



Council of the
European Union

Brussels, 10 May 2021
(OR. en)

8653/21

Interinstitutional File:
2020/0361(COD)

COMPET 342
MI 338
JAI 527
TELECOM 198
CT 66
PI 37
AUDIO 52
CONSUM 117
CODEC 676

COVER NOTE

From: European Economic and Social Committee (EESC)
date of receipt: 29 April 2021
To: General Secretariat of the Council

Subject: Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC [COM(2020) 825 final]¹

Delegations will find attached the above document.

Encl.: INT/929 Digital Services Act

¹ Other language versions, will soon be available on the following website:
<https://dmsearch.eesc.europa.eu/search/opinion>



INT/929
Digital Services Act

OPINION

European Economic and Social Committee

Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC [COM(2020) 825 final – 2020/0361 (COD)]

Rapporteur: **Gonçalo LOBO XAVIER**

Referral	Council of the European Union, 11/02/2021 European Parliament, 08/02/2021
Legal basis	Article 114 of the Treaty on the Functioning of the European Union
Section responsible	Single Market, Production and Consumption
Adopted in section	31/03/2021
Adopted at plenary	27/04/2021
Plenary session No	560
Outcome of vote (for/against/abstentions)	237/3/5

1. **Conclusions and recommendations**

- 1.1 The EESC welcomes the proposal for a single market for Digital Services (Digital Services Act) at a time when new and innovative information society (digital) services have emerged, changing the daily lives of EU citizens and shaping and transforming how they communicate, connect, consume and do business. These services have made far-reaching contributions to societal and economic transformation in the EU and across the world, and the COVID-19 crisis has demonstrated how crucial they are in order to create a better society.
- 1.2 The EESC supports the Commission's efforts to prevent the internal market being fragmented by a proliferation of national rules and regulations that could undermine the system and prevent all European companies benefiting from a strong single market. Therefore, the EESC calls for a clear statement regarding the exhaustive nature of the Digital Services Act. The EESC believes this is an opportunity to establish global standards for the digital markets that can lead Europe into this new era, ensuring a high level of consumer safety and protection online.
- 1.3 The EESC is aware that the discussion on the DSA will take time and compromises will be needed in the long term. Despite that, the EESC calls on the Commission and the Member States to define a reasonable schedule for setting up the discussion and inclusive public consultation and implementing the regulation and strategy. It is fundamental for social partners and civil society organisations to play a role in this process in order to achieve a level playing field for all players, regardless of whether they are established in the European Union.
- 1.4 The EESC also believes that, with the importance of digital technologies, the need for new rules and regulations to solve the problems and challenges of these technologies has become a priority. A new economy calls for new approaches.
- 1.5 The EESC welcomes the greater transparency for recommender systems and advertising. However, these recommender systems should not be demonised, but it should be ensured that consumers get only the advertising they want. Regulations should therefore stress individual autonomy and the EESC believes that Articles 29 and 30 of the regulation should therefore achieve a proper balance.
- 1.6 The EESC notes that there are many shortcomings with regard to the country of origin principle and calls for the careful consideration of alternative methods, such as the country of destination principle, especially in tax, labour and consumer issues unless there is a stronger regulation on the EU level in order to ensure fair competition and the highest possible level of consumer protection. It should be ensured that the same labour law provisions apply for the platform worker as are in place in the country where the service is provided, as poor working conditions for employees have become highly problematic for fair competition. The overall aim is to enforce and strengthen the internal market by securing level playing field for all actors.
- 1.7 The transparency obligations should not prevent advances in technology, particularly in the field of artificial intelligence and computer science. Even though black box AI poses risks, it may also bring significant benefits. The EESC stresses the need to ensure that the law is fine-tuned and does not hinder technical progress taking into account the highest possible level of consumer and worker

protection. It calls for an adequate framework to be developed to allow companies to assert the fairness, reliability and security of their AI systems.

- 1.8 The exemption of liability for hosting should only cease to apply when it comes to content that is clearly illegal or that has been established by a court decision as illegal. The EESC recommends establishing a positive liability regime for online marketplaces to be applied in certain circumstances.
- 1.9 The definitions used should be streamlined and, to the extent possible, harmonised with related legal texts such as the Digital Markets Act, the Directive on Copyright in the Digital Single Market and the P2B Regulation.
- 1.10 The Digital Services Act is part of a wider regulatory approach to the platform economy, which must also address taxation, workers' rights (including social protection, health and safety, right to organise and collective bargaining), wealth distribution and sustainability and product safety. The EESC draws attention to the huge task of achieving proper coordination between all relevant instruments and initiatives, notably in the field of intellectual property, telecommunications, data and privacy, product liability, product safety, the audiovisual sector and, of course, the e-commerce directive. A proper overview is needed of how these different perspectives affecting the DSA can be integrated.
- 1.11 The EESC will keep paying particular attention to taxation, data governance, employment status, working conditions and consumer protection, as they are significant factors for the, sometimes unfair, competition in the digital economies. The Committee stresses that these challenges need to be tackled in the light of the Sustainable Development Goals, the Digital Agenda, the Charter of Fundamental Rights and the European Pillar of Social Rights.

2. **General comments**

- 2.1 Digital technologies can be crucial for our daily life. They can be of great benefit to society and the economy, and it is now universally acknowledged that they are indispensable for the way the market operates and the way we relate to each other, with real benefits for the community at large. However, digital services, have also posed significant challenges for individuals, society and the market. A fairer Europe depends on a proper regulation of the digital sector and on ensuring proper distribution of those benefits and adequate protection of all market participants (citizens, consumers, workers, and companies, whatever their size).
- 2.2 The Commission's response to a number of documents, case law developments and calls - on the one hand for ambitious reforms of the existing EU e-commerce legal framework while maintaining the core principles of its liability regime, prohibition of general monitoring and the internal market clause, and on the other hand for an updated, fairer and competitive digital market – is focused on two main areas: the Digital Services Act and the Digital Markets Act.
- 2.3 With the Digital Services Act the EU should ensure a high level of European consumer protection for several aspects in the digital economy, notably on digital online platforms. Combating illegal content and increasing transparency in the way advertising targets the public are among the most important and controversial aspects of this proposal.

- 2.4 With the Digital Markets Act the Commission focuses on the way the European digital market operates while attempting to make it more balanced, more competitive and more innovative, providing people with more and better services, by establishing a level playing field for every market participant.
- 2.5 The EESC therefore welcomes the Commission's efforts to further regulate the digital economy and make it reliable for both society and the economy. Citizens, workers, and economic operators, especially SMEs and vulnerable individuals, need safeguards in their relations with digital platforms and security needs to be guaranteed in all operations, in terms of both content, economic transactions and even intellectual property rights.
- 2.6 EU cyberspace rules are becoming increasingly complex and fragmented. Effort should be made to increase their readability and coherence. Overly complex rules can be bad for businesses and citizens alike, stifling innovation, increasing costs and making it harder for people to exercise their rights. The EESC therefore welcomes the Commission's intention to coordinate and streamline the procedural aspects of enforcement rules within the Member States and the choice of a directly applicable legal instrument.
- 2.7 The EESC stresses that the Digital Services Act should be coherent with the potential legal framework addressing other relevant issues relating to the platform economy such as workers' rights (including social protection, health and safety, right to organisation and collective bargaining)¹, tax and wealth distribution and sustainability, and stresses the need to tackle these challenges at European level and in the light of the Sustainable Development Goals, the Digital Agenda, the Charter of Fundamental Rights and the European Pillar of Social Rights. Among the future Commission Initiatives, the European Economic and Social Committee will be particularly vigilant with regards to taxation, data governance, employment status, working conditions and consumer protection, as they are significant factors for the, sometimes unfair, competition in the digital economies.
- 2.8 Regulation of cyberspace should be as futureproof and technologically neutral as possible. This will provide clarity and market opportunities for all with a focus on consumer protection and security.
- 2.9 It is important that in the field of digital taxation the Commission takes initiatives within the framework of international discussions by providing principles of equity and transparency, distribution of wealth and sustainability, and underlines the need to deal with these questions at European level and in line with the Sustainable Development Goals, the Digital Strategy, the Charter of Fundamental Rights and the European Pillar of Social Rights.

3. **Specific comments**

- 3.1 Better and more efficient regulation, inter alia to avoid unfair competition, are one of the main topics in this new economy. The Commission clearly believes - and the EESC supports it - that new means and approaches are needed to regulate a market that cannot use the same tools and conduct "business as usual". It is a fact that the "normal" regulatory competition framework is not sufficient to face the challenges and difficulties caused by the existence of bigtechs efficiently.

¹ [European Commission consultation on improving the working conditions in platform work.](#)

- 3.2 The EESC calls for clearer rules, such as those the Commission is willing to explore based on a simplified fast track regulatory internal market framework for the digital world. The EU must update its regulatory toolbox to effectively address digital markets in addition to gatekeeper platform issues. The new economy demands different action and thus the EESC also welcomes the Digital Markets Act initiative².
- 3.3 European digital sovereignty must be factored into all regulatory exercises, to protect not just businesses but also workers, consumers and citizens. With the COVID-19 crisis, the sale of unsafe products, fake reviews, unfair commercial practices and other consumer law violations, piracy and counterfeiting on digital platforms rose to unacceptable levels. These illustrate the value of the DSA initiative and the urgent need for action.
- 3.4 It is also clear that the enforcement mechanisms for fighting fraud and illegal activity associated with digital platforms present a challenge and ensure that the companies which profit the most in the digital economy also have more responsibilities. The EESC believes that the DSA has a critical role to play in restoring confidence in the market and getting the Member States to define a swift and efficient enforcement mechanism that suits all Member States, taking into account their existing differences. The EESC welcomes the fact that the enforcement deficits in the area of illegal online advertising are very likely to be reduced due to the DSA.
- 3.5 Whatever the approach taken in terms of enforcement systems and mechanisms, sufficient funds need to be allocated by the Commission and the Member States to invest in human resources, training systems, software and hardware that can reinforce confidence in the market and individuals. It is therefore a priority to define the costs involved of implementing the DSA as well as the anticipated costs for society if no action is taken, and ensure adequate conditions in order to get every Member State on board.
- 3.6 When it comes to the scope of the DSA, size matters: not all companies in this field should be treated in the same way, to avoid unfair competition based on financial power and dimension. However, the proposed criterion, i.e. the number of workers, might prove to be inadequate and easy to circumvent. This is especially critical, as significant parts of the obligations for platforms set out in the proposed regulation do not apply to micro or small enterprises, such as complaint handling, abusive behaviour, reporting criminal offences, advertising transparency, independent audits and trusted flaggers.
- 3.7 Nevertheless, the EESC underlines that it is important to protect SMEs, micro and social economy enterprises. These may not be able to afford the compliance and investment costs and it must be ensured that they will not suffer from the implementation of a regulation that was supposed to bring fair competition. The EESC therefore calls for alternative criteria to be found in order to define micro and small enterprises (Article 16), such as annual turnover or their ownership or organisational structure.
- 3.8 The EESC welcomes the adaptation period for companies that fall into the category of very large online platforms (Article 25(4)). Often, these companies grow very fast and should be given a fair chance to adapt to the more stringent requirements and duties established in the proposal.

² [EESC opinion on Digital Markets act.](#)

- 3.9 Although the proposal makes it clear that it is to be understood as *lex generalis*, there seem to be many closely-related definitions in different instruments, which may become too cumbersome from the perspective of compliance, imposing additional costs on companies and consumers. For example, the concept of "online platform" is defined in the proposal; the concept of "platform" is not defined but is used in the P2B Regulation (Regulation 2019/1150); the Digital Single Market Directive (2019/790) uses the concept of "online content-sharing service provider"; and the Digital Markets Act proposal refers to "gatekeepers" and "core platform services".
- 3.10 With the rise of digital services, business models have evolved and become more complex and distinctions between different actors become blurred. Given the fast developments in the sector, which are a challenge for regulators, there is a need for clear definitions. The EESC recommends defining platforms, users or recipients (the proposal uses both terms but "recipients" occur much more frequently), consumers and workers in the digital economy more clearly.
- 3.11 Under the current proposal, the rules on the traceability of traders only apply "where an online platform allows consumers to conclude distance contracts with traders" (Article 22). An alternative is to define these providers/platforms that allow consumers to conclude distance contracts with traders as "marketplaces" and clarify which rules apply to that category of intermediary.
- 3.12 The development of codes of conduct pursuant to Articles 35 and 36 should be conducted in an open and participatory manner. Organisations representing users and recipients, civil society organisations, social partners and relevant authorities should be involved.
- 3.13 The EESC notes that there are many shortcomings with regard to the country of origin principle and calls for the careful consideration of alternative methods, such as the country of destination principle, especially in tax, labour and consumer issues unless there is a stronger regulation on the EU level in order to ensure fair competition and the highest possible level of consumer protection. It should be ensured that the same labour law provisions apply for the platform worker as are in place in the country where the service is provided, as poor working conditions for employees have become highly problematic for fair competition. The overall aim is to enforce and strengthen the internal market by securing level playing field for all actors.
- 3.14 Furthermore, the system set out in Articles 8 and 9 of the proposal should not be seen as an alternative to the recognition and enforcement of judgements, and it should be clarified that the rules on refusal of recognition and refusal of enforcement remain valid and applicable.
- 3.15 The EESC welcomes the clarification that own-initiative investigations do not affect the applicability of safe harbours (Article 6) and the fact that the general principle of a lack of obligation to monitor (Article 7) is preserved. However, those rules should not affect the duty of online marketplaces to conduct regular checks on traders and on products and services offered set forth in Article 22.
- 3.16 The first sentence of Article 12(1) should be clarified, namely to specify whether the provision covers information such as technical data provided to a software vendor in an SaaS agreement.

3.17 The EESC welcomes the detailed regulation of the notice and internal complaint-handling procedure and the safeguards brought by the proposal. However, the EESC believes that a safe harbour (Article 5) should only be excluded where the content is clearly illegal under national law in the country of origin or under directly applicable EU law or where it has been established by a court of law to be illegal. Otherwise, intermediaries will have an incentive to remove content by default. The legal assessment of certain types of content may be very complex and intermediaries should not be held liable if they have not removed it. This is in line with the duty to suspend established in Article 20, which refers to manifestly illegal content.

3.18 The creation of digital services is essentially based on the ability to manage and access data. In this regard, it is important to remember the Data Governance Act (COM(2020) 767 final), which mentions the possibility of creating "data management and exchange cooperatives", an instrument which will favour small businesses, businesses and individual entrepreneurs who might not be able to access or process large amounts of data individually. These structures could provide shared participatory governance for managing intermediation, exchange or data sharing services between companies and between businesses and entrepreneurs, which could provide data but also benefit from and use it.

4. **Implementation strategy - get things done**

4.1 It is stated that the impact assessment report clarified the links between the Digital Services Act and the broader regulatory framework, providing more detailed descriptions of the policy options, with more detailed analysis of the underlying evidence addressed in the revised impact assessment report. This is crucial, but does not mean that society will not remain anxious in the face of all the variables involved and continue to be cautious. The importance of digital services in our economy and society, but also the growing risks they bring, will continue to increase.

4.2 With regard to added value in the enforcement of measures, the initiative creates substantial efficiency gains in cooperation across Member States and pools some resources for technical assistance at EU level with regard to inspecting and auditing content moderation systems, recommender systems and online advertising on very large online platforms. This, in turn, will make enforcement and supervision measures more effective as the current system relies to a large extent on the limited capability for supervision in a small number of Member States. However, the proposal needs to be improved to ensure enforcement and redress for consumers happen in an effective and swift manner. The DSA must include remedies, including compensation for damages, for consumers when companies fail to abide by their obligations under the DSA.

4.3 It is stated that the Commission will establish a comprehensive framework for continuously monitoring the output, results and impact of this legislative instrument at the date of its application. Based on the established monitoring programme, an evaluation of the instrument is envisaged within five years from its entry into force. The EESC believes that this is not a reasonable time frame that will inspire confidence in the market and citizens and ensure consistency with the review of the e-Commerce Directive. The Commission should provide for regular evaluation every two years.

4.4 The rules should be effectively communicated and should not tarnish EU's image. Protection of EU citizens and consumer protection should be one of the main points of the future communication and

enforcement. The EU is, and must remain, a welcoming place for companies, workers and citizens, including those outside the EU. The regulation should not come across as a burden or obstacle but rather as a balanced approach to 21st century internet regulation, setting the standard for a better and fairer digital economy, a safer online space and safeguarding vibrant democracies.

5. **Fundamental rights**

- 5.1 The rights of workers, ensuring a high level of consumer protection, privacy and personal data protection and fundamental freedoms such as freedom to conduct a business and provide services and freedom of expression, thought, and opinion must be properly safeguarded, in accordance with legislation and in line with the Charter of Fundamental Rights. The proposal should aim to strike a fair balance in that regard.
- 5.2 An important aspect of the proposal is procedural fairness. However, that alone may not be sufficient to ensure actual, effective fairness if the incentives are not properly aligned. A broad concept of illegal content or, as some have proposed, "harmful content", may prove to restrict freedom of expression and opinion.
- 5.3 Human dignity is safeguarded by strong and clear rules to protect citizens and consumers. These aspects play an important role in the proposal and should be preserved.
- 5.4 The framework proposed by the DSA provides authorities with the right tools to prevent, monitor and react to manipulation, discriminatory risk, and other abuses. The EESC considers that the EU and its Member States must invest considerable resources and ensure those are leveraged to the benefit of society at large.
- 5.5 In order to mitigate discriminatory risk, the EESC urges that sufficient resources must be invested by the EU and its Member States to control and supervise the algorithms used by the platforms. The EESC appreciates the increased access to data and algorithms and recommends that it must be guaranteed for public authorities on all levels as well as for vetted independent researchers, including from independent civil society that work for the public interest.

Brussels, 27 April 2021.

Christa SCHWENG

The president of the European Economic and Social Committee
