

The Consumer Voice in Europe

## ROADMAP AND INCEPTION IMPACT ASSESSMENT ON THE DIGITAL SERVICES ACT – DEEPENING THE INTERNAL MARKET AND CLARIFYING RESPONSIBILITIES FOR DIGITAL SERVICES

BEUC's feedback



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## Why it matters to consumers

Shopping, connecting with friends and family, sharing experiences, watching a movie, planning a night out, moving around a city, and searching for information on the web. These are just some examples of activities that millions of consumers carry out every day. For each and every one of these activities, there is one or multiple online platforms that facilitate and/or deliver these services. Consumers have embraced the surge of the platform economy. It presents numerous benefits but comes also with challenges for consumers' protection and safety. The Digital Services Act should maximise the benefits and address the relevant significant problems of the platform economy.

## Summary

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*BEUC welcomes the possibility to give feedback on the European Commission's roadmap and inception impact assessment on the e-commerce part of the forthcoming Digital Services Act package. BEUC recommends proposing a comprehensive overhaul of the EU e-Commerce Directive<sup>1</sup> as many problems have arisen for the last twenty years. This review should come with robust oversight and enforcement measures. BEUC supports the European Commission's commitment to upgrade EU's liability and safety rules via a Digital Services Act. In particular, BEUC asks for a special liability regime for online marketplaces as the current legal framework does not adequately ensure compliance of EU and national law. We ask the Commission to propose ambitious measures that change the (problematic) status quo and that effectively protect consumers and their safety.*

### 1. Context

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BEUC - The European Consumer Organisation **welcomes the opportunity to comment** on the European Commission's roadmap and inception impact assessment on the e-commerce part of the forthcoming Digital Services Act<sup>2</sup>.

BEUC particularly appreciates that the Commission recognises the importance of addressing the proliferation of illegal activities, particularly the **sale, supply or promotion of illegal and dangerous goods**. As the Commission points out, "the online sale of counterfeit, dangerous products or other illegal goods puts citizens at risk and harms legitimate businesses"<sup>3</sup>.

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32000L0031>

<sup>2</sup> <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>

<sup>3</sup> *Ibid.*

BEUC member organisations have uncovered<sup>4</sup> many dangerous and illegal products sold online, particularly via marketplaces. These products range from dangerous chargers<sup>5</sup> to killer child car seats,<sup>6</sup> illegal cosmetics<sup>7</sup>, unsafe toys<sup>8</sup> and more<sup>9</sup>. **Other illegal activities** in digital services consist of scams<sup>10</sup>, unfair commercial practices, including misleading information, misleading representation of prices, undue pushing of consumers<sup>11</sup> or fake reviews<sup>12</sup>. Other examples include fake promotions and problems that appear on websites reselling events' tickets<sup>13</sup>.

During **the COVID-19 pandemic**, consumers became even more reliant on online services. At the same time, BEUC members witnessed an increase of potentially illegal business practices of online platforms, e.g. an increase of misleading claims on the sale of facemasks and price gouging of certain products<sup>14</sup>. In addition, the pandemic has shown the unrestricted power, influence and control which a few online platforms have on our society and economy<sup>15</sup>. Hence, we very much welcome that the Commission is considering establishing ex-ante measures for gatekeeping platforms and a new competition tool<sup>16</sup>.

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<sup>4</sup> See, for example [https://www.beuc.eu/publications/beuc-x-2019-072\\_new\\_evidence\\_from\\_beuc\\_member\\_organisations\\_regarding\\_dangerous\\_products\\_available\\_online.pdf](https://www.beuc.eu/publications/beuc-x-2019-072_new_evidence_from_beuc_member_organisations_regarding_dangerous_products_available_online.pdf)

<sup>5</sup> Test-Achats/Test-Ankoop, Chargeurs bon marché : danger ! <https://www.test-achats.be/hightech/gsm/news/chargeurs-usb-bon-marche-danger>

<sup>6</sup> Which?, Dangerous child car seats sold via Amazon flagged by BBC Panorama – Which? previously highlighted these products in investigations in 2014, 2017 and 2019, <https://www.which.co.uk/news/2020/02/dangerous-child-car-seats-sold-via-amazon-flagged-by-bbc-panorama/>

<sup>7</sup> Forbrugerrådet Tænk, Cosmetics from wish.com fail to comply with EU-legislation, <https://kemi.taenk.dk/bliv-groennere/cosmetics-wishcom-fail-comply-eu-legislation>

<sup>8</sup> Stiftung Warentest, Jedes vierte Produkt für Kinder ist mangelhaft, <https://www.test.de/presse/pressemitteilungen/Sicherheit-von-Kinderprodukten-Jedes-vierte-Produkt-fuer-Kinder-ist-mangelhaft-5412651-0/>

<sup>9</sup> BEUC, Two-thirds of 250 products bought from online marketplaces fail safety tests, consumer groups find, <https://www.beuc.eu/publications/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups/html>

<sup>10</sup> See, for example, Which? Stamp Out Scams campaign, <https://campaigns.which.co.uk/scams/>

<sup>11</sup> See, for example, the Consumer Protection Network investigations *inter alia* on Booking.com, Facebook, Airbnb, [https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions\\_en](https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions_en)

<sup>12</sup> See, for example:

Stiftung Warentest, Wie Verkäufer mit gekauftem Lob Kunden manipulieren, <https://www.test.de/Fake-Bewertungen-Wie-Verkaefer-mit-gekauftem-Lob-Kunden-manipulieren-5401497-5624942/>

OCU, Fake reviews in Amazon, TripAdvisor y Booking, <https://www.ocu.org/consumo-familia/compras-online/noticias/fake-reviews>

vzbv, Markwächter, Können Verbraucher Online-Bewertungen vertrauen?,

<https://www.marktwaechter.de/pressemeldung/koennen-verbraucher-online-bewertungen-vertrauen>

Which? research, The real impact of fake reviews,

<https://www.which.co.uk/policy/consumers/5860/realfakereviews>

Which?, Flawed eBay review system dupes consumers into buying shoddy products,

<https://press.which.co.uk/whichpressreleases/flawed-ebay-review-system-dupes-consumers-into-buying-shoddy-products/>

<sup>13</sup> See BEUC's Q&A on the release of tickets, [https://www.beuc.eu/publications/beuc-x-2019-034\\_resale\\_of\\_tickets\\_-\\_questions\\_and\\_answers.pdf](https://www.beuc.eu/publications/beuc-x-2019-034_resale_of_tickets_-_questions_and_answers.pdf)

<sup>14</sup> UFC-Que Choisir, Coronavirus - Hausse du prix des imprimantes, <https://www.quechoisir.org/actualite-coronavirus-hausse-du-prix-des-imprimantes-n77775/>

Which?, Price-gouging still rife on marketplaces amidst coronavirus,

<https://www.which.co.uk/news/2020/04/price-gouging-still-rife-on-marketplaces-amidst-coronavirus/>

Which?, eBay and Amazon failing to prevent sellers profiteering during coronavirus crisis,

<https://www.which.co.uk/news/2020/03/online-marketplaces-coronavirus-update-ebay-and-amazon/>

<sup>15</sup> We raised these matters in letters to Commissioners Breton and Reynders:

[https://www.beuc.eu/publications/beuc-x-2020-028\\_letter\\_to\\_commissioner\\_thierry\\_breton.pdf](https://www.beuc.eu/publications/beuc-x-2020-028_letter_to_commissioner_thierry_breton.pdf)

[https://www.beuc.eu/publications/beuc-x-2020-018\\_commissioner\\_reynders\\_covid-19\\_policy\\_recommendations.pdf](https://www.beuc.eu/publications/beuc-x-2020-018_commissioner_reynders_covid-19_policy_recommendations.pdf)

<sup>16</sup> In this regard, we refer to BEUC's responses to the roadmap consultation on these two items.

**The Digital Services Act should fill regulatory gaps and complement other applicable legislation.** It has become evidence that non-binding and voluntary initiatives are neither sufficient nor efficient to tackle the challenges of the platform economy. In fact, the implementation of self-regulatory actions often lacks adequate transparency, accountability and oversight. Regrettably, lack of compliance with non-binding or voluntary commitments does not trigger meaningful consequences for wrongdoers or adequate redress for consumers and victims of illegal activities.

To address these issues effectively and to avoid the emergence of an increasingly fragmented legal landscape in the internal market the Commission must "**upgrade our liability and safety rules** for digital platforms, services and products, and complete our Digital Single Market", as the Commission President committed to do<sup>17</sup>. Otherwise, the status quo (proliferation of illegal activities, anticompetitive practices, profit without adequate accountability, etc.) is unlikely to change. The Commission should not only focus on a set of "responsibilities and obligations" for digital service providers, but on liability, enforcement and oversight as well.

## 2. Evaluation

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According to Article 21 of the eCommerce Directive, the European Commission had to prepare reports **examining the application of the Directive** in 2003 and then every two years. We regret that the Commission did not fully fulfil this obligation over the years. Therefore, BEUC welcomes the Commission "will conduct an evaluation of the e-Commerce Directive".

As part of this analysis, we recommend the Commission to examine:

- how to put **consumer protection and safety** at an equal footing with single market objectives in the Digital Services Act. This should include preserving the consumer contracts derogation in the e-Commerce Directive;
- the **territorial scope** of the Directive, as providers established outside the EU are not properly regulated;
- the e-Commerce Directive's **categorisation of information society services**, particularly with regards to "hosting service providers". The current hosting provider categorisation oversimplifies the current situation and lacks nuances. BEUC recommends establishing rules for digital services depending on:
  - The functions and services provided. For example, Facebook hosts user-generated content, but also runs ads and offers marketplace services, among others. The same applies to other digital services. For example, think of Amazon as a cloud service provider function vs. Amazon as a marketplace. Respective activities and related responsibilities should be differentiated in the DSA.
  - Whether the activities at hand have a commercial nature from a user point of view. This means there must be a distinction between business users<sup>18</sup> activities and citizens/consumers' activities (e.g. between a company

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<sup>17</sup> [https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf)

<sup>18</sup> As defined under Article 2(1) of the Platform to Business Regulation, i.e. "any private individual acting in a commercial or professional capacity who, or any legal person which, through online intermediation services offers goods or services to consumers for purposes relating to its trade, business, craft or profession", cf. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150>

doing advertising to sell a product and a consumer posting a picture on Instagram). Companies should be more diligent towards business user activities, e.g. by imposing both a business user identification obligation and random checks on products and services (but not on user-generated content, as this would likely infringe the prohibition for general monitoring).

- how to clarify, develop and further harmonise **liability rules, in particular, for online marketplaces** who do not act expeditiously once they have received credible evidence of traders' illegal activities, including platforms where suppliers can place advertisements, digital comparison or other advisory services, and platforms that offer reputation services, and hybrid platforms (i.e. those platforms which provide various services or functions).
- the **obligations for digital service providers**, including any gaps to regulate transparency and accountability of advertising and recommendation or optimisation/curation mechanisms.
- how to **design robust and effective enforcement mechanisms**, as this has been a significant gap in the e-Commerce Directive.

### 3. Problem the initiative aims to tackle

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BEUC asks the Commission to **update and review the e-Commerce Directive to adapt it to the market reality of 2020 and beyond**. The horizontal rules under the e-Commerce Directive have indeed not changed for twenty years. Since then, companies like Facebook (2004), Airbnb (2008) and AliExpress (2010) were launched. As the Commission rightly states, "the scale of problems arising from digital services is substantially different from 20 years ago", and "an entirely new set of issues has also emerged". The Digital Services Act is an opportunity to address these challenges and maximise the benefits of the platform economy.

BEUC has identified **six main problems** that need to be tackled:

1. Spread of a wide range of illegal activities online, including the sale of illegal products.
2. The e-Commerce Directive does "not apply to service providers established in a third country" (e-Commerce Directive, recital 58).
3. The way the e-Commerce Directive regulates liability limitations on hosting providers is being used by some platforms to either shield themselves from accountability or to not take sufficient actions for fear of liability when facing illegal activities.
4. Current legislation has gaps on how to regulate the liability of online marketplaces, including platforms where suppliers can place advertisements, comparison or other advisory services, and platforms that offer reputation services, including hybrid platforms.
5. Lack of proper oversight and enforcement.

For every problem identified, BEUC proposes various solutions.



**Please check [BEUC's recommendations](#) for making the Digital Services Act work for consumers.**

We hope the Commission can take these into account. We urge the Commission to **be ambitious** in its proposals. We need effective measures to challenge the status quo, not to reinforce it.

#### 4. Objectives and policy options

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The **general objective** misses a key aspect of the e-Commerce Directive, i.e. the liability regime, particularly for online platforms.

The **baseline scenario**, i.e. not making any changes to the e-Commerce Directive, would not be appropriate. If all provisions of the e-Commerce Directive were still valid, we would not be talking about a Digital Services Act in the first place. Some aspects are welcomed, but the European Commission has itself recognised there is room for improvement.

Regarding the **policy options** presented by the Commission, BEUC welcomes the focus on measures **needing to be effective**. BEUC recommends the Commission to upgrade and **review the e-Commerce Directive in a comprehensive manner with robust oversight and enforcement mechanisms** (i.e. a combination of policy options 2 and 3).

With regards to the elements included in these options by the Commission, we would like to make the following comments:

- The Commission should **not only tackle how to react to illegal activities, but how to prevent them at their root in the first place**. Otherwise, the status quo would not significantly change. This means not focusing on (imperfect) automated measures or notice and action principles. Rather, we invite the Commission to set clear obligations with regards to the business models of digital services and how they operate. For example, the advertising and content optimisation model based on commercial surveillance fuels illegal activities. In addition, we recommend the establishment of robust business user authentication and verification processes for services and products offered or facilitated in platforms, while preserving consumer anonymity. Coupled with effective enforcement, these obligations would not ensure 100% “clean” digital services (which would be unrealistic) but would reduce the scale of the problems identified.
- Regarding obligations or responsibilities for digital services mentioned in the roadmap/inception impact assessment, BEUC considers that **regardless of size, companies need to respect consumer and product safety legislation and standards**. It would be both inappropriate and misleading for consumers to create a two-tier system of consumer protection depending on whether a firm is big or small. The Commission should not make basic obligations (e.g. on transparency) dependent on the size of the company. **However, enforcement can be adapted to size. Ex-ante measures for gatekeeping platforms, competition law and the new competition tipping tool** under consideration can address some of the concerns for start-ups and SMEs. Furthermore, BEUC advocates for online marketplaces that exert a predominant influence of the value chain to have greater liability in their platforms.

- With regards to **notice and action procedures**, BEUC considers that the Commission must take into account differences between various illegal activities as it made clear in its 2018 Recommendation tackling illegal content online<sup>19</sup>. Notice and action principles should include requirements for targeted actions, a notice format, validity of notices, expeditious action and safeguards<sup>20</sup>.
- **Upgrading or clarifying liability rules** is key to provide the market with the right incentives. To address fragmentation across the EU, the DSA should determine when online service providers would be liable and with what consequences (damages, contract performance duties, guarantees). BEUC encourages the European Commission to take a deep look at the consequences when intermediaries are deemed to be liable. Until now, the EU has been focused on when liability is not triggered on liability protections and limitations. It is now necessary to go a step beyond that.

The e-Commerce Directive has so far only established liability exemptions (for caching and mere conduit service providers) and liability limitations for hosting service providers (including online marketplaces). It is important to remind that Article 21 of the e-Commerce Directive states that when examining the adaptation of the Directive, the Commission should analyse “the attribution of liability following the take down of content”. In this sense, BEUC recommends the Commission not to aim at creating incentives for “voluntary actions” by platforms but adopt a rule of law approach. For approximately the last ten years, we have seen that self-regulation or non-binding policies or recommendations do not lead to significant improvement. The so called – “Safety Pledge” is another example of not achieving satisfactory results via industry self -regulation.

By encouraging non-accountable or non-sufficiently transparent voluntary actions, the Commission would be expanding on the unilateral decision-making power of platforms and would be creating obstacles for compliance and enforcement. That is why, based on academic research<sup>21</sup>, BEUC is highly sceptical about “good Samaritan” provisions. What is more, this type of approach has proven not to be working in the USA. The US Department of Justice is considering limiting platforms liability protections<sup>22</sup>. In addition, States like California are seeking to hold online marketplaces liable for defective products<sup>23</sup>.

- **Effective cooperation** needs to happen not only between digital service providers and authorities, but also between authorities and between authorities and civil society organisations, including consumer organisations. ‘Trusted flaggers’<sup>24</sup> should not be used to avoid responsibility by digital service providers.
- With regards to dealing with **harmful content** such as disinformation, BEUC recommends the Digital Services Act to have a rule of law approach. One measure

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<sup>19</sup><https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-measures-effectively-tackle-illegal-content-online>

<sup>20</sup> See BEUC’s notice and action principles proposal at <https://www.beuc.eu/publications/2012-00543-01-e.pdf>

<sup>21</sup> See, for example.

[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648780/IPOL\\_STU\(2020\)648780\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648780/IPOL_STU(2020)648780_EN.pdf)

<https://www.law.kuleuven.be/citip/blog/the-eu-commission-on-voluntary-monitoring-good-samaritan-2-0-or-good-samaritan-0-5/>

<sup>22</sup> Wall Street Journal, Justice Department Proposes Limiting Internet Companies’ Protections, <https://www.wsj.com/articles/justice-department-to-propose-limiting-internet-firms-protections-11592391602?mod=e2tw>

<sup>23</sup> Consumer Reports Supports California AB 3262, <https://advocacy.consumerreports.org/research/consumer-reports-supports-california-ab-3262/>

<sup>24</sup> Specialised entities with specific expertise in identifying illegal content, and dedicated structures for detecting and identifying such content online.



that would make a difference is to focus on business models, as disinformation is fuelled by the business model of some digital service providers, particularly platforms. As suggested during the elaboration of the Code of Practice on disinformation, we consider the European Commission should investigate the link between behavioural advertising revenues and disinformation or illegal activities<sup>25</sup>. This should be part of the impact assessment considerations. In addition, it would be important that the European Commission (DG Competition) continues to look at the advertising market, in particular regarding the business models of platforms like Facebook and Google. In this sense, we are concerned that the concentration in the market of online advertising has created the conditions for disinformation to flourish as a result of the incentives to hook people on sensationalist content to generate more advertising revenues.

## 5. Preliminary assessment of expected impacts and evidence-gathering exercises

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BEUC generally welcomes the European Commission's preliminary assessment and commitment to analyse the available evidence. As stated above, BEUC members have gathered extensive evidence of many dangerous and illegal products sold online, particularly via marketplaces, as well as evidence of other illegal activities taking place on digital services.

Regarding the assessment on likely **economic impacts**, it is important not to overly rely on growth as a success indicator.

## 6. Conclusions – BEUC recommendations to the e-commerce part of the Digital Services Act

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*Upgrading the liability and safety rules for digital content, services and products*

1. Consumer protection and online safety must feature prominently as guiding objectives of the reform of the e-Commerce Directive. The Digital Services Act (DSA) must complement and establish a consistent legal framework with other relevant legislation. And as self-regulation has proven to be ineffective and insufficient, additional regulatory obligations on platforms are needed. When doing so, the Digital Services Act must foresee different tools for different problems, as a one-fits-all solution would not be appropriate.
2. The DSA's rules must apply to service providers irrespective of whether they are established in the EU or in a third country.
3. The DSA should set up a toolbox of obligations for all platforms, as appropriate, comprising at least:
  - a. Clarifications to the liability regime in the e-Commerce Directive.
  - b. A robust business user authentication and verification process for services and products offered or facilitated in their platforms, while preserving consumer anonymity.
  - c. Principles for notice and action procedures.

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<sup>25</sup> See [https://www.beuc.eu/publications/beuc-web-2018-010\\_report\\_fake\\_news\\_high-level\\_group.pdf](https://www.beuc.eu/publications/beuc-web-2018-010_report_fake_news_high-level_group.pdf)



- d. Meaningful transparency and information requirements, including for advertising.
4. It should create a special liability regime for online marketplaces. Online marketplaces should:
    - a. Be liable upon obtaining credible evidence of illegal activities, without incurring a general duty to monitor the activity of platform users.
    - b. Be liable for damages, contract performance and guarantees, and consumers must be able to exercise the same rights and remedies available against the supplier or producer:
      - i. for failure to inform about the supplier of the goods or services;
      - ii. for providing misleading information, guarantees, or statements;
      - iii. where the platform has a predominant influence over suppliers.
    - c. Enjoy a right to redress towards the party at fault.
  5. The DSA must preserve the consumer contracts derogation to the country of origin principle.
  6. As digital markets evolve at a fast speed and competent authorities do not seem to cope with its challenges and lack the expertise or resources needed to monitor and tackle the problems of the market it is important that the DSA establishes a solid oversight and enforcement mechanism.



**For more details, please check**

[Making the Digital Services Act work for consumers - BEUC's recommendations](#)

END



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