

DSA - Enabling Trust, Efficiency and Maintaining Balance

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1. INTRODUCTION

Markets have existed for millennia and given generations a space to exchange goods and services for remuneration. The Internet has brought about online marketplaces which consumers around the world can partake in. However, online marketplaces introduce challenges with trust, efficiency and striking a balance between interests of stakeholders. In this essay, I will explore how Chapter III, Section 4 of the Digital Services Act (DSA) addresses these challenges.

are able to seek recourse when things go south. For example, according to the *Nemo Dat* rule, a buyer who bought stolen goods will have to forfeit title of the goods to the original owner³, leaving the buyer with a loss. With Article 32(1), consumers will have access to trader's information, allowing them to serve legal claims⁴ on traders to recoup that loss. Article 30(3) allows online platforms to act as "gatekeepers", exercising an "enforcement" function⁵ to keep out errant traders by suspending their access to the platform. This is integral in ensuring that consumers can continue to trust traders on the platform and transact with peace of mind.

2. ENABLING TRUST

Trust is integral in any contractual relationship. The seller promises to deliver goods in satisfactory condition, while the buyer promises to make payment for the goods. Thus, trust promotes confidence and encourages commerce¹. Article 30(1), 30(2) and 30(3) of the DSA places responsibility on the online marketplace to verify the identity of the traders². This allows consumers to purchase products, knowing that they

Article 31(2) and 31(3) requires traders to clearly label their products, including "any sign identifying the trader such as the trademark" and for online platforms to "make reasonable efforts" to identify illegal products⁶. This gives consumer the confidence that they are purchasing a *bona fide* product. The ostentatious luxury boutiques can nary be confused with a back alley shop. However virtual shopfronts look alike, hence the added responsibility is required. In *L'Oréal SA v eBay International AG*, it was re-

¹ Anthony J Bellia, 'Promises, Trust, and Contract Law' (2002) 47 *The American Journal of Jurisprudence* 25, pp. 30

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1, art. 30(1), 30(2), 30(3)

³ Chris Monaghan, 'The Status of the Seller in the Age of eBay' (2011) 20(2) *Information & Communications Technology Law* 103, pp. 105

⁴ Colin Scott, 'Regulatory Innovation and the Online Consumer' (2004) 26(3 & 4) *Law and Policy* 477, pp. 480

⁵ Scott (n 4), pp. 497

⁶ reg 2022/2065 (n 2), art. 31(2), 31(3)

⁷ Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* ECLI:EU:C:2011:474, para. 35

vealed that two out of seventeen listings were counterfeits⁷. The High Court of Justice's opinion was that eBay could have done additional filtering, although it was not legally obligated to⁸. With Article 31(2) and 31(3), online platforms are now legally required to "make best efforts" to verify trader's information, thus taking a step forward in consumer protection.

Article 32 will also protect consumers who were previously blissfully unaware that they purchased illegal goods. The notification obligation requires online platforms to notify these consumers on their right to seek redress⁹. However, It is poignant to note that the DSA does not harmonize what constitutes as illegal. In Hungary, it is illegal to sell contact lenses without an accompanying examination from an optometrist¹⁰. This same restriction may not apply in other jurisdictions, creating a soft conflict in laws, and requiring online platforms to tread carefully to satisfy both Member States.

3. EFFICIENCY AND THE FREE MARKET

Article 29(1) excludes traders with fewer than 50 employees and annual revenue below EUR 10 million from any further requirements in this section^{11 12}. The motivation is probably to give small businesses a chance to grow without overburdening them with regulatory requirements. To ensure "efficient allocation of resources" and enhance consumer welfare, protecting market competition is crucial¹³. Requiring traceability

of traders is an "entry barrier", resulting in less competition in the long term¹⁴. The *De minimis* doctrine also supports this stance. Requiring online platforms to perform due diligence checks on small traders with only a handful of transactions a month may be too onerous with little benefit.

4. BALANCING STAKEHOLDER'S INTERESTS

Article 30(4) provides an avenue for traders to lodge complaints against unfair discrimination or withdrawal of services. This is crucial as certain online platforms may be overly keen to "grant remedies in excess of legal rights" in a bid to "build up reputation"¹⁵. Also, online platforms have their own commercial priorities which may present a conflict when they are asked to serve as "quasi-regulatory vehicles"¹⁶. Furthermore, competitors may abuse the process by frivolously reporting competing products through fake accounts. Thus, it is important that the ambit of the DSA includes the opportunity for traders to seek redress, so as to give traders a fair playing field.

The DSA also remains silent on Consumer to Consumer transactions. A trader is defined as someone operating in relation to his "trade, business, craft or profession"¹⁷. An individual selling his used possessions will fall outside of that definition, and hence consumers who purchase from other consumers (C2C) may not derive any protection from the DSA. This is tricky

⁸ *L'Oréal SA v eBay International AG* (n 7), para. 48-49

⁹ reg 2022/2065 (n 2), art. 32(1)

¹⁰ Case C-108/09 *Ker-Optika bt v ÁNTSZ Dél-dunántúli Regionális Intézete* ECLI:EU:C:2010:725, para. 13

¹¹ reg 2022/2065 (n 2), art. 29(1)

¹² Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36, art. 2(1)

¹³ Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97, para. 13

¹⁴ guidelines 2004/C 101/97 (n 13), para. 114, 115

¹⁵ Scott (n 4), pp. 482

¹⁶ Diane Rowland, Uta Kohl, and Andrew Charlesworth, *Information Technology Law* (5th, 2016), pp. 122-123

¹⁷ reg 2022/2065 (n 2), art. 3(f)

as individuals may not have the expertise to evaluate the condition of used goods intended for sale. Perhaps we can take a leaf from the doctrine of misrepresentation and codify it into regulation. If the buyer can prove that the seller would reasonably have known of the defect and deliberately omitted it in the listing, I propose that the buyer should have a right to damages. For example, if the buyer of a used car, alleged to be accident free, subsequently stumbled upon footage of that exact car in an accident with the seller at the wheel, then it could be argued that the seller made a fraudulent misrepresentation.

5. CONCLUSION

In the past, online platforms could exclude liability in their terms and choose not to intervene in user disputes¹⁸. However, Chapter III, Section 4 of the DSA has put an end to that by requiring that online platforms check for illegal products, maintain accurate trader information, and furnish said information to affected consumers. More could be done in harmonizing illegality of products and consumer protection in C2C transactions. Nonetheless, Chapter III, Section 4 of the DSA represents a big step forward in consumer protection and efficiency in online transactions.

¹⁸ Christine Riefa, 'To Be or Not to Be an Auctioneer?' (2008) 31 *Journal of Consumer Policy* 167, pp. 185

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