

GENERAL RECOMMENDATIONS FOR THE DIGITAL SERVICES ACT

The E-Commerce Directive (ECD) successfully promoted online commerce in the EU and the Digital Services Act (DSA), its successor, should capitalize on its essential building blocks. The revision of the ECD should be an opportunity to clarify everyone's liability and address legal fragmentation.

The EUROCHAMBRES 2019 Business Survey on Single Market Obstacles points out that there's room for improvement in the Digital Single Market. A general take-away of the survey was that online sellers, across the board except for one suggested obstacle, see more issues with the Single Market than purely offline sellers. SMEs are more than ever engaged in digital trade but, the figures of the EUROBAROMETER from September 2020 show that only 4% sell their goods online to consumers in other Member States¹.

The success of the reviewed framework hinges on its simplicity and the legal certainty provided to all the parties involved in commercial transactions. This should be a general guiding principle, next to taking stock of what worked well and does not need reassessment.

In this document EUROCHAMBRES presents 10 short general recommendations. Once the proposal is published, more detailed comments will be issued.

RECOMMENDATION 1: MAKE ONLINE SELLING EASIER FOR COMPANIES

A strong legal framework needn't be overly complicated or difficult to comply with. [Our Business Survey from 2019](#)² shows that **online traders, more than offline traders, perceive more barriers in the (Digital) Single Market.** The DSA should have as a goal to address legal fragmentation, being the main reason why businesses decide to "stay at home" as identified in the Commission's March 2020 report³ on the remaining barriers to the Single Market. The revision of the ECD should address these barriers in order to make online trade as seamless and frictionless as possible.

74,2% of businesses selling online think that different national service rules are a significant obstacle and 67,2% complain about different contractual and legal practices in Member States.

56,2% of online selling companies say that differences in national (online) consumer rights is an issue for them, while the figure is only 27,5% for offline selling companies.

Finally, a majority (53,9%) of companies selling online find that "*discrimination of foreign enterprises by legislation or national authorities*" is a significant issue. For companies selling offline, the figure is much lower at 43,7%.

¹ <https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm/ResultDoc/download/DocumentKy/90712>

² More than 1100 companies from all EU Member States replied to the EUROCHAMBRES survey in the period between September and October 2019.

³ Commission Communication "Identifying and addressing barriers to the Single Market", COM(2020) 93 final
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These figures cannot be ignored and show that the current legal framework is up for review.

RECOMMENDATION 2: A HORIZONTAL LAW

The ECD is a **horizontal, technology neutral and principle-driven piece of legislation** which allowed it to withstand the test of time and allowed for the emergence of new technologies. Its successor should be molded in the same manner. Therefore, questions related to more specific sectorial issues, such as the statute of platform workers should be dealt with in other more specific legislative initiatives.

We stress at the same time that the DSA, just like the GDPR, will not only shape the legal framework in Europe but also in other jurisdictions. The ambition to become a regulatory leader is justified, yet the right balance needs to be found in this respect. Before anything else, the law should bring legal certainty as well as commercial opportunities which result in greater prosperity for both businesses and consumers. The **legislation should not become a break on the international expansion of young and dynamic start-ups on the curb of going offering their services worldwide.**

RECOMMENDATION 3: THE INTERNAL MARKET CLAUSE

One of the key principles which made the ECD work, was the **Internal Market Clause** as defined in its article 3. Especially for small and medium-sized companies, this principle offers legal certainty as its easier for them to comply with the rules of their country of origin in order to expand to other markets. It is essential that this clause is retained in its entirety, and unchanged, as it is one of the corner stones of the Single Market and absolutely essential to its proper functioning. Since the country of origin principle is based upon legal principle, and not dependent upon technological advancements for its implementation, it should not be part of the debate to update the ECD, which it is claimed is being done due the new markets which have opened up thanks to those advancements.

Changes to this clause, even with good intentions, will be an extremely tricky balancing act and could have numerous unintended consequences. It will be extremely difficult, if not impossible, to pick and choose what applies if this debate is allowed to gain traction.

While we accept that national and local governments may require a limited amount of flexibility in introducing certain restrictions, these should be strictly justified by an over-riding reason of public interest and be in line with the principle of proportionality, as confirmed by the ECJ in numerous judgements.

RECOMMENDATION 4: A LEVEL PLAYING FIELD

EU consumer are increasingly confronted with offers from dubious information society service providers from outside the EU. In certain cases, this leads to the provision of unsafe or illegal services. When buying from a provider established outside the EU borders, the consumer acquis becomes of little value. To give a fair chance to SMEs to compete with equal arms and for consumers not to be lured into unsavory offers, the Chambers favour the **expansion of the scope of the successor of the EDC to services offered from outside the EU borders but deliberately targeting consumers or users in the EU.**

RECOMMENDATION 5: TACKLING COUNTERFEIT AND UNSAFE GOODS

Too many companies are confronted with counterfeit and non-compliant goods which put the safety of consumers and the environment at risk. EUROCHAMBRES already warned legislators in the framework of the debates on the Market Surveillance Regulation 2019/1020⁴ about European law-abiding businesses losing market shares to non-compliant third country manufacturers. There is no doubt that the emergence of e-commerce has fueled this development. Article 4 and 5 of the prementioned Regulation introduced the obligation for non-EU companies to appoint an authorized representative who takes it upon him to represent an economic operator from outside the Union. We supported this provision.

EUROCHAMBRES calls upon the legislators to complement the abovementioned measure through the DSA to improve compliance with Union conformity rules. Market places have a role to play in informing consumers who have bought non-compliant products and need to have a better understanding with RAPEX to ban having dangerous and unsafe products. SMEs suffer greatly from this trend and more action is required from market places, custom authorities and law enforcement authorities, including the police.

We believe that the Digital Services Action should maintain a mechanism which facilitates cooperation between Member States' competent authorities so that they can better identify and take action against traders who are not in compliance with EU Law.

RECOMMENDATION 6: TACKLING ONLINE ILLEGAL CONTENT

The Chambers of Commerce are of the opinion that legislators should **not give in to demands to introduce general monitoring obligations for platforms**. Instead, specific monitoring obligations should depend on a number of criteria such as size, market share and turnover of the platform. A similar rationale has been applied in the field of copyrighted content for online content-sharing service providers⁵.

At the same time, it should be clear that what is not legal offline shouldn't become legal online.

Given that **what constitutes illegal content and activities**, is different for each Member State, the legal liability regime to be defined in the DSA should be restricted to what is defined as illegal in Union law. In this respect, lawmakers should be particularly careful about takedown orders, which can have a global reach while a targeted practice might only be illegal in a certain jurisdiction but not another.

More cooperation and exchange of best practices among the Member States could bring some relief along with better improved communication lines between authorities and hosting service providers.

⁴ REGULATION (EU) 2019/1020 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011

⁵ See Art. 17.6 of DIRECTIVE (EU) 2019/790 on copyright and related rights in the Digital Single Market
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RECOMMENDATION 7: KNOW YOUR BUSINESS CUSTOMER

As a basic principle, there should be a **clear set of rules regarding the identification of business users of platforms**. This is a crucial condition that needs to be fulfilled to effectively combat fraudulent activity on the internet. SMEs are increasingly being harmed by the actions of dishonest actors, which warrants a careful assessment of the rules on information requirements set out in article 5 of the ECD. Harmonization of the rules in this regards would be welcomed.

Notice and action procedures only function on the condition that information obligations have been respected.

RECOMMENDATION 8: LIABILITY REGIME

The rules as defined under article 12 of the ECD on liability, despite the emergence of different types of hosting services, should not be subject to fundamental changes. The current criteria are still valid, but might need to be more precise in light of the changed technological landscape of the past 20 years. There should be a **thorough evaluation of the obligations which will be imparted to the different information society services**, taking into account that pure hosting services do not deliver the same services as media service providers.

Pure hosting services should also remain exempt from monitoring obligations (“mere conduit”). The mere awareness of the presence of an illegal content should not lead automatically to the liability of the online platform, but rather trigger an obligation of means to remove such content, with a freedom to choose the means vis-à-vis illegal content/products.

More clarifications are due with regards to the distinction between “active” and “passive” online content service providers. This distinction, even if addressed by the CJEU in several rulings (see Joined Cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA and Others SA, , C-324/09 L’Oréal SA and Others v eBay International AG and Others) remains too arbitrary. Clarification on the status of online platforms is deemed necessary to outline the precise obligations of the agent and thus its liability regime, which will eventually contribute to greater legal certainty.

Ultimately, **any change to the liability regime should pay take into account the legitimate interest of all interested parties**. The DSA should clearly spell out the services or activities not intended to be in scope of the proposed measures.

RECOMMENDATION 9: NOTICE AND ACTION

The current legal framework doesn’t provide enough predictability for business users on what grounds their content might be removed, even if the action is legitimate. Notice and action procedures remain fragmented across the EU and differ from one platform to another. Rules for this type of action should be **harmonized and provide for enough safeguards**. Further clarifying the obligations of platforms as well as harmonizing the notice and takedown systems in the EU by indicating criteria for notices and timelines for removal of illegal content would therefore be welcome. Hosting services should be accountable for their actions, take action when required but most of all, their remit should become crystal clear. The presence of content moderation teams with adequate training

and resources is advised as well as maintaining an effective "counter-notification" system so that users can challenge erroneous decisions to withdraw products or content.

RECOMMENDATION 10: CLEAR RULES ON REMOVAL OF ILLEGAL CONTENT

61,1% of businesses selling online report that they have *"concerns about resolving commercial or administrative disputes, also because of deficits in legal protection before national or European authorities and courts"*.

87,8% of businesses trading online would like to have *"better legal protection before national and European authorities and courts in case of breaches of EU rules"*.

More harmonized rules on reporting mechanisms regarding the reporting of allegedly illegal content would bring some relief in this regard. Connected to this are the follow-up actions that the platforms would have to respect. It should be clear for the business user of a platform why his content was removed and how the decisions can be appealed. If it appears that the content was wrongly removed, the companies whose content was removed should be enabled to quickly be able to re-activate what was taken away. In short, the current framework doesn't provide enough clarity on this subject and fragmentation of the rules is leading to legal uncertainty. This needs to be fixed through an effective way to seek redress.

EUROCHAMBRES – The Association of European Chambers of Commerce and Industry represents over 20 million enterprises in Europe – 98% of which are SMEs – through 45 members and a European network of 1700 regional and local Chambers.

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ANNEX:

RATING OF OBSTACLES IN FUNCTION OF ONLINE SELLING ACTIVITY

SUGGESTED OBSTACLE (16 in total)	SIGNIFICANT OR VERY SIGNIFICANT (ALL RESPONDENTS)	SIGNIFICANT OR VERY SIGNIFICANT (Online selling)	SIGNIFICANT OR VERY SIGNIFICANT (Only offline selling)
1. Complex administrative procedures	79.5%	<u>82.4% (1)</u>	<u>78.2% (1)</u>
2. Different national service rules	71.6%	<u>74.2% (2)</u>	<u>70.3% (2)</u>
3. Inaccessibility to information on rules and requirements	69.1%	<u>71.6% (3)</u>	<u>68.0% (3)</u>
4. Different national product rules	67.0%	<u>71.0% (4)</u>	<u>65.2% (4)</u>
5. Different contractual/legal practices	65.6%	<u>67.2% (5)</u>	<u>64.9% (5)</u>
6. Concerns about resolving commercial or administrative disputes, also because of deficits in legal protection before national or European authorities and courts	60.5%	61.1% (8)	60.2% (6)
7. Differing VAT procedures	60.4%	65.0% (6)	58.4% (8)
8. Insufficient legal/financial information about potential business partners in other countries	58.9%	62.4% (7)	57.3% (9)
9. Problems/uncertainties in posting workers temporarily to another country	58.1%	56.3% (11)	59.0% (7)
10. Issues related to payment recovery	57.4%	60.8% (9)	56.0% (10)
11. Non-VAT related taxation issues	54.2%	58.5% (10)	52.2% (11)
12. Discrimination of foreign enterprises by legislation or national authorities	46.8%	53.9% (13)	43.7% (12)
13. Arbitrary public procurement practices	38.2%	42.6% (15)	36.2% (14)
14. Difficulties in the recognition of professional qualifications and/or meeting other requirements to access a regulated profession	42.2%	46.2% (14)	40.4% (13)
15. Differences in national (online) consumer rights	36.3%	56.2% (12)	27.5% (16)
16. Language barriers	35.8%	40.4% (16)	33.9% (15)

RATING OF SUGGESTED SOLUTIONS IN FUNCTION OF ONLINE SELLING ACTIVITY

SUGGESTED SOLUTION	USEFUL OR VERY USEFUL (ALL RESPONDENTS)	USEFUL OR VERY USEFUL (Online sellers)	USEFUL OR VERY USEFUL (Offline sellers)
1. Cutting red tape e.g. extensive reporting, information or documentation obligations	<u>91.2%</u>	<u>92.1%</u> (1)	<u>90.8%</u> (1)
2. Better and clearer information on a single EU online portal in different languages concerning all necessary procedures and formalities to operate in another EU country	<u>86.5%</u>	<u>88.9%</u> (3)	<u>85.4%</u> (2)
3. Administrative simplification for trading goods and services in other EU Member States by making available a maximum number of procedures through an online web portal	<u>85.0%</u>	<u>90.9%</u> (2)	<u>82.5%</u> (3)
4. Improved implementation of EU law via more cooperation between Member States and EU Commission on enforcement	<u>83.0%</u>	<u>86.1%</u> (5)	<u>81.8%</u> (5)
5. Take greater account of the impact of new regulations on small and mid-sized enterprises	<u>82.5%</u>	82.6% (7)	<u>82.5%</u> (4)
6. Ensure better legal protection before national and European authorities and courts in case of breaches of EU rules	81.6%	<u>87.8%</u> (4)	79.0% (6)
7. Creation of a single point of contact in the home country, certifying your company's eligibility to provide services in your home country, in order to facilitate proof of eligibility in other EU countries	78.2%	80.0% (10)	77.4% (7)
8. Harmonisation of national regulations and standards such as product design and licensing requirements	77.5%	79.5% (11)	76.5% (8)

9. A standardized EU-wide VAT declaration in your native language	77.5%	83.6% (6)	74.9% (9)
10. Increased action against national measures that make it more difficult for foreign companies than domestic ones to establish themselves on their local market	75.0%	76.4% (12)	74.5% (10)
11. A single EU-wide repository where you can enter company data and documentation required for public tender processes in order to avoid multiple requests for the same information	73.5%	80.1% (9)	70.6% (12)
12. Harmonisation of national regulations on (online) consumer protection	71,2%	82.5% (8)	66.2% (13)
13. Stop requiring A1 portable document forms for business trips abroad	70.2%	66.5% (13)	71.8% (11)
14. Easier cross-border access to liberal professions	61.5%	64.1% (14)	60.4% (14)
15. A training and cooperation mechanism for public authorities (including local ones) to ensure sufficient knowledge on applicable law	60.8%	63.0% (15)	59.8% (15)
16. Creation of an online calculator which helps to calculate the salaries of posted workers	51.2%	50.3% (16)	51.6% (16)