

Draft Article:

The New EU General Product Safety Regulation (“GPSR”) Ante Portas

- Be on Guard and Proactive -

The EU Commission regards the forthcoming GPSR as “*a new key instrument in the EU product safety legal framework, replacing from December 13, 2024 the current General Product Safety Directive (and the Food Imitating Directive. It modernizes the EU Gen. product safety frameworks and addresses the new challenges posed to product safety by the digitalization of our economies.*”¹⁾

¹⁾ Source: https://commission.europa.eu/business-economy-euro/product-safety-and-requirements/product-safety/general-product-safety-regulation_en

After nearly three years of intensive work on this new legislative tool, the GPSR was published in the EU’s Official Journal on May of this year*)

¹⁾ see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R0988>

Since it is an EU Regulation, it will apply from December 2024 onward in the whole territories of the European Economic Area without the need to be transposed into the national laws of those countries. In contrast to an EU Directive, a Regulation leaves no room for a divergent transposition by the national legislators. December 2024 may right now seem to be quite far ahead yet given the very substantial impact the GPSR will have also on the sporting goods sector throughout the whole supply chain, economic operators are well advised to get ready for the multiple new tasks and challenges this new Regulation will bring to the table. It consists of 50 articles, but it is not the sheer volume of the GPSR, which counts, but its far-reaching contents. The following article is by no means meant to be exhaustive, but it highlights certain focal points of the new Regulation and some of the major practical consequences it has for sports brands, manufacturers, importers, distributors and retailers

Consumer Products are in the GPSR’s Core Focus

A prime objective of the new Regulation is to prevent that European consumers are exposed to health and safety risks when using consumer products under reasonably foreseeable conditions. Yet also products which are exclusively designed for professional use, but which subsequently migrated to the consumer market are also caught by the Regulation. A practical example would be safety footwear in this context. Further, even second-hand products or products that are repaired, reconditioned or recycled, which reenter the supply chain in the course of a commercial activity fall within the scope of the GPSR, unless a clear message is sent to the targeted consumers that such kind of products are reworked.

Health Risks and Product Safety Assessment

The EU legislators have adopted the very broad WHO definition of health, which is defined “*as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.*” Needless to say that this terminology triggers a much broader liability of economic operators than it is the case right now.

If it comes to the assessment whether a certain product is safe or not, once again the GPSR interprets safety in the broadest possible manner. It is emphasized that **ALL** relevant aspects of a product need to be taken into consideration, which means all its materials, features, same as its presentation with a special view for which kind of consumers, in particular children, older or disabled persons such product is made for. Consequently decision-makers in companies should consider to review their existing contractual arrangements in particular with their suppliers, whether the allocation of risks including the possibility for recourse in the event of being exposed to third-party claims is still up to date in the light of an increased liability deriving from this new EU-wide law. To demonstrate this: A concrete example, which the GPSR explicitly refers to are mental health risks, which may be posed by digitally connected products for vulnerable consumers, in particular children. The GPSR therefore requires from the manufacturers that such kind of products meet the highest standards of safety and also emphasizes that product safety must be guaranteed over the entire lifespan of a product.

All Economic Operators in the Supply Chain Are Concerned

It is highlighted in the text of the GPSR that economic operators in the supply chain should have proportionate obligations in relation to their respective roles. This means that spheres and scopes of responsibilities and obligations need to be defined. A retailer for instance may not be required to examine whether a certain product information provided by a manufacturer or importer is correct or not, while a distributor at wholesale level may well have such obligation.

Comprehensive Technical Product Documentation Needed

Since the GPSR does not exempt small enterprises from being in compliance with its terms and provisions, even small manufacturers will be required to establish a product safety regime by documenting all necessary information, which proves that the respective product they place on the market is indeed safe. As it is already now the case, any commercial operator, which is selling a product under its own name or brand or is substantially modifying a product, are treated as manufacturers with the comprehensive legal obligations deriving from such legal definition. Internal risk avoidance management will become even much more important than it is the case already today with the need to establish more sophisticated internal procedures, guidelines or standards. The GPSR clearly states in this context that such internal processes are the sole responsibility of the respective economic operators.

Products Imported from Outside the EEA

The fact that under the new GPSR any non EWR-based seller of products, which are aimed to be offered and sold to European consumers and are imported from countries outside the EEA needs to have a responsible economic operator (authorized representative) established within the EU, will have a major impact on D2C distance sale business models of foreign manufacturers and companies. In this context it is certainly not sufficient to just appoint a single natural person residing in the EU, since the tasks, responsibilities but also liabilities of such person require much more than just to just provide an address in the EU.

Presumption of Conformity with the General Safety Requirement

In line with the current practice, the GPSR now clarifies that a product is presumed to be in conformity with its general safety requirement (Article 5 of the GPSR) if it is in compliance with European standards (or in their absence with national standards of a member state).

Differentiation Between Obligations of Manufacturers, Authorized Representatives, Importers and Distributors, Cooperation with Market Surveillance Authorities

It certainly comes as no surprise that the most comprehensive obligations and corresponding liabilities are imposed on the manufacturers of consumer products. Article 9 of the GPSR contains 13 paragraphs alone outlining in detail the scope of such obligations. They reach from carrying out an internal risk analysis prior to placing the product on the market, specific instruction and identification requirements up to constant product monitoring duties and the obligation to take in a timely fashion corrective measures such as a product recall. The Commission provides a communication channel through its Safety Business Gateway and the publication of any incidents, which is fully accessible for consumers on its Safety Gate Portal (see below).

Article 10 of the GPSR defines the role, tasks and duties of authorized representatives, while Article 11 creates a set of extended obligations for importers. In addition, Article 12 stipulates the obligations of distributors such as retailers, who are e.g. required to immediately inform the manufacturer or importer of a certain product, if they have reason to believe that such article constitutes a dangerous health risk to consumers.

All economic operators in the supply chain must fully cooperate with market surveillance authorities in the event of product safety-related incidents. In this context it will become imperative to be well-documented.

Special Focus on Online Marketplaces

In view of the significant growth of online marketplaces and the reduced significance of traders offering their products on their own (B2C) web store, the percentage decreased from 77% in 2010 to 60% in 2022 (according to the HDE Online Monitor 2022,)⁷⁾

⁷⁾ see https://einzelhandel.de/omfrx.php?option=com_attachments&task=download&id=10659 [in German language]

the EU Commission has put a special emphasis on this market segment. Article 3 (14) of the GPSR defines the provider of an online marketplace (hereinafter referred to as “POMP[S]” as “*a provider of an intermediary service using an online interface, which allows consumers to conclude distance contracts with traders for the sale of products*”. This means that any B2C online platform (be it websites, or other applications such as mobile apps) operated by a POMP falls within this definition and once again there is no exemption for small online businesses in this area.

POMPs fall under an own individual special category within the GPSR. They will in particular be affected by the new law in terms of numerous new obligations they will have to meet. These include the duty to register with the Safety Gate Portal, the establishing of internal processes and tools relating to product safety requirements, the obligation to remove unsafe or even dangerous products within extremely short periods from their platforms, comprehensive information requirements vis-à-vis those customers trading on their platforms (“traders”) and the creation of reliable and swift communication channels with those traders; in addition a duty to fully cooperate with market surveillance and enforcement authorities and to notify them swiftly upon the existence of unsafe or even dangerous products on their platforms, etc. The extensive powers conferred to the EU and national authorities in this context including the creation of technical tools to be able to access and screen in an automated fashion the website presentation and other business information of a POMP raise numerous constitutional and privacy concerns and it remains to be seen how national courts within the EEA and the European Court of Justice will deal with these highly sensitive topics....

Such operators of online marketplaces have also to ensure that appropriate measures have been taken to inform consumers without undue delay about products which are not in compliance with the EU’s safety requirements, further they will need to establish adequate online communication tools with consumers, so that they can swiftly notify the POMP upon any safety-related issue with regard to a certain product.

Safety Gate

Since numerous years already the EEA-wide information system RAPEX exists, which informs consumers same as national market surveillance authorities about unsafe products with the authority to withdraw these from the EU’s internal market⁷⁾.

³⁾see <https://ec.europa.eu/safety-gate-alerts/screen/webReport>

It is now already called “Safety Gate” and under the GPRS’s regime its competences will be significantly extended. POMPS have to be registered there and need to name a central single point of contact. They also need to carefully and continuously monitor the Safety Gate’s websites to check whether any of the products listed there are offered for sale by any of their traders. Yet it has to be noted that the Safety Gate instrument of the EU Commission is at this stage not fully operational, and it undoubtedly creates a lot more red tape bureaucracy and additional administrative cost and burdens for this specific category of commercial operators, but also for others. The Safety Gate consists primarily of three elements, i.e. the Safety Gate Rapid Alert System, the Safety Gate Portal and the Safety Business Gateway.

If POMPS realize that any of their B2B clients (traders) are offering unsafe products on their platform, they are required to first issue a warning and provided such warning remains fruitless to temporarily ban such customers from trading on the respective platform. To enforce such mechanisms, appropriate contractual arrangements between the POMPS and the respective traders should be in place.

Same as other commercial operators, POMPS need to establish an internal Product Compliance Management Process to meet the requirements of the new GPSR without any undue delay. Some elements of such Process are already described in Article 20, yet not in an exhaustive manner.

Conclusion

Given the complexity of the new GPSR and the sheer abundance of new obligations imposed on various categories of economic operators and providers of online marketplaces, it is certainly not premature to already commence with the review of existing product safety-related processes and tools at individual company level in order to find out whether they need to be changed, amended and/or updated by also looking at the whole supply chain. The GPSR sets very short deadlines once it will apply from December 13, 2024 onward and all such measures and steps take time. This is in particular true if external business partners such as distributors, importers and retailers, external legal advisors and a company’s insurance partners need be involved.

To quote Walt Disney: *“The way to get started is to quit talking and start doing.”*, respectively in a very much abbreviated version and more fitting for the sporting goods community should be the famous Nike slogan and trademark *“Just do it®”*.

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