

Revision of the E-commerce directive/Digital services act

The position of the Nordic Commerce Sector

**The E-commerce directive/DSA covers all kinds of digital platforms. This paper only focuses on online marketplaces that facilitate the sale of tangible goods.*

Summary

Online marketplaces have given retailers easier access to consumers and benefit consumers through more choices, lower prices and convenience.

At the same time, the online marketplaces have opened the European market to sellers from 3rd countries whose products many times do not comply with EU rules on product safety, consumer rights, etc.

European surveillance authorities do not have jurisdiction to hold companies outside the EU liable.

The Nordic Commerce Sector therefore wants de facto responsibility and liability for the online marketplaces when actively facilitating the sale of goods to a consumer on the European market. Their degree of responsibility and liability must – as any other economic offline as online operator - be assessed according to the actual role they play in the trade chain and marketing of the product.

The online marketplaces have transformed the retail sector and challenged the conventional structure of trade chains. Through modern business models they have changed e-commerce and the commerce market in general and affected the consumers way of shopping.

Online marketplaces have become very popular among consumers. In the Nordic countries, online marketplaces are on the top-10 list of consumers preferred online shops. In the US, the UK, Austria and Germany, Amazon has around 50 percent of the online market of sale of tangible goods. In many ways platforms are becoming the market when it comes to e-commerce.

This development has created new opportunities for retailers and brand-owners by creating value adding and more efficient ways of reaching consumers, and have at the same time increased competition which has resulted in more choices, lower prices and convenience for consumers. However, the legal framework has not kept pace and adjustments and clarifications are needed to ensure a level playing field in the commerce sector.

The original version of online marketplaces were intermediaries between the seller and the end-user (typically the consumer). They were not active in the selling process themselves, but merely facilitating the sale. These kind of online marketplaces do not typically own the products that are being sold on their website, nor do they act as sellers or owners of the products and the consumer are clearly aware that they are entering into an agreement with a seller which is not the online marketplace. These online marketplaces are merely connecting the sellers and buyers and provides merely the technical assistance for this connection. They function as an online flea market.

Today the picture is something different and there is much more activity from the platforms. The platforms take active roles during the selling process. The biggest and best-known online marketplaces in the consumer goods business are Amazon, AliExpress, E-bay and Wish. Some of them serve both as a retailer and/or manufactures or importers with own brands, or reselling products they contractually own themselves, as well as an online marketplace where other operators can sell their goods to consumers.

Acting as an online marketplace in many cases, the platforms in many cases encourage and enables the sales of goods from third country sellers, and they profit from the sales.

The services offered by the online marketplaces are as such not simply limited to providing third country sellers the ability to list their products they wish to sell. Online marketplaces often go much further, providing marketing, storage and dispatch of the products as well as the provision of payment solutions, delivery services and take care of the returns and customer care and complaints.¹

Indeed, in many cases the online marketplaces require the sellers to use the services that they offer, such as their payment solutions, while charging a fee or commission for that privilege. Hence, this is often something the seller cannot negotiate with the online marketplace.

Further, it is in many cases not clear to the consumer if the seller is the platform or a 3rd party seller.

In spite of this evolution; the above described online marketplaces often (claim to) act as passive intermediaries between two independent parties - the seller and the buyer.

If categorized as passive intermediaries they are not liable, or have only very limited liability, for the actions related to sale of the products they are mediating This follows from the horizontal liability exceptions in the E-commerce directive article 14 and 15. However it also follows from this directive and the jurisprudence that active online market places are not excepted from liability. Nevertheless, all the online marketplaces mentioned above have in practice succeeded with promoting themselves as passive intermediaries. We believe that it must be clarified in the DSA that the exemption does not apply to active platforms. In this connection we refer to a legal note on the matter² which is attached to this paper.

The EU regulations for the sale and safety of tangible goods are based on the conventional trade model with economic operators (importers) importing the goods to EU and other economic operators resell the product through physical or online stores to consumers (distributors). The main idea of this model is that there is an economic operator (a manufacturer, an importer in certain cases an authorized person and a distributor) established in the single market who is responsible for the legal obligations arising from selling products to EU consumers and which can be held liable if they do not follow applicable rules or the product is not compliant. This includes responsibility and liability for product safety, consumer protection, copyright etc.

¹ See, for example, [Fulfilment by Amazon](#)

² For further on the legal framework and liability exemptions in the e-commerce directive, please see annex XX (note from Wiggin Lawfirm, Brussels).

Below we have inserted an Illustration of obligations concerning product safety of economic operators in the trade sector (the example is taken from the explanatory guidance document to the Toy Safety Directive³) For a line-up of obligations arising from Decision 768/2008⁴ and obligations arising from the General Product Safety Directive, please see annex 1. -

Typical Business Model		Product Cycle							
a	Type	Description	b	Design & Development	Production	(Bring In to EU)	Storage & Transport	Retail	
1	EU Production	Product developed, produced and sold entirely within the EU.	manufacturer	manufacturer			distributor		
2	Developed & Domestic	Product developed and sold within the EU by an EU Operator, but produced outside the EU.	manufacturer	manufacturer			distributor		
3	3rd Party & Domestic (without product alteration)	Unaltered product developed by a supplier, then sold within the EU by an EU Operator	manufacturer		importe		distributor		
4	3rd Party & Domestic (with product alterations)	Supplier product specifically modified (see point 3 below) for or by an EU Operator and sold within the EU.	manufacturer	manufacturer			distributor		
5	Direct Import / FOB	Developed product (by a Non-EU Operator) sold outside of the EU for Direct Import by an EU Operator.	manufacturer		importe				
6	Direct Import/FOB - manufacturer is an EU entity	Developed product (by EU Operator) sold outside of the EU for Direct Import by an EU Operator. *5	manufacturer	manufacturer			distributor		
7	3rd Party (Sales Commission) FOB	Developed product (by EU or Non-EU Operator) sold outside of the EU by an EU or Non-EU sales agent, for Direct Import by an EU Operator.	manufacturer		importe				
8	Manufacturers Authorised Representative in EU	Product sold by a contracted representative of a Non-EU Operator to hold (but not draw up) Technical File.	manufacturer		Authorised representative		distributor		
9	Retailer own Brand Product	Product developed exclusively for EU retailer and bought outside the EU.	manufacturer						

Table 1: How to identify your Operator type

	The 'Manufacturer' as defined by the new TSD
	The 'Importer' as defined by the new TSD
	The 'Distributor' as defined by the new TSD

Conditional Notes:

1. A Manufacturer may, by written mandate, appoint an *Authorised Representative* to meet the obligations of the *Manufacturer* (but NOT the drawing up of the technical documentation).
2. An *Importer* or *Distributor* who modifies the product and by doing so alters its compliance, assumes the responsibilities of the *Manufacturer*.
3. The addition of legal labels to the retail pack does not constitute *modified product*. Modifications which may affect compliance are changes in materials, colour, age grading etc.
4. The same product may be sold according to a number of different business models which may in turn alter the responsibilities of the parties involved.
5. Where an EU entity presents itself as the manufacturer (by affixing their name, address etc) they are considered to place the product on the market even if they do not physically import the product. In this case there is no importer.

When goods are sold to European consumers via an online marketplace from a supplier or manufacturer which is not established in the EU, a legal loophole occurs when the online marketplaces claims to have none of the roles described above.

³ https://ec.europa.eu/growth/sectors/toys/safety/guidance_en

⁴Annex I: article R4: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008D0768&from=SV>

As a consequence, no responsible and liable operator is established in the EU and no one in the Single Market, also excluding the platforms, has formally taken over the liability, cf. the table above.

It is nevertheless presupposed in the product safety legislation that no products should be placed on the European Market without being compliant and having an economic operator to take responsibility and liability for the safety of the product.

In these cases there are therefore no practical possibility to hold an EU operator liable (see, among other things, the Swedish Retail and Wholesale Council's report on digital platforms and e-commerce marketplaces from 2019⁵).

Different actions have been taken by the previous Commission, but unfortunately neither of those have achieved any substantial effects.

Even though the new Enforcement and compliance regulation⁶ which comes into force in 2021 will allow authorities to control private purchases from from 3rd countries and oblige the 3rd country seller to appoint as minimum an authorized person with a range of obligations relating to the documentation of the safety of the product and corporation with the authorities, if there is no importer in the EU connected to the product, the problem will not be solved in practice. Further this Regulation only covers products covered by the sector-specific legislation.

According to the draft for guidelines to article 4 of the market surveillance regulation *“there is no specific obligation arising from article 4 on operators of online marketplaces when they are merely providing information society services”* (p.5). The draft guidelines thus indicate that there are no specific obligations arising from Article 4 on operators of online marketplaces when they are merely providing information society services. However, it does not clarify when operators of online marketplaces are active and therefore not merely providing information society services.

As mentioned, in practice online marketplaces do usually provide additional services, in particular optimizing the presentation of the offers for sale in question or promoting those offers and are therefore active and not exempted according to the e-commerce directive.

It would have been helpful if the guidelines from the Commission had clarified that usually, the online marketplace places the product on the EU market by targeting end-users in the EU for products sold by third-party sellers/manufacturers on their website. They do so by directing their marketing activities, offering products in national languages, and by enabling payment in local currencies and with EU payment methods. In those cases, the online marketplace would in practice have the same function as an importer and should as such be the ‘responsible economic operator’ and have the duties following from that role in the trade chain. However, this is not yet clarified in the drafted guidelines or elsewhere and therefore we need this clarification in real legislation, as for example the DSA.

One could argue that there is no need to have a liability for the online marketplaces, since all the 3rd country sellers after 2021 have to appoint as minimum an authorized person that has duties according to article 4 of the market surveillance regulation. However, it also follows from the draft for guidelines (p. 8) that *“The responsible person does not have legal obligations vis-à-vis consumers or other end*

⁵ <http://handelsradet.se/wp-content/uploads/2019/04/Digitala-marknadsplatser-och-ehandelsplattformar.pdf>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A795%3AFIN>

users pursuant to the Regulation". This of course creates a unlevel playing field towards the economic operators taking part of a conventional trade chains, where the importer and/or distributor has such a liability and are subject to duties and tasks that go beyond the tasks applying to the authorized person.

Further, it must be expected that this new regime with a new responsible economic operator – an authorized person - for the 3rd country sellers is an ineffective measure due to the fact that there are billions of different sellers operating on the online marketplaces. As such it will in practice have little or no effect on the amount of unsafe products arriving to EU consumers, since it is unrealistic to expect market surveillance authorities to verify whether billions of EU-addresses are correct, nor will it be possible to prosecute against sellers if the EU-addresses are fake or absent.

The sheer number of parcels means that it is impossible to check everything or even a small part of the packets at customs. In late 2017 the number of parcels arriving only to Arlanda airport in Stockholm was 150 000 per day. In Denmark more than 43.000 parcels arrive from China every day in 2018.

Finally, it is worth mentioning that this new Regulation does not even specify that online marketplaces need to verify whether 3rd country sellers adhere to these rules and have in fact appointed an efficient authorized person.

The lack of clarification in the interpretation of the current legislation⁷ and the lack of enforcement means, in practical terms, that products sent directly to consumers from non-EU countries, products bought through both EU and non-EU online marketplaces do not require the same level of compliance, as if the products were bought through the conventional trade chain where an EU-importer buys the products from a manufacturer (from a non-EU country) and resell it to European consumers. In the latter case the first commercial actor in the EU typically the importer (or in some cases the distributor)) for example has the responsibility to check that the manufacturer has in fact compliance systems and procedures in place to secure the safety of the products, further this importer in certain cases has to carry out test of the samples they place on the market.. Further the EU-importers (and in some cases the distributors) are in fact the liable operators also according to Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.

It is not in any way clear in a European context how an online marketplace as described above would be considered in terms of liability for defective products, if a product from an 3rd country seller is defective. This also needs to be clarified and it would seem both damaging for the consumer safety and the level playing field towards the mentioned conventional traders if the online marketplaces where not to take on any liability for these products coming directly from e.g. China.

European consumers are often unaware of this situation and therefore gets exposed to products that do not comply with chemical rules and safety standards given the fact that no economic operator in

⁷ For further on the legal framework and liability exemptions in the e-commerce directive, please see annex XX (note from Wiggin Lawfirm, Brussels).

EU has an incentive to secure the safety of the product in accordance with EU legislation. A lot of telling examples have showed up the last years. Just to mention some of them:

- 1) A study done by the Swedish National Electrical Safety Board where 10 out of 10 USB-chargers sampled were deemed dangerous.⁸
- 2) Two studies carried out by the Danish Consumer Council which revealed illegal doses of phthalates in 9 out of 29 toys⁹ - in some the threshold was exceeded 200 times. Another test revealed toys with long strings and small pieces which were dangerous for children¹⁰.
- 3) In February 2020, six European consumer groups tested 250 electrical goods, toys, cosmetics and other products bought from online marketplaces such as Amazon, AliExpress, eBay and Wish. Two thirds of the tested products failed EU safety laws.¹¹
- 4) A recent study by the Toy Industries of Europe (TIE) on the availability of illegal and dangerous toys on online marketplaces. 197 toys were bought from third-party sellers on four major online marketplaces. TIE found that 188 toys did not comply with EU rules and more than half the toys posed serious safety risks. These risks include choking, suffocation, strangulation, drowning, burns and exposure to harmful chemicals.¹²
- 5) The Danish Chamber of Commerce have also recently made a large study of the behavior of the platforms and online marketplaces and included assessments of the safety of 50 products bought on the online marketplaces in the period May 23rd 2019 to November 4th 2019.

This study shows that:

- a. 46 did not comply with EU Product Safety rules
- b. 50 did not comply with consumer rights
- c. 0 showed a match between the seller on the platform and the sender of the package
- d. 0 contained an order form or an invoice
- e. 42 products are warned about and/or recalled by national and/or EU authorities. We have received no notification hereof from any of the 3 platforms.*
- f. 38 identical products or products appearing identical to the recalled products are still available on the platforms as of the 18th of February 2020.
- g. 46 had a different value written on the package than the price paid.
- h. 0 of the 16 VAT-guilty packages had paid the VAT due to an undervaluation of the package of the total of 50 products, all bought on the platforms; Amazon, AliExpress and Wish.com. The products have been purchased in the period from

The current EU legal framework also severely affects the competitiveness of European companies, especially SMEs. A study by the Finnish Commerce Federation estimates that the average purchasing price for a (on the surface) comparable product that does not comply with European product safety legislation can be sold to consumers at a significantly lower price than products complying with the legislation and still be profitable. This is not only due to the fact that the use of legal processes and materials are more expensive but insomuch because it is very expensive to facilitate a good and sound compliance system that makes sure that the sold products are legal and safe. This means that it is

⁸ <https://www.elsakerhetsverket.se/om-oss/press/pressmeddelanden/2018/elsakerhetsverket-varnar-stora-risker-att-kopa-laddare-fran-vissa-e-handelssajter/>

⁹ <https://kemi.taenk.dk/bliv-groennere/test-kemi-i-legetoej-fra-ebay-amazon-og-wish>

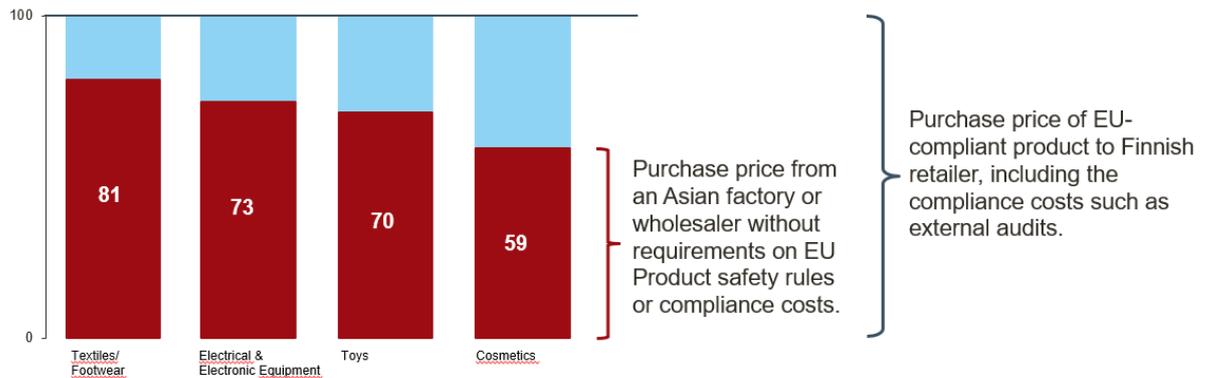
¹⁰ <https://taenk.dk/test-og-forbrugerliv/boern/billigt-legetoej-fra-nettet-er-farligt-dit-barn>

¹¹ See BEUC press release of 24 February 2020, available [here](#).

¹² TIE's investigation is available on its [website](#) and also referred to [here](#).

impossible for responsible European companies to compete with the price of the products sold without complying with the EU-regulation on product safety.

Illustration of the price difference between compliant and non-compliant products in B-to-B purchasing



In June 2018 the European Commission signed a Product Safety Pledge¹³ with four online marketplaces: Alibaba (for AliExpress), Amazon, eBay and Rakuten-France. These four online marketplaces committed themselves to respond to notifications on dangerous products from Member State authorities within 2 working days and take action on notices from consumers within 5 working days.

Even though it is positive that these four online marketplaces agree to respond to notifications, the pledge does not solve the problem. Firstly, because it only covers four online marketplaces, secondly because it is voluntary, but thirdly and most importantly because it still is a reactive and passive obligation in its nature, i.e. it only affects the products that authorities and consumers have proven are non-compliant and does not oblige the platforms to take any proactive measures to secure that the unsafe products are not sold to EU consumers. These platforms have billions of products on their online shelves that will never be subject to any compliance actions or assessed or sample test.

The efficiency of the Product Safety Pledge should therefore also be challenged. After the study by the Danish Consumer Council in June 2019, which revealed toys with phthalates up to 200 times the EU-threshold¹⁴ from Amazon, eBay and Wish, one could have thought that the online marketplaces would take actions. Even though all three platforms promised the Danish Environmental Agency to remove the toys from their website, the same toys with the same content of dangerous chemicals was purchased by the Danish National Broadcaster DR in August and October¹⁵. Further it is obvious from the study from The Danish Chamber of Commerce that this behavior is not unusual. In those cases, the online marketplaces actually remove the unsafe products, the same products tend to pop-up on

¹³ https://europa.eu/rapid/press-release_IP-18-4247_en.htm

¹⁴ <https://kemi.taenk.dk/bliv-groennere/test-kemi-i-legetoej-fra-ebay-amazon-og-wish>

¹⁵ <https://www.dr.dk/nyheder/penge/trods-advarsel-legetoej-med-forbudt-kemi-saelges-stadig-af-populaere-udenlandske>

the online shelves again, just sold from a different seller. Hence the system is inefficient and not serving as a protection system.

According to the safety pledge the platforms are only obliged to act if authorities, consumers or other stakeholders notify them. At the same time European manufactures, importers, distributors and retailers, whether they are online or offline, are responsible to ensure that the products comply **before** they are put for sale in order to avoid consumer harm.

We think that it is unacceptable that European consumers are exposed to dangerous products , as well as other breaches of safety and consumer protection issues, without any economic operator being liable in practice. Enabling a vibrant platform economy should not take precedence over product safety, consumer protection and fair competition.

Other examples of an un-level playing field

EU retailers – online and offline – need to comply with EU-consumer protection rules. This includes the right to withdraw and the right to have a faulty product repaired or replaced. They also need to ensure that they do not sell counterfeit goods. A report published in 2017 by Europol and EUIPO shows that counterfeit goods are increasingly distributed via online marketplaces, with over two thirds of counterfeits coming into the EU from China. It also states that the majority of counterfeit goods bought online evade detection at EU borders as they are usually sent directly to consumers in small parcels via postal or courier services.¹⁶

EU- and national legislation also require companies that put products on the market to contribute to producer responsibility schemes. The aim of these is to collect and recycle used products and ensure that they do not cause littering or pollute the environment. In theory this is a requirement also for sellers from non-EU countries, but the lack of controls makes this impossible to enforce. Since the products still end up in the collection systems, European companies end up paying the collection fees for their non-EU competitors.

Unlike retailers established in the EU, sellers on online marketplaces established in 3rd countries often do not comply with EU consumer rules. For the consumer it is often not aware where the seller is established, particularly when the online marketplace has a country specific website that uses the language of the consumer. We have seen many examples of terms of conditions that limits consumerrights. The right to withdraw is for example sometimes restricted to less than the 2 weeks which EU law requires and is conditioned that the package has not been opened. In the case the consumer wants to file a complaint after buying on the platform, the possibility for the consumer to exercise that right varies. If a seller on a platform refuses to handle a complaint, the consumer has to go to the complaint center in the country where the company is established, normally China or HongKong. There are also problems with misleading price advertisements of e.g. 95 percent savings where the price “before” is unrealistic. Another often seen problem is prices shown without VAT. Also there are no actually possibility for the consumer to use their long-term rights, such as replacement, repair and cancellation which is not at all in line with the ideas of a more sustainable consumption.

This deprives the consumers of their rights and distorts competition.

¹⁶ file:///C:/Users/shnlm/Downloads/counterfeiting_and_piracy_in_the_european_union.pdf

On November 8th 2019 the European Council adopted the “omnibus” directive¹⁷ which includes an obligation for platforms to inform consumers who is responsible for giving them their consumer rights. This is positive and will contribute to more transparency for the consumers provided that the implementation of this provision makes it clear for the consumer if EU rules are not followed and easy for the consumers to see how they can exercise their rights. However, this does not solve the fundamental problem that products are put for sale on the platforms that directs its activities towards European consumers but do not comply with EU rules.

Enforcement is crucial in order to ensure consumers their rights and a level playing field for companies. Since many platforms operate in many Member States it is necessary to establish a cooperation between the European Commission and between the relevant enforcement authorities in the different Member States and to provide sufficient resources for the control and supervision to be efficient. This applies for product safety authorities, consumer protection authorities and VAT and counterfeit authorities.

Proposal for a solution

We find it necessary to make rules that target the various forms of platforms. Online marketplaces selling tangible goods imposes other challenges than platforms functioning as search engines, social platforms or facilitators of C2C apartment rentals. The **proposals below are targeted towards online marketplaces selling tangible goods.**

A. Product safety and compliance

We think that legislation should make sure that online marketplaces have a greater responsibility and are held liable as any other economic operator taking the same actual role in the trading chain as the online marketplace. In cases concerning the sale of products from 3rd country sellers it would be the role of an importer.

Also, the fact that the online marketplace is the first actor that the consumer has contact with, when buy the goods through a platform, strengthen this argument. In many cases the consumer recognizes the online marketplace as the counterpart in the contract of sale. Reasonably, they need to be able to turn to the part that gives the appearance of being counterpart.

This reasoning is further supported by the fact that these platforms often make a good and profitable business by mediating the sale of goods from their sellers to European consumers. This approach is further supported by a report by The European Consumer Organization (BEUC) and the Federation of German Consumer Organizations.¹⁸

Furthermore, this approach has a precedent in the VAT-directive that will come into force as of January 1st 2021. According to the new VAT-rules online marketplaces for all practical purposes are considered as sellers¹⁹.

¹⁷ <https://www.consilium.europa.eu/en/press/press-releases/2019/11/08/eu-consumers-protection-to-be-reinforced/>

¹⁸ https://www.vzbv.de/sites/default/files/downloads/2017/11/08/17-11-08_brochure-vzbv-beuc-lr3.pdf

¹⁹ Article 14a: <https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32017L2455&from=FI>

The Nordic Commerce Sector wants to see responsibility and liability for the online marketplaces when facilitating the sale of goods to a consumer on the European market and there is no other economic operator (e.g. manufacturer, importer, distributor or seller) established in the EU that can be responsible and held liable. The marketplaces should take a more active responsibility to ensure that the EU's rules on product safety, chemicals, consumer rights, price marketing etc. are followed when facilitating the sale of goods from sellers in 3rd countries to consumers in the EU.

The passive "safe harbor" and "notice-and-takedown" role (online marketplaces in practice only have to respond to external complaints and only then take active measures, for example, remove dangerous products), undermines the EU's product safety and consumer rights regulations and distorts competition to the disadvantage of companies in the EU, cf. above and the legal note on the e-commerce directive attached to this paper.

Our proposal would be to apply the same, or similar, rules to online marketplaces when facilitating the sale of goods from a manufacturer/supplier that is not established in the EU to European consumers, as we currently apply to importers. Just like importers, online marketplaces are not the manufacturer of the products and can therefore not be expected to have the same level of liability or responsibility. They do, however, make large profits on facilitating the entry of foreign products to the European market and should therefore also have legislated responsibility and liability. For our more specific legal suggestion on how to proceed we refer to the legal note²⁰.

Below in Annex I is an example of obligations that importers need to comply with, in accordance with Decision 768/2008 that establishes a common framework for the marketing of products on the Single Market – as well as the harmonized product legislation that has since been adopted in line with Decision 768/2008.

In addition, the General Product Safety Directive prescribes a rule for all products, that manufactures (including importers) may only place safe products on the Union market. In Annex II, there is a list of the obligations for manufactures (including importers) and distributors under the General Product Safety Directive. We see no compelling reason why online marketplaces could not fulfill the obligations under harmonized product legislation (i.e. *lex specialis* for e.g. toys, cosmetics, chemicals etc.) that stems from the obligations under Decision 768/2008 and the safety requirements under the General Product Safety Directive.

Additionally, we would add that online marketplace should ensure the payment of fees for collection and recycling of used products. From our point of view none of these obligations are so intrusive that they would seriously jeopardize the platform economy. **Liability for consumer rights and information**

Online marketplaces should have an obligation to be proactively provide levels of consumer protection and police their own platforms by setting rules and removing users that breach those rules and prevent such users from reappearing.

Online marketplaces should be liable for the failure to inform the consumer that a third party is the actual supplier of the goods or service, and becoming contractually liable vis-à-vis the consumer. They should also be responsible for the failure to remove misleading information given by the supplier and notified to the platform and for guarantees and statements made by the platform operator. A joint

²⁰ For further on the legal framework and liability exemptions in the e-commerce directive, please see annex XX (note from Wiggin Lawfirm, Brussels).

liability should apply for the performance of a contract, such as payment and delivery carried out by the platform for third party suppliers in line with Art. 2 (2) of the Consumer Rights Directive. See the report “The challenge of protecting EU consumers in global online markets, November 2017”, Commissioned by BEUC & the Federation of German Consumer Organisations²¹.

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²¹ https://www.vzbv.de/sites/default/files/downloads/2017/11/08/17-11-08_brochure-vzbv-beuc-lr3.pdf

Annex I: Obligations of importers in accordance with Decision 768/2008²²

1. Importers shall place only compliant products on the Community market.
2. Before placing a product on the market, importers shall ensure that the appropriate conformity assessment procedure has been carried out by the manufacturer. They shall ensure that the manufacturer has drawn up the technical documentation, that the product bears the required conformity marking or markings and is accompanied by the required documents, and that the manufacturer has complied with the requirements set out in Article [R2(5) and (6)].

Where an importer considers or has reason to believe that a product is not in conformity with ... [reference to the relevant part of the legislation], he shall not place the product on the market until it has been brought into conformity. Furthermore, where the product presents a risk, the importer shall inform the manufacturer and the market surveillance authorities to that effect.

3. Importers shall indicate their name, registered trade name or registered trademark and the address at which they can be contacted on the product or, where that is not possible, on its packaging or in a document accompanying the product.
4. Importers shall ensure that the product is accompanied by instructions and safety information in a language which can be easily understood by consumers and other end-users, as determined by the Member State concerned.
5. Importers shall ensure that, while a product is under their responsibility, storage or transport conditions do not jeopardise its compliance with the requirements set out in ... [reference to the relevant part of the legislation].
6. When deemed appropriate with regard to the risks presented by a product, importers shall, to protect the health and safety of consumers, carry out sample testing of marketed products, investigate, and, if necessary, keep a register of complaints, of non-conforming products and product recalls, and shall keep distributors informed of such monitoring.
7. Importers who consider or have reason to believe that a product which they have placed on the market is not in conformity with the Community harmonisation legislation applicable shall immediately take the corrective measures necessary to bring that product into conformity, to withdraw it or recall it, if appropriate. Furthermore, where the product presents a risk, importers shall immediately inform the competent national authorities of the Member States in which they made the product available to that effect, giving details, in particular, of the non-compliance and of any corrective measures taken.
8. Importers shall, for ... [period to be specified in proportion to the lifecycle of the product and the level of risk], keep a copy of the EC declaration of conformity at the disposal of the market surveillance authorities and ensure that the technical documentation can be made available to those authorities, upon request.
9. Importers shall, further to a reasoned request from a competent national authority, provide it with all the information and documentation necessary to demonstrate the conformity of a product in a language which can be easily understood by that authority. They shall cooperate with that authority, at its request, on any action taken to eliminate the risks posed by products which they have placed on the market.

²²Annex I: article R4: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008D0768&from=SV>

Annex II – Obligations of producers (including importers) and distributors under the General Product Safety Directive 2001/95/EC

(e) "producer" shall mean:

(i) the manufacturer of the product, when he is established in the Community, and any other person presenting himself as the manufacturer by affixing to the product his name, trademark or other distinctive mark, or the person who reconditions the product;

(ii) the manufacturer's representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, **the importer** of the product;

[...]

CHAPTER II

General safety requirement, conformity assessment criteria and European standards

Article 3

1. Producers shall be obliged to place only safe products on the market.

2. A product shall be deemed safe, as far as the aspects covered by the relevant national legislation are concerned, when, in the absence of specific Community provisions governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty, and in particular Articles 28 and 30 thereof, and laying down the health and safety requirements which the product must satisfy in order to be marketed.

A product shall be presumed safe as far as the risks and risk categories covered by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published by the Commission in the Official Journal of the European Communities in accordance with Article 4. The Member States shall publish the references of such national standards.

3. In circumstances other than those referred to in paragraph 2, the conformity of a product to the general safety requirement shall be assessed by taking into account the following elements in particular, where they exist:

(a) voluntary national standards transposing relevant European standards other than those referred to in paragraph 2;

(b) the standards drawn up in the Member State in which the product is marketed;

(c) Commission recommendations setting guidelines on product safety assessment;

(d) product safety codes of good practice in force in the sector concerned;

(e) the state of the art and technology;

(f) reasonable consumer expectations concerning safety.

4. Conformity of a product with the criteria designed to ensure the general safety requirement, in particular the provisions mentioned in paragraphs 2 or 3, shall not bar the competent authorities of the Member States from taking appropriate measures to impose restrictions on its being placed on the market or to require its withdrawal from the market or recall where there is evidence that, despite such conformity, it is dangerous.

Article 4

1. For the purposes of this Directive, the European standards referred to in the second subparagraph of Article 3(2) shall be drawn up as follows:

(a) the requirements intended to ensure that products which conform to these standards satisfy the general safety requirement shall be determined in accordance with the procedure laid down in Article 15(2);

(b) on the basis of those requirements, the Commission shall, in accordance with Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services⁽⁷⁾ call on the European standardisation bodies to draw up standards which satisfy these requirements;

(c) on the basis of those mandates, the European standardisation bodies shall adopt the standards in accordance with the principles contained in the general guidelines for cooperation between the Commission and those bodies;

(d) the Commission shall report every three years to the European Parliament and the Council, within the framework of the report referred to in Article 19(2), on its programmes for setting the requirements and the mandates for standardisation provided for in subparagraphs (a) and (b) above. This report will, in particular, include an analysis of the decisions taken regarding requirements and mandates for standardisation referred to in subparagraphs (a) and (b) and regarding the standards referred to in subparagraph (c). It will also include information on the products for which the Commission intends to set the requirements and the mandates in question, the product risks to be considered and the results of any preparatory work launched in this area.

2. The Commission shall publish in the Official Journal of the European Communities the references of the European standards adopted in this way and drawn up in accordance with the requirements referred to in paragraph 1.

If a standard adopted by the European standardisation bodies before the entry into force of this Directive ensures compliance with the general safety requirement, the Commission shall decide to publish its references in the Official Journal of the European Communities.

If a standard does not ensure compliance with the general safety requirement, the Commission shall withdraw reference to the standard from publication in whole or in part.

In the cases referred to in the second and third subparagraphs, the Commission shall, on its own initiative or at the request of a Member State, decide in accordance with the procedure laid down in Article 15(2) whether the standard in question meets the general safety requirement. The Commission shall decide to publish or withdraw after consulting the Committee established by Article 5 of Directive 98/34/EC. The Commission shall notify the Member States of its decision.

CHAPTER III

Other obligations of producers and obligations of distributors

Article 5

1. Within the limits of their respective activities, producers shall provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks.

The presence of warnings does not exempt any person from compliance with the other requirements laid down in this Directive.

Within the limits of their respective activities, producers shall adopt measures commensurate with the characteristics of the products which they supply, enabling them to:

- (a) be informed of risks which these products might pose;
- (b) choose to take appropriate action including, if necessary to avoid these risks, withdrawal from the market, adequately and effectively warning consumers or recall from consumers.

The measures referred to in the third subparagraph shall include, for example:

- (a) an indication, by means of the product or its packaging, of the identity and details of the producer and the product reference or, where applicable, the batch of products to which it belongs, except where not to give such indication is justified and
- (b) in all cases where appropriate, the carrying out of sample testing of marketed products, investigating and, if necessary, keeping a register of complaints and keeping distributors informed of such monitoring.

Action such as that referred to in (b) of the third subparagraph shall be undertaken on a voluntary basis or at the request of the competent authorities in accordance with Article 8(1)(f). Recall shall take place as a last resort, where other measures would not suffice to prevent the risks involved, in instances where the producers consider it necessary or where they are obliged to do so further to a measure taken by the competent authority. It may be effected within the framework of codes of good practice on the matter in the Member State concerned, where such codes exist.

2. Distributors shall be required to act with due care to help to ensure compliance with the applicable safety requirements, in particular by not supplying products which they know or should have presumed, on the basis of the information in their possession and as professionals, do not comply with those requirements. Moreover, within the limits of their respective activities, they shall participate in monitoring the safety of products placed on the market, especially by passing on information on product risks, keeping and providing the documentation necessary for tracing the origin of products, and cooperating in the action taken by producers and competent authorities to avoid the risks. Within the limits of their respective activities they shall take measures enabling them to cooperate efficiently.

3. Where producers and distributors know or ought to know, on the basis of the information in their possession and as professionals, that a product that they have placed on the market poses risks to the consumer that are incompatible with the general safety requirement, they shall immediately inform the competent authorities of the Member States thereof under the conditions laid down in Annex I, giving details, in particular, of action taken to prevent risk to the consumer.

The Commission shall, in accordance with the procedure referred to in Article 15(3), adapt the specific requirements relating to the obligation to provide information laid down in Annex I.

4. Producers and distributors shall, within the limits of their respective activities, cooperate with the competent authorities, at the request of the latter, on action taken to avoid the risks posed by products which they supply or have supplied. The procedures for such cooperation, including procedures for dialogue with the producers and distributors concerned on issues related to product safety, shall be established by the competent authorities.