REACTION TO THE COMMISSION'S PROPOSAL FOR A REGULATION ON A SINGLE MARKET FOR DIGITAL SERVICES ("DIGITAL SERVICES ACT")

The proposal of the European Commission for a Digital Services Act (DSA) is arguably one of the most important legislative proposals reshaping the regulatory framework governing digital services in the EU. For almost two decades, the e-commerce directive shaped and defined the rules for digital services. While the principles of the latter are still valid, a review of the rulebook is certainly welcome as legislation needs to be adapted to the current realities of commerce in the digital sphere.

INTRODUCTION

EUROCHAMBRES fully subscribes to the objectives of the DSA, which are to create a safer digital space in which all actors in commercial relationships can thrive and to establish of a level playing field with a view to ensure a healthy competitive environment. Trust and competition should indeed go hand in hand, no matter whether the transactions occur through traditional brick-and-mortar commerce or online. In this context, the regulatory framework governing digital services should be fair and balanced, creating opportunities for innovation and expansion, thereby allowing small businesses to make use of the upscaling potential of digital markets, whether it is through platforms or in any other form.

The Chambers of Commerce recognise that the set-up of a fair and balanced digital framework is an arduous task for the legislator, especially given the technological changes that shape and reshape the name of the game in digital commerce. The right way to handle this legislative challenge is to apply to the largest extent possible, principle-based rules and envision their enforceability. Only in doing so, the regulator will be able to keep up with the speed at which digital services transform. Two decades back, no-one could have predicted the rise of platforms and their outsized role in the economy, as well as the dependence of SMEs on these new digital behemoths. In the same way, predicting how digital commerce will look like in 20 years from now is a daunting task. Principles-based rules are the most adequate answer and also the best safeguard against an ever-changing business and regulatory environment.

This paper is a reaction to the Commission's proposal for a DSA and should also be considered as a follow-up to our 10 recommendations which were issued before the publication of the proposal.

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Our main recommendations are:

- The original internal market clause from the e-commerce directive works and should remain untouched. In this regard, it should be ensured articles 8 and 9 are in line with the internal market clause. Safeguards should be introduced to avoid the introduction of “de facto” national restrictions;
- We agree with the gradual approach to confer more obligations to larger companies. Micro- and small companies should have obligations proportionate to their ability and size to ensure they remain accountable. They should be subject to the general obligations in terms of transparency and fundamental rights protection but exempt from the more stringent obligations on online platforms. Pure Access and Caching Providers should be exempted from certain obligations;
- We have concerns with service providers being pushed in the role of a judge in certain circumstances;
- The provisions on what constitutes illegal content merit clarification. There should be a clearer distinction between harmful and illegal content;
- Some terms deserve clearer definitions, especially those referring to the providers and services falling under the scope of the regulation;
- Changes in the liability regime should be carefully assessed and should avoid being non-enforceable in practice or excessive in relation to the removal of content;
- Adequate enforcement needs to be ensured.

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Specific comments on the Commission proposal

1. General provisions on subject matter and scope

Scope and Country of origin principle

The scope should be as comprehensive as possible, both with regards to the kind of intermediary services offered as well as geographically. EUROCHAMBRES is pleased to see that the future Regulation will apply to all intermediary service providers offering their services to residents of the European Union. This measure should ensure that also companies operating from outside the EU are subject to the same rules as those operating from within the EU. As a general rule, fair competition should always be on an equal footing.

The country of origin principle, engrained in the e-commerce directive and being an important tenet of the single market, is another fundamental element ensuring fair competition. It is therefore crucial that the current proposal makes it amply clear that the future Regulation is without prejudice to article 3 of the e-commerce directive. Especially for small and medium-sized companies, this principle offers legal certainty as its easier for them to comply with the rules of their country of origin in order to expand to other markets. Changes to this clause, even with good intentions, will be an extremely tricky balancing act and could have numerous unintended consequences. In general, the application of the country of origin principle needs to be examined closely as to whether derogations being applied are proportionate to achieve Member States' public interest objectives. Member States should be able to enforce their own laws, however this must not dilute the proper functioning of the single market by creating further fragmentation. Full respect of the country of origin principle should be non-negotiable.

Challenges of legal fragmentation between Member States

Whilst we support each Member State's prerogative to enforce its own national law on every legal and physical person on its territory, the proliferation of national rules and regulations that may weaken the Single Market cannot be ignored. On its end, the Commission holds the view that whilst article 3 of the e-commerce directive remains applicable under the DSA, taking down "illegal" content does not really constitute a derogation therefrom and as a consequence, it does not need to be justified. EUROCHAMBRES remains cautious on this point, and we invite the policy-makers to remain mindful of the fragmentation of substantive law and the associated risks when implementing the DSA (e.g. conflict of notions of illegal content across the Member States), and further explore efficient means for addressing such fragmentation at the appropriate level.

Articulation with other legal acts

As is clearly stated in the proposal in article 5 § 1, the DSA should function as a general act which complements a series of sectorial or more specific laws, such as the AVMSD and the P2B Regulation. Of course, this should automatically imply that rights granted to companies in the laws mentioned in the aforementioned article cannot be put in question by the DSA.

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2. Provisions on liability of providers of intermediary Services

EUROCHAMBRES welcomes the confirmation of the liability regime of providers of intermediary services as previously introduced by the e-commerce directive.

Considering the link between this liability regime and the qualification of content as "illegal", EUROCHAMBRES wishes to draw the attention of the policy-makers to the fact that providers have expressed their doubts regarding the actual confirmation of the exemption from liability in the proposal; as long as the uncertainty around the definition of illegal content persists and the risk of continuing conflicts among the Member States' interpretation of illegal content is not addressed, it is not clear whether the liability regime currently in force remains intact.

Presumption of actual knowledge of illegal content

On a related issue, EUROCHAMBRES expresses its concerns with article 14 § 3, specifically as regards the provision according to which notices that include the elements referred to in paragraph 2 of the same article shall be considered to give rise to actual knowledge or awareness for the purposes of article 5 in respect of the specific item of information concerned. Due to the fact that this provision entails that the provider will be considered -in principle- liable if he does not act against the notified "illegal content", the proposal needs to be amended to provide that a simple notification should not suffice to reverse the burden of proof. To this effect, it could be envisaged to implement a two-step mechanism that would allow all parties to verify whether their rights are fully respected and only after such mechanism has been actioned and the platform has reached a decision, to have the presumption of article 14 § 3 triggered if the other conditions of the regulation are also complied with.

We call upon the lawmakers to tread carefully with the imposition of liability and due diligence obligations as the ones encompassed under Chapter II and III. It would be helpful to have a clearer differentiation between hosting service providers that play an active role with respect to the content they host (online platforms) and those that play a more neutral role (cloud services). To date, cloud services are unable to access and manage the content they store as it is encrypted, and thus inaccessible.

Additionally, cloud services, as opposed to other active hosting services do not perform any manipulation of the content for which it might be unreasonable that they must abide by the same set of comprehensive obligations as other hosting services which do in fact have a large audience and which manipulate the content, becoming active hosting service providers.

Encouragement of voluntary measures

While we understand from the wording in article 6 that providers of intermediary services shouldn't fear a loss of the exemption from liability, in the case of voluntary investigations, it could be worthwhile investigating how voluntary measures can be actively encouraged.

No general obligator to monitor illegal activity

EUROCHAMBRES welcomes article 7 reiterating the principle set out in the e-commerce directive that no general obligation to actively monitor the presence of illegal activity on their

services shall be imposed on providers of intermediary services. Such an obligation cannot be reasonably expected to be complied with in any case and, additionally, would lead to unreasonable costs for the service providers concerned.

Orders from national authorities

Article 8 rightly obliges intermediary service providers to act against illegal content and take action following the reception of a court order. The European Commission sets a number of conditions which the orders need to conform to. More safeguards should be built in this regard. As such it should be entirely clear that the order is fully legitimate and grounded in national or Union law. A clear merit in any order addressed to an intermediary service provider should be established. A prior decision of a national authority or judge on the illegality of a product or service would offer that legal certainty, and therefore the imposition of an order of take-down of content should be made conditional on the prior issuance of a decision of illegality of the content in question.

The Commission clarifies in the recitals that articles 8 and 9 do not constitute an additional legal basis for action of national authorities and that their objective is to merely harmonize the procedural aspects of any measures that are provided for under other legal acts in the various Member States, and has further explained that these articles expressly allow national authorities of the country of destination to issue directly to the services providers orders concerning specific illegal content on the basis of their existing national laws or Union law without first soliciting the competent authority of the country of establishment of the services provider.

Hence, the proposal should clearly and unequivocally stipulate that both articles 8 and 9 do not introduce additional enforcement measures to the ones existing in virtue of other legal instruments currently in force, and that they merely confirm the applicability of such existing legal instruments while simply providing for a certain format to be complied with by the different competent authorities.

According to the Commission, online intermediaries could receive an order to remove illegal content from a court or national authority from another EU jurisdiction than its own. This raises important questions. What for instance if the content is not illegal in the country of origin of the online intermediary? While it is stated that the Internal Market Clause of the e-commerce directive still applies, there is at the least a risk of a carving out of the principle.

Recital 33 is very concerning, as it notes that *"the rules set out in Article 3 of Directive 2000/31/EC, including those regarding the need to justify measures derogating from the competence of the Member State where the service provider is established on certain specified grounds and regarding the notification of such measures, do not apply in respect of those orders."* This explanation prompts more questions as to how the Internal Market Clause, which is supposed to remain unchanged, will be affected. EUROCHAMBRES strongly believes that the Internal Market clause shouldn't be eroded and be kept in its integrality in its existing form. The recital continues by attempting to justify this stance by stating that orders to act against illegal content do not constitute restrictions to the freedom to provide services across borders. This argumentation is flawed as it is oblivious to the political realities that it leaves the door open for Member States to disregard the Country of Origin principle for disproportionate reasons, and point to this recital as a rationale for its actions. This would inevitably lead to further fragmentation, the brunt of which will be borne by European SMEs and consumers by extension.

We have noted the explanations of the Commission according to which the DSA intends to further harmonize the notion of illegal content across the Member States by creating a framework where each content that has been determined as illegal by the national authorities of a Member State when issuing an order under article 8 of the DSA is also treated in the same way in the other Member States, but we are not certain whether this would address the issue of fragmentation of national laws. The risk we see is that at certain occasions there will be no previous definition which does not allow legal certainly for providers, thus leading to geo-blocking-like solutions and perhaps over-removal of content.

The takedown orders pertain to a request of removal of illegal content. In parallel, the immunity of intermediary services providers depends on their reaction as regards illegal content. The definition in article 2 of the term illegal content is very broad and encompasses all national as well as Union law. At the same time the objective of the DSA is to make *cross-border* trade smoother and safer. While the choice not to further define or exhaustively specify all cases of illegal content (a task simply not possible) is welcomed, it is a shear impossible task to know all the laws that are defining what illegal content is in a particular jurisdiction. For example, it is possible for content to be illegal in the country of destination and not in the country of origin.

Eventually a solution should emerge that confirms the acquis of the e-commerce directive and enhances security for providers and transparency for consumers.

3. Due diligence obligations for a transparent and safe online environment

EUROCHAMBRES supports in principle the rationale that foresees in cumulative due diligence obligations in function of the types of services delivered and in function of the systemic importance of the service providers.

Section 1: provisions applicable to all providers of intermediary services

The obligation for service providers to appoint a *"point of contact"* should make communications between the company and the authorities easier. Especially for service providers operating outside the EU, it makes sense to appoint a legal representative to whom authorities can address their requests.

Article 13 sets out a new obligation for providers of intermediary services to publish yearly *"detailed reports on any content moderation they engaged in."* The *raison d'être* of these reports is to ramp up transparency, however the information included in them, in the case orders issued to the company, are most probably already in the hands of the authorities or courts that issued the orders. It seems to us that these reports would be more useful with regards to points C and D of the article.

Section 2: additional provisions to providers of hosting services, including online platforms

The notice and action mechanism and the obligations linked to it for hosting services are very far-reaching and could be more differentiated. One issue is that no distinction is being made between the different types of platforms. The legislator needs to acknowledge platforms have different types of exposure to uploads of illegal content by their users. Another issue relates to the fact that platforms would be tasked with policing powers which

need to be carefully assessed. Thirdly, EUROCHAMBRES worries that starting platforms would be burdened with unreasonable costs with regards to the set-up of the described type of notice and action mechanisms. An exemption for these small platforms could offer a solution. In the same vein, we believe that the *"statement of reasons"* described in article 15 is far too burdensome for the smallest players. We ask therefore the co-legislators to consider an exemption of these obligations for platforms that are not large or very large. This should be done through the introduction of an exemption article similar to article 16, which we support.

Section 3: additional provisions applicable to online platforms

Article 16 pins down the exemption for micro and small enterprises of the obligations under section 3. The same exemptions should apply for pure access providers.

Art. 17(5) sets that online platforms must take decisions regarding user internal complaints *"not only on the basis of automated means".*

Such a prescription seems reasonable in order to make effective other rights such as the freedom of speech, however, it shouldn't become an interference with how online platforms desire to govern their ecosystems. Ultimately, the new rules should not prevent online platforms from innovating with scalable technical solutions such as AI.

The so-called trusted flaggers will play an important role in the monitoring of allegedly illegal content and should therefore be subject to a transparent selection process based on clear criteria to carry out this role. The conditions set in article 19 § 2 as well as the fact that they will be appointed by the national Digital Service Coordinator are all legitimate safeguards. Questions remain however as to how exactly trusted flaggers will be certified at national and EU level.

For the sake of the plurality of opinions in our societies as well as the preservation of the freedom of speech, additional safeguards should be built in in order to avoid the excessive blocking of content which might be considered controversial for some but cannot be considered as truly illegal.

In addition, the national Digital Services Coordinators should make sure that in their selection of the trusted flaggers they also take into account conditions such as the financial independence of the candidate flagger as well as its non-for profit purpose. Stacking up earnings through fines cannot be encouraged as a lucrative financial model as it would create incentives wrongly. The financing questions would merit a more thorough debate.

Article 22 stipulates that online platforms allowing traders to execute distance contracts with consumers need to have a minimum amount of information on these traders. It is only fair that platforms only allow traders to make use of their platforms when they have properly identified themselves as legitimate businesses. This should be a good safeguard against traders who might deceive consumers.

While transparency is a laudable objective in itself it should stand the test of proportionality. We judge that, as is the case for the transparency obligation stipulated in article 13, the reporting obligations defined in article 23 go beyond what is necessary.

Consumers deserve to know who is targeting them with advertisements and this is therefore to be considered as an element that can optimise competition between different traders on a platform. Article 24 § 3 asks for *"meaningful information"* about the parameters used to determine the recipients of it. We can support this as long traders won't be obliged to disclose the full technological functionality that is behind such advertisements. These are part of the advertisers marketing strategies, which by no means should be viewed as a public good.

Section 5: Other provisions concerning due diligence obligations

EUROCHAMBRES agrees with the results of the public consultation that harmful content should not be covered by the current proposal.

Inclusion of "harmful content" in the DSA set of obligations may prove to restrict freedom of expression within the EU. This seems to be unfortunately the case based on the broad definition of terms and conditions.

In addition, and while we support the idea of codes of conduct to reduce "systemic risks" on very large online platforms under article 35, as well as the criteria of the risk assessment to be carried out by such platforms per article 26 § 1, we find that the ending of § 2 of the same article 26 undermines the objective: article 26 § 2 *in fine* seems to add an additional criterion being the "*dissemination of […] information that is incompatible with their terms and conditions"*. If we thus follow the logic of both articles 35 and 26, it all boils down to the conclusion that codes of conduct could be drafted and enforced at Union level based on input from the terms and conditions which could be potentially very restrictive for fundamental rights. This situation should be rectified by at least amending current article 26 § 2.

4. Implementation, cooperation, sanctions and enforcement

On enforcement, Digital Services Coordinators and the Commission should be granted appropriate powers and resources to effectively enforce the regulation. We would also like to point out that market surveillance authorities are already lacking the necessary resources to carry out their current obligations. Legal obligations should be put up on the Member States to adequately fund the competent authorities to carry out existing tasks, as well as the tasks that are set within this regulation.

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