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Restoring the balance between consumers and information society services

Contribution to Consultation on Digital Services Act package

Restoring the balance between consumers and information society services

Online interactions are increasingly mediated through information society services, including online platforms and online intermediation services. While offering many benefits to consumers and businesses, the platform economy created by these services poses challenges to the effective protection of consumers, The Digital Services Act ('DSA') offers a unique opportunity to maximize the benefits for all parties while ensuring effective consumer protection.

Providers of information society services and particularly online platform services and online intermediation services, such as online marketplaces, play a key role in the platform economy. This role comes with certain responsibilities. The Netherlands Authority for Consumers and Markets ('ACM') would like to highlight three areas through which these responsibilities could be materialized in the DSA. ACM is charged with competition oversight, sector-specific regulation of several sectors, and enforcement of consumer protection laws. ACM is not responsible for economic policy making. This document is limited to consumer law issues in the DSA that fall within the regulatory duties of ACM. For our position on the proposed ex-ante instrument of large online platforms acting as gatekeepers, we refer to the submission to the consultation by BEREC and point 3 of this document for related consumer protection aspects.

1 Update the special liability regime

At the moment, the special liability regime of the e-Commerce Directive applies to mere conduit, caching and hosting activities. Although this regime has its merits for the services it was originally drafted for, updating the regime should ensure more comprehensive consumer protection, while maintaining the fine balance of the original regime.

1.1 Special liability regime for online marketplaces and other providers

Online marketplaces have firmly established themselves as key intermediary players in the context of online transactions between consumers and traders or other consumers. This puts them in a position to allow consumers to exercise their rights effectively and to ensure traders operating on their platforms comply with their obligations under applicable consumer law. Conversely, this position also poses serious challenges to effective consumer protection if these providers are not willing to assume the responsibilities associated with their role.

The DSA therefore provides an opportunity to clarify, and where necessary introduce, duties and corresponding liabilities for providers of online marketplaces complementing other applicable EU Consumer laws. Such duties would entail:

- Swiftly removing, disabling access to and taking reasonable steps to prevent activities by traders on their platforms violating EU consumer law, of which they have knowledge or have

been made aware of in a proper manner (e.g. through a notice-and-action procedure or by the competent authorities).
- Conducting appropriate checks, for example that traders are identifiable and provide their company registration numbers, before including traders on their platform.
- Setting up their interface structures, for example the interface of an app store, in such a way that traders can comply with their legal obligations under EU consumer law.
- Distinguishing which services and products they provide and which services and products are provided by users (traders/consumers) on their platforms (e.g. who the seller is of the product).
- Informing consumers about the consumer rights they have (e.g. right of withdrawal, warranties for faulty goods) and against whom they can invoke their rights (e.g. who can you turn to in the event of a defective product).

ACM recommends considering whether the failure to comply with certain duties could result in the platform provider being held liable for lack of conformity of the goods sold through its platform (legal guarantee), which normally only applies to the trader from which the consumer bought the product ('seller'). A criterion that could be taken into account within this context is the extent to which the provider is involved in the promotion, initiation, conclusion and execution of a transaction on its platform. This could be complemented with a right of redress for the provider covered by such a rule towards the party at fault in previous links of the chain of transactions, similar to the right of redress sellers to consumers may have.

Some of the duties mentioned above should possibly also apply more broadly to providers of information society services who provide services to traders that are essential and integral to the promotion, initiation, conclusion and execution of online transactions between traders and consumers, such as providers offering ecommerce platforms and online drop shipping services. In our experience, such providers are often in a crucial position to facilitate or hinder effective consumer protection when consumers encounter issues with online traders that are making use of their services.

The duties for online marketplaces and certain other providers could possibly rely on an overarching duty to trade fairly towards consumers. In any event, the duties should take the specific characteristics of each online service and the impact on any rights involved into account.

1.2 Clarify relationship between liability regime and obligations under consumer law

Article 15 of the E-Commerce Directive stipulates that Member States may not impose a general obligation on providers to monitor the information they transmit or store, nor to actively search for facts or circumstances indicating illegal activities with regard to the supply of hosting, caching and mere conduit services. Although we recognize the merits of this provision, there is currently a lack of clarity about its scope in the context of online platforms and online intermediation services, such as online marketplaces, that provide a bundle of services that is not limited to hosting, caching or mere conduit services only. For example, how does this prohibition relate to online marketplaces acting proactively against unlawful practices by traders on their platform under the requirements of professional diligence? Further guidelines on the measures that fall or do not fall under this prohibition would avoid lengthy and costly disputes and can create certainty for all parties involved.

1.3 Ensure transparent and fair notice-and-action procedures

As part of the special liability regime, providers hosting information from third parties are required to promptly remove unlawful information upon obtaining knowledge or awareness thereof. This has resulted in notice-and-action procedures. Consumers, providers and any other parties involved would all benefit from harmonized procedural rules incorporating due process norms to ensure fair and transparent notice-and-action procedures.

2 Empower consumers through meaningful, consistent and effective transparency

Transparency and information requirements (hereinafter 'transparency requirements') are an important building block of EU consumer law and other fields of law such as data protection law. They have their merits but it is important to acknowledge that they are not a panacea to all consumer problems, and that they have their limitations. What should be avoided is information fatigue and information overload. It is therefore crucial that such requirements are meaningful, consistent and effective in such a way that it actually empowers consumers.

There are two main developments that are relevant in this context. First, the behavioural sciences provide evidence-based insights into the effectiveness (or the lack thereof) of transparency requirements. Second, providers of data-intensive information society services generate and collect large amounts of data on consumer behaviour. In conjunction with the use of methods such as A/B-testing, it is possible to measure the effects of different information and design elements on consumer behaviour in increasingly greater detail.

Given these developments, the DSA offers an opportunity to make transparency requirements more meaningful, consistent and effective towards consumers. ACM therefore recommends the following measures:

- **Incorporate insights from the behavioural sciences**. Insights about actual consumer behaviour, such as cognitive weaknesses and biases should be incorporated when transparency requirements are implemented in actual user interfaces. To foster the continuous development and adoption of these insights, we recommend investing in research in this field and stimulating a dialogue between the scientific community on the one hand, and policy makers and legislators at the national and EU level, on the other hand.
- **A reverse onus clause for effective transparency**. The information position that providers of data-intensive information society services have and their technical capabilities could be used to increase the effectiveness of transparency requirements. One way of achieving this could be by shifting the burden of proof on the provider to show that requisite information disclosures are understood by consumers and taken into account when making decisions about transactions. Such a shift could make the effectiveness of transparency requirements towards consumers an integral part of providers' design process of their online interfaces.
- **Acknowledge limitations**. Insights from the behavioural sciences can expose the limitations of transparency requirements. If trade practices harm the economic interests of consumers irrespective of the information provided, setting boundaries with regard to such practices should be considered.

3 Address impact of structural and behavioural features of large information society services on consumer's rights

Consumers are increasingly dependent on large information society services, such as online platforms and online intermediation services, for many of their daily activities, whether it is to maintain their social and/or professional life or to buy products or services. The dependence on such services can make consumers particularly vulnerable to unfair practices, due to information and power asymmetries. These asymmetries can be exacerbated by other features these services often possess, such as the data-intensive nature of the services in conjunction with the deployment of persuasive technologies.

The ex-ante framework proposed by BEREC in its submission to the consultation aims to address the economic and societal concerns large information society services may raise due to their structural features and behaviour. ACM fully supports the proposed framework. When drafting and applying this framework, it is important also to consider remedies that are specifically aimed at preventing the exploitation of consumers' vulnerable position by such large services. For example, certain standard contractual clauses could be unfair when used by providers of services meeting a certain threshold (e.g. on termination of the service or of access thereto). Also, the structural and behavioural features of such services and their impact on consumers' economic interests may require bespoke measures to restore a high level of protection for consumers. The DSA should provide room for such remedies and measures to be adopted.