Digital Services Act
Scene Setter

On 19 February 2020, the European Commission (EC) published 'Shaping Europe's Digital Future' announcing its plans to present a new framework to increase and harmonise the responsibilities of online platforms in the Single Market by Q4 2020. The legislative proposal will build on the eCommerce Directive (2000) and set out the extent to which online platforms will have to police illegal and possibly harmful content online. Following the publication of two European Parliament (EP) draft reports with recommendations to the EC on a Digital Services Act (DSA), the EC launched consultations on 2 June that will run until 8 September 2020.

Given the likely scope and scale of the DSA, it is crucial that companies of all sizes and of all sectors engage constructively in the debates that will help frame this landmark legislation. The DSA will likely reshape the online business environment with importance consequences for all companies that operate online. Beyond the broad impact of the DSA on the Single Market, the legislation will likely have significant reach in other markets as well. It is therefore critical that businesses operating outside the Single Market also engage in the conversation and pay close attention to the new regulatory framework that will emerge from the DSA.

The ICC Digital Economy Commission is dedicated to providing support and guidance to its members throughout the upcoming process. The first phase will likely culminate with the presentation of the bill at the end of 2020. At the beginning of 2021, a second phase will start with the launch of the co-decision process between European Parliament and Council of the European Union. We will aim to regularly inform members on the evolution of the discussions, and, more importantly, create opportunities for members to engage directly with policy makers. The ICC is currently working with the EC's Directorate-General for Communications Networks, Content and Technology (DG CNECT) to create a communication channel between the Digital Economy Commission and the teams at the EC leading on the DSA.

This document aims to (i) provide a broad overview of the key issues at stake, and to shed light on some of the more technical elements of the debate, and (ii) help inform members ahead of the roundtable discussions with DG CNECT in July.

- **Overview of the current EU liability regime for information society service providers**

The EU liability regime for online intermediaries is currently underpinned by the e-Commerce Directive, adopted in 2000. The underlying objective of the directive was to create a common legal framework across members states in order to (i) promote e-commerce in the EU, (ii) prevent illegal information on the Internet and, (iii) protect EU fundamental rights. To achieve this, the directive sets out specific rules for '**information society service**' providers, defined as services that are 'normally' provided 'for remuneration' by 'electronic means' upon 'an individual request of a user'. The liability regime's founding principle is the **safe harbour provision**, under which information society service" providers are exempt from liability if certain conditions are met. Service providers are exempt when they are only passively involved in the transmission of data (i.e. mere conduit), when they temporarily and automatically store date (i.e. caching) or when providers storing data for their users are unaware of the illegal content they are hosting and **act expeditiously** to remove or disable access to the illegal content once it has come to their attention. Therefore, the EU legislation exempts the service providers from a multitude of liabilities (contractual, administrative, civil, penal

etc.), unless illegal content is actively hosted, identified and the service provider fails to take adequate action.

In 2010, the Court of Justice of the European Union (CJEU) refined the distinction between **'passive' and 'active' service providers**. Active service providers (i.e. those with greater control over the content they host) have a greater responsibility in tackling illegal online content once they have '**actual knowledge**' of the illegal activity. This has given rise to various types of '**notice and take down**' mechanisms in the Single Market and the concept of '**duties of care**' on the part of service providers. However, the directive **prohibits** Member States from imposing **general obligations of monitoring** on service providers, while service providers, pursuant to Recital 40 of the e-Commerce Directive, increasingly use automatic filtering mechanisms to detect illegal content.

It is also important to note that information society service providers are subject to the law of the EU Member State in which they are established under the **country of origin principle**. This rule enables providers to expand and scale up quickly without the need to adapt to specific laws of other Member States.

- **Gaps in the current EU liability regime**

A number of gaps in the EU liability regime have been identified and discussed since the inception of the eCommerce Directive. Courts have attempted to clarify certain aspects of the directive but many gaps remain as Member States have implemented a patchwork of locally specific rules. The policy issues described below are not exhaustive and it stands to reason that additional gaps will be identified and discussed over the course of the next months. For instance, competition in the marketplace may also be targeted by the DSA. However, there is a general consensus amongst most stakeholders that the gaps listed below will have to be addressed in some form in the DSA.

A glaring gap in the current liability regime is the **lack of clarity around the definition of 'information society service'** providers. It is unclear to what extent new types of service providers (collaborative platforms, social media companies, search engines etc.) fall under the current definition and thus benefit from the liability exemptions. Additionally, the CJEU has ruled in different ways on the question of whether the service provided by Airbnb, UBER and Google must be classified as an 'information society service' (see appendix).

Similarly, a number of **other key legal concepts in the directive lack clarity**. There is a lack of common understanding of concepts such as 'illegal activities', 'actual knowledge', 'passive v active roles', 'actual knowledge' and 'acting expeditiously', all of which underpin the safe harbour provision. Furthermore, there are now many different notice-and-takedown mechanisms throughout the EU ('notice and take down', 'notice and stay down', 'notice and notice ' etc.), often with few procedural safeguards.

Finally, the **distinction between prohibited general content monitoring and acceptable specific content monitoring is problematic**, particularly with the growing implementation of automated filtering and monitoring systems used to detect illegal content. Here too, the CJEU has ruled on this topic on a number of occasions but it is still not clear what constitutes acceptable content monitoring, specifically where the balance should lie between the rights of internet users, internet service providers and rights holders.

- **Policy questions the DSA will aim to solve**

Crucially, policy makers will be redefining the scope and nature of the EU liability regime, both in terms of types of actors and type of content they seeks to regulate. Based on this updated liability regime, policy makers will then aim to set out mechanisms to monitor compliance and enforce regulations.

Information society service providers
Policy makers will look to clarify the legal concepts enumerated above, particularly the notion of 'information society service' provider and the distinction between 'active' and 'passive' roles. The DSA could include or exclude new online actors from the safe harbour regime. Targeted actors could include content distribution networks, search engines, social networks, media-sharing platforms, online advertising services, collaborative economy platforms and online marketplaces. Similarly, a number of new online business models (networking, collaboration, matchmaking, indexation etc.) often elude the active v. passive roles set out in the eCommerce Directive and the ensuing CJEU case law. Policy makers may want to clarify the distinction or build a liability regime on a different set of legal notions to solve the 'Good Samaritan paradox' whereby service providers refrain from taking proactive steps in order to maintain safe harbour protection.

Illegal and harmful content
The current regime only considers 'illegal content' (i.e. intellectual property infringement, privacy, data protection, hate speech, child sexual abuse material etc.), which, it is worth noting, is often MS-specific (e.g. hate speech laws). Beyond providing a more robust legal definition of the concept, policy makers may want to broaden the scope of the regime to encompass 'harmful content' (i.e. disinformation and 'fake news', misleading online advertisements, cyber-bullying etc.) which has so far been tackled on the basis of self-regulatory frameworks (e.g. EC Code of Practice on Disinformation).

Ex-ante v. ex-post content management
Policy makers will be looking to reassess content monitoring and removal mechanisms. Under the current regime, the emphasis is on the ex-post notice-and-takedown process. There have been proposals to amend these mechanisms, which often differ between Member States, to ensure that specific notice-and-takedown mechanisms are tailored to different types of illegal (and/or harmful) content and harmonised across the Single Market. However policy makers are also considering a shift from ex-post control to ex-ante monitoring, thereby increasing the burden on online intermediaries to pre-emptively monitor and remove content. This raises a number of complex issues around general monitoring of content, algorithmic neutrality (and ultimately transparency) and freedom of expression, particularly when it comes to harmful content.

Automated filtering measures and general monitoring
The prohibition of general monitoring is enshrined in the eCommerce Directive and will most likely continue to be a cornerstone of the EU liability regime. However this principle will continue to be challenged by automated filtering and monitoring technologies. Given the prohibition of general monitoring and the sheer quantity of content platforms have to contend with, it stands to reason that these technological solutions with continue to grow and improve. Critics have pointed to a number of issues with these solutions including the lack of transparency, the lack of safeguards and the risk of false-positives. Again, this may lead policy makers to require greater oversight in how these tools are developed and implemented.

Different liability regime for different size companies
The current liability regime does not discriminate between service providers based on size or market power. The recent Copyright Directive (2019), which imposes a differentiated set of obligations, may create a precedent and compel policy makers to take a similar approach with the DSA.

Roles and powers of regulators
Policy makers will assess the need for additional regulatory structures to monitor compliance and enforce rules. This may lead to the creation of a central regulator or extend the powers of existing authorities both at an EU and Member State level. The DSA may increase transparency requirements and may grant the power to impose fines or other enforcement mechanisms.

- **Current proposals for reform**

Although there is considerable support for reform of the current liability regime, there is also significant disagreement on how to update EU rules. There have been manifold suggestions ranging from greater self-regulation to a more comprehensive harmonisation of substantive law. Most proposals aim to incentivise intermediaries to detect illegal or harmful content, while reducing the risks of false-positives and ensuring user rights. To achieve this, some have called for cooperative responsibility of online platforms, while others have urged a vertical approach to online liabilities, where actions and liabilities are tailored to various types of illegal or harmful content. Others still have argued in favour of rules on secondary liability and negligence-based systems as well as sector-specific liability regimes. More recently, the EP drafted two reports on the DSA with concrete recommendations to the EC. The Committee on the Internal Market and Consumer Protection (IMCO) and Committee on Legal Affairs (JURI) have made non-binding recommendations to the EC. These reports call on the DSA to:

- Apply to all types of digital services and cover online actors based outside the EU; the term 'illegal content' should be clarified in the text and also apply to violations of product safety and 'counterfeit medicines';
- Introduce general information and transparency obligations for online intermediaries, reinforced by penalties;
- Harmonise EU-level 'notice-and-action' mechanism obliging online intermediaries to verify notified content; the mechanism should not affect intermediaries' limited liability regime and the ban on general monitoring obligations;
- Ensure greater transparency on the issue of third party-based sellers, including the issue of fake products from non-EU countries, and products notified as unsafe should be withdrawn from online platforms within 24 hours;
- Clarify if hosting providers with editorial functions and a certain "degree of control over the data" lose safe harbour provisions;
- Propose contractual rights for content management with principles for management and moderation of content by platforms, incl. standardised procedures for notice & action, and establishing of an independent dispute settlement procedure;
- Ensure that platforms hosting content generated by third parties should regularly submit reports on transparency of T&Cs, incl. takedown notices (number, processing speed, number of appeals, algorithms or employees working on content moderation);
- Establishing a European Agency responsible for monitoring and enforcing platform compliance with the DSA through regular audits of algorithms used, and having the authority to impose fines for non-compliance;

- Limit targeted advertising and set stricter conditions, including through limiting the data collected by platforms and providing users the possibility to consent to or opt out from sponsored content;
- Address the practices of certain large platforms to use user data to strengthen their dominant market position, calling on EC to define "fair" contractual conditions allowing for data sharing between all market players.

Additionally, a study requested by the IMCO Committee "The e-commerce Directive as the cornerstone of the Internal Market - Assessment and options for reform" calls on the DSA to:

- Prescribe strong, swift and scalable remedies against over removal of legitimate content, including through external ADR to incentivise better internal quality review;
- Set concrete incentives for high quality notification and review process by means of elaborate rules developed through technical standardisation in different areas;
- Clarify the passivity criterion by linking it to editorial choices and thereby avoiding discouragement of voluntary preventive measures;
- Include a set of new safe harbours, at least for hyperlinks, search engines and domain name authorities;
- Create a EU wide legal basis for targeted measures to the risks posed by the hosting providers if evidence suggests a failure the notice and takedown process

- **Main actors**

In accordance with its 'right of initiative', the **European Commission** will play a leading role in drafting the legislative proposal before submitting it to the European Parliament and the Council of the European Union for review and adoption. During this initial drafting phase, the Commission will turn to interested parties through consultations and other more informal discussions. The next 6-months offer a crucial window of opportunity to provide input to EC teams involved in the drafting of the proposal. Important EC Directorate-Generals (DG) involved in this process include the DG for Communications Networks, Content and Technology, specifically Directorate F (Digital Single Market) and, to a lesser extent, Directorate I (Media Policy), and the DG for Competition. Indeed, earlier this month, Commissioner Vestager in charge of a 'Europe fit for the Digital Age' stated that a 'new competition tool' would feature in the DSA. Beyond targeted engagement with specific DGs, we will also want to connect with relevant cabinet members on Thierry Breton and Margaret Vestager's team.

It is equally important to build contacts with other European institutions which are active in the EU legislative process. Although the **European Parliament** (EP) and the **Council of the European Union** (CEU) play a greater role once the EC has submitted a proposal during the so call co-decision process, both the EP and CEU will help frame the debate during this initial drafting phase. They will share both formal and informal recommendations with the Commission to ensure that their views are considered and included in the proposal, ahead of the review and adoption phase. The EP Committees on Legal Affairs (JURI), the Internal Market (IMCO) and Civil Liberties (LIBE) have been particularly active in this space. Finally, we will look to further engage with the German delegation in Brussels seeing as Germany will be taking the presidency of the Council from July 2020 to December 2020. The German representatives will chair the Permanent Representatives Committee (or COREPER) which consists of representatives from the EU countries and is responsible for preparing the work of the Council. Holding the presidency provides significant control over the agenda and

greater access to information, as well as a privileged position to influence and broker agreements between Member States.

- **Expected timeline**

EU institutions have started ramping up their fact-finding and analytical work on the DSA. EP Committees have shared recommendations with the EC and the EC has recently launched public consultations (2nd June).

In July, the Digital Economy Commission will be running roundtable discussions with the E-commerce and Platforms Unit of the DG for Communications Networks, Content and Technology. The ICC has also reached out to a number of other contacts in Brussels to ensure commission members engage constructively with relevant stakeholders. We anticipate that this process will be iterative with multiple opportunities for members to provide input.

- **ICC proposal for roundtable discussions with DG for Communications Networks, Content and Technology**

The ICC Secretariat is currently working with the head of the E-commerce and Platforms unit of the DG for Communications Networks, Content and Technology to organise virtual roundtable discussions on 16th July (c.90 minutes). The objective is to provide members with an introductory presentation from the Commission (c.30 minutes) followed by roundtable discussions on key themes jointly agreed between the Digital Economy Commission and the DG. **Please do feel free to reach out to the Secretariat to suggest specific topics you would like to raise with the DG.**

ANNEX

Q4 2020: Digital Services Act legislative proposal to be launched

5.2020 to 9.2020: EC Consultations on the Digital Services Act

24.4. 2020: EP Draft Report with recommendations to the Commission on Digital Services Act: Improving the functioning of the Single Market

22.4. 2020: EP Draft Report with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online

19.2.2020: EC "Shaping Europe's Digital Future"

2019: ECJ Case C-401/19 Poland v EP Council of the EU (Case in Progress)
Comment: Poland is challenging the legality of Article 17 of the Copyright Directive, on the grounds that the provisions imposing upload filters are contrary to Article 11 of the Charter of Fundamental Rights of the European Union.

2019: Regulation 2019/1150 on promoting fairness and transparency for business users of online intermediation services

2019: Directive 2019/790 on copyright and related rights in the digital single market

2019: EC Code of Practice on Disinformation

2019: ECJ C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland
Comment: the CJEU ruled that a social network platform operator could be ordered to find and delete comments identical to an illegal defamatory comment, as well as equivalent comments from the same user.

2019: ECJ Case C-390/18 Airbnb Ireland
Comment: the CJEU ruled that the services provided by Airbnb fall within the definition of an 'information society service'.

2018: Directive 2018/1808 on the Audiovisual Media Services Directive

2018: Regulation on preventing the dissemination of terrorist content online

2018: EC Recommendation on Measures to Effectively Tackle Illegal Content Online

2017: EP Resolution on online platforms and the digital single market

2017: EP Providers Liability: From the eCommerce Directive to the future report

2017: EC Communication on Tackling Illegal Content

2017: ECJ Case C-434/15 Asociación Profesional Elite Taxi v Uber Systems Spain SL
Comment: the CJEU ruled that Uber does not classify as an 'information society service' subject to the liability rules in the E-commerce Directive but rather as a 'service in the field of transport'.

2016: EC Code of conduct on countering illegal hate speech online

2016: EC Memorandum of Understanding on the sale of counterfeit goods via the internet

2014: EC Study on the legal analysis of a single market for the information society: New rules for a new age?

2014: ECJ Case C-291/13 Pappasavvas
Comment: the CJEU ruled that online publishers of news could be liable for defamatory comments and illegal material published on their website, regardless of whether the content is free or paid for by users, where the platform receives income generated by advertisement.

2014 ECJ Case C-314/12 UPC Telekabel Wien
Comment: the CJEU ruled that an internet service provider could block its customers' access to a website that places materials in breach of copyright law.

2011: Directive 2011/93 on combating the sexual abuse and sexual exploitation of children

2011 ECJ Case C-360/10 SABAM v. Netlog NV and ECJ Case C-70/10 Scarlet Extended
Comment: the CJEU ruled that it is illegal to require an internet service provider or an online social network to carry out general monitoring and install filtering systems to prevent copyright infringements. However, the judgments do not preclude national judges from imposing narrower filter obligations.

2011: ECJ Case C-324/09 L'Oréal SA and Others v eBay International AG and Others and ECJ Cases C-236/08 to C-238/08 - Google France SARL and Google Inc. v Louis Vuitton Malletier SA, Google France SARL v Viaticum SA and Luteciel SARL and Google France SARL v Centre national de recherche en relations humaines SARL and Others
Comment: the CJEU ruled that the level of passiveness of the service provider depends on the intermediaries' roles.

2000: Directive 2000/31/EC on eCommerce