



Position paper on the Digital Services Act

The Commission's legislative proposal for the DSA is a positive first step towards a more modern and sustainable governance of digital platforms. SACG welcomes in particular the introduction of a notice and action regime, Know Your Business Consumer (KYBC) requirements and the additional obligations for very large platforms. Yet, in order for the DSA to match its level of ambition when it comes to protecting Swedish and European consumers and businesses from the growing sales of counterfeits and other illegal products online, we assess that the proposal needs to be further strengthened in the below areas.

1. Staydown

The notice and action regime in article 14 will indeed facilitate the administrative process for right owners when sending takedown notices to platforms. However, in order for this regime to become *de facto* effective, it needs to be complemented by a "staydown" obligation. As long as removed illegal content can be re-uploaded by counterfeiters after takedown actions, consumers will continue to be exposed to the same risk of buying counterfeit products. Consequently, there is an obvious need to add an obligation on platforms to block reported counterfeit sellers from re-listing the same product offer again.

Furthermore, the criteria for suspension of repeated infringers in article 20 needs to be strengthened. The current wording sets out a quite loose regime which in SACG's assessment is even softer than many major e-commerce platforms current policies. There needs to be an effective mechanism in place for suspending illegal actors. Not a mechanism that rather improves the possibilities for counterfeiters to maintain on online platforms.

2. Extended KYBC obligations

The introduction of a KYBC obligation in article 22 is welcome. Yet, in order to increase online transparency and limit the possibilities for illegal actors to act anonymous, SACG's assessment is

that this obligation shall apply to all online platforms. A lot of counterfeit sales takes place via promotion on social media and other advertising platforms, i.e. not only on online marketplaces.

3. Extended obligations to mitigate risk

The responsibility for very large platforms to identify and mitigate systematic risks set out in articles 26 and 27 is indeed a positive step towards a more modern and accountable e-com legislation. Yet, SACG believes this obligation shall be extended to all online platforms, not just the very large ones. If not imposed as a horizontal obligation, the effect might just become that illegal actors concentrate their business to platforms falling outside the definitions in article 25. We also believe articles 26 and 27 are well suited extended application, as their application means that the starting point always will be the platform's own risk assessment. Consequently, appropriate risk mitigating measures can be set out by the platforms themselves in proportion to their size and scope of business.

4. Clarification on active platforms and trusted flaggers

The statement in recital 18 that platforms playing an active role cannot benefit from the liability exceptions is important. However, to provide further clarity and foreseeability, SACG advises that a definition of active role is also set out in the legislation, based on CJEU's decision in the L'Oreal vs Ebay case (C-324/09).

As for the "trusted flaggers" regime in article 19, we recommend it is clarified that also individual brand owners can become eligible as trusted flaggers, as the forensic expertise to conduct counterfeit assessments first and foremost is an in-house expertise.

5. Consumer transparency

Consumers have a rightful need to be informed once having bought counterfeit products. In particular so as use of counterfeit product can be directly harmful. SACG recommends that as part of the notice and action mechanism in article 14, online shopping platforms also must inform consumers that have already bought products via listings that have been reported as counterfeits.
