

13th January 2022

Open letter to the Parliament of the European Union

Liability obligations for online marketplaces must be incorporated into the DSA to protect consumers and the environment from illegal imports

Dear Member of the Parliament,

the current proposal of the *Regulation of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC (DSA)* puts EU citizens and the environment at risk. The DSA will fail to stop sales and imports of illegal products from 3rd country sellers via online marketplaces, due to liability exemptions for online marketplaces that facilitate importing products that are not connected to an EU manufacturer or an importer. **Thus, we urge you to consider the amendments proposed in this letter.** Without sufficient liability obligations for online marketplaces, we wonder if a rejection of the DSA proposal might not be the more appropriate decision to protect consumers and the environment.

The boom of online marketplaces in the wake of the corona crisis drastically increased unfair competition between retailers and online marketplaces at the expense of consumers and the environment.¹ Via virtual marketplaces such as Amazon, AliExpress or Wish are massive amounts of products sold within the EU that often do not comply with the existing environmental and consumer protection regulations.² These non-compliant products include counterfeits as well as unsafe products that pose a major risk to health and safety and are often potentially life-threatening, such as electronic goods, children's toys, cosmetics or car parts. At the same time, it is not possible to take effective action against this infringement that originates from outside of the EU, as platform operators are not legally responsible for the products they offer. This legal loophole allows the growing market segment of sellers outside of the EU via online platforms to ignore EU legislation and thereby threatens the existence of many retailers and endangers the environment as well as consumers.^{3,4}

The current proposal of the DSA continues to fail making online marketplace responsible when illegal content is distributed via their platform. Exemptions of liability for online platforms (Art. 5) and insufficient checking obligation for the platforms on a “best-effort”-approach (Art. 22) are not closing the existing legal loophole. Moreover, the DSA might prevent effective future measures to protect consumer rights and the environment in further sector legislation (such as the *General Product Safety Regulation (GPSR)*, *Waste from Electrical and Electronic Equipment (WEEE3)*, *Toy Safety Directive (TSD)*) by introducing principles like the “no general monitoring” obligation (Art. 7).

The French Anti-Waste-Law shows that the liability obligations on online marketplaces are manageable, effective and in the interest of consumers and the environment. That is indicated by the current implementation efforts of major online marketplaces in the EU. The French legislation prescribes that whenever a seller or producer does not fulfil its legal obligation, the marketplace must fulfil those instead.⁵ To avoid singularised legislations on online marketplaces in the member

states, as we can see already in France, Germany and Austria, the DSA needs to set such liability obligations in place to ensure a harmonized solution across the EU.

To prevent the import of unauthorised and potentially harmful products into the EU and to spur on the effective enforcement of European law for products offered on online marketplaces, the following amendments shall be added to the DSA Article 5 and Article 22:

Justification:

If no other economic operator located in the EU is responsible for the compliance of the products and liable to consumers, online marketplaces must take full responsibility for the non-compliant products which they enable the sale. To this end, online marketplaces must be actors in the supply chain by legal definition - for example as an importer. In addition, online marketplaces must show the full contact information of the EU actor, which is responsible for the compliance of the product and liable to consumers, and in the case of products subject to extended producer responsibility the manufacturer's registration number for the products of which they enable the sale.

Proposal for amendments:

Article 5a (new)

Liability of online platforms enabling consumers to conclude contracts with traders outside of the EU

The liability exemption of Article 5(1) shall not apply to online platforms enabling consumers to conclude contracts with traders outside of the EU, when the product does not comply with the relevant Union or national laws with respect to consumer protection and environmental laws, and there is no economic operator inside the Union liable for compliance of the product and does not respond to claims by consumers or authorities in a reasonable amount of time.

Article 22a – Paragraph 5 (new)

Additional provisions for online marketplaces related to illegal offers

5. For Extended Product Responsibility (EPR) product categories offered through its services, the online marketplace shall verify the registration of the offered product with the relevant authorities, through freely available databases, if they are provided by the member states or the EU, with regard to the information referred to in paragraph 7a of Article 22. The verification shall be performed before the trader's offer is made available on the online marketplaces.

We hope that the European Parliament will act quickly and decisively on this matter. Given the urgency and importance of the issue, we would appreciate the opportunity to discuss this with you at the earliest opportunity. Please do not hesitate to contact us if you have any questions.

Yours sincerely,

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¹ Comparison:

OECD 2020: “E-commerce in the time of COVID-19”, 7th October 2020 and
EPRS 2021: “Digital services act”, March 2021

² Comparison:

BEUC/ANEC 2020: “BEUC and ANEC views for a modern regulatory framework on product safety”, 26th August 2020 and
Bundesnetzagentur, 2020: Annual Report 2019, pp. 74-75.

³ Please see the “Open letter to the Parliament of the European Union” of 15th July 2021: <https://www.duh.de/themen/recycling/elektrogeraete/>

⁴ E.g. Batteries, electrical appliances and packaging regularly fail to comply with legal requirements for take-back, registration or environmentally sound disposal. This way, suppliers avoid paying for disposal fees, jeopardize the financing of existing disposal schemes, and increase costs for companies regularly complying with EU obligations. The OECD estimates that up to 920,000 tons of electrical appliances are placed on the EU market illegally every year by so-called ‘free riders’ [OECD 2018]. Furthermore, it is difficult for consumers to enforce their rights in the event of damage, such as a fire resulting from a short circuit, when dealing with sellers outside the EU. A particular problem here is that online market-places often sell products of low quality, with safety flaws or high levels of harmful substances. [Which? 2019] [TEI 2020] [EU Safety Gate 2021]

⁵ Art.L541-10-9 of the Anti-Waste Law