

## ESSNA's response to the proposal for a Regulation on a Single Market for Digital Services (Digital Services Act)

March 2021

This submission is made by the European Specialist Sports Nutrition Alliance ([ESSNA](#)), the trade association representing the voice of the sports and active nutrition sector in Europe. ESSNA welcomes the opportunity to provide comments to the Commission's proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (*hereafter DSA*).

### General comments

- Online platforms play a pivotal role in e-Commerce, creating huge opportunities for businesses, including in the food sector. However, they are also increasingly becoming a vehicle for unscrupulous companies or individuals to commercialise illegal and counterfeited products due to the lack of screening and their limited liability over the content they store and distribute.
- The importance to detect and tackle serious risks in relation to food or feed is acknowledged in EU food legislation, yet current provisions do not adequately protect consumers online. Because of their dominating position and increasing popularity (including in the context of the COVID-19 pandemic), consumers assume that products sold on large online platforms are compliant and that platforms provide a level of diligence, information and scrutiny on food products that is often not there.
- For these reasons, ESSNA supports the European Commission's objective, in the context of the DSA, to create a safer digital space in which the fundamental rights of all users of digital services are protected. ESSNA believes that the DSA provides an opportunity to move to a safer online environment for consumers and industry, with the potential to tackle the sale and promotion of non-compliant and counterfeited products online.
- Industry should do its part to contribute to these objectives and ESSNA is of view that the industry role in promoting better compliance online should interact with certain provisions, further explicated below, outlined in the DSA, to further ensure consumer protection online. For instance, ESSNA runs a targeted award-winning campaign to improve consumer safety and reduce unfair competition by addressing the issue of non-compliant sports nutrition products, particularly online.
- However, ESSNA believes that more clarifications, further detailed below, are needed to ensure that European consumers and businesses are equally protected online and offline against repeat offenders and rogue traders, especially those established outside the EU and not directly subject to the Union law.
- Additionally, in the context of establishing a powerful transparency and accountability framework for online platforms and lead to fairer and more open digital markets, further obligations for online platforms to inform their customers when they have purchased a counterfeit or illegal product should be included.

## **The role of platforms to ensure compliance online**

**The “Know Your Customer Principle”** - ESSNA works hard to improve consumer safety and reduce unfair competition by addressing the issue of non-compliant products, especially those found online and sold through online marketplaces. However, as a trade body our formal power is limited, and provisions should be in place to ensure online platforms are more transparent and accountable for the products and information provided online.

ESSNA therefore welcomes the European Commission’s proposal to ensure online platforms are more transparent and share more data with law enforcement bodies to reactively remove illegal goods and products from the market in a timely manner. We particularly support the intention to impose more stringent and harmonised obligations to online platforms, such as the **“Know Your Business Customer” principle**, as indicated in Article 22, under which service providers shall verify the identity of their business partners, including their company registration number or any equivalent means of identification. In particular, ESSNA believes that this way online platforms should be obliged to take all the necessary steps to proactively monitor, identify and remove non-compliant and counterfeit products sold on their platforms.

At the same time, however, ESSNA is of the view that the DSA should include **further obligations for platforms to inform their consumers when they have purchased a counterfeit or illegal product**. Consumers should have the right to know if the product they have purchased is not compliant. Especially when it comes to food supplements and sports nutrition, the safety of consumers and the urgency in removing illegal products from the markets containing banned or harmful substances is paramount. In this regard, and as stated in Regulation (EU) No 1169/2011 establishing the rules for the provision of food information for foods offered for sale by means of distance communication, online platforms should be responsible to ensure that the information on food offered online, should be the same as that applicable to food sold in physical shops. This should include the name of the food, the list of ingredients, the name and address of the responsible operator, instruction of use, the quantity of certain ingredients or categories of ingredients, the net quantity of the food, the nutrition declaration. The health and safety of consumers is paramount, and consumers should be able to purchase goods online with the same level of confidence, information and protection they have offline.

ESSNA also welcomes the inclusion of the provisions, in Articles 14 & 15, on the **mandatory procedures for removing illegal goods and a reason for content removal**. In this regard, ESSNA is willing to work with policymakers to ensure that platforms are able to provide reasons to companies as to why some content is being removed to ensure that explanations are given for wrongly flagged goods.

**The issue of repeat offenders** - On the issue of repeat offenders, as outlined in Article 20 of the DSA, ESSNA welcomes the inclusion of provisions related to **the temporary suspension of actors providing manifestly illegal content**. However, ESSNA would like to stress that a temporary suspension might not suffice to ensure consumer protection online. In the sports and active nutrition sector, the majority of companies comply with legislation, but it is not infrequent to encounter cases of repeat offenders who persevere in selling harmful products online in spite of multiple requests to stop such practices, which decrease consumer confidence and ultimately harms the whole sector. ESSNA is therefore of the view that a **permanent exclusion of repeat offenders** selling harmful and illegal content should be considered.

## **The role of the industry in promoting compliance online and interaction of the DSA with other sector specific legislation**

**Trusted flaggers** - ESSNA welcomes the introduction of provisions on trusted flaggers, as outlined in Article 19 / recital 46, as an important step for a better cooperation with the industry in promoting

compliance and ensuring consumer safety online. In this context, ESSNA would also like to gather the Commission's views **on how the proposed trusted flaggers system will interact with existing industry's initiatives and reporting model** such as the one employed by ESSNA in the context of its campaign to tackle non-compliance (as below).

ESSNA believes that the **role of the industry in supporting online platforms to remove non-compliant products is crucial**. Since March 2013, ESSNA has been running an award-winning campaign to improve consumer safety and reduce unfair competition by addressing the issue of non-compliant sports nutrition products, especially those found online and sold through online marketplaces. The rationale behind the launch of this campaign was to allow ESSNA members and the wider industry to protect consumers from products that could damage their health, also working to tackle unfair competition.

**Interaction of the DSA with existing legislation** - Tackling food fraud and non-compliance online is already within the remit of the [Official Controls Regulation \(OCR\)](#), which allows Member States to impose penalties for non-compliance regardless of the location of the non-compliant operator. Although the proportion of food products sold online is low compared to other goods sold on the internet, fast growth is anticipated in the coming years. This brings new business opportunities but also further challenges for the official control of food sold online and via online platforms. Cooperation and intelligence sharing between different authorities within and across Member States therefore becomes even more crucial. While it is too soon to see the effects of the implementation of this Regulation, ESSNA would welcome **further clarity with regard to how the proposed rules under the DSA will interact with existing legislative frameworks, such as the OCR**, to ensure compliance and consumer protection online.

#### **Oversight and enforcement mechanism**

**Digital Services Coordinators** - In response to the increasing role of digital services in the online trade and dissemination of illegal products, Member States are increasingly implementing their own rules, with notable differences in the obligations imposed on digital services, in particular online platforms, and with a variety of different enforcement processes. ESSNA therefore **welcomes the introduction of a new coordinated and harmonised enforcement mechanism, via the appointment of Digital Services Coordinators**, independent authorities which will be responsible for supervising the intermediary services established in their Member State and/or for coordinating with specialist sectoral authorities. ESSNA believes this is a welcomed first step towards ensuring a better coordination and harmonisation across the EU under which Member States' enforcement bodies are allowed to immediately tackle non-compliance and remove illegal and counterfeit products.

**Third-country legal representatives** - The e-Commerce Directive as it currently stands does not apply to service providers established in a third country. This means that online marketplaces from outside the EU are not obliged to comply with the same rules that are applicable in the EU. This poses an issue in the food supplements and sports nutrition sector, where a number of unscrupulous companies (or individuals) use the internet and online platforms to reach vulnerable consumers with dangerous products making exorbitant, illegal and unauthorised claims or not abiding by strict EU food law. Such practices and products are putting consumers' health at risk and tarnishing the reputation of the industry. **Therefore, the obligation in Article 11 to designate a legal representative in the Union for providers not established in any Member State is a welcomed step** to ensure better tracing of rogue non-EU players. However, ESSNA believes that **more clarity is needed on the role that legal representatives will assume** in this regard to ensure that consumers' health is not put at risk by unscrupulous companies making exorbitant, illegal and unauthorised claims or not abiding by strict EU food law.

## About ESSNA

The European Specialist Sports Nutrition Alliance (ESSNA) is a pan-European trade association with more around 40 members representing the interests of the sports and active nutrition sector across Europe. Our members are large global businesses, smaller specialist brands, suppliers of ingredients, sports nutrition retailers, companies representing multi sports nutrition brands, as well as national associations. ESSNA's main aim is to campaign for appropriate policy and regulation for sports nutrition products in Europe, as well as to improve the reputation of the sector with regulators and the public. We do so by working to improve consumer knowledge of sports and active nutrition products and the industry.

## Additional information on ESSNA's campaign to tackle non-compliance

Since 2013 ESSNA has been running a campaign to promote compliance across Europe targeting manufacturers, distributors and retailers involved in the manufacture and marketing of non-compliant products. To effectively tackle illegal products, we found it is also important to reduce demand from the unaware public for these products.

In the context of this campaign, consumers and businesses are encouraged to bring any suspicious products to the attention of ESSNA so that we can take action. We rely on consumers and industry's intelligence to identify non-compliant sports nutrition products on sale on the EU market, particularly over the internet. Products can be notified to ESSNA via a dedicated [webpage](#) or our [Facebook account](#). ESSNA first attempts to resolve the issues directly with the companies concerned – except for the most serious cases where a serious and immediate harm could be cause to consumers, such as products containing banned substances, dangerous ingredients or unauthorised novel foods, such as products tainted with steroids or other WADA-listed substances (WADA is the World Anti-Doping Agency, which since 2004 publishes an annual list of substances and methods prohibited in- and out-of-competition, and in particular sports), or products making outrageous, unauthorised and illegal claims. In these cases, we inform directly the relevant authorities, drawing attention to persistently non-complying firms and/or those that do not respond to our complaints and building relationships with relevant enforcement authorities.

Since the inception of the campaign, ESSNA has tackled over 500 products: many were resolved informally as a direct result of ESSNA contacting the offending company, with companies committing to relabelling or reformulating the product in line with EU law, and others agreeing to completely withdraw the product in question from the market. Other cases were escalated to the relevant enforcement authorities, including Europol, the Italian Competition Authority (AGCM), the Portuguese Economic and Food Safety Authority (ASAE), the UK Food Standards Agency (FSA), and the Medicines and Healthcare products Regulatory Agency (MHRA), and the Netherlands Food and Consumer Product Safety Authority (NVWA), among many others.

Besides flagging illegal products through our successful campaign to tackle non-compliance, as part of the [Official Controls Regulation \(OCR\)](#), (EU) 2017/625, which started to apply as of 14<sup>th</sup> December 2019, ESSNA has been notifying relevant authorities and the European Commission via the Contact points of eCommerce platforms, flagging illegal products and submitting information regarding the URL, and add additional screenshots in case of volatile websites. On this point, ESSNA is committed to continuing partnering with the European Commission, online platforms and all relevant actors to resolve the issue of non-compliance once for all. However, ESSNA believes that to achieve this objective it is important to rest on a clear legislative framework, and the DSA is indeed a first step.

Other industries that see similar instances of non-compliance simply rely on enforcement authorities to do their job to tackle these issues. ESSNA, however, recognises that these bodies face a lack of

# ESSNA

European  
Specialist  
Sports Nutrition  
Alliance

The voice of the  
sports & active  
nutrition sector  
in Europe

resources and cuts, and so we help them where we can. We have cultivated excellent relations with EU and national enforcement officials, who now regularly proactively seek our support on a range of issues. We share intelligence, provide advice, and ultimately give them back the time and resources that are so scarcely available to them to complete the job.

**For more information, please contact:**

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