

Chapter 5 - Enforcement case studies

A. *Introduction*

1. Rationale and objectives

This chapter presents two case studies that are meant to demonstrate the challenges market surveillance authorities (MSAs) face when confronted with the issue of unlawful non-food and food products on online platforms. The enforcement of product regulation online is a relatively under-explored area compared to research in e.g. online copyright enforcement or hate speech. Nevertheless, the previous sections have demonstrated that this is a persisting and growing problem, which European MSAs have been trying to tackle for the last 15 years. Unlike IP rights and unlawful speech, which are governed mainly by private law and often contractual arrangements, product regulation boasts a well-established public enforcement structure. In the former areas such a structure does not exist and enforcement of rights has happened mainly through courts, which have significantly shaped the current regime that applies to intermediaries under the ECD.

The case studies aim to capitalise on the fact that a fully operational enforcement structure has been in existence in the area of product regulation well before the rise of commerce through online platforms. The impact of the rise of e-commerce marketplaces and intermediaries on sector specific primary law and its enforcement can therefore be demonstrated tangibly.

The objective of the case studies is twofold:

1) To investigate how enforcement authorities in the area of non-food and food safety detect and prevent unlawful content on platforms, how they work together with online intermediaries and which national and EU legal basis they use for their activities. The survey also tries to establish the intensity of regulatory cooperation between national surveillance authorities at different levels (national, local, EU, international) and whether that cooperation has led to more formalised policy or regulatory initiatives. The rationale is, to test the practical applicability of the ECD liability regime in this area and the regulatory response of highly specialised, technical enforcement bodies to the horizontal challenge of e-commerce.

2) Product and food regulation are part of co-regulatory system. This system relies on both institutionalised and informal cooperation between private and public actors, be it through normative standard setting by industry bodies or through market surveillance and controls by specialist enforcers at operational level.¹⁶⁵⁵ The results of these surveys will help to establish whether the approaches of enforcement authorities *vis-à-vis* new economic actors in e-commerce are informed by the co-regulatory practices that have prevailed in these sectors. These practices are characterised by a mix of informal cooperation, enforcement using a risk-based approach and precautionary principles.¹⁶⁵⁶ The results, it is hoped, could inform the debate over a new governance framework for online intermediaries.¹⁶⁵⁷

2. Survey structure

The rationale behind the qualitative, pre-structured survey has been explained in the Chapter 1. The surveys in the area of product and food regulation were both structured around five sections. Each section consists of a mix of questions allowing for fixed (binary or multiple) choices, or open answers. ANNEX I contains a model version of the survey.

Section A, the largest section, captured data about the authorities' activities. This includes general information about the authority's foundation, resourcing, the legal scope of the enforcement activity (by EU Regulation/Directive), the product areas covered and the specific online market surveillance activities and their evolvement over the past five years. This was meant to establish and compare the degree to which different MSAs

1655 LAJ Senden and others, *Mapping Self-and Co-Regulation Approaches in the EU Context*: *Explorative Study for the European Commission, DG Connect* (European Commission 2015) 37–39 <<https://dspace.library.uu.nl/handle/1874/327305>> accessed 19 September 2017.

1656 European Commission, '2017/C 250/01' (n 1504) 6, 8, 12. Garcia Martinez, Verbruggen and Fearné (n 1624).

1657 A view also generally supported in: Cristie Ford, *Innovation and the State: Finance, Regulation, and Justice* (Cambridge University Press 2017) 69–73, 188–190. Cohen (n 19) 23–34; Woods, 'The Carnegie Statutory Duty of Care and Fundamental Freedoms' (n 698). Florian Saurwein, Natascha Just and Michael Latzer, 'Governance of Algorithms: Options and Limitations' (2015) 17 info 35. Ullrich, 'A Risk-Based Approach towards Infringement Prevention on the Internet' (n 747).

(and FSAs) have focussed and developed their expertise in the area of on-line market surveillance.

Section B sought to elicit information about the authorities' awareness of and interaction with the intermediary liability provisions of the ECD. Online platforms have developed in a way that their activities affect more directly the substantive laws that govern the content they host. Enforcers have grappled with that new ambiguity of platforms' activities. One solution would be for subject matter enforcers to develop and exploit means offered in both secondary and primary law areas to deal with the changing role of online intermediaries. This section attempts to test whether MSAs in the areas of product and food safety are making use of the current enforcement tools provided by intermediary regulation in any way, and whether they have developed views on how to improve enforcement efficacy.

Section C asked the authorities about their interaction with ISSPs as part of their market surveillance and controls activities. The co-regulatory structure of product and food safety regulation has traditionally resulted in a more collaborative approach between economic operators and enforcers. This section tried to establish whether this collaborative approach has been expanded to online platforms. It also attempts to establish whether this has shown any success, despite the fact that no legal basis existed for such cooperation at the time the interviews were conducted.¹⁶⁵⁸

The penultimate Section D tries to establish the degree of regulatory cooperation with other public authorities, both within the Member State and across the EU. This section aimed to establish strengths and weaknesses of cooperation mechanisms when it comes to enforcement on safety risks *vis-à-vis* online platforms.

Finally, Section E captured the date of the interview and the names of the participating market surveillance officers. Details from this section will, however, not be disclosed.

The two case studies rest on 13 survey answers, of which seven were based on in-person or phone-based interviews. Six authorities filled in the survey independently and sent the responses by e-mail or handed them in personally (see Table 2). One MSA had overarching responsibilities for product and food safety. The interview with that MSA was conducted for both non-food products and foodstuffs and counted as such as well, which resulted in a total of 14 responses.

¹⁶⁵⁸ The obligation to cooperate with MSAs was created in the new MSR, albeit only for specific cases: Market Surveillance Regulation Article 7 (2).

	Product safety	Food safety
Interviews	4	4
Survey completion	6	0
TOTAL	10	4

Table 2 - Number of surveys conducted

Response levels from Food Safety Authorities (FSAs) were markedly lower than in the area product regulation. The low response in the area of food safety betrays a lack of perceived relevance of the topic. As will be shown, for many authorities, e-commerce marketplaces, though essential actors, remained beyond reach for regulatory or resource reasons. Those authorities interviewed in the area of food safety were arguably those most proactively involved, most knowledgeable and most interested in the role of on-line intermediaries in food safety.

In the following, the terminology of “small” and “large” Member States is being used. The survey results indicated, that, not surprisingly perhaps, there was a marked difference between smaller and larger Member States at the level of resourcing and specialisation of enforcement work across the sectors covered. The term “large” Member States refers to France, Germany, Italy, Spain and the UK, although the interviews did not cover MSAs from all of these countries.

3. Confidentiality

Most of the authorities surveyed objected to the interviews being recorded. Most of them also indicated their preference of not being identified during the evaluation phase. This confidentiality was, however, happily traded off against greater frankness and detail in the discussions on enforcement and policy challenges that many of the authorities face in their daily work.

B. Case study 1: Online market surveillance in product regulation

1. Overview

The area of *New Approach* product regulation spans 29 product sectors, each covered by specific legislation in the form of directives.¹⁶⁵⁹ In the interest of coherence, it was appropriate to focus on a narrow range of product sectors, given the vast variety of MSAs that operate across the *New Approach* product directives. For this reason, the interviews and surveys conducted focussed on authorities that were responsible for market surveillance under the Radio Equipment Directive (RED)¹⁶⁶⁰ and the Electromagnetic Compatibility Directive (EMCD).¹⁶⁶¹ In theory, these directives cover any consumer electronics that transmit radio waves and whose operation may interfere with that of other devices. The potential area of product coverage is vast, ranging from mobile handsets, PCs, diverse consumer electronics, electronic toys, to electronic household equipment, drones and many more electronic devices. RED, but also the EMCD, will become more relevant with the growth of the IoT and the forecast proliferation of inter-connected radio equipment, be it through wearable connected devices, smart homes or equipment tagged with radio-frequency identification devices (RFID).¹⁶⁶² RED, for example, also includes technical equipment requirements to protect against data privacy violations and fraudu-

1659 European Commission, 'Blue Guide' (n 1517) 13–15. The term product sector is ambiguous if considered in its more commonplace meaning. For example, many consumer electronics products such as mobile phones or laptops would be covered by several *New Approach* 'product sectors': the Low Voltage Directive (2014/35), the Radio Equipment Directive (2014/53) and the Electromagnetic Compatibility Directive (2014/30). If targeted at children, additional compliance with the Toys Safety Directive (2009/48) may be needed.

1660 Directive 2014/53 (RED) 53; Anonymous, 'Radio Equipment Directive (RED)' (*Internal Market, Industry, Entrepreneurship and SMEs - European Commission*, 5 July 2016) <https://ec.europa.eu/growth/sectors/electrical-engineering/red-directive_en> accessed 13 July 2020.

1661 Directive 2014/30 (EMCD); Anonymous, 'Electromagnetic Compatibility (EMC) Directive' (*Internal Market, Industry, Entrepreneurship and SMEs - European Commission*, 5 July 2016) <https://ec.europa.eu/growth/sectors/electrical-engineering/emc-directive_en> accessed 13 July 2020.

1662 Centre for Strategy & Evaluation Services LLP, 'Impact Assessment on Increased Protection of Internet-Connected Radio Equipment and Wearable Radio Equipment - Annex 5 - Annex 5 – Radio Equipment Forecasts' (European Commission 2020) <<https://ec.europa.eu/docsroom/documents/40763>> accessed 14 July 2020.

lent use.¹⁶⁶³ Typical non-compliant or unlawful products sold via e-commerce and online marketplaces include radio jammers, wireless headsets, detectors, mobile radio sets, drones, security cameras, smartwatches or radio transmitters¹⁶⁶⁴ or unsafe and recalled products falling under these directives.

The choice of this focus was mainly motivated by the author's previous work and existing contacts with enforcement authorities in this area. The interviews and survey collection took place between December 2017 and March 2019. The research project and the survey were presented at the EMCD AdCo meeting in Edinburgh (UK) on 18 October 2018 and at the RED AdCo meeting in Sophia Antipolis (France) on 28 October 2018. These sessions were also used to garner feedback and discuss common challenges in e-commerce enforcement. The feedback received during these meetings will be added to the discussions below.

2. Survey results – Online market surveillance - RED and EMC Directives

I. Section A: Market surveillance and enforcement

a. Enforcement scope: sector coverage

Of the 10 MSAs that responded to the survey or took part in an interview four had exclusive enforcement competencies for the EMCD and RED. Three of these authorities were from larger Member States and one from a smaller one. One of the larger Member State authorities was not an MSA in itself but a regulatory agency that provided enforcement support and representation at EU level for the responsible MSA, which in itself had enforcement competencies for a wider scope of directives and products.

One MSA had just competency to enforce on the EMCD. Of the remaining five smaller states (four EU members, one EEA member), two had competencies to enforce a selection of five, and respectively six, Directives. Of the other three smaller Member State MSAs, two covered the entire area of the *New Approach*/or CE marking Directives, while the remaining one had overarching responsibility for all consumer products, including food and plant health products, but not pharmaceuticals. That latter authority acted as an enforcement agency, but subject matter policy compe-

1663 Directive 2014/53 (RED) Article 3 (3).

1664 Winkelmann (n 1501) 11–12.

tency for EMCD and RED was devolved to the national radiocommunications agency. This shared responsibility mode was applied throughout a number of other sectors as well for this MSA. In the interview, this MSA also said that its government was thinking of giving it an even broader scope by allocating regulatory competency for pharmaceuticals, competition, telecoms and transportation under one roof.

b. Enforcement vis-à-vis ISPs

In this subsection MSAs were asked whether they had already engaged in enforcement action against ISPs, and if yes, under which legal provision. Although enforcement *vis-à-vis* ISPs would be expected to happen chiefly through the ECD and its national implementation, the previous chapter disclosed the parallel existence and interlinkage of national secondary provisions in ordinary and sector specific laws. This question sought to elicit whether MSAs had used any provisions available through their national laws to enforce against ISPs.

Of 10 MSAs, three from smaller Member States indicated that they had enforced against ISPs in the past. Two of these MSAs had enforced on issues relating to RED, and one under the Low Voltage Directive (LVD).¹⁶⁶⁵ None of them provided further detail on the exact issue(s) or the ISP concerned. The three responses were captured from MSAs that filled in the survey individually and it was not possible to get further detail.

Of the remaining seven MSAs, two said their preferred approach was to cooperate with ISPs, especially where this concerned larger marketplaces. These two MSAs did in general not consider it appropriate to launch enforcement actions following e.g. non-responsiveness to NTD requests or failure to prevent the re-appearance of notified offers. One of the interlocutors from these two authorities stated that their internal guidelines saw enforcement as the last resort and that cooperation with economic operators was the preferred way of ensuring compliance with the law. They also said that the situation had not been tested where the concerned marketplace also operated as FSPs, such as *Amazon*.¹⁶⁶⁶ Here, technically, action could

1665 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 2014 (OJ L 96).

1666 *Amazon* operates its *Fulfillment by Amazon* service as an FSP for sellers on its platforms. See also Chapter 4.

be taken but the situation would be unprecedented and not clear. The other MSA stated that they had started to focus on consumer education rather than going after marketplaces. This was also partly due to resource constraints as the MSA covered a broad range of consumer products (outside the area of RED and EMCD).

One other MSA indicated that it did only enforce against smaller internet shops, which acted as distributors. That MSA also indicated that it had received requests for assistance from other EU MSAs to gain information on sellers and products from an online marketplace that was registered in their country. However, since that marketplace had communicated its contact details EU wide, its scope of assistance was limited. They had only contacted the marketplace's offices directly in a limited number of escalated cases, where the enquiring MSA had received no feedback. Another MSA indicated that the EMCD, the RED and Regulation 765/2008 on market surveillance only gave it powers to enforce against producers (and distributors), but not ISPs, which were not covered under the definition of economic operator for any of the directives for which they surveilled the market. Competencies to pursue action under the ECD was devolved to other authorities at different administrative levels (regional and local), with none of which any direct contact had ever been established on this matter.

The three other MSAs did not provide any further detail on why they had not enforced against ISPs.

c. Online market surveillance activity

In this subsection MSAs were asked about the type of online market surveillance they conducted. They were asked to rank the frequency of their screening activity for non-compliant products by type of ISP. They were then asked to indicate the nature of their surveillance activity (Table 3), and provide detail on whether they use automated means for this activity.

Of the 10 MSAs from which responses were received, all engaged in some sort of online surveillance activity. One MSA noted that it did only screen the sites of e-commerce marketplace on a purely reactive basis, when it received indications from other MSAs of economic operators with non-compliant products. Only four of the 10 MSAs screened three or more different types of ISPs as part of their regular surveillance work. There was no clear correlation between the size or subject matter scope of MSAs and the breadth of their surveillance activity.

As can be seen in Table 3, e-commerce marketplaces are most frequently screened by MSAs for non-compliant products and sellers. Meanwhile, two MSAs stated that they focussed their online surveillance activity more on social media networks or search engines than on e-commerce marketplaces. Only one authority from a smaller Member State covered the entire range of ISPs. One MSA noted that it had started to establish contact with payment service providers (PSP), notably *PayPal*. It engaged with this PSP in order to pressure sellers to withdraw non-compliant products or face sanctions. However, it had not been successful with other payment service providers as yet. One MSA stated it used search engines exclusively to generate leads for non-compliant products. Apart from that, it only looked at e-commerce marketplaces and social networks and did not intend to widen its online surveillance to other types of ISPs. However, it did not contact the search engines with any dereferencing or other requests. Another MSA indicated that it planned to start monitoring social media networks, which it recognised as a growing problem regarding the sale of non-compliant products. This was confirmed by one other MSA, which noted the sale of illegal products, such as radio jammers, notably through the *Facebook Marketplace*. None of the MSAs looked at messenger services such as *WhatsApp*, or UGC sites like *YouTube*. One interlocutor stated that they had in the past tracked videos featuring non-compliant products on *YouTube*. However, they had stalled this activity.

ISP Category	Number of MSAs monitoring			
	most frequently	2 nd most frequently	3 rd most frequently	also monitored
E-commerce Platform	8	1	1	-
Social Network	1	2	1	-
UGC platforms	-	-	-	1
OTT Services / Messenger	-	-	-	1
Search engines	1	2	1	-
Meta search engine/aggregators	-	-	1	1
Others, please specify	-	-	-	-

Table 3 - Type Online surveillance activity, frequency – non-food

Almost all of the MSAs searched websites of ISPs manually for non-compliant products and a majority also searched proactively for sellers with non-compliant products (Table 4). One MSA indicated that, once it had identified a seller that sold unlawful products on one platform, they also searched for it on other marketplaces. That MSA also stated that it had a

team of officers who searched the internet on a 24-hour basis for infringing products. They received alerts from *Google* and *eBay* based on keywords and other search criteria for typical infringing products. Following an identification on *eBay*, the MSA had an expedited access to receive more detailed data on the seller, subject to a reasonably founded request.

The majority of MSAs also contacted ISPs to request information on sellers and products. Six out of 10 MSAs issued NTD requests to ISPs, mainly e-commerce marketplaces.

Two MSAs deployed software to search for non-compliant products online. One MSA had purchased licenses of two pieces of software to monitor the availability of products on selected online marketplaces. They had also seized on the opportunity of *eBay* making its product search interface public and developed a system to filter the platform's product range for potentially non-compliant products. In addition, they did automated image searches for known non-compliant products. The other MSA did not make any statements over their use of software.

Seven of 10 MSAs conducted online test purchases. One MSA, which did not do this, said it had no legal basis to engage in test purchases or mystery shopping. That legal basis would only be created under the new MSR.¹⁶⁶⁷

One MSA stated that they engaged with customs authorities where it concerned dropship¹⁶⁶⁸ or remotely fulfilled orders through e-commerce sites from outside the EU. One MSA listed as part of their other surveillance methods the fact that it invited ISPs to a meeting to educate and inform them on the legal obligations and the general regulatory environment of the product sectors that it covered. This was not listed in the below table as these activities will be treated in a separate section.

1667 Market Surveillance Regulation Article 14 (3) (j), Recital 40.

1668 Dropshipping is a practice whereby retailers (that may sell via online marketplaces) do not hold stock of goods, but commission third parties, such as the manufacturer, other retailers or FSPs, to deliver directly to customers. This practice has also been related to the sale of fake or unlawful products. Nadina Jacob and Felice Simonelli, 'How to Fully Reap the Benefits of the Internal Market for E-Commerce?: New Economic Opportunities and Challenges for Digital Services 20 Years after the Adoption of the e Commerce Directive.' (European Parliament 2020) <<https://data.europa.eu/doi/10.2861/47017>> accessed 20 April 2021.

Surveillance methods	Number of MSAs
Issuing takedown notices	6
Conducting test purchases	7
Searching the website for unlawful products/ content manually	9
Searching the website for non-compliant sellers manually	7
Searching the website for unlawful products/ content with software	2
Searching the website for non-compliant sellers with software	0
Requesting information on products/content	7
Requesting information about sellers	7
Other, please specify:	Customs coopera- tion (1)

Table 4 - Surveillance methods - non-food

d. Online market surveillance resources

Five out of 10 MSAs had started their online market surveillance activities before 2010. One MSA has engaged since 2000 in online market surveillance. Three MSAs had only started after 2010 (in 2012, 2015 and 2017), while the remaining two did not have any information about the start of their online market surveillance.

Only two MSAs had dedicated internet market surveillance staff. One of them, a large Member State MSA, had a team of five officers. The other MSA had a team of two officers dedicated to online market surveillance. Although other MSAs had indicated that they had internet market surveillance officers, it could not be verified whether these teams were exclusively looking at the internet or did this as part of their overall market surveillance work. For example, one MSA from a smaller Member State indicated that it had an internet surveillance team of 11 officers, which if cross-checked against the interview conducted with larger MSAs appears to be highly unlikely. Two MSAs indicated that their teams of 13 and 12 market surveillance officers were working in both on- and offline market surveillance. Another MSA, which was responsible for a broad variety of product

sectors, noted that it employed 55 market surveillance officers that covered both on- and offline activity. Of these, 40 were dedicated to general product safety, and 15 to food and food supplements. That MSA mentioned that it was currently planning to create a dedicated team of internet market surveillance experts. Other MSAs reported teams of between one and 11 officers that presumably conducted their activities concurrently on- and offline. One authority did not give any indication about its internet surveillance resources.

Four out of 10 MSAs had increased their internet market surveillance activities over the last five years, either through an increase in staff numbers or a general increase in activities focussed on e-commerce. Of these four MSAs, three belonged to large Member States, and consequently concerned authorities with already higher staff numbers. Another four MSAs recorded no change in the extent of their internet market surveillance, with one MSA stating they nevertheless saw the need for getting more funding as the country extended its focus to become an international logistics hub with a potential increase in small e-commerce consignments. Two MSAs noted a decrease in their funding over the last five years, which translated into less resources with regards to online enforcement activities. Of these authorities, one said it was in a phase of restructuring and considered the creation of a special internet investigation unit, with the funding details however not officially confirmed as yet.

None of the MSAs consulted employed any subcontractors from the private sector for their online market surveillance activities.

II. Section B: Enforcement activity and the ECD

a. Use of the ECD by MSAs

This first question in this section asked whether MSAs had already made use of the ECD intermediary liability provisions (Articles 12 – 15) in any form when engaging with ISPs. This may appear to be similar to the question in Section A (b) on whether MSAs had already enforced against ISPs. However, in this section MSAs were implicitly asked about their awareness of the ECD's enforcement toolset.

Three of the 10 MSAs stated that they had made use of the means offered by the ECD. One larger authority stated, however, that their interpretation of that use was the issuance of NTD requests. The authority stated, that it could not pursue non-responsive platforms because the competen-

cies for this activity were with other authorities, at regional or local levels (see I. Section A. b) The two other MSAs gave no further detail about their use of the ECD. Seven MSAs stated they had not made use of the means offered by the ECD to pursue non-responsive platforms through e.g. injunctions or administrative orders.

The three MSAs that had made use of the ECD in their online surveillance activity stated that they saw specific problems with the liability provisions of Articles 12 – 15. One MSA did not further substantiate their view. Another MSA stated that the liability exemptions were too broad and general in order to be applied effectively. The remaining MSA said that the liability exemptions were outdated. This latter MSA had the view that although NTD was an effective tool, the split of enforcement competencies *vis-à-vis* products and platforms resulted in a loss of efficiency.

One authority that had not made use of the ECD in their work nevertheless stated that it found the liability exemptions too broad and general to be applied effectively. That MSA said, platforms should be obliged to do more to prevent the occurrence of unlawful products and cooperate better with authorities.

b. The relation between product safety laws and the ECD

The next question asked more specifically whether MSAs thought that the liability exemption provisions of the ECD are of any relevance for the enforcement of product regulations. The objective of this question was to elucidate whether enforcement authorities saw the hosting of offers and marketing of unlawful products as illegal information/activity as per the hosting provider liability provisions of the ECD.¹⁶⁶⁹ Seven MSAs said they were not sure. Of these, one added that platforms did also not qualify as distributors which made any enforcement action under product legislation futile. The only way forward currently was to form voluntary agreements. Two MSAs saw the ECD and product laws as separate from one another. One of these two MSAs added that product regulation was only enforceable against producers that placed products on the market. Only one MSA saw the provisions of the ECD as relevant for the enforcement of sector specific laws.

MSAs were divided over whether online marketplaces could be considered as economic operators (with responsibilities) under product legisla-

1669 As stated in Directive 2000/31 (ECD) Article 14 (1) (a).

tion.¹⁶⁷⁰ Three stated that they would see platforms generally as economic operators for product law purposes, while another three saw them generally not as economic operators. One MSA, which had not been asked this particular question during an early version of the interview, had however proposed in the 2017 MSR Impact Assessment that it was worth considering to include e-commerce platforms under the definition of economic operator.¹⁶⁷¹

MSAs were also divided over whether the ECD and its liability conditions had been discussed during the AdCo meetings of the EMCD and the RED. While four Member States answered in the negative, two other ones said the issues were discussed, with one clarifying that this happened in the context of FSPs. Furthermore, five MSAs were unsure on whether the proposed MSR would provide better tools to enforce product legislation *vis-à-vis* platforms. One MSA was of the opinion that it would, because it broadened the enforcement powers of MSAs.

The Product Safety Pledge of 25 June 2018 could not be covered in three of the four in-person interviews that were conducted prior to June 2018. Three MSAs that were asked about the Product Safety Pledge (as part of the survey) welcomed this initiative saying that the assistance of online platforms in identifying dangerous products and helping in the enforcement against non-compliant seller would be key and result in a significant contribution. Although e-commerce marketplaces are not liable, they provided online space to other sellers. One MSA thought the Pledge will be useful in helping MSAs establish contact and develop relationships with platforms.

III. Section C: Cooperation with ISPs

This section sought to establish the nature and level of contacts that MSAs had established with online marketplaces and other ISPs. As stated above, the co-regulatory product regulation system relies on public-private cooperation both when drafting technical standards and when enforcing and

1670 This was question was added to the survey prior to the AdCo meetings in October 2018 and did therefore not feature during the in-person interviews, which took place prior to this.

1671 European Commission, 'Goods Package Proposal - Impact Assessment 2/4' (n 1547) 447. Note that some survey questions were introduced at a later stage based on feedback from earlier interviews.

addressing product safety issues. These principles are rooted in the GPSD and Decision 768/2008. They were reinforced by the MSR, with a dedicated cooperation chapter and new obligations of cooperation imposed on ISPs.¹⁶⁷²

a. Nature of cooperation between MSAs and ISPs

Of the 10 MSAs, four stated they had established working contacts with ISPs which were outside the surveillance activities mentioned in Section A (i.e. NTD, information requests, product searches etc). Two of these MSAs belonged to larger Member States. Of the latter two, one MSA shared that they had participated in workshops and information meetings organised by major online marketplaces in their country. As part of this, they had agreed with some platforms that they would filter for certain unlawful products (by keywords) and display online warning messages (agreed ad hoc) related to certain dangerous products. These agreements were achieved thanks to specific language in the national product sector laws implementing the EMCD and RED, which gave the MSA powers to request support from intermediaries, such as e-commerce marketplaces (see also Chapter 5). Meanwhile, the same MSA took part in annual information exchanges between national regulators to which online platforms were invited. No further detailed was shared on the nature of these events. The second MSA from a larger Member States had entered into bilateral MoUs with two major e-commerce marketplaces, which remained however confidential. It had also struck agreements with another international online marketplace and a major payment services provider. In general, these agreements and MoUs contained agreed standards and policies relating to the identification and prevention of unlawful products and sellers. The MSA had also organised and attended policy meetings together with online platform operators to discuss future cooperation.

Of the two remaining MSAs from smaller Member States which had established contact with ISPs, one said it held regular information exchange and educational meetings with international search engine operators and social media platforms, as well as other local platforms. The other MSA had reached out to two national marketplaces in a quest to get agreements on NTD procedures and ask for the instalment of internal filters that

1672 Directive 2001/95 (GPSD) Article 5 (4); Decision 768/2008 Recital 48; Market Surveillance Regulation Chapter III (Articles 8 & 9); Article 7 (2).

would screen for certain illegal products. The latter request was unsuccessful. Nevertheless, the MSA had passed on a list of keywords and regulatory product information in the hope that the marketplaces would install internal filters and also educate their sellers. The MSA managed to agree a deadline for the removal of unsafe products and advertisements, following a notification by its officers to the marketplace. An expedited deadline was agreed for removal of offers and ads of unsafe products that posed a high risk.

This MSA remained, however, subdued over the success of the agreements struck. It did not have any data to judge whether the measures agreed did indeed help in the fight against unsafe and non-compliant products. The other three MSAs were more positive, stating that the cooperation measures had helped significantly, notably by establishing working contacts and initial processes that could serve as a basis for further cooperation. However, it should be noted that these improvements happened from a low base of virtually no previous contact or exchange between these MSAs and platforms.

b. Obstacles to effective surveillance and enforcement

MSAs were asked about the existence of specific obstacles that stood in the way of effective surveillance and enforcement of e-commerce conducted via online platforms.

Resource constraints on the side of MSAs were the most frequently cited obstacles (seven MSAs) that hindered better and more effective online surveillance and enforcement work. As stated above, one MSA was faced with a 25% budget cut over the last five years. Another MSA said their resource constraints meant they were working strictly on the surveillance of high-risk product areas (risk based approach), which currently included, for example, radio jammers, solar panel inverters and LED lights. The jurisdictional barriers, both with regards to platforms based within and outside the EU, were also seen as enforcement problems. The two MSAs that complained over the unwillingness of platforms to cooperate belonged to the group of MSAs that had entered into agreements and regular contact with online marketplaces.

Number of MSAs finding that...	
Platforms are not willing or do not see any legal obligation to cooperate.	2
Platforms have no time/resources to cooperate.	1

Number of MSAs finding that...	
Lack of resources on the side of my authority.	7
Platforms are outside of our national jurisdictional reach.	5
Platforms are outside of EU jurisdictional reach.	5
Other, please specify:	4

Table 5 - Obstacles to surveillance and enforcement work – non-food

Regarding the other obstacles, one MSA mentioned that the legal definition of platform operators did not allow for a level of enforcement that would be adequate given the market position of these platforms. This concern was supported by another MSA, which found the existing legal framework not clear where it concerned the role of online marketplaces in the supply chain. In addition, it was hard to identify the responsible person when contacting an ISP. Another smaller MSA stated that, given that no online marketplace operator or online sellers on these marketplaces was based in its country, it was virtually impossible to enforce product legislation on its territory. Meanwhile, another MSA stated that cooperation between EU MSAs was still too ineffective to deal with e-commerce problems. This might eventually be improved by the new MSR and its new system of national single liaison offices for market surveillance.¹⁶⁷³

IV. Section D: Regulatory cooperation between MSAs

The fragmented nature of market surveillance activity has been commented on before. The disadvantages of the highly specialised sectoral enforcement system were only brought further to the fore by the rise in e-commerce. This subsection aimed at getting the perspective of MSAs regarding the level of cooperation in online market surveillance.

Seven out of 10 MSAs stated that there were other authorities within their countries whose activity overlapped or with theirs. The number of other authorities with overlapping responsibilities varied depending on the scope of activities of the MSA in question and the size of the Member State. Only one Member State cited that its activities were affected by the enforcement authorities of the ECD within its country. Most commonly, the other authorities with overlapping or complementary tasks were medical or pharmaceutical agencies (3 MSAs), consumer protection agencies (3

1673 Market Surveillance Regulation Article 10.

MSAs), customs (3 MSAs), transportation agencies (3 MSAs), Food Safety Authorities (FSAs) (2 MSAs); other authorities included tax inspections, environmental authorities or postal and telecoms regulators. Seven out of the ten MSAs had some level of coordination between national surveillance authorities. One large and one small Member State reported on bi-annual meetings where enforcement work on all *New Approach* directives was coordinated. One smaller Member State said that these kinds of meetings took place on a bi-monthly basis and included discussion on online market surveillance. This was supplemented by bilateral meetings between MSAs. Another MSA from a large Member State said that a central commission coordinated between all authorities that were involved in market surveillance. Three MSAs, of which one from a larger Member State, reported that meetings took place on an ad-hoc and uncoordinated basis.

The question on EU level cooperation was only asked during the four in-person or telephone interviews. The context of EU cooperation was obvious from the surveys gathered after the AdCo meetings. The interviewed MSAs all confirmed AdCos, the ICSMS and the RAPEX system as main channels of interaction between MSAs at EU level. One MSA mentioned bilateral cooperation with MSAs in China, Canada, the US and India. Of the four MSAs interviewed, all said that the EU coordination consisted of best practice sharing and joint surveillance initiatives. Other activities, less frequently mentioned, included sharing of statistics and data, proposing or amending EU legislations, and setting common surveillance and enforcement standards. Eight out of 10 MSAs found that the coordination activity had intensified somewhat over the last five years; two found it had intensified significantly. One MSA qualified this by saying that while cooperation had intensified, output had not improved significantly. Some Member States had even withdrawn from some AdCos.

Asked on the most notable initiatives that came out of MSAs' EU cooperation, three MSAs stated that the best practice sharing on agreements and codes of conducts with online marketplaces had been useful. One other MSA mentioned best practice sharing in general as beneficial. Other initiatives mentioned were the input into the Commission Notice on market surveillance for products sold online,¹⁶⁷⁴ input into the MSR, especially the designation of FSPs as economic operators and mandatory powers of MSAs to conduct anonymous test purchases.¹⁶⁷⁵

1674 European Commission, '2017/C 250/01' (n 1504).

1675 Market Surveillance Regulation Article 14 (3) (j).

C. Case study 2: Online market surveillance in food safety regulation

1. Overview

The sectors covered by food safety regulation cover more regular food and beverages, but also fringe sectors like nutritional supplements, or novel foods and animal feeds. In addition, food that is subject to certain production methods, such as organic products, are also regulated by food safety law. The scope of the food framework encompasses the entire supply chain, from agricultural producers, importers, logistics and distribution companies to retailers. While food safety in Europe is managed and implemented on a co-regulatory basis, enforcement and controls remain solidly in the hands of public authorities.¹⁶⁷⁶ Food safety is considered one of the most tightly regulated areas in the EU.¹⁶⁷⁷

Usually, Member States have one central authority that carries responsibility for general food safety matters. However, other authorities may still be involved in food safety enforcement. For example, nutritional supplements regulation may overlap with responsibilities of pharmaceutical or medicinal product authorities. Food safety issues may also play a role in authorisation and control of plant protection products or affect the area of intellectual property and cultural heritage, for example through Geographical Indications. Despite the existence of these neighbouring enforcement areas, it was relatively straightforward to identify and focus on the central FSAs and their work. The FSAs were selected following a consultation meeting with DG Health and Food Safety at the European Commission, which took place on 6 March 2018. During this meeting, the results of which also fed into this case study, a number of FSAs were identified that, according to indication from the European Commission, played a more proactive role in the area of online food safety surveillance. Of seven authorities that were originally selected, in-person or telephone interviews with four authorities took place eventually. One of these authorities was from a larger Member State. One FSA with particularly wide horizontal surveillance powers was interviewed for both case studies (product regulation and food safety). The interviews were conducted between September 2018 and March 2019.

¹⁶⁷⁶ Garcia Martinez, Verbruggen and Fearné (n 1624) 11.

¹⁶⁷⁷ Vaqué (n 1631) 166.

2. Survey results – Online market surveillance in the area of food safety

I. Section A: Market surveillance and enforcement

a. Enforcement scope: sector coverage

Of the four FSAs interviewed, one had broad sectoral competencies that covered food and feedstuffs, food supplements, cosmetics and chemicals, but also general non-food consumer products. This authority was also interviewed in Case Study 1, where it said that its government was currently looking into further broadening its scope, adding pharmaceuticals, competition, telecoms and transportation to its remit. The other three authorities all also had responsibilities for food supplements. The authority from the larger Member State was also the competent authority in the area of animal feedstuffs, plant protection products, veterinary drugs, toy safety, textiles, food contact materials and tobacco products. One of the smaller FSAs was also responsible for tobacco products and food services, while the fourth FSA looked after seeds and live animals in addition to food and food supplements. Consequently, all of the four FSAs were the lead authorities in their Member States for the application of the EU Food Law *acquis*.

b. Enforcement vis-à-vis ISPs

In this subsection FSAs were asked whether they had taken direct enforcement measures against ISPs, and if yes, under which legal provision. Like in Case Study 1, action against ISPs would normally be taken through the ECD and its national implementation. However, the previous chapter had shown that national secondary intermediary provisions existed in Member States' ordinary laws. This question sought to elicit whether FSAs had used any of these provisions against ISPs.

Three out of the four FSAs had not taken any enforcement action against ISPs so far. One authority stated that they favoured a cooperative approach, especially where it concerned online marketplaces. They did not pursue ISPs, but went mainly after the sellers on these platforms. Another FSA said that, although they had inspected online marketplaces, i.e. verified the legality of offers, they had not acted against marketplaces. They would only have a legal basis for enforcement where a marketplace operator acted also as an FSP, which had not yet happened in their jurisdiction.

One authority stated that it had acted against ISPs under the national laws that implemented the EU Food law *acquis*. It did, however, not provide any further detail. This FSA implied later that the particular way in which the ECD was implemented in its country may have provided for the option to take direct action against a marketplace for not reacting to requests from authorities. The European Commission (DG Health) noted that there was very low appetite on its part to enhance responsibilities and liabilities for platforms in this area, due to fear over a negative impact on the digital business environment.¹⁶⁷⁸

c. Online market surveillance activity

In this subsection, FSAs were asked about the type of online market surveillance they conducted. They were asked to rank the frequency of their screening activity for non-compliant products by type of ISP (see Table 6). They were then asked to indicate the nature of their surveillance activity (Table 7), and provide detail on whether they use automated means for this activity.

All of the four FSAs interviewed engaged in some sort of online market surveillance activity. One smaller FSA regularly screened all six types of ISPs given as an option in the survey, while another two screened four different types of ISPs.

Table 6 shows that e-commerce marketplaces are most frequently screened by MSAs for non-compliant food products and sellers. One FSA surveils social networks more frequently than e-commerce marketplaces. One FSA/MSA, also covered in Case Study 1, stated it used search engines exclusively to generate leads for non-compliant products. However, it did not contact the search engines with any dereferencing or other requests. Apart from that, it only looked at e-commerce marketplaces and social networks and did not intend to widen its online surveillance to other types of ISPs. Another MSA indicated that it used *Google's* search engines to identify non-compliant products elsewhere but then tried to reach out to *Google* to block access to these listings and post warning messages next to certain offers. However, this was fraught with problems as the FSA needed to engage the Irish regulator and this was taking too long and too bureaucratic. The FSA from the larger Member State indicated that it planned to start

1678 As a reminder: the interview with DG Health took place in early March 2018.

monitoring UGC platforms and OTT services in the near future. Only one FSA looked at OTT services currently.

ISP Category	Number of MSAs monitoring			
	most frequently	2 nd most frequently	3 rd most frequently	also monitored
E-commerce Platform	3	1	-	-
Social Network	1	1	1	1
UGC platforms	-	-	1	1
OTT Services / Messenger	-	-	-	1
Search engines	-	1	-	1
Meta search engine/aggregators	-	1	1	1
Others, please specify	-	-	-	1

Table 6 - Type Online surveillance activity, frequency – food

Overall, the authorities interviewed engaged in a relatively broad variety of surveillance activities. All of the four FSAs searched websites of ISPs manually for non-compliant products and sellers, conducted test purchases and requested information on non-compliant sellers. However, only two FSAs said they also asked the ISP for information on products. One FSA stated that, although it did test purchases online, it had no proper legal basis. It also lacked the means, such as corporate credit cards.

Three FSAs had issued NTD requests to platforms. However, one FSA remarked that the level of response was unsatisfactory and that some platforms had to be approached repeatedly before they acted. Moreover, the FSA had experienced difficulties in getting contact details from some marketplace operators. That FSA was not fully aware of the obligations of platforms under the ECD to react to NTD requests. One FSA stated that it did not issue NTD requests. However, it emerged during the wider discussion that they did approach platforms with requests to block access or remove content (e.g. *Google Search*). DG Health, by contrast, noted in its interview that the NTD process was generally working well and that there was little need to put additional obligations on platforms.

Two FSAs deployed software to search for non-compliant products and/or sellers online. The FSA from a large Member States operated two pieces of software. One software product was deployed by the tax authorities to identify tax evading businesses selling via online platforms. The FSA uses data from this web crawler to identify businesses that sell food products and then double checks whether these had registered as food business operators, a requirement of the Regulation on the hygiene of food-

stuffs.¹⁶⁷⁹ The software version used is a modification by the national tax authorities of a privately developed product. Secondly, it has taken part in the development of software to identify unlawful food products sold via the internet. This project focuses on identifying food products with prohibited ingredients or misleading declarations. This software was developed in conjunction with a national university and as part of a public research project. The other MSA also used software, developed by its tax authorities to identify online food sellers that had failed to register as a food business.

One FSA had created their own account and page and on a social media network and used this to flag unlawful products to the platform operator and to post warnings to users.

Surveillance methods	Number of MSAs...
Issuing takedown notices	3
Conducting test purchases	4
Searching the website for unlawful products/content manually	4
Searching the website for non-compliant sellers manually	4
Searching the website for unlawful products/content with software	1
Searching the website for non-compliant sellers with software	2
Requesting information on products/content	2
Requesting information about sellers	4
Other, please specify:	Own social media page to issue warnings (1)

Table 7 - Surveillance methods - food

d. Online market surveillance resources

Two FSAs had no recollection of when they started their online market surveillance activities. One FSA started in 2007. It said it belonged to the group of five or so EU Member States that pioneered online market surveillance for food safety within the network of European Food Law Enforcement Practitioners (FLEP).¹⁶⁸⁰ The other, from the larger Member State, started its activities in 2011 as a pilot project before formally establishing an internet surveillance unit in 2013. That unit employed currently

1679 Regulation 852/2004 Article 6 (2).

1680 PJ Byrne, 'FLEP - Food Law Enforcement Practitioners' <<http://www.flep.org/what.html>> accessed 17 July 2020.

six people entirely dedicated to internet market surveillance. It was financed by regional food safety authorities, which retained the main competencies for enforcing the food safety *acquis*, but was assembled under the roof of the central consumer protection and food safety agency. While the number of staff (six officers) had not changed since the beginning of the operations in 2013, the FSA said that there was a public recognition that internet surveillance was becoming more important. This FSA also started in April 2020 to host another unit that looks exclusively at the online sale of plant protection products. It was not disclosed how many people work in this new unit. This FSA also said that apart from its own staff of 32, many of the large number of local food safety inspectors were also looking at e-commerce as part of their daily controls work.

The smaller FSA that started its online market surveillance in 2007 said that it had 30 staff that had received special training for online controls and enforcement. These officers, although not exclusively looking at e-commerce, were predestined to work on internet market surveillance. This number had not changed over the last five years. Meanwhile, the entire number of food safety inspectors stood at over 550 for the entire country.

Another FSA said that of its total staff of between 400 to 500 local food safety inspectors that worked nationwide, a group of 32 specialists were assembled who were fighting food fraud, part of which also concerned e-commerce activities. In addition, the authority employed 2.5 full-time resources looking exclusively at online market surveillance. Their activities covered food and food supplements. This number had stayed the same over the last five years.

The FSA/MSA already covered in Case Study 1, which engaged in a broad variety of product sectors, noted that of its 55 market surveillance officers, 15 worked in the area of food and food supplements and 40 on other product safety issues. It should be assumed that this is supplemented by a considerable number of local food safety inspectors. All of its officers were conducting both on- and offline market surveillance. The authority had experienced budget cuts of 25% over the last five years. As part of ongoing restructuring it was currently planning to create a dedicated team of internet market surveillance experts.

None of the FSAs consulted or employed any subcontractors from the private sector for their online market surveillance activities.

The DG Health interlocutor from the European Commission confirmed that there were marked differences between Member States' focus on online market surveillance.

II. Section B: Enforcement activity and the ECD

a. Use of the ECD by FSAs

The first question in this section asked whether FSAs had already made use of the ECD intermediary liability provisions (Articles 12 – 15) in any form when engaging with ISPs. This question appears to be similar to the one in Section A (b) on whether FSAs had already enforced against ISPs. However, in this section, FSAs are implicitly asked about their awareness of the ECD's enforcement toolset.

None of the four FSAs stated that they had made use of the means offered by the ECD *vis-à-vis* online platforms. The FSA from a larger Member State remarked that ECD enforcement was under the competencies of other authorities within the country and could therefore not be handled via its service.

There was a general hesitancy amongst the four FSAs to make any pronounced statement on the ECD's liability provisions. The authority interviewed already in the first case study repeated that platforms should probably be more cooperative and that the ECD liability provisions may be too broad in order to be effective. However, it did not take action against online platforms on the basis of the ECD because it preferred not to antagonise them in the interest of future cooperation. This latter view was echoed by the FSA from the larger Member State. It did not want to comment on any issues with the ECD's liability provisions. The two other FSAs were similarly evasive. One FSA broadly stated that online marketplaces should do more to assist FSAs in their work, but did not make any more specific statements on exactly how or whether this was related to the ECD. The remaining FSA voiced in the following discussion that the ECD liability provisions may be outdated, as the kind of information hosts covered under the ECD's Article 14 may not exist anymore today. Online platforms were more active today and maybe a new definition was needed.

The DG Health representative, however, stated that the ECD in its current form was perceived as working well due to FSAs' use of NTD procedures. They also doubted that more proactive monitoring on the side of platforms was adequate due to the complex and specialised nature of food law. This finding is relativised by the interviews with the FSAs, which clearly found that the use of NTD was not without problems. Meanwhile, the FSAs interviewed had a more mixed view on the ECD's liability protections for online marketplaces and the role of these actors.

b. The relation between food safety laws and the ECD

The next question asked more specifically whether FSAs thought that the liability provisions of the ECD are of any relevance for the enforcement of food safety law. The objective was to elucidate whether FSAs saw the hosting of offers and marketing of unlawful products as illegal activity as per the hosting provider liability provisions of the ECD.

Two of the four FSAs said they were not sure. One of them added that platforms did also not qualify as distributors or food business operators, which made any enforcement action under food safety legislation pointless.

The other FSA said that normally online marketplaces were not considered food business operators. However, this could change where the platform takes a commission from the sellers and charges other fees. This, it said, would make it an active participant in the transaction and potentially responsible. The FSA from a larger Member State had a clear view that the ECD was not relevant for the enforcement of food safety laws. Meanwhile, online marketplaces themselves were also not covered by food law under the Regulation on the Hygiene of foodstuffs, which applied only to “undertakings, the concept of which implies a certain continuity of activities and a certain degree of organization.”¹⁶⁸¹

Finally, the fourth FSA was affirmative that the ECD’s liability provisions were relevant for the enforcement of food law. In its view, unlawful food products were included under the definition illegal information or activity. However, the ECD was not well transposed in its national law and no authority had been allocated with clear enforcement competency. This made the imposition of injunctions, such as cease-and-desist of certain offers, placement of online warning messages, or the imposition of keyword filters, difficult. The FSA was currently trying to exploit this enforcement vacuum by gaining competencies to enforce on the basis of the ECD, i.e. through placing injunctions against online marketplace operators. This FSA also had a pronounced view on the responsibilities of online marketplaces under food safety law. The CJEU’s ruling in *L’Oréal v eBay*, it said, opened up the possibility of qualifying active platforms as food business operators. However, setting a legal precedent would be a difficult and time-consuming undertaking and the FSA preferred to place injunctions under the ECD.

1681 Regulation 852/2004, Recital 9.

DG Health view was that it was unlikely that enforcement under food safety law would be expanded towards platforms. However, it was likely to be applied towards FSPs in the future. Nevertheless, the representative said that there was development in the position of the European Commission towards platforms, with a general push for more responsibilities and regulation of platforms. Recent terrorist attacks and hate speech were responsible for a marked shift of the European Commission's position on this matter.

III. Section C: Cooperation with ISPs

This section sought to establish the nature and level of contacts that FSAs had made with online marketplaces and other ISPs. The co-regulatory structure of food safety law is based on industry designing and implementing food safety management systems according to private standards. FSAs takes these industry standards into account when conducting official controls of food businesses.

a. Nature of cooperation between FSAs and ISPs

All of the four FSAs said they had established working contacts with ISPs which were outside the surveillance activity established in Section A (i.e. NTD, information requests, market surveillance). The FSA from the larger Member State said that this cooperation consisted mainly of ad-hoc activities. For example, the FSA had distributed information material concerning the legal provisions on the sale of certain food products and supplements to online platforms. They had also asked ISPs to nominate contact points to the FSA for enquiries and removal requests. In addition, they tried to interest marketplaces and other e-commerce sites to gain trust mark certifications for safe shopping experiences. Although the authority was not able to recommend or endorse specific certificates, it worked together with industry associations to drive adoption of certification in this area. Another FSA also engaged mainly in ad hoc initiatives to inform marketplaces about applicable product legislation, with a view to have this passed on to their sellers. They engaged technical intermediaries that provide, e.g. product data, to inform marketplaces on gaps in their online product labelling and sales information, provided lists of forbidden ingredients and products for possible filtering and distributed regulatory infor-

mation for seller education. They had also met with one marketplace operator in another Member State to discuss issues of obvious non-compliance with applicable food safety laws and basic due diligence, but had made no progress with this operator.

One of the FSAs had taken part in a workshop organised by another authority in their Member State to which online marketplaces had been invited. During that workshop they reached an agreement with a national marketplace operator to establish mutual points of contact for NTD requests and other enquiries. Prior to this, the exchange of information had happened exclusively through the legal team of that e-commerce marketplace. They were also in the process of establishing contact with the national e-commerce business association to get a better understanding of the business models of certain national ISPs.

The FSA already interviewed in Case Study 1 had reached out to two national marketplaces in a quest to get agreements on NTD procedures and ask for the instalment of internal filters that would screen for certain illegal products. Although that request was unsuccessful, the FSA noted that platforms were slightly more forthcoming in their cooperation in matters of food safety than in non-food products. The FSA had passed on a list of keywords and regulatory information in the hope that the marketplaces would install internal filters and educate sellers, but had received no feedback as yet. The FSA also managed to agree a deadline for the removal of unsafe products and advertisements, which included food supplements and alcoholic beverages following NTD requests by its officers. An expedited deadline was agreed for removal of offers and ads of unlawful products that posed a high risk.

This FSA was gloomy over the success of the agreements struck. So far it did not have any data to judge whether the measures agreed did indeed help in the fight against non-compliant food products. The other three FSAs were more positive, stating that the cooperation measures had helped significantly, notably by establishing working contacts. One authority valued the fact that operational contacts between authorities and platforms were established, which was an improvement on the previously more formal exchange of communication via lawyers. However, another FSA also mentioned that the positive change happened from a very low basis and that there was room for improvement.

According to the DG Health interlocutor, the European Commission had established regular contacts with the major marketplace operators *Amazon*, *eBay*, *Alibaba* and *Facebook*. It was currently working on a list of obviously unlawful ingredients and products that it intended to circulate

among online marketplaces. The aim was to get a non-bonding commitment from marketplaces to monitor and filter for relevant products.

b. Obstacles to effective surveillance and enforcement

MSAs were asked about the existence of specific obstacles that stood in the way of effective surveillance and enforcement in e-commerce conducted via online platforms.

The jurisdictional barrier, both with regards to platforms based within and outside the EU was seen as an enforcement problem by three of the four interviewed FSAs. One FSA mentioned that efficiency of cooperation between FSAs in Europe was lacking. Speed of action was a major problem in this context.

Two FSAs cited resource problems on their side as an obstacle to enforcement. As was mentioned before, one FSA was faced with a 25% budget cut over the last five years. Another FSA had not seen any increase in the 2.5 headcount accorded to its internet market surveillance of food and food supplements despite a growth in workload.

Two FSAs saw the unwillingness of platforms to cooperate as an obstacle to effective enforcement against unsafe and unlawful food products.

Number of MSAs finding that...	
Platforms are not willing or do not see any legal obligation to cooperate.	2
Platforms have no time/resources to cooperate.	-
Lack of resources on the side of my authority.	2
Platforms are outside of our national jurisdictional reach.	3
Platforms are outside of EU jurisdictional reach.	3
Other, please specify:	

Table 8 Obstacles to surveillance and enforcement work – food

IV. Section D: Regulatory cooperation between FSAs

This subsection asked for the perspective of FSAs regarding the level of regulatory cooperation in online market surveillance.

All FSAs stated that there were other authorities within their countries whose activity overlapped with theirs. The work of the national pharmaceutical regulator had an impact on all four FSAs. Further overlaps existed

with tax authorities (2 FSAs), plant protection agencies (1 FSA), customs (1 FSA) and a number of trade, technical and labour inspections services. All four FSAs had some level of coordination between their national surveillance authorities. The FSA from a large Member State was the only one where no formal coordination between other MSAs existed. Meetings between authorities took place on an ad-hoc and uncoordinated basis. This authority also criticised that e-commerce enforcement still happened too much in silos with in its own country. Among the three FSAs where cooperation between national surveillance authorities was more institutionalised, one reported that this took place between all MSAs (food and non-food) on a bi-monthly basis and included discussions of online market surveillance. This was supplemented by bilateral meetings between MSAs. Another FSA stated that its authority has had regular quarterly meetings on internet market surveillance with the national pharmaceutical regulator for the last 10 years. Since 2018, the FSA also took part in best practice sharing on internet market surveillance with national non-food MSAs. In addition, bilateral contacts existed with the national tax authorities.

The fourth MSA has been taking part in an interdepartmental working group on e-commerce, which exists since 2017 and which meets on an annual basis. Apart from that, it had a bilateral cooperation with national trade inspection services.

The interviewed FSAs all stated that the EU level cooperation happened mainly via the Food Law Enforcement Practitioners (FLEP) working group, which was established after the first EU Directive on official controls in 1990. Its main objective is the exchange of information, learning and cooperation in the area of European food law enforcement.¹⁶⁸² FLEP participants also discuss e-commerce food safety surveillance. Apart from that, two FSAs mentioned the European Commission's initiative on online food offered, which exists since 2017 and which coordinates e-commerce controls, but also formulates policy recommendations.¹⁶⁸³ One FSA mentioned that it had formed a special bilateral cooperation with the FSA of another Member State, which was also part the FSAs interviewed.

All of the four FSAs interviewed stated that EU coordination consisted of best practice sharing. FSAs were exchanging their practical experience in enforcement work, such as for example conducting test purchases. Three

1682 Byrne (n 1679).

1683 'Online Offered Food (2017) - Food Safety - European Commission' (*Food Safety*) <https://ec.europa.eu/food/safety/official_controls/eu-coordinated-control-plans/online-offered-food-2017_en> accessed 20 April 2021.

FSAs said that joint surveillance activities and the formulation of policy recommendations were other features of their EU cooperation. Setting common market surveillance standards and exchange of data and statistics was mentioned by one FSA as an additional activity. This FSA said that this latter activity should ideally be intensified. One FSA mentioned the Better Training for Safe Food Initiative as an additional activity.¹⁶⁸⁴ All FSAs found that coordination had intensified over the last five years; two found it had intensified significantly and two noticed that it had increased somewhat. One FSA stated that participation in the FLEP e-commerce working group had grown from eight Member States in 2011 to 18 in 2017. Another FSA stated that a new enforcement case management system had been brought in place, which was good, but, at a turnaround time of 3 months, still too lengthy.

Three FSAs noted that the input of the FLEP working group into the recent official controls regulation had been one of the most notable initiatives that came out of FSAs EU cooperation. They cited the possibility of conducting online test purchases and the new provisions relating to the closure of websites as main achievements. Other initiatives included the Better Training for Safe Food Initiative and a guide for maintenance of the cooling chain in food e-commerce.

The DG Health representative confirmed the intensified cooperation between EU FSAs, which manifested itself also through improved use and functioning of the EU's Food and Feed Safety Alerts (RASFF) system, a notification tool for unsafe food that posed high health risks.¹⁶⁸⁵

D. Summary of MSA/FSA case studies

The case studies confirmed that the availability of unsafe products online via online platforms, be they food or non-food, is a problem that is in the policy focus of the EU and of Member States. The interviews conducted, however, also confirm the disparate set up, funding, knowledge and experience when it comes to online market surveillance and the enforcement of the relevant provisions.

1684 'Better Training for Safer Food (BTFSF) - Food Safety - European Commission' (n 1637).

1685 European Commission, 'RASFF - Food and Feed Safety Alerts' (*Food Safety - European Commission*, 17 October 2016) <https://ec.europa.eu/food/safety/rasff_en> accessed 17 July 2020.

A number of observations concerning the online market surveillance and enforcement system in the area of food and product safety can be made.

1. Enforcement hesitation and unclarity over the relevance of the ECD

Considering that online marketplaces and ISPs in general have been identified as a major channel through which unsafe, non-compliant or straightforwardly illegal products are being offered to EU consumers, it is astonishing how little the enforcement has been adapted to this phenomenon. This is not meant to be a criticism of the work of MSAs (or FSAs). These authorities work in an area of highly complex, technical regulation which requires expert knowledge. Their enforcement work involves technical risk assessment and cooperation with economic operators in the withdrawal of products. This kind of market surveillance is tried and tested when it comes to traditional, physical sales and supply chain activities. With regards to online intermediaries, the ECD offers a conceptually and structurally different regulatory framework, with its reliance on knowledge creation through notices and the imposition of injunctions. This corresponds more to the private regulation areas of speech and economic (IP) regulation. In addition, product and food safety regulation have until recently not envisaged obligations for intermediaries that are not economic actors. This has only recently happened with the MSR (in 2019), some national product rules, like the German implementations of the EMCD and RED, and, to a limited extent, in official controls for food safety. It comes therefore as no surprise that none of the authorities interviewed had seized on the use of preventive injunctions offered by the ECD's Article 14 (3). Only one FSA appeared to be aware of that possibility. Nor is it clear whether the MSAs have been allocated the competency to do so under their national rules. As it is, MSAs have been remarkably cautious when approaching platforms in order to get assistance in the identification and removal of unlawful product offers. Only those MSAs and FSAs that have been more proactive in their online market surveillance have demanded that platforms be more cooperative in the fight against unsafe products. The use of NTD also seems to be generally underexploited. Many MSAs/FSAs have only since recent been able to establish points of contacts to achieve take-downs for the removal of unlawful product. In that respect, some of the achievements in the Product Safety Pledge merely commit online marketplaces to actions that they have been obliged to take under the ECD for the

last 20 years. This hesitation to enforce in grey areas of sectoral and territorial competency has also been pointed out by consumer protection experts. They suggest that more guidance is needed for MSAs/FSAs. However, they also note that authorities may feel hesitant because of the risk of being challenged by large, global players in courts,¹⁶⁸⁶ an assertion which was confirmed through some of the feedback gathered in the surveys.

2. The technical role and legal classification of online platforms

Secondly, like across other sectors discussed above, MSAs and FSAs have a limited understanding about the functioning of online platforms, such as their business models, or content management practices. The assessment by MSAs/FSAs of the role of online marketplaces and social media platforms in the supply chain of these products varies. For example, while many authorities interviewed underlined the platform character of online marketplaces, they did not pick up on the fact that much of the relevant and sometimes regulated product information (product title, description, ingredients, pictures, etc.) is displayed through structured fields. The data in these field is provided by uploaders/sellers and exploited by platforms for various commercial purposes, but less so, it seems for harm prevention. Some of the MSAs/FSAs saw the fact that platforms charged a commission for the intermediation services or played an otherwise active role as a factor that influences their legal exposure and obligations. This could extend to making these marketplaces primary liable for the safety of the products offered. Others did not share this view or had no view at all. Enforcement authorities appear to be in dire need of an updated legal clarification of the role and responsibilities of the new Web 2.0 intermediaries in e-commerce. The MSR (for non-food products) and the Official Controls regulation (in the area of food safety) only partly help in addressing this problem. The upcoming review of the GPSD, in conjunction with the envisaged Digital Services Act, provide for a unique chance to fill his gap.

1686 M Goyens, 'Effective Consumer Protection Frameworks in a Global and Digital World' (2020) 43 *Journal of Consumer Policy* 195, 201.

3. Product and food safety enforcement expertise as a chance

Thirdly, FSAs and MSAs are prepared to proactively search for and assess unlawful products online. This is in line with the nature of product and food safety regulation, which puts market surveillance and enforcement solidly in the hands of public authorities. This technical expertise in assessing the lawfulness of product offers is a precious asset. In other content areas there are currently no or few public actors with the same resource and expertise to make such decisions. If online marketplaces were obliged to work more proactively with MSAs and FSAs in order to identify and prevent unlawful products on the basis of the technical expertise shared with them, this could lead to a new risk management system. Online marketplaces, whose activities are capable of amplifying harms to consumer health and safety through the listing and promotion of certain products, would need to meet certain essential requirements to contain these risks. These essential requirements could consist of processes of regulatory cooperation and/or due diligence measures relating to the onboarding and display of products in question and their sellers. Such essential requirements of platforms could be either incorporated into existing technical and industry standards for food and product safety, or set up through a new intermediary responsibility framework and linked to existing legislation. This will be elaborated on in the next chapter.

4. Horizontal cooperation

One current drawback is the fragmented and slow cooperation between MSAs/FSAs at EU level. The interviews have demonstrated that although authorities value increased cooperation in the area of online market surveillance, more can be done. This is also broadly in line with the sectoral analysis of product and food safety law enforcement in the previous chapter. Rather than a threat, e-commerce could be an opportunity to rekindle horizontal cooperation. The European Commission could expand its facilitative role and intensify common activities through working groups such as RAPEX (now the Product Safety Gate), RASFF, AdCos, the coordinated control programs and training and best practice sharing in online market surveillance. The gradual shift in the European Commission's policy position on platforms' responsibilities since 2017 needs to be backed up by more tangible support when it comes to joint surveillance and enforcement. A first step in the right direction is the research planned

by the EU into challenges and opportunities for MSAs in relation to new technologies and the digital supply chain.¹⁶⁸⁷ An enhanced co-regulatory support structure at EU or national level could be a useful start for creating synergies of enforcement expertise across Member States and content sectors.

1687 European Commission, 'Assessing the Challenges and Opportunities for Market Surveillance Activities in Relation to New Technologies and Digital Supply Chain - Call for Tenders N° 834/PP/GRO/PPA/20/11848 - 2020/S 116-280777' <<https://ted.europa.eu/udl?uri=TED:NOTICE:280777-2020:TEXT:EN:HTML>> accessed 31 July 2020.