

STUDY

Requested by the IMCO committee



The legal framework for e-commerce in the Internal Market

State of play, remaining obstacles to
the free movement of digital services
and ways to improve the current
situation



Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
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Abstract

This study presents an overview of the current state of play in the area of e-commerce. It discusses the existing legislative framework of the Digital Single Market as well as the technology-driven changes of market and economy that have taken place over the last twenty years. The analysis identifies areas prone to producing a positive reaction to legislative intervention.

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This document was requested by the European Parliament's committee on the Internal Market and Consumer Protection.

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LIST OF ABBREVIATIONS

DIRECTIVES

Audiovisual Media Services Directive	Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services
Copyright in the Digital Single Market Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
Digital Content Directive	Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services
E-commerce Directive	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

REGULATIONS

Fairness and Transparency Regulation	Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services
General Data Protection Regulation ('GDPR')	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC
Geo Blocking Regulation	Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified Geo Blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the Internal Market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC

OTHER TERMS

AI	Artificial Intelligence
CJEU	Court of Justice of the European Union
COVID-19	Corona Virus Disease 2019
EC	European Commission
EU	European Union
IMCO committee	Internal Market and Consumer Protection committee
ISS	Information Society Services
LGBTI	lesbian, gay, bisexual, transgender & intersex
PC	personal computer
Q	quarter
UNESCO	United Nations Educational, Scientific and Cultural Organization
USG	user generated content platforms
WWW	World Wide Web

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EXECUTIVE SUMMARY

Background

The E-commerce Directive was adopted in the year 2000. During the last twenty years, it has proven to be one of the most successful pieces of EU legislation. It provided an efficient and non-intrusive legislative scheme for developing the digital market in the European Union. The technological advancements that have taken place since its adoption, however, have redefined the economic and societal circumstances in which the E-commerce Directive functions. The new market situation necessitates new legislative action, as has already been revealed by the European Commission, which announced the proposal of a Digital Services Act to be published later on this year.

Aim

The aim of this report is to give an overview of the environment in which the provisions of the E-commerce Directive function at present. It offers a glance at the current EU legislative scheme that complements the E-commerce Directive, and presents the most significant, technology-driven market changes that have taken place during the last twenty years. Against this background, the analysis identifies the areas that are prone to an effective legislative intervention that would address the most pressing market failures.

Key findings

Legislative framework

The legislative framework presently complementing the E-commerce Directive comprises a number of instruments adopted over the years, all addressing issues relevant for the Digital Single Market from various different perspectives than the perspective adopted by the directive itself. The list of legislative acts includes: the General Data Protection Regulation, which deals with the free movement and processing of personal data; the Geo Blocking Regulation, aiming to remove the barriers created by unjustified Geo Blocking; the Audiovisual Media Service Directive, which strives to protect media consumers from harmful content; the Copyright in the Digital Single Market Directive, addressing copyright protection in digital and cross-border environments; the Digital Content Directive, which aims to ensure better access to and supply of digital content and digital services; and the Fairness and Transparency of Online Platforms Regulation, which imposes new rules on parties operating online trading platforms and similar services, and taking on the role of an intermediary. All these instruments are briefly discussed in this study, along with the ongoing work on the Digital Services Act, as announced by the European Commission.

Market changes

The profound changes that have taken place since the adoption of the E-commerce Directive were induced primarily by the unprecedented technological advancements of this period, which have redefined not only the market organisation and functioning, but also the needs and expectations of society. The most fundamental change from the point of view of market organisation is perhaps the technology-driven new concept of the platform economy. It changed the typical structure of a contract concluded in a digital environment from bilateral to a triangle, in which platforms became gatekeepers and standard setters of the market. Similarly, the ever-expanding use of Artificial Intelligence in all market sectors has changed the way in which contractual relations are established and executed.

The societal consequences of the rapid technological advancements of the last two decades are equally intense. On the one hand, the number of information society services (as defined by the E-commerce Directive) has increased significantly, and on the other the content of the information society services has undergone a deep evolution. Taking a broader perspective, access to the internet and information society services has become necessary for people who want to function normally in modern society. While the dehumanisation of contacts between people can be useful for society (as clearly proven in the times of the COVID-19 pandemic), it also brings about potentially very negative consequences. Contacts between people are carried out either without direct contact between humans, or even without any human involvement (when bots are employed). It creates a danger of human affairs being handled without considering that there is a human being on the other end of the internet connection.

Another fundamental change that has been recognised as important recently by both European citizens and the European Union is the need to build the EU market in a sustainable manner. As all future actions of EU must endeavour to build sustainability into the design of the proposed legislative solutions, the same must also be the case for the Digital Single Market legislative scheme.

New legislative solutions

While the E-commerce Directive is undoubtedly one of the most successful pieces of EU legislation, the aims for which it was enacted have either been met, or they need to be redefined in the new socio-economic reality. It is, therefore, clear that the Commission's plans to propose a Digital Services Act that will address the market challenges in a new perspective should be applauded. However, since the E-commerce Directive has so far proven its ability to effectively address such challenges, there should be a careful review of which of the directive's current rules could be used in any future legislation, and which phenomena require new legislative impulses that would address the market failures. This study advocated the following:

First, it is critical from the point of view of the effectiveness of the future regulation that any future instrument will concur with the already existing legal schemes. In addition, considering the speed at which technological progress is happening, as well as its unpredictability, it is important that the future Digital Services Act is constructed and formulated in a way that is as futureproof as possible.

Second, the Digital Services Act should consider that information society services presently have the potential to make a deep impact on the personal lives of European citizens. The rules, therefore, should not approach the information society services from a primarily commercial perspective, but should instead adopt a human-centric approach. Other issues that should be considered are the increasing

commercialisation of human life, and the potential negative consequences of dehumanising contacts between people.

Third, the Digital Services Act should openly and appropriately address the consequences of global enterprises gaining unprecedented law-making capabilities for the markets they organise. The European Union should be able to set market standards (including safety and quality) for the European digital market.

Fourth, EU standards for content moderation on platforms should be drafted in a way that they are capable of becoming a global standard for online spaces, balancing human rights as well as political, economic and societal interests in an exemplary manner.

Specific legislative solutions should deal with the question of what kind of content should be removed by the host-providers, in a way that ensures an adequate and transparent take-down procedure (the introduction of notice-and-action rules). In addition, statistical take-down information should be available and automatic filtering technologies should be made subject to monitoring. While maintaining the Internal Market clause and rethinking the safe-harbour principle, the Digital Services Act should introduce rules to address the liability of platform operators for damage when they do not perform their obligations, as well as for the non-performance of a contract concluded via the platform, in specific situations.

The legal framework on Artificial Intelligence should adopt a human-centric approach, counteracting – as far as possible – the inevitable dehumanisation of the approach brought about by technology. It should set up a legal scheme ensuring that AI functions in a trustworthy, explainable manner, that it not be created on the basis of an in-built (or hereditary) discrimination, and that it not be used as an instrument of manipulation. It should not be limited to AI transparency standards.

Effective and swift enforcement is a tool to reinforce trust in the EU market. In the context of the Digital Single Market, the enforcement measures should reflect the pan-national character of the digital market, as well as the global context in which the platforms operate. In other words, the enforcement actions should be coordinated at EU level. In addition, the introduction of automatic protection measures, including in the form of self-executing rights, should be considered for carefully identified market sectors.

While sustainability does not strike as a subject of primary importance in the context of the Digital Single Market, the expected increase of the e-commerce share in the entire market will require businesses to rethink their market strategies in light of the expected increase in market sustainability. The sustainability impact of the future regulation should, therefore, not be overlooked.

1. INTRODUCTION

KEY FINDINGS

The E-commerce Directive was adopted in the year 2000. The technological advancements that have taken place in the twenty years since then have redefined the economic and societal circumstances in which the E-commerce Directive functions. The aim of this report is to present the current legislative environment for the Digital Single Market, give an overview of the market developments since the adoption of the Directive, relevant from the point of view of the E-commerce Directive, and map the potential changes that could be considered in the future Digital Services Act. This chapter presents the aims of the study, gives an overview of its content and the methodology on which the report is based on.

1.1. The meaning of e-commerce for the Internal Market

It is difficult to overestimate the meaning of e-commerce for the European Union. In the past, turning commerce into e-commerce allowed technology to be exploited in order to boost the economic advancements of the European Union. By creating a legislative structure for information society services without internal frontiers, appropriate at the time of its creation, the E-commerce Directive allowed e-commerce to expand throughout the EU Member States, initiating the development of the digital single market. The E-commerce Directive made it possible to bypass the geographical obstacles for developing economic ties among the members of the EU, by cutting virtually the distance between European traders and consumers (providers and customers).

This study is being finalised at the time of the COVID-19 pandemic, which has already redefined the understanding of the properly functioning EU market, and expectations that the EU citizens might have in this regard. The significance of e-commerce for the entire market will only be strengthened, as the possibilities offered by the off-line world will be limited for a period of time that is difficult to foresee at the moment.

1.2. Changes that redefined the market: 2000-2020

The last twenty years of technological advancements have had a redefining meaning for the EU (and the global) society and economy. Technology has pushed both the economy and society into new development paths, creating new possibilities, expectations and threats. The technology-driven concept of the platform economy, as well as the ever-expanding use of Artificial Intelligence based on data harvesting in all market sectors, feeds on the ever-growing data economy. The societal consequences of the rapid technological advancements include the need to ensure access to the internet and information society services for people to function normally. At the same time, switching off-line to online might dehumanise contacts between people. The growing concerns with relation to the climate change fuel the ever-increasing concerns about the sustainability of the market.

1.3. The aims of the study

The IMCO committee requested the analysis as a part of an exercise aimed at examining the need to reform the regime of the E-commerce Directive and start a discussion on the shape of the future Digital Services Act.

This report is part of a broader project containing seven other research papers covering the following issues:

- how to fully reap all the benefits of the Internal Market for e-commerce. New economic opportunities and challenges for digital services 20 years after the adoption of the E-commerce Directive;
- the functioning of the Internal Market for digital services: the responsibility and duty of care of providers of digital services. Challenges and opportunities;
- new developments and innovations brought by Artificial Intelligence applied to e-commerce: challenges to the functioning of the Internal Market;
- enforcement and cooperation between Member States;
- possible new aspects and challenges in the field of consumer protection; and
- new developments of digital services.

The aim of the research was to provide indications on whether or not the E-commerce Directive needs to be reformed, and to provide specific recommendations on the key elements of such a reform.

In this context, this study aims to present the current legal framework for e-commerce in the Internal Market, as well as the state of play that would allow the E-commerce Directive and the current neighbouring legislation to be mapped, together with the current national implementation measures. The study identifies in which areas the present e-commerce regime fulfils its role and in which areas reforms are necessary due to existing or upcoming barriers or the inefficiency/ineffectiveness of the current legal solutions in addressing market/regulatory/judicial failures. It focuses on the E-commerce Directive in a broader legal context that includes sustainability (economic, societal and environmental) and the impact that it has on society and on democracy, in order to present options for the optimal provisions of the Digital Services Act.

1.4. The structure of the analysis

The study begins by presenting the legislative state of play, developed in the European Union between 2000 and 2020, in which the e-commerce constitutes the backbone of the regulation. Chapter II briefly presents the E-commerce Directive, alongside the General Data Protection Regulation of 2016, the Geo Blocking Regulation of 2018, the Copyright in the Digital Single Market Directive of 2019, the Directive for the Supply of Digital Content and Digital Services of 2019, and the Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation Services of 2019.

Chapter III focuses on the current market challenges. It presents the development of the platform economy, which redefined the construction of the digital market not only in the EU, but also in the global context and the social dimension of e-commerce in the broad understanding of information society services. Next it discusses the broad spectrum of issues that arise in relation to the inevitable penetration of the market operation by AI. The two last discussion points include a broader look at the internet in the context of human rights and inscribing the digital market into the concept of sustainable market development.

Chapter IV identifies the areas prone to improve the current market situation, focusing on the need to create the legislative structure that will accommodate the multi-dimensional nature of e-activities, the re-defined position of the market players and will allow the proper attribution of liability that will consider the new position of the market players. It also puts the analysis in a broader context of control of the market standards by institutions with democratic legitimacy.

Chapter V puts forward recommendations as to the scope of the proposed reformed regulation, identifying specific areas that should be regulated, along with the recommended legal instruments.

1.5. Methodology

As requested, the study is based on a broad variety of sources, including academic literature, court cases and EC working papers. It takes into account the developments regarding the European Commission's proposals in the area.

2. LEGISLATIVE STATE OF PLAY 2000-2020

KEY FINDINGS

This chapter presents an overview of the current legislative framework that impacts the functioning of e-commerce in the European Union. It focuses on the instruments that have the most direct impact on the e-commerce market, briefly presenting their content and – if possible – evaluating the effectiveness of the instrument. The analysis includes: the E-commerce Directive, the General Data Protection Regulation, the Geo Blocking Regulation, the Audiovisual Media Service Directive, the Copyright in the Digital Single Market Directive, the Digital Content Directive, as well as the ongoing work regarding the introduction of the Digital Services Act.

2.1. The E-commerce Directive 2000/31/EC

Considered a milestone for a fully functioning Internal Market, the Directive on Electronic Commerce¹ built on the already existing Community acts². It was adopted to lay down a clear and general framework to cover certain aspects of electronic commerce in the Internal Market, aimed at creating a legal framework to ensure the free movement of information society services between Member States. The E-commerce Directive was meant to stimulate economic growth, e.g. by promoting new employment opportunities and enhancing the competitiveness of European industry.

The directive, adopted in 2000, sought to solve the problems of that time, which were triggered by the ever-faster progress of digitalisation. While modern society had evolved into the so-called information society, new forms of economic activities such as online trading and online research tools, collectively referred to as "information society services", developed accordingly. The information society services are understood as services normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. When the E-commerce Directive was adopted, this area of business had not yet been integrated into the Internal Market and, as a result, the national legal frameworks deviated drastically, causing a fragmentation of the Internal Market and legal uncertainty, as motive 5 of the directive declared.

The directive approaches e-commerce as a particular type of information society service to be implicated to the Internal Market. It sought to speed up market integration, by tackling areas creating legal uncertainty, e.g. by facilitating the conclusion of online contracts and limiting the liability of service providers. In addition, the directive aimed to ensure that every provider of information society services is given access to the market without prior authorisation or similar obstacles.

While the E-commerce Directive focused on establishing an appropriate European regulatory framework, it has also recognised the global nature of electronic communications. Hence, the directive aimed at contributing to the establishment of a common and strong negotiating position of the EU in international forums. The directive assumed that, in order to allow the unhampered development of electronic commerce, the legal framework must be consistent with the rules applicable at an international level so that it does not adversely affect the competitiveness of European industry or impede innovation in that sector.

¹ Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

² Cfr. no. 11 and art. 1(3) Directive 2000/31/EC. For an overview see: <https://ec.europa.eu/digital-single-market/en/news/archive-e-commerce-directive-what-happened-and-its-adoption>.

The E-commerce Directive introduced a legal framework that consists of (i) general provisions that include definitions (Article 2) and its implications to the Internal Market (Article 3), (ii) principles concerning market access, contracts concluded by electronic means (Articles 9 to 11) and the liability of intermediary service providers (Articles 12 to 15), (iii) questions on implementation, and (iv) final provisions.

The E-commerce Directive has been criticised for containing gaps in its protection, regarding the liability regime for technical intermediaries, leading to a lack of protection of fundamental human rights³. At the same time, the directive has proved to be a great first success in meeting the aims for which it was concluded, i.e. providing an adequate legal framework for information society services and in reducing legal uncertainty as confirmed in several subsequent evaluations⁴.

2.2. The General Data Protection Regulation (EU) 2016/679 ("GDPR")

The GDPR⁵ covers the free movement and processing of personal data, while perceiving the protection of natural persons in relation to the processing of personal data as a fundamental right.

The GDPR recognises that, due to the rapid technological developments of the last decade, which have encompassed a massive increase in the sharing and collection of personal data, the protection of such data has faced new challenges. While natural persons increasingly share personal data during online activities, companies and authorities make use of this data, and so the overall cross-border data flow has accelerated. This means a strong and coherent legal framework is required in order to keep natural persons in control of their data and to enhance legal certainty for all parties involved.

The GDPR aims to protect the rights of natural persons, while ensuring the free flow of personal data between the Member States as part of the Internal Market. It also means to strengthen consumer trust in the digital economy. The GDPR seeks to accomplish this aim by strengthening the rights of the data subjects, e.g. by imposing obligations on those who collect and process the data. To ensure a reasonably high level of protection, the GDPR covers all forms of data processing, irrespective of the technical means used. However, in order not to be over-restrictive, the GDPR does not cover the processing of personal data by natural persons in the course of purely personal or household activity, or the processing of personal data by authorities for the purpose of criminal prosecution.

The GDPR consists of (i) general provisions, including definitions (Article 4), (ii) general requirements for the processing various types of personal data, including requirements for the data subject's consent (Article 7), (iii) rights of the data subject to promote transparency, including the right of access, rectification and erasure, (iv) obligations of data controllers and processors, (v) provisions for the transfer of personal data to third countries, (vi) provisions concerning supervisory authorities, cooperation and consistency, (vii) provisions concerning specific processing situations, (viii) questions of implementation and (ix) final provisions.

³ Public consultation on the future of e-Commerce, statement of the European Digital Rights Association, 5 November 2010, p. 2 f., available at: https://www.edri.org/files/EDRI_eommerceresponse_101105.pdf.

⁴ First Report on the application of Directive 2000/31/EC, COM(2003) 702 final, p. 19 f.

Available at:

<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0702:FIN:EN:PDF>.

For a complete list of evaluations see:

<https://ec.europa.eu/digital-single-market/en/news/archive-e-commerce-directive-what-happened-and-its-adoption>.

⁵ Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC.

The GDPR has been criticised for imposing extensive duties on businesses and other organisations, while containing terms that leave a lot of room for interpretation (e.g. 'undue delay' or 'disproportionate effort') that have led to uncertainties for businesses and other organisations when trying to assess whether the measures they implemented are sufficient⁶.

Nevertheless, the GDPR has been a successful step towards establishing a solid legal framework⁷, and thereby unifying the fragmented legislative landscape of the Member States⁸. While consumers have been encouraged to exercise their rights, businesses have confirmed that, in spite of the high demands of the GDPR, they were able to adapt to the new provisions⁹. In the last quarter (Q4) of 2020, the GDPR will be reviewed in order to develop the single market for data even further¹⁰.

2.3. The Geo Blocking Regulation (EU) 2018/302

The Geo Blocking Regulation¹¹ was an amendment to the already existing Community acts¹². 'Geo Blocking' is a virtual mechanism for the regional blocking of online content, particularly relevant for cross-border trading and transactions. This technology is often used by traders in one Member State to block or limit access to their websites or their goods and services for customers from another Member State, e.g. by refusing access entirely, or by redirecting the customer to another online interface without their consent. This not only leads to the discrimination of customers based on their nationality, place of residence or place of establishment, but also to the artificial fragmentation of the Internal Market and the restrictions of market freedoms.

The Geo Blocking Regulation removes the barriers created by unjustified Geo Blocking, while filtering out those cases in which the use of Geo Blocking is based on justifiable reasons (necessary for its user to comply with national or Union law). As the regulation is focused on trade business relating to different countries, it does not apply to online restrictions concerning audiovisual services.

The regulation consists of (i) general provisions, including definitions (Article 2), (ii) the prohibition on unjustified Geo Blocking and similar technologies, in the form of denying access to online interfaces (Article 3), by applying different conditions for access to goods and services (Article 4) or by applying different conditions for payment, (iii) questions of implementation and (iv) final provisions.

While the Commission's first evaluation of the regulation is still pending, a consumer survey confirms that many consumers (around 50%) are aware of the new rules on Geo Blocking¹³. However, it seems that more steps are necessary to ensure that every consumer knows the specific rights and remedies that are provided for by the regulation¹⁴. In particular, the narrow scope of application, specifically

⁶ Top five concerns with GDPR compliance, Thomson Reuters Legal, available under: <https://legal.thomsonreuters.com/en/insights/articles/top-five-concerns-gdpr-compliance>.

⁷ A European strategy for data, COM(2020) 66 final, p. 4, available at: https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf.

⁸ Data protection rules as a trust-enabler in the EU and beyond – taking stock, COM(2019) 374 final, p. 2, available at: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/aid_and_development_by_topic/documents/communication_2019374_final.pdf.

⁹ Data protection rules as a trust-enabler in the EU and beyond – taking stock, COM(2019) 374 final, p. 7 f.

¹⁰ A European strategy for data, COM(2020) 66 final, p. 4 f., 15.

¹¹ Regulation (EU) 2018/302 of 28 February 2018 on addressing unjustified Geo Blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the Internal Market.

¹² cf. Art. 10.

¹³ European Commission – Press release of 27 June 2019, Digital Single Market: Survey shows Europeans are well aware of rules against unjustified Geo Blocking, p. 1, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2528.

¹⁴ European Commission – Press release of 27 June 2019, Digital Single Market: Survey shows Europeans are well aware of rules against unjustified Geo Blocking, p. 1, available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2528.

excluding certain branches of industry, such as audiovisual services, has been subject to criticism, meaning that the review of the regulation at the end of 2020 is highly awaited¹⁵.

2.4. The Audiovisual Media Services Directive (EU) 2018/1808

The Audiovisual Media Services Directive¹⁶ of 2018 amends the first Audiovisual Media Services Directive¹⁷ of 2010 by replacing certain provisions and introducing new solutions¹⁸. Legislative changes became necessary due to the significant developments in the audiovisual media services market, based on new technical developments and the increase in audiovisual media for portable devices. Since 2010, when the previous directive was adopted, new types of content and new providers have emerged, such as video-on-demand services and video-sharing platforms. In addition, minors became very active users of this type of service.

The underlying purpose of the Audiovisual Media Service Directive is to protect media consumers from harmful content, e.g. comprising incitement of hatred, violence and terrorism. It therefore aims to increase the protection of underage users, especially with regard to content that might have a detrimental effect on their physical and mental development, in particular commercials for alcoholic beverages or gambling. Overall, services addressed to minors are subject to the strictest measures. On top of that, the directive is meant to ensure accessibility to audiovisual media for users with disabilities, especially for those with visual or hearing impairments.

The directive addresses the admissibility of product placement and the possible limitation on advertising. In light of the significant impact of audiovisual media on the opinion making of consumers, the directive seeks to grant users easy and direct access to information about the providers of services. It intends to promote 'media literacy' in order to enable users to critically assess and take informed decisions on the content they are consuming.

The directive consists of (i) the changes and amendments to be implemented in the first Audiovisual Media Services Directive, including new and revised definitions (Article 1) and (ii) final provisions (Articles 2 and 3). The revisions contained in Article 1 are intended to cover the technical developments and new habits that have occurred in recent years, such as the use of video-sharing platforms and social media services, in the scope of the directive.

It has been criticised, for example, that the directive was missing a set of specific rights for users of video-sharing platforms, which might lead to platforms hindering users in exercising their fundamental right to freedom of expression, as users might be unable to retaliate against the platform's decision to take down their content¹⁹.

The Member States must transpose the directive into national law by 19 September 2020. By April 2020, only one Member State (Austria) had accomplished the transposition²⁰.

¹⁵ A. Reygaert, Geo Blocking Regulation: What to expect?, 25 January 2019, available under: <https://www.altius.com/blog/429/geo-blocking-regulation-what-to-expect>.

¹⁶ Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

¹⁷ Directive 2010/13/EU of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

¹⁸ Cf. motive 65.

¹⁹ L. Kuklis, AVMSD and video-sharing platforms regulation; toward a user-oriented solution? 28 May 2019, London School of Economics and Political Science, available under: <https://blogs.lse.ac.uk/medialse/2019/05/28/avmsd-and-video-sharing-platforms-regulation-toward-a-user-oriented-solution/>.

²⁰ For an overview of national transposition measures, see: <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32018L1808>.

2.5. The Copyright Directive (EU) 2019/790

The Copyright in the Digital Single Market Directive²¹ amends previous Directives 96/9/EC and 2001/29/EC in the field of copyright. The copyright area has also profoundly changed as a result of recent technological developments that have made it necessary to address the issue of adequate protection in digital and cross-border environments and strengthening the Internal Market in dealing with such works. The Copyright Directive seeks to ensure the proper functioning of the Internal Market, as well as the promotion of innovation, creativity, investment and the production of new content.

In doing so, the directive strives to find a balance between making legislation futureproof and not restricting technological developments, while at the same time considering the interests of right holders and users. The restrictions on technological developments might be caused by previous directives addressing issues that are no longer compatible with the circumstances of today's technology and the use of media.

While the Copyright Directive focuses on regulating the commercial use of works, it establishes several exceptions for scientific institutions, such as research organisations and cultural heritage institutions, and certain types of uses, e.g. scientific use of works (Article 3) or use in teaching activities (Article 5).

The directive consists of (i) general provisions, including definitions (Article 2), (ii) exceptions and limitations on certain institutions and types of use (Articles 3 – 6), (iii) measures for facilitating licensing practices and ensuring access to content (Articles 8 – 14), (iv) measures to ensure a well-functioning marketplace for copyrights (Articles 15 – 23) and (v) final provisions.

The public debate revolved around Article 13 of the directive in particular. This article imposes duties on online platforms, obliging them to take down copyright-protected works if the right holders do not want their content to be available on the platform²². While some consider the provision an important step towards fair remuneration for the right holders of copyright-protected works, others are afraid that the new duties of platform operators will eventually lead to unjustified online-censorship²³. The Member States must transpose the directive into national law by 7 June 2021 (Article 29). By April 2020, two Member States (the Czech Republic and France) had accomplished the transposition²⁴.

2.6. The Digital Content Directive (EU) 2019/770

The Digital Content Directive²⁵ governs new types of contracts that have become increasingly popular in recent years. It deals with the supply of digital content and digital services.

As the Digital Content Directive declares, consumers have tended to display a certain shyness and lack of confidence when buying digital content and services cross-border, due to legal uncertainties concerning their contractual rights, as well as quality and accessibility issues. This hinders the digital market from flourishing and reaching its full potential. Thus, the directive aims to ensure better access to and supply of digital content and digital services, thereby boosting the digital economy.

²¹ Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

²² S. Blair, Europe's Copyright Reform: What Is So Controversial? *Landslide* March/April 2019, Vol. 11 No. 4, American Bar Association, available under: https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/europe-s-copyright-reform/.

²³ S. Blair, Europe's Copyright Reform: What Is So Controversial? *Landslide* March/April 2019, Vol. 11 No. 4, American Bar Association, available under: https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2018-19/march-april/europe-s-copyright-reform/.

²⁴ For an overview of national transposition measures, see: https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=urisrv:OJ.L_2019.130.01.0092.01.ENG.

²⁵ Directive (EU) 2019/770 of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

By fully harmonising the respective consumer contract law, the directive seeks to facilitate both access and supply, targeting the consumer and business sides at the same time. It creates a new set of rights for consumers regarding this type of contract, to be as technologically neutral and future-proof as possible. Apart from specific remedies, the directive stipulates requirements for the conformity of digital content and defines the role of modifications to the content, such as software updates.

The directive consists of (i) general provisions, including definitions (Article 2), (ii) descriptions of the characteristics of the contract, such as contractual duties (Article 5), requirements of contract conformity (Articles 6 – 8) and the liability of the trader (Article 11), (iii) remedies of the consumer and the subsequent unwinding of the contract (Articles 13 – 18), (iv) modifications to digital content and services (Article 19) and (v) final provisions.

While the directive was praised for providing specific rules on the requirements of contract conformity of digital content and services, it was criticised based on the fact that the definition of the personal scope of application is partly left up to the Member States²⁶. The Member States must transpose the directive into national law by 1 July 2021 (Article 24). By April 2020, no Member State had accomplished the transposition.

2.7. Fairness and Transparency of Online Platforms Regulation (EU) 2019/1150

The fairness and transparency for business users of online intermediation services regulation²⁷ imposes new rules on parties operating online trading platforms and similar services, and taking on the role of an intermediary.

The regulation follows the rapid shift towards online transactions that took place in the last decade, often through the use of online intermediation services (platforms), such as online search engines, trading platforms or booking pages. As the regulation explains, platforms focus on establishing contact between businesses and consumers, eventually leading to successful business transactions. This development has, however, also led to an increased dependency by business users on intermediation services, as those services have become increasingly crucial for the success of a business. The intermediation services are therefore able to unilaterally impose rules on business users that are disadvantageous and distort the free market.

While the regulation seeks to balance the power gap between businesses and platforms by strengthening the position of the business users, it adopts a rather cautious approach. It acknowledges, at the same time, that it is important not to inflict any disadvantages on consumer protection. On the contrary, the regulation is meant to improve consumer trust in platforms indirectly, by ensuring a fair, transparent and predictable online business environment.

The regulation consists of (i) general provisions, including definitions (Article 2), (ii) specific measures, for example content-related requirements for general terms and conditions used towards business users (Article 3), requirements for restricting business users in their commercial activity (Article 4), requirements for transparency of ranking mechanisms (Article 5), the establishment of an internal complaint-handling system (Article 11) and (iii) questions of implementation.

²⁶ C. Cauffman, New EU rules on business-to-consumer and platform-to-business relationships, *Maastricht Journal of European and Comparative Law*, August 2019, p. 10 f., available under: https://www.researchgate.net/publication/335252108_New_EU_rules_on_business-to-consumer_and_platform-to-business_relationships.

²⁷ Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

The regulation applies as of 12 July 2020 (Article 19). Even though there has not yet been any actual practical experience with the regulation, some critics have raised concerns that it is not yet clear whether the extensive notification and instruction duties imposed on intermediaries will eventually lead to a fairer treatment of the users of online intermediation services²⁸.

2.8. The ongoing work on the Digital Services Act

While the E-commerce Directive constituted the cornerstone for incorporating the new economic reality into the Internal Market, the technological and societal developments that have taken place since its adoption 20 years ago are profound. Society has become more and more digitised, new business models and consumer habits are emerging, creating new challenges and potentials.

In her guidelines for the new Commission²⁹, the current President of the Commission, Ursula von der Leyen, emphasised the importance of innovation and technological progress in every social and economic field. Thus, she introduced the Digital Services Act as one of her top priorities³⁰.

This act is supposed to eventually amend or even replace the E-commerce Directive and constitutes another important step towards completing the Digital Single Market. It is meant to update the legal framework and attune it to today's market reality, especially with regard to the liability and safety rules for digital platforms, services and products³¹.

In a recent Communication³², the Commission recognised the significant network effects created by large platforms, and therefore specified that the Digital Services Act will aim to ensure that the market environment remains fair for all market actors³³. At the same time, it is intended to increase and harmonise the responsibilities of online platforms and information service providers, while submitting their content policies to stricter supervision³⁴.

The publication of the Digital Services Act is preliminarily announced for the final quarter (Q4) of 2020³⁵.

²⁸ M. Hlavacka, New obligations for the operators of online intermediation services and search machines, 18 October 2019, available under: <https://www.bnt.eu/en/news/legal-news/2837-new-obligations-for-the-operators-of-online-intermediation-services-and-search-machines?layout=bnt:news>.

²⁹ "Political Guidelines for the next European Commission 2019-2024", available at: https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

³⁰ Political Guidelines for the next European Commission 2019-2024, p. 13.

³¹ Political Guidelines for the next European Commission 2019-2024, p. 13.

³² "Shaping Europe's digital future", published in February 2020, available at: https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

³³ Shaping Europe's digital future, p. 5.

³⁴ Shaping Europe's digital future, p. 6.

³⁵ Shaping Europe's digital future, p. 5 f.; see also: "A European strategy for data", COM(2020) 66 final, p. 15, available at: https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf.

3. THE CURRENT MARKET CHALLENGES

KEY FINDINGS

This chapter focuses on presenting an overview of the technological, economic and societal changes that have redefined the environment in which e-commerce rules are supposed to function at the moment. It begins with the technology-driven new concept of the platform economy and the ever-expanding use of Artificial Intelligence in all market sectors. Next, it introduces the societal consequences of the rapid technological advancements of the last two decades: the increase in the number of information society services and the evolution of their content. It continues to discuss the societal consequences of the digital revolution in a broader sense: the need for access to the internet and to information society services for people to function normally, as well as the potential negative consequences of dehumanising contacts between people. It ends with a reference to the actions undertaken in the context of ensuring the sustainability of the market.

3.1. Introduction

The technological, economic and societal changes that have taken place over the last 20 years have profoundly changed the circumstances in which the provisions of the E-commerce Directive function. Those changes were induced primarily by the unprecedented technological advancements of this period, which redefined not only the market organisation and functioning, but also the needs and expectations of society.

This chapter presents an overview of the most important technology-driven changes (from the point of view of the E-commerce Directive and the future Digital Services Act) that have pushed the development of the market and society alike. It begins by presenting the technology-driven new concept of the platform economy and the ever-expanding use of Artificial Intelligence in all market sectors. Next it introduces the societal consequences of the rapid technological advancements of the last two decades: the increase in the number of information society services and the evolution of their content. It goes on to discuss the societal consequences of the digital revolution in a broader sense: the need for access to the internet and the information society services for people to function normally, as well as the potential negative consequences of the dehumanisation of contacts between people. It ends with a reference to the actions undertaken in the context of the need to ensure the sustainability of the market. Due to the size of the study and its general and introductory character, this is meant to only signal these tendencies, and does not aspire to present an exhaustive analysis.

3.2. The platform economy

The market structure has changed considerably since the adoption of the E-commerce Directive. A massive, global introduction of platforms that followed the emergence of a number of inter-connected digital technologies (PCs, smartphones, the internet, algorithms, cloud computing, emerging digital technologies³⁶) to many market sectors has changed not only the global economy itself, but also global society. Platforms create multi-sided structures that allow two groups of users to meet, connecting the demand side with the supply side. Platforms have proved to be a universal structure, fit to arrange commercial as well as non-commercial dealings of modern society, and have basically entered all

³⁶ Mark Fenwick & Erik P. M. Vermeulen, A Sustainable Platform Economy & the Future of Corporate Governance, available under: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331508, p.11.

sectors of the market. As Fenwick & Vermeulen phrased it, whereas in the twentieth century capitalism was organised around large, industrial companies, much of the contemporary economy is organised around software-driven platforms. Within a generation, a reconfiguration of global capitalism has led to a situation where platforms and their founder-owners have acquired an enormous degree of economic power and cultural influence³⁷.

While the platforms (at least some of them) were not initially directed towards allowing economic activities by the users (i.e. Facebook), and others defined the economic activity of platform users as a side activity (Airbnb, Uber), the practice proved that platforms are prone to inspire and support the development of commercial undertakings of the users, thus serving the commercialisation of on-line activities.

Table 1: Types of platforms in various market sectors

Platform type	Examples
Exchange platform	Amazon, Alibaba
Service platform	Airbnb, Uber*
Content platform	YouTube, Medium, Netflix
Software platforms	Apple iOS, Google, Android
Social platform	Facebook, Instagram
Investment platforms	Priceland, OpenTable
Smart Contract Platform	Ethereum

Source: Mark Fenwick & Erik P.M. Vermeulen, A Sustainable Platform Economy & the Future of Corporate Governance, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331508, p. 4

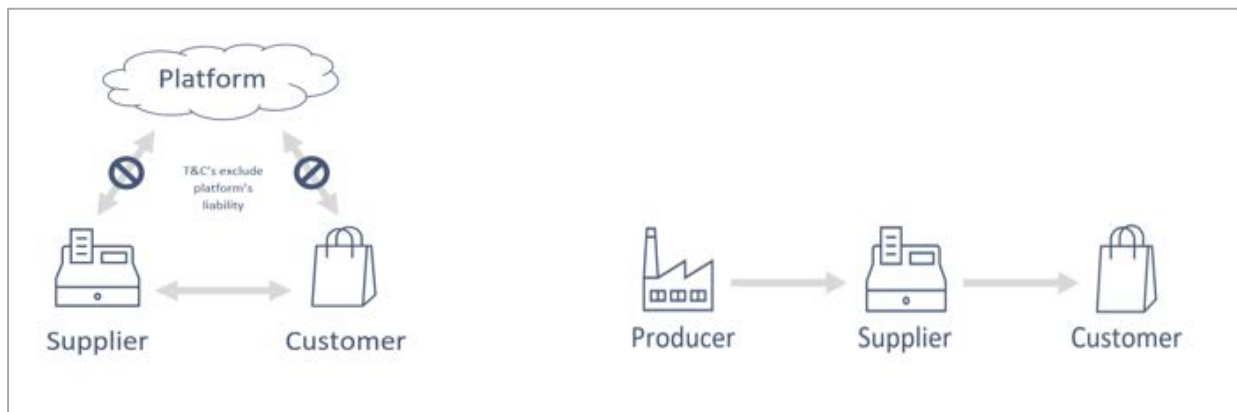
*The Uber's platform status is questionable in the light of CJEU's case law

³⁷ Mark Fenwick & Erik P. M. Vermeulen, A Sustainable Platform Economy & the Future of Corporate Governance, available under: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331508, p. 5.

3.2.1. From bi-party relations to a triangle relations market

Platforms introduce a triangular structure to the market, which has so far been based on a traditional bi-party contractual relation.

Figure 1: Bi-party market structure vs platform market structure



Source: Prepared by the authors

The triangle that the platform creates is based on three separate contractual relations: between the platform and the supplies (platform user), between the platform and the customer (platform user) and between the supplier and the customer. The prior conclusion of the contract with the platform is therefore necessary if platform users want to conclude contracts among themselves. The platform not only sets the rules for the functioning of the platform, but it may also facilitate relations between platform users. How deep the impact of the platform on the relation between the users is, depends of the platform model. Generally speaking, however, the platform not only regulates the terms and conditions according to which users make use of the platform, but it might also have an impact on the conclusion, the content and the performance of the contracts concluded between users.

3.2.2. The redefined position of the parties

The platform, as the party that sets the rules for and organises the market on which the users operate, is naturally in a structurally stronger position than the users, who in practice might only accept the terms pre-formulated by the platform. The new element that distinguishes the position of the platform, as compared with the previous market situation of bi-party relations, is that the platform might have an impact on the content of contracts concluded between platform users. This means that, by joining the platform, users might lose a part of their independence when it comes to establishing their market strategy, and the platform acts as more than just a party to a platform contract. This is particularly important from the point of view of the supplier side, where the platform may acquire control over the communication channels between the supplier and its customers, it might handle payment transfers, which means that it might be able to withhold payments, or the platform might simply impose terms and conditions that the supplier uses (including liability standards). This looks differently from the customer side. First, if the customer is also a consumer, it enjoys all the protection that EU law offers (at least in theory): the consumer *acquis*, personal data protection, cross-border access to the service, etc. The customer might also have an impression that it is contracting with the platform itself, which provides the customer with a greater sense of transactional security. The platforms, however, have tried to secure themselves from any sort of liability that might arise on the basis of the transactions

concluded on the platform (which is characteristic globally³⁸, not only for the EU market³⁹). At the same time, the platforms try to make sure that customers are satisfied with the level of customer service provided on the market, so they may push suppliers into accepting demands on suppliers above the level of the legal protection provided by the consumer *acquis*. While, generally speaking, elevating the level of consumer protection is a positive trend, in this case the elevation will not be a voluntary decision of suppliers, but will be imposed by the platform's policy, very often at the expense of the supplier. Since platforms already enjoy a vital market position (in terms of facilitating access of the supplier group to the customer group), if the suppliers want to effectively operate on the market (i.e. to have access to customers), they are effectively locked in the platform structure⁴⁰.

3.2.3. Growing market impact of platforms

According to predictions made in 2016 by Accenture⁴¹, the digital economy will grow from 15% of the world's entire economy to 25% by 2020. It is as yet unclear how the COVID-19 crisis will impact this tendency because, while the general predictions assume an economic crisis, the circumstances of the pandemic might stimulate the even faster growth in the share of the digital economy in the entire (otherwise shrinking) economy. Platforms, as the new model of market organisation, play a crucial role in this process. Out of 27 EU start-ups that reached unicorn status in 2019 (\$1 billion valuation), nine are based on a platform structure⁴². As Jacobides put it "digital platforms and ecosystems are here to stay"⁴³. All future legislative endeavours of the EU, in particular, within the Digital Single Market area should therefore be verified in the context of their fitness for purpose and effectiveness for the economy organised by platforms.

3.3. Artificial Intelligence and automated protection measures

3.3.1. Artificial Intelligence

Another ground-breaking development with a huge impact on the Internal Market (and hence, also important for the European legislator) is the ever-increasing use of Artificial Intelligence (AI). This has already been recognised by the EU and intensive work in this area has been commenced⁴⁴.

While AI, commonly referred to as a technical development⁴⁵, is technologically understood as an

³⁸ State of California v. Uber Technologies Inc., Lyft Inc., Superior Court of the State of California, suit filed on 5 May 2020; Oberdorf v. Amazon.com Inc, No. 18-104 (3rd Cir. 2019); Tiffany Inc. v. eBay Inc., 600 F.3d 93 (2nd Cir. 2010).

³⁹ C-567/18 – Coty Germany GmbH v Amazon Services Europe Sàrl – 2 April 2020; C-434/15 – Asociación Profesional Elite Eaxi v Uber Systems Spain, SL – 20 December 2017; C-494/15 – Tommy Hilfiger Licensing LLC v Delta Center A.S. – 7 July 2016; C-324/09 – L'Oréal v eBay International AG – 12 July 2011.

⁴⁰ Examples of brands who have decided to leave platforms: Birkenstock (press release of 11 December 2017, available under: <https://www.birkenstock-group.com/de/en/detail-press/newsroom/birkenstock-discontinuing-amazon-deliveries-in-europe/>), Nike, Vans and Ralph Lauren (<https://www.forbes.com/sites/stephenmcbride/2020/01/02/is-this-the-beginning-of-amazons-apocalypse/>).

⁴¹ Digital Economic Value Index, Accenture January 2016.

⁴² EU-Startups, 27 European startups that have reached unicorn status, available at: <https://www.eu-startups.com/2019/04/27-european-startups-that-have-reached-unicorn-status/>.

⁴³ Michalel G. Jacobides, Arun Sundararajan, Anrshall Van Alstyne, Briefing Paper, Platforms and Ecosystems: Enabling the Digital Economy, p.18.

⁴⁴ European Commission, Artificial Intelligence. For an overview see: <https://ec.europa.eu/digital-single-market/en/artificial-intelligence>.

⁴⁵ See, for further references, e.g. B. J. Copeland, Artificial intelligence, in: Encyclopaedia Britannica (last update 24 March 2020), <https://www.britannica.com/technology/artificial-intelligence>.

umbrella term⁴⁶, the EU White Paper on Artificial Intelligence⁴⁷ points out the importance of a clear definition of AI for the purposes of any possible future policy-making initiative⁴⁸.

Therefore, the European Commission has so far used the following definitions⁴⁹. The first was established by the Commission in a previous Communication⁵⁰ and states that "AI refers to systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals. AI-based systems can be purely software-based, acting in the virtual world (e.g. voice assistants, image analysis software, search engines, speech and face recognition systems) or AI can be embedded in hardware devices (e.g. advanced robots, autonomous cars, drones or Internet of Things applications)"⁵¹. This definition was further refined in a paper of the High-Level Expert Group⁵², which defines AI systems as "software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions"⁵³. To put it simply, "AI is a collection of technologies that combine data, algorithms and computing power"⁵⁴.

AI is already being used in virtually all aspects of human life, which definitely exceeds the economic dimension of the discussion on e-commerce. AI is already and will be employed further in the area of healthcare, e.g. to suggest diagnosis or treatment⁵⁵, farming⁵⁶ and climate change mitigation⁵⁷, the judiciary⁵⁸, as well as for the purpose of increasing sustainability⁵⁹, cyber security⁶⁰ and road traffic safety⁶¹. However, the use of AI carries potential risks for its human users. It is therefore clear that it is necessary to take sensible security measures before its implementation, in order to (in the Commission's words) keep the risk of technology as low and the user's trust as high as possible⁶².

⁴⁶ Cf. Report of Council of Europe, Commissioner for Human Rights (2019), available under: <https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64>.

As to the definition of Artificial Intelligence (AI) "An umbrella term that is used to refer to a set of sciences, theories and techniques dedicated to improving the ability of machines to do things requiring intelligence."

⁴⁷ European Commission, White Paper On Artificial Intelligence – A European approach to excellence and trust, COM(2020) 65 final.

⁴⁸ COM(2020) 65 final, p. 16.

⁴⁹ COM(2020) 65 final, p. 16, footnotes 46 and 47.

⁵⁰ Artificial Intelligence for Europe, COM(2018) 237 final.

⁵¹ COM(2018) 237 final, p. 1.

⁵² High-Level Expert Group, A Definition of AI, available at:

<https://ec.europa.eu/digital-single-market/en/news/definition-artificial-intelligence-main-capabilities-and-scientific-disciplines>.

⁵³ High-Level Expert Group, A Definition of AI, p. 8.

⁵⁴ COM(2020) 65 final, p. 2.

⁵⁵ COM(2020) 65 final, p. 1; COM(2018) 237 final, p. 1; see also: Artificial Intelligence, A European Perspective, p. 57, available at: <https://publications.jrc.ec.europa.eu/repository/bitstream/JRC113826/ai-flagship-report-online.pdf>.

⁵⁶ COM(2020) 65 final, p. 1; COM(2018) 237 final, p. 4.

⁵⁷ COM(2020) 65 final, p. 2; COM(2018) 237 final, p. 1, 25.

⁵⁸ COM(2020) 65 final, p. 2 footnote 5, p. 25; Building Trust in human-centric AI, COM(2019) 168 final, p. 1.

⁵⁹ COM(2020) 65 final, p. 2.

⁶⁰ COM(2020) 65 final, p. 2; Artificial Intelligence, A European Perspective, p. 11.

⁶¹ COM(2020) 65 final, p. 16, 21.

⁶² COM(2020) 65 final, p. 1.

3.3.2. Automated protection measures for consumers

AI offers a number of possibilities regarding automated consumer protection. Firstly, online businesses have large amounts of consumer data at their disposal, which could be made use of in order to strengthen consumer protection. One imaginable type of use could be the processing of data by AI for the purpose of providing personalised consumer information. Based on the pre-existing data on one specific consumer, online businesses could, for example, be obliged to inform/warn the consumer if he is about to purchase replacement parts that are unfit for a piece of equipment he had purchased before⁶³.

Secondly, AI makes it possible to introduce self-executing consumer rights, i.e. automatic enforcement. Such self-executing protection mechanisms would produce a very specific outcome in favour of consumers, enabling automated and personalised protection measures⁶⁴. A typical example includes the automatically triggered return of the price for a train ticket (possibly including compensation) for a delayed/ cancelled train. If (as established by an algorithm) all the prerequisites of the liability for a delay were met, the AI would initiate an automatic transfer of an appropriate sum of money, the amount of which would also be specified by the algorithm.

3.3.3. The relevance of the AI and automated protection measures for e-commerce

The current developments in the field of AI display many references to and overlaps with the ongoing discussion on e-commerce. A steady technical expansion always triggers a specific side effect, i.e. that the former technical approaches quickly become out-dated. In the same manner, AI and similar technologies will sooner or later overhaul and replace the former technologies on which previous legislation in the e-commerce context was based. Some basic technical considerations and approaches will have to be updated and rethought.

As the European Commission explains in the White Paper on Artificial Intelligence, the need to consider AI and similar technologies while pushing the discussion on e-commerce forward can easily be displayed using the example of data economy. Data economy is a key issue in the e-commerce debate, while AI is currently evolving into one of the most important data applications⁶⁵. Generally speaking, the major aim of e-commerce legislation is to strengthen and support the EU's negotiating position on a global level in the context of the digital economy⁶⁶. Currently, as the market leaders in consumer applications and online platforms are located outside the EU, the EU finds itself in a weaker position regarding data access⁶⁷. However, some substantial shifts in the value and re-use of data across sectors are incoming, the volume of data produced worldwide continues to increase and flood the market in so-called data waves⁶⁸. Hence, it is still feasible for the EU to become a market leader in this area, if it manages to face those new data waves with new, superior technology, for example AI⁶⁹. Thus, implementing AI and similar technologies plays a vital role in keeping the EU's legislation in the area of e-commerce competitive and future-proof.

⁶³ Contribution to Growth: Legal Aspects of Protecting European Consumers, p. 97, available under: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU\(2019\)631066_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU(2019)631066_EN.pdf).

⁶⁴ Contribution to Growth: Legal Aspects of Protecting European Consumers, p. 97, available under: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU\(2019\)631066_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/631066/IPOL_STU(2019)631066_EN.pdf).

⁶⁵ COM(2020) 65 final, p. 1.

⁶⁶ See above, p. 11.

⁶⁷ COM(2020) 65 final, p. 4.

⁶⁸ COM(2020) 65 final, p. 4.

⁶⁹ COM(2020) 65 final, p. 4.

3.3.4. Intensive EU works on AI

While AI and similar technologies have been of interest for the EU since the beginning of their development, the pan-European cooperation and the EU's legislative efforts only assumed a fixed form in 2018. In April 2018, the European Strategy for AI⁷⁰ was published by the Commission and is seen as the fundament of a pan-European approach until today⁷¹. As announced, the Strategy Communication was followed up by another paper presented by the Commission, comprising a Coordinated Plan⁷² prepared in cooperation with the Member States with the aim of promoting AI development in the EU. The plan will run until 2027 and mandates several joint actions to ensure efficient cooperation between the Member States and the Commission, all based on extensive EU-level funding⁷³.

At the same time, the Commission deployed a High-Level Expert Group in order to work on fundamental requirements that must be met in order to be able to control the risks imposed by AI on its users. As a result, the Expert Group presented a paper⁷⁴ outlining the most important guidelines that must be considered when employing AI in a safe, ethical and trustworthy manner.

In a subsequent Communication⁷⁵, the guidelines were welcomed by the Commission, which recognised them as a valuable input for future policy-making and legislative steps⁷⁶. Taking up the guidelines provided by the Expert Group, the Commission stresses that any future approach must see the human as the centre of the development of AI (known as the "human-centric approach")⁷⁷ and started a pilot phase to test the practical applicability of the guidelines⁷⁸.

In its White Paper of 2020⁷⁹, the Commission stresses that the approach to AI ought to be regulatory and investment-oriented, while considering the aim to promote the development of AI and the risks of this technology at the same time⁸⁰. The Commission also recognised that it is particularly important to ensure a human and ethical implication, as this is key to promoting the trustworthiness of AI⁸¹. Reinforcing the human-centric approach, the Commission emphasises the need to respect the fundamental rights of every citizen, such as human dignity and the protection of private data, thriving to establish an "AI ecosystem of excellence and trust"⁸². In addition, the Commission deems a European approach necessary and urgent in order to avoid the fragmentation of the Internal Market caused by national initiatives to regulate AI technology⁸³. The Commission announced a follow up to its White Paper on Artificial Intelligence, including impact assessments and legislative acts, for the last quarter of 2020 (Q4) alongside the Digital Services Act, both part of the "A Europe fit for the Digital Age" agenda⁸⁴.

⁷⁰ Artificial Intelligence for Europe, COM(2018) 237 final.

⁷¹ COM(2020) 65 final, p. 1.

⁷² Coordinated Plan on Artificial Intelligence, COM(2018) 795 final.

⁷³ COM(2020) 65 final, p. 5.

⁷⁴ High-Level Expert Group on Artificial Intelligence, Ethics Guidelines for trustworthy AI, available at: <https://ec.europa.eu/futurium/en/ai-alliance-consultation/guidelines#Top>.

⁷⁵ Building Trust in Human-Centric Artificial Intelligence, COM(2019) 168 final.

⁷⁶ COM(2019) 168 final, p. 4.

⁷⁷ COM(2019) 168 final, p. 1.

⁷⁸ COM(2019) 168 final, p. 6 f.

⁷⁹ COM(2020) 65 final.

⁸⁰ COM(2020) 65 final, p. 1.

⁸¹ COM(2020) 65 final, p. 1.

⁸² COM(2020) 65 final, p. 3 f.

⁸³ COM(2020) 65 final, p. 2.

⁸⁴ Commission Work Programme 2020, Annex I: New Policy Objectives, p. 2, available under: https://ec.europa.eu/info/sites/info/files/cwp_2020_new_policy_objectives_factsheet_en.pdf.

3.3.5. AI aspects important in the e-commerce context

The High-Level Expert Group drew up seven key requirements that serve as a guideline for the implementation of trustworthy AI, namely: human agency and oversight; technical robustness and safety; privacy and data governance; transparency; diversity, non-discrimination and fairness; societal and environmental well-being; and accountability⁸⁵. Depending on the specific context or settings it is used in, the importance of each of those key aspects may vary⁸⁶. Two of the requirements are particularly important in the context of AI – privacy and data governance and diversity, non-discrimination and fairness. The Commission presents the following position in this regard:⁸⁷

a. Privacy and data governance

In the context of AI, privacy and data protection must be guaranteed at all stages of the AI system's life cycle. This is particularly important, considering that digital records of human behaviour may allow AI to infer an individual's preferences, age, gender, sexual orientation, as well as religious or political views. If individuals are to trust data processing, the Commission rightly observes that it must be ensured that they have full control over their own data, and that the data concerning individuals will not be used to harm or discriminate against them.

In addition, a high quality of AI systems and of the data sets used must be ensured. The latter is paramount to the performance of AI systems. When data is gathered, it may reflect socially constructed biases and may contain inaccuracies, errors and mistakes. This problem must therefore be addressed prior to training an AI system with any given data set. Similarly, the integrity of the data must be ensured. This means that processes and data sets used must be tested and documented at each step of the procedure, such as planning, training, testing and deployment (whether the AI systems were developed in-house or were acquired from elsewhere). Finally, the access to data requires adequate governance and control.

Recommendations to Member States of the Council of Europe⁸⁸ also address the matters of data protection and privacy⁸⁹. The Council of Europe stresses that the development, training, testing and use of AI systems that rely on the processing of personal data must fully secure a person's right to respect for privacy and family life under Article 8 of the European Convention on Human Rights, including the "right to a form of informational self-determination" in relation to their data.

b. Diversity, non-discrimination and fairness

The Commission emphasises that inadvertent historic bias, incompleteness and bad governance models may distort data sets used by AI systems, both in the context of training and operation. The continuing impact of such biases could lead to (in)direct discrimination. Effects harmful from the point of view of consumers may also occur through the intentional exploitation of (consumer) biases, or by engaging in unfair competition. The way in which AI systems are developed (e.g. writing the programming code of an algorithm) is also susceptible to bias. The Commission rightly stresses that such concerns should be tackled from the very beginning of the system's development.

⁸⁵ High-Level Expert Group on Artificial Intelligence, Ethics Guidelines for trustworthy AI, p. 26 ff.

⁸⁶ COM(2019) 168 final, p. 3.

⁸⁷ COM(2019) 168 final, p. 5 f.

⁸⁸ Council of Europe Commissioner for Human Rights (2019), available at: <https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-recco/1680946e64>.

⁸⁹ Council of Europe Commissioner for Human Rights (2019) p. 11.

The Commission suggests that the solution might be establishing diverse design teams and setting up mechanisms that ensuring participation, in particular of citizens. It suggests consulting stakeholders who may directly or indirectly be affected by the system throughout its life cycle. AI systems should consider the whole range of human abilities, skills and requirements, and ensure accessibility through a universal design approach to strive to achieve equal access for persons with disabilities⁹⁰.

The Council of Europe⁹¹ recommendations in regarding non-discrimination and equality⁹² emphasise that in all circumstances, the risks of discrimination must be prevented and mitigated against with special attention for groups that have an increased risk of their rights being disproportionately impacted by AI. This includes women, children, older people, economically disadvantaged persons, members of the LGBTI community, persons with disabilities, and "racial", ethnic or religious groups. Member States must refrain from using AI systems that discriminate or lead to discriminatory outcomes and, within their jurisdiction, must protect individuals from the consequences of the use of such AI systems by third parties.

3.4. The social dimension of the information society services

3.4.1. The social dimension of e-commerce

The technological developments that have re-shaped the market structure have also had a great impact on the functioning of society. This impact manifests itself in several contexts that are critical from the perspective of the E-commerce Directive and the future Digital Services Act. First, the number of types of information society services has grown substantially. At the moment they relate to many more aspects of human life and have often become indispensable for conducting human activities. The COVID-19 pandemic has clearly illustrated how far modern society relies on the ISS for handling human affairs. Second, the content of the ISS has evolved significantly. At the moment, they offer more advanced functionalities, bringing with them new types of threats that need to be mitigated. It is therefore clear that the digital revolution has changed the way in which society functions. At the moment, an effective handling of human affairs necessitates undisturbed access to ISSs, and hence also access to the internet (this is particularly well visible during the COVID-19 crisis). The de-humanisation of the digital world, whereby technology allows human affairs to be handled without engaging human beings, at the same time offers solutions and creates potential threats that need to be identified and addressed.

3.4.2. The change of the character of the information society services

Since the adoption of the E-commerce Directive in 2000, the variety of information society services has grown enormously. At the time of enacting the E-commerce Directive, the concept of ISS was supposed to cover the services that were then offered on the market. Motive 18 explains that information society services span a wide range of economic activities that take place on-line. At that time, they consisted, in particular, of selling goods on-line and excluded activities such as the delivery of goods as such, or the provision of services off-line. Furthermore, the ISS were not solely restricted to services giving rise to on-line contracting, but, in so far as they represented an economic activity, the definition extended to services that are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for the search, access

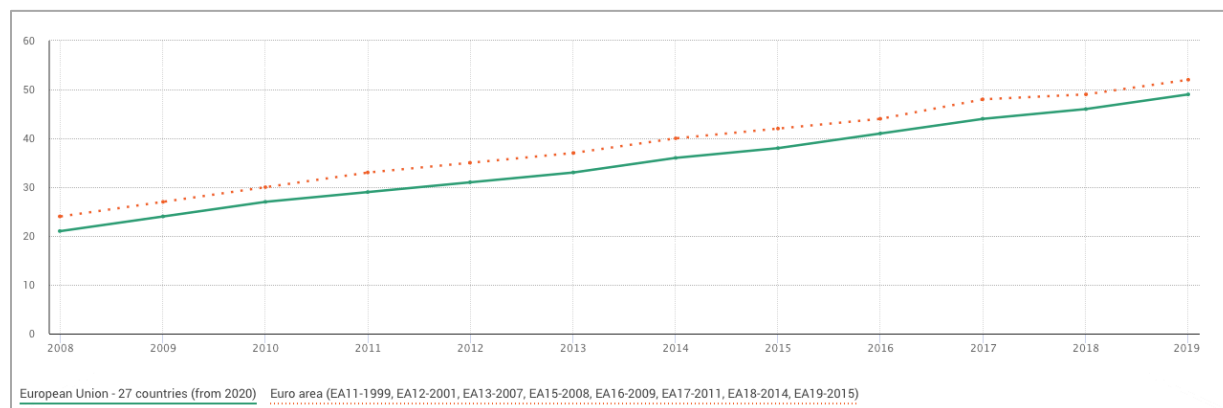
⁹⁰ COM(2019) 168 final, p. 5 f.

⁹¹ Council of Europe Commissioner for Human Rights (2019), available at: <https://rm.coe.int/unboxing-artificial-intelligence-10-steps-to-protect-human-rights-reco/1680946e64>.

⁹² Council of Europe Commissioner for Human Rights (2019) p. 11.

and retrieval of data. Information society services also included services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service. Television broadcasting within the meaning of Directive EEC/89/552 and radio broadcasting were not qualified as ISS because they were not provided upon individual request. What follows, services that are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail were qualified as ISS. Motive 18 further explains that ISS does not include the use of electronic mail or equivalent individual communications, for instance by individuals acting outside their trade, business or profession, including their use for the conclusion of contracts between such persons; the contractual relationship between an employee and his employer; activities that, by their very nature, cannot be carried out at a distance and by electronic means, such as the statutory auditing of company accounts or medical advice requiring the physical examination of a patient were not considered information society services. Lodder⁹³ recalls that, according to the Commission, the directive proposal covered all sorts of ISS concluded between business to business and business to consumer, such as online newspapers, online databases, online financial services, online professional services (such as lawyers, doctors, accountants, estate agents), online entertainment services such as video on demand, online direct marketing and advertising and services providing access to the WWW. These services have certainly kept their relevance (as Lodder rightly points out), but the market share of ISS within the meaning has increased substantially since the year 2000. The data collected by EUROSTAT shows a stable increase in the numbers of individuals that have ordered or bought goods for private use over the internet⁹⁴.

Figure 2: Individuals that have ordered or bought goods for private use over the internet in the last three months (% of individuals)

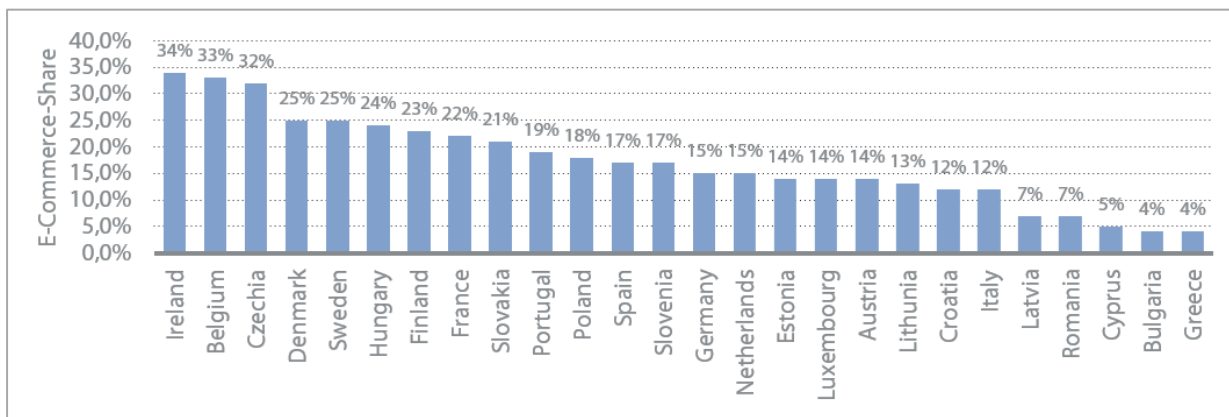


Source: EUROSTAT, <https://ec.europa.eu/eurostat/databrowser/view/tin00067/default/line?lang=en>

⁹³ A.R. Lodder, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, in Guide to European Union Law on e-commerce, Vol. 4, Update from 2016 (published 2017) of the 2001 (published 2002) version, published in EU Regulation of e-Commerce. A Commentary Elgar Commentaries series, 2017, p. 6, available at: <http://ssrn.com/abstract=1009945>.

⁹⁴ Eurostat, Individuals having ordered/bought goods or services for private use over the internet in the last three months, available at: <https://ec.europa.eu/eurostat/databrowser/view/tin00067/default/line?lang=en>. See also, Eurostat, Digital economy and society, Data, Main tables: <https://ec.europa.eu/eurostat/web/digital-economy-and-society/data/main-tables>.

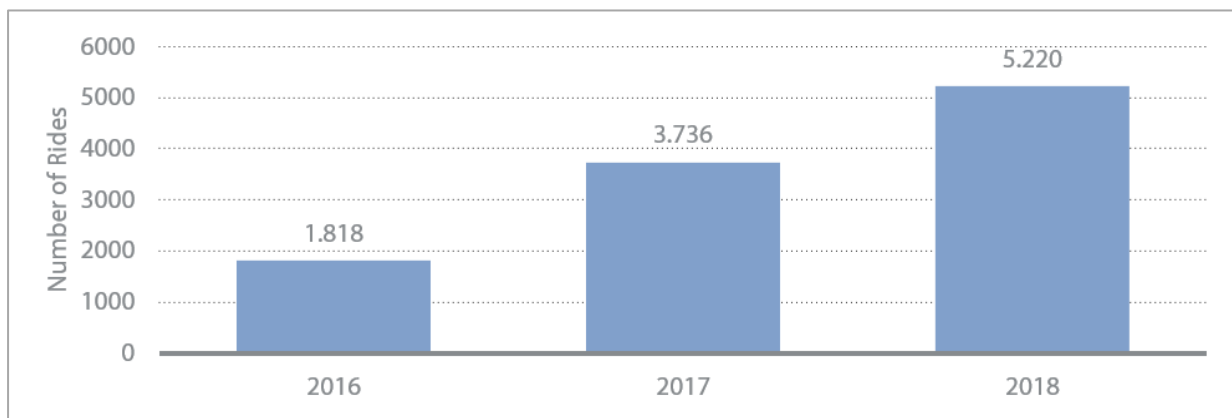
Figure 3: E-commerce-share of revenue in selected countries in Europe 2019



Source: Eurostat. (13. January, 2020). e-commerce-Anteil am Gesamtumsatz der Unternehmen in ausgewählten Ländern in Europa im Jahr 2019 [Graph]. In Statista. Visited on 08 May 2020, available at: <https://de.statista.com/statistik/daten/studie/73412/umfrage/e-commerce-anteil-am-gesamtumsatz-der-unternehmen-2008/>

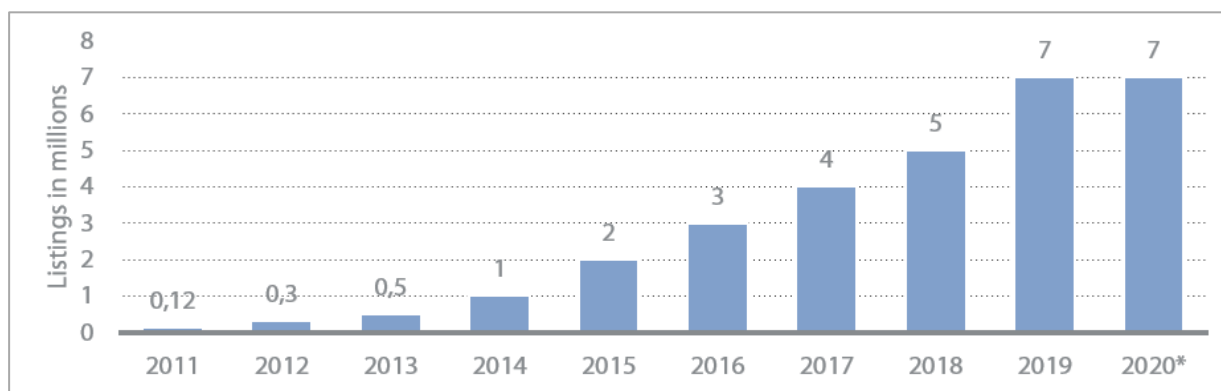
Even more importantly, a qualitative change took place on the market when it comes to the types of available services, together with the emergence of the so-called web 2.0 services, i.e. user generated content platforms (USG). Many of the platforms that are of major importance for today's market, i.e. Facebook or Instagram, did not exist at the time of introducing the directive. The enactment of the E-commerce Directive also preceded the emergence of the sharing/ participation economy facilitated by platform structures. AirBnB, Uber, Bolt and similar ISS that have redefined the marker structure, emerged only later.

Figure 4: Number of Uber rides worldwide



Source: Uber. (6. Februar, 2020). Anzahl der Uber-Fahrten im Zeitraum der Jahre 2017 bis 2019 (in Millionen) [Graph]. In Statista. Visited on 08. May 2020, from <https://de.statista.com/statistik/daten/studie/1035751/umfrage/anzahl-der-fahrten-von-uber-weltweit/>

Figure 5: Listings on AirBnB worldwide in millions



Source: Airbnb. (15. Januar, 2020). Anzahl der Inserate für angebotene Übernachtungsmöglichkeiten von Airbnb weltweit von 2011 bis 2020 (in Millionen) [Graph]. In Statista. Visited on 8 May 2020, available at: <https://de.statista.com/statistik/daten/studie/482970/umfrage/anzahl-der-inserate-von-airbnb-weltweit/>

3.4.3. The change of the characteristics of services

The rapid development of technology, which enabled the rapid development of e-commerce, has triggered the evolution of certain ISS characteristics, which, while very useful in specific contexts, also have a dangerous potential from the point of view of their addressees.

The broad understanding of remuneration under the E-commerce Directive means that the concept of the ISS covers a very wide range of services offered on the market at the moment. However, even if the customer pays for the ISS with money and not with data, the customer not only provides the intermediary with its personal data, but also produces data, while engaging in the ISS. The data economy flourishes through large-scale data collection and analysis. Even if platforms are not oriented towards reaping profits from the commercial activities of the platform users (though the platform itself does offer ISS), the platform users produce data that is then collected and monetised by the platform.

The large quantity of the collected and processed data allows for profiling customers. In principle, this is done to allow a personalised approach to the digital market, which otherwise functions in a de-humanised environment. This personalised approach allows for individual contact with customers, where the customer's preferences are pre-defined by algorithms. On the one hand, it allows a more efficient choice on the side of the customer. On the other, it carries a danger of entrapping customers with a superficially built informational bubble that brings with it the possibility of limiting consumer choices. Moreover, profiling allows for very efficient manipulation when it comes to convincing customers to buy particular products, using personalised ads or establishing the maximum price that a person is willing or able to pay for a product.

3.4.4. The potential threats of a dehumanised digital world

Information society services develop in a digital environment where – in particular in a commercial context – direct contact between humans is rather an exception than the rule. Moreover, even indirect contact is more and more often handled by bots, which provide an efficient alternative to humans in a case when, for example, standardised information is to be provided to customers. These various ways of carrying out contacts, either without direct contact, or even without any human involvement, are associated with a danger of human affairs being handled without considering that there is a human being on the other end of the internet connection. As the Commission stresses, the approach to Artificial Intelligence must be human-centric. The same principle should apply to all types of activities

in the digital world, in order to compensate for the deficiencies that stem from the lack of direct human contact, or the lack of any human contact.

An example that very well illustrates the dangers of not having any direct human contact is the expansion of hate speech through the internet. According to a report published by UNESCO, although statistics offering a global overview of the phenomenon are not available, both social networking platforms and organisations created to combat hate speech have recognised that hateful messages disseminating online are increasingly common⁹⁵. One of the reasons why hate speech disseminates so easily through the internet is the anonymity that the internet offers. A similar situation exists with communication between people that does not involve human contact – it is easier to refuse by email than in person. When it comes to communication with customers through bots that are powered by algorithms, the challenge is to include human emotions into a binary code. This inevitably leads to the dehumanisation of human relations, where technology begins to set the standards for such relations.

3.5. Access to the internet as a human right

The COVID-19 pandemic clearly proves that modern society and the economy cannot function without proper access to information society services. This means that information society services must be seen in a wider context than simply e-commerce, because they have become essential for meeting other types of needs of society (social contacts, education and work). Therefore, it is necessary to change the perspective on the aim of the regulation of ISS, to see it not exclusively in the context of e-commerce activities, but also to consider other aspects of societal life, where ISS has become increasingly important.

Access to the internet and information society services could therefore be recognised as a human right. Nowadays it ensures that people are able to function normally in a modern society. The lack of access effectively eliminates participation in many essential spheres of societal life.

3.6. Sustainable digital market

The question of market sustainability – very high on the EU agenda⁹⁶ – focuses on the sustainability of the goods and services offered in the Internal Market. In the course of the last few years, there was rarely a subject that has been as present in the public debate as the sustainable shaping of the present and the future EU agenda. Climate change and climate protection has attracted exceptional attention and media discourse. In addition, public awareness has increased rapidly. A considerable proportion of European citizens have started to rethink the ecological consequences of their lifestyle and consumption behaviour. Sustainability has become a personal priority of many, wherefore the amount of demands for action has increased as well. Even though the topics of climate protection and sustainability have been the subject matter of political discussions for many years, and certain achievements have already been made, it has become increasingly critical with the passing of time. The EU positions itself as a frontrunner and is determined to pursue the matter with utmost vigour.

In her Political Guidelines for the new Commission, Commission President Ursula von der Leyen acknowledged the special priority of this subject by granting it the topmost rank on her list of

⁹⁵ Iginio Gagliardore, Danit Gal, Thiago Alves, Gabriela Martinez, Countering online hate speech, Unesco Series on Internet Freedom, p. 13.

⁹⁶ European Commission, EU Circular Economy Action Plan, A new Circular Economy Action Plan for a Cleaner and More Competitive Europe, available at: https://ec.europa.eu/environment/circular-economy/index_en.htm.

priorities⁹⁷. She recognised climate protection as a key aspect of a future-proof Europe and announced legislative action in this area, starting with a new European Green Deal as the first step⁹⁸.

As announced, the European Green Deal⁹⁹ was published in December 2019. It emphasises that concrete measures to protect the environment are urgent and recognises climate change as the most important challenge of this generation, pointing at the severe consequences it will have for our ecosystem¹⁰⁰. It declares that the major aims are to decrease net emissions of greenhouse gases to zero by 2050, while decoupling economic growth from the use of traditional resources and encouraging economic players to design their business more sustainably¹⁰¹. At the same time, it is emphasised that it is important to protect the EU's natural capital and its citizens from environmental risks provoked by climate change¹⁰². Taking a broader perspective, the Green Deal also clarifies that climate change is a global problem, affecting all countries worldwide. Thus, the EU must seek to reinforce global cooperation on this issue and is willing to take a leading role in these efforts¹⁰³.

In the Green Deal, the Commission presents several key policies that are necessary to transform the EU's economy to be fit for a sustainable future¹⁰⁴. Some of the main pillars of this development are the promotion and more efficient use of green energy, a drastic reduction in pollution and greenhouse gas emissions, and the preservation and restoration of ecosystems¹⁰⁵. Simultaneously, the transition must be financed sensibly and conducted in a just manner, meaning that no citizen should be left behind¹⁰⁶.

The upcoming stepwise transition, as laid down in the Green Deal, will bring with it drastic changes for many industries. In the e-commerce sector, there are many contact points with specific core aspects of environmental protection agenda. The market relevance of e-commerce has grown steadily over the last decade. However, tensioning an international net over all of Europe, the branches of e-commerce concerning the sale of goods are highly dependent on shipping, transportation and packaging. These processes often entail considerable amounts of waste and emissions, which adversely affect the protection of the environment. Considering the importance of fostering economic growth while pursuing sustainability as an overall goal, it is necessary to rethink the current handling of these processes.

⁹⁷ Political Guidelines for the next European Commission 2019-2024, p. 5 ff., available at: https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

⁹⁸ Political Guidelines for the next European Commission 2019-2024, p. 5.

⁹⁹ The European Green Deal, COM(2019) 640 final.

¹⁰⁰ The European Green Deal, COM(2019) 640 final, p. 2.

¹⁰¹ The European Green Deal, COM(2019) 640 final, p. 2.

¹⁰² The European Green Deal, COM(2019) 640 final, p. 2.

¹⁰³ The European Green Deal, COM(2019) 640 final, p. 2.

¹⁰⁴ The European Green Deal, COM(2019) 640 final, p. 3.

¹⁰⁵ The European Green Deal, COM(2019) 640 final, p. 3.

¹⁰⁶ The European Green Deal, COM(2019) 640 final, p. 3.

4. AREAS PRONE TO IMPROVING THE CURRENT MARKET SITUATION

KEY FINDINGS

While the E-commerce Directive was very successful when it comes to achieving the aims for which it was enacted, the technological changes that have taken place during the last 20 years necessitate its revision. This chapter presents an overview of the areas that offer the best potential for updating and redefining the current EU legal scheme for e-commerce, but also creating a legislative framework that would target the societal dimension of the information society services, the importance of which steadily increases. It argues that while certain assumptions on which the directive is built still properly reflect the market needs, there are also plenty of new areas that have to be addressed.

4.1. Introduction

4.1.1. The need to revise and update the E-commerce Directive

While the E-commerce Directive is undoubtedly one of the most successful pieces of EU legislation, the technological, economic and societal developments of the last 20 years have profoundly changed the circumstances in which the directive's provisions function. The aims for which the E-commerce Directive was enacted have either been met, or they need to be redefined in the new socio-economic reality. While the E-commerce Directive succeeded in creating a single legal framework for the reality it was tailored to, in over 20 years, this area of legislation became fragmented again. Therefore, it is clear that the Commission's plans to propose a Digital Services Act that will address the market challenges in a new perspective should be applauded. At the same time, since the E-commerce Directive has so far proven its ability to effectively address such challenges, it should be carefully reviewed which of the directive's current rules could be used in any future legislation and which phenomena require new legislative impulses that would address the market failures.

4.1.2. Creating coherent systems with no overlaps

The EU has already addressed some of the changes transforming the market in other legal instruments. For example, the increasing use of personal data on the market led to adopting the GDPR, the intensified use of streaming services inspired the Geo Blocking Directive, and the emergence of the platform economy brought about the Platform Transparency Regulation¹⁰⁷. It is, therefore, of vital importance that the future Digital Services Act will have a legal structure that is coherent with the already existing rules that touch upon issues relevant for the Single Digital Market, but which address them from different perspectives. From the point of view of the effectiveness of the future regulation, it is critical to make sure that its application does not cause problems when it comes to, for example, overlapping the scopes of application, of conflicting legal solutions. In addition, considering the speed at which the technological progress is happening, as well as its unpredictability, it is important that the future Digital Services Act is constructed and formulated in a way that is as future proof as possible.

¹⁰⁷ For a full overview, see Chapter II.

4.2. Updated legislative scheme that corresponds with the current market situation

4.2.1. Structure that accommodates the multi-dimensional character of e-activities

The E-commerce Directive perceived information society services primarily from a commercial perspective. While this perspective holds true also for today's market, certain market developments necessitate rethinking the approach towards the "commercial". First, concluding any type of ISS contract, even strictly commercial, leads to the production and harvesting of data, some of which might have a personal character and its use might have an impact on the lives of individuals through profiling, which it allows, and potential privacy violations. Every commercial transaction of this type potentially allows an individual's personal sphere to be entered. Second, the use of the internet, and in particular social media that function through online platforms, brings about the quickly growing commercialisation of human lives. On the one hand, social media provide commercial value to a (previously) strictly private behaviour of their users (each entry produces data that can be monetised; private areas of human life have gained commercial value). On the other hand, this characteristic of social media also incentivises the commercial activities of its users (the number of social media followers is not only a very important indicator of commercial value, but also creates very efficient distribution channels).

It would, therefore, be advisable to prepare new rules in the area of e-commerce, while considering that the understanding of commerce, in the "e" context, has undergone significant changes in recent years, and that the commercialisation of the private sphere of human life will probably proceed further.

4.2.2. Balanced regulation of content moderation and removal practices

The new rules on e-commerce will have to deal, in particular, with the issue of what kind of content should be removed. The current so-called safe harbour system does not impose either a general obligation on host-providers to monitor the information that they transmit or store, or a general obligation actively to seek illegal content. However, they are obliged to remove illegal content as soon as they obtain knowledge of it. This means the decision about what kind of content should be removed into the hands of the host-providers. There are complaints of non-transparent content moderation and removal practices from both angles, namely insufficient reaction to clearly illegal content, as well as overly eager take-down practices.

The new legislation should, in particular, remedy the absence of practicable notice-and-action rules in the current E-commerce Directive, which could be seen as one of its greatest deficits. Such notice-and-action rules should be mandatory and would coherently spell out how people must be able to flag illegal content or activities on platforms, and how the platform operators are obliged to respond.

Moreover, host providers should be obliged to give meaningful statistical information about take-downs and removals in their transparency reports, which include the number of measures that have proven wrongful and the reasons for this.

Automatic filtering technologies should be made subject to monitoring by public and private entities in order to improve transparency and effectiveness of filters.

European standards for content moderation on platforms should be drafted in a way that they are capable of becoming a global standard for an online space, balancing human rights as well as political, economic and societal interests in an exemplary manner.

4.2.3. New approach to platform liability

The E-commerce Directive does not contain any rules that deal with the liability of platform operators. In order to protect the then new and growing business models, the E-commerce Directive granted several complementary rules that limited the liability imposed on platform operators under the applicable law. A basic element, which should be maintained in the Digital Services Act, is the Internal Market clause, which implies that platforms are only subject to the legal regime, including the liability rule, of the Member State where they are established. A more far-reaching and partially problematic issue is the rather broad exception from liability for the host providers, when they have neither the knowledge of, nor the control over, the hosted material and fulfil their duty to take down the illegal content only when made aware of it. This safe harbour principle will need readjustment and better fine-tuning, since it may no longer be justified given the economic and societal importance that many online platforms have meanwhile reached.

A key component for improving the EU liability regime could be that EU itself spells out in which cases platform operators are liable for damages when they do not perform their obligations. Moreover, where platform operators act as intermediaries for contracts between platform users, and where they lay claim to being given a high degree of trust for caring for the security and quality of services available on the platform, the platform operator could also be made liable for the non-performance of such services.

4.3. Adequate AI regulation

Artificial Intelligence is one of the drivers of the Digital Single Market. Its impact on the functioning of the market is so deep that there is no doubt that it is necessary to introduce EU rules on AI that would address the concerns brought about by the increased presence of AI on the market. The position of the European Commission, which stresses the need to adopt a human-centric approach to AI, is the correct one. While the use of algorithms enhances the effectiveness of the data analysis, it also creates many threats that stem on the one hand from the lack of transparency of the AI processes and the fears that they will be based on biased data, replicating the historical discriminatory approach. On the other hand, the lack of clear information in relation to how the algorithms are built (the famous "black box society" problem) inspires distrust towards this type of technology. The EU rules on AI should therefore counteract – as far as it is possible – the dehumanisation of the approach brought about by technology, which by definition is dehumanised. The legal framework on AI to be included in the Digital Services Act should therefore not limit itself to establishing transparency standards, but it should set up a legal scheme that would ensure that AI functions in a trustworthy, explainable manner, that it not be created on the basis of an in-built (or hereditary) discrimination, and that it is not used as an instrument of manipulation.

4.4. Regaining market standard control by institutions with democratic legitimacy

The importance of the e-commerce market is growing quickly, as is its share in the global market. The e-commerce expansion is facilitated by the platforms that have globally gained unprecedented market power. The platforms are therefore able to effectively impose rules regulating the global markets they have created. This is also the situation on the EU market, where addressing the law-making capabilities of global enterprises has not yet been addressed adequately.

Another aspect of this problem is the EU's ability to enforce its consumer protection market standard on its own territory. While the open global market has its evident advantages, the increasing presence of products that do not meet EU safety and quality standards, combined with lack of a practical

possibility to enforce liability for such products against liable parties should be addressed in the future legislation of the digital market.

4.5. Focus on enforceability

Proper enforcement (effective and swift) is a tool to reinforce trust in the EU market. In the context of the digital market and platform economy, the national borders within the EU are very often of minor importance from the perspective of customers. Customers are searching for the optimal products and services online, and with the available internet translation options and the decreasing transport challenges, whether or not the contract is concluded in one's home country becomes increasingly irrelevant. The enforcement schemes and instruments proposed in the Digital Services Act should therefore reflect the pan-national character of the digital market.

In addition, the market size of some of the platforms makes it very difficult to address potential market failures from the perspective of single Member States. Very often, market failures are not restricted to the area of a single Member State. With increasing cross-border online exchange, this trend will only strengthen. The enforcement actions should therefore be coordinated at EU level. Only then can an effective enforcement in the context of Single Digital Market be granted.

4.6. Exploring the automatic protection options

The AI solutions enable the use of automatic protection measures, also in the form of self-executing rights. The EU legislator should explore the options that the technology offers, not only in the context of market activities, but also to analyse whether the technology could be used as a part of effective and technologically advanced enforcement tools. It would be then necessary to clearly establish in which areas the self-executing rights could be used.

4.7. Sustainability

Sustainability does not strike as a subject of primary importance in the discussion on the future regulation of the Single Digital Market. However, considering the overall importance of the sustainability agenda, the issues identified in the climate protection should not be overlooked here either.

Rules that have a direct impact on sustainability issues lie outside the direct scope of the future Digital Services Act. However, the expected increase of the e-commerce share in the entire market will require businesses to rethink their market strategies in light of the expected increase in market sustainability. Businesses will have to redefine their procedures, e.g. by finding ways to prevent return shipments, by offering environmentally friendly delivery options, reorganising supply chains and designing packaging materials that are as sustainable as possible, but nevertheless capable of protecting its contents appropriately.

5. RECOMMENDATIONS

KEY FINDINGS

This chapter contains a concise list of recommendations for future actions in the area of e-commerce. It presents the general assumptions on which future legislation should be based, and suggests specific legislative solutions.

While the E-commerce Directive is undoubtedly one of the most successful pieces of EU legislation, the aims for which it was enacted have either been met, or they need to be redefined in the new socio-economic reality. It is therefore clear that the Commission's plans to propose a Digital Services Act, addressing the market challenges in a new perspective, should be applauded. However, since the E-commerce Directive has so far proven its ability to effectively address such challenges, it should be carefully reviewed which of the directive's current rules could be used in any future legislation, and which phenomena require new legislative impulses that would address the market failures.

The future legislative scheme should be based on the following overarching assumptions:

First, it is critical from the point of view of the effectiveness of the future regulation that any future instrument will concur with the already existing legal schemes. In addition, considering the speed at which technological progress is happening, as well as its unpredictability, it is important that the future Digital Services Act is constructed and formulated in a way that is as futureproof as possible.

Second, the Digital Services Act should consider that information society services presently have the potential to make a deep impact on the personal lives of European citizens. The rules, therefore, should not approach the information society services from a primarily commercial perspective, but should instead adopt a human-centric approach. Other issues that should be considered are the increasing commercialisation of human life, and the potential negative consequences of dehumanising contacts between people.

Third, the Digital Services Act should openly and appropriately address the consequences of global enterprises gaining unprecedented law-making capabilities for the markets they organise. The European Union should be able to set market standards (including safety and quality) for the European digital market.

Fourth, EU standards for content moderation on platforms should be drafted in a way that they are capable of becoming a global standard for online spaces, balancing human rights as well as political, economic and societal interests in an exemplary manner.

When it comes to specific solutions:

The question what kind of content should be removed by the host-providers should be addressed, to ensure an adequate and transparent take-down procedure (the introduction of notice-and-action rules). In addition, statistical take-down information should be available and automatic filtering technologies should be made subject to public and private monitoring.

While maintaining the Internal Market clause, and redesigning the safe-harbour principle, the Digital Services Act should introduce rules to address the liability of platform operators for damage when they do not perform their obligations, as well as for the non-performance of contracts concluded via a platform, in specific circumstances.

The legal framework on Artificial Intelligence should adopt a human-centric approach, counteracting – as far as possible – the dehumanisation of the approach brought about by technology. It should set

up a legal scheme that would ensure that AI functions in a trustworthy, explainable manner, that it not be created on the basis of an in-built (or hereditary) discrimination, and that it not be used as an instrument of manipulation. It should not be limited to AI transparency standards.

Effective and swift enforcement is a tool to reinforce trust in the EU market. In the Digital Single Market context, the enforcement measures should reflect the pan-national character of the digital market, as well as the global context in which the platforms operate. In other words, the enforcement actions should be coordinated at EU level. In addition, the introduction of automatic protection measures, also in the form of self-executing rights, should be considered for carefully identified market sectors.

While sustainability does not strike as a subject of primary importance in the context of the Digital Single Market, the expected increase of the e-commerce share in the entire market will require businesses to rethink their market strategies in light of the expected increase in market sustainability. The sustainability impact of the future regulation should, therefore, not be overlooked.

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This study presents an overview of the current state of play in the area of e-commerce. It discusses the existing legislative framework of the Digital Single Market as well as the technology-driven changes of market and economy that have taken place over the last twenty years. The analysis identifies areas prone to producing a positive reaction to legislative intervention.

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