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Customs
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**NOTE FOR THE ATTENTION OF**
**EUPCN & PARCS MEMBERS**

**Subject:** **Article 28(1) and 28(2) of Regulation (EU) 2019/1020 – Refusal to release for free circulation – Notices on dangerous/non-compliant products**

Article 28 of Regulation (EU) 2019/1020 lays down the procedures to be followed in case of refusal to release a product for free circulation because the market surveillance authorities (MSAs) have concluded that the product presents a serious risk (paragraph 1) or does not comply with EU legislation (paragraph 2). When this situation occurs, a specific notice 'dangerous product' or 'product not in conformity' must be included in the customs data processing system, and where appropriate on relevant documents provided with the declaration. The responsible MSAs are required to immediately enter that information in ICSMS.

**Article 28(1) and 28(2) of Regulation (EU) 2019/1020**

1. Where the market surveillance authorities conclude that a product presents a serious risk, they shall take measures to prohibit the placing of the product on the market and shall require the authorities designated under Article 25(1) not to release it for free circulation. They shall also require these authorities to include the following notice in the customs data-processing system, and, where appropriate, on the commercial invoice accompanying the product and on any other relevant accompanying document:

   **'Dangerous product — release for free circulation not authorised — Regulation (EU) 2019/1020'**.

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

2. Where market surveillance authorities conclude that a product may not be placed on the market since it does not comply with the Union law applicable to it, they shall take measures to prohibit the placing of the product on the market and shall require the authorities designated under Article 25(1) not to release it for free circulation. They shall also require those authorities to include the following notice in the customs data-processing system, and, where appropriate, on the commercial invoice accompanying the product and on any other relevant accompanying document:

   **'Product not in conformity — release for free circulation not authorised — Regulation (EU) 2019/1020'.**

> Market surveillance authorities shall immediately enter that information in the information and communication system referred to in Article 34.

Since the entry into application of Regulation (EU) 2019/1020, ICSMS has been upgraded to allow MSAs to indicate:

- if a case investigation has been referred to them by the border authorities (field GEN 68); and
- if they have requested the border authorities to refuse the release for free circulation of a product because it presents a serious risk (dangerous product, field GEN 69) or because it is not in conformity with the applicable legislation (non-compliant product, field GEN 70).

ICSMS allows both fields 'dangerous product' and 'non-compliant product' to be selected in a non-exclusive manner. Thus, a product may be identified as dangerous, as non-compliant, *or as both dangerous and non-compliant*.

However, it appears that competent authorities in the Member States have different interpretations and divergent practices when implementing the requirements of Articles 28(1) and 28(2) in ICSMS and in national customs systems. Many authorities have so far considered that a product should be marked in ICSMS and in customs systems/documents as *either* dangerous *or* non-compliant. The underlying assumption is that a product marked as dangerous (serious risk) would in any case be non-compliant, while a product marked as non-compliant would not present any serious risk.

**The question arising for the uniform implementation of Articles 28(1) and 28(2) in customs and market surveillance systems is whether the indications 'dangerous product' and 'non-compliant product' should be considered as mutually exclusive – i.e. competent authorities should always choose one or the other – or if they may be used in combination.**

This is an important question because non-uniform practices when encoding the information are bound to skew statistics and analyses drawn from ICSMS or from national customs systems. The issue will become even more relevant with the creation of the interface between ICSMS and national customs systems, since the data inputs need to be standardised across the Member States.

## 1. Dangerous and/or non-compliant?

The formulation of Article 28(1) and 28(2) may convey the impression that a product refused for release for free circulation will always be either dangerous or non-compliant, in particular because these situations are addressed in separate paragraphs. In addition, the notices could appear repetitive if used concomitantly in IT systems or documents.

However, Article 16 of the Regulation provides that market surveillance authorities must take appropriate measures if a product is liable to compromise the health and safety of users **or** if it does not conform to applicable EU legislation. In other words, a product may be dangerous without necessarily being non-compliant: there may be cases, even if rare, where a product is deemed dangerous even if it complies with the applicable EU legislation.

This is corroborated by the New Legislative Framework, which contains a model provision addressing *"compliant products which present a risk to health and safety"* (Article R.33 of Annex I to Decision No 768/2008/EC of the European Parliament and Council). This provision is implemented in all sectoral legislations aligned with Decision No 768/2008. If a compliant product is dangerous, there is clearly an issue to be addressed but this situation may occur.

Consequently, the examination of a product by MSAs can lead to four options:

| Non-compliant | Dangerous (serious risk) | The product is… |
|---|---|---|
| Y | N | ***Non-compliant*** |
| N | Y | ***Dangerous, although deemed compliant*** |
| Y | Y | ***Non-compliant and dangerous*** |
| *N* | *N* | *No issue detected* |

## 2. Consequences for the application of Article 28(1) and 28(2)

In order to ensure a uniform application of Article 28(1) and 28(2), the logic which should prevail is the following:

| Non-compliant | Dangerous (serious risk) | Release for free circulation is refused because the product is… | Encoding in ICSMS | Notice in customs data-processing system/relevant documents |
|---|---|---|---|---|
| Y | N | **Non-compliant** | **Select Field 70 only**<br>☑ Border authorities requested by MSA to refuse the release for free circulation – Non-compliant product, Art. 28(2) | **Include Art. 28(2) notice only**<br>"Product not in conformity – Release for free circulation not authorised – Regulation (EU) 2019/1020" |
| N | Y | **Dangerous, although deemed compliant** | **Select Field 69 only**<br>☑ Border authorities requested by MSA to refuse the release for free circulation – Dangerous product, Art. 28(1) | **Include Art. 28(1) notice only**<br>"Dangerous product – Release for free circulation not authorised – Regulation (EU) 2019/1020" |
| Y | Y | **Non-compliant and dangerous** | **Select Fields 69 and 70**<br>☑ Border authorities requested by MSA to refuse the release for free circulation – Dangerous product, Art. 28(1)<br>☑ Border authorities requested by MSA to refuse the release for free circulation – Non-compliant product, Art. 28(2) | **Include Article 28(1) and 28(2) notices**<br>"Product not in conformity – Release for free circulation not authorised – Regulation (EU) 2019/1020"<br>"Dangerous product – Release for free circulation not authorised – Regulation (EU) 2019/1020" |

We invite MSAs to follow the approach outlined above when encoding the information in ICSMS from now on. To this purpose, we kindly ask the Single Liaison Offices, with the support of the ICSMS contact points, to inform their national market surveillance community of this guidance, and to ensure that it is adequately followed-up.

Similarly, we call upon customs authorities to adapt their practices and IT systems, where required, to ensure the inclusion of the appropriate notice(s) in accordance with Article 28(1) and (2) of Regulation 2019/1020. The members of the PARCS expert group are invited to inform their national customs community of this guidance, and to ensure that it is adequately followed up.

This document is intended to facilitate the uniform application of the Regulation (EU) 2019/1020. Please note that it only expresses the views of the Commission services responsible for the Regulation and does not commit the European Commission. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.

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|---|---|
| *E-signed*<br>Valérie Ledure<br>Head of Unit – TAXUD A.5 | *E-signed*<br>Matthias Schmidt-Gerdts<br>Head of Unit – GROW D.3 |

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Electronically signed on 18/01/2022 12:10 (UTC+01) in accordance with article 11 of Commission Decision C(2020) 4482