

The Consumer Voice in Europe

MAKING THE DIGITAL SERVICES ACT WORK FOR CONSUMERS

BEUC's recommendations



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EC register for interest representatives: identification number 9505781573-45



Co-funded by the European Union

Ref: BEUC-X-2020-031 - 30/04/2020

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 looking 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 can be an opportunity to maximise the benefits and address some of the problems of the platform economy.

Summary

BEUC – The European Consumer Organisation supports the European Commission's intention to put forward a Digital Services Act (DSA) to "upgrade our liability and safety rules for digital platforms, services and products"¹. Under the understanding that the Digital Services Act package² is likely to include a review of the e-Commerce Directive³, BEUC would like to share its initial recommendations⁴:

1. General considerations:

- *Consumer protection and online safety must feature prominently as guiding objectives of the reform of the e-Commerce Directive.*
- *The Digital Services Act must complement and establish a consistent legal framework with other relevant legislation.*
- *Additional regulatory obligations on platforms are needed, as self-regulation is proving ineffective and insufficient.*
- *The DSA must foresee different tools for different problems.*

2. The rules must apply to service providers irrespective of whether they are established in the EU or in a third country.

3. Setting up a toolbox of obligations for all platforms, as appropriate, comprising at least:

¹ https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

² European Commission's Communication "Shaping Europe's Digital Future", available at https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf

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

⁴ BEUC acknowledges that the Digital Services Act may include another legislative initiative beyond the reform of the e-Commerce Directive. In this paper, we focus on the review of the e-Commerce Directive and the main issue identified for consumer protection, i.e. illegal activities in online marketplaces. We will publish a separate position paper regarding BEUC's views on possible ex-ante measures for "large platforms with significant network effects acting as gatekeepers".

- *Clarifications to the liability regime in the e-Commerce Directive.*
- *A robust business user authentication and verification process for services and products offered or facilitated in their platforms, while preserving consumer anonymity.*
- *Principles for notice and action procedures.*
- *Meaningful transparency and information requirements, including for advertising.*

4. Creating a special liability regime for online marketplaces. Online marketplaces should:

- *Be liable upon obtaining credible evidence of illegal activities, without incurring a general duty to monitor the activity of platform users.*
- *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:*
 - *for failure to inform about the supplier of the goods or services;*
 - *for providing misleading information, guarantees, or statements;*
 - *where the platform has a predominant influence over suppliers.*
- *Enjoy a right to redress towards the party at fault.*

5. Preserving the consumer contracts derogation to the country of origin principle.

6. Establishing a solid oversight and enforcement mechanism.

1. Twenty years ago, when the digital economy was profoundly different

Adopted in 2000, the e-Commerce Directive has been one of the cornerstones of EU's internet regulation for a long time, particularly for the platform economy.

The platform economy has provided various benefits.

The Internet has led to a considerable expansion of available information and to an enormous increase in the number of companies offering goods and services to consumers. In view of the wealth of new offers, it has become increasingly difficult for consumers to orient themselves on digital markets. This is where digital platforms such as search engines, price comparison platforms and booking portals come into play. They help consumers to select the most suitable product, service or company, thereby bringing down barriers to consumers. At the same time, platforms help providers reach consumers. As a result, the costs for all market participants may go down.⁵

Thanks to tech development and then the surge of the smart devices market, new types of services have appeared that did not exist before, take a company like BlaBlaCar which connects people in need of a trip with car owners who want to share the cost of their trip. Many platforms have disrupted what were otherwise very *sticky* markets with just a few 'old school' service providers.

The e-Commerce Directive has facilitated the "exchange of value and communications and [generated] revenues while doing so"⁶, which is positive for both businesses and

⁵https://www.vzbv.de/sites/default/files/downloads/2020/02/12/vzbv_gutachten_verbraucherrechtliche_plattformhaftung.pdf

⁶ <https://op.europa.eu/en/publication-detail/-/publication/7779caca-2537-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-102267632>, page 11.

consumers. It set forth the country of origin principle with some important derogations (notably consumer contracts), key information obligations towards the recipients of services (e.g. consumers), liability exemptions and limitations for online intermediary service providers, amongst other provisions.

The e-Commerce Directive has also clarified certain obligations for service providers and contributed significantly to the development of new business models and information society services⁷ based on, for example, the collaborative economy⁸ (e.g. Airbnb) or user-generated content (e.g. YouTube). It allowed users to act as creators of content. Yet, the platform economy has largely evolved since the Directive was enacted and legislators need to catch up.

The platform economy has evolved and is posing several risks and challenges.

When the e-Commerce Directive was adopted in 2000, platforms like Google, Amazon or Booking.com were in their infancies. Many other intermediaries did not even exist. For example, Facebook and Shopify were launched in 2004, and Airbnb in 2008. Instagram, Wish and AliExpress saw the light in 2010.

Over the past 20 years, the business models of some of these and other companies changed. The market power dynamics have also changed.

The European digital market landscape is witnessing the collection of vast amounts of data (sometimes illegally); a multiplication of platforms; a proliferation of the collaborative⁹ or gig economy; and a diversification of service providers in terms of functions, vertical integration and size; a spread of a wide range of illegal activities, etc. For example, recent research by BEUC members¹⁰ shows that **two thirds of 250 products bought from online marketplaces failed safety tests**. The consequences for consumers, including children, of buying such failing products could range from electric shock, to fire or suffocation. Sadly, and despite the rapid growth in online marketplace shopping, consumers do not have the same protections as they do when buying in traditional brick-and-mortar stores¹¹. This was not the first time¹² nor is it likely to be the last time our members report about similar problems.

To achieve a consumer-friendly Digital Services Act, the European Union should provide solutions to existing problems and be forward looking. Of course, the Digital Services Act will be a piece of a bigger puzzle of norms. Regulatory action is needed regarding the Digital Services Act, but also in other areas of law such as the General Product Safety Directive and the Product Liability Directive as well as when it comes to enforcement and trade policy. This paper is thus part of a set of policy recommendations to modernise the safety and liability legislative framework¹³.

⁷ https://www.beuc.eu/publications/beuc-x-2018-080_ensuring_consumer_protection_in_the_platform_economy.pdf

⁸ http://www.beuc.eu/publications/beuc-x-2016-030_gbe_collaborative_economy_beuc_position.pdf

⁹ <https://www.ocu.org/consumo-familia/consumo-colaborativo/informe/plataformas-consumo-colaborativo>

¹⁰ <https://www.beuc.eu/publications/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups/html>

¹¹ BEUC/ vzbv (2017): The challenge of protecting consumers in global online marketplaces, https://www.beuc.eu/publications/beuc-x-2017-122_the_challenge_of_protecting_eu_consumers_in_global_online_markets.pdf


¹² See extensive list compiled from our members' most recent work and shared with the European Commission, https://www.beuc.eu/publications/beuc-x-2019-072_new_evidence_from_beuc_member_organisations_regarding_dangerous_products_available_online.pdf

¹³ For more information, please check BEUC's website, <https://www.beuc.eu/>

2. Protecting consumers comes first. BEUC's recommendations for a Digital Services Act that works for consumers¹⁴

The Digital Services Act is an opportunity to maximise the benefits of digital services, catch up with market developments and address existing consumer protection and safety problems.

1. General considerations



Problem #1. Spread of a wide range of illegal activities online, including illegal products.

Digital services have – to some extent – become an enabler for widespread consumer law violations; a revenue stream for the sale of advertising or promotion of dangerous, unsafe, illegal products online.

For example:



BEUC's UK member Which? found Christmas tree lights sold online that could catch fire or electrocute consumers.¹⁵



The Danish Consumer Council revealed many cosmetics on wish.com do not comply with EU law.¹⁶



49% of cheap mobile chargers bought online and tested by our Belgian member Test Achats/Test Aankoop do not comply with EU safety rules.¹⁷

As Commissioner Breton stated, “[n]on-compliant products are dangerous for consumers but also undermine the level playing field for businesses by providing competitive advantages to companies which do not follow the rules.”¹⁸

BEUC's recommendations:

- **Consumer protection and online safety should feature prominently as guiding objectives of the reform of the e-Commerce Directive.**

It is obvious that digital services rules should consider a variety of interests, but these two essential objectives should be added to the (legal) objectives of the

¹⁴ This is a non-exhaustive list of recommendations. Once the path towards a Digital Services Act becomes clearer, BEUC will provide more detailed recommendations.

¹⁵ <https://www.which.co.uk/news/2019/12/these-christmas-tree-lights-bought-online-at-ebay-wish-and-aliexpress-could-catch-fire-or-electrocute-you/>

¹⁶ <https://kemi.taenk.dk/bliv-groennere/cosmetics-wishcom-fail-comply-eu-legislation>

¹⁷ <https://www.test-achats.be/hightech/gsm/news/chargeurs-usb-bon-marche-danger>

¹⁸ <https://www.europarl.europa.eu/resources/library/media/20191113RES66410/20191113RES66410.pdf>

current e-Commerce Directive. According to Article 1 of the current e-Commerce Directive, its main legal objectives are the correct functioning of the internal market and the freedom to provide information society services. Other important objectives are mentioned in the recitals, including "legal certainty and consumer confidence" (recital 7) and ensuring a high level of consumer protection and protection of minors (recital 10). Any update of the rules governing online services must **go beyond focusing only on single market objectives. Ensuring consumer and fundamental rights protection should be among the main objective of the reform of the e-Commerce Directive.** The single market objective can only be achieved if consumer trust is ensured. Otherwise there is a risk of market failure.

- **The Digital Services Act should complement and establish a consistent legal framework together with other relevant legislation**, such as rules on consumer protection, enforcement, product safety, market surveillance, competition, geoblocking, audiovisual media services and copyright, among others.

The updated e-Commerce rules must clearly establish that consumer law and product safety requirements¹⁹ and infringements fall within their scope of application. This will provide legal certainty and follow the European Commission's Communication on Tackling Illegal Content Online, which clarified that "product safety, offer and sales of food or tobacco products and counterfeit medicines, consumer protection rules or product safety measures" are included in the e-Commerce Directive scope²⁰. While there are differences between faulty products and other types of online content, platforms facilitate the purchase and promotion of products by listing them or hosting content to sell, supply or promote them. Content policies have much to do with consumer law as well. The COVID-19 crisis, which has seen numerous products with untenable health claims being marketed online, is a clear example of that²¹.

- **Impose additional regulatory obligations on platforms, as self-regulation is proving ineffective and insufficient.** There is vast evidence that voluntary action is not enough or has just become a way to delay regulatory obligations. For example, the Product Safety Pledge through which AliExpress, Amazon, eBay and Rakuten France committed to a faster removal of dangerous products sold on their sites is not leading to satisfactory results. Despite eBay being part of the EU's Product Safety Pledge²², UK consumer group Which? has raised the alarm²³ about the company's failure to remove unsafe smoke alarms from its site. Although aware of the problem, eBay seems not to be doing enough to stop removed products from being relisted. In the meantime, consumers' lives are at risk. In addition, not all relevant players are part of this initiative. Even though Allegro and cDiscount have joined *a posteriori*²⁴, the Pledge is likely not to comprise all relevant players in the market (and probably never will, as per existing experience of other Codes of Conduct – e.g. the Hate Speech Code of Conduct²⁵). Furthermore, the Pledge has

¹⁹ This would require changing Articles 1 and 2 h) of the current e-Commerce Directive.

²⁰ <https://ec.europa.eu/digital-single-market/en/news/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms>

²¹ See, for example https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/scams-related-covid-19_en

²² https://ec.europa.eu/info/sites/info/files/voluntary_commitment_document_4signatures3-web.pdf

²³ <https://www.which.co.uk/news/2019/10/which-investigation-prompts-100s-of-unsafe-co-alarms-to-be-removed-from-sale-do-you-have-one/>

²⁴ https://ec.europa.eu/info/business-economy-euro/product-safety-and-requirements/product-safety/product-safety-rules_en

²⁵ https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54300

not been assessed against strict and detailed key performance indicators (KPIs).²⁶ The notion that market forces alone can ensure best outcomes for consumers is losing credibility.

- **Different tools for different problems.** While the e-Commerce Directive should continue being a horizontal law, a one-size-fits-all solution to all types of illegal activities or hosting providers would not be appropriate. **BEUC therefore recommends tailoring measures on the basis of the services offered by a platform and the type of illegal activity:**
 - **Distinguishing between commercial and non-commercial activities.** For example, the sale or promotion of illegal products are different from consumers posting potentially illegal comments on social media. Any distinction drawn, and accompanying measures, should not unintentionally lead to unjustified limitations on consumers' freedom of expression or fundamental rights to personal data and privacy.

The debate to reform the e-Commerce Directive has to some extent focussed on issues like hate speech, terrorist content, copyrighted material and freedom of speech considerations. Digital services can be used as a suppressor of legitimate content on e.g. the basis of intellectual property allegations²⁷. In this context, it is difficult for an automated tool to identify content uploaded by consumers that would fall under the caricature, parody or pastiche exemption envisaged in copyright legislation.²⁸

Not enough attention has been given to the fact that the e-Commerce Directive also matters for consumer protection in the context of online transactions. Due to the increase of online trading of products on online marketplaces and the increasing failure to ensure EU safety standards are respected on these platforms, responsibility for the quality and safety of products have become important elements when it comes to obligations and liability of online marketplaces. It is therefore important for the co-legislators to introduce **strong safeguards and obligations for product safety and consumer protection** when defining rules on digital services.

Consumers must not become victims of unfair behaviour or be harmed, e.g. due to the purchase, supply or promotion of unsafe products online. These activities also cover advertising and marketing. For example:

- some **online influencers** do hidden marketing of products without revealing that they are paid for it.²⁹ This is an unfair commercial practice that is commonly used in the areas of health, food supplements and beauty products, but not only limited to them.

²⁶ https://www.beuc.eu/publications/beuc-x-2019-072_new_evidence_from_beuc_member_organisations_regarding_dangerous_products_available_online.pdf

²⁷ See, for example, <https://juliareda.eu/2017/09/when-filters-fail/>

²⁸ <https://www.beuc.eu/blog/in-no-mans-land-consumers-in-the-copyright-debate/>

²⁹ See, for example Italian Competition Authority's official communication "Seconda moral suasion per influencer: pubblicità occulta vietata sempre, anche sui social network", <https://www.agcm.it/media/comunicati-stampa/2018/8/alias-9449>

- the Digital Services Act should provide solutions to **end “aggressive marketing”**³⁰. At a minimum, it should limit the number of ads and pop-up screens that consumers can receive.
- Equally, the Digital Services Act must tackle **scams** (for example for fake investments), which are a growing area of concern and are difficult to tackle when these are presented to consumers using inter alia social media platforms. Our member Which?, for instance, sees ‘fake and fraudulent online ads and content’ as a key enabler of scams³¹.
- **Distinguishing between digital services hosted by platforms rather than focusing too much on the type of platform.** This is because some platforms have acquired multiple roles, which can combine different intermediary functions (e.g. Facebook³²) or act as vertically-integrated platforms³³ (e.g. Amazon³⁴).

Digital services particularly relevant for consumer protection which should fall under the scope of the DSA include **online marketplaces**, e.g. eBay. These are defined under the Omnibus Directive³⁵ as “a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers³⁶”.

If one of the services provided by a platform fulfils the criteria to be considered as a marketplace (‘hybrid platforms’), the rules should fully apply to that part of the business. These hybrid platforms include those where suppliers can place advertisements (like social media services, e.g. Instagram) and platforms which offer comparison, advisory or reputational services (e.g. Booking.com or Yelp).³⁷ This is because they facilitate (“allow”) the conclusion of B2C contracts.

- **Ensuring a high-level of consumer protection does not depend on the size of a company.** The rationale of consumer protection in the EU is to provide a common denominator of protection for all consumers irrespective of the size

³⁰ UFC-Que Choisir has launched an action against LastMinute.com for misleading and aggressive commercial practices after several consumers found that a travel insurance had been added to their order without their consent, <https://www.quechoisir.org/action-ufc-que-choisir-lastminute-consommateurs-ne-vous-laissez-pas-abuser-n74807/>

³¹ See Which?’s campaign to fight scams at <https://campaigns.which.co.uk/scams/>

³² Facebook can act both as a social network and as an advertising company in which consumers can buy products. According to Instagram’s own figures, “60% of people say they discover new products on Instagram”, <https://www.facebook.com/business/help/1603906456518352>. And yet, some of the products offered do not always respect the law.

³³ They act as intermediaries, but also compete with traders, either directly or via affiliated companies.

³⁴ Amazon is a seller, an online marketplace, a cloud computing company, a video-sharing platform, a publisher, an advertising company, a manufacturer of connected devices and an artificial intelligence company.

³⁵ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, available at <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>


³⁶ Article 2(1)(n) of the Unfair commercial practices Directive, as amended by Directive 2019/2161”, <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

³⁷ This categorisation is inspired on the European Law Institute’s Report “Model Rules on Online Platforms”, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf (article 1).

of the trader. It would be both inappropriate and confusing for consumers to create a two-tier system of consumer protection depending on whether a firm is big or small. All platforms must have the same duty to protect consumers. Against this background, asymmetrical legislation (i.e. targeting certain players) can be introduced only as a means to tackle market-related problems (e.g. complementing the Platform to Business Regulation³⁸ and ex-post competition law enforcement) but not in relation to consumer protection, which should be the same for all platforms. Online marketplaces no matter their size should be held liable if they have a predominant influence on the value chain for remedies available for damages, guarantees and contract performance issues against suppliers (see BEUC recommendations to problem #4).

2. The rules must apply to service providers irrespective of whether they are established in the EU or in a third country

Some providers established outside the European Union are exploiting the territoriality limitations of the Directive – creating an unfair and uneven playing field.



Problem #2. The e-Commerce Directive does “not apply to service providers established in a third country” (e-Commerce Directive, recital 58).

BEUC recommendations:

- The territorial scope should **cover all entities that provide services, products and/or digital content to EU consumers**, regardless of them having an establishment in the EU. This can mirror Article 3 and recital 23 of the General Data Protection Regulation (GDPR)³⁹. This would be in line with Article 6 Rome I Regulation⁴⁰ where, for consumer contracts, the applicable law is always that of the country where the consumer has his/her habitual residence. This cannot be excluded by choice-of-law contract clauses, as following the Court of Justice of the European Union (CJEU)’s joined cases C-240/98 to C-244/98⁴¹, contract terms which seek to supersede this are to be deemed as unfair under the EU Unfair Contract Terms Directive⁴².
- **Platforms must check suppliers from outside the EU which target European consumers either have set up a branch in the EU or have appointed a person responsible in the EU.** Platforms – notably online marketplaces – should be obliged to check whether the EU representative office exists and whether it is operational. This obligation could be fulfilled by random checks and by evaluating the trader-related data that is generated. If the trader does not meet this obligation and the platform is proven to have failed to verify compliance of this obligation, the platform would be liable for damages and guarantees, without prejudice to seek redress to the trader *a posteriori*.

³⁸ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150>

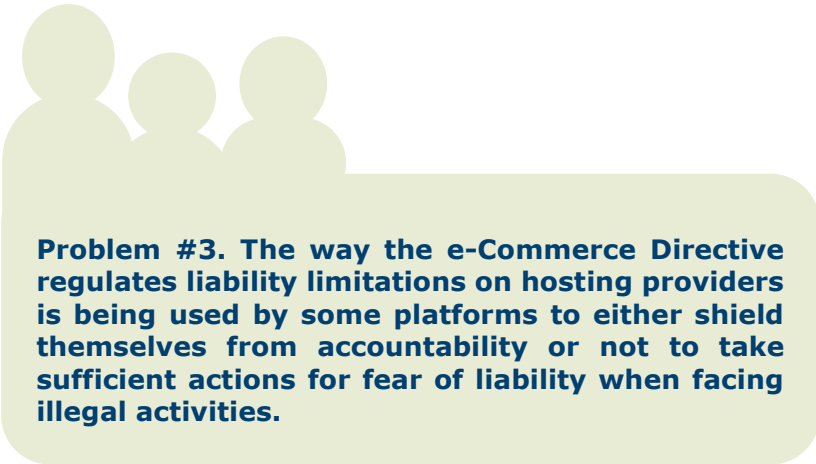
³⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R0679>

⁴⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008R0593&from=EN#d1e833-6-1>

⁴¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61998CJ0240&from=EN>

⁴² <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:01993L0013-20111212>

3. Setting up a toolbox of obligations for all platforms



Problem #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 not to take sufficient actions for fear of liability when facing illegal activities.

BEUC recommends establishing a toolbox for all types of online platforms, as appropriate. This toolbox should at least include:

- **Clarifications to the liability regime in the e-Commerce Directive.**
Articles 12-14 of the current e-Commerce Directive have set forth liability limitations and exemptions on mere conduit, caching and hosting service providers. In addition, Article 15 has prohibited Member States to impose a general monitoring obligation on online intermediaries “over the information they send or store, to look for and prevent illegal activity”⁴³, which is essential to ensure the protection of consumers’ freedom of expression, personal data and privacy.

These provisions have contributed significantly to the development of new business models and information society services based on, for example, user-generated content. In other words, **the liability exemption and limitation principles in the e-Commerce Directive have provided for a balanced framework and should be maintained. However, the e-Commerce Directive must clarify the following points:**
 - As the platform economy and CJEU case law⁴⁴ have evolved, it has become clear that **not all ‘hosting’ service providers are the same.** In fact, many hosting service providers (notably online platforms) have a more **active intermediary role** than was meant under Article 14 of the e-Commerce Directive. This is because they have the capacity to know and control information hosted or transmitted in their sites or apps.
 - Regardless of the passive-active distinction between online intermediaries, particularly hosting providers, **the Digital Services Act must ensure that online intermediaries must be held liable when failing to expeditiously remove, disable access to and take reasonable steps to prevent reappearance⁴⁵ of illegal activities they have knowledge of or have been made aware of them.**

⁴³ e-Commerce Directive – document summary, available at <https://eur-lex.europa.eu/legal-content/en/LSU/?uri=CELEX:32000L0031>

⁴⁴ See relevant case law per article in Eur-lex’s e-Commerce Directive document information, available at <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32000L0031>


⁴⁵ This recommendation should not be confused with mandatory content control filters but rather be a reinforcement of the principle “know your business user”. It could also entail spot-checks to verify products or services offered by online marketplaces, in particular for products and services that have already been identified as illegal. Evidence from BEUC members about the constant reappearance of illegal products that had already been flagged to online marketplaces shows a clear need to step up efforts.

- **When online intermediaries facilitate the conclusion of a distance contract between consumers and other traders or consumers (i.e. they are online marketplaces), a special liability regime is needed⁴⁶** (see our proposals for problem #4).
 - In addition, **BEUC is very sceptical about the introduction of a “Good Samaritan” clause to exempt providers from liability when acting in “good faith”.** While big online platforms often complain that the current regime penalises those that proactively try to address illegal content, the solution is not to import concepts from the US law⁴⁷ which are not fit-for-purpose in EU law. This type of clause would not help address the challenges for platform responsibility for online safety and consumer protection. It would encourage platforms to be deciders on what should be allowed. It would also risk reinforcing impunity, creating obstacles for enforcement. For example, when big online marketplaces have been put on the spotlight for hosting content that facilitates the sale of unsafe and therefore illegal products, they often claim that bad actors will always try to bypass their systems that are in place. Having a “best efforts” or a “Good Samaritan” clause would not solve this. It would actually not be efficient for fighting illegal activities.⁴⁸
- **Principles for notice and action procedures for tackling illegal activities.**

At least ten Member States⁴⁹ have passed legislation to set up notice and action procedures. Yet, these procedural aspects are not regulated for all types of illegal content and requirements vary across countries.⁵⁰ Both consumers and businesses would benefit from further harmonisation of procedural aspects of notice and action, while noting a one-size-fits-all process for all types of illegal content would not be appropriate.

These principles should include **requirements for targeted actions, a notice format, validity of notices, expeditious action and safeguards.**

In complex areas of law, such as alleged copyright infringements, a notice-and-notice system is more appropriate, and more safeguards need to be put forward.



Check more details about
BEUC’s notice and action principles
proposal at
<https://www.beuc.eu/publications/2012-00543-01-e.pdf>

⁴⁶ https://www.beuc.eu/publications/beuc-x-2018-080_ensuring_consumer_protection_in_the_platform_economy.pdf

⁴⁷ Particularly in sections 230(c)(2) of the Communications Decency Act,
<https://www.law.cornell.edu/uscode/text/47/230>

⁴⁸ This is reinforced by academic literature. 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/>

⁴⁹ Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Spain, Sweden and the United Kingdom.

⁵⁰ <https://op.europa.eu/en/publication-detail/-/publication/a56ceb47-2446-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-search>, pages 52, 81-96, 156.

- **A robust business user authentication obligation and a service and product verification process obligation, while preserving the right to anonymity of consumers.**

Platforms should enhance their checks before including suppliers on their sites and applications. This requirement should complement Article 5 of the current e-Commerce Directive and Article 5 of the Consumer Rights Directive, ensuring that service providers, sellers, manufacturers and products are identifiable.

Similarly, business users should provide evidence of compliance with safety and other legal requirements as a condition for their listing. This should reduce the number of fake advertisers in platforms like Instagram; reduce the problems with drop shipping when the seller disappears⁵¹; and hamper the placing of illegal and dangerous products online.

Evidence: Consumer testing

It only took our member organisation Which? a few minutes to list an unsafe car seat on Amazon MarketPlace. This is despite Which? flagging the sale of killer child car seats to the platform in 2014⁵², in 2017⁵³ and in 2019⁵⁴, followed by a BBC investigation in 2020⁵⁵; and despite Amazon only allegedly allowing approved sellers to list child car seats on its Marketplace. Which? managed to do this testing by duplicating the listing of another seller. This means that a business user authentication and a product or service verification process to list them needs to be robust. Which? staff was not asked for any proof of compliance at any stage, and their illegal car seat listing stayed live for two weeks until Which? itself chose to remove it in view of Amazon's lack of action.⁵⁶

- **Meaningful transparency and information requirements.**

Meaningful, consistent and comprehensive transparency is the first step towards accountability.

The Digital Services Act must:

- **Have thorough transparency obligations regarding**
 - **how digital service providers moderate** illegal content, services or products;

⁵¹ <https://www.quechoisir.org/actualite-seinsafe-com-le-soutien-gorge-anticancer-etait-une-arnaque-n70011/>

⁵² 'Killer car seat' alert issued by Trading Standards, <https://www.which.co.uk/news/2014/09/killer-car-seat-alert-issued-by-trading-standards-379870/>

⁵³ Watch out for 'killer car seats' on sale this Christmas, <https://www.which.co.uk/news/2017/12/watch-out-for-killer-car-seats-on-sale-this-christmas/>

⁵⁴ <https://www.which.co.uk/news/2019/02/why-are-ebay-and-amazon-still-selling-killer-car-seats/>

⁵⁵ Dangerous child car seats sold via Amazon flagged by BBC Panorama, <https://www.which.co.uk/news/2020/02/dangerous-child-car-seats-sold-via-amazon-flagged-by-bbc-panorama/>

⁵⁶ Dangerous toys and killer car seats listed for sale at online marketplaces like Amazon and eBay, <https://www.which.co.uk/news/2019/11/dangerous-toys-and-killer-car-seats-listed-for-sale-at-marketplaces-like-amazon-and-ebay/>

- **the “application, functioning and effectiveness of automated systems** for sending and receiving takedown notices” and identifying illegal activities⁵⁷;
 - **what data or parameters are used for automated-decisions** affecting consumers; and
 - **the publication of comprehensive transparency reports, following a consistent methodology and being assessed upon key performance indicators.** This is because research shows “[o]nline service providers are selective about what they publish in their reports. Although many provide statistics on notices, there is little information on the outcomes of using automated tools, with some online service providers not even publicly acknowledging their use of such tools⁵⁸.”
EU legislators can draw inspiration from the transparency obligations proposed in Articles 8 and 8a of the European Parliament’s first reading of the Terrorist Content Regulation⁵⁹.
- **Ensure platforms share relevant data with competent authorities and independent researchers, redacting and anonymising personal data, as appropriate.**⁶⁰ “The implementation of transparency requirements should make published data understandable to consumers and to the general public⁶¹”.
 - **Strengthen information requirements of the e-Commerce Directive** (Articles 5, 6 and 10), including a robust business user authentication obligation and a service and product verification process obligation on digital service providers.

As the consumer law fitness check confirmed⁶², consumer law, the Services Directive and the e-Commerce Directive requirements are complementary. Their scope of application, the moment in which the Directives apply and the type of information requirements are sometimes different.

- **Insert obligations to address manipulative and deceptive practices and design patterns.** This should apply particularly to those platforms that perform ranking or comparison services. For example, the Australian consumer authority and the Federal Court of Australia found that Trivago was misleading consumers. While Trivago claims that they offer the cheapest rooms, the ranking is based on which company is paying the platform most⁶³. Similarly, Booking.com has been found to infringe EU consumer law and must make significant changes⁶⁴ to stop unfair practices, including misleading information about rebates, misleading

⁵⁷ <https://op.europa.eu/en/publication-detail/-/publication/a56ceb47-2446-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-search>, page 158.

⁵⁸ *Ibid.*

⁵⁹ https://www.europarl.europa.eu/doceo/document/TA-8-2019-0421_EN.pdf

⁶⁰ See, for example, European Data Protection Supervisor, A Preliminary Opinion on data protection and scientific research, https://edps.europa.eu/sites/edp/files/publication/20-01-06_opinion_research_en.pdf

⁶¹ Ben Wagner, Krisztina Rozgonyi, et al, Regulating transparency?: Facebook, Twitter and the German Network Enforcement Act, p. 263, <https://dl.acm.org/doi/abs/10.1145/3351095.3372856>

⁶² https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59332

⁶³ <https://www.accc.gov.au/media-release/trivago-misled-consumers-about-hotel-room-rates>

⁶⁴ For example, our German member vzbv is concerned about Booking.com’s ranking algorithm, which seems to benefit hotels which pay a) a higher commission to the platform, b) which pay their commission “on time” or c) which are part of the a “preferred partnership programme”. Vzbv considers this default ranking system should be banned. Reference to this part of Booking.com’s T&C: https://www.booking.com/content/terms.en-gb.html?label=gen173nr-1FCAEoggI46AdIM1gEaDuIAQGyAQe4ARfIAQ_YAQHoAQH4AQQuIAgGoAgO4At-32fIFwAIB;sid=62d269bae75b1674d5da3359844584b2#tcs_s8 (last visited on 26 February 2020).

representation of prices, and undue pushing of consumers⁶⁵. Booking.com committed to make changes by 16 June 2020 at the latest. So it is yet to be seen how Booking.com abides by its commitments and how the Consumer Protection Cooperation Network (CPC) will be closely monitoring their implementation.

- **Address problems created by advertising and marketing practices, going beyond current “transparency” requirements.** Even if some degree of ad transparency is provided by platforms like Facebook, research shows the information provided has been found to be misleading or incomplete, and the main focus so far has only been on political ads. When analysing Facebook’s claimed ad transparency, researchers found that, despite targeting Facebook users with several attributes (e.g. demographic, behaviour, interest-based) in their experiments, at most only one attribute was provided in the explanation Facebook gives to users. Their research also showed “that Facebook’s ad explanations sometimes suggest that [ad targeting] attributes that were never specified by the advertiser “may” have been selected, which makes these explanations potentially misleading to end users about what the advertiser’s targeting parameters were”⁶⁶. Indeed, when a consumer clicks on Facebook’s ‘Why am I seeing this?’ on an ad, Facebook provides a rather vague explanation⁶⁷.

BEUC recommends considering inter alia the following aspects:

- **There are many different types of ads** (e.g. banner ads in apps, browser ads, search engine ads, app store ads, social media newsfeed ads, news outlets ads (in line/pop-up), video ads...).
- **The opacity of the ad-tech ecosystem.** Many of the entities involved are completely unknown to consumers.⁶⁸
- **The predominant, surveillance advertising business model**⁶⁹ is at the root of many of the problems we witness. For example, it incentivises low-quality and misleading content⁷⁰.
- **Ad categories** are not clear cut (e.g. political-related ads are not necessarily only a political party’s ad).

BEUC’s recommendations:

- **Regulation should cover all categories of advertising, not just political ads.**

⁶⁵ https://ec.europa.eu/info/live-work-travel-eu/consumers/enforcement-consumer-protection/coordinated-actions_en

⁶⁶ Andreou, A., Venkatadri, G., et al, Ad Transparency Mechanisms in Social Media: A Case Study of Facebook’s Explanations, https://people.mpi-sws.org/~gummadi/papers/fb_explanations.pdf

⁶⁷ *Ibid*, page 6.

⁶⁸ See, for example <https://www.forbrukerradet.no/out-of-control/> and <https://privacyinternational.org/advocacy/2426/our-complaints-against-acxiom-criteo-equifax-experian-oracle-quantcast-tapad>

⁶⁹ Note not all business models of advertising are based on microtargeting, programmatic, behavioural or surveillance advertising. See, for example alternative online advertising models: Kobler: <http://kobler.no/contextual-insights/>

Qwant: <https://about.qwant.com/fr/>

The New York Times: <https://digiday.com/media/gumgumtest-new-york-times-gdpr-cut-off-ad-exchanges-europe-ad-revenue/>

<https://www.nytimes.com/2019/04/10/opinion/sulzberger-new-york-times-privacy.html>

Brave: <https://brave.com/>

⁷⁰ <https://www.theguardian.com/world/2019/nov/05/targeted-ads-fake-news-clickbait-surveillance-capitalism-data-mining-democracy>

- **At the very least, consumers should have the same level of information than advertisers have when willing to place an ad⁷¹.** These should include the type of targeting criteria applied, who the source behind the ad is, etc.
- Once the Omnibus Directive becomes applicable⁷², not disclosing paid advertisements or paid placement in ranking of search results in a clear, concise and intelligible manner will be considered as an unfair commercial practice. This transparency requirement applies to both direct or indirect payments by traders. To complement this, the Digital Services Act must impose an obligation on digital service providers to **disclose who is paying for the ad and, if applicable, on behalf of whom they are placing it.**

4. Creating a special liability regime for online marketplaces

Consumers should have effective protections online.

For example, BEUC members keep uncovering illegal (unsafe and dangerous products) being sold, supplied or promoted online. Platforms like Facebook, Amazon, Alibaba or Wish are making money out of illegal sales. This has to stop.



Problem #4. Current legislation has gaps on how to regulate the liability of online marketplaces, including platforms where suppliers can place advertisements, digital comparison or other advisory services, and platforms that offer reputation services, including hybrid platforms.

The reform of the e-Commerce Directive is an opportunity to hold online marketplaces accountable and even liable if they fail their duties. As BEUC member Which? points out, “people do not have the same protections as they do when buying from traditional retail outlets or websites, leaving them exposed to unsafe products”⁷³. Ensuring the liability regime for the sale, supply or promotion of online products in online marketplaces protects consumers more effectively. This would require action not only in the DSA, but also in other laws, notably the Product Liability Directive, the General Product Safety Directive and the Omnibus Directive.

BEUC’s recommends creating a special liability regime⁷⁴ for online marketplaces in the DSA, including those services which allow the conclusion of a distance contract between a trader and a consumer via advertisements, digital comparison, reputation or other advisory services.

This liability regime would complement Articles 12-15 of the current e-Commerce Directive. Its objectives would be to better take into account the reality of the market situation and economic power distribution between platforms, traders and consumers and to protect consumers in case of illegal activities or non-complying traders.

- In line with Articles 14 and 15 of the current e-Commerce Directive, the Digital Services Act must clarify that an online marketplace will be **liable for damages if it does not take “adequate measures for the protection of platform users” upon obtaining**

⁷¹ For more detailed recommendations, please see <https://panoptikon.org/political-ads-report>

⁷² See <https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

⁷³ See <https://www.which.co.uk/policy/consumers/5234/onlinemarketplaces>

⁷⁴ This type of liability is inspired by the European Law Institute’s Model Rules on Online Platforms, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf

credible evidence of an illegal activity from a supplier or a costumer, constituting criminal conduct or causing “physical injury, a violation of privacy, infringement of corporeal property, deprivation of liberty or a violation of another similar right to the detriment of another platform user”⁷⁵.

- In addition, **online marketplaces must be liable for damages, contract performance and/or guarantees⁷⁶ and consumers must be able to exercise the same rights and remedies** available against the supplier or producer in three scenarios, as appropriate:
 - **For failure to inform about the supplier of the goods or services.** This would be **in line with**
 - Article 4 (5) of the Omnibus Directive introducing the new art. 6a (1) (b) of **the Consumer Rights Directive**, which requires the provider of an online marketplace to inform the consumer whether a third party offering the good/service is a trader or not. In addition, art. 6a (1) (d) of the Consumer Rights Directive is clear that this is without prejudice to any responsibility that the provider of the online marketplace or the third-party trader has in relation to the contract under other Union or national law”; **and**
 - **CJEU Wathelet v Bietheres judgment⁷⁷**. In this case, the court interpreted the concept of ‘seller’ for the purposes of Article 1(2)c of the 1999/44 Sales Directive. The Court made clear that an intermediary can be regarded a seller and that in such cases it would not matter whether the intermediary is remunerated for acting as intermediary or whether it acts on behalf of a private individual be held liable. The Court stated that it is essential that consumers are aware of the identity of the seller and that if “consumer can easily be misled in the light of the conditions in which the sale is carried out, it is necessary to afford the latter enhanced protection. Therefore, the seller’s liability [...] must be capable of being imposed on an intermediary who, by addressing the consumer, creates a likelihood of confusion in the mind of the latter, leading him to believe in its capacity as owner of the goods sold⁷⁸”.
 - **For providing misleading information, guarantees, or statements.** The online marketplace would be liable for damages for:
 - **misleading information or statements given by the supplier or a costumer and notified to the platform operator** if the operator has not taken reasonable measures to remove, rectify or make inaccessible such misleading information or statements (in line with Article 14 of the e-Commerce Directive)⁷⁹.
 - **misleading statements or guarantees made by the platform operator** regarding the supplier (including the goods and/or services offered by the supplier) or customers⁸⁰.

While these practices may constitute an unfair commercial practice, nowadays platforms do not have any responsibility to provide accurate information. For

⁷⁵ European Law Institute Model Rules for Online Platforms, article 8.

⁷⁶ As defined in Article 2(12) and articulated in Article 17 of Directive 2019/771 on contracts for the sale of goods, available at <https://eur-lex.europa.eu/eli/dir/2019/771/oj>

⁷⁷ CJEU case C-149/15, available at

<http://curia.europa.eu/juris/document/document.jsf?docid=185221&doclang=en>

⁷⁸ *Ibid*, para. 41 of the judgment.

⁷⁹ European Law Institute Model Rules on Online Platforms, article 9.

⁸⁰ *Ibid*, article 23.

instance, our Spanish member OCU has found numerous offers being promoted in Amazon, Tripadvisor and Booking.com by “fake reviews”⁸¹.

- **Where the platform has a predominant influence or control over suppliers.** Such “predominant influence” could be inferred by non-exhaustive and non-cumulative criteria, such as the one proposed by the European Law Institute:
 - a) “The supplier-customer contract is concluded exclusively through facilities provided on the platform;
 - b) The platform operator withholds the identity of the supplier or contact details until after the conclusion of the supplier-customer contract;
 - c) The platform operator exclusively uses payment systems which enable the platform operator to withhold payments made by the customer to the supplier;
 - d) The terms of the supplier-customer contract are essentially determined by the platform operator;
 - e) The price to be paid by the customer is set by the platform operator;
 - f) The marketing is focused on the platform operator and not on suppliers; **or**
 - g) The platform operator promises to monitor the conduct of suppliers and to enforce compliance with its standards beyond what is required by law.”⁸²

These criteria would also follow the line taken by the European Commission's Communication "A European Agenda for the collaborative Economy", which highlighted three criteria to determine the influence or control of platforms over the suppliers⁸³. Often the role of some platforms covered by the special liability regime is not limited to enabling the conclusion of a contract between sellers and buyers, but it also includes other services such as payment services, fulfilment services, returns processing and complaints handling. In such cases, the platforms are not mere “facilitators” or “intermediaries”. It is not appropriate to get economic benefits from being a marketplace without proper accountability when things go wrong.

In such cases, the position of the platform is close to that of the actual supplier of the goods or service. The more comprehensive the involvement of the platform operator in the initiation, conclusion and execution of a transaction, the more extensive are the legitimate consumer expectations and, accordingly, the legal obligations of the platform operator⁸⁴.

- To ensure proportionality and fairness, **both suppliers and platforms covered under the special liability regime should have a right to redress towards the party at fault.** This would mirror the right to redress granted under Articles 20 of the Digital Content Directive (EU) 2019/770 and 18 of the Directive on contracts for the sale of goods (EU) 2019/771⁸⁵.

⁸¹ <https://www.ocu.org/consumo-familia/compras-online/noticias/fake-reviews>


⁸² These criteria has been agreed by a large group of academics who proposed model rules for online platforms, pp. 39-40, https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf

⁸³ Available at https://ec.europa.eu/growth/single-market/services/collaborative-economy_en, page 6.

⁸⁴ Legal study on effective consumer protection in online trade: responsibility and liability of platforms, commissioned by Verbraucherzentrale Bundesverband e.V., https://www.vzby.de/sites/default/files/downloads/2020/02/12/vzby_gutachten_verbraucherrechtliche_plattformhaftung.pdf

⁸⁵ This recommendation is based on European Law Institute’s Model Rules for Online Platforms, article 25.

5. Preserving the consumer contracts derogation to the country of origin principle



Problem #5. If not carefully drafted, the DSA could be a barrier for Member States to protect consumers or correctly address public interest objectives.

For example, some EU Member States or cities want to require companies like Airbnb to hold an estate agent's professional licence so as to have more regulatory control over this type of platforms. However, in case C-390/18⁸⁶, the CJEU ruled Airbnb is an information society service under Art. 2, a) of the e-Commerce Directive. Since France failed to notify the Commission about its law, the Court ruled France cannot impose such an obligation on Airbnb, as this would breach Article 3.4 b) of the e-Commerce Directive.

This case showed that the current e-Commerce Directive can create difficulties for Member States to adopt laws and policies to protect consumers. It is important however to note that the ruling should not be interpreted as meaning that governments cannot impose such measures on companies like Airbnb. The CJEU was clear that the notification obligation in the e-Commerce Directive "is not intended to prevent a Member State from adopting measures falling within its own field of competence and which could affect the freedom to provide services, but to prevent a Member State from impinging on the competence, as a matter of principle, of the Member State where the provider of the information society service concerned is established⁸⁷".

BEUC's recommendations:

- **Member States should keep being able to adopt laws protecting consumer interests.** Public interest needs and market failures may vary from country to country so it is important to maintain derogations to the internal market clause of the e-Commerce Directive (Article 3 and the Annex).
- **The consumer contracts derogation to the country of origin principle must be preserved (cf. Article 3 and the Annex of the current e-Commerce Directive),** in line with the principles laid down in the Rome I Regulation.⁸⁸ The country of origin principle covers the Directive's information obligations but does not apply to contractual obligations concerning consumer contracts. For the latter, the consumer's home country law prevails if goods, services or digital content are targeted to that country and the consumer protection level is higher.

Any push to expand the scope of the Internal market clause to e.g. consumer protection/contracts would be an explosive paradigm change of EU consumer law. While consumer law has been more harmonised since 2000, EU law still leaves margin of manoeuvre to Member States to act so countries can address national, regional and local issues.


⁸⁶ <http://curia.europa.eu/juris/documents.jsf?num=C-390/18>

⁸⁷ *Ibid*, para. 95.

⁸⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations, OJ L 177, 4.7.2008, p 6–16

6. Establishing a solid oversight and enforcement mechanism

Digital markets evolve at a fast speed and competent authorities do not seem to cope, have all expertise or resources needed to monitor and tackle the problems of the market.



Problem #6. Lack of proper oversight and enforcement.

BEUC's recommendations:

- **When proposing solutions, EU legislators should take into account the variety of authorities that deal with illegal content, services and products online.** These can range from law enforcement authorities like judges or prosecutors, but also other authorities, such as market surveillance, consumer protection or customs authorities. If the DSA has a horizontal scope of application as intended, it would probably not find a single authority with the expertise, competence or resources needed on all topics related to the platform economy.
- **The EU must establish an enforcement mechanism to *inter alia*:**
 - Set up a clear allocation of responsibility(ies) for the enforcement of the DSA, potentially setting up central national authorities, which act as reference authorities like in the Consumer Protection Cooperation Regulation (CPC)⁸⁹.
 - Establish a network of central national authorities with specific powers related to the scope of the DSA and necessary enforcement tools, including effective, proportionate and dissuasive sanctions. This network must ensure:
 - **Out-of-silos cooperation between authorities**, for example between data protection, consumer protection and competition authorities; and between market surveillance and customs authorities. This can be based on Article 6 of the CPC Regulation. The network of national central authorities must also have an obligation to cooperate with, seek advice from and do not interfere with other authorities' competences provided for by EU and national law.
 - **Better cross-border cooperation between authorities.** Research shows that making sure an authority of another Member State helps to remove illegal content "remains a hurdle. Reinforced cooperation should be fostered among national enforcement authorities in order to facilitate the swift removal of illegal content stored abroad"⁹⁰.
 - **Improved collaboration between authorities and civil society, including consumer organisations** which can alert relevant authorities, e.g. referring evidence about the sale of dangerous products online via various platforms. In addition, authorities must have an obligation to respond to the alert within a reasonable time.

⁸⁹ <https://eur-lex.europa.eu/eli/reg/2017/2394/oj>

⁹⁰ <https://op.europa.eu/en/publication-detail/-/publication/c5fc48ac-2441-11e9-8d04-01aa75ed71a1/language-en/format-PDF/source-102736628>, page 157.

- **Online platforms have an obligation to report illegal content, services or goods** (e.g. unsafe products being sold or promoted via their websites or apps) **to competent authorities** when they become aware of them, without prejudice to other applicable EU laws⁹¹.

- **Introduce an obligation for Member States to grant adequate resources for authorities.** One million parcels arrive per day at Liège's airport. As Alibaba will open a warehouse there in 2021⁹², the airport expects this figure to go as high as 7 million per day by then. This is a challenge for customs and market surveillance authorities. They will need adequate resources.

- END -

⁹¹ Euroconsumers' position paper "Unsafe products on online marketplaces", available at https://assets.ctfassets.net/iapmw8ie3ije/7L6oQ0dnPcAyNggGicZmN5/3007be72f233cbaa2c7f9c2a7b6936e1/Position_Paper_Unsafe_products_on_online_marketplaces.pdf

⁹² <https://www.lecho.be/economie-politique/belgique/economie/alibaba-fait-exploser-les-compteurs-a-l-aeroport-de-liege/10128097.html>