



Response to the European Commission’s “Inception Impact Assessment for Deepening the Internal Market and Clarifying Responsibilities for Digital Services”

INTRODUCTION

On behalf of the Center for Data Innovation (datainnovation.org), we are pleased to submit feedback to the European Commission’s roadmap titled “Digital Services Act package: Deepening the internal market and clarifying responsibilities for digital services.”¹ In this submission, we summarize the three options under consideration, provide feedback on each option, and outline six key goals the Commission should consider when updating the EU’s liability framework. The Commission is also exploring options for an ex-ante regulatory instrument for large online platforms—a proposal which the Center responds to in a separate submission.

The Center for Data Innovation is the leading think tank studying the intersection of data, technology, and public policy. With staff in Washington, D.C. and Brussels, the Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends such as open data, artificial intelligence, and the Internet of Things. The Center is a non-profit, non-partisan research institute affiliated with the Information Technology and Innovation Foundation (ITIF).

BACKGROUND

The European Commission plans to propose a Digital Services Act, new legislation that could revise or repeal the e-Commerce Directive and create a new set of regulations for Internet intermediaries. The goal of the legislation is to create clearer and more harmonized rules for digital services and address concerns about illegal and harmful online content, while protecting digital innovation and free expression.

The Commission seeks to feedback on three policy options for the Digital Services Act, briefly summarized below:

Option 1: Keep the liability rules in the e-Commerce Directive, and establish procedural obligations for how online platforms respond to illegal content and provide redress, such as notice-and-action and counter-notices.



Option 2: Clarify and update the liability rules in the e-Commerce Directive, establish specific obligations for online platforms (e.g., notice-and-action, know-your-customer, redress against unjustified removals, and risk assessments for some categories of harmful, but not illegal, content such as disinformation), and explore transparency, reporting, and auditing requirements for certain features, such as automated content moderation, recommender systems, and online advertising.

Option 3: Create a system of regulatory oversight, enforcement, and cooperation across member states, supported at EU level, to deal with illegal content, goods, and services, especially those involving cross-border issues.

Notably, Option 1 focuses on services “established in the EU” and Option 2 considers “all services directed towards the European single market, including when established outside the Union.” Option 3 would complement either Option 1 or Option 2.

FEEDBACK ON PROPOSED OPTIONS

None of the three options is ideal, although all would take important and needed steps towards addressing illegal online content. The Digital Services Act should clarify the types of platforms and content that fall in scope; set proportionate responsibilities and obligations for platforms; increase legal certainty for platforms; protect freedom of expression; harmonize rules across the EU; and minimize the impact of its rules outside of its borders.

Option 1 would not sufficiently clarify and update the liability rules for online platforms. The introduction of “proportionate obligations” such as “effective notice-and-action mechanisms to report illegal content or goods” would be welcome, but ultimately insufficient, unless the Digital Services Act also clarifies the definition of illegal content, extends liability protection by abolishing the distinction between “passive” and “active” services, and extends liability protections to all digital services.

Option 2 includes many useful elements, but also proposes new obligations that would hurt Internet users and platforms. On the positive side, Option 2 would introduce penalties for platforms that show a systematic failure to address illegal content; clarify the liability rules for online platforms; harmonize obligations for online platforms across the EU based on the type, size, and risk of the services provided; and increase transparency. However, Option 2 also proposes measures to address content that is harmful, but not illegal. The Digital Services Act should not cover content that may be illegal in some, but not all EU countries, as this would increase legal complexity for companies to operate across member states, and impact freedom of expression. The Digital Services Act should also limit its scope to EU member states to avoid imposing its rules on other sovereign



nations. Finally, Option 2 proposes new auditing requirements for digital platforms that could be expensive and unnecessary, as well as algorithmic transparency obligations on platforms that use automated processing and filtering technologies to moderate their content that risks discouraging the use of artificial intelligence and exposing intellectual property.

Option 3, designed to complement either the first or the second option, rightly seeks to establish EU-wide governance of digital services to avoid fragmentation of national rules. This approach is necessary and appropriate given that illegal online content is a cross-border issue. However, the proposal risks allowing EU member states to enforce their content regulations laws in other EU countries, which would negatively impact free speech online since these laws vary considerably across the EU.

SIX GOALS FOR THE DIGITAL SERVICES ACT

The following is a list of six key goals the Commission should prioritize in the forthcoming Digital Services Act.

1. The Digital Services Act Should Clarify the Rules for Online Platforms and the Definition of Illegal Content, Extend Liability Protections, and Harmonize the Scope of Covered Digital Services

The online ecosystem has evolved significantly since the EU adopted the e-Commerce Directive in 2000, so it is necessary to update at least three aspects of this law: clarify the definitions of illegal information and illegal activity; extend liability protections beyond passive services; and extend liability protections to all online intermediaries to create a level playing field.

First, the Commission should clarify the definitions of illegal information and illegal activity. The current framework requires Internet companies to take down “illegal information” and “illegal activity,” but does not describe precisely what those include. EU policymakers should clarify these terms so there is no ambiguity and so that online services know to take proactive steps to remove illegal content.

Second, the Commission should extend liability protections beyond “passive” services. The e-Commerce Directive makes a distinction between “passive” and “active” online services, and only extends liability protections to service providers that “play a neutral, merely technical and passive role” toward hosted content. In practice, this means hosting providers are the primary beneficiaries of this liability protection. Policymakers should abolish this distinction for two reasons. First, the difference between passive and active service providers is vague, making unclear to many service



providers whether they receive this liability protection. Second, in order to create a level playing field between different types of online services, service providers should receive this liability protection for content they neither produced nor had actual knowledge of being illegal. The new framework should extend to more than just hosting providers, and account for the diversity of online services.

Third, the Commission should extend liability protections to all online intermediaries to create a level playing field. The current framework does not make clear which intermediaries receive liability protections. For example, the e-Commerce Directive only applies to intermediaries that qualify as “information society services”—and individual member states have been free to exclude search engines and other sites that provide indexes or directories of links. Moreover, the online services ecosystem has significantly evolved over the past two decades. The EU should update and harmonize the scope of covered online services to include a broad range of online intermediaries, including Internet service providers, cloud services, content delivery networks, domain name service providers, social media services, search engines, directories, collaborative economy platforms, online marketplaces, online advertising services, discussion boards, digital services built on electronic contracts, and distributed ledgers (i.e., blockchain).

2. The Digital Services Act Should Preserve the Main Principles of the e-Commerce Directive, Incentivize Voluntary Measures To Take Down Illegal Content, and Hold Companies Responsible for Timely Removal of Illegal Content

The Digital Services Act should preserve the main principles of the e-Commerce Directive, while also removing disincentives for platforms to take down illegal content and introducing penalties for consistent failure to respond to illegal content notifications.

First, the Digital Services Act should preserve the main principles of the e-Commerce directive. Not only does the current law limit the liability of online platforms for the content posted by their users, but it also does not obligate them to actively monitor their systems for illegal content. This is an important provision because many online platforms do not have the resources or capabilities to actively monitor all user content. Such a requirement could force online platforms—driven by fear of sanctions for unintentionally allowing offending content to slip through their moderation process—to err on the side of more-restrictive content-moderation policies, or even eliminate user-generated content altogether. Given the popularity of these features today, this type of change would almost certainly reduce the value of online platforms for consumers. Therefore, any new framework should maintain the prohibition of active-monitoring obligations.

Second, to remove disincentives for platforms to take down illegal content proactively and voluntarily, the Digital Services Act should incentivize the adoption of standard technical measures, such as automated filtering systems, to mitigate illegal content. Policymakers should ensure service



providers that use voluntary measures to detect and remove illegal content online do not face additional liability risk. And online platforms exercising editorial control of user content should not be considered evidence they have actual knowledge of illegal content uploaded by users. To do otherwise would discourage companies from actively self-policing their own services for fear of losing their liability protection. The likely result of preventing services from actively moderating online speech would either be service providers restricting user-generated content entirely or refraining from all content moderation and giving free rein to users, thereby allowing social media sites to grow larger and more toxic, and streaming sites to include more pirated and terrorist content.

Third, the new framework should introduce proportionate sanctions for systematic failure. While companies should not be liable for user content, they should always be responsible for removing or disabling access to illegal content once they learn about such material on their services. The new framework should create penalties for service providers that consistently fail to respond appropriately to illegal content notifications, whether from government, companies, or individuals. While companies should always block or remove content courts or other legitimate government authorities determine to be illegal, they deserve some latitude when making subjective decisions about whether content reported by users violates the law or their own policies.

3. The Digital Services Act Should Improve Online Platform Transparency

The Digital Services Act should require online services to provide more transparency about their policies and processes for responding to illegal content and the appeals processes available to users. Companies should release regular reports on their actions, such as the number of takedown requests received, the results of those requests, the number of appeals, and the time it took to respond to those requests. More transparency can help service providers dealing with specific problems, such as counterfeit products for online retailers, and identify best practices.

However, transparency requirements should be proportionate to the level of risk. The Commission should consider the feasibility of transparency obligations noting that not all companies have the same resources and capabilities. The Digital Services Act should also not impose additional transparency obligations on platforms that use automated processing and filtering technologies to moderate their content because this could force them to expose proprietary details about their algorithms or discourage the use of artificial intelligence (AI). Likewise, the Digital Services Act should not mandate companies use explainable algorithms, as there are typically trade-offs between accuracy and explainability in AI, and such a requirement could result in platforms using less effective automated content moderation tools.



4. The Digital Services Act Should Cover Illegal, Not Harmful, Content

The Digital Services Act should focus on illegal content and behavior, and not attempt to regulate certain forms of disinformation, harassment, and hate speech that may be undesirable but are not typically illegal in Western democracies. Doing so would increase fragmentation of the Internet in Europe, lead to greater legal complexity for companies to operate across member states, and impact freedom of expression. Moreover, it would be inappropriate for the government to require companies to remove online content that would be lawful offline.

5. The Digital Services Act Should Balance Roles and Responsibilities

One critical aspect of any updates to the EU's liability framework lies in the division of the roles and responsibilities between the public and private sectors. The primary responsibility of online service providers should be to remove or disable access to content determined to be unlawful by the government, and to moderate all other content according to their own terms of service. Online service providers should not be tasked by the government with deciding whether user-generated content is legal. That should remain the responsibility of the government. This does not mean companies should ignore problematic content on their platforms. On the contrary, online services can and should make interim decisions about whether user content meets their internal content guidelines—and respond appropriately and promptly, especially when trusted partners report prohibited activity on their platforms. But regulators should not hold companies responsible for correctly predicting whether government authorities will agree or disagree with their determinations. If companies were held liable for incorrectly predicting whether government authorities would find certain content to be unlawful, they would likely err on the side of caution and take down lawful content. Government should also not take on the role of setting guidelines for online content that would otherwise be legal if published offline, as this would unnecessarily suppress free speech online. Government should also not dictate the technology the private sector should use to moderate content, and instead allow companies to use their technical talent and resources to evaluate the best options.

The Digital Services Act should allow both companies and users to appeal a government's decision to order content to be removed, and they should be able to use this mechanism without restriction. The new framework should ensure platforms are not held legally responsible for the content of their users—and individuals are held legally responsible for the content they produce just as they would be in the offline world.



6. The Digital Services Act Should Harmonize Rules at the EU Level To Create Regulatory Consistency

One of the major barriers to a digital single market is the patchwork of national rules for online services. For example, German and French laws differ on online hate speech. Further fragmentation would only introduce more complexity and uncertainty for companies, as policies may conflict with other countries' laws, and interpretations may diverge between national authorities. In addition, fragmentation makes it harder for EU companies to scale, which is a critical success factor for companies operating in the digital economy. EU policymakers should take the opportunity to use the Digital Service Act to harmonize rules at the EU level to create a consistent regulatory process and avoid increasing policy fragmentation across member states. As illegal online content is a cross-border issue, it should be addressed at the EU level, but EU policymakers should not allow the goal of a harmonized framework to enable individual member states to enforce their content regulations outside their borders—neither within the EU nor outside the EU. Within the EU itself, some member states criminalize certain types of speech, while others do not. EU policymakers should keep in mind enforcing one country's restrictions on online content outside of that particular country will infringe on freedom of speech and limit access to information in other nations. Where there are differences across the EU, member states' takedown requests should only apply domestically. Otherwise, this would allow one EU nation decide the laws of another. A new framework should also be respectful of the global nature of the Internet by avoiding cross-border conflicts between both jurisdictions outside the EU that have tight speech standards and those that operate according to different standards. It should not require one platform to remove content globally based on either a national or EU standard. Going down this path would open other nations to extending their own policies about Internet content regulation to Europe, thereby limiting free speech and access to information to individuals in the EU.

¹ European Commission, "Proposal for a regulation—Digital Services Act: Deepening the internal market and clarifying responsibilities for digital services," <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>.