

POSITION PAPER

THE DSA CAN MAKE SHOPPING ONLINE SAFER AND FAIRER FOR EVERYONE

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The toy sector values a well-functioning e-commerce system and online platforms are an important sales channel for reputable toy manufacturers. However, reports, including our own investigation last year¹, show that loopholes in the current e-commerce rules are giving dishonest sellers of dangerous toys direct access to EU consumers.

The Digital Services Act (DSA) is an opportunity to address these gaps. The DSA can introduce future-proof rules that uphold safety, transparency, and accountability in the online space. This will make e-commerce safer for consumers and fairer for reputable businesses.

Whilst there are positive aspects in the European Commission's proposal, we regret that it leaves too many loopholes open. Specifically, the proposal does not make sure that the strict EU toy safety rules can be enforced for sellers based outside the EU, who gain access to EU consumers via online platforms. The conditions for the liability exemption provide leeway for marketplaces to escape any responsibility for their role in facilitating this.

To make sure that what is illegal offline, is also illegal online, and that all illegal practices can be effectively enforced, we recommend that the European Parliament and Council:

1. Introduce an importer responsibility in EU law for online marketplaces if sellers are based outside the EU
2. Include further conditions to the liability exemption for online intermediaries
3. Expand provisions on traceability of traders
4. Clarify the difference between general and specific monitoring obligations and include specific provisions for illegal products
5. Include a notice, action & stay down obligation
6. Improve provisions on trusted flaggers
7. Reinforce measures against repeat offenders
8. Apply proposed requirements for Very Large Online Platforms (VLOPs) to all online intermediaries
9. Add transparency obligations to share information on illegal content

The EU's product safety rules are built around 'traditional' business models with EU manufacturers, importers or authorised representatives (in combination with a manufacturer and distributor). The system has been designed to make sure there is always an operator based in the EU responsible for the safety of a product placed on the market in the EU. These operators can be identified easily and sanctioned in case they disregard the rules.

With the growth of online marketplaces, several 'new' business models have developed. This has opened up access to the EU market to sellers based inside and outside the EU. Marketplaces enable the placing on the EU

¹ TIE investigation on safety of toys sold by third-party sellers on online marketplaces: www.toyindustries.eu/ties-eu-toy-safety-the-problem-of-unreputable-sellers-on-online-marketplaces

market of the products by directing their marketing activities at EU consumers, offering products in national languages and by enabling payment in local currencies, with EU payment methods. There are two different situations that require a specific response from the legislator:

- **Seller based inside the EU:** A seller based inside the EU sells a toy through an online marketplace targeting EU consumers. In this case, the seller is usually the importer and has legal obligations under EU product safety and consumer law. To enforce the rules, it is important that the seller can be identified.
- **Seller based outside the EU:** A seller based outside the EU sells a toy through an online marketplace targeting EU consumers. In this case, the online marketplace could be regarded as the 'de facto' importer. In theory, the consumer themselves could unknowingly be considered as the importer in such cases. In practice, this leads to a situation whereby there is no economic operator based in the EU considered liable under EU product safety and consumer law. It is important that this is corrected. The online marketplace is in many cases the only relevant EU-based economic operator that can be contacted and sanctioned.

To address this situation and make sure that what is illegal offline is also illegal online, we recommend the following points are integrated into the Digital Services Act:

1. Introduce an importer responsibility for online marketplaces if sellers are based outside the EU:

Loophole: When a seller is based outside the EU, there is usually no EU-based manufacturer, importer or distributor who is liable for the safety of a toy. This means that if something goes wrong, consumers do not have anyone to address and it is difficult, if not impossible, for authorities to enforce the rules. The DSA does not create substantive liability (except for violation of the DSA itself including Due Diligence Obligations). However, an overly broad liability exemption in the DSA could make the situation worse, and shield online marketplaces from responsibilities and liability despite their central role in the toy sales chain.

Solution: EU law should introduce an 'importer responsibility' for online marketplaces when sellers using their platforms are based outside the EU. In such cases, online marketplaces should share joint-liability with the third-party seller. This would mean that consumers and enforcement authorities always have an EU-based economic operator to deal with for products placed on the EU market. This will address the problem that when sellers are based outside the EU, no economic operator in the EU is liable for the safety of a product or application of EU consumer law. Such an approach already exists for credit card companies, who can be 'jointly and severally' liable under consumer credit legislation. This is important as the online marketplace is in many cases the only relevant EU-based economic operator that can be contacted and sanctioned. This would not prevent a marketplace from seeking redress from sellers based outside the EU in case of damages.

2. Include further conditions to the liability exemption for online intermediaries:

Loophole: The liability exemption for online intermediaries is too easily triggered. This means that there is room for ill intended intermediaries to promote and profit from illegal activities by users of their platform without fear of repercussion.

Solution: Set a number of conditions that intermediaries must meet to benefit from the liability exemption:

- Liability exemption should be a privilege to be earned, rather than a right for intermediaries. It should be based on complying with the due diligence obligations set out by the DSA. For example, this includes carrying out checks aimed at detecting, identifying and removing, or disabling of access to, illegal content. This would create an extra incentive for intermediaries to comply with due diligence obligations and have dissuasive effect on any intermediaries considering ignoring such obligations.
- They should not play an active role. Intermediaries that actively promote illegal or dangerous products do not deserve favourable treatment under EU law.

- In case of the sale of goods, there should be an EU manufacturer, importer or an authorised representative combined with an EU distributor. If these are not present, the liability exemption should not apply.

3. Expand provisions on traceability of traders

Loophole: Lack of traceability of businesses is a problem when consumer protection and product safety rules need to be enforced. If there are no legal consequences for traders who disregard the rules, there is no incentive to ensure toys put up for sale are safe. Action will be limited to taking down listings when unsafe toys are discovered.

Solution: Sellers of dangerous toys should not be anonymous and untraceable. This is critical if they are based in the EU as it will allow authorities to act against the seller of dangerous products. We therefore strongly welcome the Commission's proposal to include a trader-traceability requirement (Know Your Business Customer – KYBC) for online marketplaces. This will ensure that not only illegal products will be taken down once identified, but also allow the identification of rogue traders with subsequent legal consequences.

However, we are concerned that the current wording will bring limited benefits in reality. It will not solve issues with sellers based outside the EU. Also, traders are increasingly sophisticated and use multiple channels for their illegal activities, not only online marketplaces. To give an example, traders engaged in illegal activities use social media to either directly sell their products (social commerce) or to buy advertising space for their unlawful activities. We believe that any type of online service provider should be able to know if the money they are taking for the provision of their services is to support illegal activities. We therefore recommend at least the following improvements:

- An extension of this basic obligation to all online intermediaries, including domain name registrars, web hosting providers, online advertisers and social media, to make sure that a wider range of issues with illegal traders can be addressed. This will also ensure other/future types of sales channels can be covered. This should also minimise any possible loopholes for platforms to escape their responsibility.
- Application of the trader traceability provisions should be a condition to be eligible for the liability exemption for online platforms (see proposal under 2). Such conditionality would create an extra incentive for compliance with due diligence obligations and have a dissuasive effect on intermediaries that may choose not to comply with due diligence obligations when they can afford the resulting regulatory fines and even factor them in as a cost of doing business.
- Platforms should have traceability information available for law enforcement authorities for ten years, even when the contract with the trader has terminated. This is in line with current obligations in the field of product safety, where documentation must be kept in case of requests from market surveillance authorities.
- Online intermediaries should carry out periodic checks to make sure information provided is still correct. This could be a yearly verification.

4. Clarify the difference between general and specific monitoring obligations and include specific provisions for illegal products:

Loophole: The ban on general monitoring and active fact finding for illegal activity has a role to protect fundamental rights, such as respect for private and family life, and freedom of expression and information. However, in relation to the sale of unsafe and illegal products online, strict adherence to these principles is detrimental to the enjoyment of other fundamental rights, including the rights of the child, consumer rights and freedom from injury.

Solution: We call for the monitoring ban not to apply to sale of goods. A specific obligation to seek facts or circumstances indicating illegal activity should be introduced for online marketplaces. This should not impinge on general principles such as the freedom of expression and information and not be considered general monitoring.

5. Include a notice, action & stay down obligation:

Loophole: The proposal provides for a notice and action mechanism for specific items of information. However, for unsafe products, there are often seemingly identical listings from numerous sellers, including drop shippers. A dangerous product that is taken down in one listing should not re-appear in another listing. Some online marketplaces have voluntarily committed to monitor the EU's database of unsafe products (RAPEX), but there is no visibility on the effectiveness of these checks. As shown by TIE's investigation on unsafe toys on online marketplaces, this has not been effective.

Solution: The reappearance of removed illegal content (be it goods or websites, ads etc.) is a frequent unlawful practice deployed quickly and effectively by rogue actors. Stay down obligations for online intermediary services are crucial to ensure consumer protection. For that reason, we believe that once platforms have removed or disabled access to content deemed as illegal, they should ensure that this specific content or an equivalent one will not reappear on their platforms. Such provision does not violate the prohibition of general monitoring of Article 7 and is in line with Recital 28 of the DSA proposal (as an already identified illegal content qualifies as a "specific case" i.e. identical listings) as well as CJEU's Judgment in Case C-18/18 (Facebook case). The removal of said content should be subject to reversal if an appeal procedure is proven successful.

The effectiveness of stay down measures for illegal goods can be ensured through an 'importer responsibility' for marketplaces if the seller is based outside the EU. More responsibility for the products being sold on their platforms would increase marketplaces' motivation to enact effective stay-down policies and would increase their incentive to ensure that dangerous products are not being listed. It would also increase the information that platforms have about products carried on their platforms in cases that there is no EU-based operator, therefore helping them to identify the same dangerous product in other listings.

6. Improve provisions on trusted flaggers:

Loophole: The proposed limitation only to entities representing collective interest does not seem to be justified. Third -parties, such as individual right holders, can help to keep marketplaces clean from illegal goods, including counterfeits and dangerous goods. Individual right holders are usually best placed to provide quality notices on counterfeit products, which can help platforms to keep unsafe counterfeits of their services. Illegal and non-compliant goods are also sold through small and medium-sized platforms, but the trusted flagger provisions do not apply to them.

Solution: The text should reflect that any flagger that has particular expertise and competence for the purposes of detecting, identifying and providing high quality notices should be able to obtain the status of a trusted flagger, and have their notices dealt with as a priority. Since trusted flaggers can release the burden from platforms, we recommend that they should also apply to small and medium-sized platforms.

7. Reinforce measures against repeat offenders

Loophole: While we welcome the European Commission's intention in Article 20 to introduce measures against the misuse and abuse of notification mechanisms, we believe that paragraph 1 falls short of expectations by merely *suspending for a reasonable period of time the provision of their services* to recipients of the service that frequently provide manifestly illegal content. To be concrete, as an example, traders who frequently sell illegal products will be issued with a prior warning and eventually suspended for a reasonable period of time; the consequence is that they will face a temporary suspension and return selling their dangerous products and continue their illegal activities. In the meantime, and while on suspension, it is very likely that they will use "back-up accounts" to continue their rogue activities.

Solution: Paragraph 1 should introduce a permanent exclusion from online platforms services for traders that provide illegal content (incl. products). There should be zero tolerance for even attempting to sell illegal products, if the principle of "what is illegal offline, should be illegal online" is to be upheld. In order to avoid abusive practices, users of intermediary services that face the permanent ban shall be notified regarding the online platform's decision and have the right to appeal against this decision within a certain period of time.

8. Apply requirements for Very Large Online Platforms (VLOPs) to all online intermediaries:

Loophole: Only VLOPs are required to carry out risk assessments to identify and mitigate against “any significant systemic risks stemming from the functioning and use made of their services in the Union”. However, potential harm is not necessarily more significant on VLOPs than on other sized platforms. We are also concerned that almost no existing online marketplaces will be covered by this provision because of the restrictive criteria specified to qualify as a VLOP. In addition, it is important to address systematic risks when a platform is created, to prevent significant future harm as the platform grows.

Solution: Extend Articles 26 and 27 to cover all online intermediaries. Risk assessment is proportionate to the size of a platform and its activities, and as such should not be a greater burden for smaller players. Identifying and mitigating risks could be very helpful in addressing problems with the sale of dangerous toys. Platforms should always act to mitigate a systemic risk after identifying it.

9. Add transparency obligations to share information on illegal content:

Loophole: The proposal does not include provisions to ensure that marketplaces inform relevant stakeholders when an illegal product has been identified on their website.

Solution: The text should include specific obligations on marketplaces who become aware of illegal products on their website to notify market surveillance authorities about the dangerous product and inform consumers who have bought the product under the listing that has been taken down.

About Toy Industries of Europe

Toy Industries of Europe (TIE) is the voice of the reputable European toy manufactures. Our mission is to promote the right of every child to play safely and securely and to promote fair practices and fair legislation, allowing responsible toy companies to continue to grow. TIE’s membership includes 18 international toy manufacturers, eight European national toy associations, who represent their local manufactures, and eight affiliate members.

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