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NOTE

From: Presidency
To: Delegations

Subject: Presidency Flash



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Slovensko predsedovanje Svetu Evropske unije
Slovenian Presidency of the Council of the European Union

Flash #3

WP COMPCRO (Internal Market) – DSA

Dear Colleagues,

We would like to invite you to our next CompCro Working Party meeting under the Slovenian Presidency which will take place on **15 July** and which will be dedicated to the Digital Services Act proposal (DSA).

In our last two meetings, we finished the detailed examination of the first compromise text prepared by the Portuguese Presidency. Now, we can reopen discussions on certain topics of particular political importance in order to make progress in our negotiations. In line with the provisional agenda as already announced in our Flash #2 (and in CM 3933/21) on the agenda on 15th July will be the following topics:

1. Presentation by the Commission of its proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the European Parliament and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the European Parliament and of the Council
2. Presentation of the discussion paper on online marketplaces
3. Exchange of views on due diligence obligations for online marketplaces
4. AOB

The delegations can find attached the discussion paper on online marketplaces.

After the presentation of the GPSR proposal and the discussion paper on online marketplaces, you will be invited to take the floor and share your views on the obligations regarding online marketplaces.

The DSA team, [REDACTED]

Discussion Paper on Online Marketplaces

In the Commission proposal for the Digital Services Act (DSA), online marketplaces fall into a subcategory of online platforms and are subject to all the obligations foreseen for such online platforms. The initial proposal also contained some specific obligations that apply only to online marketplaces. **The Presidency compromise text has now extended these obligations and created a separate section applicable to online marketplaces.**

1) Definition of online marketplaces in (ia) of Article 2

The initial DSA proposal did not include any separate definition of online marketplaces. The Commission explained that the aim of such policy option was to be future-proof and technologically neutral.

During our Working Party meetings, some delegations proposed to include the definition of online marketplaces in the text of the DSA, in light of the existing definitions under the consumer *acquis*¹. These requests have been accommodated and a new definition of online marketplaces² has been included in Article 2, which, for the purposes of this Regulation, combines the definition used in the consumer *acquis* together with the new category of “online platforms” as defined in the initial DSA proposal.

2) Liability of online marketplaces and Article 5(3)

In addition to the well-established liability exemptions of the e-Commerce Directive, Article 5(3) of the DSA proposal clarifies that online marketplaces cannot benefit from the liability exemption if they present products in a way that could confuse consumers as to who is offering the products, the online marketplace or a third party seller. The aim of Article 5(3) is to ensure further protection of consumers online.

¹ Directive 2005/29/EC on ‘Unfair Commercial Practices Directive’, and Directive 2011/83/EU on consumer rights include the following definition: ‘*online marketplace*’ means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers.’ Different definitions exist, however, in other instruments (Directive 2016/1148 or the ‘NIS Directive’, and Regulation 2019/1148 on explosives precursors).

² ‘*Online marketplace*’ means an online platform which allows consumers to conclude distance contracts with other traders or consumers”.

During our Working Party meetings, delegations reaffirmed their support for the overall approach to the liability exemption. Moreover, the majority of Member States considered that the provisions on liability should remain unchanged from the initial proposal. However, some Member States requested to extend the exclusion from the liability exemption to cases in which online marketplaces exercise “predominant influence” over traders, assessed against specific criteria.

The Commission explained that several of those criteria are already covered by the initially proposed rules, in particular Article 5(2), which specifies that the liability exemption does not apply when the content uploader acts under the authority or control of the service provider, or when the above-mentioned Article 5(3) applies.

Considering the broad support by Member States, the Presidency believes that the text already includes important clarifications to the liability regime (Article 5(2) and (3)) with the view to enhance consumer protection, while keeping legal predictability, stimulating innovation and ensuring continuity with the existing case law, which has given the sector legal certainty and predictability.

Against this background, the Presidency compromise text does not include any changes to Article 5(3) as initially proposed.

It needs to be recalled that while the DSA proposal (like the e-Commerce Directive) harmonises the exemption of liability, the actual potential liability incurred remains subject to a case-by-case judgement and is based on specific pieces of illegal content, as recently reconfirmed by the CJEU. Such case-by-case assessments generally depend on Member States’ laws. The Presidency believes that the most effective results with a view to strengthening consumer protection could be best achieved in the framework of the due diligence obligations. In this regard, the Presidency compromise text proposes the strengthening of the due diligence obligations.

3) Due diligence obligations for online marketplaces and Articles 24a, 24b, 24c of the Presidency compromise text

Article 22 of the initial proposal required online marketplaces to ensure traceability of traders who are using their services to offer products or services. The scope of this provision was to ensure transparency for consumers, to dissuade rogue traders and to facilitate enforcement of the law.

A number of Member States have raised questions on whether online marketplaces should be subject to additional due diligence obligations in order to protect consumers who buy products or using services online. In order to accommodate and balance these concerns, the Presidency compromise text now includes several changes to the initial Commission proposal. These changes are compiled in a new Section 3a, which is applicable exclusively to online marketplaces, and address following aspects:

- The period during which online marketplaces must store the information concerning the traders is extended to 6 months after the end of the contractual relationship between the trader and the online marketplace (Article 24a(4)).
- A new Article 24b on “Compliance by design” was inserted. This article includes in its paragraph (1) the obligation for online marketplaces that has been taken from the text of the initial Article 22(7) of the Commission proposal (*design and organise their online interfaces so as to allow traders to comply with their obligations regarding pre-contractual information and product safety information under applicable Union law*). Furthermore, it adds a new obligation in paragraph (2) to allow traders to provide necessary information for the unequivocal identification of the products or the services offered and, where applicable, the information on the labelling in compliance with Union law on product safety.
- A new Article 24c was inserted on the right to information, which requires online marketplaces to inform consumers when a product or service has been removed.

Some Member States welcomed the changes introduced in the Presidency compromise text with a view to ensure more transparency for consumers who buy products and services online. A number of delegations advocated going further by adding more obligations for online marketplaces. Other Member States considered that the initial proposal was well balanced and that the inclusion of more due-diligence obligations was not proportionate.

The new provisions in the Presidency compromise text are a step-change in defending consumers’ interest and safety. Ensuring more transparency will empower consumers to make well-informed decisions when buying products and services online.

The Presidency considers that any additional obligations introduced for online marketplaces should be proportionate and should respect the basic principles of the DSA proposal, including the prohibition of general

monitoring obligations. In this regard, the obligation for an online marketplace to introduce measures aimed at actively seeking for facts or circumstances indicating illegal activities or avoiding the reappearance of illegal activities (i.e. stay-down obligations) would not be compatible with the fundamental principles of the DSA proposal or the e-Commerce Directive, as it would amount to general monitoring. This was also confirmed by recent judgements of the CJEU³.

Online marketplaces are important for the competitiveness of our economy. According to a study⁴, marketplace unicorns have globally grown 70 % in value since January 2020 to more than \$5 trillion, outperforming tech overall. Online marketplace start-ups continue to raise billions in funding, across every sector. In Europe, in 2021, venture capital investment in marketplaces has reached \$8,7 billion and 82 European marketplaces have reached \$1 billion valuations.

In this context, new rules should not overregulate marketplaces, especially the smaller ones, by favouring only those that have enough resources to comply with new legislation. Any new obligations should be well-assessed to ensure the right balance between a strong protection of European consumers and an innovative and flourishing Internal Market. Marketplaces should also not be forced to converge towards a single type of business model, and neither should the fundamental right of traders to conduct their business through marketplace be restricted, e.g. by leading to excessive suspensions of sellers.

Additionally, the Presidency recalls the horizontal nature of the DSA, to be complemented by sector-specific instruments to address specific challenges, such as the recently **proposed General Product Safety Regulation** (“GPSR”)⁵. The GPSR proposal includes additional due diligence obligations for online marketplaces, which are sector-specific, while building on the general framework provided by the DSA proposal:

- The GPSR proposal sets out specific timelines for orders and notices (2 working days to remove products following orders, and 5 working days to assess notices).
- The GPSR proposal builds on Article 24a of the DSA proposal to include an obligation for marketplaces to design their interface to

³ Joined Cases C-682/18 and C-683/18, Frank Peterson and Elsevier Inc. v Google LLC and Others.

⁴ [The future of marketplaces 2021 | Dealroom.co](#).

⁵ ST 10381/21.

allow traders to include information on their identity, on the products sold and any related warning or safety information.

- Online marketplaces are equally required to have a specific contact point for product safety matters and cooperate with market surveillance authorities, and to take into account information provided on the EU's Safety Gate website when introducing voluntary measures to tackle the sale of dangerous products online.

4) Next steps

In order to steer the discussion in our Working Party meeting on 15 July, and to potentially further develop the three aforementioned aspects concerning online marketplaces, you are kindly invited to focus your intervention in our Thursday meeting around the following questions:

Do you agree with the changes introduced in the Presidency compromise text or do you consider that additional due diligence obligations for online marketplaces should be explored in the new redraft? If so, which ones?