



# POSITION PAPER ON THE DIGITAL SERVICES ACT (DSA) TOGETHER AGAINST COUNTERFEITING (TAC) ALLIANCE

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## WHY HAS COUNTERFEITING BECOME A GROWING ISSUE IN THE ONLINE WORLD

Over the last two decades, the Internet has provided a growing number of opportunities for consumers and businesses alike, be it in terms of interactions, information or commerce. The presence of illegal content online, and in particular counterfeited goods, has however grown significantly, both in scope and in size. Counterfeiting increasingly puts consumers' health and safety at risk, undermines consumers' confidence in online purchasing and consequently hinders the development of a safe and sustainable EU Single Market.

## KEY FACTS & FIGURES ON THE SCALE AND IMPACTS OF COUNTERFEITING TODAY:

### Counterfeiting represents a large and fast-growing problem in Europe:

- In 2016, counterfeit products represented 6,8% of all EU imports by value<sup>1</sup>, with a growth of almost 40% compared to 2013<sup>2</sup>.
- Counterfeiting is a phenomenon that concerns many different sectors of the economy, and all type of products, ranging from common consumer goods, health-related products and everyday items such as clothing and footwear, sporting goods, cosmetics and toys, business-to-business products including spare parts and chemicals, technological devices and supporting goods (such as phones, batteries and consumables) as well as luxury goods in fashion, alcohol, and jewelry.
- Just looking at 9 economic sectors (see table in the annexes), the EUIPO estimates a loss of 760 000 direct and indirect jobs due to IPR infringement<sup>3</sup>. The last EUIPO/OECD report of 2019 emphasized the example of Italy where "88 000 jobs were lost altogether due to counterfeiting and piracy".
- For the same 9 economic sectors, the EUIPO estimates a loss of € 14.57 billion for EU governments in taxes and social contributions due to IPR infringement.

### Today, the world of counterfeit has moved from the street corner to the Internet and exploited the inability of consumers to properly examine goods before purchase:

- The manufacturing, supply and trade of counterfeit goods is illegal and considered as a criminal offence under EU and international law. It also often feeds a shadow economy linked with criminal organisations, involved in other illegal activities including human trafficking, money laundering, terrorism, labour exploitation or violation of human rights<sup>4</sup>. This has been particularly highlighted during the COVID-19 outbreak, where millions of fake goods (including medical products) were sold online, taking advantage of a worldwide pandemic<sup>5</sup>.
- Counterfeit goods represent a serious risk for consumers' health and safety, as they may not meet quality standards nor thorough testing methods. For cosmetics, food, pharmaceuticals or pesticides, non-compliance is associated with potential health risks. A EUIPO study from 2019<sup>6</sup> found that 97% of recorded dangerous counterfeit goods were assessed as posing serious risks (injuries, exposure to hazardous chemicals, electric shock, fire, etc). Toys are the most popular type of product followed by clothing, textiles and fashion items, cosmetics, hobby and sport equipment, and motor vehicles, and 80% of those dangerous goods were children's products (toys, childcare items and children's clothing).
- Consumers are misled into buying fake goods. This not only hurts sales but also brand reputation and their competitive advantage, which may eventually impact the economy as a whole (see paragraph below). Studies show that brand trust, familiarity and experience have an influence: 94% of Millennials (86% of the 35 years+) say trust plays a role in big purchases<sup>7</sup>. Of those consumers who were misled into buying a fake, 12% said they would not buy from that "brand" again, and over half express doubts. Meanwhile, marketplaces' reputation is unharmed, as their confidence rating remains very high with 88%.
- Out of the 15 most affected countries by counterfeits, 10 are European<sup>8</sup>. Legitimate businesses also face a competitive disadvantage, unfairly competing with criminal actors who are able to use the same platforms to sell their products, which carries an even greater burden for SMEs. This strongly undermines businesses' innovative efforts, as they find themselves deprived of the ability to properly recover their research and development costs. This is a particularly harmful consequence, given the contribution of IPR-intensive industries to the EU economy: according to a recent study<sup>9</sup>, they account for 42,3% of the EU GDP, while generating 38.1% of all direct and indirect jobs in the EU, and make up 96% of the EU exports of goods.
- Counterfeiting harms the environment. Counterfeit chemical products and pesticides may be manufactured and disposed of in ways which may not meet environmental standards and laws<sup>10</sup>. Not only do they not respect EU standards, their storage, destruction and recycling are also problematic as they contain a significant amount of toxic chemicals.

1. OECD, EUIPO, *Illicit Trade - Trends in Trade and in Counterfeit and Pirated Goods*, 2019  
2. OECD, EUIPO, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, 2016  
3. EUIPO, *Status Report on IPR Infringement*, 2019  
4. EUIPO, EPO, *IPR-intensive industries and economic performance in the European Union*, 2019  
5. ICC, BASCAP, *GUIDE TO Managing Counterfeiting and Piracy Risks in the COVID-19 Era*, 2020

6. EUIPO, *Qualitative study on risks posed by counterfeits to consumers*, 2019

7. *SurveyMonkey* poll on brand trust in UK millennials, October 2018

8. OECD, EUIPO, *Illicit Trade - Trends in Trade and in Counterfeit and Pirated Goods*, 2019; These countries are: France, Italy, Germany, United Kingdom (before Brexit), Spain, Luxembourg, Finland, Sweden, Denmark, Belgium.

9. *Ibid*

10. *Ibid*

## THE LIMITS OF THE CURRENT REGULATORY FRAMEWORK

**The current rules have shown their limits and are not adequate anymore to tackle the growth of counterfeiting online:**

**The online ecosystem has changed**, since the adoption of the E-Commerce Directive (ECD) in 2000. The then-small platforms have become giants and a wide variety of online services have emerged. At the same time, the framework lacks incentives for online intermediaries to tackle the issue of counterfeiting which has now spread online.

**Intermediaries are the only actors who can act to prevent repeated infringements through ex-ante measures**; yet, to date, online platforms are only bound to intervene through reactive *notice & takedown* procedures. Not only are those mechanisms not efficient enough in the removal of counterfeits, but they also put all the burden on rights holders. Additionally, they often diverge from one Member State to the other, and should be therefore harmonised.

**The existing exemption of liability creates a market-based disincentive that keeps online intermediaries from acting.** Virtuous online intermediaries are being short-changed by their competitors who refuse to implement measures against illegal content.

**Existing enforcement mechanisms need to be improved.** It is currently very lengthy, expensive and uncertain for rights holders to enforce their rights, as interpretation of the rules still varies considerably from one Member State to another.

## OUR CALL FOR ACTION: A BINDING, HORIZONTAL AND EFFECTIVE FRAMEWORK FOR ALL INTERMEDIARIES

**The DSA is a unique opportunity to provide the highest level of protection for consumers and fair players, within a safe EU Single Market. It should aim at rebalancing responsibilities in the fight against counterfeiting in Europe through the adoption of a set of horizontal and binding obligations applying to all intermediaries online.**

The Together Against Counterfeiting (TAC) Alliance therefore calls on the European Commission to consider introducing the following rules in its forthcoming proposal:

### 1. CREATING A DUE DILIGENCE PRINCIPLE APPLYING TO ALL INTERMEDIARIES

The TAC Alliance advocates for the creation of a **new obligation for all intermediaries to deploy all measures at their disposal to prevent IPR infringements on their platforms**. This would entail both preventive and stay-down measures, and would not automatically engage intermediaries' liability, unless after an infringement, the intermediary fails to "act expeditiously to remove or to disable access to the information", as currently foreseen by the e-Commerce Directive<sup>11</sup>, or unless there has been a consistent failure to prevent the appearance and reappearance of manifestly illegal content. We consider a new legal obligation to be more effective than intermediaries only adopting a so-called "Good Samaritan" defence principle, as they would continue to be legally entitled not to take any measures. Such an obligation needs to be **binding and horizontal**. Unless all players start doing the right thing, we will continue to see the problem moving from one place to the next, giving an unfair competitive advantage to less virtuous companies.

Once implemented, the framework will:

- **Be flexible**, allowing intermediaries to take measures according to their size and role and the level of product information they hold.
- **Be future proof**: intermediaries could adjust and upgrade their technological tools to detect and remove counterfeited products, as innovation creates new services..
- **Create the right framework for stakeholder cooperation**: a binding and horizontal framework will provide as a pre-condition, an environment in which online intermediaries, rights holders and regulators can more efficiently and effectively collaborate to remove illegal content, namely counterfeit goods.

Intermediaries should also be required to share data on the results of their proactive and stay-down measures with brand owners, which are based on an analysis of metadata incorporated in e-commerce advertisements. This will help these companies to enhance their enforcement strategies against the sellers concerned, but also to implement subsequent actions on source level.

11. Article 14 of the Directive 2000/31/EC (e-commerce Directive)

## 2. WHAT IS ILLEGAL OFFLINE SHOULD BE ILLEGAL ONLINE

It is important that the new rules take into account the full picture of today's online world. For example, it seems impossible to imagine a physical shop not being registered or operated by an unknown seller; yet, today, counterfeiters can escape the offline world by anonymously selling illegal products on the Internet.

Therefore, the Digital Services Act should be based on the European Commission's guiding principle of "what is illegal offline, is illegal online", based on the definition of illegal content laid down in the 2018 Recommendation on illegal content online<sup>12</sup>.

## 3. KNOW YOUR BUSINESS CUSTOMER (KYBC) SHOULD BE THE STARTING POINT

All intermediaries should have an obligation to formally identify and verify the entity they are providing services to prior to the entity doing business on their platform and be able to request from the entity official identification information (e.g. business registration IDs, proof of address). While recent legislative proposals have created an obligation for intermediaries to distinguish between professional and non-professional users, additional measures need to be adopted.

Additionally, intermediaries should put in place mechanisms to detect business users posing as individuals. There should also be consequences for intermediaries in the case they are unable to identify a business user of their platforms, as this undermines a key element of EU consumer protection law.

As a result, rights holders would be able to trace back and prosecute the real bad actors, namely those abusing intermediaries' platforms to conduct illegal activities.

## 4. PROTECTING CONSUMERS MEANS PROPERLY INFORMING THEM

While the adoption of a binding due diligence principle applicable to all intermediaries should be the priority, it could be complemented by other targeted initiatives. Fighting counterfeiting has become a matter of consumer protection. The EU and national authorities should improve information to consumers on their online purchases. The Alliance suggests introducing additional notification requirements for online marketplaces to inform consumers who have bought counterfeit products on their platform, once that product has been removed following a valid notice for takedown from a rights holder or enforcement authority.

## 5. HARMONISING NOTICE AND TAKEDOWN PROCEDURES

Notice and takedown procedures currently vary across jurisdictions or intermediary concerned. The speed of the takedowns is also different within the EU, ranging from twelve hours to one month. Furthermore, notifications can only be done one by one, while a multitude of counterfeit products flood the Internet every hour. This puts a significant burden on rights holders and shows the need to harmonise rules across the EU. Rights holders should be allowed to request the takedown of several URLs simultaneously, although this can only be effective if staydown measures are also being implemented.

Staydown measures are indeed crucial. If counterfeit products reappear, the entire process is useless, and *notice & takedowns* will never work efficiently. The introduction of binding staydown measures should be one of the pillars of the DSA.

## 6. INCREASING EFFICIENCY THROUGH A TRUSTED FLAGGERS REGIME

Rights holders are best placed to determine whether content infringes their IP rights and should therefore be considered as "trusted flaggers". To enhance collaboration with online intermediaries providing commercially consumer-facing platforms, TAC recommends the creation of a trusted flaggers regime, whereby intermediaries would be required to establish a process for rights holders to report links to counterfeit goods. Those notices would automatically lead to takedowns, as long as they meet defined criteria and without prejudice to the ability of intermediaries to send a counternotice. Such a mechanism would benefit intermediaries, as they would not need to investigate every claim on its merits, thereby making the takedown process less labour intensive.

<sup>12</sup>. [Commission Recommendation \(EU\) 2018/334](#) of 1 March 2018 on measures to effectively tackle illegal content online

## 7. TAKING MORE ACTIONS ON ONLINE ADVERTISING AND USER-GENERATED CONTENT ON SOCIAL MEDIA

While consumers overwhelmingly think only legitimate companies pay to advertise, 11% of counterfeit goods purchased come from adverts and another 11% from sponsored social media adverts<sup>13</sup>. TAC members have consistently suffered over the years from such fraudulent advertising activities. Since May 2017, more than 70 consumer and apparel companies confirmed to have been targeted by fraudulent and infringing sponsored adverts on Instagram and Facebook<sup>14</sup>. This reflects counterfeiters' ability to react to measures adopted by more virtuous intermediaries and further confirm the need for binding measures. In this context, the Commission's [Memorandum of Understanding](#) on online advertising has not shown effective progress since its signature in June 2018. Therefore, advertising platforms should be included in the scope of the DSA and face similar rules such as due diligence and KYBC obligations.

## 8. PREVENTING FRAUDULENT WEBSITES AND ENSURING FAIR ACCESS TO WHOIS DATA

Fraudulent websites, often promoted through online advertising on social media, copy the aesthetics of brand owners' official sites and product catalogues and will continue to put consumers at risk and if not adequately tackled. This is compounded by search engines' failure to develop actionable and effective reporting systems for de-indexing counterfeit websites in search results, even more so as they are not understood as "hosts" within the E-Commerce Directive. This loophole needs to be fixed in the DSA and search engines should face the same obligations as other intermediaries.

Furthermore, WHOIS data is essential in combatting illegal goods online, allowing brands to identify, contact or take legal action against the owners of domains names dedicated to the sale and promotion of counterfeit goods. However, since the General Data Protection Regulation (GDPR) came into force in 2018, domain name registrars and registries have been allowed to make elective decisions about publication and access to domain name registrant data, a phenomenon which has in effect made it extremely difficult for rights holders and enforcement authorities to identify the individuals behind potentially fraudulent websites and to take action against them in a timely manner. Furthermore, much domain name registration data in the current WHOIS is inaccurate or obsolete.

It is therefore crucial to allow a standardised and efficient access to accurate WHOIS information for legitimate seekers, such as brand owners, to effectively fight against counterfeiting online. Domain name registrars should also be included in the scope of the DSA, as they can play an active role in preventing the (re)appearance of counterfeits online.

**TAC stands ready to engage with the EU institutions and all relevant stakeholders to devise practical solutions that can support a more transparent and accountable online environment, where e-commerce can thrive, and consumers' confidence and protection be enhanced.**

### ABOUT US

The **Together Against Counterfeiting (TAC) Alliance** brings together almost 100 companies from all industrial sectors, with the support of over 20 trade associations and NGOs. Our purpose is to raise awareness about the impact of the worrying growth of counterfeiting and push for the adoption of immediate, horizontal and ambitious legislative solutions at European level.

Learn more about the Alliance: <https://tacalliance.eu/>

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<sup>13</sup> Markmonitor, [Global Online Shopping Survey 2018 - Facts, Figures, Fakery](#)

<sup>14</sup> TRACIT, AAFA, [Fraudulent Advertising Online: Emerging Risks and Consumer Fraud](#), 2020

## COUNTERFEITING IN THE EU AND IN THE WORLD, 2005-2022

		2005 <sup>15</sup>	2013 <sup>16</sup>	2016 <sup>17</sup>	2022 <sup>18</sup>
EU	Counterfeit imports into the EU (% of all imports into the EU by value)		5 %	6,8 %	
	Counterfeit imports into the EU		\$ 116 billion	\$ 134 billion	
GLOBAL	Trade in counterfeit and pirated goods (% of global trade)	1,95 %	2,5 %	3,3 %	
	Global trade in counterfeit and pirated goods	\$ 200 billion	\$ 461 billion	\$ 509 billion	\$ 991 billion
	Reduction in FDI		\$ 111 billion		\$ 231 billion
	Fiscal losses		\$ 130 billion		\$ 270 billion
	Employment losses		2 - 2,6 million		4,2 - 5,4 million

## ESTIMATED DIRECT AND INDIRECT COSTS OF COUNTERFEITING ON IPR-INTENSIVE INDUSTRIES IN THE EU (AVERAGE ANNUAL FIGURES, 2012-2016)

	SECTOR REVENUE DIRECT LOSSES ANNUALLY	LOSS OF SALES BY SECTOR (%)	ANNUAL EMPLOY- MENT LOSSES (DIRECT & INDIRECT JOBS)	GOVERNMENT REVENUE LOSSES
Clothing, footwear, accessories	€ 28,4 billion	9,7 %	473 031	€ 8,6 billion
Toys and games	€1,0 billion	7,4 %	8 158	€ 300 million
Pesticides and agrochemicals	€1,0 billion	9,8 %	7 993	€ 300 million
Pharmaceuticals	€ 9,6 billion	3,9 %	80 459	€ 1,7 billion
Cosmetics and personal care	€ 7,1 billion	10,5 %	118 654	€ 2,6 billion
Jewellery and watches	€ 900 million	6,2 %	11 882	€ 300 million
Handbags and luggage	€ 1,0 billion	7,4 %	16 550	€ 400 million
Sports goods	€ 300 million	4,1 %	3 625	€ 100 million
Recorded music	€ 100 million	3,6 %	1 343	€ 100 million
Smartphones	€ 4,2 billion	8,3 %	Not calculated	Not calculated
Food <sup>19</sup> (example of Spirits & wine)	€ 2,4 billion	5,9 %	38 885	€ 2,1 billion
<b>Total all sectors</b>	<b>€ 56 billion</b>	<b>7,4 % (avg.)</b>	<b>760 579</b>	<b>€ 16,3 billion</b>

SOURCE: EUIPO, 2019 Status Report on IPR Infringement, see full report [here](#).15. OECD, *The Economic Impact of Counterfeit and Piracy*, 200816. OECD, EUIPO, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, 201617. OECD, EUIPO, *Illicit Trade - Trends in Trade and in Counterfeit and Pirated Goods*, 201918. INTA and ICC-BASCAP, *The Economic Impacts of Counterfeiting and Piracy*, 201719. The most seized categories of counterfeited products are foodstuffs - 24% (European Commission, *Report of the EU customs enforcement of IPR*, 2017).