



Mr Thierry Breton
 Commissioner for Internal Market
 European Commission
 Rue de la Loi 200

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The Consumer Voice in Europe

Ref.: BEUC-X-2022-067

Brussels, 17 June 2022

Subject: Online marketplaces must be included in the Product Liability Directive.

Dear Commissioner Breton,

BEUC is a strong supporter of the European Commission's plan to adapt liability rules to the digital age and circular economy, and in particular of the intention to update the 36-year-old Product Liability Directive. However, **we are very concerned that, despite our multiple calls to consider this pivotal issue, the envisaged legal framework might not attribute the necessary responsibility and corresponding civil liability to online marketplaces which they ought to have** according to today's market realities.

Therefore, **we would like to emphasise again the importance of including online marketplaces in the scope of the revised Product Liability Directive.** This would incentivise online marketplaces to prevent the dissemination of dangerous products, effectively protect consumers, ensure a level playing field for business and make sure that the EU does not fall behind regulatory developments in the US.¹

As you and your services well know, **online marketplaces greatly benefit from increasing online demand.** In 2020 around 70% of all internet users in the EU aged 16 to 74 ordered goods or services online for their private use.² On average, 50% of all online shoppers use online marketplaces.³ In 2019, cross-border e-commerce in Europe (EU27+UK) was worth €143bn, of which 59%, €84bn, was generated by online marketplaces.⁴ This share is projected to increase to 65% in 2025.⁵

Online marketplaces provide the infrastructure for the dissemination of millions of defective products, like smoke alarms that do not detect smoke,⁶ cosmetics that contain harmful chemicals,⁷ or toys that are dangerous for kids,⁸ potentially causing severe harm to millions of consumers. In February 2021, a BEUC study showed that, out of 250 products sold on online marketplaces, 66% of them did not meet EU safety standards. In March 2022, another BEUC publication illustrated the wide range of dangers stemming from products sold online. In addition, a report published in 2020 by our UK member Which? highlighted that online marketplaces were failing to remove banned products even after consumers reported them.⁹

¹ <https://www.natlawreview.com/article/new-california-bill-would-impose-strict-products-liability-all-online-retailers>

² <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20210217-1>

³ <https://ecommercenews.eu/europe-online-marketplaces-sales-e120-billion/>

⁴ <https://www.cbcommerce.eu/press-releases/press-release-top-100-cross-border-marketplaces-europe-an-annual-analysis-of-the-best-global-cross-border-platforms-operating-in-europe-eu-28-including-uk/>

⁵ <https://ecommercenews.eu/cross-border-e-commerce-europe-worth-e143-billion/>

⁶ <https://www.which.co.uk/news/2019/05/revealed-the-terrifying-smoke-alarms-that-will-fail-when-you-need-them/>

⁷ <https://taenk.dk/kemi/english/test-chemicals-cosmetics-bought-outside-eu>

⁸ <https://www.ocu.org/organizacion/prensa/notas-de-prensa/2021/jugetespeligrosos141221>

⁹ <https://press.which.co.uk/whichpressreleases/online-marketplaces-fail-to-remove-banned-products-even-after-consumers-report-them-which-finds/>

Online marketplaces can no longer be considered as mere intermediaries but have become influential actors in modern supply chains. Investigations have shown that some online marketplaces recruit manufacturers and traders who offer products that represent a risk to consumers.¹⁰ At the same time, online marketplaces use algorithmic recommendations, advertisement and dark patterns to manipulate consumers' choice.¹¹ In light of the aforementioned circumstances, online marketplaces should carry their share of responsibility for damage caused by defective products to consumers.

Several pieces of new EU legislation – including legislation that is still under discussion – intend to prevent or mitigate risk stemming from products that are sold online. And yet, **none of these EU laws would hold online marketplaces subsidiarily liable for damage caused by defective products sold on their platforms:**

- The Market Surveillance Regulation does not create any obligations for online marketplaces as such, unless they can also be considered being a “manufacturer”, “importer”, “authorised representative” or “fulfilment service provider” and thus qualify as “economic operator”. But even if an online marketplace falls under this category, **the Market Surveillance Regulation obliges “economic operators” only to take measures to prevent or mitigate risks stemming from dangerous products** but does not hold them subsidiarily liable for damage caused to consumers in case they do not comply with this obligation.
- If an online marketplace qualifies as an “economic operator” the pending proposal for a **General Product Safety Regulation will put online marketplaces under the general obligation to place only safe products on the European market** but it will not establish subsidiary liability for damage caused by these products either.
- The Digital Services Act will cover all types of illegal content including the sale of dangerous products online and will create a due diligence obligation for online marketplaces to design their interface in a way that enables traders to comply with their obligations regarding product safety information. However, **the Digital Services Act will not establish a positive subsidiary liability regime for online marketplaces either**, even though this was intensely discussed in the European Parliament.

The Product Liability Directive is the remaining and indeed also the appropriate place to tackle the liability of online marketplaces, a view also shared *inter alia* by the European Law Institute.¹²

In its current version, the Product Liability Directive basically limits liability for defective products to “producers”. This is problematic in several situations where the seller cannot be identified or is hard to get hold of, which can easily happen in the context of sales via online marketplaces since many defective products sold online stem from third country producers.

Holding online marketplaces accountable is also a question of fair competition between EU producers and third country producers. Many third country producers can only sell their products in the EU because of online marketplaces. Just as the online marketplaces themselves, third country producers benefit from selling products on the EU market but do not face the same risk as EU producers of being sued for defective products. This puts them at an unfair advantage compared to EU producers. If online marketplaces were subsidiarily liable, they would be more cautious in admitting third country producers to offer their products and would hold these third country producers liable for redress.

¹⁰ <https://www.wsj.com/articles/amazons-heavy-recruitment-of-chinese-sellers-puts-consumers-at-risk-11573489075>

¹¹ https://eur-lex.europa.eu/resource.html?uri=cellar:5ebd61c9-3f82-11eb-b27b-01aa75ed71a1.0001.02/DOC_1&format=PDF

¹² https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Guiding_Principles_for_Updating_the_PLD_for_the_Digital_Age.pdf

Therefore, **BEUC calls on the European Commission to hold online marketplaces under the revised Product Liability Directive subsidiarily liable as “suppliers”** in the sense of Article 3 (3) of its current version if one of the following conditions is fulfilled:

- The producer/the importer cannot be identified,
- The online marketplace fails to inform the harmed person of the identity of the producer/the importer,
- The marketplace has predominant influence or control in the transaction chain, or if
- The producer/importer is based outside the EU and does not take any action to remedy the damage.

We hope that you will take our concerns into account when preparing the proposal for a review of the Product Liability Directive. Holding online marketplaces subsidiarily liable would be a crucial implementation of the principle that consumers should be as safe online as offline, which is key for the sustainability of the online ecosystem. We would welcome an opportunity to discuss this issue further and are of course ready to provide any further information you might require.

This letter has also been sent to Commissioner Reynders.

Yours sincerely,

Monique Goyens
Director General

Ursula Pachi
Deputy Director General

C/c: Ms Filomena Chirico, Cabinet Expert

Relevant BEUC publications:

- https://www.beuc.eu/publications/beuc-x-2020-024_product_liability_position_paper.pdf
- https://www.beuc.eu/publications/beuc-x-2021-070_beuc_feedback_on_iaa_pld.pdf
- www.beuc.eu/publications/beuc-x-2022-002_response_to_public_consultation_on_pld_and_civil_liability_for_ai.pdf
- https://www.beuc.eu/publications/beuc-x-2021-004_is_it_safe_to_shop_on_online_marketplaces.pdf
- https://www.beuc.eu/publications/beuc-x-2022-029_products_from_online_marketplaces_continue_to_fail_safety_tests.pdf