Position Paper

On guidelines on the implementation of Article 4 of Regulation (EU) 2019/1020 on market surveillance and compliance of products

2020-April-16

Bitkom appreciates the opportunity to provide its views and feedback on the Commission's draft guidelines on the implementation of Article 4 of Regulation (EU) 2019/1020 on market surveillance and compliance of products and welcomes the initiative of the European Commission to consider such a guidance document.

However, some definitions made in the document are not necessary as they are already given in the Blue Guide. The requirements defined in the Blue Guide should not be exceeded in this document in order to avoid contradictions and legal uncertainties. Definitions for one and the same issue should be given in only one place and that is the Blue Guide in this case. The concept of the NLF and the explanations in the Blue Guide are a successful model that should be preserved. A guideline on the implementation of Article 4 of Regulation (EU) 2019/1020 should only cover aspects of Article 4.

While we support the regulatory objective of Article 4 to facilitate the work of market surveillance and customs authorities, notably the checking of compliance documentation, we would also like to alert the EU Commission and the Member States' public authorities to the need to ensure that this provision and the various obligations set out therein do not develop into a major barrier to international trade. This would only result in retaliatory measures against EU manufacturers taken by governments in other countries and economic regions, of which we can already see first instances. The guidance as required by Regulation (EU) 2019/1020 concerning the implementation of this Article must therefore aim at:

- reducing the overall administrative and bureaucratic effort (costs) related to the fulfillment of the various tasks and obligations for all economic operators involved, and
- defining the level of expectation regarding fulfillment of these tasks by taking account of the specific roles that authorised representatives, importers and fulfilment service providers each play in the supply chain of goods, and of the responsibilities each of these operators can typically and reasonably take.

In the following please find a table with text passages where we see room for improvement, as well as suggestions for revising these passages.

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Text reference	Guidance Text	Summary of issue and proposed change
2.1.2	*"The product is placed on the EU market. A product is placed on the EU market when it is, for the first time, supplied for distribution, consumption or use on the EU market in the course of a commercial activity, whether in return for payment or free of charge. This includes offering a product for sale online or through other means of distance sales (except where it has already been placed in the EU market prior to the offer) if such offer is targeted at end users in the EU. Whether or not an offer is targeted at end users in the EU depends on a case-by-case analysis taking into consideration relevant factors, such as the geographical areas to which dispatch is possible, the languages available, used for the offer or for ordering, or means of payment."*	It is unclear why information on when a product is placed on the market is provided in a Guidance Paper on Art. 4. A general definition on that should be given in the Blue Guide. However, a more precise definition of Article 6 and the distance selling described therein is needed. The current wording in section 2.1, point 2 of the draft guidelines misses this important detail in the legal text of Article 6, and therefore needs to be reviewed accordingly. It needs to be explicitly clarified that this provision is not intended to change or alter the point in time of placing on the market, which remains the "supply" of the product (and not the offer for supply).
2.2.3	*"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".*	Products which are locally adapted for certain destinations but sold globally (e.g. a model sold in China has the same model name as in the EU, but might have different markings, power supply and safety instructions etc.) are non-compliant although there might be an authorised representative appointed by the manufacturer in the EU. It must be made clear that the

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		authorized representative is not responsible for such products.
2.3/para 3	*"It is preferable that the contact details include an email address and/or phone number."*	Guidance should not add requirements. Economic operators have already incurred high costs to modify product labels to include postal contact addresses, in line with the New Legislative Framework. This is not proportionate or justified to add a new obligation here. It is also unclear what the implications of the term 'preferable' would actually be in practice. We advocate the deletion of the sentence.
2.3/para 4	*"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'."*	This requirement contradicts the Blue Guide (4.2.2) in its current version and exceeds the provisions of Article 4.4. According to the Blue Guide, there is the Single contact point, which is why additional requirements should not be addressed here. Furthermore it is not necessary to indicate who the "authorised representative" is; this should be clear from the fact that this is a European address. We plead for the deletion of the entire paragraph or, if this is not possible, of the sen-

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3/para 2/ bullet 3	*"Ensure that the technical documentation can be made available to those authorities upon request. When the responsible person does not keep the technical documentation itself, this requires obtaining a commitment from the manufacturer that it will share this when requested, either with the responsible person or with the market surveillance authorities directly."*	We propose to change the first sentence to: Ensure that the technical documentation can be made available to those authorities upon their justified request. The statement "requires obtaining a commitment" exceeds the requirements of Article 4 and contradicts the risk-based approach, which in our view should be applied here. Usually only the manufacturer will submit the technical documents to market surveillance and will not make the documents available to anyone other. The second sentence should therefore be deleted accordingly.
3/para 5	*"Providing the declaration of conformity or performance should be done promptly. 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 term "promptly" is not defined and could create uncertainty for economic operators. Taking into account that in the case of importers or fulfilment service providers the documents have to be requested from a different eco-

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		nomic operator 10 days may be a challenging timeline. It is also important to note that the 10 days in Art. 8 (3) of the Eco-Design Directive 2009/125/EC are only applicable for manufacturer and authorised representative. Under Art. 4 (3) (a) Regulation (EU) 2019/1020, the responsible person shall ensure that the technical documentation can be made available to authorities upon request. The guidance should not establish any deadlines which is a matter for national authorities and national law. We are therefore in favour of amending the sentence as follows: "Providing the declaration of conformity or performance should be done within a reasonable or the legally required time-frame in consultation with the relevant authorities."
5.2/para 1/ 2nd sentence	*„When 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, and if this is the case, that they check whether the name and contact details of the responsible person are indicated in any of the documents."*	The wording "any of the documents" is unclear. For example, in the case of direct shipment (a product does not go to the importer for storage, but is delivered directly to the customer), the importer's details are only noted on the product itself. Clarification is required here.

Bitkom represents more than 2,700 companies of the digital economy, including 1,900 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.