

## II

*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES  
AND AGENCIES

## EUROPEAN COMMISSION

## COMMISSION NOTICE

**on the market surveillance of products sold online***(Text with EEA relevance)**(2017/C 250/01)***Contents**

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## INTRODUCTION

The internet has changed how consumers shop and businesses advertise and sell their goods and services. E-commerce enables consumers and businesses to interact differently and increases consumer welfare because of lower online prices and greater choice <sup>(1)</sup>. E-commerce is experiencing rapid growth and has the potential to contribute considerably to the growth objectives of the European Union (EU) <sup>(2)</sup>.

However, the development of e-commerce poses certain challenges regarding the protection of the health and safety of consumers and other end-users from dangerous non-food products and/or products that do not comply with the requirements set out in Union harmonisation legislation on products ('non-compliant products') <sup>(3)</sup>. In this regard, and compared to offline, market surveillance authorities in the Member States face numerous difficulties, of which the following are examples:

- (i) difficulties with regard to tracing products offered for sale online and identifying the responsible economic operators;
- (ii) the increase in the number of economic operators located outside the territory of the EU offering products for sale online; this includes sales directly to EU consumers and other end-users, renders the enforcement of product rules challenging;
- (iii) challenges in conducting risk assessments or safety tests due to the lack of physical access to products;
- (iv) difficulties in sampling products for testing, as relevant laws in certain Member States do not permit purchases to be made online or anonymous purchases (such as mystery shopping);
- (v) challenges in the application of Directive 2001/95/EC of the European Parliament and of the Council on general product safety (General Product Safety Directive) <sup>(4)</sup> as well as of Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products <sup>(5)</sup> related to the online environment;
- (vi) lack of awareness among consumers and businesses about buying and selling safe and compliant products online.

The objective of this Notice is to assist Member State authorities in the enforcement of EU legislation on the safety and compliance of non-food products. This document refers to tangible goods and excludes non-embedded software and applications. The Notice concerns the application of the General Product Safety Directive and of Regulation (EC) No 765/2008, the two main legislative acts governing market surveillance and safety and compliance of products in online sales. The Notice also sets out good practices for the market surveillance of products sold online and for communication with businesses and consumers.

<sup>(1)</sup> A 2011 consumer market study by Civic Consulting on the functioning of e-commerce and internet marketing and selling techniques for retail goods estimated that a single EU e-commerce market with an e-commerce share of 15 % would generate consumer welfare gains (from lower online prices and increased consumer choice) of EUR 204,5 billion per year.

<sup>(2)</sup> According to data from 2015, 65 % of those who use the internet for private purposes have also purchased online goods or services over the course of a year. Source: Eurostat.

<sup>(3)</sup> See Commission Notice — The 'Blue Guide' on the implementation of EU product rules 2016 (OJ C 272, 26.7.2016, p. 1).

<sup>(4)</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, p. 4).

<sup>(5)</sup> Regulation (EC) No 765/2008 of the European Parliament and of the Council 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 (OJ L 218, 13.8.2008, p. 30).

Improved enforcement of EU rules for products sold online contributes to ensuring that non-food products are safe and compliant and further contributes to the protection of the health and safety of consumers or other end-users within the EU. Improved product safety and compliance in e-commerce increases trust in online markets and leads to e-commerce development. Better enforcement also helps ensure a level playing field among economic operators in the traditional and online supply chains and among operators located in and outside the EU. This Notice therefore contributes to one of the priorities of the Commission: the further development of the Digital Single Market.

This Notice is addressed to the Member States and to Iceland, Liechtenstein and Norway as signatories of the Agreement on the European Economic Area <sup>(6)</sup> (EEA). References to the EU, the Union or the Single Market should therefore be understood as referring to the EEA, or to the EEA market.

This Notice is intended to contribute to a better understanding of EU product legislation and to a more uniform and coherent application of that legislation in terms of products sold online. It takes into account discussions with Member State authorities and stakeholders in a collaborative process that extended from 2013 to 2016.

This Notice is intended purely as a guidance document — only the text of the Union legislation itself has legal force. It aims to provide advice based on the existing collective experiences and best practices. The information is of a general nature only and does not specifically address any particular individuals or entities.

Only the Court of Justice of the European Union is competent to authoritatively interpret EU law. The views expressed in this document cannot prejudge the position that the European Commission might take before the Court of Justice. Neither the European Commission nor any person acting on behalf of the European Commission is responsible for any use that may be made of the following information.

As this Notice reflects the state of the art at the time of drafting, the guidance offered may be modified at a later date.

#### PART A. APPLICABLE LEGAL FRAMEWORK FOR PRODUCTS SOLD ONLINE

Part A offers guidance on the application of the General Product Safety Directive and Regulation (EC) No 765/2008 to products <sup>(7)</sup> sold online.

The purpose of the General Product Safety Directive is to ensure that products placed on the Union market are safe. It sets out the requirements for organising and conducting market surveillance on the health and safety aspects of non-food consumer products. This includes products that are supplied or made available to consumers, for use by them, as part of a provision of services. It applies to all non-food consumer products as far as there are no specific provisions with the same objective in EU legislation governing the safety of the products concerned <sup>(8)</sup>. As a result, it acts as a safety net as it covers consumer products not covered by more specific provisions of EU product legislation.

Regulation (EC) No 765/2008 which aims to ensure a high level of protection of public health and safety in general, health and safety of users in the workplace, the environment etc., sets out the requirements for organising and conducting of market surveillance of all consumer and non-consumer products covered by Union harmonisation legislation on products <sup>(9)</sup>. Regulation (EC) No 765/2008 applies to all products insofar as there are no specific provisions with the

<sup>(6)</sup> OJ L 1, 3.1.1994, p. 3.

<sup>(7)</sup> Pursuant to Article 2(a) of the General Product Safety Directive, 'product' means any product — including in the context of providing a service — which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned. Pursuant to Article 15(4) of Regulation (EC) No 765/2008, a 'product' means a substance, preparation or good produced through a manufacturing process other than food, feed, living plants and animals, products of human origin and products of plants and animals relating directly to their future reproduction.

<sup>(8)</sup> Article 1(2) of the General Product Safety Directive.

<sup>(9)</sup> For a non-exhaustive list of Union harmonisation legislation on products, see Annex I of Commission Notice C(2016) 1958 final of 5 April 2016, *The 'Blue Guide' on the implementation of EU product rules 2016*, available at [http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item\\_id=7326&lang=en&title=%E2%80%98Blue-Guide%E2%80%99-on-the-implementation-of-EU-product-rules](http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=7326&lang=en&title=%E2%80%98Blue-Guide%E2%80%99-on-the-implementation-of-EU-product-rules)

same objective, nature or effect in other rules of Union harmonisation legislation<sup>(10)</sup>. Moreover, sector specific legislation applies to online sales of energy products<sup>(11)</sup> to complement EU energy labelling and ecodesign regulations<sup>(12)</sup> that aim to reduce energy consumption and ensure consumer information.

For the General Product Safety Directive and Regulation (EC) No 765/2008 to be applicable, it must first be assessed whether or not the product is supplied in the context of a commercial activity. Products are supplied in the context of a commercial activity by way of online sales when they are offered for sale by an online operator<sup>(13)</sup> to consumers or other end-users in the EU. Generally, products are offered for sale online in return for payment. Nevertheless, the supply of products free of charge can under certain conditions also constitute a commercial activity<sup>(14)</sup>. Consumer to consumer (C2C) sales are generally not considered commercial activities<sup>(15)</sup> and therefore are not governed by the General Product Safety Directive or by Regulation (EC) No 765/2008.

The following three main aspects of the EU legal framework are considered as the most relevant for online sales:

- the concept of ‘placing on the market’;
- the responsibilities of market surveillance authorities; and
- the responsibilities of the economic operators concerned.

The following chapters outline the interpretation of these three issues in relation to online sales.

## 1. The concept of ‘placing on the market’ in the context of online sales

### 1.1. The concept of placing on the market in general

The General Product Safety Directive, Regulation (EC) No 765/2008 and Union harmonisation legislation apply, within their respective scopes, to products that are placed on the Union market irrespective of the selling techniques, including distance selling and online selling<sup>(16)</sup>. Regardless of the selling technique, products must therefore be safe and comply with the applicable legislation when placed on the EU market.

Regulation (EC) No 765/2008 defines the term ‘placing on the market’ as ‘the first making available of a product on the [Union] market’ and defines the term ‘making available on the market’ as ‘any supply of a product for distribution, consumption or use on the [Union] market in the course of a commercial activity, whether in return for payment or free of charge’<sup>(17)</sup>. These concepts have legal implications in terms of identifying responsible economic operators<sup>(18)</sup> and their respective obligations under the Union harmonisation legislation on products, as explained in detail in the ‘Blue Guide’<sup>(19)</sup>.

The General Product Safety Directive does not use the term ‘first making available on the market’ and it uses the concepts of ‘placing on the market’, ‘supply’ and ‘making available’ indistinctly, without defining either concept<sup>(20)</sup> <sup>(21)</sup>. Under the General Product Safety Directive, the economic operators are identified based on whether their activity would affect the safety properties of the products<sup>(22)</sup>. At the same time, in the context of the General Product Safety Directive,

<sup>(10)</sup> Recital 5 of Regulation (EC) No 765/2008.

<sup>(11)</sup> See e.g. Commission Delegated Regulation (EU) No 518/2014 of 5 March 2014 on the labelling of energy-related products on the internet.

<sup>(12)</sup> An overview of the harmonised legislation setting the requirements for energy efficient products is available on <https://ec.europa.eu/energy/en/topics/energy-efficiency/energy-efficient-products>.

<sup>(13)</sup> Online operators are manufacturers, producers, importers or distributors as defined by the General Product Safety Directive and Regulation (EC) No 765/2008, respectively, operating online.

<sup>(14)</sup> Article 2(a) of the General Product Safety Directive and Article 2(1) of Regulation (EC) No 765/2008.

<sup>(15)</sup> Nevertheless, whether a C2C product is being supplied as part of a commercial activity or not must be assessed on a case-by-case basis, taking into account all the relevant criteria such as regularity of supplies and intention of the supplier etc.

<sup>(16)</sup> Recital 7 of the General Product Safety Directive.

<sup>(17)</sup> Article 2 of Regulation (EC) No 765/2008.

<sup>(18)</sup> For example, the importer is the economic operator who places products on the market, whereas the distributor is the economic operator who makes them available on the market, see Article 2(5) and (6) of Regulation (EC) No 765/2008.

<sup>(19)</sup> Commission Notice C(2016) 1958 final.

<sup>(20)</sup> For example Article 1(1), Article 2(a), Article 3(1), Article 5(2) and (3). In addition, the General Product Safety Directive also refers in this context to ‘supply’ (e.g. Article 2(a), third subparagraph of Article 5(1), Article 5(2), and recital 6).

<sup>(21)</sup> The definitions set out in Regulation (EC) No 765/2008 cannot be transposed mutatis mutandis for the purpose of the General Product Safety Directive.

<sup>(22)</sup> For example, the definition of a ‘producer’ includes ‘professionals in the supply chain, insofar as their activities may affect the safety properties of a product’, while ‘distributor’ means ‘any professional in the supply chain whose activity does not affect the safety properties of a product’.

'placing on the market' could be considered as covering the various stages of the supply chain, including the 'first' making available of the product on the market and also subsequent making available (for example by a distributor) or supply (for example in the context of providing a service <sup>(23)</sup>).

As a result, products covered by the Union harmonisation legislation and products covered by the General Product Safety Directive must be safe from the moment of their first being made available on the Union market <sup>(24)</sup>.

## 1.2. *The concept of 'placing on the market' in e-commerce*

In the e-commerce business models, products can reach consumers or other end-users through different channels.

a) The manufacturer <sup>(25)</sup>, the importer <sup>(26)</sup>, the distributor <sup>(27)</sup> or the producer <sup>(28)</sup> is established in the EU

If the manufacturer, the importer, the distributor or the producer is established in the EU, only the selling technique is different <sup>(29)</sup> compared to cases where products are offered in traditional brick-and-mortar shops. Products offered for sale online to consumers and other end-users on the Union market by the manufacturer, the importer, the distributor or the producer established in the EU are considered to be placed on the Union market. Therefore, they need to comply with the applicable EU product legislation.

b) The manufacturer <sup>(30)</sup>, the importer <sup>(31)</sup>, the distributor <sup>(32)</sup> and the producer <sup>(33)</sup> are established outside the EU

EU product legislation also applies to cases where online sellers based outside the EU target consumers or other end-users in the EU. As a result, if the producer, the manufacturer, the importer and the distributor are established outside the EU, it is necessary to first establish whether the offer from the online seller based outside the EU targets consumers or other end-users within the EU in order to assess whether a product is placed on the Union market.

The assessment must be done on a case-by-case basis by ascertaining whether it is apparent from the website and the online seller's overall activity that it intends selling products to consumers or other end-users in the Member States. The following aspects could be considered: the international nature of the activity, use of a language and currency (for example the euro) of the Member States, a domain name registered in one of the Member States, geographical areas to which dispatch is possible <sup>(34)</sup>.

If an online operator delivers to addresses in the EU, accepts currencies used in the EU as payment for the product from consumers or other end-users within the EU and uses any EU language, the operator has directed its activities to EU consumers or other end-users in the EU.

The physical fulfilment to consumers or other end-users in the EU of an order for a product from a given online seller based outside the EU, including by a fulfilment service provider regardless of whether it is based in or outside the EU <sup>(35)</sup>, gives irrefutable confirmation that a product is placed on the EU market. Member State authorities are empowered to take the necessary actions before the physical fulfilment of an order as implied by the wording of both the General Product Safety Directive and Regulation (EC) No 765/2008 <sup>(36)</sup>.

<sup>(23)</sup> Article 2(a) of the General Product Safety Directive.

<sup>(24)</sup> See, in particular, Article 3(1) of the General Product Safety Directive.

<sup>(25)</sup> Within the meaning of Regulation (EC) No 765/2008.

<sup>(26)</sup> Within the meaning of Regulation (EC) No 765/2008.

<sup>(27)</sup> Within the meaning of Regulation (EC) No 765/2008 or of the General Product Safety Directive.

<sup>(28)</sup> Within the meaning of the General Product Safety Directive.

<sup>(29)</sup> Recital 7 of the General Product Safety Directive clarifies that that Directive should apply to products irrespective of the selling techniques, including distance and electronic selling.

<sup>(30)</sup> Within the meaning of Regulation (EC) No 765/2008.

<sup>(31)</sup> Within the meaning of Regulation (EC) No 765/2008.

<sup>(32)</sup> Within the meaning of Regulation (EC) No 765/2008 or of the General Product Safety Directive.

<sup>(33)</sup> Within the meaning of the General Product Safety Directive.

<sup>(34)</sup> See also Judgment of the Court of Justice of the European Union of 12 July 2011, Case C-324/09, L'Oréal/eBay, paragraph 65 and Judgment of the Court of Justice of the European Union of 7 December 2010 in joined Cases C-585/08 and C-144/09 Peter Pammer v Reederei Karl Schlüter GmbH & Co KG, C-585/08, and Hotel Alpenhof GesmbH v Oliver Heller, C-144/09.

<sup>(35)</sup> For fulfilment service providers see Section 3.2 of this Notice.

<sup>(36)</sup> For example, Article 8(1)(d) of the General Product Safety Directive states that measures can be taken for any product that could be dangerous, for the period needed for the various safety evaluations, checks and controls, temporarily to ban its supply, the offer to supply it or its display; see also Article 16(2) and Article 15(4) in conjunction with Article 2(17) of Regulation (EC) No 765/2008.

Thus, if the manufacturers, the distributors or the producers are based outside the EU and direct their offers of products for sale online to the Union market, they need to comply with the requirements of the applicable EU product legislation.

## 2. Roles and responsibilities of market surveillance authorities

The relevant authorities in the Member States are responsible for conducting market surveillance and competent for checking if products sold online are safe and comply with EU product legislation. In addition, for products purchased from web-shops operated from third countries and subsequently imported into the EU, the authorities responsible for external border controls also are competent<sup>(37)</sup> to intervene when it concerns the safety and compliance of the products<sup>(38)</sup>.

## 3. Roles and responsibilities of economic operators

Selling products online generates considerable differences compared to brick-and-mortar shops in terms of both the selling techniques and supply chains used. In this chapter, the different types of economic operators that play a role in the supply chains of products sold online must be analysed in light of the applicable EU legislation and possible enforcement actions of the competent market surveillance authorities.

### 3.1. Producers, manufacturers, authorised representatives, importers and distributors

The obligations of producers and distributors under the General Product Safety Directive also apply to products that are sold online<sup>(39)</sup>. Producers must ensure that the products they place on the Union market are safe and distributors must act with due care to help ensure compliance with the applicable safety requirements<sup>(40)</sup>. The Directive also specifies the range of measures which can be taken by Member State authorities against products covered by the Directive in a manner proportional to the seriousness of the risk and taking due account of the precautionary principle<sup>(41)</sup>.

Union harmonisation legislation and Regulation (EC) No 765/2008 define<sup>(42)</sup> each category of actor involved in the product supply chain: the manufacturer, the authorised representative, the importer and the distributor. Their specific responsibilities are defined in the Union harmonisation legislation in proportion to their role and involvement in the supply chain. The manufacturer has the highest level of responsibility as it manufactures the product and, therefore, knows the product and is able to assess and manage all potential risks at the design and manufacturing stages. The importer<sup>(43)</sup> and distributor have less responsibility as they do not intervene in the production and conformity assessment phases. The 'Blue Guide' describes each category of economic operator in detail and provides information about their roles and obligations. This also applies to the online supply chain.

### 3.2. Fulfilment service providers

#### 3.2.1. The roles of fulfilment service providers in the online supply chain

Fulfilment service providers represent a new business model generated by e-commerce. These entities provide services to other economic operators. They generally store products and, after receiving the orders, package the products and ship them to customers. They may also deal with returns. There is a wide range of business models for delivering fulfilment services. Some fulfilment service providers offer extensive services, while others only provide a basic level of service. Their size and scale also differ, from global operators to micro businesses.

<sup>(37)</sup> In some cases the decision on compliance and safety has to be taken by market surveillance authorities, while in other cases customs and market surveillance authorities are the same organisation. This depends on how national market surveillance authorities are organised at national level.

<sup>(38)</sup> Article 27(1) and (3) of Regulation (EC) No 765/2008.

<sup>(39)</sup> Recital 7 of the General Product Safety Directive clarifies that that Directive should apply to products irrespective of the selling techniques, including distance and electronic selling.

<sup>(40)</sup> Articles 3 and 5 of the General Product Safety Directive.

<sup>(41)</sup> Article 8 of the General Product Safety Directive.

<sup>(42)</sup> The definitions of economic operators (manufacturer, authorised representative, importer and distributor) and their responsibilities are contained in Regulation (EC) No 765/2008. Furthermore, Decision No 768/2008/EC of 9 July 2008 of the European Parliament and of the Council on a common framework for the marketing of products (OJ L 218, 13.8.2008, p. 82) contains model provisions to be integrated in product-related legislation and more than 10 'new approach' Directives already contain these standard provisions: e.g. the Toy safety, Low voltage, Civil explosives Directives, etc. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0082:0128:en:PDF>. The guidance applies without prejudice to more specific definitions of economic operators and related requirements set out in sector specific legislation.

<sup>(43)</sup> The importer, however, has a higher level of responsibility than the distributor.

This new business model of fulfilment service providers raises questions linked to their responsibilities under the EU product legislation. This is the case especially when the economic operator providing the goods is located outside the EU and the agreement to supply the product is concluded directly between that economic operator and the consumer or other end-users in the EU, without any identifiable economic operator within the EU to be held accountable (for example, an importer or an authorised representative). In such a case, the only identifiable actor in the supply chain in the EU is often the fulfilment service provider. Experience has shown that their readiness to collaborate with authorities varies significantly.

Products offered by online operators can be stored by fulfilment service providers located in the EU to guarantee swift delivery to the EU consumers and other end-users. Accordingly, products stored by such fulfilment service providers could be considered to have been supplied for distribution, consumption or use in the Union market and, thus, placed on the Union market, especially if they have been released for free circulation before being stored in the fulfilment house<sup>(44)</sup>.

### 3.2.2. *The responsibilities of fulfilment service providers in the online supply chain*

To assess possible responsibilities of fulfilment services providers under the EU product legislation, national market surveillance authorities need to know if the fulfilment service provider is a responsible economic operator as defined by EU product legislation.

#### 3.2.2.1. Manufacturers within the meaning of Regulation (EC) No 765/2008 or producers within the meaning of the General Product Safety Directive

Manufacturers are defined as any natural or legal person who manufactures a product or has a product designed or manufactured, and places it on the market under his own name or trademark<sup>(45)</sup>. Fulfilment service providers usually provide services for storing, packing and delivering products that have already been manufactured by an economic operator. However, if they present themselves as manufacturers by affixing their name or trademark on the products, fulfilment service providers should be considered as manufacturers within the meaning of Regulation (EC) No 765/2008.

If fulfilment service providers present themselves as the manufacturer by affixing to the product his name, trade mark or other distinctive mark, or if they recondition it, they should be considered as producers under the General Product Safety Directive<sup>(46)</sup>. Moreover, in accordance with Article 2(e)(iii) of the General Product Safety Directive a professional in the supply chain is considered as a producer insofar as his activity may affect the safety properties of the product<sup>(47)</sup>. To affect the safety properties of a product means in particular to modify its structure, composition or presentation in a way that poses a risk to health and safety of persons<sup>(48)</sup>. Therefore, if fulfilment service providers are in the supply chain and their activities affect the safety properties of the product, they should be considered as producers under the General Product Safety Directive.

#### 3.2.2.2. Authorised representatives within the meaning of Regulation (EC) No 765/2008 or the manufacturers' representatives within the meaning of the General Product Safety Directive

Under Regulation (EC) No 765/2008, the authorised representative is any natural or legal person established in the EU who has received a written mandate from the manufacturer to act on his behalf in relation to specified tasks<sup>(49)</sup>. Fulfilment service providers can be considered to be authorised representatives if they are located in the EU and have a formal written mandate from the economic operator that manufactures and markets the goods, authorising them to act on their behalf in relation to specific tasks.

For fulfilment service providers located in the EU to be considered as manufacturers' representatives under the General Product Safety Directive, they need to be specifically mandated as such by the manufacturer from the third country<sup>(50)</sup>.

<sup>(44)</sup> This explanation does not attempt to deal with the question of intermediary liability and the term 'online operator' used in this context may not cover such intermediaries.

<sup>(45)</sup> Point 3 of Article 2 of Regulation (EC) No 765/2008.

<sup>(46)</sup> Article 2(e)(i) of the General Product Safety Directive.

<sup>(47)</sup> Article 2(e) (iii) of the General Product Safety Directive.

<sup>(48)</sup> See Article 2(b) of the General Product Safety Directive.

<sup>(49)</sup> Point 4 of Article 2 of Regulation (EC) No 765/2008.

<sup>(50)</sup> Article 2(e) of the General Product Safety Directive.

### 3.2.2.3. Importers within the meaning of Regulation (EC) No 765/2008 and/or within the meaning of the General Product Safety Directive

Under Regulation (EC) No 765/2008, importers are defined as natural or legal persons established in the EU who place a product from a third country on the Union market<sup>(51)</sup>. Fulfilment service providers do not place products they store on the market if they are not the ones first offering the products for distribution, consumption or use on the Union market. In such a case, fulfilment service providers only receive the products from the online vendor for subsequent services and are therefore unlikely to be considered as importers as defined by the Union harmonisation legislation on products. However, case-by-case analysis might show that fulfilment service providers are importers as defined by the Union harmonisation legislation<sup>(52)</sup>.

Unlike Regulation (EC) No 765/2008, the General Product Safety Directive does not define the importer; it considers importers as producers under certain circumstances (in particular, if there is no representative of the manufacturer in the EU)<sup>(53)</sup>. To allow effective application of this concept, fulfilment service providers can be considered as importers under the General Product Safety Directive if the products they store, label, package etc. come from outside the EU and they place them on the Union market.

### 3.2.2.4. Distributors within the meaning of Regulation (EC) No 765/2008 and within the meaning of the General Product Safety Directive

Where they are not considered to be manufacturers, authorised representatives or importers, and their activities go beyond those of parcel service providers that provide clearance services, sorting, transport and delivery of parcels<sup>(54)</sup>, fulfilment service providers are considered to be distributors within the meaning of Regulation (EC) No 765/2008.

Under the General Product Safety Directive, a distributor means any professional in the supply chain whose activity does not affect the safety properties of a product<sup>(55)</sup>. Under Article 2(f) of the General Product Safety Directive, 'affecting the safety properties of the product' has the same meaning as under Article 2(e)(iii) of that Directive. If, after a case-by-case assessment of their specific activities, it is found that fulfilment service providers do not affect the safety properties of a product, under the General Product Safety Directive they can be considered as distributors in the supply chain unless their activities do not go beyond those of parcel service providers<sup>(56)</sup>.

In practice, it means that fulfilment service providers that qualify as distributors have the following responsibilities based on the Union harmonisation legislation and the General Product Safety Directive:

- (1) Distributors<sup>(57)</sup> must act with due care when making products available on the market<sup>(58)</sup>. This obligation refers to the behaviour of any reasonable and ordinarily prudent operator trying to prevent harm. Distributors must be able to demonstrate to market surveillance authorities that they have acted with due care<sup>(59)</sup>.
- (2) Distributors<sup>(60)</sup> have to verify, before making products available on the market:
  - (a) that products, if applicable, bear the CE marking (if eligible) or other legally required marking,
  - (b) that necessary information accompanies the product (e.g. user safety instructions, the EU Declaration of Conformity),

<sup>(51)</sup> Point 5 of Article 2 of Regulation (EC) No 765/2008.

<sup>(52)</sup> An indication might be the name, registered trade mark, and contact address on the product and/or accompanying documentation.

<sup>(53)</sup> Article 2(e) of the General Product Safety Directive.

<sup>(54)</sup> Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (the Postal Services Directive) (OJ L 15, 21.1.1998, p. 14). See also Section 3.3.3 of this Notice on postal services providers.

<sup>(55)</sup> Article 2(f) of the General Product Safety Directive.

<sup>(56)</sup> The Postal Services Directive; see also Section 3.3.3 of this Notice on postal services providers.

<sup>(57)</sup> See Commission Notice C(2016) 1958 'Blue Guide', Section 3.4 on Distributors and sectoral legislation aligned to model Article R5 'Obligations on distributors' and Article R7 'Identification of economic operators' of Decision No 768/2008/EC. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:218:0082:0128:en:PDF>.

<sup>(58)</sup> Article 5(2) of the General Product Safety Directive.

<sup>(59)</sup> See also Commission Notice C(2016) 1958 'Blue Guide', Section 3.4. 'Due care' refers to the level of judgement, care, prudence, determination, and activity under particular circumstances. Exercise of the 'due care' obligation by the distributor may therefore take different forms, depending on the circumstances, and may for example involve a risk based control system.

<sup>(60)</sup> See footnote 57.



- (c) that language requirements for labelling, user instructions and other accompanying documents are fulfilled,
  - (d) that the traceability requirements as regards the manufacturer and the importer are fulfilled.
- (3) Distributors<sup>(61)</sup> have an obligation to cooperate with market surveillance authorities. Where applicable, they have to:
- (a) initiate corrective measures where they consider or have reason to believe that products are non-compliant or dangerous<sup>(62)</sup>,
  - (b) assist market surveillance authorities in identifying the manufacturer or importer responsible for the product<sup>(63)</sup>,
  - (c) cooperate with the authorities and provide all the information and documentation necessary to demonstrate conformity upon reasoned request, and
  - (d) identify any economic operator who has supplied the products and to whom they have supplied those products, over a period of 10 years (in the case of harmonised products) after they were supplied with the products or they supplied them.

In practice, this means that fulfilment service providers which qualify as distributors, as explained above, should be capable of identifying and contacting the manufacturer and any other online operator<sup>(64)</sup>, should cooperate with authorities on any corrective measures and should initiate corrective actions to the extent possible (for example suspend delivery while contacting the manufacturer and any other online operator).

Finally, Article 8(4)(c) of the General Product Safety Directive allows Member State authorities to take measures addressed to any person (other than the producer or the distributor within the meaning of the General Product Safety Directive) where necessary, with a view to cooperation in action taken to avoid risks arising from a product, in line with the principle of proportionality<sup>(65)</sup>.

### 3.3. **Other relevant actors**

#### 3.3.1. *The declarant under the Union Customs Code*

The declarant is the person who makes the customs declaration<sup>(66)</sup>. Competent authorities can request declarants to cooperate when carrying out market surveillance activities.

Articles 188 and 189 of the Union Customs Code empower customs authorities to examine the customs declaration and the supporting documents, verify the accuracy of the information provided, require the declarant to provide any other documents, examine the goods and take samples. These operations are carried out under the responsibility of the declarant who also bears the cost.

#### 3.3.2. *Online intermediary services providers*

Economic operators can sell products directly to consumers or other end-users through web shops and can also use market places provided by online platforms<sup>(67)</sup>.

The E-commerce Directive<sup>(68)</sup> establishes the general legal framework for electronic commerce in the EU. The obligations set out apply, inter alia, to online sellers of products and services or online advertisers, as long as they are

<sup>(61)</sup> See footnote 57. In addition, model Article R31 of Decision No 768/2008/EC stipulates that the economic operator shall ensure that all appropriate corrective action is taken in respect of all products concerned that it has made available on the market throughout the EU. The economic operator shall, as necessary, cooperate with market surveillance authorities.

<sup>(62)</sup> Article 5(2) and (3) of the General Product Safety Directive.

<sup>(63)</sup> Article 5(2) of the General Product Safety Directive.

<sup>(64)</sup> See footnote 13.

<sup>(65)</sup> Article 8(2) of the General Product Safety Directive.

<sup>(66)</sup> Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ L 269, 10.10.2013, p. 1). Article 4(15) of the UCC defines declarant as the person lodging a customs declaration in his/her own name or the person in whose name a declaration is lodged.

<sup>(67)</sup> There are businesses that provide both online intermediary services and fulfilment services. Their respective obligations need to be considered depending on the capacity in which they act in the given case.

<sup>(68)</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive) (OJ L 178, 17.7.2000, p. 1).

providers of an information society service<sup>(69)</sup> that fall within the scope of that Directive. The E-commerce Directive is complemented by other EU legislation, in particular EU consumer and marketing law<sup>(70)</sup>.

The E-commerce Directive also standardises the exemptions of liability for third party content that apply to those information society service providers which act as intermediaries. For that purpose it describes three different categories of services, of which hosting is the most relevant from a product safety and compliance point of view<sup>(71)</sup>. Hosting is a service where an intermediary service provider, such as an online market place or an online platform<sup>(72)</sup>, merely passively stores on its server — and makes it available to the public — information provided by the recipient of the service, such as an online seller of products.

Intermediary service providers carrying out hosting activities may benefit under certain conditions from an exemption of liability<sup>(73)</sup> for illegal information provided by third parties using their networks or illegal activities initiated by third parties, such as information constituting infringements of copyright or trademark or unfair commercial practices. While the E-commerce Directive does not define the concept of illegal information or activity, based on the Union harmonisation legislation and the General Product Safety Directive, this concept can also cover the offer of unsafe and/or non-compliant products<sup>(74)</sup>.

However, the liability exemption is subject to specific conditions. It only applies if the intermediary service providers have no actual knowledge or awareness of the illegal activity or information hosted or, upon obtaining such knowledge or awareness (for instance by a 'sufficiently precise and adequately substantiated' notice<sup>(75)</sup>), they act expeditiously to remove or to disable access to it. If hosting service providers do not fulfil these conditions, they are not covered by the liability exemption and thus they can be held liable for the content they host.

The liability exemption set out in the E-commerce Directive does not prevent Member States from establishing procedures governing the removal or disabling of access to information<sup>(76)</sup>.

Likewise, a court or an administrative authority, under Member States' legal systems, can require the information service provider to terminate or prevent an infringement by removing third party content and/or prevent the alleged infringements from re-occurring in future<sup>(77)</sup>. In this sense, public authorities can establish specific monitoring requirements, provided their scope is clearly targeted as described in Section 5.2 of Part B of this Notice.

<sup>(69)</sup> See Article 1 of Directive (EU) 2015/1535 of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1); this definition covers any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of the service.

<sup>(70)</sup> See Article 1(3) of the E-commerce Directive. Directives such as Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ L 304, 22.11.2011, p. 4) and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive) (OJ L 149, 11.6.2005, p. 22) apply to any economic operator that qualifies as a trader and engages in commercial activities towards consumers, including in the context of electronic commerce. According to the Commission Guidance on the application of Directive 2005/29/EC, as regards third party economic operators acting on a platform, the platform itself should take appropriate measures to enable third party traders to comply with EU consumer and marketing law in conjunction with EU product legislation and/or product safety law requirements (including the indication on its website of CE markings, any required warnings, information and labels in accordance with the applicable legislation). Sector specific legislation may also include labelling requirements for online sales, such as for energy products sold online, Commission Delegated Regulation (EC) No 518/2014. The Commission Guidance on the application of Directive 2005/29/EC of 25 May 2016, SWD(2016) 163 final, is available at [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf), see in particular pages 75-76.

<sup>(71)</sup> Other activities also described by the E-commerce Directive are: 1) 'mere conduit activities' such as transmitting information (provided by the recipient of the service) or providing access to a communication network (e.g. internet providers) and 2) 'caching activities' such as making the transmission of information more efficient, e.g. duplicating a database which copies the content of the initial server for ensuring a global coverage.

<sup>(72)</sup> Certain economic operators carry out various types of activities. They can provide hosting services but also trade under their own names and can provide other services linked to e-commerce. The competent authorities always have to determine in the given case in which quality the economic operator or website is to be considered.

<sup>(73)</sup> Article 14 of the E-Commerce Directive.

<sup>(74)</sup> In as far as such offer is to be considered illegal.

<sup>(75)</sup> In Case C-324/09, L'Oréal vs. eBay, the European Court of Justice clarified that the relevant question relating to the conditions for benefiting from a liability exemption was whether eBay was aware of facts and circumstances from which the illegal activity was apparent (paragraphs 120 to 123).

<sup>(76)</sup> Article 14(3) and Recital 46 of the E-commerce Directive.

<sup>(77)</sup> Article 14(3) and Recital 47 of the E-Commerce Directive.

However, under current legal basis, Member States cannot impose either a general obligation on online intermediaries, such as the providers of hosting services, to monitor the content or a general obligation to actively seek the facts or circumstances indicating illegal activity.

This means, for instance, that national authorities cannot establish a general obligation for such intermediaries to actively monitor their entire internet traffic and seek parts that indicate illegal activities such as offering non-compliant or dangerous products for sale <sup>(78)</sup>. This has been further clarified by the Court of Justice of the European Union <sup>(79)</sup>.

In the context of market surveillance activities based on the application of the General Product Safety Directive, Regulation (EC) No 765/2008 and relevant Union harmonisation legislation, the provisions of the E-commerce Directive apply in cases where unsafe and/or non-compliant products are sold through an online intermediary service provider. Regardless of any action taken against an online intermediary service provider, market surveillance authorities should perform market surveillance based on the applicable provisions of the General Product Safety Directive, Regulation (EC) No 765/2008 and relevant Union harmonisation legislation and also target the actors in the supply chain (as regards the General Product Safety Directive, for example, the producer or the distributor, as appropriate <sup>(80)</sup>). Market surveillance authorities may assess the most appropriate action to be taken on a case-by-case basis and with a view to the principle of the proportionality. This would take into account the level of the risk, if the economic operator is identifiable, the urgency, if measures had been taken previously against the given product, etc <sup>(81)</sup>.

### 3.3.3. Postal services providers

The Postal Services Directive does not cover restricted and prohibited goods. However, Member States may impose conditions on the supply of postal services to guarantee compliance with essential requirements such as the security of the network concerning the transport of dangerous goods <sup>(82)</sup>. Because postal services must guarantee the confidentiality of correspondence and of the postal items they deliver, in principle they are not liable for the content they are delivering. Nevertheless, the work of postal service providers can be affected by product controls, as packages containing products ordered from third countries going through customs procedures can be opened and verified by customs authorities <sup>(83)</sup>.

## PART B. PRACTICAL ASPECTS OF MARKET SURVEILLANCE FOR PRODUCTS SOLD ONLINE

This part provides advice and some examples of good practices for Member State authorities on the market surveillance of products offered for sale online to consumers or other end-users within the EU, based mainly on current practice <sup>(84)</sup>.

### 1. General principles for market surveillance

Member State authorities must bear in mind certain general principles when conducting market surveillance activities applicable to both traditional and online market surveillance activities.

<sup>(78)</sup> Article 15 of the E-commerce Directive.

<sup>(79)</sup> See, for instance, Case C-70/10, *SABAM v Scarlet*, and C-360/10, *SABAM v Netlog*, where the Court stated that the E-commerce Directive, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the Copyright Directive) (OJ L 167, 22.6.2001, p. 10) and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (the Enforcement Directive) (OJ L 195, 2.6.2004, p. 16), read together and construed in the light of the requirements stemming from the protection of the applicable fundamental rights, must be interpreted as precluding a national court from issuing an injunction against a hosting service provider which requires it to install a system for filtering information which is stored on its servers by its service users; which applies indiscriminately to all of those users, as a preventative measure, exclusively at its expense, and for an unlimited period; which is capable of identifying electronic files containing musical, cinematographic or audiovisual work in respect of which the applicant for the injunction claims to hold intellectual property rights, with a view to preventing those works from being made available to the public in breach of copyright.

<sup>(80)</sup> See Article 8(4) of the General Product Safety Directive.

<sup>(81)</sup> Article 8(2) and subparagraphs 2 and 3 of Article 18(1) of the General Product Safety Directive. Articles 18(4), 19(1), 20(2) and 21 of Regulation (EC) No 765/2008.

<sup>(82)</sup> Article 9 and Article 2(19) of the Postal Services Directive.

<sup>(83)</sup> See Union Customs Code, Articles 46, 188 and 189.

<sup>(84)</sup> For a description of some authority practices see the 'Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' and its Annex: <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

The principle of proportionality<sup>(85)</sup> requires authorities to take measures proportional to the seriousness of the risk posed by the product<sup>(86)</sup> and/or the severity of the non-compliance<sup>(87)</sup>. At the same time, due account must be taken of the precautionary principle.

Furthermore, market surveillance should target by way of priority the most relevant actors in the supply chain and request corrective actions in particular from those (either the manufacturer/producer or importer) responsible for placing a product on the Union market. That request should be made before or in parallel with addressing the distributor who is further downstream in the supply chain.

Furthermore, authorities from different Member States should cooperate for effective market surveillance<sup>(88)</sup>. This is especially relevant considering the cross border nature of e-commerce.

## 2. Strategy and planning of online market surveillance

In order to ensure the effective organisation of market surveillance activities, it is useful for Member State authorities to establish a market surveillance strategy for products offered for sale online to balance their task of monitoring a wide range of products online with the resources available to carry out checks. That strategy should set out priorities for their surveillance activities and allocate resources accordingly. The strategy should take into account that Member State authorities can carry out market surveillance proactively and reactively.

When conducting market surveillance proactively, authorities control certain categories of products or certain economic operators based on their own initiative and risk-related criteria. Market surveillance authorities should prioritise controls by targeting those economic operators that are causing the most harm within that authority's jurisdiction.

When Member State authorities carry out market surveillance reactively, it is after they receive information about online offers of dangerous and non-compliant products. Reactive market surveillance can be conducted by using various information sources. An effective way of carrying this out is to check if the dangerous products notified in the EU Rapid Alert System for dangerous non-food products are sold online<sup>(89)</sup>. Other information sources that can be used for this purpose include the Organisation for Economic Cooperation and Development (OECD) global portal on product recalls<sup>(90)</sup>, consumer complaints, and information received from other authorities, economic operators and the media.

## 3. The organisation of online market surveillance

Controls on products sold online call for some specific practical changes to the traditional way market surveillance is organised by Member State authorities.

Based on the experience of some Member States, designating central units for monitoring and tracing dangerous and non-compliant products sold online can help ensure the efficient use of resources available for market surveillance authorities<sup>(91)</sup><sup>(92)</sup>. Once dangerous and non-compliant products and the relevant economic operator are identified by the online surveillance unit, the follow-up can be done by the competent inspectors.

Online inspectors should have specific knowledge and awareness of the online environment and investigations to be efficient in detecting dangerous and non-compliant products. In this respect, developing specific standard operating procedures and guidelines for Member States' market surveillance of products sold online can:

- help market surveillance officers to store and find relevant information specific to online investigations in one place in a structured way;

<sup>(85)</sup> Based on Article 18(4) of Regulation (EC) No 765/2008 and Article 8(2) of the General Product Safety Directive.

<sup>(86)</sup> Article 8(2) of the General Product Safety Directive.

<sup>(87)</sup> Articles 18(4), 19(1), 20(2) and 21 of Regulation (EC) No 765/2008.

<sup>(88)</sup> Article 24 of Regulation (EC) No 765/2008 compels authorities to provide assistance upon request and exchange information and documentation. See also document 2015-IMP-MSG-02rev03 endorsed by the Expert Group on Internal Market of Products — 'Market Surveillance and Conformity Assessment Policy' <http://ec.europa.eu/DocsRoom/documents/17108/attachments/1/translations/en/renditions/native>

<sup>(89)</sup> [http://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/index\\_en.htm](http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/index_en.htm)

<sup>(90)</sup> <http://globalrecalls.oecd.org/>

<sup>(91)</sup> Member State practice: Case 5 and Case 6 of the 'Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' — <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

<sup>(92)</sup> Such units could for instance streamline market surveillance by verifying at the same time requirements from different legislative acts (e.g. product safety, energy labelling requirements).

— increase the efficiency of their activities <sup>(93)</sup>.

To complement this, Member State authorities should engage in training and information exchanges amongst themselves, together with the European Commission, on best practices for online investigations.

Online investigations linked to enforcing product safety laws and to legislation on enforcing consumers' economic interests <sup>(94)</sup> have many common characteristics. They often address the same type of websites or even the same economic operators. Therefore, it can prove efficient for online investigations linked to both areas to be conducted by the same centralised units. In particular, it can be useful when the same Member State authority is responsible for these policy areas, which is the case today in the majority of Member States. Due to the similarities of these online investigations, guidance established in one consumer policy area can also be useful in the other policy areas.

#### 4. Specific features and needs of online investigations

Once the appropriate online market surveillance strategy, planning and organisation have been established Member State authorities will conduct online investigations more efficiently. When online investigations are carried out, some specific features and needs have to be considered.

One of the major differences between investigations online and those in traditional supply chains is the authorities' access to the physical products. In online investigations, authorities need to check the information available on the website where the product is offered for sale and, if there are doubts about compliance, they need to sample products. In traditional supply chains authorities can relatively easily access product samples from the distribution chain. This is not the case for online products. If a product stock is available in the particular Member State, sampling can be straightforward. However, if the product stock is only available in another Member State, cross-border cooperation should be used to receive samples for testing or it should be agreed that tests are carried out where the products are. Authorities also need to purchase product samples online and to this end Member States' market surveillance authorities could perform 'mystery shopping' given the investigative advantage of market surveillance authorities obtaining samples anonymously, as a normal customer would <sup>(95)</sup>.

Another major difference between investigations online and in traditional supply chains relates to the challenges of finding the responsible economic operators in order to request further information from them, sample products and to carry out further market surveillance actions. If information is not readily available, finding the economic operators offering products for sale online can be the most challenging part of online investigations. Therefore, market surveillance authorities should use available tools to request data needed to identify economic operators from relevant information sources including the internet service providers, domain name registries <sup>(96)</sup>, payment service providers, intermediaries (e.g. platforms), fulfilment service providers.

When trying to get data on a particular economic operator, market surveillance authorities must take into account personal data protection rules (see the Data Protection Directive <sup>(97)</sup> and from 25 May 2018 the General Data Protection Regulation <sup>(98)</sup> and the E-Privacy Directive <sup>(99)</sup>). National authorities have to comply with the applicable rules, thus, it is recommended that their competent national data protection supervisory authorities verify such processes <sup>(100)</sup>.

<sup>(93)</sup> Member State practice: Case 3 and Case 4 of the 'Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' — <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

<sup>(94)</sup> [http://ec.europa.eu/consumers/consumer\\_rights/index\\_en.htm](http://ec.europa.eu/consumers/consumer_rights/index_en.htm)

<sup>(95)</sup> Member State practice: Case 11 of the 'Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' — <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

<sup>(96)</sup> A list of domain name registries can be found at <http://www.iana.org/domains/root/db>

<sup>(97)</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive) (OJ L 281, 23.11.1995, p. 31).

<sup>(98)</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

<sup>(99)</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (the E-Privacy Directive) (OJ L 201, 31.7.2002, p. 37).

<sup>(100)</sup> It is to be noted that this document does not aim to address all relevant data protection requirements under EU law in an exhaustive manner.

Finally, during online investigations, Member State authorities might need to collect relevant evidence on dangerous and non-compliant products. Evidence gathering methods should take into account that online information can be instantly altered and removed from the internet. Various technical tools available can ensure that evidence linked to online investigations is appropriately recorded, stored and can be used in any proceedings that may follow.

## 5. Corrective actions linked to products sold online

Member State authorities need to take corrective actions against dangerous and non-compliant products sold online. In cross-border situations this may require cooperation from authorities other than the authorities of the Member State concerned.

### 5.1. Corrective actions that depend on the economic operator's location

The enforcement powers of national market surveillance authorities are limited to their jurisdictions. Therefore, the possibilities for and effectiveness of the corrective action taken by national authorities vary depending on where the economic operator is located. This section describes what actions Member States authorities can take depending on the location of the identified economic operator supplying dangerous and non-compliant products and how authorities can cooperate.

#### 5.1.1. If the economic operator is located in the authority's jurisdiction

If the economic operator is located within the authority's jurisdiction, the authority can take actions based on its competence. After identifying the economic operator, the authority can require any documentation from it which could demonstrate compliance (for example, EU Declaration of Conformity, relevant technical documentation, test reports, etc.) and take corrective actions as required <sup>(101)</sup>.

#### 5.1.2. If the economic operator is located in the EU, but outside the authority's jurisdiction

If online surveillance shows that dangerous and non-compliant products are being offered for sale by an online vendor located within the EU, but outside the investigating authority's jurisdiction, national authorities should also first contact the relevant economic operators directly to get information necessary for the investigation or request corrective action following a finding of non-compliance <sup>(102)</sup>.

If the economic operator does not cooperate, the national authority is recommended to make use of cross-border cooperation in the following way <sup>(103)</sup>:

- if country A's market surveillance authority needs information to complete the compliance evaluation from economic operators in country B and the economic operator does not reply to the request for documentation, then country A's market surveillance authority can request the assistance of country B's market surveillance authority <sup>(104)</sup>;
- if the economic operator does not voluntarily take corrective action, country A's market surveillance authority <sup>(105)</sup> would (i) take compulsory measures concerning the products made available online within that given authority's jurisdiction regardless of the economic operator being located in country B <sup>(106)</sup> and (ii) notify the measures as appropriate via the Information and Communication System for the pan-European Market Surveillance (ICSMS) <sup>(107)</sup>/Rapid Alert System for dangerous non-food products (RAPEX). The market surveillance authorities of the other Member States would be expected to take follow-up measures, notify them for the purpose of RAPEX and/or the safeguard clause procedure and specifically the market surveillance authority of country B would be expected to contact the manufacturer/EU importer and request corrective action in relation to all relevant products <sup>(108)</sup>.

<sup>(101)</sup> Articles 19(1) and 21 of Regulation (EC) No 765/2008.

<sup>(102)</sup> Article 19(2) of Regulation (EC) No 765/2008 sets out that market surveillance authorities shall cooperate with economic operators regarding actions to reduce risks caused by products made available by those operators. Sectoral legislation aligned to model Articles R2(8), R4(7), R5(4) of Decision No 768/2008/EC contain a general obligation for the relevant economic operators to take corrective measures to bring products into conformity when they consider or have reasons to believe that a product is not in conformity with applicable Union harmonisation legislation. Furthermore, according to sectoral legislation aligned to model Article R31 of Decision No 768/2008/EC, the economic operator shall ensure that all appropriate corrective action is taken in respect of all products concerned that it has made available on the market throughout the EU.

<sup>(103)</sup> <http://ec.europa.eu/DocsRoom/documents/17108/attachments/1/translations/en/renditions/native>

<sup>(104)</sup> The legal basis for this type of mutual assistance is set out in Article 24(2) of Regulation (EC) No 765/2008.

<sup>(105)</sup> Article 19(3) of Regulation (EC) No 765/2008; sectoral legislation aligned to model Article R31(4) of Decision No 768/2008/EC.

<sup>(106)</sup> This is without prejudice to the possibility of adopting in parallel measures vis-à-vis distributors based in its own country in order to allow addressing businesses physically located within their territory.

<sup>(107)</sup> <https://webgate.ec.europa.eu/icsms/>.

<sup>(108)</sup> Pursuant to Article 12 of General Product Safety Directive and Article 22 of Regulation (EC) No 765/2008 and pursuant to Union Safeguard Procedure in sectoral legislation or provisions aligned to model Article R31(6) and (8) of Decision No 768/2008/EC.

The Commission facilitates this cooperation by providing a contact list of the relevant Member State authorities in case cross-border collaboration is needed <sup>(109)</sup>.

### 5.1.3. *If the economic operator is located outside the EU*

If an economic operator is located outside the EU, Member State authorities have certain possibilities to enforce actions against them. These economic operators should be made aware that products offered for sale online to EU customers have to comply with EU requirements. They should also be informed of their obligations and they should be requested to remedy any instances of non-compliance. Member States can block webpages offering dangerous or non-compliant products, if necessary. In particular, points (d) and (e) of Article 8(1) of the General Product Safety Directive allow Member States to take specific measures to this end. Similarly, further to Article 16(2) of Regulation (EC) No 765/2008, market surveillance authorities can take the necessary measures to withdraw, prohibit or restrict products from being made available on the market.

Cooperation with authorities in other jurisdictions can provide tools to address such cases. Therefore, Member States are encouraged to pursue cooperation with the competent authorities in third countries. Member States are encouraged to inform the Commission about such cooperation activities. This is important in particular for issues that may need a coordinated approach at EU level, in order to facilitate cooperation on investigations linked to the safety and compliance of products offered for sale online to consumers or other end-users within the EU. Member States should indicate in the notifications of dangerous products transmitted through the Rapid Alert System if the product was sold online from a third country and through which web shop or online platform.

A specific product safety international cooperation framework already exists in the form of the RAPEX-China system established between the Services of the European Commission and the Chinese General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) <sup>(110)</sup>.

Where products offered for sale online enter the EU from third countries, cooperation between market surveillance authorities and customs should also be sought to control and stop shipments of products at the border <sup>(111)</sup> <sup>(112)</sup>. This is crucial when a shipment directly arrives from outside the EU to an EU customer and where no economic operator is present in the EU.

## 5.2. **Corrective actions specific to products sold online**

Where products are offered for sale online, national law can in some cases permit market surveillance authorities to request specific corrective actions from online intermediary service providers (for example providers of hosting services, such as online platforms) to remove or disable access to information concerning non-compliant and unsafe products from their website. This includes cases when the sellers are located outside the EU. This is called the 'notice and action' procedure <sup>(113)</sup>.

Although the E-commerce Directive does not establish this procedure as such, it can be seen as serving as its basis, as far as the conditions for benefiting from the liability exemption set out in Article 14(1) of that Directive as regards knowledge and awareness and subsequent removal or disabling of access to information are concerned. Market

<sup>(109)</sup> <http://ec.europa.eu/DocsRoom/documents/12802/attachments/1/translations/en/renditions/native>,  
<http://ec.europa.eu/DocsRoom/documents/12803/attachments/1/translations/en/renditions/native>,  
[http://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/index\\_en.htm](http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/index_en.htm)

<sup>(110)</sup> RAPEX-China enables regular and rapid transmission of data between the EU and China product safety administration on dangerous non-food consumer products. The Commission provides the Chinese authorities with information on dangerous consumer products originating from China that were notified by Member States via the Rapid Alert system for non-food dangerous products (RAPEX). The Chinese authorities investigate these notifications, and when possible, adopt measures against these products which can prevent or restrict further export of those products to the EU.

<sup>(111)</sup> Article 27 of Regulation (EC) No 765/2008.

<sup>(112)</sup> Further information on cooperation with customs can be found in the Commission Notice C(2016)1958 final The 'Blue Guide' on the implementation of EU product rules 2016 and in the Guidelines for import controls in the area of product safety and compliance, available at [http://ec.europa.eu/taxation\\_customs/resources/documents/common/publications/info\\_docs/customs/product\\_safety/guidelines\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/common/publications/info_docs/customs/product_safety/guidelines_en.pdf)

<sup>(113)</sup> See Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' of 25.5.2016, COM(2016)288, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0288>

surveillance authorities should be entrusted with powers and resources to use these 'notice and action' procedures directly or establish cooperation with their national authorities competent for the implementation of the E-commerce Directive <sup>(114)</sup>.

In as far as the intermediary wishes to benefit from the liability exemption of Article 14(1) of the E-commerce Directive, the online intermediary concerned is obliged to act expeditiously to remove or disable access to illegal information after being notified, for instance concerning an unsafe or non-compliant product <sup>(115)</sup>. For these purposes, authorities submitting a notification would need to provide enough information so that the intermediary service providers can reasonably identify the illegal information concerned.

Also, while Article 15(1) of the E-commerce Directive prohibits imposing a general obligation to monitor or to actively engage in fact-finding, that Article sets out that Member States may establish obligations for intermediaries to promptly inform the competent authorities of alleged illegal activities undertaken or information provided by recipients of their service. Intermediaries may also be obliged to pass on information to the competent authorities, at their request, which enables the identification of recipients of their service with whom they have storage agreements.

In order to help intermediaries to effectively react and take information about the offer for sale of unsafe or non-compliant products off their website, it is advisable that Member State authorities establish close contacts allowing rapid response with key intermediaries that provide hosting services for products sold online.

In addition to any 'notice and action' procedure for which national law may provide, some EU market surveillance authorities can also block and take down certain websites, on the basis of their respective national legal frameworks.

Finally, as regards the special features of management of product safety in e-commerce, it should be noted that online purchases have the advantage of easily identifying consumers and other end-users, as their contact details are made available when shopping online. This means that customers could be reached more effectively by the relevant economic operators if corrective action, such as a product recall, is needed <sup>(116)</sup>.

#### PART C. RAISING AWARENESS AMONG CONSUMERS AND BUSINESSES OF THE SAFETY AND COMPLIANCE OF PRODUCTS SOLD ONLINE

This part provides best practice for Member State authorities on raising the awareness of consumers and businesses about the challenges posed by dangerous and non-compliant products sold online.

##### 1. Raising awareness among consumers

One way to prevent consumers from being exposed to health, safety and other risks from products purchased online is to raise their awareness of the challenges linked to online purchases and to empower them to make well-informed decisions.

Authorities are advised to improve consumer protection by complementing their surveillance and enforcement activities with communication activities addressed to consumers.

Authorities could develop their communication and information toolkit for consumers based on the premise that, in general, consumers expect that the products they buy online are safe and comply with the relevant rules. Consumers do not immediately see the possible risks involved in online buying <sup>(117)</sup>.

This chapter attempts to address two aspects relevant to the raising awareness of consumers: what is useful for consumers to know and how could Member State authorities inform consumers. These suggestions can be used in possible information campaigns for consumers.

<sup>(114)</sup> Further details regarding these obligations are set out in the Commission Staff Working Document 'Online services, including e-commerce, in the Single Market', p. 30, [http://ec.europa.eu/internal\\_market/e-commerce/docs/communication2012/SEC2011\\_1641\\_en.pdf](http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf)

<sup>(115)</sup> 'Notifications of allegedly illegal activities may turn out to be insufficiently precise [but] such notification represent a factor of which the national court must take account when determining, in the light of the information so transmitted to the operator, whether the latter was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality' — Case C-324/09 L'Oréal SA and Others v eBay International AG and Others, paragraph 122.

<sup>(116)</sup> Data protection requirements need to be taken into consideration.

<sup>(117)</sup> See for instance: The consumer perspective regarding product safety for online purchases, NVWA 2016, reported in OECD (2016), 'Online Product Safety: Trends and Challenges', OECD Digital Economy Papers, No 261, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/5j1nb5q93jlt-en>.



### 1.1. **What is useful for consumers to know?**

From a product safety and compliance perspective, Member State authorities can take actions to ensure that consumers are at least informed of the following essential aspects as regards the online sales of consumer products:

- consumer products (offered both online and in traditional shops) are subject to a wide range of legal requirements aiming to ensure that products present no health, safety or other risks for consumers;
- consumers, when shopping online, should be encouraged to check if the required information on the product is there, for example, warnings and traceability information (such as the address and contact information of the manufacturer and also, where applicable, the importer) <sup>(118)</sup>;
- market surveillance authorities in EU Member States are responsible, within their remit for monitoring the market to ensure that products offered for sale are safe and compliant with applicable requirements.;
- to minimise the risks of buying unsafe products online, consumers could:
  - check whether the product they want to purchase was subject to restrictive measures such as a recall, for example, on the RAPEX website <sup>(119)</sup>, on the Organisation for Economic Cooperation and Development (OECD) portal on product recalls <sup>(120)</sup> or any national recalls listings;
  - double-check the information provided by the online seller with the information provided on the manufacturer's website <sup>(121)</sup>;
  - contact the seller or the website to try to find out if the product complies with relevant EU requirements;
- consumers should be informed about possible tools that can be used to submit complaints and to report safety problems or other issues of non-compliance with products purchased online to authorities. They should also be informed of their rights as consumers when the product is recalled.

Further detailed sector-specific information could be provided for product categories where serious risks, accidents and injuries are more prone to occur <sup>(122)</sup>.

### 1.2. **How should Member States inform consumers about product safety aspects to be considered when buying online?**

This section describes specific consumer information tools and best practices which are already used by several Member States to provide consumers with information related to product safety online.

#### 1.2.1. *Authorities' websites*

Authorities' websites could provide concise and up-to-date information about product safety laws and rights of consumers, rights and obligations of economic actors. Those websites could give a clear space where consumers could introduce safety and/or non-compliance complaints linked to product sold online.

<sup>(118)</sup> See also in this respect the Commission's guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices of 25 May 2016, SWD(2016) 163 final, available at [http://ec.europa.eu/justice/consumer-marketing/files/ucp\\_guidance\\_en.pdf](http://ec.europa.eu/justice/consumer-marketing/files/ucp_guidance_en.pdf), in particular page 75 on safety warnings concerning a given product. See also, for example, Article 11(2) of Directive 2009/48/EC of the European Parliament and of the Council of 18 June 2009 on the safety of toys (OJ L 170, 30.6.2009, p. 1).

<sup>(119)</sup> [http://ec.europa.eu/consumers/consumers\\_safety/safety\\_products/rapex/alerts/main/index.cfm?event=main.search](http://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/main/index.cfm?event=main.search)

<sup>(120)</sup> <http://globalrecalls.oecd.org/>

<sup>(121)</sup> Online sellers and manufacturers are not always the same entities. Online sellers can purchase goods from the manufacturer and sell them on the dedicated website (or via intermediary/host provider). However, it is also possible that it is the manufacturer who produces and sells its own product in its own dedicated web shop.

<sup>(122)</sup> For example see: <http://www.electricalsafetyfirst.org.uk/mediafile/100129855/Buying-Electrical-Goods-Online-A5-Leaflet-2014.pdf>

### 1.2.2. Using the media and awareness raising campaigns

Authorities could make use of the media and the internet to promote key messages to consumers. The media used to convey messages to a wide target audience could include well-established television programmes, specialised websites, printed press, including consumer magazines.

Very often, as product safety related problems reach news headlines, authorities are contacted by the press for comments and interviews. This could provide an opportunity for authorities to highlight key issues to consumers on buying products online <sup>(123)</sup>.

Authorities are also encouraged to set up awareness raising campaigns, including in social media, focusing on the safety and compliance of products sold online. Authorities could include information on the aspects to be taken into account for safe online shopping.

### 1.2.3. Consumer complaints systems

Consumer complaints systems are important for market surveillance authorities as they highlight dangerous and non-compliant products as well as the concerns and needs of the consumers <sup>(124)</sup>. Complaints are a good source of information for planning surveillance and consumer information activities. National authorities could provide clear information to consumers on a) when to make a complaint, b) how to make a complaint and c) which authority is responsible for handling the complaint.

Member States could ensure that consumer complaints systems are available online for dangerous and non-compliant products sold online, taking into account the Commission Recommendation for the use of a harmonised methodology for classifying and reporting complaints and enquiries from the EU consumers <sup>(125)</sup>.

## 2. Raising awareness of businesses

Although it is the economic operators' responsibility to comply with EU rules, raising businesses' awareness on the requirements they need to meet helps ensuring that safe and compliant products reach consumers. The availability of information about applicable rules generally contributes to the presence of safer products on the market, as it influences and enhances the economic operator's compliance behaviour. A compliant profile offers a lot of advantages for economic operators; it contributes to using their resources efficiently, saving on costs related to corrective measures and avoiding loss of reputation.

Raising businesses' awareness usually starts with giving them easy access to basic information on applicable requirements and on how to comply with the requirements. In the interests of efficiency, information can be provided on specific sectors or products. In this respect, classic information campaigns, safety and compliance related seminars, etc. can be adapted to the online environment <sup>(126)</sup>.

Another way of reaching businesses is via specific guidelines addressed to them. Such guidelines could underline all useful information on how to sell safe and compliant goods online in a specific area, which are the requirements to be fulfilled and what kind of responsibility the online operator bears. This can also highlight the penalties and sanctions online operators may face in case they violate of the applicable legislation <sup>(127)</sup>.

<sup>(123)</sup> Member State practices on using media to inform consumers, described in Case study No 12 of the Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

<sup>(124)</sup> Member State practice: Case 9 of the 'Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' — <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

<sup>(125)</sup> C(2010)3021 [http://ec.europa.eu/consumers/archive/strategy/docs/consumer-complaint-recommendation\\_en.pdf](http://ec.europa.eu/consumers/archive/strategy/docs/consumer-complaint-recommendation_en.pdf)

<sup>(126)</sup> Member State practice: Case 16 of 'the Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' — <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

<sup>(127)</sup> Practice: Case 17 of the 'Study on Good Practice in Market Surveillance Activities related to Non-Food Consumer Products sold Online' — <http://ec.europa.eu/DocsRoom/documents/8723/attachments/1/translations/en/renditions/native> and <http://ec.europa.eu/DocsRoom/documents/8724/attachments/1/translations/en/renditions/native>.

As consumer products available on the EU market are also coming from outside the EU, it is important to reach out to businesses operating from abroad, e.g. web shops located outside the EU. One measure could be to ensure that the information developed for EU businesses is accessible and promoted to those businesses located outside the EU at e.g. trade fairs and to relevant chambers of commerce, trade promotion and information centres and local authorities that can inform economic operators in third countries.

Cooperation with online platforms can be helpful in distributing/conveying relevant information to businesses that offer consumer products on their platform to EU consumers.

Moreover, ideally coordinated or organised seminars on the EU level could be given in key partner countries in cooperation with the local authorities to better ensure that the information reaches the right companies. Specific training for importers could also prove useful.

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