



EUROPEAN COMMISSION

*Brussels, 13.9.2021
C(2021) 6696 final*

*Mr. Roberto FICO
President of the Camera dei Deputati
Piazza Montecitorio
IT 00100 ROMA*

Dear President,

The Commission would like to thank the Italian Camera dei Deputati 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} and on the proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) {COM(2020) 842 final}.

These proposals, adopted under the umbrella of the Digital Services Act package, are part of a broader package of ambitious measures designed along the political priorities of the Commission in its agenda for shaping Europe's digital future¹. In this context, the package aims to contribute to Europe's Digital Decade and to show that Europe leads the way on the digital agenda, setting up global standards. In particular, the Digital Services Act, together with the Digital Markets Act, defines a new regulatory framework for the provision of digital services in the European Union and seeks to address in particular the challenges posed by online platforms. The specific objective of the Digital Services Act is to define a horizontal framework for a safe and borderless single market for digital services, while the Digital Markets Act aims to ensure fair, open and contestable markets in the digital sector.

The framework proposed by the Digital Services Act builds on some basic pillars of the current e-commerce framework, which still remain valid, notably the conditional liability exemption, the prohibition of general monitoring obligations and the country-of-origin principle. These contribute to the overarching objective to maintain an open internet. At the same time, the Digital Services Act puts in place a set of 'due diligence' obligations on on-line intermediaries concerning their content moderation activities and the way

¹ https://ec.europa.eu/info/sites/default/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf

they have to deal with illegal content. The requirements are graduated according to the size, nature and reach of the intermediary at stake, with specific additional obligations on the largest platforms, requiring them to analyse and manage the risks that they pose to the European economy, society and democracy.

The Digital Markets Act, on the other hand, establishes, in the form of a presumption, a set of narrowly defined objective criteria for qualifying a large online platform as a so-called “gatekeeper”. It will ensure that “gatekeeper” platforms that play a particularly important role in the internal market, behave in a fair way online for digital markets to remain contestable. The new rules will also increase legal certainty for businesses and platforms, empower small and medium sized enterprises and start-ups, and ensure consumers benefit from quality digital services at a lower price.

The Commission welcomes the Camera dei Deputati’s broad support for the approach and content of the proposals, while noting some more specific observations related to specific aspects of the proposals. The Commission is pleased to have this opportunity to provide a number of more detailed clarifications regarding its proposals in the annex.

The Opinion has been made available to the Commission’s representatives in the ongoing negotiations between the co-legislators and will inform these discussions.

Discussions between the Commission and the co-legislators concerning the proposal are now underway and the Commission remains hopeful that an agreement will be reached in the near future.

The Commission hopes that the clarifications provided in this reply address the observations raised by the Camera dei Deputati and looks forward to continuing the political dialogue in the future.

Yours faithfully,

*Maroš Šefčovič
Vice-President*

*Thierry Breton
Member of the Commission*

As regards the points to which the Camera dei Deputati has drawn the Commission's particular attention and stressed the need for further clarifications or improvements, the Commission would like to make the following comments:

Digital Services Act

- *with regard to point a) on the need to provide clear coordination with other, more specific, Union regulatory frameworks, the Digital Services Act provides a fully harmonised set of horizontal rules on liability exemptions and due diligence obligations as applicable to providers of intermediary services. As also clarified by recitals 9 and 10, Article 1(5) of the Digital Services Act at the same time provides that these horizontal rules are without prejudice to specific Union rules applicable to specific intermediary services or with regard to specific aspects of the provision of such services, which shall prevail on the basis of the *lex specialis* principle enshrined in the Regulation.*
- *with regard to point c) and the need to modernise the three categories of intermediary services, the proposal does provide for an additional clarification in relation to online platforms, which is indeed subject to the largest set of obligations as it entails the dissemination of information to the public among its basic characteristics. Moreover, the Digital Services Act is based on a service-by-service approach, such that the different sets of obligations will apply differently depending on the characteristics of each service provided by the provider, the size of the service provider as well as its societal reach.*
- *with regard to point e) and the need to ensure strengthened proactive obligations, in particular for very large online platforms, by enhanced transparency vis-à-vis users that entered in contact with illegal content, the Digital Services Act already provides an obligation for these platforms to carry out regular risk assessments. The aim of such regular risk assessment is to identify, analyse and assess any significant systemic risks stemming from the functioning and use made of their services in the Union. Accordingly, risk mitigation measures need to be adopted and adapted to the specific risks at stake, and do not exclude enhanced ex-post transparency measures vis-à-vis users, for instance with regard to online marketplaces allowing users to conclude distance contracts through the platform.*
- *with regard to point g) and the importance of mechanisms to prevent the reappearance of illegal content, the Digital Services Act requires online platforms to develop appropriate policies concerning misuse of their services aiming at allowing the temporary suspension of their services to recipients that frequently provide manifestly illegal content. The Digital Services Act also introduces ex-ante checks for online marketplaces in order to ensure the traceability of traders using the platform. Also, orders of authorities against specific items of illegal content may include measures aiming at preventing infringements, including by preventing the*

reappearance of illegal content, in accordance with the prohibition of general monitoring obligation as specified in the requirements defined by the case law. On the other hand, general measures that may require a general monitoring obligation by the platform of the activities carried out would run against the basic principles underpinning the internet economy and the respect for the fundamental freedoms in the online environment. The Court of Justice in the European Union in its preliminary ruling in joined cases C-682/18 and C-683/18² has recently confirmed this principle that has been one of the key building blocks of the e-Commerce Directive since its adoption and remains one of the key building blocks of the liability exemption framework of the Digital Services Act.

- *with regard to point i), and the need to clarify the structure of powers to implement the Regulation, the objective of the proposal is to ensure large institutional flexibility for the Member State to identify the most appropriate authorities in charge of the enforcement, provided that sufficient coordination is ensured among these authorities and that these authorities are granted the necessary powers and independence to carry on their mandate.*

Digital Markets Act

- *as regards point a) concerning the call for strengthened cooperation between the Commission and the Member States and the involvement of the competent national authorities, the proposal envisages an important role of the Member States in the daily enforcement activities by the Commission through their advisory powers in the context of the Digital Markets Advisory Committee as well as preparation of the delegated and implementing act in accordance with the existing legal framework. Furthermore, the proposal also envisages that in certain circumstances Member States may propose to the Commission opening a market investigation (i.e. in case of designation of the gatekeeper). Finally, the proposal lays down a number of investigatory and enforcement powers where the involvement of the national authorities is necessary, such as in case of on-site inspections or monitoring.*
- *on points b) and c) concerning the criteria for designation of gatekeepers, including the notion of “active users”, the proposal lays down, in its article 3, clearly circumscribed quantitative and qualitative criteria for establishing a presumption of the status of gatekeeper. These criteria have been established based on a detailed analysis of a number of criteria in order to determine those that are most relevant and accurate in determining the gatekeeper role of the providers of core platform services. The background analysis and grounds for proposing specific criteria can be found in the recitals 16-25 of the proposal as well as in the Impact Assessment accompanying the proposal³. In addition, the proposal envisages that the*

² Judgment of the Court (Grand Chamber) of 22 June 2021. Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG; Joined Cases C-682/18 and C-683/18. ECLI:EU:C:2021:503.

³ <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-markets-act>.

Commission, by means of delegated acts, specifies the methodology for determining whether the quantitative thresholds are met, and to regularly adjust it to market and technological developments where necessary. Such methodology would also address the question of “active users” of providers of specific core platform services.

- *as regards points d) and e) on coordination with specific regulatory frameworks, such as competition law or data protection legislation, it is important to note that the proposal complements and does not replace either of the two sets of existing rules. This has been clarified in recitals 10 and 11 of the proposal in particular. In addition, a number of concepts in the proposal are aligned with the relevant rules, such as the notion of consent, which is to be understood and interpreted within the meaning of the General Data Protection Regulation.*
- *concerning point f) on the regulatory dialogue between the Commission and the parties involved, it is important to clarify that the purpose of the regulatory dialogue was always to take account of diversity of actors involved and continuous evolution of markets and technology. Further specifications may need to take account of the technical differences in core platform services covered by the obligations as well as the state of the technological development in terms of specific measures that may be considered by the gatekeeper concerned (e.g. application programme interface).*
- *as regards point g) and criteria for adoption of the delegated acts for updating of the obligations under Articles 5 and 6, the proposal lays down conditions under which these obligations may be updated by means of a delegated act as opposed to the revision of the Digital Markets Act itself. Such new obligations could only be adopted by means of a delegated act when there is a need for new obligations addressing practices that limit the contestability of core platform services or are unfair in the same way as the practices addressed by the obligations laid down in Articles 5 and 6. Paragraph 2 of Article 10 lays down under which circumstances a specific practice is to be considered unfair and limits the contestability of core platform services.*
- *Finally, as regards point h) and the possibility that the review under Article 38 also envisages the possibility of amending or removing obligations, it should be noted that reference to additional rules under this provision should be understood in broad terms, which may also entail amendments or removal of the existing obligations by means of further revision of the Digital Markets Act itself.*