Unsafe and still online: proposals to improve product safety on online marketplaces

Unsafe and still online: Proposals to improve product safety on online marketplaces

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Introduction

Consumers increasingly used marketplaces[2] as a gateway for purchasing products, many of which are unsafe. Surveys have highlighted the saliency of the problem. BEUC reported that two third of products bought on online marketplaces (including Amazon, AliExpress, eBay and Wish) failed safety tests.[3] Which?, the UK consumer association demonstrated that there are occurrences of products being sold on marketplaces despite recalls or intervention by enforcement authorities[4] confirming previous findings by an OECD's study that 68% of products that were identified as banned or recalled were supplied online.[5] As a result, many products are unsafe but still online.

While many technical and practical solutions[6] can assist, there is primarily a regulatory deficit to fill (section 1) to avert interconnected factors creating a perfect storm and putting EU consumers at risk (section 2). The route chosen is that of a regulatory package (section 3) with limited international reach (section 4) and a set of obligations falling short of imposing liability on marketplaces for the sale of unsafe products (section 5). This will likely be insufficient to stop the haemorrhage of unsafe products without significant investments in enforcement mechanisms and work on stopping goods from entering the EU in the first place.

1. Regulatory deficit to fill

[1] Prof. Riefa was expert to Rapporteur Mordechaj Martin Salamon at the European Economic and Social Committee working on INT/957 General Product Safety Directive revision. She contributed to the drafting of the EESC's opinion, https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/product-safety-directive-revision. This chapter reflects this author's views and her views alone. For more on the issues developed inthis piece, also see the report commissioned by THE LEFT at the European Parliament: Riefa, *Consumer Protection and electronic commerce: protection against unsafe products bought online* (February 2021) 17. Report commissioned by the LEFT at the European Parliament, available online: https://emmanuelmaurel.eu/wp-content/uploads/2021/04/Consumer_protection_and_electronic_commerce_Protectection_against.pdf

[2] Art 3(14) GPSR a marketplace is *a provider of an intermediary service using software, including "a website, part of a website or an application", operated by or on behalf of a trader, which allows consumers to conclude distance contracts with traders or consumers for the sale of products covered by this Regulation.* Parliament suggested minor amendments with no real incidence.

[3] BEUC (2020) https://www.beuc.eu/publications/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups/html; OECD, Safety of products sold online (2018), https://www.oecd.org/sti/consumer/safe-products-online/ also showing that 55% of 60 selected products did not comply with product safety standards.

[4] BEUC/ ANEC, *Views for a modern regulatory framework on product safety, Achieving a higher level of consumer safety through a revision of the General Product Safety Directive*, BEUC-X-2020-068 (26/08/2020), ANEC -WP1-2020-G-032 (2020) 4. See eg, Which? (2019) showing unsafe child car seat being promoted despite them being banned from platforms, https://www.which.co.uk/news/2019/02/why-are-ebay-and-amazon-still-selling-killer-car-seats/.

[5] OECD (n 3).

[6] E.g. educating consumers may help raise awareness and dangers of buying from unverified traders. Technology can help track product through supply chain and facilitate product recalls.

The General Product Safety Directive 1992 (GPSD)[7] was revised and recast in 2001. Further modernisation proposed in 2013 was blocked[8] leaving product safety, i.e. the rules that define acceptable levels of risks and expected safety standards, in desperate need of an upgrade.[9] Meanwhile, the revision of the Market Surveillance Regulation of 2008[10], essential in creating the institutional framework for enforcement, also had to be abandoned in the past but was upgraded recently via Regulation 2019/1020.[11] Regulation 2019/1020 contains measures aimed at improving product traceability and help market surveillance authority in their work with many tools directly addressing the challenges of online enforcement. However, its scope is restricted to products that fall under specific legislation and does not apply with regards to the enforcement of the GPSD.[12] This therefore leaves unacceptable gaps for many consumer products sold in the EU[13] whether produced in the EU or imported. Those will hopefully be filled by the proposal for a Regulation on General Product Safety (GPSR).[14]

Besides, the workings of the E-commerce Directive (ECD)[15] (also very much dated) mean that many content hosts have been able to escape liability for the sale of unsafe products on their websites, providing that they are able to remove content expeditiously.[16] The Directive was recently re-worked into the Digital Services Act (DSA).[17] The DSA is able to capture unsafe products sold via the use of intermediary platforms as it deals with illegal content, a concept broadly defined.[18] Yet, the new DSA regime does not go far enough to protect consumers against unsafe products sold online via marketplaces.[19] In effect, it kicks the issue into touch, stating that the DSA is without prejudice of other consumer safety laws, leaving room to define a more stringent regime in the revision of the instruments dealing specifically with consumer safety.[20] In any event, the obligations imposed on marketplaces in the DSA are more akin to information than substantive liability obligations[21] and the distinction between platforms (due to size) imposing more monitoring obligations on large platforms puts consumers at risk. It

[7] Directive 92/59/EEC of 29 June 1992 on general product safety, OJ L 228/24, 11.8.1992 recast in 2001, Directive 2001/95/EC of 3 December 2001 on general product safety, OJ L11/4, 15.01.2002.
[8] https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/694202/EPRS_BRI(2021)694202_EN.pdf
[9] A similar fate met the Directive 85/374/EEC of 25 July 1985 concerning liability for defective products, OJ L 210/29, 7.8.1985, Although the Commission has now put forward a proposal COM (2022) 495 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52022PC0495&from=EN. This aspect is beyond the scope of this article. For more, see report by Riefa (n 1).
[10] Regulation 765/2008/EC of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products, OJ 13.08.2008, L218/30, complementing the GPSD as a horizontal instrument.
[11] Regulation on Market Surveillance and Compliance (Regulation (EU) 2019/1020).
[12] The Regulation was adopted with a recognition that there is a need for strengthening enforcement measures amidst global market challenges, increasingly complex supply chains and the increase of products that are offered for sale online to end users within the Union (Recital 13). It provides a framework for controls on products entering the Union market (Art 1(3)) and notably some coordination with customs. It is therefore well placed to be rolled out across all consumer products and proposals are contained in the GPSR to extend its scope.
[13] As it stands, a bed for a child would be subject to less stringent market surveillance than a bed for a doll, BEUC/ANEC (n 4) 6.
[14] Proposal COM (2021) 346 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021PC0346
[15] Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, 17.7.2000.
[16] Art 14 ECD.
[17] The proposal for a Regulation on a Single Market for Digital Services (DSA) COM/2020/825 final, was adopted by the Commission on 15 December 2020 (awaiting publication at the time of writing).
[18] Recital 12 DSA and Art 2(g) DSA. Illegal content includes the sale of non-compliant or counterfeit products and also covers activities involving infringements of consumer law.
[19] Marketplaces are intermediary services defined in Art 2(f)(iii) hosting service, and Art 2(h) online platform.
[20] Recital 10 DSA and Art 1a(f) DSA.
[21] See for eg, Art 24; Art 24c DSA.

will inevitably lead to an exodus of rogue traders to smaller platforms to avoid detection reinforcing market positions, while pushing costs of safety compliance to smaller players.

A regulatory deficit is not the only issue, other interconnected factors contribute to the facilitation of a large volume of dangerous goods being available in the EU, creating the background to a perfect storm.

2. Interconnected factors creating a perfect storm

EU consumers using online platforms are indeed increasingly buying from online traders established outside of the EU[22] often from traders in countries that may have even less advanced legal safety rules and/or apply lower technical production standards.[23] Those traders can reach them via marketplaces. There is however no international safety standard[24] or common enforcement institutions[25] to rely on and consumers would benefit from the EU engaging in standard setting and enhancing international cooperation. In the new Consumer Agenda[26], which forms the basis for many of the reforms discussed in this chapter, the Commission commits to continue to use its influence in international organisations, such as the WTO, UNCTAD, or the OECD to promote a high level of protection and safety at international level and protect consumers globally.[27] This is important and should be coupled with influencing capacity building abroad, notably in jurisdictions where unsafe products seem to be originating from, to focus efforts on eliminating those products at source.

In parallel, alongside marketplaces, the legal regime needs to contend with new intermediary business models (eg social commerce[28]) and novel fulfilment methods, which make detection and enforcement difficult. Social commerce, for example, enables scams that are often perpetrated across borders, capitalising on consumers' vulnerabilities or difficult redress journeys if harm is suffered.[29] The proliferation of drop shipping, where the seller does not store the goods sold, but instead orders them for direct delivery to the consumer mean that quality and safety are not checked. Fulfilment service providers (aka third-party logistics providers or fulfilment houses) also cause problems.[30] Fulfilment intermediaries are responding to growing demand for the shipment, storage and stock management solutions of

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[22] Buying out of the EU is not always a conscious choice. Many consumers report not having realised that they are making purchases from traders established outside of the EU. See BEUC, vzvb (report by Julie Hunter and Christine Riefa), The challenge of protecting consumers in global online markets (2017) 12.
[23] BEUC/ANEC (n 4) 4.
[24] Note the existence of OECD, Recommendation of the Council on Consumer Product Safety, OECD/LEGAL/0459 (2020); UNCTAD, Recommendation on preventing cross-border distribution of known unsafe consumer products (2021) https://unctad.org/system/files/official-document/ditccplpmisc2021d1_en.pdf; and UNCTAD, International Cooperation in Consumer Protection (UNCTAD/SER.RP/2020/13) research paper No.54 (2020) 43.
[25] Note however, OECD Global Portal on Product Recalls, https://globalrecalls.oecd.org/#/ and collaborations put in place on a bilateral basis.
[26] Communication from the Commission, New Consumer Agenda – Strengthening consumer resilience for sustainable recovery COM (2020) 696 final, 20.
[27] Ibid, 20.
[28] For more on social commerce, see Christine Riefa, Consumer Protection on Social Media Platforms: Tackling the Challenges of Social Commerce, in Synodinou, Jougleux, Markou, Prastitou (eds.), *EU Internet Law in the Digital Era, Regulation and Enforcement* (Springer 2020) 321-345.
[29] Consumers International, *Social media scams: understanding the consumer experience to create a safer digital world* (2019) https://www.consumersinternational.org/media/293343/social-media-scams-final-245.pdf.
[30] Carsten Ullrich, New Approach meets new economy Enforcing EU product safety in e-commerce 26 (2019) 4 *Maastricht Journal of European and Comparative Law* 570.

products ordered online.[31] For small traders they can avoid upfront storage costs (somewhat like drop shipping in this respect) and benefit from economies of scale regarding shipping. But here too quality is difficult to check as well as understanding where liabilities lie when goods are unsafe. Some intermediary platforms have their own fulfilment centre (notably Amazon) adding to the complexity of this ecosystem.

Those new delivery methods reflect a shift in the way global supply chains operate. Manufacturers can use production facilities where differing standards of quality and safety[32] are prevalent and yet still access the EU market using e-commerce.[33] Divergence in standards is problematic because it can unfairly advantage traders and due to globalisation, even the most performant system of consumer protection is only as good as its lowest common denominator. A connected issue concerns the phenomenal number of small parcels that circulate.[34] Traditionally, imports into the EU would have arrived in large consignments at a restricted number of landing points. There they would be sample checked before entry. Now, millions of items arrive in small packages making monitoring extremely difficult and surveillance patchy.[35] Customs laws are thus also in need of reform.[36]

In addition, sellers based outside the EU[37] have historically benefited from advantageous rules compared to businesses in the EU. This had the perverse effect of incentivising goods coming from region with less favourable levels of safety as they have also been attractive (at least on price) from a consumers' perspective. This situation was the result of an exemption on import VAT for low value goods (below €22) coming into the EU (although now abolished since 2021)[38] combined with a lower rate of postage charged to non-EU based sellers often lower than what a consumer would pay an EU based supplier.[39]

3. Obligations on marketplaces as part of a regulatory package

[31] Carsten (n 30).
[32] Consumers International, *The challenge of protecting consumers from unsafe products, a global picture* (May 2018) 8.
[33] Consumers International found that countries with the lowest the income tended to also be the least likely to have legislation catering for product safety (n 33) 11.
[34] European Commission, Directorate General for Internal Market, Industry, Entrepreneurship and SMEs and WIK Consult., *Development of Cross-Border e-Commerce through Parcel Delivery: Final Report* (2019) 14 https://data.europa.eu/doi/10.2873/931558.
[35] European Commission (n 34) 231.
[36] BEUC, Catching dangerous and non-compliant products at the borders, Recommendations to reform EU Customs Policy (2022), https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-093_The_consumer_angle_to_EU_customs_reform.pdf
[37] European Commission (n 34) 231.
[38] Undervaluation of low value items below the €22 threshold is estimated by the EU at 4 billion in lost VAT revenue. See European Commission (n 34) 231. VAT collection is an issue also identified by OECD, Addressing the Tax Challenges of the Digital Economy, Action 1 (2015) final report, OECD/ G20 Erosion and Profit Shifting Project, https://www.oecd.org/tax/beps/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report-9789264241046-en.htm.
[39] European Commission (n 34) 20. Postal services are organised around 'terminal dues' (apportionment of costs). The rate of remuneration is arbitrary with countries grouped into rate bands whereby industrialised countries pay 100% of the rate and each band below pay incrementally less. The remuneration each country receives takes no account of the actual costs incurred. This was established before changes in trade flows meaning that millions of small parcels are now being sent by postal service. Depending on where countries import from terminal dues may be insufficient to cover the actual costs whereas countries (mostly in Asia) that are in the lower rate bands benefit from cheaper delivery of exports.

In this chapter we focus on the GPSR and more particularly the obligations imposed on online marketplaces which have been neglected during initial work[40], but also explore some of the interactions this instrument shares with the DSA and Regulation 2019/1020.

The EU introduced in November 2020 a new consumer protection agenda[41] which forms the basis for a package of reforms. Proposals were rolled out, not as a fully developed package, but as a chronological release of its different elements, without much clarity as to where and how obligations are best located and combined to be fully effective. Given the size of each reform this was hardly surprising. Some segmentation needed to occur to enable targeted discussions and progress the legislative agenda at pace. In any event, legislative reform on consumer safety for goods sold on online platforms might have struggled to be contained in one single legal instrument because the sale of unsafe products is in fact a multi-faceted and international problem.

However, the roll out of reforms in sequence raises concerns. The original GPSR proposal contains, in Recital 28, a clear recognition of the crucial role that marketplaces play in the distance sales ecosystem. It also makes a link with the electronic commerce directive which provides the general framework for e-commerce and itself lays down obligations for online platforms. It also establishes the link the GPSR will share with the Digital Services Act which amends 2000/31/EC and regulates the responsibility and accountability of providers of intermediary services online. Recital 28 GPSR explains that obligations are specific to each piece of legislation. But the Council proposes to highlight that the obligations are also complementary, making modifications to the original text to the effect that 'building on the horizontal legal framework provided by the DSA, the GPSR introduces some specific and complementary requirements deemed essential to effectively tackle the sale of dangerous products online (and this in line with Article [1(5), point (h) 1a (3), point (f)] of the DSA.' This is an important point as it was noted that proposal ignored the interaction between the different pieces of legislation far too much, with a potential for risks falling through the cracks.[42]

The Parliament's position for the trilogue also makes the proposal to add a new Recital 9(a) GPSR recognising that '*the legal framework for market surveillance (…) set out in Regulation (EU) 2019/1020 and the legal framework for market surveillance of products covered by this Regulation should be as coherent as possible. It is therefore necessary, (…) to align the two sets of provisions(…).'* Many of the Parliament's proposal also align the obligations in the GSPR with those already contained in the DSA (either by reference to it, or by reproducing some provisions and making them specific to product safety). It is indeed important to ensure compatibility with now agreed texts such as the DSA or Regulation 2019/1020, as any divergence and ambiguities may enable marketplaces to harness loopholes to avoid obligations, thus weakening the protection of consumers from unsafe products.

4. Key features of the GPSR

The GPSR proposal places new obligations on online marketplaces and conversely provides enforcement authorities with new powers, although it is not yet clear how this tooling up will

[40] ANEC/BEUC, Consumer Organisations' comments ahead of the first trilogue on a General Product Safety Regulation (2022) https://www.beuc.eu/sites/default/files/publications/BEUC-X-2022-094%20BEUC%20and%20ANEC%20comment%20ahead%20of%20the%20first%20trilogue%20on%20the%20General%20Product%20Safety%20Regulation.pdf.
[41] *New Consumer Agenda* (n 26).
[42] EESC Opinion (n 1).

be able to dwarf the arrival of unsafe products in the EU. This is primarily linked with the fact that online marketplaces and e-commerce in general facilitate commercial exchanges that are international in nature, where conversely the GPSR and the DSA will have limited geographical reach[43] given the absence of a truly international enfrocement structure. The proposal does make some allowances for this.[44]

This chapter focusses on the text of the proposal as originally written by the Commission. It takes into account the negotiating positions of the Council and the Parliament[45], who both have published their suggested amendments, ahead of the trilogue starting in late September 2022. As a full review of the Regulation and connected legislation is not feasible within the remit of this chapter, we focus on the liability of marketplaces.

Before exploring it in more details, note that, as is currently the case under the GPSD, only safe products can be placed on the market.[46] The way in which the term 'safe' product is defined could have huge influence on the scope and effectiveness of the legislation especially in an international context.[47] A definition of what a safe product is does not always exist in national legislation beyond the borders of the EU[48] or can vary widely. For example, most countries with legislation would expect a safe product to comply with safety regulations or not harm consumers' health and physical safety. However, a much lower proportion expect that the product must specifically cover foreseeable misuse or be suitable for all consumers to use including particularly vulnerable groups[49], (eg elderly or children) as the GPSD in the EU does.[50] In an international context, this proves problematic as the level of expected safety varies from country to country and may well be lower than in the EU. A marketplace allowing international sale will thus be confronted with the difficulty that listings may be legal if contained within the geographical borders of a particular state, but not compliant if the goods are shipped abroad.

Under Art 3(2) GPSR, a safe product is defined as *'any product which, under normal or reasonably foreseeable conditions of use or misuse, including the actual duration of use, does not present any risk or only the minimum risks compatible with the product's use, considered acceptable and consistent with a high level of protection of health and safety of consumers'*.[51] This is evaluated by reference to a range of factors.[52] Products may be unsafe for a variety of reasons (incl. design flaw or uses sub-standard materials; lack of or unclear instructions; lack of sufficient safety checks). In the Directive, the factors were included in the same Art as the definition of a safe product. This is now changed under the GPSR with Art 7 describing how

[43] Note Art 1a DSA applies to services irrespective of place of establishment to recipients in the EU and some widening of scope is proposed by Council (Recital 8a and Recital 25a). GPSR should also work with initiatives on global enforcement notably the 'EU e-Lab' as a platform that authorities can use to carry out online investigations and monitor dangerous products sold online.
[44] *New Consumer Agenda* (n 26).
[45] Council's amendment, Interinstitutional File: 2021/0170(COD), 11469/22, 22 July 2022, https://data.consilium.europa.eu/doc/document/ST-11469-2022-INIT/en/pdf;
Parliament's amendments: https://www.europarl.europa.eu/doceo/document/A-9-2022-0191_EN.html.
[46] Art 3 GPSD. Art 5 GPSR.
[47] Consumers International (n 32) 11.
[48] 15% of respondents indicated there is no legal definition of what constitutes a safe product in their country. See Consumers International (n 32) 12.
[49] Ibid. The next potential obstacle is the absence of a general safety provision such as the one used on the EU.
[50] Art 2(b)(iv) GPSD.
[51] Defined in Art 2(c) GPSD in similar terms.
[52] Specified in Art 2(b) GPSD.

to assess safety in broader terms than before.[53] There is however no specific link made between the articles, and thus there may be a risk to legal certainty as the definition of safety and its assessment are fragmented.[54]

Another potential clash of regulatory cultures is found in the use of the precautionary principle. Precaution is essential to ensure that when scientific evidence about health hazard is uncertain, but the stakes are high[55], products should not be allowed on the market, and thus consumers are not put at risk. This is a principle of general application in the GSPD. This of course causes issues when thinking globally about safety, because other regions of the world have adopted fundamentally different models. In the USA for example, what is not proven to be harmful can be placed on the market.[56] To tackle the challenges of increased online shopping and globalised supply chain, the precautionary principle is maintained in the GPSR proposal from the Commission. However, this point will likely be fiercely debated. The Council moved to reinforce the principle also supported by the opinion of the EESC.[57] By contrast, the Parliament called for its demotion, deleting the relevant provisions in Recital 10 and relocating them in a new Recital 39a, as well as narrowing the application of the principle, to one that only market surveillance authorities are enjoined to follow and in a proportionate manner. While the exact contours of the principle are often disputed[58], it is nevertheless a sound principle in that it ensures caution is applied and gives national authorities a basis to withdraw product from the market. It is also useful because product risks are in constant evolution and adopting prescriptive legislation could quickly become obsolete. The precautionary principle, as a guiding beacon, ensures longevity and flexibility. It also can ensure that the legislation can adapt to control new risks as they occur. The principle should thus continue to be a cornerstone of the product safety regime in the EU and further afield.[59]

The GPSR applies to distance sales[60] (Art 4 GPSR). Recital 25 highlights that online selling has grown consistently and steadily, creating new business models and new actors in the market such as online marketplaces. To ensure EU consumers are protected, regardless of the place where a trader may be established, products offered for sale online or through other means of distance sales shall be deemed to be made available on the market if the offer is targeted[61] at consumers in the Union, i.e if the economic operator directs, by any means, its activities to one or several Member States (Art 4 GPSR). However, marketplaces are not included in the list of economic operators under Art 3(13) GPSR (see para x). The onus is thus very much on traders using marketplaces, rather than on marketplaces themselves. Under those conditions, the action of placing on the market, i.e. when the goods first become available on the Union market[62], will depend on how the goods reach the marketplace, for example, whether they are placed on the market by operators also based in the EU or based outside and whether the online seller

[53] Notably it now makes reference to digital products and their safety, Art 7 GPSR.
[54] See EESC Opinion (n 1) para 3.3.
[55] European Parliament (Didier Bourguignon), *The Precautionary Principle, Definitions, applications and governance* PE 573.876 (Dec 2015) 4.
[56] Wiener, Rogers, Comparing precaution in the United States and Europe 5 (2002) 4 *Journal of Risk Research* 317-349, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1985&context=faculty_scholarship.
[57] EESC Opinion (n 1) para 3.8.
[58] European Parliament, The Precautionary Principle (n 56) 4.
[59] This position is supported BEUC/ANEC (n 4) 10.
[60] Art 4 GPSR. Distance sales are defined in Art 3, but Parliament suggests using the definition contained in *Article 2, point (7), of Directive 2011/83/EU.*
[61] Parliament's proposal is to change the word targeted and use directed instead (amendment 73).
[62] Art 3(7) GPSR.

targets the EU or not.[63] This is problematic as it is never clear if traders do in fact target particular member states when their goods are listed on marketplaces. There is some divergence between the Commission, Parliament and Council on what factors can be taken into account to make this determination.

5. Obligations falling short of liability for marketplaces facilitating the sale of unsafe products

The GPSD currently provides that 'producers' are primarily liable for any lack of safety. Some liability however does also fall on 'distributors' (those whose activities do not affect the safety properties of a product)[64] who need to act with due care to help ensure compliance and refrain from supplying any product suspected to be dangerous.[65] A producer is currently defined in Art 2(e) GPSD as being:

- the manufacturer when he is established in the EU, or any person presenting themselves as the producer by affixing their mark or name, or the person who reconditions the product;
- a representative in the EU, if the manufacturer is not established in the EU;
- or in any other case, the importer of the product into the EU, from a state that is not a member state.
- Other professionals in the supply chain can also be deemed producer if their activities may affect the safety of a product.[66]

However, not all legislations around the world dealing with consumer safety will have the same list of professionals meaning that there can be some uncertainty as to what liability may be available and against whom to act.[67] This seriously hampers the identification of who can be held liable for any violations if they are in fact located abroad.

In the EU, a key issue moving forward is to determine if and how other actors in the online supply chain need to be included in the list already established in Art 2(e) GPSD. The proposed Regulation makes economic operators liable for lack of safety. Article 5 GPSR gives economic operators direct responsibility for the respect of the general safety obligation. Economic operators are defined in Art 3(13) GPSR. This category includes: 'the manufacturer, the authorised representative, the importer, the distributor, the fulfilment service provider or any other natural or legal person who is subject to obligations in relation to the manufacture of products, making them available on the market in accordance with this Regulation'. There is thus a marked difference with the Directive with 2 new categories of actors assuming responsibility: distributors (who already had some obligations) and fulfilment service providers defined in Art 3(12) as Art 3(12) as *'any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services (...)'*.

[63] Commission Notice on the market surveillance of products sold online (2017/C 250/01) OJ 1.08.2017, C250/1, 5.
[64] Art 2(f) GPSD.
[65] Art 5(2) GPSD.
[66] Regulation 765/2008 further defines the categories of producers contained in Art 2(e) GPSD. Note that Regulation 765/2008 is also partly amended by Reg 2019/1020.
[67] Consumers International (n 32) 12.

Online marketplaces however are not included in this list. This is in part surprising because fulfilment service providers, who were not subject to obligations under the Directive have nevertheless been included.

Under the GPSD and Regulation 765/2008, the role of fulfilment service providers was not clear and they did not have any specific liability but could have been deemed: 'manufacturers' if they affixed their own names or trademarks to the products; 'producers' if their activities affected the safety of the product; 'authorised representatives' if mandated by the manufacturer established in a third country; or 'importers' if the products they store, label, package etc, come from outside the EU and they place them on the Union market.[68] They could also be deemed distributors where activities go beyond those of parcel providers, but do not affect the safety of the product. In this case, fulfilment service providers would not be directly liable for the sale of dangerous products, but would have a role in ensuring they use due care[69] and verify that products have CE marking if legally required, that necessary information accompanies the product (eg safety instructions or declaration of conformity), that language requirements are complied with and traceability requirements regarding manufacturer and importer are fulfilled.[70] In addition, they would have an obligation to cooperate with Market Surveillance authorities. To ensure that there is no ambiguity and fulfilment centre can be held accountable to combat the sale of dangerous product, the GPSR clarifies their liability, by adding them to the list of economic operators. Fulfilment service providers assist in the logistics' process. They can hold stock, prepare it and/ or send it out. They assist post sales to give the contract its effect.

By contrast, marketplaces, are defined by art 3(14) GSPR as provider of an intermediary service using software, including a website, part of a website or an application, operated by or on behalf of a trader, which allows consumers to conclude distance contracts with traders or consumers for the sale of products. Their role is thus limited to the conclusion of the contract, although they do play a critical role in the supply chain and the product safety framework, a fact acknowledged by Recital 26 GPSR. They can also be somewhat involved in fulfilment as is the case for Amazon.com. For some sale, it is possible that marketplaces may also qualify as fulfilment centre and thus fall under their liability regime.

The EESC expressed disappointment and recommended that consideration should be given to subjecting marketplaces to Article 5 and upgrading their liability to that of an importer (or distributor where appropriate) to prevent platforms circumventing the GPSR and [at the time, the DSA proposals].[71] At present, the proposal for a Regulation on Product Safety does not openly treat marketplaces as 'distributors' but Recital 29 seem to reveal that their obligations will be in line. Indeed, Recital 29 explains that they *'should act with due care[72] in relation to the content hosted on their online interfaces[73] that concerns safety of products'*. This is the

[68] Commission Notice (n 63) 5.
[69] Art 5(2) GPSD.
[70] For more details on their obligations, see the Blue Guide, Commission Notice C (2016) 1958, section 3.4, https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52016XC0726(02).
[71] EESC Opinion (n 1).
[72] Under the Directive 'due care' was also the standard applied to distributors.
[73] An online interface is defined in the GPSR in Art 3(15) 15. It means any software, including a website, part of a website or an application, that is operated by or on behalf of an economic operator, and which serves to give end users consumers access to the economic operator's products. Parliament suggests adding mobile applications to this definition.

justification for some '*due diligence obligations (...) for content hosted on their online interfaces that concerns safety of products.'*

BEUC and ANEC also advised increased liability, explaining that marketplaces ought to be considered as importers for all products sold via their interfaces (website or apps) as well as those goods passing through their fulfilment centres.[74] This should be complemented with an extension of their obligations under the both the Product Liability directive and the Digital Service Act.[75] Marketplaces could be conceptualised as operators in the supply chain and thus could be held ultimately liable if products sold through their platforms are dangerous and if the responsible producer cannot be held accountable.[76] This would mark an important departure from the Directive, under which, marketplaces did not fall under the current definitions of producers, importers or distributors.[77]

The Council in preparation for the Trilogue agreed with the view that there may be situations where marketplaces can be considered an economic operator and should be treated as such. The Council proposed the addition of Recital 26(a) clarifying that the role of platform is assessed on case-by-case basis and if a marketplace is in fact behaving like an economic operator it should be subject to those obligations to account for the fact that new complex business models may mean that the same entity providing a variety of services. This may include the marketplace being a distributor, if it distributes a product or a manufacturer if it sells its own branded products or a fulfilment service. Parliament also has proposed an amendment to Recital 26, along the same line, although adding that marketplaces could also be considered importer distributors. The proposals are useful in as much as they recognises that marketplaces could be treated as economic operators. However, the proposed amendments by the Council and the Parliament fall short of including marketplaces in the scope of Art 5, simply recognising that depending on their action they may find themselves shoehorned into pre-existing economic operators' roles. ANEC and BEUC proposed however that online marketplaces should be regulated in Chapters II and III as economic operator and be given an importer-like status. This supports the idea that marketplaces are not importers, but ought to be treated as such. In any event, there is a need for online marketplaces to be properly regulated and included into the general safety requirement of article 5.[78] This inclusion would not only improve the protection of consumers buying on platforms, it would also provide a strong incentive to take responsibility for the sale of unsafe products and actively participate in the detection and removal of listing of unsafe products.

If the principle of inclusion in the list of economic operators is accepted (which seems unlikely given the fact that both Council and Parliament have put forward similar amendments that fall short of this), the question then turns to the position they ought to occupy in the list. According to ANEC and BEUC, they ought to be made liable in case no other responsible economic operator acts. When it is the case, their inclusion in scope would also mean that they will have responsibility for organising the recall of products from end consumers (although this is

[74] BEUC/ANEC (n 4) 11.
[75] BEUC/ANEC (n 4) 11.
[76] BEUC/ANEC (n 4) 11-12.
[77] https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698028/EPRS_BRI(2021)698028_EN.pdf, p.5.
[78] ANEC/ BEUC (2022) https://www.beuc.eu/letters/beuc-and-anec-comment-ahead-first-trilogue-general-product-safety-regulation.

proposed by amendments to GPSR) and offer remedies. The definition of an economic operator in Article 3(13) should therefore be amended to include and specify online marketplaces.[79]

6. Specific obligations of Online Marketplaces under Art 20 GPSR

Marketplaces have several specific obligations to fulfil under Article 20 GPSR. All fall short of making marketplaces liable for the sale of unsafe products (as other economic operators may be in different capacity). In this context, the obligations imposed on marketplaces are more akin to assistance. They are to put in place processes that can assist surveillance authorities. However, there is a clear understanding that obligations need to go further and indeed both the Council and Parliament have broadly made proposals to increase the obligations befalling marketplaces compared to the original proposal of the Commission but they may not be sufficient to curb sales of dangerous products and protect EU consumers effectively.

a. Single point of contact (art 20(1) GPSR)

This includes establishing/ designate[80] a point of contact to act as a single point of contact with national surveillance authorities in relation to safety issues and notably concerning notices to take down offers (Art 20(1) GPSR). It also includes marketplaces having to register with the Safety Gate and disclose the information on their single point of contact.[81] Parliament suggested that marketplaces ought to be able to register easily[82] with the Safety Gate, which is consistent with Parliament's position that the current system to be officially renamed Safety Gate needs to be significantly modernised.[83] According to Recital 30, the single point of contact under the GPSR might be the same as the point of contact under [Article 10] of the Digital Services Act, without endangering the objective of treating issues linked to product safety in a swift and specific manner. Note that on the point of contact, the Council proposed an amendment (Art 20(1)(a)) that would require marketplaces to have internal processes to comply with the Regulation without undue delay, bringing into the core of the obligations of marketplaces an element that the original text had confined to the Recitals (notably Recital 31). Smooth communication channels are essential for market surveillance and prompt action being taken when unsafe products are spotted. It is thus important that the legal framework makes clear that marketplaces are to have streamlined processes to enable information flow. Parliament even suggested the addition of a new Recital 30a that would specify that there should also be a single point of contact for consumers for direct and swift[84] communications on safety issues. This direct communication will be beneficial as consumers who experience unsafe goods first hand would be able to flag issues, hopefully leading to equally swift action to curb the distribution of dangerous goods.

b. Powers to order marketplaces to remove specific unsafe product from their online interface (art 20(2) GPSR)

According to Recital 33 GPSR, national authorities will continue to hold powers (granted originally under Article 14(4) of Regulation (EU) 2019/1020 on market surveillance) to require

[79] It may also be beneficial to rationalise the definition of marketplaces and BEUC/ ANEC recommend the adoption of the definition contained in the Omnibus Directive.
[80] Parliament amendment 131.
[81] Art 20(1) GPSR.
[82] Parliament amendment 132.
[83] Parliament amendment adding recital 34.
[84] Parliament amendment 132.

the removal of content from an online interface or to require the explicit display of a warning to end users when they access an online interface. This power however is limited to situations where no other effective means are available to eliminate a serious risk. Besides, Recital 33 envisages that Article 14(4) of Regulation (EU) 2019/1020 should also apply to this Regulation so as to ensure effective market surveillance and avoid dangerous products being present on the Union market. The use of additional powers would apply in all necessary and proportionate cases and also for products presenting a less than serious risk. To control risks, it is noted that it is essential that online marketplaces comply with orders as a matter of urgency, explaining why the Regulation introduces binding time limits in this respect, without prejudice to the possibility for a shorter time limit to be laid down in the order itself. This power should be exercised in accordance with Article 8 of the Digital Services Act (on order to act against illegal content). While the Commission's position is to also enable shorter time-period for compliance, Parliament has put forward an amendment that remove the part of the sentence enabling shorter time limits, and hence, only the times specified in the Regulation would be applicable. The Council did not take any position, presumably agreeing with the Commission proposal on this point. It would be good to keep the flexibility of a shorter time frame, if only as a Damocles sword. In some circumstances, super speedy removal may become necessary to prevent harm to consumers. As a result, member states are enjoined by the GPSR to confer on their market surveillance authorities the power to order online marketplace to remove specific illegal content from their online interface, to disable access to it or to display an explicit warning to end users when they access it (Art 20(2) GPSR). The Parliament's amendment 133 specifies that orders should be issued in *accordance with the conditions set out in [Article 8(2)] DSA* bringing some much-needed coordination between the two pieces of legislations. Such orders shall contain a statement of reasons and specify one or more exact uniform resource locators to help locate the offer in question.[85]

The information can be logged via the Safety Gate. Online marketplaces are to take the necessary measures to process the orders and act upon receipt without undue delay, with a maximum specified period of 2 working days (from receipt of the order) where the online marketplace operates. Parliament suggests reducing this turnaround period to 1 working day from receipt of the order *if the information provided by the market surveillance authorities is sufficiently precise to enable the immediate identification and location of the illegal content referring to a dangerous product.* The two-day time period would apply where *the online marketplaces have to carry out additional research in order to identify the product*.[86] There is an obligation to keep the market surveillance authority issuing the order abreast of the effect given to the order (art 20(3) GPSR), all again via the Safety Gate[87] although Parliament also suggests email would be acceptable.[88]

c. Central role of the Safety Gate

Recital 30 explains that the Safety Gate[89] is used for the purposes of effective market surveillance, offering a one stop-shop for all communication needs between national authorities and marketplaces. The Safety Gate portal will in fact play an even more central role, because it will allow the general public, including consumers, economic operators and online

[85] The Parliament amendment 133 does not require a statement of reasons and this limb is removed because this is in fact a requirement of Art 8(2) DSA.
[86] Parliament amendment 133 GPSR.
[87] Art 20(2) GPSR.
[88] Parliament amendment 133 GPSR.
[89] Formerly known as the RAPEX, Rapid Exchange of Information (Recital 50 GPSR).

marketplaces, to be informed about corrective measures taken against dangerous products present on the Union market. A separate section of the Safety Gate portal enables consumers to inform the Commission of products presenting a risk to consumer health and safety found in the market. Where relevant, the Commission should provide adequate follow-up, notably by transmitting such information to the concerned national authorities.[90] It therefore becomes the central platform with communications flowing both ways, from and to national authorities and all entities with a stake in product safety. The Parliament adheres to this system but warns that the Safety Gate needs to be modernised to enable more efficient corrective measures being taken (amendments to recital 50). It also adds to Recital 50, the following: '*In addition, the Commission should develop an interoperable interface to enable online marketplaces to link their interfaces with the Safety Gate in an easy, quick and reliable way'.* Parliament also suggests to add Art 20(2a) which would require online marketplaces to *inform, where possible, the relevant economic operator of the decision to remove or disable access to the illegal content*.[91] In addition, Parliament proposed that any removal of content, disabling of access or warning can be carried out by reliable and proportionate automated search tools where the *provider does not require to carry out an independent assessment of that content.*[92] Where such action is to be carried out, traders that are thus barred from using the marketplace are given a possibility to lodge a complaint.[93]

d. Extending obligations to identical content?

The Council proposes an amendment to Art 20(2) which would add an obligation to remove, disable access or warn about all identical content. This obligation would be limited to the information identified in the order issued by a surveillance authority but would not require the provider to carry out an independent assessment of the content. This obligation can be carried out by reliable automated search tools (art 20(2a) GPSR). This is a proposal welcomed by BEUC and consumer advocates[94] in that it places some onus on marketplaces to clean up once they have notice of dangerous products being sold/ advertised on their platforms. However, this proposal may be somewhat problematic considering Recital 32 under which *'the obligations imposed (…) on online marketplaces should neither amount to a general obligation to monitor the information which they transmit or store, nor to actively seek facts or circumstances indicating illegal activity, such as the sale of dangerous products online'*. The framework of the Electronic Commerce Directive has indeed been reproduced in the DSA and thus, one of the key obstacle to obligations being imposed on intermediary platforms remains. Requiring the taking of broader action may not amount to a general obligation to monitor (as the proposal focusses on identical materials), but it will require actively seeking illegal activity even if by automated means. What is not sufficiently clear however is how identical will the offers need to be? Would an offer by a third-party trader other than the one identified in the order be identical? Would an offer for the same good but in a different colour be identical? The Council proposes the following parameters (via the introduction of Art 33a GPSR): the identification of the product specified in the order as well as the minimum traceability and product safety information displayed by traders. This does not give much to go on and Parliament did not take position on this point, thus possibly not supporting removal of identical content.

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[90] Recital 60 GPSR.
[91] Parliament amendment 134.
[92] Amendment 135 adding Article 20(2b).
[93] Amendment 136 adding Article 20(2c).
[94] https://www.beuc.eu/letters/beuc-and-anec-comment-ahead-first-trilogue-general-product-safety-regulation

e. Creating an obligation to monitor?

Perhaps a more pertinent obligation may therefore be to break the barrier of the DSA and argue that because the physical safety of consumer is at stake, an obligation to monitor where there is already existence of wrong-doing can be a requirement of the GPSR. Indeed, many of the goods consumers organisations found being sold on marketplaces, had a high propensity for harm. They included for example, defective fire alarms, electrical items and dangerous toys.[95] The European Economic and Social Committee had indeed recommended that online marketplaces should have an obligation to monitor products sold via their intermediary (akin to a notice and stay down procedure) that would mimic the procedure introduced in the DSA with the advantage of removing the burden of notice-and-take-down action away from national enforcers. This of course needed to be accompanied by a clarification on how the DSA obligations would apply in addition to or as a complement to the GPSR.[96] The Council's amendment to recital 28 of the GPSR doubles down on this point. The Council suggests adding in Recital 28, concerning the rationale for intervention, following the failure of the Product Safety pledge as a voluntary instrument, that the GSPR should lay down specific and complementary obligations of marketplaces in relation to product safety. The Recital indeed notes that the Product safety pledge signed in 2018[97] only attracted the participation of a limited number of marketplaces reducing its effectiveness and disqualifying it as an instrument sufficient to ensure a level playing field. The Regulation thus needs to step up intervention and impose legal obligations on marketplaces. This point is maintained (albeit with slightly different wording) by the Parliament. However, Parliament suggests adding an Art 20a (amendment 154) and Recital 28a which suggests that the Regulation needs to lay down provisions that encourage marketplaces to enter into voluntary memoranda of understanding with market surveillance authorities or organisations representing consumers to undertake voluntary commitments going beyond legal obligations concerning products sold online. Given the failure of the Safety pledge it is difficult to see how further voluntary agreements would be taken up and this proposal only appears to weaken the argument for a stronger obligation to monitor imposed on marketplaces.

f. Expeditious removal (Art 20(4) GPSR)

Recital 32 is focussed on expeditious removal or intervening action along the lines already familiar of the operation of Art 14 of the Electronic Commerce Directive, now the Digital Services Act. The recital indicates that *'online marketplaces should (…) expeditiously remove content referring to dangerous products from their online interfaces, upon obtaining actual knowledge or, in the case of claims for damages, awareness of the illegal content, in particular in cases where the online marketplace has been made aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question, in order to benefit from the exemption from liability for hosting services'*. Currently, Art 20(4) provide for 5 working days maximum to proceed with removal and both Council and Parliament are proposing an amendment to bring this delay to 3 working days maximum. A shorter time frame would be most appropriate as the quicker products can be removed the better the protection against harm for consumers. It would also bring intervention closer to the time

[95] BEUC (n 3).
[96] European Economic and Social Committee Opinion (n 1).
[97] Product Safety Pledge (updated 09.10.2020) https://ec.europa.eu/info/sites/info/files/voluntary_commitment_document_2020_2signatures_v4.pdf. The pledge was preceded by the Commission Notice on the market surveillance of products sold online (2017/C 250/01) OJ 1.08.2017, C250/1, 2.

frame in place when notification is received from a surveillance authority. With dangerous products time is of the essence and the quicker the platform acts, the more likely it is that consumers will be spared harm.

g. Voluntary measures aimed at detecting, identifying, removing or disabling access to unsafe products (art 20(3) GPSR)

Article 20(3) GPSR requires online marketplaces to take into account regular information on dangerous products that is notified by market surveillance authorities (cf Art 24 GPSR) via the Safety Gate portal, for the purpose of applying voluntary measures aimed at detecting, identifying, removing or disabling access to the illegal content referring to dangerous products offered on their marketplace. Parliament proposes to amend Recital 32 to add to it that *'online marketplaces are strongly encouraged to check products with Safety Gate before placing them on their website.'* It seems that simply suggesting checks may be too light an obligation. A diligent economic operator ought to be required to check available information sources and yet, in line with pre-existing obligations under the ECD, the current proposal continues to minimise the role of platforms. This significantly impairs the protection of consumers that can be exposed to known dangerous products, when a simple (and even automated) search on the Safety Gate could avoid harm.

Recital 34 builds in some flexibility in the notice and take down system, which used to require the provision of an exact uniform resource locator (URL) to enable removal of content under Art 14 ECD. It is proposed that where the information from the Safety Gate does not contain an exact uniform resource locator (URL) and, where necessary, additional information enabling the identification of the illegal content concerned, online marketplaces should nevertheless take into account the transmitted information, such as product identifiers, when available, and other traceability information, in the context of any measures adopted by online marketplaces on their own initiative aiming at detecting, identifying, removing or disabling access to dangerous products offered on their marketplace, where applicable. While it does not require action, it nevertheless suggest action would be welcome via the use of any information available for the platform to detect, identify and remove access to dangerous products. However, such measure comes with a recognition that the Safety gate needs to be *modernised to make it easier for online marketplaces to detect unsafe products* with a suggestion that a *Union notification system designed and developed within the Safety Gate* could be used to assist in removal.[98]

k. Designing and organising online interfaces to enable consumer information (art 20(5) GPSR)

Article 20(5) makes a direct link with the way obligations will unfold across the GPSR and the DSA. Under this Article, in compliance with the Digital Services Act on issues of product safety information, online marketplaces will need to design and organise their online interface in a way that enables traders to provide information for each product offered and ensures that it is displayed or otherwise made easily accessible by consumers on the product listing. In other words, it is hoped that giving information to consumers will be sufficient to help curb the sale of unsafe products as well as help with traceability. The information includes:

[98] Parliament amendment 23.

- name, registered trade name or registered trademark of the manufacturer, as well as the postal or electronic address[99] at which they can be contacted;
- where the manufacturer is not established in the Union, the name, address, telephone number and electronic address of the responsible person;
- information to identify the product, including its type and, when batch or serial number and any other product identifier.
- any warning or safety information that is to be affixed on the product or to accompany it in accordance with this Regulation or the applicable Union harmonisation legislation in a language which can be easily understood by consumers.

The Council made proposals to amend text[100] but also to cover traceability of traders mirroring Article 24c of the DSA. Article 20(5-a) GPSR and strengthening current proposals under the GPSR. For example, the Council proposal would add to the list above:

- a requirement that internal processes adopted by marketplaces, include mechanisms enabling providers to obtain information on self-certification status and/or on the trader committing to only offer products that comply with the Regulation.
- information on the existence of an economic operator established in the Union or a responsible person for products offered or any other relevant information on the identification of the trader.

Such proposal is helpful because '*product traceability is fundamental for effective market surveillance of dangerous products and corrective measures'*.[101] As a result, listings on marketplaces should not be allowed unless all information is documented. This comes within the realm of procedural safety, but not substantive safety because Recital 36, also states that *'the online marketplace should not be responsible for verifying the completeness, correctness and the accuracy of the information itself, as the obligation to ensure the traceability of products remains with the trader.'* The efficacy of the measure is thus in question. If marketplaces are not responsible for verifying the completeness and correctness as well as accuracy of the information, rogue traders can feed false information and sell their unsafe goods to unsuspected consumers. Parliament made the proposal to remove this last sentence altogether which would be an improvement in leaving the door open to decide (presumably on a case-by-case basis, or as jurisprudence evolves) if marketplaces ought to take on this role. Note in any event that current DSA obligations Art 24(d)(3) DSA already go further: online platforms allowing distance sales, *shall make best efforts to assess whether traders have provided [the information] prior to allowing the offering.*

l. Extending obligations to random checks and suspension of rogue traders?

The Council proposed in Art 20(5a) to align the GPSR with Compliance by design obligations under the DSA (Art 24d(3) DSA) under which *after allowing the offering of the product or service by the trader, providers of online platforms allowing consumers to conclude distance*

[99] Parliament amendment 142, makes some changes to wording as follows (in […]): name, registered trade name or registered trademark of the manufacturer, as well as the postal [address and the website] or electronic address at which [the manufacturer] can be contacted. Similar amendments are carried forward in Art 20(5)(b).
[100] Eg, notably making the requirement of an email a prerequisite in addition to a postal one [postal ~~or~~ and electronic] and via the addition of Art 20 (5a, -a, b).
[101] Recital 36 GPSR.

contracts shall make reasonable efforts to randomly check whether the products or services offered have been identified as being illegal in any official, freely accessible and machine-readable online database or online interface. Parliament (amendment 137) made the same proposal but would add this obligation in Article 20(2d). While useful, the measure is limited to checking the Safety Gate and not to investigating if products put up for sale are in fact dangerous or not or if the information provided does indeed stack up. Random check could become the new grail of a 'diligent operator' and may in time shift practice in a positive way. But the DSA does in fact impose more stringent requirements and the GPSR should be aligned to it. In article 24(c) DSA, the information ought to be verified before any sales are listed and for traders already on site, the DSA suggests gathering information retrospectively and suspend any traders that has not supplied the information until it has been received, although they remain liable for its accuracy.

The Council proposal (Art 20(5b)) is focussed on the operation of/ and interaction with article 20 of the DSA and mimics its content. Under Article 20(5a) GPSR, the Council would see *'providers of online marketplaces suspend, for a reasonable period of time and after having issued a prior warning, the provision of their services to traders that frequently offer products which are non-compliant with this Regulation.'* Art 20 DSA concerns measures and protection against misuse and states the same for any manifestly illegal content. This would be a useful measure as it goes beyond what used to be in effect a contractual tool rather than a statutory one.

m. Cooperation of marketplaces with enforcers (Art 20(6) GPSR)

Article 20(6) GPSR concerns cooperation with market surveillance authorities[102] and relevant economic operators to facilitate any action taken to eliminate or, if that is not possible, to mitigate the risks presented by a product that is or was offered for sale online through their services.[103] Cooperation with market surveillance authorities is a tool already available under Article 7(2) of Regulation (EU) 2019/1020 in relation to products covered by that Regulation. The GPSR would extend this obligation to all consumer products. One of the key features of Art 20(6) GPSR is to support market surveillance authorities. This may take the form of cooperation to ensure effective product recalls including by abstaining from putting obstacles to product recalls (art 20(6)(a) GPSR). It can also materialise via improving the technological tools they use for online market surveillance and the identification of dangerous products. For these tools to be operational, online marketplaces should grant access to their interfaces (Art 20(6)(d) GPSR). Moreover, for the purpose of product safety, market surveillance authorities may also need to scrape data from the online marketplaces (Art 20(6)(e) GPSR). On this point, Parliament suggests restricting access to interfaces for safety purposes 'only'[104], but it also suggests allowing scrapping from surveillance authorities and other competent authorities, upon specific request, notably where online marketplaces or online sellers have put in place technical obstacles to the extraction of data from their online interfaces. Those measures signal a more interventionist approach.

The Council proposes going further and inserted art 20(6)(-a) which requires marketplaces to provide consumers with information, by notifying consumer who bought products via their interfaces about recalls or safety warnings (direct notification), as well as provide information

[102] This also extends to other law enforcement agencies (Art 20(6)(c) GPSR), eg European Anti-Fraud Office.
[103] See also Recital 37 GPSR.
[104] Parliament amendment 26 in Recital 37.

on recalls on their online interface[105] (in the same way a supermarket may have a notice by the tills of any product recalls). As a result, marketplaces would become more active participants in product recalls[106], facilitating the flow of information as well as mobilising attention from consumers using their services.

Both the Parliament and Council in fact propose to extend the information obligations of economic operators to marketplaces by amending Art 33 GPSR and specifying that the obligations also apply to marketplaces.[107] This article deals with the role of economic operators in product recalls and safety warnings. Under Art 33(1), economic operators are required to notify directly all affected consumers (providing they can do so (ie have the ability to identify them directly). If not all consumers can be identified and contacted directly, Art 33(4) requires economic operators to disseminate a *'recall notice or safety warning through other appropriate channels, ensuring the widest possible reach including, where available: the company's website, social media channels, newsletters and retail outlets and, as appropriate, announcements in mass media and other communication channels. Information shall be accessible to consumers with disabilities.'* In addition, economic operators who collect personal data are required to make use of the information for recalls and safety warnings. Art 33(2) also explains that where economic operators have product registration systems or customer loyalty programs they ought to give the possibility to their customers to provide separate contact details for safety purposes (so as to keep the data usage separate). The personal data collected for purposes of product safety shall be limited to the necessary minimum and may only be used to contact consumers in case of a recall or safety warning. This is a powerful obligation which aligns obligations of marketplaces with that of economic operators.

Parliament proposed that marketplaces are also responsible for communicating to economic operators any information they have received from consumers.[108] In particular, Parliament includes an obligation to notify expeditiously any accident which they have actual knowledge of resulting in serious risk to or actual damage of the health or safety of a consumer caused by a product made available on their marketplace and inform the manufacturer, a stance also supported by Council.[109]

Obligations also include informing national authorities of any action taken (art 20(6)(b) GPSR) enabling close monitoring of how the obligations of marketplaces are taking effect in practice. There the Council proposes several amendments to the text making the requirement to inform immediately and mandating the Safety Gate as the tool of choice to report dangerous products the marketplace has actual knowledge of being offered on their platform (also chosen by Parliament). The information communicated would cover appropriate details available to the marketplace regarding the risk to health and safety, the number of products involved and any corrective measures, that have already been taken. But to improve efficacy of the above measures the proposal of Parliament to mandate market surveillance authorities' action via inspections and mystery shopping for products more frequently notified to the Safety Gate will also be useful (Recital 47a).

n. Penalties for non-compliance

[105] Supported by Parliament amendment 146.
[106] Also supported by Parliament amendment 146.
[107] See also Recital 62 GPSR and parliament amendment 47.
[108] Parliament amendment 147.
[109] Parliament amendment 147, Art 20(6) (aa). Council amendment adding Art 20(6) (ba).

All the above obligations cannot be effective if either marketplace act diligently in ensuring they meet them all and/or surveillance authorities are able to ensure diligent enforcement. There is in this respect a need for a significant deterrent effect to prevent the placing of dangerous products on the market.[110] As it stands the burden of enforcement very much rests on surveillance authorities, marketplace being expected to cooperate but not lead any surveillance efforts. This is problematic as it could perpetuate the status quo that marketplaces cannot be liable for content even when they profit through the sale of dangerous products.

However, the penalties for non-compliance detailed in Art 40 GPSR states that it is for member states to decide on effective, proportionate and dissuasive sanctions (Art 40(1) GPSR) and makes provisions for sanctions to apply both to economic operators and marketplaces. The factors that can be taken into account include however:

- the role and responsibility of the economic operator or online marketplace as well as any action taken by them to timely mitigate or remedy the damage suffered by consumers (art 40(2)(c) and (d) GPSR);
- any previous infringements by the economic operator or online marketplace (f);
- the financial benefits gained or losses avoided directly or indirectly by the economic operator or online marketplace due to the infringement, if the relevant data are available (g);
- the degree of cooperation (j) and
- timely notification of infringements (j).

Regrettably, amendments proposed seem to downgrade the potential for sanctioning marketplaces. First Council proposes to scrap much of the details in Art 40 to simply give member state free reign to decide on adequate sanctions, although both economic operators and marketplaces are clearly mentioned as being able to be sanctioned.[111] This may cause problem as a homogenous level of penalties would be preferable to ensure a level playing field, avoiding that economic operators or online marketplaces concentrate their activities in territories where the level of penalties is lower.

By contrast, Parliament goes a different route making a distinction between economic operators and marketplaces[112] but it maintains the list of factors to take into account in sanctioning in Art 40(1).[113] It however deletes Article 40(3) (as did Council), which lists the type of infringements where penalties would be applicable and which include: *(a) infringement of the general product safety requirement; (b) failure to inform the authority in a timely manner (…); (c) failure to comply with any decision, order, interim measure, (…)*. Not having a prescriptive list may be helpful. However, the wording clearly indicated that it was the type of things that could be sanctioned and hence, by removing this indicative list, may create uncertainty. More worryingly, Parliament also limits the use of periodic penalties under Art 40(5) to compel action on the part of marketplaces notably to put an end to a violation, comply with a decision, or allow surveillance authorities to perform data scrapping. According to Parliament, this can

[110] Recital 71 GPSR. The penalty will be of at least 4% of annual turnover as per Art 40(4) GPSR.
[111] Proposed amendments to art 40(1) GPSR: amended art 40(1): ***The*** *Member States shall lay down the rules on penalties applicable to infringements of this Regulation* ***that impose obligations on economic operators and providers of online marketplaces*** *and shall take all measures necessary to ensure that they are implemented* ***in accordance with national law.*** (Council amendment in bold).
[112] Parliament amendment 53.
[113] Parliament amendment 210.

only be used to put an end to serious and repeated violations[114], meaning that marketplaces would able to offer resistance (at least for a while) creating serious doubts as to the efficacy of the sanctions.

Conclusion

As the trilogue for the GPSR is about to start, there is a large regulatory deficit to fill. The route chosen means that protection of consumers buying on online marketplaces is subject to several regulatory regimes. Not all have been yet modernised (save the DSA). This leaves a huge potential for oversights, gaps and contradictions in the texts that may weaken the regulatory framework in place. The GPSR is the most natural place to override any difference between the instruments and create a unified enforcement regime. A consolidation of obligations, powers and sanctions in this one instrument would be welcome.

The Council and Parliament have, through their proposals, significantly increased the role of marketplaces in contributing to stopping the sales of unsafe products and contribute to any recall efforts. However, the regime falls short of recognising marketplaces as economic operator and ensuring that they can be held liable as a last resort. The regime also puts much of the onus of enforcement on surveillance authorities with only suggestions to actively monitor sales, reproducing the weaknesses of the DSA in this respect refusing to impose an obligation to monitor. This is likely to weaken the protection of consumers in the EU. However, some proposals (such as monitoring, removal of identical content, spot checks, etc) are laudable if they are to survive the regulatory process.

In any event, it is crucial to remember that the GPSR will not work in a vacuum and that many other areas of intervention will be necessary to truly protect consumers. The GPSR on its own will not be a sufficient tool. Notably customs work becomes an important cog in the system to prevent unsafe products entering the EU in the first place. This too needs reforming[115] adding yet another piece to this already awfully intricate regulatory jigsaw.

[114] Parliament amendment 211.
[115] BEUC (n 36).