

MORE CONSUMER PROTECTION ON ONLINE MARKETPLACES

Short position paper and key recommendations from the Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V. – vzbv) on the responsibilities of online marketplaces

26. June 2024

CONSUMER RELEVANCE

Consumers take advantage of the opportunities presented by online marketplaces. Despite stagnating sales figures in 2022/2023, online trade has risen significantly compared to the pre-pandemic year 2019. This growth is primarily linked to sales via online marketplaces.¹ However, there is a downside. Products that are not in conformity with legal requirements enter the EU internal market: smoke alarms that fail to detect smoke, toys for infants with small parts, cosmetics containing banned chemicals.² Online retail and in particular online marketplaces are the biggest gateway for dangerous and legally non-compliant products into the EU. Furthermore, consumers regularly complain that in particular traders from third countries don't respect consumer rights, with issues including delayed delivery or problems cancelling or returning orders.³

INTRODUCTION

Since the Digital Services Act (DSA) took effect, operators of online marketplaces are, for the first time, subject to due diligence obligations concerning what happens on their platform.⁴ The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V. – vzbv), however, finds that the legal obligations are not in line with the significant influence platforms have on e-commerce. Without the services of an online marketplace, purchasing contracts would not be concluded in such numbers. The European legislator not considered consider this circumstance adequately in the negotiations for the EU General Product Safety

¹ HDE (2024), HDE-OnlineMonitor 2024, the German Retail Federation https://einzelhandel.de/images/Online_Monitor_2024_1305_WEB.pdf (last accessed: 17/06/2024).

² BEUC (2020): Two-thirds of 250 products bought from online marketplaces fail safety tests, consumer groups find, <https://www.beuc.eu/press-releases/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups> (last accessed: 17/06/2024) or BEUC (2022): Products from online marketplaces continue to fail safety tests, https://www.beuc.eu/sites/default/files/publications/beuc-x-2022-029_products_from_online_marketplaces_continue_to_fail_safety_tests.pdf (last accessed: 17/06/2024).

³ vzbv (2020): Grenzenloser Ärger statt bequemer Online-Kauf, <https://www.vzbv.de/pressemitteilungen/grenzenloser-aerger-statt-bequemer-online-kauf> (last accessed: 17/06/2024).

⁴ Digital Services Act, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065> (last accessed: 21/06/2024).

Regulation (GPSR) either. The GPSR provisions will apply from 13 December 2024.⁵

New operators in the market both reinforce existing problems and add new ones. Gamification elements are finding their way into the e-commerce sector: by playing games, a customer can win discounts or free products. The aim is to keep consumers engaged on the platform for as long as possible. Some platforms personalise their offers more than others do. To this end, they collect huge amounts of personal data across all channels.⁶

VZBV SEES A NEED TO ACT

The **EU Customs Reform** and the **EU Toy Safety Regulation** are two legal acts currently being negotiated at European level. Both processes provide an opportunity to make operators of online marketplaces more accountable. However, it will not be enough. In the medium term, the European legislator has to amend or expand other laws. In light of the rapid pace of development, the recommendations in this short paper are not final.

1. More tailored due diligence obligations for online marketplace operators

The DSA places due diligence obligations on online marketplace operators.⁷ The EU General Product Safety Regulation merely makes these more specific. In vzbv's view, **the requirements do not go far enough**. This applies in particular to online marketplaces that enable traders from non-EU states to send goods directly to consumers in the EU.

To date, the European legislator has prevented all attempts to impose stricter due diligence obligations. The European Commission argues that the DSA regulates due diligence obligations and questions of liability for online platforms exhaustively. In vzbv's view, however, going beyond these obligations should be possible. Article 2 (4) DSA states that other legal acts that specify and complement the DSA remain unaffected. Tailored due diligence obligations outside the scope of the DSA are thus possible. Should this not be the case, the European legislator has to revise the DSA and amend the due diligence obligations accordingly.

VZBV RECOMMENDS

The European legislator must introduce additional due diligence obligations for operators of online marketplaces that are suited to the type and business model of the respective platform. They must be obliged to, among other things:

- actively monitor their platform;
- check the degree to which traders on their platform comply with product safety and consumer rights;
- check the degree to which trader information is valid and whether illegal products or services are being sold before consumers gain access to them;

⁵ General Product Safety Regulation, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R0988> (last accessed: 21/06/2024).

⁶ NewDigitalAge: How Shein and Temu's algorithms are transforming the world of ecommerce, <https://newdigital-age.co/retail/how-shein-and-temus-algorithms-are-transforming-the-world-of-ecommerce/> (last accessed: 17/06/2024), or Stiftung Neue Verantwortung (2024), auditing TikTok: TikTok's Impact on Consumer Rights: A Closer Look!, <https://www.tiktok-audit.com/blog/2024/Consumer-Protection-on-TikTok/> (last accessed: 21/06/2024).

⁷ Digital Services Act, Articles 30–32, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065> (last accessed: 21/06/2024).

- proactively remove the same products from other traders as well when products proven to be unsafe are removed;
- ensure that removed products and services are not offered again days or weeks later;
- check that the digital product passport (where required in the future) is present;
- check whether a responsible economic operator is appointed and listed and whether said operator actually exists.

2. Joint and several liability for online marketplace operators

As a rule, online platforms are not liable for content from third parties.⁸ Article 6 (3) DSA introduces an exception. Under this rule, platforms are liable for content from third parties if consumers could realistically believe that the platform itself or a trader who is acting under the platform's authority or control provides the content.

vzbv fears, however, that this provision will fail to have any real impact. Platforms are already obliged to be transparent about the nature of the trader.⁹ The problem is that the burden of proof lies with the consumer. However, it is almost impossible for consumers to prove that the design of the online interface has led the average consumer to believe that the platform itself is the supplier. Research shows that, despite transparency obligations, consumers often do not know who the actual trader is.¹⁰ There are various reasons for this. One of them is the design of the user interface. Another fact is that platforms usually use automatic translation for the text accompanying a product or service. The platforms also have an interest in every transaction being associated with the platform name. Traders, in turn, benefit from the platform's reputation. It is also difficult for consumers to determine the degree to which third parties act under the platform's authority or control.

Furthermore, vzbv believes that an online marketplace that merely mediates between traders and consumers – and thus does not fulfil the above-mentioned criteria – should, in principle, **not** be liable for the traders' actions. However, the online marketplace should have stricter obligations to monitor traders' compliance with EU law than currently. Only when it fulfils the due diligence obligations it can be exempted from liability.

VZBV RECOMMENDS

Operators of online marketplaces should be subject to joint and several liability alongside traders if they have a predominant influence on the trader. This requires a non-exhaustive list of transparent criteria. It should draw on the criteria suggested by the European Law Institute (ELI) in its report "Model Rules on Online Platforms". The more responsibilities the platform takes on for traders, the more justification there is for increasing platforms' liability.¹¹

⁸ Digital Services Act, Article 6 (1) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065> (last accessed: 21/06/2024).

⁹ Directive (EU) 2019/2161 as regards the better enforcement and modernisation of Union consumer protection rules, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019L2161> (last accessed: 21/06/2024).

¹⁰ DIN Consumer Council (2023): Online marketplaces from the consumers' perspective: problems, barriers and solutions, <https://www.din.de/resource/blob/1040028/afd753d4ec34fd5de1341103594b04a4/study-on-online-marketplaces-from-the-consumers-perspective-problems-barriers-and-solutions--data.pdf> (last accessed: 21/06/2024).

¹¹ ELI (2019): Report of the European Law Institute "Model Rules on Online Platforms", Article 20, https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf (last accessed: 17/06/2024).

The same applies if the platform does not disclose the actual contract partner to the consumer.¹² vzbv also urges clear rules on this issue.

3. Current EU legislative processes

Under the **EU Customs Reform**, the European legislator plans to define operators of online market places as “deemed importers”. In future, these platforms might be responsible for ensuring that all fees (including customs) are paid. The aim is also to ensure that consumers can rely on products meeting all EU safety standards.¹³ In vzbv’s view, however, the wording of the draft legislation must spell this out more clearly.

VZBV RECOMMENDS

The proposal for a Regulation COM(2023) 258 final states that the deemed importer will be regarded as the importer. However, Recital 14 states that the obligations of the deemed importers are different from the obligations applicable to the rest of the importers. vzbv would like to see this differentiation removed.

Furthermore, there is also a need for greater clarity regarding the obligations of online marketplace operators with respect to product safety.

The European Commission’s draft **Toy Safety Regulation** COM(2023) 462 final contains no additional provisions for the operators of online marketplaces. The Council of the European Union and the European Parliament have also failed to impose stricter due diligence obligations on online marketplace operators, even though children are a consumer group that requires special protection. vzbv urges the negotiating parties to remedy this in the trilogue.

VZBV RECOMMENDS

The negotiating parties in the trilogue negotiations on the EU Toy Safety Regulation should agree to impose stricter due diligence obligations on the operators of online marketplaces (see above).

4. Digital Fairness Initiative

The DSA sets out, for the first time, a comprehensive ban on manipulative designs. However, the DSA’s scope of application is limited to online platforms. Furthermore, the ban pursuant to Article 25 (2) only applies to manipulative designs not already regulated under the General Data Protection Regulation (GDPR) and the Unfair Commercial Practices Directive (UCPD). It is unclear what this means in practice.

The European Commission is currently evaluating European consumer law to determine the degree to which it ensures fairness online just as much as offline.¹⁴ In the digital sphere, companies have huge advantages over consumers. They have the technological means to precisely analyse their customers using personal data

¹² ELI (2019): Report of the European Law Institute “Model Rules on Online Platforms”, Article 13, https://europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/ELI_Model_Rules_on_Online_Platforms.pdf (last accessed: 17/06/2024).

¹³ EU Commission (2023): EU Customs Reform to make customs procedures more modern and efficient (article in German), https://germany.representation.ec.europa.eu/news/eu-zollreform-soll-zollverfahren-moderner-und-effizienter-machen-2023-05-17_de (last accessed: 18/06/2024).

¹⁴ EU Commission (2022): Fitness Check of EU consumer law on digital fairness, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13413-Digitale-Fairness-Eignungsprufung-des-EU-Verbraucherrechts_de (last accessed: 21/06/2024).

and to exploit their vulnerabilities. Added to this are potentially addictive and manipulative designs that lead consumers to act to their own detriment.¹⁵

VZBV RECOMMENDS

The European legislator must thoroughly revamp European consumer law. Companies must be obliged to operate fairly in the digital realm and guarantee a high level of consumer protection. Furthermore, it is also necessary to ban manipulative designs beyond what the DSA mandates.

5. Market surveillance

Market surveillance is extremely important when it comes to the online retail sector. The organisation of market surveillance in Germany is not up to the task, neither from a staffing, financial, nor organisational perspective.

VZBV RECOMMENDS

Market surveillance must be strengthened on Federal and state level: market surveillance authorities must be better equipped; they need more expertise in the online retail sector, and above all clear strategies for effective online market surveillance.

The European Commission is currently evaluating the effectiveness of the EU Market Surveillance Regulation. In particular, Article 4 (Tasks of economic operators) needs to be amended. The operators of online marketplaces need to be recognised for what they are, namely economic operators that must bear responsibility for the compliance products and services sold to consumers in the EU. In addition, the concept of an authorised representative must be linked to clear responsibilities.

VZBV RECOMMENDS

Operators of online marketplaces must be defined as economic operators. Authorised representatives must take responsibility for the product beyond the time of placing on the market. There should also be more rules as to who may be designated as an authorised representative. It is also essential that, if harm arises, the authorised representative has the necessary financial resources (including insurance) to provide compensation.

Contact

*Bundesverband der Verbraucherzentralen und Verbraucherverbände–
Verbraucherzentrale Bundesverband e.V.
Team Legal Affairs and Trade
recht-und-handel@vzbv.de
Rudi-Dutschke-Straße 17, 10969 Berlin*

The Federation of German Consumer Organisations (Verbraucherzentrale Bundesverband e.V.) is registered in the German Lobby Register and in the European Transparency Register. You can view the relevant entries [here](#) and [here](#).

¹⁵ vzbv (2024): Digital Fairness, <https://www.vzbv.de/digitale-fairness> (last accessed: 18/06/2024).