

Necessity of clarifying responsibilities and liability for online intermediaries

This position paper is complementary to [EuroCommerce's contribution to the roadmap](#) and [public consultation](#) Digital Services Act – deepening the internal market and clarifying responsibilities for digital services.

Introduction

EuroCommerce has a broad membership of different types of service providers (B2C, B2B, intermediaries), selling online, offline and omnichannel, who also provide or are users of a wide range of information society services. Our members core business is selling products, and the focus of our contribution will be mainly on this service activity and related issues.

At the core of our discussions is that the EU legal framework should:

- (i) ensure high consumer trust;
- (ii) provide legal certainty for all market players irrespective of which sales channels they use to offer their services;
- (iii) ensure balanced responsibilities for all market players depending on their position in the supply chain; and
- (iv) create a level playing field for all businesses that offer products to EU consumers wherever they are established.

Key recommendations

EuroCommerce supports one horizontal framework applying to information society service providers, which takes into account the fundamental digital transformation of our sector and the merging of brick and mortar and online channels i.e. omnichannel. This will support the further development of a real Single Market without physical or digital borders for EU businesses and consumers, and provide clarity to all information society services targeting the EU market.

A new framework should also be flexible, supporting the wide diversity of existing and future business models of information society services providers and the services they offer. One of the most important trends, is the seamless integration of the offline and online world into an omnichannel environment, where consumers enjoy a personalised and connected experience. The digital world has become so divergent and intertwined with the physical world, that depending on the type of activity and associated risk with that activity, more tailormade rules are necessary that should be channel neutral, ensure a level playing field for all businesses and that consumer are safe and consumer trust is high.

We recommend the EU legislators to take the following principles in mind:

- 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;
- ensure that any new rules are aligned with the existing hierarchy of responsibilities for the different economic operators in EU product law (i.e. producer/importer/distributor/authorised representative/fulfilment centre)
- clarify for online services, when a product is placed on the market for the first time, in alignment with EU product law;
- **there is no one-size-fits-all approach possible anymore for the wide variety of online services, in some cases tailor-made solutions are necessary (e.g. avoid overregulating retail and wholesale regarding content moderation)**
- ensure that the EU legislative framework is channel neutral;
- prevent legislative overlaps with other EU law and ensure alignment with existing and upcoming 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 guidance;¹
- regulate only what is necessary, take into account non-legislative instruments and take a risk-based approach;
- ensure enforcement is risk-based focussing on catching rogue traders and avoid additional burdens on legitimate businesses;
- enable a level-playing field between start-ups, SMEs and established players;
- assess Single Market barriers that prevent online services to scale up in the EU and become international omnichannel champions.

A level-playing field for products offered online is lacking

EuroCommerce identifies a number of trends that undermine the competitiveness of EU retailers:

- **consumers increasingly buy products at a distance which are offered by traders of which it may be difficult or impossible to determine upfront whether the products are compliant with EU law**, consumer rights are respected and traders are legitimate. This issue seems to be more salient for non-EU marketplaces and non-EU traders, especially regarding enforcement and redress;
- **EU-based market players make significant investments and costs to ensure the products they offer or are offered via their platform are safe and consumer rights are respected** (legal guarantee, repair, redress, refund, etc.). EU-based retailers are unable to compete with rogue traders offering non-compliant products and that do not bear the same costs or maintain high standards for consumer protection. Enforcement by Member States' authorities seems to be lacking and varies across Member States, especially regarding non-EU market players offering products or having products offered via their platform to EU consumers;
- Member States' enforcement authorities have **instruments available** to ensure products bought online entering their markets are safe¹, but it seems that these **are either not used or not used sufficiently and effectively**, and authorities still lack instruments for effective (online) enforcement;
- **a level-playing field for products, especially those offered online is yet to materialise**. In its absence, an increasing number of consumers will likely be persuaded to buy cheaper but non-compliant products from or via non-EU market players in the absence of effective and efficient enforcement at the EU borders. It is also unlikely in such a scenario that the EU's ambition of digital sovereignty over its digital consumer markets will be achieved.

Providing clarity and fact-based policy solutions

In the past year, many stakeholders have brought forward diverging views regarding the review of the eCommerce Directive and the European Commission's announced Digital Services Act package. **Clearer policy objectives based on objective, accurate and comprehensive knowledge of how online and omnichannel service providers operate and the market functions are needed to develop a future-proof framework for digital services.** There are important legal concepts that remain unclear and with disputed meanings. Concepts from EU product law, consumer law and services about mandatory requirements, responsibility and liability for market players should be clarified. The

¹ Market Surveillance Regulation, CPC Regulation, GPSD

Commission's impact assessment should ensure that all stakeholders have a complete overview and understanding of these concepts, which will provide the best basis for the right policy decisions.

In particular, we would encourage the Commission to:²

- **assess 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.** Over the years, the Court of Justice of the European Union has issued several preliminary rulings touching upon the concept of 'mere conduit' and 'hosting'.³ Although these cases mainly focus on whether EU trademarks are infringed or not, they also provide elements for further clarification about certain types of activities that indicate whether an online marketplace is covered by the liability exemption in Art. 14(1) of the eCommerce Directive and corresponding obligations regarding detection and removal of illegal content. A clear and comprehensive legal analysis should provide the basis for further policy debates;
- **clarify the different type of actors and market players distinguished in EU product law, consumer law and (online) services.** Looking at what their respective responsibilities are and where do they overlap or constitute significant different concepts. This should provide guidance on how the issues that have been brought forward in the debates so far can be best addressed in a proportional manner;
- **clarify when which type of market player is responsible for the product offering, the product itself, defects, redress, consumer rights, etc.** and consequently what would be the responsibilities of a marketplace deemed an active intermediary;
- **address the lack of data about non-compliant products being placed on the EU market the type of non-compliance, and an analysis of enforcement of EU law by Member States' authorities.**

Improving notice-and-action procedures

Authorities and market players would benefit from more harmonised notice-and-action procedures for non-compliant products. A harmonised scheme would help, next to other measures, to create a level-playing field throughout Europe and clarify to all market players what is expected from them. This could build upon voluntary initiatives like the [Product Safety Pledge](#).

The harmonised minimum set of requirements for notifications of non-compliant products in the eCommerce Directive is not sufficient. Not all notifications can be easily understood and may prevent intermediary service providers from acting expeditiously. Authorities should ensure that notifications of non-compliant products are shared with the whole market, so all market players can remove the offering of non-compliant products. Harmonised procedures for counter notifications by content providers would ensure the same level of protection of fundamental rights throughout the EU.

Ensuring a holistic approach for a better functioning online advertising market

Online advertising has been mentioned as a possible issue that would be partially tackled within the DSA framework. Although EuroCommerce would recommend the Commission to carefully assess if the DSA is the best place to regulate this issues, we believe that, in general, any **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 on technological means.

² Regarding data and enforcement / regulatory gaps more detailed suggestions are available in [EuroCommerce's contribution to the roadmap](#) Digital Services Act – deepening the internal market and clarifying responsibilities for digital services.

³ e.g. Joined Cases C-236/08 to C-238/08 (Google), Case C-324/09 (L'Oréal) Case C-567/18 (Coty), Joined Cases C-682/18 YouTube and C-683/18 Cyando

Self-employed individuals offering services through online platforms

The platform economy presents opportunities for retailers and wholesalers in terms of new business models and follow-on services. **Several of our members own, or have chosen to partner with, platform companies, while others rely on platforms for part of their supply chains.**

Platform workers tend to be self-employed. Self-employment has considerable advantages over worker status in terms of freedom and self-determination. It allows platform workers to determine independently when they work and for how many hours. This personal choice over their working time can bring meaningful improvements to an individual's work-life balance.

In addition, the diverse opportunities offered to platform workers by platforms can increase labour market participation as well as support entrepreneurship. Platform work allows entrepreneurs to build or diversify their client portfolios. Another group attracted by platform work are those who are not available for work in traditional 9-to-5 jobs. Finally, individuals who were previously at a distance of the labour market use platform work to gain work experience or improve their skills.

While we recognise that there are various types of platform work (as [research](#) by Eurofound has demonstrated) with their own specific characteristics, platform workers are generally classified by national law and practice as 'self-employed' as opposed to 'workers'. This legal status entails that platform workers tend to fall outside the scope of the Transparent and Predictable Working Conditions Directive and its provisions on working conditions for 'workers'. **Our members would nonetheless be in favour of voluntary initiatives promoted by platforms that help facilitate decent and meaningful working conditions for platform workers.**

Given the legal constraints involved, EuroCommerce encourages platforms to improve the working conditions and skills of platform workers on a voluntary basis. We look forward to further engage in discussions with the EU institutions and relevant stakeholders in the platform economy, based on the exchange of examples of best practice.