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**Working document:**

**INI Report Title: Towards a Digital Single Market Act  
on the European Commission Communication on „A Digital Single Market for  
Europe“**

**By S&D IMCO Rapporteur Evelyne Gebhardt**

**Introduction:**

The rapporteur welcomes the stated goal of the DSM strategy to unlock the growth and job creation potentials identified in the Cost of Non-Europe in the Single Market III Study. Undoubtedly, the digitalisation shift is providing the EU with an unprecedented opportunity to modernise its economy and societies by heading towards a further and genuine European integration and preserving its inclusive and competitive (social market economy) development model. And while the rapporteur shares the Commission's enthusiasm in many aspects she is simultaneously critical of the Commission's approach. The Commission is only focusing on a few areas and seems to ignore that the digital shift does not have an impact on consumers alone, but generates vast changes in industries, services and the society as a whole.

As rapporteur of the Committee on the Single Market and Consumer Protection, she will focus her report on related policy areas mainly revolving around consumers' non-discrimination and rights as well as the perpetuation, solidification and deepening of the EU single market. In Part 1 the rapporteur examines the proposed measures in order to remove barriers in the field of e-commerce (trade of goods and services through electronic transaction) within the EU single market. In Part II she discusses the two related policy areas of parcel delivery and different VAT regimes. Part III will concentrate on the aspect of cyber security while Part IV reflects upon the various aspects of the e-Government action plan. Part V offers a reflection upon two areas of rapidly digitised economies and societies which has not been dealt with within the Commission's strategy paper: Firstly the profitable but simultaneously disruptive nature of the sharing economy and the foreseeably dramatic shifts of business models, producers and consumers roles within the labour market. The new production models affecting the industry as well as the services sector, and role of employees in technology and robot-based production has not been reflected upon beyond the point of an ill-adapted resource with an urgent need to update its technological skills. Internal market policies have to make the preservation of the European social model as one

of the objectives of digitalisation, while mastering the challenges of a rapid shift towards a digitalised economy and society.

### **Part 1.1. Access For Consumers and Businesses – Differences between the physical and the digital sphere**

In its introduction to the Digital Single Market Strategy for Europe the European Commission recognizes a far greater fragmentation of the Single Market in the digital sphere than in the offline or physical sphere (“Fragmentation and barriers that do not exist in the physical Single Market are holding Europe back”). This understanding disregards the fact that the Single Market in its entirety is a long way off its completion. This becomes evident from an extensive and ever more nuanced case law on restrictions of the free movement of goods in recent years. For some, a neo-protectionist policy underlies these national measures. Indeed, a better protection of public interests through controlling the cross-border online trade might constitute a plausible alibi for reinforcing competitiveness of national firms. Such measures are all the more insidious on the account that they are likely to apply without distinction to both domestic and imported goods. Investment in digital infrastructures and support to the digitalisation of economy, society and public administrations would offer the opportunity to re-launch growth and competitiveness in a more even manner among the Member States and within the Single market. Thus new legislation policies and measures adopted by the EU legislators have to take into account that the Single Market and the Digital Single Market are inextricably linked.

#### **1.2. Cross-border e-commerce rules – a 29th regime?**

The Commission identifies the lack of a common set of rules for online cross-border sales as one of the major obstacles for SMEs and consumers to sell or buy online and across the EU. Further the Commission states that important aspects of online and offline sales law have already been either fully harmonised (such as information rights, the right to withdraw and limitation of unfair practices through the Consumer Rights Directive) or partially harmonised (such as law on limitations as well as of non- or irregular performance) through the Consumer Sales and Late Payment Directive, while online sales of digital content remains largely unregulated irrespective of EU or national legislation. Regarding the latter regulatory field it has to be taken into consideration that the online digital content market is continuously growing. Subsequently, the estimated amount of faulty or poor-quality goods also grows, causing considerable consumers' detriment. Until now, a consumer buying tangible digital content has access to a range of rights, while a consumer buying the same digital content delivered by electronic means doesn't. The situation becomes even more precarious for the consumer when digital content is provided solemnly in exchange of personal data.

With regard to tangible goods, the European Commission suggests that the most practical remedy against the reluctance of European traders and consumers to engage in cross-border trade is to afford supremacy to the law of the residence of the vendor while establishing a “common set of rules” entailing “the main rights and obligations of the parties of a sales contract” for cross-border online sales. Taking into account the already far reaching level of harmonisation of EU sales laws, this approach can only mean a gearing towards a harmonised online sales law within the EU. Your rapporteur believes that such a European Standard Contract for cross-border online sales could be an important step

towards a desirable full harmonisation of online sales law across the EU. In fact however online sales particularly of tangible goods and digital content will become fully harmonised which will make the area of ecommerce more apparent and accessible for consumers and SMEs. For those reasons the rapporteur suggests to take a transparent approach and fully harmonise online sales irrespective of domestic or international sales within the EU. For this purpose some of the proposed provisions in the originally proposed CESL can be utilised regarding the content of such provisions on both uniform background contract rules and stronger consumer protection. Also the proposed rules on the selling of digital content (such as music, videos, and software bought online in digital form), complementing the rules on digital content already included in the Consumer Rights Directive, appear to be sensible regulation attempts, particularly as these sales are “still surrounded by a considerable degree of legal diversity and uncertainty.” .

### **1.3. Consistent Application of existing European Secondary Law in order to avoid Discrimination**

The European Commission has made the prevention of unjustified geo-blocking (whereby users from outside a specified territory are prevented from accessing internet content) and further discrimination of consumers in cross-border scenarios its declared aim.

Your rapporteur welcomes the decisiveness with which the Commission has condemned the frequent discrimination of EU consumers, particularly from smaller Member States who encounter difficulties when ordering goods and/or digital content online. Very often, conclusion of contract is denied because of the place of residence of the consumer or the place of issuance of the respective credit card. Also, delivery restrictions only become apparent when web shops refuse to deliver goods and services at the very end of the ordering process. Despite the frequent occurrence of such discriminatory measures that divide the single market and hinder trade across national borders the case law of the ECJ is relatively insignificant. This might have to do with the fact that the Court does not treat infringements of the free movement of services (Article 56 *et seq.* TFEU) and parallel infringements of the free movement of goods (Article 28 *et seq.* TFEU) equally and does not afford horizontal direct affect to the latter. The result is that the refusal by a private entity to enter into contract cannot be regarded as a barrier to trade for the purpose of Art. 34 TFEU since it was not imposed by a Member State. In this context it has to be acknowledged though that the two concepts of trade in goods and delivery of services have become more and more complementary and inter-connected. This development has been accelerated by the internet and thus the supply of goods implies increasingly the provision of services, a phenomena commonly referred to as “servitisation of products”. For those reasons the European Commission has identified applicable secondary law as one way of ensuring free movement of goods and services unhampered by restrictions imposed by private actors.

The Commission announces action namely regarding the framework set out by Article 20 of the Services Directive. Your rapporteur welcomes these plans to further deepen the implementation of the Services Directive and stresses that under the Services Directive the concept of "service" is to be interpreted broadly and thus online retail services fall under the definition of "service" and the prohibition of discrimination is to be applied directly to private actors according to Article 20(2) of the Services Directive. She also points to the fact that Article 8(3) of the Consumer Rights Directive complements this prohibition of discriminatory behaviour against recipients of services by requiring that “(T)trading websites shall indicate clearly and legibly at the latest at the beginning of the ordering process whether any delivery

restrictions apply (...).“ The enforcement measures taken by the Commission should however not lead to an over-burdening of micro- and small businesses in this particular area. Thus, the Commission would do well by identifying and defining case groups of justified discrimination under Article 20 II of the Services Directive.

Your rapporteur further suggests that the announced action in this realm amounts to a Notice by the Commission which should aim at outlawing unjustified discriminatory behaviour by private entities which leads to an infringement of free movement laws. While Notices by the Commission have no binding effects they can be used as “ a useful point of reference” according to the ECJ ruling in case C-310/99, para. 52. This approach might even have the effect of convincing the ECJ to apply Treaty provisions equally to private law relationships.

#### **1.4. Reform and clarification of existing Competition Laws in order to avoid unjustified geo-blocking**

In parallel, the Commission has launched a Competition Sector Inquiry into the e-commerce sector in order to investigate, inter alia, whether geo-blocking restrictions infringe the rules of EU competition law (Articles 101 and 102 TFEU). Such restrictions are often enclosed in contractual and distribution agreements for online trade of tangible goods and also in the licensing of audiovisual and on-line content services. Commissioner Margrethe Vestager has indicated that the investigation will assess whether these practices constitute undue barriers to cross-border online shopping. Competition rules, such as the Block Exemption Regulation and the Guidelines on Vertical Restraints may need to be amended in this regard.

The rapporteur again welcomes the planned approach but also observes that the announced legislative changes remain unspecified by the Commission. She most importantly suggests that changes are being made to the newly (2010) introduced provisions into the Block Exemption Regulation, in the realm of Internet sales (Article 4a) and territorial restrictions (Article 4b). Although the territorial protection permitted under this regulation is limited to “active“ sales and restrictions on passive sales are never permitted, the respective guidelines on how “passive” sales can be defined leave too much room for interpretation and thus encourage territorial protection and thus violations of Articles 101 and 102 TFEU.

#### **1.5. Unfair lending practices**

It appears incomprehensible why the European Commission has not tackled an issue that threatens particularly young consumers and citizens in precarious social situations, hand in hand with a growing digitisation of all levels of public and private life: Loan offers via email, text message or mobile application pose an imminent and pressing danger to consumers despite the fact that European (financial) consumer law places a great emphasis on information requirements. Further, common rules or guidelines on limiting aggressive advertisement of such loans could be one way forward, as is already being done in some Member States. In addition the assessment of creditworthiness of consumers has to be stressed and become a compulsory requirement

#### **1.6. Enforcement**

The rapporteur explicitly welcomes the Commission’s commitment to swiftly implement the EU-wide online dispute resolution platform in order to solve problems between consumers and traders more quickly and to induce trust.

## **Part 2.1. Affordable high-quality parcel delivery across the EU- No Race to the Bottom!**

The European Commission states that ineffective and costly parcel delivery is a major obstacle to cross-border online e-commerce and proposes measures to improve price transparency and to enhance regulatory oversight. Your rapporteur welcomes this ambition and refers to the Parliament's resolution on the issue of a hugely fragmented market of parcel delivery (*on An integrated parcel delivery market for the growth of e-commerce in the EU, adopted in January 2014*) making some important recommendations in different aspects of the chain of delivery that need to be addressed in this new mandate in order to ensure that the current regulatory framework addresses the needs of the digital single market.

Despite her appreciation, the rapporteur also stresses that affordability and reliability should not be played off against each other and that the common unreliability of parcel delivery service is tightly related to precarious work conditions of deliverers and drivers. Comparative studies in several Member States show that large number of the drivers, who deliver and collect parcels and express deliveries, are either subcontractors themselves or work for subcontractors. Many parcel delivery services only employ self-employed deliverers and pay rates between 4 and 5 Euros per hour. In addition, as service contract workers they neither benefit from labour-law related standards nor from social security schemes. Situations of unfair competition and lack of a level playing field among economic operators causing damages to compliant business should be avoided. According to your rapporteur reliability cannot be achieved by standardization of prices on a low level within the EU which inevitably will affect reliability and ever more precarious work conditions.

## **2.2. Abolition of VAT related burdens**

Yet again, your rapporteur welcomes the proposed measure by the European Commission to limit fragmentation of the EU single market in this respect. A fair and sustainable taxation policy has to be established in the digital economy and needs to be aligned with tax rates for digital content and similar physical goods such as e-books.

## **Part 3 Cyber Security – an essential precondition of trust**

Your rapporteur particularly agrees with the Commission that a speedy adoption of the Directive on Network and Information Security is a vital first step to equip Europe to respond to the threat of cyber security. The so called "Cyber Security Directive" can potentially induce trust in digital solutions with European consumers and companies whose data and privacy are currently still not appropriately protected. In order for a true Digital Single Market to develop the EU needs to have a running strategy to protect critical digital infrastructures and platforms, the disruption of which would cause huge damages to the EU economies and societies. Your rapporteur supports all the efforts deployed by EP negotiating team with a view to finalise an agreement with the Council and calls on the Member State to show more ambition and to embrace a truly European solution on the cybersecurity strategy without which the EU DSM strategy would be based on shaky foundations. The Commission also seems to seek to reinforce "trust and security in the handling of personal data" by proposing a widening of the scope of the e-Privacy Directive in order to require not only telecommunication providers to notify their customers of security breaches i.e. when personal data is lost but also other online service providers like for instance Facebook. This

planned review appears given the huge amount of sensitive personal data, which is being processed through information society service providers daily, very appropriate.

#### **Part 4 E-Government**

Your rapporteur welcomes the European Commission's willingness to drive e-government tools in order to achieve a modernisation of public administrations, facilitate easier access for citizens and "cross-border interoperability". The digital shift is an opportunity to be seized by European public administration at all levels (from European to national, regional and local) with a view to modernise public administrations' organisation and functioning as well as public procurement procedures and public services provisions by improving efficiency, quality, transparency and universal access benefiting both citizens and economic operators. A well-functioning public administration is a necessary condition for the creation of a sustainable and competitive economy and society. Investing in the digitalisation of public administration with interoperable solutions represents a way to move towards better public spending, an opportunity to further integrate and connect territories, people and business at EU level as well as a way to foster innovation and participation. Public administration can also take economic advantage from digitalisation in relation to big data and re-use the public sectors information and data. At the same time, all e-government technology systems must intend to move control over decisions closer to citizens, thus increasing service access and transparency. Furthermore, the rapporteur insists on the urgent need for the interpretation and application of legislative texts to remain in the hands of the respective competent civil servants. Constitutionally sensitive administrative law should not be applied by algorithms. The principle of the rule of law has to be upheld against a general streamlining of public administration.

Further, the digitalisation of public administration also means a shift of citizens' data to be stored and handled more and more online. Efficient data protection is a fundamental right, guaranteed by Article 16 TFEU together with Article 8 of the Charter of Fundamental Rights and is inseparable from Article 7 of the Charter; the right to respect for private life. This should be the underlying principle of all digitalisation of public administration.

In turn, the author appreciates the Commission's awareness of the slow and so far inadequate transposition of the Public Procurement and Concession Directives. Particular focus should lie on the implementation of the e-procurement provisions as well as the European Procurement Single Document (PP passport) in order to facilitate EU market access for all economic operators, notably the SMEs, in compliance with all the new selection, exclusion and awarding criteria. The shift towards consistent e-procurement through the EU will bring about financial gains, efficiency, greater transparency and wider access, benefiting contracting authorities, economic operators and citizens. The progress towards e-procurement practices such as dynamic purchasing platforms and auctions, would allow for important economies of scale.

In addition, the rapporteur supports the use of high-quality e-health tools as a supplement for traditional informed consent practices, though it should also be acknowledged that e-health cannot replace traditional patient to doctor care. It also appears sensible to foster the EU-wide use of e-health technologies in order to replace a small range of traditional medical interactions, mainly of preparatory or information character.

Further, the proposal of a comprehensive digital gateway or Single Points of Contact Gateway appears to be a very suitable idea in order to facilitate cross-border trade. This tool could become particularly useful for start-ups and businesses entering or adapting to the digital single market. This gateway would have to supply information about EU and national consumer protection rules, VAT regimes, administrative cross-border requirements, product testing, information and labelling requirements.

### **Part 5 Platform Neutrality**

Your rapporteur also whole-heartedly welcomes the Commission's efforts to impose sanctions and prevent abuse as well as further establishment of dominant market positions by web platforms to the detriment of other stakeholders and subsequently consumers. The rapporteur calls upon the Commission to conduct an in-depth assessment of the practices applied by web platforms in the past and the present in order to establish a clear understanding of which strategy has to be applied in order to prevent further anti-competitive acts (e.g. manipulating search results) and to safeguard opportunities for competitors and thus enabling consumer to benefit from a wider range of products and services.

### **Part 6 Platforms Facilitators of a Post-Employment Society**

The European Commission acknowledges the economic potential of platforms and the fact that legislative fragmentation has hindered the emergence of European companies such as Uber, Lyft, Airbnb or Mechanical Turk. Yet, the Commission has neglected to offer any assessment of those phenomena in its Digital Single Market Strategy for Europe but has postponed this until the publication of its Internal Market Strategy later this year.

This approach appears to be symptomatic for the whole strategy. The Commission has stooped to picking out more or less isolated policy areas and suggested remedies for the reconciliation of an offline and online market place in Europe without examining the totality of circumstances and the structural changes that are already underway. This applies especially to the social impacts of digitalisation on companies and labour in general. It is essential to assess and to establish tools to anticipate and manage digital change at EU level. In the rapporteurs view, this should inter alia include broad consultation, information and participation of those concerned.

The rapporteur also suggests the establishment of a permanent European Forum on digitalization, which would provide a platform for the European Commission, the European Parliament, Member States and social partners to consult, discuss and develop a digital vision for Europe. A roadmap could be developed on how to shape the future digital Europe, how to design industry 4.0, workplaces 4.0 and smart digital services.

#### **6.1. The digital Market Place/ Sharing Economy**

One area which has not been touched upon by the European Commission is the unrelenting growth of the sharing economy and peer-to-peer business models. The rise of the internet has opened up room for experimentation which allows entrepreneurs to assess and

commercialize projects on a small scale and thus minimize the risk of failing. Various different forms of sharing economy models have risen and it should be acknowledged that there is no one fits all solution. Thus the Rapporteur suggests that a sectoral approach should be applied, based on the company's concrete business model, not on how the respective company identifies itself..

Some forms of the sharing economy are premised on access to rather than ownership of resources and many platform developers have utilised these new market places, such as Rhapsody or Spotify who developed subscription services. Different from tech companies though "peer-to-peer" or "on-demand" business models have in some respects outgrown their original format and pose risks to consumers, employees and the public alike.

By adapting current laws and regulations to new industries with a regulatory body will leave consumers and industries alike better protected in a rapidly changing society. At the same time companies evolving from the sharing economy can become a key component in our societies' efforts to rebuild resilient economies. Cashless transactions may help to combat tax evasion and undeclared work, sharing commodities also proves to be environmentally beneficial. Further, the flexible nature of some forms of the sharing economy concerning working hours, but also the de-localisation of work can have a positive impact on factors such as work-life balance and family life, or rural and remote areas. At the same time, this flexibility also bears the risk of over burdening and precariousness.

Nevertheless some businesses of the so called "sharing economy" provide rather traditional services like transportation or delivery services. The difference lies in the question whether an employer/employee relationship exists and manifests itself in a business model through which companies pay people who supply the equipment and manpower that drive their businesses like independent contractors, while burdening them with the work expectations of employees. The overall problem reveals itself if one looks closer at examples like for instance Uber, a company built on drivers who work according to shift plans and guidelines like employees, unable to reject trip requests but who are counted as freelancers for income tax, social security and insurance purposes. In the U.S. the California Labor Commission has recently ruled that one of Uber's drivers has to be classified as an employee, not an independent freelancer. While this ruling is not enforceable yet and has been appealed by Uber, the example sends out a powerful message to legislators in the EU to regulate this market in such a way that exploitive business models shall be prevented and not only abolished retroactively.

## **6.2. Crowdwork- Digital Bourgeoisie or Proletariat?**

Your rapporteur specifically points out the phenomena of crowdsourcing and crowd-work as these aspects of the sharing economy have the potential to significantly alter the world of labour as we know it, where paid employment with social security entitlements is still the norm.

Crowdsourcing is generally dominated by online platforms through which individuals and companies can post task they would like to "outsource" to independent contractors that are willing and able to do these. The price for the task is set by the requester (sometimes as low as 1 ct per task) simultaneously the platform chooses the task out of a pool of bidders on the task. Some of the best known platforms in this field are MechanicalTurk, oDesk and in the European Union Clickworker as well as TaskRabbit. In comparison to traditional forms of employment, workers are entirely exchangeable at any given moment and as independent

contractors they are usually paid under the respective minimum wage, have no social security entitlements and no means to influence their own working condition.

This phenomena also no longer only affects low-skilled workers. Crowdwork has been perceived, especially within the IT business as a means to foster more flexible working conditions with improved work-life-balance levels but the phenomena has reached a scale and sophistication which enables outsourcing companies to replace skilled employees through low-skilled “crowd-workers” by breaking up work steps into small manageable processes in areas ranging from product design, image and text editing to translation. Performance of crowd-workers is appraised by measuring speed and accuracy which suggests working conditions of piece workers.

Recent data suggests that this form of digital outsourcing is utilised by large multinational corporation like IBM and the automotive industry as well as SMEs. In 2013, 500.000 independent contractors from approximately 190 countries were registered with MechanicalTurk, while the German -based platform Click-worker offered during the same time service contracts to up to 600.000 workers, 2/3rds of them based in the European Union.

The increasing number of these precarious working conditions, the progressing trend towards self-employment as dominant form of occupation combined with the cross border nature of this development forces policy makers on the national but equally on the level of the European Union to envisage structural changes to market regulations and labour laws. Labour Unions in the Member States have already developed ideas like an “employment insurance” for the growing number of self-employed and freelancers in order to provide appropriate social safeguards and as a preventive measure against widely distributed poverty in old age. While the European legislator might lack competence to become active in those areas, the EU can nevertheless encourage and facilitate coordination between the Member States in order to ease the foreseeable wide-scale changes with in the European labour market.

In conclusion, the rapporteur would like to reiterate that her attention within the working document has been focused on internal market and consumer protection issues respectively topics closely related to those. For this very reason, many aspects mentioned in the Digital Single Market Strategy for Europe, like for instance the reform of copyright laws, digital skills, the neutrality and data protection as well as many proposals in the area of industrial policies have not been forgotten or bypassed but simply left to the attendance of the respective committees.