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WORKING PAPER

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NOTE

From:	Delegation of Spain
To:	Working Party on Consumer Protection and Information
Subject:	Proposal for a Regulation on general product safety - Spain's replies to PRES questions on Random samples & Remedies

Spanish comments to GPSR - Key questions on Random testing and Remedies V2 and standalone software

Standalone software

After a clear presentation by the Commission, we would like to express our support to the compromise text with regards to including the standalone software in the GPSR.

We believe that standalone software poses some risks from a consumer safety point of view that need to be addressed since its very design. For this reason, and given the safety net nature of the GPSR, we favour its inclusion in the scope, without prejudice to a subsequent regulation addressing it in more detail.

Of course, we aknwoledge that assessing this kind of products will be a challenge for market surveillance authorities. Therefore, we look forward to having new standards to deal with the new risks coming over and also guidelines on how to assess them.

I / Sample testing of products by the responsible person (Art. 15(2))

Questions of the Presidency:

1) **Responsibility for the sample testing:**

   a) **In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?**

      We support the alignment with Decision 768/2008, that states that manufacturers shall ensure that procedures are in place for series production to remain in conformity.

      We are of the opinion that sample testing is not always necessary as long as there is an internal production control implemented by the manufacturer. Only in case the manufacturer or importer is not able to prove the existence of this internal production control, it is acceptable to ask for sample testing.

      Sample testing could be performed by the manufacturer or the importer themselves or by a third party in the EU.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsbility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

We think that the responsible person in the EU should be liable for the safety of products placed in the EU market.

Nevertheless, as already answered before, sample testing is not always necessary. In case the responsible person in the EU is not able to prove that the manufacturer has an internal production control implemented, according to Decision 768/2008, it would be acceptable to request sample testing to be done by himslef or by a third party in the EU.

2) Scope of the sample testing:

- **Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?**

  There could be an exemption for those products not produced in series.

  Another exception could be for very simple products where the manufacturer has implemented an internal production control, that guarantees a manufacturing process that prevents all the risks identified in the risk analysis, and demonstrates that it is a consistent production that ensures that all products are manufactured with the same conditions. Provided that this internal production control is proved with technical documentation.

  Regardless of these exceptions, market surveillance authorities should always have the power to require sample testing when they consider it necessary.

- **For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of**

bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

As long as the manufacturing process is consistent, for ES it is acceptable to perform tests on one product reference representing a group of products that are manufactured under the same manufacturing conditions and have the same risk analysis. This should be demonstrated with technical documentation.

In any case, we consider that Market surveillance authorities should always have the power to require sample testing on any produt reference when they consider it necessary.

- **Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?**

For the sake of having the same level playing field for all manufacturers, we would agree on providing a general minimum frequency of at least 1 per year. Nevertheless, longer testing frequencies could be accepted where there is a technical justification from the manufacturer.

Frecuency is linked to the manfacturer's batching procedure. Products under the same batch/lot number are supposed to be manufactured under the same conditions, therefore controls should be performed on each lot. This way it would be on manufacturer's side to decide how to divide into lots. The greater the number of products included under the same batch number, the greater the impact would be of the measures taken if a non-conformity is detected.

- **About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?**

The GPSR has to guarantee that EOs have procedures ensuring that results are independent and neutral, but it shoud not enter into the details of the sampling process.

- **About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?**

We consider it appropriate to require that testing is carried out by accredited bodies which cover the necessary tests to ensure that the risks identified in the risk analysis carried out by the manufacturer have been mitigated or eliminated.

II / Remedies in case of product safety recalls (Art. 35)

Questions of the Presidency:

1) **When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:**
   - **Should the refund of the product always be included among the options proposed to consumers?**

     As already mentioned in our non-paper sent together with Portugal, Spain strongly supports preserving the right to choose of the consumer. However this does not mean that refund should always be mandatory as a first option.

     We are in favour of keeping the regimen as similar as possible to the one set out in Directive 2019/771. Only the reduction in price would not be acceptable since safety shall prevail in this case.

     This way, consumers should have al least the options of replacement and repair, which will usually entail a lower environmental impact. Only in case it is impossible to offer one of these two options (or both of them) due to disproportionate costs or other justifications proven by the economic operator, the possibility of refund should be included as mandatory.

   - **Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?**

     During the legal guarantee period, the regime of Directive 2019/771 should be aplicable (except for the price reduction). After that period, a similar regime should be applied. Without prejudice of other remedies that the EO may be able to offer, the consumer shall be able to choose in first place between repair and replacement and therefore these options should be mandatory as a general rule.

- **Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?**

  Yes. Only if either the repair or the replacement is impossible or would entail disproportionate costs for the economic operator or would have a higher environmental impact compared to another remedy, the economic operator may offer just one of them or, where appropriate, adequate refund of the value of the recalled product. In such cases, the economic operator shall duly substantiate the circumstances restricting the choice.

  Authorities should keep the power to issue detailed instructions and orders to economic operators regarding the remedies offered.

2) **Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?**

Provided that safety is not reduced, economic operators shall give preference to the most sustainable solutions, informing the consumers concerned accordlingy, so that they can take this into account in their choice.

3) **When the remedy is a refund, how should its value be determined?**

Refund value should be stimated as objectively as possible. When possible, the value indicated on the invoice should be taken as reference, which could be modulated according to the time elapsed by using the CPI (Consumer Price Index) or the current price of identical or similar products. This measures would generally benefit consumers, creating incentives for efective recalls. In the end, we are talking about products that shouldn't have been placed on the market by the economic operators. In any case, it would be desirable to have common guidelines for all Member States to determine the refund value in a harmonised way.

4) **How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of**

the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

A fragmentation of different regimes could lead to confusion and be more burdensome for consumers as well as for economic operators. Therefore, if the unsafe product is within the warranty period, the seller shall be joint and several responsible towards the consumer for any lack of conformity of the goods resulting from an act or omission of the seller or a third party, even if another economic operator decided the recall. The seller should also be able to pursue remedies against the person responsible in previous links of the chain of transactions.

In any case, collaboration between the different economic operators and sellers should be promoted in order to provide consumers with as clear information as possible and to increase the effectiveness of recalls, irrespective of who has initiated them.