

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE II ON THE FREE MOVEMENT OF CAPITAL AND SERVICES

EEA EFTA COMMENT

on the Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC - ([COM\(2020\) 825](#))

1. EXECUTIVE SUMMARY

- The EEA Agreement extends the Single Market to the EEA EFTA States (Iceland, Liechtenstein and Norway).
- The EEA EFTA States welcome the Commission's proposal for a Regulation on a Single Market for Digital Services (Digital Services Act, DSA), recognising the need to modernise the current legal framework in light of the growing importance of online intermediary services to our economy, society and democracy.
- The EEA EFTA States support the two-pronged objective of the DSA proposal in strengthening the Single Market for digital services to foster innovation and promoting a safer online environment for citizens in the European Economic Area (EEA).
- The EEA EFTA States are of the opinion that while illegal content should be removed effectively by online intermediaries across the EEA, it is important to uphold the right balance between the exercise of freedom of expression and removal of content online. The EEA EFTA States believe that safeguarding the main principles of the e-Commerce Directive remains essential to facilitate digital trade while protecting fundamental rights online.

- The EEA EFTA States agree with an asymmetric approach to new due diligence obligations in the DSA proposal but emphasise that there is a need to clarify the relationship between some of these obligations and the current limited liability regime under the e-Commerce Directive.
- With regard to targeted advertising, the EEA EFTA States would be in favour of additional safeguards regarding the use of recommender systems and profiling of consumers and micro-targeted advertising, in particular when directed at minors and vulnerable groups.
- The EEA EFTA States recognise that the DSA proposal needs to carefully balance the interests of businesses and consumers in the online economy. Regarding online marketplaces, the EEA EFTA States believe that the DSA should not only establish more responsibility but also ensure effective implementation and enforcement of relevant consumer protection rules and enable innovative enterprises to offer new services.
- The EEA EFTA States believe that the DSA should include an explicit safeguard to ensure that intermediary services may not, with reference to their terms and conditions, interfere with editorial content and services made available by editorial media. This safeguard should apply to all editorial media which bears editorial responsibility and complies with regulation consistent with EEA and national law.
- The EEA EFTA States consider that the mandate of the European Board for Digital Services (Board) should be clearly defined and limited to fulfilling advisory and supportive functions regarding the implementation of the DSA. They look forward to contributing to the work of the Board.

2. GENERAL REMARKS ON THE PROPOSAL

1. The EEA EFTA States welcome the Commission's proposal for a Regulation on a Single Market for Digital Services (Digital Services Act, DSA). The EEA EFTA States support the overall objectives of the proposal which are to improve the Single Market for digital services and to create a safer and more transparent online environment for citizens.
2. The EEA EFTA States share the concern that illegal content and harmful activities, including the sale of non-compliant and illegal products, continue to remain widespread on the internet. They agree that there is a need to modernise the current legal framework in light of technological developments and the impact online platforms have today on our economy, society and democracy.
3. The EEA EFTA States support the DSA proposal in clearly limiting the removal obligations for intermediary services to combating illegal content. Defining harmful and illegal content and related enforcement not already harmonised in the EEA should remain within the competence of Member States.

4. Safeguarding editorial freedom and media independence is of fundamental importance for public trust and a well-functioning democratic society. In order to promote freedom of expression and media pluralism, intermediary service providers must be required to refrain from content moderation, suspension, disabling of access to or otherwise interfere with editorial content and services made available by editorial media with reference to their terms and conditions.
5. With regard to harmful content and disinformation, the EEA EFTA States believe that voluntary mechanisms should remain the preferred solution. However, to further reduce harmful content and disinformation, the DSA should give stronger incentives to the providers to improve how they monitor their platforms. Furthermore, measures to protect against harmful content and disinformation should focus on the system design of the platforms and the systemic risks posed by the dissemination of such content. One of the EEA EFTA States has experienced that platforms which are signatories to the [Code of Practice on Disinformation](#) (Code) have distinguished between EU Member States and EFTA Member States with regard to its implementation. Therefore, the EEA EFTA States invite the European Commission, in cooperation with the EFTA Surveillance Authority when relevant, to encourage that the Code is adhered to by the platform signatories in the entire EEA.
6. The EEA EFTA States also encourage the European Commission to include them in all future activities under the European Democracy Action Plan.
7. The DSA proposal aims to preserve the key building blocks of Directive 2000/31/EC (e-Commerce Directive), such as the conditional liability exemption for online intermediaries and the prohibition of general monitoring. At the same time, the proposal introduces a new framework of graduated due diligence obligations that will apply asymmetrically to actors according to the size, nature and reach of the online services they provide. The EEA EFTA States strongly support that the key principles of the e-Commerce Directive should be maintained and agree with a graduated and proportional approach to new due diligence obligations.
8. The EEA EFTA States emphasise the importance of fostering digital innovation and competitiveness of the European online environment. Since the proposal extends the number of obligations to a wider range of enterprises, the aim should be to keep the administrative burden of those obligations to the strict minimum needed to achieve the objectives of the DSA.
9. The EEA EFTA States consider that the future DSA should carefully balance the interests of businesses and consumers. As experienced during the COVID-19 pandemic, online platforms can play a crucial role in ensuring that consumer protection rules, including those on product safety, are adhered to by businesses operating on their platforms. However, stricter rules on online marketplaces should be introduced to create a level playing field and ensure the principle of "what is illegal offline should also be illegal online". The EEA EFTA States are of the opinion that the DSA should not only

establish more responsibility in this respect but also ensure effective implementation and enforcement of the new rules.

3. REMARKS ON SPECIFIC PROVISIONS IN THE PROPOSAL

10. The EEA EFTA States welcome that the proposed DSA aims at harmonising all aspects of the notice and action procedures across the EEA, as a way to facilitate greater cross-border trade and digital growth within the EEA. In order to achieve legal certainty, however, there is a need to further clarify the scope for Member States to make national rules that complement the DSA. Within this context, the EEA EFTA States believe it should be explicitly stated in a recital that this act is without prejudice to national rules pursuing other legitimate interests, in compliance with Union law.
11. The EEA EFTA States take note of the new enforcement mechanism in Article 8 and 9, which allows national authorities to issue removal orders of a specific item of illegal content to providers established elsewhere, potentially also extending an order's applicability to the entire EEA. The EEA EFTA States support such a mechanism provided that the national law on which it is based is in conformity with Union law.
12. Whereas the DSA establishes notice and action procedures with general safeguards for freedom of expression and right of redress in Articles 14 and 15, the proposal does not include explicit safeguards against over-removals of certain types of content. The EEA EFTA States believe that there is a need for an explicit safeguard to ensure that intermediary services refrain from content moderation, suspension, disabling of access to or otherwise interfere with editorial content and services made available by editorial media with reference to their terms and conditions. This safeguard should apply to all editorial media which bears editorial responsibility and complies with regulation consistent with EEA and national law. Specific types of media services and media service providers are already defined at EEA level, such as "audiovisual media service" and "audiovisual media service provider" in Directive 2010/13/EU (Audiovisual Media Services Directive) and "press publication" in Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market. A definition of media service provider may build upon these definitions.
13. The EEA EFTA States consider that there is a need to further clarify in the DSA the relationship between some of the new obligations in Article 14 and 15 and the liability regime in Article 5 and 6. They emphasise that the due diligence obligations established by the DSA proposal should be understood as complementing and adding to the current system of liability exemptions as carried over from the e-Commerce Directive, without modifying the conditions under which intermediary services may benefit from a liability exemption. It should be made more explicit in the DSA that service providers which implement procedures and take action according to Article 14 and 15 would still be obliged to act expeditiously to remove or to disable access to illegal content, as set out in Articles 5 and 6, in order to enjoy exemption from liability.

14. Article 16 of the DSA proposal makes an exclusion for micro and small enterprises with regard to the additional obligations applicable to online platforms. Such enterprises are also exempt from the transparency reporting obligations in Article 13. The EEA EFTA States support measures to facilitate market entry for micro and small enterprises. Furthermore, since the DSA contains more detailed notice and action provisions for all hosting services in Article 14 and 15, care should be taken to ensure that the overall regulatory burden remains proportionate. The DSA needs to strike the right balance to achieve this aim while safeguarding fundamental rights, such as consumer protection, in all business to consumer relations.
15. The EEA EFTA States welcome the introduction of new transparency requirements for online advertising, including targeted advertising, in Article 24 and 30. The EEA EFTA States would be in favour of additional safeguards regarding the use of recommender systems and profiling of consumers and micro-targeted advertising, in particular when directed at minors and vulnerable groups. The EEA EFTA States, emphasise that there should be an explicit obligation for online platforms to avoid manipulative and deceptive practices and algorithm design patterns.
16. The EEA EFTA States welcome the introduction of the new requirement in Article 22 for online platforms to obtain and verify identification information from the traders prior to allowing them to use their services ('Know-Your-Business-Customer', KYBC). However, the EEA EFTA States believe that the KYBC obligation should be accompanied by a stricter obligation for online marketplaces to monitor compliance with product safety rules applicable in the EEA such as for toys and electrical equipment. In order to ensure enforcement, audit requirements for the monitoring architecture or spot-check procedures by online platforms could be introduced.
17. The EEA EFTA States recognise that within the platform economy a wide range of digital services providers have emerged in recent years. The requirements for when a service qualifies as an 'intermediary service provider' under the DSA should aim to provide the greatest possible legal certainty for new types of business models.
18. The EEA EFTA States support the de-centralised enforcement system in the DSA proposal, leaving direct supervision and enforcement by default to the national Digital Services Coordinators designated by the Member States. The EEA EFTA States further support that the Digital Service Coordinator of the country where the intermediary services providers are established should be in the lead of enforcement and investigations under the DSA. However, there may be a need to introduce additional mechanisms to ensure effective data sharing and involvement of authorities outside the county of establishment, building inter alia on the experiences from the enforcement of the General Data Protection Directive (GDPR).
19. The EEA EFTA States consider that the objectives and tasks of the European Board for Digital Services (Board) should be more clearly defined in Articles 47 and 49 respectively. The EEA EFTA States concur that the Board should primarily fulfil

advisory and supportive functions regarding the implementation of the DSA and look forward to contributing to the work of the Board.

20. Since the EEA Agreement extends the Single Market to the EEA EFTA States, Iceland, Liechtenstein and Norway remain dedicated to continuing as constructive partners in the ongoing legislative process regarding the DSA.
21. This EEA EFTA Comment is without prejudice to further comments from the EEA EFTA States on the DSA proposal.