

Enhancing consumer trust in digital services – Cosmetics Europe contribution to enabling access to safe and entrusted cosmetics products in the Digital Age

Cosmetics Europe represents the cosmetics and personal care sector in Europe. The vast majority of Europe's 500 million consumers use cosmetic and personal care products every day. Ranging from dermo-cosmetics, fragrances, make-up and shampoos, to soaps, sunscreens and toothpastes, these products play essential roles at all stages of life and have important functional and emotional benefits. The European cosmetics and personal care market is the largest in the world, with a value of €79.84¹ billion (retail sales) in 2019.²

Cosmetics Europe welcomes the opportunity to engage with the European Commission (the "Commission") on the Digital Services Act ("DSA") and wishes to contribute actively to the process, with the aim that consumers can safely buy their cosmetics products from the internet and obtain reliable product related information digitally, based on a solid regulatory framework and efficient enforcement mechanisms.

Digital is key to serve the consumer in an omni-channel distribution environment

Digital services opportunities for consumers and companies

Online sales of cosmetic products have grown significantly in the last ten years and are expected to keep growing further. The increasing on-line sales trend was further strengthened during the COVID-19 crisis where city centers and physical stores were closed down and the consumers turned to on-line sales for their purchases. Cosmetic and personal care companies consider e-commerce as a core part of their commercial strategy to ensure, across all distribution channels, the most consistent purchasing journey for consumers. Internet sales offer additional services to consumers such as the possibility to choose products at home 24/7 and home delivery, and expanded possibility to compare prices and get access to information on the products and related advice and services via digital means. Internet has changed the way industry communicates and interacts with the consumers, who expect access to safe products and the related product information, advice and services, equivalent to what they would get in-store. Cosmetics companies sell their products on their own websites, or through the retailers' digital stores and rely on social media to connect with their consumers. Digital mobile applications make it possible for cosmetics companies to provide technical information in-store to the consumers on the products they are buying and empower them to make a personalized and informed product choice.

1 Economic Contribution of the Cosmetic and personal care Industry in Europe 2019

2 Within Europe, the largest national markets for cosmetics and personal care products by retail sales are Germany (€ 14.046billion), France (€11.429 billion), the UK (€10.527billion), Italy (€ 10.537billion) and Spain (€ 7.134billion). For a complete overview of the Cosmetics and personal care sector in Europe's economic contribution, please refer our website www.cosmeticseurope.eu

Digital challenges to be addressed by the new DSA

Some of the above-mentioned opportunities have equally become challenges. There are aspects to the development of digital, that may negatively impact how the consumers perceive the products and access them on the internet. The anonymity and impunity in the online space has facilitated the development of non-compliant/illegal and counterfeit goods, which has become a major concern for cosmetic companies and market surveillance authorities. Also, the new digital actors such as the platforms, social media and digital mobile applications that emerged as the “intermediary” between companies and their customers have become so important that they are unavoidable: consumers rely on them to get access to the full array of product categories (like in a shopping-mall) and product information and cosmetics companies depend on them to be visible online.

In our view, the current legislative framework (including the e-commerce directive) is therefore no longer fit for purpose: the digital environment and the actors have changed, and the interaction with other sectoral or horizontal legislations (for example the Cosmetic Products Regulation³ (CPR) or the General Product Safety Directive⁴ (GPSD)) as to the responsibilities of the digital players in the supply chain, with regards to the safety of the product, is unclear.

The DSA is an opportunity to create a safe and sustainable digital environment where the European consumers can trust that the products purchased on the internet are safe and compliant with European legislations and create a gold standard for consumer protection and consumer information, for the rest of the world.

Below, Cosmetics Europe outlines its recommendations on what areas should be enhanced in the new DSA to guarantee to all consumers buying on-line access to products that are safe, that consumers are well-informed on the cosmetics products purchased and that they can benefit from a high standard of quality and services on-line.

Ensuring access to safe and authentic cosmetics products on-line

Challenges

The rapid expansion of digital services has also created opportunities for badly intentioned players to bring non-compliant or counterfeit products to the on-line market, profiting from the difficulties for authorities and brands to successfully scan the overall digital world to ensure such products do not reach the end-consumers. The limited responsibility and accountability of online intermediaries add to the difficulties in ensuring products sold via internet channels are safe for consumers. This phenomenon is currently emphasized by actors such as drop shippers which act as opaque sellers’ intermediaries for the sale and delivery of illegal goods on platforms. Non-compliant and/or counterfeit products put consumers’ health at risk and the consumers cannot today always trust that products that they are buying via the internet are safe or correspond to the original brand they intend to buy.

³ Regulation (EC) No 1223/2009 of 30 November 2009 on cosmetic products

⁴ Directive 2001/95/EC of 3 December 2001 on general product safety

Recommendations

Cosmetics Europe recommends several measures to ensure consumers can access safe products on-line, whatever the identity of the intermediary or on-line retailer. The DSA should:

- Create an obligation for all on-line actors that target the European consumers to comply with the European rules. The DSA should clearly state that it applies to all service providers targeting European consumers, regardless of whether they are established within or outside the European Union. Online intermediaries should have the obligation to check with suppliers from outside the EU targeting European consumers whether they have set up a branch in the EU or have appointed a person responsible in the EU, in accordance with applicable legislations. In absence of such verification, it is the platform that remains liable for any damages caused by the product.
- Require complete transparency on the role of any on-line intermediary in all exchanges, to identify the intermediary's role in the supply chain. Indeed, the platforms and more particularly online marketplaces may have different roles stretching from only providing a platform for the exchange of services, to taking complete ownership of a product for further reselling to the end-consumer. To that end, it remains crucial that enforcement authorities can identify any situation which may trigger a specific responsibility for the platform, arising from sector legislations or horizontal legislations such as the CPR or GPSD⁵. For example, the Cosmetic Product Regulation provides for strong responsibilities of the actors in the supply chain, imposing obligations on the manufacturers, importers and the distributors of cosmetics products⁶. Coherence of the DSA with other legislative frameworks guaranteeing the security of consumer products is essential to building trust in on-line services.
- Create an obligation for the on-line intermediaries to clearly identify and verify all sellers on the platform, (again regardless of where they are established) so that the consumer understands exactly who the seller is and where the product comes from. As a comparison, it is difficult to imagine a shopping mall where the physical shops would not be identifiable by their proper branding. In addition, the DSA should create a threshold to prevent professional businesses from posing as private individuals.
- Ensure transparency for the consumers as to the nature of the product sold and ban behaviours designed to deceive consumers and facilitate the sale of illegal goods, such as the use of blurred logos, pictures with the trade mark elements concealed (presenting products from certain angles) or photos or product identification details without authorization from the right owners or the authorized retailers.
- Further reinforce the duty of care for online intermediaries. The DSA offers an opportunity to think about the most suitable ways to involve all actors in confronting threats to the public interest. Every actor shall have the responsibility to take adequate and reasonable proactive measures to ensure that its operations do not cause harm to others. Any

⁵ Regulation (EC) No 1223/2009 of 30 November 2009 on cosmetic products: Directive 2001/95/EC of 3 December 2001 on general product safety

⁶ According to the CPR, these actors are considered as Responsible Persons. For each cosmetic product placed on the market, the responsible person which shall be located in the EU, shall ensure compliance with the relevant obligations set out in the CPR.

exemption of liability can no longer be granted by default but must be earned. By enhancing the duty of care for platforms, they participate to building trust online and to creating a safer and more dynamic digital environment for both consumers and businesses. In particular, intermediaries should be bound, as a pre-condition for preserving their limited liability, by compulsory “duty of care” obligations to use their best efforts to prevent the occurrence of all illegal goods, either before they are made available online or, if already online, before they are being reported (proactive measures).

- Create one single standard notification process for all intermediaries and a rule for the faster removal of illegal products notified, along with a trusted flagger system that would spare right holders the need to enter similar information every time they notify illegal products. An appeal procedure should also be provided for, in particular to detail the documents that a seller appealing a product removal decision would have to provide for his appeal to be considered.
- Create an obligation for online intermediaries to inform consumers who have bought a product which has been taken down following a notification from a right holder or enforcement authority. If illegal products fail from being detected proactively, there is an urgent need to inform consumers who have bought a product between the moment it has been uploaded on a website and the moment it has been taken down. This would allow consumers to exercise their rights and protect themselves from the dangers associated with the use of a potentially unsafe product.
- Impose on intermediaries an obligation to use their best efforts to prevent the reappearance of illegal products that have already been taken down (“staydown”).

The introduction of the above principles in the DSA would give consumers greater confidence about the safety and authenticity of the goods they are purchasing and would create tools for the enforcement authorities to identify the responsible suppliers on-line. Over time consumers will develop the same trust shopping online, as they have shopping on the high street.

Ensuring consumer access to qualitative cosmetics product and the services connected with the cosmetics products on-line

In today’s omni-channel retail market, whether purchasing products off or on-line, consumers are researching a seamless purchase experience that enables them to access the qualitative cosmetics products they want, at any moment, together with the associated services and advice. The consumers want to recognize a brand and the values that come with it and cosmetics companies therefore invest heavily to preserve the value and the reputation of their brands as well as to ensure that customers receive an appropriate level of services both off-line and on-line. Many cosmetic brands sell via selective distribution, which enables them to sell their products through a network of authorized retailers to ensure their products are sold in the appropriate sales environment where the consumer can meet and experience the brand and its associated services. The selective retailers may sell their products on-line in accordance with a set of pre-defined criteria.

Challenges

The rise of digital platforms has resulted in an increase of free-riding occurrences with brands today facing recurring violations of selective distribution rules by unauthorised retailers who sell their products illegally, benefiting from EU-wide large scale visibility on online platforms such as online marketplaces or price comparison tools. Selective distribution is recognised as pro-competitive and beneficial for consumers and, as a consequence, brand owners operating selective distribution systems must be in capacity to enforce and protect at EEA level and in every Member State the reputation and integrity of their distribution network as well as the investment and efforts made by any authorized retailer against any non-authorized resellers and platforms selling or offering for sale, directly or indirectly, the contractual products without authorization.

Grey market on online platforms is also deeply connected to consumer welfare. As already mentioned above, cosmetics products are highly regulated and necessitate a level of traceability and security which is not provided in case platforms cannot appropriately care for this in the supply chain. As an illustration, in the absence of an obligation for the on-line intermediaries to clearly identify and verify all sellers on the platform, a consumer acquiring a defective product on a platform may not be able to reach the seller to enforce its consumer rights.

Recommendations

In 2017, the Court of Justice of the European Union reaffirmed the relevance of selective distribution for luxury products (*Coty Germany GmbH v Parfümerie Akzente GmbH*, Case C-230/16). In line with the findings of this decision, it is paramount that brand owners and their authorized retailers can benefit from a harmonized possibility to act against any sales by unauthorized sellers, notably through digital platforms. Brand owners should be granted with legal tools to enforce their distribution networks and retain a same level of private enforcement means throughout the whole EU and in every Member State. On top, or alternatively to the upcoming Vertical Block Exemption Regulation⁷ (currently under review by the European Commission), the DSA could carry that principle, for further implementation into the national legislations. For that purpose, as an example, a private enforcement mechanism exists in the French commercial code⁸, whereby any entity involved in the violation by an authorized retailer or an unauthorized retailer of a prohibition to resell the products outside the network on grounds of third-party complicity can be held liable.

Such principle would reinforce the responsibility of online platforms and could provide for an obligation to take all required measures in case a brand owner identifies an act of commercialization of products under its brand in a way that is likely to infringe EU or national legal provisions. It would enable brand owners to earn the trust of the consumers, and for consumers to get access to the branded products they are looking for, with the associated quality services and advice provided by authorized on-line retailers.

⁷ Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices

⁸ Article L 422-2 French Commercial Code

Ensuring access through digital services to accurate product information

Ensuring that consumers can make an informed choice, ahead of any purchase off- or on-line, is essential to build consumer trust and enable consumer empowerment. Digital provision of product-related information has the potential to communicate more efficiently and in a personalized way information to consumers. Cosmetics companies set up websites to communicate on their individual products and use social media to reach out and explain and inform on their products, in parallel with more classical means of advertising. Various digital tools are today available whereby consumers can access information as a complement to off-pack ingredient labelling or claims. The consumer may wish to get information on a specific cosmetic ingredient to prevent any risk of allergies, or on the product, to make a specific choice in terms of health, sustainability, or environment.

A digital tool that is increasingly used to get information on cosmetic products are mobile digital applications (“apps” to be downloaded from the App or Google stores on a smart phone). The mobile applications provide easy and fast information to consumers whilst shopping, through scanning the product in-store. Such mobile applications can be provided by the industry (see for example the application called Cosmile⁹, a multi-stakeholder initiative supported by consumer organisations and federal authorities) or by third parties. Cosmetics companies are today concerned with certain digital applications developing on the European market that interfere with consumer choice since they give misleading information based on weak or non-existent scientific and toxicological assessments. These Apps are often operated by third party providers. Although these services typically do not sell the products, they scan, annotate and rank products, sometimes even presenting what the app developers perceive as “better” alternatives to the scanned product(s), thereby dividing the market into that of “safe” and “un-safe” products based on criteria developed by the app companies, and not based on sound regulatory principles.

Recommendations

Cosmetics Europe welcomes an approach by the European Commission to explore new ways to give consumers better information, including by digital means. It is however essential to ensure that consumer information delivered through digital services, including digital applications, abide by harmonised principles such as accuracy, transparency, reliability (including from a science perspective) and fairness, to better empower and build trust among consumers and businesses. Digital services providers operating Apps for the sole purpose of informing consumers should be subject to the obligation of substantiating their claims, as are manufacturers and distributors. For example, when rating a cosmetic product based on the presence/absence of an ingredient evaluated by the Scientific Committee (SCCS) and approved for use under the Cosmetics Regulation, such digital services providers should accurately inform the consumer about the ingredient’s regulatory status. These principles should be clearly stated under the DSA for all product information provided to consumers, through any digital means. Such principles may also need to be implemented into other legislations, such as the UCPD¹⁰, to ensure a harmonized approach within the overall legislative framework pertaining to consumer rights.

⁹ <https://cosmile.app/en/home-2/>

¹⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market