



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion 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}.

This proposal, adopted as an element of the Digital Services Act package, is part of a series of ambitious measures designed to complete the Digital Single Market, as announced by the President von der Leyen in her Political Guidelines. In this context, the package aims to make the 2020s Europe's Digital Decade and the Commission aims at the EU leading the way by setting up global standards.

Central to the ambition of the Digital Services Act is ensuring a borderless, strong and deep Digital Single Market that will foster the growth of EU companies, and where citizens have choice and control as to which content can be shared and received online. In this regard, the Commission supports the Bundesrat's integrated approach aiming at the adoption of a modern legal framework for digital services that will address challenges posed by their use for the whole society, as well as for individual consumers.

The Commission particularly welcomes the Bundesrat's constructive and active engagement and its appreciation of the proposal's main features, which build on the core principles of the e-Commerce Directive. This encompasses keeping the liability exemptions or the prohibition of general monitoring obligations, as well as the introduction of a new catalogue of graduated responsibility according to the societal role of the service provider.

Discussions between the Commission and the co-legislators, the European Parliament and the Council, concerning the proposal are currently underway and the Commission remains hopeful that an agreement is achievable in the near future.

The Commission remains determined to ensure that the agreed text will strengthen the Internal Single Market and the rights of users in a cross-border context of digital platforms.

*Reiner HASELOFF
President of the Bundesrat
Leipziger Straße 3 - 4
D – 10117 BERLIN*

In response to the more technical comments in the Opinion, the Commission would like to refer to the Annex.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Bundesrat and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Thierry Breton
Member of the Commission*

Annex

The Commission is pleased to have this opportunity to provide a number of clarifications regarding its proposal and hopes that these will allay the Bundesrat's concerns.

Legal basis: The legal basis is determined by the primary objective and scope of the intended proposal. The primary objective of this proposal is to ensure cross-border the proper functioning of the Internal Market in relation to the provision of intermediary services across borders of the Member States. In line with this objective, the proposal aims to ensure harmonised conditions for innovative cross-border services to develop in the Union, and by addressing and preventing the emergence of obstacles to such economic activity resulting from differences in the way national laws develop. In this regard, the Commission has taken into account the fact that several Member States have legislated or intend to legislate on issues such as the removal of illegal content online, diligence, notice and action procedures and transparency. Following a careful and detailed impact assessment analysis, the Commission has concluded that these legislative efforts at national level hamper the provision and reception of digital services across the Union, and that a regulation based on Article 114 TFEU allows for necessary and desired approximation of establishment and freedom to provide services.

Media pluralism: The proposed Digital Services Act does not hamper media pluralism in any way. To the contrary, the Commission trusts that, once adopted, the modernised framework will contribute to strengthening the role of the media in the EU societies. The Commission takes note of the concerns raised by the Bundesrat.

Article 5(3): This provision aims at ensuring the effective protection of consumers that engage in intermediated commercial transactions online. It provides that an online platform which does not make clear whether the information intermediated by the platform is provided by the online-platform itself or by third providers, will in principle not be able to benefit from the exemption from liability established in this Regulation. It should be determined objectively, based on all relevant circumstances, whether the presentation could mislead the belief of an average and reasonably well-informed consumer. It might be further assessed by the co-legislators whether this concept of a consumer is necessary to be extended.

Transaction and interaction platforms: The Commission takes note of this comment. It would like to point out that the new business models are increasingly hybrid and sometimes have the characteristics of both social media and of online marketplaces. Within the Digital Services Act, that aims to be a future-proof and technologically neutral horizontal regulation, it seems inappropriate to differentiate between particular types of services covered under the definition of online platforms. The Digital Services Act does not propose to regulate the providers themselves, but the services or activities offered by intermediary service providers. In this way, the proposal responds to the concerns that each service raises and better protects consumers.

Article 6: The Commission welcomes the position of the Bundesrat to promote voluntary own-initiative investigations and thereby to further strengthen the principles of the liability exemption.

Article 8: The Commission has not proposed any timeframes in this Article as the Digital Services Act covers tackling of all illegal content online, and its different types might require different assessment, time frames and tackling. The application of time frames in this provision thus does seem neither appropriate nor proportionate. Furthermore, Article 8 explicitly states in its last paragraph that it is without prejudice to requirements under national criminal procedural law that is in conformity with Union law. A Member State will continue, according to the proposal, to be able to adopt a law (in conformity with Union law) setting out the illegality of content and its removal conditions at the request of a public authority, the harmonised procedural requirements for sending the orders as set out in the Digital Services Act being applicable at the same time.

Article 12: Clear criteria for any potential restrictions to the use of service by the provider of intermediary service shall be, according to the proposal, unambiguously defined in its terms and conditions. If its action in applying and enforcing these restrictions were disproportionate or non-objective, the service provider would breach obligations established by the Regulation, and its action should be treated as such.

Article 13: Based on the terms and conditions that should correspond to the obligations indicated here above, the main aim of this Article is to ensure a broad transparency of content moderation practices by means of publicly available transparency reports. Such yearly timing corresponds to the horizontal scope of application of the proposal, it covers all services covered by the proposal and should therefore allow for corresponding processing of the transparency reports in a proportionate way.

Article 14: The Commission agrees with the Bundesrat that over-blocking or inappropriate content removal should be avoided. At the same time, it should be clarified that by harmonisation of notice and action procedures in a horizontal framework, the Commission does not propose to oblige the recipient of the notice to remove the content. The notices must be assessed in each individual case .

Exemption of small and micro enterprises from this Article was carefully assessed and is in details elaborated in the Impact Assessment accompanying the proposal. The Commission has discarded to exempt these enterprises from the scope of this provision. The Impact Assessment elaborated on the necessary costs, showing that, for most companies, they do not represent an additional cost compared to current operations, but require a process adaptation in the receipt and processing of notices and will ultimately streamline existing costs stemming from currently applicable fragmented obligations. It is small and medium enterprises that can benefit the most from the harmonisation and standardisation of notice-and-action procedures as proposed in the Digital Services Act.

Article 18: The Commission proposed that fees charged by the body for the dispute settlements shall be reasonable and in any event should not exceed the costs thereof, and these should be known to the both parties concerned before engaging in the dispute settlement. If the body settles the dispute in favour of the recipient of the service, the recipient shall not be required to reimburse any fees or other expenses. Such an approach is already significantly favouring the consumer and as such is reasonable and proportionate.

Regarding the obligation of the online platform to participate in the out-of-court dispute resolution, this is partly clarified by the recital 44 that provides for additional proportionality. The right of both parties concerned to seek judicial redress should not be affected, yet the Commission recognises that there is a space for further clarification.

Article 21: As recital 48 explains, an online platform may in some instances become aware, such as through a notice received from a notifying party or through its own voluntary measures, of information relating to certain activity of a recipient of the service. The suspicion of the act that the recipient may have committed, may be committing or is likely to commit, should cover a serious criminal offence involving a threat to the life or safety of a person, such as offences specified in Directive 2011/93/EU of the European Parliament and of the Council.

Article 29: This article is particularly important, as it harmonises the right for users to influence the recommender systems, which can have a significant impact on the ability of recipients to retrieve and interact with information online.

Article 37: The Commission agrees that Member States should be involved in the respective processes of drawing up crisis protocols, as well as in their testing and supervising, and believes that this is already reflected in the proposal.

Content moderation in journalistic and editorial content: The Commission takes note of the Bundesrat's concerns and fully agrees that freedom of media and information in Europe should be protected. The proposal already explains that in order to avoid imposing overly broad obligations, providers of particular hosting services should not be considered as online platforms where the dissemination to the public is merely a minor and purely ancillary feature of another service. The proposal further clarifies by way of example in recital 13 that the comments section in an online newspaper could constitute such an ancillary feature to the main service represented by the publication of the news under the editorial responsibility of the publisher.

Articles 38 – 42: Taking into careful consideration the results of a broad consultation of all stakeholders, and the co-legislators opinion in particular, the proposal provides for the appropriate supervision of digital services and cooperation between authorities at Union level, therefore supporting trust, innovation and growth in the internal market. The Commission has also reflected the fact that for supervision and enforcement of rules for provision of digital services in the EU, there is no body established so far at European level. In this regard, the Commission opted for a proposition of a hybrid structure, allowing for the utmost engagement of national authorities and their effective communication on a daily basis that should reinforce mutual trust between the Member States. At the same time, the regulation does not require that the Member States establish new administrative and enforcement authorities to comply with the regulation, as they can build and profit from the already established structures.

The Digital Services Act should be perceived as complementary to the e-Commerce Directive that builds on the internal market principle. This has been reflected when proposing Article 40 and jurisdiction of the Member State of establishment for Chapters III and IV of the Regulation. In doing so, the proposed institutional structure would allow for increased

collaboration of Member States affected, and solving any case that might occur on that basis in a reasonable manner.

Need for better coordination with sector-specific media regulation: The Commission fully agrees with the Bundesrat that the Digital Services Act should not decrease the level of protection of any part of the society, especially not of those that are especially vulnerable, such as children and young people. Regarding the proposed enforcement structure and its potential effect on Member States' administrative structure, the proposal leaves unaffected the distribution of powers among existing or potential new authorities, should the Member State decide to create any. The Digital Services Act, as proposed, requires ensuring the dedication of certain powers exclusively to a Digital Services Coordinator, but the existing regulatory framework, including institutional set up in other fields, including media regulation, is left untouched by the proposal.

Concerning the definition of illegal content and its scope, it also covers information relating to illegal content, products, services or activities. In particular, that concept should be understood to refer to information that, irrespective of its form, is under the applicable law either illegal, such as illegal hate speech, terrorist content or unlawful discriminatory content, or related to activities that are illegal, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the non-authorized use of copyright protected material or activities involving infringements of consumer protection law. In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is consistent with the Union law, and what the precise nature or subject matter is of the law in question.

Further points

- Marketplaces: The proposal for a Digital Services Act includes provisions specifically tailored to certain types of online platforms where targeted rules are needed to address specifically identified problems. This concerns particularly online platforms acting as online marketplaces, where the proposal contains among others an obligation to trace traders. Furthermore, these provisions have been designed also with third party sellers established in non-EU countries and offering illegal goods on platforms in mind. The Commission proposes that the marketplaces collect data and make reasonable efforts to verify the data, including the source of the information. If the trader fails to correct or complete that information despite being requested to do so, the marketplace shall take appropriate steps, i.e. suspend the provision of its service. It should be noted that some of the elements noted by the Bundesrat fall within the scope of the consumer acquis (Unfair Commercial Practices Directive).
- Exemption from regulatory requirements for business-to-business platforms: After careful consideration, the Commission considered that these type of platforms should not be explicitly excluded as the benefits of being covered by the proposal were considered to outweigh potential costs of compliance with the Regulation.
- Evaluation: According to the Article 73 of the proposal, the Commission shall evaluate the Regulation and report results to the Council, the European Parliament

and to the European Economic and Social Committee by five years after the entry into force of the Regulation, and then every five years thereafter. Member States may be requested to share information with the Commission for this purpose. After three years from application of the Regulation at the latest, the Commission shall also carry out an assessment of the functioning of the Board, taking into account also the Board's opinion, and where appropriate, this assessment may be accompanied by a proposal for amendment of the Regulation with regard to the structure of the Board.