**Transposing the Omnibus Directive: The importance of harmonization**

Amazon appreciates the opportunity to input into the Dutch government's consultation on the transposition of the Omnibus Directive. Amazon established its first Dutch presence in 2014 with the introduction of a Kindle Shop on amazon.nl, followed by AWS services and Dutch localizations of the German retail store amazon.de. Last year, Amazon launched a fully local retail store with millions of product offers from Amazon and third party sellers on amazon.nl. As a customer centric company, we are fully committed to providing the best customer experience to our Dutch consumers.

We appreciate the Netherland's active role in the European debate with regards to consumer safety and the aim to create a level playing field between online and offline retail for consumers, which we share. Over the course of 2020, we already had constructive dialogues on consumer rights legislation with the Ministry of Economic Affairs, NVWA and the Authority for Consumers and Markets. We are also an active Thuiswinkel.org member and are committed to keep on working with Dutch governments and sector organizations on matters related to consumer safety.

We fully support the intention of improving consumer rights and the Commission's initiative of organising workshops and issuing transposition guidelines for a harmonised implementation of the Omnibus Directive[1]. We believe that **reaching the highest level of harmonisation** within the Internal Market is of utmost importance for its good functioning and coherent consumer protection. It is of utmost importance to avoid discrepancies in order for consumers and businesses of all sizes to have legal certainty and consistency, so as to fully utilize the benefits of the Internal Market, especially in cross-border cases. In this regard, we want to bring several points to the attention of the legislators prior to the transposition of the Directive. We believe that the following points, while positive in nature, have a real potential for creating undesired and unnecessary regulatory barriers for cross-border transactions. If not transposed in a coordinated manner within the different Member States, we believe that these elements will create uncertainties, duplicate compliance costs and create an unlevelled playing field. This could ultimately result in a distortion of the good functioning of the Internal Market and in unfair competition, to the advantage of sellers established in Member States that opted for a less stringent transposition. We therefore encourage the Commission and the Member States to address the below identified points during the implementation workshops in order to find a common approach within the different national jurisdictions. In summary, we recommend:

1. **Maximum penalty:** Legislators should aim at harmonizing the maximum penalty at 4% of the seller's/supplier's/trader's annual turnover and at EUR 2 million when turnover figures are not available. Member States should furthermore aim to minimize changes to existing ceilings for maximum penalties stemming from the Price Indication Directive.
2. **Prior price: :** Legislators should harmonize the calculation period to 30 days or allow merchants to select the time period and ensure that prices offered by promotional events during this period are not taken into account for determining the "prior price". Member States should furthermore allow price comparisons and establish a clear distinction between price reduction announcements and other forms of price advantages. Finally, legislators should implement the flexible rules foreseen in the Directive for perishable good, newly launched products and progressive price reductions and avoid transposing rules that go beyond the requirements laid down in the Omnibus Directive.
3. **Ranking and Search results:** Legislators should harmonize disclosure requirements with those provided for in the P2B Regulation.
4. **Customer reviews:** To ensure harmonization, legislators should not include any additional requirements in relation to customer reviews when implementing the directive.
5. **Pre-contractual information:** Legislators should aim at providing guidance relating to the types of information subject to this requirement in the form of a non-exhaustive, indicative list of examples rather than an exhaustive, binding list, so that the type of information provided to the consumer can be adapted to each product line/category.
6. **Consumer redress:** Legislators should restrict remedies to those mentioned in the Omnibus Directive.

[1] https://eur-lex.europa.eu/eli/dir/2019/2161/oj.

**1) Maximum Penalty**

The Omnibus Directive stipulates that maximum penalties stemming from the Unfair Contract Terms Directive[2] (UCTD), Unfair Commercial Practices Directive[3] (UCPD) and the Consumer Rights Directive[4] (CRD) should be set at least at 4% of the seller's/supplier's/trader's annual turnover. If annual turnover figures are not available, the Omnibus Directive requires the maximum penalty to be set at least at EUR 2 million. Member States can thus set higher maximum penalties than those provided for and decide whether the penalty is calculated from the turnover of the previous year before the infringement or before the infringement decision. We strongly believe that it is in the best interest of consumers and businesses alike to have **the highest level of harmonisation** between Member States **and avoid discrepancies between maximum penalties issued by national authorities**. As for fines stemming from the Price Indication Directive[5] (PID), the Omnibus Directive sets no minimum amount for the maximum penalty. This may again cause significant discrepancies between Member States. We therefore ask Member States to consider harmonizing **maximum penalties at 4% of the seller's/supplier's/trader's annual turnover and at EUR 2 million when turnover figures are not available.** With regard the penalties under the PID, we encourage Member States to minimize changes to the existing ceilings for maximum penalties. Maximizing harmonization and limiting changes to existing ceilings will create legal certainty throughout the Union and facilitate cross border trade in order for businesses and consumers to fully enjoy the benefits of the Union's Single Market.

**2) Prior Price**

The Omnibus Directive defines "prior price" as "the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction"[6]. Such a wording allows individual Member States to extend the period taken into account for determining the "prior price" beyond 30 days. This would create significant discrepancies between national jurisdictions. We believe that the calculation period of the 'prior price' should be harmonised as much as possible to 30 days throughout the Union or allow merchants to define the lookback period considering their specific circumstances. Unilaterally extending this period would negatively affect cross-border transactions and create unnecessary disadvantages for local traders that compete with traders based in other Member States with a shorter calculation period. We believe that this would once more go against the aim of completing the Single Market and create an unlevelled playing field for traders aiming at utilizing the Single Market to its fullest by engaging in cross-border sales.

Regarding the **scope** of the 'prior price' indication requirements, the Omnibus Directive requires traders to indicate the "prior price" in price reduction announcements. However, it does not provide any details as to what constitutes an announcement of price reduction. We believe that Member States should establish a clear distinction between price reduction announcements and price comparisons. Price comparisons (e.g. strikethrough prices referencing "the recommended retail price" or other third party reference prices); are not subject to the new "prior price" indication requirement, as confirmed by the EU Commission in its Workshop held last February. The EU Commission also clarified that the obligation does not apply to *conditional promotions* (e.g. Buy X and Get Y Free, bounce-back coupons); *individual or customer-specific benefits* (e.g. Prime subscription); and *generic commercial claims such as "SPECIAL PRICE/OFFER" without any specific discount claim*

[2] Council Directive 93/13/EEC.
[3] Directive 2005/29/EC of the European Parliament and of the Council.
[4] Directive 2011/83/EU of the European Parliament and of the Council.
[5] Directive 98/6/EC of the European Parliament and of the Council.
[6] The Directive provides *1. Any announcement of a price reduction shall indicate the prior price applied by the trader for a determined period of time prior to the application of the price reduction.2. The prior price means the lowest price applied by the trader during a period of time not shorter than 30 days prior to the application of the price reduction.3. Member States may provide for different rules for goods which are liable to deteriorate or expire rapidly.4. Where the product has been on the market for less than 30 days, Member States may also provide for a shorter period of time than the period specified in paragraph 2.5. Member States may provide that, when the price reduction is progressively increased, the prior price is the price without the price reduction before the first application of the price reduction."*

*made by the trader*. We think it should also not apply to blanket announcements of –[X]% off in a selection of products as it would be very difficult to communicate clearly to customers what the lowest price is for each specific product included in the selection.

We encourage Members States to make use of the possibilities granted by the Directive to provide for **more flexible rules for some products**. Specifically, goods that are able to deteriorate rapidly and products launched less than 30 days ago they should enjoy full exemption to indicate the prior price or allow retailers to use as "prior price" the last price immediately before the price reduction.

It is also key to implement into national laws the possibility for traders to freeze the lowest price before the first application of the price reduction in progressive price reductions. Furthermore, we believe that **promotional prices should always be excluded from the calculation of the lowest price in the last 30 days**. This is crucial to avoid the potential negative effects of this Directive, which could unduly limit the trader´s ability to make more than one price reduction in periods of 30 days. In fact, it is common practice for traders to run several promotional events within 30 days, especially towards the end of year (Black Friday, Christmas, Winter sales etc.). In these cases, requiring traders to display the lowest reduced price practiced in a previous discount event will be very challenging, as it will require that traders beat their lowest price in the last 30 days to show an attractive selling price (even if the Directive does not require minimum discounts). In addition, during the last months of the year, it is important for brands and traders to get rid of overstock, so time-limited discounts are an effective way to solve the problem while offering customers the opportunity to buy goods at discounted prices. Therefore, unless "prior price" exclude prices applied in previous promotional events, traders will have no incentive to offer discounts and will have to assume important financial risks deriving from overstock. Although, this is not what the law intended it can be a negative side effect that ultimately harms customers, who will not be able to enjoy lower prices or identify a discounted price if retailers are unable to communicate price reductions. Due to challenges that the lack of clarity of the Directive raises, it would be helpful to establish an **extended period ("vacatio legis") for national laws to come into effect** after its promulgation.

**3) Ranking and Search Results**

The Omnibus Directive requires marketplaces to mention the main parameters determining the ranking of products and the relative importance of these parameters as opposed to other parameters. However, the Omnibus Directive does not clarify to what extent such information should be disclosed to the public. Hence, it is difficult for marketplaces to pitch their disclosure at the right level. In the interest of legal certainty and facilitating compliance, we believe that the disclosure requirements set forth in the Omnibus Directive should reciprocate those provided for in the P2B Regulation, so that marketplaces can meet requirements stemming from both legal acts through a single process, thus also reducing compliance costs. Furthermore, the Omnibus Directive considers "providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results" as an unfair commercial practice in all circumstances. However, the Omnibus Directive does not detail the way in which these paid ads should be distinguished from other product listings on the search result page. We therefore encourage Member States to ensure that local rules use the same method across the Union to determine whether a paid ad is sufficiently disclosed or not on a given search result page. We, for example, believe that a moderately-sized tag adjacent to a product listing, using a term equivalent to "paid advertisement" (i.e. Sponsored), with a brief statement and a link to a more detailed information page appearing upon mouse hover should be considered adequate under the new requirements.

**4) Customer reviews**

The Omnibus Directive requires traders to provide consumers with information about whether and if so how it is ensured that published reviews originate from consumers that have actually used or purchased the product. We believe that disclosing whether such processes are in place and the general principles of how the trader carries out such checks would be sufficient to meet this requirement and improve consumer trust. To the extent that Member States are entitled to include additional requirements in their national laws in relation to the customer review requirements specified in the directive, we believe that they should not do so in order to ensure

that the requirements are consistent and therefore straightforward for traders throughout the Union to comply with.

**5) Pre-contractual Information**

The Omnibus Directive requires, *inter alia*, that traders provide the consumer with information about the product's functionality, compatibility and interoperability before he/she is bound by a contract. However, the Directive does not provide clues as to what extent traders should provide such information to consumers. In particular, it is not clear what kind of information relating to the compatibility and interoperability of goods with digital elements/content/services is expected to be known or held by the trader. We believe that Member States should aim at providing guidance relating to the types of information subject to this requirement in the form of a non-exhaustive, indicative list of examples rather than an exhaustive, binding list, so that the type of information provided to the consumer can be adapted to each product line/category. Furthermore, manufacturers are the best placed to be considered responsible for providing this information to traders (non-manufacturer). The trader's responsibility (non-manufacturer) should be limited to providing the manufacturer's information to consumers.

**6) Consumer redress**

The Omnibus Directive provides for the following remedies: compensation for damages suffered; price reduction; and termination of contract. However, the Omnibus Directive does not lead to full harmonization since Member States are free to go beyond the three remedies proposed above. We believe that Member States should aim at restricting consumer redress to the three remedies mentioned in the Omnibus Directive. This should provide a uniform, transparent and easily understandable legal framework for both consumers and traders.