Please find here below the answers of the Belgian delegation to the questions raised by the Presidency in the document 'wk06266.x22'

I / Sample testing of products by the responsible person (Art. 15(2))

1) Responsibility for the sample testing:

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

Yes. See also Decision 768/2008 obligations for manufacturers and importers in articles R2 §4 & R3 §6.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?
If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsibility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

This sample testing obligation does not exist in Regulation 2019/1020. Provisions for the responsible persons should be aligned for both sectors, harmonised and non-harmonised. The provisions in the GPSR should not go further than the ones in Regulation 2019/1020.
Anyway, if such an obligation is kept in the GPSR, the provisions should remain generic. The obligations for the responsible person should not be more severe than for other economic operators.
As a general remark, detailed provisions and modalities should not be placed in the Regulation but in a guidance document.

2) Scope of the sample testing:

As a general comment for this second point, we consider these questions are going too far and those kind of details should not be included in a general safety legislation.

- Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

Categories of products can be exempted only if the criteria to define these categories are clear. The risk-based approach seems to be appropriate as written in Decision 768/2008: '*When deemed appropriate with regard to the risks presented by a product, manufacturers shall, to protect the health and safety of consumers, carry out sample testing of marketed products, investigate, and, if necessary, keep a register of complaints, of nonconforming products and product recalls, and shall keep distributors informed of any such monitoring*'.

- For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

It is impossible to ask to test every item. But in Decision 768/2008 (and art. 8 §5 of the GPSR): '*Manufacturers shall ensure that procedures are in place for series production to remain in conformity*'.

- Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

Following our general comment, we are not in favour for such specific provision.
But if sampling will need to be done, it will be necessary to fix criteria. If there is no indication of the frequency, perhaps some manufacturers will barely do some testing. But this should be proportionate to the production. Perhaps indicate a percentage? Or statistical criteria could be fixed. We are actually looking at a population (production) and are sampling to know with a specific certainty if a specified threshold of "bad" products has been surpassed (like the sample size method of Cannon & Roe).

- About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?

Following our general comment, we are not in favour for such specific provision.
But, if such provision has to be added, it might serve to look at the legislation in metrology for the statistical testing of pre-packaged products

- About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

II / Remedies in case of product safety recalls (Art. 35)

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:
- Should the refund of the product always be included among the options proposed to consumers?

Yes, the refund of the product should always be included among the options proposed to consumers.

- Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?

Yes, it seems logical that consumers get the option to ask either for a repair (if possible in the light of product safety) or a replacement of the product when the product they bought was not safe.

- Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?

Yes, exceptions should be allowed, in case a repair and/or replacement is not possible for the reasons as mentioned (technically not possible, unreasonably high costs).
Inspiration for remedies and exceptions can be found in directive 2019/771 (guarantee for goods), article 13-16.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the

consumer, provided the economic operator has informed him about the environmental impact of each option?

The choice for the environmental impact of the option should not be left to consumers. They will always be interested in the most beneficial option for them, whether it is a refund, a repair, or a replacement.
The economic operator should be nudged towards environmental-friendly remedies for consumers.

3) When the remedy is a refund, how should its value be determined?

The value of the refund, during the legal guarantee period, needs to be at least equal to the price paid by consumers. If not, then sellers bear heavier obligations than the economic operators that are the real responsible parties. This is the general principle as formulated in art. 16 of directive 2019/771, however recital (60) states that "this should not affect the freedom of Member States to regulate the consequences of termination other than those provided for in this Directive, such as the consequences of the decrease of the value of the goods or of their destruction or loss"; an option that Belgium has used in its legislation transposing these rules, so that a seller can take into account the use and depreciation of the good when reimbursing the consumer.
As regards to a product that is no longer under guarantee, or the above mentioned option is available, and may have lost a lot of its market value: it is very difficult and not desirable that rules were to be established on the depreciation in value of the product (too many different categories of products). This should be left to the economic operators to decide on.
If the amount of the refund is too low, consumers will not respond to the product recall. When there is a disagreement between the economic operator and the consumer, ADR can help them to decide on the amount of the refund, with the final say in the hands of courts.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

Article 35 of the GPSR should not be applied by way of complete derogation from Directive 2019/771. This would mean that sellers could refer consumers to the economic operator. As stated on page 5 of the document wk06266.en-fr22.pdf consumers have no direct relation to the economic operator and they would encounter difficulties in contacting this party. Besides, recommendation nr. 5 of the Behavioural study on strategies to improve the effectiveness of product recalls (Behavioural study on strategies to improve the effectiveness of product recalls | European Commission (europa.eu)) states that it should be less burdensome for consumers to participate in a recall.
Therefore at least during the legal guarantee period, the seller should be liable regarding product conformity towards consumers. A product recall necessary for safety reasons proves that there is a lack of conformity, so under the directive 2019/771 a consumer has a valid claim towards the seller during the guarantee period. Under the GPSD, or new regulation, the consumer also has a claim towards the economic operator. These are two different parties with different obligations and they cannot be mutually exclusive. However if one of those responsible parties remedies the lack of conformity, the consumer should no longer be able to claim a remedy from the other party.

Past the legal guarantee period, it seems unreasonable that the seller should still be responsible for the conformity of the product if another economic operator decided the recall. In this case, the seller could function as an intermediary between the economic operator and the consumers.

Written comments on sample testing and remedies from Croatia

1) Responsibility for the sample testing:

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

We are generally flexible with this issue. Meaning, we are in favor for the manufacturer and importer to perform sample testing, based on the obligations which are also set out for them in the New Legislative Framework.

Also, the New Legislative Framework does not, stipulate strictly how the manufacturer / importer shall perform this task, so we believe it should be prescribed or determined that it should be done by conformity assessment body' accredited in accordance with the Regulation 765/2008.The reason for this is ensuring the reliability of test results and setting equal rules for the market surveillance authorities when they need to revise and inspect this results.

We can also accept the fact that the sample testing is carried out or delegated to a third party under the responsibility of the manufacturer or importer if this third party meets the requirement of Regulation 765/2008.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsibility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

In case there is no importer or manufacturer within the EU, the responsible person should have the obligation to carry out sample testing as it is currently prescribed in the Article 15 of the compromise text. The responsible person can also delegate sample testing to a third party under its responsibility under the condition if this third party meets the requirement of Regulation 765/2008.

2) Scope of the sample testing:

Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

Sample testing should not be carried out for all categories of products, rather it should be based on risk assessment especially we should take into account the risks which are typical for certain category of products which are intended to be used by certain category of consumers –vulnerable consumers like children .

-For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be

representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

As for the test criteria, we believe that the tests should cover all safety requirements from the standard or from other applicable specification which relates to a particular product category.

-Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

As for the frequency of the sample testing we are in favor that the responsible person should perform sample testing periodically, but as for prescribing a concrete deadline (like once a year) – it is questionable if the responsible person will then be in an unequal position in comparison to other economic operators. Maybe the term periodically should be defined or explained in the introductory statements.

About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?

About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

New Legislative Framework does not stipulate strictly how the manufacturer/importer should perform sample testing so we believe it should be prescribed or determined that it should be done by conformity assessment body' accredited in accordance with the Regulation 765/2008.

Simply for the purpose of ensuring the reliability of test results and setting equal rules for the market surveillance authorities when they need to revise these results.

II / Remedies in case of product safety recalls (Art. 35)

Questions of the Presidency:

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:

- Should the refund of the product always be included among the options proposed to consumers?

We believe yes, it seems unfair to the consumer that the loss of a product which would be still useful for him is not compensated. Even in cases the products is not under guarantee, and especially if it is.

- Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?

This is also something that is required, having in mind that, it depends from case to case basis which of this remedy is more suitable for the consumer, in which occasion, having in mind that the repair in some cases is not possible (when there are no spare parts), that the replacement is maybe not possible - there is no equivalent product. So, yes, both of the remedies should be prescribed in case of product recalls.

- Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?

Yes, we believe it should because the choice of the remedy should depend on the situation and the given circumstances. We believe the current wording of the Article 35, saying "The remedy shall consist of at least one of the following" is satisfactory for that matter.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

We are more in favor for the consumer to be informed by the economic operator of the environmental impact of each remedy.

3) When the remedy is a refund, how should its value be determined?

If the product is under guarantee, the value of the refund should be the price consumer for the product. In other cases, we can only suggest the idea Presidency made in the shared document - usual prices of the product on the second-hand market.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

If the product is dangerous, the GPSR should be applied as lex specialis.

Presidency note on sample testing and remedies

Following the last discussions and several comments received from the Member States, we would like to submit to you a set of questions regarding two issues which are still pending:

- The issue of sample testing of products by the responsible person;
- The issue of remedies.

I / Sample testing of products by the responsible person (Art. 15(2))

Questions of the Presidency:

1) **Responsibility for the sample testing:**

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

No firm poistion on this issue.
However, we do consider that the responsible person shall carry out these samples/testing.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsbility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

Article 15 (2) of the PRES compromise proposal should be deleted.

2) **Scope of the sample testing:**

- Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

- For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?
- Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?
- About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?
- About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

Article 15 (2) of the PRES compromise proposal should be deleted. This is the BG answer for all questions of the PRES on this issue..

II / Remedies in case of product safety recalls (Art. 35)

Questions of the Presidency:

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:
   - Should the refund of the product always be included among the options proposed to consumers? YES !!! However, SGD shall apply. Not the GPSR !!
   - Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers? NO !!!! However, SGD shall apply. Not the GPSR !!
   - Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)? POSSIBLY. Accoording to the provisions of SGD.

     No repair should be proposed for a product that has been identified as dangerous.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

The choice should be left to consumers !!!!!

3) When the remedy is a refund, how should its value be determined?

Initial price, paid by the consumer. SGD shall apply. No need to regulate the refund of a product not in conformity here.

You will find below some elements which could be taken into account when answering the aforementioned questions regarding point II of this note on remedies.

When reflecting on these questions, you could also consult the studies on recall effectiveness which are available on the Commission's website at the following link: https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/consumer-product-safety/behavioural-study-strategies-improve-effectiveness-product-recalls_en

Limits due to the cost of the compensation for economic operators

When a dangerous product is recalled, the consumer (who is not responsible for the dangerous product) suffers a loss that should be adequately compensated. However, should there be a limit to the cost of the compensation that the economic operator will bear?

Initial price of the product. SGD shall apply. No need to regulate the refund of a product not in conformity here.

In some cases the repair of the product will not make any economic sense (e.g.: if the cost of the repair is higher than a replacement of the product) and would therefore be economically disproportionate if this solution were to be imposed on him.

No need to repair dangerous products.

In some other cases, the option of a replacement by another product may also be seen as disproportionate, because it would be possible only with a new product whose value may be much higher than the product being replaced (recent products being fitted with more features, using newer technologies…).

We do not agree with this statement. T

he only remedy offered to consumers shall be replacement. No need of remedies in the GPSR regulation. Provisions of the SGD shall apply.

Technical limits to some remedies

Being deprived of a product because it is recalled can be a burden for consumers: a solution where the economic operator will ensure a service including product replacement or product repair might be favored by many consumers rather than the option of consumers being refunded and having to buy/install a replacement product by themselves.

However, in some cases, the repair of the product will not be possible: lack of spare parts, old technology which is now obsolete…

Even the replacement by another product may sometimes not be possible either: no equivalent product available anymore in case of an old device or when there has been a complete change of technologies… (e.g.: a video tape recorder).

No need of remedies in the GPSR regulation. Provisions of the SGD shall apply.

Environmental impact

Some remedies have a greater impact on the environment than others (e.g.: a replacement by a new product will consume more resources than a repair), but the consumers may not be informed about this aspect when choosing a remedy among those available, or may not always take care of this aspect compared to other factors.

We do not agree with this statement.

Consumers have to be compensated under the SGD. No matter the environment impact.

Calculating a refund

The price of the product when it was sold is paramount when the product is still under a guarantee (legal or commercial) – the right that the consumer has to a full reimbursement during the period of guarantee should be preserved, as the result of EU/national legislations protecting consumer rights.

But when there is no more guarantee applicable, the product has most likely already lost part of its value (because it is not new anymore, bears the marks of age or use), and some criteria should be determined to evaluate its remaining value. One element could be to look at the usual prices of the product or of similar products when offered on the second-hand market.

On extreme cases, the product being very old has no market value left whatsoever (e.g.: if it were to be sold second-hand, its value would equal or at least extremely close to 0), yet it can still be valuable to the consumer if it is still usable. In such cases, it seems unfair to the consumer that the loss of a product still useful to him is not compensated at all. And without compensation, there is also a risk that some consumers will be tempted to ignore the recall notice.

The usefulness/necessity of a product is a difficult criterion to use because it is quite subjective, and can as such vary a lot from one person to another. While nowadays it is quite clear that every household in Europe relies on kitchen appliances like a refrigerator, there are however many products for which it is difficult to determine if they are indispensable to consumers. Let's take for example the case of a bicycle: for some people it can be a means of transport used to commute to

work every day, while for others it is only used for sports or leisure, which makes the product less essential to the second category of persons.

No need of remedies in the GPSR regulation. Provisions of the SGD shall apply.

Consumer rights towards the seller in the area of product conformity

When the economic operator recalls a product, it is because it is either non-compliant or dangerous for the consumer; but this is a preventive measure and not a remedy. The question may arise for consumers whose goods covered by the recall are still under the legal warranty period.

Therefore, in the event that the product remains covered by the legal warranty of conformity due by the seller under Directive (EU) 2019/771, namely a minimum duration of 2 years as of delivery, the consumer may request the seller to repair or replace the goods, or to reduce the price or refund where appropriate.

If Article 35 of the GPSR were to apply by way of derogation from the Directive, the seller would be authorized to refuse any remedy to the consumer and to refer him back to the economic operator. But the consumer could have difficulty in contacting the latter, the economic operator not being indeed the contracting party here. In such a case, consumer rights may be affected.

If, on the other hand, the application of Article 35 of the GPSR does not affect the Directive, the consumer would be authorized to request a remedy from the seller (repair, refund or replacement, initially). The seller would be then required to implement these remedies but could turn to the economic operator to cover the costs. This is already provided for by the right to recourse action enshrined in Article 18 of the Directive.

No derogation from the SGD should be proposed. Provisions of the SGD shall apply. Bulgaria will not support any deviation, derogation, or exemption from the SGD.

Note de la Présidence sur les tests aléatoires et les recours

Suite aux dernières discussions et plusieurs commentaires reçus de la part des Etats membres, nous souhaiterions vous soumettre une série de questions relatives à deux sujets encore en suspens.

- Celui des tests aléatoires de produits par la personne responsable ;
- Celui des recours des consommateurs en cas de rappel de sécurité d'un produit.

I/ Tests aléatoires de produits par la personne responsable (cf. art. 15(2))

Questions de la Présidence :

1) Responsabilité des tests aléatoires

a) Dans le cas d'un produit pour lequel il y a un fabricant ou un importateur dans l'UE, devraient–ils réaliser le test aléatoire du produit (par eux-mêmes ou en le délégant à un tiers sous leur responsabilité) ?

b) Dans le cas d'un produit fabriqué en-dehors de l'UE, et pour lequel il n'y a pas d'importateur au sein de l'UE, la « personne responsable » devrait-elle avoir une obligation en matière de test aléatoire du produit ?

Dans l'affirmative, cette obligation devrait-elle inclure de veiller que le test soit effectué (par la « personne responsable » elle-même, par un tiers au sein de l'UE sous sa responsabilité ou par un fabricant établi en-dehors de l'UE), conformément aux exigences posées par le RSGP et en réponse aux demandes des autorités de surveillance du marché au sujet de ces tests ?

2) Champ des tests aléatoires

- Certaines catégories de produits devraient-elles, par exception, ne pas être soumises au test aléatoire et quels critères pourraient être utilisés pour les identifier ?

- Pour une catégorie de produits donnée, l'échantillonnage devrait-il être appliqué pour chaque référence de produit dans la catégorie ou seulement pour une sélection, et quels critères pourraient permettre d'assurer qu'une telle sélection serait représentative ? Par exemple, un fabricant de bicyclettes devrait-il mener des tests sur toutes les références de ses bicyclettes ou seulement sur une sélection parmi elles ?

- Devrait-il y avoir une indication de la fréquence de test (ex : une fréquence minimale telle que « une fois par an ») ou une indication ou des critères que la « personne responsable » devrait prendre en compte pour déterminer la fréquence d'échantillonnage ?

- S'agissant du processus d'échantillonnage : le RSGP devrait-il indiquer une procédure spécifique pour assurer qu'il peut être effectué sans risque de résultats biaisés ?

- S'agissant du test : faudrait-il des règles spécifiques pour assurer qu'il sera effectué dans une installation adéquat, qu'il couvrira tous les aspects de sécurité nécessaires et que les bonnes normes/référentiels (s'ils existent) seront utilisés ?

II / Recours en cas de rappel de sécurité d'un produit (art. 35)

Questions de la Présidence :

1) Lorsqu'un rappel de produit est nécessaire pour des raisons de sécurité, quelles options devraient être proposées aux consommateurs par les opérateurs économiques :
    - Le remboursement du produit devrait-il être toujours inclus parmi les options proposées aux consommateurs ?
    - Devrait-il être obligatoire qu'une ou deux des autres options (réparation du produit, remplacement du produit) soient également être proposée(s) aux consommateurs ?
    - Certaines exceptions devraient-elles être admises pour permettre que les options de la réparation et/ou du rempalcement du produit ne soient pas propsoées dans certains cas ? (ex du fait d'une impossibilité technique et/ou du fait d'un coût qui ne serait pas raisonable ?)

2) S'agissant de l'impact environnemental des recours : l'opérateur économique devrait-il être tenu de prendre en compte l'impact environnemental de chaque option ou ce choix devrait-il être laissé au consommateur – celui-ci devant alors être informé par l'opérateur économique de l'impact environnemental de chaque option ?

3) Lorsque la remédiation est un remboursement, comment sa valeur doit-il être déterminée ?

4) Comment le présent article doit-il prendre en compte les droits des consommateurs en matière de conformité du produit vis-à-vis du vendeur ? Le vendeur devrait-il demeurer responsable de la conformité du produit sur la base de la directive 2019/771 relative à certains aspects concernant les contrats de vente de biens lorsqu'un autre opérateur économique décide du rappel ?

Vous trouverez ci-après quelques éléments pouvant être pris en compte pour répondre aux questions susmentionnées.

En réfléchissant à ces questions, vous pouvez également consulter les études sur l'efficacité des rappels qui sont disponibles sur le site web de la Commission à l'adresse suivante :

https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/consumer-product-safety/behavioural-study-strategies-improve-effectiveness-product-recalls_en

Limites liées aux couts de la compensation pour les opérateurs économiques

Lorsqu'un produit dangereux est rappelé, le consommateur (qui n'est pas responsable de ce produit dangereux) est victime d'une perte, qui devrait être compensée de manière adéquate. Néanmoins, faut-il poser une limite au coût que l'opérateur économique devra supporter pour cette compensation ?
Dans certains cas, la réparation du produit est un non-sens économique (ex : si la réparation coute plus cher qu'un remplacement du produit) et serait économiquement disproportionné si une telle solution lui était imposée.

Dans certains autres cas, l'option du remplacement du produit pourrait également être disproportionné, car possible uniquement avec un produit neuf dont la valeur serait très supérieure à celle du produit remplacé (ex : produit récent muni de davantage de fonctionnalités, utilisant des technologies plus évoluées).

Limites techniques à certains recours

Etre privé d'un produit parce qu'il fait l'objet d'un rappel peut être une charge pour les consommateurs : une solution où l'opérateur économique fournira un service incluant un remplacement du produit ou sa réparation pourrait probablement être l'option privilégiée par beaucoup de consommateurs, plutôt que l'option d'un remboursement et d'avoir à acheter/installer le produit de remplacement par eux-mêmes.

Toutefois dans certaines situations la réparation du produit ne sera pas possible : pièces détachées non disponibles, technologie du produit devenue obsolète …

Même l'option d'un remplacement du produit pourrait parfois ne pas être possible non plus : absence de produit équivalent disponible s'il s'agit d'un appareil ancien ou lorsque les technologies ont changé complètement … (ex : un magnétoscope).

Impact environnemental

Certains recours ont un impact plus important sur l'environnement que d'autres (ex un remplacement par un produit neuf consommera davantage de ressources qu'une réparation), mais les consommateurs pourraient ne pas être informés de cela lorsqu'ils choisissent une option de recours, ou pourraient ne pas toujours être sensibles à cet aspect par rapport à d'autres considérations.

Calculer un remboursement

Le prix du produit lorsqu'il avait été vendu est l'élément crucial lorsque le produit est encore couvert par une garantie (légale ou commerciale) – le droit du consommateur à un remboursement intégral durant la garantie doit être préservé, en application des réglementations européennes ou nationales protégeant les droits des consommateurs.

Mais lorsqu'il n'y a plus de garantie applicable, le produit a très probablement déjà perdu une partie de sa valeur (parce qu'il n'est plus neuf, parce qu'il porte des traces d'ancienneté ou des marques d'utilisation), et des critères devraient déterminer comment évaluer sa valeur restante. Un élément pourrait consister à observer les prix habituellement pratiqués sur le marché de l'occasion pour ce produit ou des produits similaires.

Dans des cas extrêmes, lorsque le produit est très ancien, il n'a plus aucune valeur marchande (par exemple sur le marché de l'occasion sa valeur serait égale ou au-mais très proche de zéro), mais il peut toujours avoir une valeur d'usage pour le consommateur s'il est toujours en état de marche. Dans une telle situation il semble injuste que le consommateur, qui perd l'usage d'un produit qui lui est utile, n'ait aucune compensation. En outre, sans compensation, il y a le risque que le consommateur soit tenté d'ignorer l'avis de rappel.

L'utilité/nécessité d'un produit est un critère difficile à utiliser car assez subjectif et donc variable grandement d'une personne à une autre. S'il est admis de nos jours que tous les ménages européens ont besoin d'un réfrigérateur dans leur cuisine, il y a en revanche beaucoup de produits pour lesquels il est difficile de déterminer s'ils sont indispensables pour les consommateurs. Pour prendre l'exemple d'une bicyclette : elle pourra servir à certaines personnes de moyen de transport pour aller au travail chaque jour, alors que pour d'autres personnes, cela ne sera qu'un objet de sport ou de loisir, ce qui rend cet objet moins essentiel pour ces autres personnes.

Des droits des consommateurs vis-à-vis du vendeur pour la conformité du produit

Lorsqu'un opérateur économique rappelle un produit, c'est parce que ce produit est soit non conforme soit dangereux pour le consommateur ; mais cette mesure se veut préventive et n'est pas un recours. La question se pose pour les consommateurs dont le produit concerné par le rappel est toujours sous garantie.

C'est pourquoi, dans l'hypothèse où le produit est encore couvert par la garantie légale de conformité qui s'impose au vendeur de par la directive (UE) 2019/771, soit au-moins durant 2 ans après la livraison, le consommateur peut demander au vendeur, selon le cas, une réparation ou un remplacement ou une réduction de prix ou un remboursement.

Si l'article 35 du RSGP devait s'appliquer comme une dérogation à la directive, le vendeur serait autorité à refuser la remédiation demandée par le consommateur et à le renvoyer vers l'opérateur économique. Mais le consommateur pourrait avoir des difficultés pour contacter ce dernier, l'opérateur économique n'étant en effet pas partie au contrat de vente. Dans un tel cas les droits des consommateurs pourraient en être affectés.

Si à l'inverse, l'application de l'article 35 du RSGP n'affecte pas la directive, le consommateur resterait autorisé à demander un recours au vendeur (réparation, remboursement ou remplacement). Le vendeur serait alors obligé d'appliquer ces recours mais pourrait se tourner vers l'opérateur économique pour couvrir les coûts. C'est déjà ce que prévoit le droit à l'action récursive prévu à l'article 18 de la directive.

Austrian comments to WK 6266/2022 INIT „Sample testing“ and „Remedies“

Sample testing

General remarks

The obligation for sample testing (Art 15 (2)) does not reflect a risk based approach and goes beyond the provisions of the MSR although alignment with the MSR is one of the basic objectives of the GPSR.

As a general rule industrial manufacturers do have quality assurance systems in place depending on the complexity and potential risks of their products; additional sample testing might interfere with QA-systems already in place. For small EOs producing low quantities the additional requirement for sample testing will create a substantive economic burden.

If sample testing is required for all products under the GPSR this would also create a huge burden for MSAs which have to assess if it has been done correctly.

Thus obligatory sample testing should be limited to high risk products if any. Of course it is difficult to define „high risk products“ in a generic way. Therefore it should be up to MSAs to oblige specific EOs or branches to random sample testing on a case by case decision – e.g. based on accident data or the frequency of infringements by a specific EO. Although MSAs can already nowadays take such measures it will be useful to have an explicit reference to this measure in the GPSR.

Alternatively there could be a mechanism on the European level to decide if a certain product group should be subject to sample testing.

Specific remarks

If sample testing is required delegation to third parties is acceptable. The responsibility for sample testing should primarily rest with the EU-producer or importer. If neither of these is located in the EU the obligation should be shifted to the responsible person.

If sample testing takes place it should be done based on existing standards, approved statistical methods and other systems already available. The GPSR is not the place to establish new modalities of sample testing.

Remedies

General remarks

The current GPSD does not cover remedies in case of recalls. Nevertheless recalls do work and EOs do choose the appropriate remedy which depends on several product factors like complexity, reparability, value, age, transport or disposal costs. In a nutshell, every recall is different and the recall of a simple product like a “ruler” must not be compared with the recall of a “motor vehicle”. The latter is an example where it can easily be shown that a refund as well as a replacement would b an inconceivable remedy simply because no EO can afford to refund the prize of a car or offer its replacement if e.g. just the indicators need to be repaired. On the other hand refund or replacement of a ruler containing problematic chemical compounds is the appropriate remedy because a repair is not feasible.

Thus it should be up to the EO to decide which kind of remedy is offered (of course he also may offer several options if appropriate). However, MSAs should have the power to intervene if the remedy is not efficient in terms of a necessary incentive to consumers to return the unsafe product.

Specific remarks

Ecological considerations are legitimate but the main aim of the recall procedure is a high return rate in order to reduce the risk of accidents. Thus the efficiency of the recall should be the primary basis of decision-making.

The value of a refund is determined by the original price, the expected remaining lifetime of the product, the costs for a replacement and the necessary incentive for consumers to return the product. Still the individual value can differ from one consumer to the other. A general provision determining the value of a refund will probably not be possible and will definitely go beyond the scope of the GPSR. Therefore Art 35 (1) (c) should read „adequate refund of the value of the recalled product“ without further explanations.

The provisions on remedies in the GPSR should not affect at all the rights of consumers with regard to legal guarantees on the basis of Directive (EU) 2019/771.

Responses from Ireland to questions posed by the Presidency on 02 May 2022 regarding Article 15 and Article 35 of the GPSR

I / Sample testing of products by the responsible person (Art. 15(2))

As per our previous observations, Ireland welcomes and supports the current proposal for a responsible person and the requirement to carry out sample testing on products as set out in the French Presidency compromise proposal (dated 31 March 2022) by document 5211/3/22 REV 3. Therefore, Ireland has no specific observations in relation to the questions posed at this juncture.

II / Remedies in case of product safety recalls (Art. 35)

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers: - Should the refund of the product always be included among the options proposed to consumers? - Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers? - Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?

A range of options as per the French Presidency compromise proposal of 31 March 2022 should be available to the economic operator. It is a matter for the economic operator to account for the measures/remedies chosen in the case of a product safety recall i.e., be able to demonstrate the appropriateness/effectiveness of the recall measures/remedies which are cost-free and timely.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

Ireland favours the position as currently outlined in Recitals 40 and 64(b) of the French Presidency compromise proposal of 31 March 2022.

3) When the remedy is a refund, how should its value be determined?

Ireland is of the view that the current wording of Article 35(1)(c) is appropriate.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

Ireland is of the view that it is important that consumer rights are not impacted by a recall and that consumer safety is paramount in terms of the approach. Accordingly, we would favour a position which ensures this balance and does not entail significant inconvenience for the consumer.

Regeringskansliet

2022-05-11
Fi2020/04978

Ministry of Finance
Consumer Policy Division

Proposal for a Regulation on general product safety

SE welcomes questionnaire from the French Presidency in order to clarify MS opinions concerning sample testing (Article 15.2) and remedies in case of product safety recalls (article 35). Please find the Swedish answers to the Presidency questions.

I / Sample testing of products by the responsible person (Art. 15(2))

All products must be subject to the general safety requirements. The general product safety area includes i.a. products that are not covered by any standards, developed industry practice or other assessment documents at all. In case the GPSR is too detailed concerning the product requirements, the system will fail to function satisfactory. It would be inappropriate to create a detailed regulation of the general product safety area that covers these widely differing areas and products. Better with a less detailed regulation but clarity about what is to be achieved.

We welcome the clarification from the Presidency that sample testing shall be performed periodically and at least once a year on random samples with a frequency and amount that is representative in range and volume. However, it still needs to be further clarified how the proposed sample testing is to be carried out, for example if economic operators are to test the products against standards or if the tests are to be carried out against the technical descriptions etc. established in accordance with Article 8.

With this in mind, we would like to strongly underline the need for Article 15.2 to be more clearly demarcated and limited to products/product categories presenting a medium or serious risk.

1) Responsibility for the sample testing:

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

SE has no strong opinion on whether the actual testing should be performed by the economic operators themselves or by a third party through delegation, but we are not in favour of mandatory third-party certification in these cases.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

SE has taken note of the explanation from the Presidency and from the Commission on the aim of Article 15.2 to support creating a level playing field between products manufactured within the EU and products imported to the internal market. In order to create this level playing field, the sample testing should be carried out by the responsible economic operator in the EU when the product is manufactured outside EU and there is no importer within EU.

We still consider that the use of the term 'Responsible person' in the headline is incoherent with the article where the term 'economic operator' is used. The term 'Responsible person' in the headline should therefore be replaced by 'Responsible economic operator'.

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsibility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

The obligation to ensure that sample testing is actually carried out should be the responsibility of the manufacturer outside the EU and, in case that

economic operator does not perform the required sample testing, the responsible economic operator within the EU should be responsible.

2) Scope of the sample testing:

- Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

We still believe that the scope of this article should be limited to certain products/product categories with a medium or serious risk which have been identified as problematic.

According to Article 15.1, the requirements in Article 4(2) and (3) in Regulation 2019/1020 shall also apply to economic operators under the GPSR. The manufacturer, therefore, i.a. shall establish technical documentation and EU declaration of conformity, inside and outside the EU. In order to do that, they need to have the product tested. The importer is obliged to ensure that documentation is available and that testing has been performed. The question is against what requirements the product should be tested, since GPSR will not (and shall not) contain any specific product requirements. Thus, the manufacturer must be able to carry out the tests against the technical documentation drawn up by the manufacturer himself. As a result, it will be essential that the MSA have the possibility to require the manufacturer to carry out the testing in a certain way, should it prove necessary. It follows that certain types of products will not need to be tested in case it is clear from the technical documentation that sample testing is not needed.

- For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

The sample testing should be conducted according to the technical documentation and to a risk-based approach. In case the technical documentation shows that testing is not needed, no testing will take place. We still believe that the scope of this article should be limited to certain products/product categories with a medium or serious risk, and which have been identified as problematic. Technical documentation of the product as

well as RAPEX could provide some guidance on this matter as regards proportionality. The scope of Article 4 in 2019/1020 could also give some guidance. This could contribute to a more coherent approach between the different regulations. Also, Article 13 of the compromise proposal requires internal processes for product safety, normally including sample testing, and testing of each individual copy should not be required. MSA should have the possibility to require the manufacturer to carry out sample testing in a certain way, should it prove necessary.

- Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

Establishing a minimum level for frequency of sample testing might be feasible as well as developing standards for this purpose, but standards can't be developed at 'product level' because GPSR is applicable to many different kinds of products. Also, 'Good practice and good examples' that can be used by MSA probably will develop over time.

- About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?

Establishing this kind of detailed rules in a regulation is not advisable.

- About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

It must be borne in mind that neither non-harmonized nor harmonized standards are mandatory in the field of general product safety. Sometimes there are no criteria for an economic operator to assess the product against. Furthermore, the actual risks are not seldom of mechanical and physical nature and can be investigated in terms of safety, regardless of whether there is a standard or not. We consider that proposals for criteria should be developed by MSA, since they are more involved in market control activities.

II / Remedies in case of product safety recalls (Art. 35)

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:

- Should the refund of the product always be included among the options proposed to consumers? - Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?

The responsible manufacturer would be the one who can best assess how a recall can be carried out. All corrective measures (repair, replacement or return and refund) should be available. The competent MSA should have the power to decide on the appropriate action in case the manufacturer's suggested option is not sufficient from a safety and consumer perspective.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the

The manufacturer is best equipped to have knowledge about the product and production and the one best to assess the environmental impact of different options. Placing an environmental choice in the hands of the consumer risks diminishing consumer willingness to take advantage of a recall offer. There is a risk that the economic operator who recalls the product, incorrectly emphasizes the cheapest alternative for the trader as the most environmentally sustainable.

3) When the remedy is a refund, how should its value be determined?

The terms of the refund shall be determined so that the offer can be expected to be accepted by the consumers. The conditions shall mean that the offer must be fulfilled within a reasonable time and without significant cost or inconvenience to those who use it. Upon recall, the compensation for the recalled product shall correspond to the cost of repurchasing a new item or the same or equivalent type. In case of special reasons for this, a deduction from the refund may be made for the benefit that the holder of the products has had.

In view of the importance of dangerous goods being returned, revocation-like reasoning about utility deductions, etc. should be avoided.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

The purpose of GPSR is to protect consumers as a group from unsafe products. The activities of the MSAs focus on the collective interest of the consumers and the individual consumer is not a party in cases where MSA act against economic operators. GPSR, like the existing GPSD, contains no time limits for remedies. The Directive (EU) 2019/771 regulates certain aspects of contracts for the sale of goods focused on remedies for individual consumers. GPSR is a proposal within the field of Market Law, while Directive (EU) 2019/771 contains Civil Law remedies.

Kind regards,

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Council of the European Union
General Secretariat

Interinstitutional files:
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WORKING PAPER

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NOTE

From:	Delegations
To:	Working Party on Consumer Protection and Information
Subject:	Proposal for a Regulation on general product safety - Member States' replies to PRES questions on Random samples & Remedies

Deelegations will find replies from : AT, BE, BG, DE, DK, FI, HR, IE, IT, LU, LV, MT, NL, PL, SE, SK.

LU written comments on sample testing and remedies of the Presidency revised compromise Proposal for the General Product Safety Regulation

I. Sample testing of products by the responsible person (art. 15(2))

We are not in favour of requesting the carrying out of 'sample testing'. The GPSR should not go further than the Market Surveillance Regulation. Furthermore, we do not think the responsible person – being mostly lawyers or online marketplaces – would be best placed or have the required expertise and resources to carry out such tests. How would the responsible person perform these checks? On what standards would it be based? How would the market surveillance authorities check or enforce such a provision? Would it not further strengthen the role of big players on the market to the detriment of small sellers? Given all these open questions, we think that the responsible person should only act as a contact person, if this provision were to be maintained.

For the sake of completeness, we will nevertheless answer the questions of the Presidency.

1) Responsibility for the sample testing

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

Manufacturers and importers in the EU should not carry out any sample testing, as this would represent an unnecessary burden for them, especially for SME.

If the obligation of sample testing were to be maintained, it should be limited to high-risk products. The size of the economic operator is also relevant in order to avoid any burden for SME (which produce a small number of products).

As regards the question, whether manufacturers and importers should carry out these tests themselves or through a third party, both options should be available. Nevertheless, it should be highlighted that only large economic operators would technically be able to carry out the testing themselves or could afford to have it done by a third party.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsibility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

The responsible person should not be obliged to carry out sample testing. They should rather act as a contact person and make sure the manufacturer has tested his products before.

If the obligation of sample testing were to be maintained, it should be done in accordance with the GPSR. It would mean that criteria would need to be established in order to correctly evaluate that the risk related to a product has been mitigated (but it also raises the question of feasibility of such evaluation in practice, i.e. each product would need specific criteria).

2) Scope of the sample testing

a) Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

If the obligation of sample testing were to be maintained, we would be in favour of a risk-based approach, where only products presenting a high risk should undergo such sample testing. It should be based on accidents reported on the Safety Gate Rapid Alert System (each product would require tailor-made criteria in order to assess specific risks). At the contrary, determining criteria *ex ante* would be very difficult in practice.

b) For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

In line with a risk-based approach, the scope/type of the product selected would depend on the gravity risk primarily identified. Taking up the bicycle example, if there is a risk identified in relation to specific breaks, then the whole range of bicycle using this specific type of breaks should be tested. On the other hand, if there is an issue with the red painting of the bicycle, only the ones with this painting should be tested.

c) Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

On the one hand, once a year might be too burdensome for the manufacturers, for example if nothing changed in how the product is produced. On the other hand, if the manufacturers changed their production methods, it might be useful to test their products to make sure they comply. We would rather prefer a more general wording, which would allow more flexibility when determining the frequency of the sampling.

d) About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results? About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

It would be difficult to provide for concrete provisions in order to ensure that the sampling and the testing processes are not biased and effective. It would depend on the identified risk related to a product. As mentioned above, an *ex ante* approach would be very difficult to build.

II. <u>Remedies in case of product safety recalls (art. 35)</u>

As a general comment, we would suggest that the GPSR's provisions should better reflect the fact that the GPSR applies as *lex specialis* to the Sale of Goods Directive. In that case, if the consumer notices a non-conformity of his product, we will benefit of the protection and remedies from the Sale of Goods Directive. And, in the case of a product recall following a market investigation from the national authority or from the manufacturers, the latter might be able to decide on the most appropriate remedy to offer to the consumer.

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:

a) Should the refund of the product always be included among the options proposed to consumers?

The refund of the price of the product should always be included among the options proposed to consumers, as it is the most common way for consumers to get a compensation when facing an issue with a product.

b) Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers? Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)

We believe this should be made on a case-by-case analysis, since not all remedies might be appropriate for the situation at hand. In this context, the manufacturer should be able to determine the type of remedies.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

In any case, taking into account the environmental impact of each option should not entail a financial or an administrative burden for economic operators. Therefore, it should be left to the goodwill of the economic operator to provide a more environment-friendly option and to the consumer to eventually choose it.

3) When the remedy is a refund, how should its value be determined?

It should be at least the purchase value of the product. It would be very complicated to determine a value when considering other parameters, such as the inflation between the date of purchase and the moment of the recall, or the loss of the product's value throughout time.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

The GPSR should not affect the consumer's right under the Sale of Goods Directive.

Presidency note on sample testing and remedies

I/ Sample testing of products by the responsible person (Art. 15(2))

1) Responsibility for the sample testing:

a) **In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?**

Malta finds no objection to the delegation of sample testing to a third party, as long as responsibility for the testing and subsequent results is fully assumed by the manufacturer/importer. Moreover, testing should only be required for high-risk products.

b) **In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?**

For high-risk products, where sample testing is carried out by the manufacturer, it will be sufficient if a copy of the results is made available to the responsible person. Moreover, in cases where the proposed obligation may overburden the responsible persons, for instance importers who only import a small quantity of a given product, an exemption from such from such a requirement should be provided.

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsibility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

Yes, testing should be done in accordance with the requirements laid down in the GPSR by the manufacturer (even if established outside the EU). The responsible person should have access to the results and make them available to the Market Surveillance Authorities (MSA).

2) Scope of the sample testing:

- **Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?**

Malta is of the opinion that sample testing should only be in place for high-risk products identified according to specific criteria. The criteria to be used to determine categories of products may include for example: Primarily injury data and past record of product unsafeness (data available in RAPEX).

It is also preferable to have specific rules regarding testing so as to ensure that it will be done in an adequate facility, covering all the necessary safety aspects and that the proper standards/references (should they exist) are used, provided that sufficient laboratory capacity is available should economic operators wish to outsource.

- **For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be**

representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

As a general rule., all references of the product should be applied, unless past trends of sample testing show that there are no systematic deficiencies with similar products (in which case a selection is deemed to be sufficient based on criteria that can be easily verified by market surveillance authorities). Based on past record of non-compliance, market surveillance authorities may require economic operators to sample test all product references or certain product references for a specified duration.

- **Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?**

Yes, it would be preferable to have an indication of frequency stipulated in the regulation.

- **About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?**

It would be preferrable to have a specific procedure to ensure it is done without the risk of bias, provided that verifications by market surveillance authorities that the procedure has been followed, if required, can be made easily.

- **About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?**

It would be preferable to have specific rules to ensure that it will be done in an adequate facility, covering all the necessary safety aspects and that the proper standards/references (should they exist), provided that sufficient laboratory capacity is in fact available for economic operators who wish to outsource.

II / Remedies in case of product safety recalls (Art. 35)

Following consideration by the Maltese competent authority for consumer rights and protection, Malta continues to stand by its preference for remedies to be provided for under the legal framework already up and running under Directive (EU) 2019/771, which already caters for remedies, albeit with some variations. That being said, besides the replies being provided hereunder, Malta would like to suggest some alternative drafting to Article 31(4).

This provision has/will have a significant impact on the administrative operation of the Market Surveillance Authorities (MSA). It is the MSA in each Member State that will be responsible for the surveillance and enforcement of this proposal. Therefore, the MSAs, as the entities responsible for recalls under the GPSR, would have to set up a system to deal with the provisions related to remedies. Taking the example of how remedies are overseen under Directive (EU) 2019/771, this would require the MSAs to set up the following:

- A system to receive complaints related to remedial issues;
- A system to verify the correctness of the complaint;
- A system to check that the operator chooses the correct legal remedial action, including a verification of the value of the remedy, in case of refunds;

Furthermore, different legal systems/roots might be in place in each Member State for infringements related to the GPSR and infringements under Directive (EU) 2019/771, resulting in different legal approaches for similar issues.

The following suggested amendment is considered a necessary adjustment to allow for the fulfilment of the provided function of receiving and following up on complaints, by the appropriate bodies, should provisions for remedies be maintained in the text:

4. Member States shall **designate competent authorities to provide** ~~give~~ consumers and other interested parties the opportunity to submit complaints ~~to the competent authorities~~ on product safety**,** ~~and~~ on surveillance and control activities **related to specific products, as well as on instances where remedies offered to consumers in case of product recalls are not satisfactory. These** complaints shall be followed up as appropriate**, by the relevant competent authorities.**

Presidency Questions

1) **When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:**

- Should the refund of the product always be included among the options proposed to consumers?
- Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?
- Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?

Malta stresses on the importance of having proper alignment to Directive (EU) 2019/771, with the necessary adaptations (e.g. reductions in price as provided for under Directive (EU) 2019/771 cannot be considered in this case since recalls are ordered due to safety concerns), particularly in order to ensure legal certainty and avoid duplication and possible conflicting provisions under the separate legal instruments.

With respect to whether refunds should always be included among the options proposed to consumers, this should be provided for as per Articles 13 and 16 of Directive (EU) 2019/771.

Similarly, the possibility to repair or replace the recalled product should also be offered to the consumer as per Article 13. This also applies to the allowance of exceptions when repair or replacement cannot be provided or accommodated, which is reflected under Article 13(3) of Directive (EU) 2019/771.

2) **Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?**

   Malta believes that the consumer should always have the faculty to choose between the remedies available (as per Article 13 of Directive (EU) 2019/771), as long as that selection does not result in penalties to be paid by the economic operator. Provisions regarding information on the environmental impact of the remedy chosen could be pursued/explored in other ongoing proposals, such as under the proposal for a Directive as regards empowering consumers for the green transition.

3) W**hen the remedy is a refund, how should its value be determined?**

Departing from the premise that only a refund is available as a remedy, for the first two years from purchase, the value of the refund should be equal to the price paid for the goods by the consumer upon purchase, as per Article 16 of Directive (EU) 2019/771.

Beyond the first 2 years from purchase of goods, if refund is the selected remedy by the consumer, its value should be equal to the market value of the goods in question at the moment preceding the recall. In cases where replacement is one of the remedies available to the consumer (beyond 2 years following purchase), the value of the refund offered could tally with the value of the replacement offered.

4) **How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?**

In principle, Malta agrees with the proposition that the seller should be responsible vis-à-vis the consumer however, it should also be ensured that the seller, being not responsible for the manufacture of the product per se, can seek redress/remedy. It is therefore recommended that this process is aligned with that provided for under Article 18 of Directive (EU) 2019/771.

Proposal for a Regulation of the European Parliament and of the Council on General Product Safety

Written comments from Denmark on the Presidency's note on sample testing and remedies

Article 15 - Responsible person for products placed on the Union market

General remarks

- We find it difficult to justify imposing sample testing on GPSR-products when a similar obligation does not exist for harmonised products.
- We believe the term "representative random sample testing" should be clearly defined specifically whether the sample is to be statistical representative.
- We also believe an estimate should be calculated as to the total burden of this new sample testing requirement. We believe the burden will be very substantial perhaps even unproportionally so.

I / Sample testing of products by the responsible person (Art. 15(2))

1. *Responsibility for the sample testing:*

    a. *In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?*

We remain unconvinced about the proportionality of a general sample-testing requirement. We do, however, recognize the need for ensuring that a product may only be made available on the market if an economic operator established in the Union is responsible for the compliance and safety of that product. We are, furthermore, of the opinion that it is necessary to introduce additional measures than article 4 of the Regulation on Market Surveillance [2019/1020], since this article does not, in practical terms, establish a responsibility for the compliance and safety of a product. In practice, this is especially the case regarding products sold through online marketplaces by traders established outside the Union. This issue, we believe, is better solved by enhancing article 20.

It is additionally our opinion that there is no value added by dictating the type of economic operator that is responsible for fulfilling any sample-testing requirement. Rather it should simply be the responsibility of the responsible person.

    b. *In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing? If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsbility or by the*

manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

As per our answer to part a) of this question, we do agree that issues of compliance and safety is particularly challenged in terms of products manufactured outside the EU but we are not convinced about the added value of an obligation on product sample testing with regards to fixing this issue. If, however, there is a sample-testing requirement, it should not differ based on the location of the manufacturer. Instead, the responsible person should shoulder the obligation while retaining the option to delegate the actual testing to another economic actor or even a third party.

2. Scope of the sample testing:

- *Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?*

We cannot justify imposing sample testing on GPSR-products when a similar obligation does not exist for harmonised products. We do support a risk-based approach to sample-testing such that the requirement is proportional. We therefore suggest that the requirement should only include products, or a specific category or group of products presenting a serious risk to the health and safety of consumers.

- *For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?*

As per our previous answer we suggest that the requirement shall only include products, or a specific category or group of products presenting a serious risk to the health and safety of consumers.

- *Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?*

To lessen the burden of any sample-testing requirement, we believe that it is important that the requirement is as simple and easily understandable as possible. We are therefore of the opinion that the frequency of the requirement should be clearly stated. The frequency, however, will depend on the scope of the requirement. If a general sample-testing requirement is adopted – which we at this time are not convinced is proportional – we believe the frequency should be once every third year. If a risk-based approach is adopted, we believe the frequency should be once a year.

- *About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?*

Again, our answer to this question depends on the scope of the requirement. If a risk-based approach is adopted, we believe a specific procedure would be in order.

- *About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?*

Again, our answer to this question depends on the scope of the requirement. If a risk-based approach is adopted, we also believe specific rules would be in order.

II / Remedies in case of product safety recalls (Art. 35)

1. *When a product* recall *is necessary for safety reasons, which option(s) should economic operators propose to consumers:*

- *Should the refund of the product always be included among the options proposed to consumers?*

As long as the economic operator offers an effective, cost-free and timely remedy, we are of the opinion that the economic operator should be free to choose the type of remedy they offer.

- *Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?*

Again, as long as the economic operator offers an effective, cost-free and timely remedy, we are of the opinion that the economic operator should be fully free to choose the type of remedy they offer.

- *Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?*

Again, as long as the economic operator offers an effective, cost-free and timely remedy, we are of the opinion that the economic operator should be fully free to choose the type of remedy they offer.

2. *Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?*

We believe that the environmental impact of products are best regulated elsewhere. By including the environmental impact in this special case, we risk causing unintended consequences. Furthermore, the burden of correctly calculating environmental impact is not insignificant.

3. *When the remedy is a refund, how should its value be determined?*

It is our opinion that the value of the refund should be easily calculated. We therefore propose that the current wording is kept such that the amount of the refund shall be equal to the price paid by the consumer.

4. *How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?*

We believe that it is important that one economic operator cannot transfer costs onto another economic operator. If a product is recalled, it should therefore be the economic operator that is responsible for the recall who is also responsible for the remedy. Non-conformity that springs from the recall should therefore not be the responsibility of the seller with reference to the sale of goods directive [Directive (EU) 2019/771].

Written comments of the Polish Delegation on GPSR Presidency compromise proposal – Poland's position on the key issues discussed at the meeting on May 6, 2022.

Digital products (standalone software):

PL would like to thank the European Commission for the effort put in preparing the presentation on the new technology products (digital products), presented at the meeting on May 6, 2022. We share the opinion that digital (intangible) products should meet safety standards.
However, we continue to maintain the position presented so far, according to which intangible items (including the standalone software) should be subject to the provisions of the Regulation only when they are associated with / connected with tangible objects. In our opinion GPSR provisions should focus on physical products. The issue of digital products safety should be regulated in separate legal acts. We don't support the inclusion of standalone software in the scope of the GPSR.

The issue of sample testing of products by the responsible person and remedies:

1) Responsibility for the sample testing:

If there is another entity responsible for product safety (manufacturer, importer) in the EU, it seems justified to exempt the responsible person from the obligation to test product samples. PL is of the opinion that the obligations in the scope of product testing should apply in the first place to manufacturers and importers.
PL is in favor of imposing product testing obligations on the responsible person in case a product was manufactured outside the EU, and for which there is no importer within the EU.
Responsible person should be located in the EU.
Such tests could be performed by the responsible person itself or be delegated to third party - under its responsibility.
Additionally, in both of the above cases it seems justified to impose the obligation to test a specific product by the responsible person, upon a justified request of the market surveillance authority.

2) Scope of the sample testing:

Due to the existence of objective difficulties concerning the limitation of the scope of the obligation to test products to specific criteria or a list of products, it seems that this obligation should refer to all products because almost any product could be dangerous. It is difficult to establish exemptions to testing. However, PL's position in this respect is flexible. In case of establishing justified criteria, high-risk approach seems to be acceptable.
Product tests should be carried out by entities that guarantee their level due to the technical conditions, knowledge and experience (in practice, these will be most often the accredited laboratories). It is also necessary that these tests should be representative (the criterion could be, for example, the number of products produced and placed on the market, the time during which the product was available on the market, territorial range of sales, etc.).

3) Remedies in case of product safety recalls (Art. 35):

It seems that in the case of a recall of a dangerous product, the refund should always be included. Moreover, in our opinion, the consumer should be offered an alternative option (repair or replacement), except in cases where it is objectively impossible or significantly difficult to propose such options.

We also believe that the most objective value of a product is the amount paid by the consumer. Thus, the starting purchase price seems to be the most objective measure of the value of the product - apart from exceptions, justified by the circumstances of individual cases.

The economic operator should take into account the environmental aspect when offering set of options and inform the consumer about it.

We also believe that it is the economic operator responsible for a recall who should bear the costs associated with the recall in the first place. However, it should be ensured that the proposed provisions of the GPSR does not reduce or otherwise infringe the rights that consumers are entitled to under Directive (EU) 2019/771.

WRITTEN COMMENTS FROM FINLAND ON THE PRESIDENCY NOTE ON SAMPLE TESTING AND REMEDIES (WK 6266/2022 INIT)

I / Sample testing of products by the responsible person (Art. 15(2))

In our view, it is relevant to consider whether periodic testing of all products is necessary to ensure consumer safety. Periodic sample testing of all products creates significant burden for EOs and is hard to supervise. It is important to avoid putting EOs in the EU at disadvantage when effective supervision of manufacturers in third countries is a challenge. Sample testing can also hinder product development or green innovations if production costs are too high. Supervision of sample testing in third countries is especially challenging and therefore it is good to have a RP. RPs should be able to delegate sample testing to a third party in the EU.

We support alignment with the Regulation (EU) 2019/1020. If sample testing is necessary, it should be sector specific and risk based. However, we think that it would be a considerable option to expressly indicate e.g. in implementing acts product categories where potential safety issues are identified and are to be tested. It would also allow to adjust frequency or other relevant aspects accordingly. Examples of possible product categories are for example baby care products and products posing fire hazards.

We consider that specific rules on sampling process would not be very effective as their supervision would be difficult and require significant resources from the MSs.

II / Remedies in case of product safety recalls (Art. 35)

We support the views expressed in the Working group that the consumer should be able to choose a remedy. However, when choosing remedy, safety concerns should prevail and dangerous products should be repaired only when safety of a product is ensured. For example environmental aspects can be hard to assess and therefore repair of dangerous products can be too difficult for an importer to perform or MSA to assess.

Determining the adequate refund is a difficult question. E.g. when product is bought from discount sales, the price paid by the consumer as a refund may not be satisfactory for the consumer to return the dangerous product. In addition, it is difficult to justify decrease in the value of products even if it is caused by normal use and age of a product. EOs should not gain economic advantage for selling dangerous products and then recalling them.

We consider that the GPSR should apply without prejudice to the Sales of Goods Directive (EU) 2019/771, in other words, the GPSR should only supplement the consumer rights safeguarded in the SGD. If the GPSR derogates from the consumer protection under the SGD, it can lead to deprivation of consumer rights in case of a dangerous product compared to cases of product non-conformity. To give an example, according to the current compromise text (Art.35 1 (a)), it could be possible that the only remedy offered to the consumer is repair of the recalled product, provided that the safety of the repaired product can be ensured. It might even be possible that the only remedy is self-repair by consumers. According to the SGD Art 13 (4), the consumer shall be entitled to either a proportionate reduction of the price in accordance with Article 15 or the termination of the sales contract in accordance with Article 16 for instance in the following cases: (b) a lack of conformity appears despite the seller having attempted to bring the goods into

conformity [there might have been another lack of conformity before the safety recall]; (c) the lack of conformity is of such a serious nature as to justify an immediate price reduction or termination of the sales contract. If the GPSR replaced the regulation based on the SGD as a whole, this would mean that the consumer might be deprived from a possible right of the termination of the contract, which he or she could have in relation to the seller, if the SGD were applied. In addition, the SGD allows the Member States to provide for non-contractual remedies for the consumer against persons in previous links of the chain of transactions. Finland has regulated national laws on this, extending the protection of consumers.

It would be very hard to justify application of the GPSR by way of derogation especially when the systems already have co-existed for a long time. We consider that the relationship between the SGD and the GPSR should be reanalyzed by the Council Legal Services and coordinated with the DG of the Commission responsible for the SGD. Presidency compromise differs significantly from the Commission proposal and therefore evaluation of the new approach is essential.

Comments by Germany in the context of the
Working Party on Consumer Protection and Information 06/05/2022

Compromise proposal by the Presidency document 5211/3/22 REV 3

As reference to the comments made during the working party meeting May 6th, 2022 Germany hereby submits all comments made in writing. Furthermore, Germany extends the comments already submitted as well as their explanation for further consideration.

Chapter I (Article 1 to 4) General provisions

Article 2:

Germany raises the question if - according to Article 2 (1) lit. a) - Chapter III does not apply to products subject to specific safety requirements (e.g. textiles and Textile Regulation (EU) No 1007/2011) does it mean that for these products the labelling requirements set out in Article 8 (6) do not apply too?
In this context, Germany asks to ensure within the GPSR that harmonised as well as non-harmonised products bear adequate information allowing the identification of the manufacturer and/or the importer like it is set in Art. 8 (7).

Furthermore, it is still unclear why Chapter V as a whole should not apply to products in the harmonised area (see Article 2(1) lit.b of the draft). According to its objective, the GPSR should also provide a safety net for products in the harmonised area for those risks that are not covered by specific Union legislation. In this context, it would subsequently have to be clarified on which basis the market surveillance authorities may intervene with regard to specific safety requirements for products covered by Union harmonisation legislation if the provisions of Chapter V and thus the market surveillance provisions of Article 21 are not applicable due to Article 2(1) lit.b.

For used products supplied as antiques or products to be repaired or reconditioned prior to being used and which according to Article 2 (3) do not fall under the scope of the regulation, the following amendment should be added to Article 2 (3) clause 2: “as far as the supplier clearly informs the person whom he supplies the product to”. (Same wording as in Article 2 lit. a) subparagraph 2 of the existing GPSR.)

Article 3:

Germany is in favour of using the same definitions and/or terms in the GPSR and in Regulation (EU) 2019/1020. This applies especially to definitions in Article 3 of the GPSR-proposal. Furthermore, we have comments regarding some definitions.

Article 3 No. 2 (safe product):

Germany is still assessing the inclusion of misuse of a product in the amended recital 18 c (scrutiny reservation).

Article 3 No. 5a (accident)

Germany welcomes that a definition of "accident" is added to Article 3.

In the context of inclusion of software into the GPSR, Germany raises the question if "occurrence" in this context means that it happened suddenly and unexpectedly?

For reasons of clarity, Germany still thinks that a meaningful categorisation of the accidents to be notified according to Article 19 (1) could be very helpful. Such a categorisation could, for example, concern the severity of the accidents.

Article 3 No. 14 (online marketplace)

Germany proposes to delete the phrase "for the sale of products covered by this regulation" since according to Article 3 (6) the GPSR applies also to products offered free of charge and – according to the Commission's statement in the Working Party on 27/10/2022, chapter IV on online marketplace applies also to harmonised products.

Article 3 No. 15a/16 ("consumer"/"end user")

Germany proposes to add - in addition to the definition of "consumer" - a definition of "end user". Since chapter IV and chapter VIII apply directly to harmonised as well as non-harmonised products a definition of "end user" is necessary, to prevent legal gaps in the application of chapter IV and chapter VIII. In both these chapters as well as in Article 3 No. 14 and No. 23 and recital 62 to 64b "consumer" needs to be replaced by "end user".

Article 4 (distance sales)

Germany asks whether Article 3 (6) already regulates the offer of products free of charge via distance marketing or not. If so, Article 4 subparagraph 2 can be deleted. If not, Germany proposes to change the title of Article 4 into "distance marketing" since sales do not include free offers.

Chapter III (Article 8 to Article. 19)

Art. 8 (6) – adequate information

Germany is in favour of the former wording of paragraph 6. Labelling with a type reference, batch or serial number should be the general standard and should not be mentioned only as an example. Furthermore it is unclear what is meant by "adequate information".

Article 8 (8a) – Digital product passport (proposal for an additional paragraph)

Germany proposes to introduce a new paragraph (8a) which includes the option that economic operators shall have the possibility to provide the information addressed to market surveillance authorities and referred to in Article 8 (4) in a digital format by means of electronic solutions (like QR code) clearly visible on the product or, where that is not possible, on its packaging or in a document accompanying the product.

The introduction of the digital product passport within the GPSR does not conflict with the Sustainable Products Initiative (SPI) since the proposal of Art. 9 (2) SPI states "Where other Union legislation requires or allows the inclusion of specific information in the product passport, that information may be added to the information to be included in the product passport….".

Germany is assessing, whether and which additional information should be provided in a digital format.

However, the information referred to in Article 8 (8) shall be provided in any case in a traditional way as safe use by consumers needs to be ensured.

Article 8 (12) para. 1 – Complaints register

A complaints register should only have to be kept, if this is necessary.

Germany proposes to add in the first subparagraph of Article 8 (12) the word "withdrawal" since not only recalls should be entered in the complaints register but also withdrawals.

Article 11 (1) – Obligations of distributers

Concerning Art. 11 para. 1, Germany still raises the question of how a distributor should check whether the manufacturer or importer has rightly made use of the exception in Article 8 (8) subparagraph 2 or Article 10 (4) subparagraph 2. A purely formal check is not possible for the distributor here.

Article 12 (-1) and recital 41 – a person considered a manufacturer

Germany proposes to delete the clause "or modifies a product in such a way that the conformity with the requirements of this Regulation may be affected" in recital 41 because it is inconsistent to Article 12 (-1).

Article 12 (2) and recital 41a – Term "substantial modification"

In order to achieve coherence with the New Legislative Framework, the term "substantial modification" in Article 12 (2) should be used uniformly. This term is currently used in various draft regulations (e.g. General Product Safety Regulation, Machinery Regulation). Only a uniform definition can prevent that products falling under different European legal acts have to be dealt with differently depending on the regulatory aspect with regard to substantial modification.

Article 15 (1) and (2) and recital 39a – Responsible person and sample testing

Concerning the questions the Presidency prepared for the Working Party on 06/05/2022 Germany would like to reply as follows:

1) Responsibility for the sample testing:

A manufacturer or an importer who are responsible for the sample testing can carry out at their option product testing themselves or by delegating it to a third party. Germany asks what is meant in detail by the phrase "under their responsibility" in the Presidency's question: Does it mean that the testing could be done outside the EU and how is "responsibility" in this context defined?

The same should apply to the "responsible person": The "responsible person" should have an obligation with regard to product sample testing. The "responsible person" can choose to do the testing itself or delegate it to a third party. However, if the manufacturer or importer have to do the testing within the EU the "responsible person" should do the sample testing for consumer safety reasons, for reasons of market surveillance and for reasons of equal competition conditions also within the EU.

In general testing should be well documented to enable market surveillance authorities to control whether it is done properly.

2) Scope of the sample testing:

It will be very difficult to define such exceptions from the sample testing in view of the large number and variety of products on the internal Market. As the Commission has stated in the Working Party on 11/03/2022 every product could be dangerous, even simple products. New findings from science and research can show that even products that are on the market already for years and were assumed safe could be dangerous, e.g. with respect to their chemical composition.

In principle, each product should be tested. Safety of complex products is also a question of interaction of components (e.g. gears and brakes of bicycles). However, there can be simple products where not every single product needs to be tested, e.g. different books which are made of the same paper and the same ink. Thus, the kind/nature, the complexity and the risk potential of the product should be regarded appropriately in this context.

Germany would prefer a combination of a minimum frequency such as "once a year" and an indication of some criteria to determine if in very exceptional cases the sample testing should be done more frequently, e.g. if an accident occurred with this product, or less frequently, e.g. a simple product where a risk has never been reported.

It would be helpful if the GPSR could provide a specific procedure for the sampling process or specific rules for the testing to ensure the results are reliable.

Article 16 (2) – Information to economic operators

Germany still suggests deleting Article 16 (2). From the German point of view there is no need for regulation with regard to specific information provided by the member states for economic operators with respect to the implementation of the GPSR.

Article 17 – Traceability of products

In order to give the member states some leeway, Article 17 (3) should change the empowerment for a Delegated Act to an Implementing Act.

Article 17 (4) should provide a review of the existing requirements in the Member States. From the German point of view, existing practicable traceability systems already in place in the economy should be drawn on.

Article 18 – Obligations of economic operators in case of distance sales

Article 18 should provide exemptions for stationary sale or for SME, who - with their product range - have entered or are entering online trade as an additional distribution channel - forced by the drop in sales due to the pandemic.

Article 19 – Obligations of economic operators in case of accidents or safety issues

Instead of a rigid notification period of two working days, the notification in Article 19 (1) should be made without undue delay of the manufacturer.

Chapter V (Article 21 - 22) Market Surveillance and Implementation and
Chapter VI (Article 23 - 25) Safety Gate Rapid Alert System and Safety Business Gateway

Article 21 (Market Surveillance) and Article 24 (Notification through the Safety Gate Rapid Alert System of products presenting a risk):

Germany is of the opinion that clarity and transparency of applicable law as well as of applicable information systems are essential for a well-functioning market surveillance.
For market surveillance authorities it should be absolutely clear which law applies. Therefore, Germany asks to consider the proposed Article 21 under this aspect.

Furthermore, Germany is of the opinion that the general market surveillance information system ICSMS (which is regulated in Art. 34 of Regulation (EU) 2019/1020)) is a well-functioning information system. Germany sees no reason to install a second information system that runs parallel to ICSMS. In practice, this would lead to the situation that authorities may have to enter the same information that they enter into ICSMS for Regulation (EU) 2019/1020 additionally into another system (Safety Gateway according to Article 24 of the draft for the new GPSR).
Germany fears that overlaps with the existing ICSMS lead to missing information in both systems and to additional work for market surveillance authorities. This would tie up resources of market surveillance authorities that could be better invested in market surveillance. It does not seem sufficient that the Commission should develop an interface according to Article 24(7) GPSR-proposal in order to avoid double entries. In the sense of "better legislation", one information system for the same facts should be sufficient.

Germany therefore suggests including in Article 21(1) also a reference to the first sentence of Article 16 (6) of the Regulation (EU) 2019/1020 and not only to Article 16 (1 to 5) as proposed. Germany suggests including in Article 21(1) also a reference to Article 34 of the Regulation (EU) 2019/1020. A reference to the information system that applies should be clearly mentioned in this proposal.

For the same reasons of clarity and transparency of information intended for consumers, only relevant facts should be reported to the notification system. Germany believes that extending RAPEX notifications to any kind of risk would be of disadvantage for consumers. A big number of notifications is no indication for the quality of these notifications, but will put in question the alert function of the system. Therefore, the RAPEX system (now called “Safety Gate Alert System”) should clearly stay reserved for “serious risk”.

In the headline of Article 24 and in para.1 letter (a) the word “serious” should be added before the word “risk”. Para (2) und para (2a) should be deleted.

Chapter VIII – Right to information and remedy

Article 35 and recital 64a and 64 b– Remedies in case of a product safety recall:

Germany believes that consumers must be offered an effective, free and timely remedy in the event of a product safety recall. However, this should not be ensured by an EU legal act on general product safety, as the objective pursued is to provide additional (economic) protection

in the event of a product recall. This is not the subject of market surveillance authorities and should not be their task.

As there were still several unanswered questions in the Working Party on 06/04/2022 and in the written comments of the MS about the relation and the hierarchy of Article 35 and the existing Sale of Goods Directive (SGD), it is not possible to answer the questions of the Presidency sufficiently.

GER asks the Commission/the Presidency to explain how consumer rights given by the Directive (EU) 2019/771 will be ensured/affected by remedies in a case of a product safety recall. Can the Commission/the Presidency give some examples which law should be applicable for remedies during the warranty period and which after the warranty period?

However, it should be ensured that a consumer does not find himself in a worse situation if he is affected by a product recall than he is without.

Miscellaneous (request for an additional recital)

Germany proposes to add the following recital to the proposed regulation:
(81) Pursuant to Article 106a(3) of the Euratom Treaty, the legislation adopted on the basis of the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of the Euratom Treaty. Therefore the provisions adopted on the basis of Directive 2013/59/Euratom with regard to practices involving consumer products and with reqard to information on equipment remain unaffected.

Reason for this recital: There is a need to highlight – in line with Article 106a(3) of the Euratom Treaty – that the aforementioned provisions of Directive 2013/59/Euratom remain unaffected.
The Council Directive 2013/59/Euratom (Radiation Protection Directive) is also laying down safety standards for products for protection against the dangers arising from exposure to ionising radiation, especially in Art. 20, 21 and 78.
Pursuant to Art. 20 (4) of the Directive Member States shall prohibit the sale or the making available to the public of consumer products if their intended use is not justified or their use would not fulfil the criteria for exemption from notification under Article 26.
An example of a practice that shall not be deemed to be justified are practices involving the activation of material resulting in an increase in activity in a consumer product, which at the time of placing on the market cannot be disregarded from a radiation protection point of view (Art. 21 (2)).
Furthermore Member States shall prohibit the deliberate addition of radioactive substances in specific products, i.e. the manufacture of toys and personal ornaments (Art. 21 (1) and (3))

and shall prohibit practices involving the activation of materials used in toys and personal ornaments, resulting, at the time of the placing on the market of the products or of their manufacture, in an increase in activity, which cannot be disregarded from a radiation protection point of view (Art. 21 (4)).

Art. 78 obliges Member States to ensure that any undertaking acquiring equipment containing radioactive sources, a radiation generator or medical radiological equipment is provided with certain adequate information.

These provisions shall ensure that radioactivity within products is limited to an amount that the exposure by the use and handling of the product of a representative member of the public can be disregarded from a radiation protection point of view.

These provisions remain unaffected by the enactment of the Product Safety Regulation. This interrelation should from our point of view be clarified by a recital.

Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on general product safety amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council 2021/0170 (COD)

REF. PRESIDENCY NOTE ON SAMPLE TESTING AND REMEDIES WK 6266/022 INIT 2.5.22

Written comments from Italy (answers in bold and framed)

I / Sample testing of products by the responsible person (Art. 15(2))

Questions of the Presidency:

1) Responsibility for the sample testing:

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

Yes, they should.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

Yes, he should.

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsbility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

Yes, a minimum set of criteria for the responsible person (who must be reliable and verifiable, as authorised representative, when neither the manufacturer nor the importer are established in the EU) has to be established. In particular he has to operate as an entity who is both *legitimated* (i.e., to remove the ability to assign "anyone" to act as an authorised representative) and *reliable* (i.e. to have sufficient understanding of product compliance requirements to be responsible).

In the Union already exist and implemented mechanisms for accrediting *Notified Bodies* (1), that could be used as a reference to create an accreditation program for authorised representative under the implementing act of this regulation (in the perspective of the "professionalization" of its role) and without prejudice of the authorised representatives obligations of article 9, GPSR). A "Registration Database" for authorised representatives (where there is no EU based manufacturer or importer) could be apropriate as well to create for this purpose, which will enable interested parties to view all relevant and necessary information efficiently and at scale. In this context, a related insurance obligations system would be appropriate to create.

(1) The 'Blue Guide' on the implementation of EU products rules 2016 (2016/C 272/01). Ref. Section 5.2.2. which outlines the roles and responsibilities of notified bodies.

2) Scope of the sample testing:

— Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

The focus is on consumer rights: information must be given complete for all kind of risk, to protect consumers without prejudice of related EU regulations. The sample testing provide in the GPSR is an important additional control tool for the benefit of consumer safety.

The point to consider is not the effectiveness of the test in eliminating unsafe products from the market, but the fact that the possibility that products will have to go through these tests is an additional deterrence factor for manufacturers.

We've as well to consider that given the heterogeneity of the products on the market, it is not possible to have specific sample tests for the various product categories. Some categories of products, by exception, should not be subject to product sample testing.

We need a minimum common standard for sample testing for all products.

Regarding the criteria that could be used to determine them we've to start from the application of the general principle of consumer information while providing for exceptions for products with a lower risk.

As regards the acceptable criteria for defining exceptions to this general principle, it is necessary to distinguish the technical documentation of harmonized products, as indicated in the EU regulation 2019/1020 on market surveillance, from the documentation associated with non-harmonized products, in order to avoid confusion new burden and extensive documentation for products that inherently present no or negligible risk (including those that have a simple and safe production line, like for example books). Guidelines of EU Commission could be appropriate at this respect.

— For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

Yes - consequently to what has already been indicated - for a given category of products, the sample testing should be applied only to a selection representative of the products under its responsability, Representativeness could be ensured both in range and volume.

— Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

The sample testing should be performed periodically and at least once a year on random samples whose frequency and amount are representative - taking into account the criteria for their determination both in range and volume - of the products under its responsability. The testing might be performed by a third party operator (reliable and verifiable i.e. accredited testing laboratories) and under the responsibility of the responsible economic operator. If further testing is required, which should be on an exceptional basis, the responsible person should provide a sample of the product to the Authority so that the Authority can carry out its own tests.

— About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?

Sampling process obligations must be reduced to the minimum necessary (new procedure could be burdensome and there should be no specific mandatory procedure). GPSR (last compromise proposal) provides the introduction of the concepts of *representativeness* and *proportionality,* based on the risk assessment of the EO of new recital 39a). We support the provision which, in our opinion, ensure the sampling process can be done without the risk of biased results. In this context, we highligh as well - as formally proposed by our delegation (2) - the importance of considering the explicit introduction in the text of the evaluation of the specific nature of the product (low-risk products). Useful guidelines could be adopted to indicate some non-binding requirements or procedures.

— About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

Sampling process obligations must be reduced to the minimum necessary (new procedure could be burdensome) (3). We support the provision (GPSR, last compromise proposal) which, in our opinion, ensure that testing will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used. In this context, we highligh again testing might be performed by a third party operator (reliable and verifiable i.e. accredited testing laboratories) and under the responsibility of the responsible economic operator. At this respect we suggest to add in the provision (art. 15 (2)) what already foreseen in the recital 39a (4).

(2) See comments of Italy on doc. 5211/22 REV3 – Ref. Note of Council of Europe, Brussels, 20 April 2022 WK 5651/2022:

Art. 15 (Responsible person for products placed on the Union market)

¬ We express appreciation on the new formulation of the whole article (and in particular on paragraph 1), which welcomes our suggestions for more consistency with the provisions of Regulation (EU) 2019/1020;

¬ However the obligation to carry out periodically (even, at least, once a year) sample testing of the product, as defined in article 15, paragraph 2, envisaged for all types of products without any distinction, risks introducing unnecessary, non-proportionate charges and is risky for the business;

¬ We've as well to take in consideration the fact that it is not possible to assign a judicial police officer, for each type of product on the market, who can assist the economic operator in the choice of type and quantity of product to be checked. The challenges of the new approach include the lack of funding and resourcing of market surveillance authorities (MSA). Funding and resourcing are an issue that should be dealt with by member states, although in a coordinated way, under the guidance of the Commission;

¬ Moroever, should be acceptable that an RSP provides tests reports from verifiable souces upon request (which may be obtained from the manufacturer if necessary)

¬ At this respect we ask to modify the article 15 (2): "In addition to the tasks referred to in Article 4(3) of Regulation (EU) 2019/1020, **taking into account the characteristics of each product sector as well as its possible risks as identified by the manufacturer,** the economic operator referred to in paragraph 1 shall be responsible for representative random sample testing of products for which it is responsible according to paragraph 1. The sample testing shall be performed periodically and at least [once a year] on random samples whose frequency and amount are representative of these products both in range and volume.

(3) See our comments on question above.

(4) New recital 39a Compromise proposal GPSR: […]. The testing might be performed by a third party operator under the responsibility of the responsible economic operator.

II / Remedies in case of product safety recalls (Art. 35)

Questions of the Presidency:

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:
   - Should the refund of the product always be included among the options proposed to consumers?

Yes, it should, although we consider necessary to coordinate the provision with the regulations in force on product guarantees provided for in the Consumer Code in order not to introduce new rules that can overlap the safety requirements already provided.

   - Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?

Yes, it should.

   - Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?

Yes, they should.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

The economic operator has to be required to take into account the environmental impact regarding each option of remedies to be choosen by consumer. The economic operator has as well to inform the consumer about the environmental impact of each option, taking in due consideration the enviromental and sustainiable objectives set at Union and national level.

3) When the remedy is a refund, how should its value be determined?

The amount of the refund should be *adequate* and at least equal to the price paid by the consumer to buy it, without prejudice to consumers' entitlement to another compensation as provided for in the national law transposing Directive (EU) 2019/771 *(5)*.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

The concept of *safety* (i.e. ref. GPSR) is a part of the wider concept of conformity (i.e. ref. Dir. 2019/771). Art. 35 of GPSR (as *lex specialis*) applies in the case of a product safety recall. The application of the art. 35 of GDPR therefore has to be foreseen without prejudice to Directive (EU) 2019/771 (art. 10) *(6).* Thus the seller has to be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall.

([5]) Directive (EU) 2019/771 - Ref. recitals 18 and 61.
([6]) Directive (EU) 2019/771 - Ref. Article 10.

SK WRITTEN COMMENTS on the General Product Safety Regulation concerning sample testing by the responsible person and remedies in case of product withdrawal

I / Sample testing of products by the responsible person (Art. 15(2))

General comment on Article 15 and sample testing

Slovakia maintains its position expressed earlier concerning Article 15. The preferred option is deletion of the entire article. Slovakia does not support the obligation of sample testing in its entirety. There has been no justification presented neither by the Commission nor by the Presidency on the need for such obligation. The proposed obligation is not present in the area of harmonised legislation which has in general higher requirements on products that pose higher risks to users. If Article 15 is maintained, it should be limited to a high-risk products.

1) Responsibility for the sample testing:

a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?

We do not see the need for a separate obligation for manufacturers and importers on top of their general obligations under Art. 8 and 10. The general obligations of manufacturers, in particular Art. 8 par. 1 and 9 are sufficient to guarantee high and transparent standards of production. When necessary MSA could order the manufacturer to carry out sample testing. However, in case that Article 15 stipulated a sample testing obligation, economic operators should have the possibility to delegate testing to a specialized third party.

b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?

If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsbility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

All economic operators with no regards to the country of their establishment should be subject to equal treatment. Therefore, the GPSR should allow that sample testing is carried by a manufacturer outside the EU. Any legislation contrary to this principle could possibly be in contradiction with WTO rules. We would like to highlight the external dimension of obligations applicable to products imported to the EU. Third countries might consider introducing requirements similar to those applicable in the EU concerning products imported from the EU.

2) <u>Scope of the sample testing:</u>

- Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

Our general position concerning sample testing is negative. However, in case that Article 15 stipulated a sample testing obligation it should be limited to well identified and justified product categories that present the highest risk to the safety of consumers.

For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

- Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

- About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?

- About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?

It is unrealistic to determine in a general provision all the modalities and requirements for sample testing equally applicable to a virtually unlimited number of non-harmonised product types and categories. Furthermore, the nature of the regulation must remain horizontal. Introducing specific and sectoral requirements could risk an overly prescriptive legal text. In

case the obligation was limited to a narrow list of products, details could be adopted by delegated or implementing act.

Economic operators should be free to decide whether they carry out sample testing in own facilities or use the services of third parties. The GPSR should not specify any detailed criteria concerning testing facilities.

II / Remedies in case of product safety recalls (Art. 35)

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:

- Should the refund of the product always be included among the options proposed to consumers?

No, economic operators should have the flexibility to choose and offer the most appropriate form of remedy to consumers. Individual circumstances should be considered in each case. The GPSR should not provide for any mandatory form or remedies for the consumer. It should rather establish a general legislative framework that provides the possibility for consumer to obtain an adequate remedy in case of product recall.

- Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?

- Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?

No, in line with our comment on the first question, we suggest that the GPSR sets out only a general obligation for economic operators to offer adequate, effective and timely remedies that incentivise consumer to return the product without specifying a mandatory form or remedy.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

We are not in favour of obligation with too general and vague wording. It is unclear what is meant by "considering the environmental impact" and how such obligation should be applied in practice. The procedure for recall of dangerous products must be as streamlined and simple as possible in order to

reduce the overall risk to consumers. Any complication could jeopardise this goal. Furthermore, MSAs are ill-suited to determine the environmental aspects of measures taken by economic operators and their objective is to ensure consumer safety. In order to be able to make such assessment, MSAs would need to either retrain their core staff or use external services. Both option would lead to higher costs.

We have no objection against the obligation to inform consumers about the environmental aspects of individual options. However, consumers´ choice based on the environmental aspect should not jeopardise their own safety.

3) <u>When the remedy is a refund, how should its value be determined?</u>

We prefer a precise text on the amount of refund, preferably the amount of the purchase price. Less precise wording could lead to disputes and litigation and ultimately to hampering the core objective of the provision which is the safety of consumers. This opinion follows our opinion on question no. 1). If the refund always was included among the options proposed to consumers, full purchase price refund might not be adequate.

<u>4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?</u>

We are of the opinion that general conditions set out in Art. 7 (1) (d) of regulation 2019/771 cover non-compliance based on safety of the product. We insist on an opinion of the Council´s legal service regarding the link between the GPSR and Regulation 771. It is of outmost importance to avoid duplicate regulation of remedies. We would like to recall our previous position to clearly identify the economic operator responsible for the recall. Example: if the recall is organised by the manufacturer obligation to provide remedies under the GPSR and Regulation 771 will be borne by different entities (manufacturer / trader). It is unclear how a remedy offered by the manufacturer under the GPSR and accepted by the consumer will impact his legal and contractual relationship with the trader regulated by Regulation 771. Furthermore it is unclear what is the impact of remedies under the GPSR on the contractual relationship under Regulation 771, e.g. in case of a replaced product the product is no longer the same product as sold by the trader. The product´s functions or characteristics might be impacted by the repair, traders should not be held liable for the non-conformity of the repaired product with the original contract. Furthermore, the manufacturer might replace the product with another product with similar characteristics (e.g. a newer model), it is unclear how such situation will impact the sale contract. Will the manufacturer replace the trader in the original sale contract or a new contract between the manufacturer and the consumer will replace the original contract? These are only a few practical examples. It is certain that there will be incomparably more legally challenging situations in practice.

Written answers from Latvia on the questions raised during 06/05/2022 WP meeting on sample testing and remedies

proposal for a Regulation on general product safety

I / Sample testing of products by the responsible person (Art. 15(2))

LV is opposed to Art.15 until same provision in Regulation 2019/1020 is proved to be effective. Until then, introduction of same requirement but in relation to a much wider scope of products is contrary to principles of Better regulation and evidence based legislation.

Furthermore, we do not think that the introduction of responsible person in this regulation will solve the problems we have with non-compliant products coming from third countries. In market surveillance regulation 2019/1020 there is a risk based approach for this provision, however, current proposal foresees responsible person for all non-harmonised products which we find unproportionate.

We are of opinion that mandatory sample testing should be done only for products with high risks and not for all products. We think that having sample testing for all products will devaluate this requirement and we will not be able to enforce it properly.

1) **Responsibility for the sample testing:**

   a) *In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?*

It is important to clarify what is meant by the "third party". We are of opinion that it should be accredited institution so that we can have reliable results. The responsibility of testing should always be on manufacturer/ importer, however, if responsible economic operator has developed sample testing plan indicating the frequency of testing then it could be delegated to third party. However, the responsibility for testing should always be on manufacturer/ importer even if they decide to delegate this function to someone else.

   b) *b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?*

      If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsibility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?

The question regarding products manufactured outside the EU is more complicated because reliability of products tested in third countries are very low. The construction here could be that responsible person cooperates with manufacturer and takes for sample testing the appropriate number of products (taking into consideration the number of products sent to EU) and does this testing in accredited laboratory. Preferably, this laboratory should be located in EU, as the reliability of products tested in third countries are usually very low.

2) Scope of the sample testing:

- Should some categories of products, by exception, not be subject to product sample testing and which criteria could be used to determine them?

We think that the sample testing should be done only for high-risk products also the availability of reliable testing methods should be taken into consideration (for example harmonized standards). We think that the risk level caused to the consumer should be taken into account, vulnerable consumers, probably the high number of accidents could also indicate to the level of risk. These could be some examples for the criteria.

- For a given category of products, should the sampling be applied to each product reference in this category or only to a selection, and which criteria could ensure that such a selection would be representative? For example, should a manufacturer of bicycles carry out sample testing of all the references of its bicycles or only a selection of them?

- Should there be an indication of the frequency (e.g.: a minimal frequency such as "once a year") or an indication of some criteria which the "responsible person" should need to take into account to determine the frequency of the sampling?

Regarding the sampling size and indication of frequency, we think that taking into consideration the large number of different products covered by this regulation, it will be very hard to determine the specific sampling sizes and frequency that would suite for all products. Also, when determining the sampling size and frequency, the process of production should be taken into consideration, for example, in the case of series production less testing will be required, but if production is performed in non-automated process, then more frequent testing could be required, because every product might differ. If we are deciding to go with this road, then our suggestion would be to start with the definition of sample testing. For example, sample testing could be the application of statistical method that could determine the number of representative samples and it could be complemented with guideline document, giving more precise examples and details how the method could be applied with different production volumes.

- About the sampling process: should the GPSR provide for a specific procedure to ensure it can be done without the risk of biased results?

Regarding the sampling process, it would be very hard to provide one process for all different products under this regulation. But as a suggestion, maybe we could look into A module in harmonised area and develop something similar.

- *About the testing: should there be specific rules to ensure that it will be done in an adequate facility, that it will cover all the necessary safety aspects and that the proper standards/references (should they exist) will be used?*

Regarding the testing we would suggest accredited institutions, covering safety aspects, harmonized standards and in the absence of harmonised standards, other adequate methods could be used. But again- only for high risk products.

II / Remedies in case of product safety recalls (Art. 35)

1) When a product recall is necessary for safety reasons, which option(s) should economic operators propose to consumers:

- *Should the refund of the product always be included among the options proposed to consumers?*

Yes, we think that the refund should always be included among the options proposed to consumers. It is proportionate requirement in the cases of recalls for the safety reasons. We are not talking here about minor non-compliances, there are safety risks.

- *Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?*

Regarding the mandatory obligation to offer repair and/ or replacement, no, we do not see the justification behind this. If the product is not safe, we cannot force manufacturer to have these as obligatory options. We think that it should be left for the manufacturer himself to evaluate and decide if he can offer repair and/or replacement. But not as mandatory obligation.

- *Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?*

Regarding the exceptions, yes, these could be some of the criteria used by the manufacturer to decide whether he could offer repair and/ or replacement.

2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?

We don't think that it is the right place to focus on the environmental aspects. We are talking here about correction of serious non-compliance that has already occurred. The main focus should be on the fast and effective actions to stop the non-compliance. This process cannot be overcomplicated with other things. Also, the

recalls are not very common, those will be few cases. There are many other ways how the environmental aspects could be taken into consideration (for example, production process, supply chains etc.), but not here when we have actual safety risks.

3) When the remedy is a refund, how should its value be determined?

We think that in the cases of recalls for the safety reasons the full value of the product could be refunded. Because consumers will be unwilling to return, for example, more expensive products, if they will not be able to afford the new one and will bear the risk continuing to use the unsafe product. It might not be very business-friendly opinion, but we have to think about the safety of the consumers.

4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?

Regarding the seller responsibility in the cases of recall, we are of opinion that the economic operators who placed the product in the EU market should be responsible for recalls and bear the costs caused by the recalls. If the distributor has fulfilled all his obligations he cannot be held liable for the safety of the product as it is the responsibility of the manufacturers/ importers.

Comments of The Netherlands **Wednesday 11th of May 2022**

Questions of the Presidency	Answers
1. Responsibility of the sample testing	
a) In the case of a product for which there is a manufacturer or an importer in the EU, should they carry out product sample testing (themselves or by delegating it to a third party under their responsibility)?	There should always be a possibility to delegate this sample testing to a (accredited) third party under the responsibility of the EU manufacturer or importer.
b) In the case of a product manufactured outside the EU, and for which there is no importer within the EU, should the "responsible person" have an obligation with regard to product sample testing?	Yes
If so, should such an obligation entail ensuring that the testing is done (by the "responsible person" itself, by a third party within the EU under its responsbility or by the manufacturer established outside of the EU) in accordance with the requirements laid down by the GPSR and answering to the requests of the market surveillance authorities about such testing?	No, the person or persons responsible for the testing should be located within the EU. The testing itself can be done by a third party.
3. Remedies in case of product safety recalls	
1.a) Should the refund of the product always be included among the options proposed to consumers?	We think that in any case the option of a refund should be offered to consumers.
1. b) Should it be mandatory that one or two of the other options (product repair, product replacement) are also proposed to consumers?	If the economic operator is able to offer a replacement or a repair, it should be possible for this party to do so. However, due to the nature of the product a replacement or reparation might be very costly or time consuming. Proportionality should be taken into account. Therefore we do not support making product repair or product replacement mandatory options in all cases.
1. c) Should some exceptions be allowed to admit that the options of a repair and/or of a replacement cannot be proposed in some cases? (e.g.: technical impossibility and/or at a cost which would not be reasonable)?	If these options are obligated, exceptions should be in line with the Sales of Goods Directive (Art. 13 sub 2).
2) Considering the environmental impact of the remedies: should the economic operator be required to take into account the environmental impact of each option or should this choice be left to the consumer, provided the economic operator has informed him about the environmental impact of each option?	The environmental impact should be an important aspect in the whole process, also in the case of a recall remedy. The economic operator should take this into account.

3) When the remedy is a refund, how should its value be determined?	We think that the refund as laid down in article 35, paragraph c of the GPSR proposal, is adequate.
4) How should this article take into account the consumer rights regarding product conformity towards the seller? Should the seller still be responsible of the conformity of the product on the basis of Directive (EU) 2019/771 on certain aspects of contracts for the sale of goods if another economic operator decided the recall?	Regardless of which economic operator decides to recall, the consumer rights should not suffer from this recall.