TRACIT's submission to the USPTO's Request for Comments on the OECD's Draft Voluntary Guidelines for Countering Illicit Trade in Counterfeit Goods on Online Marketplaces [Docket No.: PTO-C-2025-0016]

The Transnational Alliance to Combat Illicit Trade (TRACIT) welcomes the opportunity to submit comments on the *OECD's Draft Voluntary Guidelines for Countering Illicit Trade in Counterfeit Goods on Online Marketplaces*. We commend both the OECD and the USPTO for initiating this important dialogue and for recognizing the urgent need to address the growing volume and sophistication of counterfeit trade online.

As a global business-led initiative committed to eliminating illicit trade in all its forms, TRACIT brings substantial experience to this discussion. We work across a wide range of sectors—from pharmaceuticals and consumer goods to food, alcohol, and tobacco—advocating for effective policy frameworks and stronger enforcement mechanisms. TRACIT engages extensively with OECD member states, postal and customs authorities, intergovernmental organizations, and intermediaries to improve supply chain integrity and reduce the abuse of digital marketplaces.

Drawing from this global experience, TRACIT offers the following comments and recommendations to help strengthen the Guidelines and ensure they become a credible and practical benchmark for governments and platforms alike.

Summary of proposed changes:

1. Clearly define the objectives and scope of the Guidelines
2. Call for stronger, enforceable language in the Guidelines
3. Establish non-negotiable standards for platform accountability
    i. Austere vetting of sellers
    ii. Proactive verification and blocking of illicit listings
    iii. Deterrent penalties – take down and stay down
4. Establish platform liability

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TRACIT Submission

Overarching comments

1. Clearly define the objectives and scope of the Guidelines

The Guidelines were developed by an informal advisory subgroup (IAS) comprised of experts from OECD Member countries and the private sector nominated by the Business at OECD (BIAC). Although they were developed without prejudice to what type of OECD legal instrument would be appropriate for them, throughout the process the OECD and participating IAS members consistently referred to and modelled the efforts on the OECD Recommendation of the Council on Countering Illicit Trade: Enhancing Transparency Free Trade Zones (including Code of Conduct for Free Trade Zone Operators in the Annex).

While we continue to support this effort, the working objectives to use the Guidelines as a basis for formulating a Council Recommendation and an associated Code of Conduct have been ostensibly abandoned. Even more troubling is the degree to which the Guidelines have been watered down, echoing soft, non-committal standards that many leading platforms already claim to implement, and which fall far short of protecting consumers from fraudulent listings. As currently drafted, the Guidelines are unlikely to make meaningful progress toward fulfilling the Working Party's mandate to counter illicit trade in counterfeit goods.

Furthermore, for the Guidelines to deliver tangible results, their scope must be limited to the two 'principal stakeholders' with direct control over the problem—

i. Governments; and

ii. Online marketplace operators.

This approach mirrors the success of the OECD FTZ Recommendation, which worked precisely because it identified a targeted set of stakeholders and assigned each clear, non-overlapping responsibilities. The same disciplined focus is needed here. Diluting accountability across too many actors risks making the Guidelines aspirational rather than operational. Including right holders as a focus of these Guidelines would impose an undue burden on actors who are already disproportionately responsible for identifying and responding to counterfeit activity. Many online marketplaces have structured their business models to profit from third-party seller activity while offloading enforcement responsibilities onto rights holders. This is particularly unfair to small and medium-sized businesses, which often lack the legal, technical, or financial capacity to continuously police platforms for infringements. The primary responsibility for preventing and removing counterfeit goods must rest with those in direct control of the digital infrastructure and commerce channels—namely, the platforms themselves and the governments regulating them.

2. Call for stronger, enforceable language in the guidelines

The current draft employs language so diluted that it fails to convey any meaningful sense of duty or accountability for online marketplaces. This undermines the Guidelines' potential to serve as a credible benchmark for governments (in and outside the OECD region) to fashion sufficiently effective legislation to protect consumers from fraudulent and harmful listings.

In fact, the draft falls behind the legislative standards already in force across several OECD member countries—including the INFORM Consumers Act in the United States and the Digital Services Act in the European Union—which establish clear, enforceable obligations on platforms in some areas. For the OECD Guidelines to serve as a credible international reference point, the language must be significantly strengthened. It is not enough to suggest best practices; the Guidelines must articulate firm expectations that reflect the legal and enforcement realities shaping e-commerce governance today. Some of the current standards applied to platforms are unacceptably weak or vague. Some examples include:

- "Should consider" proactive measures to monitor for counterfeits (§ 30.a) – This undermines the urgency and feasibility of proven tools already in use across major platforms.
- "Screening of listings, where possible, prior to their being posted on the platforms" (§ 30.a) – This vague phrasing fails to establish a mandatory pre-publication verification or blocking of fraudulent listings, despite the availability of automated tools that make such screening both practical and scalable.
- "Should explore" how advanced tools might be used to detect counterfeit goods (§ 30.e) – Detection tools have existed for years, and are rapidly improving; exploration is not the barrier—implementation is.
- "Should explore" how to streamline notification processes (§ 32.g) – This fails to establish minimum standards for efficient notice-and-takedown systems, which have been a cornerstone of platform accountability for decades, and notably, this wording risks shifting responsibility away from the scope and intent of the Guidelines.
- Verification language (§ 42.a) merely suggests information "should, when possible," be supported by documentation, rather than requiring it. Verifying sellers—particularly those within corporate supply chains—must be treated as a baseline business requirement, not an optional step. Effective due diligence cannot rely on discretionary language.

This type of language creates loopholes that bad actors will continue to exploit and allows platforms to avoid accountability under the guise of voluntary compliance. The Guidelines must go further—replacing vague, discretionary phrasing with mandatory, measurable expectations that drive real-world improvements in the fight against online counterfeiting.

3. Establish non-negotiable standards for platform accountability

TRACIT has long worked on strengthening enforcement and accountability in the fight against online counterfeiting. Rights holders face significant challenges in monitoring and taking action against counterfeiters operating across an ever-expanding number of online

marketplaces. Governments must play a primary and proactive role in regulating online marketplaces to ensure they adopt robust, consistent, and transparent anti-counterfeiting measures.

Across markets and sectors, our experience shows that when three core pillars are properly implemented—proactive blocking, austere seller vetting, and deterrent penalties—the availability of counterfeit goods to consumers drops significantly. These are the levers that work, and they must be elevated as non-negotiable priorities in the final Guidelines.

i. Proactive verification and blocking of illicit listings

The Guidelines must include clear and robust requirements for proactive verification and blocking of counterfeit listings. Online marketplaces must bear explicit responsibility for ensuring their platforms are not used to facilitate counterfeit or illicit trade. This obligation cannot be shifted onto rights holders through reactive takedown mechanisms alone.

- Proactive enforcement is already feasible and must become an industry standard. Leading platforms already demonstrate the feasibility of proactive enforcement. For example, through AI-based screening systems, image-hash matching, keyword filters, and unique product identifier validation (e.g., GTINs, serial codes). These tools enable platforms to detect and block counterfeit listings before they go live—a capability that must be a minimum standard across the industry.
- Mandatory pre-publication verification requirements for regulated products. Particular attention must be paid to regulated goods, such as pharmaceuticals, pesticides, cosmetics, medical devices, or alcohol. For such products, platforms should be required to verify that all necessary product registrations, certifications, and regulatory approvals are uploaded and reviewed at the time of listing. Listings must also clearly display this compliance information, and the associated seller's license to trade in such products must be shown visibly alongside the listing. Requiring this level of verification serves a dual purpose: it not only ensures regulatory compliance but also acts as an indirect yet powerful barrier to counterfeiters, who often operate without valid licenses.

ii. Austere vetting of sellers

While the current draft of the Guidelines includes important elements of seller verification—such as collecting and verifying a seller's name, address, contact details, and, where possible, supporting government-issued documentation—these obligations are still framed in discretionary terms.

- Eliminate qualifying language to ensure enforceability. Phrases like "when possible" and "where applicable" weaken the impact and leave too much room for platforms to avoid consistent enforcement. If the Guidelines are to serve as a meaningful global benchmark, they must eliminate qualifying language and adopt clear, mandatory know-your-business-customer requirements. Without strong, mandatory onboarding processes, enforcement becomes a game of whack-a-mole. Repeat infringers can re-

register under new aliases, exploiting platforms with weak or uneven verification systems. Laws like the INFORM Consumers Act are important to this process because they require marketplaces to collect, verify, and publicly disclose seller information before allowing commercial activity. Similarly, the Digital Services Act (DSA) mandates ongoing traceability and recordkeeping obligations.

- Licensing verification for regulated product categories. For product categories that are subject to licensing or regulatory controls—such as food, pharmaceuticals, alcohol, medical devices, and pesticides—platforms must ensure that sellers hold valid licenses to trade in those goods. These licenses must be verified against official government databases before sellers are allowed to list such products for sale.

Robust seller vetting is also critical given that litigation is often not a viable recourse for rights holders. The costs and complexity of bringing legal action against anonymous or foreign counterfeiters—especially across multiple platforms—are prohibitive. This reality underscores the importance of strong marketplace compliance, rather than reliance on post-sale litigation to protect consumers and safeguard rights holders' intellectual property.

iii. Deterrent penalties – take down and stay down

There must be real consequences for counterfeit activity. Platforms should not merely remove listings—they must remove sellers. Without concrete triggers, thresholds, and escalating consequences, enforcement will continue to be sporadic and ineffective.

- Adopt a three-strikes rule. TRACIT advocates a three-strikes rule, consistent with the SHOP SAFE Act, under which any seller found offering counterfeit products three times in a 12-month period is permanently removed and barred from re-registration across the marketplace and its subsidiaries. Additionally, marketplaces must be required to retain seller funds in escrow, suspend payouts during investigations, and refund consumers directly where sellers are non-responsive. These measures shift the burden of enforcement onto platforms, where it belongs, and create a meaningful disincentive for abuse. Furthermore, governments should also be encouraged to support marketplace enforcement by maintaining public registers of repeat counterfeit offenders.
- Embed a mandatory stay-down obligation that goes beyond the notice and takedown process. Once a listing is confirmed as counterfeit, platforms must block its reappearance—whether by the same seller or others—through proactive matching and filtering systems. Proactive blocking and stay-down are both technically possible and commercially necessary. Marketplaces profit from scale; with that scale comes responsibility. If these Guidelines are to contribute value to the governance of online marketplaces, then they must not shy away from this reality.

4. Establishing platform liability

Stronger marketplace regulation is needed to counter the overwhelming volume, speed, and anonymity that allow counterfeiters to exploit digital commerce at scale. Voluntary measures

have failed to keep pace. The current draft Guidelines set a low threshold for marketplace compliance.

A critical gap in the current Guidelines is the absence of any call for governments to develop legal frameworks that impose liability on platforms that fail to implement effective anti-counterfeit measures. This omission significantly undermines the Guidelines' value as a policy instrument and forfeits a key opportunity to guide OECD member states (and non-members) toward embedding platform liability in emerging legislation aimed at strengthening governance in digital markets.

Legal liability is not only appropriate in this context — it is consistent with regulatory approaches across numerous sectors where consumer protection is at risk. Leading OECD countries have already set legislative precedents in this direction. Embedding this principle in the Guidelines would shift platform action from voluntary compliance to legal obligation—an essential step, given that voluntary measures have proven inconsistent and inadequate in curbing illicit trade.

Proposed targeted revisions

Governments

Area	Gap in text	Proposed language
Enforcement and sanctions	§ 22 lacks regulatory force	Governments should adopt national legal frameworks that impose strict liability on platforms that fail to implement anti-counterfeit safeguards.
Enforcement and sanctions	§ 22 requires governments to strengthen capacities	Governments should provide training to Law Enforcement to identify and enforce against online counterfeiting.

Online Marketplaces

Area	Gap in text	Proposed language
Third-party sellers	§ 42 requires only basic checks and uses discretionary terms	Add under § 42 Online marketplace operators should: a. *Before a listing is published*, collect and verify information on the name, physical address, working phone number and email address of third-party sellers. Such information should be supported by official government-issued

		documentation, including trade registers and tax records. ~~*Where applicable*~~ *Information on the registration of a business in a jurisdiction should also be collected and verified. Information should be subject to annual reverification.* Add a new point: *For goods subject to licensing or registration requirements—such as pharmaceuticals, alcohol, or medical devices—marketplaces must also obtain and validate third-party sellers' licenses, cross-checking them against official government databases to confirm authenticity and compliance. Sellers who fail to provide or update this information must be automatically suspended from trading.*
Market surveillance	§ 30.a references proactive screening with non-committal language, no proactive blocking (i.e. pre-publication stage) included weakening obligations	30. Online marketplace operators should: a. ~~Consider~~ monitor~~ing~~ their online marketplaces in a proactive manner, with a view towards detecting counterfeit goods, which would include the screening of listings, ~~where possible~~ prior to their being posted on the platforms, with a view towards identifying potentially counterfeit goods. Such proactive monitoring can include already existing mechanisms such as advanced technological tools—such as AI-based screening, image recognition, and keyword filters—with the explicit objective of detecting and preventing the sale of counterfeit goods. New sub-clause: Ensure that high-risk categories, including regulated products and goods with heightened health and safety risks, undergo pre-publication verification to ensure that listings do not go live without prior compliance checks. This includes verifying product registrations and seller

		licenses against relevant government databases. Online marketplace operators should share information on such removals with rightsholders that have established accounts with the online marketplace operators for such intelligence can lead to offline investigations.
Takedown	§ 4.1.3 omits stay down and reporting policies.	34. Online marketplace operators should: a. Remove listings and suspend sales of goods that are subject to a notification promptly, as soon as the allegations of counterfeiting have been examined and confirmed; in the case of government enforcement authorities and rights holders with strong notification and takedown records, action should be taken on an expedited basis. Upon successful notification, online marketplaces should remove infringing listings within three working days. Once a listing is confirmed counterfeit, identical or substantially similar offers must be blocked automatically. If third-party sellers contest actions, listings should only be restored and suspensions should only be lifted once their counterclaims have been reviewed and confirmed. Add new sub-clause: Sequester inventory that has been determined to be counterfeit and that is in their custody or control, such as goods held at their premises or within their supply chain.
	§4.1.3 sets no deadlines	Add new sub-clause: 34. Online marketplace operators should: Must resolve trusted flagger notices within 24 h; all other substantiated notices within 72 h, with confirmation to the notifier and seller.

Repeat infringers	§ 4.1.4 lacks concrete thresholds	Strengthen § 36 (c) (i): ~~The temporary or permanent suspension or restriction of accounts or sellers.~~ Adopt a three-strike rule: permanently remove and block re-registration of sellers with 3 counterfeit violations in 12 months. Retain seller funds in escrow, suspend payouts under investigation, and issue refunds directly to consumers when sellers are unresponsive.
Accountability and liability	§ 4.1.5 missing strong compensation requirements	Strengthen § 38: b. ~~Consider~~ Provide~~ing~~ refunds to consumers directly, in the event that they are unable to obtain refunds from a third-party seller, or other parties that might be involved in the sale of the counterfeit goods. Online marketplace operators should bear financial responsibility for transactions on their platforms involving counterfeit goods, ensuring consumers do not bear the sole or primary risk. Add a new sub-clause § 38: e. Reimburse rights holders for the cost of test purchases that are subsequently confirmed to be counterfeit, in recognition of the role such actions play in identifying and removing illicit goods from the platform.
Listings	§ 40 requires only basic information	Add a new sub-clauses under § 40: 40. Online marketplace operators should: Ensure that, for products subject to regulatory oversight, both valid product registration details and seller licenses to trade in such goods are included and clearly displayed within each product listing, in accordance with applicable national laws and regulations.

		Must verify that the products meet labelling requirements per national regulations ahead of permitting any listing on their sites. Indicate clearly which third party is fulfilling the goods offered for sale. Ensure that counterfeit and genuine goods are not physically commingled within their inventory or fulfillment systems.[1] Should implement inventory management controls that allow for clear segregation and traceability of products by seller and origin.
Terms of service agreements	§ 43 lacks inventory inspection rights – essential to ensure product integrity	Add under a new sub-clause § 43: 43. Online marketplace operators should: Inspect sellers' inventory and storage conditions to ensure product integrity.
	§ 43.b. lacks data-sharing provisions	Modify 43.b.: Permit an online marketplace operator to i) conduct investigations on third-party sellers of counterfeit goods and/or ii) impose sanctions on those sellers; and share such information about confirmed counterfeiters with government authorities, other marketplaces, rights holders, and consumers.
Enforcement and sanctions	§ 4.1.8 lacks a mandatory cooperation mechanism	Add a new clause § 45: c. Cooperate in good faith with government authorities and rights holders, both domestically and internationally, including the timely sharing of relevant data, seller identities, and transaction records, support and facilitate investigation, enforcement, and prevention of intellectual property infringements.

[1] Explanation: Commingling undermines the ability to sequester counterfeit goods once identified and increases the risk that consumers may receive counterfeit products, even when purchasing from a legitimate seller.

Information exchange, transparency, and public awareness	§ 4.1.9 misses the opportunity to introduce cross-platform collaboration	Add under § 47: 47. Online marketplace operators should: a. iii. Collaborate directly with other online marketplaces to coordinate cross-platform campaigns, share resources, and pool insights on illicit activity to improve detection and collectively reduce counterfeit trade.
	§ 4.1.9 excludes standardized reporting metrics	Add under § 47: 47. Online marketplace operators should: d. Include standardized metrics such as: i. Volume and estimated value of counterfeit goods identified; ii. Number and value of consumer reimbursements issued for counterfeit purchases; iii. Percentage of successful takedowns relative to total requests submitted; iv. Geographic distribution of third-party sellers and fulfillment operations; v. Seller onboarding statistics, including the number of new and active sellers.