

# Online Platforms: Role and Responsibility in Ecodesign policy

Eunomia Research and Consulting Ltd. for EEB  
March 2023



## Report For

European Environmental Bureau

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Association internationale sans but lucratif (AISBL). EC  
register for interest representatives:

Identification number 06798511314-27  
BCE identification number: 0415.814.848  
RPM Tribunal de l'entreprise francophone de Bruxelles

Published March 2023  
Responsible editor: Patrick ten Brink

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*With the support of the LIFE Programme of the European Union*



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# Executive Summary



## E1. What is the ESPR, and why does it matter?

In March 2022, the European Commission published its proposal for the Eco-design for Sustainable Products Regulation (ESPR), which is deemed the “*cornerstone of the Commission’s approach to more environmentally sustainable and circular products*”.<sup>1</sup> The new legislation aims to make sustainable products the norm and stimulate the circular economy. It fits within an extensive framework of EU product and consumer legislation, expands the range of products subject to eco-design requirements, and requires traders to provide information to consumers to enable more sustainable choices. This briefing note highlights the potential risk that sales made through the e-commerce sector could fail to comply with the ESPR.

In this report, the term ‘e-commerce companies’ refers to economic operators that facilitate the sale or purchase of goods conducted over the internet.<sup>2</sup> This includes online marketplaces, online retailers, companies that sell directly to consumers via a website, and fulfilment service providers.

Online sales have steadily grown over the last ten years, a shift that has been accelerated by Covid-19. As it expands, the online retail sector is also becoming increasingly complex due to ongoing innovation. EU policy making has struggled to keep pace with such market shifts.

Most significantly, there are concerns that the e-commerce sector has disturbed the level playing field in the retail sector, with growing evidence that some e-commerce companies (intentionally or otherwise) exploit regulatory gaps that confer economic advantages over traditional sales routes. These economic advantages stem from avoiding costs by not fully complying with EU legislation. This is particularly prominent where manufacturers in third countries ship products directly to consumers in the EU, without appointing an economic operator within the EU who would be liable for non-compliant products. The lack of legal clarity on roles, and the difficulties of taking legal action against companies in third countries, leave this legislative gap open.

Given the difficulties of ensuring compliance with existing EU legislation for products sold online by some e-commerce companies, there is reason to be concerned that the ESPR could be similarly undermined. The objective of this brief is to identify and mitigate the risks of this happening. It will review the ESPR and explore challenges for previous legislation, to develop recommendations for how to ensure that the ESPR becomes the desired cornerstone for circular product policy.

This brief also recognises that many e-commerce companies take considerable effort to fulfil their legal obligations. These companies would also welcome measures to prevent some companies from exploiting the legislative loopholes that exist. Given the significant position of e-commerce companies in their role as gatekeepers to the EU market there is also an opportunity for policy makers to leverage the influence of e-commerce companies for greater positive change.

Legislative action is required to better protect consumers, restore a level playing field for economic operators, and ensure that new legislation such as the ESPR is implemented effectively.

<sup>1</sup> Ecodesign for sustainable products. [https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products\\_en](https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products_en)

<sup>2</sup> Eurostat, Glossary: E-commerce, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:E-commerce>

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## E2. Why is there a need to be concerned about online sales?

The rapid growth of e-commerce has led to distortions in the level playing field amongst retailers. This is most evident between bricks and mortar retailers and e-commerce retailers. Some e-commerce companies also argue that whilst legal loopholes exist through which some online retailers sidestep obligations there is no level playing field within e-commerce either.

**E-commerce is challenging to regulate given its diversity in business models and global reach.**

- Online sales are increasingly significant in the global economy and have led to increasingly complex supply chains. Online marketplaces facilitate trade between a high number of smaller and international companies and EU consumers.
- Online marketplaces occupy a new position in the supply chain, and the marketplaces view themselves as intermediaries, assuming very limited responsibility for products.
- The structure of many online marketplaces makes it more problematic for market surveillance authorities to trace sellers.
- Furthermore, most marketplaces serve sellers based outside of the EU and the awareness of EU legislative requirements among this group of sellers is very low.

**Most online marketplaces have a poor track record of upholding compliance with EU legislation, and few e-commerce companies show active concern for wider environmental and social impact.**

## E3. How does EU legislation place responsibilities on E-commerce companies?

Existing legislation provides the ESPR with 'building blocks' for regulating e-commerce companies and using these the ESPR seeks to construct a new set of stronger sustainability requirements. A question emerges as to whether the legislative building are sufficient for delivering the aims of the ESPR, or whether novel approaches to regulating the economic operators involved in supplying the EU market with products are needed, most notably the e-commerce companies.

Five main types of obligations in EU law fall on e-commerce companies for sustainability:

1. Regulations for **setting standards for products** to be put on the EU market;
2. regulations for **fair conduct** in relation to consumers and the transactions that are facilitated;
3. regulations for **producer responsibility for end of life** management of products;
4. regulations that oblige e-commerce actors to cooperate and **support enforcement** operations; and
5. Corporate reporting obligations for larger companies

Current legislation is built on the distribution of responsibilities amongst the manufacturer, importer, distributor and can also include dealer/trader or other economic operators. Within many e-commerce supply routes it can be difficult to apply these terms and establish clearly who has responsibilities. For example, an online marketplace can sidestep the role of importer by facilitating a transaction directly between the manufacturer and the consumer, or a distributor in

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a third country and the consumer. For many product groups manufacturers must appoint an Authorised Representative to have an economic operator established in the Union against which enforcement action can be taken, however this is not strictly adhered to and is difficult to enforce.

The analysis highlights that firstly, there is a lack of consistency in how the economic operator terminology is used across EU legislation, and secondly, the current terminology seems inadequate to cover the business models in e-commerce. **Online marketplaces in particular offer new supply routes to the EU market. The extent to which online marketplaces are held responsible for the actions of the traders using their platforms is a highly contentious issue.** This can be explored from a variety of angles; moral responsibility, economic role within the supply chain, and responsibilities to consumers and traders. Whilst the Digital Services Act defined more clearly the responsibilities of online platforms in relation to illegal content, this has not provided the necessary clarity on the role of online marketplaces for non-compliant products.<sup>3</sup>

## **E4. What obligations does the ESPR place on E-commerce companies?**

The same five types of obligations identified in the analysis of EU legislation are seen in the ESPR proposal, with a stronger emphasis on 1. Standards for products.

When looking at the product lifecycle through the lens of the circular economy, this covers product design, use, and end of life. A key aim of the ESPR is to specify what information can support the circular economy and who is responsible for passing this through the supply chain.

The most detailed obligations in terms of product information requirements fall to the manufacturers, with different obligations placed on importers, distributors, and dealers. The obligations on online marketplaces and fulfilment service providers are minimal.

## **E5. What are the risks in the ESPR proposal in relation to E-commerce companies, and recommendations to mitigate those?**

There is a genuine risk that the *implementation* of the ESPR could be hampered due to weaknesses in the legislative text. There is a greater risk that the *ambition* of the ESPR is not achieved because it does not challenge the status quo of how online marketplaces are given obligations for products on their sites, in particular when there are no economic operators based in the EU in charge of ensuring compliance with the ESPR.

This report has therefore identified two types of risk;

1. Risks that are linked to specific elements of the legislative text that need strengthening – detailed in Table 1
2. Wider risks around the ESPR proposal arising from issues with general approach – outlined following Table 1.

<sup>3</sup> Digital Services Act, 2022. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065>

**Table 1: Risks and Recommendations**

Risk Identified		Recommendation	Legal Route
Risk that products manufactured outside of the EU may be able to avoid compliance with ESPR by selling through online marketplaces.	1.	Give legal clarity that e-commerce companies are also considered to be economic operators.	Art 3 (46) 'economic operator' should include reference to online marketplaces
	2.	Increase clarity on the circumstances in which e-commerce companies may be 'deemed to be' the importer, distributor, or dealer	Art 3 (44,45,55 and 56) clarify that online marketplaces may under certain circumstances be considered to be these economic operators
	3.	Online marketplaces should also have the same obligations as dealers to ensure that the Product Passport is easily available to their customers.	Art 25 clarify that online marketplaces are considered dealers and have the obligations under article 25.
	4.	Require online marketplaces to verify that a seller from out of the EU has an economic operator established in the Union. EITHER a) The marketplace would not allow the seller to operate until this is verified. Or b) The marketplace is deemed to be the distributor in such cases.	Add this requirement to Article 29.
	5.	Build consistency with other legislation in use of terminology	Art 3 (56) consider whether 'dealer' or 'trader' is more consistent with other legislation. And clarify the differences
Risk that the requirements on fulfilment service providers could create a loophole for non-compliance	6.	Fulfilment service providers should only service products that comply with the requirements of the appropriate delegated act. This obligation matches that of importer.	Amend Article 27. The legislation could add that fulfilment service providers should assume the obligations of importers when they distribute goods with no other economic operators based in the EU as intermediaries.

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Risk Identified		Recommendation	Legal Route
	7.	Fulfilment service providers should have the same obligations as online marketplaces in terms of cooperation with market surveillance authorities to ensure effective market surveillance	Amend Article 27 to include the same requirements as Article 29 (1)
Risk that lack of clarity in text dealing with destruction of unsold goods could lead to compliance avoidance	8.	Clarify that online marketplaces are also included as economic operators with obligations relating to unsold consumer goods.	Expand article 2 (46) definition of economic operator to include online marketplaces <b>Or</b> expand article 2(56) definition of dealer to clarify that this could include online marketplaces
	9.	Strengthen the requirements around disposal of unsold goods	Article 20 (1) c should prohibit energy recovery and disposal as options for discarding unsold consumer goods for all products.
	10.	Close a loophole of export of unsold goods	Clarify in article 20 (3) that it is prohibited to export unsold products for the purpose of destroying them.
Risk that exemptions for SMEs could be used as loopholes to avoid obligations	11.	Remove the exemptions for SMEs and instead ensure that sufficient support tools are in place to ensure that all economic operators can fulfil their obligations	Change the wording of article 20 (6) from 'may' to 'shall' to ensure that delegated acts that follow will continue with the clauses (a) and (b) to widen obligations to all economic operators Introduce provision that within the delegated acts tools are also developed to support SMEs fulfil their obligations
	12.	Refine use of the term SME and restrict the provisions to only small enterprises and micro enterprises but exclude medium enterprises.	Change the wording of article 20 to Small and micro enterprises.

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The wider risks identified include:

**1. The risk that there may be insufficient deterrent to ensure compliance.** The lack of sufficient deterrent brings two related risks: firstly, that some marketplaces will not comply with existing obligations and secondly that sellers will continue to be non-compliant at high rates because of the lack of sanctions. This second issue would be dealt with if online marketplaces had additional obligations to check that the sellers using their sites were fully compliant. In the absence of these changes some consideration of greater penalties should be given.

- Some degree of proportionality of sanctions should be introduced so that the penalty incurred by an e-commerce company that infringes the law is of sufficient magnitude to act as a deterrent.
- A strong sanction could be a financial penalty linked to EU sales, coupled with a higher penalty if an infringement is again identified within a year.
- A stronger sanction against traders found to be non-compliant would be to prohibit the trader from placing *any* items on the EU market. This would minimise the chances of the same item reappearing shortly after the listing has been removed.

**2. The risk that the product information passed onto consumers could be misleading.** Online marketplaces have a critical role in presenting information to consumers through filter tools, or summary ratings built on the sustainability data. Leaving this to their discretion runs the risk of the use of incomparable metrics and extensive greenwashing. There are already signs of this and the impact on consumers is a loss in confidence that paying extra for items labelled as sustainable actually delivers greater sustainability. This could then be counterproductive to the ESPR aims.

- To mitigate this risk, online marketplaces consulted for this project recommend that the Commission test with consumers what data helps to guide purchases, and in what form

**3. Risk that lack of communication around legal roles could lead to non-compliance.** There is a risk that compliance rates will be low due to a lack of awareness of obligations, as this has been identified in a barrier to compliance with existing legislation.

- To mitigate this risk the European Commission could take steps to centralise clear guidelines on legislative obligations.
- For such guidance to be made accessible to traders in third countries, the online marketplaces could be required to communicate obligations to traders using their site.

**4. The risk that obligations are placed on economic operators that they cannot fulfil.** A strong message from the focus groups was that obligations need to be set in accordance with the capacities of the economic operators to fulfil requirements, which is tied to their position in the supply chain, and the information they can access. This is not simply a case of an additional burden of new requirements but where information is unattainable, this will lead to non-compliance.

- It was viewed that the Commission could do more to support industry by providing templates for sellers to provide consistency in the information provided and enable them to provide the relevant information more easily. Databases of information on key data areas such as reparability information would also be welcomed.
- Harmonisation of requirements across Member States is also critical since even slight differences in data requirements can increase the burden of compliance significantly.

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## E6. Conclusions

In formulating recommendations to improve the ESPR proposal it has become clear that many of the limitations of the ESPR proposal can be traced back to existing legal constraints in the wider legislative framework. Within this there are limitations on the obligations that can be imposed on online marketplaces, and there is a lack of clarity around defining the roles of pure e-commerce companies as economic operators. If there is a genuine commitment to make the ESPR work and achieve high compliance rates, then there is a need to challenge this status quo.

**This paper argues that, since the ESPR proposal is such a significant legal tool in the transition to a circular economy, it is the right time to reassess the responsibilities along the supply chain, and to ensure that the obligations of e-commerce companies match those of other retailers.**

This briefing note argues that, if marketplaces are to play the role of important gatekeepers of the EU market, they should be expected to follow a set of basic principles;

1. Ensure that the traders using their marketplace comply with EU legislation and provide guidance to them on what this includes.
1. Ensure that the products offered for sale on their marketplace comply with EU legislation.
2. Support market surveillance authorities in detecting and sanctioning instances of non-compliance by adhering to principles 1 and 2 above.
3. Provide accurate and balanced information to consumers

Online retailers, other than marketplaces and fulfilment service providers should also follow these principles. These ambitions seem modest, and it is almost surprising that the e-commerce sector has avoided such responsibilities to date. These principles could provide the starting point for legislation that better reflects today's retail market and seeks to rebuild a level playing field amongst traders. This paper has shown that, within the ESPR proposal, they are legally achievable.

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# 1.0 Introduction

In March 2022, the European Commission published its proposal for the Eco-design for Sustainable Products Regulation (ESPR), which is deemed the “*cornerstone of the Commission’s approach to more environmentally sustainable and circular products*”.<sup>4</sup> The new legislation aims to make sustainable products the norm and stimulate the circular economy. The ESPR fits within an extensive framework of EU product and consumer legislation and seeks to build on this at the same time going beyond the impact of earlier legislation. This briefing note highlights the potential risks that the ESPR faces in relation to the e-commerce sector.

The term ‘e-commerce companies’ is used in this report to cover all economic operators that facilitate the sale or purchase of goods conducted over the internet.<sup>5</sup> This broad definition includes online marketplaces, online retailers, companies that sell directly to consumers via a website, and fulfilment service providers.

Online sales have steadily grown over the last ten years, a shift that has been accelerated by Covid-19. As it expands, the online retail sector is also becoming increasingly complex due to ongoing innovation. EU policy making has struggled to keep pace with such market shifts.

Most significantly, there are concerns that the development of the e-commerce sector has disturbed the level playing field in the retail sector, with growing evidence that some e-commerce companies (intentionally or otherwise) exploit regulatory gaps that confer economic advantages over traditional sales routes. These economic advantages stem from avoiding costs by not fully complying with EU legislation. This is particularly prominent where manufacturers in third countries ship their products directly to consumers in the EU, without appointing an economic operator within the EU who would be liable for any non-compliant products. The lack of legal clarity on roles, and the difficulties of taking legal action against companies in third countries, leave this legislative gap open which significantly distorts the EU market.

Given the difficulties of ensuring compliance with existing EU legislation for products sold via e-commerce channels, there is valid reason to be concerned that the ESPR could be undermined in similar ways. The objective of this study is to identify and mitigate the risks of this happening. It will review the ESPR and explore challenges faced by previous legislation to develop recommendations for how to ensure that the ESPR becomes the desired milestone for circular product policy.

While this brief argues that e-commerce presents a challenge for policy makers, it also recognises that many e-commerce companies take considerable effort to fulfil their legal obligations. These companies would also welcome measures to strengthen the level playing field within the e-commerce sector, preventing some companies from exploiting the legislative loopholes that exist. Given the significant position of e-commerce companies in their role as gatekeepers to the EU

<sup>4</sup> [https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products\\_en](https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products_en)

<sup>5</sup> Eurostat, Glossary: E-commerce, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:E-commerce>



market there is also an opportunity for policy makers to leverage the influence of e-commerce companies for greater positive change.

Legislative action is required to address this issue in order to better protect consumers, to restore a level playing field for economic operators and also to ensure that new legislation such as the ESPR is implemented effectively.

The study will seek to answer the following questions:

- Section 2.0: What is the ESPR, and why does it matter?
- Section 3.0: Why is there a need to be concerned about e-commerce?
- Section 4.0: How does EU legislation place responsibilities on e-commerce companies?
- Section 5.0: What obligations does the ESPR proposal place on e-commerce companies?
- Section 6.0: What are the current risks with the ESPR proposal in relation to e-commerce companies, and recommendations to mitigate these risks?

## 2.0 What is the ESPR, and Why Does it Matter?

For over a decade, from 2009, the Eco-Design Directive provided the most comprehensive direction in terms of product design: it sets minimum requirements for energy efficiency and other environmental impacts for high impact products (home appliances, industrial products) placed on the European market.<sup>6</sup> Yet, the Directive's scope was limited to products with high energy consumption and focussed on driving improvements in energy efficiency. A key part of this was developing a system of energy labelling on products that could guide consumers' choice. Classes A+, A++ and A+++ had to be introduced, and by 2021, over 90% of products had these ratings, prompting a regrading of the labelling system.<sup>7</sup> A review in 2018 found however that implementation of the directive was limited by insufficient market surveillance, resulting in an estimated 10-25% of products on the market not in compliance with the Directive.<sup>8</sup> In 2020 a new report again highlighted non-compliance as a key factor limiting the impact of the Eco-Design Directive.<sup>9</sup>

The new ESPR will replace and build off the Eco-Design Directive which is likely to be repealed when the ESPR is approved. It will apply to almost all categories of physical goods placed on the EU market and will set a far wider range of requirements on products to be sustainable. Obligations under the proposed ESPR aim to extend the life of products, reduce the impacts of

<sup>6</sup><https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009L0125-20121204&from=EN>

<sup>7</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_21\\_818](https://ec.europa.eu/commission/presscorner/detail/en/IP_21_818)

<sup>8</sup> [https://www.ceps.eu/wp-content/uploads/2018/03/RRNo2018\\_02\\_EcoDesignDirective.pdf](https://www.ceps.eu/wp-content/uploads/2018/03/RRNo2018_02_EcoDesignDirective.pdf)

<sup>9</sup> European Court of Auditors, 2020, EU action on Ecodesign and Energy Labelling: important contribution to greater energy efficiency reduced by significant delays and non-compliance.

[https://www.eca.europa.eu/Lists/ECADocuments/SR20\\_01/SR\\_Ecodesign\\_and\\_energy\\_labels\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR20_01/SR_Ecodesign_and_energy_labels_EN.pdf)

products during their lifespan (including the energy related requirements of the Eco-Design Directive), and install more circular waste management practices for products at the end-of-life. Another key feature is the introduction of the concept of a Digital Product Passport, which will support more informed choices whilst facilitating checks and controls of products by public authorities.<sup>10</sup> The ESPR is consequently attempting to create a much more complete legislative framework by which products placed on the EU market can be sustainable.

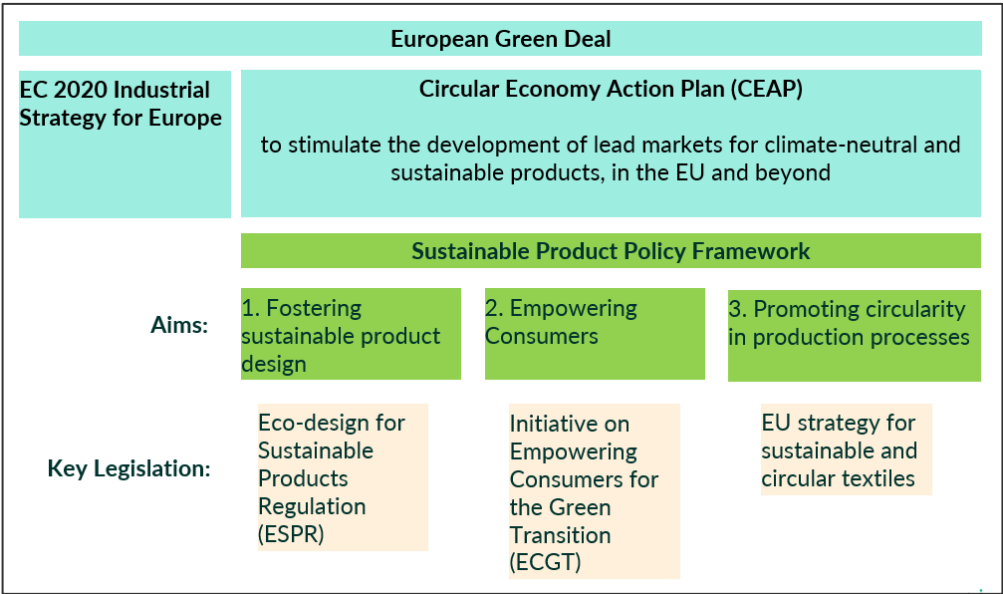
The new regulation presents a framework for action in terms of the elements that can be used in future delegated acts to drive eco-design for sustainability in different product groups. Which of these elements will be selected for which product groups remains to be decided in coming years, and there is a requirement on the Commission to “*adopt and regularly update a working plan, covering a period of at least 3 years, setting out a list of product groups for which it intends to establish eco-design requirements in accordance with this Regulation*” (Art 17(2)).

The ESPR is a key legislative arm of the EU Sustainable Product Policy Framework that is delivering on the Circular Economy Action Plan (CEAP) (see Figure 1). Whilst its primary objective is to reduce the negative environmental impacts of products over the course of their life cycle, it also seeks to contribute to the objectives of EU industrial policy by

1. boosting the supply of and demand for sustainable goods
2. delivering on sustainable production, and
3. ensuring a level playing field for products sold on the internal market.

It is clear from this that the e-commerce sector has a role to play in achieving these ambitions, given the pivotal role of online sales in the supply of goods to the EU and their significance within the internal market.

**Figure 1: Positioning of ESPR within European Policy**



<sup>10</sup> [https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products\\_en](https://ec.europa.eu/info/energy-climate-change-environment/standards-tools-and-labels/products-labelling-rules-and-requirements/sustainable-products/ecodesign-sustainable-products_en)

## 3.0 Why Be Concerned About E-commerce?

Online sales are increasingly significant in the global economy and have led to increasingly complex supply chains. E-commerce facilitates trade between a high number of smaller companies and EU consumers who would otherwise not have access to such a large market. Large purely e-commerce companies have a poor track record when it comes to compliance with EU legislation, with many market reports highlighting continued availability of products that contravene safety requirements or contain prohibited chemicals. A very recent report by Greenpeace Germany found that 32% of the 47 clothing items tested from Shein.com contain hazardous chemicals at high levels of concern.<sup>11</sup>

Many purely e-commerce companies show little concern for their wider environmental and social impact, and therefore it is left to regulation to drive positive change in this sector. E-commerce companies are a widely diverse group of companies, and online marketplaces are only one form. These are particularly challenging when it comes to regulating the sector, as the marketplaces view themselves as intermediaries, assuming very limited responsibility for the products that are sold via their site. This structure also makes it more problematic for market surveillance authorities to trace sellers, opening a route of low risk for counterfeit or non-compliant products. Furthermore, most marketplaces serve sellers based out of the EU and the awareness of EU legislative requirements among this group is very low, and they are beyond the jurisdiction of EU market surveillance authorities.

E-commerce is an ongoing challenge for legislators, and these points are expanded on here.

### 3.1 What is E-commerce?

Eurostat define e-commerce as “*the sale or purchase of goods or services, whether between businesses, households, individuals or private organizations, through electronic transactions conducted via the internet or other computer-mediated (online communication) networks. The term covers the ordering of goods and services which are sent over computer networks, but the payment and the ultimate delivery of the goods or service may be conducted either on- or off-line.*”<sup>12</sup>

For the purposes of this report the term e-commerce companies is used to cover all economic actors that facilitate the sale or purchase of goods conducted over the internet. This includes

<sup>11</sup> [https://www.greenpeace.de/publikationen/S04261\\_Konsumwende\\_StudieEN\\_Mehr%20Schein\\_v9.pdf](https://www.greenpeace.de/publikationen/S04261_Konsumwende_StudieEN_Mehr%20Schein_v9.pdf)

<sup>12</sup> Eurostat, Glossary: E-commerce, <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:E-commerce>

fulfilment service providers who facilitate the purchase of goods by delivering items to the consumer on behalf of the retailer. Some online marketplaces also operate as fulfilment service providers, whilst other companies operate independently. Other analyses do not include fulfilment service providers as e-commerce companies, though they recognise their importance in the sector as a whole.

A recent report by the IMCO committee to the European Parliament distinguishes between three types of economic actor in e-commerce: <sup>13</sup>

- 1. **Brands** that sell directly to consumers using their website (e.g. Apple, IKEA, Samsung, etc)
- 2. **Online retailers** who sell a wide range of products from different brands (e.g. online supermarkets, discount shops, and other retailers)
- 3. **Online marketplaces** which provide a variety of services to retailers and/or brands, including marketing, payment processing or similar.

The term online retailer is broad and includes a range of different business models. Some of these may be brick and mortar retailers who also sell online, also referred to as ‘omnichannel retailers’. Other online retailers will be ‘pure online’ companies, whose total economic activity is conducted through the internet. Online marketplaces can also be called ‘pure online’ retailers. Figure 2 illustrates the relationship between these terms. The market share of the online marketplaces, retailers and brands draws on data on the percentage of EU consumer visits to the top 1000 websites as reported in the IMCO<sup>14</sup> report on E-commerce and the EU Green Deal.<sup>15</sup>

Figure 2: Types of E-commerce Economic Actors



Source: Eunomia. Market share of online retailers draws on data from IMCO report on E-commerce and the EU Green Deal Dec 2022. [https://www.europarl.europa.eu/thinktank/es/document/IPOL\\_STU\(2022\)734013](https://www.europarl.europa.eu/thinktank/es/document/IPOL_STU(2022)734013)

It should be noted that within this classification system a myriad of different business models exist. This is explored in greater detail in section 3.3.1.

<sup>13</sup> [https://www.europarl.europa.eu/thinktank/es/document/IPOL\\_STU\(2022\)734013](https://www.europarl.europa.eu/thinktank/es/document/IPOL_STU(2022)734013)  
<sup>14</sup> Internal Market and Consumer Protection Committee  
<sup>15</sup> Data from figure 7. [https://www.europarl.europa.eu/thinktank/es/document/IPOL\\_STU\(2022\)734013](https://www.europarl.europa.eu/thinktank/es/document/IPOL_STU(2022)734013)

## 3.2 Economic Importance of E-commerce

### 3.2.1 E-commerce Growth

On a global scale, the proportion of total retail attributed to e-commerce has increased linearly year on year since 2000.<sup>16</sup> On a European scale, e-commerce accounted for 51% of total retail growth between 2010 and 2019 and grew by an average annual rate of 14.6% according to a study commissioned by Amazon.<sup>17</sup> In 2021 the total online sales market in Europe was estimated at €718 billion.<sup>18</sup>

The Covid-19 pandemic contributed to the shift from bricks-and-mortar to online sales. The Centre for Retail Research expects online sales for the UK, France, Germany, Netherlands, Italy and Spain to have grown by 31.1% on average in 2020 alone, and 14% in 2021.<sup>19</sup> The increase in online retail of the UK, France, Germany, Italy, the Netherlands, Poland, Spain and Sweden from 2019 to 2020, was three times that of 2018 to 2019, also according to an Amazon commissioned study.<sup>20</sup> The combined revenue generated by online sales of consumer electronics alone in Europe was expected to rise from 29% in 2019 to 33% in 2020 due to Covid.<sup>21</sup> Online sales are expected to continue growing in the future, though patterns of growth may be impacted by the current economic downturn in Europe.<sup>22</sup>

### 3.2.2 Importance of E-commerce by Geography

The proportion of total sales that are made through online channels varies significantly across different Member States. Western Europe is the most advanced in online sales, accounting for 70% of online retail turnover across Europe, with Southern Europe, Northern Europe, Central Europe and Eastern Europe accounting for 15%, 7%, 6%, and 1% respectively.<sup>23</sup> Of Western European countries, Germany and the UK appear to have the strongest e-commerce markets in Europe, due to a combination of high purchase amounts and a large population.<sup>24</sup>

It is not clear what the drivers of these geographic differences are, but if the retail trends in Southern, Central and Eastern Europe follow the path of the Western European countries then the dominance of online sales across Europe will be even greater. In March 2021, Amazon opened

<sup>16</sup> Insider. 2019, Mary Meeker's Tech State of the Union: Everything Happening on the Internet in 2019. Available at <https://www.businessinsider.com/mary-meeker-2019-internet-trends-report-2019-6?r=US&IR=T#-13>

<sup>17</sup> Oliver Wyman, 2020, Is E-commerce Good for Europe? Study funded by Amazon. Available at: <https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2021/apr/is-e-commerce-good-for-europe.pdf>

<sup>18</sup> <https://e-commercenews.eu/e-commerce-in-europe/>

<sup>19</sup> Centre for Retail Research (2020) Online: UK, Europe & N. America 2020 estimates, accessed 31 July 2021, <https://www.retailresearch.org/online-retail.html> (Western Europe here includes UK, Germany, France, Netherlands, Italy and Spain),

<sup>20</sup> Oliver Wyman, 2020, Is E-commerce Good for Europe? Study funded by Amazon. Available at: <https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2021/apr/is-e-commerce-good-for-europe.pdf>

<sup>21</sup> EP&T (2020) Pandemic hammers Europe's consumer electronics sector Available at: <https://www.ept.ca/2020/12/pandemic-hammers-europes-consumer-electronics-sector/>

<sup>22</sup> <https://ecommerce-europe.eu/wp-content/uploads/2021/09/2021-European-E-commerce-Report-LIGHT-VERSION.pdf>

<sup>23</sup> <https://e-commercenews.eu/e-commerce-in-europe/>

<sup>24</sup> <https://e-commercenews.eu/e-commerce-in-europe/>

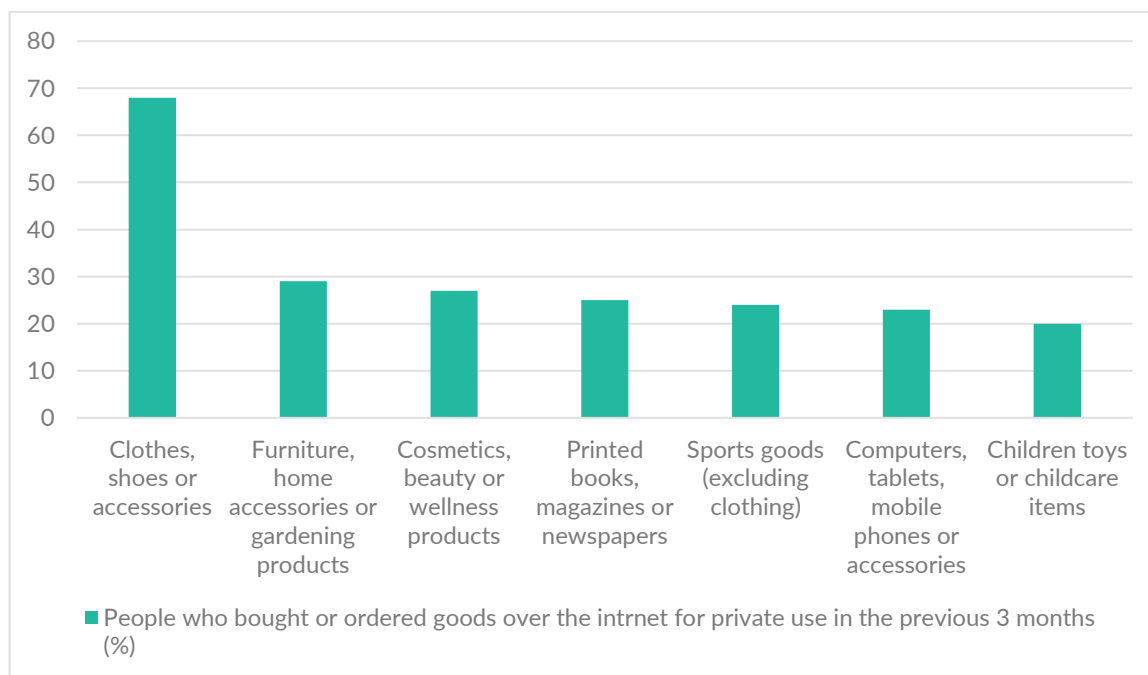
a Polish site amazon.pl, supported by a fulfilment centre that brings much of Eastern Europe into reach.<sup>25</sup>

### 3.2.3 Importance of E-commerce by Product Category

The proportion of online sales also varies significantly across product categories. Whilst Amazon established itself as a company selling books, it was the sale of consumer electronics, toys and tools that facilitated its rapid expansion. As much of the sales data of e-commerce companies is commercially sensitive it is difficult to find accurate data of the relative strength of the different online product markets.

Eurostat conducted a survey in 2021 and found that the most popular online purchases were clothes, shoes and accessories (Figure 3). These products are all in scope of the ESPR, particularly textiles. Eurostat has not delineated electrical and electronic products, yet it has been reported that home electronics items are the third most popular item sold online after clothing and books.<sup>26</sup>

**Figure 3: Most Popular Online Purchases of Goods in the EU, 2021**



Source: Eurostat, Most popular online purchases of goods, EU, 2021, <https://ec.europa.eu/eurostat/product?code=DDN-20220202-1>

The trend for more and more consumer purchases being made online has shifted the axis of retail away from the high street. Bricks and mortar retailers are highly concerned that online sales routes should be subject to the same legal obligations as traditional retail routes to avoid further distortion of the level playing field. As the changes in e-commerce have occurred rapidly, legislation at the EU level lags behind. This is a key reason why the EPSR proposal should be taken as an opportunity to close legislative loopholes and rebuild a level playing field.

<sup>25</sup> <https://www.aboutamazon.eu/news/press-lounge/amazon-pl-launches-in-poland>

<sup>26</sup> <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20220202-1>



## 3.3 Complexity of E-commerce

### 3.3.1 Complexity of E-commerce Companies

E-commerce is difficult to regulate, largely due to the many companies and sales routes involved in selling products via online channels to EU consumers. Growth in online sales has resulted in an exponential increase in companies in the field. Currently, European Commission estimates suggest that there are more than 10,000 'online platforms'.<sup>27</sup> This number gives an idea of the scale and innovation of the industry. As the industry evolves, increasing innovation in business models for e-commerce sales routes is seen. This makes understanding and categorising companies difficult.

As identified in Figure 2, a useful distinction can be made between 'pure' online companies who sell only through online channels, and bricks and mortar retailers who also sell online, also known as omnichannel retailers. The distinction is relevant here because ensuring compliance is typically more straightforward with the omni channel retailers as there are clearer lines of responsibility for the products offered for sale.

However, as business models evolve even this distinction is becoming blurred. Online platforms seek to make their products available offline by opening shops (where products can be either picked-up after an online sale or ordered on the spot), whilst physical retailers have become omnichannel retailers and therefore also using both direct online sales channels (through their own-company webshop) and indirect sales channels (through the use of platforms and/or marketplaces).

The category of 'online retailers', as distinct from online marketplaces encompasses a wide range of business models. For the purposes of compliance what matters is which economic actor is classed as the manufacturer, importer and distributor. Brands with a webshop are clearly classed as manufacturers so the allocation of responsibility is straightforward. Online retailers should be classed as importers and distributors if the customer is purchasing from the retailer directly. Online marketplaces however allow a range of traders to use the platform to conduct their own transactions and here the lines of responsibility are blurred.

Online marketplaces also differ according to how they transact with the sellers using their site. Marketplaces differ in the degree of oversight and control they have over the sellers who use their site. There are many different forms of marketplaces but for this report an important separation can be made between:

- **A closed marketplace** which allows sellers to register to the site and offer their products for sale. In most cases these marketplaces check the data sellers give them before they are allowed to use the site. The consumer typically pays the site who passes the payment back to the seller. Products are mostly sent directly from the seller to the buyer. [www.cddiscount.com](http://www.cddiscount.com) is an example of this.

<sup>27</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms_en)

- **An open marketplace** allows sellers to register to the site and offer their products for sale. Sellers can register themselves easily with few checks. It can also be the case that the marketplace facilitates the link between sellers and consumers, but the consumer pays the seller directly. Products will be sent directly from the seller to the buyer. eBay.de is an example.

Some of the online marketplaces also use the platform to sell their own branded products, so simultaneously function as a web shop for their own products. Among the top 100 online marketplaces almost half have their own stock of products.<sup>28</sup>

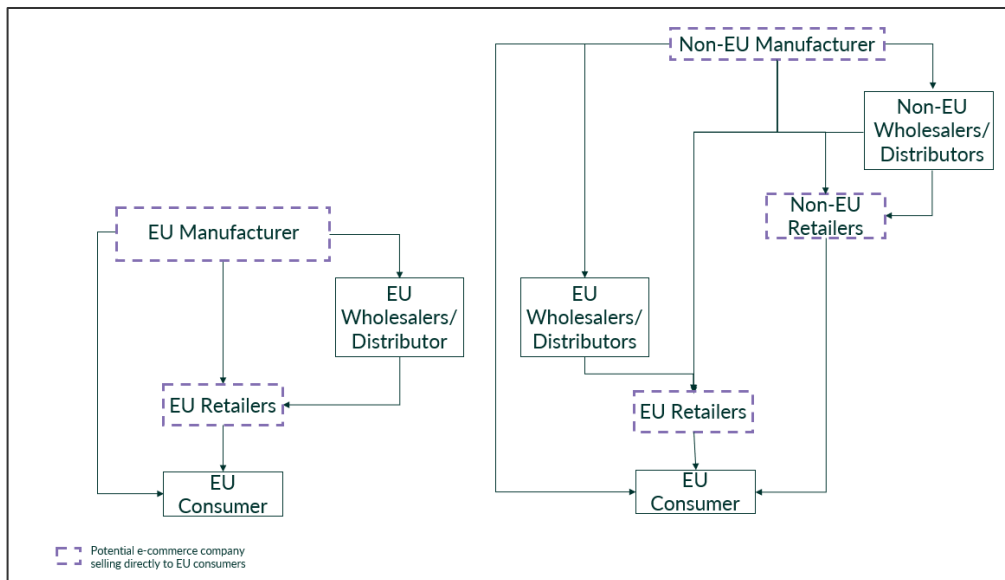
### 3.3.2 Blurred Lines of Responsibility

For compliance with EU regulations, it is important to trace both how the transaction between consumer and trader is made, and how the goods are passed from manufacturer to consumer. A retailer with an online sales channel will source the product and offer it online. A marketplace will provide the platform and the product is directly shipped from the manufacturer outside the EU to the consumer. In this latter case it is not clear who is the importer. The term drop shipping further describes a retail model in which the retailer concludes a transaction with the consumer, but this retailer holds no inventory or stock. Instead, when an order is placed the manufacturer produces the item and ships directly to the consumer.<sup>29</sup> Figure 4 shows a simplified overview of economic operators in the supply chain of products and where e-commerce companies come into play. When a product is manufactured in the EU: the manufacturer could also be an e-commerce company and sell directly to the consumer; or an e-commerce company will source the product from the manufacturer or a wholesaler, to sell it to the consumer. When a product is manufactured outside of the EU, the manufacturer could also be an e-commerce company and sell directly to the consumer; wholesaler, to sell it to the consumer. These companies mediate the transaction between supplier and consumer but the movement of goods follows an independent pathway. These companies mediate the transaction between supplier and consumer but the movement of goods follows an independent pathway.

**Figure 4: Simplified Representation of Economic Actors and the Role of E-commerce Companies**

<sup>28</sup> Cross-border, CBCommerceEU, 2020, Press Release – Top 100 Cross-Border Marketplaces Europe. An Annual Analysis Of The Best Global Cross-Border Platforms Operating In Europe, Eu 28 Including Uk. Available at: <https://www.cbcommerce.eu/press-releases/press-release-top-100-cross-border-marketplaces-europe-an-annual-analysis-of-the-best-global-cross-border-platforms-operating-in-europe-eu-28-including-uk/>

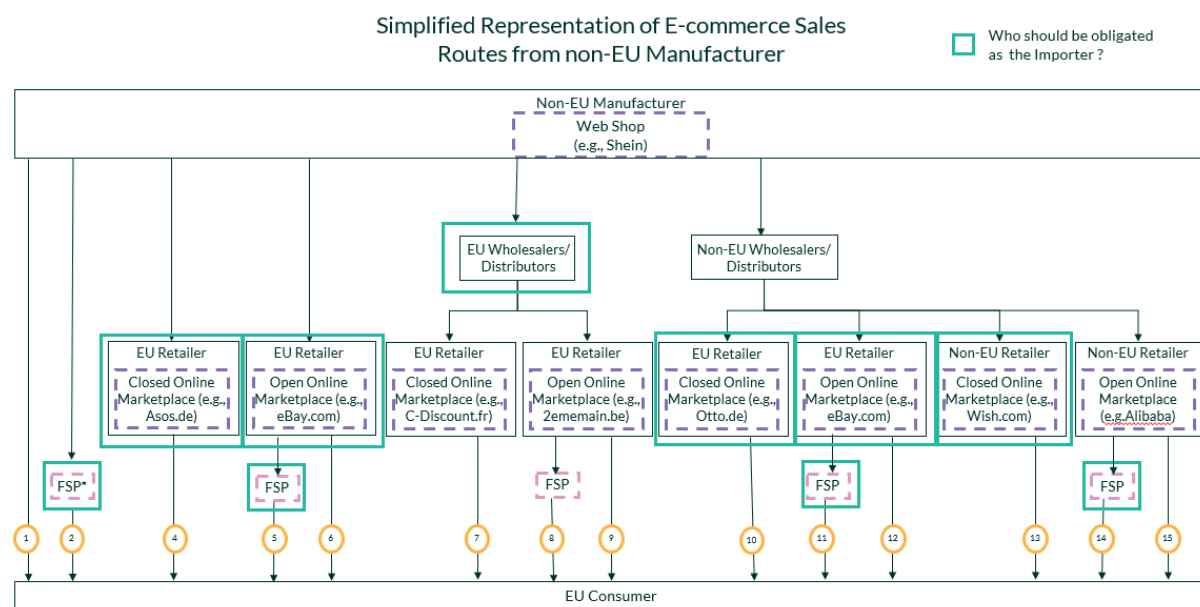
<sup>29</sup> Tech Target, Definition Drop shipping. <https://www.techtarget.com/whatis/definition/dropshipping>



Source: Eunomia

Figure 5 further illustrates the complexity of sales routes possible linking non-EU manufacturers with consumers in the EU via e-commerce. The green boxes are one interpretation of which economic operator should be classified as the importer in the different cases. This is not a reflection of current legislative provision but based on which economic operator may be best placed to take responsibility for the transaction.

**Figure 5: Multiple E-commerce Sales Routes using Online Marketplaces**



Source: Eunomia - the classification here is done to the best of our knowledge.

\* Fulfilment Service Provider (FSP)

To confuse matters further, fulfilment service providers offer additional services to the seller by storing, and shipping goods to the consumer. Many larger online marketplaces also operate as fulfilment service providers, such as Amazon through its 'fulfilled by Amazon' model. Online marketplaces that fall under the category of 'closed marketplaces' will also deal with the delivery of products in house.

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Other kinds of online platforms also act as intermediaries or marketplaces by hosting adverts linking consumers to other websites where they can make a purchase. Platforms that were originally set up as social media platforms are now facilitating sales. Consumers follow a link and are taken to the website of the single seller online shop, or a multi-seller online marketplace to buy a product. Examples include social media websites such as Facebook (although Facebook also operates as an open marketplace through Facebook Marketplace). In these cases, the distinction between business to consumer sales and consumer to consumer sales is increasingly blurred. Companies involved in servicing online transactions are also part of the e-commerce sector.

It should be clear from this analysis that one reason legislators face difficulties in regulating the e-commerce sector is the complexity and innovation in business models and the blurred lines of responsibility that this brings. This is more of an issue with online marketplaces than it is for brands selling online (omnichannel retailers).

### 3.3.3 Growth of Online Marketplaces

Online marketplaces generally outperform web shops, making up two thirds of online sales.<sup>30</sup> A survey of 6,000 shoppers across the US, UK and Germany found that 44% used marketplaces as a starting point for their product searches, with only 19% starting with search engines and 9% using web shops. This trend is even more pronounced among younger consumers (aged 18-24) where 52% use online marketplaces as a starting point.<sup>31</sup> In 2021 the value of online marketplaces in Europe was estimated at €120-150 billion.<sup>32</sup>

Although online marketplaces are becoming more and more popular across Europe, there are notable variations in market penetration across different countries.

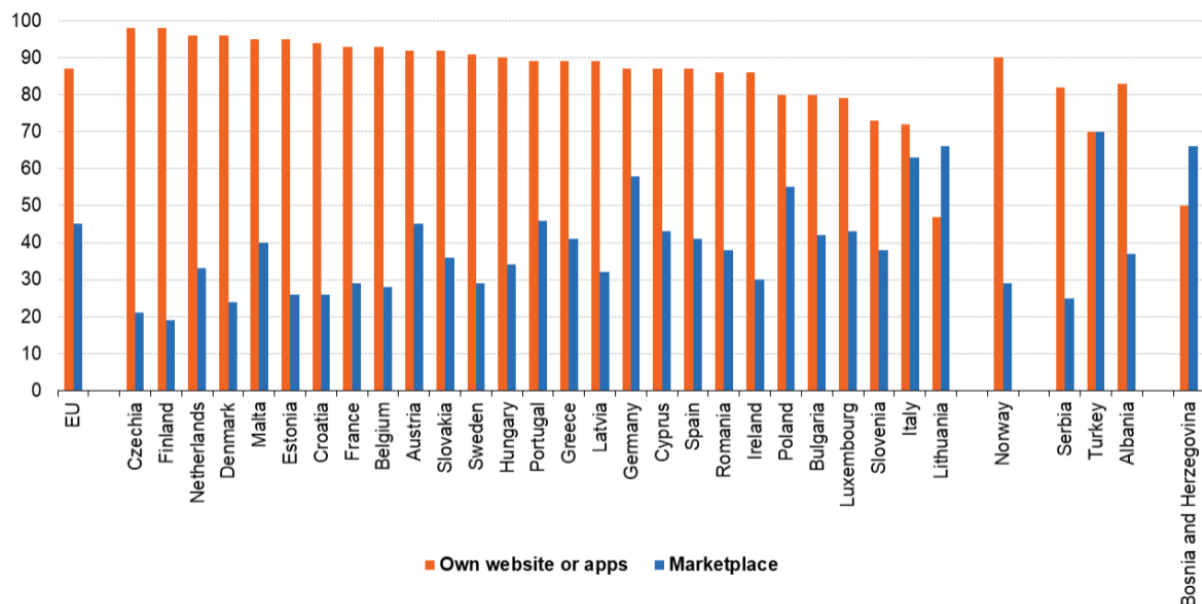
**Figure 6** shows the popularity of online marketplaces in comparison to web shops or apps across European countries. This shows marketplaces are most popular in Lithuania, Italy and Germany, while less so in Czechia, Finland and Denmark.

<sup>30</sup> Hilton, M., 2019, Extended Producer Responsibility (EPR) and the Impact of Online Sales, January 2019, [https://www.oecd-ilibrary.org/environment/extended-producer-responsibility-epr-and-the-impact-of-online-sales\\_cde28569-en](https://www.oecd-ilibrary.org/environment/extended-producer-responsibility-epr-and-the-impact-of-online-sales_cde28569-en)

<sup>31</sup> E-commerce News, Nearly half of product searches start on marketplace, November 2021, <https://e-commercenews.eu/nearly-half-of-product-searches-start-on-marketplace/>, accessed 13/12/2021

<sup>32</sup> E-commerce News, Europe: Online marketplace sales €120 billion, December 2021, <https://e-commercenews.eu/europe-online-marketplaces-sales-e120-billion/>, accessed 13/12/2021

**Figure 6: Proportion of Enterprises with Online Sales Made Through their Own Website or Apps versus Through Marketplaces, 2020**



Note: Only countries with available results for both indicators are displayed.  
 Not available: Montenegro (unreliable), North Macedonia (not available)  
 Source: Eurostat (online data code: isoc\_ec\_eseln2)

eurostat 

Popular online marketplaces vary across Member States. Overall, Amazon is the dominant online marketplace, with some reports stating it is used by 86% of European consumers.<sup>33</sup> Amazon launched the iPhone app in nine European countries, yet the app reached the top-20 most-downloaded apps in almost 30 European countries. However, by revenue it is a market leader in only a small number of countries.<sup>34</sup> Other popular online marketplaces include eBay (69% European consumers), Etsy (29%), Asos (28%) and Wish (17%).<sup>35</sup>

Other emerging actors must be taken into account. Alibaba for example, remained in the top three online sellers of consumer goods in Eastern Europe in 2020. Amazon remains by far the top seller in Western Europe, yet Alibaba's share of the market increased from 2 to 2,9% in 2020 compared to the previous year, in contrast to Amazon's share which did not increase.<sup>36</sup>

<sup>33</sup> E-commerce News, Europe: Online marketplace sales €120 billion, December 2021, <https://e-commercenews.eu/europe-online-marketplaces-sales-e120-billion/>, accessed 13/12/2021

<sup>34</sup> Marketplace Pulse, *Amazon is a Minor Player Across Most of Europe*, April 2021, <https://www.marketplacepulse.com/articles/amazon-is-a-minor-player-across-most-of-europe>, accessed 29/11/2021

<sup>35</sup> E-commerce News, *Europe: Online marketplace sales €120 billion*, December 2021, <https://e-commercenews.eu/europe-online-marketplaces-sales-e120-billion/>, accessed 13/12/2021

<sup>36</sup> <https://www.cnn.com/2021/10/29/eu-e-commerce-alibaba-competes-with-amazon-in-europe-for-singles-day-.html#:~:text=In%20contrast%2C%20Alibaba's%20market%20share,prior%20year%2C%20the%20data%20showed.&text=Alibaba%20held%20first%20place%20in,2019%2C%20according%20to%20Euromonitor%20International>

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In 2021, Shein became the most downloaded app in the US (surpassing TikTok and Instagram) and the tenth most downloaded non-game app by Europeans.<sup>37 38</sup> According to Euronews, the clothing brand is the largest online-only retailer in the world, producing between 35,000 and 100,000 new garments each day.<sup>39</sup> The e-commerce company sells products directly from China, but with more success than similar actors (e.g., Wish) due to more predictable delivery speeds and improved customer experience.<sup>40</sup> The company plans on making a larger indent in the European market, and has set up pop-up stores in London, Paris, Madrid and Barcelona.<sup>41</sup>

### 3.3.4 Cross Border Trade

**Online marketplaces increase the ease of cross border trade within the EU and from sellers based outside of the EU.** Ebay reports that only 6.9% of EU ‘traditional businesses’ export their items and that they do so to four foreign destination markets on average. The report contrasts these with ‘eBay-enabled small businesses’, of which 98% export to an average of 21 foreign destination markets.<sup>42</sup> The top five cross-border destinations for these eBay-enabled small businesses are Germany, United Kingdom, France, United States and Italy.<sup>43</sup>

There is financial incentive for consumers and sellers to engage in cross border trade where neighbouring countries have significantly different product prices. Cross border trade is increasingly taking place via online channels, and in particular online marketplaces, where products from EU and third countries are displayed.

Online marketplaces also facilitate distance sales from sellers based in 3<sup>rd</sup> countries. They allow sellers based outside of the EU to use their site and, in many cases, the items are physically in stock in the EU at the time of a sale. This enables much faster delivery. In the case of drop shipping it is common for an item to be dispatched from a 3<sup>rd</sup> country once the order is made. , Online marketplaces do provide consumers with delivery information that should make them aware of whether an item is coming from a 3<sup>rd</sup> country, but the legal implications of this are less clear. For example, if a product device breaks within the legal guarantee period it is likely to be difficult for a consumer to exercise their rights in the sale of goods directive where the product has been purchased on an online marketplace and sent directly from a manufacturer out of the EU. The Commission is considering new legislation on consumer’s right to repair but this may not address this loophole. <sup>44</sup>Fulfilment service providers have supported e-commerce companies in this shift through the services they provide: the storage of goods, assembling goods according to the order, packaging, transport, returns management, invoicing, dunning, repairs or customs clearance for products imported into the EU. Third-country economic operators profit significantly from the

<sup>37</sup> <https://www.marketplacepulse.com/articles/shein-is-the-most-downloaded-app-in-the-us>

<sup>38</sup> <https://youappi.com/european-app-trends-2022/>

<sup>39</sup> <https://www.euronews.com/green/2022/11/25/shein-fast-fashion-giants-clothes-breach-eu-chemical-regulations-greenpeace-claim>

<sup>40</sup> <https://www.marketplacepulse.com/articles/shein-is-the-most-downloaded-app-in-the-us>

<sup>41</sup> <https://ecommercenews.eu/shein-points-arrows-at-europe/>

<sup>42</sup> ‘Foreign destination markets’ include EU and non-EU countries. [https://www.ebaymainstreet.com/sites/default/files/policy-papers/ebay\\_research-report\\_eu\\_a4\\_executive\\_summary\\_v1\\_0-.pdf](https://www.ebaymainstreet.com/sites/default/files/policy-papers/ebay_research-report_eu_a4_executive_summary_v1_0-.pdf)

<sup>43</sup> [https://www.ebaymainstreet.com/sites/default/files/policy-papers/ebay\\_research-report\\_eu\\_a4\\_executive\\_summary\\_v1\\_0-.pdf](https://www.ebaymainstreet.com/sites/default/files/policy-papers/ebay_research-report_eu_a4_executive_summary_v1_0-.pdf)

<sup>44</sup> EU Commission, 2022, Sustainable consumption of goods – promoting repair and reuse, [https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13150-Sustainable-consumption-of-goods-promoting-repair-and-reuse_en)



fact that final customers in Germany or other EU-Member States can expect prompt delivery of ordered goods already being stored there. In fact, most larger marketplaces now offer fulfilment services as a supplementary service for their sellers within their platform, with others such as Alibaba following suit.<sup>45</sup> Smaller marketplaces are also moving into providing fulfilment services to keep pace with the services offered by the larger providers. CDiscount offers such a service and Allegro.pl opened a fulfilment centre on the 1<sup>st</sup> of October 2021.

### 3.3.5 Small to Medium-Sized Enterprises (SMEs)

The e-commerce market may be dominated by a few key players but there are also many smaller marketplaces. The Commission estimates that of the 10,000 platforms in the EU, over 90% are small and medium sized enterprises.<sup>46</sup>

Online marketplaces also make it easy for micro enterprises to enter the retail market. They reduce the initial investment needed to start an online sales channel, provide a gateway to international clients and therefore facilitate the establishment of SME's. In doing so, they have opened the online sales market up to small enterprises.<sup>47</sup> Some marketplaces almost encourage small sellers by removing some of the financial risk of trading at a small scale, for example eBay's "Pay as you Grow" initiative offers discounted fees until a seller reaches a threshold of their first 100 sales each month.

This has resulted in the rise of micro enterprises and blurred the line between a micro enterprise and consumer to consumer (C2C) trading. The Commission defines micro enterprises as an enterprise which employs fewer than 10 persons and whose annual turnover does not exceed €2 million, in which an enterprise is "*any entity engaged in an economic activity, irrespective of its legal form.*"<sup>48 49</sup>

## 3.4 Past issues upholding EU product legislation

Online marketplaces tend to not consider themselves liable for products sold through their platforms.<sup>50</sup> Therefore, they do not enforce strict regulations and many have a poor track record in upholding key EU legislation regarding products placed on the market. Online marketplaces feature much more in these conversations than web shops, as the latter – be they manufacturers of the products or retailers selling directly to consumers are clearly responsible for product

<sup>45</sup> Kuhn, I, 2020, Alibaba pushes logistics, Amazon lures with entertainment, PayPal adjusts the offer. Available at: <https://etailment.de/news/stories/Coronakrise-Alibaba-Amazon-Paypal-22935>

<sup>46</sup> [https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms\\_en](https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment/europe-fit-digital-age-new-online-rules-platforms_en)

<sup>47</sup> Politico, June 8<sup>th</sup>, 2021. The Role that Virtual Marketplaces can Play in SME's Growth. Available at <https://www.politico.eu/sponsored-content/how-online-marketplaces-offer-smes-a-pillar-of-support/> (article sponsored by eBay)

<sup>48</sup> [https://ec.europa.eu/regional\\_policy/sources/conferences/state-aid/sme/smedefinitionguide\\_en.pdf](https://ec.europa.eu/regional_policy/sources/conferences/state-aid/sme/smedefinitionguide_en.pdf)

<sup>49</sup> [https://ec.europa.eu/regional\\_policy/sources/conferences/state-aid/sme/smedefinitionguide\\_en.pdf](https://ec.europa.eu/regional_policy/sources/conferences/state-aid/sme/smedefinitionguide_en.pdf)

<sup>50</sup> <https://www.modernretail.co/retailers/amazon-briefing-why-amazons-product-liability-risk-is-growing/>

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obligations (as distributors of products on their webshop). These are the sorts of behaviours the ESPR may wish to avoid.

### 3.4.1 Environmental legislation

Most online marketplaces appear to tolerate non-compliance with EPR of sellers using their services. Reliable figures for EPR free-riding are difficult to obtain, as free-riders wish to remain undetected. However, previous comparisons by Eunomia of business names from Amazon.de with the German producer registers, suggested that 50% of sellers across 15 Electrical and Electronic Equipment (EEE) product categories and batteries were non-compliant. Within that, IT and telecommunications equipment reached 80% of likely non-compliance. According to an undated WEEE Scheme Forum study on potential free riding in the UK, 54% of power tools, 76% of LED lightbulbs, and 88% of fitness watches sales have the potential to be unregistered and therefore non-EPR compliant products.<sup>51</sup> EEE, in particular smaller items, are most frequently sold through online marketplaces.

Energy consuming products sold online have also been found non-compliant with efficiency labelling rules. The European Court of Audits notes in a 2020 Special Report, that 57% of inspected products sold online were not labelled properly or at all.<sup>52</sup> A study performed by CLASP to monitor the proper display of energy labels on 72 websites and across six Member States further identified online marketplaces as a market area where improvements in this regard were necessary. It indicated that the frequency of missing labels for products on marketplaces was higher, in particular for light sources.<sup>53</sup>

### 3.4.2 Product Safety Legislation

Online marketplaces are accused of permitting the sale of products that fail safety tests. The European Consumer Goods Association (BEUC) performed safety tests on 250 products bought from online marketplaces, including electric goods, toys, cosmetics and more. Two thirds of the products failed the safety tests, with some particularly concerning examples, such as faulty smoke and carbon monoxide alarms, and toys containing hazardous chemicals.<sup>54</sup> Toys Industry Europe (TIE) also conducted a mystery shopper exercise of Amazon, eBay, AliExpress and Wish, across Denmark, France, Germany, Italy, the Netherlands, Spain and Sweden. They found that 66% of the products failed EU safety laws with possible consequences such as electric shock, fire or suffocation. More than 97% of the 193 toys assessed did not comply with strict EU toy safety rules and 76% of 134 that were safety- tested in lab had defects that made them dangerous for children.<sup>55</sup>

However, it should be noted that some e-commerce companies show willingness to curtail negative impacts. Regarding product safety, a number of key online companies (Wish.com, AliExpress, Amazon, eBay, Allegro, Cdiscount, bol.com and more) signed the Product Safety

<sup>51</sup> [https://weee-forum.org/wp-content/uploads/2019/06/countering\\_online\\_free-riders\\_consultation\\_issue\\_paper-2.pdf](https://weee-forum.org/wp-content/uploads/2019/06/countering_online_free-riders_consultation_issue_paper-2.pdf)

<sup>52</sup> [https://www.eca.europa.eu/Lists/ECADocuments/SR20\\_01/SR\\_Ecodesign\\_and\\_energy\\_labels\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR20_01/SR_Ecodesign_and_energy_labels_EN.pdf)

<sup>53</sup> [https://www.clasp.ngo/wp-content/uploads/2021/06/CLASP\\_OnlineLabel\\_June2021.pdf](https://www.clasp.ngo/wp-content/uploads/2021/06/CLASP_OnlineLabel_June2021.pdf)

<sup>54</sup> <https://www.beuc.eu/press-releases/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups>

<sup>55</sup> <https://www.toyindustries.eu/ties-eu-toy-safety-the-problem-of-unreputable-sellers-on-online-marketplaces/>

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Pledge, which goes beyond product safety legal obligations.<sup>56</sup> For example, voluntary commitments in the pledge include proactively consulting information on recalled/dangerous products, cooperating with EU Member State authorities and providing sellers with information/training on compliance with EU Product Safety Regulation.<sup>57</sup> ‘Approval’ is also required to sell the certain products on Amazon.fr currently – including smoke, gas and carbon monoxide alarms, and soft toys – however it is unclear what checks an ‘approval’ entails.<sup>58</sup>

### 3.4.3 Banned Substances

Items containing banned chemicals in the EU may also be sold through online marketplaces. In 2021 a European Chemicals Agency project inspected online products: most were non-compliant with at least one of the requirements under relevant EU chemicals legislation being checked in the project and 5000 enforcement actions were taken. On inspecting compliance with Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), 78% of checked products were non-compliant and products included textiles, childcare articles, toys and jewellery.<sup>59</sup> Non-compliance for substances/mixtures reached 95%, though only 25% for articles. When comparing non-compliance for articles by company types (the report found little use in comparing company types for the substances/mixtures because the percentage is likely to be high across the board), marketplaces show 45% non-compliance compared to 18% for web shops.<sup>60</sup>

Cases of non-compliance with the EU Cosmetics Regulation are also prevalent. In March 2022, the European Environmental Bureau reported that skin lighteners containing mercury were still entering the EU via eBay.be and best.Aliexpress.com, despite the EU Cosmetics Regulation prohibiting items containing mercury from being placed on the EU market.<sup>61</sup> The Danish Consumer Council found that 54% of cosmetic products ordered from Wish.com violated requirements to show an ingredient list.<sup>62</sup>

## 3.5 Environmental Impacts of E-commerce

Many e-commerce companies show little concern for their wider environmental and social impact, and therefore it is left to regulation to drive positive change in this sector. This section reviews some of the ways in which the e-commerce sector is responsible for negative environmental impacts.

This provides relevant background to the aims of the ESPR and its wider goals.

<sup>56</sup> [https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/product-safety-pledge\\_en](https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/product-safety-pledge_en)

<sup>57</sup> [https://ec.europa.eu/info/sites/default/files/voluntary\\_commitment\\_document\\_2021\\_v5\\_0.pdf](https://ec.europa.eu/info/sites/default/files/voluntary_commitment_document_2021_v5_0.pdf)

<sup>58</sup> [https://sell.amazon.fr/?ld=AZFRSOAFooter&ref=sdfr\\_soa](https://sell.amazon.fr/?ld=AZFRSOAFooter&ref=sdfr_soa)

<sup>59</sup> <https://echa.europa.eu/-/majority-of-inspected-products-sold-online-breach-eu-chemicals-laws>

<sup>60</sup> [https://echa.europa.eu/documents/10162/17088/project\\_report\\_ref-8\\_en.pdf/cf2c453-da0e-c185-908e-3a0343b25802?t=1638885422475](https://echa.europa.eu/documents/10162/17088/project_report_ref-8_en.pdf/cf2c453-da0e-c185-908e-3a0343b25802?t=1638885422475)

<sup>61</sup> <https://eeb.org/dangerous-and-often-illegal-cosmetics-enter-eu-due-to-lack-of-online-regulations/>

<sup>62</sup> <https://taenk.dk/kemi/plejeprodukter-og-kosmetik/wishcom-hvad-er-der-mon-i-produkterne>

### 3.5.1 Stimulating Consumption

E-commerce companies encourage sales by virtue of easy access to products and the sheer variety of products made available to consumers.<sup>63</sup> They also utilise numerous mechanisms to ‘nudge’ consumers into buying: in-stock status, life of current price, direct competitor comparisons, location-based delivery times, social cues, referral information, personalisation, and more.<sup>64</sup> It has also been suggested in stakeholder engagement that some e-commerce companies place portions of poorer quality items on the market, leading to consumers buying replacement items faster. Consumers are presented with much cheaper items, accepting that these are more likely to break.<sup>65</sup>

E-commerce companies are also accused of exploiting the green transition to increase consumerism. Consumers are more likely to buy ‘green’ products, leading more products to be advertised as such: in a recent EU-level sweep by the European Commission and national consumer authorities, half of such claims were found to lack evidence.<sup>66</sup>

### 3.5.2 Destruction of Goods

Producers and retailers are known to destroy and/or dispose of unsold and returned goods in some cases, particularly in the textiles and electronics sectors. However, online sales exacerbate the problem, as they increase product returns (consumers having not seen a product in person before buying it).<sup>67</sup> Some reports suggest that the overall return rate for online sales across industries is 25%, and between 30 and 50% for textiles.<sup>68</sup> These products will be more difficult to resell, because many businesses do not have appropriate infrastructure to handle them, in which case they are likely to be donated or destroyed. Unfortunately, destruction of goods is usually the easiest and least expensive option, and some brands prefer it to keep the number of their items on the market limited and high value.<sup>69</sup> Online marketplaces have been accused of the destruction of goods too: Amazon has been linked to the large-scale destruction of goods in France, Germany and the UK.<sup>70</sup>

### 3.5.3 Obstacles to Repairability

Simultaneously, online sales from sellers from outside the consumer’s Member State are expensive to return for repair. This is worsened in the case of products from non-EU manufacturers, where consumers may need to pay a fee to send back an item to a country outside of the EU, which may be more than the original price of the item.<sup>71</sup> This suggests that products sold

<sup>63</sup> VVA x EEB x Eunomia - Interview Guidelines E-commerce and the green deal - 16 September 2022.docx

<sup>64</sup> <https://www.reforge.com/brief/6-e-commerce-nudges-to-increase-conversion-rates#yeWPw3r3FYc1JZ6DRumQ4A>

<sup>65</sup> Focus group 1

<sup>66</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_269](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_269)

<sup>67</sup> VVA Second Interview 26 September 2022.docx

<sup>68</sup> <https://www.voguebusiness.com/sustainability/why-destroying-products-is-still-an-everest-of-a-problem-for-fashion>

<sup>69</sup> <https://www.voguebusiness.com/sustainability/why-destroying-products-is-still-an-everest-of-a-problem-for-fashion>

<sup>70</sup> <https://eeb.org/library/prohibiting-the-destruction-of-unsold-goods/>

<sup>71</sup> Focus group 1

online and from outside the consumer's Member State are less likely to be repaired, increasing waste generation and contributing to consumption of new products.

### 3.5.4 Restricting Refurbished Products

Online marketplaces have been known to use their influence to restrict refurbished items placed on the market, as is the case for Amazon with Apple products. In a bid to regain more control over their brand and revenue from refurbished products, Apple struck a deal with Amazon in 2019. Companies wanting to sell Apple products through Amazon must either: purchase at least \$2.5 million worth of refurbished inventory every 90 days from Apple itself or through a retailer with more than \$5 billion in annual sales; or become an official Apple authorized reseller (which, amongst other things, requires a physical retail space for customers to enter). This new policy wipes out business for small sellers of refurbished Apple products whilst enabling Amazon and Apple to increase the price of refurbished products considerably.<sup>72</sup>

This trend extends beyond online marketplaces, to online platforms such as Google, which banned independent repair shops from advertising on its search engine, supposedly to remove ads for scammers posing as repair shops.<sup>73</sup> Whilst this is no longer the case, the time Google took to roll out a verification process – over two years – for independent repair shops took uncharacteristically long, with some suggesting it was acting in favour of larger manufacturers. During this time, some repair shops reported drops in revenue of as much as 70%, with likely increase of items ending up in landfill.<sup>74</sup>

### 3.5.5 Other Negative Environmental Impacts

Online sales have other negative environmental impacts linked to production, operations and logistics. These include overpackaging of products, and carbon emissions linked to the production of goods, transport and distribution of goods, and energy consumption of storage on the cloud. A recent study that looked into environmental footprint calculation tools for online marketplaces, found that scientific soundness of these was generally lacking as they often omitted large segments of the value chain of products.<sup>75</sup>

### 3.5.6 Positive Environmental Actions

Yet, the e-commerce sector should not be considered as unwilling to improve. In some respects, they are seen to promote the circular economy and intent of reducing their emissions.

They have significantly contributed to the second-hand market, by providing easier access to used, repaired, and refurbished products, as well as spare parts. E-commerce has given rise to new, exclusively, or largely second-hand companies such as Backmarket for EEE or Vinted for textiles. Longer standing online marketplaces are also adapting their services to provide access to

<sup>72</sup> <https://www.theverge.com/2019/5/21/18624846/amazon-marketplace-apple-deal-iphones-mac-third-party-sellers-john-bumstead>

<sup>73</sup> <https://pirg.org/articles/banning-the-fix-google-continues-blocking-third-party-repair-ads/>

<sup>74</sup> <https://pirg.org/articles/banning-the-fix-google-continues-blocking-third-party-repair-ads/>

<sup>75</sup> VVA Second Interview 26 September 2022.docx

such items. In 2021 for example, Zalando estimated having prolonged the usage of 340,000 products through the launch of its “pre-owned category”.<sup>76</sup> The company claims that in 2021 the sale of items from its ‘sustainability assortment’ account for 21.6% of the company’s Gross Merchandise Volume, up from 16% in 2020.<sup>77</sup> Some online marketplaces have found even more creative environmental offerings: eBay is helping VAUDE, a brand specialised in sustainable outdoor clothing, to sell its residual materials (unused industrial materials).

Some e-commerce companies also seek to minimise their number of returns (though this has financial as well as environmental incentives). For example, Zalando ‘advises’ consumers based on past purchases for 50% of all items ordered, and soon consumers will be able to see how an item would fit through a planned body scanning app and virtual fitting room.<sup>78</sup>

More sustainable consumer behaviour is also encouraged: Amazon has created its own certification, Compact by Design, to highlight products that meet certain sustainability standards.<sup>79</sup> Zalando has implemented sustainability filters and a sustainability flag system, whereby products are highlighted when they fulfil one or more sustainability criteria. However, some of these criteria were based on the Sustainable Apparel Coalition’s Higg Materials Sustainability Index, which received significant criticism for inaccurate environmental claims.<sup>80</sup> Sustainability filters can have a positive effect on consumption behaviour, but the criteria the filter is based on are crucial.

In some instances, e-commerce-companies have made progress with packaging too: Zalando enables “one parcel” fulfilment by streamlining multi-brand orders into a single order, a single delivery and a single return parcel. In Germany, Tchibo, Otto and Avocado store are testing reusable delivery bags as part of the three-year project, coordinated by Ökopool, the Institute for Environmental Strategies and funded by the Federal Ministry of Education and Research.<sup>81</sup>

Lastly, efforts are also underway to create CO2 calculating tools that reflect transport and logistics impacts of e-commerce and represent these to consumers more accurately.<sup>82</sup> Amazon has established the Climate Pledge: its commitment to become net-zero by 2040, and consequently attain Paris Agreement goals ten years earlier. The e-commerce giant also aims to bring half of shipments to net-zero by 2030.<sup>83</sup> Claims relating to net-zero are complex to evaluate, particularly for a consumer. The validity of these claims depends on which activities a company is including in its carbon accounting, and to what extent they are relying on offsetting to achieve ‘net zero’. The potential for ‘greenwashing’ and giving consumers a misleading view remains huge.

<sup>76</sup> <https://ecommerce-europe.eu/wp-content/uploads/2021/06/Collaborative-Report-on-Sustainability-and-e-Commerce-June-2021-2nd-edition.pdf>

<sup>77</sup> Zalando, 2022. Sustainability Progress Report 2021. Available at <https://corporate.zalando.com/en/sustainability-progress-report-2021>

<sup>78</sup> <https://ecommerce-europe.eu/wp-content/uploads/2021/06/Collaborative-Report-on-Sustainability-and-e-Commerce-June-2021-2nd-edition.pdf>

<sup>79</sup> <https://ecommerce-europe.eu/wp-content/uploads/2021/06/Collaborative-Report-on-Sustainability-and-e-Commerce-June-2021-2nd-edition.pdf>

<sup>80</sup> <https://www.nytimes.com/2022/06/12/climate/vegan-leather-synthetics-fashion-industry.html>

<sup>81</sup> Tchibo, ‘Test start with reusable mailing bags at Tchibo, Otto and Avocado store’, August 2020, available online here.

<sup>82</sup> <https://ecommerce-europe.eu/wp-content/uploads/2021/06/Collaborative-Report-on-Sustainability-and-e-Commerce-June-2021-2nd-edition.pdf>

<sup>83</sup> Personal communication with representatives from Amazon on 11th October 2022.

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# 4.0 How does EU legislation place responsibilities on E-commerce?

Understanding the position of the ESPR in relation to other legislation is central to understanding the obligations placed on e-commerce companies. The ESPR sits within an existing landscape of legislation concerning the rights of consumers and requirements on traders of products. The 2022 update to the Blue Guide on the implementation of product rules describes a ‘new legislative framework’ covering all aspects of product standards, conformity assessments and market surveillance.<sup>84</sup>

In the interests of keeping the administrative burden for businesses and the authorities at a minimum, the general principle is followed that the ESPR only sets additional requirements where necessary. The ESPR will therefore only apply to products that are not covered by existing legislation or when the legislation does not sufficiently cover sustainability of products. For example, the introduction of the Batteries Regulation (adopted in March 2022) sets more detailed requirements on industry and addresses sustainability issues so these more specific rules will apply instead of the ESPR.

It is slightly less clear how the ESPR interacts with legislation that is cross cutting and affects all product groupings. The two key legislations, also referred to as ‘horizontal legislation’ include the Market Surveillance Regulation (MSR) that sets up the general framework for enforcement of product law and the recently adopted General Product Safety Regulation (GSPR).<sup>85</sup> The REACH regulation governing the use of chemical substances in products is also a horizontal legislation in that it cuts across product specific legislation, but its scope is more limited. It is intended that the ESPR will be able to tailor the provisions in these existing legislations to serve the aims of the ESPR. However, within the hierarchy of legislation the ESPR has no authority to modify existing provisions and the ‘tailoring’ process will be more about trying to fit existing frameworks to the new objectives of the ESPR. The recent DSA and DMA are a new suite of horizontal legislation that present an additional framework that the ESPR has to work within.

Existing legislation therefore provides the ESPR with ‘building blocks’ for regulating e-commerce companies and using these the ESPR seeks to construct a new set of stronger sustainability requirements. A question emerges whether the legislative building blocks provided by existing legislation are sufficient for delivering on the aims of the ESPR, or whether there is a need to explore novel approaches to regulating the economic operators involved in supplying the EU market with products, most notably the e-commerce companies.

<sup>84</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2022:247:TOC>

<sup>85</sup> Proposal for General Product Safety Regulation, 2021. <https://data.consilium.europa.eu/doc/document/ST-10381-2021-INIT/en/pdf>

To consider this question this section outlines the obligations placed on economic operators in other legislation, to see how that compares with the ESPR.

## 4.1 Definitions of Economic Operators

Economic operators defined in the legislation and referred to most commonly are manufacturer, importer and distributor. The term producer within EU waste legislation is somewhat confusingly used in a restricted sense to refer to a 'producer of waste' which is synonymous with a manufacturer but could also be the importer or distributor in some situations.<sup>86</sup> Authorised Representatives are also used to create a legal point of obligation for companies wishing to trade in EU markets without a legal entity of their own established in the countries where they wish to trade. A full glossary of these terms is provided in appendix A 1.1

These are the primary terms used to ascribe obligations on industry and therefore carry great importance. When considering the obligations on e-commerce companies two key observations should be made. **Firstly, there is a lack of consistency in how the terminology is used across EU legislation, and secondly, the current terminology seems inadequate to cover the economic operators in e-commerce.**

### 4.1.1 Issues with Consistency in Use of Terminology

Table 1 presents a comparison of how the standard terms for economic operators have been defined across which key sustainability related legislations and gives a chronological view of this. This analysis shows each legislation differs in which terms it uses, and it can also be the case that new legislation will make a slightly different version of the definition. This is understandable where it is done to suit the requirements of the legislation, but it leads to a confusing legislative framework.

One particular example, highlighted in the focus groups conducted for this project, is that the ESPR uses the term 'dealer' which is defined in the Energy Labelling Regulation (EU) 2017/1369, whereas other legislation uses the term 'trader'.

*Energy Labelling Regulation (EU) 2017/1369 (13) 'dealer' means a retailer or other natural or legal person who offers for sale, hire, or hire purchase, or displays products to customers or installers in the course of a commercial activity, whether or not in return for payment;*

*The UCPD 2005/29 and the Consumer Rights Directive 2011/83/EU as last amended by Directive (EU) 2015/2302 have the same definition of trader as 'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive'.*

<sup>86</sup> Eu waste legislation includes, but is not restricted to the Waste Framework Directive, WEEE directive, and Batteries Regulation

The term 'trader' in consumer legislation does not fully cover the same concept as dealer and is to be interpreted in a wider sense, especially as it does not only cover sales of goods but a much wider set of situations. Although there is a legal difference between these terms stakeholders in the focus groups for this project found these confusingly similar.

**Greater consistency in use of terminology across EU product and consumer legislation would support compliance by making it easier for economic operators to identify themselves.**

Table 2: Comparison of Legal Definitions of Economic Operators

Terms used in legislation to set obligations on economic operators								
Legislation Title	Date	Producer	Economic operator	Manufacturer	Importer	Distributor	Authorised Representative	Fulfilment Service Provider
The E-commerce Directive (2000/31/EC)	2000	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
General Product Safety Directive (2001/95/EC)	2000	Yes	Not defined	Not defined	Not defined	Yes	Not defined	Not defined
Batteries Directive (Directive 2006/66/EC)	2006	Yes	Yes	Not defined	Not defined	Yes	Not defined	Not defined
Waste Framework Directive (Directive 2008/98/EC on waste)	2008	Yes	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
Eco-design Directive (Directive 2009/125/EC)	2009	Not defined	Not defined	Yes	Yes	Not defined	Yes	Not defined
Packaging Waste Directive (Directive (EU) 2018/852)	2018	Yes	Yes	Not defined	Not defined	Not defined	Not defined	Not defined
WEEE Directive (Directive 2019/12/EU)	2019	Yes	Not defined	Not defined	Not defined	Yes	Not defined	Not defined
Consumer Sales and Guarantee Directive (2019/771)	2019	Yes	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
Market Surveillance Regulation (Regulation (EU) 2019/1020)	2021	Not used	Yes	Yes	Yes	Yes	Yes	Yes
General Product Safety Directive (2021/0170 COD)	2021	Not defined	Yes	Not defined	Yes	Yes	Yes	Yes

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Terms used in legislation to set obligations on economic operators								
Legislation Title	Date	Producer	Economic operator	Manufacturer	Importer	Distributor	Authorised Representative	Fulfilment Service Provider
Ecodesign for Sustainable Products Regulation Proposal (2022/0095 (COD))	2022	Not defined	Yes	Yes	Yes	Yes	Yes	Yes
Batteries Regulation	2022	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Product Liability Directive (Proposal 2022/0302)	2022	Used but not defined	Used but not defined	Used but not defined	Used but not defined	Used but not defined	Used but not defined	Used but not defined
Empowering Consumers for the Green Transition (Proposal 2022/0092)	2022	Used but not defined	Not used	Used but not defined	Not used	Not used	Not used	Not used

## 4.1.2 Issues with the Terminology Used for E-commerce Companies

As shown in Section 3.3.1, the growth of e-commerce has led to the emergence of increasingly complex business models and the established terminology for economic operators struggles to remain relevant. Table 2 shows that there has been an evolution in how EU legislation is trying to keep pace with the evolving market complexity, as legislation prior to 2020 is very sporadic in its use of terminology for economic operators. The MSR of 2021 was explicit in its attempt to update EU legislation to keep pace with these changes:

*“The challenges of the global market and increasingly complex supply chains, as well as the increase of products that are offered for sale online to end users within the Union, call for the strengthening of enforcement measures, to ensure the safety of consumers. Furthermore, practical experience of market surveillance has shown that such supply chains sometimes involve economic operators whose novel form means that they do not fit easily into the traditional supply chains according to the existing legal framework.”<sup>87</sup>*

In response to this the MSR introduced a definition for fulfilment service providers which has continued to be used.

However, terminology for other e-commerce companies remains problematic. Online marketplaces were defined in 2013 within Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes.<sup>88</sup>

Article 4(1)(f) defines an ‘online marketplace’ as follows: ‘a service provider, as defined in point (b) of Article 2 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), which allows consumers and traders to conclude online sales and service contracts on the online marketplace’s website’.

The GPSR adapts this definition and adds a definition of online interface:

Art 3 (14) ‘online marketplace’ means a provider of an intermediary service using software, including a website, part of a website or an application, operated by or on behalf of a trader, which allows consumers to conclude distance contracts with other traders or consumers for the sale of products covered by this Regulation;

<sup>87</sup> Market Surveillance Regulation (Regulation (EU) 2019/1020) (13)

<sup>88</sup> Regulation (EU) No 524/2013 Of The European Parliament And Of The Council on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF>

Art 3 (15) ‘online interface’ means any software, including a website, part of a website or an application, that is operated by or on behalf of an economic operator, and which serves to give end users access to the economic operator’s products;<sup>89</sup>

The Digital Services Act (DSA) of 2021 recognised that “new and innovative business models and services, such as online social networks and marketplaces, have allowed business users and consumers to impart and access information and engage in transactions in novel ways,” but did not define marketplaces more specifically or reference the 2013 definition. Instead, a broad term of online platform was introduced, which sought to include social media platforms as well as online marketplaces.

2020/0361 (COD) Art 2 (h) “‘online platform’ means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.”

To a non-legal reader, it is difficult to interpret whether this definition includes online marketplaces as laid out in section 3.3.1 or not. **The lack of clarity in terminology around online marketplaces and other e-commerce economic operators makes it more difficult to give them the appropriate legal obligations.**

## 4.2 Types of Obligations

When looking at the product lifecycle through the lens of the circular economy this then covers product design, use, and end of life. There are five main types of obligations in EU law that fall on e-commerce companies in relation to issues of sustainability:

1. Regulations setting standards for products to be put on the EU market,
2. Regulations governing the fair conduct in relation to consumers and the transactions that are facilitated,
3. Regulations governing the producer responsibility for end of life of products,
4. Regulations that oblige e-commerce companies to cooperate and support enforcement operations, and
5. Corporate reporting obligations for larger companies.<sup>90</sup>

Though one single legislation may place obligations on e-commerce operators across a number of these themes, the key legislations can be grouped according to their primary purpose:

<sup>89</sup> Proposal for General Product Safety Regulation, 2021. <https://data.consilium.europa.eu/doc/document/ST-10381-2021-INIT/en/pdf>

<sup>90</sup> Companies with over 500 employees



**Figure 7: Recent EU Legislation Regarding Sustainability**

Area of Obligation	Key Legislative Acts
Product Compliance	General Product Safety Regulation 2021/0170 (COD) Toy Safety Directive 2009/48/EC Batteries Regulation 2020/0353 (COD) Cosmetics Regulation (EC) 1223/2009 REACH (EC) 1907/2006
Consumer Rights	Consumer Rights Directive 2011/83/EU and <b>2019/2161</b> Unfair Commercial Practices Directive 2005/29/EC Product Liability Directive 2022/0302 (COD) Empowering Consumers for the Green Transition Directive 2022/0092(COD)
End of Life of Products (EPR)	Waste Framework Directive 2008/98/EC WEEE Directive 2012/19/EU Packaging and Packaging Waste Directive 94/62/EC
Supporting Enforcement	Market Surveillance Regulation (EU) 2019/1020 Digital Services Act 2020/0361 (COD) Digital Markets (EU) Act 2022/1925
Corporate Reporting	Corporate Sustainability Due Diligence Directive 2022/0051(COD)

The DSA and DMA were primarily developed to engage the cooperation of e-commerce companies with the regulating of online content such as information posted on a platform. ‘Online content’ does also include products for sale online but, given the focus on dangerous content, the DSA has been criticised for being weak in regulating the sale of products online. Viewing goods sold online as a sub group of online content does not lead to regulations that are specific to trade of products. It is however the case that in some respects the new requirements on marketplaces do serve to support enforcement more generally. The primary way this is achieved is through the increased traceability of traders using online platforms. The cooperation of online marketplaces with market surveillance is further underlined by requirements for online platforms to report on activities undertaken to minimise risk of illegal content.

### 4.2.1 Product Compliance Obligations

Across all product-specific legislation the manufacturer is given primary responsibility for ensuring that the products they produce meet EU legal standards. In turn, the importer is legally only allowed to place compliant items on the EU market and the distributor is required to check that the manufacturer and importer have met their obligations. E-commerce companies have these same obligations for products that they put on the market under their own trademark.

Some product groups have essential requirements that are legally binding. Demonstrating conformity with these essential requirements can be done through a conformity assessment or

with reference to a set of harmonised standards. This framework is one component of what is now referred to by legislators as the 'New Legislative Framework'.<sup>91</sup>

This has been the system implemented under the original eco-design directive and has been shown to work satisfactorily in the case of energy labelling requirements. However, issues with compliance are still prevalent in the areas of product safety and banned substances. It is also worth noting that the products under the existing eco-design directive are not predominantly sold online, as consumers tend to buy larger white goods from bricks and mortar retailers. Lighting components are the exception, with smaller items sold online, but the industry associations for lighting are unhappy with compliance levels for existing legislation.<sup>92</sup> As the ESPR will bring in requirements for smaller products commonly sold online such as phones and laptops the problem of compliance will need to be addressed.

## 4.2.2 Obligations to Consumers

E-commerce companies have obligations towards their consumers within the Consumer Rights Directive, depending on whether they fall under the definition of distributor, fulfilment service provider or marketplace. Within this legislation, under article 6a, online marketplaces have additional specific information requirements, in that they are obliged to provide the consumer with information on whether the third party offering the goods is a trader or not, which affects the consumer rights around the transaction.

In September 2022, the Commission adopted the Revised Product Liability Directive, intended to modernise rules on liability of manufacturers.<sup>93</sup> The liability of a brand selling through their own webshop matches that of a bricks and mortar retailer but the liability of online marketplaces is more limited as their role is seen as an intermediary in the sale. Intermediary service providers, which include online marketplaces, are exempt from liability for damages or criminal sanctions related to the content provided by third parties using their networks.<sup>94</sup>

The new regulation proposes however that if a consumer purchases an item from a trader who is not established in the EU the importer of the defective product and the Authorised Representative of the manufacturer can be held liable for damage caused by that product (Art 7.2). If neither of these two actors are established in the EU then the fulfilment service provider can be held liable for damage caused by the defective product. (Art 7.3) An online marketplace is only liable in this situation if a further condition is met which is when a marketplace "presents the product or otherwise enables the specific transaction in question in a way that would lead an average consumer to believe that the product is provided either by the online platform itself or by a trader acting under its authority or control." This is a condition set under the DSA (Art 5.3).

<sup>91</sup> [https://single-market-economy.ec.europa.eu/news/blue-guide-implementation-product-rules-2022-published-2022-06-29\\_en](https://single-market-economy.ec.europa.eu/news/blue-guide-implementation-product-rules-2022-published-2022-06-29_en) The Blue Guide on the implementation of the product rules 2022

<sup>92</sup> Lighting Europe, 2021. Results of LightingEurope Online Mystery Shopper Exercise. [https://www.lightingeurope.org/images/publications/general/LightingEurope\\_-\\_Online\\_Mystery\\_Shopping\\_Results\\_-\\_20211103.pdf](https://www.lightingeurope.org/images/publications/general/LightingEurope_-_Online_Mystery_Shopping_Results_-_20211103.pdf)

<sup>93</sup> [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_5807](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5807)

<sup>94</sup> [https://single-market-economy.ec.europa.eu/news/blue-guide-implementation-product-rules-2022-published-2022-06-29\\_en](https://single-market-economy.ec.europa.eu/news/blue-guide-implementation-product-rules-2022-published-2022-06-29_en) The Blue Guide on the implementation of the product rules 2022

Significantly, for this project looking at the ESPR, the PLD states in the recital that “when online platforms perform the role of manufacturer, importer or distributor in respect of a defective product, they should be liable on the same terms as such economic operators.” The legal basis on which marketplaces should be liable for the products that they sell is the fundamental question that needs resolving.

In the United States, a key court case has questioned the liability of Amazon in a situation where a woman was badly hurt by a defective product bought on the site. *Bolger vs Amazon* went to the courts in November 2020.<sup>95</sup> The California Court of Appeal held that Amazon could be strictly liable for the defective battery, the Court concluded: “*Whatever term we use to describe Amazon’s role, be it ‘retailer,’ ‘distributor,’ or merely ‘facilitator,’ it was pivotal in bringing the product here to the consumer.*” In applying established principles of strict liability, the Court found Amazon was an “*integral part of the overall producing and marketing enterprise that should bear the cost of injuries resulting from defective products.*” Amazon has sought review of this in the California Supreme Court.

One element highlighted in this case was the importance that marketplaces have an obligation to provide accurate information for consumers, both regarding the product itself and the trader. Under the Product Safety Regulation, Fulfilment Service Providers and Online Marketplaces must ensure that ‘traders’ display or make easily accessible on the product listing key trader and product traceability characteristics. The Digital Services Act strengthens this by requiring additional data on traders to be collected by marketplaces and made available to consumers.

### 4.2.3 End of life of Products Obligations

The principles of EPR set in EU legislation place a financial obligation on ‘producers’ to cover the end-of-life costs of the waste that their products will become. Manufacturers, importers and distributors all can be liable as producers in different circumstances. Online marketplaces have this obligation for products under their own trademark, but not for products listed on their platform and offered for sale by other economic operators.

Recent new legislation at a Member State level in Germany and France has added to the obligations on online marketplaces in relation to EPR in two different ways. In Germany, following the Electrical and Electronic Equipment Act 3 (Elektro G3), as of 1.1.2023, marketplaces are required to ask EEE sellers for their EPR identification number and cannot allow them to trade on the platform without it.<sup>96</sup> The resultant increase in EPR registration numbers has been dramatic.<sup>97</sup> The French *loi anti-gaspillage pour une économie circulaire* (loi Agec) took a different approach and said that where a seller is not able to demonstrate compliance with EPR legislation, then the marketplace is ‘deemed to be the seller’ and will be liable to cover the EPR obligations of the products of that seller.<sup>98</sup>

<sup>95</sup> <https://www.jdsupra.com/legalnews/california-court-of-appeal-finds-amazon-46886/>

<sup>96</sup> <https://www.elektrogesetz.de/themen/das-neue-elektrogesetz-elektrog3-2022/>

<sup>97</sup> Private Communication with Alexander Goldberg of Stiftung-ear.de WEEE register Germany. Data can be provided if required.

<sup>98</sup> Légifrance, LOI no 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire. Available at: [https://www.legifrance.gouv.fr/codes/section\\_lc/LEGITEXT000006074220/LEGISCTA0000042584223/#LEGISCTA0000042584684](https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006074220/LEGISCTA0000042584223/#LEGISCTA0000042584684)

## 4.2.4 Supporting Enforcement

There are three main ways in which e-commerce companies could be required to cooperate with Market Surveillance Authorities:

1. Proactive measures to prevent the sale of dangerous or non-compliant items;
2. Traceability requirements to support action being taken against rogue traders; and
3. Reactive actions to remove dangerous or non-compliant items once these have been flagged.

**Proactive Measures** are not legislated for as obligations on e-commerce companies. In a written communication for this project Amazon stated that they take voluntary action in this regard: “*Our first objective is always to block unsafe or non-compliant products from ever being listed to our store. Worldwide, Amazon has more than 12,000 expert employees dedicated to product safety and compliance, and, in 2021, our teams proactively blocked more than four billion suspect listings for various forms of abuse, including non-compliance, before they were listed to our store.*”<sup>99</sup>

The reports by industry watchdogs reveal that despite such voluntary action, levels of non-compliant products for sale on large marketplaces remain high.

### Traceability

Requirements on some e-commerce companies to gather and store data on traders using their platform have recently been strengthened through the DSA through the ‘Know Your Business Seller’ approach. Online Platforms under the Digital Services Act can only allow ‘traders’ to use its services if the online platform has obtained and assessed the reliability of substantial information: contact details, identification document, bank details, economic operator contact details, trade register and registration number, self-certification committing to only offer products and services compliant with EU law. Neither the Market Surveillance Regulation nor the Digital Markets Act have included any such obligations for any kind of e-commerce company.

### Reactive actions

E-commerce companies are required by law to respond to notification of illegal content and ‘act expeditiously’ to remove the content or disable access. If they do this, then they are exempt from liability of damages or criminal sanctions related to the content provided.

The GPSD has set up the EU Rapid Alert System (RAPEX), which is intended to support this process by speeding up the exchange of information between Member States and the Commission on measures taken against dangerous non-food products. Though the intention of this system is to remove products from the entire Internal Market, it has been reported that commonly the same products reappear under slightly different descriptions. Under the GPSR

<sup>99</sup> Written Communication provided for this project from Juan Manuel Banez Romero, Head of Circular Economy Policy, EU. October 11<sup>th</sup>, 2022.

proposal which updates the GPSD the name of the RAPEX system will be changed to Safety Gate, while maintaining the same characteristics of the system.

## 4.3 Are these obligations sufficient?

The extent to which e-commerce companies are held responsible for the actions of the traders using their platforms is a highly contentious issue. This topic was touched upon in section 4.2.2 in reference to the legal case challenging the liability of Amazon for a defective product.

Currently, the DSA offers online marketplaces an exemption from liability on the basis that they are acting as intermediary online services. Furthermore, the DSA also reaffirmed that online marketplaces are exempt from 'general monitoring obligations'. This paper questions whether these restrictions are still appropriate and maintains that they significantly affect levels of compliance on the EU market.

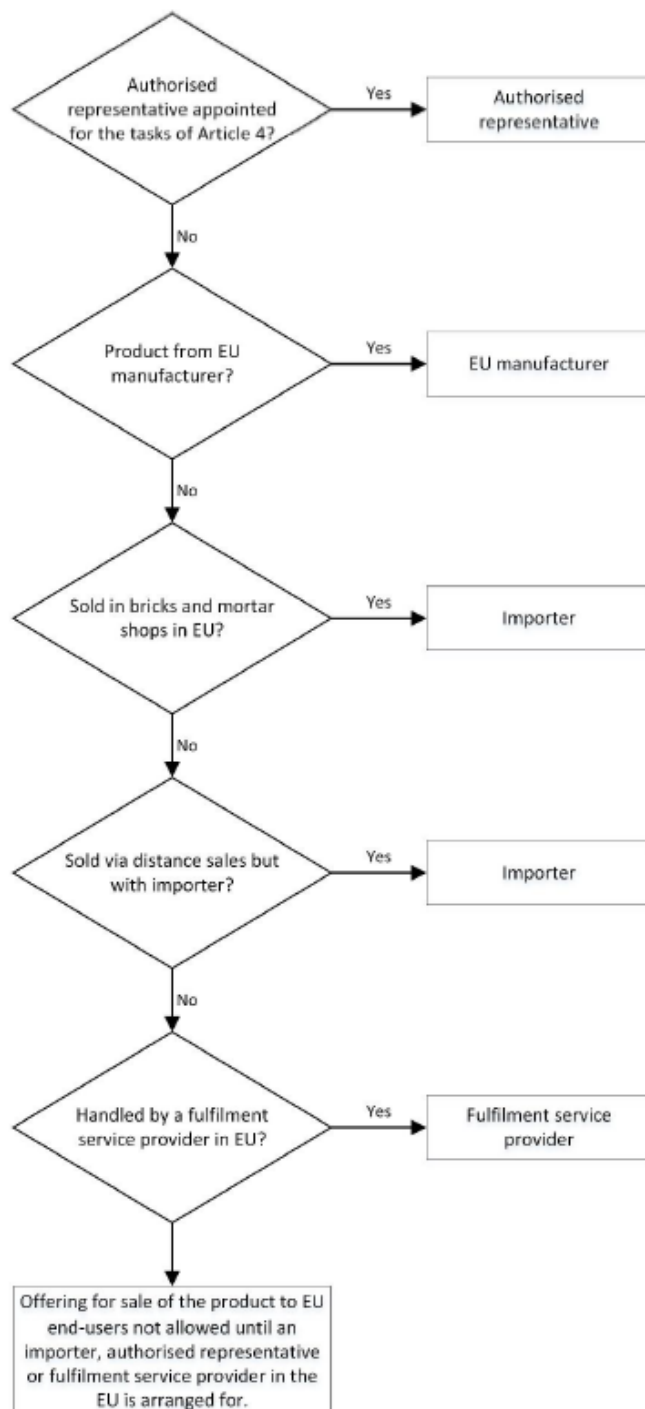
**The need for new thinking is primarily to address instances where online sales are allowing transactions to take place in the absence of an established economic operator.** Whether looking at safety or sustainability requirements, it is the manufacturer who is given primary responsibility to ensure conformity of their products with all EU rules. The importer is legally only allowed to place compliant items on the EU market and the distributor is again required to check that the manufacturer and importer have met certain obligations. For conventional supply chains this would work, but in practice in e-commerce business models the use of an online marketplace sidesteps the role of importer by facilitating a transaction directly between the manufacturer and the consumer or between a non-EU distributor/seller and the consumer. Similarly, non-EU based manufacturers who sell using their own website and distribute using a fulfilment service provider again sidestep the need for an importer role. This would be unproblematic if the manufacturer was fulfilling their obligations correctly, but in these supply chains the actions of the manufacturer are unchecked, leading to high levels of non-compliance.

**There are two examples in existing legislation which could provide routes to close this loophole. In both instances the legislative text recognises that there are situations where products are reaching the EU market without an economic actor established in the EU who is taking responsibility for these products. The solutions to this are still limited but the legal text details in which circumstances the obligations of the manufacturer should be taken on by other economic operators. This clarity is missing from the ESPR proposal.**

Firstly, the **Market Surveillance Regulation** EU 2019/1020 provides a framework to ensure compliance with product related requirements. Article 4 details which economic operator has obligations in this regard, and that this operator is required to verify "*that the EU declaration of conformity or declaration of performance and technical documentation have been drawn up, keeping the declaration of conformity or declaration of performance at the disposal of market surveillance authorities for the period required by that legislation and ensuring that the technical documentation can be made available to those authorities upon request;*"(Art 4 (3)(a).

The guidance document published in March 2021 gives a more detailed explanation of which economic operator has this obligation.<sup>100</sup>

### Box 1: The economic operator referred to in Article 4 in different supply chains



Source: Guidelines for economic operators and market surveillance authorities on the practical implementation of Article 4 of Regulation (EU) 2019/1020 on market surveillance and compliance of products

This diagram shows that there could be instances in which e-commerce sales routes are allowing trade to be conducted without an economic operator covering the obligations. The guidance states that products manufactured out of the EU, sold online and shipped directly to consumers,

<sup>100</sup> <https://ec.europa.eu/docsroom/documents/44908>



without the use of a fulfilment service provider, should only be acceptable on the EU market **IF** the manufacturer has appointed an Authorised Representative to assume their obligations. It is however the case that many companies out of the EU are using these sales routes without appointing an Authorised Representative, and market surveillance authorities will have little visibility of this.

The MSR guidelines go on to say “*If the manufacturer has not appointed an authorised representative, the product **may not be offered for sale** to EU end-users. The economic operator planning to offer the product for sale to EU end users will need to ensure that the manufacturer appoints an Authorised Representative for that product*”. **One way of closing this legislative loophole would be to oblige online marketplaces to ensure that the manufacturers who sell on their platform appoint an Authorised Representative.** Another route would be to consider if it is appropriate for the online marketplace to be appointed as an Authorised Representative. However this would incur additional obligations which may not be appropriate for the marketplace to take on, such as the storing of compliance data.

In instances where products manufactured out of the EU are sold online through the use of a fulfilment service provider, it is the fulfilment service provider who has the obligation to verify that the declaration of conformity for the products it handles has been drawn up. Given the widespread use of fulfilment service providers it is likely that these checks are not being conducted or being picked up by market surveillance authorities. **This requirement is also not reaffirmed in the ESPR proposal, therefore leaving a loophole.**

Finally, these guidelines make no mention of the obligations being passed on to a distributor or dealer, leaving further confusion.

The second legislation that addresses this issue is the Product Liability Directive 2022.<sup>101</sup> As detailed in section 4.2.2, the PLD also transfers liability to the fulfilment service provider when a consumer purchases directly from a trader in a third country and there is no Authorised Representative established in the EU (Art 7.3). This Directive goes further to state that the online marketplace will be liable if the marketplace “*presents the product or otherwise enables the specific transaction in question in a way that would lead an average consumer to believe that the product is provided either by the online platform itself or by a trader acting under its authority or control*.”

Based on these considerations, **this report argues that with the ESPR proposal being a significant legal tool in the transition to a circular economy, it is the right time to reassess the responsibilities along the supply chain, and in particular those of online marketplaces. Building on the principle stated in the PLD online marketplaces should be liable on the same terms as such economic operators when they perform the role of manufacturer, importer or distributor.**

<sup>101</sup> Product Liability Directive 2022/0302 (COD) [https://single-market-economy.ec.europa.eu/system/files/2022-09/COM\\_2022\\_495\\_1\\_EN\\_ACT\\_part1\\_v6.pdf](https://single-market-economy.ec.europa.eu/system/files/2022-09/COM_2022_495_1_EN_ACT_part1_v6.pdf)



# 5.0 What Obligations Does the ESPR Proposal Place on E-commerce?

The same types of obligations identified in section 4.0 are seen in the ESPR. Similarly, the economic operators defined in the ESPR are the same as in most other EU legislation (see Table 2).

The most detailed obligations in terms of product information requirements fall to the manufacturers. Article 28 states that where importers and distributors place a product on the market under their name or trademark then they shall be considered a manufacturer for the purposes of the ESPR and assume these responsibilities. This would equally apply to e-commerce companies (including online marketplaces) when they place products on the market under their own name or trademark. Additionally, importers and distributors who modify a product in a way that affects its compliance, are then deemed to be the manufacturer.

An overview of all obligations on economic operators is provided in Table 3 with a discussion on how and when these obligations may fall to e-commerce companies.

**Table 3: Obligations on Economic Operators within ESPR Proposal**

	Product Compliance Obligations		Obligations to Consumers	Supporting Enforcement	End of Life Obligations
Economic operator	Conformity Assessment	Product Passport	Additional product information	Supporting Compliance Verification	Destruction of Unsold Goods
<b>Manufacturer</b>	To carry out conformity assessment to ensure compliance with requirements for their product type (draw up technical documentation)	To ensure that product passport is available if required for their product type	To ensure that additional information accompanies the product	To keep documentation for 10 years To provide documentation necessary to demonstrate conformity of the product when requested To cooperate with national authority on any action to remedy case of non-compliance	Until delegated acts drafted an economic actor that discards unsold consumer products directly, or on behalf of another economic operator shall report details of this activity in a way that is publicly available.
<b>Authorised Representative (can be appointed by manufacturer)</b>	Manufacturer still has this obligation AR cannot take this on	Manufacturer still has this obligation AR cannot take this on	Manufacturer still has this obligation AR cannot take this on	To keep documentation for 10 years and do all of the above on behalf of the manufacturer	
<b>Importer</b>	Can only place on the market products that have the appropriate conformity assessment and technical documentation	to ensure that product passport is available if required for their product type	To ensure that additional information accompanies the product Also required to add contact details of importer on product	To take corrective measures if they believe a product which they have placed on the market is not in conformity. To keep documentation for 10 years To provide documentation necessary to demonstrate conformity of the product when requested To cooperate with national authority on any action to remedy case of non-compliance	
<b>Distributor</b>	When making a product available on the market, distributors shall "act with due care in relation to the requirements set out in that act." 24(1) Shall verify that importer and manufacturer have complied with	Product bears a conformity marking and is linked to a product passport where required	To ensure that additional information accompanies the product	To take corrective measures if they believe a product which they have placed on the market is not in conformity. To inform the market surveillance authorities immediately of the suspected non-compliance and of any corrective measures taken. To provide documentation necessary to demonstrate conformity of the product when requested	
<b>Dealer</b>	To ensure that their customers have access to relevant information required for each product type	To ensure that the product passport is easily available to their customers	To ensure that their customers have access to relevant information required for each product type	none mentioned	
<b>Online marketplaces and online search engines</b>	To design and organise their interface in a way that enables other economic operators to fulfil their obligations in terms of making information easily accessible to consumers			(a) cooperating and abstaining from putting in place obstacles to surveillance measures; (b) informing the MSA of any action taken; (c) establishing a regular and structured exchange of information on offers that have been removed; (d) allowing online tools operated by MSA to access their interfaces in order to identify non-compliant products; (e) single contact point allowing direct communication with MSA	
<b>Fulfilment service provider</b>	To ensure that the products under their care are maintained in a condition that does not jeopardise their compliance with the requirements of the delegated acts for those products			none mentioned	

# 5.1 Overview of Obligations on Economic Operators

## 5.1.1 Product Compliance Obligations

Manufacturers have the obligation to carry out the '**conformity assessment procedure**' for their products. The details of what this involves for each product group will be set in future delegated acts but will require some degree of technical documentation.

It is worth noting that in the ESPR proposal, if a manufacturer chooses to appoint an Authorised Representative the Authorised Representative cannot take on these particular obligations as they remain with the manufacturer. 22(1) Manufacturers can however have the conformity assessment carried out on their behalf by a verified company.

## 5.1.2 Obligations to Consumers

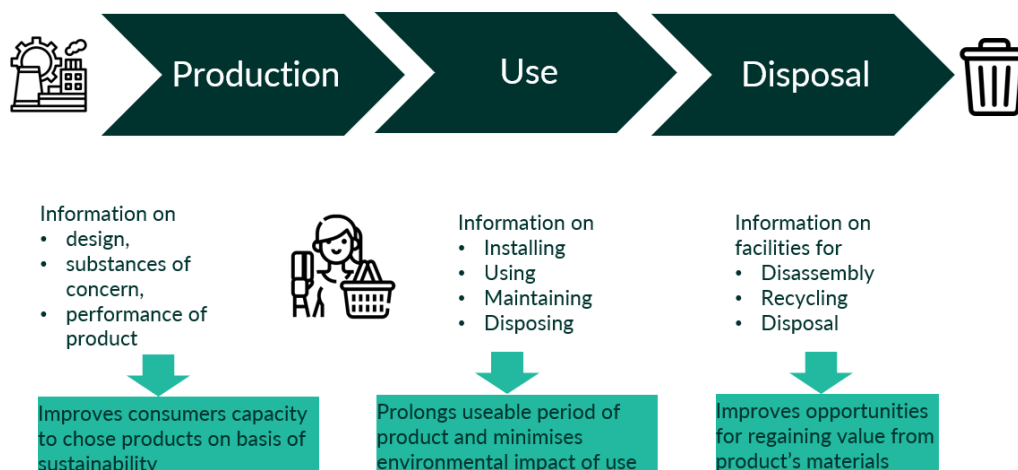
The obligations to consumers that are faced by economic operators under the ESPR mostly consist of obligations to provide sustainability information.

Article 7 (2) requires that 'products shall comply with information requirements...'

1. Eco-design requirements (chapter III)
2. Substances of concern
3. Information on the **performance of the product** in relation to eco- design parameters
  - a. the exact parameters are yet to be agreed but include durability, reliability, ease of repair, ease of remanufacture, ease and quality of recycling.
4. Information for consumers on **installing, using, maintaining and disposing** of the product, so as to minimise environmental impact and ensure optimum durability.
5. Information on **treatment facilities** for disassembly, recycling and disposal at end of life.

Each of these information areas could support a transition to a circular economy (Figure 8).

Figure 8: Information Required in the ESPR and How it Supports the Circular Economy



The legislation gives several options for presenting the information to consumers. Where information is provided on the product itself, on a label, or on the product packaging it would clearly be the manufacturer's responsibility to present this. However, where items are sold online, and consumers cannot see the product label or packaging at the point of purchase it could fall to online marketplaces to ensure the consumer has the relevant information to guide their purchase choice. Furthermore, the requirement to provide information on disposal options within the country of sale will be challenging for non-EU manufacturers to meet, and again this could be usefully provided by the marketplace. **Article 25 of the ESPR places these obligations on to 'dealers' but it is unclear if online marketplaces are included in this.**

### 5.1.2.1 Product Passport Obligations

Chapter III introduces the concept of the product passport. As a new initiative the implementation of this will prove a learning ground and the current formulation of obligations may have to be revisited.

The product passport concept is intended to create a system for information storage and sharing of data relevant to the ESPR. The legislation sets out the general framework for this but given that it stays at a general level it is difficult to see what is intended in terms of who does what to ensure the concept is implementable. Article 9 (3) states that *"The economic operator placing the product on the market shall provide dealers with a digital copy of the data carrier to allow the dealer to make it accessible to customers where they cannot physically access the product. The economic operator shall provide that digital copy free of charge and within 5 working days of the dealer's request."* Again, clarity is required on whether online marketplaces are viewed as the 'dealer' and would be required to make the data available to customers who cannot physically access the product. The dealer can request the data from the 'economic operator placing the product on the market, and they are legally obliged to provide it within 5 days.

The current legislation is not sufficiently clear on whether online marketplaces have the obligations of a dealer. If they do not, then the legislation is weak as it does not oblige the marketplaces to ask dealers for the information, it leaves it up to the dealers to comply. The legislation would be much stronger if online marketplaces could not allow product offers on their site without that information.

### 5.1.3 End of Life of Products Obligations

Dealers are required to ensure that products are accompanied by information on disposal options in the country of sale. It was highlighted above that this could present a challenge for economic operators who are not in the EU and may find it hard to access this information.

A second key element in this regard are the actions of economic operators in dealing with 'unsold stock'. Unsold consumer products include items that have not been sold along with items that

have been returned by the consumer. Section 3.5.2 highlighted that online business models have led to high levels of returned products and the handling of these has environmental implications. The **destruction of unsold goods** is incredibly wasteful and goes directly against the aims of the circular economy.

Article 20 of the ESPR gives the Commission powers to adopt delegated acts in the future prohibiting economic operators to destroy unsold consumer products in the Union. This will be done on a product by product basis where the destruction of these goods has a significant environmental impact. Until such a time as a delegated act has been adopted the regulation requires economic operators who discard unsold consumer goods to report on these actions in a manner that is publicly accessible. The report should detail the quantities of unsold products that are 'discarded', the reasons for discarding the products, and the delivery of discarded products to disposal operations that can prepare for re-use, remanufacture, recycling and energy recovery.

### 5.1.4 Supporting Enforcement

Article 5 is intended to enable the Commission “*to require that supply chain actors cooperate with manufacturers, notified bodies and competent national authorities for the **verification** of products' compliance with eco-design requirements.*” Since the general term 'supply chain actors' is used it is unclear which actors are obliged to share which data points with which other actors, and how compliance with eco-design requirements is to be verified. The provision under Article 4 gives the Commission empowerment to adopt further delegated acts and presumably these details will be considered in more detail in forthcoming acts.<sup>102</sup>

The MSR provides the blueprint for market surveillance which also covers the ESPR. The obligations discussed in section 4.2.4 therefore also apply.

### 5.1.5 Specific Obligations on E-commerce Companies within the ESPR

Article 29 sets out the only specific obligations on online marketplaces and online search engines and these mostly concern the cooperation with market surveillance authorities. Building on the MSR online marketplaces are additionally required to:

1. abstain from putting obstacles to the market surveillance authorities on their online platform.
2. allow online tools operated by market surveillance authorities to access their interfaces in order to identify non-compliant products.

<sup>102</sup> Art 5(6)a Supply chain actors required to provide, upon request, manufacturers, notified bodies and competent national authorities with available information related to their supplies or services that is relevant in order to verify compliance with ecodesign requirements;

The Commission shall, where appropriate, require supply chain actors to: (b) allow, in the absence of information referred to in point (a), manufacturers to assess their supplies or services in order to verify compliance with ecodesign requirements and give access to relevant documents or facilities to those manufacturers;

3. organise their online interface in such a way that enables dealers and economic operators to fulfil their obligations.

The question of allowing market surveillance authorities access to their sites was actively discussed in the focus group with online marketplaces for this project. Concerns were raised about market surveillance scraping activities slowing the functionality of the site for consumers. A French marketplace which is already subject to such activity said they had agreed that the scanning would take place at a certain time of day so as not to impact website performance and this had been working satisfactorily.

### 5.1.5.1 Obligations on Fulfilment Service Providers

Fulfilment service providers are companies that offer warehousing and dispatching of products on behalf of other companies. They are a crucial step in several e-commerce supply chains as they facilitate distance sales by ensuring the products reach the customer for manufacturers based in other countries. Fulfilment service providers were first defined in the MSR and this definition is referenced as the one to be used in the ESPR.<sup>103</sup> The MSR recognises that fulfilment service providers “perform many of the same functions as importers but do not always correspond to the traditional definition of importer in Union law”.

The only obligation placed on fulfilment service providers under the ESPR is that they should ensure that the products under their care are maintained in a condition that does not jeopardise their compliance with the requirements of the delegated acts for those products. This is a minimal obligation, and it begs the question: if there are business models where manufacturers deal directly with consumers and the transaction is fulfilled by a fulfilment service provider without the need for an importer, should the fulfilment service providers have the obligations of the importer? This would mean that fulfilment service providers should also only service products that comply with the requirements of the appropriate delegated act. **This is in fact consistent with the MSR guidelines, and it is surprising that it is not carried through into the ESPR.**<sup>104</sup>

### 5.1.6 How do These Obligations Differ from the Ecodesign Directive?

The Eco-design Directive (2009/125/ED) sought to address design requirements of energy related products in order to drive efficiencies in design and use. To date, 27 product groups are regulated by implementing measures spawning from this directive including lighting, white goods, consumer ICT such as laptops, heating and cooling products. As many of these products are larger items they are not typically purchased online. The expansion of product groups under the ESPR brings more products commonly purchased online under scope of the regulation. E-commerce

<sup>103</sup> EU 2019/1020 Article 3 (11) ‘fulfilment service provider’ means any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved, excluding postal services as defined in point 1 of Article 2 of Directive 97/67/EC of the European Parliament and of the Council (31), parcel delivery services as defined in point 2 of Article 2 of Regulation (EU) 2018/644 of the European Parliament and of the Council (32), and any other postal services or freight transport services;

<sup>104</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021XC0323%2801%29>

sales routes cover a significant proportion of the market for these product groups. The ESPR also covers a much wider range of product design issues than just the energy rating of products.

In some ways, the ESPR improves on the clarity and coherence of the Eco-design Directive. To begin with, the Eco-design Directive is restricted in its definitions of economic operators, containing only manufacturer, importer, and authorised representative. It altogether lacks definitions for any kind of e-commerce company. In the increasingly complex supply chains of today, economic operators may struggle to identify themselves as well as their obligations. The ESPR moved forward in that it specifically defines and obligates online marketplaces, online search engines, and Fulfilment Service Providers.

Product compliance obligations fall to the manufacturer, who is required to ensure that the products placed on the market comply with the Eco-design Directive, a CE marking is affixed and that the EC declaration of conformity is held and made available when required. However, if the manufacturer is not in the community and in the absence of an Authorised Representative the importer takes on the obligations to ensure the product placed on the market complies with the directive and to keep and make available the EC declaration of conformity. Implementing measures shall lay down ecodesign requirements for selected environmental aspects.

The Directive also requires that consumers of products are provided with the requisite information on the role that they can play in the sustainable use of the product, and the ecological profile and the benefits of eco-design when required by the implementing measures. The ESPR is more advanced in providing information that spans the products lifecycle. It is also clearer than the Eco-design Directive on who should take on this obligation: under the Eco-design Directive, it is unclear whether the Authorised Representative or the importer should become responsible for these obligations to consumers if the manufacturer is not in the community.

Moreover, the Eco-design Directive contains no obligations on the end-of-life of products: whether to minimise waste generation or to improve management of waste.

However, it contains some supporting enforcement regulation. Member States should designate market surveillance authorities to conduct checks on product compliance and recall non-compliant products from the market. The Commission is also entitled to share relevant information with other Member States where appropriate, and consumers are given the opportunity to submit complaints on product compliance. In contrast to the ESPR, the Eco-design Directive does not require other economic operators to become involved in compliance monitoring or enforcement. In general, market surveillance is recognised as being one of the primary obstacles to the implementation of the Eco-design Directive, with 10-25% of products regulated by the Directive estimated to be non-compliant with eco-design and energy labelling requirements.<sup>105106</sup>

<sup>105</sup> ECOS (n.d.), 'Market Surveillance' (<http://ecostandard.org/category/activities-market-surveillance/>).

<sup>106</sup> European Commission (2016c), Communication from the Commission 'Ecodesign Working Plan 2016- 2019', COM(2016) 773 final.



Nonetheless, the structure of the obligations in the ESPR clearly builds on that of the Eco-design Directive, in particular the product compliance obligations of the ESPR replicate those of economic operators responsible for the EC declaration of conformity and the displaying of the CE marking.

A final key difference between the legislations is that, as a Directive, the Eco-design directive was left to the Member States to implement in the way they seemed fit, resulting in a variety of approaches and a confusing landscape for economic operators. For example, any penalties incurred through an infringement of the Directive was to be set at a Member State level. As the ESPR will be a regulation, the implementation of this should be consistent across Member States.

## **6.0 Risks and Recommendations in relation to E-commerce and the ESPR proposal**

The above analysis has pointed to some areas in the ESPR legislation where there is a lack of clarity, or an inconsistency with other legislation. There is a genuine risk that the implementation of the ESPR could be hampered due to weaknesses in the legislative text. There is a greater risk that the ambition of the ESPR is not achieved because it does not challenge the status quo of how online marketplaces are given obligations in relation to the products on their sites, in particular when there are no economic operators based in the EU in charge of ensuring compliance with the ESPR.

This report has therefore identified two types of risk;

1. Risks that are linked to specific elements of the legislative text that need strengthening.
2. Wider risks around the ESPR proposal arising from issues related to the general approach.

# 6.1 Specific Risks in Wording of ESPR Proposal

## 6.1.1 Risk that products manufactured outside of the EU would be able to avoid compliance with ESPR by selling through online marketplaces.

To uphold the fair and level playing field for manufacturers in the EU there is a clear need that products from third countries are not given a competitive advantage over products produced in the EU. This would be the case if these products were not subject to the same compliance processes as for EU products, or non-compliance of these products was not dealt with. This risk is of high concern as it has been widely evidenced that products sold through online sales routes show high levels of non-compliance with a wide range of EU product and waste legislation (EPR) (See Section 3.4).

Currently the obligations on online marketplaces and fulfilment service providers within the EPSR are insufficient to close this gap. This is in part an issue with the wider framework of legislation that the ESPR is building on, including the MSR and the DSA.

The ESPR proposal is clear in article 28 that where online marketplaces offer for sale items under their own branding, they are then legally considered to be the manufacturer and subject to the obligations under article 21.

**Where a marketplace allows importers or distributors from non-EU countries to use their marketplace for the sale of items to the EU market the marketplace should be required to check that these economic operators have fulfilled their legal obligations.**

### 6.1.1.1 Online marketplaces deemed to be the ‘supplier’?

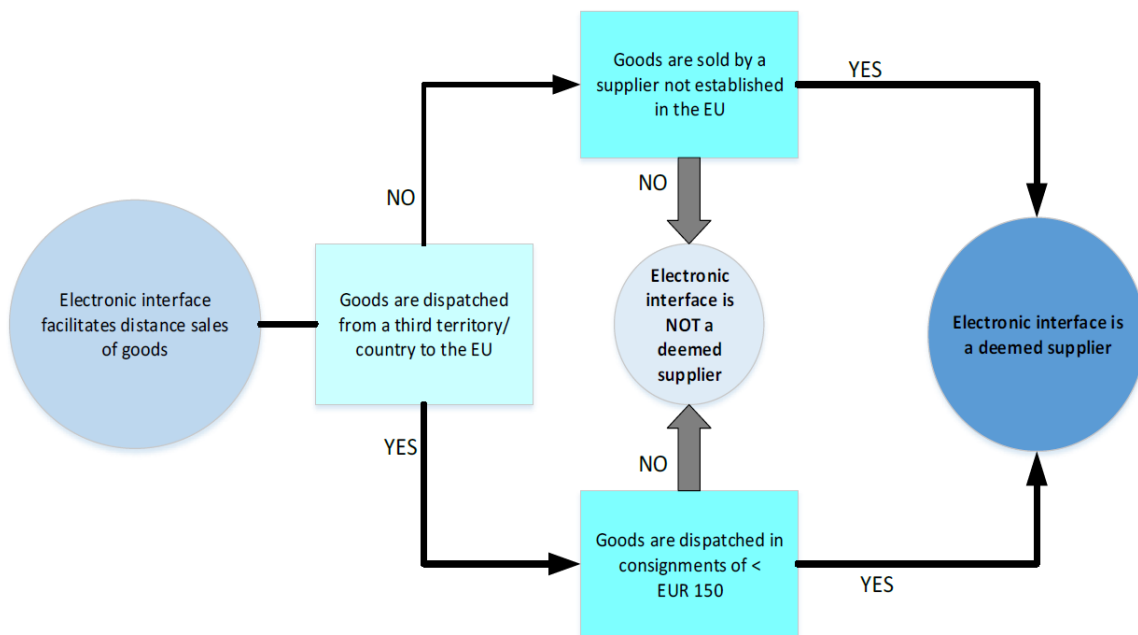
**The strongest way to mitigate this risk is to give online marketplaces and fulfilment service providers the same obligations as distributors under article 24. In this way online marketplaces and fulfilment service providers would be required to verify that importers and manufacturers (when no importer is used) have complied with the product compliance requirements.**

It is possible that the legal provision for this already exists if online marketplaces were considered to fall under the category of ‘distributor’. This rests on whether the marketplace is considered to be a ‘supplier’ of products, under the definition of ‘making available on the market’. The term ‘supplier’ is not used in the ESPR.

*Art 2 (45) ‘distributor’ means any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market;*

Art 2 (39) ‘making available on the market’ means any **supply** of a product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge;

In the 2017 changes to VAT for e-commerce this issue was considered and in certain cases the marketplace is ‘deemed to be the supplier’ and liable to account for VAT on these sales (article 14a<sup>107</sup>). The amendment was effective from January 2021 and attempted to overcome existing difficulties in collecting VAT due from sellers not established in the EU. The deemed to be supplier provision covers consignments not exceeding 150 EUR. Many of the products sold via online marketplaces also fall into this ‘low value goods’ category, particularly textiles items, and items sold by drop shipping.



Source: Figure 1. Explanatory Notes on VAT e-commerce rules Sept 2020

The logic of this principle could be extended to cover other areas of compliance of these ‘suppliers’ since the marketplace has a pivotal role in the supply chain in these distance sales. Section 5 of the VAT for e-commerce guidance document details several different e-commerce supply chain routes for distance sales and shows for each how the ‘supply of goods’ should be considered separately from the flow of goods. Figure 9, Figure 10, Figure 11 are all examples in which the electronic interface is deemed to be the supplier, mostly where the underlying supplier is not established in the EU. The two sets of arrows show that the supply of goods is distinct from the actual flow of goods. These diagrams also illustrate once again the complexity in supply routes of online trade.

<sup>107</sup> Article 2 within COUNCIL DIRECTIVE (EU) 2017/2455 of 5 December 2017 amending Directive 2006/112/EC and Directive 2009/132/EC as regards certain value added tax obligations for supplies of services and distance sales of goods With effect from 1 January 2021. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L2455&from=EN>:

Figure 9: Example 1 of Online Marketplace Being the Deemed Supplier

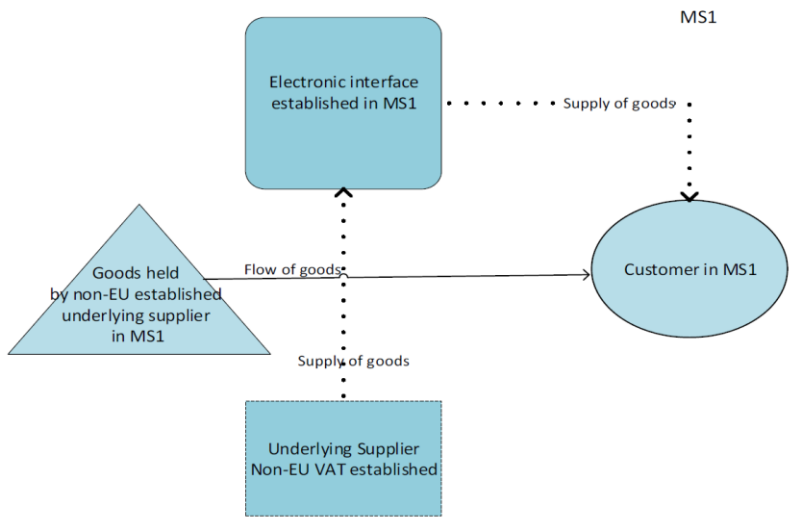


Figure 10: Example 2 of Online Marketplace Being the Deemed Supplier

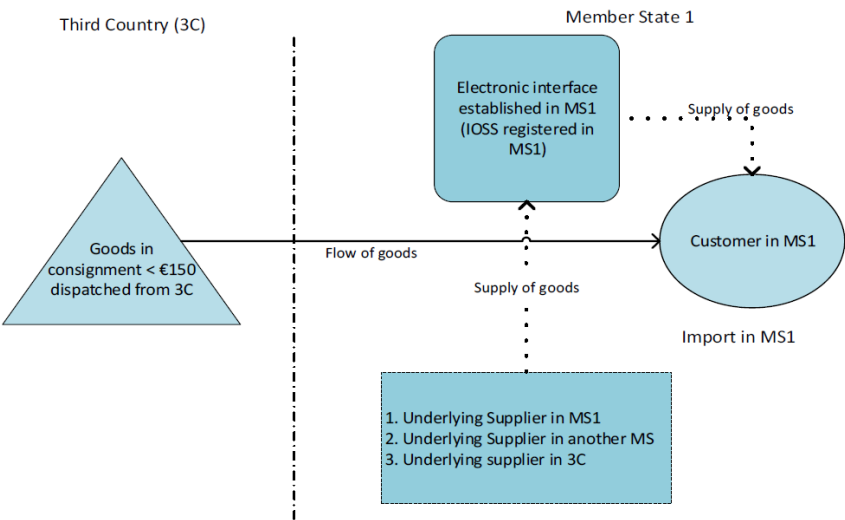
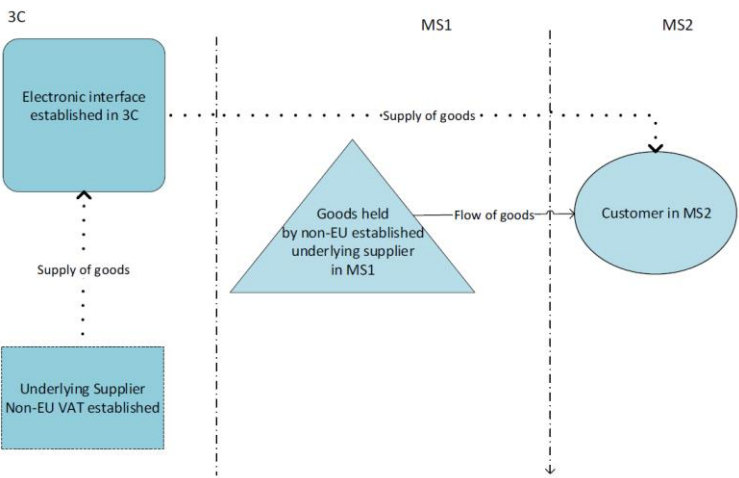


Figure 11: Example 3 of Online Marketplace Being the Deemed Supplier



A second route to closing this loophole could be if online marketplaces are considered to fall within the category of ‘dealer’, by virtue of the fact that they display products to customers.

Article 2(56) ‘dealer’ means a retailer or any other natural or legal person who offers products for sale, hire or hire purchase, or **displays products to customers** in the course of a commercial activity, whether or not in return for payment;

If this was the case, then they would have the obligation to ensure that their customers have access to relevant information required for each product type. This should mean that every listing on a site is accompanied by the required information and if it isn’t provided by the supplier, then the listing won’t go up.

### **6.1.1.2 Online marketplaces required to verify if a trader has an EU legal presence.**

A different approach to ensuring enforcement of ESPR obligations is to reinforce the requirement that items can only be placed on the market if there is an economic operator established in the EU who is carrying the obligations for these products. When most trade was through bricks and mortar retailers, this requirement was a practical necessity to facilitate a sale, whereas with the use of online marketplaces goods are often dispatched from a third country directly to consumers so the economic operator no longer has a need to establish a presence in the EU other than to comply with regulations.

Online marketplaces could be obliged to verify that a seller from outside of the EU has an economic operator established in the Union as an Authorised Representative, and that the marketplace will not allow the seller to operate until this is verified.

An alternative approach would see the online marketplace be ‘deemed to be the distributor’ in cases where there is no economic operator established in the Union.

### **6.1.1.3 Resistance to these proposals.**

Online marketplaces would resist a requirement such as this, as both routes would require marketplaces to restrict their services to only sellers who are compliant, and they are very aware that currently most sellers are not compliant. It is a valid concern that if online marketplaces with a legal presence in the EU faced more stringent requirements on sellers, would the sellers unwilling to comply shift their trade to marketplaces that do not have a legal presence in the EU but still allow sellers to sell on the EU market. This loophole would also need to be closed.

The marketplaces would argue that they cannot screen all content on their platform, and that this amounts to a ‘**general monitoring obligation**’. Article 7 of the DSA states that “No general monitoring or active fact-finding obligations No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.”

In Amazon’s written input to this project they again make this point;

*“Monitoring obligations imposed on online marketplaces should not go further than existing EU framework legislation provides for. The EU also acknowledged in the final Digital Services Act*

*(DSA), in each of the trilogue positions for the General Product Safety Regulation (GPSR), and in the Commission proposal for the Product Liability Directive (PLD), that marketplace liability does not fit with their actual role as an intermediary. The DSA also reaffirms the prohibition on general monitoring from the ecommerce directive. Further regulation in any specific policy area should be consistent with these provisions. Online marketplaces should therefore not be required to proactively ensure compliance with all the products sold by third-party sellers on its marketplace.”*

There are several counter arguments that could be put to this.

Firstly, it should be questioned whether argued that checking that the economic operators have fulfilled their legal obligations is a different type of requirement from a general monitoring of content. Marketplaces already screen their sellers and require data from them. The issue here is that there is no single indicator to show a seller has complied with ESPR information requirements for every product that they are placing on the market.

Secondly, the very basis for this restriction could be questioned. The DSA, in accord with the e-Commerce Directive prohibits the imposition of a general monitoring obligation on to online platforms on the basis that it “could disproportionately limit users’ freedom of expression and freedom to receive information and could burden service providers excessively and thus unduly interfere with their freedom to conduct a business.” The justification of this seems hard to uphold in the face of the market distortion created by continuing to allow marketplaces to be a platform for economic operators who are not compliant with EU requirements. However, since it has been reaffirmed in the DSA it is unlikely that EU policy makers would have an appetite to revisit this.

Finally it is significant that in in respect to defective products the proposal for a Product Liability Directive does require online platforms to take on the liabilities of the manufacturer, importer or distributor when the marketplace “presents the product or otherwise enables the specific transaction in question in a way that would lead an average consumer to believe that the product is provided either by the online platform itself or by a trader acting under its authority or control.” A similar provision could be established in the ESPR, though greater legal clarity would be needed on this conditional situation.

#### **6.1.1.4 Conclusion**

There are several legal routes to improving compliance with the ESPR requirements and those recommended here do place more demanding obligations on online marketplaces than they currently face. The legislators should recognize that high rates of compliance will only be achieved if these key economic operators are brought into the chain of obligation, and act as a first screening filter keeping non-compliant sellers from placing items on the EU market. This would enable Market Surveillance Authorities to perform their vital function of checking detailed cases of non-compliance rather than trying to continuously stop the leaking dam that is continually letting through non-compliant products.

**Table 4: Recommendations to Mitigate Risk of Non-Compliant Products Being Sold Through Online Marketplaces**

Overall aim:	Online marketplaces and fulfilment service providers should have the same obligation as distributors to verify that importers and manufacturers (when no importer is used) have complied with the requirements.	
	Recommendation	Legal Route
1.	Give legal clarity that e-commerce companies are also considered to be economic operators.	Art 3 (46) 'economic operator' should include reference to online marketplaces
2.	Increase clarity on the circumstances in which e-commerce companies may be 'deemed to be' the importer, distributor, or dealer	Art 3 (44,45,55 and 56) clarify that online marketplaces may under certain circumstances be considered to be these economic operators
3.	Online marketplaces should also have same obligations as dealers in ensuring that the Product Passport is easily available to their customers.	Art 25 clarify that online marketplaces are considered dealers and have the obligations under article 25.
4.	Require online marketplaces to verify that a seller from out of the EU has an economic operator established in the Union. EITHER a) The marketplace would not allow the seller to operate until this is verified. Or b) The marketplace is deemed to be the distributor in such cases.	Add this requirement to Article 29.
5.	Build consistency with other legislation in use of terminology	Art 3 (56) consider whether 'dealer' or 'trader' is more consistent with other legislation. And clarify the differences

### **6.1.2 Risk that fulfilment service providers are not obligated as other economic operators thus creating a loophole.**

Fulfilment service providers are companies that offer warehousing and dispatching of products on behalf of other companies. (see section 5.1.5.1). The MSR recognises that fulfilment service providers "perform many of the same functions as importers but do not always correspond to the traditional definition of importer in Union law" (para 13).

Within the ESPR the obligations placed on fulfilment service providers only extend to maintaining the condition of products under their care so that the products continue to conform to the legal requirements. This is insufficient compared with the significant role of fulfilment service



providers in the supply chain, and leaves open a loophole that items are sold in the EU with no economic operator established in the EU with the appropriate responsibilities.

The MSR has already identified that for cases where non-EU manufacturers deal directly with consumers and the transaction is fulfilled by a fulfilment service provider without the need for an importer. In such cases the fulfilment service provider should be required to have the obligations of the importer. This would mean that fulfilment service providers would only service products that comply with the requirements of the appropriate delegated act.

**Table 5: Recommendations to Mitigate the Risk that the Requirements on Fulfilment Service Providers Create a Loophole for Non-Compliance**

	Recommendation	Legal Route
6.	Fulfilment service providers should only service products that comply with the requirements of the appropriate delegated act. This obligation matches that of importer	Amend Article 27. The legislation could add that fulfilment service providers should assume the obligations of importers when they distribute goods on behalf of manufacturers with no other economic operators as intermediaries.
7.	Fulfilment service providers should have the same obligations as online marketplaces in terms of cooperation with market surveillance authorities to ensure effective market surveillance	Amend Article 27 to include the same requirements as Article 29 (1)

### 6.1.3 Risk that lack of clarity in text dealing with destruction of unsold goods could lead to compliance avoidance

Article 20 concerning the destruction of unsold goods is of relevance to e-commerce companies as it has been revealed that it is the items bought online and returned which are sometimes destroyed rather than processed for resale (see Section 3.5.2).

There are several ways in which this article could be strengthened.

Firstly, since article 20 (1) refers only to ‘economic operators’ and the definition of these in 2(46) includes “manufacturer, the authorised representative, the importer, the distributor, the dealer and the fulfilment service provider” **it should be made clear that online marketplaces are included in this; either as a dealer or as a named type of economic operator.**

Secondly, Article 20 (1) c *the delivery of discarded products to preparing for re-use, remanufacturing, recycling, energy recovery and disposal operations in accordance with the waste hierarchy as defined by Article 4 of Directive 2008/98/EC.*

The term ‘in accordance with the waste hierarchy’ does not actually impose any requirement on economic operators to prioritise remanufacture and recycling over energy recovery. It seems to suggest that they should prioritise the top levels of the waste hierarchy, but no penalties will occur if they don’t. The legal text should at the least require the economic operators to justify why they have not been able to prioritise actions at the top levels of the waste hierarchy. **To really deliver on the circular economy it would seem logical to prohibit energy recovery and disposal as options for discarding unsold consumer goods for all products.**

Finally, Article 20 (3) states that *The Commission shall be empowered to adopt delegated acts in accordance with Article 66 to supplement this Regulation by prohibiting economic operators to destroy unsold consumer products in the **Union**, where the destruction of unsold consumer products falling within a certain product group has significant environmental impact.*

This leaves open an option for economic operators to remove unsold consumer products from the Union and destroy them in another location. **It should be clarified that it is prohibited to export unsold products for the purpose of destroying them.**

**Table 6: Recommendations to Strengthen Requirements Around Destruction of Unsold Goods**

	Recommendation	Legal Route
8.	Clarify that online marketplaces are also included as economic operators with obligations relating to unsold consumer goods.	Expand article 2 (46) definition of economic operator to include online marketplaces <b>Or</b> expand article 2(56) definition of dealer to clarify that this could include online marketplaces
9.	Strengthen the requirements around disposal of unsold goods	Article 20 (1) c should prohibit energy recovery and disposal as options for discarding unsold consumer goods for all products.
10.	Close a loophole of exportation of unsold goods	Clarify in article 20 (3) that it is prohibited to export unsold products for the purpose of destroying them.

## 6.1.4 Risk that exemptions for SMEs could be used as loopholes to avoid obligations

Article 19 reaffirms the Commissions' commitment to ensuring that the application of this regulation is not disproportionately burdensome for SMEs. Though the general term SME is used in the text the article is intended to cover micro, small and medium enterprises who may have differing challenges. Micro and small companies comprise a large proportion of the economic operators who trade through online marketplaces, so this presents two distinct risks:

On the one hand, if the obligations on manufacturers and importers are too burdensome this is likely to drive higher rates of non-compliance. On the other hand, if SMEs are given exemptions this opens up loopholes that could be exploited by larger companies.

Currently, there is an exemption for SMEs from the requirements on destruction of unsold goods. Article 20 (6). This provision is intended to alleviate SMEs of the reporting burden associated with the discarding of unsold items. Given that SMEs make up a very large proportion of traders on online marketplaces there is a potential loophole here that could be exploited. The legal text does seem to be alive to this possibility and 6(b) attempts to close this. It states that in future delegated acts, if there is 'sufficient evidence' that the exemption of SMEs is being exploited to circumvent the prohibition to destroy unsold products then the prohibition should also apply to SMEs.

This seems to present a very cautious approach that risks the continued destruction of unsold products until such a point as this legal process has been completed.

**It is recommended that a more stringent approach is taken and that this article, and future delegated acts for specific products should apply to all economic operators regardless of size.** This will send the correct signal to traders which should trigger change, but it should be supported by actions that reduce the burden on obligated companies, such as clear reporting templates that make it easy to provide the required information.

An alternative approach would be to restrict the exemption to small and micro enterprises only, excluding medium enterprises. Medium enterprises can be as large as 50 employees with an annual turnover of €10million. Including these companies in the exemption creates a large loophole that distracts from the need to safeguard the smallest of enterprises.

**Table 7: Recommendation to Close Potential Loopholes Around SMEs**

	Recommendation	Legal Route
11.	Remove the exemptions for SMEs and instead ensure that sufficient support tools are in place to ensure that all economic operators can fulfil their obligations	Change the wording of article 20 (6) from 'may' to 'shall' to ensure that delegated acts that follow will continue with the clauses (a) and (b) to widen obligations to all economic operators Introduce provision that within the delegated acts tools are also developed to support SMEs fulfil their obligations
12.	Refine use of the term SME and restrict the provisions to only small enterprises and micro enterprises but exclude medium enterprises.	Change the wording of article 20 to Small and micro enterprises.

## 6.2 Wider Risks Around the ESPR Proposal

### 6.2.1 Risk that there is insufficient deterrent to ensure compliance

Rates of non-compliance will remain high when the likelihood of detection is low and/or the scale of penalties are also low. Currently, there is very little risk to online marketplaces of non-compliance because their obligations are very light touch. This applies equally to the compliance of their own branded products for which the obligations as a manufacturer are clear.

**Some elements of proportionality of sanctions should be introduced so that the penalty incurred by an e-commerce company that infringes the law is of sufficient magnitude to act as a deterrent.** A strong sanction could be a financial penalty linked to EU sales, coupled with a higher penalty if an infringement is again identified within a year. Penalties could also be linked to turnover, again to ensure that they have a similar impact across different company types.

In relation to the products sold through marketplaces the marketplaces are required to respond to reports of non-compliance of their sellers and remove listings if asked to do so. Voluntary schemes such as the EU product safety pledge show that several of the large marketplaces

support this approach but the effect on compliance rates is not significant as the same items reappear in different forms.

**A stronger sanction against traders found to be non-compliant would be to prohibit the trader from placing any items on the EU market if they were found to be non-compliant for one item. This would minimise the chances of the same item reappearing shortly after the listing has been removed.**

Market Surveillance Authorities are already overstretched and struggle to keep pace with infringements of product safety or substances of concern. It is highly likely that given limited resources issues of non-compliance with ecodesign requirements will be viewed as a lower priority than product safety and given insufficient attention. A recent report for the European Parliament on E-commerce and the EU Green Deal noted that the ESPR requirements significantly increase the scope of activities of market surveillance authorities and could lead to resourcing issues. “When it comes to Ecodesign for Sustainable Products (ESPR), introducing pre-approved certification schemes could prevent a proliferation of schemes that public authorities do not have the resources to verify retroactively.”<sup>108</sup>

**So there are two risks here: firstly, that some marketplaces will not comply with upcoming obligations and secondly, that sellers will continue to be non-compliant at high rates because of the lack of sanctions. This second issue would be dealt with if online marketplaces had additional obligations as proposed in section 6.1.1. In the absence of these changes some consideration of greater penalties should be given.**

## **6.2.2 Risk that the product information passed onto consumers could be misleading**

One central aim of the ESPR is that consumers are provided with sustainability information on the products they are looking to purchase to help guide their consumption. Manufacturers, importers, distributors and dealers all have to ensure that the product passport and additional information is easily available or accompanies the product. Online marketplaces are simply required to organise their interface in a way that enables other economic operators to fulfil their obligations.

The focus groups and interviews for this project threw up the issue that the online marketplaces have a critical role in presenting this information to consumers through the use of filter tools, or summary ratings built on the sustainability data. Leaving this to their discretion runs the risk of the use of incomparable metrics and extensive greenwashing. There are already signs of this and the impact on consumers is that consumers lose confidence that paying extra for items labelled as sustainable does actually deliver greater sustainability. This could therefore be counterproductive to the aims of the ESPR.

<sup>108</sup> Policy Department for Economic, Scientific and Quality of Life Policies, 2022 E-commerce and the EU Green Deal. [https://www.europarl.europa.eu/thinktank/en/document/IPOL\\_ATA\(2023\)740061](https://www.europarl.europa.eu/thinktank/en/document/IPOL_ATA(2023)740061) p76 citing ECOS, 2022, *Position Paper Ecodesign for sustainable products regulation, how to ensure it makes sustainable products the norm*. Available at: <https://ecostandard.org/wp-content/uploads/2022/06/ECOS-ESPR-Consultation-position-paper.pdf>.

Article 7(4) states that the Commission shall determine ‘classes of performance’ on the product parameters listed in Annex 1. There are 17 potential parameters listed in the annex so further detail would be useful on how the Commission propose to turn this into something meaningful for consumers and whether online marketplaces would be required to show this rating.

**To mitigate this risk the online marketplaces consulted for this project recommend that the Commission test with consumers what data is useful to guide purchases, and in what form.**

### **6.2.3 Risk that lack of communication around legal roles could lead to non-compliance**

A lack of comprehension of legal obligations faced by traders wishing to put items on the market in the EU has been recognised as a contributing factor to non-compliance with EU legislation.<sup>109</sup> This was also recognised in the recent report to the European Parliament on e-commerce and the EU Green Deal. “Another key obstacle mentioned by several stakeholders is the lack of resources and expertise of online retailers in understanding the obligations created by new legislative acts and complying with them.” The barriers to clear understanding of roles are several:

1. lack of centralised communication of compliance obligations,
2. difficulty in interpreting legal texts,
3. different compliance regimes in different member states
4. legislative updates and revisions are frequent
5. information on legal obligations is not provided in translations of languages of third party sellers.

The resources to support this understanding are currently lacking. There is therefore a risk that compliance rates will be low simply due to a lack of awareness of obligations.

**To mitigate this risk the European Commission could take steps to centralise clear guidelines on legislative obligations.** This could be made available online and regularly updated. Guidance could also be provided on how economic operators could understand whether they are classified as manufacturer, importer, distributor depending on their business model.

In order for such guidance to be made accessible to traders in third countries the **online marketplaces could be required to communicate these obligations to traders using their site.** This could be as simple as signposting them to the Commission resources and would make effective use of the marketplace’s position in the supply chain. This could be highly effective if it were coupled with a warning that the marketplace will only allow compliant traders to use their site.

<sup>109</sup> Eunomia report for DG Env, 2022. Online Free-riding and EPR: Study on the feasibility of regulatory and technical measures with the objective of improving Extended Producer Responsibility compliance and tackling free-riding in the case of online sales. Unpublished.

## 6.2.4 Risk that obligations are placed on economic operators that they cannot fulfil

A strong message from the focus groups for this project was that obligations need to be set in accordance with the capacities of the economic operators to fulfil the requirements. This is not simply a case of an additional burden of a new requirement but where information is impossible to get, this will fuel non-compliance. For example, in France where traders are already required to provide detailed product information, the marketplaces report that their traders are not able to exert influence on the manufacturers in order to extract the required information. Where manufacturers believe the information has commercial value this is an obstacle.

A common theme in the focus group with e-commerce companies was that there had been very little opportunity to engage with the legislative process leading up to the proposal for the ESPR. Two of the attendee's organisations had submitted consultation responses, only one had engaged in dialogue in relation to the proposal. Some of the key concerns should be considered by policy makers:

- It was viewed that the Commission could do more to support industry by providing templates for sellers to provide consistency in the information provided and enable them to provide the relevant information more easily. Databases of information on key data areas such as reparability information would also be welcomed.
- Harmonisation of requirements across Member States is also seen as critical since even slight differences in these data requirements can increase the burden of compliance significantly.
- Finally, marketplaces were concerned that if the level of requirements on marketplaces were too onerous this would create a landscape where only the big players could operate.

One other approach that could smooth this path is to include representatives of smaller marketplaces in the proposed Eco-design forum that will support the Commission in implementing the ESPR.

Article 17 sets out how the Commission will establish an expert group, referred to as the Eco-design Forum. This group will support the Commission in prioritising which groups of products should eco-design requirements be further developed through the delegated acts. The group will hence be closely involved in the detail required for successful implementation of the regulation. Traders and retailers are included in the list of potential participants, involving e-commerce companies should help to build support amongst this group that largely feel disengaged.



## 6.3 Proposed Amendments to ESPR Proposal

Since drafting this report, following the original ESPR proposal by the Commission, two Committees have tabled amendments to the ESPR. Some of these amendments pick up on themes in this report and are discussed below.

It is noted however that neither of these reports consider who should be liable in situations in which there is no identifiable EU economic operator, neither do they place additional obligations on fulfilment service providers. In these respects, the proposals here do not go far enough to mitigate the risks identified in this report.

### 6.3.1 Rapporteur Moretti: Report of the Committee on Environment, Public Health and Food Safety (ENVI)

This report states that *“It is important that online marketplaces are clearly covered by the same responsibilities of bricks-and-mortar marketplaces. More and more consumers purchase products online with the expectation that products bought online comply with the same level of compliance of existing sustainability rules and that the actors involved in the sale of goods online are bound by the same responsibilities.”*

The report uses this to propose expanding certain definitions to include online marketplaces ‘making available on the market’ (Art 2, 1, 39), ‘placing on the market’ (Art 2,1,40) and ‘economic operator’ (Art 2, 1,46). This matches recommendation 1. above.

They also propose expanding the term ‘dealer’ to include online platforms. (Art 2,1,56). This would achieve the same result as recommendation 3 above.

### 6.3.2 Rapporteur Cormand: Report of the Committee on Internal Market and Consumer Protection

This report mentions the concern that some improvement of the market surveillance chapter of the ESPR proposal is required to ensure its effective enforcement. The report proposes introducing a minimum set of penalties that market surveillance authorities can apply to infringers and requiring “Member States to establish mechanisms where end-users can easily lodge a complaint in case of non-compliance”. This supports the above discussion in Section 6.2.1 around the risks of insufficient deterrents.

The proposal details that the penalties shall include as a minimum:

*(a) fines proportionate to the extent of non-compliance, number of units of non-complying products and environmental impact of the non-compliance, calculating the level of the fines in such a way as to make sure that they effectively deprive those responsible of the*

*economic benefits derived from their infringements, and gradually increasing the level of such fines for repeated infringements. The maximum amount of such fines shall be at least 4 % of the manufacturer's annual EU turnover.*

*(b) in case of repeated and serious infringements to the requirements of this Regulation, temporary suspension of placing products on the market;*

*(c) temporary exclusion from public procurement processes;*

*(d) publication of the decision taken by the market surveillance authority stating the extent of non-compliance, the corrective action to be taken and the penalties applied to the economic operator.*

In relation to SMEs and the destruction of unsold goods, the report recognises the potential loopholes in the current text and proposes that the exemption on SMEs is removed. “*Where there is reasonable evidence that SMEs may be used to circumvent those obligations, the Commission should be able to require, in those delegated acts, for some product groups, that these obligations also apply to micro, small or medium sized enterprises.*” This mirrors recommendation 11 above.

Finally, some additional obligations are placed on online marketplaces.

*“Online marketplaces shall ensure that the traders provide the required information for each product sold on the online interface and that they verify that such information is reliable, complete and up-to-date on a regular basis.”* (proposed new article 29,2,3a).

The proposal clearly states that this requirement is ‘without prejudice to the prohibition to conduct general monitoring as established under the DSA’. This supports the concept that additional obligations on marketplaces can be viewed as specific monitoring cases rather than general, and it reflects recommendation 4 above.

# 7.0 Conclusions

In formulating recommendations to improve the ESPR proposal it has become clear that many of the limitations of the ESPR proposal can be traced back to existing legal constraints in the wider legislative framework. Within this there are limitations on the obligations that can be imposed on online marketplaces, and there is a lack of clarity around defining the roles of e-commerce companies as economic operators.

If there is a genuine commitment to make the ESPR work and achieve high compliance rates then there is a need to challenge this status quo. Some would argue that the ESPR is not the right legislative tool to do this, but this may be a crucial opportunity given that several key legislations have just been reviewed and are unlikely to be revised again soon. The proposal for a revised PLD does offer a more nuanced view of how the liability of e-commerce companies should be considered, and this offers a benchmark by which the ESPR proposal could be strengthened.

In spite of these constraints, this paper has made several recommendations as to where the text of the ESPR could be strengthened. This briefing note argues that if marketplaces were to play the role they should as important gatekeepers of the EU market, then as a set of basic principles they should be expected to;

3. Ensure that the traders using their marketplace comply with EU legislation and provide guidance to them on what this includes.
4. Ensure that the products offered for sale on their marketplace comply with EU legislation.
5. Support market surveillance authorities in detecting and sanctioning instances of non-compliance by adhering to principles 1 and 2 above.
6. Provide accurate and balanced information to consumers

Online retailers, other than marketplaces and fulfilment service providers should also follow these principles. These ambitions seem modest, and it is almost surprising that the e-commerce sector has avoided such responsibilities to date. These principles could provide the starting point for legislation that better reflects the realities of today's retail market and seeks to rebuild a level playing field amongst traders. This paper has shown that within the ESPR proposal they are legally achievable.



# Appendices



# A 1.1 Acronyms

Acronym	
CEAP	Circular Economy Action Plan
CSR	Consumer Rights Directive
DSA	Digital Services Act
EEE	Electrical and Electronic Equipment
EPR	Extended Producer Responsibility
ESPR	Eco-design for Sustainable Products Regulation
GPSD	General Product Safety Directive
GSPR	General Product Safety Regulation
MSR	Market Surveillance Regulation
PLD	Product Liability Directive Proposal
RAPEX	Rapid Alert System for non-food consumer products
REACH	Registration, Evaluation, Authorisation and Restriction of Chemicals
SME	Small to Medium Sized Enterprise

# A 1.2 Glossary

	Definition in plain English	Source for definition
Authorised Representative	The legal entity appointed by a producer in a MS so that they can fulfil their EPR obligations in that MS	Market Surveillance Regulation (EU) 2019/1020. <sup>110</sup>
Dealer	A retailer or other actor sells, hires out or displays products in the course of a commercial activity	Energy Labelling Regulation (EU) 2017/1369 (13)

<sup>110</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32019R1020>



Distributor	Actor in supply chain who makes a product available on the market.	Market Surveillance Regulation (EU) 2019/1020, <sup>111</sup> and General Product Safety Directive 2001/95/EC: <sup>112</sup> 'distributor' means any natural or legal person in the supply chain, other than the manufacturer or the importer, who makes a product available on the market.
Fulfilment service provider	Fulfilment service providers offer economic operators their contractual handling of sales. These services can include the storage of goods, assembling goods according to the order, packaging, transport, returns management, invoicing, dunning, repairs or customs clearance for products imported into the EU	Market Surveillance Regulation (EU) 2019/1020, <sup>113</sup> any natural or legal person offering, in the course of commercial activity, at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved,
Gatekeeper	A provider of core platform services that has a significant impact on the internal market as it serves as an important gateway for business users to reach end users	Digital Markets Act Proposal <sup>114</sup>
Importer	The actor in the supply chain who places a product on the market in the EU products that was manufactured out of the EU - commonly also refers to traders that sell products manufactured in one MS into another?	Market Surveillance Regulation (EU) 2019/1020, <sup>115</sup> and General Product Safety Directive 2001/95/EC: <sup>116</sup> importer' means any natural or legal person established within the Union who places a product from a third country on the Union market;
Manufacturer	A person or company that manufactures a product or has a product designed or manufactured, and markets that product under its name or trademark;	Market Surveillance Regulation (EU) 2019/1020. <sup>117</sup>
Online marketplace	An online platform that creates a marketplace for multiple sellers.	Defined in the Proposal for a general product safety regulation, 2021/0170 <sup>118</sup>

<sup>111</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32019R1020>

<sup>112</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0095>

<sup>113</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32019R1020>

<sup>114</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

<sup>115</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32019R1020>

<sup>116</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0095>

<sup>117</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32019R1020>

<sup>118</sup> Proposal for a Regulation Of The European Parliament And Of The Council 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. Available at [https://ec.europa.eu/info/sites/default/files/proposal\\_for\\_a\\_regulation\\_on\\_general\\_product\\_safety.pdf](https://ec.europa.eu/info/sites/default/files/proposal_for_a_regulation_on_general_product_safety.pdf)

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Online platform	A broad term for an online service that intermediates and facilitates sales but can also be that facilitates the spread of information (e.g., Facebook) - preferable to use online marketplace where appropriate as this is clearer.	Digital Services Act proposal: <sup>119</sup> 'online platform' means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information NB this definition is more focussed on information sharing than retail
Producer	A broad term that can include manufacturers, importers - useful to think of as the 'producer of waste' - the actor in the supply chain who first brings a product into the EU that will ultimately become waste	Waste Framework Directive 2008/98/EC as last amended by Directive 2018/851/EU: any natural or legal person who professionally develops, manufactures, processes, treats, sells or imports products (producer of the product). Article 8 <sup>120</sup>
Retailer	An actor that offers products for sale and makes the connection between the manufacturer and consumer. The delivery of the product may be by another economic operator. Can use both online and/or 'bricks and mortar' sales routes. <i>Common use suggests a company that is medium to large size with infrastructure - shop or website</i>	No legal definition for retailer found, but retailers are legally classed as distributors.
Trader	<i>'any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive'</i>	Consumer Rights Directive 2011/83/EU as last amended by Directive (EU) 2015/2302: <sup>121</sup> Also used in Digital Markets Act <sup>122</sup>

<sup>119</sup> Proposal for a Regulation Of The European Parliament And Of The Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC. Available at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A825%3AFIN>

<sup>120</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32018L0851>

<sup>121</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02011L0083-20180701>

<sup>122</sup> <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN>

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# A 2.0 Stakeholder Engagement

Online platforms are a complex and constantly evolving subject. Stakeholder engagement played a key role in this study: providing relevant viewpoints, data, and discussions between industry stakeholders. Stakeholder engagement contributed significantly to sections 4.0, 5.0, and 6.0. However, it also fed into section 3.0.

This appendix briefly summarises individual stakeholder engagement activities It clarifies which stakeholders were involved, the format of the engagement, and which topics were focused on.

## A 2.1 Interviews

Eunomia held several interviews towards the start of the project. The aim of these interviews was to have scoping conversations and provide Eunomia with an initial understanding of the issues surrounding online platforms in existing EU legislation and the EPSR, according to a small number of stakeholders. Interviewees were largely research and consulting experts who had worked on similar subjects. Table 8 contains information on interviewees and dates.

Table 8: Interviews

Organisation	Organisation Type	Date
European Environmental Bureau (EEB)	NGO (Client)	16.09.2022
		27.09.2022
Valdani Vicari & Associati (VVA)	Research and Consulting Firm	16.09.2022
		26.09.2022
European Policy Centre (EPC)	Think Tank	07.10.2022
Amazon	Online marketplace	10.10.2022

## A 2.2 Focus Groups

### A 2.2.1 Focus Group Attendees

Once Eunomia had gained an initial understanding of the issues through interviews, prior knowledge and desk research, it held two separate focus groups to delve into the issues in existing legislation, and the risks and opportunities in the ESPR for online platforms. In Eunomia’s experience, stakeholders tend to hold very different views on online platforms. For this reason, Eunomia decided to hold two focus groups, that could each welcome specific kinds of stakeholders, where disagreement would be limited and fruitful conversation

would ensue. The first focus group included policy experts and interest parties, whilst the second focus group included ecommerce companies, who would be impacted by policy. Table 9 provides more information on attendees and dates.

**Table 9: Focus Groups**

Focus Group	Date	Organisation	Type of Organisation
Focus Group 1: policy experts	11.07.2022	BEUC	Trade Association
		Lighting Association	Trade Association
		APA Sara Mathieu	Government
		Belgian Ministry	Government
		Toys Industry Europe	Trade Association
		EuCER	Trade Association
		Stitching Batterijen	Waste Management Actor
		WEEE Forum	Trade Association
Focus Group 2: ecommerce companies	14.10.2022	Inditex	Manufacturer
		Zalando	Online marketplace
		Back Market	Online marketplace
		Ecommerce Europe	Trade Association
		CDiscount	Online marketplace
		eBay	Online marketplace

## A 2.2.2 Focus Group Structure

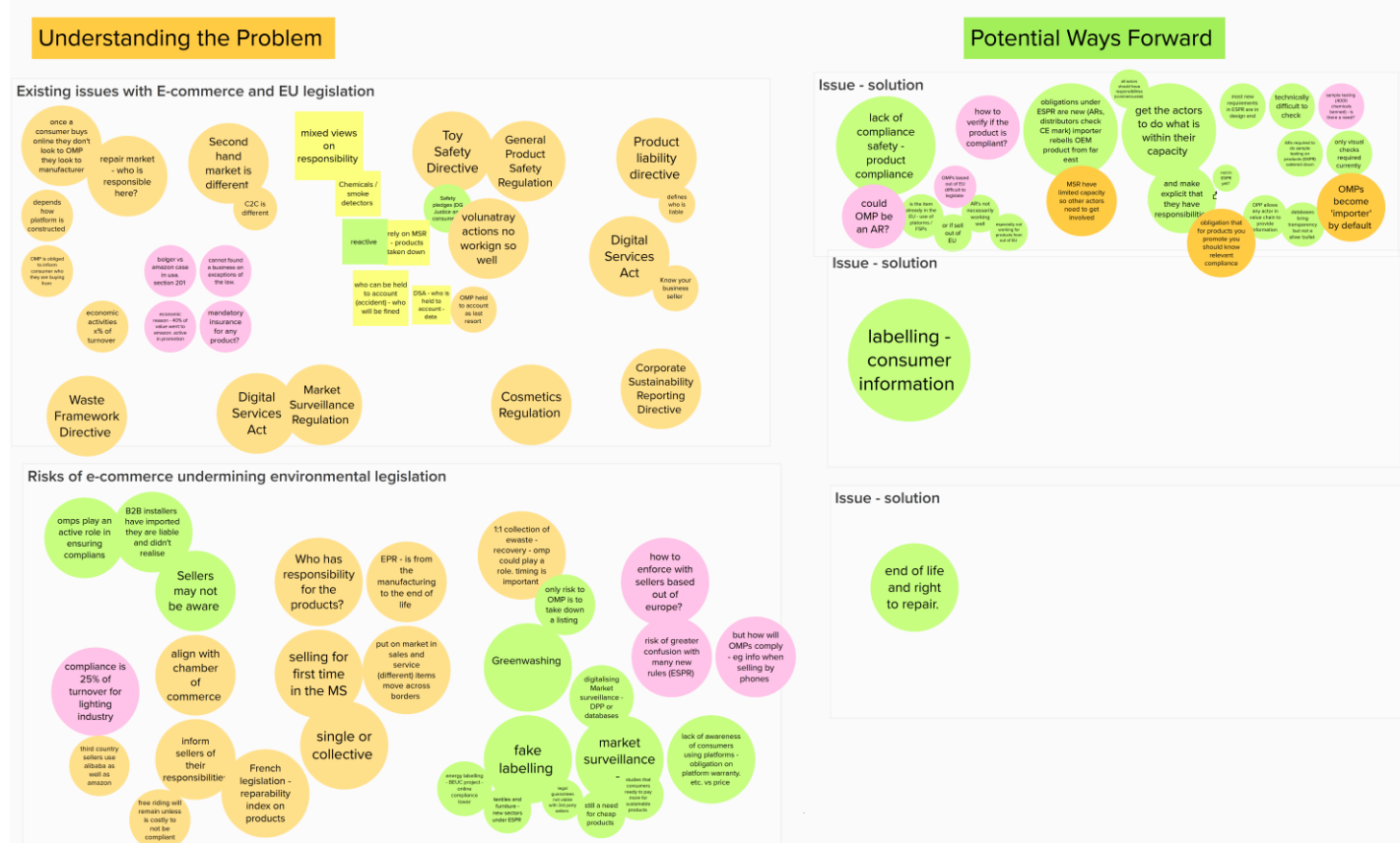
Focus groups were structured identically: they were split into three sessions to discuss different topics. These include, in order:

1. Risks related to online marketplaces
2. Opportunities related to online marketplaces
3. Recommendations regarding online marketplaces and the ESPR

Enomia used an online whiteboard tool called mural to support the discussion visually.

**Figure 12: Mural from Focus Group 1**

## E-commerce and ESPR: Focus Group 1: Policy Makers 11th October 2022



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## E-commerce and ESPR: Focus Group 2: Marketplaces 14th October 2022

