

Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services

Vodafone welcomes the publication of the combined evaluation roadmap/Inception Impact Assessment for the Digital Services Act package: deepening the internal market and clarifying responsibilities for digital services. We agree with the problems identified by the Commission in evaluating the internal market for digital services, and agree with the overall objectives described in the IIA to increase and harmonise the obligations on providers of digital services for the dissemination of illegal content, goods and services online. We further support the objective to harmonise the regulation of digital services across the single market, and to reinforce the oversight and supervision of digital services in the EU.

Vodafone plans to submit detailed comments to the public consultation on measures described in the IIA for deepening the internal market and clarifying responsibilities for digital services. Our starting position is that while the founding principles of the eCommerce Directive remain valid (limitations on liability for online intermediaries, country of origin principle and a prohibition on general monitoring obligations), proportionate and targeted changes are required to enable and encourage a subset of hosting service providers who fall within the existing liability regime to take proactive measures to prevent the dissemination of illegal content, goods and services.

We believe such a change would be best achieved through the introduction of a binding legal requirement (Duty of Care) applicable to hosting service providers who, by nature of their underlying business models and the technical characteristics of the services offered, can be defined as playing an active role in the dissemination of content, goods and services online.

On the specific policy options outlined in the IIA, Vodafone submits the following questions, as a means to highlight areas of concern that we feel are either missing or not sufficiently addressed at this stage in the legislative process.

1. Does the Commission agree that as a matter of principle, there should be no imposition of strict/direct liability for content posted by end users, as this would be counterproductive and lead to an over removal of content?
2. Would the Commission further agree that there should also be no change to liability regime for mere conduits under article 12 or caching under article 13 and that ISPs/caching providers should not be liable for content that they deliver, transmit or temporarily store as they have no control over this material (and indeed internet service providers providing services to the public are prohibited from actively blocking content without a legal requirement to do so under the Open Internet Regulation)?
3. Would the Commission consider issuing guidance on the imposition of blocking injunctions and underline that such injunctions should always be a last resort, with obligations for all other remedies to be exhausted first (and in theory diminish over time as other actors take more responsibility for removing content)?
4. Is the Commission looking to introduce some form of good Samaritan principle that would ensure that hosting services providers are not considered to attain 'actual knowledge' of illegal acts, and therefore become liable, merely by putting in place measures to prevent the dissemination of illegal content?
5. In view of the above, is the Commission willing to reopen and amend article 14 of eCD for hosting service providers recognising the emergence of a new category of 'active' hosts

who play a direct role in dissemination, organisation and monetisation of end user content?

6. Will the commission take steps to define a set of baseline criteria, upon which it will be possible to determine whether a hosting service provider is playing an active or passive role in the hosting and dissemination of content, good and services, upon which the application of obligations should depend?
7. As part of the comprehensive legal intervention (option 2) will the Commission introduce a new set of binding legal obligations (Duty of Care) for active hosting service providers?
8. Does the Commission envisage a set of full harmonised obligations, based upon the principle of procedural accountability, should be applicable to active hosting service providers, avoiding the fraught question of attempting to define which specific types of content should be covered by this regulation?
9. Does the Commission agree with the options identified below in terms of binding legal obligations, moving from reactive to proactive measures?
 - a. Notice and takedown (and put back) procedures; Obligations should centre on the identification and expeditious removal of content which is deemed to be in breach of either the applicable law, or the Active Hosting Service Provider's own terms of service. Content that is falsely flagged/removed should be restored expeditiously
 - b. Content Policy: Active Hosting Service Providers should be required to implement an end user policy on harmful content.
 - c. Tools for reporting: Provision of tools to allow end users to report and block content.
 - d. Advertising and Political Content: Commercial and political content should be appropriately labelled to end users.
 - e. Proactive monitoring: Active Hosting Service Providers should take proactive, voluntary measures to monitor and remove illegal material (without losing their liability exemption by doing so)
 - f. Hosts should have responsibility for ensuring that previous flagged material that has been removed is not persistently reloaded
 - g. Transparency: Active Hosting Service Providers should be required to provide clear and simple information about the measures they take to address harms.
10. What does the Commission believe the consequence of failing to abide by the binding legal obligations/Duty of Care should be? Has the Commission considered the imposition of fines/sanctions as an appropriate sanction?
11. Option 3: *an effective system of regulatory oversight, enforcement and cooperation across Member States* includes "appropriate powers for effective and dissuasive sanctions for systemic failure of services established in their jurisdiction to comply with the relevant obligations, potentially supported at EU level". Does the Commission envisage a standalone regulatory authority, with the power to sanction companies for systemic failure to comply with relevant obligations? Or would this be achieved along the lines of a one-stop shop, where the national authority of the country in which the service provider is registered is able to take enforcement action?