

Case Study: Regulating New Technologies

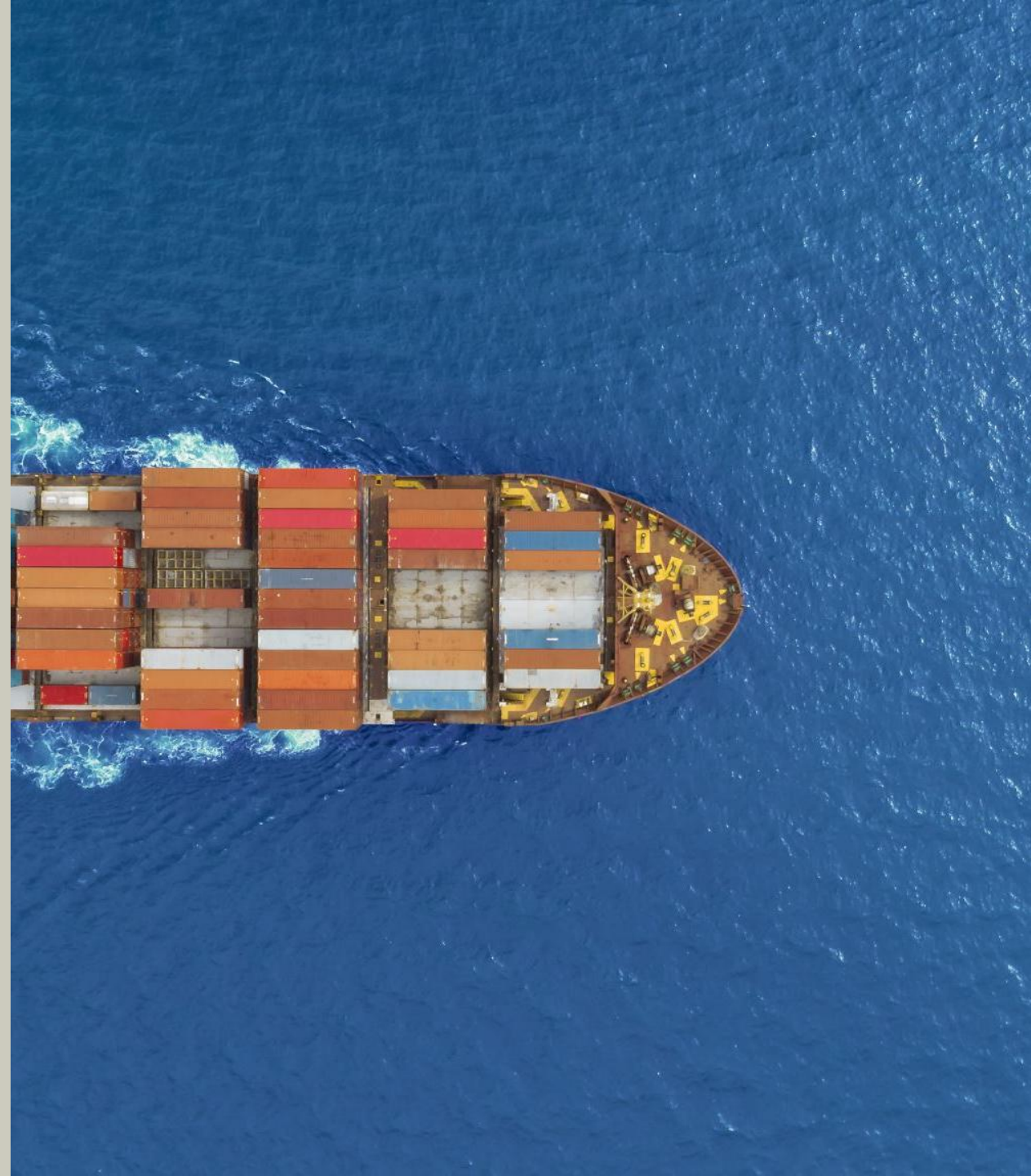
Regulating Online Marketplaces and AI Systems in Practice

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Mercify S.A.

Mercify S.A., headquartered in Luxembourg, operates a cross-border e-commerce platform accessible in all EU Member States. Mercify has been active on the European market for 3 years and last year had more than 46 million users in the European Union. The platform primarily markets low-cost own-brand products (e.g. electronics, household goods, personal care items), which are manufactured in-house and distributed via a centralised digital interface. In addition, third-party suppliers also offer their goods on Mercify. Products offered by both Mercify and third-party sellers are presented in a single, unified interface, without visual distinction; however, users can identify the seller through information on the product site (“sold by…”).

A key feature of the platform is its personalised recommender system, which determines the ranking and prominence of products on the homepage, in search results, and in suggested product panels. It further has an AI-based chat function where users can “chat” with the system to get specific product recommendations (“I don’t sleep well. Which products can I use to improve my sleep?” “You could try this pillow from SleepWell Ltd. or a sleep meditation CD from SweetDreams Inc.”). The system is based on machine learning models that analyse user data (e.g. click behaviour, location, device type, purchase history) and continuously adjust the ranking based on engagement and conversion metrics. Several third-party sellers have raised concerns that their products consistently receive inferior placement compared to equivalent in-house products, despite better ratings or competitive pricing. In addition, civil society organisations have criticised the lack of transparency in how product rankings are determined and questioned whether the system structurally favours Mercify’s own inventory.

The European Centre for Algorithmic Transparency (ECAT) has forwarded a report to the European Commission. The Commission is currently conducting a preliminary assessment to determine whether Mercify meets the criteria for designation as a Very Large Online Platform (VLOP) under Article 33 DSA. In its report to the European Commission, ECAT also pointed out that Mercify's recommendation system may also be subject to the AI Act.

Mercify S.A.

Stephanie Higgs, CEO of Mercify, has mandated your law firm to assist with several legal questions. She asks you to provide a comprehensive assessment, lining out the pro's and con's for each area together with any possible legal risks, that shall serve the management as a basis to decide the further strategy of Mercify.

1. What are the chances that Mercify will be designated as VLOP under the DSA? Are there ways for Mercify to argue that it should not be designated? What information / numbers should Mercify look at to argue that it does not meet the thresholds for a designation? Would the designation as a VLOP have significant effects on Mercify's business?
2. Mercify wonders what legal consequences it might have if the recommender system does prefer Mercify's products over the ones of third party sellers. It first wonders if the AI Act or the DSA applies to the recommender system. What if this preference has not been intended but is a "malfunction" of the AI-based recommender system? Is Mercify obliged to provide information on the functioning of the recommender system or can it argue that this is confidential business information?
3. Several customers complained that they received counterfeit products from Mercify's third party sellers. Mercify is of the opinion that it only provides the platform for the respective vendors but cannot be held accountable for the what its vendors do on the platform. In particular, it does not screen the offerings of third party sellers. Mercify wonders whether it is responsible for the products third parties offer on its platform. Would it be reasonable to implement a screening process? If so, are there any risks for Mercify that are attached to such screening process?
4. Mercify is seriously concerned about possible investigative and enforcement measure. It wants you to provide information on which authority is responsible for investigation / enforcement, which measures it might need to expect and how it can properly prepare for such measures. Even if the assessment would show that Mercify is in non-compliance with certain obligations, would it be an option to just not comply and face enforcement?

Enforcement – Key bodies

AI systems

National enforcement bodies

To be established or designated by each member state

Market Surveillance Authority

- Effective supervision and enforcement of the AI Act's provisions except for those related to GPAI-models
- Member states' single point of contact

Notifying Authority

Assessing, designating and monitoring of conformity assessment bodies

GPAI models

Single enforcement body

European Commission

Exclusive power to supervise and enforce GPAI-model related provisions of the AI Act

AI Office

- Part of the European Commission (EC)
- Entrusted with the implementation of the EC's tasks

Overarching bodies

EU AI Board

- **Role:** Advises and assists Commission and Member States for consistent and effective application of AI Act
- **Key actions:** (1) Opinions and recommendations on implementation issues, (2) advice on enforcement of GPAI rules

Advisory forum

- **Role:** Provides technical expertise and advises the AI Board and Commission
- **Actions:** Opinions, recommendations and contributions, upon request of AI Board or Commission

Scientific panel of independent experts

- **Role:** Supports enforcement, in particular by advising the AI Office
- **Key actions:** (1) Alerts AI Office of GPAI models with systemic risks, (2) advises AI Office on GPAI model classification

Thank you!



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