

Online Marketplaces and products from sellers in 3rd countries



Background

In recent decades, e-commerce has grown explosively.

The Nordic countries were the first European countries to discover and act on the growing consumer interest in e-commerce.

On that basis a tradition where individual brands, stores and retail-chains run their own webshops, where created; usually the webshop mirrors what can be found in their physical stores.

In other countries the webshop-culture might not have been as widespread as early as in the Nordics. Therefore, companies, in for example Germany and Southern Europe, have made extensive use of primarily Amazon's online marketplace to sell their products.

Amazon was already large in these markets when the appetite for e-commerce really took off, particularly during Covid-19. Online marketplaces have been a tool for these and smaller businesses to reach consumers without having their own webshop.

What is an online marketplace?

An online marketplace is a platform where a business can sell its goods in a showcase/on the platform, while the sales agreement is made between the business-seller and the consumer. The online marketplace (the platform) is essentially a meeting place connecting businesses and consumers¹.

Online marketplaces can be a safe place and a tool to make competition efficient

When it comes to selling goods and reaching out to consumers online, marketplaces are an excellent tool, that promotes businesses and makes competition more efficient by giving consumers a wide range of choices on one platform. Smaller companies can reach many consumers without opening their own webshop.

Moreover, there is no critical regulatory challenge concerning consumer protection, product safety or environmental regulation when dealing with products sold by EU businesses to EU consumers.

These products and their packaging are subject to either importer or manufacturer responsibility, which can be enforced by national enforcement authorities in EU member states.

Zalando is an example of an online marketplace that only facilitates products manufactured in or imported into the EU.

When is an online marketplace undermining the internal market and the green transition?

The challenge arises when an online marketplace, such as Amazon, Shein, Temu, LightInTheBox, etc. facilitate the sale of goods to EU consumers on behalf of sellers based in 3rd countries, such as China, India, Bangladesh etc.

¹ 'Online marketplace' is defined in the Digital Services Act (regulation 2022/2065) as "a provider of online platform allowing consumers to conclude distance contracts with traders"

In these situations, there are currently no regulations ensuring that there is a business in the EU that is responsible for ensuring that the products are legal under EU law before the products are sold.

The loophole exists because the regulation on product safety and environmental regulation have failed to bring the legislation into a digital time period and has kept the same definitions of terms like “placed on the market”, “making available”, “economic operators”, “importer” etc. as has been applied for decades.

E.g. Article 11 in General Product Safety Regulation (GSPR) states *“Before placing a product on the market, importers shall ensure that the product complies with the general safety requirement laid down in Article 5 and that the manufacturer has complied with the requirements set out in Article 9(2), (5) and (6)[...]”*

In relation to environmental protection and circular economy, the new Ecodesign Regulation (ESPR) stipulates in Article 29 that *“importers shall, with regard to products covered by a delegated act adopted pursuant to Article 4, only place on the market products that comply with the requirements set out in the applicable delegated acts”*.

A commercial importer of goods has the obligation to ensure that the products are legal **before** the products are put up for sale – whether the sale happens physically or online.

However, due to the lack of recognition of online marketplaces as economic operators (commercial importers) the products that are facilitated between sellers in 3rd countries and EU consumers through online marketplaces are not considered to be imported into the EU by a company, and thus the products and packaging are not captured by the system that has been built-up over 50 years in the EU. The consumer is in this case considered to be the importer.

What have we worked for until now?

Since approx. 2017, the Danish Chamber of Commerce has worked intensively to ensure that online marketplaces, which position themselves commercially as intermediaries between sellers in 3rd countries and EU consumers, are regulated on an equal footing with businesses that import goods from sellers and manufacturers in 3rd countries.

On this basis, we, together with the Danish Consumer Council (Tænk), the European Consumer Organization BEUC, and Toy Industries of Europe proposed, during the discussion and adoption of the Digital Services Act (DSA), that the two business models should be equalized.

The EU has granted the highest consumer and environmental protection in the world for decades and has recently set out great ambitions for a green transition. Already at the time before the proposal for the DSA we saw a significant risk that we would end up in a situation where the internal market in the EU would be undermined.

Therefore, we argued that an online marketplace that facilitates products from sellers in 3rd countries to EU consumers needs to be defined as an economic operator with proactive obligations of ensuring compliance of the products from 3rd countries and as such on an equal footing with traditional trading companies.

Unfortunately, the EU legislators did not follow our suggestion.

Despite support from MEP Christel Schaldemose, who served as the rapporteur for the proposal in the European Parliament, and support from all parties in the Danish parliament and Danish government, the result was that online marketplaces were granted almost the same exemptions from proactive obligations and liability as Facebook, Twitter, and other platforms that facilitate

content rather than physical products. The latter platforms obviously need to be regulated under consideration of values such as freedom of speech and expression. These values are not relevant to consider when it comes to distribution of physical products.

Why can the challenge with non-compliant products and packaging not be solved by enforcing the DSA?

While the DSA deals relevantly with classic consumer legislation, e.g. rules on advertising, misleading of consumers etc. in relation to online marketplaces, it fails to deal relevantly with the issue on distribution and supply of products from 3rd countries to European consumers through online marketplaces.

Rules on advertising and misleading of consumers relate to commercial communication which is a sort of immaterial content in the same category as other immaterial contents such as text, audio-visual or visual content. The content itself can do no physical harm to either the consumers or the environment.

Rules on product safety and environmental issues on the other hand relate to the compliance of physical products and the protection of consumers and environment. Negligence of the proactive obligations in product safety or environmental regulation can be harmful as soon as the products or packaging are in the hands of a consumer or become part of a recycling process.

The fundamental principle in the DSA is that the platforms, including online marketplaces, covered by the DSA have a shield against liability and a right to invoke a “no obligation to monitor”.

This “no obligation to monitor” that the platforms (including the online marketplaces) have been granted, runs diametral contra to the obligation of importers and other economic operators to ensure the compliance of products from 3rd countries *before* the products are placed on the EU market.

There is in fact a fundamental obligation in the product and environmental regulation to monitor the compliance of the products and packaging before they are sold. A fundamental principle that the product safety and environmental legislation that regulate the distribution of products and packaging to Europe is based on.

Further – in relation to subject of responsibility - the EU product safety and environmental protection system is built on a principle that there shall always be a company (an economic operator) in the EU that can be held responsible for having ensured that products sold commercially to EU consumers are legal, safe and compliant with EU law, before they are sold.

This principle is undermined by not regulating online marketplaces as economic operators with proactive obligations in relation to the compliance of products and packaging.

This is the reason why we consider the regulation of online marketplaces as part of the DSA to be a mistake, when it comes to obligations in relation to product safety and environment. The minor adjustments that have been made in the DSA especially for online marketplaces, e.g. in article 31 do unfortunately not solve the challenge.

Why does it not solve the challenge that there are strict rules on VLOPs in the DSA?

Both from the Commission and from other angles reference is made to the strict rules on Very Large Online Platforms (VLOPs) when solutions of the challenge of TEMU, Shein etc. are discussed.

However, application of those rules requires that the online marketplace has more than 45.000.000 users pr. month in the EU. Very few online marketplaces meet that requirement.

The fact is that any existing webshop that today have suppliers of products and packaging from 3rd countries and which the webshop will need to ensure complies with the EU legislation on product safety and environmental protection, will be able to transform their webshop into an online marketplace.

In that case the only difference would be that the consumer enters into the contract with the supplier from the 3rd country instead of the webshop – now online marketplace – and the webshop (now online marketplace) will be covered by the DSA instead of the importer responsibilities in the product and environmental regulation. And as such the webshop (now online marketplace) would not need to spend resources on ensuring compliance of the products and packaging before it is sold.

What has happened on the commercial market after the adoption of the DSA?

Shortly after the adoption of the DSA, Temu stormed the European market. With the dominance Temu has gained², and the low degree of compliant products found on Temu, it is clear that there remains a need to equalize online marketplaces and economic operators, e.g. importers in terms of proactive responsibility for the compliance of the products and packaging entering the EU from 3rd countries.

Several analyses show that Temu is now the second most-used e-commerce facility among Danish consumers.

Furthermore, according to the European retail organization EuroCommerce, the number of packages sent to the EU via online marketplaces has increased tenfold in just a few years, from 400 million to approximately 4 billion annually.

It is important to note that most of the online marketplaces used by Danish and European consumers are in fact established in the EU. This is the case for Temu, Amazon, Shein, Wish, etc.

Therefore, it would practically not be an issue to regulate them in the same way as European importers of products from 3rd countries and to also enforce the obligations against them.

Consequences of not introducing more proactive obligations for online marketplaces facilitating products and packaging to EU consumer

The huge amount of non-compliant products facilitated by online marketplaces, like Temu, on behalf of sellers in 3rd countries constitutes a problem and a risk for consumers³.

² Since its launch in September 2022, Temu has become one of the most popular marketplaces globally in a relatively short period of time: Statista states that the number of visits to Temu amounted to around 668.2 million in July 2024. The number of visits increased by around 20 percent compared to the previous month, <https://de.statista.com/statistik/daten/studie/1387811/umfrage/anzahl-der-visits-pro-monat-von-temu/>

Analysis from the Danish Chamber of Commerce shows that in June 2024 Temu is the second largest online marketplace in Denmark: <https://www.danskerhverv.dk/presse-og-nyheder/nyheder/2024/juni/nye-tal-om-temu-vakker-opsigt-det-er-simpelthen-uhort/>

³ The Danish Consumer Council (Tænk), August 19th 2024: <https://taenk.dk/forbrugertiliv/elektronik-og-digitale-tjenester/undersogelse-varer-fra-temu-fejler>

Toy Industries of Europe (TIE), February 20th 2024: <https://www.toyindustries.eu/95-of-toys-bought-from-new-online-platform-break-eu-safety-rules/>

Toy Industries of Europe (TIE), June 17th 2020: <https://www.toyindustries.eu/ties-eu-toy-safety-report-the-problem-of-unreputable-sellers-on-online-marketplaces/>

For example, toys, cosmetics, and electronics can be directly dangerous to consumers due to hazardous substances or poor construction.

Further, all the European companies that are – opposite online marketplaces – categorized as economic operators and as such have a number of proactive obligations in the product safety and the environmental regulation, are subject to a distortive competitive situation. This unfair situation makes the companies less effective and harms the opportunities to compete on an international level.

Last but not least, the negligence of categorizing online marketplaces as economic operators and such as part of the supply chain has significant consequences for the green transition and the effects of the Green Deal. The impact of the new green legislation risks being undermined when such a large portion of the products and packaging entering the EU are not connected to an economic operator, that is responsible for proactively ensuring the compliance of products or packaging.

Suggestions for solutions (in short)

Main initiatives required

Online marketplaces that facilitate the sale of products from sellers and factories in 3rd countries to EU consumers must be categorized as economic operators and as such treated the same way as importers of products and packaging from 3rd countries.

The online marketplaces that facilitate products from sellers in 3rd countries must have the same proactive responsibilities as importers for ensuring that the products or packaging comply with EU law before products or packaging are put up for sale in the EU.

This can be achieved through two models:

- 1) An omnibus regulation defining the obligations of online marketplaces that facilitate the sale of products from sellers or factories in 3rd countries so that their obligations match those of importers. An omnibus regulation is a regulation that changes a large number of regulations or directives at once. This omnibus regulation should cover all product safety and relevant environmental laws.
- 2) The adoption of a new section in the Digital Services Act that introduces these proactive obligations for online marketplaces regarding the sale of products from sellers and factories in 3rd countries to EU consumers.

Additional initiatives to help level the playing field

Elimination of the Customs threshold

To counter the competitive advantage that online marketplaces from 3rd countries achieve by pricing products below the EU customs threshold, the threshold should be completely removed.

This would ensure that all products, regardless of value, are subject to the same customs rules. The online marketplaces should be responsible for paying customs duty. If the customs duty is not paid, the goods cannot be released from customs.

Furthermore, online marketplaces should be required to document to customs authorities that the products are legal before they can be released from customs. This is also a requirement for importers of products from third countries.

This work should be addressed in connection with the ongoing negotiations on the EU Customs Code.

Some online marketplaces have already argued that they would happily accept to have more financial obligations whereas they refuse to accept proactive obligations that would require them to staff up on the compliance department.

However, it is very important to be aware that the ambitions in the EU to be frontrunners on the green transition and ensure a high level of consumer protection can only be fulfilled, if the online

marketplaces are met with the same obligations as already imposed on traditional trade companies.

Blocking of Online Marketplaces

In order to ensure the effectiveness of the above-mentioned proposals, it would be natural to adopt connected legislation that allows for a cross-Europe blocking of the access to online marketplaces that predominantly facilitate products or packaging that do not comply with EU law.

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