Nordic proposal for amendments to the DSA proposal – in order to restore consumer safety and level playing field on the internal market

Summary

Platforms and online marketplaces are new business models which have changed everyday life and the market. The Nordic commerce sector welcomes the aim of the Digital Service Act (DSA) to tackle both substantial problems with dangerous, unsafe and non-compliant products from third country sellers and distortions of competition.

However, the proposal is in need of refinement in order to effectively address the problem of unsafe goods entering the EU via online marketplaces. With the new DSA-initiative, we finally have a chance to improve consumer safety while putting an end to distorted 3rd country competition for the European commerce sector.

To solve the problem with unsafe and non-compliant products and to protect the principles of the internal market, stronger measures need to be introduced, such as proactive responsibility, while at the same time closing legislative loopholes.

Our main points:

- There should be **liability and an obligation to monitor for online marketplaces**, when they intermediate the sale of goods between a seller in a third country and a buyer in the EU, where there is no manufacturer or importer in EU. This should apply regardless of how passive the online marketplace is. This is in line with the applicable legislation on product safety in EU.
- In these cases, the **online marketplace should bear a similar responsibility** as an importer and the product liability as an importer/producer. In other words, they have the responsibility to ensure that the goods sold via the marketplace are in compliance with the EU legislation.
- "Notice-and-take-down"-obligations will not protect consumers against illegal and dangerous goods, as they take place **after** the dangerous goods have been sold, putting consumers at risk.
- Online marketplaces who are actively involved in the supply chain should have liability for consumer rights. It should be clearer when an online marketplace is considered liable for guaranteeing consumers their rights according to EU consumer protection law.

What should legislators consider?

- Introduce the concept of a *digital importer,* with direct liability for goods imported and sold to European consumers. This should mirror the obligations, responsibilities and liability of a physical importer, cf. the NLF and the GPSD.
- Recital 28 should be amended in order to permit a specific monitoring obligation for online marketplaces facilitating the sale of goods from 3rd country sellers.
- The principle of *know your business customer* should be amended so that it also mirrors the obligations of a distributor and an importer, cf. the NLF and the GPSD. KYBC already forms a good starting point but should, in cases where the background check has been insufficient, lead to direct liability for the online marketplace.
- Amend the whole DSA proposal in the light of the need to have special requirements on platforms that are handling sale of goods. Maybe there is a need for having a specific chapter of the DSA for online marketplaces.
- Clarify which legislation is covered by "consumer protection law" mentioned in article 5 (3). The DSA should make clear, that online marketplaces who are actively involved in the purchasing process are liable towards the consumer. The concept of "active" and "passive" are well known and should be reflected and clarified in the DSA in order to avoid different interpretations.

Introduction

Online marketplaces have become popular among European consumers. Their business model allows traders from 3rd countries to sell their products to European consumers, without any economic operator taking responsibility and liability for the safety of the products or compliance with EU product safety or consumer legislation. This situation is undermining the internal market and consumer safety since it is a fundamental principle in the Union Law that products on the European Market must be connected to a European operator that is responsible and liable for the safety of products.

Several studies from consumer organizations, business organizations and authorities have further documented, that consumers not only in theory but also in practice face severe risks due to unlawful and dangerous products sold on online marketplaces.

When the DSA was presented the Commission stated, that goal was to ensure, that consumers should have access to a wide range of ***safe*** products online and that they should be able to shop just as safely online as offline, stating that what is illegal offline should be equally illegal online. However, the DSA does not ensure consumer safety in regard to the sale of goods.

The DSA covers both illegal **content** and illegal **goods**, but its focus is on content and content is also the most used word when the proposal is discussed**.**

The relevant tool used to tackle illegal content is removal **after** it has been posted or published in order to secure the freedom of speech etc.

However, the relevant tool to tackle illegal goods is to ensure compliance with Union Law **before** the products are put for sale. That is the principle that all union law on product safety and consumer rights is based on.

The solution presented in the DSA is to strengthen the safety by "notice-and-take-down" and know your business customer obligations. However, this will not safeguard the consumers against illegal and dangerous products or breaches of consumer protection laws and it contributes to unfair competition situation since traditional importers and traders must

comply with existing legislation whereas this is not the case for the new digital online marketplaces.

The **one-size-fits-all approach** in the DSA towards platforms disseminating illegal content and online marketplaces enabling the sales of illegal goods must therefore be challenged.
Online marketplaces enabling the sales of goods should comply with the same rules as any other economic operators selling or facilitating goods to the European market and consumers. Otherwise, consumer safety will be at risk and the solid EU legal regime regarding product safety, product liability and consumer protection will be undermined.

This memo describes the problems and presents proposals for textual amendments in the DSA, which could solve the problems regarding the sale of goods on online marketplaces. This memo also explains why the proposed safeguards in the DSA are not sufficient in regard to the sale of goods from a third country seller via an online marketplace. It is divided in one section regarding product safety/product liability and one regarding consumer protection rules. Proposed changes to the DSA proposal are marked with red letters.

The Annex gives a more comprehensive and detailed explanation of how traditional importers and retailers work with product safety, how the business model and regulation of online marketplaces will in the future give them a possibility to avoid complying with existing rules by changing the business model.

A. LEGISLATIVE GAP REGARDING PRODUCT SAFETY

There are currently gaps in EU-law on product safety and product liability, which undermines the consumer safety and functioning of the internal market. The gaps are mainly connected to the situation where an online marketplace facilitates the sale of goods between a seller in a third country and a consumer in the EU. Many of these online marketplaces are established in EU.

In this situation, there is no responsible and liable economic operator in terms of product safety. Billions of products enter the EU through online marketplaces today, where several studies have proven that the products are non-compliant and dangerous[1]. The DSA does not close these gaps – in some ways it even increases them.

1. The DSA should define online marketplaces as digital importers

According to EU law on product safety, if the manufacturer is not resident in the EU, there must be an importer who, when importing the products from a third country, resumes responsibility for the safety and compliance of the product, and who must comply with the obligations of importers set out in the Union law. Any subsequent links in the distribution chain (distributors) have less strict obligations, as they "merely" resell products that have already been subject to an assessment of conformity by the manufacturer and/or importer when entering the Union.

While online marketplaces may not act as “importers” psychically, there is, however, no doubt that the activity performed by the online marketplaces, and the role they play as an entrance to EU and the European consumers, *de facto* corresponds to the role and actions a traditional importer plays and performs when products from third countries are brought to Europe, placed on the European market and made available to European consumers.

1 E.g. studies by Toy Industries of Europe, The European Consumer Organisation: BEUC, The Danish Chamber of Commerce, and Elsäkerhetsværket

Where the traditional importers act on a physical basis; the online marketplaces import the products on a digital basis, presenting the products for sale on the online marketplace and connecting the seller in a third country with the consumer in the Union just as a physical importer has done for decades. The consumer would never have seen or bought the product from the seller in the third country if it was not for the online marketplace. The online marketplaces are in fact "digital importers".

The DSA defines online marketplaces as intermediaries, who cannot be held liable for the activities of the 3rd party sellers on their platforms.

If this gap is not closed by the DSA by acknowledging online marketplaces as digital importers, it will continue to create the unreasonable distortion of competition vis-à-vis the importers covered by the technical definitions in EU product safety law who consequently have the responsibility and obligations to ensure compliance *before* placing the products on the market – and thereby ensuring, that EU consumers are not exposed to illegal and dangerous goods.

The gap should be closed by amending the structure of the DSA and adding a new article stating that online marketplaces that are established in EU and which allow consumers (or others) to conclude distance contracts concerning tangible goods with traders from third countries, should be obligated to either 1) make sure that there is an importer of the products in EU before the products are put up for sale or 2) take the responsibility and liability as an importer themselves.

This will make sure that either the online marketplace (as a digital importer) or another economic operator in the EU (a traditional importer) is responsible for the safety and compliance of the facilitated products and must therefore comply with the duties of an importer, cf. the relevant union law on e.g. product safety, product liability, environmental protection law etc.

In this context it is very important to be aware that article 22(1)(d) of the DSA proposal does not solve the described problem. This is caused by the fact that article 4 of the Regulation (EU) 2019/2020 (market surveillance regulation) does not give any obligations on the authorized representative that can be compared to the responsibilities and liabilities of an importer. The result is, as also derived from the description in the guidelines to article 4 of the market surveillance regulation[2], that no one in EU is responsible for the safety of the product or towards the consumer, if there is no importer or manufacturer in EU (and only an authorized representative).

There is an exemption in article 5 (3) which states that platforms which allows consumers to conclude distance contract with traders can be held liable for consumer protection law, if it is not obvious for consumers that their contracting part is a 3rd party seller and not the platform. However, this does **not seem to include responsibility for product safety legislation** – and it is further very unclear, whether it covers product liability.

Further, whether or not it is obvious to the consumer that he or she concludes a distance contact with the online marketplace or a seller in a third country, is irrelevant to the fact that billions of dangerous products from third countries will enter EU without any European economic operator being responsible and liable for the safety of the product. Therefore article 5(3) can meaningfully only cover distance contracts concerning goods that are already legally imported to Europe by an economic operator, and therefore also only contracts entered between a European Consumer and a European economic operator/the online platform.

[2] 1_EN_ACT_part1_V1.pdf (see page 11-12)

Further, a new recital corresponding to article 5 (3) should explicit stress, that product liability is included in the definition of "consumer protection law":

2. The DSA must not prevent regulating online marketplaces in the future in the sector specific legislation

Article 1 paragraph 5 states that the DSA is without prejudice to the rules laid down by a number of sectorial directives and regulations. It should be made clear that the DSA does neither hinder any future sectorial legislation of online marketplaces or platforms.

E.g. the online marketplaces refuse to be part of the supply chain of goods. This does not reflect the actual activity of these online marketplaces, however there is a need that e.g. DG Grow, DG Just and DG Envi in the future take a position on which obligations the online marketplaces should have, as they play an essential role in the supply of goods and packaging to European consumers.

3. Why the proposed safeguards in the DSA will not ensure consumer safety

It is at obvious that the DSA attempts to give the online marketplaces some duties like "know your business costumer", "notice and take down", and appointment of a "legal representative". However, this does not ensure consumer safety, since none of these obligations correspond to the obligations of the EU product safety and liability legislation, particularly the well-established principle that the products must be safe ***before*** they enter and are placed on the European market and that all products sold on the European market must be connected to a liable operator that the consumer can turn to in case of defects and damages caused by the product.

In the following the proposed safeguards in the DSA is described in relation to the sale of goods on online marketplaces.

3.1 More efficient "Notice-and-take-down"-obligations will not prevent the sale of dangerous goods

It is a sound and solid principle in the product safety legislation that products must be safe *before* they are placed on the European market and as such also before it comes into hands of the consumers. This is the best remedy to safeguard EU consumers from the risk of buying dangerous and illegal products.

The DSA will improve the "notice-and-take-down" obligations of the online platforms and marketplaces. We support making these procedures more uniform, transparent, and efficient, and we agree that it will have an effect on illegal *content*. However, it will not be sufficient regarding illegal *products* as this obligation of notice-and-take-down occurs *after* the product has been put for sale and even after purchase.

There are already very well-established procedures and obligations for withdrawal of dangerous goods in the product safety legislation, and the notice and take down in the DSA must be aligned with these rules.

It is also important to note, that the obligations to withdraw products *always comes in second* to the compliance procedures that must be performed *before* the product is put up for sale.

The large online marketplaces have – according to their own records – billions of products for sale. Authorities only have the resources to examine very few of these products and thereafter ask for withdrawal. By the time an authority contacts an online marketplace in order to have them to remove a dangerous product from their website, it is too late. At that time, it has been for sale for maybe a longer period and many consumers might already have purchased them. This risk is of course the reason why the European product safety regulation are based on the principle of a European operator being responsible for the compliance *before* the product is put up for sale and that the fact is that only a tiny part of the compliance-work is performed by the surveillance authorities; the rest is up to the companies.

In 2019, only 2161 products were placed on RAPEX and in 2020, only 2275 were alerted on the system[3]. This underlines why it is necessary to give online marketplaces the responsibilities and liability as digital importers obliging them to ensure that products are safe *before* they are placed on the market in the EU and as such before they make it possible for EU consumers to buy the products.

The resources allocated to market surveillance do also mirror the fact that it is provided as a condition that all products on the European market have been subject to a compliance assessment by a responsible and liable operator before the products are placed on the European market.

It goes without saying that not making the European established online marketplaces responsible and liable on equal basis with their competitors; the traditional European established importers and retailers that perform compliance work on basis of the current legislation, is distorting competition on the internal market.

3.2 "Know Your Business Customer"-obligations do not secure consumers and cannot replace the obligations in the present product safety rules

As mentioned, it is another fundamental principle in the EU product safety law, that all products sold on the European market must be connected to a responsible and liable operator that the consumer can turn to in case of defects and damages caused by the product.

The "Know Your Business Customer" (KYBC) is presented as a solution to this problem in the context of platforms and/or online marketplaces.

Of course, we find it only reasonable that platforms and online marketplaces should know the identity of their sellers/business customers. However, obliging online marketplaces to obtain contact details of their sellers does not help in ensuring that these sellers are familiar with EU law on product safety or other relevant parts of the EU legislation, and that they have performed the relevant compliance procedures before the product is put up for sale.

Neither does it safeguard the consumers rights according to EU law on product liability to reimburse consumers, who have suffered harm due to a defective, unlawful and dangerous product. Consumers are left with no other rights and possibilities than to try to sue the 3rd country seller in the country the seller is established in. This will be costly and the chance of succeeding questionable[4]. Further it does not seem to be the purpose of the EU regulation on product safety and liability that a consumer can buy a product from his or her home in the

[3] https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/?event=main.search&lng=en#searchResults
[4] REU Alm.del - endeligt svar på spørgsmål 237 : Besvarelse 236.pdf (ft.dk)

EU on an online marketplaces that without doubt direct the marketing at the consumer etc. – and still have to go to Asia to seek for damages.

Recital 50 outlines what is expected of the platforms and online marketplaces in regard to the KYBC-principle, and it is stressed, that the platforms should only make "reasonable efforts" to verify the reliability information from the 3rd party sellers, e.g. by using the VAT Information Exchange System.

Firstly, it has no relevance in order to make sure the supplied products are compliant and secondly, further it is by no means sufficient to verify the identity of e.g. an Asian seller.

The study carried out by the Danish Chamber of Commerce revealed, that a majority of the third party sellers from China operated under several names, and that the VAT-database referred to an office hotel in e.g. Manchester with 700 Asian sellers located on the address with no contact details.

Recital 50 also reveals, that the KYBC principle should not be understood as a guarantee to the consumer or other interested parties, that the information given is correct.

Recital (50)

To ensure an efficient and adequate application of that obligation, without imposing any disproportionate burdens, the online platforms covered should make reasonable efforts to verify the reliability of the information provided by the traders concerned, in particular by using freely available official online databases and online interfaces, such as national trade registers and the VAT Information Exchange System45, or by requesting the traders concerned to provide trustworthy supporting documents, such as copies of identity documents, certified bank statements, company certificates and trade register certificates. They may also use other sources, available for use at a distance, which offer a similar degree of reliability for the purpose of complying with this obligation. However, the online platforms covered should not be required to engage in excessive or costly online fact-finding exercises or to carry out verifications on the spot. Nor should such online platforms, which have made the reasonable efforts required by this Regulation, be understood as guaranteeing the reliability of the information towards consumer or other interested parties. Such online platforms should also design and organise their online interface in a way that enables traders to comply with their obligations under Union law, in particular the requirements set out in Articles 6 and 8 of Directive 2011/83/EU of the European Parliament and of the Council46, Article 7 of Directive 2005/29/EC of the European Parliament and of the Council47 and Article 3 of Directive 98/6/EC of the European Parliament and of the Council48.

3.3 Self-certification from 3rd party sellers is no guarantee that products are compliant

Article 22 concerns an online marketplace or "online platform [which] allows consumers to conclude distance contracts with traders". Regarding consumer- and product safety it relies on self-certification:

(f) "*a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law".*

Self-certification is not an efficient or even relevant way to ensure consumer or product safety and is not used in any other part of the union law on consumer and product safety.

Today, many packages from 3rd party sellers on online marketplaces already have a label "certifying" that the content in the package complies with all rules. This label is also placed on all packages, also the ones, where the products do not comply with applicable law and are dangerous.[5]

If the goal of ensuring consumer safety and the effort to make sure that "the same rules apply online as offline" should be fulfilled, the DSA must ensure, that online marketplaces should comply with the same rules as any other operator selling goods in the internal market.

3.4. The "legal representative" and the "responsible person" are not liable for the safety of the products nor liable towards the consumers

We note for the sake of good order that the above-mentioned gap is not closed by the forthcoming Market Surveillance Regulation (EU 2019/1020), since it is at the moment clear from this regulation and the guidelines to article 4 of the regulation, that the new responsible person is not responsible for the safety of the products or liable towards the consumers unless the responsible person is an importer or a manufacturer[6].

That is also the reason why article 22, 1, d does not give any further protection of the consumers nor align the current unfair competition towards traditional importers and distributors.

We stress for the sake of good order that in cases where there is an importer or a manufacturer in EU for the products for sale on an online marketplace, the online marketplace would in our opinion only have obligations under article 5(3) of the DSA proposal in relation to consumers.

Neither the "legal representative" which is introduced in article 11 in the DSA gives any solution on the described problem.

It says in article 40 of the DSA, that "*A provider of intermediary services which does not have an establishment in the Union but which offers services in the Union shall, for the purposes of Chapters III and IV, be deemed to be under the jurisdiction of the Member State where its legal representative resides or is established*". However, article 40 only relates to online marketplaces established outside of EU and only relates to chapter 3 and 4 and does not refer to responsibility for the safety of the products or liability towards consumers.

B. DSA AND CONSUMER PROTECTION LEGISLATION

Illegal and dangerous products sold by 3rd country sellers on online marketplaces represent the biggest risk to consumer safety. But other breaches on EU-consumer protection rules are also frequent on online marketplaces and thus undermine consumer rights. This e.g. goes for misleading price marketing and the 14 days' right to withdraw as well as the right to be helped within the legal guarantee period.

Directive 2019/771 on certain aspects concerning contracts for the sale of goods provides the member states with the possibility of applying the directive to platforms that do not fulfil the directive's requirements as a seller. This is stipulated in recital 23:

(Recital 23)

[5] See three memos about unsafe products on three online marketplaces from our study of 50 products. The labels are described on page 14 in memo about Wish.com, page 18 in memo about Amazon and page 22 in memo about AliExpress. The memos can be retrieved from: https://www.danskerhverv.dk/politik-og-analyser/e-handel/study-of-unsafe-and-dangerous-products-on-platforms/

[6] Guidelines to article 4 of the market surveillance regulation 1_EN_ACT_part1_V1.pdf

This Directive should apply to any contract whereby the seller transfers or undertakes to transfer the ownership of goods to the consumer. Platform providers could be considered to be sellers under this Directive if they act for purposes relating to their own business and as the direct contractual partner of the consumer for the sale of goods. Member States should remain free to extend the application of this Directive to platform providers that do not fulfil the requirements for being considered a seller under this Directive.

We believe that directive 2019/771 should always apply to EU-based online platforms in cases where the third-party seller is established outside the EU. This ensures that the consumers always are able to address their claims towards a company established in an EU member state, thereby making it easier for the consumers to have a case settled by either the ADR-system or the courts. It would also ensure legal certainty if the rules where the same throughout all the member states.

This can be achieved by adding a new article to the DSA stating that the online marketplace shall be considered as the consumers' contractual part in cases where the seller is established in a country outside the EU.

4. The DSA should make it clear that online marketplaces who are actively involved in the purchasing process are liable towards the consumer

The DSA will replace the e-commerce directive. The e-commerce directive art. 14 exempts service providers from liability if they are in no way involved in the information transmitted[7]. However, today the online marketplaces claim, that they are only intermediaries and therefore cannot be held liable for breeches of consumer legislation nor non-compliant products.

This claim is contradicted by ECJ-court rulings which have settled that online marketplaces (and other intermediaries) are *not* automatically exempted from liability. If an intermediary is **actively** involved in the purchasing process, it will be held liable if the underlying legislation gives basis for this. This will be a concrete assessment according to the underlying legislation.

In that light it is positive that article 5(3) in the DSA settles, that online marketplaces are not automatically exempted from liability. Article 5(3) supposedly codifies the criteria

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[7] The criteria for liability exemption laid out in the e-commerce directive in recital 42 and 43:

(42) The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

(43) A service provider can benefit from the exemptions for "mere conduit" and for "caching" when he is in no way involved with the information transmitted; this requires among other things that he does not modify the information that he transmits; this requirement does not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission.

established in the ECJ – even though it is done without the use of the principle of "active" and "passive", which is the general and well-known term used in EU consumer law. Eliminating the use of "active" and "passive" in the assessment creates legal uncertainty.

It is important, that article 5(3) stays in place. However, it must be further clarified in a recital when the article is applicable if it shall have practical effect. Otherwise there is a risk that online marketplaces can continue to claim, that they are intermediaries and therefore exempted from liability. The DSA should in a recital specifically describe examples of activities which would normally define an active intermediary who is considered liable. This could for instance be *activities like marketing of the products towards the consumer, customer service, shipping and handling of returns and complaints*.

If this clarification is not made there is a severe risk that consumers will be exposed to misleading advertisement and deprived of their consumer rights when shopping on online marketplaces. It could be made in a new recital connected to article 5 (3):

5. Online marketplaces who are liable should have an obligation to monitor

The e-commerce directive's article 15 states that member states may not impose a general obligation to monitor the information they transmit or store[8]. A similar statement is found in article 7 in the DSA; however, this has a wider impact as it indicates, that no intermediary services should be obliged to monitor – regardless of their involvement in the service or transaction.

The consequence will be, that also active online platforms and online marketplaces who are deemed liable will be exempted from an obligation to monitor their website in order to find and remove illegal information and products. This is unacceptable as it leaves online platforms and marketplaces with no incentive to find and remove illegal content or products putting consumers at risk.

Article 7 therefore needs to be amended in order to ensure, that online platforms who are actively involved in the service and transaction, meaning they are liable and fall under the definition of article 5(3), have a general monitoring obligation.

Monitoring obligations for active online marketplaces

It is also necessary to amend the wording of recital 28 and article 7 in order to permit a specific monitoring obligation for online marketplaces facilitating the sale of goods if the online marketplace falls under the criteria's set up in article 5 (3) and are considered liable. As recital 28 is written now, nothing in the DSA can be interpreted as imposing an obligation to monitor regardless of them being liable or not. This goes against ensuring the goal of ensuring consumer safety.

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[8] Article 15 in the e-commerce directive:

No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

6. New transparency obligations should also include consumers

In article 22 the DSA introduces new transparency obligations for online marketplaces or – as the text reads: "online platforms which allows consumers to conclude distance contract with traders". In the future online marketplaces will be obliged to obtain contact details of the trader and other information that can verify the identity of the trader. As mentioned under point 3.2 the requirements to fulfill this obligation are not effective on their own.

However, it is unclear whether these transparency obligations also cover the obligation to inform consumers.

For a consumer it is important to know, who the contracting partner is. This is particularly important if the contracting partner is a 3rd country seller, since that means, that consumers must pursue their consumer rights in a country outside the EU, most likely with a different legal system as well as language.

Today, when shopping at online marketplaces, consumers typically only see the name of the marketplace on the order confirmation and invoice. If the online marketplace is based in an EU member state consumer have little reason to know, that they are not covered by EU consumer rights, if they are not explicitly informed about it.

Amendments to paragraph 6 and adding a new paragraph 8 to article 22 could make this clear.

DANSK ERHVERV

Lone Rasmussen
Head of Retail and Wholesale Division
and Head of Consumer Policy
lra@danskerhverv.dk
Tel: +45 33 74 62 16 / M: +45 41 24 32 46

FINNISH COMMERCE FEDERATION

Ilari Kallio
Cheif Policy Adviser , EU Affairs
and Corporate Law
ilari.kallio@kauppa.fi
+358401396912

SVENSK HANDEL

Sofia Stigmar
Lawyer
sofia.stigmar@svenskhandel.se
+46722130861

VIRKE

Jarle Hammerstad
Head of Policy / Commerce
j.hammerstad@virke.no
+47 918 71 526

Annex

The sale of product and the proposal for a new Digital Service Act (DSA)

Background on sale of goods and product safety in the European Union

It is a crucial purpose of the union law on product safety, the functioning of the internal market, and the principles of consumer protection that all roles and activities in the supply chain of products are covered by a responsibility and liability that corresponds to the role and activity the given operator performs in relation to placing products on the European market and placing these products in the hands of the European consumers.

According to Union law on product safety, if the manufacturer is not resident in the EU, there must be an importer who, when importing the products from a third country, resumes responsibility for the safety and compliance of the product, and who must comply with the obligations of importers set out in the Union law. Any subsequent links in the distribution chain (distributors) have less stricter obligations, as they "merely" resell products that have already been subject to an assessment of conformity by the manufacturer and/or importer when entering the Union.

Due to digital development and new business models, there are currently gaps in the efficiency of the mentioned union law on product safety and product liability, which jeopardize the functioning of the internal market and undermines the consumer safety as well as the purpose and principles of the union.

The gaps are mainly connected to the situation, where an online marketplace facilitates the sale of goods between a seller in a third country and a consumer in EU. Many of these online marketplaces are established in EU. Billions of products enter the EU through these sales channels today. In the past, this trade was limited, as it only took place when a consumer bought products on a vacation or was lucky enough to find a web-shop in a third country that was willing to ship to a consumer in Europe.

On that basis, doubts have arisen among legislators, enforcement authorities and legal experts on how to deal with these online marketplaces in the context of responsibility for product safety and product liability. Some online marketplaces state that their business model is merely to facilitate the sale of products between sellers from third countries and European consumers, and that the online marketplaces therefore have no responsibility for the compliance of the products. Rather, they argue that it is the consumers themselves that import the products after having bought it from the seller in a third country.

The DSA and product safety and liability

It was expected that the DSA would close this gap and the clear message from the Commission at the presentation of the proposal was that one of the purposes of the DSA is to make the trade online as safe as offline.

However, this is not the case according to the current proposal, which, on the contrary, exempts these online marketplaces from responsibility and liability that is imposed on their competitors, which are the traditional European physical and online operators, that import the products physically according to current relevant and fair legislation on product safety and liability law.

As such, a reading of the DSA proposal seems to support the rest on the argument, that online marketplaces have no actual responsibility or liability in order to make sure that unsafe products do not enter the EU or harm European consumers.

The consequence of not closing this gap will be that these billions of products are not connected to any liability in case they are defect and causes damage on European Consumers, since it is crucial to notice that the existing product liability legislation is linked to the product safety legislation in such a way that it must be assumed that products, which are not technically considered imported to EU, will fall outside the product liability regulation. Consequently, no person (neither the consumer-buyer, neighbors nor others), who may suffer damage as a result of defective products from third countries purchased via online marketplaces, will be protected by the liability system found in European product liability law, according to which traditional importers and their subsequent sellers are liable for defective products towards persons in EU (See for reference an answer from the Danish Ministry of Justice to a member of the Danish Parliament[9]).

It is at the same time obvious that the DSA attempts to give the online marketplaces some duties like "know your costumer" and "notice and take down". However, this does not solve the problem, since none of these obligations correspond to the obligations of the product safety and liability legislation and the principles that this sound and solid legislation is built on; namely the principles that the products must be safe *before* they enter the market and that all products sold on the European market must be connected to a liable operator that the consumer can turn to in case of defects and damages caused by the product.

The online marketplaces are in fact digital importers

While online marketplaces may not act as "importers" psychically there is, however, no doubt that the activity performed by the online marketplaces, and the role they play, de facto corresponds to the role and actions that a traditional importer plays and performs when products from third countries are brought to Europe, placed on the European market, and made available to European consumers.

Where the traditional importers act on a physical basis, the online marketplaces import the products on a digital basis and connect the seller in a third country with the consumer in the Union - just as a physical importer has done for decades. The consumer would never have bought the product from the seller if it was not for the online marketplace. The online marketplaces are in fact "digital importers".

The mentioned gap - that is not yet closed by the DSA - creates an unreasonable distortion of competition vis-à-vis the importers covered by the technical definition, who consequently has the responsibility and obligations to ensure compliance *before* placing the products on the market.

Furthermore, allowing billions of unsafe products to continue to enter the European market without any European operator being responsible for ensuring the safety and compliance of the product prior to the product being placed on the European Market, undermines consumer safety and the principles and functioning of the internal market.

Additionally, it is worth mentioning that the same challenges as described above is connected to environmental legislation, Extended Producer Responsibility etc. Therefore, it is important that the online marketplace that acts as the "digital importer" is also responsible for the compliance with all sorts of obligations that the physical importers

[9] https://www.ft.dk/samling/20201/almdel/REU/spm/236/index.htm

are. Otherwise, it will undermine the legislation of the union law that is based on principle of the internal market, since it is impossible to require a consumer to comply with legislation that is intended for businesses and professional operators.

We note that the above-mentioned gap is not closed by the forthcoming Market Surveillance Regulation , since it is clear from this regulation and the guidelines to article 4 of the regulation that the new responsible person is not responsible for the safety of the products or liable towards the consumers.

If the changes proposed are not made, it will be far more advantageous to set up as a platform or online marketplace rather than to act as a traditional importer with affiliate retail in the future. That situation is not desirable; not for consumers, the internal market, nor the European economy.

The DSA will encourage traditional operators to change their business model to an online marketplace allowing their suppliers in China, Thailand, India, Brazil, Zimbabwe to sell directly to European consumers. This will relieve them of the responsibility for safety and legality according the sound and fair but still tight and resource-intensive regulation in the EU.

The compliance function of the business model online marketplace is thus, in principle, the consumer and market surveillance authorities. All the traditional physical and online business models must have its own and prior compliance function.

Finally, it is important to notice that the above-mentioned gap is only present in the situation, where an online marketplace facilitate a sale between a seller in a third country and a European buyer. Consequently, or proposal does not cover closed online marketplaces where the seller is established in the union or online marketplaces that facilitate recycling trade between consumers, C2C.

In the situation, where an online marketplace facilitate sales of goods already imported into the EU and thus already placed on the European market, the online marketplace should only be held responsible as a distributor (and perhaps have no responsibility, if they only act as intermediaries), but not as an importer, as the products are already imported to the European market by another European economic operator taking on the responsibility and liability in the role of an importer.