The Digital Services Act

Context

In her Presidential candidacy speech Ursula von der Leyen announced the Commission should propose a new Digital Services Act (DSA), which she claims "will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market."

While there is still a lack of clarity on the form and contents of the DSA, it is understood that the DSA will be based upon a revision of the e-Commerce Directive (Directive 2000/31/EC), despite the Commission acknowledging that the directive is fit for purpose and does not require revision as recently as 2016. The e-Commerce Directive has been key to the growth of e-commerce in the EU for the past two decades. Nevertheless, given how fast the online economy has evolved, the Commission claims that rules governing the online provision and purchase of goods and services must be revised

This led to a plethora of legislation coming through the EU over the last legislature, key of which were the:

- Audio Visual Media Services (AVMS) Directive
- Copyright Directive
- Platform-to-business Regulation
- Market surveillance Regulation
- Geo-blocking Regulation
- Revision of the Consumer laws

It is crucial that all these very recent laws are takin into consideration before taking further action.

Looking back to the e-Commerce Directive

The following e-Commerce Directive provisions have been key to the barrier-free trade in information society services[1] in the Single Market:

- **Article 1 (1)** establishing the objective of the Directive: to ensure the free movement of information society services
- **Article 3 (2)** establishing one of the cornerstones of the Directive – country-of-origin principle (where a service that is performed in one state and received in another then the law of the state from where the service was performed from applies)
- **Article 3 (6)** on the Commission's possibility to check the compatibility of measures introduced by Member States with EU law. This ensures that the Commission has oversight to keep barriers within the Single Market to a minimum

[1] **What is an information society service?** The e-Commerce Cirective defines an information society service as any service normally provided for remuneration, at a distance (without parties being simultaneously present), by electronic means and at the individual request of a recipient of services.

It is expected that this definition will be broadened by the Digital Services Act to include a larger amount of services.

- **Article 4** prohibiting Member States to require authorisation (or equivalent) to the provision of services: one of the most important principles guaranteeing deeper integration of the single market
- **Article 9** on validity of contracts concluded by electronic means. It lays out provisions that guarantee electronic contract validity across the EU
- Information requirements placed on information society services out under **Articles 5, 6 and 10** which are proportionate to the attainment of the Directive's objectives

European Commission Public Consultation

In September 2020, the MBB submitted a reply to the European Commission's public consultation on the Digital Services Act. The reply was formed based upon the results of a survey circulated among the membership of the parent organisations, focusing mainly upon the governance of the digital single market.

From the replies to the survey, it is clear that the lack of coordination between member states' authorities on regulatory and legal issues is probably the current biggest obstacle to increasing the provision of goods and services across borders. Another issue highlighted was the lack of available information on procedures and requirements; contact points; timelines; detailed accounts of cases and outcomes (including fines and disciplinary action); clear information on the remit, authority, and enforcement powers of regulatory bodies. It was also noted that adherence to transparency principles was very much lacking by national regulatory bodies. In addition, it was also lamented that sometimes, a few of these bodies are not fit to carry out their duties, due to an apparent lack of legal, technical, administrative and customer care capabilities, as well as a clear absence of commercial knowhow of day-to-day business relevant to particular sectors. It is acknowledged that sometimes the expertise is indeed there, but cooperation between member states is either not apparent, extremely limited, or even non-existent. Cases get even more messy due to the different legal requirements between Member States and the lengthy duration of disputes. Every Member State handles consumer protection differently, and this is getting harder and harder to comply with.

The need to ensure similar supervision of digital services provided to EU users by providers established outside the EU was also a sticking point in our research. It is not acceptable that non-EU service providers can offer services in the EU without needing to comply with the same obligations as EU providers. Supervision in this area could be set up through a mechanism consisting of automated monitoring with the ability to block IP addresses in the EU if service providers are found to not be in compliance with EU and Member States regulations.

It is for the above reasons that the most feasible solution, which was almost unanimously supported by our members, is the creation of a Single EU Authority, that is the final decision maker in this field, with over-arching competence and powers to enforce the legal principles that allow for the proper functioning of the Single Market. We believe this Authority should be responsible for both the Digital Single Market and the Single Market, compatible with our long-standing belief that the Single Digital Market should be considered as a single structure whether online or offline. In addition, non-EU providers should be obliged to register with the single EU authority potentially foreseen for governance in this area, with this Single Authority ultimately responsible for monitoring compliance. The Single Authority should also partner up with the third country competent authorities to ensure proper coordination and transparency.

Finally, on the country of origin principle, we are completely against it being touched upon in any way. We completely reject any protectionist notions that may undermine the benefits that the Single Market brings to EU citizens and businesses. At a worst case scenario, if changes must be made, they must be in the form of fine-tuning only for the specific purpose of bringing it up to date with today's economic realities to ensure a fair level playing field, and even then it should be handled in an extremely delicate manner. Sufficient assessment as to its impact should be ensured, while undesirable spill-over effects must be avoided at all costs in order to guarantee the proper functioning of the Single Market. In addition, the principle of proportionality should be respected at all decision making levels, be it European or national, and the principle itself should be enforced to ensure that any legislation introduced by Member States for reasons of public interest do not go beyond what is necessary to achieve the public interest objective.

MBB Reaction to Commission Proposal for a Regulation

Country of Origin Principle/Internal market clause

We support upholding the country of origin principle in its current format, and would even prefer its strengthening to ensure the proper functioning of the Single Market. It is an open secret that Member States have abused the privilege of derogating from the country of origin principle as set out in Art 3.4 of the E-commerce directive. Member States often derogate from the country of origin principle for disproportionate reasons, leading to unacceptable fragmentation in the single market.

We are highly concerned that the DSA presents risks of further fragmentation of the single market by permitting Member States to define at national level what is illegal online in Art 2.g, which could risk differing interpretations and implementation over this critical element which underpins the entire legislation. Articles 8 and 9 are clearly not compatible with the Country of Origin Principle. In these two articles it is not clear who is issuing the relevant orders, which will create uncertainty. The legal drafting itself lacks clarity. While the DSA is without prejudice to the E-Commerce Directive, from our interpretation Recital 33 of the DSA says that the internal market clause doesn't apply for in respect of orders to act against illegal content and to provide information. While the commission provides a justification in this recital, basically saying that orders to act against illegal content do not constitute restrictions to the freedom to provide services across borders, we feel that this is a slippery slope that is leaving the door open for Member States to use it from disproportionate reasons, causing even further fragmentation.

We believe that this issue could be solved by removing the reference to national law in Art 2.g, and thus limiting the definition to existing and future EU law, thus limiting the ability for Member States to create further fragmentation in the single market.

In general, the application of the country of origin principle needs to be examined closely as to whether derogations being applied are proportionate to achieve Member States' public interest objectives.

Due Diligence and enforcement

We are provisionally supportive of the due diligence obligations found in Chapter III. However, it must be pointed out that the biggest thread to business users is illegal goods (counterfeit and dangerous products) rather than content. As such, we would prefer the proposal to be designed on focusing on

illegal goods online as a priority, in particular with regards to digital service providers that allow third country goods access to the single market.

We also would like to see more dialogue between market surveillance authorities and the platforms. For example, when illegal content is flagged as illegal, the platform must provide reasons, including the legal basis according to Article 15. The platform may not always be aware of the specifics. In addition, should illegal content be reposted, it is not clear if a platform should need to provide the reasons again, and if so, it should definitely not be the case.

On enforcement, Digital Services Coordinators and the Commission should be granted appropriate powers to effectively enforce the regulation. We would also like to point out that market surveillance authorities are already lacking the necessary resources to carry out their current obligations. Legal obligations should be put up on the Member States to adequately fund the competent authorities to carry out existing tasks, as well as the tasks that are set within this regulation.

We have some concerns due to the possible way supply chains may be affected through the powers of investigation granted to Digital Services Coordinators under Article 31. More legal certainty is needed for the powers which are granted to authorities to investigated third parties that are in business relations with digital service providers covered under this Regulation. It is unclear what exactly these third parties be asked and on what basis. It is pertinent to remember that many of these third parties will be SMEs, therefore enforcement measures pursuant to investigations due to mistaken or untimely responses should be proportionate.