Position paper on the Digital Services Act

1. Introduction

Ecommerce Europe welcomes the opportunity to provide further feedback to the European Commission's public consultation on the "Digital Services Act – deepening the internal market and clarifying responsibilities for digital services", which is going to encompass a review of the Directive 2000/31/EC on electronic commerce (or e-Commerce Directive / ECD).

The ECD has been instrumental in setting up a digital infrastructure which enabled millions of digital retail businesses in the EU, and it has also helped them to profit from a more harmonized Digital Single Market for information society services. This has helped foster growth in the EU furthering European-based businesses to compete digitally not only on a European scale but also on a global scale. The ECD has fostered the development of online platforms in Europe, such as e-commerce marketplaces. These have been giving e-retailers, especially SMEs, easier access to consumers across the Union and greater choice to consumers, often at lower prices. At the same time, thanks to digitalization, the EU market is also open and accessible to sellers coming from third countries, which could pose a problem in certain cases. These third-country sellers can either sell their products directly to EU consumers or rely on (EU or non-EU based) marketplaces to do so.

In the 20 years since the ECD came into force, the role of digital service providers, platforms and online intermediaries has drastically changed, while the distinction between online and offline sales is rapidly fading away, with a transition towards an omnichannel shopping ecosystem, which Ecommerce Europe fully supports and embraces. With the DSA in sight for the end of 2020, any review of the current framework established by the ECD should be performed with the aim of strengthening the EU Single Market and thus the European economy, especially in this unprecedented time of a global pandemic caused by the COVID-19 outbreak.

Ecommerce Europe is comprised of 25 national e-commerce associations (and some direct company members i.e. digital shops and online marketplaces), which means that there may be different views within the EU association on the future Commission's plans on the DSA. However, all the members are committed to cooperating in an open and constructive way towards the best suitable solution for e-commerce in Europe. Members of Ecommerce Europe agree on various issues that are relevant for the DSA discussions. Generally, Ecommerce Europe's members agree on the fact that there are some problems with the current legislative framework and the global character of e-commerce. However, there may be diverging or alternative views on how to tackle these issues, also considering the differences between the single Member States' markets. In those cases, Ecommerce Europe clearly describes in this paper the various problems identified so far and gives EU policymakers a more general direction to follow, thus leaving it to the various members of Ecommerce Europe to provide further detail.

2. Better regulation and other key principles for the DSA

This section contains general recommendations for EU policymakers on better regulation and other key principles in the context of the ECD/DSA on which Ecommerce Europe members overall agree.

A. Adopt a future-proof approach

The Commission should ensure that the new legislative framework will be future proof. In that perspective, Ecommerce Europe strongly recommends adopting an approach that is principle-based, technology- and channel-neutral (omnichannel) with regards to the DSA, which is designed to adapt and resist to the evolution of the fast-digitalizing economy. In particular, identical rules should apply to any kind of service, irrespective of the channel used, whether online, physical, through a propriety website or an online platform.

B. Ensure legal consistency with other legislation

In the past years, the EU has created new legislation that targets, among others, also online platforms (i.e. VAT E-commerce Reform, Consumer Rights Directive - as amended by the Omnibus Directive, Market Surveillance Regulation, etc.). Most of the recently adopted legislation still has to enter into application. Therefore, in order to ensure legal certainty for businesses, Ecommerce Europe recommends the European Commission to avoid any overlap with the future DSA framework and ensure consistency and alignment with already existing regulations. In that perspective, the Commission should only regulate what is necessary, take into consideration eventual non-legislative tools and a proportionate, 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.

C. Address legal fragmentation and maintain the country of origin principle

Due to its minimum level of harmonization, the e-Commerce Directive has been implemented in different ways in the various Member States, resulting in diverging provisions across the Union and case law. To compensate the minimum character of the ECD, EU policymakers introduced the so-called “country of origin principle”, by which online providers of goods and services are subject to the law of the Member State in which they are established and not to the law of the Member States where the good or service is accessible.

This fundamental principle has been providing legal certainty to businesses operating cross-border in the EU, relieving some burden for SME businesses and helping them in expanding on a European scale. Therefore, in the opinion of Ecommerce Europe, the country of origin principle should be maintained in the upcoming DSA proposal regarding issues that are non-harmonized at EU-level. In order to achieve a greater level of harmonization, which should be as much as possible at maximum level, Ecommerce Europe would support the choice of an EU regulation or an EU directive aiming at full harmonization as legislative tool for the DSA, also to avoid gold-plating by Member States. Full harmonization will reduce legal uncertainty for businesses active (or wishing to be active) cross-border in the EU and reduce compliance costs, by leading to further simplification without creating an extra administrative or regulatory burden for businesses.

D. Ensure efficient enforceability of the new legislative framework

Due to the global nature of e-commerce, Ecommerce Europe calls on the European Commission to assess and come up with instruments that would improve enforcement not only vis-à-vis players based in the EU, but also and especially vis-à-vis those players that are not based in the Union. In order to tackle non-compliance effectively, rules need to be enforceable. More binding rules alone would not solve non-compliance issues if these rules, in general, cannot be effectively enforced. In that perspective, national authorities (i.e. market surveillance and customs authorities) need to improve collaboration, exchange, coordination and interaction, both among themselves and with stakeholders.

E. Online advertising in the DSA

Online advertising has been mentioned as a possible issue that would be partially tackled within the DSA framework. Although Ecommerce Europe would recommend the Commission to carefully assess if the DSA is the best place to regulate these 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.

3. Level playing field and non-compliant products entering the EU market

In this section, Ecommerce Europe identifies some problems with the current legislative framework on which Ecommerce Europe members overall agree. However, there is no consensus yet within Ecommerce Europe on the solutions to address these problems. Therefore, in this section, Ecommerce Europe provides EU policymakers with a more general direction to follow, thus leaving it to the various members of Ecommerce Europe to further discuss national views with the EU policymakers via position papers, answer to the public consultation, etc.

Identify the issues

One of the main concerns of European e-commerce players is the seeming increased flow of non-compliant products (i.e. unsafe products, which represent a major problem in terms of EU consumers' health, security and environment) coming from non-EU countries, either when a consumer orders directly from a seller based outside the EU or via an intermediary facilitating the sales. Moreover, this situation undermines the level playing field by creating unfair competition between European- and non-European-based online sellers, as the former have higher compliance costs than the latter. While EU-based players have to comply with European and national rules and standards, not all non-EU operators that offer or facilitate the sales of goods to European consumers do or have to, especially those located outside the EU. It should also be mentioned that the non-EU based seller that is directing the product to an EU market should be responsible for making sure it is compliant. In that perspective, there is also a lack of a level playing field over a range of issues between online sellers based in the EU and those based in third countries with no representative in the EU.

Ecommerce Europe believes that the Commission and the Member States should ensure effective and efficient enforcement and removal of illegal content and products placed on the EU market. Currently, there is an enforcement gap that cannot prevent non-compliant products from being offered on the EU market, and Ecommerce Europe members agree on the fact that this should be fixed. Ecommerce Europe also overall supports the principle that third-country operators selling products to EU consumers should comply with EU product compliance rules. There could be different ways to approach these issues, either within the framework of the DSA or by amending other legislation if that would be more appropriate and effective. Moreover, in terms of lack of understanding of EU product compliance rules by non-EU based manufacturers, which is also an issue, the EU could step up its efforts in educating these players about EU legislation and foster international cooperation with third countries.

Issues identified by members so far are in relation to the following:

A. Product safety compliance and responsibility for (unsafe) goods sold by non-EU-based sellers to EU consumers

EU product safety legislation, in general, does not allow economic operators - for a broad range of products - to place unsafe products on the European market. The Market Surveillance Regulation prohibits (as of 16 July 2021) the placing on the market of certain goods unless an economic operator established in the EU is identified as responsible for ensuring the availability of the conformity documentation, cooperating with market surveillance authorities and informing authorities when they have reasons to believe that a product presents a risk.

This can be:

- the manufacturer of the goods (if established in the EU),
- the importer (where the manufacturer is not established in the EU),
- an EU representative authorized by the manufacturer, or
- a fulfilment service provider, when there is none of the above responsible operators in the EU.

A fulfilment service provider is a person or company offering at least two of the following services: warehousing, packaging, addressing and dispatching, without having ownership of the products involved; courier and postal companies are specifically excluded. Although the representative has a responsibility on verifying documents and cooperation with the market surveillance authorities, the representative is not liable for damages and harm caused to consumers/persons in the EU by an unsafe product.

One of the biggest challenges is, therefore, how to address and allocate responsibilities and obligations on product safety in case of products offered on online marketplaces by professional sellers that are based outside the EU. It can also be possible that an EU consumer orders a product from a non-EU based seller, without any intermediation. To address this issue, the Commission should differentiate between marketplaces based in the EU and marketplaces based outside the EU, both offering sellers from outside the EU the opportunity to sell their products to EU consumers. These scenarios (including direct imports) are further described below:

a. *EU-based marketplace & non-EU-based seller*

In case the marketplace is based in the EU, the seller from outside the EU has to comply with EU product safety rules and is only allowed to place safe products on the EU market, on the condition that there is a representative responsible economic operator (as required by the Market Surveillance Regulation). In absence of a responsible economic operator in the EU (Art. 4 of the Market Surveillance Regulation), the marketplace will be regarded as responsible representative when it meets the requirements of a fulfilment service provider as meant in the Market Surveillance Regulation (see above). This means that there is a certain level of involvement or activity from the side of the marketplace needed in the transaction between the non-EU-based seller and the EU consumer. However, when the marketplace does not meet the fulfilment requirements of the Market Surveillance Regulation, it will not be considered as a responsible operator, which means that the product is not allowed to enter the EU market unless there is another economic operator other than the marketplace that can be considered responsible under the Regulation.

b. *Non-EU-based marketplace & non-EU-based seller - Direct imports without intermediation*

Also, when the marketplace is not based in the EU, the seller from outside the EU has to comply with EU product safety rules and is only allowed to place safe products on the EU market on the condition that there is a representative responsible economic operator in the EU. However, in absence of a representative of the producer in the EU, the non-EU-based platform will not be regarded as responsible representative, simply because it is not based in the EU.

We believe that there is a legal discrepancy in the Market Surveillance Regulation when products are sold by non-EU-based sellers via non-EU-based marketplaces (or other non-EU economic operators), if the non-EU-based manufacturer has not designated a responsible economic operator in the EU. The same legal discrepancy occurs when the seller is based outside the EU and an EU consumer orders a product from this seller, without any intermediation (i.e. marketplace).

Role of authorities

Considering the current rules, market surveillance (and customs) authorities seem to be in the best position to prevent non-compliant products from entering the EU market in these situations. However, as market surveillance (and customs) authorities have only limited resources to verify product safety compliance of such an overwhelming amount of imported goods, a major part of these imports will not be controlled, thus leading to substantial risk of non-compliant or unsafe products entering the EU market. This situation is not only detrimental for EU consumers, due to safety reasons, but also for EU-based operators, which are at a competitive disadvantage compared to their non-EU competitors, which have lower compliance costs.

Therefore, Ecommerce Europe generally finds that the Digital Services Act should empower market surveillance (and customs) authorities, by providing them with more resources and more efficient instruments to enforce EU rules, in order to efficiently check products and block non-compliant goods before they enter the EU market. More efficient enforcement will increase EU consumers' protection and restore the level playing field for EU-based operators.

Moreover, it is important to note that e-commerce marketplaces rely on recall databases and notices from public authorities in order to identify products to be taken down. A significant problem marketplaces encounter when they receive notifications from some market surveillance authorities is related to the quality of notifications, otherwise marketplaces experience delays or problems in identifying the impacted goods. To achieve successful deletion of potentially infringing content, marketplaces would require the following information to be provided in a notice:

- the complainant should be clearly identified and in a legitimate position to send a notification (e.g. market surveillance authority);
- the notification should be made in writing and the complainant should provide adequate information of the specific material alleged to be infringing (i.e. link to the listing);
- it should be sent to an e-mail address or other secure method reserved for this purpose by the service provider;
- it should clearly specify which information or activity the complaint relates to;
- it should include details, including legal ground to demonstrate the unlawful nature of the activity or content in question.

Role of other actors in the value chain - lack of clarity on the active/passive hosting concepts

At this point in time, there is no consensus within Ecommerce Europe as regards to the involvement of other actors in the value chain (i.e. marketplaces, delivery operators, etc.) to verify product safety compliance with EU rules. Their role may also depend on the degree of knowledge these actors have. In that perspective, Ecommerce Europe recommends the European Commission to maintain this basic principle of art. 14 ECD, which led to the distinction between active and passive hosting. However, the wording/concepts need to be clarified since this is often confusing and unclear for businesses. For e-commerce, in our opinion, the distinction should be between operators with only ex-post responsibility after notification or awareness of non-compliance, and those which have a certain level of responsibility and/or liability for the non-compliance of the seller based on their knowledge.

Overall, Ecommerce Europe believes that this principle has proven to be fit for purpose, although there is a need for clarification. The nature of digital services has changed since the ECD was implemented, thus creating more confusion around the concepts of active and passive hosting, and will continue to change. Therefore, while overall supporting the principle of art. 14 ECD, the European Commission should consider how to clarify when art. 14 ECD applies to these further developments, in a reasonably balanced and harmonized way.

Other measures

Ecommerce Europe members have different opinions on the effectiveness of voluntary measures to address product safety compliance issues, such as voluntary involvement of e-commerce marketplaces (i.e. the Safety Pledge) and international agreements on the labelling of packages that would enhance digital and automated control of the goods by a representative economic operator.

B. Product liability for (unsafe) products sold on online marketplaces by non-EU vendors

In the EU, liability for damages and harm caused to consumers by unsafe products is based on the Product Liability Directive. According to the Directive, the producer of the unsafe product is basically liable for damages and harm caused by this product to the consumer or other natural persons. In case of absence of a manufacturer in the EU, the importer in the EU will be alternatively considered as responsible and liable producer, thus guaranteeing that consumers will always be able to address their claims and remedies to a natural or legal person in the EU.

One of the biggest challenges is, in a similar way to the case described above (3.A, page 4), how to address the allocation of this responsibility and liability of the producer or the importer in the case of products offered on online marketplaces by professional sellers that are based outside the EU. Also in this case, to address this issue, the Commission should differentiate between marketplaces based in the EU and marketplaces based outside the EU, both offering sellers from outside the EU the opportunity to sell their products to EU consumers.

These scenarios are further described below:

a. EU-based marketplace & non-EU based seller

In the case of a non-EU-based seller operating on an EU-based online marketplace to sell his products to EU consumers and where there is no producer in the EU, the current Product Liability Directive does not provide for an economic operator within the EU to which the consumer can address his claims and remedies on compensation for damages and harm, simply because neither the seller nor the marketplace (regardless of its level of involvement in the sales process) can be seen as importer in the EU. The consumer himself is the importer of the product. It practically means that, in such cases, the consumer is not protected and cannot find any remedies or compensation for harm and damages caused by unsafe products. It also means that compliant EU-based economic operators suffer from unfair competition by non-EU competitors, who are able to operate at lower costs due to lower compliance costs. Moreover, as consumer-product marketing and interaction are evolving, creative and novel ideas for ensuring product safety must also be considered. The recurring point of having a responsible person assumes one solution, but there could be other approaches for consideration, e.g. via multilateral trade agreements with cargo inspection at both ends of transport, ability to have responsible legal entities in a non-EEA country, etc.

In a similar way to the case presented above (scenario 3.A), Ecommerce Europe takes no position as regards to considering eventual new economic operators as alternatively responsible and/or liable for damages and harm caused by unsafe products and highlights the need for increased enforcement resources and focus to control border and markets. Also, in this case, the role of these operators may depend on the degree of knowledge these actors have. In that perspective, Ecommerce Europe again recommends the Commission to maintain the basic principle of Article 14 ECD while clarifying the concepts of active and passive hosting., as already outlined above under 3.A (page 5).

b. Non-EU-based marketplace & non-EU-based seller

Also in the case of a non-EU-based seller operating on a non-EU-based online marketplace to sell his products to EU consumers and where there is no producer in the EU, the Product Liability Directive does not provide for any responsible and liable economic operator to which the consumer can address his claims and remedies on unsafe products, simply because there is no marketplace, seller or other economic operator within the EU that can be seen as importer, since the consumer himself imports the product.

From the perspective of consumer protection and of unfair competition by non-compliant non-EU-based competitors, Ecommerce Europe does not see yet a direct solution in new EU legislation as it will not be applicable to these operators, simply because there is no point of reference for them within the EU. Again, emphasis must be placed on the focus and resources of customs and market inspectors to address this situation.

C. Unharmonized notice and take-down mechanisms

Although the ECD does not oblige intermediaries to proactively monitor the content of third parties using their marketplace and does not hold them liable for unsafe products, these intermediaries have a responsibility under the ECD to take down unsafe products after being notified of the illegality or when the intermediary becomes itself aware of an unsafe product. When the marketplace fails to remove or correct the non-compliance in due time after it has been notified, the ECD safe harbor would not apply anymore.

Regardless of whether the liability regime of the ECD will remain as it is or will be extended in the framework of the Digital Services Act, the notice and take-down mechanism remains an important tool for marketplaces to become aware of illegal content or products on their platform so that they can consequently act to take it down. However, the minimum character of the ECD has led to a lack of harmonization of national notice and take-down mechanisms. To make this system more effective, the European Commission should examine whether a more harmonized approach to notice and take-down mechanisms is possible within the framework of the DSA. At the same time, the Commission should assess, through a thorough and fact-based analysis of pros and cons for the various players, if this mechanism should be extended and further clarified with regard to which non-compliance is covered by art. 14 ECD.

As regards the Safety Gate, supervising authorities should step up their efforts in effectively contributing to the database that can be accessed by consumers to check the safety of the product they aim to buy and by digital services and sellers. In the last case, interoperability has to be ensured. In both cases, it is vital that a minimum level of specificity is provided in the RAPEX notices to enable consumers and digital services to receive actionable information.

From the perspective of consumer protection and of unfair competition by non-compliant non-EU-based competitors, the issue of ensuring enforceability of EU rules on notice and take-down vis-à-vis non-EU based marketplaces would need to be considered.

D. Identification of the seller active on a marketplace

Some e-commerce marketplaces already prominently display next to the product description of every listing information such as who is selling the product, a way to contact the seller, seller's feedback rating, etc. However, consumers buying on other marketplaces which are less transparent, may encounter problems in finding out who the actual seller is, especially when there is a mix of sellers including consumers, businesses and/or the marketplace itself.

EU consumer legislation (e.g. Consumer Rights Directive and Unfair Commercial Practices Directive) obliges business distance sellers to disclose in a clear and easy accessible way the identity, address and contact options of the seller and obliges marketplaces to inform the consumer whether the seller is a trader

or a consumer, and - when the third party is not a trader - that EU consumer law is not applicable, and which operator will be responsible and liable for the performance of the sales contract.

However, the current legal framework may not be clear enough on the consequences for the contractual relationship when a marketplace fails to disclose the identity of the third-party seller. At the same time, it should be recognized that marketplaces are distinct and have different procedures in place and that there are certain marketplaces which already comply with these requirements. Although there is no consensus yet among Ecommerce Europe members on introducing certain obligations, such as “know your business customer”, for online marketplaces in the DSA to prevent non-compliant products from being offered via their platform, the European Commission should conduct an impact assessment to explore and assess the pros and cons of this possibility. If the impact assessment shows that there is a need to act but that it should not be tackled within the DSA framework, alternative options should then be explored. In any case, alignment with other EU legislation should always be ensured.

From a more general perspective, another issue is that the nature of EU consumer legislation could make it, in practice, only applicable to marketplaces that are based in the EU. As marketplaces based outside the EU are not subject to EU legislation, they do not have the same obligations as EU-based ones.

From the perspective of consumer protection and of unfair competition by non-compliant non-EU-based competitors, the issue of ensuring enforceability of EU legislation vis-à-vis these operators would need to be addressed. In assessing the response that the EU takes to this general challenge, effectiveness and proportionality should be priority considerations in determining what, if any, regimes beyond border control and market inspection are capable of having a significant impact without creating excessive burdens on existing compliant businesses.

E. Clarity on the responsibility for guarantees and statements made by marketplaces and for services carried out by marketplaces on behalf of the seller

Marketplaces often provide consumers with guarantees and statements on the products sold by third-party sellers and on the performance of the contract by these sellers. In the view of Ecommerce Europe, on the basis of EU consumer law, marketplaces are already responsible for compliance with the guarantees and statements they communicated to the consumer, in respect to the performance of the third-party seller.

Moreover, marketplaces often provide additional services on behalf of the sellers active on their platform, such as payment and delivery services. Although marketplaces basically can be seen as subcontractors of the third-party seller - for whose performance the seller itself is responsible and liable - in the view of Ecommerce Europe, the current legal framework may not be sufficiently clear if and in what circumstances the marketplace would possibly be jointly responsible and liable for failures in the performance of the additional services.

The European Commission should assess if the current legislative framework provides sufficient clarity on the situations mentioned above and assess how to address the issue of both platforms and sellers based outside the EU, which are not subject to EU legislation.

4. Closing remarks

Better consultation planning and timing

From a general perspective, Ecommerce Europe calls upon the European Commission to ensure that all recommendations, conclusions and initiatives are evidence-based and respect the better regulation guidelines.

Although Ecommerce Europe fully understands that the COVID-19 outbreak has caused delays and difficulties for the policy agenda of 2020, it would still like to highlight that the planning and timing of this and many other digital-related consultations, including on roadmaps, which have been running over summer is not optimal for achieving the best possible input from stakeholders. For member organizations like Ecommerce Europe, launching consultations at the beginning of the holiday period greatly limits feedback gathering from our members. It is Ecommerce Europe's intention to always provide high-quality and balanced feedback based on the input from our members across Europe.

While it is not Ecommerce Europe's intention to delay policymaking in any way, we and our members would have appreciated an extended consultation period, ideally not over the summer holidays, and a better planning considering the vast amount of consultations currently running. We call upon the Commission to take this feedback into account for future consultations, as everyone would benefit from better planning and appropriate deadlines.

General remarks

Ecommerce Europe and its members are willing to constructively cooperate with EU policymakers and other EU stakeholders on creating a proportionate EU legislative framework that would be fit for the future and which will enable the rise of EU champions in the digital sector.

For any questions on our contribution, please feel free to contact Ecommerce Europe.