

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 and lower prices.

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 to see extended liability for the online marketplaces when facilitating the sale of goods to a consumer on the European market and there is no manufacturer, importer or distributor established in the EU that can be held liable.

The online marketplaces have transformed the retail sector. Through modern business models they have changed e-commerce and the commerce market in general and affected the consumer's 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 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 more efficient ways of reaching consumers, and have at the same time increased competition which has resulted in more choices and lower prices for consumers. However, the legal framework has not kept pace and adjustments are needed to ensure a level playing field in the commerce sector.

The original version of online marketplaces are intermediaries between the distributor (seller) and the end-user (typically the consumer). They are not distributors themselves, but merely facilitate the sale. The online marketplaces do not typically own the products that are being sold on their website, nor do they act as EU importers.

Today the picture is not so clear. 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 with own brands, as well as a marketplace. Some of them also assist the sellers on their marketplace with delivery, returns and customer care.

Online marketplaces often (claim to) act as passive intermediaries between two independent parties - the seller and the buyer. As passive intermediaries they are not responsible, or have only very limited liability, for the products they are mediating. The EU regulations for the sale of tangible goods are based on the traditional retail model with physical stores in a defined geographical area. The main idea of this model is that there is a retailer in the single market who is responsible for the products and can be held liable if they do not follow applicable rules. This includes liability for product safety, consumer protection, copyright etc.

Illustration of the different responsibility structures in the retail sector

Liability and the e-commerce directive



When goods are sold to European consumers via an online marketplace from a supplier which is not established in the EU, a legal loophole occurs. The responsible actor is not established in the EU and there is therefore no possibility to hold them liable (see, among other things, the Swedish Retail and Wholesale Council's report on digital platforms and e-commerce marketplaces from 2019¹). Even though the new Enforcement and compliance regulation² which comes into force in 2021 will allow authorities to control private imports from 3rd countries, this will not solve the problem. The sheer number of parcels means that it is impossible to check everything 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.

The lack of enforcement means, in practical terms, that products imported directly to consumers from non-EU countries (through both EU and non-EU platforms) do not require the same level of compliance, as if the products were bought through the traditional chain where an EU-importer or distributor buys the products from a supplier (from a non-EU country) and sell it to European consumers. In the latter case the first commercial actor in the EU (typically the importer or the distributor) has the responsibility to make sure that the products comply with the EU rules on product

¹ <http://handelsradet.se/wp-content/uploads/2019/04/Digitala-marknadsplatser-och-ehandelsplattformar.pdf>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A795%3AFIN>

safety. If it turns out a product does not comply and can be harmful, the importer or distributor must remove the item from the market and in some cases make a product recall.

When a consumer shops directly from a foreign supplier on an online marketplace, the consumer will de facto take the role as “importer” and in practical terms assumes the responsibility to ensure that the product is safe. This problem is accentuated since several of the online marketplaces have sub-sites in several Member States or their websites are in the local languages, which makes it less clear to consumers that the trader is a seller from outside the EU.

European consumers are many times unaware of this situation and therefore gets exposed to products that do not comply with chemical rules and safety standards. A telling example is the test done by the Swedish National Electrical Safety Board where 10 out of 10 USB-chargers sampled were deemed dangerous.³ Other examples include two tests carried out by the Danish Consumer Council which revealed illegal doses of phthalates in 9 out of 29 toys⁴ - in some the threshold was exceeded 200 times. Another test revealed toys with long strings and small pieces which were dangerous for children⁵.

The current legal framework also affects the competitiveness of European companies, especially SMEs. A study by the Finnish Commerce Federation estimate 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 and still be profitable. This means that it is 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 retail purchasing (B-to-B)



In June 2018 the European Commission signed a Product Safety Pledge⁶ with four online marketplaces: Alibaba (for AliExpress), Amazon, eBay and Rakuten-France. These four online marketplaces

³ <https://www.elsakerhetsverket.se/om-oss/press/pressmeddelanden/2018/elsakerhetsverket-varnar-stora-risker-att-kopa-laddare-fran-vissa-e-handelssajter/>

⁴ <https://kemi.taenk.dk/bliv-groennere/test-kemi-i-legetoej-fra-ebay-amazon-og-wish>

⁵ <https://taenk.dk/test-og-forbrugerviv/boern/billigt-legetoej-fra-nettet-er-farligt-dit-barn>

⁶ https://europa.eu/rapid/press-release_IP-18-4247_en.htm

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 passive obligation in its nature, i.e. it only affects the products that authorities and consumers have proven are non-compliant. These platforms have billions of products on their online shelves that will never be assessed or sample tested by the online marketplaces, or tested by authorities. The effectiveness can also be questioned. After the test by the Danish Consumer Council in June 2019 revealed toys with phthalates up to 200 times the EU-threshold⁷ from Amazon, eBay and Wish. 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 Broadcaster DR in August and October⁸.

In this system the platforms are only obliged to act if authorities, consumers or other stakeholders notify them. At the same time European 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 products containing dangerous chemicals, as well as other safety and consumer protection issues, without anybody being liable. Enabling a vibrant platform economy should not take precedence over consumer safety 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.⁹

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 obvious where the seller is established, particularly when the online marketplace has a country specific website that uses the

⁷ <https://kemi.taenk.dk/bliv-groennere/test-kemi-i-legetoej-fra-ebay-amazon-og-wish>

⁸ <https://www.dr.dk/nyheder/penge/trods-advarsel-legetoej-med-forbudt-kemi-saelges-stadig-af-populaere-udenlandske>

⁹ file:///C:/Users/shnlm/Downloads/counterfeiting_and_piracy_in_the_european_union.pdf

language of the consumer. We have seen many examples of terms of conditions that limits consumers their rights. 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.

This deprives the consumers of their rights and distorts competition.

On November 8th 2019 the European Council adopted the “omnibus” directive¹⁰ 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 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 compliance

As the only actor in the chain that have the practical means to ensure product compliance as well as being established in the EU, we think platforms should have a greater responsibility. 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.¹¹

¹⁰ <https://www.consilium.europa.eu/en/press/press-releases/2019/11/08/eu-consumers-protection-to-be-reinforced/>

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

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 sellers¹².

The Nordic Commerce Sector wants to see extended liability for the online marketplaces when facilitating the sale of goods to a consumer on the European market and there is no manufacturer, importer or distributor established in the EU that can be 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 that has so far been discussed (online marketplaces 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.

Our proposal would be to apply the same, or similar, rules to online marketplaces when facilitating the sale of goods from a producer that is not established in the EU to European consumers, as we currently apply to importers. Just like importers they are not the producer of the products and can therefore not be expected to have the same level of responsibility. They do, however, make large profits on facilitating the entry of foreign products to the European market and should therefore also share the responsibility.

Below in Annex I is the list 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 horizontal rule for all products, that producers (including importers) may only place safe products on the Union market. In Annex II, there is a list of the obligations for producers (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, chemicals etc.) that stems from the obligations under Decision 768/2008 and the horizontal 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. They would however increase consumer safety and help re-balance the playing field.

B. 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, becoming contractually liable vis-à-vis the consumer. They

¹² Article 14a: <https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32017L2455&from=FI>

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 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 Organisations¹³.

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¹³ 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 768/2008¹⁴

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.

¹⁴Annex 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.