June, 2020

Contributions to the public consultation on the White Paper on Artificial Intelligence - A European Approach

About EuroCommerce

EuroCommerce is the voice of over 5 million retail, wholesale, and other trading companies. Our members include 32 national federations from all EU Member States and European countries outside the EU, 36 leading European retail and wholesale companies, and federations representing specific retail and wholesale sectors. Our members are the link between producers and consumers billions of times every day.

Key recommendations

Artificial Intelligence (AI) **can offer significant benefits not just to businesses, but also to consumers and society.** Many retailers and wholesalers use and develop Artificial Intelligence applications in their operations. In most cases, AI applications used by retailers and wholesalers carry no direct impact or risks for individuals but improve shopping experiences and internal efficiencies.

EuroCommerce welcomes the opportunity to provide input to the ongoing consultation on the White paper on AI. To secure a future-proof framework that will support an innovative and competitive retail and wholesale sector, EuroCommerce believes that:

- **Having a positive narrative towards AI technologies is a prerequisite to unlock Europe's tech sovereignty.**

- **The future European framework for AI should rely on a simple, narrow, clear, and harmonised definition of 'Artificial Intelligence'.**

- **Better enforcement of already existing Regulations can provide safeguards to AI applications.**

- **The future European framework for AI should be technology-neutral** and focus on achieving desirable outcomes rather than regulating tools, as it is already the case with existing legislation such as the General Data Protection Regulation.

- **We support that the sector-specific approach taken in the AI White Paper acknowledging that a 'one size fits all' approach is not appropriate for AI**, as one AI application used in a given sector can have a different level of risk in another.

- **High-risk AI applications should be defined and overseen in a way that provides legal certainty and is future-proof.**

- **Investing in skills, digital education and research should be a priority of the European Union.** We strongly encourage the European Commission to support investment in various digital skills and in cooperation with education providers to secure digital literacy across the EU, so that everyone can flourish in an AI-powered future.

- **The future EU framework for AI should support the digital development of SMEs.** SMEs need to be supported in their digital transformation and provided with the right set of digital skills and training that will help them responsibly use the potentials offered by AI.

AI for retail and wholesale

Retailers and wholesalers have been using Artificial Intelligence and automation technologies for many years to improve their competitiveness and provide a better consumer experience. AI has enabled our sector to optimise its operations and better meet customer expectations, by ensuring faster deliveries, better predictions of customer demand, stock management, fraud detection, safer payments and making it more sustainable. The sector is using AI in all stages of the supply and value chain. AI has an enormous potential to benefit both consumers and businesses. The adoption and overall success of AI technology in retail and consumer product sectors will depend on customers' acceptance and trust. Other key factors for success are access to data and creating strategic partnerships in the supply chain. The retail and wholesale sectors use AI across their business operation and the consumer experience, most generally without impacting individuals:

Business Operations and supply chain – can be improved using AI, notably in areas such **as product development, stock management, distribution and transport**:

1) Product development and testing: AI helps retailers understand how people approach buying and using products and whether a specific design will be successful. This saves companies from multiple iterations of product testing and millions of funds in terms of research and development. The development time of a new food product can be reduced by AI by up to 70%.

2) Stock management and replenishment. Manual inventory management is replaced and done more efficiently and accurately with AI applications. AI, helps retailers keep track of stock and purchase orders, ensure that inventory is replenished and maintained at optimal level**.** AI powered stock management can use image recognition to track when an item is removed from a shelf and taken out of a warehouse, make recommendations on reducing excess stock, send out a repurchase order, optimise stock across warehouses, limit food waste by predicting product shelf life, optimise the product route from factory to warehouse, manage expiring inventory, etc. Such systems can ensure reliability for online grocery shopping customers, as well as contribute to a significant **reduction in food waste**.

3) Forecasting and predicting demand: AI improves the accuracy of demand forecasting by measuring all available parameters. Retailers can rely on AI to better understand consumers' preferences, while considerably reducing remaining stock, return rates and the costs related to them. AI plays an important role when it comes to planning and procurement, make product content and catalogue management, contract analysis, back office procurement development, stock replenishment and much more. It can continuously adjust forecasting, based on real-time sales, weather and many other factors. This results in our sector becoming **more sustainable and environmentally friendly**.

4) Logistics, distribution and transport: AI is used for intelligent route optimisation for logistics operators to efficiently pick up and deliver shipments, as well as for optimising on-time delivery performance and providing information for future service improvement. Reducing the negative **environmental impact of transportation and service improvement.**

Consumer Experience, whether in stores or online, is made much easier, safer and more efficient with AI:

1) Personalisation, product recommendations and consumer relationship-building: Retailers have been using data for decades to understand and connect with customers. Personalisation includes, for example, fashion retailers offering personalised online landing pages that only display clothing available in the customer's size. This saves time for the consumers, also reducing return rates significantly – thus also improving the environmental footprint of retail.

2) Assisting consumers: Chatbots can help respond to consumer queries and complaints in real time and at all times of the day, thereby increasing customer satisfaction. Voice assistance, still in its infancy, is expected to gain increasing popularity among consumers. Virtual Reality (VR) and Augmented Reality (AR) have the potential of huge benefits for consumers by helping them make the best choice possible. Furniture retailers are using AR to allow shoppers to see what a product might look like in their homes before they make a purchase. The technology can also show the texture of fabric giving an online buyer a better appreciation of a product.

3) Ordering, payment and checkout: AI makes payment processing safer, more tailored to customers' needs and better equipped to reduce financial risks and cut fraud. Every second a digital transaction is being made, by using bank transfers, debit cards, credit cards, e-wallets and mobile wallets. Fraud rises commensurate with this increasing volume of online transactions, making the traditional fraud detection systems outdated. Additionally, retailers have been installing cashier-less payment systems in their shops for decades, paving the way for checkout-less payment where retailers use embedded sensors, deep learning and computer vision to help automate the process. All these technologies combined will allow for a more seamless shopping experience for the betterment of consumers.

4) Delivery: AI-powered autonomous vehicles and optimised routing systems can deliver cost reductions for many businesses and reduce the environmental impact of deliveries.

Securing better enforcement of existing legislation should be a priority

The future European framework for AI should first focus on proper enforcement of existing regulations and assessment of recently adopted rules that apply to Artificial Intelligence. Retailers and wholesalers are already complying with existing EU laws that provide safeguards to AI development and use, which include – only to name a few:

- The General Data Protection Regulation (GDPR),
- Platform to Business Regulation,
- Product Liability Directive,
- Machinery Directive,
- General Product Safety Directive,
- Radio Equipment Directive,
- Low Voltage Directive,
- Network Information Security (NIS) Directive,
- EU Cybersecurity Act,
- Geo-blocking Regulation,
- New Deal for Consumers,
- The Charter of Fundamental Rights.

AI and data privacy

The General Data Protection Regulation (GDPR) **has introduced the concept of risk-based processing** that relies on a robust set of basic privacy principles including legality, purpose limitation and data minimisation.

- **The Regulation distinguishes between various types of personal data** with corresponding levels of obligations and provides strong safeguards, including **privacy by design** and **by default** as well as data protection impact assessments.
- **These provisions complement a number of rights for individuals**, including increased transparency and the **right to object to automated decision making**.
- **The GDPR has at its core an accountability principle** empowering companies to implement policies and procedures demonstrating accountability and to live up to them. Each organisation processing personal data is responsible for ensuring its GDPR compliance given the nature of data, purposes of data processing, and the risks involved in data processing.
- **The GDPR is intentionally technology-neutral** to be able to capture all technologies, whether existing or yet to be developed. The Regulation is equipped with robust enforcement mechanisms and hefty penalties, guaranteeing a deterrent effect on any company that would breach its provisions.
- **Complementing the GDPR requirements, the European Data Protection Board has issued a number of specific guidelines relevant for AI technology**, including on automated decision making, transparency, consent and video surveillance.

This approach acknowledges that proportionality is needed for the development of innovations that are respectful of customers' privacy. Any data processing, whether fully automated or involving human oversight, whether AI-based or not, must comply with the GDPR.

Public authorities must give retailers and wholesalers more time to embrace the GDPR when developing and deploying Artificial Intelligence technologies. The GDPR has been applicable since May 2018 and is currently under evaluation. Calling for additional AI-specific privacy rules and safeguards would undermine the technology-neutral approach of the GDPR.

AI and transparency

Existing EU legislation already provides a framework for transparency in Artificial Intelligence. Some of its provisions are:

- The GDPR foresees **strong transparency obligations**, requiring businesses to provide individuals with clear information relative to the processing of their personal data. Data protection authorities have clarified over time that transparency must involve explanations that individuals can easily understand, as opposed to technical details. These obligations already cover AI technologies. Privacy regulators have notably recommended that businesses should use clear and comprehensible ways to explain algorithms to individuals instead of providing them with a complex mathematical explanation about how algorithms such as machine-learning solutions work. The GDPR has already created **a legal framework for algorithmic transparency and explainability**.
- The **Regulation on transparency and fairness in the platform-to-business relationship** has completed this framework with new rules on transparency for seller and product rankings that will enter into force in July 2020. Similarly, the Directive on modernisation of consumer law, the so-called **Omnibus Directive**, requires online platforms and search engines to provide information about product rankings to consumers and is still being transposed at national level.

The European Commission must allow Member States to transpose these new rules and evaluate whether they are fit for AI development and use.

AI and data security

Retail and wholesale companies use data security, cybersecurity and overall system safety as a basic element of trust building. Data security is crucial across the whole value chain, in particular regarding payments and AI applications using consumer data. The same security and safety standards should apply to all technologies, regardless whether it is AI or not.

The new rules for data protection and cybersecurity, including the Network Information Security Directive and the EU Cybersecurity Act, **have improved the robustness and resilience of the EU digital economy**:

- The General Data Protection Regulation has introduced an obligation to **report personal data security breaches**.
- The certification mechanism of the EU Cybersecurity Act enhances the security of connected products, Internet of Things devices as well as critical infrastructure. The cybersecurity certification framework **incorporates security in the early stage of product development**, the so-called **security-by-design**.

The rules are new, and the European Commission must allow time, that is needed to show, and evaluate whether these rules work in practice and are fit for AI development and use.

AI and non-discrimination

Existing non-discrimination and data protection rules cover adequately potential direct and indirect discrimination by AI or other technologies. The EU Charter of Fundamental Rights, the European Charter of Human Rights, existing case law and specific EU law on non-discrimination, such as the Directive on equal treatment irrespective of racial or ethnic origin, prohibit many potential cases of discrimination which might arise from AI. The GDPR includes also direct and indirect safeguards against discrimination, including:

- A general principle that personal data must be processed lawfully and fairly,
- Requirement to conduct data protection impact assessments in case of risky processing, when a practice is *"likely to result in a high risk to the rights and freedoms of natural persons"*, especially when using new technologies.
- Rules for certain types of *"automated individual decision making"* that aim, among other things, at mitigating the risk of illegal discrimination and protecting people from being subjected to certain automated decisions with far-reaching effects.

The European Commission must secure effective enforcement of existing rules to the benefit of both potentially vulnerable people and businesses and avoid legal uncertainty.

AI and liability

EuroCommerce calls on the Commission to **carefully evaluate whether significant gaps in the existing liability framework need to be addressed and, if any, whether a change in implementing guidelines or possible adjustment to specific sections would be more fit for purpose than a change in legislation**. The European Commission should give the opportunity to stakeholders to provide their input.

Such adjustments (Guidelines) could potentially clarify how the Product Liability Directive applies to products that combine hardware, software and services components. Since 1985, the Product Liability Directive has provided a comprehensive framework securing adequate safeguards for

technologies such as AI. This Directive has established a solid, well-functioning legal basis for consumer protection related to physical goods. Guidelines would shed light on how to apply the current liability regime the complex nature of today's products.

Any upcoming European AI framework should be technology-neutral and focus on achieving desirable outcomes rather than regulating tools. Artificial Intelligence is first and foremost technology and should be treated as any other technology. Where user have the ability to get certain degree of protection when purchasing and using the technology and where developers have the freedom to innovate while continuing to respect fundamental rights, all by unlocking value for businesses and consumers.

Such adjustments (or Guidelines) should take into consideration all players in the supply chain and how they act and interact with each other. Fair, clear and futureproof guidelines on product liability are prerequisite for retailers and wholesalers to successfully develop and deploy AI technologies. Providing clarity on who is considered a producer, developer, user, end-user and/or data provider would mitigate uncertainty along supply chains. Retailers and wholesalers should only be held accountable for what is in their sphere of influence.

- Retailers and wholesalers are mostly users and sometimes developers of AI applications.
- Developers should be encouraged to provide clear explanation on the purpose and proper use of any given AI application.
- It should be left to developers to provide a comprehensive overview of possible negative outcomes of their AI applications.
- Retailers and wholesalers should have the opportunity to ask developers for an explanation should a properly used AI application causes any kind of harm to consumers.

Note: We understand that developers cannot predict all the possible outcomes of AI systems because of the complex nature of AI systems. The harm that AI systems can create is not always easy to predict as algorithms are capable of reasoning in high dimensional spaces, and humans are not. Finding an explanation or even understanding what happens, could take reverse engineering and effort by professionals who are experts in the field.

For retailers and wholesalers as users of AI, it would be even more challenging to understand the root cause of the action and reaction of AI applications. Retailers and wholesalers should have the opportunity when using AI in a clear, proper way, to seek clarity from developers if an AI application causes harm to the consumer. Currently, there are not many such cases. However, technology is continually evolving and if we want to have a future-proof, holistic AI framework, we need to encourage this aspect to be taken into consideration.

Particular attention (exceptions) should be given to SMEs and start-ups. SMEs are the core of the European economy and start-ups are the core of innovation, technological development and the driving force of AI ecosystems in the European Union. Any upcoming European framework for AI must remain feasible for SMEs and start-ups. The complimenting report to the White paper on AI suggests that 'alleviating/reversing the burden of proof' could be one of the potential solutions to address the complexity of AI-related liability. *"Alleviating/reversing the burden of proof"* in case of AI-induced harm could be very costly for SMEs and start-ups, which do not have the capacity to prove they hold no responsibility and provide adequate compensation. Additionally, *"alleviating/reversing the burden of proof"* is already in effect under the GDPR. According to the GDPR, every actor involved in personal data processing is liable to pay compensation unless they can prove lack of responsibility. The European Commission, as already mentioned, should first test how this is working in practice before imposing this rule on AI systems.

AI and safety

A fine balance between safety and liability needs to be ensured. The Commission sees the General Product Safety Directive and Product Liability Directive as two pillars that should complement each other. Safety should be set in place as a preventive measure, and liability should ensure compensation of damage. However, the changing nature of AI applications requires flexible product safety rules that support innovation and digital development.

The future EU framework for AI should rely on the Cybersecurity Act to address cybersecurity risks related also to AI. The Cybersecurity Act has put in place adequate safeguards against cybercrime. AI-specific measures would overlap with recently adopted legislation and prevent efficient risk management. However, the AI White paper addresses risks that are not just AI specific, but have a cross-cutting nature, a joint approach to risk for different digital technologies would help provide clarity.

Retailers and wholesalers should be only required to undertake new risk assessments only when they push software updates lead to substantial changes. Many developers are contributing to software updates, in particular to address security threats. Retailers and wholesalers should have the opportunity to ask relevant developers for risk assessment should a major update be pushed.

We encourage the Commission to clarify existing rules concerning stand-alone software by the mean of guidelines. It is unclear if current product safety legislation covers stand-alone software. A homogeneous framework for products and AI-powered services would support the uptake of AI in the European Union.

We are curious to understand what is considered as safe AI, currently this explanation is not given.

4. EuroCommerce key recommendations on AI White paper

General recommendations

Having a positive stance towards AI technologies is a prerequisite to unlock Europe's tech sovereignty. Artificial Intelligence is still, in many areas, at its infancy and has the potential to better the lives of European citizens, optimise public service management and boost businesses' competitiveness. AI technologies in retail can better consumer experience and increase the efficiency of resource allocation, only to name a few. The future EU framework should highlight the benefits of AI and provide risk management mechanisms. Flexible rules supporting innovation will also secure EU consumers easier access to upcoming AI-powered services.

The future European framework for AI should rely on a simple, narrow, clear, and harmonised definition of 'Artificial Intelligence'. The definition of 'Artificial Intelligence' is needed to secure the legal certainty needed for businesses to innovate in the European Union and should not (unintentionally) other technologies, it should be AI specific. All stakeholders, from developers to researchers and users, should be able to easily understand such a definition to foster trust among consumers. Currently the definition for AI, set in the AI White paper, includes "data" and "algorithms", this is a very broad definition, that can be applied to various types of software. Therefore, we would appreciate a simpler, narrower, clear, and harmonised definition of what is considered under AI.

Investing in skills, digital education, and research should be a priority of the European Union. We strongly encourage the European Commission to support investment in various digital skills and in cooperation with education providers to secure digital literacy across the EU, so that everyone can flourish in an AI-powered future. Additionally, we support the suggestions put forward by the European Commission to invest in already existing and creation of new of AI research centres ('*lighthouse centre of research and innovation for AI in Europe*') that should promote a balanced

centralised approach. Digital education will be paramount to train the AI experts of tomorrow and support the competitiveness of the European economy. We also strongly support that the AI White Paper focusses on increasing the number of women trained and employed in AI, this will lead and help to broaden distribution of AI across society. Additionally, retaining and retraining current employees will be key to make most of digital opportunities, as well as addressing the changing customer demand.

Support digital development of SMEs. SMEs need to be supported in their digital transformation and provided with the right set of digital skills and training that will help them responsibly use the potentials offered by AI. SMEs can significantly benefit from further AI development. Therefore, it is essential to promote and support digital skills and education so that SMEs can fully thrive in future AI development.

Data sharing for purpose of AI development should remain on a voluntary basis. Data is the driving force behind the AI development. To have successful data sharing for the purpose of AI development, companies should remain free to decide for themselves which data they want to share or grant access to, and to whom. Sharing data can be expensive and cumbersome. A voluntary approach would support data reuse, foster AI development while safeguarding the competitiveness of European businesses and securing adequate investment for data management.

Competition coming from outside the EU should not be ignored. Countries like China and the United States have foreseen the rise of AI technologies and have become the leading AI developers and users. European businesses need to act swiftly to remain competitive in a AI-powered world. The European Union must develop a more business-friendly environment where businesses can innovate and existing and upcoming safeguards for AI apply to all actors, no matter where they are based.

The European Commission's first priority should be to work towards a global framework that would secure a level-playing field beyond EU's borders. An AI ecosystem of excellence cannot be built without the establishment of global standards. By nature, AI technologies are universal, do not know any border and can be developed in several places at the same time. Therefore, the requirement to retrain AI in the EU can cause potential harm to innovation and should be removed.

The future European framework for AI should be technology-neutral and focus on achieving desirable outcomes rather than regulating tools, as it is already the case with existing legislation such as the General Data Protection Regulation and Product Liability Directive.

Regulatory sandboxes for testing high-risk AI solutions could potentially enable businesses of all sizes to explore the potential of Artificial Intelligence. Current European and national legislative frameworks, notably competition and privacy rules, limit data reuse for AI training purposes between small, medium, and large companies. The European Commission could potentially introduce sandboxing for high-risk AI applications in which governments could experiment innovative approaches to regulation that are supportive of small and large businesses alike.

The use of already existing AI applications should not be disrupted. Any upcoming EU AI framework should take into consideration that there is already a wide spectrum of low risk applications in use. The effect and the costs connected to unbaling use of these applications should be taken into consideration.

Should the European Commission decide to update existing regulations in light of upcoming AI applications, **careful attention should be paid to avoid overregulation – especially considering recently adopted EU and national legislation (as mentioned above), support the use of existing AI technologies and bolster innovation**. Any future update of EU law should be proportional and rely on

careful **consultation and assessment with stakeholders.** Over-regulation will hinder – or even prevent – the development and use of AI in the European Union. SMEs and start-ups would be particularly exposed to negative outcomes while enforcement of current and new rules to players outside the EU would unlikely be successful. As a result, the European economy would face a loss of competitiveness at a global stage, which would reduce consumers' choices and expose them to lower quality goods and services.

Specific recommendations

Risk-based approach

Retailers and wholesalers welcome that the European Commission recognises our sector as a safe sector. The sector-specific approach taken in the AI White Paper acknowledges that a 'one size fits all' approach is not appropriate for AI, as one AI application used in a given sector can have a completely different level of harm in another.

Any upcoming AI framework should be application-based and not technology-based. Such an approach should implement safeguards on technological use rather than development, thereby securing technology neutrality.

'High-risk' applications should be assessed based on their intended use, i.e., on whether they will be used for internal business processes, decision tools, physical use that presents safety risks including harm to human body.

Retailers and wholesalers should be granted the freedom to assess their own risks. Considering the fast-changing nature of AI, the European Commission should provide businesses with adequate guidance to secure flexible and reliable risk assessments for high-risk AI applications. In particular, by providing the scope of harm, clear criteria for high-risk applications and a narrow, clear and harmonised definition what is considered AI.

High-risk AI applications should be defined and overseen in a way that provides legal certainty and is future-proof.

- **The future EU framework for high-risk AI applications should rely on a clear definition of what constitutes 'risk' and 'harm' in line with the Product Liability Directive.** Securing a harmonised definition of these concepts and underlying factors and measurement will be paramount to support the uptake of Artificial Intelligence in the EU. Legal certainty will help retailer and wholesalers to assess risks, ensure compliance and meet safety requirements.
- **'Immaterial damage' should be removed from the scope of high-risk harms.** Immaterial damages are a very broad concept that is very hard to define and could be misused, reducing the attractiveness of the EU for the development of innovative AI applications.

Remote biometric identification.

Certain biometric identification systems contribute to significant innovations in retail, such as paying by fingerprint. When properly managed, such innovations facilitate the customer journey and benefit internal efficiencies.

EU rules for remote biometric identification systems should balance privacy concerns with opportunities for consumer experience improvement. The General Data Protection Regulation (GDPR) has already created a clear framework for remote biometric identification systems in which biometric data processing should be a last resort option. Retailers and wholesalers would welcome the opportunity to explore innovative biometric-based services for our consumers, such as to cashier-less check-out processes.