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DIGITAL SERVICES ACT

IMPACT ASSESSMENT

6 January 2021

Council Working Party on
Competitiveness and Growth
(Internal Market)

Impact Assessment for the Digital Services Act

1. Context of the Impact Assessment
2. Approach and methodology
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11. Opinion of the Regulatory Scrutiny Board of the Commission



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1. Context

Political context

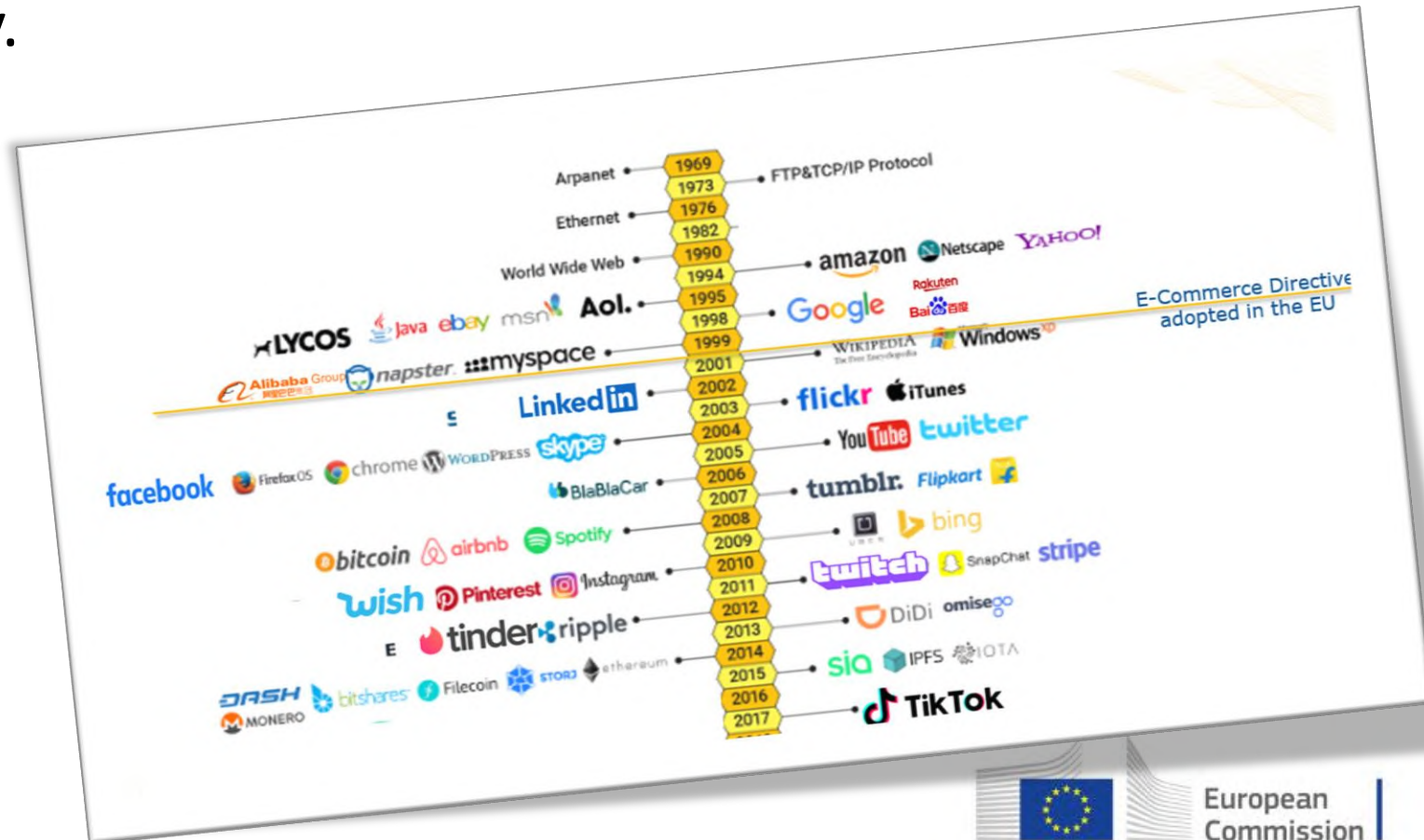
- The Digital Services Act announced by the President in her political guidelines as one of **the key measures in making Europe fit for the Digital Age.**
- Communication ‘Shaping Europe’s Digital Future’: together with the Digital Markets Act, a comprehensive package for digital services and online platforms in particular.
- **European Parliament:** three own initiative reports, fleshing out areas of concern and calling for ambitious measures.
- **European Council (October 2020)**
- **Council of the European Union (June 2020)**
 - *‘clear and harmonised evidence-based rules on responsibilities and accountability for digital services that would guarantee internet intermediaries an appropriate level of legal certainty’*
 - *‘enhance European capabilities and the cooperation of national authorities, preserving and reinforcing the fundamental principles of the Single Market and the need to enhance citizens’ safety and to protect their rights in the digital sphere across the Single Market’*
- **Concerns in Member States and targeted actions**

International aspects

- Strategic area for the EU, setting a high standard for an effective intervention, with balanced measures anchored in the protection of fundamental rights online.
- Increased attention on the role of online platforms and intermediary liability regimes in international fora and organisations.
- Ongoing discussions and reforms in the policies of EU's trade partners across the globe.

Evolution and role of intermediary services

- A step-change in the nature, scale and role that digital services play in our economy and society.
- E-Commerce is a case in point:
 - 9% of Europeans shopped online in 2002
 - 70% shop online today – and 40% of businesses that sell online, do so through online platforms



What are digital services?

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Information society services

- Provided 'at a distance'
- 'by electronic means'
- 'at the individual request of a recipient of services'

Types of services

Intermediaries

Other

Benefitting from liability exemptions or limitations

'Mere conduits'

'Caching'

Hosting

No such horizontal provision

Examples:

ISPs, instant messaging services

Content Distribution Networks

Web hosting, file storage and sharing, online media sharing platforms

Social networks, online marketplaces, collaborative economy platforms, online games

Ratings and reviews platforms

Online websites, video on demand, online games, etc

Online intermediaries: new opportunities and challenges

Online intermediaries are the main focus of the impact assessment and of the intervention, with a special attention to online platforms:

- Inherently cross-border, with a strategic importance in supporting a truly European single market.
- Major innovators and supporting innovations.
- Evolving business models for online platforms. By their reach and scale, they pose particular societal risks today.

Current framework & sector-specific interventions

Legal framework

- **E-Commerce Directive:** sets the framework
- **National law and EU law** defining illegal activities and actions to be taken

EC guidance

- **Recommendation** on measures to effectively tackle illegal content online (2018)
- **Communication** on Tackling illegal content online – towards an enhanced responsibility for online platforms (2017)

Self- & Co-Regulation

- **Sectoral dialogues and coordinated, voluntary actions**, e.g.:
 - Online terrorist content: [Internet Forum](#)
 - Online illegal hate speech: [Code of conduct on countering illegal hate speech online](#)
 - Counterfeit products: Memorandum of Understanding
 - ...

Sector-specific legislation:

- Consumer protection
- Terrorist content
- Copyright
- Video-sharing platforms and certain types of content
- Market surveillance
- CSAM

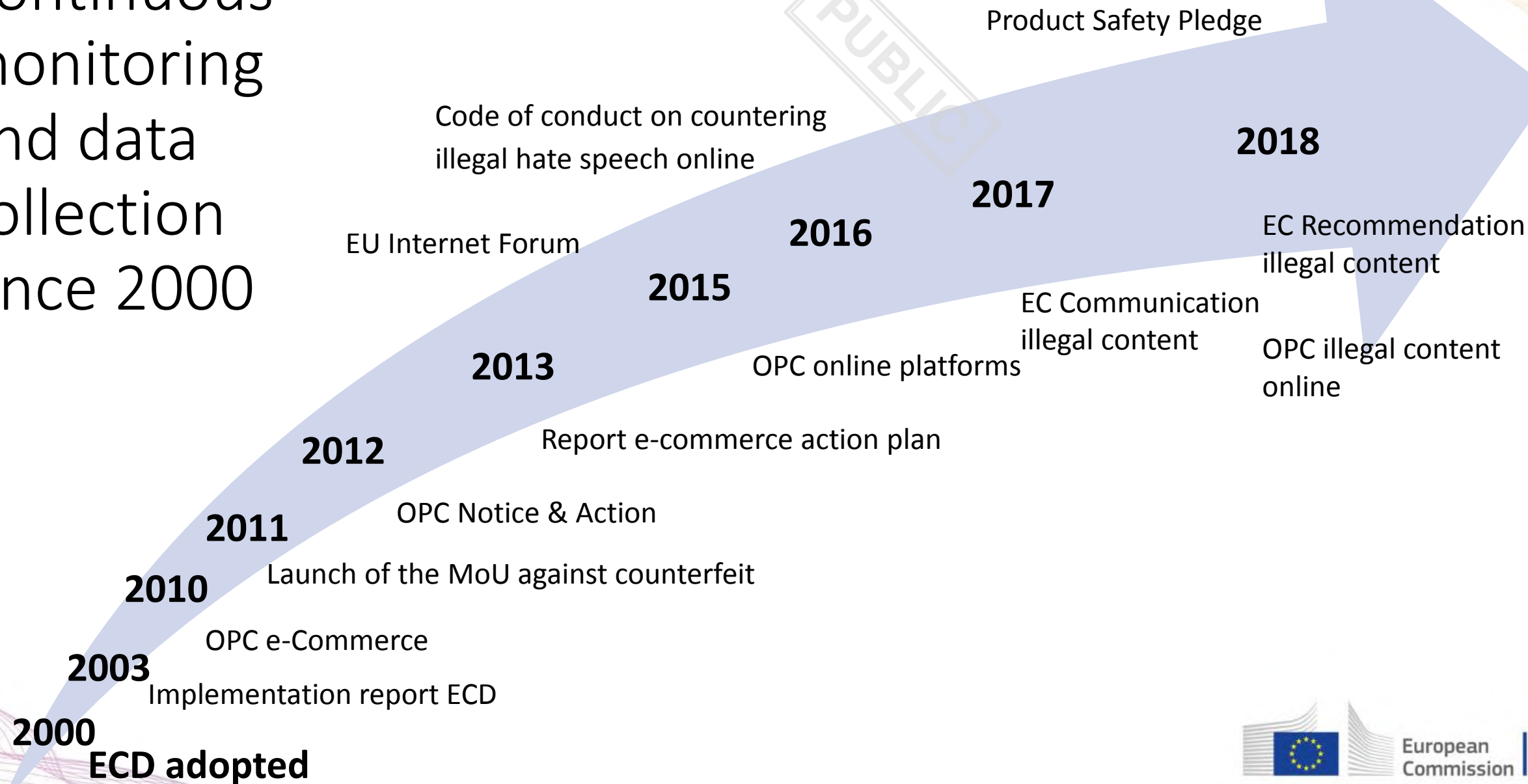
Legal basis

- The analysis addresses the horizontal challenges for the cross-border provision of digital services, in particular online intermediary services, in the Single Market.
- Article 114 TFEU is the legal basis considered for all policy options: harmonisation of rules applicable to online intermediaries and the functioning of the single market.

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2. Approach and methodology

Continuous monitoring and data collection since 2000



Robust evidence base



- Building on continuous monitoring
- Dedicated studies:
 - Legal studies:
 - The liability regime and notice and action procedures (ICF)
 - Hosting Intermediary Services and Illegal Content Online (van Hoboken et al.)
 - Legal analysis of the intermediary service providers of non-hosting nature (Schwermer et al.)
 - Technical studies
 - Algorithmic Awareness Building study (Optimity Advisors)
 - Exploratory study on the governance and accountability of algorithmic systems (LNE)
 - Economic studies & models conducted with the platforms expertise pool in the Joint Research Centre on: intermediary liability, costs of content moderation, costs of legal fragmentation
 - Other data collection:
 - Eurobarometer on illegal content online (2018)
 - Global platforms and marketplaces (Dealroom)
- Evaluation of the E-Commerce Directive
- MS experiences
- Desk research

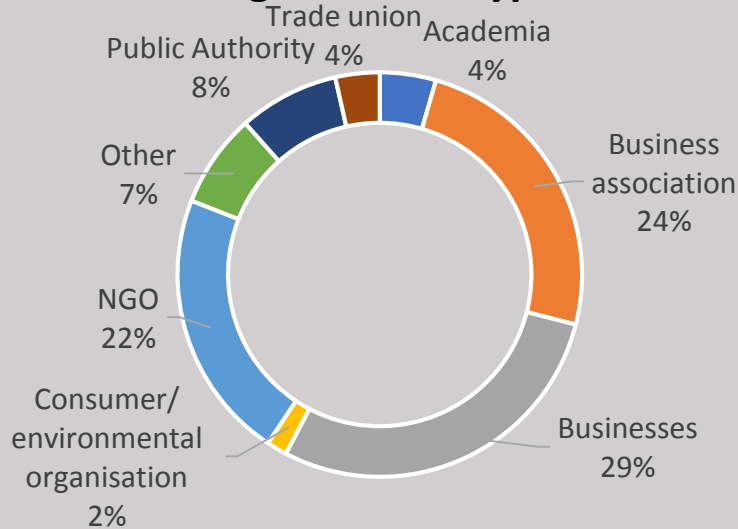
Engagement and consultations

- Targeted consultation with Member States, national consultations, studies, evaluations and policy experimentation
- E-Commerce Expert Group
- Feedback on Inception Impact Assessment: over 100 replies
- Open Public consultation: almost 3000 replies
- Over 300 position papers
- Workshops, roundtables
- Bilateral meetings with over 200 organisations

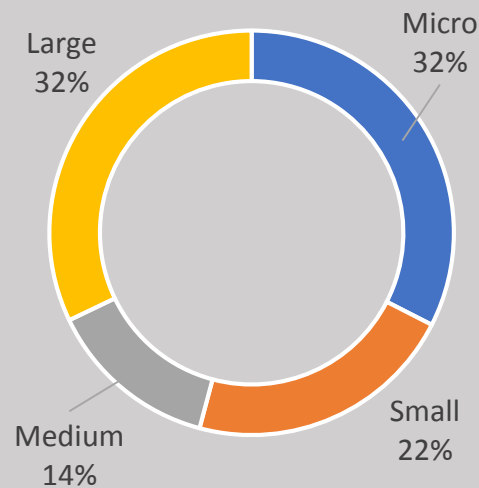
Open Public Consultation (02/06/20 – 08/09/20)

- **2863 responses** & ~300 additional **position papers** received
- mostly from within the EU: DE (28%), FR (14%), BE(9%); most contributions outside of EU from UK (21%), followed by US (3%)
- Most feedback received from **EU-citizens (66.5%)** & **non-EU-citizens (8.2%)**, followed by business organisations (7.4%), business associations (6.3%), NGOs (5.6%), & public authorities (2.1%).

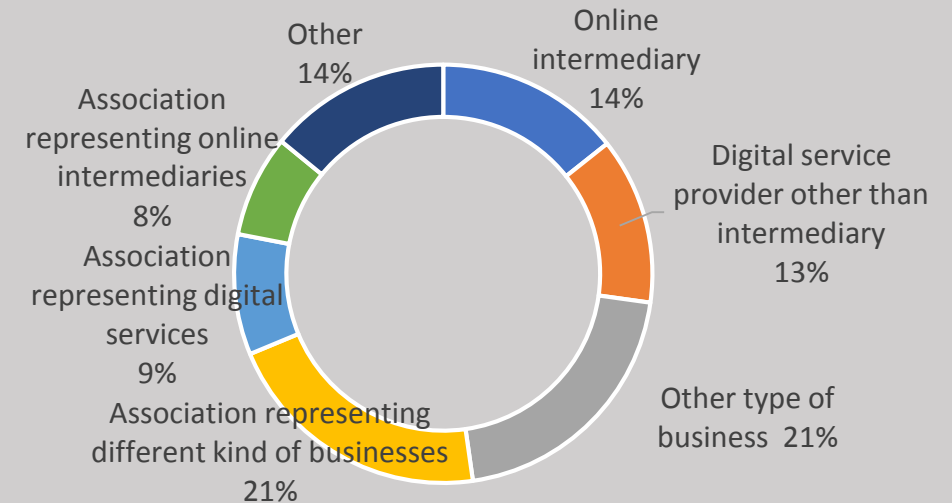
Organisation Type



Organisation Size



Types of businesses responding



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3. Problem definition

Three core problems in the single market

For whom is this a problem?

Main problems

Main types of digital services concerned

Other stakeholders primarily affected

1. Serious societal and economic risks and harms of online intermediaries: illegal activities online, insufficient protection of the fundamental rights and other emerging risks

Illegal activities and risks to fundamental rights: all types of online intermediaries, with particular impacts where online platforms are concerned
Other emerging risks: primarily related to online platforms

Citizens and consumers
Businesses prejudiced by illegal activities
Law enforcement

2. Ineffective supervision of services & insufficient administrative cooperation, creating hurdles for services and weakening the single market

Mostly as regards supervision of online platforms, with particular challenges where platforms cover a large part of the single market

Citizens
National authorities

3. Legal barriers for services: preventing smaller companies from scaling up and creating advantages for large platforms, equipped to bear the costs

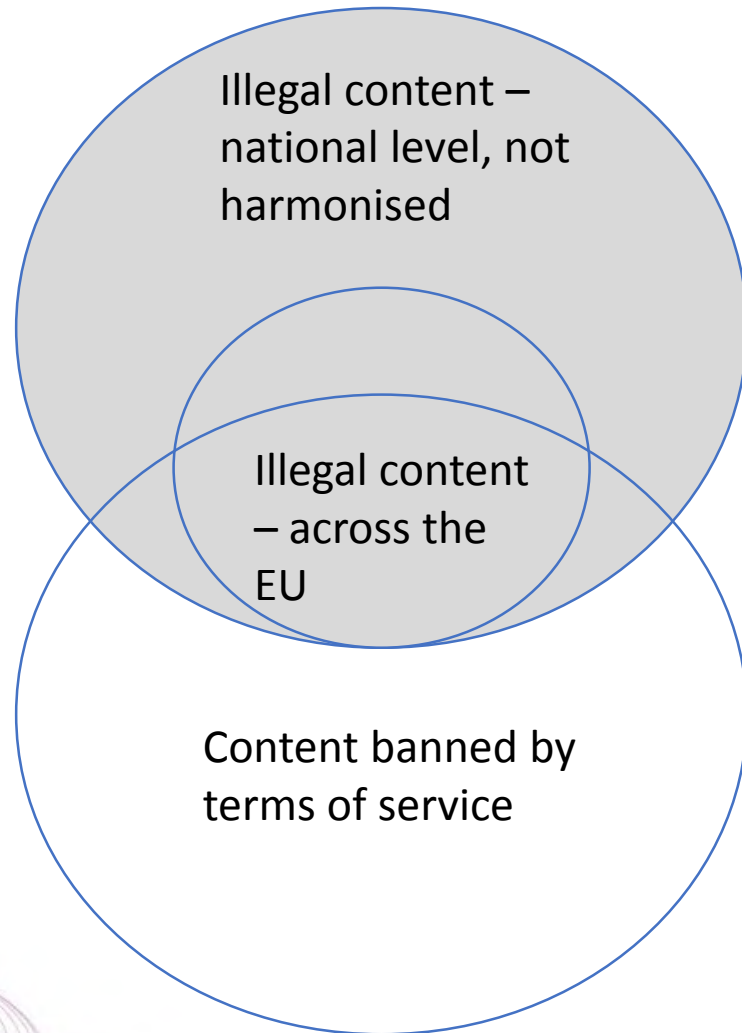
In particular online platforms as primarily targeted by the legal fragmentation, but also other online intermediaries

Businesses depending on online intermediaries

1. Serious societal and economic risks and harms of online intermediaries

- With increased importance of digital services intermediating trade of goods and services and information sharing, illegal activities and other societal risks have also emerged.
- Most prominent on online platforms: direct 'exchanges' between users & incentives to reach wide audiences.
- Particular challenges with scale and impact where very large online platforms are concerned.
- Three types of challenges:
 - Illegal content
 - Other emerging risks
 - Fundamental rights online

Illegal content online



• What content?

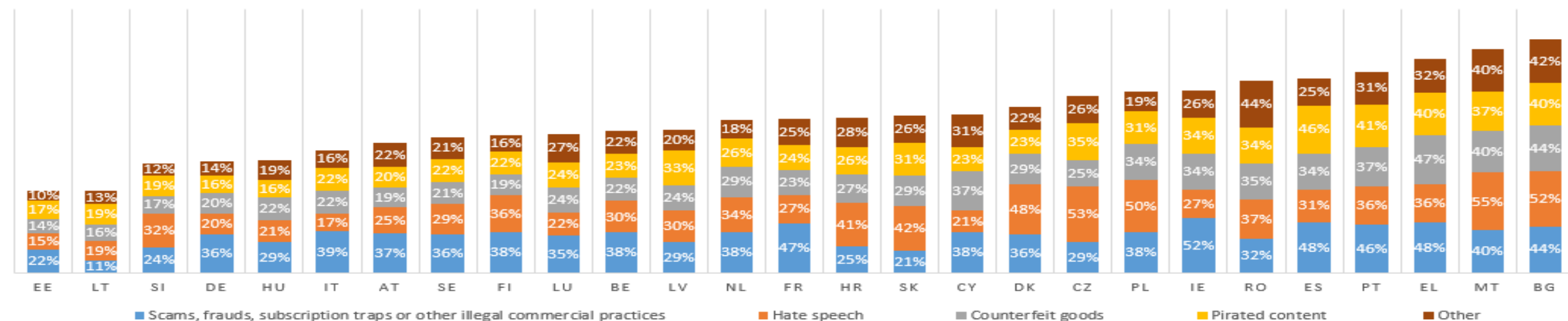
- Scope: illegal at national level or European level – provided by law
- Not just 'content', but also goods and services:
 - Dangerous goods, illegal medicines, counterfeits, scams, wildlife trafficking
 - Child sexual abuse material, terrorist content, illegal hate speech, illegal ads, IPR infringing content
 - Non-compliant accommodation services on short-term rental platforms, consumer protection, extended producer responsibility obligations....

Illegal content online (II)

Indications of scale: moving target, with significant impacts on victims, society, economy. For example:

- Counterfeit products: EUR 121 billion loss
- CSAM: volumes of content identified doubled from 2016 to 2019

**MOST FREQUENTLY SEEN TYPES OF ILLEGAL CONTENT PER MEMBER STATE
(percentage of respondents per MS)**



Systemic societal risks

- Particular to services provided by online platforms: ‘attention economy’ and service design
- Systemic role in selectively amplifying and shaping information flows online: core value proposition for matching users with their interests
- Most impactful where broad audiences are reached
- Evolving pitfalls:
 - Amplifying illegal content, sometimes with ‘viral’ spread
 - Negative effects on the exercise of fundamental rights
 - Intentional manipulation of the systems: disinformation related to health crisis, elections or political participation, instigation to violence and self-harm...

Systemic societal risks (II)

- How?
 - **Optimisation choices:** platforms' own design of the system maximises commercial interests sometimes to the detriment of societal good - e.g. dark patterns, targeting criteria and 'filter bubbles', discriminatory access to information or discriminatory content moderation
 - **Dynamic manipulation of the systems:** like in cyberattacks, the design of platforms' systems is vulnerable to manipulation and attacks – e.g. use of bot farms and inauthentic behaviour, artificial amplification of content, targeting criteria
- Case in point: online advertising & recommender systems
 - Core systems for sharing & receiving information in a context of information overload
 - Oftentimes based on micro-targeting: GDPR sole protection to individuals
 - No meaningful information to users & no choice
 - Opaque systems: no public information to even detect or infer optimisation choices or incidents in the manipulation of the system

Fundamental rights not appropriately protected

- Most delicate balance in online regulation:
 - e.g. stifling freedom of expression online through over-removal of content and incentivising private enforcement - but also chilling effect on speech in environments where illegal content proliferates
- Observed issues:
 - Over-removal of legal content and further chilling effects on expression online from past content removals.
 - How? Abusive notices, non-diligent assessment by the platform and erroneous removal, malfunctioning content detection tools
 - Stifling freedom to receive information – in particular where content of public interest is concerned
 - Risks for persons in vulnerable situations and vulnerable groups to be exposed to discriminatory behaviours and infringement on their right to private and family life, human dignity, rights of the child.
- More far-reaching consequences where take-down takes place on service lower in the internet stack

2. Ineffective supervision

- Faced with the complexity of issues related to online platforms, cross-border cooperation is not sufficiently agile
- Evaluation of the E-Commerce Directive:
 - Internal market principle continues to be extremely valid, in particular today, where the need to ensure legal certainty in a true single market for competitive digital services
 - Increased importance of cooperation
 - However: lack of trust & cooperation among authorities for cross-border issues
- Information asymmetries and technical capability for public authorities: real challenge in supervising the most dynamic area of online platforms, marked by profound socio-technical complexity

3. Legal barriers



- Increasing legal fragmentation
- Duplication of costs for providing cross-border services: disproportionately affects small & emerging businesses, whereas large platforms can easily absorb the costs
- 50% of platforms in the EU seem to be micro-enterprises and 35% are small businesses.
- Important opportunity costs, not least in the context of post-corona digital developments
 - Up to 1.8% of online trade
 - Investment focusing on certain types of marketplaces in the EU & challenges for services to grow

Problem tree

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Drivers

Private companies making fundamental decisions with significant impact on users and their rights

Very large platforms play a systemic role and are 'public spaces' for information & trade

Regulatory gaps: systemic issues not appropriately addressed

Ineffective and underused administrative cooperation mechanism & lack of trust between authorities

Expanding legal fragmentation when MS address the issues unilaterally

Legal uncertainty liability regime for intermediaries, disincentives to act

Problems

Societal and economic harms caused by the illegal activities online, insufficient protection of fundamental rights and other emerging risks

Ineffective supervision of digital services

Legal barriers for digital services: preventing smaller companies from scaling up

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Drivers

What are the main causes for the identified problems?

Private decisions with significant impact on users & their rights

- Fundamental decisions on what is permitted online and private enforcement of rules taken by online platforms unilaterally, non-transparently and inconsistently
- Freedom to conduct a business & freedom of contract, but need to ensure also due process and protection of users' rights
 - With opacity of 'private enforcement' limited transparency and no oversight or accountability of platforms' actions and systems
 - Users and civil society or concerned parties not empowered to take action: N&A systems only selectively available
 - Incentives for content removal, but less so for diligence in preserving and protecting legitimate content
 - Limited safeguards for users: information where content is removed/accounts suspended, complaint and redress

Particular role for very large online platforms

- Public spaces for expression and economic transactions
 - over half of the EU population uses social networks (90% of 16-24 yrs demographics)
 - 50% of businesses use social networks and over 40% sell through marketplaces
- Effects of the design and the abuse of these platforms are significantly higher than for smaller players
- Important particularities of business models: they have capitalised on strong network effects and economies of scale, and build much of their value proposition on personalised and targeted services – not least through recommender systems and targeted advertising.

Legal fragmentation

- Notice and action measures already anticipated in the E-Commerce Directive. 2018 Recommendation covers, through soft law measures, the general approach for good practices.
- Member States have adopted such rules in a fragmented way, and more recent legislative measures continue to emerge in some MS to address the scale and scope of the challenges in the current context:
 - 9 MS have statutory provisions on notice and action provisions: but they do not consistently cover all types of illegal content.
 - Several adopted together with the transposition of the ECD, but emerging rules focus on specific types of content (national definitions of hate speech)
 - 4 define minimum requirements for notices
 - In other MS, case law indications on N&A
 - 13 MS: some provisions on complaints to dispute take-down, and 8 MS include some alternative dispute resolution system
- Main areas of divergence: type of illegal content covered, minimum requirements for a notice, complaints, timeframes to react, abusive notices, independent third party scrutiny.

Regulatory gap

Current approach of sector-specific interventions:

- Only addressing some specific types of illegal content
- Only covering some categories of services
- Some sector-specific measures, but do not address consistently:
 - Emerging legal fragmentation
 - User empowerment to flag illegal content
 - Protection of users' rights, faced with private enforcement
 - Supervisory challenges for authorities
 - Information asymmetries

Legal uncertainties & contradictory incentives

Main areas identified:

- Information society service vs. underlying service intermediated
- Liability regime
 - Evaluation of the E-Commerce Directive, public consultation and legal studies confirmed the key importance of the balanced conditional liability regime for intermediaries
 - Legal uncertainty: what intermediaries are covered? Case law interpretation of 'active/passive' platforms
 - Legal disincentives: for voluntary measures and 'gardening' the platforms' space. This disproportionately affects smaller players, risk-averse to legal uncertainties, and favours large online platforms which can afford to prioritise quality of service

Limited cooperation among MS & lack of trust

- Analysis of the cooperation under the current mechanism:
 - IMI just over 100 notifications, from a limited number of MS and 18 concern issues on online platforms (mainly consumer protection)
- Reported lack of clarity as to the use of different cooperation mechanisms (e.g. CPC & IMI) and areas of improvement flagged by MS
- Current emerging approach is to favour national interventions through statutory laws

How will the problem evolve?

- Importance of online intermediaries and decisions taken by such private actors can only increase, with the digital transformation accelerating
- Systemic issues will be amplified: illegal content, harmful behaviours, impacts on fundamental rights
- Absent EU intervention establishing an ambitious governance, driven by EU values:
 - private enforcement and private standard-setting, under the influence of international regulatory interventions
 - national legislation to address the emerging issues, with limited, local effects, but severe consequences for the services' competitiveness in the single market
 - Impossible to bridge information asymmetries and the gap will continue to grow

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4. Policy objectives

Policy Objectives

Ensure a proper functioning of the single market for digital services

- 1. Ensure the best conditions for innovative cross-border digital services to develop*
- 2. Maintain a safe online environment, with responsible and accountable behaviour from digital services, and online intermediaries in particular*
- 3. Empower users and protect fundamental rights, and freedom of expression in particular*
- 4. Establish the appropriate supervision of online intermediaries and cooperation between authorities*

Problems

Societal and economic harms caused by the illegal activities online, insufficient protection of fundamental rights and other emerging risks

Legal barriers for digital services: preventing smaller companies from scaling up and creating advantages for large platforms, equipped to bear the costs

Ineffective supervision of digital services & insufficient administrative cooperation, creating hurdles for services and weakening the single market

Drivers

Private companies making fundamental decisions with significant impact on users and their rights, with important information asymmetries

Large platforms as public spaces

Expanding legal fragmentation when MS address the issues unilaterally

Legal uncertainty over the liability regime for intermediaries & disincentives to act

Ineffective and underused administrative cooperation mechanism & lack of trust between authorities

Specific Objectives

A safe online environment, with responsible and accountable behavior from digital services

Ensure the best conditions for innovative cross-border digital services to prosper

Empower users and protect and enhance fundamental rights online, and freedom of expression in particular

Enhanced supervision of digital services

General Objective

Ensure the functioning of the single market for digital services



5. Subsidiarity and proportionality

Subsidiarity

- Assessed in light of Art 5(3) TFEU: EU action where aims cannot be achieved by Member States alone.
- Necessity of EU action:
 - Costs of fragmentation hamper the provision of services cross-border, in particular for small service providers
- Added value of EU action:
 - Effectiveness in a joint-up approach
 - Legal certainty and reduced compliance costs
 - Efficiency gains in supervising digital services & effectiveness of interventions
 - Addressing issues related to service providers not established in the EU

Proportionality

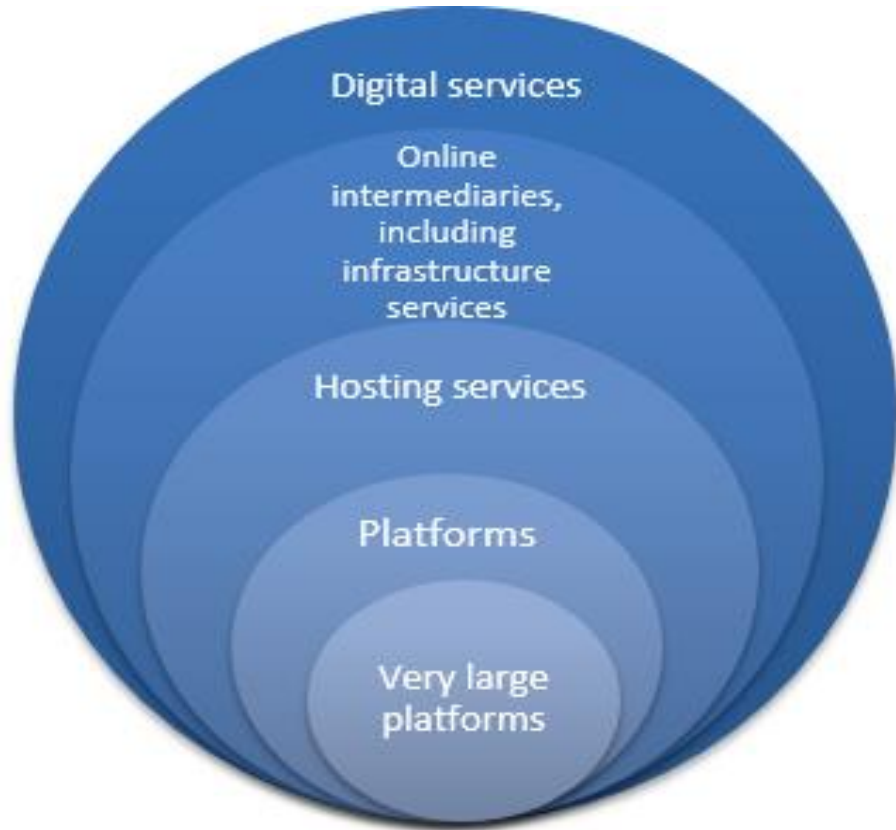


- Analysed for each of the three options.
- Balanced approach, approximating the necessary rules across the Single Market where the fragmented approach across Member States cannot address the problems
- The options complement but do not overlap with existing sector-specific instruments.

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6. Policy options

Four policy options



0. Baseline
1. Limited measures against illegal activities
2. Full harmonisation of measures
3. Asymmetric measures and EU governance

| | Baseline | Option 1 Limited measures against illegal activities | Option 2 Full harmonisation | Option 3 Asymmetric measures and EU governance |
|---------------|---|---|---|--|
| Due diligence | Soft law (Recommendation) Fragmented rules in some MS Sector-specific rules Some self-regulatory measures | Notice & action, know your business customer, transparency of content moderation, cooperation with authorities, clear terms and conditions including respect for fundamental rights | Advertising transparency | Enhanced responsibilities for very large platforms and co-regulatory approach |
| Liability | E-Commerce Directive & case law | | Removing disincentives for services to take action Court and administrative orders | Full harmonisation and clarification where a service cannot benefit from liability exemptions |

| | Baseline | Option 1 Limited measures against illegal activities | Option 2 Full harmonisation | Option 3 Asymmetric measures and EU governance |
|----------------------------|-------------------------------------|---|---|--|
| Supervision and governance | E-Commerce Directive & national law | Admin cooperation through 'Digital Clearing House' | Enhanced 'Digital Clearing House' Central 'coordinator' in each Member State | 3.A: EU Board as advisory committee 3.B: EU Board as decentralised agency |

Very large online platforms

- ‘Public spaces’ test: highest impact where large audience reached
- Most immediate, operational, objective and non-discriminatory proxy: number of users.
 - Benchmarked against other approaches at national level and around the world
 - Coherent with Digital Markets Act approach (but different scope)
 - Proportionality is important: all services covered by horizontal rules, but very large platforms pose particular concerns and risk management approach necessary
- Value set at 10% of the EU population (45 mil.), as a proxy value for the significant, systemic role and potential impact of such services.

Stakeholder views

Option 1: Limited measures against illegal activities

DUE DILIGENCE

- **Strong call for action** & convergence across all stakeholder groups
- Large majority wanted **all platforms** to be transparent about content policies (90%), support N&A mechanisms (85%), & request professional users to identify themselves clearly (86%)
- **Some highlights:**
 - Right holders & brands called for KYBC
 - Media & audiovisual associations argued for policies on trusted flaggers & repeat infringers
 - General public & civil society organizations emphasized challenges with automated content moderation
 - Start-ups asked for clear T&Cs and to develop best practices.
 - Businesses called for minimum information requirements for notices.

LIABILITY

- Strong convergence for maintaining the **conditional exemption from liability: necessary** for a fair balance between protecting fundamental rights & preserving the ability of existing operators and newcomers to scale.
- However, many stakeholders pointed to legal uncertainties.

SUPERVISION

- **Consensus:** improved cooperation between authorities is needed & emerging patchwork of legislation impedes on enforcers' ability to oversee DSM.
- **MS** flagged challenges of consumer protection authorities, pointed to a low level of awareness among enforcement bodies, lack of harmonization of EU law & the looming fragmentation of the single market.
- **Online intermediaries** emphasized the importance of coordination between national authorities & all actors involved.

Stakeholder views

Option 2: Full harmonisation

DUE DILIGENCE

- **In addition** to core obligations, various stakeholder groups were concerned about online advertising (e.g. lack of user empowerment, meaningful oversight & enforcement)
- **Users** demanded that **reporting** of deceptive ads should be facilitated.
- Other issues deemed as necessary relate to more **transparency** regarding the identity of the advertiser, how advertisements are personalized & targeted, & to the actions taken by ad intermediaries to minimize the diffusion of illegal ads & activities.
- Implementing **features** that explain why certain advertisements are shown to users were considered necessary.

LIABILITY

- Intermediaries, academic institutions, civil society organizations, start-ups: the current liability regime creates disincentives & clarifications are needed to **stimulate voluntarily measures** to detect illegal content
- **Start-ups** converge on the opinion that illegal content should be tackled **by all online platforms** regardless of their capacity, whereas **harmful but not illegal content should not** fall under this regime.
- Strong positions, especially but not limited to civil society associations, against **monitoring requirements** & the use of **automated tools** due to **significant risks to fundamental rights**

SUPERVISION

- **81% of respondents** called for a **cooperation mechanism** within MS across different competent authorities responsible for systematic supervision on online platforms & sectorial issues.
- MS & civil society organizations called for a **more formal regulatory framework** & pointed to risks related to the inability to provide effective supervision & enforcement.
- National authorities were in favor of **reinforced cooperation mechanisms**, some called for assessing the effectiveness of a **European agency**
- **80% of respondents** stated that a cooperation mechanism would need to have **swift procedures & assistance** across national competent authorities across MS.

Stakeholder views

Option 3: Asymmetric measures & EU governance

DUE DILIGENCE

- Many stakeholders stated that not all types of **legal obligations** should be put on all types of **platforms**, especially **start-ups** warned against effects of a **'one-size-fits-all'** approach.
- **72% of respondents** considered independent **system audits & risk assessments** as essential, especially when it comes to countering the spread of disinformation, as well as reporting & data access to researchers & regulators.
- Recurrent requests on **algorithmic accountability & transparency, as well as independent audits** on very large platforms, especially with regards to how content is prioritized & targeted.
- Users should receive more information & control over the content they interact with & digital rights associations think they should be able to **opt out** of micro-targeting & algorithmically curated content.
- **Online intermediaries** acknowledged the need for more transparency, but warned against possible implications e.g. on trade secrets.

LIABILITY

- Start-ups, telecommunication operators & new types of services in the internet stack, such as cloud services, CDN & DNS services, as well as other technical infrastructure providers, **called for clarifications in the liability regime of intermediaries**.
- Consumer organisations called for a **special liability regime for online market places**.

SUPERVISION

- Effective EU oversight is considered essential by most stakeholder groups & the majority favoured a **unified oversight entity** (66%).
- Business associations & companies stated that the **degree of oversight should vary depending on the services' obligations & related risks**.
- **Authorities** called for a coordination & technical assistance at EU-level for supervising & enforcing rules on online platforms.
- **Academic institutions & civil society organizations** showed concerns about the lack of adequate financial & human resources in competent authorities.

Discarded options

1. No horizontal EU action: continuing solely the sector-specific approach
2. Fundamental changes to the liability regime
3. Changing the prohibition on general monitoring obligations
4. Changes to the single market principle in the E-Commerce Directive
5. Prescriptive rules on content which is potentially harmful but not illegal
6. Governance structure: expert group
7. Governance structure: existing EU body



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7. Analysis of impacts

Economic impacts

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| <i>Impacts assessed</i> | <i>Baseline</i> | <i>Option 1</i> | <i>Option 2</i> | <i>Option 3</i> |
|--|-----------------|-----------------|-----------------|------------------------------------|
| <i>Economic impacts</i> | | | | |
| <i>Functioning of the Internal Market and competition</i> | ~ | + | ++ | +++ |
| <i>Costs and administrative burdens on digital services</i> | ~ | > | >> | >> ¹ / >>> ² |
| <i>Competitiveness, innovation, and investment</i> | ~ | + | ++ | +++ |
| <i>Costs for public authorities</i> | ~ | > | >> | >>> |
| <i>Trade, third countries and international relations</i> | ~ | + | + | + |

Functioning of the single market & competition

- All three options conceived to streamline **compliance costs** and facilitate the **scaling up of online platforms** and other intermediaries in the single market
 - Estimates (JRC): increase of cross-border digital trade between 1 and 1.8%.
- Options 2 & 3: **better cooperation between authorities** for cross-border concerns and more effective supervision and enforcement of rules online
- **Competition:**
 - Level playing field for all service providers in the single market
 - Option 3: asymmetric rules for very large platforms are non-discriminatory and generally proportionate to their capacity.

Competitiveness

- For **intermediary service providers** and online platforms:
 - Harmonised rules throughout the single market
 - Legal certainty through liability regime
 - Level playing field regardless of the place of establishment
- For businesses **intermediated**:
 - Substitution of illegal goods and services with legitimate businesses
 - Notice & action, trusted flaggers, dispute and redress provisions
- **Macro-level impact**: between EUR 38.6 (option 1) and EUR 82 billion (option 3)

Costs for services

- Increase with scale of (illegal) content hosted and user base:
 - in particular for notice& action: some fixed costs, but variable costs from volumes of notices and complaints can
- ...but with economies of scale from harmonised rules across the single market

| Obligations | Intervals of costs |
|---|--|
| Notice & action (and complaint mechanism) | Varies significantly. Estimates from EUR 15.000 to EUR 16 mil. |
| Specific obligations for very large platforms | Fixed costs: EUR 300.000 to EUR 3.5 mil Variable costs: one off & recurrent will depend |

- SMEs: small and micro-enterprises exempted from most costly obligations, but minimum requirements for N&A necessary in view of potential societal harms

Costs on public authorities

- Policy design for all three options:
 - better results, with cost savings
 - but, with the evolving role and impact of digital services in our economy and society, public expenditure and capability for supervision and enforcement will continue to be important.
- Option 1: process streamlining and efficiency gains
- Option 2: digital coordinator – centralising coordination expenses; better information flows
- Option 3: larger costs born at EU level, for efficiency gains and assistance to MS.

Estimates

| | Option 1 / Option 2 | Option 3 |
|---------------------------------------|---|---|
| Supervising due diligence obligations | Efficiencies: streamlining evidence and information in supervising services Costs: 0.5 – 25 FTEs | |
| Supervision of very large platforms | | Efficiencies: through transparency & data access obligations on platforms + mutual assistance Costs: in particular for inspections & audits (EUR 50.000 – 300.000) |
| Participation in EU Board | | 0.5-1 FTE |
| EU-level | | 3.A: 50FTEs+ EUR 25 mil. 3.B: 65 FTEs + EUR 30 mil. |

Trade, third countries and international relations

- Reduced illegal trade into the Union:
 - Know Your Business Customer obligations
 - Extension of due diligence obligations to all platforms with a significant presence in the Union, regardless of their establishment.
- Setting a global standard for the governance of issues emerging on online platforms, both in ensuring online safety and the protection of fundamental rights online.
- All measures considered are non-discriminatory and in line with the Union's GATS commitments.

Social impacts

| <i>Impacts assessed</i> | <i>Baseline</i> | <i>Option 1</i> | <i>Option 2</i> | <i>Option 3</i> |
|---|-----------------|-----------------|-----------------|-----------------|
| <i>Social impacts</i> | | | | |
| <i>Online safety</i> | ~ | + | ++ | +++ |
| <i>Enforcement and supervision by authorities</i> | ~ | + | ++ | +++ |
| <i>Fundamental and rights (as laid down in the EU Charter)</i> | | | | |
| <i>Freedom of expression (Art 11)</i> | ~ | + | ++ | +++ |
| <i>Non-discrimination, equality, dignity (Art 21, 23,1)</i> | ~ | + | ++ | +++ |
| <i>Private life and privacy of communications (Art 7)</i> | ~ | + | + | ++ |
| <i>Personal data protection (Article 8)</i> | ~ | ~ | ~ | ~ |
| <i>Rights of the child (Art 24)</i> | ~ | + | ++ | +++ |
| <i>Right to property (Art 17)</i> | ~ | + | + | + |
| <i>Freedom to conduct a business (Art 16)</i> | ~ | + | + | + |
| <i>User redress</i> | ~ | + | ++ | ++ |

Online safety

- The three options consider different regulatory approaches for ensuring online safety and tackling illegal content:
 - All three options: core measures through N&A, KYBC measures
 - Options 2 & 3:
 - removing disincentives for voluntary measures
 - clarity for cross-border orders
 - Option 3:
 - targeted risk management approach for very large platforms addressing a broader set of societal concerns
 - co-regulatory framework

Enforcement and supervision by authorities

- Enhancing supervision for the compliance of intermediary services with the new rules:
 - Due diligence obligations coupled with robust transparency requirements for service providers, enabling public scrutiny as well as supervision by authorities
 - Proportionate and dissuasive penalties
- Better enforcement online to tackle illegal content:
 - Option 2 & 3 harmonise conditions for orders from authorities, leading to better response from platforms and more legal certainty

Freedom of expression

Substantial improvements compared to the baseline, setting the highest standards of due diligence, due process and accountability

1. Mitigating risks of chilling effects on freedom of expression:
 - Due diligence in notice and action, accountability and supervision when automated content moderation is concerned
 - Information to users when content is removed, complaint and redress
 - In the third option: enhanced risk assessment and mitigation measures for how systemic risks very large platforms could pose on freedom of expression
2. Addressing online safety and the chilling effects on speech in environments where illegal content proliferates
3. Stimulating freedom to receive information and hold opinions
 - Transparency and user empowerment (in particular options 2 & 3)

User redress

- Step-change in ensuring that all users of online platforms have appropriate redress available:
 - Information to users
 - Internal complaint mechanisms
 - Out of court dispute mechanisms
 - Overall transparency on platforms' policies and decisions
- Corrects information asymmetries and empowers users of platforms, from citizens and consumers, to journalists and media publishers.

Other fundamental rights

- **Non-discrimination:** notable impacts of the risk management provisions in option 3
- **Protection of personal data, private life and privacy of communications:** all option constructed with appropriate safeguards
- **Rights of the child:** particularly impacted by an unsafe online environment, all three options cater for the protection of the rights of the child. Option 3 also addresses these concerns through risk management measures for very large platforms
- **Right to property:** all three options tackle violations of IPR; trade secrets remain protected
- **Freedom to conduct a business:** all obligations are proportionate

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Environmental impacts

Environmental impacts

- No net impacts observable on the environmental footprint of digital services following the obligations in either one of the options.
- Many illegal activities conducted online are, however, intensely polluting (e.g. counterfeit products, dangerous products).

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8. Comparison of options

Overall comparison

| | Effectiveness | Efficiency | | DMA | Coherence | |
|---------------------------------|---------------|------------|----------|-----|-------------------------------|---------------------|
| | | Costs | Benefits | | Sector-specific interventions | Internet principles |
| Baseline | ~ | ~ | ~ | ~ | ~ | ~ |
| Option 1 | + | > | + | + | + | + |
| Option 2 | ++ | >> | ++ | ++ | + | + |
| Option 3: Sub-option 3.A | +++ | >>> | +++ | +++ | + | + |
| Option 3: Sub-option 3.B | +++ | >>>> | ++++ | +++ | + | + |

Coherence

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- With the Digital Markets Act:
 - Complementary intervention, addressing different aspects in the provision of digital services in the single market
 - Some overlap in the material scope: some very large online platforms (DSA) will also be gatekeeper platforms (DMA)
- With sector-specific interventions:
 - AVMSD: complements and extends the provisions covering only video-sharing platforms
 - Copyright Directive: preserves the *lex specialis* approach
 - Platform-to-Business: alignment and complementarity with transparency provisions and complaint and redress mechanism

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9. Preferred option

Problems

Societal and economic harms caused by the illegal activities online, insufficient protection of fundamental rights and other emerging risks

Legal barriers for digital services: preventing smaller companies from scaling up and creating advantages for large platforms, equipped to bear the costs

Ineffective supervision of digital services & insufficient administrative cooperation, creating hurdles for services and weakening the single market

Drivers

Private companies making fundamental decisions with significant impact on users and their rights, with important information asymmetries

Large platforms as public spaces

Expanding legal fragmentation when MS address the issues unilaterally

Legal uncertainty over the liability regime for intermediaries & disincentives to act

Ineffective and underused administrative cooperation mechanism & lack of trust between authorities

Specific Objectives

A safe online environment, with responsible and accountable behavior from digital services

Empower users and protect and enhance fundamental rights online, and freedom of expression in particular

Ensure the best conditions for innovative cross-border digital services to prosper

Enhanced supervision of digital services

Preferred option: option 3

Harmonised due diligence obligations for online platforms with asymmetric obligations for very large services

Information to users and transparency obligations, with oversight from third parties & regulators

Clarifications in the liability regime for online intermediaries

EU Board and enhanced cooperation mechanism for Member States

| Section 1 | Section 2 | Section 3 | Section 4 |
|--|------------------|---|----------------------|
| INTERMEDIARIES | HOSTING SERVICES | ONLINE PLATFORMS | VERY LARGE PLATFORMS |
| Transparency reporting | | | |
| Requirements on terms of service and due account of fundamental rights | | | |
| Cooperation with national authorities following orders | | | |
| Points of contact and, where necessary, legal representative | | | |
| | | Notice and action and information obligations | |
| | | Complaint and redress mechanism and out of court dispute settlement | |
| | | Trusted flaggers | |
| | | Measures against abusive notices and counter-notices | |
| | | Vetting credentials of third party suppliers (“KYBC”) | |
| | | User-facing transparency of online advertising | |
| | | Risk management obligations | |
| | | External risk auditing and public accountability | |
| | | Transparency of recommender systems and user choice for access to information | |
| | | Data sharing with authorities and researchers | |
| | | Codes of conduct | |
| | | Crisis response cooperation | |

Due diligence obligations:

Option 3 of the IA

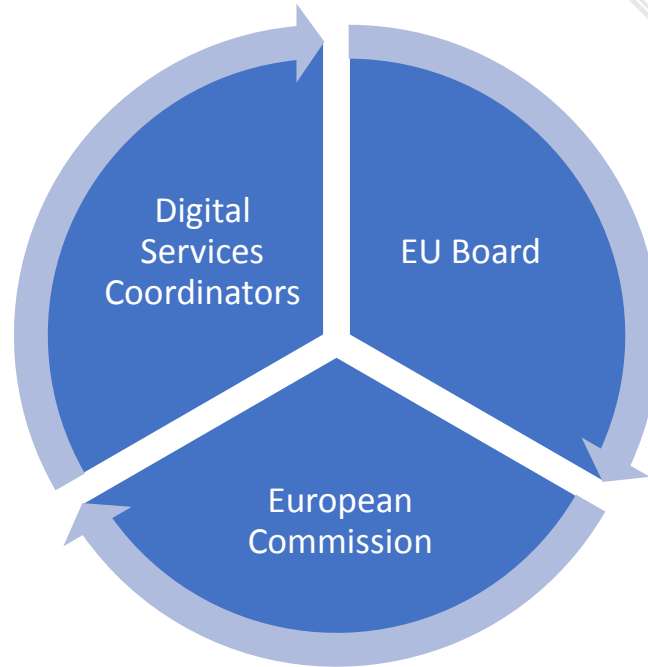
Chapter III of the proposal

Section 5

Governance structure in the preferred option

(Chapter IV of the proposal)

- Independent authorities
- Direct supervision of intermediaries
- Coordination with other national competent authorities
- Coordination and cooperation at EU level with Board, COM and other DSCs



- Independent advisory group
- Composed of Digital Services Coordinators and the Commission
- Advising DSCs and COM, recommending actions

- Escalation system where the EC can supervise and enforce the rules on very large platforms



10. Monitoring, transposition, compliance

Monitoring and evaluation

- Transparency obligations are core to the preferred option; they mark a step-change in the ability of public authorities to identify and monitor the evolution of societal risks online.
- Qualitative approach, with some quantitative indicators.
- Evaluation within 5 years and an assessment on the functioning of the Board in 3 years
- Regular reports from EU Board

| Specific objectives | Operational objectives | Examples of indicators |
|---|---|--|
| Best conditions for innovative, cross-border digital services to develop | Harmonised application of due diligence obligations for online platforms | Infringements Monitoring legal fragmentation Economic indicators for cross-border trade |
| | Legal certainty and consistency in enforcement with regard to the due diligence obligations and the legal clarity in the liability regime for online intermediaries | |
| | Mitigate and prevent further burdensome legal fragmentation for digital services | |
| Safe online environment, with responsible and accountable behaviour from digital services | Effective application of the due diligence obligations by service providers | MS and digital services reporting as per their obligations EU level cases KPIs from co-reg efforts (but no unattainable targets) |
| | Enable effective actions by law enforcement | |
| Empower users and protect fundamental rights online | Compliance from service providers with due diligence and transparency obligations | Number of complaints escalated through out of court dispute mechanisms Negative audits MS and digital services reporting |
| | Investigations, audits and data requests from authorities, researchers and independent auditors | |
| Appropriate supervision of digital services and cooperation between authorities | Effective supervision and enforcement by Member State of establishment | Avg. response time from DSC to requests Qualitative indicators from Digital Clearing House |
| | Responsive and effective cross-border cooperation | |

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11. Opinion of the Regulatory Scrutiny Board of the Commission

RSB scrutiny

- The IA report received a positive opinion with reservation from the Regulatory Scrutiny Board, following which several improvements were made:
 - further details on the coherence considerations with other EU instruments
 - further details in the presentation of the components of the policy options
 - additional data computed for estimating costs on service providers
 - more granularity in the presentation of stakeholder views.