



TIE COMMENTS

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

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TIE - Toy Industries of Europe – welcomes the possibility to comments on the draft guidelines. We have a number of comments, as outlined below. We'd also like to highlight two key issues that are important for the overall functioning of Article 4:

- **Decision on which economic operator is to be considered 'responsible person'**

We believe the following order should followed when determining which operator is the responsible economic operator:

1. Authorised representative with a mandate from the manufacturer to perform this task
2. EU-based manufacturer
3. Importer
4. Fulfilment service provider

It is important that market surveillance authorities contact the correct economic operator and provide that economic operator also with opportunities to provide its point of view and appeal in case decisions are taken on the compliance of the product in question.

- **Practical application to online marketplaces with 3rd party sellers that are based outside the EU**

Article 4 was especially designed to provide market surveillance authorities with the possibility to enforce the relevant safety rules for product placed on the EU-market through these online sales channels (direct imports). It would be important if the guidelines clarify the role of these online marketplaces, especially when they are not merely providing information society services

Products are often placed on the EU-market through an online marketplace. The online marketplace for example targets end-users in the EU for products sold by third-party sellers/manufacturers on their website. They do so by directing their marketing activities, offering products in national languages, and by enabling payment in local currencies and with EU payment methods. In those cases, the online marketplace would function as importer and would be the 'responsible economic operator'.

Detailed comments:

1) Term 'responsible person'

On page 2, the term 'responsible person is introduced for the economic operator located in the EU who on request of the authorities has to provides them with information or takes certain actions. We believe the term 'responsible person' could be confusing and would suggest using 'responsible economic operator'. This will avoid that one believes it is a 'natural person' or confuses it with 'responsible person' under the Cosmetic Regulation



2) Who can be the 'responsible person'/'responsible economic operator' (section 2.2)

- On page 4, the document reads:

“For products from manufacturers established in the EU, whether sold online or in brick-and-mortar shops, the EU manufacturer will be the responsible person”

We suggest to amend this to clarify that manufacturers can also appoint an authorised representative:

“For products from manufacturers established in the EU, whether sold online or in brick-and-mortar shops, the EU manufacturer will be the responsible person, **unless it has mandated an authorised representative for these tasks.**”

- Page 4 states:

“Brick-and-mortar shops therefore do not have to undertake additional action or verification as a result of Article 4, nor do any other distributors in the supply chain. Their obligations in this case remain those that they have under the applicable sector-specific legislation.”

This would not be correct in case brick-and-mortar shops are also the manufacturer, importer or authorised representative. We therefore suggest the following amendment:

“**Unless they are also the manufacturer, importer, or authorised representative,** brick-and-mortar shops therefore do not have to undertake additional action or verification as a result of Article 4, nor do any other distributors in the supply chain. Their obligations in this case remain those that they have under the applicable sector-specific legislation.”

- On page 4 & 5, the draft guidelines lay out three scenarios for products from manufacturers outside the EU (manufacturers not based in the EU) offered for sale online. We believe the distinction between scenario 1 & 3 might not be as clear-cut as indicated in the document and there could be confusion with section 2.4. In fact, in the case of products shipped from outside the EU directly to the end-users in the EU, products are often placed on the EU-market through an online marketplace. The online market place for example targets end-users in the EU for products sold by third-party sellers/manufacturers on their website. They do so by directing their marketing activities, offering products in national languages, and by enabling payment in local currencies and with EU payment methods. In those cases, the online marketplace would function as importer and would be the 'responsible economic operator'. We believe scenario 3 should be amended accordingly.

3) The information on the responsible person (section 2.3)

The draft guidelines state:

“It is possible that there are multiple names and contact details of economic operators indicated on or with the product. In such case, it should be made clear which of them is the responsible person, for example by indicating 'authorised representative' in case it concerns the authorised representative, or 'Responsible person Article 4 of Regulation (EU) 2019/1020'. “

We are concerned that this might lead to requests to translate the additional statement in numerous languages, which might not be feasible (unless additional packaging space is made available or



additional papers are added). Moreover, the Regulation has no explicit obligation to indicate which economic operator is the 'responsible economic operator'. We believe market surveillance authorities should follow the following order when determining which operator is the responsible economic operator:

1. Authorised representative with a mandate from the manufacturer to perform this task
2. EU-based manufacturer
3. Importer
4. Fulfilment service provider

We therefore suggest the following amendment:

"It is possible that there are multiple names and contact details of economic operators indicated on or with the product. In such case, it **could** be made clear which of them is the responsible person, for example by indicating 'authorised representative' in case it concerns the authorised representative, or 'Responsible person Article 4 of Regulation (EU) 2019/1020'. **There is no obligation to translate this statement in multiple languages.**

In case it is not made clear which of them is the responsible persons, market surveillance authorities should determine the market surveillance authorities should determine which operator is the responsible economic operator in the following sequence:

- 1. Authorised representative with a mandate from the manufacturer to perform this task**
- 2. EU-based manufacturer**
- 3. Importer**
- 4. Fulfilment service provider"**

4) Products sold through online marketplaces (section 2.4)

Section 2.4 reads:

"Article 4 applies to products sold through online marketplaces equally as to products sold through other sales channels. There is no specific obligation arising from Article 4 on operators of online marketplaces when they are merely providing information society services. However, where such operators offer also fulfilment services under conditions defined in Article 4(2)(d), Article 4(3) and (4) apply as regards the provision of those services. Similarly, where operators of online marketplaces are at the same time manufacturer, importer or authorised representative, or offer products for sale themselves, the relevant provisions of Article 4 apply."

The draft guidelines thus indicate that there are no specific obligations arising from Article 4 on operators of online marketplaces when they are merely providing information society services. However, it does not clarify when operators of online marketplaces are not merely providing information society services. In practice online marketplaces do usually provide additional services, in particular optimising the presentation of the offers for sale in question or promoting those offers.

Likewise, it would be helpful if it is clarified that usually, the online marketplace places the product on the EU market by targeting end-users in the EU for products sold by third-party sellers/manufacturers on their website. They do so by directing their marketing activities, offering products in national



languages, and by enabling payment in local currencies and with EU payment methods. In those case, the online marketplace would function as importer and would be the 'responsible economic operator'.

A suggestion to amend this section is:

“Article 4 applies to products sold through online marketplaces equally as to products sold through other sales channels. **In case of sale of products directly from sellers outside the EU, online marketplaces place the product on the EU market by directing their marketing activities, offering products in national languages, and by enabling payment in local currencies and with EU payment methods. In those cases, they are the importer. If they are the importer the relevant provisions of Article 4 apply. However, there is no specific obligation arising from Article 4 on operators of online marketplaces when they are merely providing information society services.**

Where operators of online marketplaces are at the same time manufacturer, authorised representative, **fulfilment service provider**, or offer products for sale themselves, the relevant provisions of Article 4 apply.

5) Tasks of the responsible person (section 3)

- The guidelines state that the responsible person should “keep the declaration of conformity”. However, Article 4 refers to keep the declaration of conformity “at the disposal of market surveillance authorities”. This is not necessarily the same thing. We therefore suggest the following additions (in red) to the guidance:

Page 6: “Keep the declaration of conformity **at the disposal of market surveillance authorities.** All the sector-specific legislation requires such declaration, except for construction products for which instead to the declaration of performance has to be kept. As specified in the sector-specific legislation covered by Article 4, these declarations have to be kept for 10 years after the product has been placed on the market. When more than one legislative act applies to a product the declaration of conformity is usually drawn up as a single declaration for all applicable acts together.”

Page 7: “Provide the declaration of conformity or declaration of performance to those authorities, **or in the cases the responsible person does not keep this declaration and the manufacturer prefers to provide this directly to the authorities, make sure that the manufacturer does so**”

- On technical documentation, page 7 states that the responsible person has the task to do upon request of a market surveillance authority:

“Provide the technical documentation to those authorities, 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.”

However, Article 4 para 3(a) states that the responsible economic operator should ensure that the technical documentation can be made available to the authorities upon request, while para 3(b) states that they should provide documentation upon a reasoned request. We believe it is important that the guidelines clarify that requests need to be reasoned.



Also, since different market surveillance authorities might deal with different aspects and because not all parts of technical documentation are necessarily relevant, we suggest the following changes:

“Upon a reasoned request, provide the relevant parts of technical documentation to those authorities, 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.”

- On deadlines to provide documentation, page 7/8 states:
“For the provision of other documents the 10 day deadline as specified in ecodesign legislation would generally be a reasonable timeframe. Market surveillance authorities may require a shorter deadline if justified by the urgency on the basis of an immediate serious risk.”

The Toy Safety Directive (Article 21) provides for a legal time limit of 30 days for the provision of technical documentation or a translation of parts unless a shorter deadline is justified in the case of serious and immediate risk. We see no justification for an unrelated provision of the ecodesign legislation to override Article 21 of the Toy Safety Directive. We therefore suggest that this section is removed or it is clarified that for toys, a 30-day timeframe applies.

- On sanctions, page 8 reads:
“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 guidance refers to Article 41 of the Regulation, which states that penalties have to be effective, proportionate and dissuasive - not just proportionate. We therefore suggest the following change:

“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 effective, proportionate and dissuasive.”

This also needs to be corrected on page 14.

6) A manufacturer in the EU (section 4.1)

The guidelines state on page 8:

“If the manufacturer is established in the EU, it is by default the responsible person.”

Whereas we agree in principle, we believe it important to specify that this does not hold in case an authorised representative is appointed for this task and suggest the following addition:

“If the manufacturer is established in the EU, it is by default the responsible person, unless it has appointed an Authorised Representative for these tasks.”

7) An Authorised Representative in the EU (section 4.2)

On page 10, the draft guidelines mention:



“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”.

We believe it should be specified that this only applies if the Authorised Representative will be mandated to act as the responsible person/responsible economic operator:

“in case the manufacturer mandates an authorised representative to be the responsible person and where that 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”.

8) Market Surveillance (section 5.1)

- On page 12 the following statement is included:

“Market surveillance authorities should contact the responsible person directly, using the contact details indicated on or with the product. Market surveillance authorities should be specific about which type of compliance documents for which products the responsible persons need to provide.”

Article 4 (3b) specifies that these requests need to be reasoned. It is important that this is reflected in the guidelines:

“Market surveillance authorities should contact the responsible person directly, using the contact details indicated on or with the product. Requests from market surveillance authorities should be reasoned and specific about which type of compliance documents for which products the responsible persons need to provide.”

- On online or distance sale, on page 12 of the guidelines it is stated:

“In the case of online sales or other distance sales where market surveillance authorities want to check compliance documentation before acquiring the product, they can contact the economic operator offering the product for sale to ask for the name and contact details of the responsible person.”

This is not sufficiently clear for the particular cases of online marketplaces placing, or making available, on the EU-market products from 3rd party-sellers based outside the EU. Usually, the marketplace places the product on the EU market by targeting end-users in the EU for products sold by third-party sellers/manufacturers on their website. They do so by directing their marketing activities, offering products in national languages, and by enabling payment in local currencies and with EU payment methods.

To avoid that a wide range of dangerous products can in practice remain on the EU market, we suggest the following change:

“In the case of online sales or other distance sales where market surveillance authorities want to check compliance documentation before acquiring the product, they can contact the economic operator placing or making the product available on the EU market to ask for the name and contact details of the responsible person. In case of online marketplaces enabling the sale of products from third-party sellers based outside the EU, the online marketplace should be contacted.”



- At the end of section 5.1 the draft guidelines add:
“Further, market surveillance authorities could contact the responsible person in case they have an issue relevant to the manufacturer whose product(s) the responsible person covers, but other than specifically falling into the scope of Article 4. This could be an issue with a product covered, but concerning other legislation than specifically mentioned in paragraph 5 of Article 4 or concerning a product not covered but from the same manufacturer. Responsible persons are encouraged to facilitate the contact between market surveillance authorities and manufacturers for these purposes.”

We believe this paragraph can be problematic and would change the scope of Article 4. 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. We therefore suggest to delete this paragraph.

About TIE

Toy Industries of Europe (TIE) is the voice of the reputable EU toy manufacturers. Our mission is to promote the right of every child to play safely and securely and to promote fair practices and fair legislation, allowing responsible toy companies to continue to grow.

TIE's membership includes 19 direct international companies, nine European national toy associations, who represent their local manufacturers, and seven affiliate members who make toys but it's not part of their main business.

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