

D9+ NON-PAPER ON THE CREATION OF A MODERN REGULATORY FRAMEWORK FOR THE PROVISION OF ONLINE SERVICES IN THE EU

On December 9th 2019 the countries forming the Digital 9+¹ met in Warsaw to discuss the market of online services in the EU and the need for regulatory changes to make it fit for the modern digital age. The European Commission plans to propose a Digital Services Act Package, which is expected to include an upgrade of the rules on liability and security of digital platforms, services and products offered on the EU market².

We the D9+ would like to raise some points to take into consideration while conducting the review of the current legislation, in particular the e-Commerce Directive, and designing the new framework for providing digital services in the EU³.

The information society services in the EU are regulated by the e-Commerce Directive⁴, which was adopted 20 years ago. The extension and diversity of new digital business models and services have significantly changed and although good legislation does not have an expiry date, it cannot be overlooked that as technology evolves, more and more issues come to light for which no provisions were envisaged in the Directive. As a result, a patchwork of EU and national legislations has emerged, undermining the foundations of a strong Single Market that we need.

The legal environment that we have today is **not reflecting the new reality we now live in**, and makes it harder for enforcers to oversee the European market, for new innovative digital services to launch, for smaller players to grow, for consumers to know their way around the online world, and for Europe to compete effectively with digital leaders outside of the EU. **We need strong and trusted digital economy working for both businesses, consumers and citizens, and to become a key player on the global market – and we need it quickly.**

To address these challenges, the Digital Services Act Package should provide an improved regulatory framework for the digital economy. It should provide the trust for businesses to develop new services, trust for businesses and consumers that digital service providers abide by the rules, and the trust for citizens that the digital economy offers legal protection, digital services can be safely used and works for them. We think that there is a need to re-examine whether the rights and obligations imposed upon participants of the digital market are suitable and see how we can make improvements if needed. **Different factors will need to be considered such as promoting single market measures, economic growth, innovation, respect for human rights and the effective protection of public interests.**

While designing this framework, we have to make sure it is clear, consistent and encourages cross-border trade, and that all relevant EU legislation applying to e-commerce has been taken into account. The review should be evidence-based and include a thorough impact assessment in consultation with different stakeholders encompassing civil society and the private sector.

¹ Belgium, Czech Republic, Denmark, Estonia, Finland, Ireland, Luxembourg, Netherlands, Poland and Sweden.

² "A Union that strives for more, My agenda for Europe -Political guidelines for the next European Commission 2019-2024".

https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

³ This non-paper is based on D9+ MS' current understanding of what a Digital Services Act Package might include.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce').

The upcoming Digital Services Act must create a truly functioning Single Market where technology companies can grow and scale up and be globally competitive, by enabling digital services and platforms in the whole European market.

Under the spotlight, the e-Commerce Directive, **was an important step towards the creation of a fully-operational Digital Single Market.** It established provisions allowing an exchange of information and views on the internet, such as the following:

- **the country of origin principle**, which means that a provider of information society services is subject to the law of the EU Member State in which it is established. This rule enables SMEs to expand and scale up quickly without the need to adapt to specific laws of other Member States. The principle has contributed significantly to the EU economic development.
- **exemption for intermediaries from liability for the content they store** if they fulfil certain conditions. It guarantees that the internet remains an open environment for everyone to use.
- **no general obligation for providers to monitor information**, which they transmit, store or publish, nor a general obligation for them to actively seek facts or circumstances indicating illegal activity. This rule safeguards freedom of expression and access to information.

We would like to reiterate that the core principles of the e-Commerce Directive should not only be maintained, but modernized, yet in a targeted manner and take into account the emergence of new types of online intermediaries that didn't exist at the time of introduction of the e-Commerce Directive, but have a significant impact on our societies today. To last another 20 years, the envisaged revision should equally look at a 20 years' future horizon which generally means setting a solid and technology neutral framework which embraces future innovation.

While not imposing a general monitoring obligation upon internet intermediaries, the e-Commerce Directive leaves at the discretion of Member States the possibility to establish notifying obligations for internet intermediaries regarding alleged illegal activities undertaken through their platforms, and set up appropriate procedures for taking down such content. Yet, nowadays there are mounting expectations from internet intermediaries to be held accountable and to protect users, especially those whose rights are violated, against certain types of illegal content online. In order to accommodate those concerns and provide more legal certainty to prevent fragmentation of the internal market, we feel that **time has come to consider introduction of a framework for notice and action mechanisms across the EU, with measures that are proportionate to the nature and impact of the harm committed**, so as to:

- **enable swift and effective removal of the clearly illegal content.** The goal is to minimise potential harm, not make the rules too burdensome and costly for companies, and to include a mechanism for preservation of the removed content when necessary for the prevention, detection, investigation and prosecution of a criminal offence;
- ensure appropriate **balance between the interests and expectations of those reporting illegal content that should be removed, and those posting content**, making it possible to counter-notice;
- **guarantee internet intermediaries an appropriate level of legal certainty;**
- improve coordination and cooperation between national authorities as well as with the European Commission;
- ensure clarity and swift reaction for individuals whose rights are at stake;
- safeguard online users' rights to freedom of expression and information;
- encourage internet intermediaries to take a more proactive approach to content on a voluntary basis by exploring **incentives and safeguards** for them to do so.

Another issue worth looking at is the nature of global competition. Strong competition rules and open markets have made the EU one of the most prosperous and competitive economies in the world. In its recently published Communication⁵ the European Commission mentioned that it is “*currently reflecting on the effectiveness of the way in which the current rules are applied, for example in relation to anti-trust remedies, and also conducting an evaluation and review of the rules themselves to ensure that they meet today’s digital and green challenges*”. We are looking forward to this evaluation to see if there is a need for new rules to make it fit for a new digital environment. **We will welcome evidence-based solutions that will work for the European consumers and businesses.** We agree with the Commission that digital Europe should reflect the best of Europe - open, fair, diverse, democratic, and confident.

With these points we wish to contribute to the discussion on the future of digital services in the EU, and invite the European Commission and other Member States to support the position of D9+.

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⁵ [Shaping Europe's digital future](#)

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