Handelsrådet

Report on

Digital marketplaces and e-commerce platforms

This report was commissioned by Handelsrådet
[the Swedish Retail and Wholesale Development Council]
from Cirio Advokatbyrå AB.
Year of publication 2019.
Graphical production: Fotoskrift AB
Printing: Typografiska Ateljén AB
www.handelsradet.se
ISBN: 978-91-86508-58-6

Foreword

Sweden's prosperity is based on strong exports and good conditions for importing. Swedish trade policy, which is favourable towards free trade and which is based on facilitating imports and exports and bringing about conditions for reciprocal trade with other countries, serves Sweden well and is far better than the opposite: protecting and defending domestic commerce and industry by means of trade barriers, customs duties and subsidies. Free trade and the competition it gives rise to provides opportunities for the most innovative and efficient companies to grow and thrive at the expense of less successful companies.

Globalisation and digitalisation are transforming the trade sector at an unprecedented rate. Before the boom in digital trade, consumers' trading patterns were, historically, relatively locally-based. Goods were almost exclusively purchased in shops in the vicinity of home or work. Today, through a few taps on a mobile phone, a consumer can purchase goods through e-commerce marketplaces directly from the manufacturer on the other side of the world. This type of trade has exploded in recent years to point where, for example, according to PostNord, the most common country for a European consumer to purchase from online, besides the consumer's own country of residence, is China, followed by the UK and the USA.[1] This means that the commercial sector is now exposed to tough international competition.

However, problems arise if free trade and competition is disrupted as a result of exemptions from paying taxes or other fees and lack of liability when it comes to complying with laws and regulations designed to protect consumers, the environment, health and workers. There are then good reasons for legislators to evaluate whether there is a need to update and modernise the laws and rules that lay down the framework for present-day global e-commerce.

Such a situation of distorted competition currently applies to the commercial sector in view of the rapid growth in private imports from manufacturers outside the EU via online marketplaces direct to consumers in Sweden or other EU countries. In the EU, we have spent decades building up an extensive system of consumer and product safety, rules on chemicals, waste management and tax collection for VAT and customs duties. All trading companies established in the EU must comply with and conform to those rules. At the same time, the Swedish Retail and Wholesale Development Council report shows that e-commerce platforms currently have limited liability for overseeing compliance with the aforesaid rules.

The Swedish Retail and Wholesale Development Council therefore takes the view that a discussion needs to be initiated on the need to evaluate and modernise the laws and regulations governing global e-commerce. The aim is to ensure that consumer confidence in e-commerce can be maintained and that conditions are in place to allow European commercial companies to compete on equal terms.

The Swedish Retail and Wholesale Development Council international committee

---

1 https://www.postnord.com/globalassets/global/english/document/publications/2018/e-commerce-in-europe-2018_en_low.pdf

Table of contents

1 Summary and conclusions

Digital technology is developing rapidly and the commerce sector and the social economy have changed considerably just in the past few years. The effects of digitalisation and technological progress are generally observable in all sectors of society. Consider the following.

> *"Uber, the largest taxi company in the world, owns no vehicles. Facebook, the world's most popular media service, creates no content. Alibaba, the world's most valuable retailer, has no products. And Airbnb, the largest accommodation company in the world, owns no properties."* [1]

The quote describes what is referred to as the *sharing and platform economy*, in other words people exchange/borrow/rent goods and services with one another via platforms on-line instead of engaging traditional companies. It was unthinkable just a few years ago that the economy would take this turn.

What the above companies have in common is that they are run as *platforms*, which means that they act as *intermediaries* between two independent parties without playing an active part themselves in the performance of the service provided. An increasingly large part of the economy is now run through platforms and platform companies are at the leading edge as far as digital development is concerned.

One sector where digitalisation and platforms are re-drawing the playing field is *commerce*. Commerce is currently undergoing a structural change and the transition to a digital existence is happening at a rapid pace. E-commerce with retail goods is growing rapidly and every year it takes market share from physical retail commerce. More and more established companies in retail commerce are therefore investing in e-commerce, which means that old business models are quickly becoming outdated and new business models are emerging. Even in e-commerce, the platforms have made a breakthrough. Large companies such as Amazon, Alibaba and Wish have fundamentally changed the way we buy things and have been the driving force behind a fundamental change in the commercial sector.

Digitalisation, the emergence of platforms and the increase in on-line trade have brought about a substantial increase in competition from abroad. It is now easy for a consumer to order products from the other side of the world and international competition is constantly on the increase. This means that competitive conditions for Swedish commerce have changed. One prerequisite in order for commerce to function is that the competitive situation must be perceived to be fair and equitable and that only works as long as everyone is playing by the same rules.

---

1 Tom Goodwin *"The battle is for the customer interface"* in Techcrunch (2015-03-03). See also the report by the Swedish Competition Authority *Konkurrensen i Sverige [Competition in Sweden]* (2018:1) p. 60.

There is a large number of stringent requirements placed on traders in Sweden. However, it is reasonable that this should be the case – we consumers must be able to feel confident that the toys sold to our children are not dangerous and that products do not harm the environment or ourselves. As a society, we have become less and less forgiving of traders who do not meet our requirements. However, sometimes we allow our own desire for profit to take over and we do not always think through the consequences of our choices. For example, it is not reasonable to think that a cheap phone charger we buy on-line from China is as safe and environmentally friendly as a more expensive CE marked charger we buy from an authorised dealer in Sweden. It is inevitable that our choices will have undesirable consequences in terms of product safety and environmental considerations.

As the e-commerce and platforms have grown, it has become easier to sell unsafe and counterfeit products. When those unsafe and counterfeit products are sold via professional platforms, there is a risk in the short term that legitimacy will be ascribed to the goods and sellers on the platform, but in the longer term there is a risk of undermining confidence in the platform economy and e-commerce as a whole. Every day, the authorities deal with issues of how to check products sold on-line, whether it is possible to trace the manufacturers of products, what powers the authorities themselves have and what responsibilities the platforms have. Progress therefore raises a large number of legal

and practical issues and one of the key issues is how old regulations should be applied at a time of great change.

There are therefore a number of challenges associated with the growth in e-commerce and the platforms' increasingly strong position and there are good reasons for limiting harmful trade in risky and defective goods. One possibility would be to make e-commerce platforms more responsible for the products sold through their channels. In the area of VAT, for example, a rule has recently been introduced whereby the platforms must pay VAT on sales from a third country to consumers within the EU (see also in section 4.2.4.3).

There are therefore a number of challenges associated with the growth in e-commerce and the platforms' increasingly strong position and there are good reasons for limiting harmful trade in risky and defective goods.

Focusing on the platforms would probably be an effective way of dealing with some of the problems that exist and we can verify that greater liability has recently been imposed on the platform companies in the areas of both VAT and personal data. However, if extensive liability for the products sold was imposed on the platforms, it would be likely to impede their power of innovation and would result in them being unable to run their businesses in the same way as at present. The big challenge is therefore to guarantee effective consumer protection while ensuring that technological progress is not impeded. It is not easy to achieve that balance.

In view of the above, we have produced this report, which seeks to highlight what a platform is, what differentiates a platform from a retailer and how the platform economy affects e-commerce. This report also provides an overall illustration of some of the regulations with which Swedish traders must comply, compared to the liability the platforms have. Finally, the report describes action taken in the sphere of the platforms, including in order to make platforms assume greater liability.

The subject is broad-based and there are many questions to be addressed. This report does not claim to be exhaustive, but hopefully it may serve as a basis for further discussion of what responsibilities the platforms should have in the new economy.

Platforms and the new platform economy

2

2.1 General

In this chapter, we will provide an overview of what platforms are, how the platform economy works and how it affects traditional e-commerce.

2.2 Platforms in general

A platform's basic activity is to serve as an *intermediary* between two (or more) independent parties. The platform's main task is therefore to link people, simplify and facilitate transactions and help the consumer to sort and present the supply in the market.[2]

A number of different activities can be carried on through platforms, including e-commerce (Amazon, Alibaba and Wish), search engines (Google), social media (Instagram, Facebook), video sharing (YouTube) and various forms of sharing economy (Airbnb, Uber). One of the specific features of platform-based business models is that a large part (sometimes all) of the material is *user-created*, in other words created and owned by the users and not by the platform. In the sharing economy, for example, need and demand are often matched in real time and the platforms seldom own the resources marketed or the materials existing on the platform. One of the great advantages of the platform model is therefore that it can act as an intermediary for unused resources throughout the world. Goods and services that already exist in a given market are thus exposed to competition, which often leads to a lower price.[3]

One prerequisite in order for a platform to be successful is that it must manage to connect different user groups and these groups must value being brought into contact with one another. When the number of users of the platform increases, the value of the platform and the benefits for users also increase. When such contacts are created on a large scale, it is referred to as *network effects*.[4] Regardless of the type of platform used, *interconnection of users*, *collection and use of data* and *network effects* are key for the platform's operation.

---

2 Konkurrensen i Sverige [Competition in Sweden] (KKV 2018:1), p. 59 and Konkurrens och tillväxt på digitala marknader [Competition and growth on digital markets] (KKV 2017:2), p. 82.

3 Konkurrens och tillväxt på digitala marknader [Competition and growth on digital markets] (KKV 2017:2), p. 119.

4 Konkurrens och tillväxt på digitala marknader [Competition and growth on digital markets] (KKV 2017:2), p. 120.

2.3 Platforms and e-commerce

E-commerce is highly developed in Sweden and many people now buy most of their goods on-line. E-commerce now accounts for approximately nine per cent of total retail commerce in Sweden and it has grown by almost 20 per cent annually since 2004.[5] E-commerce is also expected to grow within the EU in the future. E-commerce from third countries is also increasing[6] and China is now the most common country to buy from. Of those who have bought online, 34 per cent bought from Wish, 27 per cent from Zalando and 12 per cent from AliExpress. Nevertheless, Chinese traders operate on the basis of completely different conditions from Swedish traders – salaries are lower, production is located closer to the sellers and requirements for eco-labels and product safety are not as strict.[7]

One clear trend is that the traditional retailer model is quickly being replaced by the platform model. The unique feature of the platform model is that the platforms generally do not have, and perhaps also do not *want* any control over the products in terms of price, marketing, presentation or product placement, for example.[8]

There are also e-commerce platforms that use a combination of the platform model and the traditional retailer model. These are known as *hybrid platforms*, and well-known examples include *Amazon* and *CDON*. Hybrid platforms are characterised by the fact that in some cases they operate *as a platform*, with no control over the products sold, and in some cases *as a retailer* of their own products with full control over the products.

2.3.1 Example of a traditional retailer – platform

The image on the next page can be used to illustrate how the traditional retailer model differs from the platform-based business model.

The factors that mainly distinguish the platform-based business model from the traditional retailer model are as follows:

1. The possibility of **direct contact** between buyer and seller, and
2. The fact that both buyer and seller are **connected** to the platform.[9]

The fact that buyer and seller have direct contact with each other allows network effects to arise. When a large number of buyers attract more sellers to the platform, the supply of goods increases, which attracts even more buyers, which attracts even more sellers. This is how supply grows without the platform needing to invest in goods or infrastructure, which means that the sales costs per product sold are low and the scalability of the business model is extremely great.

---

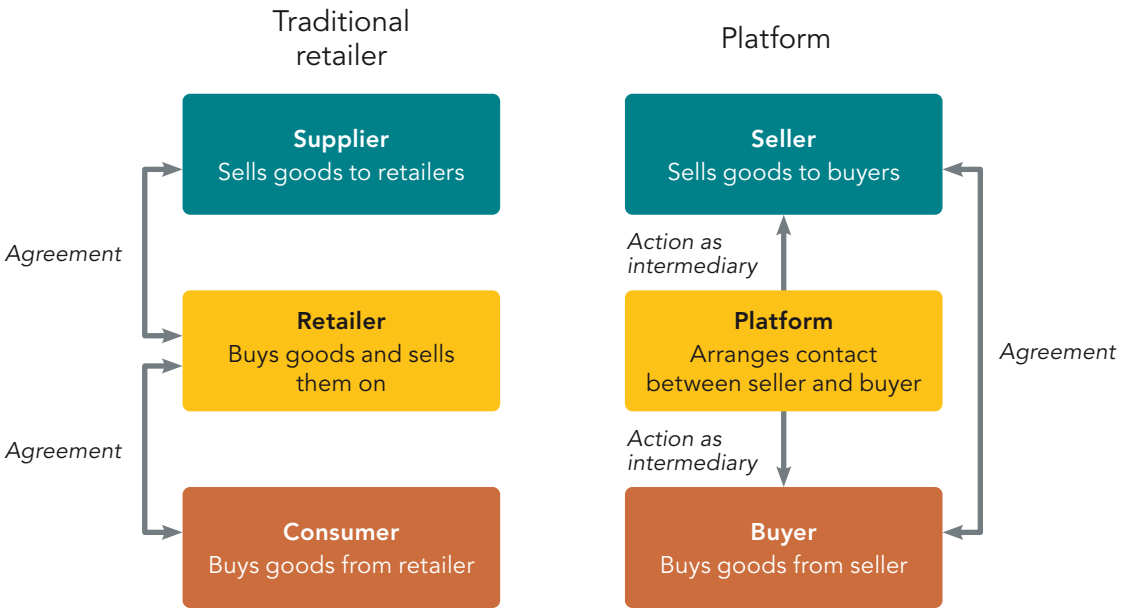
5 *Det stora detaljhandelsskiftet [The great shift in retail commerce]*, p. 7.

6 In 2017, 60 per cent of all consumers bought from abroad using e-commerce on some occasion and 25 per cent of Postnord's packages delivered in July of that year were from abroad.

7 *Det stora detaljhandelsskiftet [The great shift in retail commerce]*, p. 14–15.

8 In a Swedish context, Tradera and Blocket are typical examples of platforms with no control over the seller's goods. By paying a fee to the platforms, the seller connects to the platform and is able to offer its products directly to the consumer.

9 Hagiu and Wright, *Multi-Sided Platforms* (2015), Harvard Business School, p. 5. http://www.hbs.edu/faculty/Publication%20Files/15-037_cb5afe51-6150-4be9-ace2-39c6a8ace6d4.pdf



The platforms are also based on the network rather than on the traditional vertical business model in which a retailer buys a product from a manufacturer and then sells the product to a consumer and thereby assumes the entire business risk. The platforms have thus completely transformed the traditional distribution chain.

2.4 The platforms' limited liability

When an e-commerce platform only acts as an intermediary between a buyer and a seller, the platform normally has no liability for the goods or services sold. This principle of *exemption from liability for intermediaries* has been key to the development of the internet and the emergence of platforms. The principle is also key to this report and we will come back to it on several occasions below.

The principle derived from the so-called Electronic Commerce Directive[10] and means, in very simplified terms, that service providers that provide any of the information society's services will not be liable for information that is transmitted or stored.

An e-commerce platform provides the information society's services in the capacity of what is referred to as a *hosting service*. This means that the platform is not liable for the information it stores if it is unaware of illegal activity/information **or** if it removes the information as soon as it becomes aware of it.[11]

10 Electronic Commerce Directive 2000/31/EC, https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:32000L0031&from=en

11 The Electronic Commerce Directive Article 14. See also Government Bill 2001/02:150, p. 33.

Nevertheless, the exemption from liability only applies when the platform activity is purely of a *technical, automatic and passive nature*, which implies that the platform has neither knowledge of nor control over the information.[12] If the intermediary actively concerns itself with the information to such an extent that it can no longer be considered to be neutral and passive, the exemption from liability can no longer apply in that individual case.[13] The platform that only arranges contact between a buyer and a seller nevertheless has extremely limited liability.[14]

Another central principle contained in the Electronic Commerce Directive is that service providers may not have a general obligation imposed on them to monitor materials that exist on the platform or a general obligation to actively investigate circumstances indicating illegal activity.[15] In order for the platform to be aware that illegal material exists, it must therefore usually rely on someone else to bring the material to its attention.

The purpose of granting service providers exemption from liability was twofold: on the one hand, there was no wish that differences in Member States' legislation should prevent the smooth functioning of the single market and, on the other hand, there was concern that technological progress would be impeded if excessive liability was imposed on the intermediaries.[16]

Overall, this means that the platforms' liability is extremely limited as long as they act as passive intermediaries. However, the platforms do not always act as passive intermediaries and their activities differ greatly depending on whether they are focused on sharing of services (Airbnb, Uber, etc.) or on e-commerce (Amazon, eBay). A brief account is given below of how the EU Commission (**"the Commission"**) and courts have viewed the platforms' liability.

2.4.1 Sharing economy platforms

The Commission takes the view that (sharing) platforms' obligations must be assessed on the basis of a number of circumstances. One central criterion is the extent to which the platform has *control* or *influence* over users. The degree of control is established on the basis of a number of criteria, including who determines *the price*, who controls the *key terms of the agreement* and who *owns the assets*. If all criteria are met, it is a *clear indication* that the sharing platform exercises control over the user who delivers the service, which indicates that the platform should also be considered to be providing the service. Based on the circumstances of the individual case, sharing economy platforms can therefore have everything from full business liability for the service for which it acts

12 The Electronic Commerce Directive, preamble paragraph 42. However, it has been questioned whether this requirement also applies to hosting services, and in practice it has been argued in slightly different ways, see, inter alia, Google v. Louis Vuitton and others [C-236/08–C-238/08] p. 113–114 and Loreal v. eBay [C-324/09] p. 112–116. The question of whether host services must be completely passive in order to be able to cite exemption from liability has therefore not been fully clarified. Within the context of this report, however, the question is mostly of academic interest.

13 See, for example L'Oréal/eBay [C-324/09, p. 116]. However there is no general liability. Instead, the liability is likely to relate precisely to a specific case and specific information.

14 See, for example, Google v. Louis Vuitton and others [C-236/08–C-238/08, p. 106–120] for a detailed review of liability for intermediaries.

15 See the Electronic Commerce Directive, Article 15, Government Bill 2001/02:150, p. 33–34 and L'Oréal/eBay [C-324/09, p. 139].

16 Government Bill 2001/02:150 p. 31–32 and 87).

as an intermediary, to limited liability only for the action as an intermediary itself.[17] There are also intermediary forms where the platform voluntarily assumes liability in certain areas.[18]

The threshold for considering that a platform is providing the service itself is therefore relatively high. It is hardly normal for the platform to control the price, agreement conditions and also own the assets.[19] That approach is nevertheless in line with what we perceive as the European Commission's generally positive view of the platforms, in other words their power of innovation should not be hampered by excessive regulation.

However, one case which has attracted attention in recent years is *Uber Spain*[20]. The case was concerned with the question of whether Uber's services as an intermediary would qualify as "information society services" or "services in the area of transport".[21]

The court firstly noted that a service as an intermediary in a mobile app through which information on an order for a transport service could be transferred between a passenger and a driver in principle met the criteria for "information society services". Nevertheless, the court found that the service in question in the case could not be described only as a service as an intermediary. By providing services as an intermediary, a range of local transport services was created, and without the app, drivers would not be able to provide the transport services and the passengers would not have the opportunity to make use of the drivers' services. In addition, Uber's service as an intermediary was founded on recruitment of drivers who were not professional drivers, who used their own vehicle and were dependent on Uber's app to be able to provide their services. Furthermore, Uber exercised a dominant influence over the terms for the service, in particular by setting a maximum price, collecting payment from the customer and carrying out inspections of the vehicles and drivers (which could lead to exclusion from the platform). The court thereupon held that Uber's service as an intermediary formed an integral part of a comprehensive service which consisted mainly of a transport service and that it could therefore not be classified as one of the "information society services".[22]

The court thus found that Uber should in principle be seen as a taxi company, which brought to the fore a number of other rules than if the company had been regarded merely as a commercial intermediary.[23] The case is a good example of an apparently passive intermediary that operates in such an active way that it cannot rely on the exemption from liability in the Electronic Commerce Directive.

---

17 See also SOU [Statens offentliga utredningar – Swedish Government Official Reports] 2017:26, p. 261–264.

18 In Sweden, ARN has recommended that a platform pay compensation for delay to a user due to delay by the other party when returning a rented car. The users had themselves agreed on the time for returning the vehicle, but compensation due to delay was included in the user terms and conditions for the platform. The terms and conditions stated that the platform would advance payment to the vehicle owner, which means that the platform assumed liability for an obligation between the users. See SOU 2017:26, p. 261–262.

19 Nevertheless, see *Uber Spain* below.

20 Asociación Profesional Elite Taxi v. Uber Systems SpainSL [C-434/15].

21 The question of Uber's classification was determined according to factors such as whether the company needed to obtain an administrative permit, etc.

22 See, in particular, paragraphs 35–40.

23 This point of view was later confirmed in the case against Uber France SAS [C-320/16].

The question of how the sharing platforms must be regulated and the liability they have has not been finally settled. In summer 2018, the Commission, among other things, urged Airbnb to comply with the rules of European consumer law[24] and a French court submitted a request for a preliminary ruling in a case against Airbnb Ireland.[25]

The key question in the case is whether Airbnb is considered to provide "information society services" or whether the company should be classified as a real estate broker. The question is therefore, in principle, the same as in the Uber case and the court is likely to apply the same type of reasoning in this case. However, the case is in its infancy and it is likely to take some time before we see a ruling.

2.4.2 E-commerce platforms

As we have seen above, the sharing platforms' liability is generally determined on the basis of *control criteria*. However, for e-commerce platforms, the question of liability is usually a little easier to determine: if the e-commerce platform owns the goods, it is generally considered as a retailer and is therefore liable. In the case of e-commerce platforms, it is therefore normally not particularly relevant to play around with control criteria.

However, the interesting question is under what conditions is it possible to impose liability on an e-commerce platform as a retailer when *the platform does not own the goods*.[26] In this regard, it would be possible to play around with liability that is clearly based on the e-commerce platforms' specific conditions, such as liability based on marketing of goods or optimisation of offers.[27] In this regard, the role played by the platforms' algorithms is of decisive importance as well as whether the use of algorithms can be considered to mean that the platforms are no longer passive in terms of what is offered to customers.[28] As technological development advances and digitalisation progresses, it may be necessary to examine this question again.

Nevertheless, case law with regard to the e-commerce platforms' liability is sparse. In **Sweden**, the issue has been addressed in a case involving CDON.[29] The question was whether or not CDON was to be regarded as a retailer. The Administrative Court of Appeal found that, in the case of most of the products sold via the website, CDON could not be regarded as a retailer. CDON was therefore also not obliged to comply with administrative rules on labelling of products. The court case therefore confirms that the e-commerce platforms have limited liability for the products sold by anyone other than via the platform.

---

24 See the Commission's statement using the following link: http://europa.eu/rapid/press-release_IP-18-4453_en.htm

25 C-390/18.

26 See, for example the reasoning of the court in L'Oréal/eBay [C-324/09].

27 See, for example L'Oréal/eBay [C-324/09, p. 116].

28 For further discussion of the importance of the algorithms, see section 5.3.3.1.

29 The judgment by the Administrative Court of Appeal in Jönköping in case 599–17 (The Swedish Energy Agency v. CDON).

In Sweden however, there are numerous examples of private individuals who have ordered goods from Wish and Alibaba being subsequently convicted of offences (for knife crime, for possession of knuckle dusters, offences under the Radiation Protection Act for possession of laser pointers without a permit, offences against copyright law for the sale of false bulbs, etc.) because it is illegal to possess or sell on the goods in Sweden for various reasons. It is therefore largely individual consumers who are liable for the products purchased and any problems they entail. This is also an example of the platforms' limited liability for products sold through them and the risks of private imports (see also section 3.7).

Even in the **USA**, the courts appear not to be inclined to impose excessive liability on the platforms. Amazon has been involved in a number of disputes in relation to products sold via the platform, but the courts have been unwilling to impose liability on the platform despite the fact that consumers were injured and property was destroyed.[30] It has been established in older case law that general knowledge of the existence of counterfeit products on the platform does not mean that the platform must pay compensation to the right-holder[31], and that the platforms are not able to monitor each product sold by a third party.[32]

This has been taken further in **France** and there are examples of the courts imposing greater liability on the platforms when the platforms did not do enough to prevent the sale of pirated.[33] [34]

2.4.3 Conclusion

In conclusion, we can state that it is easier to discuss greater liability for the sharing platforms than for the e-commerce platforms. This is largely due to the sharing platforms' activities, i.e. they generally design and play a greater part in the offer to the customer than the e-business platforms do. Simply put, sharing platforms are often more active. However, it is not inconceivable that what the e-commerce platforms' offer customers may become more and more sophisticated over time and it may then be necessary to also discuss greater liability for them. However, for the moment it may be stated that a platform's liability is extremely limited as long as it only acts as a neutral intermediary.

---

30 For a brief description of several cases, see https://www.cnbc.com/2018/06/02/amazon-not-liable-for-exploding-hoverboard-marketplace-argument-wins.html

31 As far as we have been able to see in a general search: see Tiffany v. eBay. https://www.reuters.com/article/us-tiffany-ebay/ supreme-court-rejects-tiffany-trademark-appeal-vs-ebay-idUSTRE6AS3YJ20101129129

32 As far as we have been able to see in a general search, see Masck v. Sports Illustrated. https://digitalcommons.law.scu.edu/ cgi/viewcontent.cgi?article=1410&context=historical

33 See, for example, Louis Vuitton Malletier v / eBay, Inc. and eBay International AG.

34 Please note that this review of case law does not claim to be exhaustive or complete in any way.

3 Regulations for Swedish e-traders

3.1 General

As was explained above, platforms have a limited liability for products for which they act as an intermediary via their websites. However, Swedish e-traders that sell their own products must comply with a number of different laws and rules. We will give an account of this in this chapter.

In the review, we will focus primarily on the consumers' rights and the traders' obligations. However, the regulations are usually aimed at the trader, the manufacturer, the importer or the seller. An e-commerce platform that only operates as an intermediary should in general not be regarded as a manufacturer, importer or seller.[35] The regulations therefore seldom apply to e-commerce platforms.

The laws and regulations governing traders' liability can be categorised in one or two overall areas (areas of liability);

- *Consumer Liability,*
- *Product Liability,*
- *Market Liability,*
- *Personal Data Liability* and
- *Tax Liability.*

However, these areas are in no way exhaustive and a trader, for example, also has liability in accordance with labour legislation, which is not covered in this report.

3.2 Consumer liability

In this context, *consumer liability* means the liability that traders (primarily retailers) have towards the end customers in the markets. Briefly, consumer liability means that the trader's relationship with the consumers is subject to certain requirements and he or she has a number of obligations in that regard.

The European Union has adopted a directive governing consumer rights[36], and therefore the rules in the various Member States are largely similar. In Sweden, consumer liability is primarily governed by the Consumer Purchases Act and the Distance Agreements Act.

35 E-Commerce platforms must certainly be regarded as traders, which can give rise to liability if the platform itself enters into agreements with consumers.

36 Directive 2011/83/EU on consumer rights.

To sum up, the laws grant consumers extensive rights in the case of commerce, including extensive rights to withdraw and to complain.

3.2.1 The Consumer Purchases Act

The Consumer Purchases Act applies to purchases of goods sold by traders to consumers. The Act also applies to exchanges of goods and goods to be manufactured. "Goods" means all movable property such as food, clothing, means of transport (gases and liquids) and other consumer goods. The purpose of the Act is to protect consumers and therefore the Act is imperative to the benefit of consumers. That means that companies may not sell their products on less favourable terms than the terms set out in the Act.

Despite the imperative nature of the Act, a trader and consumer may freely agree on the time and place for delivery of the goods and when and what the consumer must pay. The trader assumes the risk associated with the goods until the consumer takes physical possession of the goods, in other words when the goods are in the consumer's possession. Unlike the *Sales Act* (which is applicable in the case of purchases between traders), it also applies if the consumer has not obtained or received the product in time. The trader is therefore liable for any costs incurred or that may be incurred prior to that.

In the event of a breach of the agreement, the trader's liability is dealt with in two different aspects: the trader's liability in the event of *delay* and the trader's liability in the event of a *fault in the product*.

If the goods were not delivered in time or were not delivered at all – and such is not attributable to the consumer – it is a case of *delay*. In such a situation, the consumer is entitled to withhold payment and require the trader to execute the purchase or cancel the purchase if the delay is of substantial importance for the consumer. In addition, the consumer is entitled to claim compensation for any damage he or she has been caused by the delay on the part of the trader.

If there is a *fault in the product* other penalties may be claimed by the consumer. The consumer is then entitled to require repair, redelivery and a price reduction or compensation for repairing the fault. If the fault is of substantial importance for the consumer, the purchase may be cancelled. The consumer is also entitled to claim damages from the trader. The trader is liable for faults that existed before delivery and at the time of delivery to the consumer, in other words the moment when the consumer took physical possession of the goods.

To sum up, the laws grant consumers extensive rights in the case of commerce, including extensive rights to withdraw and to complain.

The consumer is *always* entitled to cite a fault in the goods and claim penalties if the goods have been sold contrary to a prohibition in accordance with the *Product Safety Act* or another prohibition on sales or are otherwise so defective that they constitute a danger to life or health. Other situations where the consumer has an unconditional right to cite a fault in the goods include if the trader acted with gross negligence or contrary to good faith and fair dealing.

Unlike the *Sales Act* (which governs purchase agreements between traders), under the Consumer Purchases Act, a trader may be obliged to compensate the consumer for damage arising due to faults in *property other than* the goods sold. Traders therefore have greater liability in the case of purchases covered by the Act. The consumer can also file claims against a trader *at previous stages of the sales chain*. This is possible in situations where, for example, the trader is insolvent, has ceased trading or cannot be traced.

3.2.2 The Act on distance agreements and agreements off business premises ("The Distance Agreements Act")

The Distance Agreements Act is one of several Acts governing commercial activities via the internet.[37] The Act therefore offers the consumer protection when an agreement is entered into at a distance between traders and consumers, for example when a purchase

37 The Act is based on Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

agreement is entered into on the internet, by telephone or by mail order. Just as in the Consumer Purchases Act, the provisions are imperative to the benefit of the consumer, which means that agreement terms that are worse than those established in the Act are invalid.

The Act also largely includes agreements governing the supply of digital content such as downloads of computer programs, games and apps. However, the Act does not apply to e-commerce involving food, which is instead governed by the e-Commerce Act.

One of the most important consumer rights established in the Act is the right of withdrawal. Consumer rights under the Act differ depending on the kind of purchase agreement entered into, for example a purchase of digital content supplied *digitally* (a game that is downloaded) or whether the digital content is supplied on a *physical medium* (a CD).

The purchase of digital content supplied on a physical medium is regarded as a *product* and a 14-day right of withdrawal begins to apply when the consumer takes physical possession of the product, in other words has the product in his or her possession. However, in the case of supply of digital content, the purchase ends up in a grey area as far as consumer law is concerned because it relates to a purchase of neither a product nor a service. As a result, certain consumer rights may become outdated and/or the consumer is able to waive them (for example the right of withdrawal), which constitutes an exception to the imperative nature of the consumer rules.

Traders are obliged to provide consumers with necessary information at the time of the purchase such as information on the right of withdrawal and the deadline for that right, the right to complain and the trader's contact details.

3.2.3 Conclusion

The *Consumer Purchases Act* applies to purchases of movable property that a trader sells to a consumer. The Distance Agreements Act applies in the case of distance agreements when a trader transfers or leases movable property to or performs a service for a consumer. An e-commerce platform that only acts as an intermediary cannot be regarded as a seller, which means that the rules in general are not applicable to its activities.

3.3 Product liability

In this context, product liability means the liability that a trader (manufacturer, importer, retailer) has for the products he or she places on the market. In brief, product liability means that the products placed on the market are subject to certain requirements and that the trader has a number of obligations in that regard.

Product liability is extensive and consists, inter alia, of the rules in the Product Liability Act and the Product Safety Act. In addition, there are provisions concerning CE marking and the use of chemicals (the REACH Regulation) and on producer responsibility for residual waste.

In Sweden, there is a responsible authority, market surveillance authority, that checks to ensure that products sold fulfil current requirements with regard to their properties, are labelled and controlled in the prescribed manner and that documentation exists for the product (for example user instructions and technical documentation). If the product fails to meet the established requirements, the authority will adopt measures which may include the product being made subject to a prohibition on sales or being recalled from end users.[38]

3.3.1 The Product Liability Act

In accordance with the Tort Liability Act, damage caused by a product is normally subject to compensation only if the damage was caused intentionally or due to negligence. The Product Liability Act is instead based on the principle of *strict liability*, in other words liability for damages does not require the party liable to have caused the damage due to negligence. The Act also affords more extensive protection for injured parties in the event of product damage than that provided by the Tort Liability Act.

Damages may be payable for damage due to a *safety flaw* in the product. A safety flaw means that the product is not as safe as may reasonably be expected. Safety must be assessed in the light of how the product could have been expected to be used and how it was marketed and taking into account user instructions, the moment when the product was put into circulation and other circumstances.

In slightly simpler terms, it may be said that the parties who risk becoming liable for damages are *the manufacturer*, *the importer* and *the person that markets the product* as its own. More than one trader may thus become jointly and severally liable for the same product damage. If damage is caused by a defective component in a product, both the manufacturer of the assembled product and the manufacturer of the component are liable and if an imported product causes damage, both the importer and the foreign manufacturer are liable for the damage. The liability is normally joint and several, which means that the injured party can claim against any of the parties liable and the party singled out is liable for compensation for all of the damage.

If it is not clear who manufactured or imported a product that causes damage, strict product liability also applies at subsequent stages of the distribution chain, in other words to the person that sold the product or otherwise supplied it. One of the basic principles of product liability legislation is that the injured party should as far as possible have someone to file his or her claim against. Product liability is extended to traders who concern themselves with the product after manufacture or import in order to ensure that the injured party will not be prevented from claiming compensation just because he or she is unable ascertain who produced the product causing the damage.

3.3.2 The Product Safety Act

The Product Safety Act aims to ensure that goods and services supplied to consumers do not cause injury to persons. The Act is applied in the case of goods and services supplied in business activities and goods supplied in public activities One prerequisite for the

38 For more information, see, se https://www.marknadskontroll.se/wp-content/uploads/2017/11/Swedac_Marknadskontroll_webb.pdf

applicability of the Act is that the goods or services must be intended for consumers or it must be presumed that consumers will use them.

In slightly simplified terms, it may be said that a trader's main obligation is to supply safe products and services. A trader also has other obligations, including an obligation to provide any information required to enable a consumer to assess the risks associated with the product and protect him or herself against those risks and to provide information on the risk of injury and how it can be avoided if the manufacturer supplied hazardous goods. A manufacturer must also recall goods if necessary, in order to prevent injury.

The Government determines which authorities will be responsible for supervision with regard to the Act and authorities such as Konsumentverket [the Swedish Consumer Agency], Elsäkerhetsverket [the Swedish Electrical Safety Board] and Kemikalie-inspektionen [the Swedish Chemicals Agency] are responsible for monitoring compliance with the Act. If a trader has placed a hazardous product on the market, he or she must inform the responsible authority and also inform it of any actions carried out. The supervisory authority may decide that a hazardous product may not be supplied or placed on the market.

3.3.3 The Act concerning Accreditation and Conformity Assessment ("CE marking")

Swedish traders must ensure that their products conform to EU health, environmental and safety requirements. The EU has therefore introduced a regulation requiring manufacturers to certify that products meet the Union's requirements by marking them with the letters "CE" (so-called ***CE marking***).[39] The Regulation has been supplemented by the above Act in Swedish law.

CE marking works *both* as a stamp showing that a product conforms to the EU Directive *and* as a trade mark showing that the product may be sold freely within the EU.[40] However, not all goods need to be CE marked. The obligation to affix the CE mark extends to products in around 25 different categories (for example construction products, toys, energy labelling, explosives for civil use, machine safety, recreational craft and medical devices). Each product category is covered by an EU Directive that is transposed into Swedish law by a range of regulations and the manufacturers are responsible for ascertaining which products must be CE marked.[41]

By CE marking a product, the manufacturer gives an assurance that the product conforms to the EU directive. The importer of a product should ensure that the manufacturer has issued the EU declaration and that the other technical documentation meets the requirements. If a product bears the CE marking despite the fact that it does not comply

39 Regulation (EU) No 765/2008 of the European Parliament and of the Council.

40 https://www.sis.se/standarder/ce-markning/

41 https://www.konsumentverket.se/for-foretag/produktsakerhet/ce-markning/

with EU requirements, the manufacturer or importer is obliged to adopt immediate measures to cancel the CE marking, otherwise it may be fined.

3.3.4 The REACH Regulation

Traders who *import* or *manufacture* chemical substances, compounds and products containing chemical substances are required to comply with the REACH Regulation.[42] The Regulation governs, among other things, how and when chemical substances, etc. must be registered, evaluated, approved or restricted. The obligation to register applies to persons who manufacture or import chemical substances in quantities of at least one tonne per year and registration must be carried out with the European Chemicals Agency ECHA. Unregistered chemical substances, compounds and products may not be released in the EEA.

The regulation applies in principle to all chemical substances and products containing chemical substances (for example mobile phones, toys, chairs and tables).

Manufacturers and *importers* are responsible for ensuring that the chemical substances they manufacture and place on the market can be used safely and do not give rise to any harmful effects to health or the environment. Manufacturers and importers are required, inter alia, to draw up a safety data sheet for a chemical product in the EEA and ensure that the information in the safety data sheet is correct.[43]

The rules also extend to imports from third countries outside the EEA. A supplier who is located outside the EU can appoint a natural person or legal entity within the EU as a "sole representative" to meet obligations such as registration imposed on importers under the Regulation. Nevertheless, the manufacturer or importer retains full liability for meeting the obligations laid down in the Regulation.

The Regulation contains rules that limit the use of substances that pose an unacceptable risk to health or the environment. If a company is in breach of a restriction, the company must immediately remedy the defects, otherwise the company risks having a prohibition on sales imposed on it or being forced to recall the products from customers.

3.3.5 Producer responsibility for residual waste

Producer responsibility means that producers are responsible for collecting and dealing with end-of-life products. The purpose of producer responsibility is to encourage producers to develop products that make more efficient use of resources, are easier to recycle and do not contain substances that are hazardous to the environment. [44]

---

42 Regulation (EU) No 1907/2006 of the European Parliament and of the Council.

43 https://www.kemi.se/hitta-direkt/lagar-och-regler/reach-forordningen/sakerhetsdatablad. Distributors and suppliers are also obliged to issue a safety data sheet or other information to the recipient of a chemical substance.

44 The following information is taken from https://www.naturvardsverket.se/Amnen/Producentansvar/

Statutory producer responsibility currently exists in the areas of *batteries*, *cars*, *tyres*, *electronics*, *packaging*, *waste paper*, *pharmaceuticals* and *radioactive products*.[45] Voluntary producer responsibility also exists for *office paper* and *agricultural plastic*.

Producer responsibility is burdensome for Swedish producers because it makes them responsible for dealing with any waste produced.

Förpacknings- och Tidningsinsamlingen (FTI) [the Packaging and Newspaper Collection Service] assumes responsibility for collecting and recycling packaging and newspapers on behalf of producers. The FTI is a non-profit organisation financed by the companies. In order to be affiliated with the FTI, companies pay a fee which currently amounts to at least SEK 2,000 per year. In the case of smaller quantities of waste, companies can pay standard fees for recycling (up to SEK 8,500), but for larger quantities of waste, companies pay a packaging fee for the total weight of the waste they produce. The packaging fees currently amount to, for example, SEK 1.07 per kilo for household paper and SEK 2.45 per kilo for household plastic. Producer responsibility therefore constitutes a burden both in purely practical terms and in economic terms.[46]

3.3.6 Conclusion

The Product Liability Act imposes liability for damages on the person who has manufactured, imported, supplied or circulated a product. *The Product Safety Act* imposes extensive liability in several respects on manufacturers and traders that supply products. By supplying a product bearing the *CE marking*, the manufacturer is declaring under its own liability that the goods comply with all legal requirements for CE marking. The person that manufactures or imports chemicals also has extensive liability under the REACH Regulation. An e-commerce platform that only acts as an intermediary does not appear to fulfil any of the above roles, which means that the rules are in general not applicable in its activities.

3.4 Market liability

In this context, "market liability" means the liability that a trader (importer, retailer etc.) has in relation to the market as a whole. In brief, market liability means that certain requirements are imposed on the trader's general conduct on the market and that the trader has a number of obligations in that regard.

Market liability is mainly governed by the Marketing Act, which states that all marketing must take place in accordance with satisfactory marketing practices.[47]

---

45 See, for example Regulation (2008:834) on producer liability for batteries. .

46 For more information and a complete price list, see http://ftiab.se/233.html

47 The Price Information Act may also be referred to in this context. The Act aims to promote satisfactory price information for consumers and states that consumers must receive clear, accurate price information.

3.4.1 The Marketing Act

The Marketing Act is based on an EU Directive[48] and aims to promote the interests of consumers and the commerce sector as far as marketing products is concerned and combat inappropriate marketing. The Act covers all advertising and sales with a commercial interest.

Traders must mark in a manner that is consistent with good *marketing practice*, in other words in accordance with good business practice or other accepted standards to protect consumers and traders when marketing products. Aggressive or misleading marketing is not permitted.

Aggressive marketing means marketing that contains harassment, coercion, physical violence, threats or other aggressive means of exerting pressure. *Misleading marketing* means marketing that affects the consumer's ability to make informed purchase decisions, for example by containing inaccurate statements, excluding important information or presenting the goods in a misleading way. One example of misleading marketing is what is referred to as *hidden advertising*. Hidden advertising occurs primarily on social platforms and is based on the fact that a person markets a product without revealing that he or she is being paid.[49]

In addition, traders are under an obligation, when marketing, to provide certain information on aspects such as the product's price, contents, characteristics and agreement terms and conditions. The Marketing Act contains no exhaustive list of what must be included and the trader must carry out an assessment on a case-by-case basis and refer to more detailed rules in other Acts.[50] Finally, there is also a "black list" for marketing that is not permitted under any circumstances (such as marketing aimed at children, incorrect quality marks or pirate copies).[51]

If the marketing of a product is contrary to the Marketing Act, the trader may be banned from continuing with the marketing. The prohibition may also be imposed on an employee of the trader or another person acting on the trader's behalf. If the marketing lacks any important information (concerning the price of the goods, for example) the trader may be ordered to add the omitted information. Both the prohibition and the order to provide information are often associated with a fine, which means that the trader must pay a sum of money if the same error is repeated. In the event of any breach of an order or if the seller does not accept an order, the case will be heard before the Patent and Market Court.

In the case of particularly serious infringements, a trader may be required to pay what is referred to as a *market disruption fee*.

---

48 The Unfair Commercial Practices Directive (2005/29/EC).

49 See, for example, the "*Kissie case" (PMT 11949-16).*

50 See, for example, the Distance Agreements Act and the Consumer Purchases Act above.

51 See Annex I to Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices.

3.4.2 Conclusion

The Marketing Act is applied when a trader markets or itself issues a request for products in its commercial activities. An e-commerce platform that only acts as an intermediary does not market products, which means that the rules are in general not applicable in its activities.[52]

3.5 Personal data liability

In this context, *personal data liability* means a trader's liability for ensuring that consumers' personal data is processed in a lawful manner.

Personal data liability is now governed by the EU's GDPR, which entered into force on 25 May 2018.[53] The new Data Protection Regulation applies to all personal data that is processed at places of business in the EU, regardless of whether or not the processing itself is carried out within the EU. The Data Protection Regulation also applies when the personal data is processed by a company *outside* the EU, when the processing is connected with supply of goods or services *within* the EU. That means that e-commerce platforms that are not engaged in business activities in the EU but that sell products and services to EU citizens are subject to the provisions of the Data Protection Regulation.

In brief, in accordance with the Data Protection Regulation, a company has an obligation to collect personal data only for specific, expressly stated and legitimate purposes, not to process more personal data than is required for the purpose, to carry out thinning of personal data when it is no longer necessary to fulfil the purpose, to ensure that personal data is protected from unauthorised intrusion and to ensure that the rights of the person whose personal data is processed (the "data subject") are protected. The data subject has a number of rights in relation to the company that processes personal data and those rights vary depending on the nature and circumstances of the processing in each individual case. One example of such a right is the *right to information*, which means, among other things, that a company is under an obligation to provide information on how the personal data will be processed at the moment when the personal data is collected.[54] Platforms therefore need to limit the personal data collected from customers or from the persons who visit them. Nor may a customer's personal data be stored for longer than is necessary, for purposes other than those for which it was collected or for purposes other than those of which the customer has been informed.

Before the entry into force of the Regulation, there was some uncertainty as to the effect it would have and how the new penalty fees[55] would be applied. It is still unclear exactly how the supervisory authority (the Data Protection Authority) will act, but there is likely

---

52 Nevertheless, it should be noted that an e-commerce platform may be subject to the Marketing Act if it actually markets products or its own services.

53 It should be noted at this point that data protection legislation also consists of the Act (2018:218) containing supplementary provisions to the EU Data Protection Regulation, Regulation (2018:219) containing supplementary provisions to the EU Data Protection Regulation and regulations issued by the Data Protection Authority (collectively referred to as the *"data protection regulations"*).

54 For a more thorough presentation of the rights of the data subject, see https://www.datainspektionen.se/lagar-- regler/dataskyddsforordningen/de-registrerades-rattigheter/

55 Penalty charges may, in particularly serious cases, amount to EUR 20 million or four (4) per cent of global annual sales. A data subject whose personal data is processed in an inadmissible manner and who thereby suffers damage also has the right to receive damages in accordance with applicable national tort law.

to be overall sector supervision of the largest operators (such as Google, Facebook or Amazon) and sectors where large quantities of personal data are processed (such as e-commerce platforms). Nevertheless, it is not clear whether a decision by the Data Protection Authority will be enforceable in the country where the company has its place of business. For example, it is generally known that Chinese courts are not particularly eager to enforce judgments or decisions from other countries. In practice, this means a competitive advantage for companies whose places of business are located in countries outside the EU.

It is also important to note that, in addition to purely legal questions, data protection legislation also raises several ethical questions (for example how customers'/users' personal data *can* and *should* be shared). These issues are particularly relevant for platforms (particularly sharing economy platforms). However, it is not certain that this discussion will be carried on to the same extent throughout the world, which means that the ethical aspects of personal data liability can also form an obstacle to competition in relation to smaller scrupulous platforms.

3.5.1 Conclusion

The Data Protection Regulation applies to all personal data processed at places of business in the EU, regardless of whether or not the processing is carried out within the EU. The Regulation also applies when the processing is carried out by a company outside the EU, when the processing has a connection with the offer of goods or services within the EU. E-commerce platforms that do not operate in the EU but that sell goods and services to EU citizens are therefore covered by the rules contained in the Regulation.

3.6 Tax liability

Companies operating in Sweden must comply with Swedish value added tax legislation. As a main rule, VAT is payable on sales of goods and services. Companies engaged in activities liable for tax must register for VAT at the Swedish Tax Agency, charge VAT on sales of goods and services, declare their VAT in a VAT declaration and pay in VAT to the State.

Private individuals buying from companies in Sweden pay VAT through the price they pay for the goods. Private individuals have no obligation to report or responsibility for checking that the company has charged the correct VAT. This is completely incumbent on the company.

3.6.1 Imports of goods to Sweden from a country within the EU

When goods are brought into Sweden from another EU country, it is referred to as importing the goods. In accordance with the Value Added Tax Act, import is understood to mean that goods are brought into Sweden from a location outside the EU. When goods are brought into Sweden from another country in the EU, it is instead referred to, inter alia, as *circulation* of goods. "Circulation" means, inter alia, that goods are transferred against payment.

Goods are normally considered to be circulated in the country in which the goods are located when the transport of the goods to the purchaser begins. This means that VAT is paid in the EU country where the goods are located when the transport to the purchaser begins, provided that the selling company will report VAT on the sales in accordance with the rules in force in that country.

However, there are exceptions to this rule. Distance sales are one such exception, whereupon circulation is considered to have taken place in Sweden despite the fact that the goods are not located in Sweden when the transport of the goods to the purchaser begins. E-commerce involving goods for private individuals is one example of distance sales. In such cases, the selling company is obliged to pay VAT in Sweden, but only if the selling company sells goods to customers in Sweden amounting to at least SEK 320,000 per year. Such selling companies are required to register for VAT in Sweden despite the fact that they do not carry out any activity in Sweden other than the fact that their online sales are aimed at customers in that country.

The effect for the buyer in Sweden is that he/she must pay Swedish VAT instead of VAT in the selling company's country. However, in purely practical terms, this means no liability for the private individual and the VAT must be included in the price of the goods. The liability for VAT simply rests with the selling company.

One further exception applies for purchases of certain goods within the EU, for example in the case of purchases of new means of transport or products covered by an obligation to pay excise duty. Such goods are instead subject to the rules on *intra-EU* acquisitions, whereupon the VAT on the goods must be paid in Sweden.

Nevertheless, there is no VAT on goods sold by private individuals within the EU. However, VAT is payable on receipt of goods from a private individual in a country outside the EU. Certain exceptions exist for items such as gifts.

3.6.1.1 The basis for taxation

The basis for taxation in the case of circulation and intra-EU acquisitions is generally the payment for the goods, the market value of the goods if the payment is lower than the market value, with a supplement for taxes and charges, except for VAT. Also included in the basis for taxation are associated costs such as commission, packaging, transport and insurance costs that the seller charges the buyer.

3.6.2 Import of goods to Sweden from a country outside the EU

In accordance with the Value Added Tax Act, *import* is understood to mean, as stated above, that goods are brought into Sweden from a location outside the EU.

In the case of import of goods from a country outside the EU, as a general rule the person importing the goods is obliged to pay VAT if the goods are or would have been subject to the obligation to pay customs duty in Sweden in accordance with applicable customs legislation. The obligation to pay tax arises at the moment when the obligation to pay customs duty in accordance with customs legislation arises or would have arisen had the obligation to pay customs duty existed.

A customs declaration, inter alia, must be prepared at the moment when VAT is paid. The VAT must be paid either to the Swedish Customs or the Swedish Tax Agency, depending on who is importing the goods. Private individuals must pay VAT to the Swedish Customs, whereas companies registered for VAT must pay the tax to the Swedish Tax Agency.

Companies operating in Sweden must comply with Swedish value added tax legislation.

In cases where the goods are ordered through another EU country which, in turn, imports them from a country outside the EU, it is still the final recipient, i.e. the buyer, who is liable for payment of VAT.

Normally it is the party that transports the goods and brings them in on behalf of the buyer, for example Postnord or a courier company, that draws up the customs declaration and reports the VAT for the buyer. The supporting documents are the documents and invoices that accompany the package.

It is, at least in theory, possible for a buyer to draw up a customs declaration him or herself. However, in practice this is fairly unusual since the rules are complex and the declaration must be completed on a form and must be physically submitted to one of the Swedish Customs' customs clearance offices along with supporting documents.

However, regardless of whether it is a company that deals with the customs declaration and the VAT, it is always the buyer (i.e. the private individual) who is liable for ensuring that the correct VAT is paid.

Failure to declare VAT can constitute a customs offence in accordance with the Smuggling Act and an offence against the Customs Act. For items that bypass Customs without VAT being paid, it should, in practice, be relatively difficult to do something about it unless the buyer gives notice voluntarily that no VAT was charged. If the buyer notifies the Swedish Customs, the Swedish Customs can send a bill for retrospective customs duty. The buyer can notify the Swedish Customs within three years from when the consignment arrived in Sweden. A buyer who fails to pay VAT on imported goods risks both criminal liability and supplementary customs duty.

3.6.2.1 The basis for taxation

The basis for taxation in the case of import is the customs value of the goods, including in cases where the goods are not subject to customs duty, established by the Swedish Customs, with a supplement for customs duty and other State taxes or charges, except VAT, levied by the Swedish Customs due to the import. Nevertheless, such a supplement will not be levied if the customs duty, taxes or charges are included in the value of the goods. In addition, the basis for taxation includes associated costs such as commission, packaging, transport and insurance costs.

3.6.2.2 Import of consignments of negligible value

Certain goods may, upon application, be exempt from the obligation to pay VAT upon import.

In accordance with the Value Added Tax Act and the Act (1994:1551) on exemption from tax upon import, etc., an exemption from VAT on import is granted, inter alia, for consignments with a value below EUR 22. Nevertheless, this does not apply to mail order consignments except for foreign periodical publications. "Mail order consignments" means goods sold online to consumers, for example. No tax exemption therefore applies to mail order consignments. This is a derogation that Sweden has chosen to apply. In most other EU countries, a tax exemption also applies to mail order consignments if their value is below EUR 22.

The value limit of EUR 22 for a tax exemption is equivalent to SEK 300 from 1 January 2016, in accordance with the Swedish Customs' notice on certain limits expressed in Swedish kronor (TFS 2015:12) of 3 December 2015.

Private individuals must apply for an exemption from VAT directly in the customs declaration for the Swedish Customs.

Companies that are registered for VAT must apply for an exemption from VAT from the Swedish Tax Agency. Other provisions apply to gifts.

New VAT rules for cross-border e-commerce enter into force from 2019 and 2021, as outlined in section 4.2.4.

3.7 Summary

In this section, we have briefly described a number of regulations affecting Swedish traders and e-traders. Despite the fact that the above review is brief and general, it can be verified that Swedish e-traders must meet a large number of obligations extending over a number of different areas. Nor is the above description exhaustive.

The regulations normally impose considerable liability on *the trader*, *the manufacturer*, *the importer* or *the seller*. E-commerce platforms that only act as intermediaries seldom meet the requirements to be considered as traders, manufacturers, importers or sellers. The obligations imposed on Swedish e-traders therefore do not normally apply to e-commerce platforms. Of the areas referred to above, Swedish e-traders and e-commerce platforms have the same obligations only with regard to liability for processing of personal data.

In addition to the above, there is also the territorial aspect of e-commerce. Much of Swedish e-commerce takes place from countries *outside* the EU and, in the case of that commerce, the rules are slightly different from those applying in the case of trade *within* the EU.

If a consumer buys a product from a country outside the EU, it is considered as a private import. The consumer who imports the goods must then, in general, pay customs duty and VAT on the goods. Furthermore, EU consumer law does not apply in the case of

purchases outside the EU and questions relating to the right of withdrawal and complaint are governed by the exporting country's legislation and the company's policy. This means that the consumer can end up in a difficult position if the product is defective in any way. In addition, the same high levels of product safety are not imposed everywhere in the world, which in the worst case can have serious consequences.[56] It is therefore extremely important for the individual consumer to realise that from the point of view of liability, whether he or she buys the goods from an EU country or from a country outside the EU makes a big difference.

In addition, the question arises of *enforcement*, i.e. the ability to enforce his or her right against a selling company. In Sweden, there are a number of procedures and bodies for this, including the Swedish Consumer Agency and the Board for Consumer Complaints. Within the EU there is, inter alia, Consumer Protection Cooperation (CPC)[57] which is a network of national authorities that ensure compliance with EU consumer legislation, and in the United States it is possible to resort, inter alia, to the Better Business Bureau (BBB). However, consumers can find it difficult to enforce their right against companies based outside the EU.

As a **consumer** it is therefore important to understand, firstly that e-commerce platforms generally do not have any liability for products sold through their channels and secondly that e-commerce from countries outside the EU poses particular risks. In addition, **Swedish e-traders** are exposed to tough competition on two fronts: from the e-commerce platforms and from sellers outside the EU.

With regard to the market power of the platforms, it is questionable whether the above competitive situation is reasonable. However, in recent years there have been several initiatives in the area. These will be described in the next chapter.

---

56 In recent years there have been several warnings that components of electronics imported from Asia are flammable and that CE markings are often inaccurate and counterfeit.

57 CPC is the authority responsible, for example, for the statement concerning Airbnb's failure to comply with consumer rules, see section 2.4.1.

Ongoing initiatives in e-commerce and the platform economy

4

4.1 General

As stated in the previous section, the platforms that act as intermediaries have extremely limited liability for the products for which they act as an intermediary. Nevertheless, due to the increasingly strong position of the platforms, the issue of their liability has begun to be seriously debated, both within Sweden and around the world. Demands have come from various quarters that the platforms should assume greater social responsibility and act more responsibly.

The question of *whether* and, if so, *how* the platforms and their activities should be regulated is therefore extremely topical. The discussions focus primarily on whether the current regulations are suited to dealing with greater digitalisation, whether new legislation is needed or whether the problem can be solved by other means.

In this chapter, we will describe the developments that have taken place and the discussions being carried on in the EU and in Sweden.

4.2 The creation of a digital single market within the EU

The creation of a **Digital Single Market** or **"DSM"** is one of the European Commission's most important priorities and work on developing a strategy began in 2015. The aim of the strategy is a single market in which private individuals and companies can make use of network services under equitable competitive conditions and with a high level of consumer and personal data protection while at the same time stimulating innovation. The strategy extends over several years and focuses on measures that can only be adopted at EU level.

The Commission has verified that the strength of the platforms may lead to problems and has therefore examined whether it is possible to impose greater liability on the platforms. A number of initiatives have been adopted that affect the platforms and their business activities. Much of the discussion has focused on sharing platforms and platforms in the service sector, but the reasoning should also apply to platforms operating in e-commerce.

Below is a description of the initiatives in the following areas.

- Consumer and market liability
- Illegal content
- Competition and equitable conditions
- Value added tax

4.2.1 Consumer and market liability

The European Commission is currently carrying out a wider reform of consumer protection through what is referred to as a *"new deal for consumers"*.[58]

As a part of that work, in April 2018 a proposal was put forward for the amendment of four directives in the area of consumer rights.[59] The aims of the proposal included strengthening the supervision of consumer law and updating and modernising some parts of the regulations.[60] This will mean, among other things, that greater requirements for transparency will be imposed. The platforms must then provide information on who purchases the product, whether search results are sponsored by a seller and how the ranking of search results is determined.[61]

The Commission noted that consumers visiting on-line marketplaces can be offered products from both third-party suppliers and the marketplace itself and that the consumer does not always know with whom he or she is entering into an agreement. This can cause problems if something goes wrong, when it is not always easy to determine who is liable. It was also noted that it was often unclear how the products offered to consumers have been ranked. According to the proposal, requirements would be introduced whereby e-marketplaces must inform the consumer of:

a) the parameters forming the basis for search results,

b) whether an agreement is being entered into with a trader or a private individual,

c) whether consumer protection legislation applies and which trader (third-party supplier or e-marketplace) is then liable for ensuring that rights are respected.[62]

The following four Swedish Acts will need to be adapted in accordance with the Directive: the Marketing Act, the Distance Agreements Act, the Consumer Terms and Conditions Act and the Price Information Act.[63]

---

58 "New Deal for Consumers" COM (2018)183. https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:52018DC0183&from=EN

59 COM (2018) 185. http://ec.europa.eu/transparency/regdoc/rep/1/2018/SV/COM-2018-185-F1-SV-MAIN-PART-1.PDF

60 Memorandum of facts 2017/18:FPM81, p. 1. https://data.riksdagen.se/fil/2BE1F775-257E-4C13-929D-9D6A390DCB79

61 Memorandum of facts 2017/18:FPM81, p. 4. However, during the consultation round, criticism has been levelled at the lack of sanctions for platforms that fail to comply with the requirements. See the referral response from Sveriges Konsumenter [Swedish Consumers]. http://www.sverigeskonsumenter.se/nyheter-press/senaste-nytt/the-new-deal-for-consumers/

62 See "New Deal for Consumers" COM (2018)183. https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:52018DC0183&from=EN

63 Memorandum of facts 2017/18:FPM81, p. 4.

4.2.2 Illegal content

The Commission has adopted a number of initiatives to deal with illegal material online.[64] The term *illegal material online* is extremely broad and includes everything from particularly serious material such as incitement to terrorism, racist propaganda and child pornography to, in the context of less serious material, pirate copies and unsafe products. The term *illegal content* therefore includes everything that does not comply with EU legislation or legislation in an EU country – *everything that is illegal offline is also illegal online*.[65]

Everything that is illegal offline is also illegal online.

It was noted at an early stage that there were two central issues concerning platforms:

- How to create an equitable, innovation-friendly business environment, and
- how to ensure that illegal content was removed quickly and efficiently from the platforms.[66]

The dilemma in relation to the platforms was therefore how to recognise their positive effects on the development of the internet and commerce while at the same time dealing with the problems associated with their strong market position and their defective handling of illegal material online.

The Commission found **that** common rules were required at EU level, **that** the platforms were covered by existing EU rules in several areas (for example competition), **that** they must comply with these rules and **that** any legislation should focus only on clearly defined problems. It was also found that *self-regulation* in combination with existing legislation could yield good results.

In September 2017, the Commission presented non-binding guidelines[67] on how platforms should work proactively to prevent, detect and remove illegal content. It was found that the platforms must assume greater social responsibility and the Commission proposed, among other things, that the platforms should:

---

64 It may also be verified that the EU, within the context of the single market, proposed further measures including a Compliance and Enforcement Regulation. The proposal concerns goods that fall within the harmonised area and means, among other things, that manufacturers must appoint a person that national authorities can contact with regard to questions about the product and whether it meets existing requirements.

65 Tackling Illegal Content Online Towards an enhanced responsibility of online platforms COM 2017 [555]. See also SOU [Statens offentliga utredningar– Swedish Government Official Reports] 2018:1, p. 283.

66 Online platforms and the digital single market – opportunities and challenges for Europe COM (2016) 288. http://ec.europa.eu/transparency/regdoc/rep/1/2016/SV/1-2016-288-SV-F1-1.PDF

See also the writing in the mid-term review (COM 2017 228) using the following link: https://eur-lex.europa.eu/resource. html?uri=cellar:a4215207-362b-11e7-a08e-01aa75ed71a1.0022.02/DOC_1&format=PDF

67 Commission communication on tackling illegal content online – towards an enhanced responsibility of online platforms COM (2017) 555. http://ec.europa.eu/transparency/regdoc/rep/1/2017/SV/COM-2017-555-F1-SV-MAIN-PART-1.PDF

- Appoint persons with responsibility for removing illegal content and work with trusted reviewers.
- To introduce a system for users to report illegal content.
- To inform their users of the policy for downloading content and draw up reports on the number and type of reports received.
- To adopt measures to deter users from uploading illegal material after it has been taken down.
- To use automated tools to detect illegal material and prevent content that has been taken down from being re-uploaded.

As a follow-up to the guidelines from September 2017, in March 2018 the Commission recommended[68] a number of measures that could be adopted by companies and the Member States to take the work further before the Commission finally determines whether it is necessary to propose legislation. This recommendation was also non-binding and was not intended to amend the rule on exemption from liability for intermediaries.

The Commission expected that platforms would:

- Carry out proactive and automated action to identify and remove illegal content.
- Cooperate with other Member States, trusted reviewers, authorities and with one another to apply best practice and make the measures more efficient.
- Report regularly on activities to remove and block content.
- Ensure effective protection for fundamental rights so that decisions on removal of content are correct and well-founded.

The Commission also expected voluntary commitments from the platforms in order to improve product safety.

4.2.2.1 Voluntary commitment – "Product Safety Pledge"

A voluntary commitment such as the one the Commission hoped for was initiated in June 2018 when Alibaba, Amazon, eBay and Rakuten entered into a voluntary agreement to achieve faster removal of dangerous products sold on the companies' online marketplaces.[69]

The agreement meant that the four platforms voluntarily undertook to take action to ensure that the products sold on the platforms by third parties are safe. The purpose of the agreement was to improve consumer protection and detect unsafe products before they are sold to consumers (or as soon as possible after the products have been sold).

---

68 The Commission's recommendation on measures to effectively tackle illegal content online (2018/334). https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:32018H0334&from=SV

69 For more info, see http://europa.eu/rapid/press-release_IP-18-4247_en.htm and https://ec.europa.eu/info/sites/info/files/voluntary_commitment_document_4signatures3-web.pdf

The four companies undertook, inter alia, to appoint specific contact persons for the authorities, to have internal mechanisms and processes for taking down material and to respond to reports of dangerous products from Member States' authorities within two working days and to take action to ensure that material taken down is not re-uploaded.

Věra Jourová, the Commissioner with responsibility for Justice, Consumers and Gender Equality stated as follows::

> *"More and more people in the EU are shopping online. E-commerce has opened up new possibilities for consumers, offering them more choice at lower prices. Consumers should be just as safe when they buy online, as when they buy in a shop. I welcome the Product Safety Pledge which will further improve consumer safety. I call also on other online marketplaces to join this initiative, so that the internet becomes a safer place for EU consumers."*[70]

The parties will assess progress after six months (i.e., probably by the end of 2018) and then publish a report on this matter. The Commission has urged other digital marketplaces to join the initiative and participate in the work to improve product safety for consumers within the Union.

The agreement therefore means that a clear time limit is laid down in which the platforms must respond to alarms on defective products. It is reasonable to assume that the platforms will now take down products relatively promptly and will not investigate whether the product actually is faulty before it is removed. The issue will surely be addressed with the seller at a later stage. The fact that the process to remove suspected illegal material is being speeded up is good for consumers because the process to verify whether the material is illegal is often long and complicated. Nevertheless, the method raises the problem of so-called "over-removal" and, in that regard, it is difficult for the platforms to strike a balance when managing opposing interests.

Although the initiative involving voluntary measures is seen as positive, questions have been asked as to whether it is enough because it is still the consumers or the authorities who are responsible for detecting illegal material.[71] Furthermore, the initiative only applies within the EU, which means that consumers outside the EU are not protected. Furthermore, there is no possibility of sanctions if a company fails to comply with the requirements laid down in the agreement. A breach of the agreement is not therefore likely to mean anything more than bad PR.

Although the initiative involving voluntary measures is seen as positive, questions have been asked as to whether it is enough because it is still the consumers or the authorities who are responsible for detecting illegal material.

70 http://europa.eu/rapid/press-release_IP-18-4247_en.htm

71 See, for example the statement from ChemSec that it is not enough in the case of products with hazardous chemical contents. https://chemicalwatch.com/68097/e-commerce-product-safety-pledge-not-enough-say-ngos

However, the initiative means that more responsibility is placed on the platforms, which may be regarded as reasonable in view of the platforms' influence. The fact that a clear time limit is being introduced should also be used as a target when assessing whether the platforms have been passive with regard to illegal material. Even if the rule is not binding, the two-day rule sets a clear target within which a platform should act in the case of a specific suspicion of illegal material.

A similar initiative has also been entered into in the **area of intellectual property** regarding pirated material sold through platforms. Amazon is one of several companies that have signed a *Memorandum of Understanding* which, in brief, means that the parties must adopt measures to stop sales of pirated material. It was noted that the right-holders had a responsibility to *protect and enforce* their intellectual property rights, but the platforms must assist with procedures for reporting and removing material from the websites.[72]

All parties are likely to gain if the platforms adopt their own measures – consumers have access to better and safer products, the platforms avoid the introduction of potentially more stringent rules and society as a whole benefits from the fact that technological development is not being unnecessarily hampered. Agreements such as the *Product Safety Pledge* may in this context be seen as a major step in the right direction towards greater platform responsibility on a voluntary basis. However, in order for voluntary agreements to have a major impact, it is desirable for more companies to adhere to the agreement and for that to take place as soon as possible.

All parties are likely to gain if the platforms adopt their own measures – consumers have access to better and safer products, the platforms avoid the introduction of potentially more stringent rules and society as a whole benefits from the fact that technological development is not being unnecessarily hampered.

4.2.3 Competition and equitable conditions

This report deals for the most part with the platform – consumer relationship and focuses on the platforms' (limited) liability for the products for which they act as intermediaries. In view of the great power of the platforms, there are nevertheless reasons to also address the "platform – company" relationship *(business to business).*

The platforms are subject to EU competition rules, but there has been some concern that the regulations of competition law are not sufficient to ensure equitable competition within the Union. Companies that use the platforms are becoming increasingly dependent on the platforms, which increasingly determine the conditions for access to the market. A platform such as Amazon thus compiles a huge amount of knowledge on customer behaviour and builds the whole experience around that, which will be key in the future.[73] [74]

---

72 *Memorandum of Understanding 21 June 2016 Brussels.*

73 Anna Felländer in *Det stora detaljhandelsskiftet*, p, 21.

74 Personal data issues also appear most clearly in this activity.

The platforms are able to handle large networks of buyers and sellers and those network effects tend to favour large companies. Smaller businesses can therefore find it increasingly difficult to keep up with developments.[75] A few platforms can be considered to have excessive power in relation to the companies that depend on their services. In this connection, it has been noted that the platforms have the opportunity to adopt a variety of potentially harmful business practices, including amending general terms and conditions, removing goods or services and discontinuing accounts without giving reasons. In addition, there is a general lack of transparency regarding how goods and services are ranked on the platform.[76]

Also in Sweden, the Swedish Competition Authority has pointed out the existence of potential competition problems with regard to the platforms. Among other things, there is a risk that the platforms may abuse their dominant position, that advanced algorithms for pricing can facilitate the formation of cartels and that platforms, through their access to large quantities of valuable data (so-called "big data") create barriers to entry and strengthen their market power. Access to data can even be so valuable that competition authorities should take it into account when examining concentrations between undertakings. In addition, it is unclear how the SSNIP test – the most common test used in concentrations between undertakings – should be used in relation to transactions containing platforms and sharing economy services.[77] The Swedish Competition Authority nevertheless considers that the existing regulations are sufficient, at least in material terms.[78]

In order to solve some of the above problems, in 2018 the Commission issued draft legislation relating to the "platform – company" relationship (*business to business*).[79] The draft legislation aims to ensure fair and predictable conditions for companies that use platforms and it is hoped that the platforms' harmful business practices will be restricted and that confidence in the platform market will increase. The idea is that companies should be protected from unjustified closures and that requirements for transparency with regard to ranking and complaints should increase. *The draft legislation was also supplemented with a decision to set up a group of experts to monitor the opportunities and challenges that the platform economy means for the EU.*[80]

---

75 In Sweden, the Swedish Competition Authority has investigated Blocket, among others, for abuse of a dominant position (reg. no. 601/2015). However, the case was discontinued.

76 The Swedish Competition Authority has also pointed to a similar problem, see *Konkurrens och tillväxt på digitala marknader [Competition and growth in digital markets]* (KKV 2017:2), p. 134–136.

77 See *Konkurrens och tillväxt på digitala marknader [Competition and growth in digital markets]* (KKV 2017:2), p. 134–136. The SSNIP test is applicable mainly to traditional retailers, which is why the applicability of the test to platforms may be problematic. The question is how network effects should be valued and which price should be subject to the hypothetical increase – the price the seller pays the platform or the price of the product itself? There is also the question of exchangeability – should the test be applied to the or the sales channel?

78 *Konkurrens och tillväxt på digitala marknader* (KKV 2017:2), p. 146–147.

79 Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services COM (2018) 238. https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:52018PC0238&from=SV

80 For more info, see https://service.betterregulation.com/sites/default/files/upload/2018-04/Commissiondecision-Groupofexpertsfortheobservatoryontheonlineplatformeconomy.pdf

4.2.4 New value added tax rules for cross-border e-commerce from 2019 and 2021

4.2.4.1 General discussion of the new rules

On 5 December 2017, the European Council adopted a new directive and two regulations on value-added tax in cross-border e-commerce. The aim is to improve the competitiveness of companies established in the EU that sell to private individuals within the EU, halt the reduction in tax and simplify and facilitate the application of VAT rules to e-commerce companies. The proposal forms part of the EU's strategy for the digital single market.

The following timetable applies for the implementation of the new provisions:

- new provisions on simplification measures for sales of electronic services within the EU must be adopted no later than 31 December 2018 and must apply from 1 January 2019, and

- new provisions on the aspects set out below, inter alia, must be adopted no later than 31 December 2020 and must apply no later than from 1 January 2021

  – the EU-wide common digital portal that must be extended to include the sales of all goods and services and imports,

  – a new portal for distance sales of goods below a value of EUR 150 from sellers established outside the EU,

  – abolition of the EU rule on tax exemption for consignments of lower value, i.e. below EUR 22, and

  – administrative cooperation and combating value added tax fraud.

The European Council has given the Member States up to 2021 to implement the second part of the proposal to enable the Member States to update their IT systems. This must be done by each Member State according to agreed specifications.

Conversely, measures that do not require updating of IT systems must be implemented no later than 2018.

4.2.4.2 New value added tax rules from 2019

The Member States in the EU must have implemented rules no later than 31 December 2018 that must begin to apply no later than 1 January 2019 on simplification of sales of electronic services to non-taxable persons.

New provisions must be introduced on the applicable taxation country for sales of electronic services. A new common threshold must be introduced whereby a company established in an EU country and that sells electronic services to non-taxable persons in other EU countries must be able to apply its own country's VAT rules when total sales, excluding VAT, amount to a maximum of EUR 10,000 during the calendar year in question and the immediately preceding year. Up to the threshold amount, the selling company may apply its own country's VAT rules and pay VAT to its own country,

whereas the provisions on VAT that are otherwise applicable apply to sales above the threshold amount.

In addition, a company engaged in cross-border trade with total sales below EUR 100,000 a year may benefit from a certain relaxation of proof with regard to identification of the customer's location (in order to identify the applicable taxation country). Under the current regulations, these companies need to be able to show two different kinds of evidence in order to be considered to have met the obligation whereby they must be able to identify the location of the company's customers. The new rules mean that these companies will only need to show one kind of evidence to that effect.

4.2.4.3 New value added tax rules from 2021

The Member States in the EU must have implemented rules no later than 31 December 2020, that must begin to apply no later than 1 January 2021, on the following matters, among others.

An electronic system constituting a common EU-wide digital portal on management of VAT must exist in each Member State. Each Member State's tax authority will be the host for this in its own language.

There is currently a common EU-wide digital portal that enables online companies established both in and outside the EU that sell certain electronic services to declare and pay VAT in a single Member State for all e-commerce to consumers within the EU. (one-stop shop). The Member State receiving the VAT paid then distributes it to the Member States where electronic services are purchased and consumed.

This common digital portal must therefore be extended to include distance sales of all goods and services and imports. Instead of registering for VAT in each Member State where a company sells goods or services to consumers, the sales will be simplified by the administrative relief that the common digital portal provides. Companies in countries outside the EU must nevertheless only be permitted to use the portal for consignments for a value up to a maximum of EUR 150 and they must in some cases appoint a representative within the EU to manage their VAT obligations. A complete declaration will be required for consignments above that value.

Platforms must be made responsible for levying value added tax on the sale when they act as intermediaries for goods from sellers in countries outside the EU to consumers within the EU. Such platforms will be considered as sellers.

Unlike at present, it must be possible for VAT to be levied at the moment of sale by sellers or platforms to consumers within the EU. Sellers from countries outside the EU must be able to declare the VAT through the digital portal, where the goods sold will enjoy a "fast-track" customs mechanism.

A further mechanism must be available for situations when the digital portal is not used.

The tax exemption in the case of imports of low-value consignments, i.e. goods amounting to a maximum of EUR 22, should be removed.

Simpler invoicing rules must be introduced that make it possible under certain circumstances to invoice according to the company's own country's provisions.

4.3 Initiatives in Sweden

In Sweden, there is no study aimed only at e-commerce platforms, but in 2016 a study was set up with the task of surveying the sharing economy and analysing the various users' roles and legal positions and whether existing legislation was fit for purpose. It was found that there was no immediate need for new legislation regarding sharing platforms to be enacted before a clear need had arisen. Their development would nevertheless be closely followed and would be combined with extended activities on the part of the authorities to provide information for users with regard to the sharing economy and with the platforms' own measures.[81]

Platform liability was also discussed in another study, but from an *advertising perspective*. The study considered that the existing regulation of intermediaries' liability was sufficient and that questions concerning how the rules must be applied due to the emergence of the new technologies should be left to established practice and that the supervisory authority (the Swedish Consumer Agency) should draw up guidelines on how to consider intermediaries' liability.[82]

The Swedish Government has also drawn similar conclusions, in other words that it is best to adopt a problem-based perspective and not attempt to regulate the new economy before there are clear problems that must be addressed.[83]

81 SOU 2017:26 *Delningsekonomi på användarnas villkor [Sharing economy on the users' conditions]*, see summary and p. 277f.

82 SOU 2018:1 Ett reklamlandskap i förändring – konsumentskydd och tillsyn i en digitaliserad värld [An advertising landscape in change – consumer protection and supervision in a digitised world], p. 285.

83 See the Memorandum of Facts of the Government Offices of Sweden 2015/16:FPM103.

Summary and reflections

5

5.1 General

The use of platforms is growing rapidly. Technical progress has changed society and the economy in a fundamental way and that progress is likely to continue. The platforms' increasingly strong position in the market has had a major impact on society and some of the biggest and most influential companies in the world are run on the platform model. The model has also had a major impact on commerce, which has benefited consumers – there is greater price transparency and price competition and choice has also increased. Platform commerce therefore entails a number of advantages compared to traditional commerce, of which lower prices and time savings are only two examples. With regard to the demonstrated benefits of the platform model, there are no clear barriers to prevent the model continuing to evolve and the platform companies becoming even bigger and more important in future.

The ever-increasing power of the platforms has nevertheless given rise to a discussion as to *whether* and, if so, *how* they should be regulated. The discussions focus on the *sharing economy platforms*, since they represent something completely new that existing regulations are largely unsuited to deal with and video sharing platforms, since they make it possible to disseminate propaganda. There is not so much focus on e-commerce platforms, but some reasoning generally applies to platforms of all types. There is therefore reason to broaden the perspective and carry on a debate on greater platform liability and the way forward at a more general level.

5.2 The restriction of material on the internet in general

The idea that the platforms should work to prevent the spread of pirated or dangerous products and encouragement of terrorism is almost self-evident. In recent years, there have even been reports that the EU is preparing legislation whereby *terrorist material* must be taken down within the space of one hour under penalty of the fine for the platforms.[84] This is a clear sign that the Commission takes the issue of platform liability seriously, particularly with regard to the most serious type of illegal content.

However, the Commission has called on the platforms to use proactive and automated methods to prevent the spread of *other materials* (usually materials present on social media and video sharing platforms such as Facebook, YouTube, etc.).[85] Preventing the spread of such material in *practice* constitutes a limitation of users' freedom of expression, which means that the issue of the platforms' liability is seen in a different light from previously.

---

84 See, for example https://www.bbc.com/news/technology-45247169

85 The Commission has also been working with Facebook, Microsoft, Twitter, YouTube and others since May 2016 and has developed a Code of Conduct for how the online platforms must act with regard to hate content online.

There are a number of risks associated with imposing more stringent requirements on the platforms in this regard. The automated systems for detecting and taking down and the uploading filters used are extremely sophisticated in technical terms. Regardless of how developed the systems are, they will hardly have the ability to determine the context of a particular statement/image and what the real aim of the message is. This is likely to lead to so-called "over removal" or "over-compliance", where an increasingly large quantity of material is deemed harmful and is removed.[86] Whether the material is removed for safety reasons or because society is less tolerant towards certain messages, a reduction in the flow of information is hardly desirable from a democratic point of view. It is therefore far from certain that it is a good idea to allow private companies to determine what statements and messages are illegal and should be removed and what messages are only satirical and tasteless and must be allowed to exist in a democratic society.[87]

People's freedom of expression is thus now limited to a large extent by the platforms' general terms and conditions and their controls. The platforms seldom explain in detail why particular material has been taken down, which can lead to arbitrariness and lack of predictability. The fact that private companies have this power can be considered problematic and the fact that in practice power is concentrated in a few dominant companies complicates the matter even further. There is also the national aspect – is it desirable that an American platform should determine what messages may exist in Sweden or Germany?

The platforms' business consists, among other things, of filtering and sorting information and the platforms largely determine what material we users may access and how that material is presented to us. The platforms' power has become so great that they have even been described as *"gate keepers"* to the modern market.[88] The question of the platforms' liability is therefore extremely important in principle and involves much more than just product safety and equitable conditions for competition. The major issues, now and in future, are therefore *who should make the decision* to take down material and with *what degree of transparency and knowledge* the decision should be made.[89]

The above issues are more relevant for video sharing platforms (Facebook, YouTube, etc.) than for e-commerce platforms since taking down dangerous products does not raise questions of freedom of expression in the same way as, for example, taking down political material. The principle of exemption of intermediaries from liability is nevertheless the same regardless of whether it is a question of products on an e-commerce platform or

---

86 There are many comic examples of so-called "over removal", including a period when Facebook closed down all users named Isis. For more info see https://www.theguardian.com/technology/2015/nov/18/facebook-thinks-im- a-terrorist-woman-named-isis-has-account-disabled

87 This issue has also appeared in the UK through media companies urging the government to introduce independent reviewers of social media platforms, see inter alia https://techcrunch.com/2018/09/03/uk-media-giants-call-for-independent-oversight-of-facebook-YouTube-twitter/?guccounter=1

88 Newman, John M. (2017) *"Complex antitrust harm in platform markets"* in CPI antitrust chronicle May 2017, p. 3.

89 The question of whether the State or the companies must determine whether a criminal offence has been committed flared up in Germany after a new law was passed which forced the platforms to remove illegal material under penalty of heavy fines. For more info, see https://www.reuters.com/article/us-germany-hatecrime/german-opposition-calls-for-abolition-of-online-hate-speech- law-idUSKBN1EW0Q9

political material on a video sharing platform.[90] The question of whether greater liability must be imposed on the platforms for user-generated material must therefore be assessed in the light of this and must be based on their strong market position.

5.3 The path towards greater platform liability

5.3.1 General

It is clear that the Commission does not want to hinder the platforms and their power of innovation before specific problems arise that cannot be solved in any other way. This also appears to be Sweden's view, at least as far as the sharing platforms are concerned. It is clear that the legislator has no wish to over-regulate an industry that drives development before knowing exactly what problems must be solved. We consider that this cautious approach is reasonable at present and that any legislation in this area needs to be thoroughly studied. We also consider that there are measures less stringent than legislation that can be used to impose greater liability on the platform companies without hampering their power of innovation.

5.3.2 What more can be done?

Firstly, it should be noted that current regulations (the Electronic Commerce Directive) does not allow a *general obligation to monitor* to be imposed on the platforms. This has also been confirmed in practice several times in recent years.[91] However, the measures proposed by the Commission on proactive and automated action are increasingly moving in the direction of general monitoring. However, it remains to be seen how far the proactive measures may be taken without coming into conflict with the prohibition on monitoring in the Electronic Commerce Directive. The demarcation of the boundary between permitted specific monitoring and non-permitted general monitoring cannot be said to have been fully clarified and it is not inconceivable that the question may be tested in a national court in future.

The question of general monitoring is also relevant in the area of copyright due to the Directive on Copyright in the Digital Single Market.[92] The Directive contained a controversial *"Article 13"*, pursuant to which suppliers of information society services must adopt certain measures such as *efficient content recognition technologies* to prevent access to copyrighted material. The proposal was severely criticised and was voted down in Parliament in summer 2018. However, the proposal will be revised and presented again in autumn 2018.

In addition to various types of monitoring measures as described above, there are other measures that could be adopted. The Swedish study on sharing economy platforms put forward certain proposals on what could be done to improve the situation.[93]

---

90 However, it should be noted that there are also other regulations for video sharing platforms, including the EU's new Audiovisual Media Services Directive (AVMSD) which to some extent supplements the Electronic Commerce Directive.

91 Scarlet v. Sabam [C-70/10], Sabam v. Netlog [C-360/10] and McFadden v. Sony Music [C-484/14, p. 87].

92 COM/2016/0593 final – 2016/0280 (COD).

93 See SOU 2017:26 *Delningsekonomi på användarnas villkor [Sharing economy on the users' terms]*.

These proposals could also be reasonable in the case of the e-commerce platforms. **The first proposal** is for an authority to be given the task of providing information on the risks associated with platform commerce and providing individual guidance to consumers at the time of a purchase. It is conceivable that users of the platforms still largely lack knowledge of the rules applying in the case of purchases from third-party suppliers and the risks. This proposal would therefore involve a form of consumer guidance. **The second proposal** is for an authority to be given the task of studying the issue of greater platform liability and then preparing a report for the competent body.

There are also some interesting proposals from other countries with regard to the sharing economy that it should also be possible to apply to e-commerce platforms. A **French study** included a discussion of whether information liability towards the consumers could be imposed on platforms with regard to everything that is of *essential importance* (for example information on consumer protection and guarantees, conditions and offers as well as how products are rated and sorted).[94] 94 In **Italy**, active work is being carried out on a legislative proposal with regard to sharing economy platforms which would mean, among other things, that the platforms would be required to deduct preliminary tax relating to sharing economy transactions.[95]

The above proposals could be combined with the platforms' additional *own measures* which have been recommended by the European Commission and the Swedish legislator.[96] Such own measures could mean, among other things, **that** the platforms must survey distribution chains and sales patterns in order to detect illegal products faster, **that** the platforms must provide information to customers who purchased products that are later found to be illegal, **that** the platforms must cooperate with other platforms in order not to create so-called *"safe harbours"* for less scrupulous retailers, **to** establish and/or simplify specific mechanisms for settlement of disputes and **to** establish clear requirements for sellers and thereafter to introduce sanctions against the sellers that fail to meet the requirements.

If any of the above measures are adopted, they must nevertheless be designed in such a way as not to become too burdensome for companies using the platform. This becomes particularly relevant in relation to smaller companies. Nevertheless, it has not been clearly established which measures platform companies can adopt and still continue to be regarded as passive, neutral intermediaries. However, it may be noted that in practice certain boundaries have nevertheless been drawn with regard to the offer to users itself (see, for example, *Uber Spain* and *L'Oréal* v. *eBay* above). It has not been fully clarified where the boundaries are in relation to user terms and conditions (in other words how extensive the requirements imposed on the seller by the platform can be and what checks it can carry out to ensure compliance with the conditions). Provided that progress continues in the same direction, it is not inconceivable that this question will be tested in a national court in future.

---

94 See also SOU [Statens offentliga utredningar – Swedish Government Official Reports] 2017:26, p. 232–233.

95 See also SOU [Statens offentliga utredningar– Swedish Government Official Reports] 2017:26, p. 249.

96 Such an agreement was reached earlier this year through the Product Safety Pledge (see section 4.2.2.1).

5.3.3 What can we expect in the future?

The Commission's work to induce the platforms to take greater responsibility has been going on for a relatively short time and has mainly consisted of pressure and non-binding recommendations, so-called "soft law". This has yielded some results and the platform companies now assume greater responsibility than they did just a few years ago. For example, Facebook has been cooperating with external fact checkers since 2016 and several other companies are adopting internal initiatives in order to take greater responsibility.[97] The latest of these is Spotify, which recommends that an independent function (an ombudsman) should be appointed to oversee hate content on the platform.[98]

In addition, the Commission has established a voluntary commitment (Product Safety Pledge) from four major platforms regarding product safety. The parties must report on the measures adopted every six months and a first report was expected in December 2018, but has been delayed (see page 52 for more information). It is therefore reasonable in any case to wait for the report in order to be able to evaluate the impact of the measures adopted

97 https://newsroom.fb.com/news/2018/06/hard-questions-fact-checking/

98 https://www.dn.se/ekonomi/spotifys-grundare-vill-att-ombudsman-ser-over-hatiskt-innehall/

before taking further action. We therefore consider that legislation is not likely to be imminent, either at EU level or at Swedish national level.

Nevertheless, we share the Commission's few that it is necessary for any legislation to be at EU level. The digital economy and the platforms' activities are cross-border and it would not be appropriate to have different rules in different EU countries. In addition, the Electronic Commerce Directive is beginning to become outdated and the internet is a completely different world today than at the beginning of the 2000s. It is therefore not unlikely that the Commission will wish to update the legislation and adapt it to current circumstances. This becomes particularly relevant if the European Court of Justice comes to the conclusion that the proactive and automated measures recommended would be contrary to the Electronic Commerce Directive. If it is considered that the platforms must assume greater liability and that supervision is the right way to go, the Electronic Commerce Directive must probably be replaced by other legislation.

In view of the above, it is thus not inconceivable that the most appropriate solution is some form of "platform directive" or "platform regulation".[99] The platforms should in that case be faced with regulations that are specifically adapted to them and to the times we now live in. Then it would be a simple matter to clarify what the term 'information society services' actually means when the companies are called Uber, Airbnb and Amazon and the services are integrated solutions for transport, overnight stays and parcel deliveries. Updated legislation would also allow clarification of *what the platforms are liable for* and not just *what the platforms are not liable for.* There may also be reason to depart from the dichotomy *active – passive* and treat all platforms alike as long as the material itself existing on the platform is user-created.[100]

However, regardless of the solutions chosen, legislation is a departure from the current "soft law" approach in relation to the platforms. The question of comprehensive legislation of the platforms' activities is also complicated by the fact that the platforms carry on activities in widely differing areas. Nor need it therefore be necessary or appropriate to impose the same rules on Amazon and eBay as on Facebook and YouTube, which is something that should be taken into consideration in any legislative process.

5.3.3.1 Extended requirements on transparency

One issue that we consider will in any case become more important is the issue of how to achieve greater transparency. This is indicated not least by the fact that the notion of *fake news* has come to be discussed more and more. There have been demands asserting that

---

99 The question of a new directive relating to notice and action (i.e. mechanisms for removing illegal material) has in any case been raised in Parliament, see, inter alia https://marietjeschaake.eu/en/meps-want-notice-and-action-directive. However, at the time of writing, no new initiatives appear to be in progress.

100 The question of the platforms' liability and their legal status is also currently being studied within the framework of a parliamentary committee in the UK. The question of how the platforms are to be regulated after Brexit is open because the country will no longer be bound by the provisions of the Electronic Commerce Directive. The committee will publish a complete report at the end of the year. For more information, see https://www.politico.eu/article/jeremy-wright-uk-mps-to-join-call-for-tech- liability-reform-brexit-vote-leave/

Previously, the Minister of Culture Matt Hancock stated as follows on the same matter: *"Outside the EU, we could […] write really forward-looking legislation that supports the innovation and the freedom that these social media platforms bring but also ensures they mitigate better against the harms".* https://www.theguardian.com/media/2018/mar/14/uk- could-rethink-social-media-laws-after-brexit-says-minister

users have a right to know whether a specific news item is at the top of the search results because it is the most relevant news or because someone has paid for it to be at the top.

In that regard, the Commission launched a pilot programme on *Algorithmic transparency* in March 2018. *Algorithmic transparency* is the notion that the way the algorithms operate should be visible to the people who use them and who are affected by them, which is a prerequisite for being able to examine the communication of information online. The programme will study the role of the algorithms in the digital economy and, in particular, how they shape, filter and customise information. One of the aims of the programme is to spread understanding among the general public on the role of the algorithms in relation to platforms, to identify any problems and to find solutions to these problems.

The question of algorithms is interesting, among other things because it could be argued that the platforms' algorithms, which sort and control what information we are permitted to access, mean that the platforms *play an active part in the processing* the material and that they therefore may no longer be regarded as *neutral service providers* within the meaning of the Electronic Commerce Directive. Based on that reasoning, it could be argued that the Electronic Commerce Directive and the rules relating to exemption from liability are not applicable to such platforms at all. The issue of the platforms' liability would therefore be seen in a completely different light.

The programme provisionally ends in September 2019 and anyone who wants to follow the programme can do so via this link: http://www.algoaware.eu/

5.4 Concluding remarks

The question of *whether* and, if so, *what* responsibility the platforms should have is extremely complex. The platforms and technology companies have vigorously opposed regulation in this area and have not infrequently cited the principle of exemption from liability for intermediaries when the question of platform liability has been raised. Nevertheless, it is clear that the platforms have to some extent begun to weaken in the face of pressure from legislators and from the general public and have agreed to assume more liability than previously for what takes place in their activities. It is not unreasonable to presume that the threat to withdraw advertising (for example Unilever[101]) and the threat of legislation is beginning to feel more and more imminent and that this weighs heavily in their decision to enter into agreements and take action themselves.

Nevertheless, care should be taken if the platforms are to be governed by legislation. To impose on the platforms all liability for the products/services for which act as intermediaries would be extremely burdensome and would be likely to lead to the end of the platforms' activities as we know them today. Nor would it be desirable to impose all responsibility for product safety etc. on consumers and the general public, since such a system would be neither effective nor appropriate from the point of view of the consumer. A middle way is likely to be preferred.

---

101 https://www.bbc.co.uk/news/business-43032241

The problem should perhaps be solved as most problems have been solved when it comes to technological development – platforms and other market operators (consumers, authorities, etc.) must work together and share the responsibility (see section 5.3.2 for specific measures that can be adopted). The platforms' work to establish effective mechanisms for detecting and taking down illegal material must continue and become more efficient, while at the same time it should be done with the principles of the rule of law in mind. Consumers and other stakeholders should continue to be active in reporting illegal material. The *Product Safety Pledge* is a step in the right direction in this regard. It is interesting to note that the Commission, through a voluntary agreement, has managed to get four major operators to adopt such far-reaching measures to deal with illegal material. The major challenge in the future should therefore be to make the application of the agreements more efficient and ensure that more platforms join and assume responsibility for the development.

The problem should perhaps be solved as most problems have been solved when it comes to technological development – platforms and other market operators […] must work together and share the responsibility.

At the same time, the work on greater transparency for platforms is becoming increasingly important and will hopefully lead to concrete results in the future. Transparency, in relation to other companies and to consumers, is a prerequisite for achieving an accessible and equitable single market for everyone.

Annex – list of links

6

The European Union

The European Commission
Page of links for the Digital Single Market
https://ec.europa.eu/digital-single-market/

Regulations
Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)
https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:396:0001:0849:sv:PDF

Regulation (EC) No 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance
https://eur-lex.europa.eu/legal content/SV/TXT/PDF/?uri=CELEX:32008R0765&from=SV

Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data
https://eur-lex.europa.eu/legal content/SV/TXT/PDF/?uri=CELEX:32016R0679&from=sv

Directives
Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')
https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:32000L0031&from=SV

Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices
https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:32005L0029&from=SV

Directive 2011/83/EU of the European Parliament and of the Council on consumer rights
https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:32011L0083&from=SV

The European Court of Justice
Google France v. Louis Vuitton Malletier SA med flera [C-236/08, C-237/08, C-238/08]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=73281&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627973

L'Oréal SA and others v. eBay International AG and others [C-324/09]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=107261&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627941

Scarlet Extended SA v. SABAM [C-70/10]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627929

SABAM v. Netlog NV [C-360/10]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=119512&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627906

Tobias McFadden v. Sony Music Entertainment Germany GmbH [C-484/14]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=183363&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627882

Asociación Profesional Elite Taxi v. Uber Systems Spain, SL [C-434/15]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627860

Stichting Brein v. Ziggo BV and XS4All Internet BV [C-610/15]
http://curia.europa.eu/juris/document/document.jsf?text=&docid=191707&pageIndex=0&doclang=SV&mode=lst&dir=&occ=first&part=1&cid=627718

Sweden

Preparatory materials for legislation
Government Bill 2001/02:150 Act on electronic commerce and other information society services, etc.
http://data.riksdagen.se/fil/2e2bba99-4de0-4882-9ac4-8e5d3f4b385b

Official Government Reports
Delningsekonomi på användarnas villkor (SOU 2017:26) [Sharing economy on the users' terms]
https://www.regeringen.se/495f62/contentassets/82aabf7f731c4e18aaee3b8dc3621063/delningsekonomi--pa-anvandarnas-villkor-sou-201726

Ett reklamlandskap i förändring [An advertising landscape in the process of change] (SOU 2018:1)
https://www.regeringen.se/48e152/contentassets/d9e443d926cb4ee4abcc58de7976c001/ett-reklamlandskap-i-forandring--konsumentskydd-och-tillsyn-i-en-digitaliserad-varld-sou-20181.pdf

Reports
Competition and growth on digital markets: Ett regeringsuppdrag om e-handel och delningsekonomi [A Government commission on e-commerce and the sharing economy] (2017:2)
http://www.konkurrensverket.se/globalassets/publikationer/rapporter/rapport_2017-2.pdf

Konkurrensen i Sverige 2018 [Competition in Sweden] (2018:1)
http://www.konkurrensverket.se/globalassets/publikationer/rapporter/rapport_2018-1.pdf

Det stora detaljhandelsskiftet
http://www.svenskhandel.se/globalassets/dokument/aktuellt-och-opinion/pressmeddelande/rapport_det-stora-detaljhandelsskiftet_2018-digital-version.pdf

Vad händer när Amazon kommer? [What happens when Amazon comes?]
http://handelsradet.se/wp-content/uploads/2018/04/Vad-ha%CC%88nder-na%CC%88r-Amazon-kommer.pdf

Swedish websites

The Swedish Consumer Agency
https://www.konsumentverket.se/

The National Board for Consumer Complaints
https://www.arn.se/

The Swedish Competition Authority
http://www.konkurrensverket.se/

The Swedish Environmental Protection Agency
https://www.naturvardsverket.se/Amnen/Producentansvar/

Other

Memorandum of Understanding 21 June 2016 Brussels
https://www.google.se/search?q=Memorandum+of+Understanding+21+June+2016+Brussels&rlz=1C1GCEA_enSE796SE796&oq=Memorandum+of+Understanding+21+June+2016+Brussels&aqs=chrome.69i57.733j0j7&sourceid=chrome&ie=UTF-8

Newspaper article containing a review of American legal cases relating to Amazon
https://www.cnbc.com/2018/06/02/amazon-not-liable-for-exploding-hoverboard-marketplace-argument-wins.html

7 Update as of 11 March 2019

This report was originally prepared in mid-September 2018. In this section, we will provide an overview of events in the relevant areas since then.

7.1 Digital Single Market

The work on the digital single market is in its final stages and the Commission is working to clarify the initiatives presented during the mandate period. It is not certain that there will be time for all the legislative initiatives that the Commission has presented to be completed before the European Parliament elections in May 2019. A new Commission takes office in autumn 2019, which means that a decision may be made to remove some of the proposals.

The proposal on *"A new deal for consumers"* that aims to reform four directives in the area of consumer law has now been discussed in the Council and in Parliament. Parliament has adopted a position and the Council presented a draft in late February 2019. The Romanian Presidency now has the task of attempting to get Parliament to accept the proposal in its first reading.

Minor amendments were made to the Swedish Distance Agreements Act and the Swedish Marketing Act in 2018. We nevertheless do not consider the amendments to be of significance for this report.

7.2 Product liability

Work on product liability and closely-related issues was carried out in autumn 2018 and there have been some developments in this area.

7.2.1 Product Safety Pledge

As stated in the report (section 4.2.2.1), four marketplaces entered into a voluntary agreement in June 2018 to bring about faster removal of dangerous products. Under the agreement, a report would be published after six months. We have been informed by the Commission that the first control period began on 1 October 2018 and will end on 31 March 2019. The first report will therefore be published some time in May 2019.

However, the issue of a Product Safety Pledge was discussed in detail during International *Product Safety Week* in November 2018. It is noteworthy that smaller marketplaces consider that the agreement is more geared towards the larger marketplaces and that it should be regarded as "best practice" rather than as a completely new standard since

there are other ways of solving the problems.[102] The EU Commissioner responsible nevertheless hoped that more marketplaces would accede to the agreement.[103]

As far as we are aware, no other marketplaces have yet chosen to accede to the agreement and nor are there any corresponding initiatives in this area. It is therefore difficult to say whether the agreement has led to any great change in practice and whether we are closer to or further away from legislation in this area.

However, the marketplaces have received criticism from BEUC, a European consumer organisation, since they have failed to meet their commitments on product safety with regard to so-called *slime products*. The products should have been tested and shown to contain dangerous substances and the results of the tests should have been shared with the Commission. The Commission has also been asked to ensure that the marketplaces comply with the voluntary undertaking.[104] Toys are reportedly the product group that most often contains dangerous chemicals.[105]

7.2.2 Artificial Intelligence and overhaul of product liability

The issue of product liability has also been raised in the context of technological progress and the Commission published a communication in December 2018 within the context of the overall work on artificial intelligence.[106] The draft Council conclusions called for an overhaul and renewal of the relevant regulations, for example with regard to product liability, in order to ensure that the rules are adapted to suit the challenges and opportunities presented by artificial intelligence.[107]

The Commission has also noted that the growth of artificial intelligence means that there may be a need to discuss whether or not old rules on safety and liability are suitable and that both horizontal and sector rules may need to be overhauled. For example, the Commission intends to issue a guidance document on interpretation of the Product Liability Directive. The document must provide legal clarity for consumers and producers in the event that a particular product suffers a safety flaw.[108]

---

102 https://ec.europa.eu/consumers/consumers_safety/safety_products/rapex/alerts/repository/ipsw/documents/ipsw.2018.report.pdf

103 https://ec.europa.eu/commission/commissioners/2014-2019/jourova/announcements/speech-commissioner-jourova-international-product-safety-week-2018_en

104 https://www.beuc.eu/press-media/news-events/dangerous-slime-toys-consumer-groups-ask-eu-keep-kids-safe

105 https://chemicalwatch.com/72927/toys-contain-more-banned-chemicals-than-other-product-types

106 COM (2018) 795.

107 https://www.riksdagen.se/sv/dokument-lagar/dokument/bilaga-till-dokument-fran-eu-namnden/kkr-reviderad-kommenterad-dagordning_H60N4CA162

108 https://data.riksdagen.se/fil/508CA833-C7F2-47D3-A33C-7DE9444057CC, p. 5.

We consider that such an overhaul is to be welcomed since the question of liability for products sold is always of immediate interest. Products sold on the platforms often derive from so-called third countries whose manufacturers may be difficult or impossible to trace. If a product is sold through a platform from a country outside the EU, the buyer risks having to assume liability for any damage that occurs, which may be perceived as unreasonably burdensome for the individual.

The question of liability for defective products has recently come to the fore in a case before Malmö District Court in which it was alleged that a defective mobile modem charger caused a fire in a villa. After the insurance company paid out compensation to the injured party, the person contacted the insurance company with a claim for recourse against Kjell&Co in its capacity as distributor of the charger. The case shows that Swedish and European companies assume substantial liability for alleged faults in products sold through their channels. That liability is associated with high costs and represents a significant competitive disadvantage in relation to companies that do not assume such liability.[109]

7.2.3 Regulation on market control

Companies are often active both within the EU and all over the world and modern supply chains, including distance sales, are developing rapidly. Products that do not meet established product requirements expose consumers and professional operators to risks. For that reason, as early as in December, the European Commission put forward a proposal for two new regulations – a *"Regulation on compliance with and enforcement of Union harmonisation legislation"*[110] and a *"Regulation on the mutual recognition of goods"*.[111] The proposals formed part of the so-called "Goods Package" and the aim was to improve the functioning of the single market. In February 2019, an agreement was reached within the EU on the second proposal which will mean, among other things, greater cooperation between national authorities and a faster dispute resolution mechanism between companies and the authorities.[112]

7.2.4 Product safety and the work to combat terrorism

Another area where product safety interacts with other prioritised areas is in the question of combating terrorism. In the context of combating terrorism, the EU has put forward a proposal for a new regulation on the manufacture of explosives precursors. The proposal is based on the premise that the current regulation[113] has not been sufficient to prevent the illegal manufacture of explosives. There is therefore a proposal to replace the current regulation with a new regulation whereby access to explosives precursors will be subject to even more stringent checks.[114]

---

109 The District Court handed down a judgment by default in the case in November 2018. Nevertheless, the judgment was recovered and the case is currently being processed at Malmö District Court.

110 https://data.riksdagen.se/fil/D9623D80-9729-4CF2-80BB-04AB040F4455

111 https://data.riksdagen.se/fil/63CD15EC-636D-4C21-9B88-DFBE3AC0EEE9

112 http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/614671/EPRS_BRI(2018)614671_EN.pdf

113 Regulation (EU) No 98/2013 of the European Parliament and of the Council on the marketing and use of explosives precursors.

114 https://www.consilium.europa.eu/sv/press/press-releases/2019/02/14/eu-to-reinforce-controls-on-access-to-explosive-precursors/

In accordance with the proposal[115], digital marketplaces must:

> *"have in place appropriate, reasonable and proportionate procedures to detect suspicious transactions, targeted to the specific environment in which the regulated explosives precursors are offered".*

The proposal may therefore have a major impact on digital marketplaces and platforms because they are subject to the same monitoring and reporting obligations as other traders. Even if the platforms will not be subject to a general responsibility for monitoring, they will be required to monitor and report suspect transactions of prohibited materials in a suitable manner.

The proposal may therefore have a major impact on digital marketplaces and platforms because they are subject to the same monitoring and reporting obligations as other traders.

7.3 Competition and equitable conditions

As stated in the report (section 4.2.3), in April 2018 the Commission put forward a proposal for a regulation on promotion of equitable conditions and transparency of online-based intermediation services. The proposal is aimed at platforms and their relationship with business users. The Commission has identified a number of problems in this relationship, including a lack of predictability, transparency, trust and unequal relative strengths. Clearer rules for companies concerning information on contractual conditions, shut-off from the services, termination of agreements, transparency in ranking, differentiated treatment and access to data are now being proposed. Proposals also include internal complaint systems established by platforms, the appointment of mediators and the ability for organisations to bring class actions.[116]

The Commission's proposal was discussed in the *European Economic and Social Committee* which was essentially in favour of the proposal.[117] The proposal was discussed in the Council of the European Union within the context of a first reading[118] and the parties reached a preliminary agreement on 13 February 2019.[119]

115 See the proposal, p. 16, https://data.consilium.europa.eu/doc/document/ST-6158-2019-INIT/en/pdf

116 See the annotated agenda, p. 9f, https://data.riksdagen.se/fil/C4447CC8-3FED-49D0-9A71-08B3E1D645D9

117 https://eur-lex.europa.eu/legal-content/SV/TXT/PDF/?uri=CELEX:52018AE2619&from=EN

118 https://eur-lex.europa.eu/legal-content/EN/HIS/?uri=COM:2018:0238:FIN

119 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_6090_2019_INIT&from=EN

7.4 The way forward

As stated in the report, the digital marketplaces and e-commerce platforms on the internet have extremely limited liability for the products they sell as long as they are acting only as passive intermediaries. The legal basis for this is to be found in the Electronic Commerce Directive.[120]

Since the report was published, the Commission has stepped up its work against illegal content online. That work mainly concerns material relating to terrorism, but also includes hate propaganda and counterfeit products.[121] It is clear that the idea of the platforms' exemption from liability is being increasingly questioned and challenged from various quarters.

One area where the platforms' exemption from liability has been questioned is in the area of tax and in particular the question of tax benefits for e-commerce outside the EU. A system of "VAT from the first krona" (see chapter 3.6 of the report) is now applied in Sweden, which means that VAT is also charged for consignments of lower value. In Norway, those rules will be introduced from 2020.[122] Germany has gone even further and introduced rules whereby, among other things, the platforms must collect information on the sellers and the transactions and ensure that the sellers are registered for VAT in Germany. If the platforms fail to meet their obligations, they can ultimately be obliged to pay value added tax.[123] Similar rules are expected to be introduced throughout the EU in 2021 (see also section 4.2.4.3 of the report), which is a further indication that the platforms' exemption from liability is now being seriously challenged from various quarters.

The fact that the platforms should take greater responsibility for the content for which they act as intermediaries is no longer particularly controversial. More and more stringent proposals are being put forward along those lines, particularly with regard to copyrighted material.[124] However, the major question is how these views and proposals should be reconciled with the Electronic Commerce Directive and its prohibition on on *general monitoring*. Our view is that more and more rules are being introduced that impose liability on the platforms that is *in practice* more and more similar to general monitoring. However, there is an extremely fine line between prohibited general monitoring and permitted specific monitoring and the difference is to some extent merely semantic. The big question is therefore whether or not the time has now come to abandon the Electronic Commerce Directive and its provisions in favour of rules that are more suited to today's society. Any such reform of the legislation would make it possible to take overall charge of the digital marketplaces and e-commerce platforms and create sustainable rules for a new digital world.

120 See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, Articles 12–15.

121 http://europa.eu/rapid/press-release_MEMO-18-5711_en.htm

122 https://e24.no/naeringsliv/netthandel/350-kronersgrensen-fjernes-fra-2020/24498408

123 https://www.avalara.com/vatlive/en/vat-news/german-passes-marketplacevatliabilitylaws.html

124 It may be noted at this point that, at the time of writing, the parties have agreed on a final version of the EU's controversial copyright directive. The question of YouTube's liability for copyrighted material also flared up in Germany in the autumn and the case is now being heard at the Court of Justice of the European Communities (C-682/18).

Your own notes

Your own notes

”Research aimed at making commerce more competitive and bring about satisfactory conditions for employees in the sector.

Handelsrådet

Handelsrådet | SE-103 29 Stockholm | Sweden
Office address: Regeringsgatan 60
Telephone no. switchboard: 010-471 85 80
www.handelsradet.se

www.fotoskrift.se | 20-04