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From:	ES delegation
To:	Working Party on Technical Harmonisation (Goods package)
Subject:	ES comments on the Compliance and Enforcement Regulation Proposal - Presidency discussion paper: doc. WK 11296/18

Comments from Spain to the Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation on products and amending Regulation (EU) No 305/2011, (EU) No 528/2012, (EU) No 2016/624, (EU) No 2016/425 and (EU) No 2017/1369 of the European Parliament and of the Council, and Directives 2004/42/EC, 2009/48/EC, 2010/35/EC, 3012/39/EU, 2013/53/EU, 2014/28/EU, 2014/29/EU, 2014/30/EU, 2014/31/EU, 2014/32/EU, 2014/33/EU, 2014/34/EU, 2014/35/EU, 2014/53/EU, 2014/68/EU a 2014/90/EU of the European Parliament and of the Council

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Article 3 **Definitions**

Definition (5) ‘market surveillance authority’ means an authority designated by a Member State under Article 11 or Article 26 as responsible for carrying out market surveillance in the territory of that Member State;

Spain would like to add “or article 26”, as depending on the Organizational structure of each member State, market surveillance authorities can be designated to perform control of products entering the Union Market based on article 26.

*Definition (8) ‘non-compliance’ means any failure **by an economic operator** to comply with any of the requirements under the Union harmonisation legislation or the requirements of this Regulation;*

Spain would like to ask why it is necessary to refer only to “economic operators” in this definition. This could lead to think whether there are non-compliances not related to economic operators that may be excluded from this definition. **We propose to delete it**

Article 4 **Economic operator responsible for compliance**

Paragraph 2(ba) any other natural or legal person established in the Union subject to obligations in relation to the manufacture of products or placing on the market;

Spain would like clarification about what economic operator is the Presidency trying to include here.
Is it referring to Article R6 of Decision 768/2008? Or something else?

Paragraph 4 The name, registered trade name or registered trade mark and the contact details, including the postal address, of the economic operator responsible for compliance with respect to the product shall be indicated on the product or, where that is not possible because of the size or physical characteristics of the product, on its packaging, the parcel or an accompanying document.

Spain foresees a problem in those products where more than one Economic Operator (EO) must be in the label (according to the Union harmonisation Legislation). In these cases is necessary to know who is who in the supply chain in order to know which one is the responsible for compliance.

Therefore, Spain proposes two alternatives:

1) To add the obligation for economic operators to be identified as such in the product, packaging, accompanying documents or websites by putting: Manufacturer/importer/etc.

OR

2) The obligation to clearly identify the EO responsible for compliance when there is more than one EO.

Paragraph 5. Economic operators offering a product for sale online shall indicate with their offer for sale the name, registered trade name or registered trade mark and the contacts details, including the postal address, of the economic operator responsible for compliance with respect to the product. With this regard, online marketplaces shall facilitate the display of abovementioned information for the products sold through them.

Spain welcomes this paragraph. We however suggest the following modification:

*“Economic operators offering a product for sale online shall indicate with their offer for sale the ~~name, registered trade name or registered trade mark and the contacts details, including the postal address~~ **information as described in paragraph 4**, of the economic operator responsible for compliance with respect to the product, **so that it is visible to the end-user before making the purchase**. With this regard, online marketplaces shall facilitate the display of abovementioned information for the products sold through them”*

Besides, a definition of “Online marketplaces” is necessary.

Article 4b Obligation of cooperation

*Paragraph 2. **Hosting service providers** **Information Service providers** shall cooperate with the market surveillance authorities, at their request, to facilitate any action taken to eliminate or, if that is not possible, mitigate the risks posed by a product that is or was offered for sale online through their services.*

Spain would rather change “hosting service” for a broader concept like: “Information Service provider”. This provision should be more ambitious, as MSA could need support from other Information Service providers different from Hosting services. Besides, this is the term used also in article 14.4.d.

Article 12 Activities of market surveillance authorities and use of findings

*Paragraph 9. Products deemed to be non-compliant on the basis of a decision of a market surveillance authority in one Member State, shall be presumed to be non-compliant by market surveillance authorities in another Member State, unless **evidence justification** to the contrary is provided **or a Member State has raised objections in accordance with the applicable Union safeguard procedure**.*

Spain requests to change the word “evidence” for “enough justification” or “justification”. As it is not always necessary to use evidence to reject a non-conformity from another MSA. In some occasions the interpretation of a guidance document may lead to a change in the criteria on the compliance of a product

On the other hand, we think that the last sentence (highlighted) can be understood as if any objection raised in accordance with the applicable Union safeguard procedure is considered sufficient to refuse to recognise a non-conformity from another MSA in another MS, regardless of the Commission's decision.

We think Safeguard procedure is clear enough in the Union harmonisation legislation and there is no need to add this last sentence.

However we can accept to keep it with the following inclusion:

"...or a Member State has raised objections ratified by the Commission in accordance with the applicable Union safeguard procedure."

Article 14 Powers and duties of market surveillance authorities

Spain supports the text of the article and the explicit mention of 'mystery shopping' requested by Denmark during the meeting the 3rd of October.

Article 15 Market surveillance measures

Paragraph 5. *If a national measure is considered justified according to Article 12(9) or the applicable safeguard procedure, the competent market surveillance authorities in the other Member States shall take the corrective actions measures necessary in respect to the non-compliant product and where applicable the economic operator and fulfilment and hosting service provider, and shall enter the related information in the system referred to in Article 34.*

Spain supports the article, but as we did for section 2 of art 4bis it would be more appropriate to refer to a broader concept like: "Information Service Providers"

Article 22 Mutual Assistance

Paragraph 5. *In well justified cases, a requested authority may refuse to comply with a request for information under paragraph 1, when own duties would be substantially impaired, or when the applicant authority does not agree that the information is subject to the rules on confidentiality and on professional and commercial secrecy as laid down in Article 16.*

Spain does not oppose to this paragraph, however we consider that our proposal, previously submitted and included in WK 7227, confers greater legal certainty and specifies the cases in which an authority can reject the request for information. In addition, the Spanish proposal was aligned with the Regulation (EU) 2017/2394 CPC.

Here is the proposed paragraph:

3a. A requested authority may refuse to comply with a request for information under paragraph 1, if one or more of the following applies:

a) following a consultation with the applicant authority, it appears that the requested information is not needed by the applicant authority to determine whether there is a non-compliance;

b) the applicant authority does not agree that the information is subject to the rules on confidentiality and on professional and commercial secrecy as laid down in Article 16;

c) criminal investigations or judicial proceedings have already been initiated against the same economic operator in respect of the same non-compliance before the judicial authorities in the Member State of the requested authority or of the applicant authority.

Article 26 Controls on products entering the Union market

paragraph 3 Products subject to Union ~~harmonisation~~ legislation that are to be placed under the customs procedure 'release for free circulation' shall be subject to controls **according to Article 12(3)**, performed by the authorities designated under paragraph 1 ~~and the rules of market surveillance according to this regulation and the relevant harmonized EU legislation.~~ They shall perform those controls on the basis of a risk analysis in accordance with articles 46 and 47 of Regulation (EU) No 952/2013 and on the basis of risk based approach as referred to in Article 12 (4).

Spain requests to add here also a reference to Article 12(3) in order to state that authorities set out in this article can also base their market surveillance controls at an appropriate scale and carry out appropriate checks on the characteristics of the products through documentary checks and, where appropriate, physical and laboratory controls from a representative sample. This would reflect the normal practice for MSA in charge of the control on products entering the Union Market.

Article 27 Suspension of release for free circulation

Paragraph 1(a) .the product is not accompanied by the documentation required by the Union harmonisation legislation applicable to it **or the documentation accompanying the product is false;**

Spain suggests to add here: "or the documentation accompanying the product is false". This is something that actually happens very often according to our customs authorities.

Article 28 Release of products

Paragraph (a) within five working days of the suspension, the authorities designated under Article 26(1) have not been requested by the market surveillance authorities to maintain the suspension;

Spain requests to **delete this paragraph** as it could pose a risk that undermines the objective of having only compliant products available on the Union Market. (Article 1.1). The absence of response by the MSAs should be interpreted as reaffirming the suspension of importation as it is established in the agri-food sector. With the current wording the work carried out by border authorities could be impaired.

Article 32 Composition and operation of the Network

Paragraph 3. The Network shall meet at regular intervals and, where necessary, at the duly motivated request of the Commission or **a simple majority of Member States**.

Spain suggests to introduce the requirement of “a simple majority” of Member States in order to optimize resources and avoid an excessive number of meetings.

Article 34 Information and communication system

Paragraph 3. Market surveillance authorities shall enter the following information into the system: in relation to products made available on the market in their territory for which compliance has been assessed by them, including at a minimum the products for which samples have been collected and analysed, without prejudice to Article 12 of Directive 2001/95/EC and Article 19 of this Regulation, and where applicable, in relation to products entering the Union market for which the process for the release for free circulation has been suspended in accordance with Article 27, in their territory, information concerning:

Spain understands from the current wording of this paragraph, that there is a minimum requirement: “to introduce products for which the sample has been taken”, but there is no obligation to enter other products for which physical or documental checks have been performed without taking samples.

If we understood correctly, this minimum requirement could undermine the objective stated in paragraph 1: “*providing a comprehensive overview of market surveillance activities, results, and trends*”. In market surveillance campaigns the set of sampled products can be a small proportion with respect to the total list of controlled products, so the Information and Communication System would not provide a reliable statistical value of what its actually being surveilled and its results.