

11 January 2021

BRIEFING NOTE (Commission Internal)

Scene setter/Context of the meeting:

Art 4(1)(b) You are meeting [REDACTED] eBay (see CV attached).

eBay has contributed to the Open Public Consultation on the DSA package with 3 submissions of more than 100 pages in total. eBay was also signatory of a recent joint industry letter on the DMA by 23 platform companies sent to the Commission in November 2020 (see a more detailed description of their position below).

eBay's focus is on the role of intermediaries in strengthening a safe environment online, facilitating intra-community trade, and ensuring fair and non-discriminatory competition.

eBay supports the idea of ex-ante regulation of gatekeeper platforms. [REDACTED]

Art 4(3) first subparagraph [REDACTED]
[REDACTED]

eBay sent last week to the cabinet a report on the importance of SME digitisation. The [REDACTED] is likely to raise it in the meeting.

KEY messages

- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]

Art 4(3) first subparagraph

DSA

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DG CNECT

Art 4(1)(b)

Virtual meeting on Digital Services Act package with eBay

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- [Redacted]
[Redacted]
[Redacted]
[Redacted]

DMA

- [Redacted]
[Redacted]
[Redacted]

- [Redacted]
[Redacted]
[Redacted]

Art 4(3) first
subparagraph

- [Redacted]
[Redacted]
[Redacted]

- [Redacted]
[Redacted]
[Redacted]
[Redacted]

- [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

- [Redacted]

- [Redacted]
[Redacted]

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Position of eBay

On the Digital Services Act:¹

- **Main provisions and protections of the e-Commerce Directive**, such as the limited liability framework for hosting providers, the prohibition of a general monitoring obligation and the country of origin principle **should be upheld**.
- **Legal certainty and clarifications are needed** especially as regards notice and takedown procedures, and the clarification of several concepts in the e-Commerce Directive, including the concepts of ‘actual knowledge’ and ‘manifestly illegal content’, as related to liability exemptions.
- **Retailers’ compliance obligations and the legal responsibilities of professional sellers should not be shifted to online marketplaces**.
- **On illegal activities:** eBay has various systems in place for addressing **illegal activities**, amongst them N&A mechanisms, “know-your-customer”, cooperation with trusted flaggers, moderation teams, automated and human verification tools as well as streamlined processes with law enforcement.
 - eBay thinks that **detecting illegal activities should not be required by law**. Further, it should not be required by law to inform consumers when eBay becomes aware of product recalls or sales of illegal goods. eBay also strongly advises against notice and stay-down obligations, since there is no reliable technology available, resulting in over-blocking and destruction of business models and platform services.
- Main challenges in **content moderation** include finding cost-efficient and effective combinations of processes and tooling, the limitations of technology (cannot distinguish lawful from unlawful content), grey areas, and the **lack of resources of government and regulatory agencies**.
 - Content moderation procedures should focus on **content that is grounded on a solid legal basis**. Harmful content does not fit this criterion and should therefore be excluded from the scope of the DSA.
 - **On harmful content:** eBay prohibits pornography, x-rated content, sexual services, politically oriented listings, listings that promote offensive, aggressive, discriminatory, terrorist content, as well as listings that profit of human tragedy, such as banning second-hand sale of masks and disinfectants to stop people from profiting from pandemic. A grey area for eBay is the rehoming of pets.
 - It is crucial to allow platforms to moderate content in a **flexible, voluntary and platform-specific and types of content-specific manner versus overly prescriptive and “one size fits all” obligations**, taking also proportionality into account.
- **On obligations:**
 - **KYBC:** When is a seller considered a professional / business seller? There are many entrepreneurs testing ideas on a small scale, growing hobbies into businesses.
 - **Transparency reports:** eBay does not oppose transparency reports per se, but does not publish them due to operational challenges and because they doubt the value of such reports. Further, eBay does not publish information about the use of their **automated tools** out of fear of aiding bad actors in hiding their listings and circumventing legitimate measures.

¹ Position as expressed by the eBay Classifieds Group in the OPC on the DSA package (2020)

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- **On enforcement:** eBay is in exchange with law enforcement, regulatory agencies and third party experts in order to fight illegal content. eBay stresses that government authorities and regulatory agencies play a vital role in tackling illegal content and their allocation of resources and capacity, knowledge and expertise needs to be ramped up to match the (digital) economy of today's world. eBay laments that there is a lack of enforcement and shifts of responsibility to online platforms.
- **On supervision:** eBay mostly operates on a local level and finds the fragmentation between EU member states very burdensome, and especially mentions the different obligations with regards to illegal activities, requirements to have a legal representative in more than one MS, different procedures and points of contact with authorities amongst others.

On the Digital Markets Act:²

- eBay recommends that **all players in the market should have an equivalent and broad access to the services offered by ecosystem platforms**, without the risk of their data being harnessed and used by the ecosystem platforms to develop and/or promote competing businesses. The collection and usage of data within ecosystem platforms should be restricted, e.g. through unbundling of services
- eBay wants certain **non-discrimination measures** to be imposed on gatekeeper platforms, including measures to prevent self-preferencing and discrimination between users, as well as measures to protect weaker contractual business partners and their data.
- eBay does not become specific on how they were affected by unfair contractual terms or unfair practices of very large online platforms, but mention the **unilaterally dictated terms & conditions** in particular related to data collection and use as having an effect on their business.
- eBay thinks that reversing certain systemic practices, that disrupt competition in a large number of sectors, ex post may be very difficult/too late –**existing competition law and enforcement should be complemented by new ex ante regulation**.
- Ex-ante measures should include **certain principles and blacklisted behaviours as well as some case-by-case restricted practices, such as the unbundling of services or divestiture of data**. The regulation should focus on large gatekeepers.
- ebay thinks that to **define gatekeeper platforms, a combination of criteria** should be used, since singular criteria such as user numbers and geographic scope are not problematic when considered in isolation. Criteria to define large systemic gatekeepers should comprise quantitative and qualitative elements and apply cumulatively:
 - **Quantitative** criteria should be set sufficiently high to reflect such companies' unparalleled economic power, which is (a) incontestable given their size, scope of activities, and geographic footprint, and (b) able to create significant competitive and consumer harm in the European digital market.
 - **Qualitative** criteria should be tightly set to capture platforms in a gatekeeper position: i.e. a platform's (i) enduring ability to control access to a critical number of customers for business users from a wide range of sectors of the economy, and (ii) its ability to leverage its power to distort competition in adjacent markets.

² IBID, and eBay's opinion as expressed in the Joint Industry Letter on the DMA by 23 platform companies as well as the position as expressed in the OPC on the DSA package (2020).

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- Limiting the scope of regulation to large systemic gatekeepers is considered crucial as **overly broad criteria would weaken the focus and strength of the regulation** because certain obligations/prohibitions could be seen as disproportionate; and an overly broad set of companies would overwhelm enforcement capabilities and ultimately render the regulation ineffective, and finally to ensure continued political and business support for the regulation as a whole.
- The enforcement of this regulation should be dealt with on **the European level** to prevent fragmentation and ensure remedies are EU-wide. eBay thinks that the **Commission would be well suited to carry out this oversight and they do not see a need to install a new, specific regulatory authority**. Further, the Commission should have exclusive jurisdiction to designate a platform as a gatekeeper platform and these decision should be in force indefinitely, but revisited and updated regularly. Platforms should be able to repeal decisions.

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Background**eBay – company background³**

- eBay is an **American multinational e-commerce corporation** based in San Jose, California, that facilitates consumer-to-consumer and business-to-consumer sales through its website.
- eBay was founded by Pierre Omidyar in 1995, and became a notable success story of the dot-com bubble. eBay is a multibillion-dollar business with **operations in about 32 countries, as of 2019**.
- The company manages the eBay website, an **online auction and shopping website** in which people and businesses buy and sell a wide variety of goods and services worldwide. The website is free to use for buyers, but sellers are charged fees for listing items after a limited number of free listings, and again when those items are sold.
- In addition to eBay's original auction-style sales, the website has evolved and expanded to include: **instant "Buy It Now" shopping**; shopping by Universal Product Code, ISBN, or other kind of SKU number (via Half.com, which was shut down in 2017); **online classified advertisements⁴** (via Kijiji, or eBay Classifieds); **online event ticket trading** (via StubHub); and other services.
- eBay previously offered online money transfers as part of its services via **PayPal, which was a wholly owned subsidiary of eBay from 2002 to 2015**.
- In July 2020, **Adevinta ASA**, a Norwegian small ads platform, operating in multiple countries across the EU (35 digital products and websites, attracting 1.5 billion average monthly visits) **acquired the entirety of the online classified ads business from eBay for a headline value of \$9.2 billion** through the acquisition of 100% of the shares in several companies. In consideration for this acquisition by Adevinta, **eBay received USD 2.5 billion in cash from Adevinta and approximately 540 million newly-issued shares** in the "new" Adevinta.
- As announced in a recent FDI notification from Austria, Adevinta will acquire the entirety of the online classified ads business from eBay through the acquisition of 100% of the shares in the following companies: (i) eBay Classifieds Holding B.V., (ii) eBay Mobile Labs, Inc., (iii) eBay Services México, S. de R.L. de C.V., and (iv) Mobile.de GmbH (eCG) ("Transaction"). In consideration of this Transaction eBay will receive **USD 2.5 billion in cash** from Adevinta and approximately **540 million newly-issued shares** in the "new" Adevinta.
- Following the closing of the Transaction, "new" Adevinta, will include the classified ads businesses of both the current Adevinta and eBay Classified Group (i.e. the four subsidiaries mentioned above), representing approximately **33.3%** of the voting rights and around **44%** economic interest in Adevinta.

³ Source Wikipedia: <https://en.wikipedia.org/wiki/EBay>

⁴ eBay Classifieds Group (eCG) is a collection of online classifieds advertising websites ("**online classifieds platforms**") operating in 12 countries, with strong presence in Europe. Online classifieds is about connecting people to trade in goods, motors, services, jobs and real estate in their local community.

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- As a result of the Transaction, Schibsted (Norway), which currently owns around **59.3%** of the shares of Adevinata, will have approximately **39.5%** of the voting rights (and own a c. **33.1%** economic interest) in New Adevinata.
- Next biggest shareholder - Blommenholm Industrier AS – will have approximately **4.2%** of the voting rights. Remaining shares are freely floating.

eBay - financial results⁵

- In 2019, eBay had a market capitalization of \$32.8 bn, a net income of \$1.79 bn and a total turnover of \$10.8 bn.
- eBay Inc's EBAY.O quarterly profit **topped Wall Street expectations** on 28 October 2020 and the e-commerce company forecast fourth-quarter sales above estimates, as people staying at home due to the COVID-19 pandemic took to online shopping.
- eBay said it expects fourth-quarter revenue in the range of \$2.64 billion to \$2.71 billion, while analysts estimate \$2.54 billion, according to IBES data from Refinitiv.
- E-commerce firms and retailers with a strong online presence have witnessed a spike in demand as the COVID-19 pandemic has led more people to shop online.
- The company raised its **full-year sales outlook to between \$10.04 billion and \$10.11 billion**. The forecast excludes the classifieds business, which eBay in July agreed to sell to Norway's Adevinata ADEV.OL in a \$9.2 billion deal.
- eBay, which has made its platform simpler to use through grouped listings and personal recommendations, said **active buyers grew 5% to 183 million in the third quarter**.
- **Net income from continuing operations rose to \$621 million, or 88 cents per share**, for the third quarter ended Sept. 30, from \$210 million, or 25 cents per share, a year earlier.
- Revenue rose about 25% to \$2.61 billion, beating analysts' average estimate of \$2.48 billion. However, the company missed its prior revenue forecast of \$2.64 billion to \$2.71 billion.
- Despite these results, shares of the company fell nearly 2% at \$52.24 in extended trade. **eBay's guidance for the fourth quarter** had analysts wondering whether the boost the e-commerce site got from consumers visiting during the **coronavirus pandemic would fade**.⁶

⁵ [Source Reuters](#)

⁶ Source : <https://www.nasdaq.com/articles/why-ebay-is-falling-today-2020-10-29>