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From:	LV comments
To:	Working Party on Technical Harmonisation (Goods package)
Subject:	LV comments on the Compliance and Enforcement Regulation Proposal (Art. 22-64)

LV comments on Articles 22 to 64 of the Proposal for a Regulation of the European Parliament and of the Council laying down rules and procedures for compliance with and enforcement of Union harmonisation legislation

Chapter VI – Cooperation and procedure for mutual assistance

Latvia is quite pleased with the current wording of Chapter VI of the proposal and would be interested to keep the cooperation mechanism as detailed as possible so that it would not lose efficiency. It is highly essential to have a clear mechanism in place which ensures simultaneous remedying of non-compliances both in the MS where it has been identified and in the MS where the manufacturer or importer of the non-compliant product is established.

However, taking into consideration the concerns expressed by a number of MS, Latvia would propose an alternative to use also the agreed wording of Articles 11 to 14 of the CPC regulation which address the issues raised by the MS so far. Introducing in the text of the current Chapter VI a new article corresponding to the Article 14 of the CPC regulation would also help solving the doubts some MS might have regarding increased work load that a cooperation procedure might bring.

As regards the wording of the current proposal, Latvia would like to comment on the following provisions:

Article 25 – Use of evidence and investigation findings

Latvia especially supports Para 3 according to which 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, however, such a mechanism loses efficiency, if, according to the wording which starts with the word “unless”, we leave a possibility for other MSs to disregard the decision originally made by the first MS. In Latvia’s view, Para 3 instead should provide a procedure how the originally made decision would be amended in the event economic operators can provide evidence on compliance of the product.

Latvia would like to propose to supplement Article 25(3) as follows:

“(3) 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 economic operators can provide evidence to the contrary and **the initial decision is amended accordingly.**”

Chapter VII – Products entering the Union market

Article 27 – Suspension of release for free circulation

Latvia is especially positive with regard to the level of details Article 27 provides as regards the activities to be performed by the customs authorities and the activities they request other MSA’s to perform.

However, with regard to Article 27(1)(a), Latvia would like to draw the attention to the fact that it contradicts with the possibility to make the declaration available on a website according to Article 5. At the same time we would not favour the electronic declarations available at websites, as they can be falsified easily and would not relate to the specific product. In this respect we would advise to reconsider Article 5 rather than Article 27.

Article 29 – Cooperation with authorised economic operators

Latvia has concerns with regard to Para 2 which provides for unconditional right for the AEO to request the release for free circulation. Latvia questions the relationship of this Article with Article 39 of the Union Customs Code (UCC) which provides for requirements for acquiring the status of Authorised Economic Operator (AEO). Art 39 of the Customs Code does not stipulate the product compliance as the criteria for requesting the status of AEO, therefore, Art. 29 of the current proposal seems to extend the scope of Art. 39 of the Customs Code and, moreover, it attributes its application to MSAs. But at the same time, the reverse link to the Customs Code is missing, meaning that if the AEO after all brings uncompliant products to the EU, he can be deprived the status of the AEO only under the current regulation, but still keep his privileged status under the Customs Code. We consider that in this case the benefits of the AEO counterbalance the additional administrative burden for the authorities in the information exchange and establishing such a priority procedure. We do not understand why these provisions would be necessary and how they would facilitate market surveillance and ensure compliance of products entering EU market.

With regard to the second sentence of Para 2, it is unclear, what would be the reason to carry out controls on products at a place other than the place where products have been presented to customs and thus - carry out several contrls for the same container while it is possible to do it at the same time and place by both, the customs and the MSA.

Para 4 provides for an obligation of the MSA to enter details of the non-compliance in the system referred to in Article 34. However, such information will not be the basis for revoking the status of an AEO for the purposes of the Customs Code. Therefore, we do not understand what would be the added value of the double priority system and the administrative burden MSAs will face having to gather and exchange additional information. Having said that, Latvia considers there is no need for the implementing acts referred to in Para 5.

Latvia proposes to consider deletion of the Article 29 as it brings no added value to enhancing and strengthening market surveillance.

Article 30 – Refusal to release

Unclearity is caused by the formulation of “that information” which, according to Paras 1 and 2, the MSA shall immediately enter into the system. The wording needs to be clarified in this regard.

Latvia would like to propose the following wording:

- “1. Where the market surveillance authorities conclude that a product presents a serious risk, they shall **immediately enter that information into the system referred to in Article 34**, shall take measures to prohibit the placing of the product on the market and shall require the authorities designated under Article 26(1) not to release it for free circulation. They shall also require these authorities to include the following notice on the commercial invoice accompanying the product and on any other relevant accompanying document, including in the customs data-processing system:

‘Dangerous product – release for free circulation not authorised – Regulation [Reference to this Regulation to be added]’;

~~Market surveillance authorities shall immediately enter that information into the system referred to in Article 34.~~

2. Where market surveillance authorities conclude that a product may not be placed on the market as it does not comply with the Union harmonisation legislation applicable to it, they shall **immediately enter that information into the system referred to in Article 34**, shall take measures to prohibit the placing of the product on the market and shall require the authorities designated under Article 26(1) not to release it for free circulation. They shall also require these authorities to include the following notice on the commercial invoice accompanying the product and on any other relevant accompanying document, including in the customs data-processing system:

‘Product not in conformity – release for free circulation not authorised – Regulation [Reference to this Regulation to be added].’

~~Market surveillance authorities shall immediately enter that information into the system referred to in Article 34.”~~

Chapter VIII – Coordinated enforcement and international cooperation

Article 32 - Composition of the Union Product Compliance Network

Art 32 describes just the composition of the Network, however, it is not clear, how the EUPC Board, ADCO groups, the Commission, the secretariat would function as a Network and what would be the objectives, functions and main principles of operation of the Network. Art 33 sets forth the tasks of the Commission and EUPC Board only, and also the following articles of the Chapter provide for duties for the Commission and Member States only.

Article 33 - Coordinated enforcement tasks

Latvia proposes that the part of tasks set forth for the Commission in Para 1 should be assigned for the Network instead. The decisions that would affect as a result market surveillance in MS should be left to the MS through the cooperation platform the Commission is generously proposing to create and host, but should not be left entirely for the Commission, like adoption of the work programme of the Network in (a) that can be easily done by the Board, apply instruments of international cooperation referred to in Art.35, setting standards for minimum penalties (subparagraph (m)).

The tasks of the EUPC Board in Para 2 include adoption of rules of procedure for itself and for the ADCO groups in subparagraph (d). However, subparagraph (c) contains reference to Art 8 which provides for a possibility to enter into memorandum of understanding with businesses and organisations where the EUPC Board would have a task to assist in drawing up and implementation of such memorandums of understanding. Since these are agreements concluded by MSA and economic operators or their organisations, it is not clear why this should be a task of the Board. We propose to delete (c).

Furthermore, we would like to note that there is no Article of the Chapter which would provide for the decision making procedure of the EUPC Board as well as the binding (or non-binding) nature of such decisions with regard to the Member States. In addition, none of the articles in Chapter VIII refers to the idea of creating a horizontal ADCO group to facilitate work of ADCO groups.

Article 34 – Information and communication system

Latvia would like to point out that MSAs should not be subjected to too much of administrative burden by entering the same information in many different systems.

We think it is important to integrate the national information systems into the systems maintained by the Commission. And this requires the Commission's support for the MS, including its financial support.

In Para 3(a), clearer wording is required instead of the word "details" which must be entered into the system with regard to national market surveillance strategies, otherwise it is not entirely clear what information is supposed to be inserted. To make the matters less complicated, the strategies could just be uploaded into the system.

In Para 4, it is not clear why would information have to be transmitted to the ICSMS for the purposes combatting fraud, because fraud has no direct relationship with product compliance. Also the wording "where relevant for the enforcement" raises questions. Some clarification is required with regard to what would be the information for minimising risk here. Even though the fraudulent products can cause a risk and be non-compliant, it is a different type of violation than the non-compliance.

Para 5 seems taken out of the context and probably would better fit into Article 25 or somewhere in Chapter IV or V.

In Para 6, it is not entirely clear why would implementing acts be necessary if the ICSMS already functions. Latvia is sceptical about the necessity of Para 6 and sees the risk of introducing additional burden on MSAs.

Article 35 – International cooperation

Latvia cannot accept the powers Commission has provided itself in Para 3 to approve pre-export control systems of third countries. These decisions should be left to Member States, therefore, Latvia has doubts whether Paras 3 to 10 should be included in EU regulation as such agreements may be settled bilaterally. Latvia proposes deletion of Para 3 – 10.

However, if majority of Member States would deem these provisions to be kept in this Regulation, Latvia would propose the following changes to the Article:

As the approval and implementation of pre-export control system requires considerable trust towards the third party and, therefore, it should be left for the Member States only to decide whether such a trust is possible, Latvia suggests **the powers of approval stated in Para 3 as well as decisions regarding types of products should be granted to the EUCP Board**, providing that the Chapter VIII clarifies the functions and decision making procedures of the board. The EUCP board can be also given the powers to carry out the audit mentioned in Para 5.

In Para 9, it is unclear what is meant by "significant number of instances" which would lead to withdrawal of the granted approval.

Chapter IX – Financial provisions

Article 36 – Financing activities

With regard to Para 3, Latvia would like to express its support to introduction of the electronic interface referred to in Article 34(4), however Latvia is sceptical as regards the obligation for the Member States to share the financing of the interface which is imposed by a regulation. We would be in favour of deletion of the last sentence of Para 3.

Chapter X – Final provisions

Article 38 – Applicability of Regulation (EC) 765/2008 and amendments to Union harmonisation legislation

In Latvia's view, maintaining the application of the said provisions of Regulation (EC) 765/2008 with regard to some part of the products in parallel to the different market surveillance provisions of the current proposal will cause complications in practice. For the sake of better regulation, and since it is not clear if there are any legal acts that will remain under the Regulation 765/2008, we would suggest to foresee that the articles 15 to 29 of the mentioned regulation are no longer applicable and discuss, whether the list of legal acts in Annex 1 could be made open and informatorily rather than shaping the scope of this regulation.

Article 40 – Amendments to Directive 2009/48/EC

Paragraph 1. Latvia supports deletion of Article 40 of Directive 2009/48/EC under the condition that the obligation of Member States to organise and perform market surveillance is explicitly stated in the current Compliance and enforcement proposal (the current wording doesn't foresee that).

Paragraph 2. In Latvia's view, plain deletion of Article 42, Paragraph 1 is not an appropriate solution because this would repeal the Member States' obligation to assess the conformity of toys with all the requirements in the event some non-compliance is detected. Such a deletion would also reduce the powers of market surveillance authorities to request corrective actions to be performed by economic operators and would no longer require market surveillance authorities to inform the relevant notified bodies of the detected non-compliances.

Latvia proposes an alternative solution with regard to amendments to Article 42(1) of Directive 2009/48/EC:

- 1) to reword the first subparagraph of Article 42(1) by replacing the reference to Regulation (EC) 765/2008 with a reference to the current Compliance and enforcement proposal;
- 2) to delete the fourth subparagraph of Article 42(1).

Article 41 – Amendments to Directive 2010/35/EC

Paragraph 2. In Latvia's view, plain deletion of Article 30, Paragraph 1 is not an appropriate solution because – like in the case with amendments to Article 42(1) of Directive 2009/48/EC – this would reduce the powers of MSA's and obligations of economic operators, as well as obligation to inform the notified bodies.

Latvia proposes an alternative solution with regard to amendments to Article 30(1) of Directive 2010/35/EC:

- 1) to reword the first subparagraph of Article 30(1) by replacing the reference to Regulation (EC) 765/2008 with a reference to the current Compliance and enforcement proposal;
- 2) to delete the fourth subparagraph of Article 30(1).

Article 42 – Amendments to Directive 305/2011/EU

In Latvia's view, plain deletion of Article 56, Paragraph 1 is not an appropriate solution because this would reduce the powers of MSA's and obligations of economic operators, as well as obligation to inform the notified bodies.

Latvia proposes an alternative solution:

1) to reword the first subparagraph of Article 56(1) by replacing the reference to Regulation (EC) 765/2008 with a reference to the current Compliance and enforcement proposal;

2) to delete the fourth subparagraph of Article 56(1).

Article 46 – Amendments to Directive 2014/28/EU

Latvia would like to draw the attention to the following. After deletion of the reference to Regulation (EC) 765/2008 in the first subparagraph of Article 41(1), the remaining second subparagraph of Article 41(1) sets forth the obligation of the MS to take measures to ensure that explosives may be placed on the market only if, when properly stored and used for their intended purpose, they do not endanger the health or safety of persons. Such a provision would no longer comply with the title of Article 41 - Union market surveillance and control of explosives entering the Union market. The Title should be amended accordingly.

Article 55 – Amendments to Directive 2014/68/EU

Paragraph 2. Latvia draws the attention to the fact that the third subparagraph of Article 40(1) of Directive 2014/68/EU which is proposed to be deleted has no relevance to Regulation (EC) 765/2008. Therefore, Latvia proposes to delete the fourth subparagraph of Article 40(1) of Directive 2014/68/EU.

Article 56 – Amendments to Directive 2014/90/EU

Paragraph 1. In Latvia's view, deletion of the whole Paragraph 10 of Article 12 of Directive 2014/90/EU is not appropriate because this would reduce obligations of manufacturers. Instead, Latvia would propose to replace just the reference to Regulation (EC) 765/2008 with reference to the current Compliance and enforcement proposal or delete the reference at all, but keep the rest of Paragraph 10 of Article 12 of Directive 2014/90/EU.

Paragraph 3. In Latvia's view, Paragraph 4 in Article 25 of Directive 2014/90/EU should be kept and not deleted because it provides for specific powers for MSA's to request the manufacturer to make the necessary samples available or to give on-the-spot access to the samples at the manufacturer's own cost. This is a more specific provision than the generally applicable ones to be set forth by the Compliance and enforcement proposal.

Therefore, Latvia would propose to replace just the reference to Regulation (EC) 765/2008 with reference to the current Compliance and enforcement proposal or delete the reference at all, but keep the rest of the provision.

Chapter XI – Penalties, evaluation, committee procedure and entry into force and application

Article 61 – Penalties

Paragraph 2(c). Latvia is concerned with regard to obligation to take due regard of the intentional or negligent character of the infringement when making the decision whether to impose a penalty in each individual case. This may be complicated to prove which in turn makes it unnecessary complicated for MSA to impose a penalty (or the maximum amount of penalty) and as a consequence leaves an opportunity for the infringer to skip the penalty if he claims it happened due to the lack of knowledge of the applicable law, for example.

Paragraph 3. Latvia can support inclusion of criminal penalties for serious infringements of Union harmonisation legislation as long as it remains an option and not an obligation for the Member States.

Latvia proposes to delete the words “may be increased where the economic operator has previously committed a similar infringement and” in Paragraph 3 to avoid duplication, as this criteria is already set forth in Paragraph 2(e) as the criteria for increasing a penalty.

Paragraph 4. Latvia is concerned of complications with regard to application of penalties which would offset the economic advantage arising from the infringement. This requires some methodology or interpretation guidelines, as well as information gathering from other MS, where the infringement has occurred.

Article 64 – Entry into force and application

Even though the regulation is directly applicable, it will require considerable changes in Latvian legislation which cannot be done in a short term (until January 2020). In Latvia’s view, the regulation should be applicable not before two years following its publication and entry into force.