

Impact Assessment Quality Checklist for Regulatory Scrutiny Board Opinion ¹			
Title:	Digital Services Act: deepening the Internal Market and clarifying responsibilities for digital services		
AP Reference:	PLAN/2020/7444	IA submitted to the RSB on:	08/10/2020
RSB meeting	04/11/2020	Date of IAQC (initials A2 Desk):	29/10/2020 ()

Policy context
<p>The 2000 e-Commerce Directive harmonised the principles for cross-border provision of digital services. Since then the nature and scale of such services have grown significantly. This has generated new social and economic challenges. These include illegal activities and fundamental rights issues. Enforcement of the current Directive remains uncoordinated and the single market continues to be fragmented.</p> <p>This initiative proposes new rules to frame the responsibilities of digital services, to tackle the risks faced by users and to protect their rights. It follows an evaluation of the e-Commerce Directive. The new obligations aim to ensure enhanced supervision of platforms and effective enforcement.</p>

Main issues for discussion
<p>(1) What are the inter-linkages between this initiative and related legislation? Does this broader regulatory framework for digital services contain any overlaps or unclear delineations? If so, will they be addressed in the proposed initiative? How have non-legislative or self-regulatory measures worked so far? What will be their role in the future? [boxes 1, 2 and 5]</p> <p>(2) What are the main political trade-offs and risks relating to the options? How was the initial threshold for a ‘very large platform’ set? Who would be covered? To what extent are third country digital services covered, and why? [box 5]</p> <p>(3) How would the supervisory framework function under the different options? How would it link to other (existing or planned) supervision structures in the digital area? Could an alternative structure be considered for the EU Board? [box 5]</p> <p>(4) On what basis does the assessment conclude in favour of the preferred option? How does it account for stakeholder views? What would be the additional costs imposed on very large platforms under Option 3? [boxes 6, 7 and 9]</p>

¹ The Board's assessment is based on the application of the Commission's guidelines, the evidence base, the scope and depth of the analysis and whether it is proportionate in relation to the type of initiative and likely impacts, as well as the quality of the analysis, the appropriateness of the applied tools/methodology and the reliability of the data used.

1. Context and scope

The report could further explain the regulatory set-up for digital services and what is covered in the e-Commerce Directive as opposed to other horizontal, service-specific or sectoral pieces of legislation. It could also clarify the role – and observed success – of non-legislative (e.g. 2018 Commission Recommendation) and self-regulatory measures in the area. The report should explain how these measures complement each other and where there may be gaps or overlaps.

Regarding the scope of option 3 and the suggested definition of ‘very large platforms’, the report should specify how it was designed. It should clarify how it would link to the forthcoming definition of ‘very large online platforms acting as gatekeepers’ in the parallel ex-ante/competition tool initiative.

2. Problem definition and use of evaluation

The problem definition points to the problems of the rapid developments in the area of online platforms and the outdated legal framework and its implementation. The report characterises the problems and their magnitude but the analysis could go more in depth in explaining their drivers to more clearly substantiate the choices of options.

The report could more clearly present the main trade-offs and risks relating to the identified problems (e.g. consumer protection vs fundamental rights, transparency vs commercially-sensitive or private information).

The report could be clearer on which problems are already (partially) addressed by existing legislation, and which ones are not.

Some of the presented examples of societal risks posed by online platforms also occur in the offline world:

- Advertising has always been targeted. By choosing to publish their ads in certain newspapers and magazines or next to certain television programmes, advertisers have always aimed to reach certain audiences, and has in that sense been discriminatory. (§45)
- The ‘lack of transparency around political advertising’ is not regulated by legislation on digital platforms, but is an issue for electoral rules (e.g. transparency on electoral spending). (§45)

3. Subsidiarity and EU value added

The report demonstrates the necessity for action at EU level because of the cross border nature of digital services. A patchy framework of national rules has turned out to be counterproductive for the functioning of the internal market and the protection of consumers and businesses.

4. Objectives and intervention logic

The policy objectives match the described problems and the report logically connects the problems with the objectives and options. However it is not clear to what extent the general objective and specific objectives are consistent with broad policy strategies and other relevant policy initiatives. For example, to what extent can the specific objective of “ensuring the best conditions for innovative cross-border digital services” be achieved through this initiative? A weakness of the intervention logic is that it is not clear what the success of the initiative would look like in practical terms, nor how it would be measured.

5. Baseline and options

The report should better substantiate the baseline by bringing in available evidence of how the situation would evolve under a no-policy change scenario. The uncertainties and risks of the baseline should be assessed.

The way the options are currently constructed seems artificial. It is not clear whether there would be any alternative ways to group the different measures under the options. For instance, could EU-level governance have been relevant also for option 2? Why is a (voluntarily) coregulatory framework not already envisaged for options 1 and 2? Only option 3 addresses all problems (problems of very large platforms; clarify status of new types of services). Would there be any alternative sub-options for option 3 (e.g. see further down on supervisory mechanisms)? The current description of the options is high-level, leaving questions open as to their actual content and how they would be implemented in practice. The report should be clearer about which obligations would be fixed in this legal revision, which would be defined in subsequent steps (in implementing legislation), and what role self-regulatory measures would play as a complement (if any).

For example:

- Option 1: why does the complaint and redress mechanism have to be internal to the company (§151)? This would make it more difficult for start-ups, where outsourcing could be a more viable (initial) solution.
- Option 2: on liability of intermediaries (§157), how would the initiative ‘incentivise’ hosting services to take proactive measures to address illegal activities (legal or voluntary measure)?
- Option 3: what would be the ‘co-regulatory efforts’ to mitigate emerging risks (p26)?
- Option 3: how was the threshold set for what is a ‘very large platform’ (p30)? Who would be covered?
- How would a fundamental rights by design approach work in practice? What does “crisis response cooperation” stand for?

Regarding enforcement and supervision, the report should clarify the challenges to effectively identify and tackle misuse of algorithms to capture or steer users’ attention, and how the options would address them. The report should also explain what kind of data access rights would be given to public authorities and how these would be aligned with those envisaged under the parallel ex-ante / competition tool initiative. The report should clarify which researchers (public interest based?) would be able to access data.

The report should further specify the proposed supervision framework set out in the options. How would the Digital clearing house be set up, by whom, what functions and

powers would it have? What would be expected from the national Digital coordinators? How would they link to Digital clearing house? What would be the added value of a new EU body? Why was no alternative considered to an independent agency (e.g. expert group, other kind of EU network or platform)? How would this structure link or delineate with CPC authorities or other related supervisory functions? Could the new Board integrate the Commission's new supervisory responsibilities under the parallel digital markets act?

Given the Commission's commitment to respond to European Parliament's legislative initiative resolutions, the report should further clarify to what extent the options align or deviate (and if so, why) to the EP's own initiative reports on the single market, illegal content, protection fundamental rights.

The report should better clarify whether suggestions from stakeholders (e.g. in box p. 28) are integrated in the options. If not, why not?

Given the global character of the sector, the report should explain to what extent the EU's action would be in line with or deviate from the EU's international obligations? It should specify more clearly how the options would apply to digital service providers established outside the EU, including on enforcement.

To what extent would this new horizontal legislation replace existing sectoral legislation?

The report examines options discarded at an early stage but it should more clearly describe the reasons for discarding.

6. Impacts

The risks and uncertainties associated with the impact of each option have not sufficiently been identified.

The report should consider how a lack of global agreement on regulating web content, and different rules for providers in and outside the EU, may have negative consequences for digital service users.

The report should further elaborate the impacts on businesses and their competitiveness. It should make an effort to estimate the additional costs imposed on very large platforms under Option 3. Given that the latter should be covered under 'costs and administrative burdens on digital services', it is unclear why option 3 receives the same score as option 2 for this assessment criterion (cf. table 3).

Other assessment scores in table 3 could be better justified in the text. For instance, the degree of variation in fundamental rights scores between options 2 and 3 is not always clear.

7. Comparison of options and proportionality

The options are compared against the baseline scenario and criteria of effectiveness, efficiency, coherence and proportionality. The report should clarify how comparison table 5 links and is coherent with table 3 on impacts.

The scoring on efficiency should include a separate score for comparing costs. Showing

only scores for the cost-benefit estimate hides the differences in costs and mainly repeats the effectiveness scores.

The report should clarify how the efficiency and proportionality scores should be interpreted (e.g. the more +++ the worse the option scores?)

The report is written towards the preferred option (option 3) and leads the reader towards pre-set conclusions. The report should present all options more objectively. The superiority of option 3 as opposed to option 2 should be better argued. It should explain to what extent it would be supported by stakeholders and how potential concerns have been addressed.

The coherence analysis could explore possibilities to align governance mechanisms between this initiative and the parallel digital markets act. It should also analyse in more detail to what extent certain aspects of existing (sectoral) legislation are covered by the proposed digital services act. It should discuss whether these possible overlaps would need to be removed.

8. Future monitoring and evaluation

It is not clear how success would be measured. The report proposes monitoring arrangements, as a system for data collection and monitoring is an essential part of the preferred option. Data collection would be qualitative, as the report states that “quantitative indicators are not set here as key performance indicators, as the framework is designed to adapt to the dynamic challenges of the digital world”. However, an impact assessment should be able to say more about how an initiative would be monitored and evaluated to pave the way for establishing such a system. The report states that a review of the initiative “should be planned” five years after entry into force. Will this be an evaluation and when will it take place?

9. Consultation, information base and methodology

All relevant stakeholders have been identified and consulted via open and targeted consultations, bilateral and expert group meetings, interviews, seminars and workshops over the last years.

Annex 2 should present a more granular analysis of the public consultation. It should discuss the large number of responses coming from individuals (8749 out of 8961 replies – cf. p.20). Where were the respondents from? Were any campaigns identified? Also for other replies, a more granular stakeholder analysis should be provided of who has responded – e.g. from which Member States, third countries, representing which interests?

The main report should be clearer on divergent stakeholder views or concerns. It should specify how concerns of stakeholders have been addressed in the options, and, if they have not been taken on board, why.

The use of analytical methods is sparse and limited to the cost of non-Europe (legal distance and cross border traffic). This is included in Annex 4 and partly in the report. The report should better explain which methods and resulting evidence are used.

10. Presentation

The report is repetitive at times and sentences are too long, incorrect, or incomplete (in the annexes). The glossary is not complete, some abbreviations are missing. A spell check has not been carried out. The tables of contents and page numbers do not match. Margins should not be reduced and text boxes should not use a smaller font size to artificially lower the number of pages.

Footnotes rather than endnotes should be used to help the reader.