

Stockholm, 27 January 2021

Introductory comments on the proposal for a Digital Services Act

The Confederation of Swedish Enterprise notes the Commission's legislative proposal, on 15 December 2020, for a Digital Services Act (DSA). Our introductory comments on the DSA proposal are as follow:

- We strongly support restricting the DSA to illegal content.
- We welcome proposals for a horizontal regulatory framework that also includes those digital service providers not established in the EU but that are offering services that reach the internal market.
- We support the DSA to apply the country-of-origin principle.
- We welcome the DSA to clarify the conditions for the important proactive work on countering the existence of illegal content online.
- We are concerned that the introduction of increasingly strict requirements may have unforeseen consequences.
- We emphasize the fundamental importance of in-depth impact assessments in achieving rules that are proportionate and - as far as possible - principle-based and technology-neutral. This is crucial for ensuring predictability, encouraging innovative power and creating a positive investment climate.
- We support the proposal of maintaining the existing exemptions from liability of the e-Commerce Directive. However, we continue to evaluate the conditions for discharge from liability proposed for the differing types of digital services.

These positions are developed in detail below.

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The digital transformation has made major contributions to the development of the EU economy as well as bringing extensive societal benefits. Digital services in particular have been a strong contributor to this development. Despite this, the overall legal framework for digital services has remained unchanged since the adoption of the e-Commerce Directive in 2000.

The DSA sets out to update the current legislation in order to create a well-functioning internal market for digital services. It will also modernise and harmonise liability rules for providers of intermediary services to align them to the current digital reality.

Several proposals within the DSA entail a restriction on freedom of trade for service providers. According to the European Commission, this restriction should be weighted by a regulatory framework that helps counteract fragmentation of the internal market, with the result that the costs for companies are reduced. In addition, there are several requirements proposed that apply only to very large internet platforms. These are designed to reflect situations where illegal content - due to the platform's many users - creates serious risks. Those platforms can also be assumed to be better equipped to bear a heavier regulatory burden.

The Confederation of Swedish Enterprise welcomes proposals aimed at harmonising rules to combat illegal content online and thereby countering fragmentation of the internal market. We also support proposals that seek to clarify liability rules for intermediary service providers and that - as far as possible - aim to reduce the regulatory burden, particularly for smaller players.

At the same time, the requirements for intermediary service providers must be proportionate if they are to achieve their desired effect. They must not undermine the overall business models of the services, given the broad positive impact and the opportunities and incentives for innovation that they bring.

Illegal, but not harmful, content is covered

The definition of illegal content in Article 2 includes all information that does not comply with EU law or the law of a Member State. The Confederation strongly support that the DSA is restricted to counteracting illegal content, to resolve the major societal damage such content may cause.

Counteracting the presence of legal but harmful content online is better handled through other regulatory strategies.

Territorial regulations

The Confederation of Swedish Enterprise supports the proposal to introduce a horizontal regulatory framework that will also apply to those providers of digital services not established in the EU but that are offering services that reach the internal market. The Confederation also supports the introduction of a requirement for these digital service providers to have a legal representative within the EU (Article 11), in order to facilitate extraterritorial and enforcement issues.

We support the application of the country-of-origin principle. This will make it easier for small and medium-sized enterprises to expand rapidly and scale up their activities without having to adapt to the specific legislation of other Member States.

It is important to encourage proactive action

Articles 3-5 proposes to maintain the existing exemptions from liability for digital platforms for the content they store, as long as they are able to fulfil certain conditions, and to maintain the prohibition on general monitoring. Article 6 proposes that these limitations of liability should continue to apply even where an intermediary service provider voluntarily, and on its own initiative, investigates or takes steps to identify and remove or block access to illegal content. This is an important clarification, encouraging service providers to also act proactively to counteract the existence of illegal information.

Gradually increasing regulatory burden

To combat illegal online content, the DSA proposes new obligations for digital service providers through the introduction of increasingly strict requirements, including on transparency to authorities and end users. This way, the DSA can prevent potential widespread proliferation and harm while avoiding overly burdensome and costly rules for smaller service providers.

However, the fact that specific requirements are applied to companies reaching a certain size may have undesirable threshold effects that could threaten to hamper platform development in Europe. Users may prefer services with stricter requirements, which in turn can have a negative effect on smaller platforms.

The business community cannot emphasise enough the fundamental importance of preceding new legislation with careful in-depth impact assessments. This is to ensure that the legislation is proportionate and - as far as possible - principle-based and technology-neutral. This is crucial in order to ensure predictability, encourage innovative power and create a positive investment climate.

Limitation of liability if certain conditions are met

The Confederation of Swedish Enterprise support the proposals in Articles 3-5 to maintain the existing liability regime. Digital platforms should be exempted from liability for the content they store, as long they meet certain conditions. And these conditions should differ between different types of service providers.

In the DSA, the Commission has wisely taken into account the differences that exist between different types of digital service providers. It recognises that there are three main groups of providers, taking different positions on the information provided by users of their services. Some are simple *conduits* for forwarding information, some are *cashier* services that in addition perform a temporary caching of information, while others – *hosting* services - take a more active position with the information. In turn, the concept of hosting services includes a set of actors that are even more active. They - at the request of a service recipient - store information or disseminate it further; i.e. so-called *internet platforms*. Additional conditions are set for those internet platforms where companies market their products and services, for example to ensure that companies provide particular information to the platform.

The Confederation is continuing to evaluate the conditions for the limitation of liability proposed in the DSA. We are pleased that the terms differentiate between the different types of digital service providers. However, we remain concerned over the potential consequences of the introduction of increasingly strict requirements.

Transparency

For hosting service providers, Article 14 introduces proposals for harmonised rules on how notifications of illegal content are to be handled (the so-called 'Notice-and-Action' mechanism). Article 15 also contains an obligation for service providers to justify decisions to delete or block access to certain information.

It is important for business users to be informed where information placed online is later deemed illegal. This is irrespective of whether the assessment was made by a supervisory authority or by an intermediary of hosting services. Any requirements for transparency must not, however, increase the risk of hosting services being misused. It is also important to ensure that any requirements for transparency or any removal of illegal information do not complicate the jurisdiction of law enforcement agencies.

Compliance

It must be easy to do the right thing. What is illegal offline must be illegal online. However, it should not be the duty of service providers to decide what is illegal. National regulators, legislators and courts - not private actors - must be responsible for these decisions. Most digital services operate or aim at operating cross-border. And we therefore support efficient cooperation between Member States in order to strengthen regulatory compliance within the digital environment.