

Upstream meeting RSB-CNECT-GROW
SKYPE videoconference

Digital Services Act package

3 July 2020

The purpose of RSB upstream meetings is for report authors and Board members to informally discuss questions concerning how to prepare the best possible report on the issue at hand. Board members give their advice in a personal capacity and advice is not binding for the subsequent Board meeting.

List of participants:

CNECT: [REDACTED]

GROW: [REDACTED]

JRC: [REDACTED]

RSB: Veronica Gaffey; [REDACTED]

SG: [REDACTED]

The upstream meeting discussed two initiatives in the Digital Services Act package:

- 1) PLAN/2020/7444 - Digital Services Act: deepening the Internal Market and clarifying responsibilities for digital services
- 2) PLAN/2020/7452 - Digital Services Act package: ex ante regulatory instrument of very large online platforms acting as gatekeepers

This workstream originated in the Political guidelines of the President with regard to 'a Europe fit for the digital age'. The Package was not postponed in the revised CWP because it relates to resilience of the EU economy. Two legal proposals are expected to be adopted in December 2020. The files will be scrutinised by the RSB in October.

A joint CNECT and GROW team has worked for a couple of years already on a platform for business regulation.

The original eCommerce Directive is 20 years old, and CNECT said that it has been a great success. However, much has changed since then, including with market places, platforms, and social media. There is thus a need to update regulation of digital services.

As originally drafted, the eCommerce Directive was not about platforms. There are now around 10,000 platforms in the EU, most of which are medium-sized or small. The second initiative focuses on the abuse of gatekeeper power to give preference to services of its own company e.g. via coupling of services. Since the eCommerce Directive is a horizontal framework, it is not well suited to address such issues in a problem-by-problem way.

CNECT stated that there is enormous political attention on the Digital Services Act, and the issues are on the agenda in several 3rd countries as well. CNECT said that no one questions the need to intervene, and in fact some Member States are already legislating unilaterally to address problems. This is resulting in fragmentation, an issue that will be captured in the baseline. At the EU level, the focus is on the single market.

Points raised in the discussion

General

- Board members asked about plans to evaluate first what is in place and what needs to change. CNECT reported carrying out an evaluation of the eCommerce Directive at the moment, and reported that the Directive remains largely valid but some elements have become sub-optimal. CNECT will present the evaluation alongside the impact assessments.
- The impact assessments should explain how the interventions would logically work to deliver better final outcomes. The impact assessments should explain why proposed measures would be important and what success would look like in practice.
- The impact assessment should explain how the foreseen initiative will be coherent with and complement related pieces of legislation.
- As this is a rapidly evolving area, the impact assessments should consider issues of future proofing. This includes reflecting on likely future developments and how the options might accommodate these.
- Board members emphasised the importance of clarity, conciseness and reader-friendliness, both in the main report and especially in the executive summary. The narrative should be understandable to people without a technical background.

1) eCommerce directive

- The scope of the initiative should be clearly defined. If there is a need to treat different types of operators (e.g. platforms and infrastructure and network providers) differently, the report needs to differentiate them clearly. The focus of the initiative is on illegal content. However, the presented problem drivers also raise harmful behaviour. The report should be clear whether or to what extent it wants to cover harmful behaviour.

- The full range of possible options does not seem to be covered. Sub-options of the current option 2 seem to be needed. For option 3, the report should investigate credible alternatives.
- The options should consider the possibility for 'self-regulation' (e.g. reputational damage, like the recent Facebook case with advertisers)
- The options need to consider what is an appropriate approach for smaller players (SMEs). They should reflect on how to create appropriate conditions for both start-ups and scale-ups.
- The co-legislators, in particular the Parliament, are very interested in these initiatives. The Parliament is preparing own initiative reports to request the Commission to act. Any policy options suggested by the Parliament should be taken into account in the IA and be assessed against the regular better regulation principles, alongside other alternative options flowing from the problem analysis and the objectives. The IA should report transparently on any reasons to narrow the focus of the options to particular approaches. Board members recommended the DGs to be in close contact with the EP to learn whether the EP services have done analytical work that could feed into the IA.
- The IA should sketch out the position of the EU vis-à-vis other major economies. It should anticipate how the initiatives may change this position and how the EU framework would be aligned (or not) with international regulation. The analysis should reflect and be explicit about how the initiatives may affect digital companies based in non-EU countries. To what extent will they be accountable? How could requirements be enforced? Could the initiatives affect their willingness to set up activities in the EU? The impact assessment should also address the risk that EU companies may move out of the EU.

2) Fair and competitive environment of platform markets

- The report should clearly distinguish the envisaged role for the ex ante requirements from the continued (or changing) role of competition policy.
- The impact assessment should clearly define which platforms will be subject to the initiative and why. There could possibly be options on the scope.
- Option 3 should include more information on the blacklist and scope. The IA should clearly explain the role of possible delegated acts (or other follow-up initiatives).
- A number of problems may be missing from the options and analysis:
 - Consumer lock-in (such as barriers to transfer data to alternative players - cfr. switching banks or energy companies)
 - Enhancing competition by protecting upcoming competitors from acquisitions by gatekeeper platforms.

JRC comments

1) eCommerce directive

The JRC.I1.CC-ME notes that other units in JRC, such as JRC.B6, are already providing support to this initiative; it made the following comments in view of future monitoring and evaluation.

1. The presentation states the overall objective to “Ensure the functioning of the single market for digital services”, i.e. to (i) “Ensure the best conditions for innovative cross-border digital services to prosper” (ii) “A safe online environment, with responsible and accountable behavior from digital services”, (iii) “Empower users and protect and enhance fundamental rights online, and freedom of expression in particular” (iv) “Appropriate supervision of digital services and cooperation between authorities for cross-border issues”.

All these aspects need to be defined precisely in order to measure them properly in monitoring and evaluation. For instance: how will “innovative cross-border digital services” be defined and measured in (i)? Will the number or amount of content taken offline be the indicator of success in (ii)? If so, how can this be reconciled with freedom of expression in objective (iii)? Will number of collaborations of online police forces be a measure of success for (iv)? As always it is important to state “How would success look like and how will that be measured” both for the overall and for the specific objectives.

2. In order to set up an appropriate monitoring (and evaluation) system, the inception impact assessment (IIA) states that “Experience from existing cooperation structures (such as BEREC, CPC Network, RAPEX) will be taken into consideration”. The collaborative approach used in these structures is proving useful for building effective monitoring and evaluation systems. Such a monitoring and evaluation system appears a core part of the supervision function of this policy intervention; as such the IA could address how this can be accomplished. This would also fall under objective (iv).

3. The issue of costs associated with online surveillance needs to be addressed, possibly in a different way for different options on the level of surveillance. This appears relevant for the One-In-One-Out perspective.

4. Evaluation of the specific contribution of this initiative would benefit from an integrated approach with respect to other parts of the same policy initiative, this policy area and related ones. This may allow to also analyse the (lack of) trade-offs and interactive effects with other related regulations.

2) Fair and competitive environment of platform markets

The JRC.I1.CC-ME notes that other units in JRC, such as JRC.B6, are already providing support to this initiative; it made the following comments in view of future monitoring and evaluation.

5. The presentation states the general objectives to “Proper functioning of the Internal Market” and to “Ensuring fair and contestable online platform ecosystems”. Moreover it lists some specific objectives, i.e. to (i) “Address unfair practices arising in gatekeeper platforms”; (ii) “Allow SMEs to contest and innovate in online platforms ecosystems” (iii) “Safeguard long-term consumer and societal interest”. As mentioned before, these aspects need to be defined precisely in order to measure them properly in monitoring and evaluation.

For instance: will the number of unfair practices claims on the part of consumers be considered an appropriate indicator to monitor both (i) and possibly (iii)? How will innovation indicators look like in the context of (ii)? As always it is important to state “How would success look like and how will that be measured” both for the overall and for the specific objectives.

6. Since the initiative will act both on the consumer side and the producer side, in order to evaluate the success of the intervention one needs to assess its impact on each of them separately: will the consumers be better off after the introduction of the new measures? Will SME and producers be better off after the introduction of the new measures? Probably prices could be an indicator that can be used for both the consumer welfare analysis and the producer welfare analysis; in this sense, evaluation of the specific contribution of the initiative would benefit also from an integrated jointly approach in the analysis the two sides of the market.

7. Is there scope for common monitoring and evaluation provisions or systems across different instruments of this policy package? It would be important to discuss how to collect data at the right level of granularity (high) for the data to be useful for evaluation purposes for this and related initiatives.

8. Evaluation of the specific contribution of this package would benefit from an integrated approach with respect to other parts of the same policy initiative, this policy area and related ones. This may allow to also analyse the (lack of) trade-offs and interactive effects with other related regulations.

JRC.I1.CC-ME would be happy to discuss or give further input if deemed useful.