



Position Paper

EU Commission Consultation on the Role of Online Platforms¹

EMOTA's main goal is to assist policy makers in removing any barriers to cross-border trade². EMOTA's commitment to a barrier free EU Single Market is long standing and can be traced across all our positions and actions. We are making the following comments with the aim to constructively contribute to the debate over the future of the EU Digital Single Market for products and services by reflecting the views of online sellers across 17 markets, including the largest.

Recommendations

- **Enhance the enforcement of existing rules, including at the regional and global level**
- **Focus on the market failures and issues rather than the market players**
- **Ensure the online and sharing economy is not restricted by unjustified fears of technology**
- **Focus on removing the (many) existing barriers to online trade**
- **Not to issue new burdensome rules that would increase costs on SMEs operating in online marketplaces**
- **Avoid creating additional legal fragmentation and uncertainty by proposing technology focused policies as the line between online and offline is increasingly blurred in retail**
- **Avoid imposing new rules forcing online sellers to share their business data**

Definition of platforms

In today's discussions on platforms, many different business models are covered. Some platforms limit their offer to bringing supply and demand together, others offer a variety of additional services, like payment, shipment of products, etc., while again others also act as retailers by selling directly to consumers. Some platforms allow consumers to sell whereas others do not; some offer a platform for sale of products, others for the sale of services. With the current speed of innovation, we may have new types of platforms tomorrow.

Due to the variety of business models, policymakers should not consider the regulation of these on a one-size-fits-all basis. Instead, policymakers and regulators should be sensitive to the differences and apply the rules in a manner fit for the type of platform

¹ Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy

² EMOTA, the European eCommerce and Omni Channel Trade Association, is the European level umbrella federation representing online and distance sellers across Europe. The main mission of EMOTA is to promote eCommerce and Distance Selling and help policy makers remove any barriers to cross-border selling. Transparency register N° 11251212351-96



The EU Commission and EU Parliament concentrated much of the “platforms” debate on finding a definition for online platforms, one that could match the concerns voiced by policy makers in relation to the “increasing role” online platforms and intermediaries play in the economy.

Considering the difficulty to find a one-size-fits-all approach, as described above, EMOTA strongly believes that the EU policy makers should focus on defining the issues, identifying the legislative gaps and taking the necessary action where market failures have been identified or where current legislation is not properly implemented.

☞ ***The EU Commission should focus on identifying the consumer protection or competition issues irrespective of the type of company generating these (platform or not).***

The value of platforms to economy and society

Online platforms enable small and larger retailers to launch in eCommerce

Online marketplaces allow webshops, generally small and medium sized companies, to sell online via the infrastructure made available by the marketplaces. Online market places offer some unique benefits for both consumers and retailers alike:

- They enhance visibility for smaller sellers that might otherwise not afford the advertising costs.
- By increasing visibility online marketplaces help generate and consolidate ecommerce traffic (parcels, payments, internet connections, packaging) thus helping to reduce costs for sellers and consumers.
- By creating and consolidating ecommerce traffic they help open new markets for webshops (including cross-border).
- Offer additional webshop infrastructure services, thus reducing development costs.
- Act as sellers generating further ecommerce volumes and opening new niches that might be too risky for smaller sellers (e.g. accessories for more expensive products).
- Allow consumers to find a wide offer of products or services in one place.

☞ ***Policy makers should recognize the enabling role platforms play for online sellers. EMOTA does not see a need for introducing costly or burdensome requirements that would be transferred to webshops and consumers. Instead, it would like to see some issues addressed under the current legal framework, see below.***

Sharing and the collaborative economy

EMOTA is surprised by the EU Commission’s inquiry into the perceived public and stakeholder concerns regarding the “rise” of the digital sharing economy, which suggests a conflict with the “traditional” service providers.



eCommerce and the online economy have been wrongly referred to as reducing employment, for example in traditional retail, while in fact the jobs created have greatly outnumbered the jobs lost as a result of technological shifts³.

As the EU Commission pointed out in Digital Single Market Scoreboard⁴ the current legislative fragmentation across the EU make it very difficult to launch new business models (especially pan-EU) as a result of monopolies, licensing requirements or burdensome compliance checks.

☞ ***European policies should be developed that favour the development of new digital services and remove the barriers to develop new services in an Internal Market. It should both promote entrepreneurship and risk capital in this economic sector.***

Issues to be addressed under the current legal framework

EMOTA encourages authorities to ensure that some issues addressed under the current legal framework in order to ensure the good functioning of retail trade on platforms.

- **Bargaining power**

As with any commercial relationship, especially in a supplier/user context, friction points may result between online sellers and platforms. In the retailer/platform or platform/consumer and retailer/consumer relationship the potential for abuse is always present as the bargaining power can be very different.

☞ ***In general, we believe these these issues should be addressed by enforcement actions rather than new legislation.***

- **Responsibilities**

The EU Commission and some EU Member States argue for a possible review of the liability for online platforms in light of their supposed increased role in the relation with the consumer and the online economy in general.

EMOTA would underline the importance of legal certainty for sellers and consumers and the importance of contractual relations between the platforms and sellers. Any future legislation that would affect both these aspects should be proposed only after careful consideration and after a comprehensive impact analysis.

EMOTA would like to point out that existing consumer rules and case law already cover these aspects. The responsibilities should be clearly linked to the actions and roles taken by the parties to the contract. Should any of the parties provide inaccurate or misleading information to the consumer or breach the limits of the contract, the adequate enforcement measures should be available. Such a context does not require new legislation but rather enforcement actions.

☞ ***Liability should be determined by the contract and actions. In general we believe that shared liability is a very complex concept which will increase legal uncertainty.***

³ http://www.mckinsey.com/insights/high_tech_telecoms_internet/internet_matters

⁴ <http://ec.europa.eu/digital-agenda/en/digital-agenda-scoreboard>



- Switching: monopolies vs competition

The EU Commission is questioning whether online sellers and consumers are facing difficulties in changing/switching platforms which are not covered by the current legislative framework.

EMOTA is not aware of any lawful restrictions preventing sellers from using several platforms at the same time or to switching from one platform to another

- ☞ ***Should restrictions exist, enforcement bodies should be adequately equipped so to check the lawfulness of such restrictions and to implement the necessary enforcement actions.***

- Data sharing

The eCommerce market is extremely competitive, being well known for the low margins and high choice. Online sellers are some of the most transparent and communicative companies. A great number of tools make it possible to compare and analyze information and data generated by online players.

Online sellers are always able to access the information regarding their sales and activities as this is the entire purpose of the online marketplace from their perspective.

The data generated by online shops and online platforms are often the most important assets owned by these companies and policy makers should not impose any sharing obligations.

- ☞ ***EMOTA opposes policy initiatives with the aim to require online service providers, including online sellers, to share specific business data (to potential competitors).***
- ☞ ***Enforcement bodies and policy makers should consider regional and even global enforcement measures and coordination in order to prevent abuse and lack of compliance.***

- Channel neutrality

Retail can be **online** (webshop, platform, social media) or **offline** (brick and mortar/street shops, catalogues, direct selling). Increasingly, retailers aim to cover as many different online and offline selling channels in what is called **omni-channel** retail (selling through all channels). Retailers see opportunities for growth in additional channels and may not want to lose a customer in a channel where it does not have a presence.

Having retail channel specific policies will increase costs for retailers and confuse consumers. It cannot be the purpose for the same consumer to have different consumer protection depending on whether he/she buys from the same retailer through different channels.

- ☞ ***Retail is fast becoming omni-channel, blurring the lines between online and offline. Policy making should follow with a unitary approach to reduce compliance costs and provide predictability of consumer rights.***

- Contractual rules

The EU Commission is inquiring the public on several aspects of the contractual relationship between online sellers and service providers such as platforms. For example, several questions point to a possible obligation for online marketplaces to share data generated by their services. Further



questions point to a potential lack of sufficient customization or unilateral decision to change terms and conditions, by the platforms.

EMOTA is of the view that the existing and upcoming data protection rules provide for a sufficient legal framework that governs the role of each party in the contract for data collection and processing.

The Article 29 Working Party has issued an extensive Opinion on the concepts of controller and processor⁵ which clarifies even further these aspects.

The rules and guidance on Consumer Rights, Unfair Commercial Practices or Misleading and Comparative Advertising also govern extensively the practices around pricing, dynamic and personalized pricing, discrimination or pre-contractual information requirements.

The EU Commission or the EU Member States did not present sufficient evidence of issues which cannot be addressed by the enforcement of existing rules.

- The real EU (digital) competitiveness barriers

Many barriers to the development of eCommerce and platforms exist in the current Internal Market. These lead to high compliance or unsustainable trading costs. A short selection of areas where trading barriers exist:

- Data protection rules
- Unevenly enforced competition rules
- Different and unclear VAT rules
- Different and unclear payments rules
- Market fragmentation in payments
- Lack of competition in payments
- Specific national rules
- Costs of delivery
- Different contract law rules
- Rules on Unfair Practices
- Different labelling rules
- Waste management
- Different product safety rules
- Market access restrictions
- Distribution restrictions
- Restrictive funding regulations (e.g. crowdfunding)
- Lack of digital skills

The EU Commission should ensure that the debates on the sharing economy and any so called “disruptive” digital initiatives are not turned into long lists of compliance checks which finally result in less innovation (focusing on taxation, licensing, labour law, etc.)

- Application of *Acquis Communautaire*

EMOTA believes that the current *Acquis Communautaire* should be looked at when addressing some of the issues surrounding eCommerce in general or platforms in particular. Below are some examples.

| Issue | Legal framework/enforcement tools |
|-----------------------------|---|
| Personal data ownership/use | 1995 EU Data Protection Directive General Data Protection Regulation |

⁵ Art 29 WP Opinion 1/2010 on the concepts of "controller" and "processor"
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf



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|---|--|
| | Extensive guidance by Data Protection Authorities ⁶ |
| Pre-contractual information requirements (changes in the information provided to the consumer, terms and conditions or product imagery) | 2011 Consumer Rights Directive |
| Price obligations/restrictions or price parity | Competition law Case law ⁷ |
| Dynamic pricing, discrimination/differentiation | 2005 Unfair Commercial Practices Directive Guidance on the Unfair Commercial Practices Directive 2006 Misleading and Comparative Advertising Directive |
| Competition aspects (restrictions, unilateral decisions, etc.) conflicts between the marketplace dimension and seller dimension of the same company | Competition law Lack of regional and global cooperation on enforcement |
| Payments (security, charges) | 2007 Payments Services Directive 2015 Payments Services Directive II 2015 Multilateral interchange fees Regulation Various ECB/EBA/EPC rules and guidelines |
| Taxation | National VAT rules |

Conclusions

- EMOTA strongly believes online platforms are beneficial for the development of eCommerce, especially because they help reduce costs and give access to superior infrastructure solutions to online sellers.
- The vast majority of issues identified in the EU Commission consultation can be addressed via application of existing legislation and enforcement actions.
- As retail is becoming omni-channel (selling via multiple channels, online and offline), it is crucial for policy makers not to fragment the market by adopting retail channel specific policies. These will only increase costs and consumer confusion.

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⁶ Art 29 WP Opinion 1/2010 on the concepts of "controller" and "processor"
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf

⁷ <http://www.haerting.de/de/neuigkeit/amazon-announces-it-will-no-longer-enforce-its-price-parity-clause>