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Explanatory memo
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The Danish Chamber of Commerce contribution to the European Commission's Public Consultation on the initiative: "Digital Services Act Package"

Introduction

The European Commission has launched a public hearing regarding the Digital Services Act Package (DSA). The Danish Chamber of Commerce has tried to answer the questionnaire the best we can. However, we find that the questionnaire does not sufficiently address the central issues as it covers too many areas, addresses too many stakeholders and most importantly we find the questions unclear and open for interpretation. The questionnaire is in our eyes unfit for preparing new legislation of this importance. We have therefore included this explanatory memo.

The Danish Chamber of Commerce is the second largest business organisation in Denmark, we represent 15.000 companies and 80 sector-specific business organisations. Our members range from retailers, hotels, restaurants to tele companies etc.

In the following we focus specifically on the problems related to online marketplaces selling goods from non-EU traders to European consumers, since we have found this topic very hard to address in the questionnaire

Today a huge part of the products from third countries is sold through both European and non-European online marketplaces to European consumers without any economic operator taking any role of liability in the product safety legislation nor the consumer and marketing regulation. This undermines the internal market, consumer safety and creates an unlevel playing field. The DSA should target this problem, which is of utmost urgency as the sale through online marketplaces are growing and due to COVID-19 has increased even further than expected, and as the online marketplaces are as such increasing their share of the online market.

Key messages and general principles

Legislation should not be targeted specific technologies or specific business models, as these constantly change in a dynamic and efficient market.

Companies with the same kind of activities, same effective role in the supply chains and the same kind of involvement in these activities should be treated equally and be covered by the same rules. This ensures a level playing field and predictability for the consumers. A certain business model or technology should not automatically be exempted from the rules in the internal market – nor the

digital single market. Nor should certain business models automatically be considered liable without a concrete examination of its activities.

This implies, that the question of *how* and *how much* an online platform is involved in the activities on the platform should determine which rules apply and to which degree the platform is liable for the activities on the platform's website. The notion of "active" involvement and "passive" involvement is therefore crucial.

The Digital Services Act is expected to include all types of platforms: search engines, booking platforms, dating sites and online marketplaces selling goods. However, activities and regulations vary much from area to area. The "one-size-fits-all" approach is therefore not suitable.

Article 14 of the e-commerce directive exempts service providers from liability granted that the service provider does not have knowledge of the illegal activity or information. Recital 42 in the e-commerce directive defines, that the exemptions from liability only cover cases "where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored" and in recital 43 it is stated that "a service provider can benefit from the exemptions when he is in no way involved with the information transmitted".

We still support this provision however it needs to be modernized and clarified. When the e-commerce directives' wording regarding liability was adopted in 2001 the internet and e-commerce was still relatively new. Neither Facebook nor online marketplaces existed.

The DSA should therefore strengthen and clearly define the distinction between passive and active platforms and for each area establish criteria's regarding what it takes to be passive and exempted for liability on that specific area. The "one-size-fits-all" approach is not suitable.

A vast majority of online marketplaces selling goods today take a very active role and offer services that go far beyond there mere hosting of information. These service include, but are not limited to the following: They decide how the products are presented on the marketplace, they activity promote the website, they profit from the sales, they process the payment, the name of the platforms is the most visible for the consumer, they select their sellers, they deliver the product, they handle the returns and many also offer customer service.

For online marketplaces selling goods from 3rd party traders it should be clear, that they are covered by the same rules for product safety, consumer protection, marketing practices, counterfeit, wee etc. as importers engaging in the same kind of activities as the online marketplace. . This is due to the simple fact that they are the gate that enables the third country seller/manufacturer to sell to the European Consumers as much as the importer that connect the consumer/the retailer with the third country seller/manufacturer. The products would never reach the EU consumers if it was not for the online marketplaces/the importers.

Regarding the sale of good in the internal market the EU has established legislation with clear requirements defining the liabilities of the different economic operators in the supply chain (producers, manufacturers, importers and distributors). Active online marketplaces should also comply with these rules.

However, since the rules are not clear-cut on this, we believe the Digital Services Act and the revision of the General Product Safety Directive should provide further clarity. The new and revised rules must make sure online marketplaces are required to:

- prevent dangerous products to be offered for sale on their platforms (proactive measures)
- react effectively when unsafe products are discovered (reactive actions), including:
    - Operate a 'notice, take-down & stay-down' policy'.
    - Recall unsafe products and inform consumers.
    - Cooperate with and inform Market Surveillance Authorities.
    - screen sellers and collect verified contact information (traceability requirements)

Consumers should be able to shop online in the internal market with companies that target the European consumers feeling ensured, that they are protected by EU law – also when they shop on an online marketplace. The notion that consumers should be educated better in order to avoid the risk of dangerous products and poor consumer rights is a wrong path to go – ensuring compliance can never be up to consumer choice – real enforcement and appropriate liability and responsibility for the involved actors has always been the principle in European legislation and should remain so.

Other jurisdictions than the EU is also increasingly becoming aware of this problem. In August 2020 a Californian appeals court has decided to hold a major online marketplace (Amazon) liable for damages when a consumer's laptop caught fire and gave the consumer third degree burns[1]. The Californian court stated: "Whatever the terms we use to describe Amazon's role, be it "retailer", distributor", or merely "facilitator" it was pivotal in bringing the product to the consumer" and ".....Amazon should be held liable if a product sold through its website turns out to be defective". US law resembles in this area EU law.

<u>Recommendations:</u>
In order to secure fair competition and consumer safety in the internal market we believe that it must be clarified in the Digital Services Act that the horizontal liability exemptions in the E-commerce directive article 14 and 15 does not apply to active platforms. Thus, in the course of the legislative debate on the DSA, the following key principles are paramount:

1) Legislation should not be targeted specific business models or technologies.
2) Regulation should be targeting the activity and businesses carrying out the same activities should follow the same rules.
3) Retain and strengthen the distinction between passive and active platforms in the legislation by setting up specific criteria targeted online platforms selling goods; and
4) Clarify that active platforms do not benefit from the liability limitation in Article 14.

[1] Link: https://cnb.cx/3gW8X9W

COVID-19 has accelerated the problem with unsafe products on marketplaces
The COVID-19 crisis has underlined and shed a light on the issue of unsafe, illegal and dangerous goods offered for sale on online marketplaces. It has especially made it clear for a larger part of national and EU decision makers that non-compliant and dangerous products are sold in large scale on the large online marketplaces. 3rd party sellers sold COVID-19 protection through big online marketplaces, that were non-compliant and as such did not protect as promised. . We find this unacceptable.

However, it is, unfortunately, not an issue only related to the COVID-19 crisis and protective equipment. The problem has existed long before Covid-19, and it applies for most – if not all – types of goods, such as toys, consumer electronics, cosmetics, medical products etc. sold from 3rd party sellers on the online marketplaces. Thus, it is crucial that the DSA addresses the issue to ensure consumer safety online and level playing field for law-abiding European firms in similar roles as the online marketplaces but with unequal liability requirements.

Multiple studies document the same alarming pattern of non-compliant and dangerous goods reaching European consumers through online marketplaces
The problem with non-compliant and dangerous goods sold on online marketplaces has been a large issue for a long time. Several studies have been conducted with the same alarming results, e.g. studies from Toy Industries of Europe (TIE) and BEUC. These studies concluded - among other things - that:

- In the TIE study[2], 97% of the toys bought on online marketplaces were non-compliant with EU law; and 76% of those tested were unsafe for children.
- In the BEUC study[3], two-thirds of 250 products bought on online marketplaces failed safety tests

The Danish Chamber of Commerce has carried out a study of 50 purchases of mainly toys on 3 large online marketplaces Amazon, Wish and AliExpress which documents the problem[4]. The study showed the following conclusions regarding the 50 products received:

- 46 did not comply with EU Product Safety rules
- 50 did not comply with consumer rights
- 0 showed a match between the seller on the platform and the sender of the package
- 0 contained an order form or an invoice
- 42 products are warned about and/or recalled by national and/or EU authorities. We have received no notification hereof from any of the 3 platforms.
- 38 identical products or products appearing identical to the recalled products are still available on the platforms as of the 18th of February 2020.
- 46 had a different value written on the package than the price paid.
- 0 of the 16 VAT-guilty packages had paid the VAT due to an undervaluation of the package

The results are alarming and stresses the need for new and better rules and enforcement of these.

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[2] Linkhttps://www.toyindustries.eu/ties-eu-toy-safety-the-problem-of-unreputable-sellers-on-online-marketplaces/
[2] Link
[3] Link
[4] https://www.danskerhverv.dk/politik-og-analyser/e-handel/study-of-unsafe-and-dangerous-products-on-platforms/

Consumer safety and liability requirements should be the same online as offline
The European Union and its member states have worked long and hard to establish rules on product safety, consumer rights, VAT etc., which stems from the principle that products should only be placed on the European Market if they comply with the sound and strict legislation aiming at protecting consumers and the Internal market.
As such it has also been a part of the legislation that if non-compliant and unsafe good were sold in EU the economic operator would be held accountable towards both the authorities and the consumers.

This principle is undermined in the current situation by allowing sellers from third party countries to sell goods directly to European consumers through European established online marketplaces who are in practice not held accountable for the sale of these products.

Jeopardizing this principle exposes the consumer to illegal and unsafe goods and outcompetes law-abiding European firms, who – regardless of their size – have many liability requirements in accordance with the role they play in the supply chain.

As the executive Vice-president, Margrethe Vestager, argued in the DSA week by Forum Europe on July 3rd 2020, consumers should be as secure online as offline: "Consumers shopping on high street stores would not think twice whether the toys they see on the shelves are dangerous, or whether that expensive leather bag might be fake. We need to have the same trust when shopping online."

The Californian court in Bolger v. Amazon.com also held that: "Because Amazon customers have an expectation of safety—and Amazon specifically encourages that expectation—it is appropriate to hold Amazon strictly liable when a defective product is sold through its website". This situation is the same in Europe.

Hence, the DSA should ensure that consumer safety and liability requirements are the same online as offline. This should be done by clarifying that companies with the same kind of activities and the same kind of involvement in these activities should be treated equally and be covered by the same rules.

The Voluntary Product Safety Pledge
Some of the online marketplaces – such as Amazon, eBay, AliExpress and recently Wish.com - have signed the European Commission's Voluntary Product Safety Pledge. However, there is a number of concerning issues with the Product Safety Pledge in our opinion:

1. <u>It is voluntary</u>

Throughout the pledge it is emphasized that the measures within are entirely voluntary. Ensuring consumers safety should not be a voluntary question, particularly since European firms does not have voluntary liability requirements.

As long as there is an economic incentive for these online marketplaces to sell unsafe goods and no incentive other than voluntary, reactive measures, consumer safety and level playing field is not ensured.

2. It is only reactive and not proactive

Even if the Product Safety Pledge became law, the issue would not be solved. The commitments in the pledge is only reactive – meaning that online marketplaces only need to have ex post measures for when a product is illegal and/or unsafe. With billions of products offered for sale, the authorities have no chance of controlling all of them and notify the online marketplace. It is the active online marketplaces that has the means to do proactive checks and therefore it should be their responsibility and liability.

Other European firms that play similar roles to the online marketplaces have proactive (as well as reactive) liability requirements. A Swedish and Finnish study shows that it is costly and burdensome to comply for other economic operators, and that this cost itself often exceeds the price of the products on online marketplaces. Hence, it is outcompeting European operators that they must be compliant with EU laws. As Margrethe Vestager has said: "Abiding by the law must not lead to a competitive disadvantage."

3. It has simply not been effective

Among other things the cosignatory of the voluntary product pledge has committed themselves to consult RAPEX and remove dangerous and recalled products. Our study[5] documents, that this does not happen. It is still possible to purchase goods appearing identical to the goods that have been alerted on e.g. RAPEX, which show the same violations of consumer rights and product safety.

The Danish Chamber of Commerce have also received marketing e-mails offering the dangerous products after the cosignatories have promised authorities to remove them from their websites. Anybody using 5 minutes to examine the large online marketplaces will be able to products that seem identical to non-compliant and dangerous products from non-EU sellers.

It is not transparent for consumers whether, or not, they are protected by EU consumer rights

When consumers buy goods from a non-EU trader on an online marketplace it is typically not transparent who their contract part is, which terms and conditions apply for the purchase and whether they are protected by EU consumer- and product safety law[6]. It is also rarely transparent where these rights can be enforced if a disagreement occurs.

It is a widespread misunderstanding that the omnibus directive solves this problem. The original proposal did propose more transparency, but these were watered out in the final directive. The omnibus directive obliges the online marketplaces to inform consumers whether EU consumer protection rules apply for the purchase if the third-party seller has the status of non-trader. However, there is no obligation if the third-party seller has the status as trader, which the large online marketplaces argues they have. The omnibus directive requires online marketplaces to inform consumers how obligations to the contract is shared between them and the third-party seller – but not which rights apply.

[5] https://www.danskerhverv.dk/politik-og-analyser/e-handel/study-of-unsafe-and-dangerous-products-on-platforms/
[6] This is described in detail in the Danish Chamber of Commerce's study.

It is striking that the information requirements do not contain the obligation to inform the consumer in a clear and easily understandable manner about the identity of the third party, where the third party is established, which terms and conditions apply for the purchase and whether they live up to EU consumer rights or not. These are essential information to the consumers especially when it comes to complaint handling and the possibility of actually enforcing their rights.

The new information requirements leave the consumers with the impression that the only case where Union consumer protection rules do not apply is when the seller is not a trader.

This new provision does nothing to inform the consumer about their contractual part and the choice of law governing the contract. It is unclear whether a third-party seller established in China can choose Chinese law as applicable law even though the contract has been entered into on an online marketplace established in an EU member state? Or whether all contracts between traders and consumers are EU consumer protection rules as long as the online marketplace is established inside the EU? And if the latter is the case, whether it is OK to refer consumers to complaint handling centers in HongKong or other non-EU institutions?

There is a need to clarify this.

Gatekeeper role

The DSA consultation also regards the “gatekeeper role” of large online platforms. When answering this question, it is important to have a more detailed definition of a “gatekeeper role”. We don´t have that, and it’s crucial to made clear what is understood by having a “gatekeeper role”. It should also be remembered that online platforms are very diverse in the services they offer, and a one-size-fits-all approach is not suitable. We also find it important to stress, that new regulation should build on the existing legislation and tools in the competition law.

We share the concern that certain large platforms can distort competition in the internal market. For example, the hotel booking platforms, where the market barriers for new portals is big, and the so-called "narrow" price parity clauses prevents that hotel rooms are sold cheaper elsewhere than on the platforms themselves. Therefore, the platforms do not have to worry about competition, and the consumer will not have any reason to look elsewhere for a hotel room, as the price is the same everywhere. Hence, it is meaningless for others to establish competing booking platforms – although they offer lower provision.

Likewise, the online marketplace Amazon has in a relatively small time period obtained a market share of up to 50 percent of the online market for goods in Germany, Austria and the UK. Despite the large market share, there is a risk that Amazon doesn’t meet the criteria for a ‘dominant position’ in the competition laws.

A gatekeeper role is normally connected to dominance and therefore will the ongoing revision of the COMMISSION NOTICE, on the definition of relevant market for the purposes of Community competition law, be important. By evaluating the market share the notice must take the payment with data into account in the future. In those situations, there is no traditional turnover, but it goes

without saying, that a big database is one of the tools to become a “gatekeeper”. This was proven in the Facebook decision from Bundeskartellamt this year.

Online marketplaces serve both the demand from sellers (dealers / manufacturers) who want to sell their goods, as well as the demand from buyers (end customers) who are looking for and want to buy goods. The right interaction between the large number of suppliers/products and the large number of customers combined with a lot of benefits for both parties is what makes an online marketplace attractive, but what kind of tools are the most effective ones may vary from industry to industry. Some tools are already mentioned in question 4.

Thus, it is essential that level playing field is restored and that companies with the same kind of activities and the same kind of involvement in these activities are treated equally and be covered by the same rules. This ensures a level playing field and predictability.

Workers’ rights, labour law and collective agreements
We do not believe that working conditions should be regulated in the DSA. EU has already adopted directives regulating working conditions across several areas – most recently with the Transparent and Predictable Working Conditions Directive, which lays down a large number of rules aimed at improving working conditions by promoting greater transparency and predictability in employment, while simultaneously ensuring the adaptability of the labour market.

We can refer to the response from DA Confederation of Danish Employers.

Kind regards,

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