

Background document – Digital Services Act

Comments regarding extended due diligence obligations

The Nordic confederations: Confederation of Danish Industry, Confederation of Swedish Enterprise, and the Confederation of Finnish Industries are experiencing an increasing problem with illegal and dangerous products flowing into the EU.

Products that do not comply with European product legislation pose a threat to consumer safety and are a distortion of competition for European companies, that spend both money and resources on ensuring that they comply with the strict product rules. It is therefore crucial that we find a solution in the Digital Services Act (“DSA”), which applies regardless of where the platform is established.

We believe that the digital economy must match the physical to an extent that makes sense. Furthermore, it is important to find a solution that is legally durable and will work in practice for the affected business. Below follows an introduction of our concrete proposal regarding an extended responsibility for platforms in relation to product safety in the DSA.

Our concrete proposal

We find it important that the DSA contains articles that have an actual preventive effect, which gives the platforms an independent responsibility. More specifically, we suggest including a new paragraph in article 5 (hereafter article 5(4)) with the following wording:

Paragraph 1 shall not apply with respect to product liability if a platform is allowing consumers to conclude distance contracts with traders when:

- 1) *The product sold is covered by legislation listed in Article 4(5) in the Market Surveillance Regulation (“MSR”), and*
- 2) *there is no other responsible person in EU for the products sold*

The abovementioned reference to article 4(5) of the MSR should not be exhaustive. It could be supplemented with other product legislation, and products that are typically traded online and recognized as dangerous, cf. notifications in RAPEX and Rapid Alert. This could for example also be, the Regulation on cosmetic products (1223/2009 of 30 November 2009), the Directive on the approximation of the laws of the Member States relating to food supplements (2002/46 / EC of 10 June 2002), and the Regulation on medical devices (2017 / 745 of 5 April 2017).

In relation to fulfilling a new article 5 (4) platforms should verify the following requirements, that could be introduced in section 3 “additional provisions applicable to platforms”:

- that the product bears the required conformity marking(s) (e.g. CE marking),
- that the product is accompanied by relevant documents (e.g. EU declaration of conformity) and by instructions and safety information in a language which can be easily understood by consumers and other end users if required by the applicable legislation,



Confederation of Danish Industry



- that the manufacturer and/or the trader mentioned in MSR article 4(1) have indicated their (1) name, (2) registered trade name or trademark and (3) the address at which they can be contacted on the product or when not possible because of the size or physical characteristics of the products, on its packaging and/or on the accompanying documentation and that the product bears a type, batch or serial number or other element allowing the identification of the product.

As many platforms never receive the products physically, the documentation requirements should be uploaded and checked digitally e.g. by the seller uploading image documentation and declaration of conformity via an electronic system.

There should be no legal difference between the origin of the platforms and the rule should therefore apply extraterritorially to platforms based outside of Europe but offering their products to consumers based within it. The important matter is solely if the product already lives up to EU legislation.

Other elements

The proposed article 5(4) could be supplemented with a new recital in the introduction to the DSA, as well as a change of recital 28 to clarify that platforms, which allow consumers to conclude distance contracts with traders regarding dangerous products should exercise due diligence checks in relation to the seller's compliance.

In addition, under the section “sanctions”, it should be specified if a platform knows, it is in the possession of information or on basis of experience should have known, that a product does not meet the applicable requirements, the platform may not allow the seller to offer the product on the platform. The platform shall also cooperate with the competent authority in taking measures to avoid or minimize risks and inform the manufacturer. The sanction for non-compliance should be equal to the sanctions established by infringing due diligence obligations in the DSA.

For the largest platforms and the ones established outside of EU, it should be specified, that the Commission has the power to enforce the rules. While for platforms falling out of the two categories the competence should be given to the market surveillance authorities in the country of establishment. In addition, it must be clarified that the Commission shall ensure that coordination takes place across the EU, if the platform operates across several EU countries.

The DSA's interaction with the Market Surveillance Regulation

We believe that the DSA should go beyond the MSR in relation to the responsible subject, as the MSR is limited to imposing a platform obligation, if it has the character of a “fulfilment service provider”. We believe that both regulations can exist in parallel and that there will be no conflict between the platforms' obligations.

The MSR in article 4 already contains an obligation for sellers established in 3rd countries to appoint a responsible person in the EU. Hereby, the market surveillance authorities can contact the responsible person to obtain a declaration of conformity and possibly relevant technical documentation. The MSR itself mentions that this person can be a platform if it performs distribution services in the EU.

Our proposal, however, differs from article 4 of the MSR as all platforms in the DSA are subject to the same obligations regardless of their size and function, when no other legal person within the EU is responsible for the product. The reason why we find it necessary to expand the subject of responsibility, and to give all platforms the same obligations, is that most of the existing

platforms are mediate platforms. Thus, the problem of dangerous products, which mostly arrive from outside of EU, cannot be solved with the current rules of the MSR as it only applies to platforms, that have the character of distribution services.

Furthermore, we believe it is important that platforms established outside of the EU should have the same obligation. In this regard, the DSA differs from the MSR, which imposes obligations solely toward platforms established within the EU.

Finally, the crucial difference between our proposal in the DSA and the MSR is that the latter only requires fulfilment centres to verify that the seller has issued a declaration of conformity, technical documentation etc. and to hand it out to the market surveillance authorities. On the other hand, our proposal will introduce an obligation for all platforms to check the information from the seller on a product level, for example that the product is CE-marked, that an address of the manufacturer and the legal representative in EU is written on the product etc. The listed obligations in our proposal above are inspired from the obligations of a distributor in EU.

We believe, that giving the platforms a more proactive role in the value chain is crucial if we want to reduce the sale of illegal products to consumers. Nonetheless, there are products that may slip through the hole, and in these situations the products could potentially also be stopped by custom authorities in EU. However, many market surveillance authorities and other regulators involved with keeping online and offline markets safe are grossly under resourced. Therefore, we implore Member States to uphold their political intentions and sufficiently fund their authorities and regulators responsible for enforcing existing frameworks and the DSA.

The DSA interaction with the General Product Safety Directive

It is unnecessary to include the scope of the General Product Safety Directive (“GPSD”) in the DSA. The problem with dangerous products mainly concerns the type of products covered by the MSR. In order to maintain competition, the starting point should be that the platforms bear no prior liability for checking products covered by GPSD.

On the other hand, it is important to ensure an obligation to cooperate with the authorities if a problem has been identified, for example illegal children's furniture. In this situation the obligation should be equal to the MSR.