon a company if the marking of origin used is misleading.</p> <ul style="list-style-type: none"> <li>- According to the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended), the FTC is entitled to issue an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest.</li> <li>- When the Commission issues a consent order on a final basis, it carries the force of law with respect to future action. Each violation of such an order may result in a civil penalty of up to \$16,000.</li> </ul>

## **2. ANALYSIS OF EXISTING EU LEGISLATION CONTAINING IDENTICAL OR SIMILAR TYPES OF PROVISIONS ON SANCTIONS AND PENALTIES AS PROPOSED IN THE FINAL IMCO REPORTS ON CONSUMER PRODUCT SAFETY AND MARKET SURVEILLANCE OF PRODUCTS**

### **INTRODUCTION**

Member States and their authorities are entrusted with ensuring compliance with Union law and sanctioning infringements<sup>2</sup>. The principle of loyal co-operation, as laid down in Article 4 (3) TEU, states that "Member States shall take all the necessary measures to guarantee the application and effectiveness of Union law."

A proper enforcement of EU legislation requires that all national authorities have at their disposal appropriate sanctioning powers, but under the legal framework that currently exists in the EU, Member states have considerable autonomy in terms of choice and deciding whether to apply national sanctions. The choice of enforcement instruments at the disposal of Member States includes administrative and civil penalties, but also criminal as well as informal and reputational sanctions.

Most EU Regulations or directives do not give any indication as to the penalties that will ensue if a product is placed on the market in contravention of the provisions of EU law. "This is certainly an example of the principle of subsidiarity before it came to the fore during the post-Maastricht period. The founding fathers of the European Union certainly believed that Member States should be given adequate discretion in deciding on the appropriate national penalties for contravening EU law"<sup>3</sup>.

In its case-law, since the 80's, the ECJ has laid down that the national enforcement of Union law must comply with four requirements<sup>4</sup>:

- effectiveness
- equivalence
- proportionality
- and dissuasiveness.

These requirements are often reiterated in the major sectors of European secondary legislation. It is the case in the 2001/95 Directive<sup>5</sup> on general product safety (art.7) and in the Regulation 765/2008 setting of the requirements for accreditation and market

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<sup>2</sup> JH Jans, R de Lange, S Prechal, and RJGM Widdershoven, *Europeanisation of Public Law*, Europa Law Publishing, 2007, p. 200.

<sup>3</sup> R. O'Rourke, *European food law*, 2<sup>nd</sup> edition, 2001, p. 199.

<sup>4</sup> See for example Van Colson, Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891 and Greek maize cases, Case C-68/88 *Commission v Greece (Greek Maize)* [1989] ECR 2965.

<sup>5</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, OJ L 11, 15.1.2002, p.4-17.

surveillance relating to the marketing of products (art.41)<sup>6</sup>. Both texts are stating that “the penalties provided must be effective, proportionate and dissuasive”.

Penalties or sanctions<sup>7</sup> can be considered *effective* when they are capable of ensuring compliance with EU law, *proportionate* when they adequately reflect the gravity of the violation and do not go beyond what is necessary for the objectives pursued, and *dissuasive* when they are sufficiently serious to deter those committing violations from repeating the same offence, and other potential offenders from committing similar violations<sup>8</sup>. The principle of *equivalence* is less often found in the secondary legislation, and represents the idea that rules governing a dispute with a Union dimension should not be treated less favourably than those governing similar action at home.

The requirement that penalties shall be ‘effective, proportionate and dissuasive’ is minimal and rather vague, and leaves a wide scope for discretion on the part of Member States, without providing clear guidance on how Union law should adequately be enforced<sup>9</sup>.

In order to achieve a greater degree of convergence in the enforcement practices of national administrative authorities across Member States and “avoid importation and distribution in states where penalties are less harsh than in others,” the reports of the Committee on the Internal Market and Consumer protection of 25 October 2013 have proposed several amendments, reinforcing the penalties foreseen in the two proposals for Regulations from the European Commission on consumer product safety and on market surveillance.

The amendments proposed in the IMCO reports go further than the provisions proposed by the European Commission in six major aspects:

- a) Links between the penalties and the seriousness, duration and, where applicable, the intentional character of the infringement (amendments 89 of CPSR/128 of MSR)
- b) Minimum basis and ceiling of administrative penalties: administrative penalties applicable to infringements shall at least offset the economic advantage sought through the infringement, but shall not exceed 10% of the annual turnover or an estimate thereof. The penalties imposed may be higher than 10% of the annual turnover or an estimate thereof, where necessary to offset the economic advantage sought through the infringement (amendments 90 of CPSR/129 of MSR).

<sup>6</sup> Regulation (EC) no 765/2008 of the European Parliament and of the Council of 9 July 2008 setting of the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) no 339/93, *OJ. L* 218/30.

<sup>7</sup> According to the European Commission, the term ‘sanctions’ amounts to a broad notion covering the whole spectrum of action taken after a violation is committed, and intended to prevent the offender as well as the general public from committing further infringements, European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, reinforcing sanctioning regimes in the financial services sector, 8.12.2010, COM (2010 ) 716 final, p.4. The use of the word ‘penalties’ defined as “a punishment imposed for breaking a law, rule or contract” implies that national enforcement measures must have a punitive character. K. de Weers, *Towards a European Regulatory Toolkit on the Enforcement of Union Law by National Regulatory Authorities*, Het Europa Instituut Utrecht , 2012, p. 56. It seems that Union law prefers not to use the term “sanctions” as an umbrella term for labelling the state’s response to unlawful behaviour. More often, we find the terms ‘penalty’ and ‘measure’ in the English versions of EU rules, A. de Moor-van Vugt, *Administrative Sanctions in EU Law*, Review of European Administrative Law, 2012, Vol. 5 no 1, p. 12.

<sup>8</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European economic and Social Committee and the Committee of the regions, Reinforcing sanctioning regimes in the financial services sector, 8.12.2010, COM (2010 ) 716 final, p.4.

<sup>9</sup> K. de Weers, *Towards a European Regulatory Toolkit on the Enforcement of Union Law by National Regulatory Authorities*, Het Europa Instituut Utrecht , 2012, p. 59.

- c) Inclusion of criminal sanctions for serious infringements (amendments 90 of CPSR/129 of MSR): The possibility of the inclusion of criminal sanctions was, in fact, proposed earlier in the text of the proposals for a Regulation on consumer product safety (art.18 par.2) and on Market surveillance (art.31 in fine). It has been kept as such in the IMCO reports. We thought it would be interesting, however, to take this aspect into account in the present analysis.
- d) Obligation of information of the European Commission: the Member States shall inform the Commission of the type and the size of the penalties imposed under this Regulation and indicate the identity of economic operators for which penalties have been imposed (amendments 91 CPSR/130 MSR).
- e) Publicity of sanctions: The Commission shall make the information available to the public without undue delay, electronically and, where appropriate, by other means (amendments 91 CPSR/130 MSR).
- f) Blacklisting: the European Commission will publish and update a blacklist of economic operators who are repeatedly found to intentionally infringe the provisions of this Regulation (amendments 91CPSR/131MSR).

These different types of sanctions, obligations for Member states and criteria to be taken into consideration in the application of sanctions, though not frequently found, are not new in Union law; they are already provided in some legislative instruments adopted in different sectors, such as:

- Antitrust and competition law,
- Protection of air passengers
- Protection of intellectual property rights
- Energy
- Environment protection

Detailed provisions related to sanctions have also recently been proposed by the European Commission, and are currently under discussion between Union institutions in three different sectors:

- Official controls in food and feed
- Protection of individuals with regard to the processing of personal data
- The financial sector.

The following analysis does not, however, claim to be exhaustive; its main purpose is to describe briefly some of the provisions in existence or under discussion in EU law, and which contain similar or comparable sanctions to those proposed in the IMCO reports.

## **2.1. Antitrust and competition law**

Regulation no 1/2003 on the implementation of the rules on competition<sup>10</sup> grants both Member States and the European Commission the power to impose penalties on activities found to infringe Article 101 or 102 of the Treaty.

Article 5 gives the competition authorities of the Member States the power, acting on their own initiative or on a complaint, to impose fines, periodic penalty payments or any other penalty provided for in their national law.

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<sup>10</sup> Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *OJ* 4.1-2003, p.1.

Pursuant to Article 23(2)(a) of Regulation No 1/2003, “the Commission may also, by Decision, impose fines on undertakings or associations of undertakings where, either intentionally or negligently, they infringe Article 101 or 102 of the Treaty”.

In enacting this power to impose fines, the Commission enjoys a wide margin of discretion within the limits set by Regulation No 1/2003.

In order to ensure the transparency and impartiality of its decisions, the European Commission has adopted Guidelines on the method for setting imposed fines, pursuant to Article 23(2)(a) of Regulation No 1/200<sup>11</sup>. The key elements of the Commission’s fining policy, introduced in the 2006 fining guidelines, have been endorsed by the European Court of Justice.

#### 2.1.1. Links between the penalties and the seriousness, duration and where applicable, the intentional character of the infringement

“It is in competition law where the case law on the proportionality of penalties is most developed”<sup>12</sup>. Antitrust law sanctions at EU level establish a relationship between the size of the penalty for antitrust violations and the severity of harm or the gravity of the infringement<sup>13</sup>. The link between the fine and the duration of the infringement, as well as the increase for repeat offenders has also been applied in competition law since 2006<sup>14</sup>.

The amount of the fine relates to the seriousness of the infringement and the consequences thereof for the market, the turnover of the companies involved, the period of time the infringement has lasted, and the existence of aggravating circumstances, such as a party initiating the scheme or being the leading player in it, intent, recidivism etc<sup>15</sup>.

#### 2.1.2. Ceiling of administrative penalties

The fine imposed may not exceed the limits specified in Article 23(2), second and third subparagraphs, of Regulation No. 1/2003. Fines are based on a percentage of the value of the sales connected with the infringement. The percentage of the value of sales is determined according to the gravity of the infringement (nature, combined market share of all the parties concerned, geographic scope, etc.) and may be as much as 30%. In order to fully reflect the duration of the infringement, this amount will be multiplied by the number of years participation in the infringement persisted. This rule allows the financial strength of the one committing the violation to be taken into account, which helps in ensuring that sanctions are sufficiently dissuasive, even for large companies.

The basic amount calculated may then be adjusted by the Commission, downwards if it finds that there are mitigating circumstances, or upwards in the event of aggravating circumstances (for example where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82): firms that re-offend could face a 100 % increase in fines for each subsequent infringement.

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<sup>11</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1-9-2006, p.2-5.

<sup>12</sup> A. de Moor-van Vugt, *op.cit.* p.37.

<sup>13</sup> Point 2, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ C 210, 1-9-2006, p.2-5.

<sup>14</sup> See: Competition: Commission revises Guidelines for setting fines in antitrust cases, 28<sup>th</sup> of June 2006, [http://europa.eu/rapid/press-release\\_IP-06-857\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-06-857_en.htm?locale=en).

<sup>15</sup> A. de Moor-van Vugt, *op.cit.*, p.37.

However, in all cases, the ceiling for fines that can be imposed on companies is fixed by Article 23(2) of Council Regulation No 1/2003; the maximum fine for each firm remains 10 % of its total turnover in the preceding business year<sup>16</sup>.

#### 2.1.3. Information of the European Commission

Article 5 of Regulation no 1/2003 gives the competition authorities of the Member States the power to apply Articles 81(101TFEU) and 82 (102 TFEU) of the Treaty in individual cases. For this purpose, acting on their own initiative or on a complaint, they may, among other courses of action, impose fines, periodic penalty payments or any other penalty provided for in their national law. There are no more detailed provisions in the Regulation on the size of penalties that may be imposed by the Member States themselves.

According to Article 11(4) of the Regulation, no later than 30 days before the adoption of a decision applying Articles 81 or 82 of the Treaty, Member States' competition authorities shall inform the Commission. They have to send notification to the Commission at least 30 days before the adoption of the decision, along with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action.

National courts also play a key role in the enforcement of European competition policy. They may be called upon to apply Article 101 and/or 102 TFEU to a variety of scenarios<sup>17</sup>.

Article 15(2) of Regulation 1/2003 requires Member States to forward to the Commission a copy of any written national court judgment on the application of Article 101 or 102 TFEU. These judgments must be sent "*without delay after the full written judgment is notified to the parties.*"

#### 2.1.4. Publicity of sanctions

Non-confidential versions of the national court judgments are published in a database managed by the European Commission, as a source of case practice, as well as providing an overview of the activities of national courts in their role as enforcers of EU competition law. Judgments are published in the original language, sorted by the Member State and filed chronologically<sup>18</sup>.

Article 30 of Regulation 1/2003 also foresees the publication of the Commission decisions. The publication shall state the names of the parties and the main content of the decision, including any penalties imposed. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets. This provision applies to all decisions adopted by the Commission pursuant to Articles 7 to 10, 23 and 24.

#### 2.1.5. Inclusion of criminal sanctions for serious infringements

The possibility of imposing criminal sanctions for serious infringements is not explicitly mentioned in Article 5 of Regulation No 1/2003. This provision states that Member States can, in their national law, impose fines, periodic penalty payments or "any other penalty

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<sup>16</sup> Point 32 of the Guidelines, on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003.

<sup>17</sup> Some courts have jurisdiction over lawsuits between private parties, such as action relating to contracts or actions for damages; some act as public enforcers (e.g. in Finland, Ireland and Sweden) and some act as review courts, hearing appeals which are brought against the decisions of the national competition authorities.

<sup>18</sup> See the national court cases database: <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/>.

provided for in their national law”<sup>19</sup>. This wording thus also covers the possibility for Member States to provide for criminal enforcement of Articles 81/101 and 82/102 EC<sup>20</sup>.

Most of the detailed provisions related to fines and sanctions contained in Regulation 2003/1 and in the Guidelines are related to the powers that the European Commission itself uses in the field of competition law. The European Commission does indeed have significant powers for intervention in this field; it has the power to act on a complaint or on its own initiative and the power to adopt a decision requiring the undertakings and associations concerned to bring such an infringement to an end. It also has powers of investigation, power to request information and powers of inspection, while the general product safety directive only grants the European Commission powers to adopt, in the case of serious risk, a decision requiring Member States to take measures in order to solve the problem at Union level in a uniform and co-ordinated way.

Except for provisions related to the obligation of European Commission information regarding decisions adopted by the national authorities or courts, the provisions contained in competition law are not aimed at directing Member States as to how they should apply the national sanctions. The precise requirements have been brought in order to frame important decisions made by the powers of the European Commission, and to ensure the impartiality and transparency of its decisions. In this regard, it is different from the amendments proposed by the IMCO reports, which are directly addressed to national enforcement authorities, which have to apply the different sanctions.

## 2.2. Protection of air passengers

Regulation (EC) No 2111/2005<sup>21</sup> aims to ensure a high level of protection for passengers from safety risks, and of consumer protection in general. This Regulation is part of a legislative process pursuing an efficient and coherent approach to reinforcing air safety in the Community, in which the European Aviation Safety Agency plays an important role.

This Regulation establishes a Community list of air carriers that do not meet relevant safety requirements and offers one of the few examples of a blacklist officially established at EU level and made public<sup>22</sup>.

Based on common criteria drawn up at Community level (set out in the Annex of the Regulation), the list is brought to the notice of passengers via the Internet, so as to ensure as much transparency as possible. Air carriers included in the Community list should be subject to an operating ban. The operating bans included in the Community list should apply throughout the territory of the Member States to which the Treaty applies. Each Member State shall enforce, within its territory, the operating bans included in the Community list in respect of the air carriers that are the subject to those bans.

A procedure for updating the Community list is foreseen, in order to provide adequate and up-to-date safety information to air passengers and to guarantee that air carriers that have remedied safety deficiencies are taken off the list as quickly as possible. The Regulation

<sup>19</sup> W. P.J. Wils, Is Criminalization of EU Competition Law the Answer? Paper first presented at the Amsterdam Center for Law and Economics (ACLE) Conference *Remedies and Sanctions in Competition Policy*, Amsterdam, 17-18 February 2005, p. 17.

<sup>20</sup> This possibility has been followed up by some Member States, such as: Ireland, the United Kingdom and Estonia. W. P.J. Wils, *op.cit.*, p.19.

<sup>21</sup> Regulation (EC) No 2111/2005 of the European Parliament and the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air passengers of the identity of the operating carrier and repealing Article 9 of Directive 2004/36/EC, *OJ* 27.12.2005, L 344/15.

<sup>22</sup> No other example of such a public and official blacklist at EU level has been found in the framework of this research.

also contains some provisions related to the information given to passengers (schedules, identity of the operating air carrier).

Adverse publicity is considered a particularly significant element in the field of enforcement against business misconduct. "The consequences of reputational damage in terms of financial harm due to loss of clients and stakeholders, and in terms of loss of personal status and prestige on the part of members of the business elite through shame and stigma, largely exceed the damage resulting from formal sanctions"<sup>23</sup>.

"Publicity may therefore also contribute implicitly to prevention, by creating public awareness of the harmfulness of corporate misconduct and by fostering normative attitudes against corporate offences, both in the general public and in business communities. Publicity is often considered an extra "weapon" to strengthen the otherwise weak position of enforcement agencies against 'crimes of the powerful'"<sup>24</sup>.

This Regulation is quite similar in its objective to the general product safety directive, as it also has the objective of protecting the physical integrity of consumers. It is also interesting to note that this Regulation contains several provisions that are similar to those of the EU directive 2001/95 on general product safety<sup>25</sup>.

### 2.3. Protection of intellectual property rights

Counterfeiting and piracy have become international phenomena with important economic and social repercussions, affecting the functioning of the single market and impacting on consumer protection, particularly with regard to public health and safety<sup>26</sup>.

Directive 2004/48/EC on the enforcement of intellectual property rights<sup>27</sup> aims to harmonize Member States' legislation so as to ensure an equivalent level of protection for intellectual property within the internal market.

Article 15 of this directive foresees the possible publication of judicial decisions, to include displaying the decision and publishing them in full or in part. Member States may also provide for other additional publicity measures, which are appropriate to particular circumstances, including prominent advertising. This right to information, which allows precise information to be obtained on the origin of infringing goods or services, as well as the distribution channels and the identity of any third parties involved in the infringement, was recognized in several Member States prior to the adoption of the directive (Recital 21).

<sup>23</sup> J. Van Erp, *Messy Business: Media Representations of Administrative Sanctions for Corporate Offenders*, *Law and Policy*, Vol. 35, Nos. 1-2, January-April 2013, p.110.

<sup>24</sup> *Ibidem*, p.110.

<sup>25</sup> These common features are: (i) Possibility for the Member States to take unilateral measures (imposing an immediate operating ban on its own territory) in cases of urgency and when confronted with an unforeseen safety problem; (ii) Obligation for the Member States to inform the EU Commission of any information related to safety deficiencies and transmission of this information to other member States (according to the same philosophy as the Rapex system); (iii) Obligation for air carriers to report safety deficiencies to the national air safety authorities as well as for addressing such deficiencies without delay; (iv) Possibility for the European Commission to adopt immediate measures on a provisional basis where there is a risk to safety that has not adequately been resolved by the Member State(s) concerned (art.5). This power is used with the assistance of a special Committee; (v) Obligation for the Member States to lay down rules on penalties applicable to infringements of the provisions of Chapter III and ensure that these penalties are applied. The penalties, which may be of a civil or administrative nature, should be effective, proportionate and dissuasive. (art.13).

<sup>26</sup> European Commission, *Combating counterfeiting and piracy in the single market*, online: [http://europa.eu/legislation\\_summaries/internal\\_market/businesses/intellectual\\_property/126057\\_en.htm](http://europa.eu/legislation_summaries/internal_market/businesses/intellectual_property/126057_en.htm).

<sup>27</sup> Directive [2004/48/EC](#) of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *OJ L 195* of 2 June 2004, p.45-86.

The Communication from the Commission of 30 November 2000, on the Follow-up to the Green Paper on combating counterfeiting and piracy in the single market<sup>28</sup>, also refers to the setting up of a website, through which legal decisions published in the Member States would be accessible, in accordance with personal data protection, to operators and law-enforcement authorities. This website could be based in particular on the information component in the European Judicial Network in civil and commercial matters. Via hyperlinks, it would provide access to national sites dealing with these matters.

The initiative described above is in line with the publicity of sanctions, proposed in amendments 91 CPSR/131 MSR.

## **2.4. Energy legislation**

Directive 2009/72/EC concerning common rules for the internal market in electricity<sup>29</sup> deals with "the generation, transmission, distribution and supply of electricity, together with consumer protection provisions, with a view to improving and integrating competitive electricity markets in the Community" (Art.1).

Article 37 (4) (d) Directive 2009/72/EC gives more detailed instructions to the regulatory authorities as far as penalties are concerned. This provision starts by reiterating the fact that penalties imposed upon electricity undertakings must be effective, proportionate and dissuasive. It then specifies that a regulatory authority must have the power to impose penalties of up to 10% of the annual turnover of the undertakings that do not comply with their obligations, which is to say either the transmission system operator<sup>30</sup> or the vertically integrated undertaking<sup>31</sup>. The directive does not specify precisely the minimum level of penalties.

A similar provision can be found in article 41(4) d) of Directive 2009/73/EC concerning common rules for the internal market in natural gas<sup>32</sup>.

The precise specification related to the ceiling of administrative penalties according to a percentage of the annual turnover is, in the case of these two directives, similar to the provisions proposed in amendments 90 and 129 of the IMCO reports, as they are addressed directly to the Member States.

However, while the provisions contained in the energy law are foreseen in the directives, leaving the Member States with the responsibility of integrating them into their national

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<sup>28</sup> Point 23 of the Communication, Brussels, 30.11.2000 COM(2000) 789 final.

<sup>29</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC, *OJ L* 211, 14.8.2009, p. 55-93.

<sup>30</sup> Art. 2.4 of Directive 2009/72/EC defines the transmission system operator as the "person responsible for operating, ensuring the maintenance of and, if necessary, developing the transmission system in a given area and, where applicable, its interconnections with other systems, and for ensuring the long-term ability of the system to meet reasonable demands for the transmission of electricity". According Article 12, transmission system operators are mainly responsible for: ensuring the long-term ability of the system to meet demands for electricity; ensuring adequate means to meet service obligations; contributing to the security of the supply; managing electricity flows on the system; providing the operator of any other system with information related to the operation, the development and interoperability of the interconnected system; ensuring non-discrimination between system users; providing system users with the information they need to access the system; collecting congestion rents and payments under the inter-transmission system operator compensation mechanism.

<sup>31</sup> According to art. 2.21 of Directive 2008/72/EC: a vertically integrated undertaking is an electricity undertaking or a group of electricity undertakings where the same person or the same persons are entitled, directly or indirectly, to exercise control, and where the undertaking or group of undertakings perform at least one of the functions of transmission or distribution, and at least one of the functions of generation or supply of electricity

<sup>32</sup> Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ L* 211, 14.8.2009, p. 94-136.

legislations, the amendments proposed in the field on product safety and market surveillance concern a Regulation which has a direct effect on national laws. These will, therefore, be much more constrictive towards them. It is not certain that such a difference will be relevant in practice, as even if the sanctions proposed by the IMCO reports are included in Regulations and not directives, the competent authorities of the Member States will still be free to choose from among the different possible penalties those that are the most suitable on a case-by case basis.

## 2.5. Environmental law

Environmental law does not usually outline details of sanctions that apply in the case of non-respect of EU provisions<sup>33</sup>. As in the field of general product safety, EU law is limited to requesting from Member States that sanctions be "effective, proportionate and dissuasive".

A directive was adopted in 2008<sup>34</sup> in order to achieve effective protection of the environment. It introduced more dissuasive penalties for environmentally harmful activities, which typically cause or are likely to cause substantial damage to the air, including the stratosphere, to soil, water, animals or plants, as well as to the conservation of species. It foresees that some unlawful acts committed intentionally or, at least, out of serious negligence will have to be treated by Member States as criminal offences (art.3)<sup>35</sup>.

Although this provision has been introduced through a directive, it can be compared to the amendment put forward by the Commission in its proposal (art.18.2) and confirmed by the IMCO reports related to the introduction of criminal penalties for serious infringements.

## 2.6. Official controls of food and feed

E EU Regulation 882/2004 on official controls for feed and food law<sup>36</sup> sets out the approach that the competent authorities of Member states must adopt for official controls. As far as sanctions are concerned, the Regulation does not contain any particular requirement, except the classic provision, requiring Member states to provide for "effective, proportionate and dissuasive" sanctions, and to notify the Commission without delay of any provisions applicable to infringements of feed and food law, and any subsequent amendments. (art.55).

In order to strengthen the enforcement of health and safety standards for the whole agri-food chain, the European Commission adopted a package of measures in May 2013 which provide a modernized and simplified approach to the protection of health and more efficient control tools to ensure the effective application of the rules guiding the operation of the food chain. Included in this package, the Proposal for a Regulation on official controls and other official activities performed to ensure the application of food and feed law (...) <sup>37</sup>

<sup>33</sup> L. Krämer, *Droit de l'environnement de l'Union européenne*, Helbing Lichtenhahn, Bale, 2011, p.109.

<sup>34</sup> Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, p.28-37.

<sup>35</sup> Several Member States had contested EU competence in this field but the European Court of Justice confirmed that competence. Judgment of the Court (Grand Chamber) of 13 September 2005, *Commission of the European Communities v Council of the European Union*, Case C-176/03, European Court Reports 2005 Page I-07879. In another case the Court stated, however that "By contrast, and contrary to the submission of the Commission, the determination of the type and level of the criminal penalties to be applied does not fall within the Community's sphere of competence", Judgment of the Court (Grand Chamber) of 23 October 2007, *Commission of the European Communities v Council of the European Union*, Case C-440/05, European Court Reports 2,007 Page I-09097.

<sup>36</sup> Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules, OJ L 165, 30.4.2004, p.1-141.

<sup>37</sup> Proposal for a Regulation of the European Parliament and of the Council on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant

revises the legislation on official controls to overcome shortcomings identified in its application. The proposal contains three new provisions related to the penalties that may be considered comparable to some of the amendments proposed in the IMCO reports.

(i) Minimum basis of fines for intentional violations

Where financial penalties are used in relation to intentional violations of food chain law, they should be at a sufficiently dissuasive level and “at least offset the economic advantage sought through the violation” (art. 136).

This provision is partially comparable to the one proposed in amendment 90 of CPSR/129 of MSR, which states that administrative penalties applicable to infringements shall at least offset the economic advantage sought through the infringement, but shall not exceed 10% of the annual turnover or an estimate thereof. However, three differences have to be underlined:

- In the food and feed controls proposal, this minimum fine amount is only applicable in the case of intentional infringement, while the IMCO amendments propose such a basis for fines for all infringements.
- In the food and feed controls proposal, there is no foreseen ceiling<sup>38</sup>.
- In the food and feed control proposal, this rule is valid for all financial penalties, while the IMCO amendments seem to limit this provision to administrative penalties only.

(ii) Publication of sanctions

In order to ensure better transparency in terms of the official controls performed, competent authorities shall ensure the “regular and timely publication of information on”, among others, “the cases where the penalties referred to in Article 136 were imposed” (art. 10.1. d).

The Commission shall lay down and update as necessary the format in which the information referred to in that paragraph shall be published.

(iii) Name and shame approach

Moreover, the competent authorities shall be entitled to publish or otherwise make available to the public, information about the rating of individual operators based on the outcome of official controls. This information has to respect certain conditions, however:

- (a) the rating criteria are objective, transparent and publicly available;
- (b) appropriate arrangements are in place to ensure the consistency and transparency of the rating process (art.10.3.).

This so-called ‘name-and-shame approach’ remains a potential tool in the hands of Member states, and one they may decide to use or not, the information related to which is not

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health, plant reproductive material, plant protection products and amending Regulations (EC) No 999/2001, 1829/2003, 1831/2003, 1/2005, 396/2005, 834/2007, 1099/2009, 1069/2009, 1107/2009, Regulations (EU) No 1151/2012, [...]2013, and Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC, 2008/120/EC and 2009/128/EC (Official controls Regulation), COM/2013/0265. The three other proposals of the package are: a proposal for a Regulation on the production and making available on the market of plant reproductive material (plant reproductive material law); a proposal for a Regulation on animal health and a proposal for a Regulation on protective measures against plant pests.

<sup>38</sup> However, both provisions might be thought of as similar, since the second indent of the IMCO amendments (90 CPSR/129 MSR) states that the penalties imposed may be higher than 10% of the annual turnover or an estimate thereof, where necessary to offset the economic advantage sought through the infringement.

supposed to be publicised at European level. In this sense, this provision is different from the blacklist proposed by amendments 91CPSR /131 MSR of the IMCO reports.

## **2.7. Protection of individuals with regard to the processing of personal data**

The European Commission proposed, in 2012, a comprehensive reform of the EU's 1995 data protection rules to strengthen online privacy rights and boost Europe's digital economy.

The Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)<sup>39</sup> contains a catalogue of fines to be imposed by the competent authorities of the Member States according to the different possible infringements<sup>40</sup>.

"The amount of the administrative fine shall be fixed with due regard to the nature, gravity and duration of the breach, the intentional or negligent character of the infringement, the degree of responsibility of the natural or legal person and of previous breaches by this person, (...) and the degree of cooperation with the supervisory authority in order to remedy the breach". (art.79.2.).

Maximum amounts of penalties are also foreseen according to the different cases (first and non-intentional non-compliance, less serious offences, serious violations), being either a fixed amount of money, or determined on the basis of a percentage of the global annual turnover of the company. They will be empowered to fine companies that violate EU data protection rules with penalties of up to (in the most serious cases) €1 million or up to 2 % of the global annual turnover of a company (art. 79.5). There is however no minimum fixed for the penalties.

These provisions under discussion are thus comparable to the ones proposed in amendments 89 CPSR/128 MSR and 90 CPSR/129 MSR of the IMCO reports.

## **2.8. Financial sector**

Most of the regulations adopted in the financial sector are rather minimal, vague and imprecise as far as the sanctions are concerned<sup>41</sup>. Member States are asked to adopt appropriate administrative measures in the case of infringements to the laws implementing the Directive provisions.

As commonly stated, these measures must be "effective, proportionate and dissuasive". Several regulations make provision for the national authorities to publish the measures and sanctions under certain circumstances, stating that: "Member States shall provide that the competent authority may disclose to the public every measure or sanction that has been imposed for infringement of the provisions adopted pursuant to this Directive, unless the disclosure would seriously jeopardize the financial markets or cause disproportionate damage to the parties involved"<sup>42</sup>.

<sup>39</sup> COM (2012) 11 final, Brussels, 25.1.2012.

<sup>40</sup> The planned reform of the protection of individuals with regard to the processing of personal data also includes a proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, COM(2012) 10 final.

<sup>41</sup> K. de Weers, *op.cit.*, p. 31.

<sup>42</sup> This provision is foreseen in the following provisions : Article 51(3) of Directive 2004/39/EC - MiFID, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, *OJ L 145*, 30.4.2004, p.1-44; Article 25(2) of the Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending

But this possibility to publicize the sanctions is recognized for the Member States and not for the European Commission, as is the case in amendments 91 CPSR/130 MSR of the IMCO reports.

"The financial crisis has made it clear that the enforcement of Union law with regard to financial services is of utmost importance for the stability and functioning of the entire European Union"<sup>43</sup>. In December 2010 the Commission published a Communication on reinforcing the sanctioning regimes in the financial services sector where it points out the need for the EU to ensure a consistent and effective application of EU rules. A proper functioning supervisory system calls for convergent sanctioning regimes. A similar conclusion was drawn in the De Larosière report: "Supervision cannot be effective with weak, highly variant sanctioning regimes. It is essential that within the EU and elsewhere, all supervisors are able to deploy sanctioning regimes that are sufficiently convergent, strict, resulting in deterrence"<sup>44</sup>.

Divergences and weaknesses across Member States have been identified in the ways they implement the existing sanctions in the field of financial services. Namely:

- lack of sanctioning powers for certain violations<sup>45</sup>;
- variation in the levels of administrative fines;
- fines remain too low and do not act sufficiently as a deterrent in some Member States;
- only natural persons can be sanctioned in some Member States, while this is possible for both natural and legal persons in others;
- the criteria taken into account for the application of sanctions are not the same;
- administrative sanctions are given priority in some Member States while that is true for criminal ones in others.

In its Communication, the Commission recognizes that these divergences may lead "to a situation in which sanctions do not seem always optimal in terms of effectiveness, proportionality, and dissuasiveness".

It suggests that a minimum common standard could be set at European level on the key issues of sanctioning regimes in the financial services sector where shortcomings have been identified, such as:

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Directive 2001/34/EC, OJ L 345, 31.12.2003, p.64-89; Article 28(2) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, p. 38-57; Article 14(4) of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16-25; Article 99(3) of Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ L 302, 17.11.2009, p.32-96.

<sup>43</sup> K de Weers, *op.cit.*, p. 27.

<sup>44</sup> Report of the High-level Group on Financial supervision in the EU chaired by Jacques de Larosière, 25.2.2009, par. 201.

<sup>45</sup> For example, according to the Commission, public warnings and publication of sanctions are not foreseen in all national legislations even though they may make a significant contribution to general prevention, since they act as reminders of the sanctions applicable to certain types of behaviour and show that there is a real danger that such behaviour will be discovered and punished by the authorities (Communication from the Commission "Reinforcing sanctioning regimes in the financial services sector", COM(2010) 716, p.7).

- (i) Appropriate types of administrative sanctions for the violation of key provisions
- (ii) Publication of sanctions
- (iii) A sufficiently high level of administrative fines
- (iv) Sanctions provided for both individuals and financial institutions
- (v) Appropriate criteria to be taken into account when applying sanctions

"The effectiveness, proportionality and dissuasiveness of sanctions as well as aggravating or mitigating circumstances should also be taken into account by the competent authorities when deciding the sanctions to be applied to the author of a specific violation.

These factors should be framed in such a way as to allow competent authorities to adapt type and level of sanctions imposed to the nature and the impact of the violation as well as to the personal conditions of the offenders, which would help ensuring optimal proportionality and dissuasiveness of the sanctions actually imposed"<sup>46</sup>.

- (vi) Other considerations in relation to the author of the violation should include financial benefits derived, financial strength, cooperative behaviour displayed and the duration of the violation. Also, the possible introduction of criminal sanctions for the most serious violations.
- (vii) Appropriate mechanisms supporting the effective application of sanctions.

Other considerations should include the financial benefits for the author of the infringement derived from the violation, the financial strength of the author of the violation, the cooperative behaviour of the author of the violation and the duration of the violation. Possible introduction of criminal sanctions for the most serious violations and an appropriate mechanisms supporting effective application of sanctions are also factors to be taken into account.

One of the latest developments in the financial sector relates to the market abuse.

On 20 October 2011, the Commission adopted a proposal on insider dealing and market manipulation (market abuse)<sup>47</sup>. The Regulation was adopted by the European Parliament on 10 September 2013.

The Regulation aims to update and strengthen the existing framework to ensure market integrity and investor protection provided by the Market Abuse Directive. The new framework will, among other factors, introduce a greater harmonisation of administrative sanctions.

Common rules include a ceiling for sanctions (three times the amount of profits gained or losses avoided), a minimum amount of fines, other aggravating or mitigating factors (gravity of the offence, previous offences, etc.) and the possibility to impose a permanent ban in the case of repeated breaches.

In parallel, a proposal for a Directive on criminal sanctions for market abuse requires Member States to introduce criminal sanctions for the offences of insider dealing and market manipulation as defined in the Directive, where these are committed intentionally<sup>48</sup>.

<sup>46</sup> Communication, COM (2012) 11 final, Brussels, 25.1.2012, p.13

<sup>47</sup> Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) of 20 October 2011, COM 2011 (651) final.

<sup>48</sup> European Parliament's endorsement of the political agreement on Market Abuse Regulation, 10 September 2013, [http://europa.eu/rapid/press-release\\_MEMO-13-774\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-13-774_en.htm?locale=en).

## CONCLUSION

In some EU sectors, the European legislator has progressively begun to introduce more detailed and stringent sanctions, listing what powers the European Commission or the national authorities should have in their “toolkit”: power to impose fines of up to a certain percentage of annual turnover (Antitrust law and Energy), power to take certain criteria into consideration in order to establish the fines, such as seriousness, duration and the intentional character of the infringement (Antitrust law), publication of sanctions at national or EU level (Intellectual Property Rights and Antitrust law), the setting up of a blacklist (Air passenger protection).

The EU anti-trust and competition policy is the best example of this will to present in a detailed manner the way sanctions can be imposed upon undertakings that have violated the law. However, most of the provisions relating to penalties concern those that can be imposed by the European Commission and not by the Member States’ competent authorities. In this sector the European Commission has, indeed, nearly as many powers of intervention as the Member States. This is a major difference with respect to the amendments proposed in the IMCO reports, which relate to the penalties that Member States themselves may impose.

The blacklisting instrument is one of the earliest forms of sanctions alternative to the traditional penalties<sup>49</sup>. This tool is less developed at EU level, as it seems only applicable in the protection of air passengers. However, it seems to be more and more popular in some Member States.

These initiatives are, however, still in their infancy and Union institutions have up to now been reluctant to enter into too much detail in a field in which Member States want to retain their sovereignty.

In other sectors currently under revision, penalties have also been proposed in a more precise way: food and feed controls, personal data protection and market abuse. In these fields, the provisions are all related to the sanctions that the Member States themselves may decide to apply.

However, no current EU legislative text or proposal under discussion contains as many detailed provisions related to sanctions as the IMCO reports are proposing in their amendments.

While these amendments go further than any existing or proposed EU legislation, they offer a good synthesis of the tools that currently exist, albeit in a scattered way, in the analysed sectorial legislations. In particular, they are in line with the ideas debated at the occasion of the revision of the financial sector.

According to us, the interest at stake, that is the protection of the physical safety of consumers, is much more important than the economic interests defended in antitrust, financial services or market abuse legislation. If precise sanctions are proposed in these sectors, *a fortiori*, why couldn’t similar sanctions be transposed to the field of general product safety, where the lives of consumers and their children may be at risk?

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<sup>49</sup> S. Bell & D. Mc Gillivray, *Environmental Law*, 6<sup>th</sup> edition, 2006, p. 308.

The reflections of the European Commission with regard to financial services are valid in the field of general product safety, where several divergences and weaknesses among Member States in the way they are implementing the general product safety legislation certainly hamper a correct and uniform enforcement of it<sup>50</sup>. One could come to the same conclusion, that such divergences will lead to a situation in which sanctions are not applied in an 'effective, proportionate and dissuasive' manner<sup>51</sup>.

The tendency to reinforce the applicable sanctions also goes in the direction that some Member States (such as the Netherlands and the UK) have started to move in the past decade: these countries were looking for methods to reduce the regulatory burdens on businesses and to use more effectively the enforcement capacity of market surveillance authorities<sup>52</sup>. "Within this approach, the administrative authorities assume that corporations comply with the law spontaneously. However, if the administrative authority finds an infringement of the law, it will impose tough, punitive sanctions"<sup>53</sup>. More and more Member States also use the 'naming and shaming' of economic operators in order to increase the effect of penalties<sup>54</sup>.

"The development of a European regulatory toolkit could preserve the national procedural autonomy of Member States on the one hand, and contribute to more convergence in the enforcement practices of administrative authorities on the other. These remain free to choose the best fit enforcement measure to remedy violations of Union law. This is important, because the best enforcement measures could depend on the specific characteristics of a particular jurisdiction"<sup>55</sup>.

However, in order to make these different sanctions really efficient and to reach a certain uniformity among the Union, the European Commission should give some directions to the Member states' authorities in charge of applying the penalties. It could adopt similar guidelines to those that exist in the field of antitrust and competition law for on the imposing of fines in the fields of Consumer Product Safety and Market Surveillance. These guidelines would be addressed to national authorities and not to the European Commission, which has to date no power to impose penalties in the field of product safety. They would not be binding for the national authorities, which would retain full discretion as to their fining policy<sup>56</sup>.

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<sup>50</sup> A study conducted in 2000 on the practical implementation of the general product safety directive revealed that in several cases, sanctions provided for by the transposition law were only applied in a very limited number of countries. Several countries considered that sanctions had no dissuasive effect, while in some others there were professionals who tended to think that it was more profitable to pay the penalties rather than comply with obligations. It appeared that for professionals, a fear of their responsibility relating to the product liability law is much more effective. See: Fr. Maniet, *La sécurité des produits en Europe*, Centre de droit de la consommation, 2000 and Baker & McKenzie, *General Product Safety Directive (GPSD) – Comparative Inventory*, Service Contract 17.020100 / 04 / 391471, Frankfurt /Main, March 2006.

<sup>51</sup> K. de Weers, *op.cit.*, p.27.

<sup>52</sup> *Ibidem*, p. 60

<sup>53</sup> K. de Weers, *op.cit.*, p.41.

<sup>54</sup> See, for example, the Environment Agency in the UK, which began in 1999 to publish a list of the worst corporate offenders who had committed environmental crimes in the previous year.

<sup>55</sup> K. de Weers, *op.cit.*, p.55.

<sup>56</sup> They could, for example, follow the model of the Risk Assessment Guidelines for Consumer Products contained in point 5 of the Rapex Guidelines, Commission Decision of 16 December 2009 laying down guidelines for the management of the Community Rapid Information System 'RAPEX' established under Article 12 and of the notification procedure established under Article 11 of Directive 2001/95/EC (the General Product Safety Directive), JO L 22, 26.1.2010, p. 34-64.

## Summary of findings

	<b>Anti-trust and competition law</b>	<b>Air passengers</b>	<b>IPR</b>	<b>Energy</b>	<b>Envi</b>	<b>Food and feed control proposal</b>	<b>Personal data proposal</b>	<b>Market abuse</b>
Links between the penalties and the seriousness, duration and the intentional character	x for sanctions imposed by the Commission						x	x links with the gravity of the offence, previous offences or a suspect's cooperation with an
Minimal basis of administrative penalties						x only in the case of intentional infringement		x
Ceiling of administrative penalties	x for sanctions imposed by the Commission			x			x	x
Inclusion of criminal sanctions					x			x

	<b>Anti-trust and competition law</b>	<b>Air passengers</b>	<b>IPR</b>	<b>Energy</b>	<b>Envi</b>	<b>Food and feed control proposal</b>	<b>Personal data proposal</b>	<b>Market abuse</b>
Obligation of information of the European Commission about the decisions/	x							
Publicity of sanctions	x by the Commission at EU level		x by Member States and not by the Commission possibility not obligation project at EU level			x by Member States only		x possibility, not obligation by Member States and not by the Commission
Blacklisting		X on EU website				X not mandatory information remains at the level of Member States		

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## **ANNEX: EXPLANATION OF THE COMPARATIVE TABLE EU PROPOSAL/ US SYSTEM OF MARKS OF ORIGIN**

### **1. SITUATION IN THE US**

There are two different systems of indication of origin in USA: the country of origin claims (1) and the "Made in USA" claims (2). These two systems are regulated by different legislative instruments.

#### **1.1. Country of origin claims**

##### **1.1.1. Objective**

Country of origin claims pursue the double objective of enabling the application of taxation to goods (i) and informing the ultimate purchaser (ii).

##### **(i) Taxation of goods**

The basic role underpinning the rules of origin is the determination of the economic nationality, as opposed to the geographical nationality of a given item. Determining the country of origin is an essential factor in establishing the amount of Customs duties and taxes payable. The origin of an item will also determine, where appropriate, the application of any trade policy measures (allocating quotas, anti-dumping duties, trade embargoes, collection of trade statistics, etc.).

##### **(ii) Information for the ultimate purchaser**

Although it may not be possible to identify the ultimate purchaser in every transaction, broadly stated, the "ultimate purchaser" may be defined as the last person in the United States who will purchase or receive the article in the form in which it was imported<sup>57</sup>.

The ultimate purchaser could be:

- a consumer (who buys or receives the item): if an article is to be sold at retail in its imported form, the retail customer is the ultimate purchaser
- or manufacturer ( who further processes materials): when an article is imported into and used in the United States to manufacture another article with a different name, character or usage than the one imported.

"A person who subjects an imported article to a process that results in the article's substantial transformation is the ultimate purchaser, but if that process is only minor and leaves the identity of the imported article intact, the processor of the article will not be regarded as the ultimate purchaser"<sup>58</sup>.

##### **1.1.2. Product scope**

All products (food and non-food) of foreign origin imported into the USA must bear an indication of origin.

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<sup>57</sup> Par. 134.1d) 19 CFR and U.S. Customs and Border protection, *Importing into the USA, A guide for commercial importers*, 2006, U.S. Customs and Border protection, Washington D.C., p.96.

<sup>58</sup> *Ibidem*, p.96.

§ 1304a) of the Tariff Act, 19 U.S.C. (1999) provides some exceptions to this requirement by listing some articles exempted from this marking requirement:

- articles imported for use by the importer and not intended for sale in their imported or any other form
- articles to be processed in the United States by the importer or for his account (...) and in such manner that any mark of origin would necessarily be obliterated, destroyed, or permanently concealed
- articles that the ultimate purchaser in the United States, by reason of the article's character or the circumstances of its importation, must necessarily know the country of origin even though the article is not marked to indicate it.

This exception has been interpreted in a broad sense by the courts so that the importation of unmarked component parts in properly marked containers is allowed, provided the importer is the "ultimate user" of the goods (see *infra*).

There is also a special treatment foreseen for the goods of NAFTA countries.

#### 1.1.3. Status

The indication of the origin of the imported products is mandatory. These claims are regulated primarily by the U.S. Customs Service ("Customs" or "the Customs Service") under the Tariff Act of 1930.

§ 1304 of the Tariff Act, 19 U.S.C. (1999), administered by the Secretary of the Treasury and the Customs Service, requires that "every article of foreign origin (or its container) imported into the United States shall be marked (...) as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article".

#### 1.1.4. Place of the marking

The same provision of the Tariff Act states that the marking has to be placed on the product itself, in a "conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit". The marking is considered sufficiently permanent if it will remain on the article or container until it reaches the ultimate purchaser<sup>59</sup>. The best form of marking is one which becomes a part of the article itself, such as branding, stencilling, stamping, printing, moulding and similar methods. When tags are used, they must be attached in a conspicuous place, and in a manner that assures that they will remain on the article until it reaches the ultimate purchaser<sup>60</sup>.

"If marked articles are to be repacked in the United States after release from Customs Border Protection custody, importers must certify on entry that they will not obscure the marking on properly marked articles if the article is repacked, or that they will mark the repacked container. If an importer does not repack, but resells to a repacker, the importer must notify the repacker about marking requirements. Failure to comply with these certification requirements may subject importers to penalties and/or additional duties"<sup>61</sup>.

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<sup>59</sup> *Ibidem*, p.96.

<sup>60</sup> US Customs and Border Protection, *Marking of the country of origin on U.S. imports- Acceptable terminology and Methods for marking*, Washington D.C., 2004, p. 3.

<sup>61</sup> U.S. Customs and Border protection, *op.cit.*, p. 97.

Some articles are exempted from marking but the outermost containers in which these articles ordinarily reach the ultimate purchaser in the United States must also be marked to indicate the English name of the country of origin of the articles.

These articles are mainly<sup>62</sup> :

- Articles incapable of being marked (A),
- Articles that cannot be marked prior to shipment to the United States without injury (B),
- Articles that cannot be marked prior to shipment to the United States except at a cost economically prohibitive of their importation (C),
- Articles for which marking of the containers will reasonably indicate their country of origin (D),
- Crude substances (E),
- Articles produced more than 20 years prior to their importation into the United States (I),
- A list of articles and classes of articles which, due to their characteristics, shape or nature are not required to be marked to indicate country of origin is also given by the Tariff Act<sup>63</sup>(J). If these articles are repacked in the United States, the new packages must be labelled to indicate the country of origin of the articles they contain. If they do not package, but resell to repackagers, they must notify repackagers about these marking requirements.

As mentioned in point 1.1.2., some articles are excluded from the marking and also exempted from container marking <sup>64</sup>:

- Articles imported for use by the importer and not intended for sale in its imported or any other form (F),
- Articles to be processed in the United States by the importer or for his account other than for the purpose of concealing the origin of the article and in such manner that any mark of origin would necessarily be obliterated, destroyed, or permanently concealed (G),
- Articles that the ultimate purchaser in the United States, by reason of the article's character or the circumstances of its importation, must necessarily know the country of origin even though the article is not marked to indicate it (H).

It seems that the courts have interpreted this last exception in a broad way, which would permit an importer to import component parts in containers duly marked with the country of origin in lieu of marking each individual article<sup>65</sup>.

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<sup>62</sup> See 19.U.S.C. 1304, par. 134.32, exceptions A,B, C, D, E, I,.

<sup>63</sup> These articles are for example: Works of art, Jute Bags, Steel Bands, Briquettes, coal or coke, Buttons, Playing Cards, Cellophane and celluloid in sheets, bands, or strips, Chemicals, drugs, medicinal and similar substances, when imported in capsules, pills, tablets, lozenges, or troches, Cigars and cigarettes, Eggs, Feathers, Flowers, Glass, fish hooks, Livestock, Monuments, Nails, Natural products, such as vegetables, fruit, nuts, berries, and live or dead animals, fish and birds; Paper, newsprint, Paper, stencil, Paper, Plants, Ribbon, Rivets, Rope, Screws, Sponges, Stamps, Tiles, not over one inch in greatest dimension, Christmas Trees,....

<sup>64</sup> See 19.U.S.C. 1304, par. 134.32, exceptions F, G, H.

<sup>65</sup> D. Silverstein, Country-of-origin marking requirements under Section 304 of the Tariff Act: an importer's map through the maze, *American Business Law Journal*, 1987, Vol. 25, p. 291.

"In summary, imported components or semi-finished goods need not be individually marked with the country of origin provided that: (1) they are shipped in a properly marked container, and (2) the importer or user is considered an "ultimate purchaser" under the law. Whether the importer or user will be deemed an "ultimate purchaser" turns on whether a "substantial transformation" is made in the imported goods before resale in the United States"<sup>66</sup>.

Some articles in metal such as knives, clippers, shears, safety razors, surgical instruments, scientific and laboratory instruments and pliers have to be marked in a special way: by die-stamping, cast-in-the-mould lettering, etching (acid or electrolytic), engraving, or by means of metal plates that bear the prescribed marking and that are securely attached to the article in a conspicuous place by welding or rivets.

Watches and clocks also have to be marked in a specific way.

The Secretary of the Treasury may, by means of regulations prescribe other reasonable methods of marking and the place on the article (or container) where the marking must appear.

#### 1.1.5. Mention and language

There is no unique way of expressing the origin of the product under the Tariff Act. Customs requires the foreign country of origin to be preceded by "Made in," "Product of," or words of a similar meaning.

"Use of the words "assembled in" may be used to indicate the country of origin of an article where the country of origin of the article is the country in which the article was finally assembled. "Assembled in" may be followed by the statement "from components of (the name of the country or countries of origin of all the components)"<sup>67</sup>.

The Secretary of the Treasury may, by means of regulations, require the addition of any other words or symbols which may be appropriate to prevent deception or misunderstanding as to the origin of the article.

The name of the country of origin has to appear in English.

#### 1.1.6. Determination of the country of origin

Pursuant to 19 U.S.C. §, 1484, and the applicable implementing regulations, importers are required to use "reasonable care" in declaring the correct country of origin of imported goods.

There are two basic concepts behind determining the origin of goods namely:

- Goods incorporating material and/or processing from one single country or '*wholly obtained*' products (i)
  - Goods incorporating material and/or processing from more than one country (ii).
- (i) Goods incorporating material and/or processing from one single country or "*Wholly obtained*" products.

<sup>66</sup> *Ibidem*, p. 292.

<sup>67</sup> US Customs and Border Protection, *Marking of the country of origin on U.S. imports- Acceptable terminology and Methods for marking*, Washington D.C., 2004, p.4.

The simplest case is when only one country is involved, with no foreign input. The country of origin will in that case be the country of "manufacture, production or growth" (19 CFR § 134.1). In practice, this will be restricted mainly to products obtained in their natural state and those derived from wholly obtained products, such as mineral products, vegetable products or live animals born and raised in a given country.

(ii) Goods incorporating material and/or processing from more than one country

Increasingly, goods are processed in multiple countries using both domestic and foreign materials, thereby complicating the process of determining a country of origin. "It is almost impossible to define clearly where a manufactured product is made in the global market"<sup>68</sup>.

Moreover, another difficulty is present in taking into account the location of intangible aspects of production (research and development, computer software, advertising and marketing, etc.), which often form the core of the value ascribed to a product. These intangible aspects of production lead to products eluding any attempt to grasp a definite country of origin<sup>69</sup>.

The example of iPhones, designed and marketed by Apple, is particularly relevant to illustrate the complexity of determining a country of origin for non-food products. Except for its software and product design, iPhones are produced outside the US. The manufacturing of iPhones involves nine companies, located in China, the Republic of Korea, Japan, Germany and the US. All iPhone components produced by these companies are shipped to Foxconn, a company from Taipei, China, to be assembled into finished products and then exported to the US and the rest of the world<sup>70</sup>. This is why, on the back of iPhones, one can read "Designed by Apple in California, Assembled in China."

If two or more countries are involved in the production of goods, the concept of "last, substantial transformation" determines the origin of the goods (19 CFR § 134.1b). This rule was created and has been interpreted by the courts, and codified in administrative regulations. Where an imported product incorporates materials and/or processing from more than one country, customs considers the country of origin to be the last country in which a "substantial transformation" took place.

A substantial transformation is a manufacturing or other process that results in a new and different article of commerce, having a new name, character and use that is different from that which existed prior to the processing.

Country-of-origin determinations using the substantial transformation test are made on a case-by-case basis through administrative determinations by the Customs Service.

The US Customs and Border Protection (CPB) Office has itself acknowledged that there remains considerable uncertainty about what is deemed to be substantial transformation due to the "inherently subjective nature" which may be involved in CBP interpretations of these facts<sup>71</sup>. This uncertainty has been criticized by some importers, who consider that

<sup>68</sup> Yuqing Xing et Neal Detert, *How the iPhone Widens the United States Trade Deficit with the People's Republic of China*, Tokyo, Asian Development Bank Institute, 2010, pp 3-4, <http://www.adbi.org/working-paper/2010/12/14/4236.iphone.widens.us.trade.deficit.prc/>; See also: V. C. Jones, M. F. Martin, *International Trade: Rules of Origin*, Congressional Research Service, January 5, 2012, p.1.

<sup>69</sup> Y. Jégo, *En finir avec la mondialisation anonyme, La traçabilité au service des consommateurs et de l'emploi, Rapport à M. le Président de la République*, La Documentation française, mai 2010, p.2, en ligne : <http://www.ladocumentationfrancaise.fr/rapports-publics/104000213/>.

<sup>70</sup> Yuqing Xing et Neal Detert, *op.cit.*, p 3-4.

<sup>71</sup> V. C. Jones, M. F. Martin, *International Trade: Rules of Origin*, Congressional Research Service, January 5, 2012, p.3.

some origin determinations remain too subjective and/or inconsistent and may even run contrary to congressional (legislative) intent<sup>72</sup>.

"This type of search requires the exporter, importer, or producer to furnish a great deal of factual information to prove substantial processing. This fact-intensive, time-consuming inquiry raises the cost of determining origin, makes the rule even more restrictive and complex than it otherwise would be, and contradicts the spirit and purpose of the last substantial transformation rule"<sup>73</sup>.

There are also specific rules defining "country of origin" in NAFTA countries (Canada, Mexico and the United States). Paragraph 1 of Annex 311 of the NAFTA provides that the NAFTA parties shall establish "Marking Rules" to determine when a good is originating from a NAFTA country<sup>74</sup>.

#### 1.1.7. Enforcement

The Customs administration is principally in charge of the enforcement of the indication of origin markings. Customs and Border Protection officials at Customs and Border Protection ports of entry are responsible for verifying the accuracy of the declarations during the clearance of goods through customs.

However, the Customs Modernization Act (Title VI of P.L. 103-182) actually shifted much of the responsibility for complying with customs laws and regulations from Customs and Border protection officials to the importer. In cases where the country of origin is unclear, importers may seek advance rule of origin rulings from Customs and Border protection officials in an effort to accelerate the import process<sup>75</sup>.

That responsibility is discharged and monitored through the review of pertinent documents (or electronically transmitted information) and through selected audits of the merchandise and the importer.

"No imported article of foreign origin which bears a name or mark calculated to induce the public to believe that it was manufactured in the United States, or in any foreign country or locality other than the country or locality in which it was actually manufactured, shall be admitted to entry at any customhouse in the United States"<sup>76</sup>. Merchandise discovered, after conditional release, to have been missing a required country of origin marking may be subject to an order for redelivery to CBP custody.

<sup>72</sup> *Ibidem*, p. 7.

<sup>73</sup> J. Weiler, S. Cho and I. Feichtner, *International and regional trade law: the Law of the World Trade Organization. Unit III: Rules of origin*, 2011, p. 10.

<sup>74</sup> Article 401 of NAFTA Agreement defines "originate" in four ways:

1. Goods wholly obtained or produced entirely in the NAFTA region (these contain no foreign inputs);
2. Goods produced entirely in the NAFTA region exclusively from originating materials (these contain foreign materials that have been previously manufactured into originating materials);
3. Goods meeting an Annex 401 specific rule of origin such as a prescribed change in tariff classification, regional value content requirement; and in extremely limited instances,
4. Unassembled goods and goods classified with their parts, which do not meet the tariff-shift rule but contain 60 percent regional value content using the transaction-value method, or 50 percent using the net-cost method. Annex 401 of NAFTA is codified in General Note 12(t) of the Harmonized Tariff Schedule of the United States and is available at [www.cbp.gov/nafta/rulesorg.htm](http://www.cbp.gov/nafta/rulesorg.htm).

<sup>75</sup> V. C. Jones, M. F. Martin, *International Trade: Rules of Origin*, Congressional Research Service, January 5, 2012, p.2.

<sup>76</sup> Section 42 of the Trademark Act of 1946 (15 U.S.C. 1124).

The compensation and expenses of customs officers and employees assigned to supervise the exporting, destruction, or marking of exempt articles, in carrying out duties provided for in this subsection shall be reimbursed to the Government by the importer.

In addition, the Federal Trade Commission, whose mission is to protect consumers against fraud, deception and unfair business practices in the marketplace, could also pursue a case if deception was involved regarding country of origin.

For example, in many cases, the words "United States," the letters "U.S.A.," or the name of any city or locality in the United States appearing on an imported article of foreign origin, or on the containers thereof, are considered to be calculated to induce the public to believe that the article was manufactured in the United States unless the name of the country of origin appears in close proximity to the name which indicates a domestic origin<sup>77</sup>. Finally, the Federal Trade Commission has jurisdiction over foreign-origin claims in advertising, which the U.S. Customs Service does not regulate.

#### 1.1.8. Sanctions

According to the Tariff Act, if the article – or its container, when the container and not the article must be marked – is not properly marked at the time of importation, a marking duty equal to 10 percent of the article's customs value will be assessed unless the article is exported, destroyed or properly marked under CBP supervision before the entry is liquidated<sup>78</sup>.

Incorrect country of origin information may also lead to delays and detentions and, if the country of origin affects admissibility, to denials of entry. In addition, negligent or fraudulent country of origin information can lead to monetary penalties or, in certain cases, to criminal sanctions.

### 1.2. "Made in the USA" claims

#### 1.2.1. Objective

Many American producers mark their goods as being of US origin in order to inform consumers, to help in preventing consumer deception as to the true origin of the goods and to promote the attractiveness of American products in the eyes of the consumer. "Since the terrorist attacks of September 11, news reports suggest that consumers are more sensitive to "Made in USA" claims and more interested in buying American-made goods"<sup>79</sup>.

#### 1.2.2. Scope of application

All products manufactured in the USA can virtually bear a "Made in USA" claim. But it is not because an imported product does not need a foreign country-of-origin mark, that it is necessarily permissible to promote that product as *Made in the USA*. The Federal Trade Commission indeed considers additional factors to decide whether a product can be advertised or labelled as *Made in the USA*.

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<sup>77</sup> U.S. Customs and Border protection, *op.cit.*, p.103.

<sup>78</sup> Art.19 USC par 1304 i.

<sup>79</sup> Selling 'American-Made' Products? What Businesses Need to Know About Making Made in USA Claims, on line: <http://business.ftc.gov/documents/alt101-selling-american-made-products-made-usa-claims>.

### 1.2.3. Status

There is no requirement for goods made wholly or partially in the US to be labelled with a “made in the USA” claim or similar. Unless the product is an automobile or a textile or wool product, there’s no law that requires manufacturers and marketers to make a “Made in USA” claim.

The Federal Trade Commission does not pre-approve labelling or advertising claims; companies making the claims must be able to justify each type of claim.

As with most other advertising claims, a manufacturer or marketer may make any claim as long as it is truthful and substantiated. Manufacturers and marketers who choose to make claims about the amount of U.S. content in their products must, however, comply with the FTC’s *Made in the USA* policy.

The enforcement policy statement issued by the FTC details all the conditions an item has to meet in order to be eligible to bear a “Made in USA claim”.

### 1.2.4. Place of the marking

Since the system is entirely voluntary, there are no specific requirements as to the place where the “Made in USA” claim has to be presented.

### 1.2.5. Mention

There are two different types of “Made in USA” claim: unqualified claims (i) and qualified claims (ii).

- (i) Unqualified claims (without qualifications or limits on the claim ):

As there is no standard “Made in USA” claim, the various forms can be expressed in several ways and may also be implied.

- Examples of expressly made claims: *Made in the USA*. “Our products are American-made.” “USA.”
- Examples of implied claims: “A company promotes its product in an ad that features a manager describing the “true American quality” of the work produced at the company’s American factory. Although there is no express representation that the company’s product is made in the U.S., the overall — or net — impression the ad is likely to convey to consumers is that the product is of U.S. origin”<sup>80</sup>.

In identifying implied claims, the overall impression of the advertising, label, or promotional material will be assessed.

“Depending on the context, U.S. symbols or geographic references (for example, U.S. flags, outlines of U.S. maps, or references to U.S. locations of headquarters or factories) may convey a claim of U.S. origin either by themselves, or in conjunction with other phrases or images”<sup>81</sup>.

- (ii) Qualified claims:

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<sup>80</sup> Federal Trade Commission, *Complying with the Made in USA standard*, <http://www.business.ftc.gov/documents/bus03-complying-made-usa-standard>, p.4.

<sup>81</sup> Ibidem, p.24.

A qualified *Made in the USA* claim is appropriate for products that include U.S. content or processing, but don't meet the criteria for making an unqualified *Made in the USA* claim.

A Qualified *Made in the USA* claim describes the extent, amount or type of a product's domestic content or processing; they indicate that the product isn't entirely of domestic origin. Examples: "60% U.S. content." /"Made in USA of U.S. and imported parts." /"Couch assembled in USA from Italian Leather and Mexican Frame."

All *Made in the USA* claims, qualified or unqualified must be truthful and substantiated.

The Federal Trade Commission gives the following example:

"An exercise treadmill is assembled in the U.S. The assembly represents significant work and constitutes a "substantial transformation" (a term used by the U.S. Customs Service). All of the treadmill's major parts, including the motor, frame, and electronic display, are imported.

A few of its incidental parts, such as the handle bar covers, the plastic on/off power key, and the treadmill mat, are manufactured in the U.S. Together, these parts account for approximately three percent of the total cost of all the parts.

Because the value of the U.S.-made parts is negligible compared to the value of all the part, a claim on the treadmill that it is "Made in USA of U.S. and Imported Parts" is deceptive. A claim like "Made in U.S. from Imported Parts" or Assembled in U.S.A." would not be deceptive"<sup>82</sup>.

In addition, if a product is of foreign origin (that is, it has been substantially transformed abroad), manufacturers and marketers also will have to comply with the requirements related to the foreign country of origin marking.

Both claims (mandatory indication of origin and qualified "made in USA" claim) can, therefore, co-exist in this case. "Thus, on a product label, where the Tariff Act requires that the product be marked with a foreign country of origin, Customs regulations permit indications of U.S. origin only when the foreign country of origin appears in close proximity and is at least of comparable size. As a result, under Customs regulations, a product may, for example, be properly marked "Made in Switzerland, finished in U.S." or "Made in France with U.S. parts," but it may not simply be labeled "Finished in U.S." or "Made with U.S. parts" if it is deemed to be of foreign origin"<sup>83</sup>.

Other examples of qualified claims are given by the Federal Trade Commission<sup>84</sup>, such as:

- A company designs a product in New York City and sends the blueprint to a factory in Finland for manufacturing. It labels the product "Designed in USA — Made in Finland." Such a specific processing claim would not lead a reasonable consumer to believe that the whole product was made in the U.S. The Customs Service requires the product to be marked "Made in," or "Product of" Finland since the product is of Finnish origin and the claim refers to the U.S.
- "Bound in U.S.— Printed in Turkey."
- "Hand carved in U.S. —Wood from Philippines."
- "Software written in U.S.— Disk made in India."
- "Painted and fired in USA. Blanks made in (foreign country of origin)."

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<sup>82</sup> Ibidem, p.10.

<sup>83</sup> Ibidem, p.33.

<sup>84</sup> Ibidem, p. 11.

### 1.2.6. Determination of the country (USA)

According to the Federal Trade Commission's policy, an unqualified "Made in the USA" claim means that "all or virtually all" of the product has been made in the US<sup>85</sup>. That means that all significant parts, processing and labour that went into the product must be of U.S. origin. Products should not contain any — or only negligible — foreign content.

The FTC's Enforcement Policy Statement and its business guide, *Complying with the Made in the USA Standard*, spell out the details of the standard, with examples of situations where domestic origin claims would be accurate and when they would be inappropriate.

A product that is fully or almost entirely made in the United States will ordinarily be one in which all significant parts and processing leading to the finished product are of U.S. origin.

In other words, where a product is labelled or otherwise advertised with an unqualified *Made in the USA* claim, it should contain "only a *de minimis*, or negligible, amount of foreign content. Although there is no single "bright line" to establish when a product is or is not "all or virtually all" made in the United States, there are a number of factors that the Commission will look to in making this determination"<sup>86</sup>. The main factors taken into consideration are whether the product's final assembly or processing has taken place in the U.S., how much of the product's total manufacturing costs can be assigned to U.S. parts and processing, and how far removed any foreign content is from the finished product<sup>87</sup>.

Raw materials are also included in an evaluation of whether a product is "all or virtually all" made in the U.S., but it depends on how much of the product's cost the raw materials constitute, and how far removed from the finished product they are.

Examples<sup>88</sup>:

**1) Propane barbecue grills produced at a plant in Nevada.**

- Product's major components: gas valve, burner and aluminium housing, each of which is made in the U.S.
- The grill's knobs and tubing are imported from Mexico.

*Made in the USA* claim: allowed.

Why? In this case, the knobs and tubing make up a negligible portion of the product's total manufacturing costs and are insignificant parts of the final product.

**2) Table lamp**

- Table lamp assembled in the U.S. from American-made brass, an American-made Tiffany-style lampshade and an imported base.
- The base accounts for a small percentage of the total cost of making the lamp.

*Made in the USA* claim: deceptive

<sup>85</sup> The term "United States," as referred to in the Enforcement Policy Statement, includes the 50 states, the District of Columbia, and the U.S. territories and possessions.

<sup>86</sup> Federal Trade Commission, *op.cit.*, p.26.

<sup>87</sup> *Ibidem*, p.26.

<sup>88</sup> The examples are taken from: FTC, *Complying with a Made in USA standard*, 1998, on line: <http://www.ftc.gov/os/statutes/usajump.shtml>.

Why? The base is not far enough removed from the finished product's manufacturing process to be of 'little consequence' and is considered a significant part of the final product.

**3) Imported gold ring**

*Made in the USA* claim: deceptive.

Why? The significant value of the gold is likely to represent that of the finished product, and because the gold — the integral component — is only one step 'back' from the finished article.

**4) Clock radio**

- clock radio made in the US of US-made components.
- the plastic in the plastic case is made from imported petroleum

*Made in the USA* claim: allowed.

Why? The petroleum is far enough removed from the finished product, and is also an insignificant part of it.

A qualified *Made in the USA* claim is appropriate for products that include U.S. content or processing but don't meet the criteria for making an unqualified *Made in the USA* claim.

In order to facilitate the task of economic operators and to help them to decide whether they are entitled or not to use unqualified claims, some companies propose a "Calculator" that standardizes the Made in the USA content calculation<sup>89</sup>.

A qualified *Made in the USA* claim, like an unqualified claim, must be truthful and substantiated.

The principles set forth in this enforcement policy statement apply to U.S. origin claims included in labelling, advertising, other promotional materials and all other forms of marketing, including that through digital or electronic means such as the Internet or electronic mail<sup>90</sup>.

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### 1.2.7. Enforcement

The Federal Trade Commission verifies that the "Made in USA" claims on products are truthful and accurate. It has brought these types of cases several times in the past<sup>92</sup>.

It provides a toll-free number on its website for any person, economic operator or consumer who believes that a product promoted as "Made in USA" is not America-made or

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<sup>89</sup> <http://www.madeinusacontent.com/made-in-usa-standard/>.

<sup>90</sup> Federal Trade Commission, op.cit., p.3.

<sup>91</sup> Federal Trade Commission, op.cit., p.3.

<sup>92</sup> See different examples on: <http://www.ftc.gov/opa/2001/11/musa.shtm>.

contains significant foreign parts or processing. A complaint form is also available on the website of the FTC<sup>93</sup>.

#### 1.2.8. Sanctions

The FTC has jurisdiction on the basis of Section 5 of the Federal Trade Commission Act, which prohibits unfair and deceptive practices in trade and allows the FTC to impose sanctions upon a company if the mark of origin used is misleading.

According to the Federal Trade Commission Act (15 U.S.C. §§ 41-58, as amended), the FTC is entitled to issue an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest.

When the Commission issues a consent order on a final basis, it carries the force of law with respect to future action. Each violation of such an order may result in a civil penalty of up to \$16,000.

A recent example concerned a marketer of iPhone accessories, bottle holders, lens cleaners, dog collars, leashes, and other outdoor accessories who had falsely claimed that some of its products were "Made in the U.S.A," or "Truly Made in the USA", even though they contained substantial foreign content.

The FTC alleged that the company imported many of its products and components, and that it distributed deceptive promotional materials for its products to retailers. The FTC alleged that the company violated the Federal Trade Commission Act by making false and unsupported statements that its products were all or virtually all made in the United States.

The company was prohibited from claiming that any product is made in the United States, from making any misleading claims about a product's country of origin and from providing deceptive promotional material to retailers. The company was also required to contact all distributors who had bought or received products between January 1, 2010 and May 1, 2013, and to provide them with a notice and a copy of the order<sup>94</sup>.

### 1.3. Specific sectors:

In some specific sectors, indications of origin are imposed for some goods having been wholly made or assembled in the States.

#### 1.3.1. Textiles and wool products:

The Textile Product Identification Act and the Wool Products Labelling Act require the placing of *USA* label if the final product is manufactured in the U.S. of fabric manufactured in the U.S., regardless of where materials used earlier on in the manufacturing process (for example, the yarn and fibre) came from.

Imported products must identify the country where they were processed or manufactured.

Products made in the U.S. of imported materials must be labelled to show the processing or manufacturing that takes place in the U.S., as well as the imported component. Products partly manufactured in the U.S. and partly abroad must identify both aspects.

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<sup>93</sup> See: <http://www.ftc.gov/os/statutes/usajump.shtm>.

<sup>94</sup> Marketer of Outdoor Accessories Agrees to Drop Made-in-the-USA Claims, 21 October 2013, <http://ftc.gov/opa/2013/10/ekcessories.shtm>.

In addition, print and online catalogues must disclose whether a textile was made in the USA, imported or both<sup>95</sup>.

### 1.3.2. Furs

The Fur Products Labelling Act requires that the country of origin for imported furs be shown on all labels and in all advertising<sup>96</sup>.

### 1.3.3. Cars

The American Automobile Labelling Act (AALA) requires that every car manufactured on or after October 1st, 1994, and which is for sale in the U.S. bears a label disclosing:

- where the car was assembled,
- the percentage of equipment that originated in the U.S. and Canada,
- and the country of origin for the engine and transmission.

When a company makes claims in advertising or promotional materials that go beyond the AALA requirements, it will be held that they meet the Commission's standard.

### 1.3.4. Meat

On October 1, 2008 the US Government implemented the Mandatory Country-of-Origin Labelling (mCOOL), which requires that beef, pork and other meats sold in U.S. retail stores to be labelled to indicate the country in which the animal was born

## 2. E.U PROPOSAL FOR A REGULATION ON CONSUMER PRODUCT SAFETY (ART.7)

"Current Community legislation requires in all cases a declaration of origin (based on preferential or non preferential rules, as the case may be) to accompany imported goods, but does not provide for any origin marking, except for some specific cases in agricultural legislation. There is no requirement or reference regulation on non-EU origin products to carry any origin marking, nor currently any legal basis for a made in the EU origin marking.

As a result there is no uniform practice in the EU regarding the use of an EU origin mark and no means at EU level to ensure that such marks when used are used accurately"<sup>97</sup>.

Compulsory origin marking for imported goods at national level is prohibited within the EU. In 1985, the Court of Justice ruled against the prohibition of the retail sale of certain goods imported from other Member States unless they were marked with or accompanied by an indication of origin<sup>98</sup>.

Voluntary origin marking either on domestic production or on foreign goods is allowed where traders wish to indicate this for consumer information purposes or as a private mark

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<sup>95</sup> For more details, see: "Threading Your Way Through the Labeling Requirements Under the Textile and Wool Acts," [www.ftc.gov/bcp/online/pubs/buspubs/thread.htm](http://www.ftc.gov/bcp/online/pubs/buspubs/thread.htm) and <http://www.ftc.gov/os/statutes/textile/woolact.shtm>.

<sup>96</sup> Fur Labeling Rule: <http://www.ftc.gov/os/statutes/textile/rr-fur.shtm>.

<sup>97</sup> European Commission, Directorate General for Trade, Made in the EU Origin Marking, Working Document of the Commission Services, 12 December 2003, p.2.

<sup>98</sup> Commission vs United Kingdom, Case 207/83, 25 April 1985.

of distinction. Companies are free to label their products with the country of origin. If they do so, the information on the label should be accurate and correct according to the consumer protection legislation of the Member States.

The idea of creating an indication of origin marking in the EU has been on the table for many years; since 2006, a lot of discussion has taken place on this topic, but until today, no harmonized legislation has been implemented. For seven years, the European Commission has tried unsuccessfully to introduce "Made in" only for certain sectors and products from third countries<sup>99</sup>.

The proposal for a Regulation on consumer product safety contains in its article 7 a provision related to the mandatory indication of origin for all consumer goods.

## 2.1. Objectives

Justification<sup>100</sup>:

- 1) Supplements the basic traceability requirements concerning the name and address of the manufacturer.
- 2) helps to identify the actual place of manufacture in all those cases where the manufacturer cannot be contacted (address different from the actual place of manufacture/ **name and address of the manufacturer is missing/address was on the packaging that has been lost**).
- 3) This information can facilitate the task of MS authorities in tracing the product back to the actual place of manufacturer and enable contacts with the authorities of the countries of origin.
- 4) **Would make it easier for consumers to access information about the product chain, thereby increasing their level of awareness (name and address of manufacturer does not necessarily mean the country of production).**
- 5) **Will bring the Union into line with the international trade regime, as in several jurisdictions of the trade partners of the Union, the indication of origin is mandatory on product labelling and in customs declarations.**
- 6) **Will comply with the international trade obligations of the Union, as it covers all non-food products on the territory of the Union, whether imported or not.** As highlighted by the rapporteur, mandatory origin marking on consumer products would be fully compatible with the rules of the WTO as it would cover "*all non-food products on the territory of the Union, whether imported or not*", thereby excluding any risk of discrimination.

## 2.2. Product Scope

Origin marking regulation covers all consumer goods placed or made available on the market, that is : (i) imported goods and (ii) domestic production for the internal market,

<sup>99</sup> See : Proposal for a Council Regulation on the indication of the country of origin of certain products imported from third countries, Brussels, 16.12.2005, COM(2005) 661 final.

<sup>100</sup> Whereas no 21. The bold characters refer to the amendments proposed by the IMCO report (amendments.no 30. 31, 32 CPSR).

except the products excluded from the scope of application of the Regulation (food, medicinal products, materials in contact with food, feed, etc.).

## **2.3 Status**

Article 7 of the proposal imposes the obligation on all manufacturers and importers to ensure that their products bear an indication as to the origin of the product.

## **2.4. Place of the marking**

The marking has to be on the product itself or, if the size or nature of the product does not allow it, on the packaging or in a document accompanying the product.

## **2.5. Mention and language**

No particular mention is foreseen by the proposal, which only states that, when the country of origin is a Member State of the Union, manufacturers and importers can choose to refer either to the Union in general, or to the Member State in particular.

No precise details are given by the proposal concerning the language to be used on the label. The IMCO has proposed an amendment stating that "Manufacturers shall be authorized to indicate the country of origin in English alone (made in "country"), since this is readily comprehensible for consumers" (amendment 62 CPSR).

## **2.6. Determination of the country of origin**

As in the USA, there are two basic concepts to determine the origin of goods, namely '*wholly obtained*' products and products that have undergone a '*last substantial transformation*'.

(i) Wholly obtained products: If only one country is involved, the "wholly obtained" concept will be applied. In practice this will be restricted mainly to products obtained in their natural state and those derived from wholly obtained products, such as mineral products, vegetable products, live animals and products derived from lived animals.

(ii) If two or more countries are involved in the production of goods, the concept of "last, substantial transformation" also determines the origin of those goods.

The determination of the country of origin is made on the basis of art. 24 (new 60) of the Community Customs Code<sup>101</sup>, stating that "goods whose production involved more than one country shall be deemed to originate in the country where they underwent their last, economically justified processing or working, in an undertaking equipped for that purpose and resulting in the manufacture of a new product or representing an important stage of manufacture".

These rules of origin are based predominantly on the criteria of substantial transformation (especially, change in tariff classification) thus prefer the stage of final production to that of intermediate production, which essentially represents component production. The European Communities use a similar default rule to the American one<sup>102</sup>; substantial transformation is

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<sup>101</sup> Amendment 61 of the IMCO suggests the reference to article 52 to 55 of Regulation no 952/2013 of 9 October 2013 laying down the Union Customs Code. However we believe, that reference should rather be made to article 59 and following.

<sup>102</sup> J. Weiler, *op.cit.*, p.16.

called “*justified working or processing*” in the European context<sup>103</sup>. There is no fundamental difference in the meaning of these two expressions, even if the wording is somewhat different.

There are three major criteria to express a substantial/sufficient transformation; these criteria are used preferably for certain goods.

- (i) The criterion of a change in tariff classification

An item is considered substantially transformed when that article is classified in a heading or subheading (depending on the exact rule) different from all non-originating materials used.

- (ii) The criterion of value added (ad valorem percentages)

Regardless of any change in its classification, an item is considered substantially transformed when the value added to that article increases up to a specified level, expressed by ad valorem percentage. The value added criterion can be expressed in two ways, namely a maximum allowance for non-originating materials or a minimum requirement of domestic content.

- (iii) The criterion of manufacturing or processing operations (technical requirement)

Regardless of any change in its classification, an item is considered substantially transformed when that article has undergone specified manufacturing or processing operations.

## 2.7. Enforcement

The proposal for a Regulation on consumer product safety does not foresee specific provisions related to the enforcement of the indication of origin<sup>104</sup>. Chapter II, III and IV of the proposal on market surveillance deal in a general manner with enforcement of the provisions of the Regulation on consumer product safety.

Article 6 of the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market<sup>105</sup> deals with the misleading use of origin indications.

It foresees, among other factors, that: “A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise (...):

<sup>103</sup> World customs organization, *Substantial Transformation: Concept of "Originating Goods" / "Sufficient Working or Processing"*, <http://www.wcoomd.org/en/topics/origin/instrument-and-tools/comparative-study-on-preferential-rules-of-origin/specific-topics/study-topics/suf.aspx>.

<sup>104</sup> See amendment no 59 proposed by the Committee on International Trade to the proposal for a Regulation on market surveillance of products completes Article 23.1 related to the cooperation and exchange of information between the market surveillance authorities, stating that this cooperation should also apply to the product's origin or its components and that the Member States have to ensure that these procedures are fully consistent with the Union's external border management.

<sup>105</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22–39.

(b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product”;

However, this directive does not define the meaning of 'made in' and does not empower customs authorities to carry out inspections.

## 2.8. Sanctions

There are no specific provisions related to the sanctions that would apply in the case of an infringement of the indication of origin requirement in Article 18 of the Proposal for a Regulation on consumer product safety, nor in Article 31 of the Proposal on market surveillance. No specific sanction is mentioned in the proposals in the case of a wrong or misleading indication of origin or in the case of an absence of such a marking.

## Conclusion

The system for indicating origin put forward in the EU proposal for a Regulation on consumer product safety is quite similar to the American “country of origin” claim. One of the main differences between these systems relates to scope for their application.

First of all, the EU-proposed system is not restricted to imported goods but covers all imported and non imported products, while the American system imposes the indication of origin to imported goods only, the “Made-in-USA” label being optional (except for textiles, wool, fur and cars).

Secondly, the European system only covers consumer goods, while in theory the American system does not distinguish between consumer and industrial goods. However, this difference may not prove to be significant in practice, as it seems that in the USA, imported components or semi- finished goods need not be individually marked with the country of origin provided they are shipped in a properly marked container, and the importer or user is considered an “ultimate purchaser” under the law. In that case, however, it is far from certain that information on the true origin of a product effectively reaches the consumer.

Despite its potential benefits, the country-of-origin labelling system in the US faces important challenges that stem from problems related to its practical implementation and an insufficient legal framework<sup>106</sup>. The complexity of determining a country of origin in the context of globalized production chains is one of the main problems facing the current US system. This determination is made on the basis of a similar rule in the EU, even if the wording of the legislative provisions is somewhat different (“substantial transformation” in the USA / “justified working or processing” in the EU.)

Businesses criticize the current process as lacking clarity, consistency, and predictability<sup>107</sup>.

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<sup>106</sup> E. Conway, Étiquetage obligatoire de l'origine des produits au bénéfice des consommateurs : portée et limites, *Revue Québécoise de Droit International*, 24.2 (2011), p.1-51. See also V. C. Jones, M. F. Martin, *op.cit.*, p.7.

<sup>107</sup> J. Weiler, *op.cit.*, p.18.