

Att.: GROW-B1@ec.europa.eu

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Consultation - Draft Guidelines, article 4 of regulation 2019/1020 on market surveillance and compliance of products, for the purpose of market surveillance authorities and economic operators

The Danish Chamber of Commerce thanks the Commission for the possibility to contribute to the consultation and would like to submit the following comments:

Introduction

In our view there is currently a huge challenge with unsafe goods entering EU directly to consumers, mostly through online platforms and marketplaces.

We are aware that the introduction of a “responsible person/economic operator” intends to make this challenge less serious. However, we are concerned that the model described will not solve the problem and in worst case make the situation worse.

In our view no product should be able to be placed on the EU market without any EU company being not only “responsible” but also “liable” for the safety of the product.

In principle no product can – according to the European product safety legislation - legally be placed on the European market without a European operator being liable for the safety of the product (either a liable European manufacturer or a liable European importer).

We are concerned that this new model with a responsible person/European operator will undermine the well-functioning system and we would therefore have preferred a model that understudied the already existing system and didn't accept the free-riding of new business models not respecting the fundament of the European product safety regulation.

As such, we don't see any reason why the safety of the European consumers should be jeopardized simply for the benefit of the business model of large platforms and marketplaces facilitating the sale of (non-compliant) products manufactured and sold by third-country-sellers to European consumers.

Further, we don't find it in the interest of the European Union that reputable

European businesses which comply with the European product safety legislation are undermined and becomes subject to unfair competition on the mentioned grounds.

As goes for the practical enforcement of this new model we would also like to express our concerns.

Given the fact that billions of parcels from millions of different third- countries-sellers arrives to EU every day to be distributed to EU Consumers having purchased products online typically through online marketplaces, it seems to be almost impossible and unrealistic for the customs and market surveillance authorities to handle these products in the way referred to in this draft for guidance document, section 5.

In that view we believe that it would be much more effective to provide the national market surveillances authorities with duties to block their national IP addresses from accessing online homepages/platforms/marketplaces that repetitively sell or facilitate products that violates the product safety regulation.

Unfortunately, we don't find that the current requirements in article 14 in this regard give sufficient tools if implemented on the minimum-terms by the member states.

In the light of the above, we strongly encourage the Commission to take action in order to make sure that these guidelines are drafted in a way that they as far as possible under the regulation address and take care of this challenge.

And if it does not lie within the frame of the regulation and these guidelines to fully secure the safety of the European Consumers and the level playing field for the reputable businesses; then we encourage the Commission to take action to change the legislation, e.g. through the revision of the General Product Safety Directive, the E-commerce Directive or the new Digital Service Act.

Below we will submit our comments to the specific draft for guidelines:

General comments

We welcome a guidance document on this part of the regulation.

However, we consider it important for DG GROW to ensure consistency of the text and terminology between the guidance and other legislation such as the New Legislative Framework. In addition, the guidance should from the beginning clearly state that if no responsible person has been appointed/indicated on the products falling under this obligation, such products cannot be placed on the market.

Furthermore, for this guidance it is important that the Commission take a practical approach. For example, it is necessary to make clear who can act as the responsible Economic Operator. If not practical or enforceable then it makes no sense to state this.

Lastly, the responsibilities under article 4 for the different economic operators need to be clearly explained.

Specific comments

1. Introduction

Instead of referring to responsible “person”, the guidance should refer to responsible economic operator. This will avoid confusion and be in-line with the legal text.

If this is intentional a footnote should be added to clarify that the responsible economic operator under article 4 is different from the concept of authorized representative as foreseen under the toy safety directive [1] and the responsible person under the cosmetics regulation [2].

2. Scope and application

Overall, we suggest not to duplicate the information already included in the blue guide. Multiplication of information sources in relation to this regulation should be avoided to prevent confusion which could lead to economic operators to abandon searching.

It needs to be stressed that a distance-seller that targets and sell products to European Consumers has placed the products on the European Market.

Point 2.1.2 ‘Placing on the market’: this is already explained in the blue guide and consistence should be secured. . However, as we also pointed out in our comments to the consultation to the Blue Guide, a clear and consistent definition of “placing on the market” needs to be coordinated on cross of the EU legislation and in respect of article 6 of the regulation, it needs to be stressed that a distance-seller that in any way targets and sell products to European Consumers has placed the products on the European Market already by the presenting the products for sale online.

Clarity is needed on the transition period between the date from which the regulation applies and when the parcel arrives.

Point 2.2: Only when there is no EU-based manufacturer or authorized representative in the EU (Article 4.2.b. mentions "where the manufacturer is not established in the Union")

Justification:

A product imported to the Union can have an EU-based manufacturer as that does not refer to the physical place of manufacturing but to "*any natural or legal person who manufactures a product or has a product designed or manufactured, and markets that product under its name or trademark*". i.e. if a product is produced in a 3rd country, the manufacturer can be based in the EU. In that case there is both an EU-based manufacturer and an importer.

Since the authorized representative is appointed directly by the manufacturer, an importer will also not be the 'responsible person/responsible economic operator' if these tasks are transferred to the authorized representative.

Point 2.2 It is stated on page 4-5 that:

“The product is shipped from outside the EU directly to the end-user: an authorised representative in EU is the responsible person. If the manufacturer has not appointed such authorised representative, the product cannot be offered for sale to EU end-users. In order to sell it to EU end-users through this supply chain, the economic operator offering the product for sale will need to ensure that the manufacturer appoints an authorised representative in the EU for the product concerned. Only after this is arranged can the product be offered for sale to end-users in the EU.”

Does this refer to cases where products are put up for sale on an online marketplace, with a third-party-seller based outside the EU?

In that case, the online marketplace often fulfills the function of importer. The goods are placed on the market through the marketplace, which directly targets end-consumers in the EU and they provide additional services to their sellers, going beyond the provision of a place for sellers and buyers to find each other. In that case, the online marketplace is the responsible person and must fulfill the obligations of an importer according to the product safety legislation.

Point 2.3 'Information': Trade-fairs samples need to be considered.

Point 2.3 The whole point must correspond with the Blue Guide.

Point 2.4:

It would be very helpful if it can be clarified when online marketplaces are NOT merely providing information society services - for example, if it "has provided assistance which entails, in particular optimizing the presentation of the offers for sale in question or promoting those offers". Most online marketplaces in some way optimize the presentation of offers for sale. Moreover, many online marketplaces often have significant decision-making power in terms of presentation, pricing and payment means. In addition, many offer additional services to their sellers, going beyond the provision of a place for sellers and buyers to find each other.

In these cases the platform or marketplace cannot benefit from the exemption-system in the E-commerce Directive article 14 and 15. The following conclusions can be made concerning online marketplaces and liability for the unsafe products:

1. Article 14 is not available where the online marketplace is directly liable for the sale of the illegal products.

2. Article 14 is not available when the online marketplace plays an active role, such as to give it knowledge of or control, over the data relating to the sale of illegal products. Per ECJ jurisprudence, this can include the provision of “assistance”, such as optimizing or promoting the sale of products.

3. Where the online marketplace is passive but has knowledge or awareness of facts or circumstances from which a diligent economic operator would conclude that illegal products are being sold, the online marketplace must act expeditiously to remove the data relating to these toys.

4. Neither Article 14 nor Article 15 prevent online marketplaces from taking proactive measures to address the availability of illegal products on their services. The imposition of specific, proportionate proactive measures is permitted under Article 15.

3. Tasks

This chapter is very important in that it affects relationship between different operators. We urge the commission to clearly spell out what the responsibilities are for each type of operator. It should be avoided that Art 4 creates a parallel set of tasks and definitions.

On technical documentation: We would like to point out that this information is in general not shared automatically but only on request.

Page 6 – first bullet: Article 4 requires the responsible person to verify that the declaration of conformity or the declaration of performance has been drawn up and keep it at the disposal of market surveillance authorities. This is normally not inherent to the task of keeping them. It needs to be clarified what the responsibility is in fact.

Page 6 - second bullet: On the obligation to verify that technical documentation has been drawn up: it should be clarified what is meant by “verify” and how can the responsible person prove this has been drawn up? It is also not clear how the risk-based principle should be applied in this situation.

Further clarity is needed on what to do in the case of non-compliance and who can take corrective action => Corrective action is the domain of the manufacturer and cannot be expected from others.

Page 6 – third bullet: Is this in line with practice under Toy Safety Directive? Should it say, "that it will share this upon a reasoned request by the relevant market surveillance authorities"?

Page 7 – first bullet: or in the cases the responsible person does not keep this documentation and the manufacturer prefers to provide this directly to the authorities, make sure that the manufacturer does so.

Page 7 - second bullet: It should refer to “relevant parts of” the technical documentation => different authorities deal with specific points in the technical documentation.

On page 7 “If the responsible person cannot fulfil one or more of its tasks (‘...’) Distributors are not mentioned but can be equally affected. We would like to ask for new obligations for retail to be listed separately as well.

Page 7 below and page 8 in the top (The responsible person should act ...)
The deadline specified in the relevant harmonized legislation should be applied. For example, a 30 days deadline is provided for in the Toy Safety Directive (Article 21).

There is no justification to apply the ecodesign deadline to cases where the co-legislators have decided on another deadlines.

Page 7-8: "The responsible person can be sanctioned if it does not cooperate, though only to the extent that it does not fulfil its tasks as set out above. Any penalties have to be proportionate. The manufacturer remains responsible for the compliance of the product, while it and other actors in the supply chain retain any legal obligations, they have under EU legislation on compliance of products, guarantees or liability for defective products, etc. The responsible person does not have legal obligations vis-à-vis consumers or other end users pursuant to the Regulation"

The responsible person can be sanctioned if it does not cooperate" should be: "if it does not fulfill its tasks as outlined above"

"Any penalties have to be proportionate": Article 41 states that penalties have to be effective, proportionate and dissuasive - not just proportionate.

4. Practical implications distinguishing between the different types of economic operators

Distributors are not mentioned in the draft for guidance but can be equally affected. We would like to ask for new obligations for retail to be listed separately as well. As such a summing up of responsibilities of each operator in relation to Article 4, including distributors, would be welcome

Point 4.2.: This is at odds with the statement above *"If the manufacturer is established in the EU, it is by default the responsible person"*. It is very common that a manufacturer is based in the EU, while the product is produced outside the EU and there is therefore an importer.

Suggestion: *"If there is an importer in the EU and no manufacturer based in the EU and no Authorised Representative, the importer is by default the responsible person/responsible economic operator."*

Point 4.3.

"Thus, where an authorised representative has already been appointed under sector-specific legislation, its mandate will have to be reviewed in order to ensure that all the tasks listed in

section 3 are included. In particular tasks to be undertaken when there is reason to believe that a product presents a risk likely need to be added.”

Only in case the authorized representative should also be the responsible person/responsible economic operator. The tasks for the responsible person are not minimum tasks for an authorized representative.

5. Tool for the Market surveillance authorities

As goes for the practical enforcement of this new model we would like to express our concerns. Given the fact that billions of parcels from millions of different third- countries-sellers arrives to EU every day to be distributed to EU Consumers having purchased products online (typically through online marketplaces), it seems to be almost impossible and unrealistic for the customs and market surveillance authorities to handle these products in the way referred to in this draft for guidance document, part 5.

4 section of 5.1. *“the economic operator offering the product for sale”* - shouldn't it be: "the economic operator making the product available on the market" or "placing the product on the market"? Again consistency is needed.

The last section of 5.1 *“Further, market surveillance authorities could contact ...”* this seems to go beyond the legislation and should be deleted. For example, an authorized representative should not be contacted for products for which it is not the authorized representative'. Also, the scope of products covered by the Article is clear and should not be applied to products out of scope just because a manufacturer also produces another product which is within scope.

5.2. The guidelines state that *“When the customs authorities select a customs declaration for documentary check, it is recommended that they verify whether the product concerned falls in the scope of Article 4”*. We consider for this regulation to work, the guidance should read “should” to ensure this rule is enforced. I.e. if the customs authorities are only “invited” or recommended to check for the contact details of the responsible person the rule becomes ineffective. However, as stated above we find it unrealistic for the national authorities to do manage this task in the view of the massive number of parcels entering EU from third-country-sellers (products sold on online marketplaces).

We remain at your disposal in case of questions or comments.

Best Regards,

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Betina Schiønning

Senior Advisor

[1] <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0048&from=EN>

[2] <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R1223>