

## The Digital Services Act

EucoLight, the European association of lighting WEEE compliance schemes, commends the European Commission for its efforts to propose, with the Digital Services Act (DSA), new obligations on online companies to address concerns about illegal content. But we think there is room for improvement to address the responsibility of online marketplaces.

3 May 2021

### EucoLight main recommendations:

- **The DSA should distinguish the liability of online platforms, which offer products to consumers in the Union (online marketplaces), from that of other type of providers of intermediary services.**
- **Online platforms, which offer products to consumers in the Union (online marketplaces), should perform compulsory ex-ante compliance checks, failing which they would bear the liability as producers of the products for which they facilitate the access to the consumer in the Union.**

### Who is EucoLight:

EucoLight is the voice of European producer responsibility organisations (PROs), specialised in the collection and the recycling of end-of-life lighting products. EucoLight members represent 80%, in aggregate, of the lamp waste collected and recycled in the 19 European Member States where they operate.

### Extended Producer Responsibility (EPR) and WEEE:

Waste Electronic and Electric legislation (WEEE) makes sure that the collection and environmental treatment of Electric & Electronic Products (EEE) can be enforced against an actor within EU jurisdiction. The one responsible is the one that puts on the market the EEE in any given EU country. You always have a responsible at national level. This actor is obliged to finance the collection and environmental treatment of those EEE when they became waste (EPR). The responsible actor can be the manufacturer/producer, the importer, or the authorised representative of the manufacturer/producer.

### The level of non-compliant product supplied through online marketplaces is exceptionally high:

Online marketplaces link producers, often based outside the Union (predominantly in Asia) with consumers inside the Union. Given that the producers are beyond the jurisdiction of the Member States, this means there is very little, if anything, that Member States' market surveillance authorities can do to prevent the import of non-compliant product. As a consequence, online platforms facilitate the sales in EU Member States of products from sellers that do not comply with EPR obligations and other Union legislation. Often, such sellers do not have a physical presence or a legal site in the Member State where the product is supplied and have not appointed an Authorised Representative.

This non-compliance means that EPR financial obligations are not met, and ultimately, compliant producers who do meet their obligations are put at a significant cost disadvantage.

In such situations, the online marketplace can legally deny responsibility for compliance. So, there is no economic operator in the Union against whom enforcement action can be taken.

The scale of this non-compliance is well established. The OECD has stated that “free-riding associated with the rapid growth of online sales is compromising the viability of these schemes and has led to the realisation that additional measures are needed to support their operation”<sup>1</sup>. The OECD Report “Extended Producer Responsibility (EPR) and the Impact of online sales”<sup>2</sup>, (June 2017) showed that the overall scale of the online non-compliance issue is likely to be between 5% and 10% of the Electrical and Electronic Equipment market. In the EU alone, 5% to 10% would represent 460,000 to 920,000 tons of WEEE.

A study undertaken by EucoLight in 10 countries in 2019 has shown that the level of non-compliance is exceptionally high – particularly in respect of smaller products such as light bulbs, hair dryers, electric screwdrivers, and fitness trackers:

Product category / Country	Czech Republic	Denmark	Estonia	Germany	Italy	Netherlands	Portugal	Slovakia	Spain	UK
LED bulbs	100%	100%	100%	89%	81%	100%	95%	100%	81%	78%
Hair Dryer	100%	n/a	n/a	96%	28%	n/a	97%	n/a	80%	67%
Washing Machine	100%	n/a	n/a	16%	69%	n/a	94%	n/a	50%	17%
Electrical Screwdriver	100%	n/a	n/a	96%	78%	n/a	98%	n/a	75%	69%
Fitness Tracker	100%	n/a	n/a	84%	92%	n/a	98%	n/a	93%	91%
Tablet/ PC	100%	n/a	n/a	92%	86%	n/a	98%	n/a	68%	76%
Display Monitor	100%	n/a	n/a	96%	43%	n/a	96%	n/a	33%	16%

It is quite reasonable to assume that if this level of non-compliance is detected in Union WEEE legislation, that similar levels of non-compliance would exist in other legislation covering, for example, waste packaging, product safety, ROHS, REACH, and others.

### Member States are now implementing national solutions to address this high level of non-compliance:

In France, **online** marketplaces are now “deemed as EPR producers” when producers located outside of the EU do not comply with their EPR obligations<sup>3</sup>. Germany is currently considering one of two options – either the “Deemed as EPR producer” approach or an *ex-ante* “Compulsory verification” approach (in which the online marketplace is required to check compliance, and to only allow compliant product onto the platform). Spain is also likely to implement the online marketplaces “deemed as EPR producers” model when producers located outside the EU do not comply with Spanish EPR provisions.

At EucoLight, we welcome these national moves, in the absence of strong appropriate measures at a Union level. But it would be far more preferable for such requirements to be implemented at a Union level, to avoid an inevitable “patchwork” approach. This paper proposes changes to the DSA which, if implemented in full, would fulfil that objective.

<sup>1</sup> <https://www.oecd.org/environment/waste/policy-highlights-extended-producer-responsibility-and-the-impact-of-online-sales.pdf>

<sup>2</sup> [https://one.oecd.org/document/ENV/WKP\(2019\)1/en/pdf](https://one.oecd.org/document/ENV/WKP(2019)1/en/pdf)

<sup>3</sup> LOI n° 2020-105 du 10 février 2020 relative à la lutte contre le gaspillage et à l'économie circulaire.

### **The DSA, a promising opportunity:**

We consider that the DSA could provide an excellent opportunity to address these material non-compliance problems, and indeed that to do so would meet the expectations set in various statements by the Commission:

- Commission President Von der Leyen said she believed "what is illegal offline should be illegal online too" (2 December 2020).
- "Digital Service Act: Improving the functioning of the Single Market" (October 2020, Mr Alex Agius Saliba) made a clear reference to maintaining sustainability and to minimising false environmental claims In the European Parliament initiative report.
- Circular Economy Action Plan: European Parliament resolution of February 2021 urging the Commission to ascertain that all online sellers, regardless of their location, comply with the essential requirements and report and contribute financially to the EPR systems in the EU Member States where the products are placed on the market.

But unless changes are made to the DSA along the lines of the proposals contained within this paper, there is a strong likelihood that the commitments above will not be honoured. The DSA should be a horizontal framework to be complemented by existing and future specific legislation: should the requirement for online marketplaces be settled in this act, they will then apply to other harmonised legislation e.g., WEEE EPR.

### **The DSA and online marketplaces, as currently drafted:**

Three key aspects of the DSA proposal, as currently drafted, should be noted:

- The liability regime is still largely the same as in the E-Commerce Directive – there is no update to take into account the huge influx of non-compliant product into the Union, facilitated by online marketplaces.
- Improved notice and action requirements are laid down, but these will not stop the flow of non-compliant product into the Union.
- New due diligence obligations are foreseen, but again, these will not be sufficient to stop the flow of non-compliant product into the Union.

### **Eucolight's main concerns:**

- The overall liability regime contained in the proposal (notably the exemptions) are far too loose for online platforms which offer products to consumers in the Union (online marketplaces). Specifically, they will NOT address the sale of unsafe, non-compliant and sub-standard products. A fundamental issue is that the nature of such platforms is radically different from that of other providers of intermediary, information, and social networking services.
- The 'one size fits all' notice and action approach is insufficient to prevent online platforms/electronic marketplaces from selling illegal products unsafe, non-compliant and sub-standard products. The reasoning is clear:
  - Notice and action may be a never-ending process. For example, many major online marketplaces allow producers to copy all product available for sale from one legal entity to another. That means if a notice is received, all the producer needs to do is to move the product to another company, and trading can continue.
  - At the time when the notice and action takes place, the product is already put on the market of an EU Member State. It is already non-compliant with WEEE legislation. When it becomes waste, the compliant producer community will be required to finance its collection and recycling.

- The notice and action process will take time to be performed and commercial transactions will still take place.
- Constant external monitoring by third parties will be required.

### **Eucolight recommendations to improve the DSA proposal:**

To implement the policy objective set by Commission President Von der Leyen when she said "what is illegal offline should be illegal online too", the following changes are essential:

- **Distinguish the liability of online marketplaces from other online operators:** Since the "one size fits all" solution does not address the fundamental problems, the DSA should separately distinguish the liability of online platforms, which offer products to consumers in the Union (online marketplaces), from that of other type of providers of intermediary, data and social networking services. For instance,
  - the exemptions established under Chapter III of this Regulation should not apply to such online platforms.
  - The exemptions underlined under Article 5 (1) ("Hosting") should not apply where the hosting service consists in an online platform offering products to consumers located in the Union.
  - The exemptions mentioned under "voluntary own-initiative investigations and legal compliance" under Article 6 should not apply in the case of online platforms offering products to consumers located in the Union.
  - The exemption of general monitoring or active fact-finding obligations (under Article 7) should not apply when offering products to consumers located in the Union.
- **Insert a clear reference to sustainability goals and environmental issues** and stress the important role of online marketplaces in supplying products that comply with Union sustainability and environmental legislation and providing consumers with clear and easily understandable information on the environmental impact of products they buy. In this we agree with the European Commission statement in the DSA proposal Explanatory Memorandum stating that "Digital services can support achieving Sustainable Development Goals by contributing to the economic, social and environmental sustainability" and the spirit of the recital contained in the European Parliament initiative report (Mr Agius Saliba).
- **Add mandatory Ex-ante easy-to-check verifications on the compliance of products and EPR obligations before the suppliers may contract with online marketplaces:**
  - Online platforms which allow consumers to conclude distance contracts with traders, should apply, prior to the use of the service, due diligence checks on the compliance of traders and their products with Union legislation by using official online databases such as trader registers, and VAT Information Exchange Systems, but also **Extended Producers Responsibility Registers**.
  - If the Union harmonisation legislation applicable to the product provides for an EU declaration of conformity or declaration of performance and technical documentation, proof of declaration should be provided to the online platform.
  - Where the trader must comply with Extended Producer Responsibility obligations, proof of compliance and registration with the corresponding extended producer responsibility scheme at national level.
- Online platforms must not offer services or products to consumers in the Union, if because of the due diligence check referring to in Article 22 (1) on the "Traceability of

traders" the trader does not comply with any Union law or the law of a Member State, that apply to the service or products. In other words, the contract must not take place.

- Traders should be required to **update annually the information relating to the diligence checks** referred to in Article 22 (1) on the "Traceability of traders".
- **Online platforms which offer products to consumers in the Union from traders using their service should be deemed as the economic operator subject to obligations of making the product available to the consumer in the Union if they fail to apply prior due diligence check to traders, or if such checks show that the product is not compliant.** In other words, the marketplace is deemed to be producer.

### **About EucoLight:**

EucoLight is The European association of collection and recycling organisations for WEEE lamps and lighting. On behalf of its 20 members, EucoLight engages with everything related to the WEEE Directive, legislations and standards affecting the collection and recycling of WEEE lighting. EucoLight members collect and recycle, in aggregate, 80 % of the lamp waste collected in the 19 countries in which they operate.

Founded mid-2015, EucoLight has quickly embarked into constructive dialogue with relevant stakeholders to provide expertise in the field of management and treatment of WEEE lighting and to promote the positive role of Extended Producer Responsibility schemes on the environment and society.

EucoLight is the voice of European WEEE compliance schemes specialised in managing the collection and recycling of WEEE lighting; working to make the circular economy a reality for lighting products.

For more information, visit the EucoLight website [www.eucolight.org](http://www.eucolight.org), follow EucoLight on [Twitter @EucoLight](#) or contact the Secretary General, Marc Guiraud ([marc.guiraud@eucolight.org](mailto:marc.guiraud@eucolight.org)).