

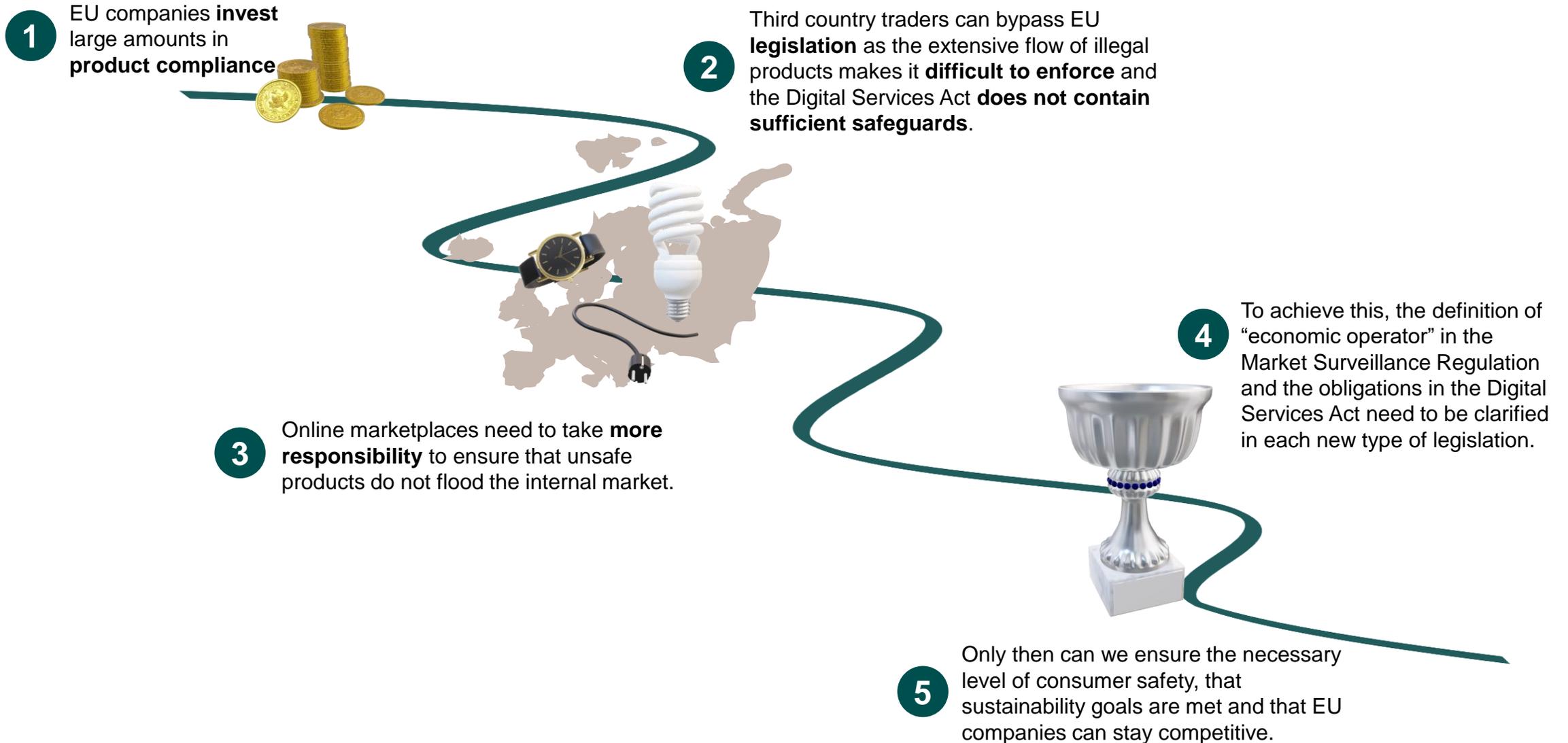


Why the liability for online marketplaces needs to be further regulated

2023-03-03

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The marketplace issue.



Why is the Digital Services Act insufficient?

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Online marketplaces are not considered as economic operators under the market surveillance regulation which means that their liability is limited. This is what the Digital Service Act is supposed to regulate.

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That can be done through notices from third parties and trusted flaggers and through random checks but given the extensive flow of products through an online marketplace, this will not solve the problem.

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But online marketplaces have no general monitoring obligation under the Digital Services Act.

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And even if they become aware of illegal content, the first step is to issue a warning and then the marketplace shall assess on a case-by-case basis if the trader shall be suspended based on if the trader **frequently** has provided **manifestly illegal content**.

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They are however obliged to remove illegal content to avoid liability.

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It is clear that the threshold to suspend and thus prevent a trader from continue to sell non-compliant products is too high and the decision is also left up to the discretion of the online marketplace.

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The problem is that removal of illegal content is contingent upon the online marketplace becoming aware of illegal content.

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That is why all new product compliance legislation need to consider if the Digital Services Act is fit for purpose in light of the interests that such legislation is supposed to protect.

What changes are needed to ensure appropriate protection?

- 1 Online marketplaces must be included in the definition of an economic operator under the Market Surveillance Regulation to ensure appropriate liability under each product legislation.
- 2 Depending on the relevant legislation, online marketplaces shall be liable in the same way as a distributor and/or dealer when:
 - i. they present the product or otherwise enable the specific transaction that would lead the consumer to believe that the product is provided either by the online marketplace or by a trader acting under its authority or control, and
 - ii. the online marketplace fails to promptly identify a relevant economic operator based in the Union.
- 3 Any product that is non-compliant with mandatory EU legislation shall be regarded as manifestly illegal content.
- 4 To ensure that online marketplaces act swiftly to suspend traders that offer non-compliant products to EU customers, it should be established that at least two incompliances shall be presumed to satisfy the requirement of “frequently provides manifestly illegal content” giving rise to suspension under article 23.1 of the Digital Services Act.
- 5 There must be a clear obligation for Member States and market surveillance authorities to notify the online marketplace of non-compliance so that the online marketplace becomes aware of the illegal content and thus needs to take actions to remove the illegal content and decide whether to suspend the trader from its services.