

# The Digital Services Act

## Position paper of the Nordic commerce sector

*The DSA covers all types of platforms. However, the focus of this paper is exclusively on online marketplaces that facilitate the sale of tangible goods from 3<sup>rd</sup> countries.*

### Summary

The Nordic commerce sector welcomes the Digital Services Act. The proposal is a first essential step to tackle both substantial problems with dangerous, unsafe and non-compliant products from third country sellers and distortions of competition, which are detrimental to the rights of consumers, to the competitiveness of European businesses, and to the goal of more sustainable Single Market.

We believe that several measures introduced in the DSA-proposal are appropriate and proportional, but the proposal needs refinement in order to effectively address the problem of unsafe goods entering the EU via online marketplaces. With the new DSA-initiative, we finally have a chance to improve consumer safety while putting an end to distorted 3<sup>rd</sup> country competition for the European commerce sector.

To solve the problem with unsafe and non-compliant products, stronger measures need to be introduced, such as proactive responsibility, while at the same time closing legislative loopholes.

### Our main points:

- Introduce the concept of a *digital importer*, which would designate an online marketplace with direct liability for goods imported and sold to European consumers by traders established in 3<sup>rd</sup> countries.
- There should be **liability and an obligation to monitor for online marketplaces** when they intermediate the sale of goods between a seller in a third country and a buyer in the EU. This should apply regardless of how passive the online marketplace is.<sup>1</sup>
- In these cases, the **online marketplaces should bear the responsibility** as an importer and the product liability as an importer. In other words, they have the responsibility to ensure that the goods sold via the marketplace is in compliance with EU legislation.

### What should legislators consider?

- The *non-automatic liability exemption* introduced in **art. 5.3** needs to cover issues such as:
  - product safety, environment related legal responsibilities and intellectual property rights.
  - A condition for Article 5.3 to apply should be that the seller is based in a 3<sup>rd</sup> country.

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<sup>1</sup> See proposal for obligation under the point about recital 28.

- A general monitoring obligation should be introduced for online marketplaces which fall under the definition in **art. 5.3**.
- Recital 28 should be amended in order to permit a specific monitoring obligation for online marketplaces facilitating the sale of goods from 3<sup>rd</sup> country sellers.
  - The obligations should be equal to the one's defined in decision no. 768/2008/EC article R4 *obligations of importers*
  - **For example**, the online marketplace/digital importer should be required to:
    - only place compliant goods on the market,
    - ensure that appropriate conformity procedures have been carried out before placing goods on the market,
    - inform the market surveillance authorities if there is a good which is considered to have a high risk
    - confirm that the good comes with right instructions and safety information,
    - ensure, while the good is under their responsibility, storage, or transport, that it does not infringe on requirements set out in other legislations, such as product safety regulations and consumer law protection,
    - carry out sample testing, controls, investigations and keep a register of complaints of non-conform products and product recalls.
- The principle of *know your business customer* is a good starting point but should in cases where the background check has been insufficient, lead to direct liability for the online marketplace.
  - The *burden of proof should lie with the* online marketplace to show that the background check of the sellers on the online marketplace have been sufficient.
  - It should, in addition to the introduced obligations in **art. 22**, also be mandatory for the online marketplace to collect documentation about products and to ensure that it is correct.
- **Art. 14** about a notice and action mechanism, should only apply to intermediaries which do not fall under the definition in **art. 5.3**.
  - The principle needs to be combined with a “stay-down-principle” which require the online marketplace to monitor that the goods that have been taken down from the online marketplace is not placed back on the marketplace again.
    - Failure to comply with a stay-down-principle must immediately lead to sanctions. Otherwise, it will not be efficient.
- **Art. 20** point 1 about measures and protection against misuse mention the condition “**manifestly**” illegal content. “Manifestly illegal content” will be difficult to apply to online sales of goods, for example counterfeit goods because the “better” they are, the less evident their illegal nature is to a layperson (recital 47). The simplest solution to avoid this issue would be to remove “manifestly” from the text.

## What is the problem?

Digital technology is driving societies forward. Commerce is one of the sectors where digitalization has created great opportunities for consumers and retailers. Today, online trading is a natural part of our sector, reaching billions of customers each year. While the commerce sector is undergoing a structural change, new actors and business models have been introduced. Large companies such as Amazon, Alibaba and Wish have fundamentally changed the way consumers interact with the commerce sector and shaped a new way for consumers to buy goods online.

This development has undoubtedly increased the level of competition from 3<sup>rd</sup> country market actors. The digital infrastructure of today makes it easier for consumers to order products from the other side of the world. Consumers do not take national borders into account which increases the level of international competition between market actors. Below is a graph from PostNord's report *Ecommerce in Europe 2020*, which highlights the rapid change of cross-border e-commerce.



Retailers with brick and mortar stores and e-commerce retailers on a daily basis face large amounts of demands and requirements from both consumers and legislators. Consumers need to feel safe that toys bought for their children are safe and that products they use in their everyday life do not harm neither the environment nor themselves. Since more trade takes place online, it is important that consumers feel as safe online as they do offline.

With the rise of e-commerce, selling unsafe and counterfeit products to consumers has been made easier. This negatively affects competition and exposes consumers to a great risk. Often, consumers think that online marketplaces are responsible for products sold on their website, but the reality is different. Each year millions of unsafe and counterfeit products are sold to consumers via an online marketplace, without having a market actor to hold responsible.

On the 15<sup>th</sup> of December 2020, Commissioner Margrethe Vestager presented the DSA-proposal. One of her main messages was that consumers should be equally safe both in the online and offline environment, and that European companies must be able to compete on equal terms online and offline.

Also important to mention in that survey results<sup>2</sup> shows that 93% of the respondents expect online marketplaces to ensure that traders on the platform comply with EU rules. We therefore support Margrethe Vestager's statement that "rules must be made that can bring order to the chaos".

The root of the problem is not increased competition between online and offline actors, but rather between European companies that are covered by EU legislation and online marketplaces which are exempt from liability, while facilitating the sale of dangerous goods from 3<sup>rd</sup> country sellers. These sellers are impossible to reach with European legislation and enforcement. It is not reasonable to have different rules for different business models who both serve the same EU consumers, with the same essential service the sale of goods. This situation creates unfair competition and we see the risk that, if we do not address this problem now, retailers will abandon the business model as a traditional e-commerce trader, and will instead change in an online marketplace. This could lead to a marked deterioration in product safety and consumer protection.

## **Analysis of the Digital Services Act proposal**

The Nordic commerce sector welcomes the proposal for a Digital Services Act. It is evident that the E-commerce Directive no longer has the ability to address the challenges that have arisen when the digital environment has evolved.

We do see the legislative proposal as a good attempt to balance different interests. We also believe that it is motivated to have different rules for different types of intermediaries. Both challenges and possible solutions differ vastly, when different

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<sup>2</sup> <https://ssl.vzbv.de/pressemitteilung/grenzenloser-aerger-statt-bequemer-online-kauf>

<https://www.vzbv.de/sites/default/files/downloads/2020/11/24/2020-11-24-vzbv-ergebnisbericht-globaler-onlinehandel.pdf>

types of intermediary activity may involve such broad array of activities as e.g. social media, transportation services, accommodation, or sale of goods.

However, with the DSA proposal we find that the legislator has still not fully been able to solve the problem with liability for 3<sup>rd</sup> country goods that are being sold to European consumers via online marketplaces. There is still no level playing field between European retailers and sellers from 3<sup>rd</sup> countries. The Nordic commerce sector view this as remarkable and worrying. We therefore look forward to contributing to more solid regulations and solutions. We would also like to point out the need for clarification of certain articles and concepts introduced in the legislation, such as: *the interpretation of the non-automatic liability exemption in art 5.3, the principle of know your business customer, and how the measures introduced in the DSA will solve the problem of dangerous goods and unfair competition.*

The DSA includes several different legislative areas and opens for discussion for adjacent jurisprudence, such as consumer protection law, intellectual property law and environment related issues.

### ***Consumer protection law***

Several rules in the OMNIBUS directive aim to strengthen the consumer's position in the online environment. This is very important as e-commerce has accelerated as a result of the COVID-19 pandemic.

For example, there is an obligation introduced that online marketplaces need to inform the consumer whether the products are sold via a seller or directly from the online marketplace or from a private individual. In the latter case the EU consumer protection rules do not apply.

The rules introduced in the DSA about clear information towards the consumers in **art 22** are highly welcomed. The fact that the online marketplace is the only actor that the consumer has contact with, when they buy the goods through an online marketplace, 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 the counterpart.

The obligations in **art 22** should be read together with the *non-automatic liability exemption in art 5.3*: “*with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.*”

The purpose of the legislator is to protect consumers from dangerous content, such as unsafe and non-compliant goods. The necessary prerequisite should therefore, when determining whether an online marketplace falls under the definition of **art 5.3**, be the activity of the different players. An active online marketplace, that easily could be mistaken for a counterpart for the consumer, should be directly liable for non-compliant goods. An online marketplace cannot, just by fulfilling the obligation in **art**

**22** claim that they fall outside the definition of **art 5.3**. Compliance with **art 22** should not, in other words, per se result in a liability exemption.

The actual circumstances should be the determining factor. Until the online marketplace has proved that it is not active or can be interpreted as the counterpart, it should be considered fully liable for the goods sold on the online marketplace.

### ***Intellectual property right***

It is important that the concept of “illegal content” is defined broadly and covers information relating to illegal content, products, services and activities, as mentioned in recital 12. By doing so, we can hopefully ensure a safe, predictable, and trusted online environment.

In 2016, counterfeit goods amounted to as much as 3.3% of world trade, and up to 6.8% of EU imports from 3<sup>rd</sup> countries.<sup>3</sup> These figures underscore the need for action against IP crime and trade in counterfeit goods.

The EUIPO also found that in 2013-2017, the presence of counterfeits in the EU marketplace caused the loss of over 670 000 jobs in legitimate businesses, EUR 83 billion p.a. in lost sales in the legitimate economy for just 11 industry sectors and EUR 15 billion p.a. in Member State tax and social security revenue.<sup>4</sup>

A report<sup>5</sup> shows that brands suffering the most from counterfeiting are primarily registered in the OECD and EU member countries, while China appears as the single largest producer of these goods.

Notably there is an increasing use of small shipments by counterfeiters due to the rise of e-commerce and to reduce the risk and financial consequences of detection.

Platforms who generate revenue through advertising are making money through ads directing their users to sites that sell counterfeit goods and other unsafe products. Now, platforms are only responsible for removing illegal content once it has been flagged, but by this point they may well have already benefited financially from its existence.

### ***Environmental issues***

European sellers need to ensure that the goods they sell follow EU environmental legislation. This is both costly and time consuming. As e-commerce increases, the EU's environmental standards will weaken and the Green deal cannot be successful if rules and standards do not apply to and are not enforced on all goods in the single market.

One example is that companies must participate in the organisation of Extended Producer Responsibility (EPR) systems and/or pay the related fees. This ensures that goods at the end of life are collected and processed in accordance with agreed

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<sup>3</sup>[https://euipo.europa.eu/tunnelweb/secure/webdav/guest/document\\_library/observatory/documents/Mapping\\_the\\_Economic\\_Impact\\_study/executive\\_summary\\_en.pdf](https://euipo.europa.eu/tunnelweb/secure/webdav/guest/document_library/observatory/documents/Mapping_the_Economic_Impact_study/executive_summary_en.pdf)

<sup>4</sup> Ibid.

<sup>5</sup> <https://www.worldtrademarkreview.com/anti-counterfeiting/estimating-global-economic-and-social-impacts-counterfeiting-and-piracy>

standards. 3<sup>rd</sup> country sellers are technically also obliged to contribute to the EPR systems, by paying their fair share of the costs. However, authorities lack the means, both in terms of resources and jurisdiction, to enforce this towards actors from outside the EU. The reality is therefore that European companies are forced to cover the costs of handling foreign goods.

Additionally, many of the goods that are imported from 3<sup>rd</sup> countries via online platforms contain substances that are prohibited in the EU. When processed with other goods at the end of life, these substances can contaminate and lower the quality of whole batches of recycled material.

Another example relates to different taxes such as national chemical or plastic taxes. The Directive (EU) 2017/2455 states that<sup>6</sup>: *Where a taxable person facilitates, through the use of an electronic interface such as a marketplace, platform, portal or similar means, the supply of goods within the Community by a taxable person not established within the Community to a non-taxable person, **the taxable person who facilitates the supply shall be deemed to have received and supplied those goods himself.*** However, this only applies to VAT, online marketplaces are not responsible to ensure that other taxes and fees are paid. For the same reason as the EPR fees, these taxes are therefore most of the time not collected. This means that goods coming from 3<sup>rd</sup> countries will be cheaper, further undermining the competitiveness of European retailers.

The Nordic commerce sector believes it reasonable that online marketplaces that facilitate the sale of goods from 3<sup>rd</sup> countries are required to collect all fees and taxes the seller is obliged to pay.

### **General comments**

The Nordic commerce sector expressed its concern that there are different rules for different business models at an early stage. We do believe that in order to create a fair and open single market, the same rules should apply to all companies that engage in the same kind of activities. This is the only way forward towards a fair and equal single market. Taking this into account, we can therefore not understand why online marketplaces still enjoy the possibility to only take action after notices. This is remarkable given that all other EU-based actors with similar activity in the supply chain (such as retailers, importers, or e-commerce companies) have proactive responsibilities to protect consumers.

We also worry about the one-size-fits-all approach that still applies. The Nordic commerce sector consider that it is a huge difference between assessing what is illegal content on social media and on an online marketplace. In the latter case the good either comply with harmonized product safety legislation or not, there are no gray zones. Against this background, the liability rules should also be adapted and designed in different ways. To ensure that consumer protection is not undermined, checks and controls of goods must be performed before they are put on the market. This is the starting point in all product safety legislation. It is therefore a strange choice in the DSA proposal to actively not legislate along the same principles.

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<sup>6</sup> Article 14a, part 2: <https://eur-lex.europa.eu/legal-content/en/TXT/HTML/?uri=CELEX:32017L2455&from=FI>

We are not arguing for stricter rules for online marketplaces than for other economic operators, but we are arguing for equivalent rules. Actors in the supply chain that target the same consumers, with similar products and with the same purpose (to sell the product) should also have the same liability and responsibility.

## Our proposal for a solution

There are several challenges associated with the growth of e-commerce and the online marketplaces' increasingly strong position, and there are good reasons to put an end to the trade of unsafe and counterfeited products.

Our position is that this loophole needs to be closed now. In so many other areas the EU is working to protect its citizens from unsafe goods and companies from unfair competition. Several initiatives have been presented by the Commission in recent years to secure this, for example greater consumer protection, environmental requirements, taxation on platforms etc. We cannot let sellers from 3<sup>rd</sup> countries continue to sell non-compliant goods via online marketplaces without having anyone liable.

Hence, the exemption from *liability* and *non-monitor obligation* should not apply to online marketplaces, when they intermediate the sale of good between a seller in a 3<sup>rd</sup> country and a buyer in the EU (no matter how passive the online marketplace is). The online marketplaces should have pre-defined minimum obligations related to the screening of not only the traders but also the goods offered on the platform.

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

### ***Introduce a digital importer***

The proposed DSA-legislation does not fully address the issues related to unfair competition and danger for consumers. We strongly believe that legislation should make online marketplaces have a greater responsibility and are held liable as any other economic operator taking the same active role in the trading chain.

In cases concerning the sale of products from 3<sup>rd</sup> country sellers, online marketplaces should have the role of a *digital importer*. Today, when a consumer buys a product sold by a seller in a 3<sup>rd</sup> country via an online marketplace there is no actor liable for the consumer protection law, environmental requirements, product safety legislation etc. The consumer becomes the importer, and this is obviously not the intention of the legislator.

We need to cover this loophole. Since enforcing European rules is extremely difficult towards sellers in 3<sup>rd</sup> countries, which are often hard or outright impossible to reach, we instead need to focus on the actor that makes the sale possible. The online marketplace would then be considered *the digital importer* instead of the consumer.

A *digital importer* should have **liability** for 3<sup>rd</sup> country goods sold via the online marketplace. The marketplace would therefore automatically have to monitor the goods sold via the online marketplace to European consumers. This would per se lead to an extended obligation in **art.22**, which would also cover compliance work for the goods. The online marketplaces should bear the responsibility and the product liability as an importer. In other words, the online marketplace should make sure that the products and the packaging etc. comply with EU legislation.

A *digital importer* should also have to **check their business partners** (know your business customer) as other active retailers must in the single market. Today, European retailers, both e-commerce retailers and brick and mortar, spend time and money on their compliance work. This is of course something that is reasonable to do, but at the same time it is also burdensome. The same requirements should therefore also apply to online marketplaces when 3<sup>rd</sup> country goods are sold via them directly to consumers.

A *digital importer* should as well have the **burden of proof** for the compliance work. If the digital importer could not ensure that a seller from a 3<sup>rd</sup> country for example leave correct contact information, the digital importer cannot enter into contract with this seller. Hence, the seller cannot be accepted as a business partner and sell goods via the online marketplace. The same rule should apply to goods. In other words, an online marketplace, must control goods that are sold on the marketplace to fulfill its duties as a digital importer. It is up to the digital importer so prove that this work has been done sufficiently and that there are no reasons to think that the seller or the goods did not live up to European rules and standards.

### ***The non-automatic liability exemption needs to be interpreted broadly***

The Nordic commerce sector strongly welcomes art 5.3:

*“with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.”*

This article is key to maintain and develop a high level of protection for consumers and to secure a level playing field. We do not have any opinion about other types of platforms and whether they should have liability or not, but for the online marketplaces, which give the appearance of being the counterpart to the consumer, it is reasonable to establish a direct liability.

Today online marketplaces which control payments, logistics/deliveries, marketing, algorithms, pricing, and rating give the appearance of being the counterpart. Hence, most of the online marketplaces have such influential role that they should be considered the counterpart.

Art 5.3 needs to be interpreted broadly. It is good that consumer protection law is included, but we ask for clarifications what this definition includes. For us, product

safety is a basic right for consumers, and hence checks and controls of goods will be interpreted as one of the obligations online marketplaces will have in the future.

Further, we ask for more jurisprudence to be included for example regarding responsibilities for intellectual property rights and some environment related obligations such as waste management.

Art 5.3 cannot under any circumstances result in a situation where stronger requirements are established in other legislations act, such as the general product safety directive.

### ***There is a need for proactive measures***

The Nordic commerce sector is positive to many of the measures introduced in the DSA proposal. The requirement to announce and **appoint a contact person**, and that companies established outside the EU must appoint a single point of contact within the EU. However, we are asking for clarifications on what responsibilities these actors have and confirmation that these actors do not release the company from the liability. We suggest that this *responsible person* is first and foremost only a formality, and that it does not function as a *legal representative*. This is important since they more have a role as a paper holder for whom there is no responsibility neither for the goods nor for consumer safety.

Another problematic rule in the proposed DSA is the recital 28. From that recital it seems like nothing in the regulation can create a **general obligation to monitor** the content or proactively take actions against illegal content. It is important that this recital is not structured as a setback from the current e-commerce directive. Today the monitoring requirements depend on the role of the online marketplace. This is a typical example when one-size-fit-all does not work. Instead of this general prohibition of a general obligation to monitor, we would need to see a clearer statement on proactive measures and monitoring obligations for online marketplaces that facilitate the sale goods from 3<sup>rd</sup> countries.

The compliance process for a regular retailer, which for example have the role as an importer, are often misinterpret. It is not like every single product must be checked, rather a sample test is performed based on risk. This risk based compliance process is equally possible for an online marketplace as it is for a retailer. Today we have access to AI-systems that simplify these processes.

**Art 14 present a notice and action mechanism** which we welcome. It is a positive development that there will be a mechanism that makes it possible for individuals and entities to report and notify the platforms about illegal content. This is also an example where different rules need to apply different types of platforms. It is a useful mechanism for social media platforms, where there is a higher threshold to get content removed since the requirements to motivate why the information is illegal many time create gray-zones. It is obvious that this is not a good way to handle goods. All goods fall under the same product safety regulations, either a product is compliant, or it is not. We do not have the same challenges with gray-zones on online marketplaces as we have when it comes to statements on social media platforms. This rule gives the online marketplace a too passive role, which clearly differs from all

other actors within the single market which have great responsibilities to proactively work to make sure that the products are compliant.

***The Nordic commerce sector is looking forward to continue to discuss the enclosed topics both with the European Parliament and the Council. We hope that our opinion is taken into account. We will also be happy to elaborate on this position in depth.***

## **CONTACT INFORMATION**