

ECCIA Position Paper on Digital Services Act (DSA)

Context and Opportunities

October 2020

THE DIGITAL SERVICES ACT – AN OPPORTUNITY TO BUILD A SAFE AND TRUSTED DIGITAL ECOSYSTEM

Context – Online counterfeiting as an unwanted consequence of the development of the Internet

Over the past 20 years, the Internet has grown to create unprecedented and innovative opportunities for businesses to develop their activities and reach out to their customers. However, this development also created challenges both for consumers and businesses which, if not addressed, will hinder the achievement of Europe’s digital single market.

The recrudescence of illegal products online is one of those main challenges. In particular, online counterfeiting is a fast-growing problem both in size and in scope that increasingly poses a risk to consumers’ safety, as well as significant damage to a wide range of economic actors, from the brands whose products are fraudulently copied, to small and medium-sized businesses who suffer from unfair competition, to governments and national economies who lose in terms of tax revenue.

This phenomenon became particularly worrying in the context of the COVID-19 pandemic, as the surge in e-commerce encouraged rogue operators to sell non-authentic, often unsafe goods online to unsuspecting consumers, with potentially serious consequences for their health and safety.

Why does the current framework not work?

Although it would be unfair to attribute the rise in counterfeiting to the development of the Internet, the growing presence of counterfeits online has certainly been enabled by online intermediaries - including online marketplaces, social media, advertising services, domain name registrars, search engines, and instant messaging apps – as they feel as if they are protected from any liability under current legislation.

Indeed, the existing legal framework – the e-commerce directive – has made it difficult for brands, intermediaries and enforcement authorities alike to meaningfully curb the growth of online counterfeiting, for several reasons:

- **For some online intermediaries, the exemption of liability creates a disincentive** – if not legal, at least commercial – **to proactively fight illegal content or to communicate in details about the measures taken.** Indeed, in the absence of a horizontal obligation to prevent the appearance (and reappearance) of online counterfeiting, intermediaries who invest in proactive measures run the risk of moving online counterfeiting to their less scrupulous competitor.

- **The entire framework is based solely on reactive measures.** Brand owners are forced to monitor the Internet and request infringing products to be removed one by one, while the Internet is being flooded with thousands of illegal products every day. In addition, even the products that are taken down almost instantly reappear, which makes it very inefficient for brand owners to enforce their rights and keeps exposing consumers to the risk of buying potentially unsafe products.
- **Proactive measures fall outside the scope of the law.** Because there is no horizontal obligation for intermediaries to implement proactive measures, there is a **complete lack of transparency and accountability with regards to the measures being taken.**
- As a result, **voluntary measures do not work.** Initiatives such as the Memorandum of Understanding on the sale of counterfeit online failed to curb the global presence of counterfeiting online, primarily because there is no legal obligation for intermediaries to join such an initiative, and because those who take part in it only do the minimum to avoid the threat of legislation.
- Because of the **lack of identity verification obligation on platforms and websites,** counterfeiters can operate under fake identities, which make it extremely difficult for rights owners and even more for consumers to take meaningful actions against them.

The DSA as a unique opportunity to rebalance responsibilities in the fight against counterfeiting

The DSA offers a long-awaited opportunity to introduce a set of minimum legal obligations for online intermediaries to compel them to act more efficiently, following the European Commission's principle of « what is illegal offline is illegal online ».

In order to do so, ECCIA members encourage European decision-makers to adopt the following measures in the DSA:

1) Extension of the scope to non-EU sellers

European rules and standards should apply to all providers and sellers who offer services to European consumers, regardless of where they are established. Such a principle would not only strengthen consumer protection online, but also create a level-playing field for EU and non-EU sellers to play by the same rules.

2) Introduction of a “Know Your Customer” principle

The anonymity that rogue traders benefit from online is at the heart of the proliferation of online counterfeiting. It is virtually impossible to identify sellers, which makes it very complicated for consumers, rights owners and authorities to seek settlement or obtain redress. Online sellers should be treated as offline sellers. The DSA should include an obligation for online intermediaries to verify the identity of their sellers, as well as the possibility to provide that information to right owners when needed to enforce their rights, in accordance with the provisions of the GDPR.

In addition, we would also encourage the European Commission to provide clear guidance on the need for expedited and standardized access to accurate domain name registrant data, which constitutes a key pillar for brand enforcement and consumer protection in the fight against fraud and illegal trade online.

3) Harmonisation of notice and takedown procedures (including a «staydown» principle)

Our members dedicate considerable resources to detect and flag illegal goods on online platforms. Their experience is that the current system of notice and takedown is unfortunately both time consuming and inefficient. In addition, their efforts are strongly undermined by the fact that illegal listings almost instantly reappear after being taken down.

The notice and takedown procedures could therefore be improved through:

- the creation of a procedure enabling right holders to notify multiple infringing listings at the time.
- the implementation of a single standard notification process for all platforms with a harmonised “trusted flagger” status for all infringements related to the intellectual property rights that they own.
- The introduction of transparency and reporting obligations for online platforms. They should also regularly share with right owners and national authorities detailed information about the illegal offerings they have proactively removed. This information should at least include the number and nature of offerings, the number of accounts suspended, etc.
- the implementation of staydown measures to ensure that illegal offerings that have been taken down do not reappear online, including through the adoption of clear measures against repeat infringers.

4) Creation of an obligation for online intermediaries to implement proactive measures («duty of care»)

The constant increase in the volume of illegal content and goods online and the increasing risk it poses to consumers' health and safety emphasise the need to complement the existing framework, based solely on reactive measures, with the introduction of a horizontal obligation for online intermediaries to adopt proactive measures aimed at preventing illegal products from reaching their consumers.

As they stand between buyers and sellers, online intermediaries have the unique capacity to prevent the publication of these offerings in the first place and their reappearance afterwards by using already-available preventive measures.

The COVID-19 crisis has also demonstrated that, when under pressure from European and national governments and when their reputation is at stake, in particular regarding the health and safety of consumers, online platforms have no difficulties taking swift and efficient measures to limit the appearance of illegal products online.

Technological solutions are widely available and using them should be a normal cost of doing business.

In addition, it is important to note that preventing the appearance of illegal goods online is about protecting consumers, not about restricting free speech. This is not about stopping individuals from expressing themselves, but about making sure online sellers only sell goods which are legal and secure, and that information shared by sellers is as trusted online as it is in physical stores. Sellers' freedom to conduct business should not mean that they can sell illegal goods and should not come at the expense of consumers' safety.

Finally, it should be noted that the introduction of a so-called "Good Samaritan" principle, currently advocated by online platforms, would certainly not achieve the results sought by the introduction of a duty of care for online platforms. Indeed, while this principle has been in place for decades in the US, our members do not see any decrease in the presence of counterfeiting on the US market, to the contrary. Similarly, while the Commission introduced a Good Samaritan principle in its 2018 Recommendation on Illegal Content Online, there has been no improvement in Europe either. As a matter of fact, the Good Samaritan principle only extends the exemption of liability to platforms who adopt proactive measures, without creating any kind of transparency or accountability with regards to the measures nor any real incentive for platforms who chose not to implement any proactive measures to start doing so.

5) Inclusion of domain name registrars in the scope of the DSA

All online intermediaries providing services used in connection with infringing activities should have an obligation to cease providing these services to the infringer upon valid notice from a rights owner, when technically feasible. Currently, many service providers, such as domain name registrars, ignore such notices, as they feel immune when doing so under current legislation.

6) Informing consumers who have bought illegal products

When online platforms become aware of the sale of illegal goods and remove the latter upon receipt of a request for takedown, it is essential that they inform consumers who have bought the product prior to its removal.

We are convinced that this should be part of the “after-sale” of a takedown request, and would constitute a cornerstone aspect of consumer awareness and protection.

¹ European Commission recommendation of 1.3.2018 on measures to effectively tackle illegal content online

About ECCIA

ECCIA is composed of six European high-end cultural and creative industries organisations - Altagamma (Italy), Circulo Fortuny (Spain), Comité Colbert (France), Gustav III Committee (Sweden), Meisterkreis (Germany) and Walpole (UK)- who between them represent over 600 brands and cultural institutions.

Based on art, culture and creativity, ECCIA’s work is underpinned by continuous innovation, a relentless focus on quality, highly skilled employment and strong exports abroad. Our members strive for the highest quality in all they do, from products and services all the way to the experience offered to consumers.

Find out more about ECCIA : <http://www.eccia.eu/>