Digital Services Act: Ecommerce Europe's comments on the ongoing negotiations

Ecommerce Europe strongly encourages the Digital Services Act's (DSA) ambition to introduce a harmonised framework for regulating online content. However, developments in the legislative process have raised concerns about amendments suggested in both the Council's General Approach as well as in the Compromise Amendments that have circulated for the Report of the Internal Market and Consumer Protection Committee (IMCO) in the European Parliament. With this Paper, Ecommerce Europe would like to share its views on the most relevant issues in the current debate and their impact on the e-commerce sector.

Key concerns

1. Definition of 'recipient of the service'

Ecommerce Europe is concerned that the proposed definition of an 'active recipient of the service' in the General Approach (recital 54) of the Slovenian Council Presidency does not properly reflect the reality of an e-commerce marketplace. The text defines 'active recipients' by providing examples of their engagement with the service: "[…] *viewing content by scrolling through an online interface or uploading content on an online platform, including an online marketplace, and not only interacting with content by clicking on, commenting, linking, sharing, purchasing or carrying out transactions on an online platform, such as an online marketplace."*

Consequently, the number of average monthly active recipients of the service in the Union is used to determine whether a platform would be considered a 'Very Large Online Platform' (VLOP). Similar to Ecommerce Europe's comments on the definition of 'active end user' in the Digital Markets Act (DMA), we believe **the proposed definition is not appropriate to capture the 'active recipients' of an e-commerce marketplace**. While the number of business users included in this concept might be relatively simple to measure, end users that merely 'view content by scrolling' should not be considered active end users.

As is stated in the Slovenian Presidency's text, *"the operational threshold and methodology to determine the active recipients should […] reflect the nature of the service and the way recipients of the service interact with it"* (recital 54). Ecommerce Europe believes the proposed definition insufficiently reflects the intricacies of online marketplaces. The proposed 'active recipient' concept, particularly regarding end users, is a different concept than what we consider to be an active 'end user'. E-commerce companies differentiate between 'unique visitors', individuals browsing through the website or app, and 'active users', referring to those users that are actively "using" the service. While the Presidency suggests that "viewing content by scrolling through an online interface" is sufficient and that it does not have to include interactions such as purchasing or carrying out transactions, we do not agree with that interpretation of active usage.

In the case of the e-commerce marketplaces, as transaction-based platforms, the active usage refers to the situation in which a transaction has been facilitated. Consequently, revenue is generally generated by charging a fee to the business users or via for instance a subscription to a dedicated service. Additionally, within the online marketplaces' ecosystem, multihoming is a very common practice. Similar to window-shopping in an offline environment, consumers may just visit and browse a marketplace and choose to buy a product or service elsewhere. According to the definition proposed, in these instances, the consumer would still qualify as a 'active recipient'.

To avoid placing a disproportionate burden on many e-commerce marketplaces by considering them to be VLOPs based on the number of mere visitors, **Ecommerce Europe calls on the co-legislators to create a separate definition of 'active users' for marketplaces offering products online.** Alternatively, further

granularity could be added to the concept of 'active recipient of the service' by differentiating between mere visitors and active users. These suggestions would better take into account the variety of business models in scope of the DSA.

Finally, Article 23.2 of the Council text describes that "*providers of online platforms shall publish in a publicly available section of their online interface"* information on the average monthly active recipients "*calculated as an average over the period of the past six months"*. Ecommerce Europe would like to point out that e-commerce is a very seasonal business, and that the fact that the figure needs to be calculated as a monthly average of 6 months does not adequately reflect the actual number of active end users. For instance, due to the holiday season, the second half of the year will likely show a much higher number of users. Ecommerce Europe therefore calls on policymakers to turn this into a monthly average but over a period of one year. Additionally, the publication of number of active end users in a publicly available webpage is concerning due to the sensitive nature of the information from a competitive standpoint and in particular for publicly rated companies. It is unclear what the added value of disclosing this information to the general public would be, as the objective is to use the figure for the qualification of an online platform as a VLOP. We would therefore urge policymakers to limit the dissemination to solely the Commission and Digital Service Coordinators.

2. Targeted advertising

While Ecommerce Europe generally welcomes the objectives of the Commission to introduce further transparency obligations regarding online advertising for intermediary service providers, we believe **a ban on targeted advertising would lead to negative consequences for both businesses and consumers**.

We believe that the proposed ban on targeted advertisements goes beyond the objective and scope of the DSA proposal. Targeted online advertisements are already regulated by other relevant legislation, such as the Unfair Commercial Practices Directive (UCPD), the Consumer Rights Directive (CRD), the e-Privacy Directive and the Directive on Misleading and Comparative Advertising (MCAD). Moreover, the legal ground required for the processing of personal data for targeted advertising is already sufficiently regulated in Article 6 of the GDPR and Article 5.3 of the e-Privacy Directive. The **DSA should be aligned with the GDPR and e-Privacy Directive and not be used to revise existing data protection rules**. Instead, the focus should be on ensuring that existing rules are properly executed and enforced at Member State level.

Beyond the fact that targeted advertisements are already sufficiently regulated, a ban would have far-reaching negative consequences for the competitiveness of smaller companies. SMEs use targeted online advertising to reach relevant consumers and measure return on investment in advertising carefully. Unlike larger companies, SMEs often operate on much smaller budgets, and do not have the resources or brand recognition that larger, more established companies have. Please find our retail industry statement on targeted advertising here.

3. Recommender systems

Ecommerce Europe is concerned about the developments on the issue of 'recommender systems' in the European Parliament. The proposed Article 24a (previously Art. 29 in the EC proposal) extends the obligations with regards to recommender systems by adding a consent requirement and requiring profiling to be turned off by default. These developments seem to follow from the current debate on the concerns related to social media and (political) advertising. Ecommerce Europe believes that the transparency requirements proposed by the European Commission would sufficiently address the concerns of policymakers in the context of e-commerce marketplaces. In a marketplace context, recommender systems are used to improve the experience of the end user when navigating the platforms and help them find the offer best suited to their wishes. There are different types of recommender systems, used by a great variety of online platforms. Ecommerce Europe believes that optimisation used to improve an end user's e-shopping experience cannot be compared to and has very different implications than profiling news or social

media updates. Third, it is important to stress that the amendments proposed in Article 24a overlap with existing legislation. The Platform-to-Business Regulation addresses requirements for ranking, the GDPR covers the legal grounds required for processing (those not being limited to consent) and the Unfair Commercial Practices Directive, which has been updated by the Omnibus Directive and is currently still being implemented, already addresses unfair data-driven Business-to-Consumer commercial practices. **Ecommerce Europe** therefore **believes that the rules on recommender systems should not** (or at most only in terms of transparency) **be applicable to online marketplaces**.

4. 'Know-Your-Business-Customer' (KYBC) principle

Ecommerce Europe generally welcomes Article 22 on traceability and believes it can lead to greater transparency and help marketplaces prevent misuse and reduce the offering of non-compliant products by ill-intentioned sellers. However, we would like to raise some concerns on the proposed amendments to the IMCO Report and the Council text. Regarding the information required to comply with the KYBC obligations, we welcome that the Council has suggested to delete Article 22.1(d) requiring the contact details of the economic operator. We would urge the European Parliament to follow this suggestion, as economic operators are connected to the products themselves and not to the trader. The addition therefore also does not contribute to the objective of the article to establish traceability of the trader.

Furthermore, Ecommerce Europe foresees some practical concerns with the proposed amendments to the IMCO Report. Article 22.1(fa) requires information on the type of products or services the trader intends to offer on the online platform. Ecommerce Europe expects difficulties with complying with this rule, as at the moment of registration, traders may not yet have decided which type of products they intend to sell. Furthermore, the obligation for online platforms to verify the information provided by the trader seems very burdensome. In particular requiring online platforms to check the information in multiple sources is not workable. Finally, we are concerned about the obligation to take *"adequate measures such as random checks on the products and services offered to consumers"*, as e-commerce marketplaces do not always have physical access to the products that are sold via their platform. via their platform. It should be clarified that marketplaces can rely also on other, less burdensome measures, if such an obligation is introduced. Additionally, we believe such measures are already addressed the Commission's proposal for a General Product Safety Regulation and are better suited to be discussed in that context.

Finally, **Article 22c, introduced in the IMCO compromise amendments, should be deleted.** While we generally support transparency on sustainability, this should rather be addressed in the upcoming legislation on sustainable consumption.

5. Take-down deadlines

Ecommerce Europe welcomes the DSA's ambitions to introduce EU-wide standards in Article 14 for the notice and action mechanisms and supports any attempts aimed at ensuring that online players act upon notices in a timely manner. However, specific deletion deadlines for various types of content, as suggested in the Opinion to the IMCO Report by the Legal Affairs Committee, seem very burdensome for smaller platforms and do not properly reflect the various risks for the highly divergent content available on online platforms. Ecommerce Europe instead supports the amendment proposed in the Council text in recital 41, stating that *"providers of hosting services should act upon notices in a timely manner, in particular, by taking into account the type of illegal content being notified and the urgency of taking action"*. **We urge the European Parliament to follow this less prescriptive approach of the Council and leave it up to the discretion of the online platforms, which are best placed to make that assessment, to determine the risk and urgency of the takedown.**

6. Dark patterns

The Slovenian presidency has proposed a ban (recital 50a) on so-called 'dark patterns', defining these as *"design techniques that push or deceive consumers into undesired decisions which have negative consequences for them".* They provide as examples that these techniques can be used to *"persuade the recipients of the service to engage in unwanted behaviours, including […] to deceive the recipients of the service by nudging them into decisions on transactions […]".* This ban would apply to online marketplaces and VLOPs recommender systems. Ecommerce Europe is concerned about the direction the discussion on dark patterns is taking.

First, we believe that the issues regarding 'dark patterns' as currently referred to in the negotiations are not of a legal nature, but are due to problems with enforcement. We would like to point to relevant existing legislation, such as Article 5(3) of the ePrivacy Directive, which already describes that the storing of information (such as placement of cookies) in the terminal equipment of a user requires consent. If this consent is given based on misleading information, it is not valid. In addition, according to Article 4(11) of the GDPR, this consent has to be freely given, specific, informed and unambiguous by a clear affirmative action signifying agreement to the processing of personal data. Furthermore, Article 7 of the GDPR requires that the request for consent shall be presented in a clear and easily accessible manner and must be as easy to withdraw as it is to give. Moreover, according to the Unfair Commercial Practices Directive, a commercial practice is already regarded as misleading if, through false or deceptive information, consumers are led to take a transactional decision he or she would not have taken otherwise, such as buying a product. We would therefore urge policymakers to first assess carefully what could be done, on the basis of existing legislation, to improve enforcement at Member State level.

Second, within the context of the DSA, we are concerned that the activities considered as dark patterns are not sufficiently defined and delimited in the DSA. While recital 50a states that *"common and legitimate advertising practices that are in compliance with Union law should not in themselves be regarded as constituting dark patterns",* we fear that the proposed wording makes it difficult to clearly differentiate those practices that will be banned, from other tactics commonly used in marketing. To ensure that the proposed rules would not have an impact on legitimate marketing practices, we suggest further specifying what would be considered dark patterns in the context of the DSA. For example, this could be limited to sneaking (to hide, disguise, or delay the divulging of information relevant to the consumer's decision, like hidden fees), or obstruction-related practices that make it difficult to cancel a service or revert to more privacy-friendly settings.