The Digital Services Act: Making the Internet Fair Again

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Due diligence obligations for platforms

Liability of platforms

Personalised advertising
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Personalised advertising
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\textsuperscript{50};

(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\textsuperscript{51} 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.
SHOP SAFE Act

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

INFORM Consumers 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
Changing concept of marketplace

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

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   (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
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

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**Traceability of traders**

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   (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\(^{[15]}\) 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?

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**Product Safety Pledge (2018)**

**Proposed Amendment to Korean E-Commerce Act (March 2021)**
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California AB 1182: Product liability
(Products purchased online)
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")

**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.
How to assess “apparent control”?

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")
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:

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- Impression that the offer is provided by the platform itself or under its control ("apparent control")
Further exclusions from the liability privilege?

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

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.

Draft IMCO Report, 28 May 2021
Amendment 73
Further exclusions from the liability privilege?

- Failure to comply with due diligence obligations
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**Article 5a**

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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.

Draft IMCO Report, 28 May 2021 Amendment 73

Korean Act on Consumer Protection in Electronic Commerce (No. 6687)

- Duty to inform about the identity of the trader (Art. 20(1))
- Joint liability of platform if information is incorrect, unless platform has observed due diligence (Art. 20-2)
Further reading


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