

# **Consumer Protection in the Platform Economy**

**Prof. Dr. Christoph Busch, Maître en Droit**

Director, European Legal Studies Institute, University of Osnabrück

Visiting Fellow, Information Society Project, Yale Law School

# **Agenda**

**I. Introduction**

**II. Digital Services Act**

**III. Product Liability of Online Marketplaces**

**IV. Conclusion and Outlook**

# **Agenda**

**I. Introduction**

**II. Digital Services Act**

**III. Product Liability of Online Marketplaces**

**IV. Conclusion and Outlook**

# **Agenda**

## **I. Introduction**

## **II. Digital Services Act**

## **III. Product Liability of Online Marketplaces**

## **IV. Conclusion and Outlook**

# EU Digital Services Act Package

On 15 December 2020, the European Commission proposed two new Regulations as part of its European Digital Strategy:

## **Digital Markets Act (DMA)**

- Ex ante regulation of digital gatekeepers
- List of Do's and Don'ts for gatekeepers
- Fines up to 10% of global annual turnover

## **Digital Services Act (DSA)**

- Liability of providers of online intermediary services
- Due diligence obligations for service providers
- Fines up to 6% of global annual turnover

# EU Digital Services Act Package

On 15 December 2020, the European Commission proposed two new Regulations as part of its European Digital Strategy:

## **Digital Markets Act (DMA)**

- Ex ante regulation of digital gatekeepers
- List of Do's and Don'ts for gatekeepers
- Fines up to 10% of global annual turnover

## **Digital Services Act (DSA)**

- Liability of providers of online intermediary services
- Due diligence obligations for service providers
- Fines up to 6% of global annual turnover

## DSA: Scope of application

- DSA applies to providers of online **intermediary services** (Art 2 lit. f)
  - “Mere conduit” services
  - “Caching” services
  - “Hosting” services (including **online platforms**)
- DSA applies to intermediary services provided to recipients in the EU **irrespective of the provider’s place of establishment** (Art 1(3))

## **DSA: Different due diligence obligations for different categories of actors („risk-based approach“)**

<b>Very large online platforms (VLOPs)</b> - Reaching 10% of EU population	<b>Art 25-33 DSA</b>
<b>Online platforms</b> - Social networks, online marketplaces	<b>Art 16-24 DSA</b>
<b>Hosting services</b> - Cloud storage, online platforms	<b>Art 14-15 DSA</b>
<b>Providers of intermediary services</b> - Mere conduit, caching, hosting (Art 2(f))	<b>Art 10-13 DSA</b>



## DSA: Due diligence obligations for online platforms

- Providers from outside the EU must designate a **legal representative in the EU** to be addressed by authorities (Art 11)
- User-friendly **notice-and-action** mechanism for illegal content (Art 14)
  - Priority for notices submitted by **trusted flaggers** (Art 19)
- **Traceability of traders:** Know your business customer (“KYBC”) (Art 22)
- Transparency requirements for **online advertising** and **algorithms** used for recommendations + opt-out from profiling-based recommendations (Art 24, 29, 30)
- Additional obligations for very large online platforms, including independent **audit** of their **risk management** measures (Art 26-28) and **data access** for vetted researchers (Art 31)

# DSA: Due diligence obligations for online platforms

## *Article 22*

### *Traceability of traders*

1. Where an online platform allows consumers to conclude distance contracts with traders, it shall ensure that traders can only use its services to promote messages on or to offer products or services to consumers located in the Union if, prior to the use of its services, the online platform has obtained the following information:
  - (a) the name, address, telephone number and electronic mail address of the trader;
  - (b) a copy of the identification document of the trader or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>50</sup>;
  - (c) the bank account details of the trader, where the trader is a natural person;
  - (d) the name, address, telephone number and electronic mail address of the economic operator, within the meaning of Article 3(13) and Article 4 of Regulation (EU) 2019/1020 of the European Parliament and the Council<sup>51</sup> or any relevant act of Union law;
  - (e) where the trader is registered in a trade register or similar public register, the trade register in which the trader is registered and its registration number or equivalent means of identification in that register;
  - (f) a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

# DSA: Due diligence obligations for online platforms

116TH CONGRESS  
2D SESSION

## H. R. 6058

To amend the Trademark Act of 1946 to provide for contributory liability for certain electronic commerce platforms for use of a counterfeit mark by a third party on such platforms, and for other purposes.

---

IN THE HOUSE OF REPRESENTATIVES

MARCH 2, 2020

Mr. NADLER (for himself, Mr. COLLINS of Georgia, Mr. JOHNSON of Georgia, and Mrs. ROBY) introduced the following bill; which was referred to the Committee on the Judiciary

### US SHOP SAFE Act

117TH CONGRESS  
1ST SESSION

## S. 936

To require online marketplaces to collect, verify, and disclose certain information regarding high-volume third party sellers of consumer products to inform consumers.

---

IN THE SENATE OF THE UNITED STATES

MARCH 23, 2021

Mr. DURBIN (for himself, Mr. CASSIDY, Mr. GRASSLEY, Ms. HIRONO, Mr. COONS, and Mr. TILLIS) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

### US INFORM Consumers Act

# DSA: Due diligence obligations for online platforms

## *Article 22 Traceability of traders*

1. Where an online platform allows consumers to conclude distance contracts with traders, it shall ensure that traders can only use its services to promote messages on or to offer products or services to consumers located in the Union if, prior to the use of its services, the online platform has obtained the following information:
  - (a) the name, address, telephone number and electronic mail address of the trader;
  - (b) a copy of the identification document of the trader or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>50</sup>;
  - (c) the bank account details of the trader, where the trader is a natural person;
  - (d) the name, address, telephone number and electronic mail address of the economic operator, within the meaning of Article 3(13) and Article 4 of Regulation (EU) 2019/1020 of the European Parliament and the Council<sup>51</sup> or any relevant act of Union law;
  - (e) where the trader is registered in a trade register or similar public register, the trade register in which the trader is registered and its registration number or equivalent means of identification in that register;
  - (f) a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

## Changing concept of marketplace

- Online marketplaces, app stores
- Social commerce:  
social media + e-commerce
- Conversational shopping:  
messenger, smart speaker
- Livestream shopping:  
streamed e-commerce

# DSA: Due diligence obligations for online platforms

## *Article 22 Traceability of traders*

1. Where an online platform allows consumers to conclude distance contracts with traders, it shall ensure that traders can only use its services to promote messages on or to offer products or services to consumers located in the Union if, prior to the use of its services, the online platform has obtained the following information:
  - (a) the name, address, telephone number and electronic mail address of the trader;
  - (b) a copy of the identification document of the trader or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>50</sup>;
  - (c) the bank account details of the trader, where the trader is a natural person;
  - (d) the name, address, telephone number and electronic mail address of the economic operator, within the meaning of Article 3(13) and Article 4 of Regulation (EU) 2019/1020 of the European Parliament and the Council<sup>51</sup> or any relevant act of Union law;
  - (e) where the trader is registered in a trade register or similar public register, the trade register in which the trader is registered and its registration number or equivalent means of identification in that register;
  - (f) a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

## Scope of due diligence obligations?

### Traders:

- Verify identity of traders
- Verify registration requirements (e.g. short-term rentals)

Automated verification:  
Regulation by API

# DSA: Due diligence obligations for online platforms

## *Article 22 Traceability of traders*

1. Where an online platform allows consumers to conclude distance contracts with traders, it shall ensure that traders can only use its services to promote messages on or to offer products or services to consumers located in the Union if, prior to the use of its services, the online platform has obtained the following information:
  - (a) the name, address, telephone number and electronic mail address of the trader;
  - (b) a copy of the identification document of the trader or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>50</sup>;
  - (c) the bank account details of the trader, where the trader is a natural person;
  - (d) the name, address, telephone number and electronic mail address of the economic operator, within the meaning of Article 3(13) and Article 4 of Regulation (EU) 2019/1020 of the European Parliament and the Council<sup>51</sup> or any relevant act of Union law;
  - (e) where the trader is registered in a trade register or similar public register, the trade register in which the trader is registered and its registration number or equivalent means of identification in that register;
  - (f) a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

Platforms as “regulatory intermediaries”

## Scope of due diligence obligations?

### Traders:

- Verify identity of traders
- Verify registration requirements (e.g. short-term rentals)

### Products:

- Consult EU rapid alert system for dangerous products (Safety Gate)
- Inform buyers of illegal products and in case of product recalls

# DSA: Due diligence obligations for online platforms

## *Article 22 Traceability of traders*

1. Where an online platform allows consumers to conclude distance contracts with traders, it shall ensure that traders can only use its services to promote messages on or to offer products or services to consumers located in the Union if, prior to the use of its services, the online platform has obtained the following information:
  - (a) the name, address, telephone number and electronic mail address of the trader;
  - (b) a copy of the identification document of the trader or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>50</sup>;
  - (c) the bank account details of the trader, where the trader is a natural person;
  - (d) the name, address, telephone number and electronic mail address of the economic operator, within the meaning of Article 3(13) and Article 4 of Regulation (EU) 2019/1020 of the European Parliament and the Council<sup>51</sup> or any relevant act of Union law;
  - (e) where the trader is registered in a trade register or similar public register, the trade register in which the trader is registered and its registration number or equivalent means of identification in that register;
  - (f) a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

EU Product Safety Pledge (2018)



Australian Product Safety Pledge (2020)



## Scope of due diligence obligations?

### Traders:

- Verify identity of traders
- Verify registration requirements (e.g. short-term rentals)

### Products:

- Consult EU rapid alert system for dangerous products (Safety Gate)
- Inform buyers of illegal products and in case of product recalls

# DSA: Liability of online platforms

## *Article 5 Hosting*

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service the service provider shall not be liable for the information stored at the request of a recipient of the service on condition that the provider:
  - (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
  - (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.
2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.
3. Paragraph 1 shall not apply with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.
4. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

## **Broad liability shield for platforms with some exceptions:**

- Actual knowledge of illegal activity or illegal content
- Failure to act expeditiously upon obtaining such knowledge
- Impression that the offer is provided by the platform itself or under its control (“apparent control”)



# DSA: Liability of online platforms

## *Article 5 Hosting*

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service the service provider shall not be liable for the information stored at the request of a recipient of the service on condition that the provider:
  - (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
  - (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.
2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.
3. Paragraph 1 shall not apply with respect to liability under consumer protection law of online platforms allowing consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average and reasonably well-informed consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.
4. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

## **Broad liability shield for platforms with some exceptions:**

- Actual knowledge of illegal activity or illegal content
- Failure to act expeditiously upon obtaining such knowledge
- Impression that the offer is provided by the platform itself or under its control (“apparent control”)

How to assess “apparent control”?

# DSA: Liability of online platforms



3. *For the assessment of whether the online platform has that control or authority or decisive influence over the trader, relevant criteria shall include:*

a) *the trader-consumer contract is concluded exclusively through facilities provided on the platform;*

b) *the online platform operator withholds the identity of the trader or contact details until after the conclusion of the trader-consumer contract;*

c) *the online platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the consumer to the trader;*

d) *the terms of the trader-consumer contract are essentially determined by the online platform operator;*

e) *the price to be paid by the consumer is set by the online platform operator;*

f) *the online platform is marketing the product or service in its own name rather than using the name of the trader who will supply it;*

## Broad liability shield for platforms with some exceptions:

- Actual knowledge of illegal activity or illegal content
- Failure to act expeditiously upon obtaining such knowledge
- Impression that the offer is provided by the platform itself or under its control (“apparent control”)

European Parliament, IMCO Committee, Draft Report on the DSA, 28 May 2021, Amendment 73

# DSA: Liability of online platforms

## *Article 5a*

*Liability of online platform allowing consumers to conclude distance contracts with traders*

*1. In addition to Article 5(1), an online platform allowing consumers to conclude distance contracts with traders shall not benefit from the liability exemption provided for in Article 5 if it does not comply with the obligations referred to in Articles 11, 13b, 13c, 14, 22 or 24a.*

*Such liability exemption shall also not benefit the online platform if it does not comply with specific information requirements for contracts concluded on online marketplaces, in line with Article 6a(1) of the Directive 2011/83/EU of the European Parliament and of the Council.*

## **Further exclusions from the liability privilege?**

- Failure to comply with due diligence obligations
- Failure to provide consumers with key information items

# **Agenda**

**I. Introduction**

**II. Digital Services Act**

**III. Product Liability of Online Marketplaces**

**IV. Conclusion and Outlook**

# Product liability of online marketplaces

## Restatement (Second) of Torts § 402A (1965)

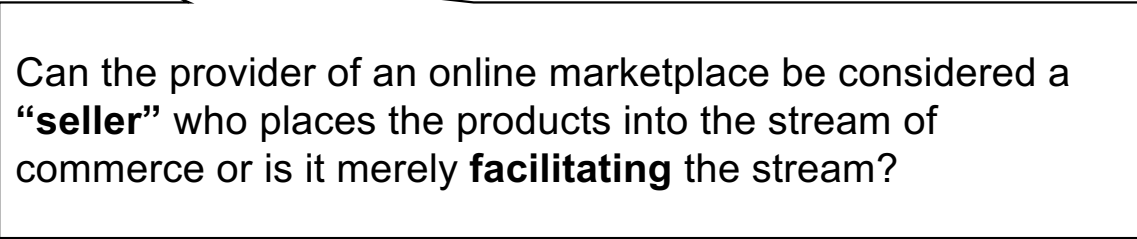
### Special Liability of **Seller** of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

[...]



Can the provider of an online marketplace be considered a “**seller**” who places the products into the stream of commerce or is it merely **facilitating** the stream?

# Product liability of online marketplaces

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JACOB T. EBERHART,  
Plaintiff,

-v-

AMAZON.COM, INC.,  
Defendant.

“First, regardless of what attributes are necessary to place an entity within the chain of distribution, the **failure to take title to a product** places that entity outside.”

”Second, as it is not a distributor, **Amazon is better characterized as a provider of services.**”

Eberhart v. Amazon.com, Inc. 325 F Supp. 3d 393 (S.D.N.Y. 2018)

# Product liability of online marketplaces

Filed 8/13/20

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANGELA BOLGER,

Plaintiff and Appellant,

v.

AMAZON.COM, LLC,

Defendant and Respondent.

D075738

(Super. Ct. No. 37-2017-  
00003009-CU-PL-CTL)

**“Amazon had **control** over both the product at issue and the transaction that resulted in its sale to Bolger. It constructed the Amazon website, accepted Lenoge as a third-party seller, marketed Lenoge’s offer for sale, took possession of the replacement battery, accepted Bolger’s order for the battery, billed her for the purchase price, and shipped her the battery in Amazon-branded packaging. But for Amazon’s own acts, Bolger would not have been injured. **Amazon’s own acts, and its control over the product in question, form the basis for its liability.**”**

Bolger v. Amazon.com, 53 Cal.App.5th 431 (Cal. Ct. App. 2020)

# Product liability of online marketplaces

Filed 4/26/21	
CERTIFIED FOR PUBLICATION	
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA	
SECOND APPELLATE DISTRICT	
DIVISION EIGHT	
KISHA LOOMIS,	B297995
Plaintiff and Appellant,	(Los Angeles County
v.	Super. Ct. No.
AMAZON.COM LLC,	BC632830)
Defendant and Respondent.	

“Application of strict liability in this case may **incentivize Amazon to expand its safety compliance requirements** to more products and thus further the goal of product safety.”

[...]

As to consumer compensation, Amazon may be the **only member of the distribution chain reasonably available** for an injured consumer to recover damages.

[...]

As to **loss spreading**, Amazon can adjust the **costs of consumer protection between it and third party sellers** through its fees, indemnity requirements, and insurance.”

Loomis v. Amazon.com, 2021 WL 1608878 (Cal. App. Ct. April 26, 2021)



# Product liability of online marketplaces

CALIFORNIA LEGISLATURE—2021–22 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1182**

---

**Introduced by Assembly Member Stone  
(Coauthors: Assembly Members Cunningham, Lorena Gonzalez,  
and Wicks)**

February 18, 2021

---

An act to add Section 1714.46 to the Civil Code, relating to civil liability.


LEGISLATIVE COUNSEL'S DIGEST

AB 1182, as introduced, Stone. Product liability: products purchased online.

# Product liability of online marketplaces

**What type of control is necessary to justify product liability of online marketplaces?**

- Physical control over the **product**
- Algorithmic control over the **purchasing process**



Effect of regulatory design on competition between online marketplaces?

# **Agenda**

**I. Introduction**

**II. Digital Services Act**

**III. Product Liability of Online Marketplaces**

**IV. Conclusion and Outlook**

## Further reading

- C. Busch et al., The ELI Model Rules on Online Platforms [2020] Journal of European Consumer and Market Law 61-70. [https://www.elsi.uni-osnabrueck.de/research\\_paper\\_series.html](https://www.elsi.uni-osnabrueck.de/research_paper_series.html)
- C. Busch, Rethinking Product Liability Rules for Online Marketplaces: A Comparative Overview, ELSI Osnabrück Working Paper 1/2021, <http://ssrn.com/abstract=3784466>
- C. Busch, Regulation of Digital Platforms as Infrastructures for Services of General Interest, WISO-Diskurs 04/2021, <https://library.fes.de/pdf-files/wiso/17836.pdf>
- C. Busch & V. Mak, Putting the Digital Services Act in Context, [2021] Journal of European Consumer and Market Law 109-115.

# **Consumer Protection in the Platform Economy**

**Prof. Dr. Christoph Busch, Maître en Droit**

Director, European Legal Studies Institute, University of Osnabrück

Visiting Fellow, Information Society Project, Yale Law School

E-Mail: [christoph.busch@uos.de](mailto:christoph.busch@uos.de)

Twitter: [@christophbusch](https://twitter.com/christophbusch)