



Rialtas na hÉireann
Government of Ireland

The Irish position on the EU Commission's proposed Digital Services Act package - Submission to the Public Consultation

8 September 2020

1. The e-Commerce Directive related strand

Key Points

Ireland supports an approach to the development of a Digital Services Act package which supports business and innovation while protecting consumers. We urge that measures taken should be clearly evidence based, targeted to deal with specific concerns, and proportionate to the harms that they wish to prevent. We believe that the appropriate governance framework has at its head a European oversight entity capable of ensuring cohesion and collaboration between Member States and consistency of approach between all measures taken without any MS having a disproportionate administrative and regulatory burden.

We believe that the main principles of the e-Commerce Directive have stood the test of time and that the framework does not need to be changed but to be added to with specific requirements relevant to the types of services and issues that have presented themselves. In order to address the tensions that naturally arise between the country of origin principle and the measures within national legislation of destination countries, we suggest that the system that is adopted to achieve cooperation should also involve collaboration between Member States and recourse to European oversight in order to ensure that no disproportionate burden falls on the regulatory body of one, or a small number of, Member States.

Ireland believes that an EU Authority or Commission based entity will help to provide much needed cohesion, collaboration and consistency and that the Commission should act in accordance with these goals in devising the Digital Services Act package. It is felt that it is important that the Commission appreciates real issues that arise from the specifics of individual Member States legal systems when implementing enforcement elements of its EU Regulations and learnings from these should be incorporated into the Digital Services Act Package proposals. We would encourage the Commission to listen to and take on board Member States concerns in this regard and to accept the need to actively manage areas where there is likely to be division between MS in order to promote the EU as an effective Union.

The need for a DSA

Ireland appreciates the need for the revisiting of the e-Commerce Directive. While we believe that the main principles of the Directive have stood the test of time, the environment to which it applies has evolved considerably in the past twenty years. Information Society Service Providers (ISSPs) are no longer merely in the business of facilitating the posting of information online by their users. A significant number of new uses have developed on the internet and with those have come varying characteristics for the ISSPs providing them. This gives rise to new considerations that need to be taken into account when applying both

the principles and the particulars of the Directive to these uses. These include, for instance, whether the categorisation of mere conduit, hosting and caching are still sufficient and what it means for each to be either 'active' or 'passive' when it comes to assessing their status in terms of liability.

Principles of the Directive

In terms of consideration of some of the key principles of the Directive we would wish to make the following observations:

Country of Origin Principle

Ireland agrees with the Country of Origin Principle and is particularly supportive of its role in providing businesses with the necessary certainty and understanding as to the rules and regulations to which they must adhere. This principle has allowed companies to establish, grow and scale across the EU in an efficient and cost-effective way. This has taken on particular significance in digital markets because digital business models are typically large in scale but low margin, and country of origin control avoids duplication of regulatory costs which would be inefficient and damaging for such models.

However, Ireland is concerned with the potential impact of its operation (including the mechanism under Article 3) upon the relationships between Member States and, in particular, on regulators within those Member States. Ireland believes that an EU Authority or Commission based entity, providing support and guidance, while also actively resolving contentious cases, will help to provide much needed cohesion, collaboration and consistency to support the smooth operation of the Country of Origin principle. In addition, we also believe that strong cooperation mechanisms between Member States on matters of mutual interest should be established, albeit without going so far as requiring a country of origin to implement the laws of a country of destination.

It is also the case that a country of origin approach is most effective – and perhaps can only be implemented – when it is applied in respect of a systemic approach to regulation. Otherwise the volume of content and the different cultural expectations around harmful content across the European Union would result in such a volume of appeals and judicial review processes that would impair the effective functioning of the Country of Origin regulator. It may therefore be the case that for any processes that require the removal of individual pieces of illegal content, for example as proposed by the Terrorist Content Regulation, a cooperation mechanism may work better.

Limited Liability

Ireland believes that it is still appropriate that online services without editorial responsibility for the material present on their services should not be legally liable for the presence of any illegal material, providing that said material is dealt with in accordance with the law when it is brought to their attention. The conversation about modernisation should focus on what

appropriate obligations or regulatory structures sitting atop the legal liability regime should look like.

Ireland is supportive of a systemic approach to online content regulation. Such an approach would focus on identifying the risks posed by certain online services in content delivery and content moderation, developing targeting measures to minimise those risks and reviewing the effectiveness of those measures over time with a view towards creating a cycle of harm minimisation. Such a systemic approach can also create incentives for platforms to tackle quickly and efficiently the illegal content on their platforms, through appropriate systems, and enable the authorities to assess the efficiency and effectiveness of systems put in place. This approach would allow platforms to develop the systems needed to address regulatory concerns rather than imposing a one-size-fits-all approach that may be incompatible with how some platforms operate.

This type of approach is inherent in the revised Audiovisual Media Services Directive and is the approach Ireland is following in the proposed Online Safety and Media Regulation Bill, which implements the revised Directive and creates a broader regulatory framework for online safety.

It would also be useful to clearly provide for a “Good Samaritan” principle in Union law, similar to the provision in existence in s. 230 of the Communications Decency Act in the USA, which would allow online services to deal proactively with objectionable material on their services without running the risk of incurring liability for doing so. However, this should not be seen as a substitute for effective regulation.

Illegal vs. harmful material

One matter that needs to be established is whether material which is generally not illegal, yet which may be harmful, for example content promoting suicidal behaviour, should be dealt with under any structures for online content regulation developed atop the limited liability regime. This is particularly pertinent given the jurisprudential and cultural diversity of the Union and the greater relevance of certain fundamental rights, for example freedom of expression.

The revised Audiovisual Media Services Directive requires online content regulation for audiovisual content that may be harmful to minors on video sharing platform services. Concerns remain as to the degree to which this area can be practically harmonised. Taking this into consideration it is felt that the revised Directive, which has not yet been implemented, should be given time to bed down before further regulation of legal yet potentially harmful online content is introduced.

It has been indicated that certain legal, yet potentially harmful, material may be dealt with under the European Democracy Action Plan rather than the DSA package, specifically disinformation. However, there is likely to be overlap in the discussion as, by and large, addressing the spread of disinformation is one of the main drivers behind the DSA package.

It is also important to note here that disinformation has far broader political and societal implications than most kinds of legal yet potentially harmful material as it sits within a nexus of foreign policy, national political structures and conflicting fundamental rights issues. As such, addressing it will likely require a different approach to other online content regulation issues.

Product safety and the sale of illegal/harmful goods

It is understood that the report of the European Parliament Committee on the Internal Market and Consumer Protection on addressing product safety in the single market issued in April 2020 called on the European Commission to evaluate the role online ‘marketplaces could play in improving the detection of unsafe products, and to propose mandatory rules on their responsibility, taking into account the special role of SMEs as part of the Digital Services Act, the revision of the General Product Safety Directive (GPSD) and any other relevant legislation’. The Competition and Consumer Protection Commission is further aware of suggestions from BEUC (the European Consumer Organisation) that a revised GPSD should designate online platforms as ‘operators in the supply chain and be held liable if products sold through those platforms cause damage’. Ireland believes that it is important that a holistic view is taken across the DSA and revised GPSD to enable the targeting of the wide variety of online harms without creating regulatory overlap, clearly identify liability issues and ensure coordination of the enforcement regimes. The legislative frameworks should also be sufficiently flexible to cover new forms of harm as they emerge.

Summary/Overview on the e-Commerce related strand

Ireland therefore supports an approach to the development of a Digital Services Act package which supports business and innovation while protecting consumers. We urge that any measures taken should be clearly evidence based, targeted to deal with specific concerns, and proportionate to the harms that they wish to prevent. We believe that the appropriate governance framework could have at its head a European authority or oversight entity capable of ensuring cohesion and collaboration between Member States and consistency of approach between all measures taken without any MS having a disproportionate administrative and regulatory burden.

2. The Ex-Ante Regulation strand

Key points

There remains a high degree of uncertainty surrounding the functioning of the digital economy.

Ireland broadly agrees with both objectives of the Commission's Inception Impact Assessment. However, from Ireland's perspective it will not be enough for the final Impact Assessment to show certain platforms have significant market power.

In order to justify the need for ex ante intervention, the onus is now on both DG CNECT and DG Grow to demonstrate that innovation is being stifled by so called 'gatekeeper platforms' and that digital markets are not contestable due to exclusionary behaviour.

Many Member States, including Ireland, blocked attempts to include 'blacklisted' practices without merit and evidence of economic harm during the negotiations on the Platforms to Business Regulation. The evidence base required to prohibit, per se, certain practices did not exist in Q1 2019 and Ireland remains to be convinced that this evidence base exists now.

We look forward to further engagement with the European Commission on the IIA, the final Impact Assessment and the formulation of proposals which will be discussed at Working Party level.

Introduction

Ireland welcomes the European Commission's Inception Impact Assessment which considers various ex ante regulatory instruments for very large online platforms. The current public consultation on the Digital Services Act Package is an important opportunity to gather wide stakeholder views on existing and emerging issues concerning large platforms but more importantly to gather a comprehensive evidence base to aid in formulating policy options.

Digital markets, as we know, differ significantly from traditional markets and policy makers lack complete knowledge of their functionality. There remains a high degree of uncertainty surrounding the functioning of the digital economy as evidenced by recent reports from the *independent* expert group of the *Observatory on the Online Platform Economy* and the Terms of Reference of the *Platforms with Significant Network Effects Acting as Gatekeeper Impact Assessment Support Study*. Therefore, Ireland believes it is too early in the Impact Assessment process to support or discount any of the options presented in the Inception Impact Assessment (IIA). However, we look forward to further engagement with the European Commission on the IIA, the final Impact Assessment and the formulation of proposals which will be discussed at Working Party level.

Overall reaction to Inception Impact Assessment

The IIA has two clear objectives:

1. The first is to ensure a fair-trading environment in the EU platform economy. It proposes to address this by investigating the market power of certain gatekeeper platforms.
2. The other overarching policy objective of the IIA is to increase the innovation potential and capacity of the EU online platform economy. Setting optimal trading conditions, as outlined in the Assessment, would have a positive impact on innovation and research, technological development and growth of the digital economy.

Ireland broadly agrees with both objectives and the overarching focus on the contestability of markets is appropriate. However, in terms of market power, it is important to recognise that there is nothing illegal or anti-competitive about acquiring such power and unquestionably many large platforms have been successful in this regard over recent years. The abuse of market power is what is anti-competitive and exclusionary.

The independent expert group of the Observatory on the Online Platform Economy recently highlighted ambiguity around the alleged effects of platforms' power. The Observatory goes on to stress that in order to assess what practices are "unfair" more research is needed on the practices in which platforms engage. The ongoing work of the Observatory and its forthcoming Report on Market Power should shed more light on these topics. Ireland requests that a draft or interim version of this Report be published or at least made available in advance of the publication of the final Observatory Report and final Impact Assessment given the importance of the topic.

In terms of the second objective of the IIA, the Terms of Reference of the recent *Impact Assessment Support Study* only requests the contractor to identify and analyse business practices that *potentially* harm innovation. From Ireland's perspective it would not be enough for the Commission's final Impact Assessment to show certain platforms have significant market power. Given the magnitude of the Line of Business Restrictions being proposed, especially under Options 3(a) and 3(b) of the IIA, evidence that innovation is being stifled by so called 'gatekeeper platforms' or that digital markets are not contestable will be required. At present, there is only anecdotal evidence that the behaviour of certain platforms restricts the ability of new innovators to successfully enter the market thereby reducing consumer welfare and the social gain from innovation.

Inception Impact Assessment Options

Ireland is a European digital frontrunner, as evidenced in the EU Digital Economy and Society Index, and is a key stakeholder in terms of formulating such policy options and

equally importantly assessing their potential impacts. Therefore, we would like to make the following points, and seek further clarification, on the Options presented in the IIA.

IIA Option 1

Option 1 presented in the IIA proposes to revise the horizontal framework set in the Platform-to-Business Regulation (EU) 2019/1150 (aka P2B). P2B came into effect on 12 July 2020 and the Inception IIA highlights that P2B is conceived as a first step to establish a fair and transparent business environment around online platforms.

The Review under Article 18 of the Regulation commits to establishing ‘whether additional rules, including regarding enforcement, may be required to ensure a fair, predictable, sustainable and trusted online business environment within the internal market. Following the evaluation, the Commission shall take appropriate measures, which may include legislative proposals.’ This Review is due to be published at the latest by Q1 2022.

Given the Regulation has only just come into effect and the Review is 18 months away it is not possible at this juncture to infer any market impact and levels of compliance arising from it. Recently the *independent* expert group of the *Observatory* on the *Online* Platform Economy recommended that the data generated by the internal complaint-handling procedures of platforms, mandated by Article 11 the P2B Regulation, should be analysed with a view to identifying and assessing any need for further public policy intervention. Furthermore, the *Observatory* believes the Regulation provides a good starting point to facilitate the more concrete identification of forms of differentiated treatment that can be considered unfair and might, as such, need to be regulated.

Therefore, as there is no evidence base of emerging issues arising from P2B, nor is there currently a need for targeted horizontally applicable additional powers, is it not appropriate to endorse or discard the merit of Option 1 proposed in the IIA. Ireland requests that the Commission clarify the role the Review of the P2B Regulation will have in formulating the final Impact Assessment.

IIA Option 2

Option 2 of the IIA proposes empowering regulators to collect information from large online platforms to gain further insights into their business practices and their impact on the users and consumers of these large online platforms. There are still many areas of the digital economy where there is ambiguity and the inclusion of this Option of the IIA reaffirms this. More extensive research is needed in many areas of the platform economy as outlined recently by the independent expert group of the Online Platform Observatory.

More specifically, the *Observatory* recently outlined the challenge policy makers face in ‘trying to understand many aspects of platform companies ‘economic role and behaviour.’ Importantly the *Observatory* envisage a role for the statistical office of the European Union.

Therefore, due to the ambiguity surrounding which body or bodies are optimally placed to collect information from large platforms and increase our understanding of digital business models, and the functioning of the digital economy, it is not appropriate to again support or rule out the merit of Option 2.

Furthermore, DG CNECT have commissioned work on determining both qualitative and quantitative criteria to classify platforms as gatekeeper platforms as part of the Impact Assessment Support Study. Ireland suggests that the criteria the Commission would use to target a subset of platforms must be a combination of structural and specific variables and should not be inherently biased against certain companies and business models. We look forward to assessing the criterion chosen.

IIA Option 3(a)

Option 3(a) centres around the prohibition or restriction of certain unfair trading practices by large online platforms.

Ireland supported the final text of the P2B Regulation because we believed it was a balanced proposal which included measures that would ensure a fair, predictable, sustainable and trusted legal environment for platforms and their business and corporate website users alike. Ultimately, it will contribute to a strengthened, better-functioning Digital Single Market in terms of innovation, competitiveness, growth and jobs.

However, during Trilogue negotiations attempts were made to broaden the scope of the Regulation to include 'blacklisted' practices without merit and evidence of economic harm. Due to the lack of a supporting evidence base Ireland, along with a number of other Member States, opposed widening the scope of the Regulation to include these 'blacklisted' practices. The evidence base required to prohibit, per se, certain practices did not exist in Q1 2019 and Ireland remains to be convinced that this evidence base exists at present. Ireland will adhere to the precedent set during the P2B negotiations and will not support future proposals we feel are not justified by evidence.

Efficiencies, and dynamic efficiencies in particular arising from practices and business models unique to the digital economy, are not fully understood. If this Option is selected as the preferred option in the final Impact Assessment, in order to ensure fairness, Ireland recommends that large platforms need to have the possibility to challenge the presumption of illegality. We believe that not every instance of, for example, differentiated treatment is problematic and detrimental to consumer welfare. An outright ban on certain behaviour could negatively affect incentives to invest.

Lastly, the IIA states that emerging issues will be explored when considering this Option including online advertising services. The ongoing work of the *independent* expert group of the *Observatory* on the *Online* Platform Economy in this area will be an important component in the final evaluation. Therefore, stakeholders should be afforded the

opportunity to review draft findings prior to the publication of the Observatory's final report later in 2020.

IIA Option 3(b)

Option 3(b) proposes the adoption of tailor-made remedies addressed to large online platforms on a case-by-case basis where necessary and justified. The proposed new ex ante regulatory framework would also include an ability to impose, where considered necessary, tailor-made remedies.

Under this option remedies would be adopted and enforced by a competent EU regulatory body. An EU Authority would investigate, based on an analysis of the specific characteristics of a platform and the market it operates in. The Authority would have to prove a gatekeeper position exists. Ireland believes the scope of the ex ante strand of the Digital Services Act needs to be defined in the first instance and only then can discussions commence regarding the optimal regulatory structure

There is currently a lack of clarity as to how a proposed ex ante regulatory framework being proposed by DG CNECT/DG Grow, and Option 3(b) in particular, might operate alongside the New Competition Tool being proposed by DG COMP. A joint statement by Directorates would be helpful in order to create certainty among platforms, avoid any potential duplicity of regulatory effort and inconsistency of outcomes.

The aforementioned Impact Assessment Support Study will aim at providing technical, legal, and economic analysis of the dynamics of digital platform ecosystems, which occur outside the existing competition law notion of relevant markets. The consultants, as part of the Support Study, will devise a series of case studies relevant to the alleged unfair practices highlighted in the IIA under Options 3(a) and 3(b) – namely self-preferencing and interoperability. Furthermore, the Support Study has been commissioned to help analyse the impact of targeted regulation (e.g. data access/sharing obligation, interoperability, portability and standards requirements).

Given the weight this Support Study is likely to have on the final Impact Assessment and the selection of a preferred option or options, Ireland requests that stakeholders be afforded the opportunity to review the findings of the Support Study prior to the publication of the final Impact Assessment.

Finally, if specific line of business restrictions are proposed in the Final Impact Assessment, a thorough analysis of their interaction with existing legislation needs to be produced (interoperability and the European Electronic Communications Code and portability with the General Data Protection Regulation)

Conclusion

In order to justify the need for ex ante intervention, the onus is now on both DG CNECT and DG Grow to demonstrate that innovation is being stifled by so called 'gatekeeper platforms' and that digital markets are not contestable due to exclusionary behaviour. Ireland remains to be convinced that this evidence base exists at present.

Ireland supports innovation and aspires to position itself as a global leader in this field. It also fully supports competition in the marketplace and full market contestability. Were it to be convincingly demonstrated that there is potential for increased competition in digital markets, that these markets are not contestable, and innovation is being stifled by large platforms, then Ireland would be open to proportionate ex ante measures complimenting existing and future competition policy. Any measure or measures would ultimately have to be proportionate to any dampening effect these platforms have on innovation and achieve an appropriate balance in terms of the different stakeholders and retain what is functioning optimally for the broader digital economy.