



FESI position on the Digital Services Act

FESI, the **Federation of the European Sporting Goods Industry**, welcomes the publication by the European Commission of the new “Digital Services Act” (DSA) proposal¹ which aims to better protect consumers online through the establishment of a clear accountability framework for online platforms.

While this proposal is most certainly a step towards a more secure digital ecosystem for users, FESI believes that some provisions could be further improved in order to build a robust Digital Services Act which will effectively ensure that “**what is illegal offline is also illegal online**”².

In view of the future discussions on the DSA proposal, **FESI calls on the EU institutions to take the following recommendations into consideration:**

1. Complementing the notice and actions mechanism by **stay down measures to tackle repeat infringers**
2. Extending the “**know your business customer**” principle to all intermediaries
3. Clarifying the **trusted flaggers** regime
4. Clarifying the rules on **online advertising transparency**
5. Strengthening **consumers’ information**
6. Making **proactive and preventing measures** mandatory for all intermediaries

FESI represents some **1 800 sporting goods companies employing more than 700 000 people in Europe**. Our members’ focus is to offer innovative products and satisfy their consumers’ needs. While the development of e-commerce has been highly beneficial for the expansion of their operations, our brands are also **severely impacted by the presence and sale of illegal products online**³, which has direct consequences on their businesses, employees, and consumers. In fact, **7,7 % of sales** are lost in the sporting goods sector annually

¹ <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>

² <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF>

³ “Illegal products” means any product which infringes intellectual property rights or criminal and/or civil legislation.

due to counterfeiting, which translates into **EUR 1,1 billion of revenue, 6 579 direct and indirect jobs losses, and EUR 0,2 billion in government revenue**⁴.

FESI believes that the new “Digital Services Act” (DSA) represents a great opportunity to adopt a **powerful transparency and a clear accountability framework for online platforms, thus creating a safe and sustainable digital environment for all**. As Commissioner Breton stated *“Online platforms have taken a central role in our life, our economy and our democracy. With such a role comes greater responsibility”*⁵. While there is no doubt that digital services have become essential to the daily life of businesses and citizens, they are also posing serious risks to consumers’ security and safety by facilitating the flow of illegal content and products. FESI welcomes all the efforts that have already been taken by the European Commission to address these very risks, particularly the MoU on the sale of counterfeit goods on the internet (MoU)⁶, which has helped to promote collaborative approaches and voluntary practical solutions to curtail the offering of counterfeit goods online. Correspondingly, FESI believes that the MoU can play a valuable and complementary role to the obligations set out in the DSA. To make Europe fit for the digital age, the EU must ensure that “what is illegal offline is also illegal online” stays the guiding principle of the future regulatory framework.

We understand and welcome the horizontal approach taken by the European Commission to ensure that all types of illegal content are covered by the text. However, this objective should not prevent addressing some specific problems such as **the sale and promotion of illegal content online, especially counterfeit products**. Other countries, in particular the United States, are also currently strengthening the measures to prevent the sale of illegal goods online⁷. In view of the current discussions within the European Parliament and the Council on the European Commission’s DSA proposal, FESI would like to already draw the attention on some key recommendations that we think should be taken into consideration.

1. Complementing the notice and actions mechanism by stay-down measures to tackle repeat infringers

FESI strongly welcomes the introduction in the DSA proposal of a new **harmonized notice and action mechanism (N&A) under Article 14**, that will enable the notification of multiple specific items of allegedly illegal content through a single notice by electronic means. Indeed, until then, self-regulation by online platforms themselves was not sufficient to ensure a rapid and effective withdrawal of illegal products.

However, we regret that the notice and action mechanism does not come with stay-down measures that would effectively prevent illegal content that is identical and equivalent to previously removed content from reappearing online at later stage. Platforms should be encouraged to set up “blacklisting” mechanisms using content recognition tools in order to block repeat infringers.

⁴ Figures of the report reflect the presence of counterfeit goods in the EU marketplace (online and offline):

https://euipo.europa.eu/tunnelweb/secure/webdav/guest/document_library/observatory/documents/reports/2020_Status_Report_on_IPR_infringement/2020_Status_Report_on_IPR_infringement_en.pdf

⁵ https://ec.europa.eu/commission/presscorner/detail/en/IP_20_962

⁶ https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement/memorandum-understanding-sale-counterfeit-goods-internet_en

⁷ US Report on Combating Trafficking in Counterfeit and Pirated Goods; Executive Order on Ensuring Safe & Lawful E-Commerce for US Consumers, Businesses, Government, Supply and IP Rights; the Shop Safe Act 2020

Once the repeat infringer's account has been blacklisted/suspended, the online platform should make it effectively impossible for the seller to further distribute counterfeits on the platform nor communicate with potential customers. Without such stay-down measures, we fear that the newly introduced notice and actions mechanism will be insufficient to effectively tackle the presence of illegal content online in a sustainable way.

Moreover, the current reaction time following a notification differs a lot from a platform to another, from 12 hours to a month. **FESI believes that the term “without undue delay” mentioned at paragraph 5 could be more strictly defined as a short period not exceeding 48 hours.** Without stricter limits for hosting services providers, including online platforms, to act upon a notification, an item notified as a counterfeit and potentially dangerous may continue to be sold multiple times to consumers.

We also believe that the possibility for recipients of a notice to contest certain decisions through the platform **internal complaint-handling system defined under Article 15 paragraph 2 (f) should not be open for repeat infringers.** Such a system could create a hurdle for rights owners if actions are taken against notorious and persistent counterfeiters.

FESI also welcomes **Article 20, which lays down specific measures against repeat infringers** (“Measures and protection against misuse”). Indeed, currently, sellers that were identified and notified by rightsholders continue to resurface online. While some platforms are voluntarily playing the game through efficient proactive and preventive measures, most platforms continue to fail to identify these repeat infringers, even further to rightsholders' multiple notifications.

However, we **regret the soft approach currently proposed in the DSA when it comes to “suspending” the provision of services to repeat infringers “for a reasonable period of time”.** First, it should be clarified that depending on the number of warnings, the account should not only be suspended, but also permanently blocked. For the sake of clarity, it could be useful to specify the type of information as well to be considered as “manifestly illegal content” (article 20 paragraph 1): for example, operating under multiple accounts or uploading pictures with blurred logos should be considered as a “misuse” and lead to permanent restriction of the seller. The provision “reasonable period of time” should also be further clarified as a one-month period to be sufficiently deterrent.

We would therefore recommend **amending Article 14 to make sure that the notice and action mechanism is complemented with an efficient stay-down regime, that would allow illegal products that have been removed after a short period of time not exceeding 24 hours, not to reappear online.** The **internal complaint-handling system defined under Article 15 should not be open to repeat infringers.**

Article 20 should also be strengthened to make sure all online platforms apply strong and deterrent policies against the misuse of services by repeat infringers, including the permanent suspension of the infringing accounts.

2. Extending the Know Your Business Customer principle to all intermediaries

FESI supports the proposal to include a **“Know Your Business Customer” provision under Article 22** of the DSA (“Traceability of traders”), which would represent a major step forward in preventing illegitimate business to offer their products and services to EU consumers.

However, we regret that the approach proposed by the European Commission is limited to marketplaces only (“online platform allowing consumer to conclude distance contracts with traders”). Nowadays, it is impossible for a company to provide goods and services online without having a domain name, being hosted, or without advertising or payment services. It therefore seems logical that these intermediaries, who have a direct relationship and get benefits from other businesses, should be required to know who is doing business on their services. All intermediaries shall ensure that their business customers identify themselves prior to the use of their services, based on a due diligence assessment that the information provided are correct. In case this information is manifestly wrong or if the intermediary is notified that the business customer is not who it claims to be, then the intermediary in question (whether a marketplace or a simple hosting service provider) should suspend its services until the business customer has complied. When vetting “new” business customers, intermediaries should also check against the list of infringers already removed from their services and information related to such business customers to make sure they do not infringe the law again.

We would therefore recommend **extending Article 22 to make sure that ALL intermediary services comply with the Know Your Business Customer obligations.**

3. Clarifying the “Trusted flaggers” regime

FESI is positive about the inclusion of a **“Trusted flaggers” regime under Article 19**, which would oblige online platforms to ensure that notices submitted by entities granted the status of trusted flaggers are treated with priority and without delay.

However, we believe that it is not sufficiently clear at the moment as to what falls within the scope of the term “entity” which can be awarded the status of trusted flagger. The Commission’s Recommendation on measures to effectively tackle illegal content online defines “trusted flagger” as *“an individual or entity considered by a hosting service provider to have particular expertise and responsibilities for the purposes of tackling illegal content online”*⁸ In our perspective, individual rightsholders that are subject to regular violation of their IPRs are the best placed to carry out this mission since they are perfectly knowledgeable about the issues at stake and possess the required expertise and knowledge to detect, identify and notify illegal content. Moreover, the long-standing experience of the MoU against online counterfeiting shows that online platforms themselves already consider rights owners as experts in relation to the IPRs they hold and rely on their assistance when removing offers of counterfeit goods.⁹

We would therefore recommend **clarifying that individual rightsholders are covered by Article 19 and can therefore be awarded the trusted flaggers status.** For the sake of effectiveness, it should also be specified under Article 19 that a notice submitted by a trusted flagger should be treated in a short time period not exceeding 24 hours.

⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018H0334&from=FR>

⁹ <https://ec.europa.eu/docsroom/documents/42701>

4. Clarifying the rules on online advertising transparency

FESI is pleased to see the introduction of **online advertising transparency measures under Article 24**, which we believe will have a positive impact on advertisers' brand safety efforts and help prevent fraudulent advertising. Indeed, online advertising has substantially evolved over the recent years and represents a major revenue source for many digital services, as well as other businesses present online. At the same time, revenues from online advertising as well as increased visibility and audience reach are also a major incentive for potentially harmful intentions, including selling illegal products.

FESI also welcomes **Article 30 which would create additional online advertising transparency for very large online platforms** (VLOPs) by making it mandatory for VLOPs to develop a public ad repository. However, FESI is concerned that the proposed repositories could have unintended consequences on competition in the digital single market, as VLOPs could be obliged to publicly disclose information related to the marketing strategies of sporting goods companies (such as budgets, target audiences), much of which is commercially sensitive.

We would therefore recommend that any additional transparency measures foreseen under **articles 24 and 30 not have the unintended consequence of VLOPs having to publicly disclose commercially sensitive information.**

5. Strengthening consumers' information

While FESI welcomes the European Commission's ambition to **enhance consumer protection in the online ecosystem** through the DSA, we believe that consumers' right to be informed should be further strengthened to really meet this objective. Indeed, it is now undeniable that online marketplaces play a key role in the dissemination of counterfeit products. According to a study analyzing online shopping behaviors¹⁰, 30% of consumers have inadvertently bought fake products online over the last five years and 26% of those purchased counterfeits were coming from online marketplaces. Moreover, a recent testing experience carried out by the European Consumer Organization shows that 66% of 250 tested products were found unsafe¹¹. Not to mention the obvious and concerning example of the COVID-19 crisis, which has seen the spread of rogue traders advertising and selling personal protective products to consumers, which were allegedly preventing or curing the virus. Fake sporting goods, in particular hardware goods such as helmets or climbing equipment, can also be extremely dangerous to the health of consumers who are unaware of their counterfeit nature.

In such cases, only the online marketplace operator has the necessary information (e.g. information about the seller, information regarding the product, transaction history, contact details, etc.) to alert those of its users who have bought the product, and prevent damage. Better informed consumers are also more able to avoid buying counterfeits again and being tricked by rogue sellers. This information could simply take the form of an email sent to the consumer.

In that context, FESI calls for the **inclusion in the DSA of a specific provision making it mandatory for any online marketplace operator who has come to learn (through a notification from a right holder, a trusted flagger, or on its own) that a product on its platform is a counterfeit, to inform consumers which have previously bought the corresponding product, that this product is a counterfeit and that its use could cause harm.**

6. Making proactive and preventing measures mandatory for all intermediaries

FESI welcomes the fact that the DSA seeks to encourage online intermediaries to take own-initiative measures aimed at detecting, identifying and removing, or disabling of access to, illegal content. However, **we regret that Article 6 only encourages such preventive measures on a voluntary basis** through the introduction of the so-called “Good Samaritan” provision. Encouraging online platforms to take proactive measures within the context of liability exemption is no longer sufficient. Online platforms need a clear role on the process to identify and ban bad actors and repeated offenders, acting together with rights-holders to effectively prevent counterfeits from entering the market. Therefore, we recommend amending article 6 to tie intermediaries’ liability to a negligence-based regime. Under such a regime, intermediaries would benefit from their liability exemption only if they do implement preventive and proactive measures to detect, remove illegal products, identify, and ban repeated offenders, and use all the technology at their disposal to screen sellers and products. Failure to do so, on the contrary, would engage their liability. This obligation could be flexible and associated with the size of the intermediary, the nature of its activities or the level of involvement with product sale (warehousing, fulfilment, shipping for instance).

FESI understands the need to maintain some safeguards in the DSA to ensure the protection of freedom of expression. However, it should be clear that preventing the appearance of illegal products online is not about restricting the freedom of expression. It is about protecting consumers from products that could cause severe harm to them, not about preventing them to speak. Protecting the fundamental rights of users online is essential, but this should not undermine the other key objective of the DSA, which is to keep users safe from illegal goods, content, or services. Therefore, we believe that **maintaining the prohibition of general monitoring obligation under Article 7 will not help modernize the current online ecosystem and fight against the presence of illegal products.**

In this respect, we are satisfied VLOPs are being imposed new obligations to carry out risk assessment and mitigation measures as stated in **Articles 26 and 27**. However, we believe that smaller platforms should also be held responsible of assessing and mitigating the risks stemming from the functioning and use made of their services. We believe this would not add too much burden on smaller platforms as the risk assessment should be proportionate to their size. As it stands, the proposed system is incomplete as it would only prevent risks for consumers buying goods on very large platforms only.

We also believe that the provision of “reasonable, proportionate and effective” **mitigation measures should be more strictly defined under Article 27** as mandatory obligations to avoid leaving ample room for interpretation and hence weakening this much-welcome measure.

We would therefore recommend **amending article 6 to clarify that intermediaries can benefit from their liability exemption only if they implement proactive and preventive measures**. We also recommend **moving Articles 26 and 27 to section 1 of Chapter 3 setting out the due diligence obligations applicable to all providers of online services** in order to effectively build a transparent and safer EU environment. **Article 27 should be amended to make it clearer that the mitigation measures are mandatory** and not at the own appreciation of the intermediary. **Article 7 on the prohibition of general monitoring obligation should be removed.**

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About FESI

Founded in 1960 FESI - the Federation of the European Sporting Goods Industry represents the interests of approximately 1.800 sporting goods manufacturers (85% of the European market) through its National Sporting Goods Industry Federations and its directly affiliated member companies. 70-75% of FESI's membership is made up of Small and Medium Sized Enterprises. In total, the European Sporting Goods Industry employs over 700.000 EU citizens and has an annual turnover of some 81 billion euro.
