

This paper is part of the eBay DSA Series – for more information on eBay and the series, you can have a look at our inaugural blog post [here](#).

Our recommendations

- The horizontal nature of the DSA must be safeguarded. Consequently, the core principles of the e-Commerce Directive, notably **the intermediary liability exemption and the prohibition on general monitoring, must be upheld** for all digital services regulated under the DSA. In particular where it concerns **platforms providing pure third-party marketplace services, like eBay**. These platforms have no access to or control over the goods sold by their third-party sellers.
- In a marketplace context and within the meaning of the Digital Services Act, **illegal content should be understood as information present in the product listing**. Thus, it should not apply to characteristics of the product that is offered for sale online per se, as these characteristics are not visible or otherwise accessible to third-party online marketplaces, like eBay. In fact, the question whether a product is illegal does not depend on the service or channel through which it is sold. Therefore, this should not be addressed in the DSA, but in separate legislation, such as the General Product Safety Directive, which is currently under revision.
- **Notices under Article 14 should only give rise to actual knowledge when the illegality of the hosted information is obvious**. Service providers should be allowed to process notices according to **flexible risk- and context- based assessments**. Furthermore, when the illegal content is not directly visible, accessible or otherwise controllable by the service provider (e.g. a product sold via an online marketplace), the provider should have the possibility to forward the notice to their Digital Services Coordinator to perform an independent assessment.

What we observe

On eBay, the primary form of user-generated content is a product listing, i.e. information provided by a user (seller) offering a product for sale on the platform. **A pure third-party marketplace like eBay does not sell its own products**. Thus, eBay has **no visibility nor control over any of the products** offered on its platform. The only information that the marketplace has is what the third-party seller initially provides through the listing. That information may at times be contested by third parties, some of which with reliable expertise over the product, such as a market surveillance authority, or an IP rights owner.

Article 14 suggests that a notice may come from any source, such as a regular individual user. The notice can pertain to a listing or to a product. But **even if a notice contains all the elements listed under Article 14.2, it may not be sufficient for the provider to “identify the illegality of the content”**. A larger set of clues is usually required. These should be assessed in combination and compared with other notices, including the identity of the notice issuer (and their alleged level of expertise*) and the type of infringement being reported. Marketplaces are even more challenged by the lack of access to the physical product, making the assessment of illegality impossible without reliable third-party expert information.

The draft DSA currently does not allow for any differentiated treatment of notices, thus giving the power to create actual knowledge to anybody, making the platform potentially liable under Article 5. As a result, **we believe that, in practice, the mechanism may give rise to significant blocking of legitimate content**. Ill-intentioned users may indeed assume that a marketplace like eBay will, when in doubt about a notice, always decide to remove the content in question. For example, a seller may try to harm their direct competitors by notifying the marketplace of alleged illegal products, hoping to see them removed permanently or at least for the duration of a crucial trading moment*.

Referenced articles

Defining illegal content (article 2g): *“any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State (...)”*.

Notices, liability and action linked to this illegal content (Article 14):

- *“any individual or entity” shall be empowered to notify hosting services “of the presence on their service of specific items of information that [they consider] to be illegal content.”*
- *“Providers shall take the necessary measures to enable and facilitate the submission of notices containing” a certain list of elements “on the basis of which a diligent economic operator can identify the illegality of the content in question.”*
- *“Notices that include the elements referred to in paragraph 2 shall be considered to give rise to actual knowledge or awareness” for the purpose of actioning the obligation and related liability to “[act] expeditiously to remove or to disable access to the illegal content” (article 5).*

* We will be going back on the subject of “trusted flaggers” (Article 19) and of “notice abuse” (Article 20) in a later issue of the eBay DSA Series.