verbraucherzentrale Bundesverband

First Comments by
Verbraucherzentrale Bundesverband (vzbv)
on the
Discussion draft of a Directive on Online Intermediary Platforms

The Federation of German Consumer Organisations (vzbv) welcomes the Discussion draft of a Directive on Online Intermediary Platforms as a very well-conceived basis for further discussions. The draft provides for a convincing structure for the consumer problems posed by online platforms, and in principle vzbv agrees with the regulatory solutions suggested by the draft. vzbv would like to participate constructively in the discussion about developing concrete legislative measures on the basis of the Discussion draft. In this context vzbv pleads for a broader scope and better effectiveness of some of the core provisions.

Our suggestions for a further elaboration of the Discussion Draft are outlined in more detail in the following notes.

1. Scope of the Directive (Article 1 and 2 a)

The scope of the directive should be widened and clarified. By the definition of “online intermediary platform” in Article 2 a) the draft only covers platforms which enable consumers to conclude a contract. It remains unclear what “enabling” means. Probably this criterion would exclude platforms that only offer links leading to websites outside of the platform, meaning that the contract is then concluded on a website different from the platform.

From the consumer’s perspective the conclusion of the contract should not be the only relevant parameter to decide about the applicability of a specific platform regulation. Consumer’s interest in using platforms and the platform’s influence on the consumer’s decision does not depend on this distinction.

A major reason for using a platform is to find and identify a supplier by certain search criteria and receiving additional information offered by the platform like reputational feedback and additional information about the supplier. So it appears to be inappropriate to exclude websites whose service is limited to searching for and identifying the right supplier.

Furthermore it may not always be clear to the consumer whether the online buying procedure is integrated into the website platform or whether it is part of the supplier’s website. If the whole information and comparison procedure is finished and the platform transfers all relevant data of the consumer to the supplier it may not make any difference for the consumer if he leaves the platform to conclude the contract or not.

Most of the draft’s provisions would also be appropriate within a broader scope that goes beyond the conclusion of a contract on the platform’s website. The Draft’s focus on platforms acting as intermediaries between suppliers and customers is too narrow. The provisions on information (Article 5), transparency (Article 6), communication between a consumer and business (Article 7), feedback systems (Article 8), duty to protect users (Article 9) and – to a limited extent – information duties and liability (especially regarding the duty to remove misleading information, Article 17) should be applicable for any commercial for-profit comparison-, search- and matching- platform.

If the Directive were limited to platforms inviting consumers to conclude a contract, then it would leave a wide area of consumer problems uncovered. In Germany, courts hold that

platforms collecting consumer ratings are not covered by the UCP Directive as long as the platform does not invite consumers to conclude a contract. So in case the ratings and the rankings resulting therefrom are incorrect or misleading, there is no way to stop the platform from misleading consumers. The Draft should address this shortcoming of the existing legislation.

As a consequence the scope of the directive should not exclude “services that only identify relevant suppliers” (Article 2 a), but it should rather cover any kind of listing of suppliers, products, services or other users. Such a broad approach could be combined with additional definitions for other kinds of platforms e.g. for market places enabling customers to conclude a contract. The application of some of the provisions could be limited on these platforms (e.g. Article 14).

2. Transparency (Article 6)

The requirements of the transparency provision in Article 6 should be expanded with regards to the scope and tightened with regards to the consequences.

a) Scope of the transparency provisions

Transparency should not be limited to *paying* for *placement* or on *corporate links*. It should rather include general information about the criteria for identifying and listing the suppliers and cover any kind of influence or remuneration between the platform and the supplier on the presentation and listing including any emphasis (writing or pictures) that could increase the attraction of a listed supplier offer or user.

The French “Decree relating to the information requirements applicable to operators of digital platforms” could serve as a model for the following provisions:

- Information about *the conditions for listing and default classification criteria for content and offers of goods and services*.
- Instead of only “paying” the *existence of any influence on the listing and classification of a contractual relationship, capital link or remuneration between the platform operator and the listed provider* (supplier).
- *For each classification result the platform should provide information by any means distinguishing this result, showing that their classification has been influenced by the existence of a contractual relationship, capital link or remuneration between the platform operator and the referenced provider*.

b) Consequences: Clear identification of advertisements

The transparency requirements should be more than just informing the consumer about an economic benefit that the platform has received in exchange for a certain ranking or presentation of a listing.

Rather, any reference to a supplier, product, service, user or any other listing that has been highlighted in exchange for an economic benefit earned by the platform should be clearly identified as an advertisement. In rankings it should be displayed clearly separated from the generically generated lists. In vzbv’s understanding this is already required by existing consumer law, and the platform directive should not fall back behind this standard. The platform directive should rather explicitly strengthen concrete labelling and separation

requirements to avoid any hidden advertising more clearly than the general transparency requirements of the UCPD which seem to be not sufficient to prevent confusion and misleading effects on the consumer's decision in practice.

3. Reputational Feedback Systems (Article 8) and portability

Article 8.4 b) should be supplemented with a provision that ensures that feedback given in exchange for an economic benefit should be clearly identified as an advertisement and displayed clearly separate from other feedbacks.
This applies to feedback where the provider of the feedback has an economic benefit from providing the feedback or has a capital link with either the platform or the supplier.

The provision of portability (Article 8.5) should not be limited to the termination of the contract. The consumer's interests in using platforms is not only to switch from one platform to another by termination of the contract but to use two or more platforms simultaneously (multi homing).

Beyond the reputational feedback, the portability should include other data such as the number of successfully performed contracts regardless of reputational feedback. Easy changing and multi homing are important requirements to facilitate access to the market of platform and improve competition. So a general provision on portability including all kind of relevant data would be preferable.

4. Identification and status of the supplier

For consumers it is crucial to know the contract partner and his status as a trader or consumer (b2c or c2c). Primarily it is the supplier's obligation to inform the platform and the customer about this status. In addition, the platform must ensure that the supplier fulfills this information duty (Article 11.2).

Any wrong information should be corrected by the platform within the duty to remove misleading information (Article 17.1). In contrast to Article 17.1 the platform's duty to remove and correct should not only depend on (external) notification but rather be an active duty of the platform. For the consumer it is not easy not recognize a trader, pretending to be a "non-trader"/supposed consumer as a trader. So the platform should be obliged to play a more active role than only wait for notification and rather use its data about the supplier's business model and offers (quantity, amounts) to detect "hidden traders".

To facilitate this duty the European Consumer Law Acquis should develop a clear and comprehensible approach to distinguish between consumers and traders. Taking into account socio-economic and legal differences between Member States it appears difficult to draw the distinction between consumers and traders by introducing harmonized thresholds on turnover, transactions etc. It is, however, possible and desirable for the EU legislator to develop common criteria for such a distinction, and to clearly state the responsibilities of platforms and traders to make the distinction clear to the consumer.

5. Liability

Sharing economy platforms like Airbnb and Uber should always be liable for minimum standards. These standards should include a joint liability for non-performance and safety of the offered goods or services. The criteria for a liability of platforms could be developed referring to Article 18.2, 19.1 and 20. Where the platform operator, in contradiction to its presentation as an intermediary, has acted on behalf of the supplier it should be fully liable.

For a minimum standard the liability should include any damage to result from a non-conformity or danger after notification to the platform. If the consumer is lead to believe that the platform takes responsibility for certain quality or safety criteria, this should result in a liability of the platform in case these quality or safety criteria are not met in practice.

6. Regulatory Approach

Many of the questions addressed by the Discussion Draft fall within the remits of the existing horizontal EU consumer legislation, in particular the UCP directive and the CRD directive.

vzbv is, however, not certain whether all the new challenges presented by platforms can be addressed within the framework of these directives. It may be necessary to have a more “technological approach” in legislation, including detailed rules for certain business models, like we know it from telecoms or energy regulation. Such a shift in the legislative approach would require a separate legislative initiative by the Commission.

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