

The EU Digital Services Act

ITI Views on the Inception Impact Assessments: Responsibilities, Gatekeepers Regulation and Competition tools

The Information Technology Industry Council (ITI) appreciates the opportunity to comment on the European Commission inception impact assessments and roadmaps on clarifying responsibilities for digital services, regulatory instruments for gatekeepers, and the new competition tool, that have been published in the context of the DSA consultation.

ITI is the global voice of the tech industry. Our member companies include leading innovation companies with worldwide value chains and active through all the segments of the technology sector. We therefore understand and recognise our shared responsibility to maintain a safe, inclusive, and innovative online environment, and support the commitment of policymakers to safeguarding citizens from harmful and illegal content online and maintain a well-functioning, competitive online ecosystem. It is paramount that all relevant players work together to ensure that the internet has sufficient protections for users, smaller businesses and brands.

As we noted in our [views for a framework for digital services](#), online intermediaries play a foundational role in driving innovation and growth in the economy, supporting the smooth operation of digital supply chains and creating market opportunities and access for businesses of all sizes. We appreciate that policymakers around the world are grappling with real challenges caused by the scale, speed, and complexity of various types of platforms and the roles they play.

As the notion of platform refers to very different business models, policymakers should consider the role that specific companies play in the markets they operate in, the value they create, their relationship to customers and competitors, and the possible alternatives. Grasping differences in business models and user interaction across digital platforms is key to gauging potential non-competitive conduct and properly addressing any challenges. The goal should be to **ensure market access for innovative challengers, ensure consumer welfare and economic efficiency, and focus on resolving proven market failures.**

Proportionate instruments that ensure a consistent policy approach and fair competition should be considered wherever necessary. Still, remedies would have to focus on the specific situation, and be preceded by a consideration of whether other, less radical alternative approaches would be effective. It would be difficult to enact a one-size-fits-all approach across all types of situations. Artificially constraining the size of a company or network may appear to increase competition, but it could also reduce consumer welfare. Policymakers should consider how to ensure that new market entrants are able to succeed, while not imposing rigid rules that disrupt the consumer experience or value that they receive from a platform.

We support the goals of the Digital Services Act to increase legal certainty, clarify roles, and define responsibilities for actors in the online context, i.a. by reviewing and bringing more clarity to the framework. We are committed to working with the European Institutions to forge a balanced framework preserving the current limited intermediaries' liability rules and rights of third parties, for a healthy online ecosystem, while clarifying where more legal certainty would be helpful. We support the

European Commission's thoughtful consideration of the existing legal principles underpinning the provision of digital services and products and acknowledging their importance for the economy at large.

While we understand these are initial assessments, the Roadmaps should further take into account the impact of existing regulation, namely the recently adopted Regulation for Fairness in Platform-to-Business Relations, the Audiovisual Media Services Directive and the Copyright Directive, as well as the Recommendation on measures to effectively tackle illegal content online, and competition, consumer and data protection rules. This large body of legislation must be taken into account in order to understand what, if any, gaps remain, and how to best resolve any remaining challenges.

The following sections provide ITI's specific comments on each of the inception impact assessments. We look forward to continuing to engage on these important and timely topics as the Commission advances the Digital Services Act.

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Comments on the Inception Impact Assessment on Deepening the Internal Market and clarifying responsibilities for digital services

We welcome the opportunity to comment on the European Commission's Inception Impact Assessment and Roadmap (abbreviated as IIA in the following) assessing different policy options for reforming the regulatory framework for digital services operating in Europe.

In our view, the ideal policy action would combine the following elements from the Commission's outlined policy scenarios for consideration:

Reviewing and enforcing existing legislation

We support the goals of increasing legal certainty, clarifying roles, and defining responsibilities for actors in the online context, i.a. by reviewing and bringing more clarity to the framework. We are committed to working with the European Institutions to forge a balanced framework preserving the current limited intermediaries' liability rules and rights of third parties, for a healthy online ecosystem. We support the European Commission's thoughtful consideration of the existing legal principles underpinning digital services and products and acknowledging their importance for the economy at large. We welcome plans to gather robust stakeholder input and develop well-tailored solutions for specific, well-defined challenges.

We believe that while there might be scope to improve the regulatory framework in a targeted fashion, existing legislation should be transposed and enforced first, before introducing new obligations for digital services. This includes the Recommendation on measures to effectively tackle illegal content online, the Copyright Directive and the Audiovisual Media Services Directive, as well as the Platform-to-Business (P2B) Regulation. For example, the 2019 P2B Regulation already introduced comprehensive reporting obligations for platforms. Instead of introducing new requirements, we urge policymakers to assess the workings of the P2B obligations at the occasion of the law's first review in 2022.

Rethinking approaches to illegal content online

Platforms have an important role to play in removing illegal content online, including proactive measures and **effective notice & takedown (N&T) systems**. Any future initiative on oversight of illegal content should focus on a company's role and its interaction with the content to identify the actors best placed to act. Differentiating where services may have the ability or right (contractual, legal or otherwise) to edit, moderate, or manage content versus where they have technical control but often no access or capability to alter or remove the data will be important criteria for properly scoping this regulation.

While intermediary service providers cannot be compelled by a Member State to provide general monitoring of content or activities, this does not imply that service providers cannot initiate certain proactive activities on their own. A number of service providers currently perform voluntary oversight activities to enforce their terms of service or to protect users. Companies need clear rules and responsibilities that do not disincentivise these proactive actions to limit distribution of illegal content online. We welcome the European Commission's acknowledgment that platforms can face a **dilemma when screening content with or without deploying automated tools to screen content** on their sites, as this might remove crucial liability protections. We would welcome that the European Commission's legislative approach considers options on how to alleviate this situation. Any "voluntary measures" that may be considered under possible options should be very clearly defined as to their scope and limits. For

example, the E-Commerce Directive (ECD) does not clarify that when an intermediary has voluntarily reviewed content or activities for a specific unlawfulness (or specific violation of community guidelines), it is not deemed to have knowledge of any other ways in which the reviewed content or activities might be unlawful. ITI recommends providing this clarity.

While we appreciate it is challenging to **define some types of illegal content at EU level such as those related to freedom of expression at the national level**, given this is the remit of the national legislatures and courts, we think such a definition is highly desirable and important to advance efforts of keeping the Internet a safe place for all. An attempt at achieving a harmonised definition would be to find minimum requirements that are universally agreeable to define illegal content based on existing court rulings at EU and national level as per the Commission's proposed approach.

While we acknowledge that differing cultural contexts and legal traditions in the Member States regarding freedom of expression may justify the need for specific measures, we fear that the growing tendency of some EU Member States to “go at it alone” and seek to enforce legislation targeting online content contrary to the Country-of Origin principle is worrying as differing national definitions of what is illegal, create a patchy legal framework that creates uncertainty for businesses and undermines the joint goal of all actors involved to reduce illegal content online.

Given the ongoing legislative initiatives launched by a number of Member States, there is value in exploring a **single EU-wide coordinated oversight model**, be it a body or a process within the current institutional setting, that would enhance legal certainty by providing guidance to consumers and companies, and help the latter take reasonable, feasible, and proportionate measures. The oversight mechanism should not interfere with responsibilities within the jurisdiction of the Courts. This model should be co-regulatory in nature, providing a consultative role for industry and civil society. Any oversight model should fully respect the Country-of-Origin principle.

Developing basic default criteria and guidelines for ‘notice-and-action’ systems

Currently, there are no harmonised reporting requirements in place for notices filed through platforms which delays notification procedures and adds burden for stakeholders using the processes. In order to foster greater convergence of reporting tools for different types of illegal goods, content, and services, we would welcome the introduction of **basic default criteria and guidelines for ‘notice-and-action’ systems into an EU-wide harmonised framework** referring to a number of vehicles including co-regulatory codes of conduct developed jointly by all involved stakeholders and the European Commission. Such codes of conduct would ensure that the best possible technological solutions (e.g. format for submitting complaints), are found for respective industrial sectors in a consultative manner involving all relevant industry stakeholders and can be more easily updated as technology develops.

Creating legal certainty around liability

We support the roadmap's intention to clarify and upgrade the liability and safety rules for digital services with a view to removing disincentives for voluntary actions to address illegal content, goods or services. There are countless types of digital platforms that offer different sorts of products and services, and the DSA should provide legal certainty in this constantly changing landscape. Clear rules and responsibilities that do not disincentivise companies' actions to limit distribution of illegal content online while being flexible enough to allow for innovative solutions are crucial.

Tackling harmful content online

The differentiation between illegal and harmful content needs to be maintained. Regulatory efforts should focus on illegal content as defined by existing law – including both civil and criminal infringements, with no distinction being made in the application of the liability rules. **Harmful, but not illegal, content** should continue to be addressed separately through voluntary or co-regulatory approaches, in line with solutions foreseen for instance in the Audiovisual Media Services Directive. For example, we welcome the continued efforts to work jointly with the European Commission and industry players on the [EU code of conduct on countering illegal hate speech online](#). The decision on whether content is harmful and should be removed is greatly influenced by regional or national cultural context. Policymakers should cooperate with companies to develop harmonious solutions vis-a-vis harmful content that fit a certain society through self-regulatory or co-regulatory approaches that promote trust between companies, policymakers and users, and support innovation. We are keen to explore the idea of an **EU-wide project to try and define harmful content online and find regulatory solutions** in conjunction with existing case law and in close cooperation with EU regulators and industry to address these challenges.

Promoting accountability & transparency

‘Know your customer’ (KYC) schemes for commercial users of marketplaces are an interesting idea that, if developed and implemented in a way that does not introduce disproportionate or burdensome obligations on the parties involved, could create a positive scenario for improving accountability. KYC schemes could for example be helpful to combat fraud and counterfeit products being sold online thereby enhancing consumer protection. Several online marketplaces are already conducting background checks of their sellers on a voluntary basis. The potential introduction of a KYC scheme should consider that the digital services landscape is multifaceted, and a variety of actors would be subject to potential new obligations. There can be challenges in identifying professional users (e.g. limited access to freely available digitized public records at scale), holding up SMEs from accessing services pending clearance. Disproportionate KYC schemes, that could impact the flexible “pay-as-you-go” model on which many cloud-based software or infrastructure services are based, should be avoided if they discourage companies, particularly SMEs, from moving to the cloud. Any potential KYC measures should also be proportionate, tailored to the variety of business models involved, and developed in collaboration with stakeholders. We also encourage the introduction of a harmonised definition at EU level of what constitutes a business customer as national definitions are currently diverging or absent in some Member States.

While the Commission reflects on the potential increased costs for public authorities to ensure enforcement and cooperation, it should consider the **significant costs that companies would incur** if new obligations such as **independent audits** and **reporting obligations** would come into effect, and alternative approaches. These costs need to be carefully weighed with the benefits that regulatory action could bring for European consumers.

Addressing new challenges posed by operators from third countries

Ill-intentioned traders selling fake or unsafe products in the EU market put the safety of European citizens at stake and reduce trust in the online economy. Customs authorities are equipped with the power to seize products breaching EU health and safety requirements. However, customs authorities are often unable to verify products due to a heavy workload as well as a lack of resources, training and expertise. For cases involving several customs authorities from different EU Member States, language barriers can further complicate cooperation. Advanced electronic data for postal shipments would enable risk profiling

and screening ahead of arrival or even before being cleared for dispatch. Additional investment in enforcement against bad actors when goods are discovered should be a priority.

We encourage the Commission to explore what workable and proportionate measures that online intermediaries can take, in conjunction with retailers, brands, customs authorities and other stakeholders, to ensure that products sold online in the EU are genuine and comply with relevant EU rules.

Separating discussions on online advertising from the DSA

We acknowledge the European Commission's interest in better understanding how online advertisement is impacting European consumers. It is important to note that the online advertising ecosystem encompasses a large range of actors including whole industries, third party advertising agencies and publishers who all rely heavily on revenues generated via the online advertising business. We therefore suggest separating the discussions on online advertising and the DSA, as online advertising issues fall outside of the scope of an effort aimed at content oversight and intermediary liability and risk impacting a broad range of industries that are currently grappling with the economic impact of the COVID-19 crisis and increasingly relying on digital platforms as vehicles to reach customers.

Increasing effective cooperation between all actors involved

We also believe that boosting **enforcement capabilities**, especially in the Member States and for relevant authorities, is a crucial step towards reducing proliferation of counterfeit goods. Currently, there are hundreds of customs authorities and domestic law enforcement agencies across Europe that do not successfully cooperate, in many instances due to a lack of personnel and resources more broadly, as well as due to language barriers. A refocusing of priorities for enforcers and an increase in resources to enable them to act effectively against counterfeiting, including through the power of issuing meaningful sanctions should be a central part of a renewed agenda on this topic. Further, cooperation between all stakeholders in the process needs to be advanced, in particular between digital service providers, authorities and IP rights holders.

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Comments on the Inception Impact Assessment on Ex Ante Regulatory Instruments for Large Online Platforms Acting as Gatekeepers

ITI welcomes the opportunity to share key considerations and insights on the European Commission's inception impact assessment on ex ante regulatory instruments for large online platforms acting as gatekeepers.

We appreciate the recognition of the impact assessment that platforms have played an indispensable role in driving innovation and growth in the economy, creating market opportunities and access for businesses of all sizes. In pursuing this initiative, we recognize that the EU must carefully consider how to ensure that it protects important public interests, including consumer welfare, the right to do business, and prevention of anti-competitive behaviour. Because there has been significant innovation in this space, both in spite of and enabled by large platforms, any *ex ante* regulation should be carefully considered and appropriately targeted.

Internet platforms are transversal actors across a global economy and supported by complex supply chains. As the internet allows consumers to increasingly benefit from fully integrated products and services, it also creates diverse types of relationships between different suppliers. As the Commission considers these relationships and market characteristics, we urge recognition of the flexibility that has enabled the internet economy to flourish and allow citizens, businesses, governments, and consumers to connect with each other and others in remarkable ways.

ITI also appreciates the efforts that went into the platform to business (P2B) regulation just last year, and we look forward to participating in the first review of the P2B regulation in August 2022. As this consultation and effort moves forward, we recognize that the P2B regulation is just newly in force, and it will be difficult to assess which items may or may not be working well and where new or altered regulations may be needed.

The impact assessment notes the important role of network effects, which is an essential factor in the online ecosystem. Network effects bring additional benefits to users with each additional user that participates in a platform, but it does not necessarily eliminate competitors, lock in users, or stifle innovation. In fact, many companies see the network effects of online platforms as highly beneficial in helping small businesses be discovered by more people. However, the impact assessment fails to identify how strong network effects necessarily create a market failure, bargaining imbalance, or other need for correction.

As the European Commission advances this assessment, we encourage consideration of the following factors:

Scope

The scope of this effort will be extremely important, as which companies may be considered gatekeepers and therefore subject to potential additional regulations will have significant impact on the ecosystem. The nature of a platform and its size should not automatically be perceived as harmful, particularly given the demonstrated benefits the platform economy brings to all users, including to deliver trust, reach and efficiencies. We therefore encourage the Commission to consider focusing the scope and test for intervention on particular actions and conduct, rather than companies. The characteristics of a market, specific activities by a platform, and interactions with other platforms and with users will be more

indicative of a potential market failure than just the characteristics of a particular platform, such as market share, number of users, or number of services offered.

Similarly, it is important to consider how gatekeeper definitions may apply to companies with multiple verticals. For example, a company may have a dominant position in one area, such as social media, e-commerce, or music streaming, but also compete as a smaller player with large platforms that dominate other verticals. The roadmap should focus on specific conduct and actions, rather than the size of one or more business units. Furthermore, the variegated nature of online platforms and the incentives driving specific decisions by platforms must be taken into account when assessing conduct. An incentive to protect the user against fraud, data violations or security threats might be to the immediate detriment of specific business users, while sustaining consumer trust to the benefit of all users.

The roadmap refers to certain platforms having become or acting as “gatekeepers” but does not actually clarify what that entails and what the potential consumer harm is. **One should not single out certain companies based exclusively on their size (market share, number of users, amount of services...) or impact.** It is unclear how this approach would help alleviate competitive concerns that cannot already be addressed by existing instruments. To the contrary, there is a risk of discouraging growth beyond a certain threshold due to the increased burden of compliance with additional legal obligations.

Interplay of Regulations

As identified in the impact assessment, this consultation sits at the intersection of several initiatives that are already in place or also in consultation, such as P2B, the new competition tool, and various consumer protection and data privacy laws. Due consideration should be given to this consultation as to whether these themes are already adequately captured by those efforts, so as to avoid duplication, confusion, or negative impacts on the marketplace.

It will be important for the Commission to give the still new P2B regulation time to come into effect and be evaluated for where it is or is not successful, and what, if any, alterations may be necessary to strengthen or improve it. Adding new requirements, or building upon those already in the P2B regulation, without first assessing how they are working, could create additional challenges, costs, and harms to both platforms and consumers. Any new initiative should align with existing rules, especially those in the P2B regulation.

Similarly, we urge the Commission to consider how this potential regulation and the NCT may overlap or create similar or duplicative burdens for companies. Legal certainty is critical for companies of all sizes, and the Commission should ensure that companies, including gatekeepers, have a clear legal environment in which to operate.

Transparency and Emerging Practices Limitations

Options 1 and 2 of the impact assessment note a number of potential practices that could be reviewed, limited, or prohibited, as well as new transparency requirements that may be added to gatekeeper platforms. We recognize the challenge in creating *ex ante* restrictions or limitations, as the Commission does not want to create unintended consequences that could needlessly hamper innovation, consumer experiences, or business growth. We urge the Commission to carefully consider the impact of potential limitations, in order to prevent any regulatory failure from overbroad instruments or poorly tailored requirements. Any potential limitation to behavior or business practices should be narrowly focused to achieve the intended goal. Similarly, the Commission’s proposal should reflect the importance of proportionality for a regulation based on the action or conduct deemed inappropriate.

Prohibited Practices

The consultation notes in Option 3 the potential to develop *ex ante* regulations, including a 'blacklist' of prohibited practices. This approach would require very careful consideration in relation to a dynamic industry that has multiple business models, types of users, types of business partners, and existing tools in place to address the issues at stake. Any new regulation should take into account how business users interact with and benefit from greater transparency and communication with online intermediation services.

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Comments on the Inception Impact Assessment on the New Competition Tool

ITI strongly supports free and undistorted competition as key to promoting innovation and consumer welfare. The tech community is committed to addressing challenges arising from technological change globally and in the EU.

ITI is resolutely in favour of this reflection process as part of a broader policy debate about the need for changes to the current competition law framework in order to allow interventions that preserve competitive markets. Proportionate instruments that ensure a consistent policy approach and fair competition should be considered wherever necessary. However, **we do not believe the options presented in the NCT roadmap are commensurate to the potential challenges** that have been described in the consultation.

Problem definition and market analysis

The new Competition Tool (“NCT”) roadmap refers to the existence of structural competition problems that cannot be tackled under the EU competition rules while resulting in inefficient market outcomes, but more evidence supporting this statement would probably be needed. While competition challenges may exist, further consideration should be given to the fact that by **reducing entry barriers and making it easier for small suppliers to reach new customers**, innovative technologies and businesses benefit consumers by offering new services and increasing competition and economic efficiencies in innumerable fields. By doing so, they offer major opportunities to start-ups and SMEs, who can grow more and faster than they would otherwise do, underpinning future European prosperity.

While we understand this is an inception assessment, we would welcome a deeper reflection by the Commission on the problem definition and market analysis to support the introduction of such sweeping measures. For example, deeper analysis of **network effects** is needed – markets are not necessarily less competitive or less innovative, as there are several **medium and smaller platforms that continue to help customers reach a wide range of goods and services**. This is particularly relevant as regards the roadmap’s assumption that intervention at national level would not be effective, as it is not infrequent that the competitive balance varies significantly in some Member States’ markets where local platforms play a very strong role. Finally, competitive dynamics across **platforms offering different core services** to the same customers should also be assessed. Grasping differences in business models and user interaction across **digital platforms** is key to gauging potential non-competitive conduct and properly addressing any challenges.

Addressing specific competition challenges vs. structural risks to competition

In the case of specific concerns is referred to in the roadmap – like tacit collusion, or the growing availability of algorithm-based technological solutions that may facilitate the monitoring of competitors’ conduct – we believe these could and should be addressed by more targeted measures. In any case, we fundamentally believe **any remedy should seek to address specific unlawful conduct or a systemic problem in the market, not focus on the actors and the characteristics of a type of company**.

The roadmap also refers to certain platforms having become or acting as “**gatekeepers**” but does not actually clarify what that entails and what the potential consumer harm is. We refer to our previous comments on the Gatekeepers roadmap in this regard.

The roadmap's section describing the problems the initiative aims to tackle refers in particular to structural *risks* to competition, presumably in the future and particularly for tipping markets. According to the roadmap, these could be prevented by "earlier intervention." It is however difficult to conceive how this type of intervention by a public enforcement authority, in absence of a well-identified infringement of existing laws, can be deemed compatible with a market economy.

While the objectives of the roadmap refer to the importance of restoring *undistorted* competition, the policy approach presented seems to address situations where competition has not been distorted yet, and would rather require regulators to *predict* the future development of a market – based on the assumption that competition law remedies based on addressing an illegal conduct that has taken place would not be sufficient.

Specific comments on the options presented

All of the options in the roadmap would constitute a major shift from the current European Competition law setting, based on enforcement of articles 101 and 102 TFEU, which have served the European single market well for the past nearly 60+ years, during which it has undergone deep scrutiny by the European Courts, demonstrating it is both durable and sufficiently flexible to address new challenges.

Focus on a company's conduct

Enforcement should focus on a company's conduct and not on structural issues, like the amount of data a company holds, or its size. Nevertheless, *all of the options under consideration would allow the European Commission to impose behavioural or structural remedies even in absence of any infringement.*

In addition, the roadmap does not provide any indication as to what kind of behavioural or structural remedies would be deemed appropriate for application to a business that has not been infringing any rules. As a bare minimum, if a new tool were to be introduced, it should be subject to the highest burden of proof threshold, to demonstrate that any remedy is underpinned by robust economic analysis.

Also, competition policy enforcement should focus in particular on **consumer welfare**, not on protecting competitors. For example, artificially constraining the size of a company or network may appear to increase competition, but it could also reduce consumer welfare. Policymakers should consider how to ensure that new market entrants are able to succeed, ensuring markets remain open to innovative challengers, while not imposing rigid rules that disrupt the consumer experience or value that they receive from a business, therefore keeping consumer welfare and economic efficiency as final objectives.

Scope

As regards the differentiations in **scope**, based on the current level of development of thinking in the roadmap, the difference between horizontal (options 1 and 3) vs limited scope does not seem particularly meaningful, since even when the scope would be limited in principle, the tool could be applied to digital markets, as well as other markets identified by the Commission. This being said, it is our perspective that if such a tool would ever be enacted, it should be based on rigorous application across sectors so that any potential benefits apply across various markets.

Lack of dominance

Provided that all of the options are in our view unjustified given the potential application absent any infringement, options 3 and 4 appear to be particularly problematic as they would allow the Commission to apply behavioural and structural remedies even without a requirement to demonstrate dominance.

Proportionality and consideration of other options and initiatives

Finally, the Commission should also take into account the overall proportionality of the parallel consideration of both an *ex ante* regulatory intervention about “gatekeepers” and the potential introduction of broad-ranging *ex-post* remedies, that are meant to address similar concerns.

While in principle ITI would rather be in favour of a targeted approach, addressing specific, individual situations that are negatively affecting competition, we do not believe the current options presented in the NCT roadmap can provide an appropriate basis for that approach. We stand ready to work with the Commission to better scope any emerging challenge and identify the most appropriate way forward.

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