

## The Sale of Unsafe Products on Online Marketplaces and Article 14 of the E-Commerce Directive

We have been asked by the Danish Chamber of Commerce to set out our assessment of the applicability of Articles 14 and 15 of the E-Commerce Directive to online marketplaces. This note sets out our advice in summary.

### Introduction

In February 2020, six European consumer groups tested 250 electrical goods, toys, cosmetics and other products bought from online marketplaces such as Amazon, AliExpress, eBay and Wish. Two thirds of the tested products failed EU safety laws.<sup>1</sup> The scale of the problem is vast, going far beyond 250 tested products. Indeed, the results from these tests are likely representative of the state of the inventory of products sold by third party sellers on online marketplaces.

By way of further illustration, a study of 50 test purchases conducted in 2019 by the Danish Chamber of Commerce showed that:

- none of the 50 sales complied with the relevant EU consumer rights legislation;
- 46 of the products delivered did not comply with EU product safety rules; and
- EU or Member State authorities had issued warnings and/or recalls in respect of 42 of the products purchased.<sup>2</sup>

Moreover, a recent study by the Toy Industries of Europe (TIE) on the availability of illegal and dangerous toys on online marketplaces shows the same pattern: 197 toys were bought from third-party sellers on four major online marketplaces. TIE found that 188 toys did not comply with EU rules and more than half the toys posed serious safety risks. These risks include choking, suffocation, strangulation, drowning, burns and exposure to harmful chemicals.<sup>3</sup>

How is this possible?

In short, Article 14 of the E-Commerce Directive limits the liability of online marketplaces when they host third party information. This safe harbour only applies in certain limited circumstances and does not apply to activities going beyond passive hosting of information.<sup>4</sup> The online marketplaces of today do far more than that. They store products for the third-party sellers, they market and promote the products, they suggest products that the consumer may be interested in based on her browsing history and they provide payment solutions – and they make a significant profit from doing so. **However, despite their active role, Article 14 is widely, but incorrectly, interpreted and applied to absolve online marketplaces from any legal liability when third parties use their platforms to sell products to consumers in the EU.**

Consequently, a vast number of unsafe products are sold to EU consumers via online marketplaces. The sales rarely comply with basic consumer rights requirements. The sellers are typically established in countries outside the EU and outside the reach of EU courts and law enforcement authorities. The online marketplaces enable, encourage and profit from these sales.

This note briefly illustrates the problem, sets out what the law is and how it is applied, and considers the effect of excluding, in practice, active online marketplaces from Article 14.

<sup>1</sup> See BEUC press release of 24 February 2020, available [here](#).

<sup>2</sup> A Study on the Safety of Products for Sale on Online Marketplaces and the Behaviour of Online Marketplaces, Danish Chamber of Commerce, published in 2020, available on the website of the Danish Chamber of Commerce, [here](#).

<sup>3</sup> TIE's investigation is available on its [website](#) and also referred to [here](#).

<sup>4</sup> See Judgment of 12 July 2011, *L'Oréal SA and Others v eBay International AG and Others*, Case C-324/09, EU:C:2011:474 (**eBay**) as well as Recital 42 of the Directive.

## What is the problem?

The problem, in a nutshell, is that a vast number of unsafe products are offered and sold to consumers in the EU. These products do not comply with EU products safety rules and their offer and sale do not comply with EU consumer rights law. Thus, while the EU has some of the world's strictest rules in place, these rules are not followed.

## Why is this happening?

The EU product safety regime is predicated on a natural or legal person in the EU being responsible for the compliance of the products with EU law, be that person a manufacturer, importer, distributor or seller.

Unsafe products are typically sold by third-party sellers via online marketplaces. The third-party sellers offering unsafe products on online marketplaces are often impossible to identify, and where they can be identified, it is often found that they reside outside of the jurisdiction of EU Member State courts and the reach of law enforcement. In particular, most of these products are sourced from China. By way of illustration, the names of the sellers are found in fine print on the marketplace listing, several names for the same seller are often listed and the address is frequently a PO box, "office farm" or, quite simply, untraceable. Moreover, in the course of its 2019 test purchases, the Danish Chamber of Commerce found that the seller's name as listed on the online marketplace in none of the cases corresponded to the name ultimately appearing on the package received containing the product ordered.<sup>5</sup>

In short, it is difficult – if not impossible – to prevent the sale of unsafe products and violation of EU consumer rights by pursuing the third-party sellers which put them up for sale.

The online marketplaces, for their part, say that they are passive hosts of information and, as such, fall within Article 14 of the E-Commerce Directive and thus attract no liability. However, it is very clear that the online marketplace business model has evolved far beyond such passive behaviour.

The role of online marketplaces is no longer merely to connect sellers and consumers. Instead they are active players, encouraging and enabling the sales, and profiting from the sales. The services offered by the online marketplaces are not simply limited to providing third country sellers the ability to list their products they wish to sell (which, if unsafe, would be bad enough) on the platform. Online marketplaces often go much further, providing marketing, storage and dispatch of the products as well as the provision of payment solutions, and handling returns and customer complaints.<sup>6</sup> Indeed, in many cases the online marketplaces require the sellers to use the services that they offer, such as their payment solutions, while charging a fee or commission for that privilege.

The provision of these services and the data collected in the process has earned these platforms billions of euros. Moreover, many online marketplaces often have significant decision-making power in terms of presentation, pricing and payment means. In many cases, the online marketplace resembles the *de facto* seller of the products. At any rate, it is often difficult, even for a knowledgeable consumer, to find the information about the third-party seller provided on the marketplace.

Quite clearly, these types of marketplaces play an active role and they have control over the information provided by the third country sellers and, indeed, often they even have control over the products. This should mean that they fall outside of Article 14.

At the same time, online marketplaces benefit from the sale by third-party sellers of these unlawful and dangerous products via their platform, either because the third-party sellers pay the online marketplace a fee for listing their items or the online marketplace charges a commission per sale. It follows that there is a clear financial incentive to turn a wilful blind eye to such activity and to advocate for escaping liability for doing so; and indeed, not just to turn a blind eye, but to encourage more third-party sellers to sell more products and more consumers to buy more products.

<sup>5</sup> A Study on the Safety of Products for Sale on Online Marketplaces and the Behaviour of Online Marketplaces, Danish Chamber of Commerce, published in 2020, available on the website of the Danish Chamber of Commerce, [here](#).

<sup>6</sup> See, for example, [Fulfilment by Amazon](#)

Consequently, online marketplaces take the position that Article 14 of the E-Commerce Directive shields them from liability when third parties use their services to sell products that do not comply with the relevant legislation, regardless of how active a role the marketplaces themselves play.

The upshot is that EU law on product safety and consumer rights is not complied with, as the traditional model envisaged by those regimes are predicated on an operator in the EU being held liable. In the case of third-party sellers offering unsafe products via online marketplaces, the third party sellers are located outside the EU while the online marketplaces say that Article 14 of the E-Commerce Directive precludes holding them liable for the non-compliance with EU product safety and consumer rights law.

While the wording of the law is fairly clear, widespread misunderstanding of the law and a lack of effective enforcement have enabled online marketplaces to build their businesses with little, or no, regard for European product and safety laws, consumer protection laws – or any other laws, for that matter.

## What is the law?

Article 14 of the E-Commerce Directive sets out a legal mechanism limiting the liability of certain platform businesses, where they store information relating to illegal products provided to them by third parties (a “safe harbour”). Article 15 prohibits Member States from imposing on these businesses a general obligation to monitor information.

### Article 14

Article 14 of the E-Commerce Directive limits the liability of online marketplaces when they host third party information.

The limitation does not apply to activities going beyond hosting. To be clear:

- **Direct liability:** Article 14 is not available where an online marketplace is directly liable for the sale of products not complying with product safety or consumer rights law.<sup>7</sup>
- **Active role:** Article 14 is not available where the online marketplace plays an active role such as to give it knowledge of or control over the information relating to the offers for sale of illegal products.<sup>8</sup> Specifically, the European Court of Justice (ECJ) has held that the safe harbour is not available where the online marketplace “*has provided assistance which entails, in particular optimising the presentation of the offers for sale in question or promoting those offers*”.
- **Conditions for passive hosting:** Article 14 is only available for passive platforms provided they meet the following conditions: (i) they do not have actual knowledge of illegal activity or awareness of facts or circumstances from which the illegal activity is apparent; **and** (ii) upon obtaining knowledge/awareness, act expeditiously to address such illegal activity.

### Article 15

Article 15 prohibits Member States from imposing on certain platforms a general obligation to monitor information. Specific monitoring obligations are permitted, as confirmed by Recital 47, as is monitoring pursuant to an order by national authorities.<sup>9</sup>

In addition, there is nothing in the E-Commerce Directive which prevents online marketplaces from undertaking such monitoring on a voluntary basis and indeed most online marketplaces have software solutions available to them for that very purpose.

More recently, the European Court of Justice has engaged with the question of the required specificity of the obligations imposed in the context of defamatory content in the *Facebook* case.<sup>10</sup> The Court ruled that Article 15 did not preclude a Member State

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<sup>7</sup> See *eBay*.

<sup>8</sup> See *eBay* and Judgment of the Court of 23 March 2010, *Google France*, Joined cases C-236/08 to C-238/08, EU:C:2010:159

<sup>9</sup> Recital 47: “*Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.*”

<sup>10</sup> Judgment of 3 October 2019, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, C-18/18, EU:C:2019:821

court from handing down an injunction requiring Facebook to remove content identical and equivalent to the defamatory content in question and on a worldwide basis.

Consequently, and importantly, the law is clear: online marketplaces are at liberty to take proactive measures to prevent the sale of dangerous and illegal products on their services as well as take proactive measures to ensure that they comply with EU consumer law.

Furthermore, it is clear that national authorities and courts can require online marketplaces, in accordance with national legislation, to implement specific, proportionate proactive measures.

## **What do online marketplaces say they do to address the problem of unsafe goods?**

Online marketplaces say they do two things:

- (1) they claim that they comply with Article 14, which requires them to act expeditiously to remove or disable the information relating to the illegal product upon receipt of a notification; and
- (2) they claim that they have in place a number of measures safeguarding consumer safety.

Despite all of these efforts, it is clear that a significant number of unsafe goods remain available on online marketplaces. It must follow that the measures are insufficient to ensure compliance with the law and consumer safety.

While the European Commission has facilitated voluntary initiatives, such as the 2018 Product Safety Pledge,<sup>11</sup> their design renders them ineffective. By way of illustration, the Product Safety Pledge commits the signatories to respond to notifications of unsafe products from Member State authorities within two working days and notifications from consumers within five working days. There are a number of problems inherent in this approach. We highlight two key issues. (1) The Product Safety Pledge places the burden of compliance on consumers and Member State authorities, not on the parties which enable, encourage and profit from the sale of the unsafe products – the online marketplaces themselves. Returning to the issue of distorted competition, in the case of traditional businesses, the burden of compliance lies squarely with the economic operator. (2) As the Danish Chamber of Commerce study demonstrates, the Product Safety Pledge does not work.

The fact is that as long as online marketplaces continue to benefit financially from the sale of unsafe products without running the risk of liability, they will continue to do so. In other words, Article 14, as applied in practice, has enabled online marketplaces to put their business interests and the interests of their shareholders before their compliance with EU rules on product standards and consumer rights and, more importantly, before consumer safety.

## **Why is the law not being applied correctly?**

The E-Commerce Directive dates from 2000. In the late 1990s, when the Directive was conceived, it made some sense to put in place legal mechanisms serving to bolster and protect a nascent internet services and e-commerce sector. The EU legislator wanted to enable the growth of a European internet industry which in turn would be able to benefit from a European internal e-commerce market. At that time, the services that existed were very different from those existing today. The E-Commerce Directive envisaged a neutral and passive hosting provider, which simply stored content, or hosted static websites.

It is plain that the drafters of the E-Commerce Directive did not envisage it applying to the types of services prevalent today.

Today, the e-commerce sector is no longer nascent. The ten largest companies in the world by market cap includes at least five in the e-commerce sector, including Amazon and Alibaba. They employ and contract an army of lawyers and lobbyists whose job it is to ensure that Article 14 remains on the statute books and is interpreted favourably. Even if these giants have established affiliates in Europe, we find no European companies on the list. In short, the services now benefiting from Article 14 look very

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<sup>11</sup> The Product Safety pledge was signed in 2018 by the European Commission and four major online marketplaces: Alibaba (for AliExpress), Amazon, eBay and Rakuten-France.

different than the services the E-Commerce Directive's safe harbour sets out to protect, and the reality is that some of the main beneficiaries of this piece of legislation are large, non-European online marketplaces, certain of which have demonstrated scant respect for European privacy norms, tax rules or competition law – let alone safety and consumer rights.

## The Digital Services Act

The wording of the law is clear. The Article 14 exemption from liability does not apply to activities going beyond passive hosting.

That said, the application of the law in practice is not optimal and it is not in line with the wording of the Directive or the case law from the European Court of Justice.

The Danish Chamber of Commerce, together with other Nordic trade associations, have therefore suggested that in the course of the legislative debate on the Digital Services Act, two key principles are paramount:

- (1) Retain and strengthen the distinction between passive and active platforms in the legislation; and**
- (2) Clarify that active platforms do not benefit from the liability limitation in Article 14.**

We note that excluding active online marketplaces from Article 14 does not mean that they automatically become liable for the sale of unsafe products and failures to comply with EU consumer law. Instead, the result would be that their liability falls to be considered under ordinary rules of liability – similarly to any other economic operator.

However, in order to avoid similar problems with the application of the law as is currently manifest, it is crucial that the activities of online marketplaces are looked at “in the round”, that is, there needs to be an understanding that the totality of the services provided by online marketplaces adds up to them being active.<sup>12</sup>

As set out above, self-regulation by the online marketplaces and even initiatives such as the Product Safety Pledge have been woefully inadequate in tackling the problem – the EU market continues to be flooded by unsafe products and consumer rights continue to be ignored. Consequently, it is clear that more, and more effective, action is needed.

Without the benefit of the liability limitation, active marketplaces will run the risk of being found liable when products not satisfying EU legislation are provided on their platforms – they will be put on a similar footing as EU importers, distributors and bricks and mortar stores. This would also serve to ensure that competition is not distorted and safeguard the principle of a level playing field.

We envisage two things happening as a result of these actions:

- (1) online marketplaces will start taking genuinely effective measures to prevent and address the sale of unsafe products – not only the insufficient measures they take now; and/or
- (2) online marketplaces will (need to) re-design their business model so as to ensure that they run a business that complies with EU legislation – much like the vast majority of reputable businesses in the EU.

**Is there another sector which the EU permits to disregard EU product safety and consumer law standards without the risk of any consequences?**

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<sup>12</sup> See further the Opinion of Advocate General Campos Sánchez-Bordona of 28 November 2019, *Coty v Amazon*, Case C-567/18, EU:C:2019:1031.