Ibec
For Irish Business

Brexit &
Future EU
An Ibec campaign

Implementing an open European digital future

Ibec recommendations on the proposed European Commission Digital Services Act Package


Ibec
For Irish Business
Brexit &
Future EU
An Ibec campaign

Contents

The shape of Europe's digital future matters

Ibec[1], Ireland's business group, welcome the publication of the European Commission's Communication, 'Shaping Europe's digital future'[2], as bringing a necessary focus to the importance of: digital leadership; enabling further development of our digital capacities; and championing further digital and data innovation, enterprise and trade. Ibec and its members have outlined nine policy recommendations across these three priority areas to EU policy makers and influencers. We envisage a Europe that provides the ambition and tools to enable its member states, businesses, innovators and citizens to lead and succeed in the local and global opportunities offered by further digital transformation, enabling further innovation, quality jobs, better services and enhanced well-being in period 2020-2024[3].

An effective digitalised single market matters

Some of the factors that hold up Europe's digital performance are simply due to regulatory complexity and fragmentation in the current Single Market. This does not always require further regulation but rather better communication and better implementation of existing rules. Ensuring a Single Market that works is the foundation for enhancing Europe's future global digital performance. We need to complete the Single Market by ensuring effective implementation and risk-based enforcement of rules.

One of the proposed actions in the European Commission's 'Shaping Europe's digital future' is, *"New and revised rules to deepen the Internal Market for Digital Services, by increasing and harmonising the responsibilities of online platforms and information service providers and reinforce the oversight over platforms' content policies in the EU (Q4 2020, as part of the Digital Services Act package)"*. The Commission President's stated political purpose of a proposed EU Digital Services Act is to upgrade liability and safety rules for digital platforms, services and products, and complete the European Digital Single Market[4]. Based on the Commission President's statement, the DSA might encompass two pillars: 1. purely commercial (trading information society services without barriers) – which we will refer to as a 'Single Market pillar'; 2. broader societal interests (redefining liability aspects, tackling hate speech, misleading information, terrorist content etc.) – which we will refer to as a content pillar.

1. www.ibec.ie/digitalpolicy
2. European Commission (2020) COM (2020) 67 final
3. Ibec (2019a) Europe's digital future – open for business, https://www.ibec.ie/connect-and-learn/insights/insights/2020/02/07/europes-digital-future-open-for-business
4. Political Guidelines for the next European Commission 2019-2024, https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

The existing e-Commerce Directive (ECD) has allowed a wide variety of online services and business models to flourish, allowing for free expression, creativity and innovation while preserving the safety and protection of all stakeholders. Ibec believes that any DSA proposal should build on the achievements of the ECD and seek to achieve the twin aims of protecting all stakeholders, while allowing for an innovative, open, and dynamic digital ecosystem.

Ibec encourages EU policy makers to implement an open digital future, to preserve and support further digital innovation and to protect businesses and individuals online. Any DSA proposal should adopt a clear, robust risk-based and evidence-based approach to regulation of relevant Digital Services, consistent with existing European and national law.

In this context, Ibec and its members are proposing several general principles and specific priorities for consideration by EU policy makers in the development of any proposed Digital Services Act (DSA) package[5].

5. https://ec.europa.eu/digital-single-market/en/digital-services-act-package

I. Keeping users safe online

Any proposed Digital Services Act package should encourage further positive action in addressing illegal content. Specifically, Ibec recommends clarity on scope; the formalisation of a workable system of notice and takedown; provision for a good Samaritan clause; and transparency in any proposals.

Recommendations to EU policy makers

Clarify scope

Clarify the scope and proportionate actions expected of digital services, respecting both fundamental rights and differences between digital services, for example in cases where users of cloud services have control and responsibility over their own content and the services they operate. Recognise differences between single market and content issues. The DSA package should address the Single Market and the content pillars separately or at a minimum clearly distinguish between the two pillars. Such a broad range of issues would be difficult to address effectively in a "one-size fits all" legislative instrument.

Formalise a workable system of notice and takedown

Notice and takedown should remain at the core of the DSA and there should be no liability without actual knowledge. The DSA could improve the system by introducing clear guidelines and formalising the procedures for notice and takedown. This would be of benefit to all stakeholders, providing certainty and clarity to companies and customers, while improving safety.

Notifications should contain all the necessary information for the recipient to act without communicating further with the notifier. Minimum information requirements should include:

a) Clear identification of disputed content by URL or other unique identifier
b) Clearly stated basis for the claim
c) Status of notifier

All notifications should be made in good faith and those who repeatedly make false or groundless claims should be held accountable and online intermediaries should be permitted to ignore any future notifications from such bad actors and take further actions if necessary, in line with their terms and conditions.

Provide clarity on harmful versus illegal content

It is for policy makers to define what constitutes illegal content. In contrast to illegal content, harmful content is difficult to define clearly and may depend on many contextual nuances and cultural differences. If policy makers believe a category of content is sufficiently harmful, then policy makers should precisely define such content and make it illegal or engage in specific vertical measures to tackle harm. Any proposed content regulation should provide clarity and a sound basis in law.

Provide for a 'Good Samaritan' clause

While companies should not be compelled to carry out general monitoring of content or activities, equally they should not run the risk of being penalised for any monitoring that they do carry out in good faith to enforce terms of use or to protect customers or the wider public. There are two distinct risks to companies carrying out voluntary monitoring:

a) If a platform provider mistakenly removes legal content that in good faith it believed to be illegal, the company may be liable to action from the content owner or provider.

b) Reviewing and passing content for a specific type of illegality should not imply that the platform provider is then liable for any other potential underlying ways that the content may be used for illegal activity, which the platform provider had no knowledge of.

The European Commission has defined "Good Samaritan actions" in the context of internet intermediary liability as *"good practices for preventing, detecting, removing and disabling access to illegal content so as to ensure the effective removal of illegal content"* or *"proactive steps to detect, remove or disable access to illegal content"* (see Communication COM (2017) 555 dated 28 Sept. 2017 at p.3).

This definition is not integrated into the ECD. It should be integrated into the DSA.

Ensure transparency

Improving transparency online will increase users' trust in the internet and help foster Europe's vision for 'human-centric' digital services. At the same time, the need to ensure a balanced, safe and competitive EU market should focus on offering meaningful and proportionate transparency. The principle of transparency touches upon many different elements of discussion around the DSA, from the notice and action regime, to algorithmic transparency and 'know your user' obligations.

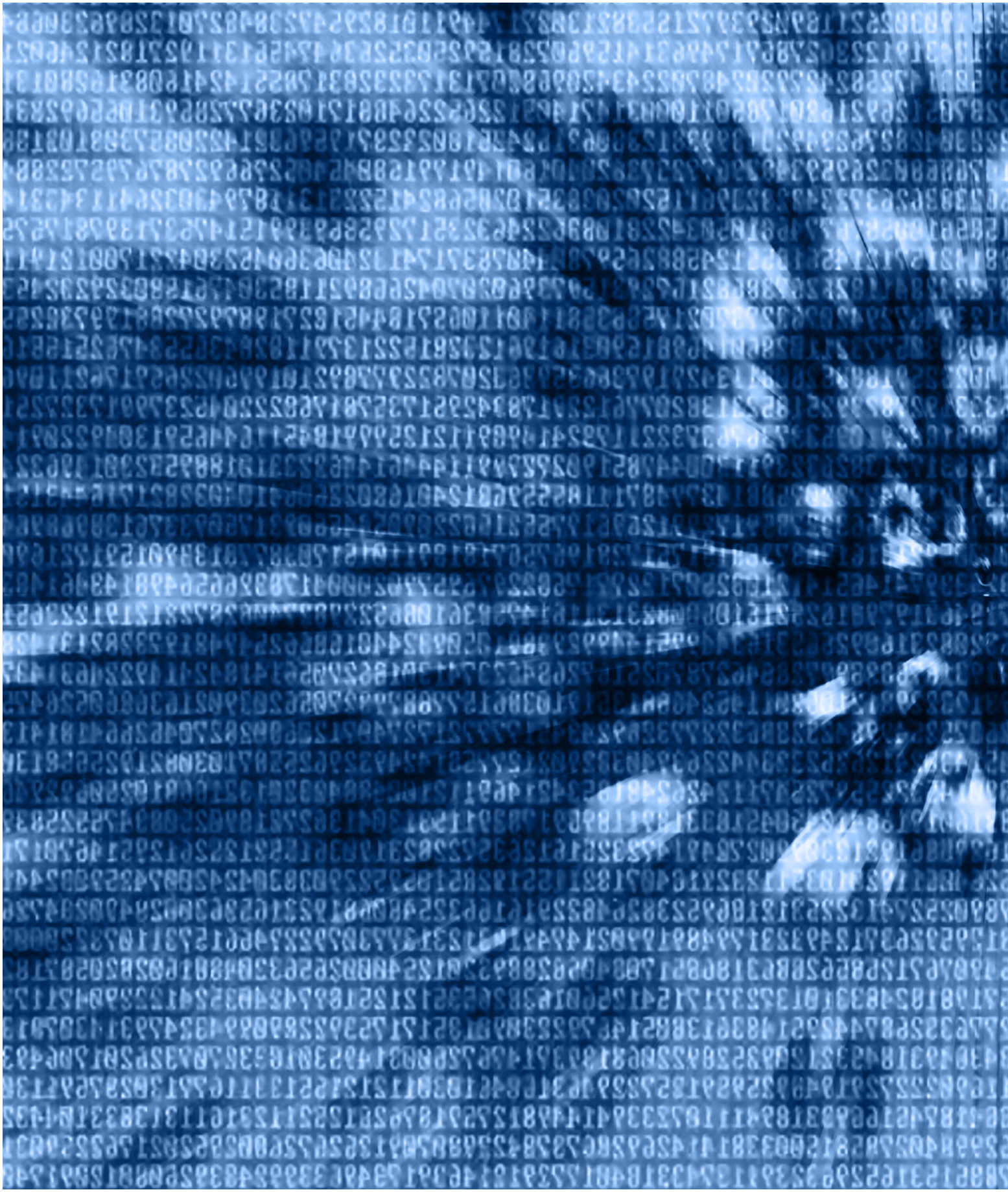
In the case of content moderation, intermediaries should inform the user about when and why content has been taken down, in a meaningful and reasonable manner. Such transparency is an essential component of the right of redress to be provided to the users.

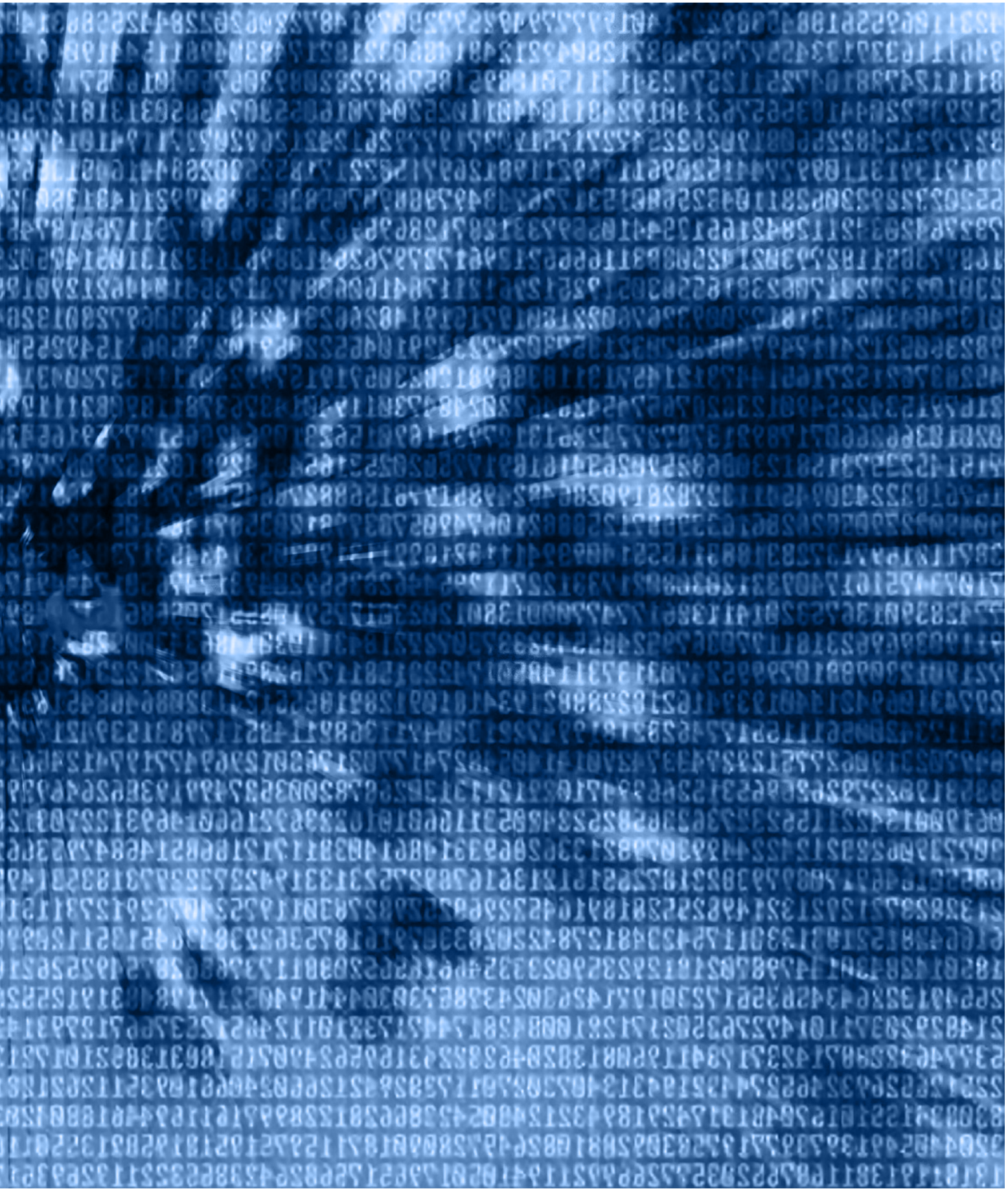
At the same time, different types of content may merit different levels of transparency—for instance, providing notice to users might be appropriate in cases of suspected copyright violations, but inappropriate in cases of child sexual abuse imagery where there may be ongoing law enforcement investigations. Given that many online service providers already publish periodic transparency reports, these should be leveraged to the maximum extent possible.

There are also issues around algorithmic transparency - the principle that the factors that influence the decisions made by algorithms should be transparent, to the people who use, regulate, and are affected by systems that employ those algorithms. Ibec supports the need for transparency, but it should not risk disclosing trade secrets or allow bad actors to 'game the system'. The recently revised Consumer Rights Directive and the Platform to Business Regulation have already introduced proportionate obligations for online marketplaces in this regard.

Some stakeholders have also proposed introducing 'know your customer/user' obligations[6] to the Digital Services Act. Whilst basic verification of business identities might be useful to disincentivise bad actors online and aide law enforcement, the introduction of such obligations must be proportionate and include appropriate safeguards to protect the privacy of users, particularly in the case of content.

5. Typically requires service providers to verify the information and identity of business partners with whom they have a contractual commercial relationship, and to ensure the information they provide is accurate and up to date.





II. Liability regime

A proposed DSA should maintain legal certainty for business, to encourage continued investment. Specifically, Ibec recommends the preservation of key principles of the eCommerce Directive (ECD) including country of origin; limited liability for intermediates who act expeditiously when they have knowledge of specific infringements; and no general monitoring obligations.

Recommendations to EU policy makers

Maintain country of origin

Maintaining the "country of origin" principle[7] must be a cornerstone of any proposed DSA. The principle has allowed companies to operate seamlessly across all EU Member States and has been fundamental for the development of the internal market and the facilitation of cross-border trade. Specifically, the DSA should state that providers of online services are subject to the law of the Member State in which they are established and not the law of the Member States where the service is accessible. This provides legal certainty for all stakeholders across the EU. We encourage the Commission to undertake research on the importance of country of origin for digital businesses given that most are low margin high volume businesses and require an efficient regulatory framework in order to thrive. Maintain country of origin rules within the single market, as a basis for scaling small businesses and, keeping derogations to a minimum.

Maintain limited liability

The E-Commerce Directive (2000/31/EC) framework (ECD) limits liability for online intermediaries with respect of their users' wrongdoings, provided that they act expeditiously when they have knowledge of specific infringements. This foundational legal principle underpins digital supply chains and provides precious legal certainty in a fast-moving B2C[8] market context. The DSA should therefore preserve the principle that individual users are ultimately responsible under the law for their online behaviour and the content they post. Commission guidance could provide further certainty. Transparency and accountability should be promoted in the B2B[9] context, while respecting contractual freedom. The 'Digital Service Act' discussions should seek to retain the principle of limited liability and develop a robust evidence base to support any change. It is important that the DSA avoids creating legal uncertainty by contradicting existing statutory or regulatory obligations in this area or proposing new, overlapping ones. We encourage the Commission to undertake research on the value of limitations to liability to the wider economy and therefore the importance of retaining it in a form that provides ongoing certainty for those who currently rely on it but not contemplated in the Commission questionnaire. Ensure any review of the E-Commerce Directive (2000/31/EC) recognises the importance of safeguarding media freedom and fundamental rights via horizontal limitations to liability and the role that this framework plays in ensuring a diverse supply of intermediation services and contracting within digital supply chains.

7. Article 3 (2) of the ECD
8. Business to Consumer
9. Business to Business

No general monitoring obligations

Under the ECD member states cannot introduce a general obligation to actively look for facts or circumstances indicating illegal activity by systematically monitoring information that intermediary service providers transmit or store. This principle should be retained within the DSA. Any attempt to introduce general monitoring would have profound implications for freedom of speech and could prove an obstacle to new entrants to the market, who would not have the capability to carry out such monitoring.

III. Gatekeeper platforms

It is important for Europe's future competitiveness that our digitalised markets remain competitive and open to new business models. Any proposed DSA package should preserve this principle.

Recommendation to EU policy makers

Ensure our digitalised markets remain competitive and open to new business models

It is important for Europe's future competitiveness. Ensure effective enforcement of competition law. Use an evidence-based approach to assess barriers to competition and to address any infringements or identified market failures. Be mindful of unintended impacts of market-wide regulation to correct for competition concerns and apply better regulation principles to ensure such action is justified, proportionate and non-discriminatory. The rights of market actors should be balanced in any new proposals – adequate market information, IP rights, and the freedom of contract of firms. In terms of any new proposed instruments, where gaps and market failures are identified, the following principles should be considered in encouraging continued investment and innovation, ensure:

- ***Clarity, necessity, and effectiveness.***
  Provide clarity on the definition of markets, models and behaviours in scope, and the standard that applies to proposed interventions. Proposed new instruments may share similar elements with existing regulation and enforcement. Consequently, it is necessary to clearly define when the use of any new instruments is appropriate, who may trigger such interventions and under what circumstances. Provide guidance to service providers, users, and authorities. Otherwise there is a risk of regulatory overlap, uncertainty or worse – the legitimacy of regulation and enforcement being inadvertently undermined.
- ***Consistency, transparency, accountability, and proportionality.***
  Provide consistency and certainty to service providers, users, and authorities. Ensure any new instruments have a common and transparent process to identify and address issues, with access to judicial review. Avoid inconsistent or discriminatory obligations and outcomes. There should be clear guidance on how the European Commission decides which remedies, if any, are appropriate and proportional in different situations. As markets are rapidly evolving with the state of technology, any new proposed instrument should remain future proof.

IV. Other issues and opportunities

Ibec believes that any DSA proposal should build on the achievements of the existing e-Commerce Directive (ECD) and seek to achieve the twin aims of protecting all stakeholders, while allowing for an innovative, open, and dynamic digital ecosystem.

Recommendation to EU policy makers

Preserve key Single Market provisions of the ECD

- Article 1 (1) establishing the objective of the Directive; important it remains focused on proper functioning of the internal market by ensuring the free movement of information society services.
- Article 1 (3) establishing the relationship of the e-Commerce Directive with other Community law applicable to information society services; it is key to draw a clear line between different legal instruments regulating information society services in order to have a clear, targeted and Single Market-friendly framework. Distinction between the "Single Market pillar" and "content pillar" needs to be preserved.
- Article 9 on validity of contracts concluded by electronic means; it is essential to preserve the provisions that guarantee electronic contract validity across the EU and are the safeguard against obstacles for the use of electronic contracts and their legal effectiveness.
- Information requirements spelled out under Articles 5, 6 and 10 should remain limited to what is necessary and proportionate in attainment of the Directive's objectives.

V. Platform workers

We understand that the Commission is taking the opportunity to consult on issues related to platform workers' rights as self-employed people providing services for the platform economy.

The issues currently under discussion are not specific to platforms – they relate to self-employed persons more generally.

EU labour law is, quite rightly, only applicable to people who are in an employment relationship. The determination of whether such an employment relationship exists remains within the discretion of Member States. This has been confirmed most recently by the directive on transparent and predictable working conditions and the recent decision of the CJEU[10]. It is, therefore, for Member States to decide how to define different types of work and categories of workers. This must be done in a way which ensures legal clarity, takes account of new forms of work and is future proof. It should also be in line with competition policy rules, and their interpretation by the CJEU.

Ibec has concerns about the implementation of EU wide one-size fits all proposals for platform workers. There is no typical 'platform worker' and platform workers are not a clearly defined group. Some people offer their services through platforms to top up their income from another job. For others, it is their primary source of income. There are many ways in which people choose to do platform work and many different reasons for choosing this form of work.

Furthermore, there is a significant diversity of approach across different Member States when it comes to the regulation of new forms of work.

In these circumstances, platform work must be dealt with within the context of national legislation and EU-wide one-size fits all proposals for "platform workers" are flawed.

In any case, the EU has already established legal instruments to ensure that those people working on platforms and others in new forms of work can be protected. Most recently, the directive on transparent and predictable working conditions includes provisions targeted at platform workers who are correctly classified as employees. It is now a matter of proper implementation and enforcement. An EU legislative initiative on platform work is neither necessary nor appropriate.

10. C-692/19 concerning the status of platform workers in the UK working for Yodel delivery network, the CJEU ruled that it is for national courts to make decisions about workers' employment status and that in this case, the worker had been correctly classified as self-employed

Collective representation and links with competition policy

The issue of collective representation of workers engaging in new forms of work is a matter which must be left to Member States to address. It is only in this way that the diversity of industrial relations systems across Member States will be respected. It is our view that it would harm national industrial relations systems to seek a harmonised approach on this at EU level. Indeed, it is doubtful whether the EU has the legal competence to legislate on matters relating to collective representation at all.

Ireland actively promotes voluntary collective bargaining between workers and employers and their respective organisations where applicable. In general, self-employed persons do not have the protection of industrial relations legislation insofar as that would conflict with our national competition law. However, in 2017, legislation was passed to enable certain categories of self-employed individuals to collectively bargain.

There is a reason that workers operating under a contract of employment enjoy significant additional levels of protection in law, given the level of control usually associated with an employment relationship. A self-employed individual does not face these constraints or controls. Self-employed individuals, including those offering their services working on platforms, carry out their services for and with commercial contractors and are considered as undertakings. They are, rightly, subject to the prohibition of price cartels between economic actors. It is therefore logical that agreements made between self-employed persons generally go against the rules of EU competition policy, as they are considered to restricting or distorting competition within the internal market, when, for example, they directly fix prices, including wages or fees.

Any attempt to undermine or subjugate competition law to address alleged bogus or false self-employment is not appropriate. If workers are found to be bogus or falsely self-employed, according to national legislation, they should be treated in the same way as employees, including all rights and obligations of an employee, as this is a misapplication of the legal status of self-employed individuals and does not require any further EU legislation.

If some workers are categorised as self-employed, but in actual fact the characteristics of their work qualifies them as employees according to the national legislation, then this should be clarified by discussing the distinction between being self-employed individuals and employees – not by extending employment rights, such as the right to negotiate a collective agreement, to self-employed persons.

To do otherwise would risk stifling the creation and development of new, innovative business models, including platforms, on which predominantly self-employed persons operate.

Conclusion

Ibec is supportive of clear evidence-based regulation of relevant digital services that recognises the many changes in technology and business models, since the existing ECD was implemented. A new DSA package must reflect these changes and be robust enough to allow for the fast pace of technological advances that will inevitably follow.

Ibec believes that the areas outlined in this paper are crucial to the successful implementation of a DSA package that will achieve the twin aims of protecting all stakeholders, while creating a fertile and creative ecosystem for innovation in the digital era.

Ibec recognises that this paper is the starting point of a deeper policy conversation during the formulation of any proposed Digital Services Act package. Ibec and its members look forward to participating in future discussions with EU policy stakeholders.

About Ibec

Ibec is Ireland's largest lobby group, representing Irish business both domestically and internationally. Our members span all sectors of the economy, collectively employing over 70% of the private sector workforce. Our policy work seeks to improve business conditions and thereby promote sustainable economic growth.

www.ibec.ie

EU Transparency Register ID No. 479468313744-50

Contact us

Erik O'Donovan
Ibec Head of Digital Economy Policy
email: erik.odonovan@ibec.ie

Pat Ivory
Ibec Director of EU and International Affairs
email: pat.ivory@ibec.ie

ibec.ie