

The Consumer Voice in Europe

ENSURING CONSUMER PROTECTION IN THE PLATFORM ECONOMY

Position paper



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Why it matters to consumers

Shopping, connecting with friends and family, sharing experiences, watching a movie, listening to music, reading a book, booking a trip, cooking a new recipe, planning a night out, moving around a city, asking for your neighbour's help, and looking for information on the web. These are just some basic 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 platform that facilitates these services. Consumers have embraced the surge of the platform economy, and it presents numerous benefits as well as challenges for consumer protection.

Summary

As the digital economy develops, online platforms have become key market players, covering any service or application delivered over the internet to consumers, and increasingly becoming the intermediaries of other online and offline services. While platforms have brought about numerous benefits, making consumers' lives much easier and creating new possibilities to enjoy the digital revolution, their ubiquitous growth also generates numerous concerns and challenges from a consumer protection perspective that must be swiftly addressed. This paper addresses the major areas of concern and makes the following policy recommendations:

1. Additional **transparency** is necessary in the platform economy.
2. **Unfair terms** are too widespread and need to be addressed.
3. Consumers deserve adequate protective measures when they **access services in exchange for data**.
4. New rules on **responsibility of platforms** are required.
5. **New pricing techniques** can be problematic and must be transparent to consumers.
6. Consumers need access to a wide array of affordable, user-friendly **payment methods**.
7. Reputation mechanisms and **user reviews** need additional transparency and control mechanisms.
8. Strong enforcement of the General Data Protection Regulation and an ambitious ePrivacy Regulation are necessary to protect **consumers' fundamental rights**.
9. Platforms should use **eIDAS-certified identity mechanisms**.
10. **More competition in the platform economy is necessary**. This requires **stricter enforcement** of existing competition rules...
11. ... and additional rules through the proposed **Platform to Business (P2B) Regulation**.
12. Solving the problem of **fake news** requires looking into the market of digital advertising.

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1. Introduction

Online platforms cover almost any service or application delivered over the internet to consumers, and increasingly act as intermediaries other online and offline services. All these platforms can bring about different benefits, making consumers' lives much easier and opening up endless possibilities to enjoy the digital revolution. But the ubiquitous growth of platforms also generates various concerns. For example:

- Are platforms sufficiently transparent about their inner workings, business models and how they use consumers' personal data and user-generated content?
- Are comparison sites giving consumers impartial advice, always based on what is best for them and not what is best for the platform itself?
- Are existing EU rules on liability fit for purpose in the platform and collaborative economy? Who is liable if something goes wrong when a consumer rents an apartment via a house sharing platform? The platform or the person renting out the apartment? And what if the apartment someone has booked does not even exist?
- Are dominant platforms imposing unfair terms and conditions on their users, locking them in and exploiting their power to become online gatekeepers, hampering competition and innovation?

Online platforms do not operate in a legal vacuum. There are EU legislation and policy measures in place that apply to platforms as providers of online content, services, products and applications. Yet, consumers often find themselves exposed because current legislation is either not appropriately enforced or simply not sufficient to deal with some of the existing problems.

There is no one-size fits all solution to solve all the issues raised by platforms, given the variety of platforms and each of them having their particularities. Nevertheless, action is urgently necessary to create a Digital Single Market built on trust, choice and a high level of consumer protection. In other words, a consumer-driven Digital Single Market that truly benefits businesses and consumers alike.

Some Member States such as France and Germany have already adopted national laws to solve some of these problems. For example, France adopted a Bill on a Digital Republic¹ that establishes new transparency and responsibility obligations on online platforms, as well as three executive decrees on transparency for platforms and user reviews².

The EU knows very little digital borders, and platforms typically offer their services seamlessly across the entire Union. The EU must therefore stand up to the challenge and update its legislative and policy instruments where necessary to ensure consumers are adequately protected and empowered.

¹ <http://www.gouvernement.fr/en/the-digital-bill>

² <http://proxy-pubminefi.diffusion.finances.gouv.fr/pub/document/18/22764.pdf>

2. Protecting consumers in the platform economy

Numerous concerns exist with regard to online platforms, ranging from a varied range of anticompetitive practices in digital markets, lack of transparency about how some of these platforms operate to legal uncertainty when it comes to the applicability of consumer law, the widespread use of unfair contract terms and privacy-related issues, to name but a few. For example, in 2016 Consumer Protection Authorities adopted a common position concerning the protection of consumers on social networks which identified several potential breaches of EU consumer law in the terms and conditions of the most popular social media platforms.

The European Commission's online peer-to-peer (P2P) study³ showed that problems are rather frequent. 55% of surveyed consumers had experienced at least one problem over the past year. The most frequent problems relate to the poor quality of goods or services, or to the goods and services not being as described.

Actions carried out by several BEUC members at national level, such as by UFC-Que Choisir in France [against several social networks](#) and [against Booking.com](#) or by vzbv in Germany [against Facebook](#), have highlighted the need and the challenge of enforcing key pieces of legislation better, such as the Unfair Commercial Practices Directive, towards some of the most popular online platforms.

All this demonstrates the need to amend existing legislation where necessary to address specific issues in the platform economy, and to strongly enforce existing legislation, as highlighted in each section below.

2.1. Transparency and information duties

A common source of consumer concern

One of the most common problems for consumers using online platforms is the lack of transparency and information provided by the platform. Many platforms do not inform consumers properly about how the platform works and the nature of the service it provides, which prevents consumers from assessing the real value of the service they are getting, as well as the underlying contractual relationship and economic trade-off that is taking place.

The European Commission's study showed that 60% of consumers are not aware or are uncertain of their rights and responsibilities in consumer-to-consumer transactions or about who to turn to when something goes wrong. In addition, about 40% of users who offer their services on such platforms say they do not know or are not assured about their rights and responsibilities.

Importantly, about 85% of consumers find it important or very important that platforms are clear and transparent about who is responsible when something goes wrong, and about their rights in case of a problem with the price or quality of a product or service. Consumers who offer their services on platforms without being a professional (who are also known as "prosumers") attach similar importance to clarity and transparency about regulations and responsibilities when something goes wrong.

The Commission's study also found that further transparency is also necessary with regards to pricing practices. The search results on many platforms do not give the total price; platform fees which range from 10% to 25% are often added only at the booking stage. Among the 10 case study platforms only the French language version of BlaBlaCar displayed prices in search results that include the transaction fee.

³ Exploratory study of consumer issues in online peer-to-peer platform markets, European Commission, 2017 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=77704

Transparency around marketing and advertising practices is also a concern. For example, consumers are generally unable to differentiate between 'ads' and 'sponsored content'. Moreover, the difference between 'paid' content and 'normal' content is often blurry too. Studies such as the one by OFCOM in the UK⁴ show that children cannot tell the difference between ads and normal search results in Google.

Algorithms – the backbone of platforms, a mystery for consumers

The way the algorithms that run the platform function remain a mystery for consumers. There is a lack of transparency regarding how information and offers on search engines, comparison sites and online booking platforms are ranked and displayed.

Consumers might think that the offers they are seeing on online booking platforms for travel services such as Booking.com are based on the value and relevance of each offer and assessed on the basis of user reviews. The reality often is that specific service providers have paid for their offers to be promoted, or that the offers promoted are the ones giving the platform the highest margin of benefit. All this is not properly disclosed and explained.

Of the main online booking platforms in Germany, only Booking.com⁵ mentions in its terms and conditions that its default ranking is influenced by the commission that the hotels pay. But this information is not properly disclosed but rather hidden in the terms and conditions. That leads to a very misleading situation for consumers.

Similarly, on search engines and comparison sites, results that have been artificially promoted to a higher placement or given prominent display need to be clearly identified and it should be made clear to consumers why the content has been promoted or given prominence. Search engines play a vital role in consumers' online behaviour as gatekeepers to the web, so full transparency with regards to the way they operate is a must.

It is important for consumers to be informed about the use and logic of algorithms. Consumers should be empowered to understand how information is organised and presented and which criteria and which data have been used to rank offers. Also, new forms of potentially unfair advertising and other practices need to be addressed. Consumers will often be unaware of restrictions when it comes to commercial offers or they will not be aware that the price of a product is determined based on their user profile (personalised pricing) or on other factors used to dynamically determine the price (dynamic pricing).

Legal clarity and further information requirements are necessary

The information requirements that apply to online platforms are unclear, as is the case for example regarding the standard of due diligence or information requirements about the business model of the company running the online platform. There is therefore a clear need to clarify the standard of information requirements for online platforms and to introduce specific information duties into the EU consumer law acquis.

In general terms, without being forced to disclose any business secrets or algorithms, platforms whose core function is to put in contact sellers and service providers with consumers should clearly disclose the price of this service, the nature of the information they are providing and the rationale they apply to rank, display and filter the information and offers they show to consumers.

Platforms should clearly indicate whether suppliers advertising their goods or services on the platform have paid for a better placement, or whether there is a corporate link between

⁴ [Children and parents: Media use and attitudes report 2015](#)

⁵ Booking.com: <http://www.booking.com/content/terms.de.html?label=gen173nr-15CAEogqJCAIhYSDNiBW5vcmVmaDuIAQGYAQe4AQTI AQTYAQPoAQE;sid=ef62aa0ba81aef16774c31867d8ac0e1;dcid=4>)

the supplier and the platform. Also, platform operators should follow rules of professional diligence when using reputation feedback systems such as user reviews.⁶

Where online platforms act as intermediaries between two or more parties, it is often unclear whether the platform is a party to the contract or who is legally considered a trader or acting on behalf of a trader. Although the Commission's Guidance on the Unfair Commercial Practice Directive⁷ makes clear that online intermediaries which are considered as 'traders' should respect due diligence and information standards under the Directive, it seems that courts in some Member States follow a rigid approach when interpreting those standards. This is particularly true as far as comparison websites are concerned⁸.

Online intermediaries often invoke the privileges of 'mere hosts' under the e-Commerce Directive, which limits the possibilities of consumers to hold the platform accountable for incorrect information. Therefore, online platform providers do not have a strong incentive to ensure the correctness and validity of information provided on their platform.

While we welcomed the update of the Unfair Commercial Practice Directive Guidance in 2016 and the publication of Principles for Comparison Tools⁹, experience with these tools show very clearly that non-binding 'guidance' is not enough. Clear rules for the correctness and validity of information provided to the consumer are necessary. The European Commission therefore rightly proposed to update the consumer law acquis and in particular the Unfair Commercial Practice Directive. Its proposal for a Directive on Better Enforcement and Modernisation of EU consumer protection rules¹⁰ is a step into the right direction but doesn't go far enough. For more details on the proposed directive, please see our position paper¹¹.

BEUC demands

- Online platforms must clearly disclose the nature of their business model, their legal status in the transaction, and whether any corporate link or economic transaction takes place between suppliers and the platform. There must be a specific information requirement about the legal status of each user – who is a consumer or prosumer? who is a trader? – and about whether consumer law is applicable. We support the proposal for a Directive on better enforcement and modernisation of EU consumer protection rules, which addresses these issues. However, the consequences and standard remedies are not stipulated in the draft proposal in case traders do not comply with those requirements. In addition, it is important to test whether available consumer remedies are effective in practice or not.¹²
- Online platforms must clearly explain to its users how their algorithm works, and how results are displayed, ranked and filtered. This should include details about how the information is organised and presented, and which criteria and which data have been used to rank offers. There should be full transparency about whether prices of products are determined based on user profiles or online activities (personalised or dynamic pricing)¹³. The proposal for better enforcement and modernisation of EU consumer

⁶ See the suggestions by the *Research group on the Law of Digital Services*, Discussion Draft of a Directive on Online Intermediary Platforms, EuCML 4/2016, 164.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>

⁸ For example, German courts hold that the Directive does not apply to comparison platforms where the platform does not actively promote the sale of certain goods or services.

⁹ https://ec.europa.eu/info/sites/info/files/key_principles_for_comparison_tools_en.pdf

¹⁰ COM/2018/0185 final.

¹¹ https://www.beuc.eu/publications/beuc-x-2018-081_omnibus_directive.pdf

¹² Which? report on testing of effective remedies - <https://www.which.co.uk/policy/consumers/335/the-role-of-demand-side-remedies-in-driving-effective-competition>

¹³ For a more detailed view on algorithms, see BEUC's position paper "Automated decision making and Artificial Intelligence – A consumer perspective" ([BEUC-X-2018-058](#)).

protection rules is a first step in this direction, suggesting transparency standards on ranking. However, this only relates to the main parameters of ranking. It is also important that the relative importance of ranking criteria (weighting) is disclosed.

2.2. Unfair terms and conditions

Issues around terms and conditions of online services are a longstanding problem. Terms of use and privacy policies are often long and complex, written in an obscure legal jargon that is very hard for consumers to understand. Rather than explaining to users what the conditions are, these texts are drafted with the purpose of being a liability waiver for the company, to which consumers, most often blindly, agree to be able to use the service.

A 2014 study by BEUC's German member vzbv¹⁴ showed that 53% of consumers "always" (27%) or "mostly" (26%) agreed to the terms and conditions without having read them. Only 16% of them always read the terms and conditions of the service. For 72% of consumers the reason not to read the terms and conditions, including the privacy policies, is because they are too long and complex. Another study¹⁵ found that it would take an average person about 76 working days to read the privacy policies of the websites he or she visits in a year.

But problems are not limited to the length and readability of the terms and conditions. Platforms often use clauses that breach EU consumer and data protection laws, as highlighted by the actions of UFC-Que Choisir and vzbv explained in the preceding section.

The use of unfair terms is also widespread among mobile applications that serve as an entry point to popular online platforms. A recent study¹⁶ by Forbrukerrådet, our Norwegian member organisation, into the terms and conditions of 22 popular mobile apps found:

- Terms that render the contracts meaningless, e.g. terms can be changed unilaterally without notice to the user.
- Unclear and complicated terms dominated by hypothetical language, such as "may" and "can", making it difficult for consumers to understand what the app will do.
- Apps that require users to grant perpetual, non-revocable, transferable, worldwide licenses over user generated content.
- Terms that seriously undermine users' privacy, granting the app permission to share personal data with a complex myriad of third parties for poorly specified purposes and, in some cases, going as far as requiring the user to agree to waive any claims related to his/her right to personal privacy and publicity.
- Apps that demand excessive or disproportionately intrusive permissions in relation to the functionality that they provide.
- Apps that limit users' ability to withdraw consent to processing of personal data by not allowing the deletion of user accounts inside the app.
- Apps that can terminate user accounts without valid cause or notice, leaving users without access, for example, to fitness data generated over time or to a social or professional network.

Many of the apps analysed by Forbrukerrådet are a mobile interface to interact with an online platform that is also provided via the web. The terms and conditions generally apply to the app and other services within the brand.

¹⁴ <https://www.vzbv.de/sites/default/files/downloads/studie-digitalisierung-grafikreport-emnid-2014.pdf>

¹⁵ <https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/>

¹⁶ "AppFail: Threats to consumers in mobile apps", Norwegian Consumer Council – March 2016

Another widespread problem exists with respect to the supply of digital content where consumers are often confronted with a flood of disclaimers and unfair copyright and liability clauses. On top of that, many platforms aim at depriving or misleading consumers about their rights to sue the trader before their home courts if a problem arises. Such unfair jurisdiction clauses must be banned, and consumers always informed about their rights.

The shift towards mobile devices and the internet of things only aggravates these concerns around terms and conditions, as it will become even more difficult for consumers to access the information about the terms of service and/or understand what they are agreeing to.

All these practices are very problematic for consumers as they put them in very vulnerable situations with respect to online platforms. To solve this, the EU must act swiftly to amend the consumer law acquis accordingly and step up enforcement activities to make sure these practices are eradicated.

BEUC demands

- Further rules are necessary on standard terms: there should be a black list prohibiting the use of unfair terms that are commonly used by online platforms, and the list should be updated regularly. In particular, unfair 'as is' disclaimers included in terms and conditions, which exclude the liability for any disturbance in the availability or reliability of the service should be considered unfair in all circumstances. The same should apply to exclusive or misleading jurisdiction or choice of law clauses.
- Stricter criteria are necessary for the presentation of contractual terms. Essential terms and conditions, particularly those which relate to obligations or refer to deadlines, should be particularly highlighted, using user-friendly colours, font-size, or background of the text.
- Traders should be obliged to keep the length of terms and conditions to a minimum.¹⁷
- Platforms and traders must be obliged to provide a summary of key terms and conditions¹⁸.

For further information about the necessary changes to the consumer law acquis to ensure effective consumer protection and the better presentation of consumer information, please see our position paper¹⁹.

2.3. Services in exchange for data, not money

In the online world, many services do not require monetary payment, but are typically served against data as remuneration. In this sense, services are not for free. Consumers actively provide personal and non-personal data in exchange for the service, product or content or passively allow service providers to track them and collect data about their habits and preferences. This data is often then sold to advertising networks, which in exchange remunerate the service provider. The Regulatory Fitness (REFIT) check of EU

¹⁷ The positive effects of shortening terms and conditions was recently confirmed by the Commission Study on consumers' attitudes towards Terms and Conditions (2016)
http://ec.europa.eu/consumers/consumer_evidence/behavioural_research/docs/terms_and_conditions_final_report_en.pdf

¹⁸ As an inspiration may serve the EU Regulation on key information documents for investment products (PRIIPs). Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs), OJ L 352/1.

¹⁹ http://www.beuc.eu/publications/beuc-x-2017-040_csc_fitness_check_of_consumer_law_policy_recommendations.pdf

Consumer Law has revealed that the EU consumer law acquis is not designed to adequately apply to these business models and must therefore be reformed²⁰.

The Proposal for a Digital Content Directive²¹ makes clear that consumers should enjoy legal guarantee rights where they have provided data as remuneration when buying digital content and services. While such rights are related to the post-contractual stage, it is crucial that consumers are well protected at every stage of the transaction process.

The Unfair Contract Terms Directive has proven to be useful in protecting consumer rights. However, it does not reflect that contract terms on the processing of data or the performance of data may cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer. It should therefore be made clear that the processing and provision of data should be taken into account in assessing the fairness of contract terms.

The Consumer Rights Directive is one of the most important consumer law instruments, particularly for online sales. It contains essential rights for consumers, such as the right to receive information and to withdraw from certain contracts. If the Directive did not cover payments other than money, many consumers would lack essential protective measures. Since the Directive only refers to contracts under which the consumer pays a price, it is not applicable where consumers provide their personal data in exchange for goods or services. Information requirements do not apply, nor does the consumer's right to withdraw from the online sales or service contract. This is why BEUC supports the proposal for a Directive on Better Enforcement and Modernisation of EU consumer protection rules, to apply the provisions on the right of withdrawal and information requirements under the Consumer Rights Directive to situations where consumers provide personal data as a counter-performance if they sign up to a digital service. However, the scope is still too narrow. As a general principle and in order to ensure contractual justice, the scope should be extended to cover all kinds of counter-performance in exchange of goods, services, or digital content products.¹⁵

In addition, consumers should always have a right to withdraw from the contract in case of an on-line purchase. It is essential for consumers to be able to test the product, digital content, or service and withdraw from the contract within 14 days without giving a specific reason. Where consumers have provided non-personal data as a counter-performance, they are currently protected neither by the Directive nor by the General Data Protection Regulation. Within these 14 days, the consumer should be able to test the product, digital content or service without the supplier being allowed to process or commercialise the consumers' data.

The Unfair Commercial Practices Directive (UCPD) also requires an update in this respect. In order to assess whether a commercial practice is unfair, the accuracy of information and the potential omission of material information about the service are crucial. One of the most important elements in the unfairness test under the UCPD is the information about the product's main characteristics and its price. These essential information pieces relate to the minimum content of a contract and are therefore material information for the consumer.

The economic value of data is undisputed, and data can be the essential object of the contract. However, if data is required as a counter performance, the concept of 'price' under the Directive is not applicable.

²⁰ Study on the application of the Consumer Rights Directive 2011/83/EU, 185, 187, DS-02-17-435-EN-N..

²¹ COM/2015/0634 final.

The UCPD also sets out provisions on promotional practices. It considers an unfair commercial practice those that describe a product as 'free' if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for delivery of the item (No 20 Annex I).

However, the criterion of payment is understood as only covering practices where the consumer has to provide money as remuneration, which implies that companies such as Facebook can mislead²² consumers by stating that their services are 'free' while in reality, consumers provide their personal data to use the service, which is then monetarised by the companies. The Directive should thus clarify (in particular in Art 7(2)) that whether data must be provided constitutes material information, as well as the purpose of monetisation of the data. An update should also be envisaged as regards No 22 of Annex I to the Directive, which prohibits the false claim or impression that the trader is not acting for his business purposes.

BEUC demands

- Consumers should always be protected when they buy goods, services, or digital content, regardless of whether they pay with money or provide for in-kind payments, including data as counter-performance.
- Where consumers provide data as a counter-performance, they should receive information and have a right to withdraw from the contract under the Consumer Rights Directive as suggested by the Proposal for a Directive on Better Enforcement and Modernisation of EU consumer protection rules. However, these measures should cover both personal and non-personal data. Also, information requirements should be updated to make sure traders always inform consumers that they will collect and monetise consumers' data.
- Consumers should be protected against unfair clauses. The provision of data should be taken into account when assessing the fairness of terms.
- The Unfair Commercial Practices Directive should clarify that whether data must be provided constitutes material information, as well as the processing the data for commercial purposes or related to the commercial practice, including the monetisation of data. Its annex should be updated to ensure that the monetisation of data is considered a business practice and that misleading or false claims are considered unfair.

2.4. Responsibility and potential liability of platforms

As explained earlier, the overall liability regime for third party content of the e-Commerce Directive provides for a balanced framework and should be maintained. These provisions have clarified the obligations of service providers and contributed significantly to the development of new business models and information society services based on, for example, user-generated content.

Yet as the platform economy has evolved, and in particular with the surge of numerous collaborative economy platforms, it has become more and more common for platforms to have a more active intermediary role than what is meant for by "mere hosts" under Article 14 of the e-Commerce Directive.

²² Our German member vzbv brought an action against Facebook based on the argument that such a promotional claim is misleading and therefore unfair, an interpretation that has been validated by the German court.

The European Commission's study on peer to peer platforms²³ establishes a distinction between three mainstream business models:

- **Hosting of listings:** where the platform passively matches peers supplying and demanding information. The platform normally only makes money through the sale of premium listing options such as photos, etc.
- **Actively managed peer transactions:** the platform actively matches supply and demand, engaging in numerous activities to increase trust in the users of the platform. They typically charge transaction and/or subscription fees. In these business models, platforms heavily influence transactions.
- **Platform-governed transactions:** in this model platforms set the terms and conditions for the services or goods being traded, and exercise direct control over their performance. They set rules for cancellations, refunds, automated price settings or maximum prices. They manage payments, monitor the success of the service provision before handing out pay-outs to suppliers, and actively intervene when there are complaints.

Particularly when the online platform facilitates communication and contractual transactions between other market players, the application of EU consumer law is unclear. The standard of correctness and validity of information provided to the consumer needs to be reinforced. In addition, whether and under which circumstances platforms, particularly those that have a certain control over the transactions, should be held liable for non-performance of the contract need to be regulated.

When platforms become active intermediaries beyond the scope of what is covered by Article 14 of the e-Commerce Directive, we see three types of liability that are necessary to regulate:

2.4.1. Liability for the failure to inform about the supplier of the goods or service

Where the platform fails to inform the consumer that a third party is the actual supplier of the goods or service, the platform should be liable for the performance of the contract. For example, if a consumer buys a car on a platform where it was not disclosed that the platform provider acted on behalf of someone else, then the platform must be held liable as the seller.

This approach was taken by the Court of Justice when interpreting 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 as a seller and that in such cases it would not matter whether the intermediary is remunerated for acting as intermediary or whether he acts on behalf of a private individual.

The Court stated that it is essential that consumers are aware of the identity of the seller and that the "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 sold."²⁴

²³ Exploratory study of consumer issues in online peer-to-peer platform markets, European Commission, 2017 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=77704

²⁴ Case C-149/15, *Wathelet v Bietheres*, ECLI:EU:C:2016:840 [41].

2.4.2. Liability for misleading information, guarantees, or statements

Similar to the removal and observance duties under the e-Commerce Directive for illegal content, if a consumer can legitimately expect that the platform takes responsibility for certain quality or safety criteria about the products and services traded in the marketplace the platform controls, the platform should be liable for damage that occurs if these quality or safety criteria are not met.

In particular, this should comprise misleading information given by suppliers of goods or services on the platform and which has been notified to the platform. It should comprise also misleading statements or guarantees made by the platform regarding the supplier or about the goods and services offered by the supplier.

2.4.3. Liability where the platform has a predominant influence over suppliers

The business model of many platforms, in particular in the collaborative economy, gives them decision-making power over essential elements of the economic transactions taking place in its market place such as payment means, prices, default terms and conditions or conduct.

In such cases, the position of the platform is close to that of the actual supplier of the goods or service. It is therefore important to create clear rules for responsibility for contract performance duties, particularly where the platform has a predominant influence over suppliers.

BEUC demands

Online platforms should provide correct and valid information towards consumers and be liable:

- for the failure to inform the consumer that a third party is the actual supplier of the goods or service, thus becoming contractually liable vis-à-vis the consumer
- for the failure to remove misleading information given by suppliers and notified to the platform
- for guarantees and statements made by the platform itself
- if they have a predominant influence over the supplier.

The consumer law acquis must be modified to reflect the above rules. It is a missed opportunity that the proposed “new consumer deal” by the Commission has not introduced such changes.

2.5. Personalisation and dynamically-changing offers and results

It is becoming more common for platforms – from e-commerce websites to hotels to airlines – to use different technical means to personalise or dynamically-change the pricing of the services they provide or the ranking of the offers they compare.

Dynamic pricing, where platforms change the prices dynamically as user’s surf through their websites or use their apps, has become a widespread practice²⁵. Dynamic pricing is a

²⁵ Online-Handel: Das Spiel mit dem dynamischen Preis, VZBV, 2018 <https://www.marktwaechter.de/pressemeldung/online-handel-das-spiel-mit-dem-dynamischen-preis>

technique that can be used for increased economic efficiency, like for example to ensure that a train or a flight gets filled in.

A more problematic practice is that of personalised pricing, whereby platforms can personalise their prices for each individual consumer according to different indicators, and possibly based on constant tracking of users' consumption and browsing habits on and beyond the platform itself, as some evidence suggests²⁶. Recent studies of our members²⁷ demonstrate that these changes can be based on how frequently the consumer visits the websites and does a particular query. Characteristics such as the brand of smartphone or laptop used to access a website, can be used to artificially modify the price of a service.

Platforms are also increasingly personalising the ranking results of their services. A recent European Commission study²⁸ found that 61% of the e-commerce websites personalise the ranking, including 92% for airline ticket websites, 76% for hotel room websites, 41% for the websites selling sports shoes, and 36% for the websites selling TVs.

Personalised pricing and ranking are based on artificial market dynamics because prices and rankings are decided according to the data generated by consumers when searching for products and services. If unchecked, these practices can be directly harmful to consumers, and disruptive to the overall competitiveness of online markets. In particular, personalised pricing based on sensitive information such as financial situation, race or health conditions is of particular concern and can only happen with consumers' explicit consent. In that regards, personalised pricing could lead the way to numerous problematic discriminatory practices.

Although some of these practices may not be illegal per se, their increasingly widespread use without adequate transparency is problematic. Tracking technologies allow companies to collect and process vast amounts of data enabling them to build economic profiles of customers and therefore serve them with prices matching their consumption behaviours. It should not be possible that consumers are offered prices based on their online behaviour without disclosing this to the consumer (hidden personalised pricing). Platforms must therefore be obliged to clearly disclose and explain any such pricing mechanism they use, and in all cases fully comply with data protection legislation if the mechanism entails tracking users or in any way processing their personal data.

BEUC demand

- Platforms (and traders in general) should always disclose whether and how they use personalised or dynamic pricing and ranking mechanisms. Consumers should have a right to object to personalised pricing and it must be ensured that price discrimination does not disproportionately and negatively affect certain groups of consumers.

2.6. Online payments

Many platforms provide online payment facilities, either for their own services and/or as an intermediary for suppliers of goods and services. These payment services must be safe, cost-efficient, user-friendly, and respectful of consumers' privacy.

²⁶ https://www.ftc.gov/system/files/documents/public_comments/2015/09/00011-97593.pdf

²⁷ Preisdifferenzierung im Online-Handel, AK, March 2017, https://media.arbeiterkammer.at/wien/PDF/Preisdifferenzierung_im_Online-Handel_2017.pdf and "C'era una volta un prezzo" Altroconsumo, June 2018

Citizens Advice study, August 2018 - <https://www.citizensadvice.org.uk/a-price-of-ones-own-an-investigation-into-personalised-pricing-in-essential-markets/>

²⁸ https://ec.europa.eu/info/publications/consumer-market-study-online-market-segmentation-through-personalised-pricing-offers-european-union_en

The Payment Services Directive (PSD2) already contains important provisions in that respect, such as a ban on payment surcharges, consumer-friendly principles regarding security of payments and liability when a fraud happens.

BEUC demands

- When making online payments, consumers should always have a choice between several payment options. Currently consumers are not able to use their readily available payment instruments everywhere within the single market, e.g. debit cards are not accepted by many online platforms.
- Payment services should not be expensive, especially regarding cross currency transactions. Currently making a card payment or money transfer outside the eurozone is very costly. This should be addressed by the upcoming revision of Regulation 924/2009 on cross-border payments. The cost for national and cross-border transactions in all EU currencies should be the same for consumers.
- Consumers should also be able to use anonymous payment options – digital alternatives to cash payments should be developed.
- All payment options, including the innovative ones, should be user-friendly. Vulnerable consumers must not be left behind.

2.7. User Reviews

Online platforms typically try to present themselves as trusted partners – but this trust needs to have a solid basis. It is very common for online platforms, and in particular for platforms active in the collaborative economy, to attempt to develop consumer trust through peer review, rating and reputation systems.

Well designed and adequately governed reputation systems have the potential of providing real added value to consumers through genuine insight and factual information. Consumers often rely on what similar individuals might have to say about a product or service when making up their minds on whether or not to buy.

Reviews and reputations: not such a promising story for the time being

Unfortunately, the available data suggests a more problematic situation. After analysing 485 online platforms, carrying out user surveys and focus groups, the European Commission's peer-to-peer study²⁹ concludes that "the core trust building tools, peer review and rating systems as operated by most platforms and their identity verification practices, are neither fully reliable nor transparent. Their effectiveness is therefore subject to serious doubt. Online platform users do not use peer reviews and rating systems systematically and they do not always trust them. In addition, most platforms do not appear to monitor systematically whether reviews or ratings are generated by actual and genuine users."

The vast majority of users simply don't use such systems

The European Commission's surveys show that neither consumers nor prosumers use reviews or ratings systematically, with only about 40% of users doing so regularly. It also found that more users read reviews before concluding a transaction than write them afterwards, which indicates that reviews are "unlikely to reflect the experience of all platform users, but those of a smaller number of more involved peers." "In particular, as only 20% of peers said they left a negative review or rating after encountering a problem with a transaction, there are indications that ratings and review systems may be biased."

²⁹ http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=77704

Reputation systems do not generate the trust they intend to

The Commission's study also found that while most consumers evaluate review systems positively, about 75% have some reservations about their reliability and their capacity to generate trust, provide adequate information, safety and protection.

The case studies raised further questions about the transparency, reliability and neutrality of the management of these reputation systems, as most platforms analysed do not tell their users whether positive or negative reviews or ratings influence the search results or ranking criteria, and those platforms that do disclose such influence, do not explain clearly how it is done.

If the governance system that rules the reviews on the platform is not transparent and reliable, reviews could be easily prone to manipulation and end up misleading consumers. Platforms that host user reviews should have appropriate systems to take down fake reviews and to ensure that advertising content is identified.

Platforms using these reputation systems must also be transparent with regards to which mechanisms are applied to ensure the authenticity of the reviews and how reputation systems work, give information to users about the representativeness and reliability of user reviews or ratings, and about how positive or negative reviews or ratings influence the search results or access to the platform. In addition, they should also disclose the total number of reviews provided to determine a given rating.

Inspiration could be drawn from France's legislation on reviews³⁰, whereby platforms have to inform consumers about:

- Whether a procedure allowing for a control of consumer reviews exists or not.
- The publication date of the review as well as the day when the "consumer experience" took place.
- What are the ranking criteria applied for reviews, including the chronological order.
- What is the maximum period of publication and retention of the review.
- Whether there is a possibility to contact the author of a review.
- Whether there is a possibility to modify a review (if yes, under what criteria).
- Conditions under which it can be refused to publish a review.

Reputation systems can also create 'lock-in' effects if consumers cannot easily take their reviews from one platform to another. As with all markets, switching is very important for consumers to be able to choose alternative providers or platforms when they are dissatisfied, and if that switching is not possible technically, this will act as a disincentive and effectively lock in consumers, in turn worsening the tendency towards monopolies already inherent to the dynamics that rule online platforms.

Finally, peer reviews cannot replace essential mandatory consumer information which has to be provided by the trader. Reviews are a complementary tool which can have great additional benefits but should not be seen as a substitute for obligatory requirements.

³⁰ Article D111-17 and D111-18 of the French "Code de Consommation" as created by Decree n°2017-1436 of 29 September 2017.

BEUC demands

- Platforms that host user reviews should have appropriate systems to take down fake reviews and to ensure that advertising content is identified.
- Platforms using these reputation systems must also be transparent with regards to which mechanisms are applied to ensure the authenticity of the reviews and how reputation systems work.
- Platforms should inform consumers about the control they exercise over reviews, the modalities of such control, and the functionalities and options that consumers can use regarding their review mechanisms
- Platforms must ensure that consumers can take a copy of the reviews they have provided or received when they decide to switch platforms.

2.8. Online privacy and data protection

As explained above, online platforms have an increasingly ubiquitous presence in consumer's daily lives. Combined with the sensitivity of the data that they collect (social interactions, buying habits, personal preferences and interest, location, holiday plans, etc.) and the economic value of such data, makes data protection and privacy a fundamental concern for consumers.

The constant tracking and profiling of users is a very opaque and problematic issue, as well as the sharing with third parties of personal data collected by platforms. Some platforms even track consumers who are not users of their services, as illustrated for example in the case that the Belgian Data Protection Authority has won against Facebook³¹.

Like numerous events such as the Facebook/Cambridge Analytica scandal and in-depth investigations like Forbrukerrådet's #AppFail study have shown, platforms regularly share personal data with third parties from all over the world, often breaching EU data protection rules. Numerous studies such as "The Great Data Race" study published by the Norwegian Data Protection Authority³² and "Networks of control"³³ also clearly highlight how commercial surveillance increasingly challenges consumers' privacy and data protection. The advent and widespread use of big data and the Internet of Things will make all these privacy challenges even more serious.

The EU's General Data Protection Regulation, in application since May 2018, will help protect how consumers' personal data is collected and processed. Enforcing this Regulation is a fundamental challenge that lies ahead the European and national public authorities, and which should be a priority for them.

In addition, Europe needs a strong e-Privacy Regulation that complements the GDPR and ensures that consumers' right to privacy is strongly protected in the digital economy, and which establishes efficient tools to counter the widespread use of unconsented, pervasive tracking³⁴.

³¹ <https://www.privacycommission.be/en/news/victory-privacy-commission-facebook-proceeding>

³² <https://www.datatilsynet.no/globalassets/global/english/engelsk-kommersialisering-endelig.pdf>

³³ http://crackedlabs.org/dl/Christl_Spiekermann_Networks_Of_Control.pdf

³⁴ http://www.beuc.eu/publications/beuc-x-2017-059_proposal_for_a_regulation_on_privacy_and_electronic_communications_e-privacy.pdf

BEUC demands

- Data Protection Authorities must ensure robust compliance and enforcement of the General Data Protection Regulation.
- The EU must adopt an ambitious e-Privacy Regulation that gives consumers strong rights to protect their privacy and the confidentiality of their communications, and in particular, enables them to protect themselves from constant commercial surveillance.

2.9. Electronic Identification

Adequate identification for transactions on online platforms is essential for the platform economy to work well for consumers. Firstly, it is a key precondition for legal and economic relationships to be properly established, so all parties to a contract can be identified and verified. Secondly, it is fundamental in order for consumers to be able to trust the intermediating platforms and the users offering goods and services on it.

There is a general lack of adequate measures to identify users

The European Commission's study mentioned above found that most platforms set very minimal identification requirements for registration and access (such as name and email address only), and usually do not adopt further measures to adequately verify the identity of their users, and almost all platforms scanned deny responsibility for the accuracy of use information.

The vast majority of the platforms analysed by the Commission rely on user information checks through email or social media account, while some offer optional identity verification services and very few require official identity documents for registration. This situation is clearly problematic for consumers and must be amended.

BEUC demand

- Platforms operating in Europe should use eIDAS-certified identification mechanisms in order to generate consumer trust and validate the legality of the identities of all market participants.

2.10. Tackling anti-competitive behaviour in the platform economy

Competitive markets are essential for consumer welfare. Particularly, in the digital ecosystem consumers expect to find a wide range of products and services. However, there is a growing trend of market concentration around a reduced number of platforms that threatens that diversity and innovative paradigm on the internet.

The emergence of Big Data has led to problematic anticompetitive business practices. Access to and control of vast amounts of consumer and market data is increasingly becoming a condition for success in the digital market, which can become an entry barrier for new actors.

Against this background, dominant platforms become gatekeepers of information, choice and prices, gradually restricting the ability of consumers to freely choose between a wider array of innovative options.

Some platforms restrict the information that consumers can get about services offered through them. For example, consumers are not aware that subscribing to the popular music service Spotify via Apple's AppStore is more expensive than subscribing on Spotify's website or through Android's Play Store. This happens because Apple applies a 30% surcharge on all Spotify subscriptions, allegedly to create an anti-competitive advantage to push consumers to the Apple's own Music service.³⁵ Apple limits the information consumers get through its popular AppStore by not allowing Spotify to inform its customers about the different prices. In practice, Apple abuses its gatekeeping position through its control of the AppStore to create an (anti-)competitive advantage in favour of one of its vertically-integrated services (Apple Music) over its main rival (Spotify), directly harming consumers.

Similarly, social networks and search engines also define what information consumers receive. Motivated by political³⁶ or commercial reasons, these gatekeepers can influence consumers by strategically placing information on consumer screens what they might think is best for them. But this placement of information is not necessarily done by an editor as we would expect on a journal or magazine. It is done by algorithms designed to maximise the value of consumer data for advertising purposes³⁷.

Globally, Google delivers about 32% of all ads across all platforms. In the search market specifically, it controls about 80% of ads. Between Google and Facebook, they control over half of global online and mobile advertising, and their combined market share is constantly growing. This growing duopoly raises serious concerns with regards to the different advertising markets and the undue influence they might have on innovation online.

Further to this, both Facebook's and Google's advertising networks are based on an intrusive tracking infrastructure that follows and records consumers' every move, from their browsers to their smartphones and tablets, to their Smart TVs. These practices frontally violate consumers' right to privacy and must be strongly addressed by regulators and supervisory authorities (see section H above).

Some platforms restrict consumer choice. Platforms that act as gatekeepers while offering additional services to consumers might not allow other competitors to reach consumers on an equal footing.

Google has been a paradigmatic example, exercising this type of control through its search engine. For example, companies like Yelp and Foundem have faced significant difficulties to reach consumers in the local search³⁸ and shopping markets because Google down-ranks the competitors of its vertically-integrated services in the results of its popular search engine or by simply excluding them from the results shown to consumers with its

³⁵ *The Verge* (2015), Rival music services say Apple's App Store pricing is anticompetitive, <https://www.theverge.com/2015/5/6/8558647/apple-ftc-spotify-app-store-antitrust>.

³⁶ *Washington Post* (2013), Could Google tilt a close election?, https://www.washingtonpost.com/opinions/could-google-tilt-a-close-election/2013/03/29/c8d7f4e6-9587-11e2-b6f0-a5150a247b6a_story.html

³⁷ This was put in evidence by a recent article by the *Australian* that revealed that Facebook was able to identify when young people felt vulnerable, which was a good time to advertise certain products. Thus, a teenager who feels insecure could be served while flipping the pictures of his or her Facebook friends with personalised advertising of products tailored to exploit that situation of vulnerability. Facebook is therefore controlling the information—in this case in the form of advertising—displayed on the users account to maximise its revenues from advertisers. Although this might not raise competition concerns, this could lead, at least in Europe, to infringements of both consumer and data protection laws.

³⁸ *Forbes* (2016), Why Is Yelp Fighting With Google? CEO Jeremy Stoppelman Explains. <https://www.forbes.com/sites/quora/2016/02/23/why-is-yelp-fighting-with-google-ceo-jeremy-stoppelman-explains/#3e94e2467865>

algorithms.³⁹ As a result, not only companies but also consumers are affected, getting a reduced amount of options without even realising.

Another example of a problematic gatekeeping position is that of Google's banning of the privacy app Disconnect⁴⁰ from all its Androids devices, resulting in the restriction of consumer choice and directly impeding consumers from protecting their privacy.

Some platforms restrict competition on price. There are several forms of restriction relating to pricing and the power the gatekeepers have to set the prices that consumers find online. For example, companies like Booking.com and Amazon were able to always offer cheaper prices for hotels and eBooks, respectively, through the imposition of so-called 'most-favoured-nation clauses' (or wide parity clauses) onto their suppliers.⁴¹

Another problematic practice in the field of pricing relates to automatisisation and price adjustments based on tracking of users and competitors' prices and algorithms. According to the European Commission's final report on the e-Commerce sector inquiry, an automatised adjustment of prices is a growing tendency among retailers. The report notes that: "A majority of retailers track the online prices of competitors. Two thirds of them use automatic software programmes that adjust their own prices based on the observed prices of competitors. (...) The availability of real-time pricing information may also trigger automatised price coordination."⁴²

These practices create the risk of prices being set based on artificial market dynamics in which prices are decided according to the data generated by consumers when searching for products and services. If unchecked, these practices can be directly harmful to consumers, and disruptive to the overall competitiveness of online markets.

The current EU competition law framework is not fully capable to address these concerns. For more detailed views on the future reform of competition law, please see our response to the European Commission's public consultation on the "Shaping Competition Policy in the era of digitisation"⁴³.

However, there are situations in which *ex-ante* regulation is preferable to *ex-post* investigations. Particularly when it comes to platforms that facilitate and have the power to influence the relationship between suppliers of goods and services and consumers, making it necessary to look at more efficient means to guarantee a fair treatment of all parties and to keep markets competitive.

The proposed Platform-to-Business Regulation: a promising initiative if amended correctly

The European Commission's proposal for a Regulation on Promoting Fairness and Transparency for Businesses Users of Online Intermediation Services (Platform-to-Business or P2B Regulation)⁴⁴ is a welcome initiative to try and solve some of the most pressing issues in the platform economy that affect the competitiveness of the market and therefore consumers.

³⁹ *The Register* (2019), When algorithms attack, does Google hear you scream?, https://www.theregister.co.uk/2009/11/19/google_hand_of_god

⁴⁰ <https://techcrunch.com/2015/06/02/disconnect-me-files-antitrust-case-against-google-in-europe-over-banned-anti-malware-android-app/>

⁴¹ BEUC (2017), Commitments offered by Amazon in e-book investigation (AT.40153), http://www.beuc.eu/publications/beuc-x-2017-016_are_commitments_offered_by_amazon_in_e-book_investigation.pdf

⁴² European Commission (2017), Final Report on the E-commerce Sector Inquiry, paragraph 13, http://ec.europa.eu/competition/antitrust/sector_inquiry_final_report_en.pdf

⁴³ BEUC-X-2018-084

⁴⁴ European Commission proposal for a Regulation on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final, 26.4.2018.

The P2B proposal relies on a series of enhanced transparency measures regarding the terms and conditions, ranking and treatment of business suppliers that rely on intermediation services to reach consumers. In addition, it includes measures on complaint handling, mediation and a B2B injunctions procedure.

Regarding the scope of the proposed Regulation, we are concerned that the envisaged delimiting measures as inserted in the definitions in Article 2 will be inefficient and run the risk of reducing the scope of application too significantly. To be considered as an “online intermediation service”, there must be three contractual relationships: between the supplier of goods or services and the consumer that buys the good or service through the platform, between the platform and the supplier, and between the platform and the consumer.

Requiring the existence of contractual relationships between the platform and the consumer and between suppliers and consumers is unnecessary and should be removed. If the intention of the co-legislators is to delimit the scope of application of this Regulation to platforms that intermediate and for suppliers that offer services and goods to consumers, the mere act of offering should be the defining criteria, and not the conclusion of a contract.

In addition, Recital 12 limits the scope of applicability of the provisions of the Regulation to terms and conditions that are offered publicly to suppliers that wish to offer their goods and services on intermediary platforms. They would hence not apply to terms and conditions that are individually negotiated. This provision could have a very significant impact and render the Regulation by and large ineffective, as it is likely the case that many platforms will adapt to personalise the terms and conditions they use with individual suppliers to escape from the application of this Regulation.

Regarding the substantive provisions of the proposed Regulation, while additional transparency would certainly be beneficial to the digital economy, we are concerned that transparency alone will not be sufficient to modify the behaviour of dominant platforms. We would therefore like the EU co-legislators to use the opportunity presented by this legislative proposal to insert some targeted but important measures that will ultimately enhance competition and increase consumer welfare, as explained below:

- 1) Use Article 6 to limit the use of default options.** A standard practice in many platforms, like for example app stores, mobile operating systems (OS), and home assistants, is to preconfigure vertical services of the same company as the default option for consumers. This widely-used practice has a very big impact on the competitiveness of vertical markets such as search, music streaming or maps, and should be addressed.

A very good case in point are Google’s anticompetitive practices with its dominant mobile smart operating system Android. The European Commission has found⁴⁵ that Google leverages its dominance in the smartphone and tablets markets OS to its own benefit in numerous vertical integrated services such as search, email, maps, etc.

Consumers generally rely on default services out of comfort and are highly unlikely to opt-out. Using the P2B Regulation to limit the impact of the use of vertical services by default could be a significant measure to increase competitiveness in the platform economy to the benefit of consumers.

⁴⁵ http://europa.eu/rapid/press-release_IP-18-4581_en.htm

There are already examples of this type of intervention in the field of consumer law and data protection laws. For example, the Consumer Rights Directive⁴⁶ sanctions the so-called pre-ticked boxes⁴⁷ in which traders seek to obtain payments for additional services from consumers by using default options⁴⁸. Similarly, the General Data Protection Regulation⁴⁹ establishes a principle of data protection by default to ensure that, by default, only personal data which are necessary for each specific purpose of the processing are processed⁵⁰.

Inspiration could be drawn from these instruments when it comes to the use of default options by platforms providing marketplaces and technologies that allow consumers to access different products and services. For example, it could be established that when a firm offers vertically integrated services competing with other firms, the use of default options should be limited by allowing the consumer to decide among different options when configuring the service by the first time.

2) Article 7 can help increase competitiveness in the market. The P2B Regulation is also a good opportunity to prevent that firms holding large amounts for data raise barriers to entry for competing companies to develop and offer new products to consumers. For example, EU co-legislators should consider whether a right to access data on the basis of a market-failure assessment could be introduced to create the conditions for an innovative digital ecosystem⁵¹. The current article 7 of the Commission's proposal is a starting point in this direction but unfortunately it is limited to disclosure of information concerning the data held by a company.

3) Article 8 should be amended to ban wide-parity clauses. Article 8 of the proposed P2B Regulation addresses so-called 'most-favoured-nation clauses' (MFNs) or parity clauses. These contractual terms are often used in vertical relationships between suppliers and platforms amongst other purposes to guarantee the recover on investments. These clauses can have different scopes according to the obligations imposed on suppliers: First, 'narrow' parity clauses generally link the price and terms offered by the online platform to those available directly on the upstream supplier's website in order to guarantee that the latter will not be less attractive than the offers available on the platform. Secondly, 'wide' parity clauses have the same effect as the previous one but in addition they seek to guarantee that the prices available on other platforms, including competitors, would not be lower than those advertised on the platform.

Wide parity clauses hamper competition and therefore should be prohibited. In particular, when such parity clauses are imposed by platforms with significant market power, it becomes impossible for suppliers or competitors to offer better deals to consumers alongside the dominant platform. As a result, the dominant

⁴⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64–88)

⁴⁷ Article 22.

⁴⁸ "Before the consumer is bound by the contract or offer, the trader shall seek the express consent of the consumer to any extra payment in addition to the remuneration agreed upon for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment."

⁴⁹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1–88)

⁵⁰ Article 25, GDPR.

⁵¹ For more information, please see the upcoming by Professor Drexler commissioned by BEUC on the design of a data access right.

platform could fix the retail prices of the product for the whole online market in detriment of consumers.

In relation to narrow parity clauses, although the effect of these terms might be different from wide clauses e.g. because they do not seek to fix prices in relation to competitors of the online platform, they must continue being scrutinised by competition authorities.

BEUC demands

- The European Commission and the national competition agencies should ensure that antitrust laws are rigorously enforced in digital markets. Further adaptations may be necessary, for more details please see our response to the European Commission's public consultation.⁵²
- Co-ordination of national cases with a European dimension is needed to ensure consistent results across the EU.
- The proposed Platform to Business (P2B) Regulation should be amended to include specific measures to address discriminatory practices by gatekeeping platforms aimed at excluding competitors by putting them out of the sight of consumers or by unduly influencing the characteristics or the prices of competing services, as highlighted above. These amendments should include: a) measures to limit the use of default options in vertically integrated services that could impact the ability of consumers to opt for competing service providers, b) measures to address barriers to entry generated by the data hold by a firm, and c) restrictions to apply wide parity clauses imposed by gatekeeping platforms restricting the ability of service providers to offer different prices and conditions to consumers.
- Platforms should be transparent about how their algorithms work towards consumers (see section A above).
- Automatised price co-ordination should be carefully monitored to identify whether companies are colluding leading to higher prices for consumers.

⁵² Idem - BEUC X/2018/084

2.11. Addressing consumer disinformation in the online world

A new area of concern around platforms relates to the dissemination of information to influence users' behaviours. This has led to undesirable societal outcomes when the information is misleading or misrepresents facts in order to unduly influence the outcome of elections or societal debates (e.g. impact of immigration). One of the reasons why this type of information spreads so fast relates to the underlying business models of social media platforms.

Online platforms also use several techniques to keep users within their own ecosystems. One of these techniques is to push users towards so-called 'filter bubbles'. Although platforms might present these functions as "personalisation of the users' experience", such manipulation is designed to maximise the amount of user attention dedicated to the platform and to keep them as much time as possible on the platform itself, generating as much advertising revenue as possible.

Similarly, another tool used to 'hook' users is to give preference to content that triggers feelings such as anger and fear. This is evidently the case with so-called 'fake news' which are designed to stimulate such feelings, giving the platform an incentive to use them to maximise user attention. Consequently, it is very important to explore how to prevent the dissemination of content designed to mislead users. One possible avenue is to cut the existent incentives to the spreading of such content based on advertising revenues.

Another important element to consider is the relationship between online disinformation and current levels of concentration in the online advertising market. Digital advertising, based on constant surveillance of consumers through the collection and aggregation data, is concentrated in the hands of a few market players. This is an aspect of the debate that has also been echoed by the European Data Protection Supervisor in his recent opinion on "online manipulation"⁵³. In the EU, there are limits for what companies can do with personal data, but this has not deterred the big players like Facebook and Google to continue profiling consumers at their backs to boost their advertising business and exposing them to situations like the one witnessed with the Cambridge Analytica case.

BEUC demands

- The European Commission should carry out a sector inquiry into the digital advertising sector to identify anti-competitive practices leading to market concentration⁵⁴, in particular the revenue model that underpins click-baiting.
- Data protection authorities should look at whether the data collected by social media platforms is being used to profile consumers and push them into filter bubbles therefore exposing them to content which seeks to unduly influence their behavior.
- The self-regulatory initiative to establish a Code of Practice on Disinformation⁵⁵ is not a satisfactory approach, as has been highlighted unanimously by the Sounding Board⁵⁶ of the Multi-stakeholder forum on the Code of Practice. Its impact should nonetheless be urgently and thoroughly monitored by the European Commission, well ahead of the European elections.

⁵³ https://edps.europa.eu/sites/edp/files/publication/18-03-19_online_manipulation_en.pdf

⁵⁴ Our UK member Which? has requested the Competition and Markets Authority in the UK to undertake a similar exercise: <https://www.which.co.uk/policy/digitisation/2659/control-alt-or-delete-the-future-of-consumer-data-main-report>

⁵⁵ <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>

⁵⁶ Opinion of the Sounding Board of the Multi-stakeholder forum on the Code of Practice - https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54456

3. Public enforcement and market surveillance

Enforcing the EU legal framework that applies to online platforms is a complex matter and does not work satisfactorily today. Numerous consumer problems exist, and it is of crucial importance that the enforcement of rules by public authorities works efficiently and rapidly to make sure consumers are protected in the digital economy. This enforcement must happen increasingly across different sectors and through the coordination of different public authorities.

National Consumer Protection Authorities, Data Protection Authorities (in the future Supervisory Authorities), telecoms National Regulatory Authorities, Competition Authorities and other sector specific regulators need to collaborate closely both at national level but also at EU level through their respective EU networks⁵⁷.

In an ever more complex digital world where bundling of products (often with embedded software) and services from different markets are becoming the norm, it is essential that these groups of authorities work closely together to enforce EU law and uphold consumers' rights. In this sense, it will be paramount to assess whether the enforcement cooperation structures between them are ready to act swiftly to make sure consumers' rights are protected at all times.

A good example was the work done in 2016 by the EU network of national consumer protection authorities (the Consumer Protection Cooperation network, established by the EU Regulation 2006/2004⁵⁸) where they adopted a common position concerning the protection of consumers on social networks. Their position identified several potential breaches of EU consumer law in the terms and conditions of the main social media platforms. Especially the clauses preventing the consumers from going to court in their own country or taking away the mandatory protection granted to them by the EU law were considered as potentially unfair. As a result, the concerned platforms had to amend their terms and conditions. More than one and a half year later, not all platforms have complied with the common position of the regulators.

Other examples of enforcement against online platforms have been carried out by Data Protection Authorities (DPA) against Facebook. For examples, coordinated actions took place in France, Belgium, the Netherlands, Spain and Hamburg⁵⁹ to investigate the quality of information provided by Facebook and the validity of consent obtained from its users. France's CNIL⁶⁰ and Spain's AEPD⁶¹ both found Facebook non-compliant with data protection law and fined the company. France's CNIL⁶² and Hamburg's DPA⁶³ have both sent a formal notice to Facebook regarding the data being transferred by WhatsApp without a proper legal basis to do so. Unfortunately, such activities remain limited to the respective country as enforcement remains tied by national borders. The strengthened enforcement co-operation procedures that apply since May 2018 with the new General Data Protection

⁵⁷ Article 29 Working Party (data protection, soon the European Data Protection Supervisory Board), the Consumer Protection Co-operation Network (consumer protection), the European Competition Authorities Network (competition policy), the Council of European Energy Regulators (energy), etc

⁵⁸ EU Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws (OJ L 364), now replaced by the Regulation 2017/2394 (L 345/1 of 27.12.2017)

⁵⁹ <https://www.cnil.fr/fr/node/23602>

⁶⁰ <https://www.cnil.fr/en/facebook-sanctioned-several-breaches-french-data-protection-act>

⁶¹ <https://www.reuters.com/article/us-facebook-spain-fine/facebook-fined-1-2-million-euros-by-spanish-data-watchdog-idUSKCN1BM1OU>

⁶² <https://www.cnil.fr/fr/transmission-de-donnees-de-whatsapp-facebook-mise-en-demeure-publique-pour-absence-de-base-legale>

⁶³ <https://www.pcworld.com/article/3124397/halt-whatsapp-data-transfers-german-privacy-watchdog-tells-facebook.html>

Regulation will hopefully improve the situation for a more coherent protection of consumers throughout the EU.

This type of public enforcement activities is essential to make sure consumers are protected in the digital economy not just in theory, but also in practice.

Market surveillance

The current market surveillance system to ensure product safety has many shortcomings such as lack of human and financial resources to do product testing and lack of coordination among different Member States and at EU level. Regarding online sales through platforms, additional problems arise. Such as for example the fact that consumers may order products to be delivered directly to their homes from outside the EU without that any checks or controls regarding safety would have taken place. Yet, most Member States have no dedicated strategies in place or are in very early stages to develop concepts for the surveillance of online sales. Moreover, not all Member States have the necessary toolbox to act effectively against rogue traders that use online platforms to get market access. For example, not all Member States have the power to do mystery shopping.

In July 2017, the European Commission issued guidelines on to help national market surveillance authorities better control products that are sold online⁶⁴. However, these are not binding for Member States and simply guidance on best practice is not sufficient to address the problem.

The European Commission aims to improve compliance and enforcement with product safety rules through the 'Goods Package'⁶⁵. While there are good provisions which may enhance consumer safety, there is too much focus on working with reliable economic operators through compliance partnerships rather than to step up enforcement efforts against rogue traders that often may be difficult to reach in case they are located outside the EU territory. Making a legal representative in the EU binding is a good step but it will remain a toothless tiger without better traceability rules for products along the supply chain such as for example making the mentioning of the producers and importers full name and address mandatory on the product or its packaging.

What is needed in addition are better tools for market surveillance authorities such as the power to close down websites of rogue traders that put consumer safety at risk.

END

⁶⁴ Commission notice on the market surveillance of products sold online, [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0801\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017XC0801(01)&from=EN)

⁶⁵ On 19 December 2017 the European Commission published the 'Goods Package' which consists of a Commission communication " and The Goods Package: Reinforcing trust in the single market', of a draft Regulation on enforcement and compliance and a draft Regulation on mutual recognition.



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