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Ref: Consultation on the Digital Services Act" (DSA) and "Digital Markets Act" (DMA)

Dear Colleague,

Ibec welcome the opportunity to comment on this DETE consultation. In 2020, Ibec responded to both DETE and European Commission consultations on a proposed European Commission Digital Services Act Package[1].

We support further efforts to increase trust in digital tools and to address the challenge of illegal content online. We support free and fair competition and efforts to ensure businesses and citizens can reap the benefits of a Digital Single Market. However, the design and implementation of new rules needs to be thought through very carefully to avoid an overly prescriptive approach.

Ibec and its sectors continue to deliberate on the issues raised in the subsequent Commission legislative proposals (DSA[2] and DMA[3]). This letter re-emphasises Ibec's previous positions and outlines some principles and initial comments in relation to issues raised in the recently published DSA and DMA proposals now under discussion.

[1] Ibec (2020) https://www.ibec.ie/-/media/documents/influencing-for-business/digital-policy/open-digital-future-dsa-paper.pdf
[2] European Commission (2020a) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en
[3] European Commission (2020b) https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en

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Initial Ibec recommendations to EU policy makers and influencers on DSA proposal:

1. **Implement an open digital future, preserve, and support further digital innovation and protect businesses and individuals online**. The DSA and DMA proposals should adopt a clear, robust risk-based and evidence-based approach to regulation of in scope Digital Services, consistent with existing European and national law.

2. **Maintain legal certainty for business, encourage continued investment**.
   Ibec welcome the Commission's DSA proposal to preserve key principles of the eCommerce Directive (ECD) including country of origin; conditional liability limitations for online intermediaries; and no general monitoring obligations. These principles are important to firms of all sizes and have facilitated market certainty, innovation, and economic growth. It is right that they should be retained and form the next generation of online regulation. The retention of the activity-based approach is also welcome.

3. **Provide clarity for business, encourage continued investment**.

   It is important to formalise a workable system of notice and takedown, clarifying definitions of illegal content and proportionate actions expected of digital services, respecting both fundamental rights and differences between digital services. We caution against overly prescriptive provisions or provisions that would incentivise companies to remove content without careful decision-making.

   The adoption of the Commission DSA proposal should:
   - Encourage formalities on notices, careful and effective decision making on content removal, and proportionality and fairness in arbitration processes. For example, the quality of the notice and whether the content it identifies is illegal or not should be considered in Article 14 (3).
   - Encourage further positive action in addressing illegal content.
   - Support further transparency online. Transparency obligations should, however, be clear, proportionate, and targeted, recognising differences between services. For example, the scope of Chapter 3, Section 1 is overly broad and an obligation to produce a transparency report may be unnecessary or an overreach e.g., a B2B intermediary governed by a contractual or industry transparency standard. Reporting obligations should be mindful of protecting user privacy, user and platform security, and IP rights.

   Further clarity would be welcome on:
   - Territorial scope and the concept of 'substantial connection': How will this work in practice? This is important in understanding the scope and burden on regulators.
   - Requirements on risk assessment and mitigation: It is important to ensure requirements are understood and risk is mitigated while innovation and access are maintained.

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- The requirements Article 14(3) seem to suggest that any notice meeting the criteria would constitute actual knowledge and trigger a requirement to act regardless of third-party rights. The IIA did not intend to set a significantly lower legal threshold than in the current eCommerce Directive and expose intermediaries to new legal risk in cases where a notice makes an untrue claim.
- Whether Article 43 constitutes a right to private action for individual complaints or whether the oversight and enforcement framework is intended only to address systemic breaches?
- Proposed regulatory oversight: While trying to understand how this could work in practice, further clarity on the checks and balances in the Commission role and timelines for decision making would be welcome. It is important to ensure clear and robust due process for all parties is not lost in the drive for the framework to operate at speed and with less friction between member state authorities. Governance should facilitate the growth of the Digital Single Market (DSM) and members are supportive of the country-of-origin principle. Regulatory complexity and fragmentation in the DSM, where there is potential for divergent approaches, should be avoided to provide certainty to all. However, there seems to be no barriers to routine escalation of matters to the European Commission, thus potentially undermining member state regulators and disincentivising companies from choosing a main EU establishment in Ireland in order to benefit from a one stop shop.
- Scope of application: the proposal provides for asymmetric obligations with a focus on very large online platforms. This appears to take a quantitative approach to the threshold of application. Risk should be considered in the approach as in the proposed Online Safety and Media Services Bill.

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Initial Ibec recommendations to EU policy makers and influencers on DMA proposal:

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

   This is important for Europe's future competitiveness. As a general principle, a new DMA instrument should encourage, not hinder, further competition, innovation, and choice. Any regulatory intervention should be based on a holistic, evidence-based analysis of harms and benefits.

   Ibec restates the importance of (a) ensuring effective enforcement of existing competition law and (b) ensuring clarity, necessity, effectiveness, consistency, transparency, accountability, and proportionality for all, in the adoption of new instruments in this area[4]. Some aspects of the proposed DMA instrument may overlap with existing regulation and enforcement. For example, competition rules apply to online platforms and can effectively govern their relationship with businesses and users. The digital sector has been subject to close scrutiny by competition authorities in Europe. Consequently, it is necessary to clearly define when the use of a new instruments is appropriate, who may trigger such interventions and under what circumstances. Further guidance to service providers, users, and authorities would avoid regulatory overlap or uncertainty.

   The proposal differs from that presented in the consultation and IIA (Inception Impact Assessment), which intended the DMA to be a new competition tool. As drafted, the DMA builds on the Platform to Business (P2B) Regulation and seems to suggest organisations that meet quantitative thresholds and who cannot prove to the Commission that they do not have entrenched market power are subject to regulation. This would suggest that the proposal would apply to more organisations than indicated in the IIA. It also seems that the Commission would have the exclusive power to decide whether the organisations' reasons were satisfactory and would make that decision within 60 days. This differs from the approach taken by some competition authorities, for example the Digital Markets Taskforce advised the UK Government that a 6-month assessment by an expert competition authority be used to designate firms for such intrusive regulation. A platform which is considered in scope seems at this point not to be granted the opportunity to provide an objective justification for its practices, meaning the regulator might not take a broad view of the costs and benefits of intervention. These issues should be addressed in any new instrument.

   As markets are rapidly evolving with the state of technology, any new proposed instrument should remain future proof. A principled approach and guidance that recognises differences between platforms would be welcome in adopting a new instrument. This could ensure objectives on fairness and choice are met in the future design of products and services.

[4] Ibec (2020) Ibid.

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We hope these initial comments prove constructive and we look forward to engaging further with you and colleagues on these important proposals.

Kind regards,

Erik O Donovan

Head of Digital Economy Policy, Ibec

(By email)