

1. What is the purpose of this note?

This note aims to provide a basis for an orientation discussion at the DSM Steering Group on a potential new initiative for the next college to update the horizontal regulatory framework for all digital services in the single market, in particular for online platforms. Such an update would encompass a REFIT of the E-Commerce Directive.

2. What problems would this initiative address?

The box below contains some illustrative examples of the type of issues that an updated horizontal regulatory framework could tackle.

Illustrative Examples: (1) Social networks face multiple divergent rules for removing illegal hate speech on their services in different Member States (eg. Germany, France), and different rules for text or video material. As a result, **the fight against online hate is expensive and inefficient** across the Single Market, without binding safeguards for freedom of expression. (2) There are no common legally binding rules on online advertising services in the EU, including for political advertising across borders. As a result, cross-border **micro-targeted disinformation campaigns are easy to set-up, but difficult to detect**. (3) Digital collaborative economy services increasingly face uncoordinated national or even regional regulation of their services and no standards exists for information exchange with local or national authorities (e.g. on tax matters). As a result of this legal fragmentation, lack of enforcement (e.e. of the E-Commerce Directive), and the lack of information for regulators, **home-grown collaborative economy start-ups such as Taxify cannot scale-up across the EU and grow to compete with US rivals such as Uber**.

Below is an initial list of possible problem statements, their causes, and their consequences.

a) Divergent rules for online services across the Digital Single Market. Services such as social networks are used by the majority of Europeans on a daily basis, but are subject to an increasingly wide set of rules across the EU. For example, Germany, and soon France, have different national laws for hateful comments online on social networks. Ireland, Hungary, and France have (or are preparing) divergent national laws for online advertising. Collaborative economy services are subject to a plethora of different laws at national and at local level. Furthermore, case law has increased this complexity through sometimes diverging interpretations of the rules across the Single Market.

Even if consumer rules, data protection rules, as well as contract rules, have converged across the EU, in today's regulatory environment, only the big platform companies can grow and survive. A fragmented market with divergent rules is difficult to contest for newcomers, and the absence of clear, uniform, and updated rules in areas such as illegal content online is dissuasive for new innovators. This is a major strategic weakness for the EU in the digital economy and increase reliance on non-EU services for essential services used by all citizens on a daily basis.

b) Outdated rules and significant regulatory gaps for today's digital services. Many of the cornerstone rules of the horizontal framework in the E-Commerce Directive have not been adapted since 2000, and do not adequately reflect the technical, social and economic reality of today's services, across their whole life cycle from establishment, to advertising, to contracts, and to liability. For example, concepts such as "active" or "passive" hosts, linked by the court to the notion of "optimising content", appear outdated in light of today's services. At the same time, a variety of online intermediaries such as Content Delivery Networks or Domain Name Registrars and Registries are not sure what the legal regime is under which they operate. Similarly, online advertising services now play a key role, e.g. in the context of cross-border micro-targeted political advertising or in the context of disinformation campaigns, while the role of algorithms in the way information flows are shaped can take on a wider societal significance. Yet such new problems in the cross-border provision of services occur in a regulatory gap in the Digital Single Market.

The consequence is legal uncertainty for many established and new services operating cross-borders, combined with lack of regulatory control on key aspects of today's information environment.

c) Insufficient incentives to tackle online harms and protect legal content. The lack of legal clarity also entails a regulatory disincentive for platforms and other intermediaries to act proactively to tackle illegal content, as well as to adequately address harmful content online, especially when combined with the issue of fragmentation of rules addressed above. As a consequence, many digital services avoid taking on more responsibility in tackling illegal content, for fear of becoming liable for content they intermediate. This leads to an environment in which especially small and medium-sized platforms face a regulatory risk which is unhelpful in the fight against online harms in the broad sense. At the same time, when companies do take measures against potentially illegal content, they have limited legal incentives for taking appropriate measures to protect legal content.

d) Ineffective public oversight. The extremely fast evolution of digital services and the high complexity of issues resulting from the wide take-up of digital services raises structural problems in the ability of regulators to implement, enforce and adapt rules dynamically and in a timely and effective manner. Although digital services regulators exist for Data Protection, Audio-visual media, Competition, Electronic Communication Services, and Consumer Protection etc, there is currently no dedicated "platform regulator" in the EU, which could exercise effective oversight and enforcement, e.g. in areas such as content moderation or advertising transparency. Many of the existing regulators also lack the digital capacities needed to interface with online platforms today. At the same time, no regulatory authority is presently available to provide quick and reliable EU-wide guidance on emerging, unforeseen issues, such as the recent organised abuse of multiple platforms seen in the Christchurch attack, or such as the ever-changing issues around online harms for minors.

Besides the costly, slow and potentially contradictory oversight exercised by different sectoral regulators, one consequence is that many public interest decisions that should be taken by independent public authorities are now delegated to online platforms, making them de-facto regulators without adequate and necessary oversight, even in areas where fundamental rights are at stake.

The perceived lack of control over the activities of globally operating service providers is also one of the drivers for increasing national regulatory activity in this area.

e) High entry barriers for innovative services. Besides the regulatory fragmentation, the EU has no legally binding, controlled way for regulatory experimentation with innovative services as they are introduced. For example, collaborative economy services face similar problems in many EU cities, but there is no method at present to develop controlled regulatory sandboxes which would allow shared learning between innovators and regulatory authorities for a fixed period of time with a view of establishing harmonised rules across the EU after a certain trial period. The consequence is that innovative services find it hard to launch and scale in the EU.

3. What objectives would we pursue, and what would be the scope?

Initial ideas for **possible objectives** of any initiative could be:

- To provide providers of digital services with a clear, uniform, and up-to-date innovation friendly regulatory framework in the Single Market;
- To protect, enable, and empower users when accessing digital services;
- To ensure the necessary cooperation among Member States, together with the adequate and appropriate oversight of providers of digital services in the EU.

The **scope** would cover **all digital services, and in particular online platforms**. This means that the clarification would address all services across the internet stack from mere conduits such as ISPs to cloud hosting services; while a special emphasis in the assessment would be dedicated to updated rules for online platforms such as social media, search engines, or collaborative economy services, as well as for online advertising services.

4. How does this relate to other recent initiatives?

The outgoing Commission decided in 2016 to take a **sector and problem-specific approach**.

The sector-specific rules for AVMSD, Copyright, Terrorist Content, Explosive Precursors, Child Sexual Abuse, as well as the recent New Deal for Consumers, or the P2B regulation leave (most of) the ECD unaffected. For example, the proposed Regulation on terrorist content envisages obligations on platforms to quickly remove content following a notice from competent authorities, but does not provide for a notice-and-action framework for content flagged by users.

A revised set of rules would thus **complement** the recently adopted rules, making them more impactful through a harmonisation step.

5. What sort of substantive provisions could be included?

In full respect of the Better Regulation rules, an updated set of rules would amount to an implementation check and a REFIT of the ECD into an updated, future-proof Digital Services Act or Digital Service Code for the EU. The nature of such an instrument should support its overall aim to update, clarify, and harmonise rules for digital services in the Single Market, which could potentially mean that the Directive should evolve into a Regulation. The main structural components would - subject to a rigorous assessment of all relevant options - build on the existing building blocks of the ECD:

Internal Market. This component would build on, and strengthen the home state control principle, by updating its scope in light of the increasing convergence of consumer protection, commercial communications and contract laws across the Union during the last 20 years. As the ECD, it would reinforce the treaty freedom of establishment and free movement of digital services through specific rules for the internal market. Unlike the ECD, it should also assess the need to expand its scope to services established in third countries. Clearer rules should also simplify establishment in the EU, e.g. by mandating a single digital representative, and by narrowly limiting any exceptions to the home state control principle.

Updated scope. The ECD regulates information society services, a concept which has been subject to a rich case-law by the Court of Justice. However, there are some grey areas as regards a wide range of services across the entire stack of digital services in the EU. This would include services such as ISPs, cloud services, content delivery networks, domain name services, social media services, search engines, collaborative economy platforms, online advertising services, and digital services built on electronic contracts and distributed ledgers. This scope could be clarified, also in light with recent regulatory developments (EECC, FFD). Options to define a category of services on the basis of a large or significant market status, complementing the competition threshold of dominance, in order to impose supplementary conditions, should also be examined.

Services building on distributed ledger technologies should equally be covered in an assessment, and if necessary the legal regime applicable to such distributed ledger contracts should be clarified with a view of stimulating the sustainable and trusted development of these new technologies, without limiting innovation.

Intermediary liability. This component would update the liability provisions of the ECD, in particular taking stock of the regulations adopted during the last mandate (copyright, AVMSD, Omnibus, explosives precursors, etc). Recent debates have shown that the general principle of a harmonised graduated and conditional exemption continues to be needed as a foundational principle of the internet. The principle, however, needs to be updated and reinforced to reflect

the nature of services in use today. This could mean that the notions of mere conduit, caching and hosting service could be expanded to include explicitly some other services. In some instances, this can amount to codifying existing case-law (e.g. for search engines or wifi hotspots), while in other cases a clarification of its application to collaborative economy services, cloud services, content delivery networks, domain name services, etc is necessary.

In addition, the concept of active/passive hosts would be replaced by more appropriate concepts reflecting the technical reality of today's services, building rather on notions such as editorial functions, actual knowledge and the degree of control. Finally, a binding "Good Samaritan provision" would encourage and incentivise proactive measures, by clarifying the lack of liability as a result of Such measures, on the basis of the notions already included in the Illegal Content Communication.

General monitoring and automated filtering. While the prohibition of general monitoring obligations should be maintained as another foundational cornerstone of Internet regulation, specific provisions governing algorithms for automated filtering technologies - where these are used - should be considered, to provide the necessary transparency and accountability of automated content moderation Systems.

Regulating content moderation. Uniform rules for the removal of illegal content such as illegal hate speech would be made binding across the EU, building on the Recommendation on illegal content and relevant case-law, and include a robust set of fundamental rights safeguards. Such notice-and action rules could be tailored to the types of services, e.g. whether the service is a social network, a mere conduit, or a collaborative economy service, and where necessary to the types of content in question, while maintaining the maximum simplicity of rules. The feasibility of introducing thresholds could be examined in this context, taking due account of the size and nature of the service provider and of the nature of the potential obligations to be imposed on them.

Building on the Recommendation on illegal Content, binding transparency obligations would also be at the heart of a more effective accountability framework for content moderation at scale, and would complement recently adopted rules on AVMS or Copyright. Options for transparency for algorithmic recommendation systems of public relevance such as newsfeeds should also be examined. At the same time, these rules would avoid that Member States impose parallel transparency obligations at national level, thus providing for a simple set of rules in the Single Market.

The analysis will also cover harmful content (which is not necessarily illegal), as such content is not only addressed in EU-level policies (such as the AVIVSD), but also at MS level (e.g. the draft French fake news law, the UK Online Harms White Paper, etc. However, a clear distinction will be made between illegal and harmful content when it comes to exploring policy options. For instance, the ever changing nature of harmful content seems to make it unsuitable for strict notice and action type obligations; in case of harmful content, codes of conduct and user

empowerment in choosing sources could be given higher prominence; the role of the regulator could be strengthened (e.g. via approval of such codes of conduct).

Rules for online advertising services. Additional specific obligations should be examined for cross border online advertising services, including for rules around political advertising, adequate possibilities for auditing and accountability, as well as with a view of lowering entry barriers for competitors and alternatives.

Service interoperability. Where equivalent services exist, the framework should take account of the emerging application of existing data portability rules and explore further options for facilitating data transfers and improve service interoperability – where such interoperability makes sense, is technically feasible, and can increase consumer choice without hindering the ability of (in particular, smaller) companies to grow. Such initiatives could be accompanied by appropriate standardisation initiatives, and co-regulatory approaches.

Innovation sandboxes. Options to include in the general framework provisions which would allow controlled regulatory experimentation should also be examined. This should facilitate the introduction of new services, while allowing close monitoring and assistance during a trial period.

Regulatory oversight. A dedicated regulatory structure should ensure oversight and enforcement of the rules, in particular for cross-border situations, but also partnerships and guidance for emerging issues, and with appropriate digital capacities and competences, inter alia to help translate rules into technical solutions. The nature of the regulatory structure will depend on the specific mission, and could involve a central regulator, a decentralised system, or an extension of powers of existing regulatory authorities. Possible roles and powers of such regulatory structures will be explored, including reporting requirements, powers to require additional information, complaint handling, the power to impose fines or other corrective action, or the approval of codes of conduct. This analysis will draw on external advice (e.g. through the Observatory of the Online Economy) and any insights to be gained from existing or planned regulatory structures, both at EU and national level.

Cooperation with public authorities, including data access. Cleaner rules would also involve a simpler interface with public authorities, including e.g. data access to public interest data sets, or of illegal content notifications, or in the context of oversight and compliance, eg. with local tax authorities. These interfaces should be digitally enabled and harmonised across the EU to the greatest degree possible, and reflect the appropriate division of responsibility between public and private actors.

6. What is the evidence base?

At present internal work is underway to procure a study on online services in the Digital Single Market, alongside preparations to analyse the implementation of the ECD and a REFIT evaluation.

A dedicated study on algorithmic transparency will cover areas such as content filtering, transparency of recommender systems, and online advertising.

Associated evidence gathering is taking place in the context of the Administrative Arrangement with the Joint Research Centre, as well as in future plans in the context of the Online Platform Observatory.

National sources, e.g. from the evaluation of the German NetzDG, as well as the ongoing monitoring in the framework of the illegal content recommendation (including Hate Speech, Terrorist Content, Counterfeit goods) will similarly inform the assessment.

Existing studies including multiple previous public consultations, the work done in the context of the terrorist content regulation, as well as recent studies on the legal aspects of the liability provisions and business models for online intermediaries will equally be used. Additional targeted studies, public consultations, and stakeholder workshops will be indispensable.

7. Questions for Discussion

- a. Are there elements of the problem analysis missing?
- b. Are there additional substantive angles which should be included in the assessment?
- c. How can we ensure proper coordination across instruments, e.g. during the transposition period for Copyright and the revised AVMSD?

