

Consultation on the European Commission's Inception Impact Assessment

Digital Services Act:

Deepening the Internal Market and Clarifying Responsibilities for Digital Services



Google's Submission
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Overview

Google welcomes the opportunity to submit feedback to the European Commission's Inception Impact Assessment on the Digital Services Act: Deepening the Internal Market and Clarifying Responsibilities for Digital Services.

Digital services connect individuals and communities around the world. They can inspire the best of society by democratizing access to knowledge, powering business, and providing new opportunities for art and creativity.

The current legal framework has supported innovation from companies throughout Europe, and allowed users throughout the EU to benefit from those services. The Commission notes that “the core principles of the [e-Commerce] Directive have been the cornerstone of the internal market for digital services. Whilst they may need certain adjustments, the underpinning basis is as valid today as it has been 20 years ago.” We agree. We also acknowledge that regulatory changes may be needed in light of the digital transformation of the last two decades. As such changes are considered, we must be careful to not unravel the benefits the current framework has delivered.

We take our [responsibility](#) seriously. We continue to invest in developing and improving the tools, processes, and teams that help us elevate trustworthy information and moderate content across our services. And we have shared [principles](#) that have informed our practices, and that we believe would make for an effective regulatory framework. This document outlines considerations we believe the Commission should take into account as it prepares for a broader impact assessment of policy options for the Digital Services Act.

Section 1 - Key Principles

The Commission pointed to the enduring validity of the e-Commerce Directive provisions “aimed at allowing [online intermediaries] to function effectively in the internal market, by harmonizing the exemption from liability for illegal content across the single market,” enabling digital innovation, and protecting freedom of expression.

As the Commission looks to modernize certain specifics of the current regime, we believe the following principles could form the basis of an effective regulatory framework:

1. **Harmonization across the Single Market:** The ability for businesses to provide services across borders without confronting internal barriers is vital to ensuring they can scale up across the EU, consistent with the ambition for a true digital Single Market. There is increasing uncertainty due to fragmentation across Member States, and divergence in the case law, making it difficult for businesses, including small and medium-sized enterprises (SMEs), to predictably offer services across the Single Market. Ensuring harmonization and avoiding further fragmentation will be vital in maximizing the role that digital

services have to play in the economy, including the post-Covid-19 economic recovery.

2. **Legal certainty for businesses:** Online intermediaries have been able to generate value for businesses and consumers across Europe because of the legal certainty provided by the limited liability regime in the e-Commerce Directive. Legal certainty enables innovative technologies and business models to grow, and it will be instrumental to the EU's ambitions to lead the next decades of technological innovation.
3. **Flexibility to accommodate new technology:** Given the fast-evolving nature of the sector, laws should be technologically neutral. That is, they should avoid mandating specific technological fixes.
4. **User trust and transparency in digital services:** The e-Commerce Directive recognized that trust was vital to the uptake of digital services. Trust and accountability remain critical: we believe the best way of achieving this is through a balanced framework with clear, proportionate responsibilities and incentives for businesses to take action against illegal content while protecting their users' rights. We also recognize the role of [transparency](#) in increasing user trust, including sharing data that sheds light on content removal of [illegal content](#), efforts to remove content that violates [Community Guidelines](#), and initiatives such as the EU Code of Conduct on Hate Speech and the EU Code of Practice on Disinformation.
5. **Shared responsibility:** Tackling illegal content is a societal challenge, and we acknowledge the need for companies, governments, and civil society to work together towards reaching our shared goals. Alongside regulation, we should work together to educate and equip users with the tools to recognize and deal with a range of content challenges online.

Section 2 - Cornerstones of the Internal Market

We support the Commission's general objective to "provide for a modern legal framework for digital services, strengthening the Digital Single Market and ensuring that digital service providers present in the Union act responsibly to mitigate risks emanating from the use of their service, respecting Union rights and values, and protecting fundamental rights."

Strengthening the single market and establishing the framework conditions for digital innovation and effective enforcement, as the Commission notes, rests on **core principles such as the country-of-origin principle, the guarantee of the freedom of establishment and of the freedom to provide digital services cross-border in the Union, and respect for fundamental rights.**

The country-of-origin principle has made possible the free movement of goods and services in the Single Market, and we strongly urge that this principle be maintained under a revised Digital Services Act.

The current legal framework has allowed innovation to flourish and enabled fundamental rights. The e-Commerce Directive has led to the growth of a wide variety of online services and business models, and enabled businesses to provide services across borders without confronting internal barriers. These services have helped promote free expression, media pluralism, educational opportunities, creativity, culture, and the arts for users throughout the European Union.

We understand the need to clarify the legal framework for digital services, and to clarify services' responsibilities in effectively responding to illegal content. A harmonized, notice-and-takedown regime can provide businesses with legal clarity while ensuring an effective response to illegal content. Clarifying that services are not liable without actual knowledge would provide them with the certainty to scale up and grow across the European Union. We also believe that, to be truly effective, the regulatory regime must protect against illegal content migrating to less regulated platforms by ensuring a consistent set of rules for all market players. Analysts have observed, for example, terrorist groups targeting smaller platforms, and we have been working within the industry to support smaller actors via the [Global Internet Forum to Counter Terrorism](#).¹

Section 3 - Economic Impacts

We agree with the Commission that **“a strong digital services sector will to a large extent drive growth and enable a series of subsequent services.”**

The e-Commerce Directive has helped foster innovation and economic growth in Europe. Studies have shown the value to consumers, businesses, and the European economy:

- A recent study prepared for the European Parliament Committee on the Internal Market and Consumer Protection (IMCO) describes how e-commerce brings **more choice, lower prices, and more convenience to consumers**. In a survey of the existing evidence, they estimated the **consumer surplus to be between €34 billion to €204.5 billion per year**.²
- Many of Google's consumer products are provided free of charge, which can make their value challenging to measure in traditional metrics such as GDP. We

¹ Tech Against Terrorism, Analysis: ISIS use of smaller platforms and the Dweb to share terrorist content, April 2019. Available [here](#).

² Iacob, N., Simonelli, F., How to Fully Reap the Benefits of the Internal Market for E-Commerce?, Study for the Committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020. Available [here](#).

[found](#) that Google's core services of **Search, Maps and YouTube create €420 billion in value for European consumers**, based on the difference between what a consumer would theoretically be willing to and actually do pay for a product, and that **Google's products supported €177 billion in economic activity** for businesses, developers, creators and publishers across Europe last year.

- A 2015 study by Copenhagen Economics estimated that the total value of goods and services purchased by private households and the public sector through online intermediaries was about **€270 billion in 2014** and that search platforms generate **time savings worth €140 billion for European consumers**.³
- A 2019 survey of European SMEs highlighted the importance of e-commerce to European SME business strategy. Online intermediaries help European SMEs overcome barriers by making it easier to enter a market and reach consumers, and they **enjoy “big company” benefits at a fraction of the cost** they would incur without them. The research found that **48% of European SMEs** were engaged in e-commerce, with a further 24% planning to engage in the next two years.⁴ E-commerce and, more broadly, digitalization has become even more critical to the future of European SMEs, in light of the COVID-19 pandemic.
- The recent study prepared for the IMCO Committee also shows how e-commerce is **an enabler of trade**, as digital technologies facilitating online exchanges reduce trade costs associated with geographical distance by improving access to information. The authors find that in some cases, the impact of distance on trade is **65% smaller for transactions online** compared to transactions carried out offline. As a result, more SMEs can engage in longer-distance trading.⁵

We urge the Commission to study carefully the potential economic impacts of its policy options for the Digital Services Act, and in particular the risks that:

- **Removal of liability exemptions would undermine the ability of intermediaries to deliver value to both consumers and businesses.** Doing so would likely erode intermediaries' ability to share content and create economic value. Erosion of content sharing may make it more difficult for publishers to find audiences, for SMEs to reach customers, and for emerging creators to gain exposure, as well as for Europeans to enjoy the benefits of these services and increased choice. These spillover effects go beyond the

³ Thelle, Martin H., et al, Online Intermediaries: Impact on the European Economy, Copenhagen Economics and EDiMA, October 2015. Available [here](#).

⁴ Bank Gospodarstwa Krajowego, Bpifrance, Instituto de Credito Oficial, KfW Bankengruppe, British Business Bank, Going Digital: The Challenges Facing European SMEs. European SME Survey 2019. Available [here](#).

⁵ Iacob, N., Simonelli, F., *supra* note 2.

viability of online platforms and would generate a broad economic impact.

- **Overly-prescriptive requirements would weaken the ability of digital services to innovate and generate additional value for consumers and businesses.** Given the pace of technological change, mandating or banning specific practices may have an unintended consequence of adding barriers to innovation. Evaluation of policy options should take flexibility and future-proofing into account.
- **Regulatory oversight mechanisms that do not provide business certainty would increase internal barriers to the provision of digital services.** If oversight undermines the country-of-origin principle, this could multiply compliance costs for businesses, and would ultimately affect EU businesses' ability to scale up quickly and offer their services across the EU.

We want to continue to help strengthen the European economy and the internal market through our products, services, and learning infrastructure. It is encouraging to see that, across Europe, 1,950 YouTube channels have more than 1 million subscribers, growing 50% between 2018 and 2019. As a result of the training we provided through our [Grow with Google](#) programme, over 594,000 European businesses (mostly SMEs) have taken on more staff or seen revenue growth and over 978,000 have grown careers or found jobs.

Section 4 - Social Impacts and Impacts on Fundamental Rights

The Commission is right to note that **“digital services are fundamental means of communication – from offering the infrastructure, to intermediating flows of information. Greater trust that citizens’ safety is protected will also ensure greater uptake of digital services.”** At the same time, regulation that is overly prescriptive or rigid could interfere with development and uptake of digital services. It is critical that the Impact Assessment considers the social impact of such restrictions, as well as the impact on fundamental rights.

The Commission makes clear that **“a range of fundamental rights are affected by the regulation of intermediaries, as confirmed by case law of the CJEU and the ECHR.”** This range includes the freedom to conduct a business; freedom of expression and freedom of thoughts; the freedom to receive and impart information and ideas without interference by public authority, and regardless of frontiers; the right to an effective remedy; and protection of personal data and privacy.

We believe the Impact Assessment should study the ways fundamental rights can best be respected through the Digital Services Act, and how the risks to fundamental rights can be avoided. This includes study of:

- **The ways fundamental rights are respected when the liability regime is based on illegal content.** The Commission rightly notes that the Digital Services Act should “respect[] the important distinction” between illegal and lawful-but-harmful content. As the [Center for Democracy & Technology](#) has noted, “it is inconsistent with [human rights and rule-of-law] principles for governments to leverage private companies to limit speech that authorities cannot directly restrict.” The European Court of Human Rights has confirmed that freedom of expression includes the right to “offend, shock or disturb.”⁶ Finally, the changing nature of and norms around harmful content make it unsuitable for the liability regime. That said, the focus on illegal content and activity in the new framework need not preclude further evaluation and action on “lawful but harmful” content through self- and co-regulatory initiatives, such as the EU Code of Practice on Disinformation.
- **The ways fundamental rights are respected by maintaining the prohibition on general monitoring obligations.** As [noted](#) by organizations dedicated to promoting and protecting fundamental rights and freedoms in the digital environment, “general monitoring would undermine free expression and privacy by imposing ongoing and indiscriminate control of online content with mandatory use of technical filtering tools.”
- **The risks to fundamental rights from mandated use of automation in moderation.** While breakthroughs in machine learning and other technology are impressive, the technology is far from perfect. [Misclassification](#) of content remains a challenge, and machine learning tools are [vulnerable](#) to [adversarial examples](#), even based on tiny changes to images that are imperceptible to the human eye. In addition, such technology is still unable to discern differences in context that can be critical to determining whether content is legal or not. Consider a video of military conflict. In one context, the footage might be documentary evidence of atrocities in areas where journalists have great difficulty and danger accessing. In another context, the footage could be promotional material for an illegal organization. Even a highly trained reviewer could have a hard time telling the difference, and machines are even more limited.
- **The risks to fundamental rights where companies are forced to prioritize speed of removal over careful decision-making.** We encounter many grey-area cases that require appropriate time to evaluate the law and context, and we remain concerned about recent laws that enable imposition of large penalties if short, fixed turn-around times are not met. As the Commission has noted elsewhere, such requirements could lead to “excessive content deletions.”⁷ The French Constitutional Council recently ruled that this

⁶ Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 23 (1976).

⁷ European Commission, Notification 2019/412/F: Loi visant à lutter contre les contenus haineux sur internet, November 22, 2019.

combination, as included in France's Act to Combat Hateful Content on the Internet, "undermines freedom of expression and communication in a way that is not necessary, adapted, and proportionate."⁸ Any new standard should safeguard fundamental rights by ensuring an appropriate balance between speed and accuracy of removal.

- **The risks to fundamental rights from barriers that constrain the arts and scientific developments.** Article 13 of the Charter of Fundamental Rights of the European Union states that "the arts and scientific research shall be free of constraint," a right "deduced primarily from the right to freedom of thought and expression." The Commission should study the risks that barriers and constraints on digital services could limit scientific development, creativity, and contributions to and enjoyment of the arts by European citizens.

We want to ensure our services remain a place where Europeans can exercise their freedom to receive and impart information-- to learn, to share, to enjoy arts and culture, and to participate in democratic political debate.

Section 5 - Additional Considerations

As the Commission evaluates the range of policy options, we wanted to offer some additional points for consideration. The Impact Assessment should consider:

- **How rules appropriate for one type of service may be inappropriate for others.** What makes sense for content-sharing platforms may not be appropriate, or technically feasible, for a search engine or for a platform that hosts mobile apps. Of note, cloud providers are more limited in what they can do to address illegal content stored at the direction of their customers or their customers' users, given the technical architecture of their services designed with privacy protections and the contractual obligations they hold towards their customers' data. Cloud customers own their data and cloud providers process it based on their instructions. To expect the same of cloud providers as of public-facing content sharing services is not only technically infeasible, it would also give rise to unjustified privacy, security, and commercial interferences. For example, it is often impossible for a cloud provider to remove individual pieces of content from a platform run by a customer, such that the only way a cloud provider could disable access to content is by disabling the entire project or platform. Finally, regulation should ensure respect for user privacy, where users communicate one-on-one or in small groups, and where they use anonymization or pseudonymization.
- **The benefits of a liability regime with a notice-and-takedown system, where there is no liability without actual knowledge.** This provides services with the legal clarity they need to operate, and for internet services to remain

⁸ French Constitutional Council, Decision n° 2020-801 DC of June 18, 2020.

vibrant places for education, culture, and freedom of expression and information.

- **The ways to “remove disincentives for [online services’] voluntary actions to address illegal content, goods or services they intermediate.”** Currently, an intermediary that engages in such voluntary moderation risks being labelled as an “active” service provider, or otherwise being deemed to have knowledge of all of the content on its platform, creating uncertain liabilities. This current risk of liability creates a perverse incentive for intermediaries to either refrain from engaging in reasonable proactive moderation, or to over-remove content in the course of moderating. The Commission should consider ways to remove these disincentives.
- **The ways to strengthen the notice system by introducing clear formalities for notice, and where appropriate, counter-notice.** Formal notice should include, at minimum, requirements to: clearly identify the content at issue by URL, video timestamp, or other unique identifier; state the law and basis of the legal claim; clearly identify the sender of notice where the nature of the rights asserted requires identification of the rightsholder; and attest to the good faith and validity of the claim. This helps review teams process information more efficiently and responsibly, as well as protecting against abuse by fraudulent or bad-faith notices.
- **The need for transparency reporting obligations to be reasonable, proportionate, and based on clear metrics.** We recognize the Commission’s concerns and the importance of improving accountability and user trust, and we are committed to a constructive dialogue on how best to achieve aims around transparency. It will be important to take into account the risks that information can be used by bad actors to game systems, that commercially sensitive information is exposed, or that user privacy is affected. Finally, we would highlight our recent [announcement](#) of a new advertiser identity verification initiative, which will require advertisers to complete a verification program in order to buy ads on our network.
- **The need for an adequate implementation period.** Providing adequate time between the publication of the law and the date it comes into force will help ensure that businesses implement the law effectively, and that implementation does not have adverse impacts on users and fundamental rights.

The Commission is also considering options for creating an effective system of **regulatory oversight, enforcement, and cooperation among Member States, supported at the EU level.** As the Commission evaluates options for regulatory oversight, we believe it is important that any system: (a) be proportionate and evidence-based; (b) increase legal certainty; and (c) be based on the country-of-origin principle, as the Commission has set out. In addition, we believe

enforcement activities should focus on the interests of users, and as the Commission has also set out, relate to systemic issues and not individual cases.

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We once again thank the Commission for the opportunity to submit feedback to the Inception Impact Assessment on the Digital Services Act: Deepening the Internal Market and Clarifying Responsibilities for Digital Services. We look forward to expanding on these ideas in our submission to the Commission's open public consultation on the Digital Services Act package.