

FINAL

Comments to the Commission's roadmap/inception impact assessment on the Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services

Introduction

EuroCommerce welcomes the opportunity to provide input to the roadmap consultation on 'deepening the Internal Market and clarifying responsibilities for digital services.' Digital services have become an essential part of the retail and wholesale landscape: online sales have been growing faster than total retail sales in the past years but is still in most countries below 10% of total retail sales¹; with the Covid 19 crisis, many consumers have switched to on-line and are expected to continue to do in the future. Retailers and wholesalers are also exploring new opportunities arising from the digital economy to offer consumers affordable services.

The Commission's communication accompanying its proposal for a recovery package² recognises that the retail and wholesale ecosystem has been hit particularly hard by the COVID-19 crisis. Confinement measures have significantly accelerated the move to online shopping and digitalisation, both for food and non-food products. Food retail businesses faced unprecedented demand online and many non-food businesses experienced a sharp decline in their offline sales which an increase in online sales only partially compensated. The sector invested substantially to ensure the safety of customers, employees, the deployment of new e-commerce capabilities and the reopening of their stores.

To remain competitive, retailers and wholesalers need a regulatory EU framework that supports strong European retail and wholesale ecosystems in digital and physical environments and gives them legal certainty and incentives to invest in robust omnichannel strategies. We need a true Omnichannel Single Market, seamlessly integrating the online and offline environment.

This contribution sets out a description of the impact of digitalisation on retail and wholesale, and preliminary views on the proposed options in the inception impact assessment on 'Deepening the Internal Market and clarifying responsibilities for digital services'.

Note that we envisage that some of the problems we have identified cannot only be dealt with in the context of the Digital Services Act package, but may require further review or amendments of other EU law and initiatives.

Digitalisation is changing retail and wholesale

The Internet and the digitalisation of commerce have fundamentally changed how retail and wholesale businesses operate. We are transforming not only the front office for customers (including recommender systems), but also how we market and advertise, conduct transactions, collect and process data, manage our supply chain, etc. This change is creating new opportunities for businesses to innovate and to enter new markets.

Business models are also shifting. Consumers are looking for integrated experiences that are tailored to their needs, whether online or offline. Successful approaches are seamlessly integrating the online

¹ Centre for Retail Research

² SWD (2020) 98 final "Identifying Europe's recovery needs"

and offline environment: omnichannel is growing faster than pure online players. Online markets are on average with 10% still smaller than offline markets but consumers order most online in certain categories such as clothing, household goods, electronics, books, etc³.

More and more retail and wholesale businesses are (co-)developing new digital services, becoming platforms for other businesses, also for other business sectors. Online marketplaces have become more and more important by providing SMEs access to online markets and facilitating online store management, marketing, transactions, delivery, etc. For example, in Germany the market share of online sales by marketplaces based on turnover increased from 33% in 2018 to 38% in 2019.⁴

Increased competition with non-EU players

The 2015 Digital Single Market Strategy for Europe⁵ was designed to unlock the huge potential of the EU Single Market and to stimulate cross-border e-commerce. However, even today only 36% of EU27 consumers tried to shop cross-border in the previous 12 months when asked.⁶ The European digital services market clearly lags behind the United States and China especially with regards to presence on the global market, as reflected in the strong growth of online sales from some non-EU countries, particularly China.⁷

General remarks

From a more general perspective, we call upon the Commission to take into account in the review of the eCommerce Directive and the Digital Services Act package impact assessments to :

- ensure that all recommendations, conclusions and initiatives are evidence-based and respect the better regulation guidelines;
- ensure a technology neutral approach which is future proof;
- avoid that the future EU framework has legislative overlaps and ensure alignment with existing rules and obligations in order to minimise uncertainty and compliance costs for businesses, especially in light of other EU law, already applicable or not, and planned reviews and guidance⁸;
- only regulate what is necessary, take into account non-legislative instruments and take a risk-based approach;
- focus on rogue traders and avoid additional burdens on compliant businesses;
- enable a level playing field for start-ups, SMEs and established players;
- assess single market barriers that prevent online services to scale up in the EU and become international digital champions.

Non-compliant products entering the EU

One of the main concerns of European retailers and wholesalers is the growing influx of non-compliant products from non-EU countries through digital channels that generate unfair competition between European and non-European operators. Our Members comply with EU and local rules and standards, but not all non-EU operators that offer or facilitate the online sales of goods to European consumers do or have to, especially those located outside the EU. Compliance costs are a significant part of the consumer price of a product and EU operators cannot set competitive prices compared to non-EU operators that offer or facilitate the online sale of non-compliant products.

In the context of the Roadmap, the Commission should clearly identify what type of service providers play a role in every aspect of an online sale originating in a third country (from offering to delivery and after sales services), and particularly assess:

³ E-commerce statistics for individuals, Eurostat, January 2020

⁴ [Online Monitor 2020](#), Handelsverband Deutschland,

⁵ COM(2015) 192 final

⁶ *Attitudes towards the impact of digitalisation on daily lives*, Eurobarometer, March 2020

⁷ PostNord, *E-commerce in Europe 2018, Consumers' buying behavior increasingly global*, September 2018

⁸ e.g. GDPR, ePrivacy, future rules on AI and Data, General Product Safety Directive, Product Liability Directive, review guidance product liability, update Blue Guide on the implementation of EU product rules 2016, guidance article 4 of the Market Surveillance Regulation, Commission Single Market Enforcement Action Plan, review of VBER, HBER and Market Definition Notice etc.

- how was the online sale concluded and what are the different options to prevent non-compliant products from being placed on the market, e.g.:
 - via an online platform or marketplace established in the EU;
 - via an operator not established in the EU and targeting the EU market, which is using an online platform or marketplace not established in the EU;
 - Via an operator not established in the EU, which is using an online platform or marketplace established in the EU and targeting the EU market;
 - via an operator not established in the EU and not targeting the EU market, which is using an online platform or marketplace not established in the EU;
 - directly via an operator with an online presence not established in the EU but targeting the EU market;
 - directly via an operator with an online presence not established in the EU and not targeting the EU market.
- in the context of the above, what are the options to ensure customers can get redress, including possibilities of redress via the non-EU online marketplace;
- the role of carriers, customs brokers and other shipping intermediaries in ensuring the compliance of goods brought for clearance to the border of the single market.
- whether the concept of direct imports is lacking in the context of the massive and increasing influx of products entering the EU market bought online.
- whether the current wording in the eCommerce Directive and relevant EU case law about active and passive hosts is still sufficient or further clarification is needed to provide legal certainty for current and future service providers and create the right incentives to reduce and remove illegal content and products as much as possible.
- what are the possibilities for improving compliance with and/or enforcement of EU law of non-EU operators offering via an online platform or online marketplace, including to extend the country of origin principle? To what extent would it be possible to increase responsibilities and liability of non-EU players

Putting forward an adequate and proportional remedy to this issue will require to address the lack of data on the overall influx of non-compliant products into the EU and individual Member States.

The Commission should look in particular to understand:

- what is the scale of non-compliant products entering the EU market compared to intra-EU trade, split into B2C and B2B sales, at EU and Member State levels, and across product categories, whether non-compliant products entering the EU market are subject to EU law, and identify the main trends;
- what type of non-compliance EU consumers face and what are the remedies available under EU law, who would be liable, including for products bought from non-EU online service providers not targeting the EU market (e.g., withdraw products, recall products, bring products in compliance with EU law, etc.).
- whether already lessons can be drawn from the authorised representative and responsible person foreseen in the Toy Safety Directive and the Regulation on Cosmetic Products.

The future horizontal principle-based EU framework for digital services should address the increased complexity of digital services.

- The eCommerce Directive identifies currently only one type of service provider. However, as the Commission already rightly identifies in the Roadmap, there is a wide diversity of digital service providers that have one common denominator: ‘providing an information society service’. Considering the Commission’s focus on addressing illegal and harmful content and products, the review process should assess the varying risk levels associated with different types or categories of services providers and information society services provided e.g. hate speech or political ads are not the same as non-compliant products. Such assessment should provide a proportionate and targeted risk-based approach that differentiates, if and when needed, legal obligations depending on the type of service provider and the type of information society service provided.
- Another possibility that the Commission could explore is to develop a proportionate and targeted risk-based approach looking at it from a sectoral or ecosystem level. For example, looking at what the most common risks in the retail and wholesale ecosystem are and how could they best be addressed.

- The Commission should make a clear distinction between the different types of non-compliance⁹ and how they are or could be addressed in the future. It is unlikely there is a one-size-fits all approach, and in some cases there is already EU law addressing non-compliance which may overlap. For example, counterfeit products are regulated under Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights and implemented by specific administrative units with the relevant competences for implementation. If currently non-compliance persist due to lack of enforcement, it is undesirable to come up with new rules that will be difficult to enforce as well.

The Commission and Member States should ensure effective and efficient enforcement and removal of illegal content and products.

- The country-of-origin principle should be maintained as long as no maximum harmonisation at EU level applies to online service providers. The principle provides legal certainty to businesses operating cross-border.
- It is important that rules are enforceable. e-Commerce is increasingly a European market. National authorities, such as market surveillance as well as customs, need to improve collaboration, exchange, coordination and interaction with stakeholders. In the case of non-compliant products, such approach should be anchored in the Union Product Compliance Network foreseen in the Market Surveillance Regulation.
- The Commission should, in addition to the clarifications about active and passive online marketplaces, assess the need for a harmonised EU approach for notice-and-action procedures reducing the increasing fragmentation at national level. Fragmentation hampers the ability of smaller players and start-ups to enjoy the benefits of the Single Market and trigger high compliance costs for cross-border service providers.
- The Commission should explore the introduction of proportionate due diligence obligations for services providers to prevent illegal content and products online. These obligations should be proportionate to the type of services provider and service provided.
- New obligations on online advertising and digital marketing should focus on outcomes (securing an open, competitive and transparent market where advertisers can monitor the effectiveness of their ad investments) rather than technological means.

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⁹ E.g. there is a difference between formal non-compliance (e.g. something that easily could be restored without any harm to the customer), unsafe, dangerous, counterfeit goods. The latter is already covered by Regulation (EU) No 608/2013 concerning customs enforcement of intellectual property rights