EuroCommerce for retail & wholesale

Position paper
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Proposal for a General Product Safety Regulation: a core issue to keep consumers safe.

Key messages

1. An **effective legal framework for product safety is needed.** We welcome the Commission's continued work to improve product safety and aligning the approach for harmonised and non-harmonised product regulation.

2. **Risk-based approach at the core**: We support the risk-based approach in this proposal, focussing on harmonised risk-assessment and removing dangerous products from the market. Imposing disproportionate obligations to law abiding companies, and unnecessary burden for SME's, including on information and reporting requirements, should be avoided.

3. Coherent legal framework for connected products: Some aspects related to modern technologies are better regulated under *lex specialis.* Furthermore, the decisive moment for ensuring product safety is the placing on the market. Full coherence with other proposals currently being debated, such as the digital services act and the cyber security act is especially important.

4. Roles and responsibilities of each type of operator in the supply chain should be in line with their sphere of influence and activities. Proportionality of new measures for retail and wholesale at the end of the chain needs to be ensured. To take full account of the new omnichannel trading environment, which received a major boost during the COVID pandemic, establishing an online presence for European retailers and wholesalers should be facilitated.

5. Information requirements for products sold via distance selling should be aligned with the type of information legally required to be provided by the retailer to their customers.

General Introduction

Product safety, a core issue for retail and wholesale to keep consumers safe.

Consumer confidence is a key priority for retailers and wholesalers: consumers need to know that the products they buy are safe. Retail patterns have changed, and legislation needs to adapt to minimise the sale of unsafe products on the EU market, which can potentially cause harm to consumers. With major changes in how and where people buy, it is important that we have a modern and coherent product safety framework which is reasonable, effective, proportionate, and as simple as possible.

Retailers and wholesalers therefore fully support Commission action to ensure that all products placed on the EU market are safe. To address the problem of dangerous products, the proposal for a regulation, instead of a directive, is supported and will lead to a more uniform approach across the EU to the benefit of business.

The alignment to the Market surveillance and Product compliance regulation to ensure coherence between harmonised and non-harmonised product legislation, will add to a more harmonised approach by providing a common surveillance framework for all products on the EU market.

Currently, we face multiple legislation regulating product safety and compliance, including 70 pieces of product regulation (Lex Specialis), the digital service act, the new legislative framework (NLF) and

the market surveillance and product compliance regulation. The fact that the digital services act is currently being negotiated is important to consider maintaining coherence and avoid duplications.

Overall, we believe in a risk-based approach, encompassing all sales channels reflecting the responsibilities of each economic operator as set in other legislation. The bottom line remains appropriate and proportionate responsibilities for, and risk-based enforcement of businesses that sell products in the European Union, irrespective of the origin or sales channel of these businesses. As such, we support the narrative under point 24 of the proposal.

Retailers and wholesalers need a level playing field and we expect enforcement systems to be more severe against rogue traders who put non-compliant products on the market. These situations often arise in cross-border sales and can be addressed by stronger cooperation between authorities across the EU as foreseen in the proposal.

Enforcement against traders from non-EU countries, however, remains a challenge. Obligations that theoretically apply to all economic operators but can only be effectively enforced towards those within the EU, will create burdens on those already compliant, while doing nothing to tackle traders of non-compliant products from outside the EU. Further international cooperation (and agreements) between the Commission and third countries, such as China, to help address the challenges of non-compliant and unsafe products is therefore strongly supported.

We regret to see that the paradigm shift towards equal treatment of paper-based and digital information transfer was not addressed in the proposal. Opportunities for the digital transfer of information does allow easier adaptation of the information by the manufacturer and to provide this information in different languages which facilitates trade in the single market. We suggest to explicitly add the possibility to pass on safety information and instructions for use to the end customer in a digital manner.

Lastly, we want to stress that, while the obligations for economic operators are largely in line with what is being done already, some might have a big impact on the ability to establish an online presence for SMEs in the retail and wholesale sector, as well as those businesses embarking in the circular economy. We will be commenting on this in this paper.

Detailed comments

General provisions (Chapter I)

Subject matter (Article 1). Product safety is **a key priority for retailers and wholesalers** and crucial importance to maintain consumer confidence. To increase legal certainty, EU product safety legislation needs to provide a common framework for all non-food products, with clear responsibilities for every private and public actor. This will reduce the number of non-compliant and unsafe products on the EU market.

Scope (Article 2). With the development of new circular business models (in which consumer articles are utilized as much as possible, thereby preventing them to become waste), it is important that consumers can trust their repaired or refurbished product. A retailer repairing or refurbishing products, on a voluntary basis, is dealing with individual cases for which it would be impossible to conduct a full risk assessment according to the standards prescribed in this regulation.

In view of the above and to ensure consistency with the Blue Guide and the objectives of the circular economy action plan, we would recommend that products which have been repaired, refurbished or exchanged without changing the original performance, purpose or type are **also outside of scope** (2.3). This does not mean that safety standards should be lower for repaired or refurbished articles.

Definitions (Article 3)

Against the backdrop of the ongoing discussion around the Digital Services Act (DSA), and existing EU product regulation, it is important to make sure the definitions are **uniform and consistent**.

(1) Product
We welcome the definition of product under the proposal, which is limited to consumer products.

However, the definition here proposed includes a reference to products which "*can*", under reasonably foreseeable conditions, be used by consumers even if not intended for them. **This will create uncertainty for manufacturers and wholesale producing products for professional use.**

The term "interconnected" also needs to be defined. We like to point out that digitally connected products are already covered by Dir 2014/53/UE relating to the making available on the market of radio equipment.

In addition, we note that multiple technology related discussions are currently taking place and several pieces of legislations are being drafted by different DGs of the European Commission, such as on AI, cyber security etc. To avoid major legal inconsistencies, the GPSR proposal should not duplicate these discussions

(2) Safe product
The revision introduces the fact that a product must be safe in case of misuse. It will be highly **challenging to foresee all possible risks related to misuse or to assess such a risk** and this approach will put a huge burden on manufacturers and put the burden of proof on them. Translation of the word misuse into different national languages could lead to different interpretation of what is considered misuse.

The reference to "minimum risks" in the definition of a safe product can also lead to legal uncertainty with possible divergences in interpretation amongst Market Surveillance Authorities.

We would here like to refer to the Blue Guide[1] section 7.5.2.1. on Compulsory restrictive measure taken, where it is stated that compliance with harmonised standards give a presumption of conformity. The decision of the competent authority to take corrective action must always be based on an established non-compliance with the essential requirements.

(5) Risk
We welcome the wording in this definition explicitly referring to the *practical* occurrence of risks and the foreseeable use.

(16) End user
The final user definition mentions the professional activities. This can be confusing considering that the scope of this regulation focusses only on consumer goods. We therefore ask for the deletion of the last part of the sentence.

(23) Recall. It is important **to reinsert the word "dangerous**" as this constitutes the core of a recall.
Distance sales (Article 4). Criteria are developed in case law regarding the eCommerce directive. It is very important that the criteria here proposed are aligned with the criteria used to determine the targeting of distance sales of goods under the eCommerce directive. In addition, following case law (Alpenhof[2]) it needs to be certain that the concept applied ensures legal certainty.

Safety requirements (Chapter II)

Presumption of safety (Article 6). Clarification is needed on the difference between the presumption of conformity and the presumption of security. In addition, we also would like to see acknowledged that some products can be aligned with norms that are not yet published.

Aspects for assessing the safety of a product (Article 7). This is a useful part of this regulation guiding the economic operators in their work. The proposal adds new references, such as to non-embedded items, cybersecurity and to evolving and learning and predictive functionalities the standards of which should be coherent with lex specialis.

Recent innovations and developments in the context of artificial intelligence, cybersecurity and (external) software usually concern harmonised product regulation (e.g. Low Voltage Directive or

[1] COMMISSION NOTICE The 'Blue Guide' on the implementation of EU products rules 2016 (Text with EEA relevance) (2016/C 272/01) – new version currently being translated
[2] https://curia.europa.eu/juris/liste.jsf?num=C-585/08&language=en

Radio Equipment Directive) and should primarily be addressed there. This was already the case in the proposal for the revision of Directive 2006/42/EC on machinery.

Importantly, in our opinion, the time of placing on the market must remain decisive for products. Furthermore, it should be ensured that updates and downloads themselves are secure.

With regard to (b) and (c) and the effects on and of a product (i.e. interconnectivity), for reasons of reasonableness and proportionality of duty, this should be limited to when products **are intended** to be used together - not when it is merely reasonably foreseeable. This will ensure a proportionate approach to safety assessment and provide manufacturers with the necessary certainty.

Obligations of economic operators - Section 1 (Chapter III)

Obligations of manufacturers (Article 8). The requirements placed on manufacturers under the GPSR should be proportionate to the actual risk a product poses. General obligations which are not risk-based can lead to a disproportionate administrative burden (especially for SMEs).

Under 8.4, the term technical documentation is applied within harmonised product legislation and should not be used here to avoid confusion. The evaluation of the risk (8.5.b) should be done on the product category, not the product itself. Also, a 10-year period under Article 8.5 is disproportionate.

Under Article 8(7) states that information on the single contact point should be allowed to appear on the product, or on the packaging, or on an accompanying document *when labelling on the product is not possible*. Practical experience has shown that there is often uncertainty as to when labelling on the product is not possible and thus if labelling on the packaging is permissible. From our point of view, labelling on the packaging would be sufficient which would allow the product, in case of complaints, to be traced back to the manufacturer. "**Where that is not possible" should be deleted.**

In addition, the article should be amended to specify that the postal address *or* (instead of *and*) a digital one, in line with harmonised legislation.

Obligation of the authorised representative (art 9.2.b). We propose to include that the information provided to the manufacturer on the specific risk should also be communicated to distributors.

Obligations of distributors (Article 11). We question the obligation of the distributor to check whether the manufacturer or importer has accompanied a product with the instructions for use and safety information. The GPSR applies to many completely different products, not regulated by special legislation. These include, for example, furniture, many non-electric garden tools and certain household objects, such as a broom. For all such products, **the manufacturer must decide** which instructions and information are required for each item and include them with the product. This varies from product to product and the trader cannot be expected to check whether all these items need and are accompanied by the required information. Therefore, we call for **the deletion of this from the distributor's obligations,** or, *alternatively*, add a reference specifying that the distributor should be able to rely on the assessment of the manufacturer.

Distributors have previously been subject to a standard of "due care" under harmonised product legislation, and "within the limits of their respective activities" under the GPSD. Given their more limited role within the supply chain, we consider that it would be reasonable to again include reference to distributors acting with "due care".

Regarding the text under **Article 12 "Cases in which obligations of manufacturers apply to other economic operators"** it is unclear what 'substantial' means and how the Economic Operators would need to assess if the safety of a product is affected.

Internal processes (Article 13) are common practice for our members, adapted for specific product groups, business model and business size and sectors.

Cooperation of economic operators with market surveillance authorities (Article 14). Our sector fully cooperates with market surveillance authorities to ensure dangerous products are removed from the market. It is important that the regulation differentiates between the responsibilities of those operators who first place a product on the market and those that make the product available on the

market. Distributors would inform the manufacturer of the complaints received by the consumer but might not have all the necessary information linked to the risk reported by their clients. This is the role of the manufacturer to further investigate.

Responsible person (Article 15)

We ask for ***clarification and consistency*** between articles 8.7, 10.3 and 15 on the provision of the address. If the manufacturer is not European, the product will have to include the references of the non-EU manufacturer *and* the responsible person in the EU. According to this proposal the product may even have to bear three references together with those of the EU importer, all of which could be associated by the consumer and the national authorities as responsible economic operators. Multiple references on the same product could lead to confusion as to who is placing the product on the European market and thus primarily responsible for its conformity/safety.

As such we suggest that in Article 15, a paragraph 4 is added as follows:
"*In the case where the name and address of the economic operator referred to in Article 4(1) of Regulation 2019/1020 is indicated on the product, its packaging or in an accompanying document, the obligations referred to in Article 8.7 and Article 10.3 may not apply.*"

In view of limited resources, we expect the Market Surveillance and Customs authorities to first focus on those products presenting the highest risk.

We have concerns regarding the additional tasks for a responsible person going beyond the tasks referred to in Article 4(3) of Regulation (EU) 2019/1020.

To periodically carry out sample testing of randomly chosen products made available on the market will create huge legal uncertainty. The proposal does not clarify on which basis (standards/legislation) the sample testing should take place, nor provides clarity on how many and which tests should be carried out. **Also, important to note is that there are no harmonized standards for most products which fall under the GPSR.**

The obligation to inspect products should firmly remain with the market surveillance authorities and we suggest **this proposed task is deleted**, albeit retaining the duty to perform sample testing in the instance where a product has been the subject of a decision of the Commission under Art26(1).

Traceability (Article 17). More information, precision and predictability are needed on this article which introduces new concepts of traceability whereby the Commission may require economic operator to establish or adhere to a system of traceability for certain products. This provision is associated with great uncertainty for economic operators concerned, as they do not know when and for which type of product such a system can be expected.

The consumer goods industry has for many years invested in logistical processes and systems to help their operational activities. It is therefore important that the choice of system is to be **determined by the economic operators based on their business practices and ideally on open standards used at global level, the Commission should not set the technical modalities but only the objective.**

The establishment of an expert group to advise the Commission and discuss possible proposals is recommended to include experts from the different business sectors.

Distance sales (article 18). Special obligations for distance sales seem to be redundant. These provisions go beyond the rules of the New Legislative Framework and do not fit the concept of graduated obligations in the supply chain and should therefore be deleted.

Retailers and wholesalers sell offline and online. Overall, the provisions here included represent an additional obstacle to enter into online trade, greatly increasing the effort required to set up and maintain an online shop, without any additional benefit for product safety. Especially for SME's this additional effort would be unmanageable.

Online presence has greatly taken off during the COVID 19 crisis and permitting many businesses to survive at time when brick and mortar stores were forced to close. Consumers have found the way to online shopping, and it would go against current trading environment, market trends and consumer expectations if this is made more difficult without a clear benefit for product safety.

Furthermore, the specifications on the contact details for the responsible person (Article 18.b) are not in line with the guidance on article 4 of Regulation (EU) 2019/1020.

The obligations in Art. 18 letters c) and d) are highly problematic. **Currently, there is no requirement to indicate the batch number of the products in brick-and-mortar sales**. The indication of a batch or serial number would necessitate a new offer to be placed in the online shop for each batch or series, **while this number will not be the same for all the product in stock or being shipped**. In the case of printed catalogues, this information is not possible at all and would not help on the product identification.

As in stationary trade, the enclosed safety information is not visible in advance. The information is however available to consumers in time for the use of the product. The consumer also can ask for information or advice before finalising the purchase online. The indication of all safety information and warnings to be printed (in catalogues) or enclosed in the online offer according to Art 18(d) is thus unnecessary and disproportionate. If, in individual cases, specific safety information is required at the time of purchase, this can be regulated in the special legal acts.

Obligations in case of accidents related to products (Article 19). The requirement to inform the competent authorities on accidents within two days according to Article 19.1 is disproportionate, especially compared to similar requirements for cosmetics, medicinal products and medical devices, which require such rapid notification only for the most serious incidents. It is also unclear what kind of accident is being referred to. A 2-day period can start only once the causality link in between the accident and the product is confirmed.

We strongly suggest that this obligation would at least be limited to cases in which an accident can be attributed causally to the product alone (due to a defect, the design, etc.) and when other factors can be completely excluded. The relevant period should only begin after it is proven that the product has been identified as the cause of the accident.

Online marketplaces (Chapter IV)

Market places (Article 20) The proposal introduces new requirements for marketplaces to react when unsafe products are found online. While this is highly appropriate to avoid sale of unsafe products, the feasibility for all types of marketplaces to do so is unlikely. In relation to discussions related to other pieces of legislation, we repeat the importance to ensure consistency and legal certainty.

The deadlines to delete products within 2 working days can quickly overburden SME platforms. This action might also not be appropriate in every case due to the highly divergent risk of the different types of non-compliant products. As already mentioned under article 19, this obligation must be **supported by clear information** in the notice to help identify the products. In any case the 48h requirement can only start once the economic operator has processed the notice allowing time to verify product safety/compliance issues if the contact does not come from a regulator.

To verify that the injunction is necessarily within the limits of a lawful order, it is always recommended to obtain legal advice, including in the case the notice comes from an authority from another members states from where the business is established. SME's do not have their own legal advisors and hiring outside legal advice is costly, affecting the level playing field for such operators. We recommend keeping **the wording "without delay"**.

Furthermore, authorities should be obliged to give reasons for their request, to avoid liability to pay damages to traders affected by the blocking if it removes products without having a concrete reason for doing so.

The GPSR introduces the requirement for economic operators to consent to data scraping by authorities and allow authorities to access the economic operator interface so that "online tools" can be deployed to detect compliance issues. This is very concerning as any access to such infrastructure would **most likely expose business sensitive information** and may impact the integrity of the systems and degrade the user experience. Attention is also needed for **possible security issues** access or scraping might bring (and resulting liabilities).

We call for the consideration of **alternative approaches to this proposal**, encouraging enhanced cooperation with market surveillance authorities and the development of mechanisms and communication channels building on the current EU Product Safety Pledge, for example through periodic reports.

Market surveillance and implementation (Chapter V)

Market surveillance (Article 21). The proposal under article 21(4) specifies that Market surveillance authorities *may* set up schemes focusing on control of internal processes for product safety set up by economic operators according to Article 13. It is unclear what a competent authority would check or how its "legality" would be confirmed. We consider this unnecessary in relation to non-food products and it could lead to a fragmented approach affecting businesses active in various member states.

These internal processes are common practice by responsible business operators in line with their specific business model, size, sourcing practices and product range. The individual application of such control schemes by some member States could lead to a fragmented approach across the EU, affecting especially businesses active in multiple Member States. **Businesses themselves are best placed, as part of the responsible business conduct, to decide on and set up such a scheme.**

This approach could also require a lot of resources of the authorities, and **we consider it more useful that support is provided to business, especially SMEs, on setting up such a process.**

Safety Gate rapid alert system (Chapter VI)

We welcome measures to enhance transparency and efficiency for economic operators using the EU Safety Gate. The Safety Gate is an important tool which is being used by retail and wholesale as part of their quality assurance and compliance processes. Further guidance to use the opportunities and obligations in relation to the Safety Gate would be very helpful (**Article 25**).

To make it easier for economic operators to link information on the products listed in the Safety Gate to products in their databases, it would be welcomed, if additional information, such as the European Article Numbers (EAN), where it exists for given product, is included in the Safety Gate.

Commission role and enforcement coordination (Chapter VII)

Arbitration mechanism (Article 27) While it is useful to share information between member states, the measures and restrictions applied in one member state should not be automatically applied in another member states unless the harmonised approach to risk assessment has been fully implemented across the EU. In addition, it is vital that in the case of arbitration the economic operator **is given the opportunity to comment on the conclusion of the member states and provide further test result or other supportive information.**

Furthermore, the validity and acceptability of test reports by accredited laboratories should include those located outside EU territory. Test results should automatically be considered valid and fully acceptable when done by a laboratory that is ISO 17025 accredited by a national authorisation board mutually recognized by, or a full member of, the European co-operation for accreditation.

Right to information and remedy (Chapter VIII)

Information from Economic operators to consumers (Article 33). We do not support the fact that economic operators who collect their customers' personal data *shall* make use of this information for recalls and safety warnings. The collection of data for individual notifications could considerably impair business processes.

We are of the opinion that for safety purposes there should be **clear and specific channels** for the customer containing general information. Such a channel should be independent from any registration system or loyalty program which have specific features and objectives that should not be associated with product safety matters.

A provision could be included that the trader ***can choose* a direct approach if he wishes to do so**. To

allow this option, it should be made explicit that the GDPR does not block retailers from contacting their customers in case of a recall.

Online marketplaces should, like other operators in the supply chain, be given the responsibility for informing consumers when hazardous and explicitly dangerous products come to light.

Recall notice (Article 34). The GPSD sufficiently governs recalls, however their efficiency can be further improved using harmonized notices which should include the relevant information for consumers to understand which products are being recalled and why, and clearly explains what action is required from them.

Harmonisation of the framework for recalls through EU guidance is also important for retail and wholesale to be able to identify the dangerous products more easily, and act according to their legal obligations. Often the information provided is poor or incomplete and this creates delays in identifying the correct products and taking actions, which can cause unsafe products to be available for longer.

Although it might not be possible to establish a communication method that is suitable for everyone, **minimum requirements** for recall notices and recall processes would help economic operators, authorities and consumers to whom these are directed. Further guidelines for businesses, such as on the use of social media, the timing and wording of a notice and other communication, are helpful.
It is equally important to ensure that **the risk assessment process at the basis of a recall is harmonized**. Too often Member States have diverging views and methodologies and fail to provide the justification for a decision to recall to the manufacturer.

Lastly, it should be noted that registration of products is a process driven by manufacturers who will subsequently be able to contact the customer and offer an appropriate solution.

International Cooperation (Chapter IX)

International cooperation (Article 36). We welcome international cooperation between market surveillance and customs authorities, as well as increasing the sharing of information, to ensure that products imported from third countries are compliant with EU rules. It has become clear that imported article are part of the problem hence working together with third countries can tackle problems (if any) at the source.

Financial provisions (Chapter X)

Penalties (Article 40). We support a uniform interpretation and application of the sanction regime throughout the Union. The basic approach should however be that the level of fines should be risk-based and proportionate.

Genuine operators who accidentally and unintentionally violate the law should not be punished in such a way that threatens their daily business operations. In addition, removing non-compliant products from shelves already involves a high cost to companies.

It should also be possible for competent authorities, in case of, minor cases of non-compliance, to reprimand an operator, while providing assistance through a list of improvement tasks requested to be introduced within a given time period.

In the light of the above, **Article 40(4)** however **imposes disproportionate penalties.** This is especially important if we consider that such fines would primarily affect economic operators in the EU, but not competitors in third countries which would get a further competitive advantage. We therefore suggest applying similar wording as in **Regulation 2019/1020, Article 41.**

We consider that the "**naming and shaming"** of those who are subject to penalties is **unnecessary and would recommend that this is removed**. Especially as in paragraph 8 certain exceptions are listed, including the potential disproportionate economic damage. This is a valid argument but would be difficult to judge prior to publication, nor to contain after publication as this information might remain available online for a very long period with reputational damage even after the issue has been solved.

A last but important remark is related to the **transition period (Article 47)** Economic operators – among which many SMEs - need sufficient time to be able to comply with the new obligations. Considering the number of provisions that need to be implemented, 6 months is far too short and **should be extended to two years**. The Goods Package concerned a smaller business area compared to the scope of the GPSR, while allowing a 2-year transition.

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