

Position Paper: Digital Services Act

The European Commission intends to propose, through its so-called 'Digital Services Act' (DSA), new and revised rules to strengthen the supervision of digital services in the EU. In particular, this will cover the responsibilities and obligations of online platforms.

This is a welcome initiative, allowing required adjustments to be made to the rapidly expanding platform economy. The goal must be to create a functioning and secure internal market, with room for new technology and new business models.

Our position does not address digital marketplaces that sell physical goods. Within the framework of the DSA, the Commission should consider whether the liability and security rules for digital marketplaces can be handled more effectively in a separate text.

In updating the e-commerce directive, the Confederation of Swedish Enterprise supports the D9 countries' non-paper^[1] on illegal content proposals *to maintain*:

- The principle of origin, which enables SMEs to expand and scale up rapidly without having to adapt to specific laws in other Member States.
- Liability exceptions for digital platforms for the content they store, as long as they meet certain conditions. This will help guarantee that the internet remains an open environment, accessible for everyone.
- The ban on general monitoring obligations. This rule protects freedom of expression and access to information.

The Confederation of Swedish Enterprise further believes in:

- Using the regulations to promote the proactive efforts of digital platforms to act against illegal online content.
- Ensuring that any new or updated rules are proportionate and, as far as possible, are principle based and technology neutral. This will provide predictability, innovative power and a strong investment climate.
- Respecting the principle of better regulations in all legislative work.
- Avoiding overlapping and contradictory rules. Existing and ongoing legislation addressing the services of the platforms must be taken into account.
- Upgrading the regulatory framework to cover those platforms that are established outside the EU but offer services on the internal market.
- Ensuring that the updated regulations do not include legal but "harmful" content.

- Designing a harmonised process for notice and takedown.
- Allowing the differing types of work and categories of workers to be defined by the Member States and social partners.

Regarding proposals for ex ante regulation, the Confederation of Swedish Enterprise believes that:

- The tools of competition authorities should be updated and streamlined.
- Countries should coordinate their actions and increase their international cooperation.
- Regulators should be mandated to gather information from major digital platforms.
- Leverage and self-preference strategies should be prohibited, and MFN clauses should be analysed as they are potentially harmful.
- Ex ante regulations must meet normal requirements for an intervention and new public regulation of business activities.

The above positions are elaborated in detail below.

The overall legal framework for digital services has remained unchanged since the adoption of the e-Commerce Directive in 2000. This Directive establishes the basic principles that enable the cross-border provision of digital services.

Online platforms provide companies with huge opportunities to gain quick and efficient access to EU consumer markets. Such platforms are now used by millions of companies, large and small, in the majority of industries. The COVID-19 pandemic has clearly illustrated the importance of digital services, and the value of accurate content, on these platforms.

The impact assessment for the DSA shows that the digital transformation has contributed greatly to the development of the EU economy and has delivered extensive societal benefits. However, as with all structural change and transformations of markets, it has inevitably seen some problems arise. Any risks posed to citizens and unhealthy competition from reputable companies must be carefully managed. Such risks include, for example, the sale of counterfeit, dangerous products or other illegal goods. Digital services can also be used to spread illegal content. There are also violations of intellectual property rights. Other risks relate to the systematic misuse of digital services, and their algorithmic processes, to amplify the online spread of disinformation. The safety of vulnerable users, and children in particular, is also a challenge.

There are additional concerns over the social consequences of using online platforms and the opportunities and challenges they pose for workers offering services via platforms (so-called 'platform workers'). These risks need to be

recognised; however, at the same time they must also be managed proportionately and with respect for other parties' values and rights.

Proportionate, principle-based and technology-neutral rules

The Confederation of Swedish Enterprise will work for supportive conditions for entrepreneurship and for well-functioning markets, where large and small companies alike can compete and grow based on their own merits. Given the shortcomings identified in the current regulations, which means that the markets do not function as they should, this suggests that new regulations may be needed. However, it is important that any new rules are proportionate and, as far as possible, are principle based and technology neutral in order to provide predictability, support for innovation and an encouraging investment climate.

To achieve this, it will be necessary to take into account the differences that exist between different types of online platforms during the legislative work. Not least, this should address structural, contractual and legal differences between communication services, business to business (B2B) sales and business to consumer (B2C) sales.

In order to avoid overlapping and contradictory rules, other legislative measures that address the services of the platforms must be taken into account. These include, for example, the Copyright Directive, the Regulation on the promotion of fair conditions and transparency for business users of online media services, the Audiovisual Media Services Directive, VAT reforms and the ongoing discussion on the Regulation on online content for terrorists.

A particular focus on digital marketplaces that sell physical goods

Sales of counterfeit goods, dangerous products or other illegal items on digital marketplaces put citizens at risk, distort competition and harm legitimate businesses. These need to be effectively counteracted. Additional legislation that specifically relates to digital marketplaces selling physical goods must also be taken into account here. In order to safeguard the principle of regulatory improvement, the Confederation of Swedish Enterprise proposes that the European Commission, within the framework of the DSA, should consider whether the liability and security rules for digital marketplaces can be handled more efficiently in a separate text.

The Confederation of Swedish Enterprise's position on the liability and security rules for online platforms, with the exception of digital marketplaces that sell physical goods, is set out below.

Internal market aspects

Any updates to the rules must aim to avoid fragmentation between Member State regulations and the monitoring of illegal content on the internet.

- Some Member States have introduced specific laws on the communication and detection of content, such as terrorism-related information (UK), child abuse / pornography (Italy, France, Germany) and intellectual property infringement (Finland, Lithuania).
- Some Member States have set a deadline within which online platforms must reduce or block access to illegal information.
- National courts take different views when deciding whether the online platform have "actual knowledge".

To achieve this, the principles that will apply to digital services must be reviewed and harmonised. This process should also take into account innovative practices.

The country-of-origin principle is an important simplification that strengthens companies' willingness and ability to expand into new markets. This must be allowed to remain without further adjustments.

The Confederation of Swedish Enterprise believes that the e-commerce directive should be upgraded in order to apply to those third country platforms that are not established in the EU but that offer services within it. These platform actors should be required to have a digital representative to allow for extraterritorial and enforcement issues.

Responsibility and prohibition of general supervision

The Confederation of Swedish Enterprise believes that the prevailing principle in the e-commerce directive- on discharge from liability for online platforms for the content they store if they meet certain conditions- must remain in place. This exception guarantees that the internet remains an open environment, accessible for everyone. There should also be no general obligation for online platforms to monitor the information that they transmit, store or publish; nor should there be any general obligation for them to actively search for facts or circumstances that indicate illegal activity.

The Confederation also wishes to highlight the importance of clear and legally secure rules, where legislators and courts - not private actors - decide on potential human rights restrictions in the digital environment, such as our constitutional freedom of expression.

Proactive measures should be encouraged

Online platforms should be encouraged to proactively combat illegal content. To succeed in filtering out such content, platforms increasingly rely on automated systems. In order for these systems to be programmed to achieve the desired outcome, it is essential to define what constitutes prohibited general content monitoring and what constitutes acceptable monitoring of specific content. Proactive measures should be encouraged if it is clear which content is actually considered to be 'illegal' and on which platform(s) it therefore needs to be removed from. Otherwise, there is a risk that platforms will refrain from taking

proactive measures or that they will - because of a lack of clarity - also remove legal content for security reasons; this will restrict our constitutionally protected freedom of expression.

Consumer flagging can also play an important role in detecting illegal material, and many online platforms already provide this opportunity. In the absence of judicial practice, regulators should communicate their views on what constitutes illegal content.

Transparency is also important for business users who have placed their content online and who are later deemed to have done so illegally, either by a regulatory authority or by a digital platform. An explanation as to why the content was considered illegal and deleted should be clearly and quickly communicated to the business user.

Harmful content

The Confederation of Swedish Enterprise opposes proposals to extend the DSA to include legal but 'harmful' content. The focus within DSA should instead be on defining illegal content, in order to resolve the major societal damage that such content can cause.

It is considered legally difficult to legally define content that is 'harmful' (but not 'illegal'). Combatting the existence of harmful content online could and should be better addressed in the self-regulatory and co-regulatory initiatives taken at EU level, including the EU Code of Practice on Disinformation. Other upcoming initiatives, such as the European Democracy Action Plan, also have the potential to further address the issue of harmful online content.

Notice and take down

An important part of updating the e-commerce directive is to determine harmonised rules for the monitoring of online content, in order to provide legal certainty for stakeholders. The issues that need to be clarified are:

- How to report illegal content, in particular what information should be included in the message.
- Whether the provider of alleged illegal content should be entitled to a response.
- How quickly the online platform should act upon receipt of notification of illegal content.
- Whether or not online platforms should be more open about their procedures for noticing and removing illegal content.

Platform workers

The updated regulations also intend to take into account the rights of platform workers as self-employed persons who provide services for the platform

economy. The Confederation of Swedish Enterprise believes that it is important to realise that the issues currently being discussed are in fact not specific to platforms - they also refer to self-employed people more generally. As already clarified in the agreement on the Directive on open and predictable working conditions, it is the responsibility of Member States and social partners to decide how different types of work and categories of workers are classified. This should take into account the circumstances and needs of each Member State, and should not be done at EU level.

Ex ante control for platforms with gatekeeper position

The European Commission argues that a limited number of large online platforms are able to control increasingly important platform ecosystems in the digital economy. This in turn leads to many imbalances, affecting consumers and competition as well as innovation.^[3]

The Commission is therefore considering proposals for ex ante regulation. The evidence, highlighted by the Commission through three specially designated reports,^[4] indicates that competition in digital markets is suboptimal and that action is needed.

The Confederation of Swedish Enterprise supports the measures highlighted in these reports, which are intended to contribute to a legally secure and effective application of the competition rules. Thus, we welcome the proposals for:

- Updating and streamlining competition authorities' tools, and
- Coordinating the actions in countries and for expanding international cooperation between the competition authorities.

These measures, however, cannot fully resolve the fact that competition analysis is ad-hoc and thus takes time. In addition, companies' right of defence must be safeguarded.

Special considerations

Digital platforms operate in dual-sided markets which, as a result of network effects, tend to expand much faster than other markets once the critical mass has been achieved. The reason for this is that individuals prefer larger networks to smaller ones; this gives them greater choice and thus a higher likely benefit. Early measures aimed at getting markets up and running can thus be particularly effective.

However, the combination of network effects and rapid technological development means that particular care should be taken when deciding on which interventions should be made in the market. It is often very difficult to predict

the technology of the future, and therefore equally difficult to know how the market would have developed without any intervention.

In addition, in technology-intensive industries the changes are usually substantial, with some products and companies completely replaced by others. Therefore, there is much to support the idea that intervention should only take place if the effects of restricting competition are counteracted by a high degree of certainty, or if it is easy to predict any likely effects.

Advance regulation can damage the EU's business relations with the US and China, as many of those affected by these regulations are headquartered in these countries. In addition, such regulation may make it difficult for EU-based platforms to survive, as a result of an increased regulatory burden.

The Confederation of Swedish Enterprise also sees challenges in designing ex ante rules that are truly general and are not aimed at one or a few specific companies. The players that the ex-ante regulation intends to address are disparate, with completely different business models and operating in different markets, even if they partly compete with each other.

There are also problems with thresholds, where certain regulations need to be applied to companies that have reached a certain size. The risk of creating different rules for large and small players is that it can hamper companies from growing, with the subsequent negative effect on growth in Europe.

However, the evidence highlighted by the Commission in the reports^[4] indicates that there are structural competition issues that EU competition rules cannot address or cannot deal with effectively.

Mandate to gather information

In the opinion of the Confederation of Swedish Enterprise, the three specially designated reports^[4] that form the basis for ex ante regulation point to the need for the authorities to better understand and follow the digital markets. This should also promote legally sound and more-effective competition analysis. Swedish Enterprise believes that supervisory authorities should be given a mandate for collecting information from large platforms; this can also act as a prerequisite for improving how they follow the rapid development in technology and services.

Leverage strategies, self-preferencing and MFN clauses

The Competition policy for the digital era report states that platforms that engage in leverage strategies and provide their own products and services - self-preferencing - should be analysed, as they can be damaging. The Confederation of Swedish Enterprise is inclined to agree with this assessment, and proposes further analysis to investigate whether new regulations against such strategies are justified.

The Competition policy for the digital era report also states that all types of clauses referencing Multi Favourable Nation (MFN) can be harmful due to competitive pressure. In defence of this type of clause, the so-called 'free-riding' argument has been raised. This argument has been questioned before, and the Bundeskartellamt published a report^[5] showing major shortcomings in the free ride argument as far as online hotel bookings are concerned. The Confederation of Swedish Enterprise believes that the application of MFN clauses may also be harmful. We propose that it should be investigated whether MFN clauses are harmful in several markets, whether they risk negatively affecting competition and, if so, whether the existing competition rules are sufficient or whether there is a need for new regulations.

Requirements for new regulation of business activities

Advance regulation of digital markets does offer a possible route, provided that it takes place in such a way that it addresses all of the problems that need to be dealt with in such regulation. However, any new regulations - including ex ante regulation - must meet the normal requirements for any intervention and new public regulation of business activities.

^[1] *D9+ Non paper on the creation of a modern regulatory framework for the provision of online services in the EU*, published in May 2020.

^[2] *Market Surveillance Regulation, Geo-blocking Regulation and New Deal for Consumers. Existing and proposed legislative measures have been complemented by a series of non-legislative measures, such as the Memorandum of Understanding on the sale of counterfeit goods via the internet, the Commission communication on market surveillance of products sold online, online sales of products in the food supply chain, the EU Action Plan on Illegal Wildlife Trafficking, the Guidance on the Unfair Commercial Practices Directive and joint actions of national authorities in the Consumer Protection Cooperation Network.*

^[3] *Impact assessment (Ares(2020)2877647)*

^[4] *Unlocking digital competition (Mars 2019), Stigler Committee on Digital Platforms: Final Report (July 2019) and Competition policy for the digital era (2019)*

^[5] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/28_08_2020_Booking.html?utm_source=POLITICO.EU&utm_campaign=aa2d2ff9d7-EMAIL_CAMPAIGN_2020_08_31_05_00&utm_medium=email&utm_term=0_10959edeb5-aa2d2ff9d7-190579343