Ecommerce Europe's comments for the trialogues on the General Product Safety Regulation

Key concerns

1. **Provide clarity on the application to second-hand products**
2. **Ensure feasibility for the responsible person obligations and follow a risk-based approach**
3. **Remove the reference to batch/serial numbers in the information requirements**
4. **Clarify the concept of 'identical content' to avoid an unworkable stay-down obligation**
5. **Support the provision of information in a digital format through electronic solutions**
6. **Extend the implementation period to at least 24 months**

Clarity on application to second-hand products

While we believe policymakers agree with us that circular business models should be incentivised by facilitating and simplifying procedures, there are often still significant limitations that businesses face, both from EU and national legislation. Article 12 of the GPSR proposal currently states, in both the Council and Parliament text, that a person should be considered a manufacturer for purposes of the Regulation when they substantially modify the product, or when they place a product on the market under its name or trademark. While Ecommerce Europe recognises the importance of trust and safety in the case of second-hand, repaired or refurbished products, and believes that safety standards should by no means be lowered for these products, we urge policymakers to keep feasibility and legal certainty in mind when designing such obligations. Without further clarifications, the proposed article leaves uncertainty for refurbishers that work with second-hand products.

To provide legal certainty on what a refurbishment process entails, we suggest adding a definition to Article 3, to clarify that the act of refurbishment corresponds to the testing of the functionalities of a product, and, if needed, the maintenance and repair of a good or waste by a professional before it is made available on the market once again. Refurbishment does not entail modifying a product, but simply consists in returning a product to a condition where it fulfils its intended use. It is important to clarify that a refurbished product does not lead to a new product being created. In that sense, we believe that there should be a clear distinction between refurbishment and remanufacturing, where (re)manufacturing implies bringing a good back to a new condition when refurbishment does not.

Additionally, we call for a clarification of the concept of 'substantial modification' to ensure that refurbishing or repairing a product cannot be caught in the scope of Article 12. We suggest aligning the GPSR with the wording proposed in the recent Cyber Resilience Act proposal, in which it is stated that software updates and repairs do not constitute a modification of a product when they do not affect the compliance of the product with the Regulation or change the intended use for which a product has been assessed (Recital

23). Moreover, Recital 25 of the Cyber Resilience Act draws the connection to the refurbishment of a product with digital elements. We generally welcome the attempt to provide clarification with regards to refurbishment, but we suggest some improvements to the wording. That's because the wording "does not necessarily lead to a substantial modification" is skewed in the wrong direction, since it suggests that there is a significant chance that the refurbishment process could result in a substantial modification. However, as explained above, a refurbisher would have to deviate far from what the standard refurbishment process is in practice to cause a substantial modification. The wording should thus better reflect these probabilities. With consideration to the suggested improvements to the clarifications in the Cyber Resilience Act, we nonetheless strongly suggest introducing similar wording in the GPSR to avoid the risk of discouraging companies to engage in circular business models.

Finally, we fear that Article 12 could create the risk that refurbishers are limited to using only original spare parts rather than compatible ones as well. Although the established practice of using compatible spare parts does not sacrifice the safety of a product, nor affect the nature or functionalities of the product, the part itself may not have exactly the same performance characteristics as the originally installed part (e.g., slightly shorter battery lifespan (within an acceptable range)). Currently, Article 12 states that a modification is substantial if it changes the product in a manner which was not foreseen in the initial risk assessment of the product. It is unclear which actor makes this assessment. We are concerned that if it is up to the manufacturer to assess whether a change 'can be foreseen' that they could argue that any use of non-original spare parts could lead to unforeseen risks. To stimulate the repair and sale of second-hand products and allow this to be a viable business model, Ecommerce Europe believes that legislation should secure the availability of non-original spare parts, and not risk limiting their use.

Recital 16 states that "the requirements laid down in this Regulation should apply to second hand products or products that are repaired, refurbished or recycled that re-enter the supply chain in the course of a commercial activity". We would like to point to the practical issues involved in compliance with several obligations of the GPSR for sellers of second-hand or refurbished products. Unlike sellers of new products, these distributors or importers do not have a direct relationship to the manufacturer and thus access to all the information about the original product. According to the current texts, distributors are required to verify that manufacturers or importers have complied with certain requirements, for instance in terms of product information or documentation (Art. 11). In the case of second-hand products, this is not always feasible and could create significant administrative barriers that make it less attractive for economic operators to sell second-hand products.

In Recital 24, the GPSR proposal states that economic operators should have obligations concerning product safety in relation to their respective roles in the supply chain. Ecommerce Europe urges policymakers to consider whether the application of the relevant provisions sufficiently takes into account the role of second-hand products in the supply chain. To ensure that it is feasible to comply with this regulation, and to ensure product safety for consumers, we therefore call on policymakers to create a specific status for distributors and importers of second-hand products, with obligations adapted to their situation.

Responsible person obligations

Article 15 of the GPSR expands the application of the responsible person from Regulation (EU) 2019/1020 (Market Surveillance Regulation) to all products. By doing so, virtually all products being placed on the EU market will need to have an economic operator in the EU, responsible for tasks regarding compliance, documentation, and cooperation with EU market surveillance authorities. While Ecommerce Europe generally supports this principle, we see a risk that this could have unintended consequences for micro and small businesses selling into the EU. In practice, it will likely not be feasible for all small businesses to find,

appoint, or pay a representative based in the EU to manage their compliance obligations. We believe that a responsible person for all products would be unnecessarily burdensome, with very little benefits for consumers. Instead, we recommend that the responsible person obligation follows a risk-based approach, prioritising higher-risk products. We therefore also support the proposal of Rapporteur Charanzová in the European Parliament to empower the Commission to "*adopt delegated acts [to determine] the products, categories, or groups of products for which [that requirement] should apply*" (Art. 15(2a)). This risk-based approach is aligned with the Market Surveillance Regulation, which has only entered into application in July 2021. It is therefore advisable to first assess, through a thorough impact assessment, what the consequences of this obligation are, before expanding it even further. Additionally, we would like to make sure that the allocation of responsibilities is aligned with the hierarchy that is introduced in Article 4 of the Market Surveillance Regulation, meaning that the responsible person or fulfilment service provider would only be responsible for product safety when there is no other economic operator in the EU.

Article 15(2) of the original proposal proposes that the economic operator has to periodically carry out sample testing of randomly chosen products made available on the market. We strongly welcome that the Parliament's mandate has amended this Commission proposal to recognise that the testing of randomly chosen products should be limited to the products, categories or groups defined by a delegated act based on the potential risk they pose to consumers. Moreover, we believe documentary checks of the technical documentation are more appropriate as responsible persons are often not in direct possession of the products and can therefore not always perform physical tests. In contrast, the Council proposes that the responsible person checks should be "regular" and that they go beyond the checking of documentation into checking whether the product itself complies with the descriptions in the technical documentation and that the technical solutions adopted to eliminate or mitigate risk are "in place and effective." While the Council's Recital 39a states that the responsible person "may choose to perform such verifications through representative random sample testing", this would still appear to require a technical safety assessment which the responsible person is often not capable of performing. Moreover, it is unclear how a responsible person would be able to assess whether the technical solutions adopted to eliminate or mitigate risk are in fact effective. To fulfil the objective of protecting consumers from unsafe products, we believe a focus on high-risk products for the checks is sufficient and would not place a disproportionate burden on businesses. We therefore recommend rejecting the Council's amendments and maintaining the Parliament's mandate for Article 15(2).

Batch/serial number indication

The obligations in Article 18(c) and Article 20.5(c) as currently formulated in the Commission's proposal and the Council's mandate would require economic operators and traders on online marketplaces to indicate the batch or serial number on every individual offer. While Ecommerce Europe understands that the provision has been proposed with the objective to improve the efficiency of market surveillance, we believe that such an obligation is unlikely to achieve this objective whilst unduly burdening economic operators and online marketplaces.

In particular, we are strongly concerned that the obligation would require a complete and very costly overhaul of IT systems. A retailer would need an IT system that connects in real time its inventory with its website offer, which is currently non-existent for the large majority of the retailers with an online presence. Additionally, batch numbers are not standardised across all product categories as manufacturers create their own structure of batch numbers. A retailer's IT system would therefore need to be able to handle all such individual batch number formats. This is very complex and costly and would need to be fully coordinated with the manufacturers to succeed. Furthermore, an obligation to indicate batch numbers online will reveal publicly sensitive commercial information to competitors. Competitors scraping websites will have access in real-time to information about the quantities of products ordered and sold by their competitors (as

well as the time of order). Such information is likely to qualify as sensitive commercial information under EU horizontal competition rules. Their disclosure to competitors entails a risk of collusion prohibited by article 101(1). We understand that the objective is to improve traceability for market surveillance authorities, however, we fear it will only enable rogue traders. Rogue traders counterfeiting products, or selling non-conform products, would no longer need to invent a batch number, since real existing batch numbers are publicly accessible and can easily be used to cheat market surveillance automated scraping tools.
Ecommerce Europe therefore strongly supports the European Parliament's mandate which removes the reference to the batch and/or serial number in Article 18(c) and Article 20.5(c).

Alternatively, we would suggest the following amendments:

	Commission Proposal	EP Mandate	Council Mandate	Proposed Amendment
New recital 34a				
				(34a) Where the identification of illegal content requires online and distance sales channels to publish product identifiers, such as the batch or serial number, on their offers, they should only be required to do so where those identifiers are available and easily accessible. For the purpose of this regulation, availability shall mean the physical availability in the warehouse of the distributer who publishes the offer. Easily accessible shall mean that the IT system of the distributer publishing the offer allows the automated extraction and real-time updating of such data.
Article 18, first paragraph, point (c)				
261	(c) information to identify the product, including its type and, when available, batch or serial number and any other product identifier;	(c) ***pictures and other*** information ~~*to identify*~~ ***that allow identification of*** the product, including its type ~~*and, when available, batch or serial number*~~ and any other product identifier;	(c) information a**llowing the unequivocal identification of** ~~to identify~~ the product, including **a picture of it,** its type and, when **easily accessible and/or** available, batch or serial number and any other product identifier;	**Preferred option: Maintain EP Mandate** *Alternative option:* (c) information **allowing the unequivocal identification of** ~~to identify~~ the product, including **a picture of it***s box or packaging***,** its type and, when **easily accessible and***/or* available, batch or serial number and any other product identifier. *This shall not impose any disproportionate burden upon the distributer.*
Article 20(5), point (c)				
277	(c) information to identify the product, including its type and, when available, batch or serial number and any other product	(c) information to identify the product, including its type and, ~~*when available, batch or serial number and*~~ any other product	(c) information **allowing the unequivocal identification of** ~~to identify~~ the product, including **a picture of it,** its type and, when **easily accessible and/or**	**Preferred option: Maintain EP Mandate** *Alternative option:* c) information **allowing the unequivocal identification of** ~~to identify~~ the product, including **a**

	identifier;	identifier;	**available,** available, batch or serial number and any other product identifier;	**picture of it***s box or packaging***,** its type and, when **easily accessible and***/or* available, batch or serial number and any other product identifier. *This shall not impose any disproportionate burden upon marketplaces and traders.*

Please find further feedback on the batch number obligation in our joint sector statements here and here.

Marketplace obligations

Timelines

Article 2.2 describes the timeline for online marketplaces in case of actions taken following the receipt of an order. Ecommerce Europe considers the two working days suggested by the Commission to be insufficient. We therefore certainly consider the even further shortened timelines, as proposed by the European Parliament and Council, too short. We ask policymakers to keep the ultimate objective of this article in mind, namely for marketplaces to take appropriate actions following the receipt of an order to ultimately reduce unsafe products being offered. We strongly believe that the proposed timelines make it unnecessarily unworkable for online marketplaces, especially for smaller players. Moreover, following the introduction of Article 14 of the Digital Services Act, marketplaces are also increasingly confronted with notices coming from individuals. While these notices can certainly be helpful, they are also more susceptible to abuse. For instance, bad actors may claim IP rights they do not have, sellers can use it to harm competitors during peak sales periods, or people could use it to voice their disagreement regarding lawful content. To ensure that marketplaces have sufficient time to properly assess the orders they receive, the timelines should preferably be removed. Alternatively, the timelines should be aligned with those established in the Product Safety Pledge (i.e., 2 working days for authority reports, and 5 working days for the proactive detection of illegal products via Safety Gate alerts).

Information requirements

Article 20(5) describes the obligation for online marketplaces to design and organise their online interface in such a way that enables traders to provide the necessary information. The Council's proposal for Article 20(5b) and 20(5c) proposed to change the duty on marketplaces to design interfaces to "enable" the provision of information by traders to a duty to "require" the information. This slight change in the language implies that traders would not be allowed to offer products for sale unless the required information is included. However, in practice, the information listed in the paragraph may simply not exist for a variety of reasons. This can be the case for new products, but especially also for second-hand and handmade or crafted products that would turn out to be unjustly blocked from being sold if this information were to be 'required' by online marketplaces. While we understand the intention of having complete information displayed on the product page, we are concerned that this wording would amount to an obligation for online marketplaces to actively review such compliance information and assess its veracity. Moreover, it is inconsistent with the DSA's Article 24d which indicates that online marketplaces shall "ensure that [their] interface is designed and organized in a way that enables traders to comply with their obligations regarding pre-contractual information, compliance and product safety information under applicable Union law." and also that they shall "ensure that [their] online interface is designed and organized in a way that it allows traders to provide at least" information on the identification and labelling of the product. Ecommerce Europe therefore proposes to reject the Council's mandate of Article 20(5).

Removal of 'identical content'

Article 20(2a/2b) as introduced by the European Parliament and Council proposes to require online marketplaces to disable access to, display a warning on, or remove from their online interface all identical illegal content referring to a dangerous product. This provision risks resulting in a "stay-down" obligation, because if marketplaces had to determine which other content would be identical to the unsafe product, they would need to actively monitor all product offerings to ensure 'identical' offerings do not constantly reappear.

Ecommerce Europe has identified several issues with this obligation. First, it is unclear from the text what can be understood by 'identical content'. For instance, would this apply to products being sold by different traders, or is it limited to the initial trader offering the unsafe product? There is also a lack of clarity on what is meant by the term 'identical', as this could refer to physical appearance, products from a specific batch or different models/versions/designs of the same product (e.g., would a product still be considered identical if its appearance changed, but the internal workings remain the same?). Consequently, the current text carries a significant risk of over removal of content. Considering the uncertainty of what would be deemed 'identical illegal content', we fear that marketplaces might need to take down more content to ensure they are fulfilling this obligation. This could lead to a restriction on traders being able to sell their products to consumers across the EU.

Second, the article states that identical illegal content must be removed "provided that the search for the content concerned is limited to the information identified in the order and does not require the provider to carry out an independent assessment of that content, and that it can be carried out by reliable and proportionate automated search tools". While the text thus states that the removal should not require an independent assessment of the content, it would at the same time be impossible to practically identify identical content without doing so. For each listing that has been picked up by automated search tools as "dangerous" a manual review would be necessary to avoid over-blocking of (alleged illegal) content. Moreover, online marketplaces are not well-placed to make such an assessment at all, considering they often do not have access to physical products (this would make it impossible to identify a product that is identical in appearance, but does not have the same defect for instance in terms of functionalities). Finally, the provision appears to conflict with Recital 28[1] of the Digital Services Act which states that intermediary services should not be subject to a monitoring obligation.

For the reasons mentioned above, we strongly urge policymakers to remove Article 20(2a/2b). Should, despite the legal and technical issues described, policymakers maintain the current provision, we would propose the following amendments in line with the "reasonable efforts"-clause in Art 24d of the DSA:

> *"2a. Orders issued pursuant to paragraph 2 and on the condition that such order contains one or more exact uniform resource locators (URL) to identify and locate the offer of a dangerous product may require the provider of online marketplace to make reasonable efforts to remove from its online interface all identical content referring to offers of a dangerous product, to disable access to it or to display an explicit warning, provided that the search for the content concerned is limited to the information clearly and precisely specified ~~identified~~ in the order and does not require the provider to carry out an independent assessment of that content, and that it can be carried out by reliable automated search tools.".*

[1] "Providers of intermediary services should not be, neither de jure, nor de facto, subject to a monitoring obligation with respect to obligations of a general nature. This does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation, in compliance with Union law, as interpreted by the Court of Justice of the European Union, and in accordance with the conditions established in this Regulation. Nothing in this Regulation should be construed as an imposition of a general monitoring obligation or active fact-finding obligation, or as a general obligation for providers to take proactive measures to relation to illegal content."

Additionally, we would propose adding the following subparagraph pertaining to the distribution of risks and the burden of proof:

> *"As far as the provider of an online marketplace has undertaken reasonable efforts to abide with the obligations set out in the first subparagraph above, it shall not be held liable for identical content referring to offers of a dangerous product which is nevertheless published on their interface by a trader. Where it is ambiguous whether the content is identical, the market surveillance authority must provide appropriate proof that the order encompasses this content as well."*

Website of manufacturer

Paragraph 5(a) of Article 20 requires online marketplaces to ensure that traders have provided information about the manufacturer for each product offered. The European Parliament's mandate has included the website of the manufacturer in the information obligation. Ecommerce Europe suggests rejecting the European Parliament's amendment as this creates a strong competition concern for traders selling via online marketplaces. We would like to point to Article 8.7 of the GPSR proposal, which already includes the obligation for manufacturers to indicate their contact details "on the product or, where that is not possible, on its packaging or in a document accompanying the product". As a result, when purchasing a product, consumers can already find these details, enabling them to reach out in case of a problem. To our understanding, prior to the purchase, the main objective for the consumer is to be assured that a person will be contactable in case they do decide to purchase that product and run into some issue. This is already covered by the Omnibus Directive and reinforced by the Digital Services Act, which prescribe that online marketplaces must provide means for consumers to be in direct contact with the seller on the platform, regardless of this seller's location being in or out of the EU. Considering that in the last years direct-to-consumer (D2C) sales have grown significantly, obliging traders to mention the website of the manufacturer in the product listing would essentially mean that they have to advertise the sales channel of their direct competitors. We therefore recommend the removal of any reference to the manufacturer's website.

Information requirements in electronic format

Ecommerce Europe welcomes the Parliament's amendment suggested in Article 19a, which allows economic operators to additionally make information available in a digital format by means of electronic solutions. We believe this increases accessibility of the relevant product information and allows companies to move towards a system focused more on electronic product information.

Implementation period

Ecommerce Europe welcomes the Council's proposal to extend the implementation period of the GPSR to at least 24 months. The proposed 6 month-timeline by the European Commission is too short considering the extensive scope of the new obligations for economic operators.