

RESPONSIBILITY FOR ONLINE PLATFORMS

Consumer-centric proposals for reforming the liability provisions in the E-Commerce Directive as part of the Digital Services Act (DSA)

BACKGROUND

According to the European Commission, one of the aims of the Digital Services Act (DSA) is to update liability and security provisions for digital platforms, services and products.

Currently, the E-Commerce Directive (ECD) dating from 2000 provides the general legal framework for all digital services in the EU. In light of various legal initiatives (including copyright law and the Regulation on preventing the dissemination of terrorist content online) and an increase in national legislation in this area (e.g. the German Network Enforcement Act (NetzDG)), the European Commission believes it is necessary to address this subject in order to prevent significant fragmentation in the EU.

The current legal framework states that many platforms operate as neutral or passive providers and are therefore not liable for the information that they store ('safe harbour', see Art. 14 ECD). This exemption applies as long as providers limit themselves to acting as intermediaries for the storage of information and thus maintain their passive role. They are liable if, upon becoming aware of illegal content, they fail to act expeditiously to remove it. However, if the action taken by platforms become 'too' proactive, for example they take steps to prohibit hate speech, they run the risk of losing their exemption from liability.

Given this situation, discussions are currently taking place about whether it would be a good idea to allow, or even oblige, platforms to take a proactive approach. However, this goes beyond the typical role of a merely passive intermediary.

This raises the general question of whether exemption from liability (Art. 14 ECD) is perhaps now an outdated concept and whether reforms are required with regard to the responsibility and liability of platforms.

POTENTIAL SOLUTIONS

Platforms often serve very different interests and purposes, so a one-size-fits-all solution will not be possible. From a consumer perspective, it is important for potential solutions – and thus the reform of platform liability – to take account of the different functions of the various types of platforms. The business models of online platforms generally fall into two groups:

- Curating user-generated media content and publishing and communicating such content (**interaction platforms**); this is the core business of platforms such as YouTube, Twitter and Facebook.

- Acting as an intermediary for platform users and helping them to conclude contracts (**transaction platforms**); this is the core business of platforms such as Uber, Amazon Marketplace and Airbnb. Transaction platforms can be divided into **online marketplaces** and **comparison websites**.

A platform with multiple business lines may belong to both groups. Facebook, for example, is the archetype of the interaction platform but also operates a marketplace on which goods can be traded.¹ However, if the appropriate rules are to be applied, the liability of transaction and interaction platforms needs to be determined by their specific function in each specific case. In the case of online marketplaces, the focus is mostly on facilitating and securing a transaction in the form of a contract that includes a possible financial risks for consumers. By contrast, interaction platforms focus on facilitating and securing a forum for the free circulation of information and dialogue. In view of the different functions, the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband – vzbv) believes that stricter measures are generally required for transaction platforms, whereas excessive regulation of interaction platforms could easily be detrimental to consumers and society as a whole.

Some possible solutions are set out below. vzbv believes that these initial ideas should be taken into account in the reform of the liability provisions in the DSA. Through these proposals, vzbv wishes to contribute to the current debate:

- ❖ The scope of the E-Commerce Directive should be broadened to include all platforms aimed at European consumers, including platforms whose operators are not established in the EU.
- ❖ Exemption from liability and the ban on implementing general monitoring obligations should be maintained.
- ❖ Differences in liability provisions should be contingent on the platform's function rather than the platform type.
- ❖ The risks faced by consumers who enter into contracts on transaction platforms include direct economic loss and even damage to their health. These risks justify the introduction of specific obligations for transaction platforms. Such obligations include not only providing transparency about the other party to the contract (the trader) but also setting out clear rules on how offers are structured and the extent to which traders are checked. In some circumstances where they fail to comply, they should also bear the liability for their merchants (see vzbv's detailed position paper on the liability of online marketplaces and comparison websites²).
- ❖ In the case of interaction platforms, it will be crucial to balance out the one-sided incentive effect. At present, measures to remove content as quickly as possible are dominant (NetzDG, Directive on copyright and related rights in the Digital Single Market (DSM-D)). To offset these, strong procedural safeguards for users need to be put in place in order to prevent content being blocked or

¹ Facebook Marketplace, available at: <https://www.facebook.com/marketplace/>

² https://www.vzbv.de/sites/default/files/downloads/2020/02/12/20-_02_12_positionspapier-online-marktplaetze-vergleichsportale.pdf (German only)

deleted without justification. These include preventive measures (e.g. pre-flagging, delayed takedown), user-friendly technological controls (e.g. precise filter settings) and subsequent procedural protections (more specific definition of 'notice & action' procedures, such as a put-back obligation).

- ❖ Furthermore, binding rules must be defined to improve the transparency of platforms' decisions (e.g. introduction of meaningful reporting obligations), especially in the case of algorithmic decision-making processes.

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