

Position paper on the Digital Services Act (DSA)

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Executive summary

The development of the internet as we know it today has largely been influenced by the [e-commerce Directive of 2000](#), which limits liability of internet service providers and intermediaries for illegal content. With a proposal for new Digital Services Act¹ (DSA), this set-up may change: The DSA could upgrade the EU's liability and safety rules for digital platforms, services and products to tackle some problematic issues which have occurred over the past 20 years (unsafe or defective goods sold via platforms, hate speech and illegal content on social media, etc.). At the same time, the Digital Services Act is intended to tackle competition-related aspects such as the gatekeeper role of platforms. In contrast to the early days of the internet, which relied on openness and interoperability, many services offered by large online platforms (such as messaging, social media, etc.) are accessible only in closed-off proprietary environments that rely on network effects, lock-in their users and are thus largely shielded from competition.

While this new piece of legislation bears potential for a more open and competitive internet ecosystem, it also carries some risks. Similarly to the discussions around the Copyright Directive, for example, an updated liability regime could lead to unintended effects such as automated filtering or general content monitoring. It could stifle innovation if it puts too many burdens on smaller upcoming platforms, which may not be able to cope with additional administrative burden and rules. **In the end, rules that were intended to tackle issues created by large platforms may turn to harm digital SMEs. Therefore, it is important to contribute to the [public consultation](#) on the Digital Services Act package by voicing the concerns and suggestions of digital SMEs across Europe.**

¹ The Commission is initiating an open public consultation as part of its evidence-gathering exercise to identify issues that may require intervention through the Digital Services Act, as well as additional topics related to the environment of digital services and online platforms, which will be further analysed in view of possible upcoming initiatives: https://ec.europa.eu/eusurvey/runner/Digital_Services_Act.

At DIGITAL SME, we believe that the EU should aim to create a **harmonised digital single market that is open and competitive and allows innovative upcoming companies to thrive**. Therefore, any measures proposed in the context of the Digital Services Act need to be **specific to the companies that cause harm**. One-size-fits-all regulation disproportionately affect smaller companies and needs to be avoided. Ideally any new rules and obligations should **directly tackle the issues caused by a small number of large gatekeeper platforms**, i.e. they should be limited to certain thresholds and **defined along a list of criteria**, which may have to do with size, the associated harm and impact, turnover, network effects, lock-in of users, integration of services throughout different markets, cross-platform and cross-services collection and combination of data at a large scale, etc.

Harmonising an emerging patchwork of rules is generally welcome but needs careful consideration so as to not hamper the overarching goal of creating a competitive and open single market. The current limited liability regime and other important basic principles (country of origin; prohibition of general monitoring obligations) of the e-commerce Directive need to be upheld. However, it might be necessary to increase the level of responsibility and liability of large commercial online platforms, e.g. by strictly obliging them to follow up on user notifications about illegal content or goods and strong European oversight that ensures harmonised enforcement.

Finally, interoperability requirements in combination with a set of obligations and prohibitions imposed on large platforms (e.g. access to data, non-discrimination, transparency requirements) could solve some of the issues associated with closed-off environments that they create. The current platform economy dominated by large gatekeepers should be opened up to allow users to switch to alternative providers, thus offering more and better choice and competition in currently closed-off markets.

Background

The current liability framework for online intermediaries and so-called “information society services” (e.g. search engines, market places, social networks, mediasharing platforms, but also internet service providers in general, hosting service providers, etc.) is governed by the [e-commerce Directive](#)², which dates back to the year 2000. In this legal framework, online intermediaries are not liable for illegal content, goods, or services which may be distributed via their channels *if* they fulfil certain conditions: Intermediaries are not liable if they remove illegal content or disable access to it as fast as possible once they are aware of its illegal nature or if they play a neutral, merely technical and passive role towards the hosted content. This **limited liability is fundamental to today’s internet** as we know it and has without doubt contributed to the enormous growth and success of the internet in the past 20 years. Today’s internet ecosystem relies to a great extent on advertisement revenues. Facebook and Google relied on advertisement for over 98 / 85 percent of their revenues in 2018, respectively³ and offer seemingly “free” services. These ad-reliant business models only work if the companies collect personal data of their users to understand their preferences, behaviour and choices (in order to tailor advertisement and services). Nonetheless, these types of businesses have contributed and shaped what we know as the internet today and offer a host of innovative services.

At the same time, recent years have brought to light a multitude of risks and concerns associated with large online platforms. Studies by members of the European Consumer Organisation BEUC showed that “two thirds of 250 products bought from online marketplaces failed safety tests⁴”. Furthermore, “electronic commerce channels are increasingly being used to distribute counterfeit, dangerous or unsafe products or even illegal goods such as fake medicines”, which can cause harm to consumers and producers alike. Hate speech and disinformation pose risks to democratic discourse and society. The logic of algorithms that are designed to keep users on a certain

² See: <https://ec.europa.eu/digital-single-market/en/e-commerce-directive>.

³ See: <https://www.visualcapitalist.com/how-tech-giants-make-billions/>.

⁴ The European Consumer Organisation BEUC, “MAKING THE DIGITAL SERVICES ACT WORK FOR CONSUMERS”, BEUC-X-2020-031 - 30/04/2020, p. 3, Please also see here for direct link to study: <https://www.beuc.eu/publications/two-thirds-250-products-bought-online-marketplaces-fail-safety-tests-consumer-groups/html>.

platform sometimes seems to work in the favour of sensational, at times outright wrong, or hateful content.

Furthermore, recent years have seen the rise of a small number of **dominant digital players that operate in closed-off markets or ‘walled gardens’ or offer seemingly free services**, while upcoming innovators find it difficult to compete. Due to network effects and closed proprietary environments, digital markets seem to concentrate more easily, leading to the dominance of a number of platforms which can act as gatekeepers. The European Commission recognises that while there are over 10,000 online platforms operated in Europe’s digital economy “a small number of large online platforms captures the biggest shares of the value⁵”. These platforms act as “gatekeepers between businesses and citizens, benefitting from strong network effects⁶”. This may create hurdles for competitors trying to enter the same market because “some of these large online platforms exercise control over whole platform ecosystems that are essentially impossible to contest by existing or new market operators⁷”. Moreover, the platforms set the rules for participants/users of the platform. Sometimes, these rules can be set unfairly, leading to privacy/data protection concerns in the terms of use—which users need to accept anyway as the platforms offer them unique access to a network—or unfair terms and conditions for business users.

Against this background, the Digital Service Act Package aims at tackling some of the main issues which have been associated with large social media platforms: the spread of hate speech and illegal and unsafe products; and the dominance of gatekeeper platforms in certain markets.⁸

⁵ See impact assessment for overview: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>, p. 1.

⁶ Ibid.

⁷ Ibid.

⁸ In the public consultation, different types of harms associated with platforms are addressed in a set of questions. The consultation focuses on safety of users online, ranging from illegal goods (e.g. dangerous products), content (e.g. violence, hate speech) and services or practices infringing consumer law. The consultation also addresses the following topics: reviewing the liability regime of digital services acting as intermediaries; the gatekeeper power of digital platforms; other emerging issues and opportunities, including online advertising and smart contracts; challenges around the situation of self-employed individuals offering services through online platforms; the governance to reinforcing the Single Market for digital services. See: <https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package>.

DIGITAL SME key demands

Harmonised European rules for a strong Digital Single Market

Firstly, DIGITAL SME generally welcomes the initiative for a Digital Services Act. There is a risk that a fragmented regulatory environment for platforms will emerge if the EU does not act⁹. A fragmented Digital Single Market is first of all a barrier to smaller companies as they have less resources to deal with different national rules. Thus, in order to support digital SMEs and SMEs in general, the EU regulators should aim at a piece of legislation that contributes to the harmonisation of the digital single market instead of allowing a patchwork of national rules. **This can be achieved by preferring a regulation over a directive and by building a functional European oversight system ensuring that rules will be implemented in the same way in all member states.** Ideally, further harmonisation will allow innovative digital services to emerge and scale.

No one-size-fits-all approach

At the same time, SMEs have less resources to deal with additional administrative burden and the measures that may need to be implemented as a consequence of the Digital Services Act. As a result, the Digital Services Act could stifle innovation if it puts additional burdens on small upcoming platforms, which may not have the resources to deal with the associated administrative load. In the end, rules that were intended to tackle issues created by large platforms may turn to harm digital SMEs. **Smaller platforms should not be hindered in their development and any proposed legislation should follow the Commission's commitment to its 'think small first' principle. Even more so, legislation should be targeting gatekeeper platforms.**

⁹ At national level, governments started addressing emerging issues associated with social media, online advertising or collaborative economy services. For instance, Germany passed its NetzDG in 2017, while other countries are also working on hate speech laws. Some countries have started or are planning digital taxes, while local authorities have laid down stricter rules for online platforms such as Amazon or Uber. Other interventions such as the Platform to Business Regulation aim at creating more transparency and fairness in digital markets. While these issues are certainly too complex to be tackled by one piece of legislation, the underlying framework of the current e-Commerce Directive may need to be revised to change the general conditions and address some shortcomings.

Uphold limited liability & basic principles of the e-commerce Directive

Unintended consequences need to be avoided when discussing an updated liability framework. Similarly to what happened with the Copyright Directive, for example, an updated liability regime could lead to unintended effects e.g. lead to general monitoring, and have negative consequences for fundamental rights. **Thus, updated rules should focus on addressing the responsibilities of large platforms as regards illegal content or unsafe products.** For instance, it might be necessary to oblige large platforms to follow up on user notifications about illegal content and for a European public authority to oversee this process. Large platforms could be required to be transparent about algorithms that push hateful or false content. **Rules should be aimed at the gatekeepers that are at the centre of the problems rather than fundamentally change the basic principles of the e-commerce Directive.**

Interoperability for a competitive open market

At DIGITAL SME we believe that interoperability¹⁰ requirements could solve some of the issues associated with large platforms and allow new innovative solutions to enter closed-off markets.¹¹ The current platform economy should be opened up to allow users to switch to competing services. The majority of the large platforms that dominate internet services today encourage walled gardens or silos and are thus shielded from direct competition. **As a remedy, the Digital Services Act package could introduce interoperability requirements for large platforms, which could solve some of the issues associated with those gatekeeper platforms.** Interoperability is a solution discussed in competition circles to solve many issues

¹⁰ Interoperability can be defined as “a characteristic of a product or system, whose interfaces are completely understood, to work with other products or systems, present or future, in either implementation or access, without any restrictions” (see: <https://aful.org/gdt/interop>). In simple terms, interoperability can be defined as “the act of making a new product or service work with an existing product or service”. Examples of day-to-day interoperability are a majority of chairs fitting with tables or standardised plugs providing electricity to a broad variety of devices. In the context of the internet ecosystem, most of us are familiar with basic internet services that relied on a set of open standards for website protocols, emails, instant messaging (see EDRI paper, ‘Platform Regulation Done Rights’, April 2020, p. 19 and EFF: <https://www.eff.org/de/deeplinks/2019/10/adversarial-interoperability>).

¹¹ See joint letter to Vestager requesting ex ante interoperability in the DSA: https://www.digitalsme.eu/digital/uploads/Vestager_Letter_Interoperability.pdf

Historically, the EU has successfully required and pioneered interoperability in ICT markets as essential as:

1. Telecoms (Local Loop Unbundling),
2. Fintech (Payment Services Directive 2), and
3. Web browsers (both supporting W3C standards and requiring Microsoft to permit interoperability with their operating system).

associated with closed market environments in the digital sphere.¹² Thus, it can be an important element to create an open innovative internet ecosystem in which smaller providers could thrive. This needs to be accompanied by a set of smart and tailored obligations and prohibitions imposed on large platforms (e.g. access to data, non-discrimination, transparency requirements) to ensure fair and competitive markets in areas where platforms dominate.

Conclusion

SMEs are the backbone of the EU economy. Therefore, any new piece of legislation/initiative should **avoid additional burdens on SMEs and propose measures that address the real concerns associated with large platforms**. The EU should aim to create a **harmonised digital single market that is open and competitive and allows innovative upcoming companies to thrive**. Instead of re-vamping the overall rules that many services on the internet build on today, the DSA should uphold the limited liability regime and other basic principles of the e-commerce Directive (country of origin, prohibition of general monitoring), while introducing obligations on large platforms where necessary. The DSA can be an opportunity to **create harmonised rules** that are valid throughout the European market. This would be beneficial to SMEs who benefit from clear rules that allow them to access a larger market and customer-base. However, these rules need to be developed with the ‘think small first’ principle in mind. Finally, interoperability requirements could solve some of the issues associated with large gatekeeper platforms and **help to re-instate the openness of the internet that originally allowed innovation to thrive**. By obliging large platforms to make some of their services interoperable, closed-off proprietary environments could be opened up to competition and allow innovative digital SMEs to flourish, while bringing benefits to consumers and society.

¹² Wojciech Wiewiórowski, Friday, 13 December, 2019, available at: https://edps.europa.eu/press-publications/press-news/blog/sharing-caring-depends_en. This is for instance the case with emails, which allow for free choice and communication as a customer can communicate freely between platforms as emails can be exchanged irrespective of the email service provider.

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