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NOTE

From:	DK Delegation
To:	Delegations

Subject:	Digital Services Act: Danish amendment to articles 5 and 7 – establishing liability for products sold on online marketplaces
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Danish amendment to article 5 and 7 – establishing liability for products sold on online marketplaces

The PRES CA has taken a step in the right direction in giving online market places selling products from third country sellers obligations to ensure safe products being sold to European consumers.

But the DSA should be more ambitious by ensuring the principle of “what is illegal offline should also be illegal online” and should be enforceable.

It is a problem today that there is no one in the Union to be held responsible in cases where online marketplaces make it possible for traders to sell their products and services from third countries directly to European consumers. There are several cases where European consumers end up with dangerous and illegal products and suffer from the system, that we have today.

DK finds the DSA should ensure that there is always a part in the EU to be held accountable for goods whether they are sold offline or online. The preferable solution would be not to exclude online market places from a responsibility to comply with EU legislation as done in article 5 and then add in article 24a that online market places are responsible for the compliance of goods made available to EU-consumers.

However, this solution would be a major adjustment at this stage in the negotiations. Therefore, we suggestion to exclude online market places with third country goods from the exemption of liability in Article 5 and it should be ensured that online market places are held responsible and the market places should further be obliged to monitor their market place in order to remove illegal products. Doing so, it should be possible in the relevant sector specific legislations (for example product safety regulation, chemicals regulations REACH and CLP, toys safety directive, regulations for pesticides, biocides and foods etc.) to put in place the relevant liability to target the issues raised in the right and appropriate way.

DK is of the opinion that this is the second best solution as a horizontal liability for the market places will ensure that regardless of the goods sold, the online market places will have the same responsibility. This will not necessarily be the case if the liability is set in sector specific legislations.

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 the liability under Product safety rules, including the general product safety regulation¹ and Union harmonisation regulation on products as covered by the Market Surveillance Regulation (1020/2019), annex 1² or under the Control Regulation for Food and Feed law³ where an online market place intermediates products from third country sellers.

3.—Paragraph 1 shall not apply with respect to liability under consumer protection law where an online marketplace presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online marketplace 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.

Article 7

No general monitoring or active fact-finding obligations

1. No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.

1-2. Paragraph 1 shall not apply to online marketplaces intermediating products from third country sellers as regards to the monitoring of illegal products on the online market place.

¹ Directive 2001/95/EC and future Regulation [...] on General Product Safety

² Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products

³ Regulation (EU) 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products