

The Consumer Voice in Europe

BEUC COMMENTS ON THE DRAFT DSA IMPLEMENTING REGULATION ON CERTAIN COMMISSION PROCEEDINGS



Contact: Maryant Fernández – digital@beuc.eu

BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND

Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • www.twitter.com/beuc • www.beuc.eu

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Why it matters to consumers

Consumers need to be better protected online. That requires effective implementation and enforcement of the Digital Services Act particularly as regards very large online platforms and search engines, such as Google, YouTube, Facebook and Amazon who too frequently avoid taking sufficient action to create a safer internet.

Summary

BEUC generally welcomes the draft Implementing Regulation on detailed arrangements for the conduct of certain proceedings by the Commission under the Digital Services Act (DSA).¹ It is positive that the draft implementing regulation draws from established procedures in other fields such as competition law enforcement. We recommend the Commission to better integrate learnings from these fields and further improve the draft implementing regulation to ensure effective implementation and enforcement of the DSA. Many of our recommendations echo those already made under the equivalent consultation under the Digital Markets Act (DMA).²

1. Article 2 – Inspections

BEUC supports the Commission's intention to add more clarity in relation to inspections to avoid companies from adding procedural hurdles to prevent the effective implementation and enforcement of the DSA.

As its heading infers, article 2 only deals with explanations provided during inspections but does not cover other aspects related to inspections. In line with the principles of good administration and legal certainty³, **BEUC recommends covering other aspects related to inspections beyond what is written in article 2 of the draft implementing regulation.** Articles 83 and 69 of the DSA and article 1(1)(a) of the draft implementing regulation are clear that the scope should be broader than just “explanations provided during inspections”⁴.

We noticed the Commission seems to get inspiration from the ‘Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003’⁵ when drafting article 2. Given experience with this regulation in competition law, **BEUC recommends greater clarification** about inspections to increase legal certainty, and avoid unnecessary delays and other procedural obstacles invoked by companies to buy time and avoid swift and effective enforcement.

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13565-Digital-Services-Act-implementing-regulation_en

² For more details, please see BEUC’s input on the draft DMA Implementing Regulation at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13540-Digital-Markets-Act-implementing-provisions/F3374351_en

³ See also recital 1 of the draft Commission implementing regulation.

⁴ Heading of article 2 of the draft implementing regulation.

⁵ https://competition-policy.ec.europa.eu/system/files/2021-03/inspections_explanatory_note_en.pdf

An example of the additional elements that should be added in relation to inspections is that officials conducting inspections should not be “required to expand upon the subject matter as set out in the decision or to justify the decision in any way. They may however explain procedural matters.”⁶ Other examples of key elements missing include the use of forensic IT tools when conducting inspections, the (non-required) presence of external legal counsel and the application of Regulation (EU) 2018/1725 to any personal data processing by the Commission, amongst others.

2. Article 3 – Monitoring actions

BEUC recommends amending article 3(7) to ensure **appointed experts and auditors** are under the obligation to remain **independent not only “throughout the period of appointment” but also within a set period of time after the period of appointment.**

The Commission can get further inspiration from competition law and merger trustees' independence and integrity requirements in particular⁷. For example, “[f]or a period of one year following termination of the Mandate, the members of the Trustee Team shall not provide services to the Parties or Affiliated Undertakings without the Commission's prior approval and must establish measures to ensure the independence and integrity of the members of the Trustee Team”⁸. Appointed experts and auditors must be bound by confidentiality agreements not to disclose information they may have had access to during their appointment or use it to the advantage of very large platforms or search engines. External experts and auditors should disclose any conflict of interest and provide assurances that there will not be information shared between teams working for platforms and search engines in other contexts. Overall, they should meet the requirements of independence and integrity described under article 37 DSA.

3. Articles 4, 7 and Annex – Written observations and transmission of documents

BEUC supports limiting the length of documents and setting forth requirements to ensure their readability and transmission. This is important to ensure companies do not undermine the effective implementation and enforcement of the DSA. The requirements in the annex to the draft implementing regulation seem to be in line with those by the Practice Directions to Parties Concerning Cases Brought Before the Court of Justice of the European Union.⁹ These rules would provide companies with rights of defence.

Having said that, **BEUC recommends:**

- **requiring documents to be submitted in a digital and machine-readable format**, not in paper format, except in the rare circumstance that transmission by digital means is impossible. This will allow better comparability, searchability and

⁶ *Ibid*, para. 2.

⁷ See ‘Commission notice on remedies acceptable under Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No 802/2004’, para. 125, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN); see also ‘Trustee mandate’, paras. 24-29, https://competition-policy.ec.europa.eu/system/files/2021-03/trustee_mandate_en.pdf

⁸ Best Practice Guidelines: The Commission's Model Texts for Divestiture Commitments and the Trustee Mandate under the EC Merger Regulation, para. 40, https://ec.europa.eu/competition/mergers/legislation/best_practice_commitments_trustee_en.pdf

⁹ See <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020Q0214%2801%29&qid=1678700762068>, paras. 39 *et seq.*

readability of documents. Article 4, the annex and article (7)(7) should be amended accordingly.

- **adding further requirements to facilitate managing large amounts of information.** The Commission could get further inspiration from the CJEU's Practice Directions to Parties. For example, the Court requires documents to be "drafted in a form which allows their structure and scope to be grasped from the first few pages."¹⁰

4. Article 6 – Identification and protection of confidential information

We welcome that the Commission will assess whether the need to disclose documents is greater than any harm caused to the persons who submitted the information or documents (recital 5). In addition, **BEUC recommends** the following:

- **article 6 should clarify what happens if the Commission is not satisfied with the explanations provided to consider something as 'business secrets or other confidential information'.**
- **there should be a provision to prevent long debates about confidentiality or undue delays in disclosing information under the guise of business secrecy.** BEUC has witnessed, both under competition and data protection proceedings, how this type of procedural matters unnecessarily delays effective and swift supervision and enforcement of legislation. As with the Digital Market Act, we **recommend that the Commission considers confidentiality rings.**¹¹

5. Involvement of civil society - missing element

The draft implementing regulation should address how the Commission will deal with third parties, including consumer organisations and other civil society organisations, involved in proceedings. For example, there should be more clarity in relation to the 'right to be heard' when Commission proceedings are triggered by information or complaints from third parties. The DSA does not contain any provisions in this regard. However, **clarifying civil society's role** is in the interest of good administration and legal certainty. It would also help prevent very large online platforms and search engines from using procedural mechanisms to stop civil society from accessing information or helping the Commission in its proceedings against very large players. After all, "[e]nforcement is about cooperating and working hand in hand with Member States in the first instance, as well as with specialised authorities like consumer or data protection authorities, competition and regulatory authorities, NGOs, businesses and the public. For the system to function effectively, it relies both on the full commitment of national authorities responsible for the proper application and enforcement of the law, and the involvement of the public, civil society, business and others to identify potential breaches"¹².

END

¹⁰ *Ibid*, para. 41.

¹¹ See BEUC's input on the draft DMA Implementing Regulation for more details about this recommendation, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13540-Digital-Markets-Act-implementing-provisions/F3374351_en

¹² 'Communication from the Commission – Enforcing EU law for a Europe that delivers', pp. 6,7, https://commission.europa.eu/document/b75864f0-8516-4ff0-9e2a-c3e8a557bbfb_en

