Independent Retail Europe

ARTIFICIAL INTELLIGENCE ACT
- COMMENTS OF INDEPENDENT RETAIL EUROPE -

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EXECUTIVE SUMMARY

Independent Retail Europe is the voice of groups of independent retailers at EU level. Our members are groups of independent (SME) retailers that usually operate under one brand name while maintaining their independence as individual businesses. We represent 23 groups and their over 386.600 independent member retailers, who provide more than 6,6 million jobs in the EU.

The EU Commission has proposed the revision of various product safety legislations in parallel to its Proposal for an Artificial Intelligence Act. These legislations are very important for groups of independent retailers, as they determine their obligations across the whole range of products that they sell. In this context, it is critical for retailers to ensure that the new obligations under the AI Act are fully coherent with other product safety legislation. Diverging obligations (e.g. on entities to notify or extent of the obligations) across product categories make legal compliance harder for SME retailers, and should therefore be avoided.

In addition, as the commercial use of AI is clearly advancing rapidly across the economy, the retail sector does not escape this phenomenon. Many group of independent retailers are increasingly using AI applications to maximise their brick & mortar and omnichannel operations, raise efficiency and better target their offer to consumers' expectations and needs. This is for instance the case when using AI for the purpose of optimising operations in the warehouses/stores through smart inventory or shelf management, smart management of ventilation/refrigeration systems, hybrid/cashless stores, use of algorithms for product recommendations, etc.

In this context, retailers are therefore increasingly not only distributors of AI, but also users of AI, and sometimes developers for their own use. Groups of independent retailers therefore need a legislative framework that both, minimises risks in a proportionate manner and does not prevent them from using new technologies based on AI to raise their efficiency and therefore their competitiveness on the retail market, especially against large integrated retail chains.

Therefore, we welcome the risk-based approach of the AI Act Proposal, but consider that it needs clarification concerning several aspects which are relevant for retailers using AI or developing AI for their own-use.

This position covers in detail the following aspects:

- ➔ A multitude of separate revisions of product safety legislations may lead to legal incoherencies. The AI act obligations for distributors (art. 27) should be fully coherent/aligned with other product safety legislation, and in particular with the Proposal for a General Product Safety Regulation.
- ➔ Recording obligations (art. 12) should be proportionate, aligned with GDPR requirements and include information that benefits both developers and users.
- ➔ Trade secrets should be preserved – including for algorithms.
- ➔ Clarifications are needed for some specific high risk AI systems (Annex III).
- ➔ Guidelines for AI developers are needed before entry into force of the AI Act.
- ➔ Provisions on Regulatory sand boxes (art. 53/54) and small-scale users/developers (art. 55) shall be supported.

COMMENTS OF INDEPENDENT RETAIL EUROPE ON THE AI ACT

1. Retailers obligation (art. 27) need to be coherent across the product safety acquis

Legal coherence between the different texts on product safety is of upmost importance for retailers. It is a fact that a retailer offers a multitude of products that often fall within the scope of different legal texts. Retailers are willing to fulfil all their legal obligations to ensure a high level of product safety on the Internal Market. Diverging legal provisions on their obligations, depending on the type of products, would make the process overly complicated and prone to error.

Reporting obligations for retailers should therefore be aligned in the different legal texts of the product safety acquis. Irrespectively of the legal regime that applies for the safety of a product / machinery product / toy / AI product, the *reporting obligations* must follow the same procedure, address the very same actors (importers, manufacturers, national authorities) and use a consistent/coherent wording across the various product safety legislation.

We believe that the Commission Proposal for a General Product Safety regulation (GPSR) should be used as a model to ensure consistency across product safety legislation, as this is the latest product safety proposal from the Commission, therefore reflecting the most up-to-date approach to product safety. **The distributors' obligation under the AI Act (art. 27) should therefore be consistent with and aligned on the distributors' obligation under the GPSR proposal.**

Currently, there are noticeable divergences between the proposed AI Act and the GPSR proposal:

- The GPSR explicitly recognises that distributors must assess the lack of conformity of a product "*on the basis of the information in their possession"* (reflecting retailers' sphere of knowledge/competence) – this aspect is missing from art. 27(2) and 27(4) of the AI Act
- The GPSR requires distributors who are supplied with an unsafe product (but which they did not make available on the market) to inform the manufacturer or the importer and the market surveillance authorities – while the AI act does not mention the market surveillance authorities in art. 27(2).
- The GPSR proposal requires distributors who have already made available on the market an unsafe product to inform the manufacturer or the importer and the market surveillance authorities - while the AI act (and the revised Machinery Regulation) does not mention the provider or importer in art. 27(4).
- The GPSR provides a clear, precise and explicit list of 'manufacturers/importers' requirements that distributors must check, through a reference to precise articles, while the AI act only refers to generic "*obligations set out in this Regulation*" (art 27-1). Retailers need to know exactly which aspects they must legally check. The AI act should therefore use the same approach as the GPSR.

Our position:

- ➔ Ensure that the distributors' obligations are coherent across product safety legislation.
- ➔ For this purpose, align the provisions on distributors' obligations of the AI Act (art. 27) on those on distributors' obligations of the GPSR (see amendment below).
- ➔ Do not add additional requirements for distributors beyond those already foreseen by the GPSR.

Proposal for a Regulation **Article 27**	
Text proposed by the Commission	*Amendment*
(1) Before making a high-risk AI system available on the market, distributors shall verify that the high-risk AI system bears the required CE conformity marking, that it is accompanied by the required documentation and instruction of use, and that the provider and the importer of the system, as applicable, have complied with the obligations set out **in this Regulation.**	(1) Before making a high-risk AI system available on the market, distributors shall verify that the high-risk AI system bears the required CE conformity marking, that it is accompanied by the required documentation and instruction of use, and that the provider and the importer of the system, as applicable, have complied with the obligations set out ***in Article 16 and in Article 26(1), 26(3) and 26(4) respectively.***
(2) Where a distributor considers or has reason to consider that a high-risk AI system is not in conformity with the requirements set out in Chapter 2 of this Title, it shall not make the high-risk AI system available on the market until that system has been brought into conformity with those requirements. Furthermore, where the system presents a risk within the meaning of Article 65(1), the distributor shall inform the provider or the importer of the system, as applicable, to that effect.	(2) Where a distributor considers or has reason to consider***, on the basis of the information in its possession,*** that a high-risk AI system is not in conformity with the requirements set out in Chapter 2 of this Title, it shall not make the high-risk AI system available on the market until that system has been brought into conformity with those requirements. Furthermore, where the system presents a risk within the meaning of Article 65(1), the distributor shall inform the provider or the importer of the system, as applicable, to that effect, ***and the market surveillance authorities***.
(4) A distributor that considers or has reason to consider that a high-risk AI system which it has made available on the market is not in conformity with the requirements set out in Chapter 2 of this Title shall take the corrective actions necessary to bring that system into conformity with those requirements, to withdraw it or recall it or shall ensure that the provider, the importer or any relevant operator, as appropriate, takes those corrective actions. Where the high-risk AI system presents a risk within the meaning of Article 65(1), the distributor shall immediately inform the national competent authorities of the Member States in which it has made the product available to that effect, giving details, in particular, of the non-compliance and of any corrective actions taken.	(4) A distributor that considers or has reason to consider ***on the basis of the information in its possession,*** that a high-risk AI system which it has made available on the market is not in conformity with the requirements set out in Chapter 2 of this Title shall take the corrective actions necessary to bring that system into conformity with those requirements, to withdraw it or recall it or shall ensure that the provider, the importer or any relevant operator, as appropriate, takes those corrective actions. Where the high-risk AI system presents a risk within the meaning of Article 65(1), the distributor shall immediately ***inform the provider or the importer of the system and*** the national competent authorities of the Member States in which it has made the product available to that effect, giving details, in particular, of the non-compliance and of any corrective actions taken.
Justification	

The amendments proposed would ensure full coherence between the AI act and the GPSR proposal, therefore providing for a consistent product safety acquis with regards to distributors obligations.

2. Recording obligations (article 12)

Recording obligations are important and give developers the possibility to retrace their steps. They also allow to establish a relationship of trust with end-users. Recording obligations should, however, contain information that also represents added value for users and that can be recorded without disproportionate burdens.

The following information could be made available as part of recording obligations, as they offer a benefit for both end users and developers:

- Artificial Intelligence Architecture
- Resources used
- Problem statement and solution approach
- Computer-implementable instructions
- Responsible use of AI & associated data/processes e.g. re:
    - Carbon footprint of resources vs. benefits.
    - No discrimination in AI use to harm or oppress one group
    - No AI exploitation of humans and animals
    - No detection of diseases through user behaviour
- Data compliance with GDPR
- Transparent documentation of data
- Verification and minimisation of bias (language, gender, etc.) to the best of our ability

Finally, as the GDPR is the blueprint for all further digital and data-related legislative proposals, the duration of the record-keeping obligation should be aligned with the GDPR and not go beyond existing GDPR obligations.

Our position:

➔ The duration of the recording obligations should be aligned with the GDPR.

➔ Recording obligations should not be disproportionately burdensome and should be complemented with simple information that would benefit both users and developers (see list above).

3. Protection of trade secrets must be ensured – also for algorithms

As for any product, a technical documentation needs to be drawn-up for an AI system before it is placed on the market (article 11). Given the specificities of AI systems, the technical documentation must obviously contain certain details to demonstrate that the AI system complies with the AI Act requirements.

As part of the technical documentation, recital 46 mentions in very generic terms that information on 'algorithms' should be included. **While it is understandable that the technical documentation contains some brief provisions on algorithms (given the nature of AI systems) to show that the AI**

system complies with applicable legal requirements, the text should also make clear that trade secrets must be protected at all times in this context, and that this requirement should not be understood as requiring the full disclosure of algorithms.

Whether used online or in shops, algorithms help to shape modern retail companies. They enable the product range to be adapted to the individual needs and wishes of the customer, allow to estimate the risk of non-payment, help to optimise sales forecasts, inventory/shelf management and delivery routes. Algorithms have thus become an important competitive feature in the retail sector.

Regulatory inconsistencies would result in competitive disadvantages for European retailers if different legal standards were applied to offline, online and smart (i.e. AI operated) innovations. The existing legal framework already offers adequate consumer protection. Moreover, legislation should not request the disclosure of trade secrets in the digital world that would be protected in the offline world. This would otherwise result in a strong restriction of competition if the core content of algorithms were to be disclosed. Full disclosure of algorithms, and therefore of trade secrets, would make innovative companies loose the benefit of their innovation and investments, without bringing added value (as algorithms are often complex, change frequently and contain random moves).

Our position:

➔ Preserve trade secrets by ensuring that the requirements to provide explanations in the technical documentation (i.e. on algorithms) do not lead to divulgations of trade secrets (see amendment proposal below)

Proposal for a Regulation - Recital 46	
Text proposed by the Commission	*Amendment*
(46) Having information on how high-risk AI systems have been developed and how they perform throughout their lifecycle is essential to verify compliance with the requirements under this Regulation. This requires keeping records and the availability of a technical documentation, containing information which is necessary to assess the compliance of the AI system with the relevant requirements. Such information should include the general characteristics, capabilities and limitations of the system, algorithms, data, training, testing and validation processes used as well as documentation on the relevant risk management system. The technical documentation should be kept up to date.	(46) Having information on how high-risk AI systems have been developed and how they perform throughout their lifecycle is essential to verify compliance with the requirements under this Regulation. This requires keeping records and the availability of a technical documentation, containing information which is necessary to assess the compliance of the AI system with the relevant requirements. ***While preserving trade secrets,*** ~~S~~such information should include the general characteristics, capabilities and limitations of the system, algorithms, data, training, testing and validation processes used as well as documentation on the relevant risk management system. The technical documentation should be kept up to date.

4. High risk AI applications – clarifications needed

The AI Act proposes to classify as high-risk AI systems two groups of AI applications: AI systems that are used (as a safety component) of products in the scope of EU legislations listed in Annex II, and AI applications listed in Annex III.

We would like to stress that an overly broad definition or list of AI applications would have a negative impact on innovation, given the (necessary) long list of requirements for developing high-risk AI. We would therefore encourage to 1- not enlarge the list of annex III and 2- make sure the applications are correctly/narrowly defined.

In particular, annex III (1) includes in the list of high-risk AI "*Biometric identification and categorisation of natural persons*". We believe it is important to clarify that the provision is meant to cover only "passive mass identification from distance", but **does not cover the active identification of individual persons.** This distinction is necessary to ensure that active biometric authentication systems in the retail sector remains possible, such as new AI-based systems used for payment by fingerprint/biometric data, or cashierless shops (which allow consumers to simply walk in a shop, fill their basket, and leave – payment being automatically made when they exit the shop). Such innovations are not only improving efficiency in the retail sector, but are also highly appreciated by consumers (due to major time savings).

Our position:

- ➔ Do not enlarge the list of high-risk AI systems under Annex III, and clearly/narrowly define them.
- ➔ Clarify in Annex III (1) that "*Biometric identification and categorisation of natural persons"* does not include active individual biometric authentication systems– e.g. used for secure authentication in payments.

5. Commission guidelines are needed before entry into force of the AI Act

To facilitate the implementation of the AI act (once adopted), which is a technically complex legal text, the European Commission should be required to develop and publish application-oriented guidelines before the full entry into force of the provisions of the AI Act.

Such guidelines should:

- Be practical and easy-to-understand for AI developers;
- Use practical examples, checklists and step-by-step instructions;
- Help developers answer questions such as when an AI application poses a high risk or how to ensure that data sets do not contain bias.

Our position:

- ➔ Introduce provisions requiring the European Commission to issue guidance for AI developers before the entry into force of the AI Act.
- ➔ Such guidance should be practical, use a simple language and include check-list and step-by-step instructions.

6. We support provisions on Regulatory sand boxes (art. 53/54) and small-scale users/developers (art. 55)

We welcome the introduction of the possibility for Member States authorities to establish AI regulatory sand boxes where new AI applications can be developed/tested/validated before their

making available on the market (art. 53/54). This will help to support innovation, while preserving security. This may prove essential for SMEs willing to develop/use innovation AI systems. We therefore also strongly welcome the specific support offered to SMEs by article 55 of the AI Act. This is necessary to ensure that SMEs can also benefit from AI innovation (both as developers and users), given the obstacles they naturally face because of their size.

Our position:

- ➔ Provisions on AI regulatory sandboxes (art. 53/54) and SME support in regulatory sand boxes (art. 55) should be broadly supported.

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Established in 1963, ***Independent Retail Europe*** *(formerly UGAL – the Union of groups of independent retailers of Europe) is the European association that acts as an umbrella organisation for groups of independent retailers in the food and non-food sectors.*

Independent Retail Europe represents retail groups characterised by the provision of a support network to independent SME retail entrepreneurs; joint purchasing of goods and services to attain efficiencies and economies of scale, as well as respect for the independent character of the individual retailer.
Our members are groups of independent retailers, associations representing them as well as wider service organizations built to support independent retailers.

Independent Retail Europe represents 23 groups and their over 386.600 independent retailers, who manage more than 753.000 sales outlets, with a combined retail turnover of more than 944 billion euros and generating a combined wholesale turnover of 297 billion euros. This represents a total employment of more than 6.603.000 persons.
Find more information on our website, on Twitter, and on LinkedIn.