

## New Approach Meets New Economy – Enforcing EU Product Safety in E-commerce

*By Carsten Ullrich\**

### **Abstract**

This paper reviews recent regulatory initiatives in the area of product safety legislation and the market surveillance of products from the angle of e-commerce. With the arrival of the internet, the sale of non-compliant and illegal consumer products has proliferated. E-commerce and globalized supply chains are challenging a regulatory system which is fragmented, highly technical and slow to respond to the dynamic changes introduced to the market place. The EU Commission's 2017 Notice on the surveillance of products sold online and its latest proposal for a new regulation on enforcement of product compliance rules testify to the unsatisfactory state of progress in this area. A reason for this may be seen in the history and nature of New Approach style product law, which outsources technical product regulation to industry and entrusts enforcement tightly in the hands of specialized national regulators. New actors in the supply chain, such as fulfilment service provider or e-commerce platforms have fallen between the cracks. This paper argues that extending principles of the New Approach onto e-commerce players, by seeing their activities as affecting essential requirements, could be of interest to both the problems at hand and the wider debate on online platforms regulation.

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\* MA, LL.M, PhD Researcher, Faculty of Law, Economics and Finance, University of Luxembourg. The author is indebted to Julia Sinnig, University of Luxembourg, for her valuable feedback during the drafting of this article.

## A. Introduction

The debate over the responsibilities of online platforms in the fight against illegal content on the internet has intensified over recent years. The EU Commission confirmed in its 2017 Communication on tackling illegal content online (the Communication) that it is stepping up its efforts with legislative and non-legislative measures across various sectors and types of content<sup>1</sup>. New regulatory initiatives on hate speech, terrorist content, copyright and IP rights in general<sup>2</sup> have seen the day at EU and member state level. These have been discussed widely and controversially across academia, industry and civil society. Largely, they try to assign more preventive *ex-ante* and more prescriptive *ex-post* content policing obligations on information society service providers (ISPs). By contrast, recent initiatives by the EU legislator<sup>3</sup> to step up enforcement of product regulation for goods sold over the internet have received much less attention. The fight to combat the sale of unsafe food and non-food products is part of the Commission's broad initiative to impose enhanced responsibilities on online platforms<sup>4</sup>. E-commerce continues to grow<sup>5</sup> and the sale of non-compliant and/or unsafe products online has been identified as a growing problem<sup>6</sup> impacting consumers<sup>7</sup>. It may negatively impact public health and safety and has frequently been linked to the sales of counterfeits<sup>8</sup>.

In the following Section, the initiatives to step up the enforcement of illegal and non-compliant products sold online will be reviewed in the wider context of the EU's horizontal strategy to tackle illegal content. The e-commerce in physical goods poses specific legal challenges emanating from global supply chain transformations and the nature of product regulation in the EU. It is therefore appropriate to give a brief overview of the EU *New Approach* applied to product regulation in Section 3. This will be followed by an analysis of the EU Commission's proposal for a regulation on compliance and enforcement of product legislation (Goods Package proposal)<sup>9</sup> in Section 4. The analysis will focus on the measures proposed to counter the problems of enforcing against illegal and non-compliant products in e-commerce and global supply chains. At first hand, the problems with the established concepts of *placing products on the EU market*<sup>10</sup> and the new phenomenon of Fulfilment Service Providers<sup>11</sup> (FSPs) may be specific to the supply chain and not relevant for the responsibilities of online platforms. However, this article argues that it is difficult to separate these problems because they are both rooted in two trends, which have been mutually reinforcing each other over the last two decades: digitization and globalization. In a world where off- and online business models not only converge but evolve constantly it

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<sup>1</sup> EU Commission, 'Tackling Illegal Content Online Towards an Enhanced Responsibility of Online Platforms, COM (2017) 555 Final' 4, 12.

<sup>2</sup> Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final 2016.; Proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593 final 2016.; 'Code of Conduct on Countering Illegal Hate Speech Online' (2016) <[http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf)> accessed 9 March 2017.; EU Commission, 'Guidance on Certain Aspects of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights, COM(2017) 708 Final'.

<sup>3</sup> EU Commission, 'Commission Notice on the Market Surveillance of Products Sold Online (2017/C 250/01)'.

<sup>4</sup> COM (2017) 555 final 3.

<sup>5</sup> Ecommerce Foundation, 'European Ecommerce Report 2017' (2018) <[www.e-commercefoundation.org/reports](http://www.e-commercefoundation.org/reports)> accessed 18 June 2018. E-commerce sales will have grown to €603 bn in 2018, up 13.6% from 2016, and 340% since 2009.

<sup>6</sup> OECD, 'Online Product Safety' (2016) OECD Digital Economy Papers 261 8 <[http://www.oecd-ilibrary.org/science-and-technology/online-product-safety\\_5jlnb5q93jlt-en](http://www.oecd-ilibrary.org/science-and-technology/online-product-safety_5jlnb5q93jlt-en)> accessed 23 April 2018.

<sup>7</sup> EU Commission, 'Bringing E-Commerce Benefits to Consumers - Accompanying Document SEC2011\_1640' 40.

<sup>8</sup> OECD (n 7) 15–16, 27–28.; EU Commission, 'Summary of Responses to the Public Consultation on the Evaluation and Modernisation of the Legal Framework for IPR Enforcement' (2016) 10, 41 <<http://ec.europa.eu/DocsRoom/documents/18661>> accessed 17 March 2017; Hans-Georg Koch, 'Strategies against Counterfeiting of Drugs: A Comparative Criminal Law Study', *Criminal enforcement of intellectual property: a handbook of contemporary research* (Edward Elgar 2012) 353–355.

<sup>9</sup> 2017 (COM(2017) 795 final).

<sup>10</sup> Regulation (EC) No 765/2008 of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93 2008. Article 2 (1)

<sup>11</sup> Commission Notice The 'Blue Guide' on the implementation of EU products rules 2016, Official Journal of the EU (2016/C 272/01) 2016 36.

is therefore appropriate to design common enforcement tools addressing these challenges. Section 5 will then review efforts of the Commission to fight the sale of unsafe and non-compliant food products.

The Conclusion will summarize the assessment of the Commission's initiatives to fight the sale of illegal and non-compliant products on the internet. The largely self-regulatory proposals in the areas of copyright, hate speech and fake news have tackled the issues of platform responsibility for infringing content in a more proactive way than in the area of product regulation. This may be due to the different set up and history of product regulation and its enforcement regime, which bear the marks of co-regulation. However, this article submits that the characteristics of product regulation lend themselves well to the design of more tangible and enforceable responsibilities of online platforms when it comes to preventing and acting on illegal content.

## B. Illegal Content Online and Product Safety

The objective of this paper is to analyze legal efforts in combatting the sale of unsafe and non-compliant consumer products on the internet. This section puts these issues in the wider perspective of the EU Commission's strategy to fight illegal content online, as announced in the 2017 Communication on tackling illegal content online<sup>12</sup>. Apart from commonly discussed regulatory initiatives in the areas of copyright, and hate speech, this document also refers to actions in the areas of product safety (non-food and food products), consumer protection and violent and sexually exploitative content harmful for children<sup>13</sup>. This sector specific approach recognizes the different legal frameworks which apply to different types of content hosted by various ISPs. At the same time, the Communication also acknowledges the common horizontal legal conditions laid down for all ISPs under the e-commerce Directive<sup>14</sup> (ECD). No matter what type the content hosted or made accessible by ISPs, they are not liable for it, if they have no actual knowledge of its illegality and, when obtaining such knowledge, remove it expeditiously<sup>15</sup>. Moreover, information hosts cannot be obliged to monitor proactively and in a general way their servers for infringing activity or content<sup>16</sup>.

As the spread of illegal content continues unabated across all sectors and internet platforms enjoy growing socio-economic importance, the EU has come up with legislative proposals that encourage or mandate more proactive infringement prevention measures by these platforms. The EU Commission considers online platforms to carry a significant societal responsibility because of their role in mediating access to online content<sup>17</sup>.

The recent EU regulatory advances in the areas of hate speech and copyright have been critically discussed across academia, politics and industry stakeholders. It is not the purpose of this article to add to this particular debate. Suffice it to state that some of these sectoral initiatives have been seen as contradicting the generous liability exemptions and the prohibition of general monitoring obligations under the ECD<sup>18</sup> by imposing quasi-mandatory proactive filtering mechanisms on ISPs. The Commission however has so far denied any intention to modify the ECD provisions directly. On the contrary, it sees the ECD liability framework as a key support for digital innovation in Europe.<sup>19</sup>

The Commission therefore underlines its view that voluntary proactive measures taken by online platforms to detect illegal content would not necessarily lead to a loss of the current liability privileges<sup>20</sup>. Conscious of the limitations set by the ECD, it stops short of calling for mandating these proactive detection measures for ISPs. It

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<sup>12</sup> COM (2017) 555 final.

<sup>13</sup> *ibid* 4–5.

<sup>14</sup> Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 187 2000 (ECD).

<sup>15</sup> *ibid*. Art. 14 (1 b)

<sup>16</sup> *ibid*. Articles 14 and 15, which regulate the content liability conditions for online information hosts and prohibit the imposition of general monitoring obligations. For a detailed overview see for example: Arno R Lodder and Andrew D Murray (eds), *EU Regulation of E-Commerce: A Commentary* (Edward Elgar Publishing 2017) 47–52.

<sup>17</sup> COM (2017) 555 final 2.

<sup>18</sup> See for example: 'Copyright Reform: Open Letter from European Research Centres' (24 February 2017) <<http://bit.ly/2loFISF>> accessed 21 August 2018.

<sup>19</sup> EU Commission, 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe COM(2016) 288 Final' 8.

<sup>20</sup> COM (2017) 555 final 13.

Author pre-print version (unrevised/undedited)– The final, published, revised version is available at *Maastricht Journal of European and Comparative Law* (15 July 2019). <https://doi.org/10.1177/1023263X19855073> merely concedes that “sector-specific rules for online platforms ... to help ensure the detection and removal of illegal content” could be made mandatory<sup>21</sup>. The sector specific examples cited in that Communication refer to copyright, hate speech and terrorist content<sup>22</sup>. The Recommendation on measures to tackle illegal content online<sup>23</sup> (the Recommendation), issued five months later, confirms the dedication to sector specific legislation and industry agreements in order to fight illegal content. While copyright, hate speech, counterfeit and consumer protection are mentioned in passing as examples where preventive approaches are worth pursuing, it gives significantly more attention to the fight against terrorist content online<sup>24</sup>. The Commission has written an entire Chapter on the prevention of terrorist content online. The tenor of the Chapter is that ISPs “should stake proportionate and specific proactive measures, including by using automated means, in order to detect, identify and expeditiously remove or disable access to terrorist content”<sup>25</sup>. It can only be speculated that the Recommendation may have been politically motivated by pressing public security concerns over the use of social media in facilitating acts of terrorism<sup>26</sup>. In fact, it was followed suit by a regulation proposal which seeks to impose relatively far-reaching removal and proactive identification duties of terrorist content on ISPs<sup>27</sup>. By contrast any detailed references to the fight against non-compliant products sold online or unfair commercial business-to-consumer practices have not been carried over from the September 2017 Communication.

This is somewhat at odds with the press release accompanying the Recommendation, which enlists the fight against unsafe products as one of the five initiatives in the fight against illegal content, alongside terrorist content, hate speech, child sexual abuse and breaches of IP rights<sup>28</sup>. It begs the questions how the fights against unsafe or non-compliant products fits within the entire strategy of combating illegal content online.

On 1 July 2017, the Commission published a Notice on the market surveillance of products sold online<sup>29</sup> (Commission Notice). The document acknowledges the increasing challenges of protecting consumer health and safety posed by the rise in e-commerce. It notes several trends, which have made the enforcement of product regulations more difficult over recent years. Amongst those are: difficulties of tracing products sold online throughout the supply chain and identifying responsible economic actors; an increase in sales into the EU from online business based outside the EU territory; problems for market surveillance authorities (MSAs) with conducting product risk assessments, tests or getting access to product samples; challenges in coordinating online market surveillance across the EU and a lack of consumer awareness regarding online purchases<sup>30</sup>. These developments have at their root a profound change in the supply chain and consumer habits caused by digitization and globalization, which challenge market surveillance authorities in three areas: jurisdictional scope, speed of business and traceability.

In order to better understand the specific enforcement challenges in this area it is appropriate to give a short overview of product legislation and its historic development in the EU.

## C. The New Approach and the History of Product Regulation

### I. The New Approach

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<sup>21</sup> *ibid* 12.

<sup>22</sup> *ibid* 12–14, 20.

<sup>23</sup> EU Commission, ‘Commission Recommendation of 1.3.2018 on Measures to Effectively Tackle Illegal Content Online, C(2018) 1177 Final’.

<sup>24</sup> See also ‘The EU Commission and the Tackling of Illegal Content: Is More Too Much? – Sophie Stalla-Bourdillon | Inform’s Blog’ <<https://inform.org/2018/03/11/the-eu-commission-and-the-tackling-of-illegal-content-is-more-too-much-sophie-stalla-bourdillon/>> accessed 15 June 2018.

<sup>25</sup> EU Commission, ‘C(2018) 1177 Final’ (n 24) ch III, para 36.

<sup>26</sup> *ibid* Recital 5., see also Council of the EU, ‘European Council Conclusions on Security and Defence, 22/06/2017 - Consilium’ (2017) Press Release 403/17 <<https://www.consilium.europa.eu/en/press/press-releases/2017/06/22/euco-security-defence/>> accessed 18 June 2018.

<sup>27</sup> Proposal for a regulation on preventing terrorist content online, COM(2018) 640 final 2018.

<sup>28</sup> EU Commission, ‘A Europe That Protects - Countering Illegal Content Online - Press Release’ <[http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=50096](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50096)> accessed 18 June 2018.

<sup>29</sup> EU Commission, ‘2017/C 250/01’ (n 4).

<sup>30</sup> *ibid* 2.

Today EU (non-food) product regulation is based on two key two main pieces of legislation: the General Product Safety Directive (GPSD)<sup>31</sup> and Regulation 765/2008 on market surveillance.<sup>32</sup> The GPSD specifies general safety requirements of products and respective obligations of economic operators and member states, including the actions to be taken with dangerous products, such as product recalls. Regulation 765/2008 provides detailed definitions of economic operators, such as manufacturers, importers, distributors or authorized representatives<sup>33</sup>. It also defines the responsibilities, tasks and powers of national market surveillance authorities in enforcing product regulations. It is important to state that both pieces are complemented by sector specific product legislation, which sets additional technical safety requirements for manufacturers deemed necessary by the legislator. This *lex specialis* does not significantly affect the responsibilities of economic actors and MSAs but is important on an operational level, when MSAs perform market surveillance and enforce product safety laws.<sup>34</sup>

EU product regulation in the area of non-food is dominated by the so-called *New Approach* directives<sup>35</sup>. The *New Approach* goes back to 1985 and was developed in response to the CJEU's *Cassis de Dijon* judgement<sup>36</sup>. This seminal judgement had two important implications for product legislation in Europe.

First, it laid down that only product requirements imposed by member states which answer a legitimate purpose (i.e. public interest) and which are applied proportionally could justify a breach of the free movement provisions imposed by the EU Treaties<sup>37</sup>. In response to this judgement, the EU legislator started to spell out public interest (aka essential) requirements for a variety of product areas. These essential requirements respond mainly to specific health and safety risks posed by products across certain sectors. In order to be marketed freely across the EU, products need to meet these essential requirements<sup>38</sup>. For example, the EU passed legislation laying down such essential technical (safety) requirements for electronic products within certain voltage limits<sup>39</sup>, electromagnetic compatibility<sup>40</sup>, wireless communication<sup>41</sup>, or toys<sup>42</sup>.

Secondly, *Cassis de Dijon* paved the way for the principle of mutual recognition, by which goods legally marketed in one EU member state must have access to the entire Community market<sup>43</sup>. Therefore, products that meet the essential requirements set by EU legislation can be marketed freely across the EU, no matter in which members states they were first placed on the market.

Meeting the essential requirements involves more complex technical design questions. Legislation as a regulatory tool was deemed unpractical and too inflexible in the light of market and technological developments. The Commission therefore asked private, industry-run standardization bodies to draw up technical specifications and technical (harmonized) standards, which meet the essential requirements. These technical standards then

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<sup>31</sup> Directive 2001/95/EC of 3 December 2001 on general product safety 2001.

<sup>32</sup> Regulation 765/2008.

<sup>33</sup> *ibid.* Article 2

<sup>34</sup> For a more detailed discussion: Lauren Sterrett, 'Product Liability: Advancements in European Union Product Liability Law and a Comparison Between the EU and U.S. Regime' 23 42.

<sup>35</sup> See also: 'New Legislative Framework - Growth - European Commission' (*Growth*) </growth/single-market/goods/new-legislative-framework\_en> accessed 20 June 2018.

<sup>36</sup> *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, Case 120/78* [1979] EU:C:1979:42 (CJEU) (*Cassis de Dijon*).

<sup>37</sup> *ibid.* 11.

<sup>38</sup> Any additional requirements need to be justified by the public interest and be applied proportionately. See also EU Commission, 'COMMISSION NOTICE The Blue Guide on the Implementation of EU Products Rules 2016, Official Journal of the EU (2016/C 272/01)' (2016) 59 Official Journal of the European Union 7–8; For a more detailed description: Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart Pub 2005) <<http://public.eblib.com/choice/publicfullrecord.aspx?p=270793>> accessed 19 June 2018.

<sup>39</sup> Directive 2014/35/EU of 26 February 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of electrical equipment designed for use within certain voltage limits (recast) 2014 Article 3 and ANNEX I.

<sup>40</sup> Directive 2014/30/EU of 26 February 2014 on the harmonisation of the laws of the Member States relating to electromagnetic compatibility (recast) 2014 Article 6 & ANNEX I.

<sup>41</sup> Directive 2014/53/EC of 16 April 2014 on the harmonisation of the laws of the Member States relating to the making available on the market of radio equipment and repealing Directive 1999/5/EC 2014 Article 3.

<sup>42</sup> Directive 2009/48/EC of 18 June 2009 on the safety of toys 2009 (170). Article 10

<sup>43</sup> *Cassis de Dijon* (n 37) para 14.

provided a presumption of compliance for manufacturers<sup>44</sup>. However, the standards are voluntary and manufacturers are still free to design their own technical product specifications that respond to the essential requirements. The *New Approach Directives* require that manufacturers a) create a declaration of conformity, which lists the safety directives, or regulations the product complies with and b) affix a CE Mark to the product as a public demonstration that it meets the essential requirements and can be marketed throughout the EU<sup>45</sup>.

## II. Reforming the New Approach

The *New Approach* has been considered an important contributor to EU integration.<sup>46</sup> The EU Commission meanwhile has continuously formalized, reformed and extended its standardization approach, for example through Regulations 765/2008, Decision 768/2008 and Regulation 1025/2012 on European standardization<sup>47</sup>. Initially, the *New Approach* directives focused on free trade in goods and the act of placing goods on the market. The revisions of the system through Regulation 765/2008 have put more weight on enforcement, market surveillance and the responsibilities of economic operators<sup>48</sup>. This reform resulted in the *New Legislative Framework (NLF)* of which the above-mentioned instruments are the core components.

Enforcement of product regulations remains in member states' hands. However, through Regulation 765/2008 the legislator recognized that a certain degree of horizontal coordination was needed to create a level playing field for the enforcement of product legislation and to effectively fight non-compliant products across the EU. Articles 16 to 26 of Regulation 765/2008 thus establish general requirements, obligations on the organization and procedures of market surveillance programs, as well as specific measures that MSAs must adopt when checking products and acting *vis-à-vis* economic operators. They prescribe the conduct of risk assessments on products, exchange of information between MSAs, general principles of cooperation and sharing of resources amongst member states and the European Commission. The regulation recognizes and tries to contain the complex and technical structure of market surveillance which developed mainly along national public safety concerns and vertical lines determined by the product directives. This vertical character had been reinforced by more complex technology and a subsequent elaboration of safety risk assessments and certification requirements.

Five years after Regulation 2008/765 came into force the Commission proposed a new combined instrument replacing the GPSD and the Regulation (2013 Goods Package)<sup>49</sup>. This proposal was meant to give further clarification and additional horizontal guidance on what was considered a heterogenic, highly technical regulatory framework, which started to feel the impact of e-commerce. Regarding online sales, the Commission and member states have begun realizing that further research was needed to understand the impact of this new activity on the enforcement framework and to develop a common enforcement approach<sup>50</sup>. However, the package got stuck in the legislative process over member states' disparities regarding the proposed consumer product safety regulation.<sup>51</sup>

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<sup>44</sup> Decision No 768/2008/EC of 9 July 2008 on a common framework for the marketing of products, and repealing Council Decision 93/465/EEC (Text with EEA relevance) 2008 (OJ L). Article R8

<sup>45</sup> For more detail: Jean-Pierre Galland, 'The Difficulties of Regulating Markets and Risks in Europe through Notified Bodies' (2013) 4 *European Journal of Risk Regulation* 365.

<sup>46</sup> Rob Van Gestel and Hans-W Micklitz, 'European Integration through Standardization: How Judicial Review Is Breaking down the Club House of Private Standardization Bodies' (2013) 50 *Common Market L. Rev.* 145, 156–157.

<sup>47</sup> Regulation (EU) No 1025/2012 of 25 October 2012 on European standardisation. E.g. Article 8 establishes an annual work program of standardization, Recital 10 & Article 11 extend the scope of standardization towards services.

<sup>48</sup> Other new elements of the NLF include accreditation, updates to CE marking provisions and procedural rules for conformity assessments, see also: Blue Guide 9–12.

<sup>49</sup> Proposal for a Regulation on market surveillance of products 2013 (2013/0048 (COD)).

<sup>50</sup> EU Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - 20 Actions for Safer and Compliant Products for Europe: A Multi-Annual Action Plan for the Surveillance of Products in the EU, COM/2013/076 Final'. Action 12

<sup>51</sup> European Parliament, 'Strengthening Market Surveillance of Harmonised Industrial Products - Briefing - EPRS\_BRI(2018)614696\_EN' <[http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614696/EPRS\\_BRI\(2018\)614696\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614696/EPRS_BRI(2018)614696_EN.pdf)> accessed 10 August 2018.

As part of a new reform attempt, the Commission published an ex-post evaluation of Regulation 765/2008 in 2016 (ex-post evaluation). It found that the 2008 framework had only been partially successful in stemming the flood of non-compliant products and creating a level playing field of enforcement across Europe.<sup>52</sup>

Most importantly, the Regulation's broad provisions did not reign in the complex and fragmented landscape of market surveillance and enforcement, with varying degrees of resourcing, powers and responsibilities across member states. Many member states have a decentralized system of market surveillance across the 20 or so product sectors covered by the New Legislative Framework (NLF)<sup>53</sup>. A similarly fragmented picture emerges when looking at funding and staff resources of MSAs, access to product testing facilities, sanction powers and the level of penalties that can be imposed on non-compliant operators<sup>54</sup>. As a result, cross-border cooperation between market surveillance is seen as unsatisfactory<sup>55</sup>. Cooperation between economic operators and MSAs has also been found insufficient. The relevance of the legal provisions in the GPSD and the Regulation are increasingly undermined by e-commerce and budget constraints on MSAs<sup>56</sup>.

Following the ex-post evaluation, the EU Commission started an initiative to amend the current regulatory framework on 19 December 2017. It launched a Proposal for a regulation on procedures for compliance with and enforcement of legislation on products<sup>57</sup> (Goods Package proposal). If put in place it would replace the current market surveillance framework (Articles 15 – 29 of Regulation 765/2008) and change sector *lex specialis* accordingly, but also amend certain definitions in order to “reflect the architecture of modern supply chains”<sup>58</sup>.

In the following, the challenges posed by e-commerce as exposed in the ex-post evaluation, the Commission Notice and the Commission Blue Guide will be discussed. The analysis will then be complemented by critically evaluating the solutions proposed in the Goods Package.

#### D. E-commerce and the Fight Against Unsafe Products

In the ex-post evaluation, online sales appear to be *the* trend, which has exposed most strikingly the weaknesses of product safety enforcement to act against unsafe and non-conform products in the EU<sup>59</sup>. In line with the Commission Notice,<sup>60</sup> three legal aspects are identified which have been challenged by e-commerce and the evolution of global supply chains:

- the responsibilities of MSAs,
- the concept of placing on the market,
- the responsibilities of economic operators.
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For the purpose of this article, just the two latter aspects will be dealt with in more detail. It should be sufficient to note regarding the responsibilities of MSAs that the sheer number of potentially infringing products and the elusiveness of many online offers and operators has only further exposed the fragmented nature of market surveillance in the EU. The measures proposed in the Goods Package aim at providing a stronger, binding framework for coordination of surveillance, better funding and enhanced enforcement tools. The expansion of regulatory networks through a new *Union Product Compliance Network* is at the heart of the proposal to address this challenge<sup>61</sup>. Eventually, a centralized regulatory structure as seen in the areas of pharmaceuticals or food safety may be what the Commission is hoping for. It remains to be seen whether the changes proposed will help

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<sup>52</sup> Technopolis Group and others, ‘Ex-Post Evaluation of the Application of the Market Surveillance Provisions of Regulation (EC) No 765/2008’ (2017).

<sup>53</sup> *ibid* 31–35.

<sup>54</sup> *ibid* 36–72.

<sup>55</sup> *ibid* 111–113.

<sup>56</sup> *ibid* 102–103.

<sup>57</sup> Goods Package Proposal. (Goods Package)

<sup>58</sup> *ibid*. Recital 10, and also Recitals 11 - 14

<sup>59</sup> Technopolis Group and others (n 53) 143–144.

<sup>60</sup> EU Commission, ‘2017/C 250/01’ (n 4).

<sup>61</sup> Goods Package Proposal. Articles 31-33, Recital 17

MSAs to keep at least pace with the dynamic growth in e-commerce and help stem the sales of non-compliant products. Given that the enforcement landscape is highly fragmented, involving different administrative levels across member states, varying degrees of sectorial compartmentalization<sup>62</sup>, institutional differences as well as requiring a high level of technical expertise, the EU has a huge task ahead.

### *1. The Concepts of Placing on the Market and Entering the Market*

The report finds that the concept of placing a product on the market is out of touch with the increasing complexity of supply chains in the wake of e-commerce<sup>63</sup>. Regulation 765/2008 defines placing on the market as the first making available of a product for consumption, distribution or use for commercial purposes on the Community market<sup>64</sup>. The GPSD and Regulation 765/2008 allocate the primary responsibility for the safety of a product to the producer or its EU representative who places it on the market<sup>65</sup>. However, they do not define any further the terms *placing on the market*, or *making available on the market*. They also tie certain responsibilities relating to the safety of a product to other economic operators involved along the supply chain, such as distributors<sup>66</sup>.

The emergence of e-commerce means that consumers increasingly buy products directly from internet sellers based outside the EU. The GPSD and Regulation 765/2008 do not cover this scenario. Both presume that for a given product there is either a manufacturer, its representative or an importer on the EU territory who would make that product available on the EU market for the first time and therefore assume responsibility for its safety and regulatory compliance.

The Commission Notice now tries to provide guidance as to when a non-EU entity could be considered placing a product on the EU market. It clarifies that non-EU entities shipping products directly to EU consumers can be considered as being responsible for placing the product on the EU market and therefore would need to comply with EU product legislation<sup>67</sup>. The methodology employed recalls relevant case law on determining when online traders can be considered as targeting consumers in third countries<sup>68</sup>. For example, the choice of language, accepted currencies or support of delivery to the consumer's EU address are criteria which would indicate whether EU residents are targeted<sup>69</sup>.

The Commission Notice empowers MSAs to take all necessary enforcement action prior to shipment of the goods if there is a risk that these products are dangerous. These measures could consist of at least temporarily banning supply of the product or its display<sup>70</sup>. This could therefore open the way for MSAs to request blocking orders against internet access providers of IP addresses of non-EU traders or platforms found targeting EU consumers with infringing or non-compliant products. In the area of copyright, the CJEU recently granted such a blocking order against an internet access provider of a peer-to-peer site enabling access to unlicensed content<sup>71</sup>. A distinction would need to be made between products for which non-compliance is proven and products which are only potentially non-compliant. Where a product only potentially infringes product law, MSAs would only be able to request temporary bans until compliance was proven. The practicalities of such actions are unclear. It could be indeed cumbersome to request proof of compliance from sellers or marketplace operators that are

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<sup>62</sup> Over 500 different EU MSAs currently exist in the 29 product sectors covered by New Approach legislation: EU Commission, 'Commission Staff Working Document - Impact Assessment - Proposal for a Regulation of the European Parliament and of the Council Laying down Rules and Procedures for Compliance with and Enforcement of Union Harmonisation Legislation on Products - SWD(2017) 466 Final - Part 1/4' 14., Technopolis Group and others (n 53) 82–84.

<sup>63</sup> Technopolis Group and others (n 53) 99–100.

<sup>64</sup> Regulation 765/2008. Article 2

<sup>65</sup> Directive 2001/95 (GPSD) Article 3 (1). Article 3

<sup>66</sup> *ibid* Article 5 (2), (3).

<sup>67</sup> EU Commission, '2017/C 250/01' (n 4) 5–6.

<sup>68</sup> *L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd and others*, C-324/09 [2011] EU:C:2011:474 (CJEU) or *Peter Pammer v Reederei Karl Schlüter GmbH & Co KG; Hotel Alpenhof GesmbH v Oliver Heller*, *Joined Cases C-585/08 and C-144/09* [2010] EU:C:2010:740 (CJEU). Also cited in EU Commission, '2017/C 250/01' (n 4) 5 and Footnote 34.

<sup>69</sup> EU Commission, '2017/C 250/01' (n 4).

<sup>70</sup> *ibid*.

<sup>71</sup> *Stichting Brein v Ziggo BV, XS4ALL Internet BV, C-610/15* [2017] EU:C:2017:456 (CJEU).



Author pre-print version (unrevised/undedited)– The final, published, revised version is available at *Maastricht Journal of European and Comparative Law* (15 July 2019). <https://doi.org/10.1177/1023263X19855073> established beyond the EU's jurisdictional scope. Meanwhile, the pitfalls and inefficacies of IP blocking are an open secret.

Maybe the complexity of this issue, both in terms of jurisdiction and practical enforcement, explain why the Commission, despite identifying it as a major problem, did not provide any further clarification on *placing on the market* in its new Goods Package proposal. The Commission wants to put more emphasis on surveillance, product traceability and enforcement vis-à-vis economic operators, once the products have entered the supply chain. In the Blue Guide, it already admitted that, realistically, enforcement would only be possible once the product has reached EU customs. Given the number of small parcels entering the EU each year due the growth in e-commerce this seems to be an uphill struggle under the current enforcement regime<sup>72</sup>. Moreover, under the present fragmented and insufficiently coordinated surveillance framework, it is unlikely to expedite enforcement actions against these non-EU consignors, such as requesting proof of compliance or conducting product testing<sup>73</sup>.

Therefore, the Commission proposes a new status for “products entering the Union market”. It concerns all products from third countries intended for placement on the EU market. These goods are put under the release for free circulation procedure under to the Union Customs Code, which means that they are subject to all customs procedures before officially released<sup>74</sup>. At the same time, non-EU manufacturers, who have no designated EU importer for their product, would now need to nominate a *person responsible for product compliance information* within the EU if they place products on the EU market<sup>75</sup>. This is supposed to give MSAs better enforcement possibilities.

In conjunction with this, the new proposal creates a dedicated legislative framework for product checks at the EU's customs borders<sup>76</sup>. The focus here is on better and faster information sharing to avoid different treatment of products at different EU entry points and duplication of work. The nomination of designated authorities in charge of control on products entering the Union<sup>77</sup> is supposed to further facilitate horizontal exchange of information on high risk and non-compliant products and operators. The provisions on products entering the market also closes the gap with more recent EU risk management measures in the area of supply chain security. Article 29 of the Goods Package proposal thus affords preferential treatment to authorized economic operators (AEOs) as designated by the Union Customs Code<sup>78</sup>. This is a welcome step. AEOs have demonstrated enhanced security, due diligence, operational and financial standards and a clean sheet concerning compliance with customs and tax rules<sup>79</sup>. They are thus already subject to lighter and expedited security and customs checks. It seems logic that they would now also be afforded expedited treatment regarding product compliance checks, which also relieves MSA of some work.

In turn MSAs would now be able to focus on products entering the EU market where there is no economic operator within the EU, i.e. the rising number of small consignments ordered from non-EU sellers. While an increase in these checks is not expressly stated, the Goods package proposal<sup>80</sup> aims at targeting non-compliant shipments in a better way through improved risk assessments gained from enhanced information sharing and cooperation with supply chain intermediaries and advanced analytics<sup>81</sup>.

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<sup>72</sup> EU Commission, ‘Commission Staff Working Document - Impact Assessment - Proposal for a Regulation of the European Parliament and of the Council Laying down Rules and Procedures for Compliance with and Enforcement of Union Harmonisation Legislation on Products - SWD(2017) 466 Final - Part 3/4’ 646–650. An estimated 188 million of small consignments entered the EU in 2013.

<sup>73</sup> EU Commission, ‘Goods Package Proposal - Impact Assessment 1/4’ (n 63) 23–25.

<sup>74</sup> Goods Package Proposal. Recitals 1, Article 3 (21), according to the Regulation (EU) No 952/2013 of 9 October 2013 laying down the Union Customs Code (recast) 2013. Article 201.

<sup>75</sup> Goods Package Proposal. Article 4 (1)

<sup>76</sup> *ibid.* Recitals 6-8, 38, 39; Articles 26 – 30 (Chapter VII)

<sup>77</sup> *ibid.* Article 26 (1)

<sup>78</sup> Regulation 952/2013 (Union Customs Code). Section 4 (Articles 38 – 41)

<sup>79</sup> *ibid.* Article 39

<sup>80</sup> Goods Package Proposal. Article 15 (1)

<sup>81</sup> EU Commission, ‘Goods Package Proposal - Impact Assessment 3/4’ (n 73) 607. Such intermediaries can be parcel services, or payment service providers.

Overall it seems more realistic to focus on better enforcement and risk management within the Union rather than attempting to tie responsibilities and chase actions from economic actors far beyond reach of authorities. However, much depends also on whether MSA can indeed generate the efficiency savings outlined in a foreseeable time frame. The proposal is up against a dynamically increasing e-commerce sector and a constantly evolving supply chain business. In the context of these developments, the absence of quantitative data and models, it seems, will make the establishment of risk-based compliance checks a challenge.

## *II. The Responsibilities of (New) Economic Operators*

The Commission Notice on products sold online provides a more detailed analysis of economic operators in the supply chain of consumer products. It identifies two new actors that have become more prominent due to e-commerce: fulfilment service providers and e-commerce marketplaces (platforms)<sup>82</sup>. The Commission Notice attempts to interpret these new business models in the light of Regulation 765/2008 and the GPSD. It attempts to give guidance following previous observations on these new actors in the Blue Guide<sup>83</sup>. Meanwhile the ex-post evaluation report also elaborates on specific problems these new operators pose to the current scope of regulation 765/2008<sup>84</sup>.

### *1. Fulfilment Service Providers (FSPs)*

FSPs, also referred to as third-party logistics (3PL) providers or fulfilment houses, have proliferated with the rise of e-commerce. While the concept of outsourced logistics is not new, it had previously been used mainly in a B2B context<sup>85</sup>. However, as new internet sellers emerge, and traditional brick and mortar retailers go online, FSPs have turned to answer the demand of tailored B2C shipment, storage and stock management solutions for products ordered online. A small online seller, which faces increasing demand for its products or which offers products requiring special handling, may decide to have part or all of his logistics managed by an FSP. This could entail goods storage, order preparation, packaging, shipment, customer returns, and additional services, such as inventory management and supply chain analytics<sup>86</sup>. Some of the advantages for the seller are that they do not need to deal with up-front investments for storage of goods, may incur lower fulfilment costs and efficiency savings by benefitting from economies of scale and the logistics expertise of FSPs.

The ex-post evaluation report states that MSAs have found it difficult to apply the current definitions of economic operators offered by Regulation 765/2008 to FSPs. This is especially the case where online traders based outside the EU use FSPs within the Community territory to ship goods to EU customers. Some MSAs have suggested introducing a stand-alone economic operator definition for FSPs or amending the current definition of importer<sup>87</sup>.

Meanwhile, the Blue Guide notes the large variety of FSP business models and concludes that they could be classed as distributors, importers or authorized representatives, with the connected responsibilities as per Regulation 765/2008 and the GPSD<sup>88</sup>. The Commission Notice attempts to provide clarification by examining different FSP business models and determine criteria for classification as economic operators<sup>89</sup>.

In order to be classified as a manufacturer or authorized representative, a FSPs would need either to apply their own trademark/brand name to the products or be in possession of a mandate from the manufacturer to perform certain tasks relating to the products. It is not clear, however, whether this scenario is a common one in the current market.

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<sup>82</sup> EU Commission, '2017/C 250/01' (n 4) 6–11.

<sup>83</sup> Blue Guide 36–38.

<sup>84</sup> Technopolis Group and others (n 53) 74, 98–100.

<sup>85</sup> 3PL Central, '2018 State of the Third-Party Logistics Industry' (2018) <<https://info.3plcentral.com/hubfs/2018-state-of-the-third-party-logistics-industry-3pl-central.pdf>> accessed 7 February 2018.

<sup>86</sup> C Dwight Klappich and others, 'Warehousing and Fulfillment Vendor Guide' 38., /> accessed 2 July 2018.

<sup>87</sup> Technopolis Group and others (n 53) 99.

<sup>88</sup> Blue Guide 36.

<sup>89</sup> EU Commission, '2017/C 250/01' (n 4) 7.

Classifying FSPs as importers proves even more ambiguous, as both the terms of importer and placing on the market are not explained by Regulation 765/2008. The Commission Notice therefore simply states that it is more likely that an FSP qualifies as an importer if there is no manufacturer or authorized representative for the product and if the FSP places the product on the market<sup>90</sup>. This appears to be consistent with the interpretation that in lack of such an FSP or any EU presence, the seller itself would be considered as placing the product on the market (see Section 4.1.). An FSP would most likely need to mitigate this risk by asking the seller to employ a customs broker and register for tax purposes in the EU<sup>91</sup> before it receives and ships the products.

Additionally, FSPs may be considered as manufacturers where their activities affect the safety of the product. This may be the case where the product is repackaged, or its structure and composition is otherwise affected in the course of storage and transportation. The latter aspects could become important for products, which require specific handling and storage, such as for example cosmetics, medical devices or even batteries<sup>92</sup>.

FSPs, which do not fall under any of the above activities, but whose service go beyond those of pure parcel services, would be considered distributors. Distributors would be subject to certain due care requirements relating to the products they handle. This includes knowledge and verification of the applicable product compliance requirements (CE marking, labelling, language requirements), ensuring proper handling conditions, ensuring traceability of the product and acting on suspected incidences of non-compliance<sup>93</sup>. Given the structure of the current FSP market most FSPs would be classed at least as distributors.

From an enterprise risk management perspective, the differences between being a distributor or importer/authorized representative are substantial. It certainly sounds logic to class FSPs at least as distributors, but additional clarification of the terms importer and economic operator would help in the light of e-commerce.

The Impact Assessment to the proposed Goods Package states that the emergence of FSPs and e-commerce platforms have created legal uncertainties for both MSAs and businesses, leading to enforcement gaps<sup>94</sup>. Meanwhile, the Expert Group on the Internal Market for Products recommends including FSPs into a revised regulation on market surveillance<sup>95</sup>.

The Goods Package proposals appears to take account of this by broadening the economic operator definition. For a start, it includes additional definitions of economic operators where they appear in sector and product *lex specialis*<sup>96</sup>. Secondly, a more general clause has been created which includes “any other natural or legal person established in the Union and other than a distributor, who warehouses, packages and ships products to or within the Union market”<sup>97</sup>. This suggests that FSPs, where they cannot be recognized as distributor, importers, etc. would still be seen as economic operators. However, there are no specific responsibilities attached to entities falling under this new clause. As it seems to be most likely that FSPs would be seen at least as distributors, or importers<sup>98</sup>, with the connected due diligence requirements as per the GPSD, it is not clear what this new category, without any specific responsibilities, is good for. The Commission Notice and the Goods proposal are contradictory in that respect.

This proposal provides a contrast to the area of trademark infringement, where FSP Fulfilment by Amazon (FBA) was recently absolved of any responsibilities for the rights infringing nature of products stored and shipped on

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<sup>90</sup> *ibid* 8.

<sup>91</sup> See for example: ‘UK Import’ <<https://www.shipwire.com/w/support/uk-import/>> accessed 3 July 2018.

<sup>92</sup> These products may, for example, require expiry date management, temperature control, special protections against physical damage etc.

<sup>93</sup> Blue Guide 34–36; Directive 2001/95 (GPSD). Article 5 (2, 3), Decision 768/2008. Article R5

<sup>94</sup> EU Commission, ‘Goods Package Proposal - Impact Assessment 1/4’ (n 63) 22–23.

<sup>95</sup> SWD(2017) 466 Final - Part 2/4’ 125.

<sup>96</sup> Goods Package Proposal. Article 3 (12) For example the Batteries Directive empowers member states to require economic operators to participate in battery collection schemes: Directive 2006/66/EC of 6 September 2006 on batteries and accumulators and waste batteries and accumulators, Article 8 (2)

<sup>97</sup> Goods Package Proposal. Article 3 (12 (h))

<sup>98</sup> Regulation 765/2008. Article 2 (7)

behalf of an online seller<sup>99</sup>. In this case, the Regional High Court (*Oberlandesgericht*) of Munich decided that a third-party service provider who stores a variety of goods for a variety of customers (online sellers in this case) could not be obliged to systematically verify for each product whether it infringed law. The court likened the protection of the FSP to that of internet hosts under the ECD<sup>100</sup>. This judgement would appear to conflict with the possible future responsibilities of an FSP who is classed as a distributor as per the GPSD and Decision 765/2008.<sup>101</sup> An FSP, which is classed as a distributor would have verification obligations with regards to product compliance. At the same time, it would, at least in Germany, not be held to verify whether the product could be counterfeit. Meanwhile the case was appealed to the German Federal Court of Justice, which referred it to the CJEU for clarification<sup>102</sup>. It requests confirmation of whether the activity of FBA impacted on the exclusive marketing and distribution rights of the applicant under the EU Trademark Regulation<sup>103</sup>.

## 2. E-commerce Platforms

### 2.1 A New Supply Chain Actor? The Disputed Role of E-commerce Marketplaces

Online marketplaces offer sellers and retailers the opportunity to reach a wider clientele. The third-party seller business is booming<sup>104</sup>. The network effects generated by the large e-commerce platforms, such as AliExpress, Amazon or eBay, offer smaller sellers a unique opportunity to reach an international and even global audience. Meanwhile cross border and global e-commerce is being expanded rapidly mainly through e-commerce platforms<sup>105</sup> with millions of items ordered every day.

The ex-post evaluation highlights the problems MSAs have when enforcing product regulation vis-a-vis e-commerce platforms. For example, MSAs are unclear over the exact role that e-commerce platforms play within the increasingly complex supply chain of products sold online.<sup>106</sup> While the traditional large marketplaces mentioned above dominate e-commerce in Europe there also a number of regional or sector specific marketplaces. E-commerce is diversifying further as social networks and other players, such as Google, launch their own marketplaces. Additionally, in-app e-commerce through messaging services is gaining in popularity. Some online sales may not even take place via a screen any longer but be entirely based on voice commands<sup>107</sup>.

Meanwhile, non-compliant products remain a problem on e-commerce platforms. The OECD states that unsafe, previously recalled or banned products, and those with incorrect labelling information are more likely to be found on e-commerce platforms than on retailer websites<sup>108</sup>.

The Commission Notice states that e-commerce platforms are protected under the ECD's generous liability provisions from monitoring their sites for infringing products on a general basis<sup>109</sup>. They will only need to remove infringing content once notified of it. MSAs therefore face a sheer impossible task if they want to identify and enforce on all infringing products on e-commerce marketplaces. The largest marketplace platforms sell across a wide range of products groups, including consumer electronics, medical devices, cosmetics, toys, protective equipment, foodstuffs, etc. Some MSA in Europe are proactively working with large marketplace

<sup>99</sup> *Versand durch Amazon* [2016] OLG München 29 U 745/16, GRUR-Prax 2017 380.

<sup>100</sup> *ibid* 63.

<sup>101</sup> Decision 768/2008. Article R5

<sup>102</sup> *Davidoff Hot Water III*, I ZR 20/17 - [2018] BGH DE:BGH:2018:260718BIZR20.17.0, BeckRS 2018 19562. The CJEU reference for this pending case is C-567/18.

<sup>103</sup> Regulation (EU) 2017/1001 on the European Union trade mark 2017 (OJ L 154, 16 6 2017). Article 9 (3b)

<sup>104</sup> Ecommerce Foundation, 'European Ecommerce Report 2018 Edition' (2018) <[www.e-commercefoundation.org/reports](http://www.e-commercefoundation.org/reports)> accessed 5 July 2018. For example, over 50% of worldwide e-commerce units are sold by Amazon third party sellers alone.

<sup>105</sup> *ibid*. Online marketplaces eBay, AliExpress and Amazon are responsible for 47% of cross border e-commerce worldwide.

<sup>106</sup> Technopolis Group and others (n 53) 90.

<sup>107</sup> 'How Conversational Commerce Is Changing E-Commerce' (*Content Harmony*®, 28 June 2016)

<<https://www.contentharmony.com/blog/conversational-commerce/>> accessed 5 July 2018.

<sup>108</sup> OECD (n 7) 7; Bundesnetzagentur, 'Statistik Der Marktüberwachung 2016'

<[https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Verbraucher/WeitereThemen/Marktueberwachung/StatistikMarktueberwachung2016.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundesnetzagentur.de/SharedDocs/Downloads/DE/Sachgebiete/Telekommunikation/Verbraucher/WeitereThemen/Marktueberwachung/StatistikMarktueberwachung2016.pdf?__blob=publicationFile&v=3)> accessed 20 March 2017.

<sup>109</sup> Directive 2000/31 (ECD). Articles 12 - 15

operators on a voluntary basis to achieve the expedited removal of non-compliant products<sup>110</sup>. However, proactive cooperation in preventing non-compliant products remains patchy.

In the face of the ECD, the EU legislator sees little scope to get these information hosts engage in more proactive infringement prevention duties. The Commission Notice rehearses the exemptions of the ECD and concedes that there is no chance under the current framework to oblige e-commerce platforms, which qualify for the liability exemption of information hosts, to monitor proactively for unsafe and non-compliant products. Instead, it advises MSAs to focus on manufacturers and distributors, in this case the sellers on these platforms, which offer infringing products<sup>111</sup>. However, even with enhanced and improved enforcement tools offered by the Goods Package, it is doubtful whether these purely reactive measures will be effective, especially where sellers are based outside of the EU.

Whether e-commerce platforms should or should not be subject to more onerous monitoring duties is currently subject to intensive discussion, as can be seen from recent legislative proposals in the areas of copyright or hate speech mentioned above. However, the Goods Package proposal does not seek to consider demanding more proactive prevention measures from platforms. It just highlights the (limited) enforcement options available to MSAs under the ECD, namely notice-and-takedown vis-a-vis products, seller accounts, websites or domain names<sup>112</sup>. In addition, the more inclusive definition of economic operators is also unlikely to capture e-commerce platforms<sup>113</sup>. E-commerce platforms appear therefore to be out of scope of the enhanced enforcement tools, which the Goods Package is supposed to create. If this is the case, one wonders whether an important opportunity has been missed in order to fight more effectively and efficiently the flood of unsafe and non-compliant products.

Despite this rather conservative approach towards platform liability there appears to be at least an underlying discussion over enhanced duties of e-commerce platforms. According to the ex-post evaluation, MSAs have requested enforcement tools to punish online platforms which repeatedly sell non-compliant products<sup>114</sup>. The Impact Assessment of the Goods package proposal reveals that some MSAs have demanded that online platforms be included in the list of economic operators accountable for product conformity<sup>115</sup> and asked for a revision of the ECD to create better enforcement tools against these actors<sup>116</sup>.

Meanwhile, the Commission guidance on the Unfair Commercial Practices (UCP) Directive gives the clearest legal indication to what extent e-commerce platforms could be made accountable for the integrity of products sold via their sites. The Guidance reminds that the ECD applies without prejudice to the level of protection for public health and consumer interests and therefore complements the EU consumer acquis<sup>117</sup>. An online platform, which qualifies as a trader under the UCP Directive, could therefore be subject to professional diligence requirements commensurate to their specific field of activity<sup>118</sup>. To qualify as a trader, a platform would need to engage in commercial practices “directly connected with the promotion, sale or supply of a product to consumers”<sup>119</sup>. It would be hard to argue that e-commerce platforms are not engaged in this way. This could mean that they are held to “designing their web-structure in a way that enables third party traders to present

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<sup>110</sup> Department for Business, Energy & Industrial Strategy, ‘UK National Market Surveillance Program January 2016 - January 2017’ 20 <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539110/BIS-16-115UKNMSP-UK-National-Market-Surveillance-Program.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539110/BIS-16-115UKNMSP-UK-National-Market-Surveillance-Program.pdf)> accessed 17 February 2017.

<sup>111</sup> EU Commission, ‘2017/C 250/01’ (n 4) 12.

<sup>112</sup> Goods Package Proposal. Article 2 (4), Recitals 13, 16. Under a Notice-and-Takedown process user or MSAs inform marketplaces of allegedly illegal content. The latter are obliged to investigate these notifications and need to remove content if found illegal or infringing. ECD, Article 14 (1b)

<sup>113</sup> The additional economic operator definition offered in Article 3 (12) (h) of the proposal just extends to entities which warehouse, package and ship products.

<sup>114</sup> EU Commission, ‘Goods Package Proposal - Impact Assessment 2/4’ (n 96) 447.

<sup>115</sup> Technopolis Group and others (n 53) 165–167.

<sup>116</sup> EU Commission, ‘Goods Package Proposal - Impact Assessment 2/4’ (n 96) 125.

<sup>117</sup> EU Commission, ‘Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices SWD(2016) 163’ 126. Directive 2000/31 (ECD). Article 1 (3)

<sup>118</sup> EU Commission, ‘UCP Directive Guidance’ (n 118) 126–127.

<sup>119</sup> Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (‘Unfair Commercial Practices Directive’). Article 2 (d)

information to platform users in compliance with EU marketing and consumer law”<sup>120</sup>. Failure to do so could, according to the guidance, lead to the loss of the liability exemption under ECD.

## 2.2 Current legislative proposals – a missed opportunity?

It is disappointing that this guidance has not been utilized to create better enforcement possibilities against e-commerce platforms in the proposed Goods Package. This hesitation is even more surprising as at least some of the *lex specialis* referred to in the economic operator definitions of the Goods Package<sup>121</sup> do provide for obligations relating to online sales. For example, the Energy-labelling<sup>122</sup> and Toys Safety Directives<sup>123</sup> require that specific product information (warnings, energy efficiency classification) is made visible to consumers, which includes online sales. While these are manufacturer requirements, distributors, according to the Toys Safety Directive, for example, must “act with due care in relation to applicable requirements”<sup>124</sup>. According to the UCP guidance, this would mean that an online marketplace could be held accountable for providing sellers with the possibility to display mandatory energy-labelling information or toys safety warnings to customers as part of their professional diligence requirements.

The economic operator definition could for example have been worded in a way that opens the opportunity of including e-commerce platforms (as was done for FSPs). On the other hand, it might be still possible that MSAs or courts to find that e-commerce marketplaces are involved in the “supply of a product for distribution, consumption or use” and thus be seen as distributor<sup>125</sup>. This would make sense as these platforms occupy a key position between manufacturer/seller and consumer within the supply chain and are in a position to technically provide sellers with the opportunity to comply with online labelling requirements<sup>126</sup>. From this activity to auditing whether sellers comply with the requirement should be a trivial step for a platform operator. Were platforms found to be distributors, this could even become a legal requirement<sup>127</sup> as part of any proper due diligence and risk management framework.

There is a chance here to construct or at least open the possibility within the legislation towards specific and transparent due diligence requirements for e-commerce, at least where *lex specialis* requires product labelling and consumer information<sup>128</sup>. Platforms could hold sellers to fill in certain regulatory information on a mandatory basis<sup>129</sup>. Compliance with this could be audited through regular data queries and reporting. Moreover, e-commerce platforms have an intrinsic interest to gather product, sales and traffic data from sellers and customers. Requiring that they use this data for the purposes of consumer protection by helping to prevent the sale of unsafe and non-compliant products would make common sense. However, despite the CJEU judgement in *L’Oréal*<sup>130</sup> the Goods Package does not appear to challenge further the liability protections of the ECD in the context of big data or explore further the concept of diligent economic operator<sup>131</sup>.

<sup>120</sup> EU Commission, ‘UCP Directive Guidance’ (n 118) 126.

<sup>121</sup> Goods Package Proposal. Article 3 (1) (a) – (g)

<sup>122</sup> Regulation (EU) 2017/1369 of 4 July 2017 setting a framework for energy labelling and repealing Directive 2010/30/EU 2017 (OJ L). Article 5 (1a)

<sup>123</sup> Directive 2009/48. Article 11 (2) and E Commission, ‘Toy Safety Directive 2009/48/EC - An Explanatory Guidance Document Ref. Ares(2016)1594457’ 42–43.

<sup>124</sup> Directive 2009/48. Article 7 (1)

<sup>125</sup> Regulation 765/2008 765. Articles 2 (1), (6) and Goods Package Proposal. Articles 3 (1), (10)

<sup>126</sup> Jonathan Cave and Ben Edward Nathaniel Cave, ‘Nudging EConsumers: Online Ecolabelling as Part of the Green Internet’ [2012] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2141967>> accessed 29 June 2018. Thibault Verbiest and others, ‘Study on the Liability of Internet Intermediaries, Markt 2006/09/E’ 20–23.

<sup>127</sup> Decision 768/2008. Article R5

<sup>128</sup> E-Commerce platforms demand a variety of product data from their sellers (photos, dimensions, price, product descriptions, SKU/GTIN etc.) which are displayed in a structured way on the website.

<sup>129</sup> Toys and Eco-Labelling are just two examples, but similar requirements may exist for medical devices, cosmetics, chemicals or for product recycling, etc.

<sup>130</sup> *L’Oréal v eBay* (n 69) para 111.

<sup>131</sup> *ibid* 120–122.

Alternatively, platforms could be obliged to provide interfaces for regulators enabling them to search for non-compliant information<sup>132</sup>. Compared to other areas subject to online infringements (e.g. hate speech, copyright, trademarks), enforcement in the area of product regulation can build on a strong institutional framework and technical expertise<sup>133</sup>. There is a chance here to combine that technical experience in market surveillance with the innovative analytical tools of e-commerce marketplaces as they gather, analyze and monetize product and sales (big) data on their platforms. Such cooperation could serve as a model for the areas of copyright, hate speech or trademark infringements when defining transparent and accountable infringement prevention procedures. The recent debate controversial debate over the copyright directive proposal<sup>134</sup> shows that obliging online platforms on a purely self-regulatory basis, without public oversight, to oversee the legality of content, is indeed controversial. Meanwhile, the current purely reactive notice-and-takedowns are too little to stem the flood of non-compliant products sold via these platforms. It is submitted here that a useful compromise could be the creation of co-regulatory technical standards of infringement prevention<sup>135</sup>. The area of product regulation could provide a useful blueprint how such a system could be constructed. Under a co-regulatory approach, platforms and MSAs could be brought together to create procedures and due diligence standards for preventing and detecting non-compliant product and how to deal with unsafe products and sellers. Regulators would be able to give technical assistance with regards to the large variety of regulatory product requirements, risk assessments and procedural requirements. Platforms would implement risk management systems and processes taking into account their specific business model and making use of their closeness to sellers, customers and the huge amount of traffic, sales and product related data they own<sup>136</sup>.

Eventually, national and EU regulators could make use of their expertise in technical standardization. They could develop essential requirements for e-commerce platform due diligence (with regards to product compliance) and mandate the development of technical standards to achieve such requirements.

### 2.3 The Product Safety Pledge – voluntary agreement with e-commerce platforms

On 25 June 2018, the Commission announced an initiative with four major e-commerce platforms regarding the safety of products sold by third-party sellers<sup>137</sup>. This initiative, called the Product Safety Pledge, follows similar initiatives made with online platforms in the area of Hate speech (Code of Conduct) and Counterfeits (Memorandum of Understanding). The online marketplaces commit to more structured notice-and-takedown criteria, such as reacting within two days to notices of non-compliant products submitted by MSAs and react to customer notices within five days. Once offers have been removed, the platforms also agree to processes that will sanction repeat offenders and prevent the reappearance of removed product listings. While these measures are in accordance with duties already imposed by EU case law<sup>138</sup>, the agreement tries to reach further. Marketplaces will nominate single contact points for notices provided by MSAs and undertake to work proactively with authorities to identify and prevent the sale of dangerous products. It is probably more remarkable that the platforms have committed to work with MSAs in proactively preventing banned products and informing and training third-party sellers on their product safety compliance obligations. Point 12 of the agreement states that the four platforms would “explore the potential use of new technologies and innovation

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<sup>132</sup> For example, the German Bundesnetzagentur, developed a product search interface with the eBay search engine. This was possible because the eBay has made its search engine code publicly accessible. (Information gained from an interview with Bundesnetzagentur in December 2017)

<sup>133</sup> See Section 3.

<sup>134</sup> ‘Parliament to Review Copyright Rules in September | News | European Parliament’ (7 May 2018)

<<http://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september>> accessed 6 July 2018.

<sup>135</sup> See for example: Carsten Ullrich, ‘A Risk-Based Approach towards Infringement Prevention on the Internet: Adopting the Anti-Money Laundering Framework to Online Platforms’ (2018) 26 *International Journal of Law and Information Technology* 226.

<sup>136</sup> Jacob Rowbottom, ‘If Digital Intermediaries Are to Be Regulated, How Should It Be Done?’ (*Media Policy Project*, 16 July 2018)

<<http://blogs.lse.ac.uk/mediapolicyproject/2018/07/16/if-digital-intermediaries-are-to-be-regulated-how-should-it-be-done/>> accessed 7 August 2018.

<sup>137</sup> EU Commission, ‘Product Safety Pledge Voluntary Commitment of Online Marketplaces with Respect to the Safety of Non-Food Consumer Products Sold Online by Third Party Sellers’

<[https://ec.europa.eu/info/sites/info/files/voluntary\\_commitment\\_document\\_4signatures3-web.pdf](https://ec.europa.eu/info/sites/info/files/voluntary_commitment_document_4signatures3-web.pdf)> accessed 20 September 2018.

<sup>138</sup> Such as *L’Oréal v eBay* (n 69).

to improve the detection of unsafe products.”<sup>139</sup> While the latter action items remain vague, it may still testify to the overall mounting pressure on platforms to take more responsibilities in tackling illegal content online.

Meanwhile, the key performance indicators (KPIs) agreed are thin. Two indicators will merely measure the processing times of notices submitted by MSAs and of removals identified by platforms through monitoring the EU Rapid Alert System for Dangerous Non-Food Products systems<sup>140</sup>. The data, provided every six months, will hardly provide proof on whether the agreed proactive measures have shown any success. This reminds of the Memorandum of Understanding on Counterfeit products, concluded in 2011, with a similar basic set of KPIs. The success of this MoU, which was concluded in 2011, and especially the transparency of the KPIs remain disputed<sup>141</sup>.

However, the voluntary commitment can be seen as getting close to the due care obligations imposed on distributors in the supply chain of products as per Decision 768/2008<sup>142</sup>. The agreement could be a warning shot to online platforms to take more responsibility for dangerous and illegal third-party products. The strategy should be familiar by now. If the EU legislator finds that the voluntary commitments lack tangible results it may bring more decisive action through legislation à la Copyright Directive, AVMSD or the recently Proposed regulation on preventing terrorist content online<sup>143</sup>.

## E. Market Surveillance of Food Products

### I. Food Safety Law in the EU

The fight against unsafe food sold online is also part of the Commission’s broad initiative to enhance the responsibilities of online platforms<sup>144</sup>. However, the Communication does not provide any further reference to this topic. The Commission refers to a recommendation on a coordinated e-commerce control programme, launched in July 2017, just two months before its Communication<sup>145</sup>. This 2-page document, which is accompanied by a 3-page Technical Annex, recommends that member states create a coordinated plan to conduct official controls on novel foods and novel food ingredients sold via the internet<sup>146</sup>. However, it is not immediately visible how these initiatives correspond to the Communication, and the Recommendation, which is focusing on mainly on enhanced responsibilities for online platforms.

Food law is subject to a separate regulatory regime in the EU<sup>147</sup>. Although food products are covered by the GPSD, Regulation 765/2008 only applies to non-food products and clearly excludes food from its scope of application<sup>148</sup>. In fact, a comprehensive food law and food safety enforcement regime, based mainly on regulations, exists already since 2006 in the EU (the Hygiene Package<sup>149</sup>). The hygiene package encompasses provisions regarding food safety and consumer protection, market surveillance and enforcement (food controls), labelling requirements and certain categories of food (novel foods, organic products, etc.) as well as animal feeds. A European scientific authority (European Food Safety Authority), which supports risk assessments, communication and enforcement decisions, was created.

<sup>139</sup> EU Commission, ‘Product Safety Pledge’ (n 138).

<sup>140</sup> ‘Rapid Alert System for Dangerous Non-Food Products - European Commission’ <[https://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/alerts/repository/content/pages/rapex/index\\_en.htm](https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/content/pages/rapex/index_en.htm)> accessed 24 September 2018.

<sup>141</sup> EU Commission, ‘Overview of the Functioning of the Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet, SWD(2017) 430 Final’ 11–12.

<sup>142</sup> Decision 768/2008. Art. R5

<sup>143</sup> Copyright Directive Proposal. Art 13, Proposed AVMSD amendment. Art 28a, COM(2018) 640 final. Art 6

<sup>144</sup> COM (2017) 555 final 3.

<sup>145</sup> ‘Commission Recommendation of 24.7.2017 on a Coordinated Control Plan on the Official Control of Certain Foods Marketed through the Internet, C(2017) 4986 Final’.

<sup>146</sup> *ibid.*

<sup>147</sup> For more detail: EU Commission: ‘General Food Law - Food Safety - European Commission’ (*Food Safety*) <[/food/safety/general\\_food\\_law\\_en](https://ec.europa.eu/food/safety/general_food_law_en)> accessed 6 July 2018.

<sup>148</sup> Regulation 765/2008 765. Article 15 (4)

<sup>149</sup> Agnieszka Biliska and Ryszard Kowalski, ‘Food Quality and Safety Management’ (2014) 10 *Scientific Journal of Logistics* 351, 353.



The general objectives of EU food law are the protection of human life and health as well as consumer interests<sup>150</sup>. An EU harmonized risk management and the precautionary principle are the main regulatory tools employed to reach these objectives<sup>151</sup>. Food regulation is considered relatively complex and, arguably, one of the most tightly regulated areas in the EU. Consequently, it is seen as stricter and as more harmonized than regulation in the area of non-food products listed above in Section 5<sup>152</sup>. The reasons for this can be seen in the special social, cultural and political perceptions attached to food production and food consumption, as well as its high impact on human health<sup>153</sup>. In general, the responsibility for food safety is allocated to the economic operators involved along the entire supply chain, from production to retail. The EU legislators set the framework conditions by mandating the use of established quality management principles such as HACCP or GHP<sup>154</sup>. These are bolstered by a variety of voluntary industry standards the use of which is actively encouraged by the EU<sup>155</sup>. The regulator is mainly concerned with market surveillance and enforcement. A detailed and harmonized system of official controls<sup>156</sup> and registrations<sup>157</sup> has been set up. Economic operators at all stages of the supply chain are subject to official controls by member state competent authorities “regularly, on a risk basis and with appropriate frequency”<sup>158</sup>. Unlike in the New Approach areas, EU and national authorities are not involved in mandating technical standards and overseeing accreditations.

## *II. Enforcing Food Safety in E-commerce*

The EU and member states have been confronted at least since 2007 with the challenges of e-commerce in respect of food law<sup>159</sup>. The sale of food online may pose a number of specific problems: new market entrants may need to be familiar with the risks and requirements of storing and shipping food to consumers (e.g. complying with a cold chain, managing expiry dates). Web traders may not be aware of business registration requirements, restrictions on certain foodstuffs and ingredients from outside the EU or specific labelling requirements<sup>160</sup>. Food products are offered both by EU based traders or platforms, offering products from non-EU supplies or sellers, and from non-EU sellers and platforms.

The Commission currently sees the regulatory framework as fit for the digital single market<sup>161</sup>. First, the provisions in place before the emergence of online food retail have been confirmed as applying to the current environment. Online food traders are considered food business operators and therefore must comply with food safety requirements as per general food law<sup>162</sup>. This includes compliance verification and labelling requirements. In addition, like any other offline operator they need to be registered with member states

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<sup>150</sup> Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety 2002 2. Article 5 (1)

<sup>151</sup> Regulation 178/2002. Articles 5 - 7

<sup>152</sup> Luis Vaqué, ‘The Proposed EU Consumer Product Safety Regulation and Its Potential Conflict with Food Legislation’ (2014) 9 *European Food and Feed Law Review* : EFLL 161.

<sup>153</sup> *ibid* 168.

<sup>154</sup> Regulation (EC) No 852/2004 of 29 April 2004 on the hygiene of foodstuffs 2004. Recital 11, Article 1 (d), (e); Hazard Analysis and Critical Control Points (HACCP) and (Good Hygiene Practice (GHP) are internationally recognized quality management systems in the food sector.

<sup>155</sup> *ibid* Recital 44. and Regulation 178/2002. Article 5 (3)

<sup>156</sup> Regulation (EU) 2017/625 of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products. 2017 (OJ L). Chapter II Articles 9 - 27

<sup>157</sup> Regulation 852/2004. Article 6

<sup>158</sup> Regulation 2017/625 625. Article 9

<sup>159</sup> Bundesamt für Verbraucherschutz und Landwirtschaft (BVL), ‘BVL/FLEP Conference on European Approaches to Risk Based Official Controls in Food Businesses, Including e- Commerce’ <[http://www.flep.org/downloads/workshops/2010/Risk\\_based\\_controls\\_conf\\_Berln\\_day2summary.pdf](http://www.flep.org/downloads/workshops/2010/Risk_based_controls_conf_Berln_day2summary.pdf)> accessed 10 August 2018.

<sup>160</sup> For more detail: Dirk W Lachenmeier and others, ‘Does European Union Food Policy Privilege the Internet Market? Suggestions for a Specialized Regulatory Framework’ (2013) 30 *Food Control* 705, 708–709.

<sup>161</sup> Andrea Gavinelli (EU Commission), ‘E-Commerce Control of Food - EU Action Plan’ (25 November 2016)

<[https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp\\_plenary\\_20161125\\_pres\\_04.pdf](https://ec.europa.eu/food/sites/food/files/safety/docs/adv-grp_plenary_20161125_pres_04.pdf)> accessed 13 August 2018.

<sup>162</sup> Regulation 178/2002 2. Articles 3 (2) and (3), 16 and 19

authorities and, depending on their activity, may require authorizations<sup>163</sup>. Secondly, the law has been adjusted to take account of e-commerce. New food labelling rules, passed in 2011, explicitly state that mandatory food labelling information (except expiry dates) will need to be made available by web shops before the consumer makes a purchase decision<sup>164</sup>. In 2017, the EU legislator adjusted its market surveillance and official controls framework to the e-commerce environment. The new Official Controls Regulation, passed in 2017, empowers competent authorities to order product samples anonymously and to suspend the internet sites of non-compliant operators for an “appropriate period of time”<sup>165</sup>.

This will equip authorities with the legal toolset to step up enforcement and official controls. It remains to be seen, however, whether it will help enforcement bodies catch up with the rapidly growing food online retail.<sup>166</sup> The sheer number of products available both from food operators within the EU as well as those targeting EU consumers from outside is staggering. Member states’ food law enforcement authorities have been coordinating their activities since 2010 and conducted regular checks of products and online operators. In 2014, the EU initiated a training programme for control authorities to effectively conduct e-commerce controls of foodstuffs. An official e-commerce working group on food law enforcement under the auspices of the EU Commission (DG Sante) has been put in place in 2016<sup>167</sup>. As a result, the EU launched a coordinated control program on online offered food. Subsequently a Recommendation on an e-commerce control program was issued in July 2017<sup>168</sup>. Using a risk-based approach, the recommendation identified the sale of food supplements with medicinal claims (e.g. diet pills, sports nutrition, etc.) and the sale non-authorized novel foods as the most conspicuous problems. Its first series of coordinated internet food controls came up with high instances of noncompliant novel foods and nutritional supplements across Europe, noting the presence of US and China based traders targeting EU consumers. It noted that a large amount of products were offered by brokers which were merely acting as platforms for the sale of these products<sup>169</sup>. The Commission concludes that it has established contacts with major e-commerce platforms, including social media. However, it admits that more needs to be done to “remind the main players of e-commerce such as platforms, payment services and the traders themselves of their responsibilities, to ask for their contributions to increase the safety of online offered foods and to reduce offers which mislead consumers”<sup>170</sup>. This is annotated with a reference to the Commission Communication on enhancing platform responsibilities<sup>171</sup>.

There is no further assessment available as to what extent e-commerce marketplaces hosting food offers from third party sellers can be considered as needing to comply with food law. This is surprising seeing the obvious prevalence and importance of e-commerce platforms in online food retail. Like Section 4, it can be argued that marketplaces play a role as distributors because of their crucial role in making offers widely available to consumers. At the very least, they would have some contributory role within the supply chain of these products. As demonstrated above, food safety and labelling requirements are extensive, and distributors have compliance verification requirements concerning food law. Following the provisions of the UCP and the EU Commission Guidance<sup>172</sup> on e-commerce referred to in the previous section, it could be argued that platforms would at least need to follow some due diligence when it comes to enabling sellers to display mandatory food labelling information to consumers. Along this logic, failing to do so could, arguably, result in them affecting the safety of

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<sup>163</sup> Clemens Comans, ‘Onlinehandel Mit Lebensmitteln – Mit Den Projekten „ELKE“ Und „G@zielt“ Auf Dem Weg Zu Einer Funktionierenden Überwachung Des Onlinehandels’ (2015) 10 *Journal für Verbraucherschutz und Lebensmittelsicherheit* 109, 110.

<sup>164</sup> Regulation 1169/2011 of 25 October 2011 on the provision of food information to consumers 2011. Recital 27, Article 14; for more detail: Lomme van der Veer, ‘Product Liability for Online Food Suppliers’ [2015] *Eur. Food & Feed L. Rev.* 286.

<sup>165</sup> Regulation 2017/625. Articles 35, 135 (2i)

<sup>166</sup> Comans (n 164); Lachenmeier and others (n 161); Dr Frank Alleweldt, ‘Scoping Study Delivering on EU Food Safety and Nutrition in 2050 - Scenarios of Future Change and Policy Responses Final Report’ Final report 334, 154.

<sup>167</sup> Gavinelli (EU Commission) (n 162).

<sup>168</sup> ‘Commission Recommendation of 24.7.2017 on a Coordinated Control Plan on the Official Control of Certain Foods Marketed through the Internet, C(2017) 4986 Final’ (n 146).

<sup>169</sup> EU Commission, ‘The First EU Coordinated Control Plan on Online Offered Food Products - Analysis of the Main Outcome of the Implementation of the Commission Recommendation on a Coordinated Control Plan on the Official Control of Certain Foods Marketed through the Internet, Ref. Ares(2018)893577’ (2018) <[https://ec.europa.eu/food/sites/food/files/oc\\_oof\\_analysis\\_main\\_outcome\\_en.pdf](https://ec.europa.eu/food/sites/food/files/oc_oof_analysis_main_outcome_en.pdf)> accessed 8 October 2018.

<sup>170</sup> *ibid.*

<sup>171</sup> COM (2017) 555 final.

<sup>172</sup> EU Commission, ‘UCP Directive Guidance’ (n 118).

products and thus entail liability. Platforms determine the design and layout of product pages, decide on the placement of complementary adverts to generate additional revenue and collect extensive traffic and sales data. They have an interest that sellers display product information in a consistent and clear way to consumers to optimize the shopping experience. This all infers a certain level of control over the content hosted and a subsequent level of applicable due care along the lines of settled EU case law<sup>173</sup>.

## F. Conclusion

This paper has analyzed EU regulatory initiatives in the areas of product regulation and food law aimed at tackling the ongoing problem of illegal and unsafe products sold online. These initiatives are part of a wider, horizontal strategy of the EU to fight illegal content on the internet by enhancing the responsibilities of online platforms. The Goods Package proposed by the Commission tries to address the challenges brought about by e-commerce in a much less hawkish way than in the area of copyright or hate speech. This may be due to the specific nature and history of product regulation in Europe, which has been characterized by the *New Approach*. Product requirements are defined through technical standards managed by industry with the state retaining but a general oversight function along essential requirements. Regulatory activity focuses on market surveillance and enforcement, which is highly technical and fragmented along product sectors and national boundaries. E-commerce and the revolution of global supply chains have found this system unprepared to deal with the continuing influx of new, unsafe or illegal products. It lacks in flexibility and speed of communication, coordination and action. The measures proposed in the Goods Package however still bear the marks of the *New Approach*. The focus is on the improvement of traditional enforcement tools, cooperation amongst regulators, and a better legal grip on new supply chain actors, such as FSPs and e-commerce platforms.

The Blue Guide and the Commission Notice on the market surveillance of products sold online see FSPs at least as distributors, if not importers or manufacturers. The Goods Package proposal now directly targets FSPs by creating a new category of economic operators. While MSAs may now have clear surveillance and enforcement means vis-a-vis FSPs, no proactive responsibilities, such as the due care requirements applicable to distributors under GPSD are specified in the proposals. Meanwhile, the failure to deal more decisively with e-commerce platforms is puzzling. E-commerce platforms are in a unique position as product (information) aggregators and enablers of online sales. Their importance is set to rise even further. The UCP Directive guidance provides a justification for proactive due diligence requirements of e-commerce platforms when enabling the sale of consumer products, which is in line with the ECD. It is regrettable that the Goods Package proposal did not develop this further. It could have applied its *New Approach* expertise creatively by prescribing risk management obligations for ISPs commensurate with the products sold on their platforms. E-commerce platforms would need to demonstrate that they are aware of the regulatory requirements and risks applying to these products. They would need to enable sellers to meet regulatory labelling and information requirements and audit this for high-risk products and activities. These activities could eventually develop into more formal standards, which define the contributions of platforms to meet essential requirements of product regulation and the GPSD. It is submitted here that a classification of both FSPs and e-commerce platforms as distributors could create the legal basis for these duties.

This indecisiveness is replicated in the area of online food sales. Again, there is an emphasis on traditional enforcement and surveillance in the form of coordinated internet controls and checks in the face of a vast influx of illegal or unsafe products through the internet. Meanwhile, the more proactive role platforms could play to prevent the availability of these products is barely touched on. There could have been a chance here to apply to e-commerce platforms some of the risk management principles required of economic operators in the food supply chain. This is even more surprising as food law has been adapted to the online environment for manufacturers and distributors by imposing specific labelling and registration requirements.

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<sup>173</sup> *L'Oréal v eBay* (n 69).

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