



NLF interpretative Fiche

Orgalime Position Paper

Title Short:

Placing on the market of imported products

Fiche Nr:

21

Subject: Clarifying the point in time when an imported product is considered to be placed on the market

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Category: Obligations of importers and manufacturers

Legislative references:

Regulation 765/2008

Article 2.5: 'importer' shall mean any natural or legal person established within the Community who places a product from a third country on the Community market;

Article 2.19: 'release for free circulation' shall mean the procedure laid down in Article 79 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (2);

Article 27.3. The authorities in charge of external border controls shall suspend release of a product for free circulation on the Community market when any of the following findings are made in the course of the checks referred to in paragraph 1:

- (a) the product displays characteristics which give cause to believe that the product, when properly installed, maintained and used, presents a serious risk to health, safety, the environment or any other public interest referred to in Article 1;
- (b) the product is not accompanied by the written or electronic documentation required by the relevant Community harmonisation legislation or is not marked in accordance with that legislation;
- (c) the CE marking has been affixed to the product in a false or misleading manner.

Guidance documents:

Chapter 2.3.1 of the 2000 version of the Blue Guide, second and third paragraph

"A product is placed on the Community market when it is made available for the first time. This is considered to take place when a product is transferred from the stage of manufacture with the intention of distribution or use on the Community market. (...) The transfer of the product takes place either from the manufacturer, or the manufacturer's authorised representative in the Community, to the importer established in the Community or to the person responsible for distributing the product on the Community market."

Chapter 2.3 of the 2014 version of the Blue Guide, first paragraph

"A product is placed on the market when it is made available for the first time on the Union market. The operation is reserved either for a manufacturer or an importer i.e. the manufacturer and the importer are the only economic operators who place products on the market. When a manufacturer or an importer supplies a product to a distributor or an end-user for the first time, the operation is always labelled in legal terms as "placing on the market".

Chapter 2.3 of the 2014 version of the Blue Guide, bullet points (page 18)

"Placing on the market is considered **not** to take place where a product is (...)

- manufactured for one's own use. Some Union harmonisation legislation however covers products manufactured for own use in its scope;
- bought by a consumer in a third country while physically present in that country;
- transferred from the manufacturer in a third country to an authorised representative in the Union whom the manufacturer has engaged to ensure that the product complies with the Union harmonisation legislation
- introduced from a third country in the EU customs territory and has **not** been released for free circulation. This includes the cases of products in transit, placed in free zones, warehouses or temporary storage." (...)
- manufactured in a Member State with a view to exporting it to a third country (this includes components supplied to a manufacturer for incorporation into a final product to be exported into a third country)
- transferred for testing or validating pre-production units considered still in the stage of manufacture

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- displayed or operated under controlled conditions at trade fairs, exhibitions or demonstrations; or
- **in the stocks** of the manufacturer (or the authorised representative established in the Union) or **the importer**, where the product is not yet made available, unless otherwise provided for in the applicable Union harmonisation legislation.

Chapter 3.1 of the 2014 version of the Blue Guide

[As regards unfinished products]: “Thus, when a product is transferred to a manufacturer for further measures such as assembling, packaging, processing or labelling, when placing the product on the market, he has the sole and ultimate responsibility for ensuring the conformity of the product to the applicable legislation, and must be able to do so.”

THE POINT IN TIME WHEN AN IMPORTED PRODUCT IS “PLACED ON THE MARKET”

Orgalime considers that, as a general rule, imported products from non EU countries are placed on the internal market at the point in time when the product is “**released for free circulation**” by customs authorities and the ownership or other proprietary right concerning the product has been transferred from the third country economic operator to either the importer or and end user established in the EU.

This is in line with the interpretation of the former version of the Blue Guide (see reference above). However, a number of statements in the current version of the Blue Guide seem to call this established principle into question (see references to Chapter 2.3 of the Blue Guide 2014 above).

A product **can only once** be made available on the market for the first time (that is placed on the market). In our view, a product should be required to comply with all Union harmonisation legislation that applies to it at the time when it (first) passes the EU borders for further distribution in the European Economic Area (EEA). This is the purpose of the border controls and possible measures taken by the national authorities according to Article 27 to 29 in the Regulation 765/2008. Confirming this principle is essential to ensure the effectiveness of border controls and related market surveillance.

However, it should also be stated clearly that certain aspects of formal product compliance, such as the affixing of traceability requirements, can only be checked once the product is at the disposal of the importer. This is why according to the current legal framework, customs authorities are only required to check specific aspects of product compliance, but not traceability requirements (see article 27.3 of Regulation 765/2008), in order to judge whether the product’s compliance should be further assessed by market surveillance authorities. This is logical, as it is impossible for the importer to fulfil their obligations, such as checking the product’s compliance or adding their contact details (traceability requirements) before having the product at their disposal. Therefore, this should be clarified in Chapter 7.3.3 of the Blue Guide (2014).

This interpretation of the point in time at which imported products are placed on the market has the following benefits:

1. It clarifies that all finished products entering the Union market should be considered as placed on the market at the time of release for free circulation by customs authorities and the transfer of ownership or other propriety rights has taken place;
2. It allows market surveillance authorities to check products in the stocks of importers after release for free circulation for their conformity with all applicable Union harmonisation legislation as these products are considered as already placed on the market;
3. It gives the importer and the third country manufacturer (or other economic operator) the necessary legal certainty that the legislation applicable to the product is the one that was in place when the product was (first) released for free circulation, regardless of whether the legislation changed before the product actually left the stocks of the importer for further distribution.

CLARIFICATION FOR NON-FINISHED PRODUCTS ENTERING THE INTERNAL MARKET

It should be further clarified in the Blue Guide that non-finished products cannot be considered as placed on the market at the point of release for free circulation.

According to the Blue Guide, a product is not placed on the market when it is transferred to a manufacturer for further transformation and measures, such as assembling, packaging, processing, labelling, translating the instructions or completing the conformity assessment. This principle also applies in the case of imported products.

In such a case, it would be advisable for manufacturers to provide adequate information for the authorities that the product or the conformity assessment is not finished.

NECESSARY CHANGES TO THE TEXT OF THE BLUE GUIDE 2014

Given the interpretation of the concept of “placing on the market” described above, we consider that the following amendments to the latest version of the Blue Guide 2014 are necessary:

Chapter 2.3, 1st paragraph:

“A product is placed on the market when it is made available for the first time on the Union market. ~~The operation is reserved either for a manufacturer or an importer i.e. the manufacturer and the importer are the only economic operators who place products on the market. When a manufacturer or an importer supplies a product to a distributor or an end-user for the first time, the operation is always defined in legal terms as “placing on the market”. Any subsequent operation, for instance, from the importer to a distributor, from a distributor to a distributor or from a distributor to an end-user is defined as making available.~~”

Chapter 2.3, eighth bullet point (page 18):

“Placing on the market is considered not to take place where (...)

- *The manufacturing and conformity assessment process is not yet completed*
- *in the stocks of the manufacturer (or the authorised representative established in the Union) ~~or the importer~~, where the product is not yet made available, unless otherwise provided for in the applicable Union harmonisation legislation.*

Chapter 2.4:

*“Union harmonisation legislation applies when the product is made available (or put into service) on the Union market for the first time. **In this case the first making available takes place when the product is transferred either from the manufacturer to the importer or directly from the manufacturer to the final consumer or user. This means that, as a general rule, the relevant point in time is the release by customs for free circulation on the Union market.** It also applies to used and second-hand products imported from a third country...”*