Computer & Communications Industry Association
Tech Advocacy Since 1972

Discussion Paper on the Digital Services Act

Introduction

Over the past two decades, the European Union (EU)'s E-Commerce Directive has been the foundation on which Europe's digital economy has developed. It has enabled thriving digital businesses that operate across borders within the EU Single Market. In particular, online businesses make the Digital Single Market (DSM) a reality. The E-Commerce Directive (ECD) is a true European success story.

The Computer & Communications Industry Association (CCIA) supports the European Commission's desire to improve the Single Market for services through addressing fragmentation and gaps left in the framework. We acknowledge that the internet and digital services have evolved over the last 20 years and so have everyone's expectations.

The announced Digital Services Act (DSA) is an opportunity to design a pro-innovation framework that strengthens the EU Single Market to allow companies from wherever they are created in the EU to thrive. We welcome a focus on digital services that enables consumers to receive the benefits of the Single Market and that facilitates businesses in scaling across the union to meet their demands. Consumers and businesses need to trust each other in order for markets and society to function efficiently and productively. Evaluating what more should be done, and how, requires a thorough analysis of past measures. The new EU leadership have stated that this process should not be rushed. We agree that time and careful reflection is necessary to craft targeted and effective interventions where needed.

Digital service providers are committed to being responsible players. We see the opportunity to review how to encourage proactive behaviours, without penalising companies for their good efforts such as fighting unlawful and harmful content, products or conduct. The expectations for these proactive behaviors should be in line with companies' particular types of services and capabilities, lawful users and users' fundamental rights. The existing ECD liability regime, with its prohibition of general monitoring and the country of origin principle, should be maintained, while areas of national divergence can be addressed.

> In 2018, 83% of Europeans used the internet at least weekly and about 76% daily or almost every day, compared with 81% and 72% respectively a year earlier[1]. EU citizens engage in a broad range of online activities: they order goods or services online (69%), participate in social networks (65%), use online banking (64%) or watch video on-demand (31%)[2].
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> Small and medium-sized enterprises (SMEs) as well as micro-businesses are also hugely benefiting and growing, thanks to digital services providers. For instance, 18% of business turnover in the EU comes from e-sales[3]. Moreover, 26.2% of European enterprises purchase cloud computing services and incorporate cloud technologies for improving operations while reducing costs, representing an increase of 25% compared to 2016[4].

[1] Digital Economy and Society Index Report 2019, Use of Internet Services, 29 October 2019, available at: https://ec.europa.eu/ digital-single-market/en/use-internet

[2] Idem.

[3] Eurostat, Online businesses & e-sales, consulted on 26 February 2020, available at: https://ec.europa.eu/eurostat/cache/ infographs/ict/bloc-2c.htm

[4] Digital Economy and Society Index Report 2019, Integration of Digital Technology, 29 October 2019, available at: https://ec.europa.eu/digital-single-market/en/ integration-digital-technology

Rue de la Loi 227 • First Floor • B-1040 Brussels • Belgium • Ph: +32 2 661 2020
www.ccianet.org

1. Assessing before regulating

In accordance with the EU 'better regulation' principles, we encourage the European Commission to consult stakeholders, conduct robust impact assessments, and then act based on clear evidence. The E-Commerce Directive should remain a cornerstone of Europe's internet economy and key provisions must be kept intact to facilitate the functioning of the Single Market. Any revision that is not based on proper consultations with stakeholders and a thorough consideration of empirical evidence may inadvertently create harm, especially where broad horizontal measures are considered. Moreover, legislators should carefully assess any potential unintended consequences that regulating digital services might have on businesses operating in Europe, particularly SMEs. Obligations should be achievable, and proportionate to known risks. This should also reflect the need for sufficient protections for users' rights of freedom to do business and freedom of speech, and to prevent over-blocking as the default response to obligations and any regulatory oversight.

The EU has already adopted frameworks[5] to deal with problematic content, goods or conduct online. Before adding another layer, and potentially creating confusion, we would urge legislators to wait for the implementation of these frameworks. The Copyright Directive, goods package, VAT reforms, consumer omnibus Directive and changes at UPU-level to fees, as well as the Terrorist Content Regulation, are major changes that have not yet come into force. Their impact must be understood to assess any further gaps and proportionate responses, including within the existing voluntary frameworks[6].

2. Guiding principles

2.1 Harmonised EU Single Market

While in 2018, the European Commission estimated that 7,000 online platforms[7] operated in Europe, today there are around 10,000[8]. This represents a rise of 43%. The digitisation of Europe's economy has just started.

CCIA advocates for an innovation-friendly framework helping digital service providers to develop, scale up and compete globally. A harmonised EU framework would support micro-businesses, SMEs, and digital service providers' growth and prosperity. In an assessment of the ECD, CCIA would welcome clarifications and harmonisation of 'notice-and-takedown' procedures, and ensure they complement the concepts of 'actual knowledge'[9], and 'manifestly illegal content'.

A harmonised approach could help businesses operate more seamlessly across borders in the EU. These rules could also include important clarifications on issues such as what constitutes a valid notice and the rights of users to potentially file a counter-notice. Importantly, sufficient flexibility should be ensured to take account of the specific needs of different online services.

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[5] The Directive on Copyright in the Digital Single Market (2019/790/EC), the revised Audio-Visual Media Services Directive (2018/1808), the Directive on the Enforcement of Intellectual Property Rights (2004/48/EC), the proposed Regulation on Preventing the Dissemination of Terrorist Content Online (COM/2018/640), the Code of Conduct on Countering Illegal Hate Speech Online, the EU Internet Forum, the Directive on General Product Safety (2001/95/EC), the Regulation on Market Surveillance and Compliance of Products (2019/1020), the Product Safety Pledge, and the Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (2011/93/EU).

[6] For instance, the EU Internet Forum, the Product Safety Pledge or the EU MoU on Counterfeiting Online.

[7] European Commission, Impact Assessment Annexes accompanying the proposal for a regulation on promoting fairness and transparency for business users of online intermediation services, 26 April 2018, available at: https://ec.europa.eu/digital-single-market/en/news/impact-assessment-proposal--promoting-fair ness-transparency-online-platforms

[8] European Commission's presentation, European Parliament IMCO workshop on "e-commerce rules, fit for the digital age"", 19 February 2020, 17:35:33-17:36:25, available at: https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200218-1600 -COMMITTEE-IMCO

[9] The type of evidence required to substantiate 'actual knowledge' varies among jurisdiction. While in some Member States (Austria) actual knowledge could only be triggered in the case of manifestly illegal content, others like Germany and the Netherlands require knowledge of the illegal activity. In Italy and Spain the national legislation requires a communication or declaration of illegality from a competent authority. Recent case law in Italy and Spain ruled that actual knowledge can be obtained by any means. This approach has also been followed by the Polish and United Kingdom courts. In Finland, actual knowledge is obtained by a court order, with the exception of copyright infringements (for which a typified notice is sufficient). In Austria, France, Italy, Portugal and Spain the courts have held that the hosting service provider is not obliged to remove the disputed content or disable access where there is no manifest illegality. In Portugal, actual knowledge is limited to manifestly illegal content. In Finland, the relevant legislation provides that certain extreme pornography or ethnic agitation is assumed to be recognised by the host, regardless of whether a separate notice is provided by the competent authorities. In Sweden, the hosting service provider must remove, without notice, all content referring to agitation against a national ethnic group, child pornography and unlawful depiction of violence.

2.2 One size does not fit all

We would welcome horizontal measures focusing on the processes and the principles underlying them. That has been the enduring success of the ECD. Specific measures concerning types of content, goods or collaborative economy services should be considered individually and across on- and off-line spaces in order to address root causes.

Furthermore, it is essential to acknowledge and differentiate between the various types of intermediation services. These should properly be accounted for in the context of any amendments made to the currently applicable framework. For instance, a cloud or technical infrastructure provider does not provide the same services as a content hosting service, and the extent to which they can be said to have control over information may be very different.

We would support a European problem-solving approach based on stakeholder consultation, evidence and thorough assessment. To be effective in assessing providers' responsibilities, a pragmatic and targeted approach should be favoured.

2.3 Future-proof

The most innovative technological tools of today will likely be outdated in a few years. EU law should not mandate one technical solution above another as it would harm innovation and competition. The Digital Services Act should be technology-neutral by regulating outcomes instead of processes. We encourage policymakers to build smart pro-innovation policy frameworks that maximise the benefits of technology by encouraging attainable principles for all.

2.4 Building a healthy ecosystem together

The evidence of the self-regulatory activities documented through several MoUs and Codes of Practices is that online intermediaries can and do play a role when it comes to tackling all kinds of problematic content, products or conduct. That, however, is only one piece of the puzzle. While online companies must play their part, unenforced laws simply create burdens on the compliant while leaving problems unaddressed elsewhere. There are also roles for law enforcement, rights owners or users. Successful policy will ultimately depend on finding the appropriate balance between the rights and obligations of all relevant stakeholders.

3. Adopt a problem-solving approach

While we believe that the ECD continues to serve Europe well, a potential review could be an opportunity for improvements.

3.1 Scope

CCIA supports the European Commission's objective to treat all digital services equally, regardless of where they are established.

We wouldn't be opposed to creating specific categories for different platforms. However, we strongly oppose defining a category of services based on large or significant market power status. It is not clear what the benefit of a separate rulebook for bigger players would be given that the current, successful structure is based on solid principles regardless of company size. The risk of such an approach could be to incentivise successful European players to stay small to avoid regulation. Another unintended consequence would be the migration of illegal content, goods or conduct to smaller, less regulated platforms. Last but not least, it is in no one's interest to make a potential review of the ECD focus only on a handful of companies when the critical issues, questions and impacts involve the entire ecosystem of companies handling online content.

3.2 Liability

Intermediaries stand ready to act as responsible players. However, they cannot be held directly liable for what their users do. A general monitoring obligation could lead to excessive takedowns or de-activations. It would also likely lead to a market entry barrier as companies would prioritise limiting their legal risk. A 'no obligation to monitor' rule is the necessary companion of the liability protection principle. The Digital Services Act should under no circumstances weaken these fundamental principles.

The tech industry has invested considerably to make sure that illegal materials or accounts are removed quickly and efficiently. However, some platforms might still be reluctant to be more proactive as they may face liability risks due to the assumption that they would then have 'actual knowledge' of any illegal activity on their platforms. CCIA would welcome the introduction of a "proactive measures" provision where relevant and technically feasible. Such a clause would create legal clarity and encourage such companies to take proactive measures tackling problematic content, products or conduct without being penalised for their good faith efforts.

3.3 Country of origin

The country of origin principle allows innovators to grow their businesses from wherever they are in the EU and provide their services across the Single Market. It is as such the cornerstone of a functioning Digital Single Market and is particularly important for companies, notably for startups. Without it, European companies might face increased challenges to scaling up in the EU Single Market.

3.4 Content

To the extent that the Digital Services Act will focus on content, we recommend that it differentiate between illegal and harmful but legal content. "Lawful but harmful" content cannot be treated as "illegal content" without risking infringement of important rights, such as freedom of expression and access to information. Harmful content is complicated to assess, as the definitions are vague and norms often vary considerably, even within EU Member States. It will by definition require nuanced and subjective line drawing. A targeted regulatory approach adapted to the type of content will be more effective and limit the risk of unintended consequences.

3.5 Goods

EU citizens buy ever increasing amounts of goods, services and content online and cross-border. In 2019, 35% of e-buyers made purchases from sellers in other EU countries, compared with 2% in 2014. Last year, 71% of EU internet users shopped online[10].

E-commerce services and online marketplaces work every day to ensure their users' trust in their services. Addressing issues related to goods in the DSA should be based on careful identification of specific issues, to avoid confusing distinct challenges through broad terms like "counterfeit". A detailed analysis of existing initiatives, including rules yet to come into force, should consider where interventions are needed and best made, regardless of whether they are sold online or offline, as they should address goods however sold. Given that over 90% of all goods in the EU are still sold offline[11], this requires an approach that is channel-neutral and focuses on the full supply chain.

3.6 Collaborative economy services

Collaborative economy services are digital services providing digital and physical products. Through a horizontal approach, the DSA offers the perfect opportunity to bring some consistency between EU Member States and local initiatives, enabling companies to scale up and consumers to receive better services.

3.7 Online advertising

The digital economy has improved the advertising experience for all stakeholders involved in it. Thanks to ad-supported business models, consumers enjoy goods and services for a lower price, oftentimes even for free.

[10] Eurostat, e-commerce statistics for individuals, consulted on 26 February 2020, available at https://ec.europa.eu/eurostat/statistics-explained/index.php/E-commerce_statistics_for_individuals

[11] European Commission Inception Impact Assessment Proposal on contract rules for online purchase of digital content and tangible goods, July 2015, available at: https://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_008_contract_rules_for_digital_purchases_en.pdf

Thanks to investments in technology, consumers usually receive relevant advertising to them. Sometimes to provide a more personalised online experience, digital platforms use information that is drawn from users' profiles and/or activities. This usage of information does not necessarily have a negative impact on users' privacy provided that operators empower consumers by allowing them to control the personal data that is being shared with the operator by implementing transparency measures. Following GDPR, platforms and intermediaries have undertaken efforts to address these concerns and better empower consumers by developing new privacy controls and practices. CCIA acknowledges policy-makers' interest in increasing online advertising transparency. We stand ready to discuss how to improve consumers' experience.

3.8 Oversight authority

Enforcing the existing rules is key to success. We would welcome further cooperation between the Member States. If the European Commission would like to create a specific oversight body, or extend the mandate of an existing one, we would suggest to clearly outline the type of body, areas to cover, and mission statement. In both cases, CCIA and its members would like to cooperate with the Member States' authorities or the governing body who will implement the Digital Services Act.

Conclusion

The Computer & Communications Industry Association stands ready to provide constructive input to the forthcoming Digital Services Act. We believe the DSA is an opportunity to strengthen online rights, clarify rules for all players and strengthen Europe's (Digital) Single Market.

We are very much looking forward to working with policymakers and exchanging information on how we counteract unlawful or harmful content, fake or dangerous products, and bad conduct, while safeguarding users' fundamental rights and preserving the economic growth and opportunity that digital services have provided for Europe. We are delighted to work with the EU institutions to tackle the remaining challenges that haven't been solved by the previous initiatives. We believe that the DSA should be a horizontal principle-based legislative initiative, which could be complemented by targeted measures (legislative and non-legislative) tackling specific concerns.

The tech industry shares European policymakers' ambition to build a strong human-centric Digital Single Market enabling EU citizens and businesses. We do not take our corporate social responsibility lightly and we offer our support to the European institutions in building an efficient and fair regulatory framework aligned with with European values.

About CCIA

CCIA is a not-for-profit membership organization for a wide range of companies in the computer, internet, information technology, and telecommunications industries, represented by their senior executives. Created over four decades ago, CCIA promotes open markets, open systems, open networks, and full, fair, and open competition. CCIA serves as the eyes, ears, and voice of the world's leading providers of technology products and services in Washington and Brussels.

CCIA members include computer and communications companies, equipment manufacturers, software developers, service providers, re-sellers, integrators, and financial service companies. Together they employ almost one million workers and generate more than $540 billion in annual revenue.

For more, please go to: **www.ccianet.org**.