



2020/2019(INL)

9.7.2020

OPINION

of the Committee on the Internal Market and Consumer Protection

for the Committee on Legal Affairs

with recommendations to the Commission on Digital Services Act: adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL))

Rapporteur for opinion(*): Dita Charanzová

(Initiative – Rule 47 of the Rules of Procedure)

(*) Associated committee – Rule 57 of the Rules of Procedure

PA_INL

SUGGESTIONS

The Committee on the Internal Market and Consumer Protection calls on the Committee on Legal Affairs, as the committee responsible:

- to incorporate the following suggestions into its motion for a resolution:
 - A. whereas the free movement of services, including digital services, is one of the four fundamental freedoms, enshrined in the Treaty on the Functioning of the European Union and is vital to the functioning of the Single Market, and needs to be enhanced by greater consumer protection and consumer welfare;
 - B. whereas Directive 2000/31/EC¹ (“the E-commerce Directive”) is the legal framework for online services in the internal market and regulates content management by hosting intermediaries; whereas any fragmentation of that legal framework, resulting from the revision of the E-commerce Directive should be avoided;
 - C. whereas the report by the Committee on Legal Affairs on “Digital services act: adapting commercial and civil law rules for commercial entities operating online” does not deal with the E-commerce Directive rules, which are the subject of a report being prepared by the Committee on the Internal Market and Consumer Protection;
 - D. whereas Directive (EU) 2019/2161², which amends Directive 2005/29/EC³ (“Unfair Commercial Practices Directive”), , and Directives (EU) 2019/770⁴ (“Digital Content Directive”) and (EU) 2019/771⁵ on certain aspects concerning contracts for the supply of digital content and digital services and contracts for the sale of goods have only

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178, 17.7.2000, p. 1).

² Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (OJ L 328, 18.12.2019, p. 7).

³ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ L 149, 11.6.2005, p. 22).

⁴ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.5.2019, p. 1).

⁵ Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (OJ L 136, 22.5.2019, p. 28).

recently been adopted;

- E. whereas Regulation (EU) 2017/2394¹ has a pivotal role in enhancing cooperation amongst national authorities in the field of consumer protection;
- F. whereas the Digital Services Act package should be without prejudice to Regulation (EU) 2016/679² “(GDPR)” setting out a legal framework to protect personal data;
- G. whereas the Digital Services Act package should not affect Directive 2002/58/EC³ which requires that Member States ensure a high level of protection of the right to privacy, with respect to the processing of personal data in the electronic communication sector;
- H. whereas in relation to the COVID-19 outbreak, the Commission welcomed the positive approach taken by the platforms in response to its letters, sent on 23 March 2020, requiring their cooperation in taking down ‘scam’ advertisements for products falsely claiming that they could prevent or cure a COVID-19 infection;
- I. whereas the legislative measures proposed as part of the Digital Services Act package should be evidence-based and whereas the Commission should carry out a thorough impact assessment, based on relevant data, statistics, analyses and studies of the different options available;
 - 1. Welcomes the “CPC Common Position COVID-19”⁴ issued by the Commission and the Consumer Protection Cooperation (CPC) authorities of the Member States on the most recently reported scams and on unfair practices in relation to the COVID-19 outbreak;
 - 2. Stresses the necessity of better protecting consumers by providing reliable and transparent information on examples of malpractice, such as misleading claims and scams;
 - 3. Calls on all platforms to cooperate with the Commission and the competent authorities of the CPC network and European Consumer Centres Network (ECC Net) to better identify illegal practices and to take down scams; asks the Commission to constantly

¹ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (OJ L 345, 27.12.2017, p. 1).

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

³ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37)

⁴ European Commission / Consumer Protection Cooperation (CPC) Network, Common Position of CPC Authorities, “Stopping scams and tackling unfair business practices on online platforms in the context of the Coronavirus outbreak in the EU”.

review its guidelines for consumers and traders in order to contribute to avoiding the placement, the sale or the purchase of items and services of false, misleading or otherwise abusive content for consumers and, where necessary, to take legislative action;

4. Believes that such guidelines should not only seek to apply Union and national consumer law, but to proactively seek to put in place the means of reacting to the crisis in the market rapidly;
5. Encourages efforts to bring transparency concerning the functioning of and accountability to advertising online and considers that additional guidance is needed as regards professional diligence and obligations for platforms, when it comes to advertising online; outlines that new measures establishing a framework for Platform-to-Consumers relations are needed as regards transparency provisions on advertising, digital nudging and preferential treatment;
6. Recalls that paid advertisements or paid placement in a ranking should be identified in a clear, concise and intelligent manner; suggests that platforms should disclose the origin of paid advertisements, especially those of a political nature;
7. Points out that targeted advertising must be regulated more strictly in favour of less intrusive forms of advertising and that the Digital Services Act package should set clear boundaries as regards the conditions determining when accumulation of data for that purpose would be permitted, in order to better protect consumers;
8. Believes that, if relevant data show a significant gap in misleading advertising practices and enforcement between Union-based and third country-based platforms, it is reasonable to consider further options to reinforce compliance with existing laws;
9. Considers that the options to reinforce compliance with existing laws should include an obligation for advertisers and advertisement intermediaries established in a third country to designate a legal representative, established in the Union, to whom requests could be addressed, in order, for example, to make it possible to obtain consumer redress in the case of false or misleading advertisements;
10. Stresses the need for a level playing field between advertisers from the Union and advertisers from third countries; asks, therefore, the Commission to evaluate the impact that reciprocal obligations from third countries adopted in reaction to the new Union rules would have on the provision of services by Union-based companies in third countries, while raising awareness on how consumer law applies to advertisers from third countries targeting the Union market;
11. Asks the Commission to clarify what sanctions or other restrictions those advertisement intermediaries and platforms are subject to, in accordance with Union and national laws, if they knowingly accept false or misleading advertisements;
12. Stresses the importance of clearly defining what constitutes false or misleading advertisement; recalls that online platforms should take measures to ensure they do not profit from false or misleading advertisements, including from influencer marketing content which is not being disclosed as sponsored;

13. Underlines that transparency requirements should include the obligation to disclose who is paying for the advertising, including both direct and indirect payments or any other remuneration received by service providers, and protect consumers from unsolicited communications online;
14. Underlines that advertisements for commercial products and services, and advertisements of a political nature, or public interest announcements are different in form and function and therefore should be subject to different, but complementary, guidelines and rules;
15. While recalling earlier efforts, asks the Commission to further review the practice of using pre-formulated standard clauses in contract terms and conditions, which are not individually negotiated in advance, including End-User Licensing Agreements (“contract terms and conditions”), and to seek ways of making them fairer and to ensure compliance with Union law, in order to allow easier engagement for consumers, including in the choice of clauses to make it possible to obtain more informed consent;
16. Recalls that restrictions on the use of digital content and digital services such as technical restrictions, including interoperability restrictions, or restrictions resulting from end-user licencing agreements, may be in breach of Union law if they do not meet the reasonable expectations of the consumer, protected under the Digital Content Directive;
17. Notes that contract terms and conditions are often accepted by users without reading them; moreover notes that when contract terms and conditions do allow for users to opt-out of clauses, service providers may require users to do so at each use in order to encourage acceptance of those terms and conditions;
18. Notes that the majority of contract terms and conditions can be unilaterally changed by the platforms without any notice to consumers, with pernicious effects in terms of consumer protection, and calls for better consumer protection through effective measures;
19. Asks the Commission to introduce guidance for platforms on how to better inform consumers about those contract terms and conditions, for example with a pop-up message comprising key information thereon;
20. Considers that a summary text of contract terms and conditions written in plain and clear language, including the option to "opt out" easily from optional clauses, should be displayed at the start of any such contract terms and conditions; believes that the Commission should establish a template for such summaries;
21. Underlines that contract terms and conditions should effectively ensure that the sharing of all data with third parties for marketing purposes is based on the consent of the user thus establishing a high level of data protection and security;
22. Recommends that any data access remedy should be imposed only to tackle market failures, be in compliance with the GDPR, give consumers the right to object to data sharing and provide consumers with technical solutions to help them control and manage flows of their personal information and have means of redress;

23. Asks the Commission to ensure that consumers can still use a connected device for all its primary functions, even if consumers do not give or withdraw their consent to share non-operational data with the device manufacturer or third parties; reiterates the need for transparency in contract terms and conditions regarding the possibility and scope of data sharing with third parties;
24. Calls for a better enforcement of the right of consumers to informed consent and freedom of choice when submitting data;
25. Underlines that Directive (EU) 2019/2161, Directive (EU) 2019/770 and Directive (EU) 2019/771 are still to be properly transposed and implemented; asks the Commission to take this into account when designing additional measures that respond to new market developments;
26. Notes the rise of “smart contracts” such as those based on distributed ledger technologies without a clear legal framework;
27. Asks the Commission to assess the development and use of distributed ledger technologies, including “smart contracts”, in particular questions of legality, and enforcement of smart contracts in cross-border situations, provide guidance thereon to ensure legal certainty for businesses and consumers, and to take legislative initiatives only if concrete gaps are identified following that assessment;
28. Asks especially for the Commission to update its existing guidance document on Directive 2011/83/EU¹ (“the Consumer Rights Directive”) in order to clarify whether it considers smart contracts to fall within the exemption of point (l) of Article 3(3), and, if so, under which circumstances, and to clarify the issue of the right to withdrawal;
29. Asks for guidance on cross-border transactions and on the existing rules regarding notarisation requirements;
30. Stresses that any future legislative proposals should be evidence-based and seek to remove current unjustified barriers in the supply of digital services by online platforms, and prevent potentially new barriers arising, while enhancing consumer protection; believes that such proposals should be aimed at achieving sustainable and smart growth, address technological challenges, and ensure that the digital single market is fair and safe for everyone;
31. Underlines, at the same time, that new Union obligations on platforms must be proportional and clear in nature in order to avoid an unnecessary regulatory burden or unnecessary restrictions, be guided by consumer protection and product safety goals, ensuring a level playing field for companies, including small and medium enterprises (SMEs), and protect the health and safety of our citizens; underlines the need to prevent

¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64).

gold-plating practices of Union legislation by Member States;

32. Asks the Commission to explore the possibility of presenting, as part of the Digital Services Act Package several proposals, including on contractual rights in the context of supply of digital services, as referred to in recommendations set out in the Annex;

ANNEX TO THE MOTION FOR A RESOLUTION:

DETAILED RECOMMENDATIONS AS TO THE CONTENT OF THE PROPOSALS REQUESTED

A. PRINCIPLES AND AIMS OF THE REQUESTED PROPOSALS OF THE DIGITAL SERVICES ACT PACKAGE

The Digital Services Act package should consist of:

- a comprehensive legislative proposal, revising the E-commerce Directive with the aim to improve the functioning of the internal market and the free movement of digital services;
- a legislative proposal on *ex-ante* regulation of large platforms addressing market failures and strengthening transparency, building on the Platforms to Business Regulation;
- proposals on contractual rights in the context of supply of digital services, ancillary to the Digital Services Act, as part of a package, based on the recommendations set out in this Annex, following a thorough analysis of the transposition and implementation of recently adopted legal instruments in the area of consumer protection, as well as a revision of the Regulation (EU) No 910/2014¹ (“eIDAS Regulation”) in the light of the development of virtual identification technologies, in order to improve the efficiency of electronic interactions between businesses and consumers.

B. RECOMMENDATIONS

Recommendation 1. Purpose

The proposals should aim to strengthen civil and commercial law rules applicable to commercial entities operating online with respect to digital services, including, where concrete gaps are identified following a thorough impact assessment, civil and commercial law aspects of distributed ledger technologies and, in particular, smart contracts.

The proposals should also seek to make contract terms and conditions more understandable, and give individuals an effective option to opt-out of some clauses or to negotiate individual terms.

Recommendation 2. Scope

The proposals on contractual rights should only focus on civil and commercial law aspects and should not affect the E-commerce Directive. They should be consistent with the rules on advertising, set out by the Unfair Commercial Practices Directive and the rules on digital content and digital services, laid down by the Digital Content Directive.

¹ Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).

Recommendation 3. General principles

Principle of transparency

Any terms and conditions or other clauses of use should be easily accessible and easy to understand, and clear and plain language should be used. Consumers should receive correct and adequate information about the functionalities and technical restrictions of digital content and digital services, in order to avoid incorrect and misleading advertising. If a connected product or a service depends on one or more services to function, or to function optimally, advertisers and advertising intermediaries must ensure that the consumers understand that the product or the service cannot be used without the additional service. The Commission should establish a template for a summary of the key contract terms and conditions or end-user licence agreements (EULAs) to be displayed in the beginning, in order for the consumers to be able to identify the most important points and to understand the consequences of their consent.

Principle of fairness

Any terms and conditions or other clauses of use that are not strictly essential to provide a digital service or that are not required by law should be amendable or removable before acceptance by an end-user ('opted-out').

Businesses should equally be able to limit some services if an individual decides to choose such 'opt-outs', but should not to be able to deny access altogether or restrict essential elements of a digital service or a physical product linked or otherwise connected to a digital service.

Principle of legal certainty

It should be clearly established that whenever, inter alia, contract terms and conditions and smart contracts fall under the legal definition of a contract, all relevant provisions on consumer protection, set out in the Consumer Rights Directive, should apply.

It should be clarified whether informed consent can be assumed by the mere acceptance of terms and conditions or whether use of a digital service is done without evidence that an end-user has read such terms and conditions or other clauses of use.

Enforcement and penalties

Member States should better enforce the right of consumers right to informed consent and freedom of choice when submitting data to advertisers and advertisement intermediaries. Member States should allow for consumer redress and lay down the rules on penalties applicable to infringements of rules on contractual rights and take all measures necessary to ensure that they are implemented. The penalties provided for need to be effective, proportionate and dissuasive.

INFORMATION ON ADOPTION IN COMMITTEE ASKED FOR OPINION

Date adopted	7.7.2020
Result of final vote	+: 39 -: 1 0: 4
Members present for the final vote	Alex Agius Saliba, Andrus Ansip, Brando Benifei, Adam Bielan, Hynek Blaško, Biljana Borzan, Vlad-Marius Botoș, Markus Buchheit, Dita Charanzová, Deirdre Clune, David Cormand, Petra De Sutter, Carlo Fidanza, Evelyne Gebhardt, Alexandra Geese, Sandro Gozi, Maria Grapini, Svenja Hahn, Virginie Joron, Eugen Jurzyca, Arba Kokalari, Marcel Kolaja, Kateřina Konečná, Andrey Kovatchev, Jean-Lin Lacapelle, Maria-Manuel Leitão-Marques, Adriana Maldonado López, Antonius Manders, Beata Mazurek, Leszek Miller, Kris Peeters, Anne-Sophie Pelletier, Christel Schaldemose, Andreas Schwab, Tomislav Sokol, Ivan Štefanec, Kim Van Sparrentak, Marion Walsmann, Marco Zullo
Substitutes present for the final vote	Pascal Arimont, Marco Campomenosi, Maria da Graça Carvalho, Edina Tóth, Stéphanie Yon-Courtin

FINAL VOTE BY ROLL CALL IN COMMITTEE ASKED FOR OPINION

39	+
ECR	Adam Bielan, Carlo Fidanza, Eugen Jurzyca, Beata Mazurek
EPP	Pascal Arimont, Maria da Graça Carvalho, Deirdre Clune, Arba Kokalari, Andrey Kovatchev, Antonius Manders, Kris Peeters, Andreas Schwab, Tomislav Sokol, Ivan Štefanec, Edina Tóth, Marion Walsmann
GREENS/EFA	David Cormand, Petra De Sutter, Alexandra Geese, Marcel Kolaja, Kim Van Sparrentak
ID	Markus Buchheit, Marco Campomenosi, Virginie Joron, Jean-Lin Lacapelle
NI	Marco Zullo
RENEW	Andrus Ansip, Vlad-Marius Botoș, Dita Charanzová, Sandro Gozi, Svenja Hahn, Stéphanie Yon-Courtin
S&D	Alex Agius Saliba, Biljana Borzan, Maria Grapini, Maria-Manuel Leitão-Marques, Adriana Maldonado López, Leszek Miller, Christel Schaldemose

1	-
ID	Hynek Blaško

4	0
EUL/NGL	Kateřina Konečná, Anne-Sophie Pelletier
S&D	Brando Benifei, Evelyne Gebhardt

Key to symbols:

+ : in favour

- : against

0 : abstention