



Digital services act

European added value assessment

STUDY

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Digital services act

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This European added value assessment (EAVA) analyses the potential added value that could be achieved by enhancing the current EU regulatory framework on digital services. The scope of the EAVA includes an analysis of the e-Commerce Directive and more broadly of commercial and civil law rules applicable to commercial entities operating online. Based on the comparative legal analysis, the assessment identifies **22 main gaps and risks that currently affect provision of online services in the EU** and proposes policy solutions to address these shortcomings. In order to assess the European added value (EAV) quantitatively and qualitatively, the gaps and policy solutions identified are clustered into four policy packages: **consumer protection measures, action on content management and curation, measures to facilitate competition in online platform ecosystems, and actions to enhance enforcement and legal coherence.**

The results of the macroeconomic-modelling, for two of the four policy packages, suggests that taking **common EU action to enhance consumer protection and common e-commerce rules, as well as to create a framework for content management and curation** that guarantees business competitiveness and protection of rights and freedoms, would potentially add at least **€76 billion to EU gross domestic product between 2020 and 2030**. This quantitative estimate provides a lower boundary for direct economic impacts, and does not quantify or monetise the EAV of qualitative criteria, such as consumer protection, coherence of the legal system or fundamental rights. Therefore, the overall European added value of improving the functioning of the single market and adapting commercial and civil law rules for commercial entities operating online, as indicated by qualitative analysis, would be considerably higher.

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The first annexed research paper on a quantitative assessment of the European added value of the digital services act has been written by Carlota Tarin, Juan Pablo Villar, Julio Blázquez Soria (Idaves S.L.) Cornelia Suta, Unnada Chewpreecha, Bence Kiss-Dobronyi, Anthony Barker (Cambridge Econometrics BV). The second annexed research paper on the Digital services act: Adapting commercial and civil law rules for commercial entities operating online: legal assessment, has been written by Prof. Gerald Spindler (University of Goettingen/Germany). The third annexed research paper on the Digital services act: Improving the functioning of the single market, has been written by Prof. Jan Bernd Nordemann (Humboldt University Berlin and law firm NORDEMANN) with the support of Dr Julian Waiblinger (University of Potsdam and the law firm NORDEMANN), all three at the request of the European Added Value Unit (EPRS).

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Executive summary

Background

E-commerce has become an indispensable feature both of the economy, particularly for the services sector, and of consumers' shopping habits. It helps EU citizens to access services more easily and quickly and businesses to reach customers in a more targeted and direct way. The legal framework provided by the e-Commerce Directive – set up 20 years ago – has been an important pillar for digital services. However, despite the success story of the e-Commerce Directive, the need to amend the current regulation is now widely accepted – in both private and public sectors, by consumers and fundamental rights organisations, and is part of debates around technology and science. Concerns range from the need to do more to protect social and fundamental rights, strengthen consumer trust and foster a level playing field for European services. The current coronavirus pandemic has meanwhile highlighted the benefits and downsides of e-commerce still further.

Why should the EU act?

There is a clear need for action at EU level. The existing legal framework, as discussed in Chapter 3, has a number of gaps and risks that negatively impact provision of digital services in the internal market. These issues include: fragmentation of national regulation within the EU; weak enforcement and cooperation between Member States; differing Member State rules on protection of consumers and businesses using digital services; and market entry barriers. Moreover, the work of balancing fundamental rights and principles with the freedoms of the single market is often left to the national courts, again leading to differentiated, fragmented solutions.

The European Parliament can ask the European Commission to take legislative action (Article 225 of the Treaty on the Functioning of the European Union, TFEU). To this end, Parliament adopts legislative-initiative reports (INL), which are accompanied by a European added value assessment (EAVA). This specific EAVA analyses the added value to be achieved through a digital services act introduced at EU level. It supports the legislative-initiative reports (INL) of the European Parliament on (i) the Digital services act: Adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL)) and (ii) the Digital services act: Improving the functioning of the single market (2020/2018(INL)) prepared by (i) the Legal Affairs Committee (JURI) and (ii) the Committee on the Internal Market and Consumer Protection (IMCO). For the legal and economic evaluation, three external studies were commissioned. Those can be found as annexes to this paper.

Scope of the assessment

The scope of the EAVA includes an analysis of the e-Commerce Directive (ECD) and more broadly of commercial and civil law rules applicable to commercial entities operating online. On the basis of the comparative legal analysis, the assessment identifies gaps and risks currently affecting provision of online services in the EU and proposes policy solutions to address these shortcomings. In order to assess the European added value (EAV) quantitatively and qualitatively, the gaps and policy solutions identified based on the legal analysis are clustered into four policy packages: consumer protection measures, action on content management and curation, measures to facilitate competition in online platform ecosystems, and actions to enhance enforcement and legal coherence (see Table 1 below).

Table 1 – Summary of policy options and policy actions identified

	Policy package	Policy actions*
1	Enhanced consumer protection and common e-commerce rules	<ol style="list-style-type: none"> 1. Fair and transparent contract terms and general conditions for business partners and consumers. 2. Reinforced minimum information requirements for commercial communications. 3. Increased transparency of commercial communications. 4. Extension of scope of the ECD to service providers from non-EU countries. 5. Limitations on intrusiveness of advertising.
2	Creation of a framework for content management and curation that guarantees the protection of rights and freedoms	<ol style="list-style-type: none"> 1. Clear** and standardised notice-and-action procedures to deal with illegal and harmful content. 2. Enhanced transparency on content curation and reporting obligations for platforms. 3. Out-of-court dispute settlement on content management, particularly on notice-and actions procedures.
3	Specific regulation to ensure fair competition in online platform ecosystems	<ol style="list-style-type: none"> 1. New horizontal rules in the Platform to Business Regulation for all digital platforms. 2. Creation of a specialised body to reinforce oversight of the behaviour of systemic platforms. 3. Creation of specific ex ante rules that would apply only to systemic platforms to ban or restrict certain unfair business practices.
4	Cross-cutting policies to ensure enforcement and guarantee clarity	<ol style="list-style-type: none"> 1 Clarification of key definitions. 2 Clarification of liability exemptions for online intermediaries. 3 Establishment of transparency and explainability standards and procedures for algorithms. 4 Measures to ensure enforcement.

Source: Based on Annex I.

Note: * Annex I includes a more detailed explanation of the policy actions.

** 'Clear' in this context refers to 'well defined' and 'precise'.

The quantitative assessment is twofold. First, all four policy packages are assessed against qualitative criteria. Second, two policy packages (policy packages 1 and 2). are further assessed on the basis of the E3ME macro-economic model. The two scenarios are compared against a baseline represented by the current framework: a minimum coordination scenario (definition of specific regulations by Member States) and a scenario of deeper coordination at EU level (all Member States implementing the same legal requirements).

European added value

Qualitatively, the assessment proves that all four policy packages could achieve European added value when introducing a possible digital services act. It is shown that the principles of effectiveness and sustainability (less fragmentation, increased public trust and creation of economies of scale), innovation (a more distinct regulation may create new avenues for investment and innovation), political feasibility (consensus on need for regulation but question of degree), and subsidiarity and proportionality (digital services are cross-border by nature) could all be satisfied.

Quantitatively, the assessment presents the direct economic benefits and costs for policy packages 1 and 2. Overall, by implementing the identified policy options in a harmonised way throughout the

EU, the combined effect of the two scenarios could represent a €76 billion increase in EU gross domestic product (GDP) over the 2020-2030 period.

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1. Introduction

This European added value assessment (EAVA) analyses the European added value of a possible digital services act. In doing so, it supports the legislative own-initiative reports (INL) of the European Parliament on (i) the Digital services act: Adapting commercial and civil law rules for commercial entities operating online (2020/2019(INL)) and (ii) the Digital services act: Improving the functioning of the single market (2020/2018(INL)), requested by the (i) the Legal Affairs committee (JURI) and (ii) the Committee on the Internal Market and Consumer Protection (IMCO). Based on Article 225 of the Treaty on the Functioning of the European Union (TFEU), the European Commission can be asked by the European Parliament to take legislative action. This is triggered via the adoption of legislative own-initiative reports.

Article 10 of the Interinstitutional Agreement on Better Law-Making of 13 April 2016 stipulates that the European Commission should react to a European Parliament request. The European Commission has a timeframe of three months to establish whether the adoption of a specific communication is envisaged.

1.1. Methodology and scope of the assessment

This specific paper focuses on the European added value assessment of a digital services act on the basis of a methodological approach incorporating qualitative and quantitative elements. To this end, three external analyses have been commissioned, two legal analyses and one economic assessment:

- Annex I: J.P. Villar Garcia et al., Quantitative assessment of European added value of digital services act.
- Annex II: G. Spindler, Digital services act: Adapting commercial and civil law rules for commercial entities operating online: Legal assessment (to support JURI INL 2020/2019).
- Annex III: J. Nordemann et al., Digital services act: Improving the functioning of the single market (to support IMCO INL 2020/2018).

The three studies annexed are intertwined and complimentary, but represent stand-alone documents and may therefore come to divergent conclusions. An overview of the methodology used to measure the European added value of a digital services act is presented in Table 5.

In order to assess and calculate the European added value, preferences were made based on Annexes II and III to this paper, and complemented by a further literature review and available data. It is important to note that the assessments concentrate largely on the e-Commerce Directive¹ (ECD) and partly also on the Platform to Business Regulation² (P2B). Given the broad existence of studies by the European Parliament services, further in-depth analysis has not been carried out. These studies contributed significantly to the assessment.³

¹ Directive 2000/31/EC of 8 June 2000 on [certain legal aspects of information society services, in particular electronic commerce, in the internal market](#) ('Directive on electronic commerce').

² Regulation (EU) 2019/1150 of 20 June 2019 on [promoting fairness and transparency for business users of online intermediation services](#).

³ For further analysis please see [Collection of studies for the IMCO Committee – Digital Services Act](#), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, June 2020. As well as T. Madiaga, [Reform of](#)

Table 2 – Methodology for measuring European added value

	Annex I (Villar Garcia et al.)	Annex II (Spindler)	Annex III (Nordemann et al.)
Scope	<ul style="list-style-type: none"> Economic analysis of the possible EU added value of legislative changes by means of a digital services act. 	<ul style="list-style-type: none"> Legal analysis of gaps and shortcomings of the ECD with the perspective of adapting the commercial and civil law rules for commercial entities operating online. 	<ul style="list-style-type: none"> Legal analysis of gaps and shortcomings of the ECD with the perspective of improving the functioning of the single market.
Approach	<ul style="list-style-type: none"> Quantitative and qualitative 	<ul style="list-style-type: none"> Qualitative 	<ul style="list-style-type: none"> Qualitative
Method	<ul style="list-style-type: none"> Cost-benefit analysis Macro-economic calculations are the results of the Cambridge Econometrics E3ME model⁴. 	<ul style="list-style-type: none"> Legal analysis: identification of problems and relevant European legislation, discussion of policy options and their European added value. 	<ul style="list-style-type: none"> Legal analysis: identification of problems and relevant European legislation, discussion of policy options and their European added value.
Outcome	<ul style="list-style-type: none"> Identification of four policy packages and policy options. Three scenarios assessed: <ul style="list-style-type: none"> - maintaining the current framework (baseline scenario); - minimum coordination at EU level, leaving for Member States the definition of specific regulation; - common action at EU level, with all Member States implementing the same legal requirements. Qualitative assessment: effectiveness and sustainability, innovation, subsidiarity and proportionality and political feasibility. Macro-economic estimation based on E3ME model. Economic assessment: Cost and benefits in GDP and economic growth and job creation in GDP and employment. 	<ul style="list-style-type: none"> Legal assessment: identification of gaps, need for legislation, and policy options, typology of policy options ('do nothing', basic rules, specific rules), and regulatory impact. Qualitative assessment: coherence of legal framework, legal clarity, effective and efficient law enforcement, functioning of the (digital) single market, consumer rights and protection, fundamental rights, and cost and benefits. 	<ul style="list-style-type: none"> Legal assessment: identification of gaps, need for legislation, and policy options, typology of policy options (status quo/baseline, full harmonisation, slight alternations of status quo, moderate policy options), and regulatory impact. Qualitative assessment: coherence of legal framework, legal clarity, effective and efficient law enforcement, functioning of the (digital) single market, consumer rights and protection, fundamental rights, and cost and benefits.
Limitations	<ul style="list-style-type: none"> Macro-economic modelling is by nature based on limitations and assumptions; to mitigate this a cautious approach was used. Not everything that might have an impact is quantifiable and/or in some cases it lacks data Unknown mid- and long-term effects of the pandemic 	<ul style="list-style-type: none"> The broad scope of this paper made a fully-fledged comparative analysis of the legislation and policies of all EU Member State impossible; neither is there a quantitative assessment of possible benefits and costs. 	<ul style="list-style-type: none"> The broad scope of this paper made a fully-fledged comparative analysis of the legislation and policies of all EU Member States impossible; neither is there a quantitative assessment of possible benefits and costs.

Source: Author's compilation based on Annexes I, II and III.

[the EU liability regime for online intermediaries: Background on the forthcoming digital services act](#), EPRS, European Parliament, May 2020.

⁴ A short description of the E3ME model is provided in Annex I. Currently used in a lot of assessments, the model itself is computer-based and originates from European Commission's research framework programmes. See Annex I to this paper (Villar Garcia et al.).

This paper begins with a presentation of the methodological approach, the scope of the combined assessments and a short background on the issue. It then gives a brief overview of ongoing developments in the EU digital market, addressing the current legal framework, the political and economic context, weaknesses in the existing EU systems and the EU's right to act. The most relevant regulatory aspects of the assessment are then presented, followed by the economic assessment. The study concludes by putting forward an overall estimation of the European added value achieved by implementing the identified quantifiable policies in the EU. In the context of this paper, European added value is defined as a positive net benefit in a case where action is better achieved at EU level than by Member States alone. This goes hand in hand with the principles of subsidiarity and proportionality.

This paper is designed to give a brief overview of the European added value of a digital services act. The supporting annexes are recommended reading for a more in-depth analysis of the European added value.

1.2. Background

Nowadays, e-commerce is an indispensable part of the economy, business life and consumers' shopping habits. It can help EU citizens to access services more easily and quickly, while enabling businesses to reach customers in a more targeted and direct way. In doing so, e-commerce can have a positive influence on both consumer welfare and business development. The legal framework offered by the e-Commerce Directive⁵ – now 20 years old – has been a cornerstone for digital services. However, despite this success story, the need to amend the current regulation is the subject of discussion on all sides, among private and public sectors, consumer and fundamental rights organisations, and technology and science organisations.

Examples of concerns range from the need for better social and fundamental rights protection, to calls for action to build consumer trust and provide a level playing field for European businesses – especially for micro, small and medium-sized enterprises, create new opportunities in research and development, and update aspects of civil and commercial law. The coronavirus pandemic has meanwhile highlighted the usefulness of e-commerce and the potential for its further development while also demonstrating the hurdles, such as concerns regarding consumer protection.

⁵ Directive 2000/31/EC of 8 June 2000 on [certain legal aspects of information society services, in particular electronic commerce, in the internal market](#) ('Directive on electronic commerce').

2. The EU digital market and current developments

2.1. Current legal framework

The EU digital market is, to a certain extent already regulated. The most relevant applicable EU legislation includes:⁶

- Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce');⁷
- Regulation (EU) 2019/1150 of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services;⁸ and
- Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data.⁹

As part of this assessment, the e-Commerce Directive plays a major role. It contains a clause on the internal market and thereby fostered the establishment of the free movement of information society services, building consumer trust and safeguarding legal certainty. Four topics are crucial to the implementation of the e-Commerce Directive: (i) 'transparency and information requirements for digital service providers', (ii) 'commercial communications', (iii) 'electronic contracts and limitations of liability of intermediary service providers', and (iv) 'cooperation between Member States and the role of self-regulation'.¹⁰ It was adopted in 2000 with the aim of enhancing e-commerce within the EU. When developed, the approach of the directive was to align the law of the Member States in some areas, such as the setting up of service providers.¹¹

Furthermore, of relevance with regard to freedom of expression are the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights (ECHR).¹²

2.2. Policy context

The EU institutions have identified the need to renew and adapt the current legislation on several occasions since the establishment of the e-Commerce Directive. In 2010, Parliament adopted a resolution on completing the internal market for e-commerce.¹³ Since 2010 the Commission has assessed the e-Commerce Directive several times, for example on the question of a common

⁶ For a more detailed overview of applicable regulations and policy measures in the field of the digital single market see table 1: Policy measures in the field of the digital single market (2015-2019) of Annex I to this paper (Villar Garcia et al.).

⁷ Directive 2000/31/EC of 8 June 2000 on [certain legal aspects of information society services, in particular electronic commerce, in the internal market](#) ('Directive on electronic commerce').

⁸ Regulation (EU) 2019/1150 of 20 June 2019 on [promoting fairness and transparency for business users of online intermediation services](#). LINK NOT WORKING

⁹ Regulation (EU) 2016/679 of 27 April 2016 on [the protection of natural persons with regard to the processing of personal data and on the free movement of such data](#).

¹⁰ [e-Commerce Directive](#), European Commission, September 2020.

¹¹ T. Madiaga, [Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act](#), EPRS, May 2020.

¹² Article 11 [Charter of Fundamental Human Rights of the European Union](#) and Article 10 of the [European Convention on Human Rights](#) on Freedom of expression (and information).

¹³ Resolution of 21 September 2010 on [completing the internal market for e-commerce](#) (2010/2012(INI)), European Parliament, September 2012.

approach to a framework for EU 'notice and action' procedures. This was followed by a communication on a 'coherent framework to build trust in the digital single market for e-commerce and online services'.¹⁴ The Commission advocated in favour of maintaining the liability regime while supporting platforms' efforts at self-regulation.¹⁵

In a 2017 resolution¹⁶ the European Parliament demanded clarification concerning the liability of online intermediaries and called on the Commission to offer further guidance to online platforms in the compliance with their duties. The Commission's reaction was a sectoral approach as opposed to a revision of the e-Commerce Directive itself. Specific legislation implemented dealt, for example, with online sexual abuse,¹⁷ hate speech and violence,¹⁸ and also copyright infringements.¹⁹ Parliament also took a stance in 2018 in a resolution on distributed ledger technologies and block chains: building trust with disintermediation²⁰.

In 2019 the von der Leyen Commission pledged²¹ to propose a new digital services act and in 2020 two communications were adopted: 'Shaping Europe's digital future'²² and 'A European strategy for data'.²³ The digital services act itself is planned for the fourth quarter of 2020.²⁴ At the beginning of 2020, Parliament decided to work on reports on the digital services act: two legislative own-initiative reports, one by JURI, 'Digital services act: Adapting commercial and civil law rules for commercial entities operating online' (2020/2019(INL)),²⁵ one by IMCO, 'Digital services act: Improving the functioning of the single market' (2020/2018(INL)),²⁶ and one own-initiative report by the Civil Liberties, Justice and Home Affairs committee (LIBE), 'Digital services act and fundamental rights issues posed' (2020/2022(INI)).²⁷

¹⁴ Communication on [A coherent framework for building trust in the digital single market for e-commerce and online services](#), (COM(2011) 942 final), European Commission, 11 January 2011.

¹⁵ T. Madiaga, [Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act](#), EPRS, May 2020.

¹⁶ Resolution of 15 June 2017 on [Online platforms and the digital single market](#) (2016/2276(INI)), European Parliament.

¹⁷ Directive 2011/93/EU of 13 December 2011 on [combating the sexual abuse and sexual exploitation of children](#).

¹⁸ Directive 2018/1808 of 14 November 2018 on the [Audiovisual Media Services Directive](#).

¹⁹ Directive 2019/790 of 17 April 2019 on [copyright and related rights in the digital single market](#).

²⁰ Resolution of 3 October 2018 on [distributed ledger technologies and blockchains: building trust with disintermediation](#) (2017/2772(RSP)), European Parliament.

²¹ [A Union that strives for more – My Agenda for Europe](#), European Commission, 2019; and Commission Work Programme, [A Union that strives for more](#), (COM(2020) 37 final), European Commission, 29 January 2020.

²² [Shaping Europe's digital future](#), (COM (2020)0067), European Commission, 2020.

²³ [A European strategy for data](#), (COM(2020)66), European Commission, as at September 2020.

²⁴ [Annex 1 of the European Commission work programme](#), as at September 2020.

²⁵ Draft report on a [Digital Services Act: adapting commercial and civil law rules for commercial entities operating online](#) (2020/2019(INL)), European Parliament, 22 April 2020.

²⁶ Draft report on a [Digital Services Act: Improving the functioning of the Single Market](#) (2020/2018(INL)), European Parliament, 24 April 2020.

²⁷ Draft report on [Digital Services Act and fundamental rights issues posed](#) (2020/2022(INI)), European Parliament, 27 April 2020.

2.3. Economic context

E-commerce has changed life for businesses and consumers substantially in the past 20 years, and further developments and growth can still be expected. Looking at a very ambitious estimation of e-commerce and its potential development in the EU, a 2011 study²⁸ quantified the potential benefit in economic terms. It was one of the first studies to do so and suggested that EU consumers could profit by up to €204.5 billion per year (at the time about 1.7 % of overall EU GDP) in welfare gains as a result of greater choice and lower prices. That scenario is still some way off, as the study had envisaged an e-commerce market share of about 15 % (3.5 % of retail sales at that time) whereas the figures for 2019 indicate that e-commerce has a total retail trade share of about 10.1 %.²⁹

Nevertheless, research and existing data show the potential of e-commerce. As pointed out in a 2020 Policy Department for Economic, Scientific and Quality of Life Policies study:

'E-commerce is an enabler of trade. Digital technologies facilitating online exchanges reduce trade costs associated with geographical distance compared with offline commerce. In addition to the most typical barriers to trade, such as tariffs and non-tariff barriers, geographical distance can increase trade costs through a number of channels, notably high transport costs, limited access to information and lack of trust.'³⁰

This is underpinned by the results of Flash Eurobarometers carried out in 2016 and 2019 as well as recent Eurostat data. According to the 2016 Eurobarometer³¹, 37 % of SMEs sold products and/or services online. Out of this share, almost half used online marketplaces. The bigger the SME, the more they relied on online marketplaces: 36 % SMEs with a staff size of 1 to 9, 42 % with 10 to 49, against 53 % with 50 to 250 people. Eurostat data³² shows a constant increase in the number of people in the EU using e-commerce. In 2009, about 50 % and in 2019 about 71 % of internet users purchased products or services online. Here the decisive factor is age. The younger the internet users, the more likely they are to buy online for private use: in the 16 to 24 age group the percentage is 78 %, followed by the 25 to 54 age group with 76 %, and the 55-74 age group with around 57 %. The 2019 Eurobarometer³³ highlights the cross-border component of online content services: 49 % of users have tried to log on to their (paid and unpaid) subscriptions in the past year when in a Member State other than their own; and 32 % have attempted to use a subscription from another EU Member State. Interestingly 43 % of the respondents who do not have a paid online subscription, still recognised the importance of the accessibility to such services while in another Member State.

²⁸ Civic Consulting, [Consumer market study on the functioning of e-commerce and Internet marketing and selling techniques in the retail of goods](#), 2011.

²⁹ Centre for Retail Research, [Changes in online shares of retail trade 2012-2019. Data for Europe is estimated as the mean of 11 European countries](#), 2020.

³⁰ For a more detailed analysis see [How to fully reap the benefits of the internal market for e-commerce?](#), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, May 2020.

³¹ Flash Eurobarometer 439, [The use of online marketplaces and search engines by SMEs](#), European Commission, April 2016.

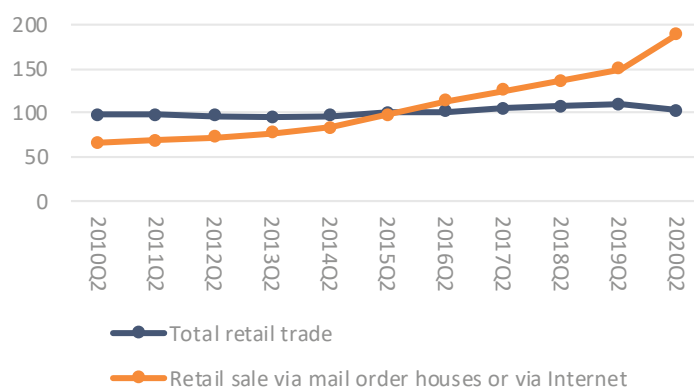
³² [E-commerce statistics for individuals](#), Eurostat, as at 17 September 2020.

³³ Flash Eurobarometer 477: [Accessing content online and cross-border portability of online content services](#), European Commission, April 2019.

Looking at the past 10 years, other Eurostat data (see Figure 1) show the development of retail trade and digital means driven retail sales.³⁴ The annual growth of the latter exceeded 14 % between 2014 and 2020, whereas retail trade achieved just about 1 %.

In 2019 e-commerce sales totalled approximately €621 billion with a growth expectation in 2020 of around €717 billion.³⁵ Although from 2015 to 2019 e-commerce-related retail sales increased steadily, the mid- and long-term effects of the coronavirus pandemic remain to be seen.³⁶

Figure 1 – Evolution of retail trade in the EU (2015=100)



Source: Annex I based on Eurostat.

2.4. Weaknesses in the existing EU system

As identified by research on various occasions and in the annexes to this paper, within the EU there is a great divergence in how the e-Commerce Directive is implemented. Broadly speaking, there is a largely fragmented landscape of national law and approaches.³⁷ A wide range of gaps has been identified, such as questions on the definitions applying to certain services (for example social media) and the extent to which they are covered by the 'information society services' definition; a lack of definitions, distinctions and clarity concerning 'safe harbour' conditions and 'notice-and-take down' obligations; and challenges regarding content monitoring, public safety, fundamental rights issues and competition problems, to name but a few.³⁸

Using a sectoral approach, three main issues have been identified, to be observed in each sector of the digital market. Table 3 offers a synopsis of these problems and their drivers.³⁹

³⁴ [Turnover and volume of sales in wholesale and retail trade – annual data](#), Eurostat, as at September 2020.

³⁵ [European Ecommerce Report](#), Ecommerce Foundation, 2019.

³⁶ Annex I to this paper (Villar Garcia et al.).

³⁷ Ibid.

³⁸ T. Madiaga, [Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act](#), EPRS, May 2020.

³⁹ Annex I to this paper (Villar Garcia et al.).

Table 3 – Overview of problems and drivers

Problem	Drivers
Limited and uneven protection of digital service users (businesses, particularly SMEs, and citizens)	<ul style="list-style-type: none"> • Uncertainty: lack of common and clear definitions of digital services; unclear information on obligations for providers (service terms and conditions, knowledge of business customers); unclear transparency obligations regarding commercial information; lack of transparency of algorithms; absence of clear* mechanisms to remove unsafe/counterfeit goods and illegal content. • Fragmentation: differences in information obligations for providers (service terms and conditions, knowledge of business customers); differences in transparency obligations regarding commercial information; lack of alignment of accountability mechanisms; absence of clear* mechanisms to remove unsafe/counterfeit goods and illegal content. • Weak enforcement: lack of accountability of third-country providers; absence of effective enforcement mechanisms; absence of clear mechanisms* to remove unsafe/counterfeit goods and illegal content.
Current market power of online platforms is generating asymmetries and distorting competition	<ul style="list-style-type: none"> • Lack of common and clear definitions of digital services. • Different (or even lack of) transparency obligations. • Lack of transparency of algorithms. • Lack of interoperability between platforms. • Lack of alignment of accountability mechanisms. • Unbalanced bargaining power between platforms and business partners. • Absence of enforcement mechanisms.
New and increased risks deriving from the use of digital services threatening citizens' rights and freedoms	<ul style="list-style-type: none"> • Lack of common and clear definitions of digital services. • Unclear terms and conditions of services. • Lack of clear transparency obligations regarding content management. • Lack of transparency of algorithms. • Lack of alignment of accountability mechanisms. • Lack of alignment in national approaches to harmful content. • Absence of enforcement mechanisms.

Source: Based on Annex I to this paper.⁴⁰

Note: * 'Clear' in this context refers to 'well defined' and 'precise'.

2.5. EU right to act

As shown in the previous section and in the supporting analysis,⁴¹ there is a clear need for action at EU level, as the existing legal framework does not fill all the gaps or resolve all the problems identified. Examples include: fragmentation of regulation within the EU, lack of enforcement and cooperation, imbalanced protection of consumers and businesses using digital services and

⁴⁰ Annex I to this paper (Villar Garcia et al.).

⁴¹ Annexes I, II and III to this paper.

unequal market entry barriers. The freedoms of the internal markets need to be well balanced with fundamental rights and principles.

A new digital services act would fall under the objective of the establishment of the internal market (Articles 4(2)(a), 26, 27, 114 and 115 TFEU) to safeguard free movement of goods, persons, services and capital, as do the existing e-Commerce Directive⁴² and the regulation on promoting fairness and transparency for business users of online intermediation services.⁴³ Furthermore, as previously mentioned, fundamental rights issues are covered by the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the EU and the enshrined right of freedom of expression.⁴⁴

⁴² Directive 2000/31/EC of 8 June 2000 on [certain legal aspects of information society services, in particular electronic commerce, in the internal market](#) ('Directive on electronic commerce').

⁴³ Regulation (EU) 2019/1150 of 20 June 2019 on [promoting fairness and transparency for business users of online intermediation services](#).

⁴⁴ Article 10 of the [European Convention on Human Rights](#) and Article 11 [Charter of Fundamental Rights of the European Union](#) on freedom of expression (and information).

3. Qualitative assessment of European added value

The qualitative assessment of European added value (EAV) is based on: a legal analysis of the gaps and risks present in the current regulatory framework; an analysis of the possible policy solutions addressing the gaps and risks identified; and a comparative assessment of policy options in terms of their potential to generate added value. For the purposes of this analysis, added value is understood to be the net benefit that could be generated by EU action versus no action or versus the current status quo. This net benefit is assessed qualitatively on the basis of an analysis of the costs and benefits that could be generated as a result of regulatory action or inaction.

The qualitative assessment is structured on and informed by the current regulatory framework. Accordingly, the scope of analysis covers gaps and shortcomings in the current e-Commerce Directive (ECD). However, to account for existing challenges that are not fully addressed by the ECD, the analysis is further supplemented by an assessment of gaps and barriers to the regulation of digital services more broadly.

In total there are 22 substantive issues relating to digital services that are qualitatively analysed. This analysis focuses on the assessment of why the identified issues create risks, problems or obstacles to digital services in the EU and what impacts non-action at EU level would likely have. The issues analysed cover the existing provisions of the ECD (points 11 to 22 in the Table 4 below) as well as other issues that are not covered by the ECD (points 1-10 in Table 4 below) but nevertheless impact directly on provision of digital services in the EU internal market.

3.1. Gaps and risks relating to the provision of digital services in the EU: comparative analyses

3.1.1. Legal gaps and barriers relating to the provision of digital services not addressed in the ECD

When it comes to **content management**: issues relating to (1) control and (2) curation of content, (3) notice procedure and (4) dispute settlement are analysed. This group of issues is generally characterised by limited EU legislation, emerging divergent national practices and risks connected with the distorted balance between the power of platforms and the rights of users. The absence of EU action addressing issues relating to content management is likely to lead to further fragmentation of the digital single market, limited protection of consumers and users, enforcement inefficiencies and costs for all parties related to the administrative burden and litigation.

The second block of issues analysed relates to **advertising practices**, specifically (5) personalised ads and (6) ranking and recommender systems. This group of issues is different. Here there is existing EU legislation, i.e. GDPR, the Directive on Unfair Commercial Practice, the e-Privacy Directive and the P2B Regulation, however the current regulatory framework leaves a broad scope for interpretation and lacks effective enforcement mechanisms. Thus, no action would likely prolong legal uncertainty and further contribute to the emergence of divergent interpretations by national courts. Existing uncertainties, for example those relating to the scope of the GDPR in connection with personalised advertising, can deter businesses from generating profits from advertising and negatively impact the willingness of consumers to take legal action against the unlawful actions of businesses.

The third block of issues relates to the **enforcement** of existing content curation and advertising rules. Two matters that could facilitate enforcement are analysed. At institutional level, to enhance coordination among Member States, the creation of a European agency is discussed (7). At the substantive level, transparency obligations (8) are put forward as mechanisms to foster control of

the practices and actions of platforms. In the limited areas covered by EU legislation, such as for example the rules applicable to advertising, EU enforcement mechanisms are lacking. Enforcement of EU rules is primarily left to the Member States. Divergent national enforcement practices and a lack of coordination between national supervisory authorities could potentially lead to fragmentation across the EU, divergent procedures and enforcement standards, differing levels of consumer protection, and inefficient use of the administrative and financial resources of the Member States. One possible institutional solution to address these shortcomings would be the establishment of an EU agency. The transparency and reporting obligations of platforms currently also lie with the supervisory and enforcement authorities of Member States. Differing national rules and practices on transparency and reporting could potentially be in conflict with Article 3 ECD, creating costs for platforms, as they need to comply with different national legal requirements, and implying divergent levels of consumer protection across the EU. Therefore, the absence EU action would once again lead to further legal uncertainty and fragmentation across Member States, to the disadvantage of businesses and users.

Smart contracts (9) – technology-enabled ways to manage the contractual relationship between parties – are one of the innovations introduced by e-commerce but raise substantial legal questions, in particular related to foreclosure, standard terms and conditions and consumer protection. At EU level there is very limited legislation governing this new phenomenon directly. Member States have taken steps to regulate blockchain technology in general and also smart contracts in particular. Taking no action at EU level would leave development in this area to the Member States. Considering that smart contracts are mostly used in e-commerce in cross-border contexts, divergent Member State regulations could impact negatively on consumer protection and potentially lead to different levels of consumer protection for traditional and smart contracts.

A final issue relating to digital services that is not regulated directly by the ECD has to do with the rules on the choice of law provisions and, more specifically, the mechanisms for **conflict of law clauses** (10), in particular in the context of business to business (B2B). Choice of law provisions are regulated by private international law and are based on the fundamental principle of freedom of contract. Existing practice indicates that platform operators tend to prefer to exclude application of EU law. Considering the market power of a platform, in practice SME traders operating online have little choice but to accept the jurisdiction clauses preferred by platforms. In cases of conflict, the cost for SME traders of taking action against a platform in a foreign jurisdiction could be significant and result in the inability to enforce their legal rights. This current situation is to the benefit of platforms. The absence of EU action on conflict of law rules would further disadvantage SME traders, because the existing uneven power relationship between platforms and traders would continue to exist.

3.1.2. Legal gaps and barriers relating to the provision of services addressed in the ECD

The ECD is the main EU legal instrument regulating digital services. Generally ECD proved to be a successful and powerful tool, facilitating the provision of online services.⁴⁵ However, emerging new business practices and the structure of the market itself create new risks and obstacles to digital services not fully covered by the ECD. Six blocks of issues that create obstacles or risks to provision of services in connection with the ECD are discussed, including: the internal market clause (11-17), definitions (18), general information requirements (19), tackling illegal content online (20), ex-ante regulation of systemic platforms (21) and enforcement (22).

⁴⁵ For the analysis of the benefits created by the ECD see Annex I 'Quantitative assessment' and Annex III, Research paper by Nordemann et al.

The first block of issues relates to the **internal market clause** (IMC). The IMC (Article 3 ECD) has added significant added value to the operation of e-commerce. However, further action to clarify the existing provisions or address existing implementation gaps is analysed, including the following: cooperation and mutual assistance between Member States (12); a coordinated field (13) and national legislation within the coordinated field; extension of the application of the IMC to non-EU providers (15); multiple claims to jurisdiction and conflict of laws (16); and derogations and exceptions (17). No action would not be detrimental to the overall functioning of e-commerce services. Taking additional EU action to enhance application of the IMC would further contribute to fostering a well-functioning digital single market (DSM), reduce fragmentation of law and decrease the burden on national courts, as well as benefiting consumers.

Under the current framework (Article 2 ECD), some uniform **definitions** (18) relating to the provision of online services are missing (e.g. consumer) and others are unclear, e.g. information society service. The clarification of the scope of those definitions are left to national and European courts. The development of definitions through case-law provides flexibility to the current regulatory framework, but could be a challenge and a source of divergent interpretations at national level.

There are two key practical issues relating to **general information requirements** (Article 5 ECD): lack of compliance (19) and the hidden identity of operators of illegal offers (20). This set of issues relates to gaps created as a result of fragmentation of national enforcement rules on information requirements. No action at EU level would negatively impact the smooth functioning of the DSM, on grounds of transparency, coherence of the EU legal framework and effectiveness of enforcement of Article 5 ECD, especially against operators of structurally infringing services.

The existing framework, specifically Articles 12 to 15, provides rules that serve as a shield against liability. However, they do not provide rules to establish liability itself. The existing rules, therefore, provide limited mechanisms to tackle **illegal content online** (20) and regulate intermediary liability effectively.

Finally, issues relating to **ex-ante regulation of systemic platforms** (gatekeepers) (21) and institutional mechanisms to enhance **enforcement** (22) are analysed. The existing legal framework seems to be inadequate to address the problems that large online platforms constitute for the platform ecosystems in the DSM. Lack of action at EU level would maintain the status quo where online platform ecosystems are controlled by large online platforms, raising competition law issues and negatively impacting functioning of the DSM – among other problems. Considering the transboundary nature of the platforms and their market power, individual actions by Member States are unlikely to be effective. Current supervision of application of the ECD is based on decentralised supervision by national enforcement bodies. There is no EU-level authority to enforce the regulatory framework of the ECD. One way to enhance supervision and enforcement of the ECD would be to establish a central regulatory authority at EU level.

The comparative results outlining the main substantive issues and the impacts of no action for each issue identified are discussed in detail in Table 4 below.

Table 4 – Gaps and risks and potential impact of non-action at EU level

		Gaps, risks and inefficiencies	Cost of no-action
Content management	<ul style="list-style-type: none"> Control of content 	<p>Platforms do not act as mere hosts but rather as gatekeepers for a variety of functions. In many cases they exercise control over user-generated or uploaded content. Thus, they are the key players in multilateral markets, establishing the rules on how to access or upload content. At present, however, there are hardly any regulations at EU level focusing on users' rights.</p>	<p>Control of content will remain the role of platform operators, who set standards that are possibly stricter than as defined by fundamental rights. Member States will independently evaluate those standards under national law; higher legal cost to consumers, no guaranteed protection against cyber bullying. Considering the different national approaches and the absence of EU- regulation, a patchwork of legislation and national court decisions across the EU is the likely outcome. As long as specific contract law regarding platforms is missing in Member States and user rights are not acknowledged in general contract law, it is very likely that courts will diverge widely concerning the balance of fundamental rights of users and those of platform operators. Divergent interpretations will likely contribute to great legal uncertainty for users and platforms alike.</p>
	<ul style="list-style-type: none"> Curation of content 	<p>There is only very limited regulation on curation of content, an area that is lacking a broad and clear framework.</p>	<p>Different speeds and intensities of national law, fragmenting the digital single market; enforcement of violated rights and showing evidence in court may be difficult; higher legal costs and less protection for consumers, less legal clarity for platforms. The status quo mostly places the costs and risks involved on platform users, be it consumers or content providers. Content providers lose potential monetary benefits by being negatively affected by a platform's algorithm. The existing uncertainties may prevent digital entrepreneurs from using those platforms. More crucially, however, echo chambers and filter bubbles risk affecting democracy as a whole by skewing public opinion.</p>
	<ul style="list-style-type: none"> Notice procedure 	<p>Article 14 ECD establishes notice-and-takedown procedures, however, EU legislation does not provide any design of such procedures leaving it to Member States (and national courts) to establish standards for such procedures. Member State have differing interpretations of notice-and-take-down procedures.</p>	<p>Notice procedures will continue to diverge between Member States, users and platform operators will have to adapt to rules depending on the Member State; the compatibility of national rules with regard to Article 3 (2) ECD remains unclear; adaptation costs for platforms and hampered enforcement of consumer rights can ensue. Accordingly, not taking action results in ineffectiveness owing to legal uncertainty and fragmentation, also inefficiency due to cumulative national administration costs.</p>

	<ul style="list-style-type: none"> Dispute Settlement 	<p>In the area of enforcement, there are currently no EU-wide rules and consumers still face the problem of lengthy and costly court proceedings for online complaints.</p>	<p>Inaction by the EU would have a negative impact on the digital single market and all parties involved. No improvement for users; costly and inadequate dispute settlement continues.</p>
Advertising	<ul style="list-style-type: none"> Advertising (personalised ads) 	<p>GDPR applies to personal data used for personalised advertising, however the crucial provisions for personalised advertising remain unclear in scope.</p>	<p>Legal uncertainty may remain regarding the interpretation of certain provisions in the GDPR; no improvement in legal clarity.</p>
	<ul style="list-style-type: none"> Advertising (ranking and recommender systems) 	<p>Some legal provisions are in place including Article 6 of the Directive on Unfair Commercial Practices (misleading information) and the P2B Regulation (Article 5 (1)–(3)). However the current framework is not complete and leaves broad scope for interpretation. The existing practice suggests that application, compliance with and sanctions for violation of the existing provisions are problematic.</p>	<p>If no action is taken, distortions of competition would still be possible, which could hinder the development of the digital single market, and consumers would continue to be exposed to possible misinformation.</p>
Enforcement	<ul style="list-style-type: none"> European agency 	<p>Enforcement is left mostly to Member States; depending on the design of the European legislation in question, Member States also decide how to enforce the European legislative act, be it by civil law, by criminal law or administrative law or a combination of all of these elements.</p>	<p>Differing enforcement standards could result in fragmentation of law across the EU. No action would result in a weaker DSM and in some kind of 'forum shopping' (or regulatory arbitrage) between Member States. As a result, the cost of not taking action is burdened onto platforms that have to adapt to different enforcement standards and have to split their resources. Also, levels of consumer protection can differ, resulting in a lack of legal clarity for consumers, possibly dissuading them from enforcing their rights.</p>
	<ul style="list-style-type: none"> Transparency 	<p>At EU level, there are scarcely any obligations to report notice-and-take-down procedures or dispute settlement mechanisms; moreover, there are no report obligations for the concrete figures of notices received by providers or removal requests nor about time spans between complaints and removals.</p>	<p>Were no action taken, the result would be a patchwork of different obligations, potentially coming into conflict with the country-of-origin principle of Article 3 ECD. Platforms would bear the cost of legal uncertainty and have to adapt to many different legal requirements. Also, consumer protection levels would differ across the EU. This would not only lead to more legal uncertainty for consumers and less effective protection but would also increase the costs of legal procedures since more information needs to be collected by dispute parties rather than being provided by the platform. As a result, the cost of enforcing consumer rights would differ as well, running counter to DSM goals.</p>

	<ul style="list-style-type: none"> Smart contracts 	<p>There are no directives or provisions at EU level that directly regulate this new phenomenon; even though the Unfair Contract Terms Directive (UCTD) applies in principle, it does not envisage any specific rules for smart contracts, neither for acknowledging legally binding effects of smart contracts nor for providing minimum protection for contracting partners in cases of foreclosure.</p>	<p>Inaction in this area would lead not only to different rules with regard to the conclusion of contracts, but also to different mandatory consumer protection rules in the various Member States. Unharmonised law across Member States makes legal uncertainty in cases of cross border contracts more likely. Less room for innovation regarding smart contracts; mandatory consumer protection might be achieved in different ways; costs of legal uncertainty and risks for consumers remain.</p>
	<ul style="list-style-type: none"> International private law 	<p>Many platform operators, in particular the market-dominant platforms, are not based in the EU (or only by means of subsidiaries). Usually, contracts between traders and these platforms contain a choice of jurisdiction and also of courts referring to the jurisdiction of the seat of the platform operator (mother corporation), thus avoiding application of EU law as well as the jurisdiction of EU courts.</p>	<p>Uneven footing between contract partners; often avoidance of EU law; different protection standards depending on national conflict of law regulations; costs shouldered by SME-traders, potential reluctance to pursue legal action.</p>
Internal market clause (IMC)	<ul style="list-style-type: none"> IMC generally 	<p>The IMC is one of the success stories of the ECD. However, addressing some weaknesses analysed below could further strengthen this central principle of the ECD.</p>	<p>The IMC should remain as it is. Action should focus on additional mechanisms that could further facilitate added value, however, the core principle underlying the IMC. In this context, further action amending the existing IMC principles would have negative impacts. Thus, 'no action' to reform the core principle of the IMC would lead to benefits rather than costs.</p>
	<ul style="list-style-type: none"> Cooperation and mutual assistance between Member States 	<p>The IMC functions well, however, Article 19 ECD is limited and vague. It lacks a mechanism for cooperation and mutual assistance between Member States.</p>	<p>Member States would continue to follow current divergent conditions and practices to request mutual assistance from other Member State (country of establishment of information society service (ISS) provider, including the time for a response and rules to settle disputes between the Member States. Lack of effective and efficient mechanisms for cooperation and mutual assistance would mean that administrative challenges for Member States and costs regarding enforcement of law against providers would remain and probably increase.</p>

<ul style="list-style-type: none"> Coordinated field 	<p>The IMC functions well, but the broad definition of ISS providers poses problems for national jurisdictions. The definition and its scope of application has been developed through the CJEU case law.</p>	<p>No action to further define ISS providers in law would mean that the assessment of the emerging business models will continue to be dealt with by courts on a case by case basis.</p>
<ul style="list-style-type: none"> National legislation within the coordinated field 	<p>Recently several Member States have adopted national legislation targeting hate crime and illegal content, those national measures raise concerns regarding compatibility with the IMC.</p>	<p>National, non-coordinated actions would likely lead to a fragmentation of the set of rules applicable to the digital single market and incoherence of the European legal framework. Further allowing for national legislation in this field would contravene the aim of the directive that 'the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level', because dissenting national legislation could be implemented and enforced at least pending a decision of the CJEU.</p>
<ul style="list-style-type: none"> Extension of the IMC to non-EU providers 	<p>The IMC does not apply to ISS providers established outside the EU.</p>	<p>Retaining the status quo would mean further excluding ISS providers established outside the EU from the scope of application of the ECD. Retaining the status quo without extending the IMC to non-EU providers would allow for further fragmentation of the applicable regime at national level. With regard to the international nature of business models in this field and the aim to establish an internal market without hindrances to stakeholders, including service providers, national fragmentation of policy would be especially disadvantageous to non-EU providers. However, weaker competition might ultimately lead to less innovation on the European market and thereby disadvantage the consumer.</p>
<ul style="list-style-type: none"> Multiple claims to jurisdiction and conflict of laws 	<p>Articles 3(1) and (2) ECD do not prevent multiple claims to jurisdiction and they are not defined as a specific conflict-of-laws rule</p>	<p>If no action is taken, then the current situation that allows multiple claims to jurisdiction would remain. The existence of multiple claims to jurisdiction under the status quo negatively impacts the good functioning of the DSM. The lack of a mechanism for settlement of multiple claims to jurisdiction, and clarity in terms of applicable law, in practice means costs in terms of efficiency and enforcement and potential incoherence of the European legal framework.</p>

<ul style="list-style-type: none"> Conditions of derogation & annex 	<p>Consumer protection is one of the derogation grounds for limited application of the ECD (Article 3(4) ECD) however consumer protection rules are already highly harmonised in other EU legislation.</p>	<p>The status quo, would mean that protection of consumers will stay as a derogation clause. It is not necessary as other EU legislation provides highly harmonised legislation on this issue. Therefore, the current derogation clause contributes to legal uncertainty and complex enforcement.</p>
<ul style="list-style-type: none"> Definitions 	<p>Under the current framework, Article 2 ECD, some uniform definitions are missing (e.g. consumer) and some definitions unclear, e.g. information society service.</p>	<p>The definition of 'consumer' raises concerns regarding the coherence of the European legal framework. There is no consistent and uniform definition of consumer in EU law and there are divergences among Member States. The definition of 'established service provider' and 'coordinated field' also give rise to divergent interpretations. Legal notions of 'content hosting intermediaries', 'commercial online marketplaces' and 'illegal content' are not precisely defined either. No action will leave the situation as it is now, leaving interpretation to national courts and the CJEU.</p>
<ul style="list-style-type: none"> General information requirements (GIR) 	<p>Enforcement of GIR pursuant to Article 5 ECD implies different tools in the EU Member States.</p>	<p>The divergence among tools in the Member States can potentially impact negatively on compliance with the GIR and negatively impacts effective enforcement because it is difficult to identify digital service providers. Under the current framework it is easy for the operators of illegal services to hide their identities. No action would also mean that the situation when there is limited enforcement against operators of structurally infringing services will continue to exist.</p>
<ul style="list-style-type: none"> Tackling illegal online content 	<p>Articles 12 to 15 ECD only regulate the larger groups of access providers, cache providers and hosting providers. In recent years several new business models have emerged that cannot be clearly classified into one of the three groups. Also ECD only provides for EU harmonisation of rules to shield against liability, but not to establish liability in itself.</p>	<p>In the current framework, it is the courts that have responsibility for deciding on liability privileges for new business models, this would remain so, if no action is taken.</p>
<ul style="list-style-type: none"> Ex-ante regulation of systemic platforms 	<p>Specific regulation of systemic platforms (gatekeepers) hampering others</p>	<p>Systemic platforms, in an unregulated form, could pose threats to the good functioning of the DSM. Issues relating to accountability and the liability of gatekeepers will continue to exist, with a negative impact on enforcement.</p>

	<ul style="list-style-type: none"> Enforcement 	No central EU regulatory authority, but only national authorities	The current system, based on the fragmented national systems of supervision would continue.
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Source: Authors, based on the analysis in Annexes II and III.

3.2. Comparative assessment of policy options to address existing gaps in terms of added value

Following the analysis of gaps and risk, the assessment focuses on the identification of regulatory action that could potentially be taken at EU level. The **47 specific policy solutions for the 22 issues identified** are discussed and measured comparatively against the status quo and between themselves for their ability to generate added value. Table 5 below provides the main results of this assessment. Table 5 also provides an overview of the main drivers of European added value that could potentially result from action at EU level. Considering the wide spectrum of issues analysed, the results are a complex network of inter-related solutions. Proposed policy solutions have been analysed qualitatively for their ability to generate European added value.

The added value of each policy option has been assessed based on the following seven criteria:

- 1) regulatory impact;
- 2) impact on the coherence of the legal framework;
- 3) legal clarity;
- 4) effectiveness and efficiency of law enforcement;
- 5) impacts on DSM;
- 6) impact on consumer rights;
- 7) and impact on fundamental rights.

Table 5 – Comparative assessment of policy options to address existing gaps⁴⁶

		Policy option 1	Policy option 2	Policy option 3	Added value of EU action
Content management	Control of content	Set EU-wide mandatory standards for content control	Risk-based regulation framework is implemented to oversee and regulate algorithms		EU action would contribute to consumer protection. A risk-based approach is considered a more flexible regulatory option as it would guarantee an appropriate level of regulation, thereby avoiding overreach; legal clarity for platform operators and other algorithm users is achieved; legal clarity for future technological development guarantees an appropriate level of regulation, therefore avoiding overreach; legal clarity for platform operators and other algorithm users is achieved; EU action however, would also be an intervention in platforms' business models and potentially trigger high adaptation costs for platforms; potential disadvantage for EU-resident platforms against international competition that is less regulated; high costs for observation and transparency. EU action would however be a net benefit as compared to the status quo.
	Curation of content	Minimum harmonised EU regulation with general clauses	Fully harmonised EU regulation with set rules		EU action would increase consumer protection, transparency, and easier enforcement of rights by easing the burden of proof for platform users. EU-wide legislation would support the idea of the digital single market and the one-stop-shop principle laid down by the GDPR.

⁴⁶ The highlighting in green indicates that, overall, the suggested policy option has the highest potential to achieve the added value; if none of the option is highlighted then it is not yet clear what is the best option. The detailed assessment of each policy option in relation to the 22 issues discussed in this Table 5 are provided in Annex II and Annex III. All policy options presented in Table 5 are assessed for their ability to generate added value as compared to the status quo, or no action at EU level as discussed in Table 4 above.

	Notice procedure	Minimum harmonised EU regulation with general clauses	Harmonised legislation with general clauses and technical guidelines		EU-wide full harmonisation would add the most value as third parties (injured) as well as content uploaders (users) would have legal certainty regarding the procedure applicable. Thereby platforms could save the cost of providing different notice systems, ensuring improvements to the digital single market.
	Dispute settlement	National dispute settlement	National dispute settlement with EU-guidelines	Platform-based dispute settlement with independent legal experts, EU-wide and mandatory	EU action would ensure that all citizens in the Union would have equal chances to enforce their rights against the same operator. This not only benefits consumers but also platforms by levelling the international playing field and not giving any national platforms an advantage by being subject to less strict dispute rules. Clear and publicly accepted dispute settlement procedures can also help foster trust in platforms in the long term.
Advertising	Advertising (personalised ads)	Clarify existing legislation (GDPR)	Adding personalised advertising to the Unfair Commercial Practice Directive		By explicitly setting the rules for personalised advertising, users and platform operators achieve great legal clarity. By amending the Unfair Commercial Practice Directive, precise procedures can be implemented without being inappropriately placed.
	Advertising (ranking and recommender systems)	Introduction of a tiered disclosure system, specification of the disclosure obligations and introduction of sanctions for unfair influence on ranking mechanisms	Adding obligations for platform operators to the Unfair Commercial Practice Directive		By specifying which parameters have to be disclosed, real transparency is created, and the prohibition of self-interest with the threat of punishment creates a real incentive not to behave unfairly. Through transparent and fair ranking mechanisms, consumers are not deceived and the market opportunities of the traders are not unduly reduced.
	European agency	Enforcement is left entirely to Member States	General EU-wide standards with national enforcement	European agency	The creation of a European agency would help to avoid different levels of enforcement in the Member States and provide field coordination across the Union. Equal enforcement of legislation across the EU would lead to

					better user protection. Having a centralised agency would also simplify procedures for platforms.
	Transparency	Transparency reports to national institutions	Transparency reports to an EU institution		Transparency rules for digital platforms would facilitate enforcement and provide incentives for compliance. Having mandatory EU-wide rules would ensure a level playing field for platforms across the EU and ease the hurdle of entry to the market, thereby strengthening the European digital single market. This would lead to more legal certainty. Also, administrative costs would be lower for one reporting standard than many different ones.
	Smart contracts	Harmonised guidelines for implanting consumer protection	Harmonising different aspects at EU level		EU action would contribute to legal clarity regarding the use of smart contracts, fostering innovation in the EU.
	International private law	Conflict of law rules for contracts between SME-traders and platforms are implemented	Scope of application similar to Article 3 GDPR, supplemented by conflict of law rules	Expanding curation of content rules to P2B as well	Great legal clarity, application of EU legislation is ensured, good synergy with GDPR, freedom of contract remains untouched.
Internal market clause	Cooperation and mutual assistance (CMA) of Member States	Full harmonisation of national law	Status quo + specific CMA + central European authority	Status quo + implement more specific and binding stipulations regarding the CMA between Member States	The improvement of the cooperation procedure between Member States would (1) align EU action with the principle of sincere cooperation (Article 4(3) TEU). Member States would remain responsible for the enforcement of the ECD, however, improved and more binding cooperation mechanisms would lead to reduction of administrative costs and inefficiencies and lead to a more effective and efficient enforcement of the ECD.
	National legislation	Codification of CJEU case law	New definition of ISS provider in Article 1(2)		A common approach to regulating national legislation within the coordinated field would further add to the

	within the coordinated field		Directive 98/34/EC as amended by Directive 98/48/EC		defragmentation of policy concerning DSM. ISS providers would not face an unlimited number of national laws supplementing or diverging from the EU legal framework, effectively reducing costs necessary to comply with all legal provisions. The codification of CJEU case law on the definition of ISS providers could facilitate legal clarity.
	Extension of the IMC to non-EU providers	Change of Article 3(1) ECD			An extension of the IMC to non-EU providers would provide for more coherent regulation of ISS providers.
	Multiple claims to jurisdiction and conflict of laws	Online register managed by European Commission where Member States register all ISS providers under their jurisdiction	Make the IMC in Art. 3(1) ECD a conflict of law rule	Full harmonisation of the provisions governing ISS providers	Regulatory action to avoid multiple claims to jurisdiction would increase the efficiency of enforcement, because the country having jurisdiction would be clear without having to adapt the substantive definition of 'establishment'. Furthermore, a mechanism of settlement of multiple claims to jurisdiction could lead to European added value due to the increased coherence of the European legal framework, as well as leading to savings from more expedited decision-making, thus, avoiding costs of lengthy proceedings.
	Conditions of derogation & Annex	Delete the derogation of consumer protection	Delete exceptions from the annex, such as intellectual property		The removal of the 'protection of consumers' as one of the derogation clauses would contribute to legal clarity and less complex enforcement and overall coherence of the EU framework on consumer protection. The exceptions under the annex to the ECD seem to be justified regarding more specific legislation at EU level; the status quo should be retained, in particular for

					intellectual property rights. No additional European added value could be envisaged here.
	Definitions	Full harmonisation of definitions – new regulation under a digital services act (DSA) ('simple' option)	Full harmonisation of definitions – new regulation under a DSA (comprehensive option)	Minimum harmonisation of definitions under a reformed ECD	Fully harmonising legal definitions in the field of e-commerce law would add to legal certainty regarding all stakeholders, including consumers, ISS providers and both national jurisdictions and authorities. More legal clarity would positively impact the smooth functioning of the internal market. In addition, full harmonisation of definitions could lead to a less fragmented digital single market and increased coherence of the EU legal framework.
	General information requirements	Full harmonisation of the enforcement of information requirements; improving the general system of enforcement under a DSA	(additional to option 1)	The general information requirement, Article 5 ECD	Full harmonisation of the enforcement of information requirements could help to provide consumers with the desired transparency. A more coherent framework of enforcement in all Member States would also increase legal certainty for ISS providers, reducing their costs to enter the market in further Member States. Strengthening the general information requirements already provided for in Article 5 ECD could substantially reduce the amount of illegal content available online.
	Tackling illegal content online	Abolishing the distinction between active and passive hosting providers	EU rules to establish liability	Stay down duties	Harmonisation of liability and injunction responsibility will improve the EU framework, protect injured parties more effectively and create a better level playing field for all ISS providers in cases of illegal content.
	Ex-ante regulation of systemic platforms	Introduction of rules to prevent gatekeepers from hampering others in their business activities, creation of a central regulatory authority	Harmonisation of EU law to establish liability for such gatekeepers, in particular by harmonising the term 'infringer' and		The platform's international character would mean that the only level to adequately implement effective legislation would be the EU level. Implementing ex-ante regulation of systemic platforms at EU level, including a regime of responsibility and liability of operators, would positively impact the competition on the digital single market. Legislation would be defragmented, resulting in

		(CRA) for such gatekeepers	establishing stay-down duties.		a better harmonisation of the single market, more legal certainty and a more level playing field. This will primarily benefit innovative small and medium-sized businesses, because the regulation would allow for more equal access to the market. This would eventually increase the level of innovation, resulting in higher standards and better quality, ultimately benefitting both businesses and consumers. In addition, increased competition and innovation will add to the competitiveness of European businesses.
	Central regulatory authority (CRA)	Central regulatory authority at EU level	National enforcement bodies as a part of a European network; coordination by a CRA with enforcement competences for model cases and systemic platforms (gatekeepers)		The implementation of a CRA could both have positive and negative impacts, depending on its concrete implementation, especially regarding attributed rights and duties. Thus to add value, the CRA should be responsible for the following tasks: (1) fostering cooperation between national agencies; (2) initiating model cases regarding important legal questions; (3) addressing centrally systemic platforms (gatekeepers) usually operating on the pan-EU level.

Source: Authors, based on the analysis in Annexes II and III

In conclusion, 47 specific policy actions are proposed and compared in detail, as per their potential to generate added value as compared to the base line scenario. Addressing all 22 substantive points identified in the qualitative analysis would have significant potential to contribute to the good functioning of the single market and adaptation of commercial and civil law rules for commercial entities operating online. As the analysis suggests, across all 22 gaps analysed, EU action would be the preferred policy solution. The specific policy actions required depend on the nature of the gap. For some gaps, the best solution is enhanced cooperation among Member States, for others, common action and legally binding rules applicable across the EU is the best solution in terms of European added value.

Chapter 4 provides further quantitative assessment of identified gaps and barriers. In order to operationalise the quantitative assessment, the 22 gaps and barriers were clustered into four policy packages: (1) measures to facilitate consumer protection; (2) action on content management and curation; (3) measures to facilitate competition in online platforms ecosystems and (4) action to enhance enforcement of the existing rules and the coherence of the EU legal system. Policy options were also clustered to reflect the degree of policy intervention at EU level. Therefore, for the quantitative assessment discussed in Chapter 4, a wide spectrum of possible policy actions, discussed in Chapter 3, were grouped into three broad groups: first, status quo, or no further action at EU level; second, additional EU action implemented through minimum coordination at EU level, leaving for Member States the definition of specific regulation; and third, additional EU measures based on common action at EU level, with all Member States implementing the same legal requirements.

In this context, the analysis and conclusions of Chapter 3 and 4 are complimentary. Chapter 4 provides a structured overview, assessment and quantification of a general direction of possible EU action, as per four policy packages identified and per 3 policy directions proposed. Chapter 3, provides a more nuanced, detailed assessment of the main gaps, in total 22, and a qualitative comparative assessment of specific policy options, in total 47.

4. Quantitative assessment

As shown in Chapter 2, e-commerce has a relevant impact on business development and consumer welfare. Still, for this analysis it is necessary to bear in mind the current coronavirus pandemic and its unseen impacts on the economy in the world and on consumer behaviour. Projections by the European Central Bank (ECB) indicate a fall in GDP within the euro zone in 2020 of about 8.7%.⁴⁷ This may lead to an increase in e-commerce, as recent Eurostat data indicates for the time being, with growth of 17.4% within the first four months of the crisis in 2020.⁴⁸ It is important to add a caveat to this analysis, owing to the unpredictability of the current situation and the lack of data. Nevertheless, it is clear that all action addressing the functioning of the internal market concerning e-commerce and digital issues in general might have a larger impact.

This chapter is based on the economic assessment as carried out in Annex I to this paper.⁴⁹ In order to assess economic impact and the European added value of a potential digital services act, a clear understanding of which sectors might fall under its scope is necessary. Figure 2 shows the markets on which a digital services act – as conceived in this paper and the corresponding annexes – would and/or could have an effect.

Figure 2 – Main digital sectors



Source: Annex I to this paper.

Based on the existing literature, the ongoing debates, stakeholder opinions and Annexes II and III to this paper, a 'digital services act package' for European Union level would need to be made up of a number of policy packages. To this end this assessment works on the premises of a range of policy options, related problems and suggested policy actions. For the economic calculation those were clustered into four packages which were assessed qualitatively and/or quantitatively:

1. Enhanced consumer protection and harmonised e-commerce rules
 - Problem: limited and uneven protection of digital service users (businesses, particularly SMEs, and citizens)
2. A framework for content management and curation that guarantees the protection of rights and freedoms

⁴⁷ [Eurosystem staff macroeconomic projections for the euro area](#), European Central Bank, as at September 2020.

⁴⁸ [Impact of Covid-19 crisis in retail trade](#), Eurostat, as at September 2020.

⁴⁹ Annex I to this paper (Villar Garcia et al.).

- Problem: New and increased risks derived from the use of digital services that threaten citizens' rights and freedom.
- 3. Specific regulation to ensure fair competition in online platforms ecosystems.
- Problem: Current market power of online platforms is generating asymmetries and distorting competition.
- 4. Cross-cutting policies to ensure enforcement and guarantee clarity.
- Problem: lack of transparency of algorithms, lack of common and well defined definitions of digital services, weak enforcement.

Items one to three deal with limitations in the existing EU legal framework on digital services and item four addresses cross-cutting issues within the EU common to digital services. The policy actions related to each policy package are described in Table 6.

Table 6 – Policy options and policy actions to tackle related problems

	Policy package	Policy actions
1	Enhanced consumer protection and common e-commerce rules	<ol style="list-style-type: none"> 1. Fair and transparent contract terms and general conditions for business partners and consumers. 2. Reinforcement of the minimum information requirements for commercial communications. 3. Increase transparency of commercial communications. 4. Extend the scope of the e-Commerce Directive to service providers from non-EU countries. 5. Limit the intrusiveness of advertising.
2	Create a framework for content management and curation that guarantees the protection of rights and freedoms	<ol style="list-style-type: none"> 1. Clear and standardised notice-and-action procedures to deal with illegal and harmful content. 2. Enhanced transparency on content curation and reporting obligations for platforms. 3. Out-of-court dispute settlement on content management, particularly on notice-and actions procedures.
3	Specific regulation to ensure fair competition in online platforms ecosystems	<ol style="list-style-type: none"> 1. Include new horizontal rules in the Platform to Business Regulation for all digital platforms. 2. Creation of a specialised body to reinforce oversight of the behaviour of systemic platforms. 3. Creation of specific ex ante rules that would only apply to systemic platforms to ban or restrict certain unfair business practices.
4	Cross-cutting policies to ensure enforcement and guarantee clarity	<ol style="list-style-type: none"> 1 Clarification of key definitions. 2 Clarification of liability exemptions for online intermediaries. 3 Establishment of transparency and explainability standards and procedures for algorithms. 4 Ensure enforcement.

Source: Based on Annex I to this paper.⁵⁰

* Note: Annex I to this paper includes a more detailed explanation of the policy actions.

⁵⁰ Annex I to this paper (Villar Garcia et al.).

4.1. EAVA from a macroeconomic perspective

The lack of available data and the methodological approach taken mean that only a limited set of direct economic impacts could be used for the macroeconomic modelling; and the quantitative assessment was only carried out on two policy packages, on:

1. enhanced consumer protection and harmonised e-commerce rules; and
2. a framework for content management and curation that guarantees the protection of rights and freedoms.

Needless to say that the impact on the economy may well also be affected by other, additional influences. Having said this, the estimates of the overall economic impact (see Table 7) in this paper can be carefully understood as a lower bound.

For policy package 1, the direct economic benefits could be between €25.1 billion and €74.3 billion per year and the one-off costs €8.1 billion. In the case of minimum coordination the benefits could lie between €20.8 billion and €60.4 billion per year and the one-off costs could add up to €23.6 billion. Macroeconomic expectations could add up to approximately €47 billion to EU GDP over the 2020-2030 period. The expected outlook for policy package 2 would be smaller with the direct economic benefits of common action potentially surpassing those already achieved by legislation at Member State level by €3.1 billion. EU-level common action could add €29 billion to EU GDP over the 2020-2030 period.

By implementing the identified quantifiable policy in a harmonised way in the EU, the combined effects of the two scenarios could result in 0.11 percentage points further GDP growth than without common action in the EU, that is about €76 billion EU GDP over the 2020-2030 period.

Table 7 – Summary of the economic impacts of policy packages 1 and 2 (EU27)

	2020-2025	2020-2030
Policy package 1		
Direct import effects	13 109	26 277
Net costs*	-3 339	1 457
Consumption growth	3 250	8 603
Legal growth (investment)	1 668	-725
TOTAL DIRECT IMPACT	14,687	35 612
TOTAL INDIRECT IMPACT	6 419	12 018
TOTAL IMPACT	21 105	47 630
Multiplier	1.44	1.34
Policy package 2		
Consumption growth	6 965	19 120
Net costs*	-2 710	-6 130
Government expenditure	3	7
TOTAL DIRECT IMPACT	4 258	12 996
TOTAL INDIRECT IMPACT	5 382	16 166
TOTAL IMPACT	9 640	29 162
Multiplier	2.26	2.24
Combined policy packages		

Direct import effects	13 109	26 277
Consumption growth	10 214	27 723
Net costs*	-6 050	-4 673
Legal growth (investment)	1 668	-725
Government expenditure	3	7
TOTAL DIRECT IMPACT	18 945	48 608
TOTAL INDIRECT IMPACT	11 807	28 178
TOTAL IMPACT	30 752	76 786
Multiplier	1.62	1.58

Note: * Net costs are the difference between cost savings and cost of compliance.

** 2010 prices, values discounted at 5 % per year to make the impacts comparable over time.

Source: Annex I to this paper⁵¹ (calculation based on E3ME model).

⁵¹ Annex I to this paper (Villar Garcia et al.).

5. Conclusions on European added value

To sum up the analysis, this chapter gives an overview of the added value that could potentially be achieved as a result of EU action, taking a look at effectiveness and sustainability, innovation, subsidiarity and proportionality, political feasibility, costs and benefits, and economic growth and job creation. For an overview of the EAV for all four policy packages see Table 8.

Effectiveness and sustainability

A common framework for a digital services act would raise effectiveness and create sustainability by boosting public confidence in cross-border e-commerce, reducing fragmentation and improving the alignment of regulation concerning information, and also making space for more fair competition. SMEs could run services more easily in other Member States and they could be supported in their sustainability and in creating economies of scale as they operate in new areas (services, business and countries). The decrease in compliance costs would also benefit companies. If backed up by a highly coordinated approach, content management mechanisms such as 'notice-and-action' procedures, content curation and transparency reporting could be more effective. More effective protection of citizens' rights and freedoms could be achieved through more legal certainty and cross-border enforcement.

Innovation

Innovation would stem from more distinct and easier-to-navigate legal requirements, standards and enforcement for both services and citizens, as it could unleash investment by European firms in innovative business models and services. Furthermore, the cost of implementing differing regulations would be greatly reduced with one EU approach, the savings from which could be spent on innovation. A level playing field for EU services and the restructuring of the digital services market, especially for SMEs, could have a similar effect and could therefore create a taste for innovation.

Subsidiarity and proportionality

Member States experience comparable problems when ensuring consumer protection and fundamental rights, as digital services operate in several or even in all Member States; and given the nature of digital services, which do not stop per se at borders. Tackling those, either with common EU action or with an approach of minimum coordination, is therefore in line with the subsidiarity and proportionality principles. Also, national particularities are less important to digital services given the type of services they offer, and EU-level approaches such as common definitions and standards are better defined. Content management procedures and sanctions mechanisms tackling illegal and harmful content could be instigated respecting the differences of each Member State and their legal systems, while content control and curation mechanisms are defined at EU level.

Feasibility

Consensus on the need for action to regulate e-commerce, be that societal, technical or political, is in general widespread. Recent experience of an intensified use of digital services throughout the coronavirus pandemic has been positive in many respects but has also seen a significant increase in downsides such as online scams and unfair practices. This has strengthened still further the understanding of a need for action and willingness to take steps. Issues related to addressing digital market failures, disinformation and content curation and moderation touch upon the core principles of European democracy and fundamental rights values. In this sense, the issues are highly sensitive. Keeping enforcement at Member State level seems to be more in line with the Member States' understanding, whereas the search for common definitions could more easily be tackled jointly.

Costs and benefits

The direct economic benefits and costs over the 2020-2030 period could be summed up as follows:

For policy package 1:

- with a common approach, the benefit should be between €25.1 billion and €74.3 billion per year and the one-off costs €8.1 billion; and
- with minimum coordination the benefits could lie between €20.8 billion and €60.4 billion per year with one-off costs adding up to €23.6 billion.

For policy package 2:

- the one-off benefit for both a common approach and minimum coordination should approach between €37.5 billion and €44.5 billion . With minimum coordination the benefits could add up to €3.1 billion per year.

Economic growth

For policy package 1 macroeconomic expectations for the introduction of EU-level common action could add approximately €47 billion to EU GDP over the 2020-2030 period; and policy package 2 could add approximately €29 billion to EU GDP over the same period.

In total by implementing the identified quantifiable policy in a harmonised way in the EU, the combined effects of the two scenarios could bring around €76 billion to EU GDP over the 2020-2030 period.

While it was not possible to quantify the impacts of the policy packages on specific regulation to ensure fair competition in online platforms ecosystems and cross-cutting policies to ensure enforcement and guarantee clarity, it is expected that both would contribute to the implementation of the digital single market, and boost innovation. That said, it is to be assumed that the EU added value achieved in GDP and job creation might be significantly higher than quantified.

Table 8 – European added value of the four policy packages

Assessment criteria	Policy options											
	Enhanced consumer protection and common e-commerce rules			Create a framework for content management and curation that guarantees the protection of rights and freedoms			Specific regulation to ensure fair competition in online platform ecosystems			Cross-cutting policies to ensure enforcement and guarantee clarity		
	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action
Effectiveness and sustainability	---	-	++	---	-	+++	-	-	+	-	++	+++
Innovation	-	-	+++	-	-	+	-	-	++	-	+	++
Subsidiarity and proportionality	-	++	++	++	++	-	+	+	++	++	+++	+
Political feasibility	+	+++	+++	-	-	--	-	+	+	+	++	+
Cost and benefits	N/A	Costs: €23.6 billion (one-off cost) Benefits: €20.8 billion-€60.4 billion per year	Costs: €8.1 billion (one-off cost) Benefits: €25.1 billion-€74.3 billion per year	N/A	Costs: at least €590 million per year Benefits: one-off benefit of €37.5 billion-44.5 billion	Costs: €590 million per year Benefits: €3.1 billion per year + one-off benefit of €37.5 billion-€44.5 billion	N/A	-	++	N/A	-	++
Economic growth and job creation	N/A	N/A	€47 billion (2020-2030) (over baseline)	N/A	N/A	€29 billion (2020-2030) (over baseline)	N/A	N/A	++	N/A	N/A	++

Source: Based on Annex I to this paper⁵² (calculation based on E3ME model).⁵² Annex I to this paper (Villar Garcia et al.).

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Quantitative assessment of the European added value of a digital services act

Research paper

This research paper assesses the European added value of the digital services act proposal. Firstly, the current state of the main digital markets and the problems still preventing full implementation of the single market for digital services are described.

Potential policy options to tackle current problems, and their expected direct economic impacts, are defined. A quantitative macroeconomic assessment is conducted to estimate the impact of these policy options in the whole EU economy in the coming years.

The European Added Value of the policy options is assessed based on qualitative and quantitative criteria. Two main scenarios are compared to the current situation: new common legal provisions at EU level and minimum coordination among Member States and new national regulations.

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Executive summary

Since the cornerstone of digital services regulation, the EU e-Commerce Directive (ECD), was enacted 20 years ago, the evolution of digital services has been so rapid and profound that issues that could not have been imagined at that time have arisen. Therefore, the current EU regulatory framework faces relevant limitations in dealing with these new challenges. Being aware of these limitations, the EU intends to undertake a thorough revision of this framework. This initiative has been named the 'Digital Services Act Package' (DSA).

This study assesses the European added value assessment of the policy options that the DSA package will likely include to amend essential pieces of the current regulation of digital services (mainly the ECD and the Platform to Business Regulation) in response to the problems that prevent the full implementation of the Digital Single Market (DSM). These problems can be summarised as follows:

- 1 Limited and uneven protection of digital services users (businesses, particularly SMEs, and citizens) due to:
 - Uncertainty derived from the lack of clarity of service providers' obligations.
 - Fragmentation of the internal digital market and increasing dispersion of legal provisions in Member States, delving into legal uncertainty, imposing added costs for cross-border business operation, particularly for SMEs, and hindering cooperation.
- 2 Current market power of online platforms is generating asymmetries and distorting competition.
- 3 New and increased risks derived from the use of digital services threaten citizens' rights and freedoms.
- 4 Absence of effective legal enforcement mechanisms.

Based on existing literature, the Commission Digital Services Act (DSA) package proposal, and the stakeholders' position papers, four groups of policies are identified to address the limitations in the current legal framework regulating digital services in the EU. Each of the packages includes diverse policy actions, summarised in the following table.

Table 1: Summary of policy options

	Policy package	Policy actions
1	Enhanced consumer protection and common e-commerce rules	<ol style="list-style-type: none"> 1 Fair and transparent contract terms and general conditions for business partners and consumers. 2 Reinforcement of the minimum information requirements for commercial communications. 3 Increase transparency of commercial communications. 4 Extend the scope of the ECD to service providers from non-EU countries. 5 Limit the intrusiveness of advertising.
2	Creating a framework for content management and curation that guarantees the protection of rights and freedoms	<ol style="list-style-type: none"> 1 Clear and standardised notice-and-action procedures to deal with illegal and harmful content. 2 Enhanced transparency on content curation and reporting obligations for platforms. 3 Out-of-court dispute settlement on content management, particularly on notice-and actions procedures.

3	Specific regulation to ensure fair competition in online platform ecosystems	<ol style="list-style-type: none"> 1 Include new horizontal rules in the Platform to Business Regulation for all digital platforms. 2 Creation of a specialised body to reinforce oversight of the behaviour of systemic platforms. 3 Creation of specific ex-ante rules that would only apply to systemic platforms to ban or restrict certain unfair business practices.
4	Cross-cutting policies to ensure enforcement and guarantee clarity	<ol style="list-style-type: none"> 1 Clarification of key definitions. 2 Clarification of liability exemptions for online intermediaries. 3 Establishment of transparency and explainability standards and procedures for algorithms. 4 Ensure enforcement and create a European supervisor.

Source: Authors' own elaboration.

The above policy packages are not mutually exclusive, in fact, they are complementary to each other.

The direct economic impacts of the four policy packages are assessed. Some of them are quantified and included in the macroeconomic modelling exercise, others are only quantified, and others are analysed qualitatively. The following table summarises all the impacts considered.

Table 2: Summary of direct economic impacts of policy packages

Policy package	Expected impact	Level of analysis
Enhanced consumer protection and common e-commerce rules	Increase in cross-border e-commerce consumption	Quantified and used as input for the macroeconomic assessment
	Increase in domestic e-commerce consumption	Quantified
	Increase in turnover of business users of cloud computing services	Quantified and used as input for the macroeconomic assessment
	Compliance costs for e-commerce providers	Quantified and used as input for the macroeconomic assessment
	Cost savings for e-commerce providers selling cross-border	Quantified and used as input for the macroeconomic assessment
	Reduction of litigation costs and ADR costs for consumers and service providers	Quantified and used as input for the macroeconomic assessment
	Increase in domestic (EU) production of legal goods due to decreased imports of counterfeit goods	Quantified and used as input for the macroeconomic assessment
	Increase in innovation due to enhanced IPR protection	Analysed qualitatively
	Impact of limiting intrusiveness of advertising on consumption	Analysed qualitatively
Creating a framework for content management and curation that guarantees	Increase in legal consumption of digital content	Quantified and used as input for the macroeconomic assessment
	Compliance costs for digital service providers	Quantified and used as input for the macroeconomic assessment

the protection of rights and freedoms	Costs of transparency reporting for digital service providers	Quantified and used as input for the macroeconomic assessment
	Increase in stock prices of digital service providers due to transparency reporting	Quantified
	Increase in market capitalisation of digital service providers due to transparency reporting	Quantified
	Reduction of cost of capital for digital service providers due to transparency reporting	Quantified
	Economic gains of tackling online disinformation	Analysed qualitatively
Specific regulation to ensure fair competition in online platform ecosystems	Lower prices for consumers	Analysed qualitatively
	Greater product variety for consumers	Analysed qualitatively
	Higher product quality for consumers	Analysed qualitatively
	Increase in innovation of digital service providers	Analysed qualitatively
Cross-cutting policies to ensure enforcement and guarantee clarity	Costs for public budgets to create enforcement bodies	Analysed qualitatively
	Increase in online consumption due to transparency of algorithms	Analysed qualitatively
	Potential economic detriment to digital service providers due to transparency of algorithms	Analysed qualitatively

Source: Authors' own elaboration.

The macroeconomic modelling is applied to the two first policy packages and it is based on some of the direct economic impacts mentioned above. The two main routes through which the first policy package (enhanced consumer protection and common e-commerce rules) will impact on the economy are consumer spending and increased costs. The increase in consumer spending within EU borders will lead to an increase in both domestic and intra-EU demand. Increase in demand for goods and services in turn leads to higher sectoral output, investment, employment, and disposable income. Higher income leads to additional spending on goods and services. The implementation of the first policy package will also bring about changes in rules and conditions that service providers will need to comply with. Initially, this legal framework will lead to compliance costs for online service providers and investment in adapting to the new changes. The initial investment and costs will be one-off and will be mainly felt in 2021. From 2022 onward, the increase in cross-border e-commerce will bring cost savings. Further clarification of the legal framework concerning e-commerce will bring about additional cost savings by preventing legal costs arising from cross-border litigation or avoiding dispute settlement costs from non-court cases. An increase in consumer spending online is based mainly on increased trust, however some of the spending will be displacement of spending on illegal goods rather than new spending.

The second policy package (creating a framework for content management and curation that guarantees the protection of rights and freedoms) is expected to tackle illegal online content, amongst other issues. If there are more stringent rules on illegal online content, consumers will switch their consumption towards legal content. Online service providers will be expected to bear a one-off compliance cost (with notice-and-action measures and with transparency requirements) that will be spread over the period 2021-23. The initial cost increases faced by service providers are likely to be offset by the cost savings in the long term.

European Added Value (EAV) can be defined as ‘the value resulting from an EU intervention which is additional to the value that would be otherwise created by Member State action alone’.¹ According to this definition, the EAV of the policy packages is assessed by taking three possible scenarios into consideration: (1) maintaining the current regulation (baseline scenario), (2) a reform implemented through minimum coordination at EU level, leaving the definition of specific regulation to Member States; (3) a reform based on a common action at the EU level, with all Member States implementing the same legal requirements.

Both qualitative and quantitative aspects are considered when assessing this value. The qualitative assessment compares the three scenarios considering these criteria: (1) effectiveness and sustainability, (2) innovation, (3) subsidiarity and proportionality and (4) political feasibility. The quantitative assessment takes into account: (5) the estimates of the direct economic impacts (costs and benefits) of each policy package, comparing all three scenarios; and (6) the macroeconomic estimates of the impact on GDP growth and job creation of policy package 1 (enhanced consumer protection and common e-commerce rules) and policy package 2 (creating a framework for content management and curation that guarantees the protection of rights and freedoms), comparing scenario 3 (common action) to the baseline scenario.

Over the period 2020-30, policy package 1 will increase growth in EU GDP by 0.06 percentage points over the baseline (an additional €47 billion over the 10 years). The impact of policy package 2 is lower, producing a cumulative GDP impact of €29 billion. The joint effect of these two policy packages is 0.11 percentage points more GDP growth than in the absence of EU-level common action. By 2030, the two policy packages will create 82 000 new jobs compared to the baseline.

Table 3: Summary of macroeconomic impacts (EU27)

	2021	2025	2030	2020-30
Policy package 1				
GDP (% difference)	-0.002	0.05	0.05	0.06*
GDP (€ million)	-250	7 088	7 743	47 630**
Total employment (% difference)	0.008	0.02	0.02	0.02*
Total employment ('000)	17	41	40	40***
Policy package 2				
GDP (% difference)	-0.001	0.04	0.04	0.05*
GDP (€ million)	-83	5 026	6 019	29 162**
Total employment (% difference)	0.000	0.01	0.02	0.02*
Total employment ('000)	0	29	43	43***
Combined policy packages				
GDP (% difference)	-0.003	0.09	0.09	0.11*
GDP (€ million)	-332	12 116	13 755	76 786**
Total employment (% difference)	0.01	0.03	0.04	0.04*
Total employment ('000)	17	71	82	82***

¹ European Commission (2011). The added value of the EU budget. Accompanying the document Commission Communication. A budget for Europe 2020. Commission staff working paper SEC(2011) 867 final.

Note: * Difference in growth between the scenario and the baseline over the period 2020-30, expressed in percentage points. ** Aggregated difference between the scenario and the baseline over the period; GDP values are discounted at 5% per year to make the euro values comparable over time. *** Additional employment by 2030 compared to baseline.

Source: Authors' calculation based on E3ME model.

Overall, for the policy packages quantitatively assessed, the relative size of GDP impacts reflects the relative size of the direct impacts. Due to data availability and the methodological approach, some direct economic impacts are considered as inputs for the macroeconomic model. However, there are other impacts that might increase the overall economic impact. Therefore, the above estimation of the macroeconomic impact on growth and job creation should be considered as lower bound of the overall impact on the economy.

All in all, the economic assessment provides a combination of macro-economic estimates and micro-economic assessment on the specific issues related to the Digital services act, complemented with a qualitative analysis to facilitate better comparison and a more comprehensive understanding of the EAV of the various policy packages.²

² Criteria one to four (effectiveness and sustainability, innovation, subsidiarity and proportionality, and political feasibility) are qualitatively assessed by using a six-level scale: high positive impact (+++); medium positive impact (++); low positive impact (+); low negative impact (-); medium negative impact (--); high negative impact (---). For criteria five and six (cost benefit and economic growth and job creation), of economic nature, quantitative estimations are provided when available, complemented with qualitative approximations.

Table 4: Summary of the EAVA

Assessment criteria	Policy options											
	Enhanced consumer protection and common e-commerce rules			Creating a framework for content management and curation that guarantees the protection of rights and freedoms			Specific regulation to ensure fair competition in online platform ecosystems			Cross-cutting policies to ensure enforcement and guarantee clarity		
	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action
Effectiveness and sustainability	---	-	++	---	-	+++	-	-	+	-	++	+++
Innovation	-	-	+++	-	-	+	-	-	++	-	+	++
Subsidiarity and proportionality	-	++	++	++	++	-	+	+	++	++	+++	+
Political feasibility	+	+++	+++	-	-	--	-	+	+	+	++	+
Cost and benefits	N/A	Costs: €23.6 billion (one-off cost) Benefits: €20.8 billion-€60.4 billion per year	Costs: €8.1 billion (one-off cost) Benefits: €25.1 billion-€74.3 billion per year	N/A	Costs: at least €590 million per year Benefits: one-off benefit of €37.5 billion-44.5 billion	Costs: €590 million per year Benefits: €3.1 billion per year + one-off benefit of €37.5 billion-€44.5 billion	N/A	-	++	N/A	-	++
Economic growth and job creation	N/A	N/A	€47 billion (2020-2030) 40 000 new jobs by 2030 (over baseline)	N/A	N/A	€29 billion (2020-2030) 43 000 new jobs by 2030 (over baseline)	N/A	N/A	++	N/A	N/A	++

Source: Authors' own estimates.

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List of Abbreviations

AI	Artificial Intelligence
DSA	Digital Services Act
DSM	Digital Single Market
ECD	e-Commerce Directive
MS	Member State
NaA	Notice and Action
IPR	Intellectual Property Rights
OSP	Online Service Provide

1 Introduction

This research paper aims to provide a quantitative assessment of the European added value of the proposal on regulatory amendments in the field of online services, named 'Digital services act' (DSA). The enhancement of the current regulation related to the provision of online services, particularly the Directive 2000/31 EC ('e-Commerce Directive'), is aimed at consolidating the Digital Single Market by easing cross-border e-commerce, improving consumer protection when buying online, enhancing content management in online services, reducing the presence of illegal online content, fostering competition in digital markets, easing the entrance to those markets to innovative companies, particularly SMEs, and boosting economic and social cohesion of the EU.

The first part of the study describes the state of play, providing an overview of the current situation of the main digital sectors and the problems that citizens and businesses face when using digital services in the EU. The context in which digital services have flourished since the beginning of the century, and how regulation has tried to cope with the challenges posed by their evolution, is described. Some estimations of the economic impact of regulatory amendments aimed to reinforce the EU internal market for digital services are provided to complement the contextual analysis. Barriers still preventing full implementation of the Digital Single Market in the EU are then analysed, followed by a detailed analysis of the main digital sectors, paying attention to their development in terms of usage and economic growth. Specific barriers hampering the evolution of these digital sectors, which can also affect users' rights, are detailed.

The second part of the study discusses the policy actions that have been proposed so far as part of the DSA, based on existing literature, the Commission's DSA package proposal and stakeholders' position papers made public.³ For analysis purposes, these actions are grouped into four policy clusters or packages aimed at tackling high-level issues, namely: enhanced consumer protection and common e-commerce rules; a framework for content management and curation that guarantees the protection of rights and freedoms; specific regulation to ensure fair competition in online platform ecosystems; cross-cutting policies to ensure enforcement and guarantee clarity. Direct economic impacts of all policy packages are assessed. For some policy actions, a quantitative estimation has been provided, as they focused on facing problems of specific economic activities or sectors for which existing statistics give aggregated information (for instance, the number of enterprises/users that sell/purchase through e-commerce channels). Other policies, however, are more cross-sectorial, which hinders the quantitative estimation as their economic benefits are less accurately captured by available data (for example, the platform business model). As a result, when possible, these impacts are monetised and included in the macroeconomic modelling exercise, others are quantified, and, when quantification has not been possible, a qualitative assessment is provided.

Based on these direct impacts, the two first policy packages are modelled within the macro-econometric model E3ME to quantify the wider spill-over effects on the EU27 economies.

The last part of the study assesses the EU added value of the four policy packages. Each policy package is assessed to give an estimation of the added value in three scenarios:

- 1 Maintaining the current framework (baseline scenario).
- 2 Minimum coordination at the EU level, leaving the definition of specific regulation to Member States.

³ Position papers published before 30th July 2020 have been considered. The full list of documents is described in the corresponding chapter and in the references section.

- 3 Common action at the EU level, with all Member States implementing the same legal requirements.

Although the focus of the assessment is on the economic added value of these options, it is not always possible to capture the real value of a policy in monetary terms. For that reason, the added value of each option is also assessed against qualitative criteria, trying to reflect as broadly as possible their potential impact.

A remark on the current COVID-19 crisis

The global pandemic that spreads around the EU since March 2020 has changed, maybe forever, many of our behaviours and has impacted the economy in an unprecedented way. The European Central Bank has projected a fall of 8.7 % of the GDP in the euro area in 2020.⁴ Transport and tourism are expected to be two of the sectors most negatively affected by the crisis.

The coronavirus crisis is also having a great impact on consumers behaviour. Changes in this sense point to a growth opportunity for digital businesses, particularly e-commerce services.⁵ According to Eurostat, internet sales in the EU increased by 17.4 % between February and June 2020.⁶

In this context, all measures aimed at improving the functioning of the Digital Single Market may have a greater impact. However, data availability at the moment of elaboration of this study makes it impossible for the macroeconomic analysis of policy options to reflect the circumstances created by the COVID-19 pandemic. The volatility of the current economic environment is a very relevant aspect to consider when applying the results of this study, making it difficult to isolate the impact of legislation from the impact of new circumstances on digital markets.

⁴ European Central Bank (2020). [Eurosysteem staff macroeconomic projections for the euro area](#).

⁵ Accenture (2020). [Outmaneuver uncertainty: Navigating the human and business impact of Covid-19](#).

⁶ Eurostat (2020). [Impact of Covid-19 crisis in retail trade](#).

2 State of play

2.1 Context and definition of the problem

2.1.1 Context

While technology and the digital economy are evolving at a dizzying pace, the legal framework regulating digital services in the EU is the e-Commerce Directive (ECD),⁷ which dates back to the year 2000.

Since then, new enabling technologies, new digital services and new business models have emerged. In particular, platform business models⁸ have led to huge disruption in many markets but have also helped consumers and businesses by facilitating personal and commercial exchanges, particularly cross-border, that would not have otherwise been possible.⁹ Furthermore, the evolution of digital services and these exchanges have generated new challenges affecting the safety of citizens and societies, in particular democratic societies.

For that reason, various instruments have been put in place in recent years to address specific aspects of the digital transformation of society and the economy.

In 2015, the Digital Single Market (DSM) Strategy¹⁰ was launched. It intended to create a 'Digital Single Market in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence'.¹¹

To achieve this overall goal, the DSM Strategy defined three main pillars:¹²

- Ensuring better access to online goods and services across Europe for consumers and businesses.
- Establishing the right conditions for digital networks and services to flourish.
- Maximising the EU digital economy's potential for growth.

The first pillar was aimed at creating a regulatory environment where online businesses, particularly e-commerce, might develop on equal terms with offline markets, ensuring the same level of consumer protection, allowing free movement of goods and services, and supplying the same customer experience regardless of whether it is a domestic or cross-border purchase. Full implementation of this pillar would result in greater convenience and choice for consumers, lower

⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000, on certain aspects of information society services, in particular electronic commerce in the Internal Market ('Directive on electronic commerce').

⁸ Platform business models focus on facilitating interactions amongst a large number of stakeholders. Service providers might supply the infrastructure for the interaction (the technology) but also the governance structure and the standards and procedures that allow interactions to scale so that network effects can be triggered. Their contribution to the value chain consists of creating the means for connecting providers and end users. Deloitte (2020). [Platform business model explained... in under 100 words](#).

⁹ Oxera (2015). [Benefits of online platforms](#).

¹⁰ [Communication](#) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe. May 2015.

¹¹ Ibid.

¹² Ibid.

prices and increased consumption. From the business side, it would allow participation in a wider market, the whole EU, achieving scale economies that result in increased competitiveness.¹³

The other two pillars intended to further improve digitisation of the EU, easing the deployment of remarkably high capacity networks, the essential infrastructure for the provision of digital services, and the development of enabling technologies (cloud computing, artificial intelligence, cybersecurity, blockchain). Digitisation of the EU would result in productivity gains; product, service and process innovation; reduced transaction costs and improved competitiveness of the EU economy.¹⁴

Table 5 summarises the most relevant policies and legal instruments implemented in recent years in connection with the provision of digital services and the deepening of the DSM.

Table 5: Policy measures in the field of the Digital Single Market (2015-2019)

Policy measures
e-Commerce, content and online regulations
Regulation on cross-border portability of online content services (2017)
Regulation addressing unjustified geo-blocking (2018)
Council Regulation and Directive VAT for e-Commerce (2018)
Regulation on cross-border parcel delivery services (2018)
Directive on Audio-Visual and Media Services (2018)
Regulation on promoting fairness and transparency for business users of online intermediation services (2019)
Regulation on the implementation and functioning of the .EU Top Level Domain name (2019)
Payment Services Directive 2 (2015)
Intellectual property
Directive on Trade Secrets (2016)
Regulation and Directive on permitted uses in copyright for print-disabled persons (2017)
Directive on copyright in the Digital Single Market (2019)
Council Directive on VAT for e-publications (2018)
Data and AI
Directive on the re-use of public sector information (2019)
Regulation on free flow of non-personal data (2018)
General Data Protection Regulation (2016)
ePrivacy Directive (2002, under revision)
Council Regulation establishing the European High-Performance Computing Joint Undertaking (2018)
Trust and security
Regulation on electronic identification and trust services (eIDAS) (2014)
Directive on Network Information Security (2016)
Regulation on the EU Cybersecurity Act (2019)

¹³ Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

¹⁴ Ibid.

E-Government
Regulation establishing a Single Digital Gateway (2018)
Consumer protection
Regulation on Consumer Protection Cooperation (2017)
Directive on contracts for the supply of digital content (2019)
Directive on contracts for sales of goods (2019)
Directive on better enforcement and modernisation of EU consumer protection rules (2019)
Electronic communication networks and services
Directive on European Electronic Communications Code (2018)
Regulation Open Internet/TSM (2015)
Decision on use of 470-790 MHz frequency band (2017)
Regulation on wholesale roaming (2017)
Regulation to promote internet connectivity in local communities (Wi-Fi4EU) (2017)

Source: Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

However, several points are still to be addressed, such as clarifying digital service providers' responsibilities, enhancing users' protection and rights, and implementing measures to guarantee a level playing field for all digital players across the whole EU while fostering innovation.

The European Commission has launched an initiative to modernise the current legal framework regulating the single market for digital services, with the aim of tackling these challenges. The Commission has named this initiative the Digital Services Act (DSA) package.¹⁵

The economic impact of an internal digital services market

One of the first attempts to quantify the potential economic benefits of improving the EU e-commerce market was conducted in 2011,¹⁶ eleven years after the ECD. The study estimated the welfare gains for EU consumers, resulting from lower prices and increased choices, at €204.5 billion per year, a figure equivalent to 1.7 % of the overall EU GDP at that time. The estimation was based on a scenario where market share of e-commerce accounted for 15 % of total retail trade. It was an ambitious scenario, as at the time of the study (2011), e-commerce sales represented 3.5 % of total retail sales in Europe. Eight years later (2019), the e-commerce share of total retail trade in Europe was estimated at 10.1 %, ¹⁷ meaning the scenario was still far from being realised.

In a study conducted in 2014 by the Institute for Prospective Technological Studies, belonging to the Joint Research Centre of the European Commission (IPTS/JRC), Duch-Brown and Martens calculated the consumer surplus that increased e-commerce sales of a selected group of home appliance goods could yield.¹⁸ They concluded that e-commerce sales of such products could increase the consumer surplus by €34.4 billion (0.3 % of EU GDP) compared to the counterfactual situation without e-commerce. They also estimated that full convergence of online prices to the

¹⁵ European Commission (2020). [The Digital Services Act package](#).

¹⁶ Civic Consulting (2011). Consumer market study on the functioning of e-commerce and internet marketing and selling techniques in the retail of goods.

¹⁷ Centre for Retail Research (2020). [Changes in online shares of retail trade 2012-2019](#). Data for Europe is estimated as the mean of 11 European countries.

¹⁸ Duch-Brown N., Martens B., (2014). [Consumer benefits from the EU Digital Single Market: evidence from household appliances markets](#).

lowest price could increase welfare gains by €2.6 billion (0.02 % of EU GDP). The other realistic scenario (10 % increase in online sales that would be fully added to offline sales), would render welfare gains for consumers of €5 billion per year (0.04 % of EU GDP).

Table 6: Economic benefits of e-commerce

Study	Scenario	Macroeconomic impacts
Consumer benefits from the EU DSM: evidence from household appliance markets	1 e-Commerce sales vs. no e-commerce.	1 Increase of consumer surplus: €34 billion (0.3 % of EU GDP).
	2 Online price convergence to the lowest.	2 Increase of consumer surplus: €2.6 billion (0.02 % of EU GDP).
	3 10 % increase in online sales and equivalent displacement of offline sales.	3 Increase of consumer surplus: €3.4 billion (0.03 % of EU GDP).
	4 10 % increase in online sales without displacement of offline sales.	4 Increase of consumer surplus: €5.2 billion (0.04 % of EU GDP).

Source: Duch-Brown N., Martens B., (2014). Consumer benefits from the EU Digital Single Market: evidence from household appliances markets.

Both studies (Civic Consulting; Duch-Brown and Martens) confirm the economic benefit of enhancing e-commerce in the EU, but also show that there is still untapped potential and room for improvement.

In 2015, the Commission estimated that the DSM Strategy would 'generate up to EUR 250 billion of additional growth in Europe in the course of the mandate of the next Commission, thereby creating hundreds of thousands of new jobs, notably for younger job-seekers, and a vibrant knowledge-based society'.¹⁹

Diverse studies have tried to quantify the economic impact of the DSM Strategy.²⁰ While some have focused on specific DSM Strategy measures, particularly those related to easing cross-border e-commerce, others have adopted a more comprehensive approach, estimating the overall economic contribution of all measures. For instance, the IPTS/JRC has developed several working papers on diverse policy issues related to the Digital Agenda and the DSM.²¹ For example, a study quantified the impact on consumers' welfare of lifting one of the main barriers to e-commerce: geo-blocking restrictions to cross-border e-commerce.²² This study was the basis of estimating the economic impact of the regulation on addressing geo-blocking and other forms of discrimination based on

¹⁹ [Communication](#) from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe. May 2015.

²⁰ See for example Duch-Brown N., Martens B. (2016). The economic impact of removing geo-blocking restrictions in the EU Digital Single Market. Digital economy working paper 2016/02; Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth. The European Digital Single Market. Delivering economic benefits for citizens and businesses; Duch-Brown N., Cardona M. (2016). Delivery costs and cross-border e-commerce in the EU Digital Single Market. Digital economy working paper 2016/03; Pataki Z. (2019). The Cost of Non-Europe in the Single Market. 'Cecchini Revisited' An overview of the potential economic gains from further completion of the European Single Market.

²¹ The following repository includes all working papers on digital economy carried out by the JRC: <https://ideas.repec.org/s/ipr/decwpa.html>

²² Duch-Brown N., Martens B. (2016). The economic impact of removing geo-blocking restrictions in the EU Digital Single Market. Digital economy working paper 2016/02.

customers' nationality, place of residence or place of establishment within the internal market.²³ Duch-Brown and Martens found that the full removal of geo-blocking restrictions on cross-border e-commerce would increase consumer surplus by 1.2 %. These welfare gains would come from reduced prices (1 % online products; 0.5 % offline products). Firms would also benefit from lifting geo-blocking restrictions, as their profits would increase by 1.4 %, by achieving economies of scale and cost reductions when selling online.

Another issue that the IPTS/JRC has analysed is delivery costs on cross-border e-commerce.²⁴ Duch-Brown and Cardona (2016) estimated that a policy that removes delivery concerns (which later materialised in the Parcel Delivery Regulation)²⁵ could increase household consumption by €2.3 billion (0.03% of EU GDP). Such a policy would also have a positive impact on consumer prices, which could be reduced by 0.03 %.

Therefore, the IPTS/JRC has analysed the economic impacts of addressing partial issues related to the DSM with policy interventions. Table 7 summarises some of the economic impacts estimated:

Table 7: Economic benefits of policy interventions in the DSM

Study	Scenario	Macroeconomic impacts
Duch-Brown N., Martens, B. (2016). <i>The economic impact of removing geo-blocking restrictions in the EU DSM</i>	Geo-blocking restrictions are removed by regulation vs. geo-blocking restrictions persist	<ul style="list-style-type: none"> • Increase in consumer surplus: 1.2 %; • Reduction of online prices: 1 %; • Reduction of offline prices: 0.5 %; • Increase in firms' profits: 1.4 %.
Duch-Brown N., Cardona, M. (2016). <i>Delivery costs and cross-border e-commerce in the EU DSM</i>	Policy intervention to eliminate concerns about delivery costs for cross-border e-commerce in the EU	<ul style="list-style-type: none"> • Increase in household consumption: €2.3 billion (0.03 %); • Reduction of consumer prices: 0.03 %.

Source: JRC studies.

IPTS/JRC researchers have provided economic estimations of the expected impact of some regulatory provisions aimed at tackling specific issues (geo-blocking, parcel delivery costs, cross-border e-commerce) that hinder the full implementation of the DSM. However, as these regulatory amendments have entered into force in recent years, ex post assessments of their economic impacts are still lacking.

The most comprehensive attempt to aggregate all potential economic gains of the legislative provisions related to the DSM Strategy that have already been enacted or are expected to enter into force soon is the study 'Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses'.²⁶ The study reviewed all legislative measures in the field of the DSM Strategy. Based on the economic estimations provided by the European

²³ European Commission (2016). Impact assessment accompanying the document proposal for a regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on place of residence or establishment or nationality within the Single Market.

²⁴ Duch-Brown N., Cardona M. (2016). Delivery costs and cross-border e-commerce in the EU Digital Single Market. Digital economy working paper 2016/03.

²⁵ Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services.

²⁶ Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

Commission accompanying each policy measure, the authors compound an overall figure of €177 billion in potential annual economic gains, which accounts for 1.2 % of the 2017 EU GDP.

Most (€86.1 billion) of the potential annual gains were attributed to the European Electronic Communications Code. Policy measures aimed at boosting the EU data market, especially by easing re-use of public sector information, were expected to provide gains worth €51.6 billion annually. In the field of trust and security, the NIS Directive²⁷ was expected to reduce losses derived from cybersecurity breaches by €4 billion. Policy actions related to e-government could lead to additional gains of €20 billion. The e-commerce, content and online platform policy packages and consumer protection rules contributed to the overall gains with €14.6 billion and €0.3 billion, respectively. Table 8 describes the expected gains of each policy measure in more detail:

Table 8: Estimated economic gains for DSM policy measures

Policy measure	Type of effect	Expected annual benefits (€ billion)
e-Commerce, content and online regulations		14.6
Regulation addressing unjustified geo-blocking (2018)	Increase in consumption of cross-border e-commerce sales	10.3
Council Regulation and Directive on VAT for e-Commerce (2018)	Reduction of VAT compliance costs for businesses	2.3
Regulation on cross-border parcel delivery services (2018)	Positive effect of transparency in price reduction	1.0
Directive on Audio-Visual and Media Services (2018)	Reduction of administration and implementation costs	1.0
Data and AI		51.6
Directive on the re-use of public sector information (recast) (2018)	Savings for businesses Reduction of costs for public agencies	45.0
Regulation on free flow of non-personal data (2018)	Increase in GDP derived from the number of jobs created	4.3
General Data Protection Regulation (2016)	Savings on administrative costs	2.3
Trust and security		4.0
Directive on Network Information Security (2016)	Reduction in losses caused by cybersecurity incidents	4.0
e-Government		20.0
Regulation establishing a Single Digital Gateway (2018)	Savings for businesses	20.0
Consumer protection		0.3
Directive on contracts for the supply of digital content (2019)	Gains for businesses	0.3
Electronic communication networks and services		86.1
Directive on European Electronic Communications Code (2018)	Revenue from spectrum auctions Broadband access benefits Service efficiency improvements	81.1
Regulation on Open Internet/TSM (2015)	Roaming savings	5.0
Total		176.6

²⁷ Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

Source: Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

All these estimations assume that existing barriers to the full implementation of the Digital Single Market are removed.

2.1.2 Definition of the problem: persisting and new obstacles to a single digital services market

Current e-commerce figures have not reached the estimations made a decade ago. When evaluating the impact of measures implemented in the field of the DSM, researchers²⁸ identify obstacles that today still prevent the full potential benefits of a digital internal market from being realised in the EU. As it can be seen, some have already been addressed by different pieces of legislation, but others, particularly those relating to the aspects of digital services covered by the ECD, are still to be tackled.

The ECD aligned the basic rules for e-commerce in the EU, focused on four key areas:²⁹

- 1 Transparency and information requirements for digital service providers.
- 2 Commercial communications.
- 3 Contracts and liability limitations for intermediary service providers.
- 4 Cooperation between the Member States and the role of self-regulation.

As mentioned, the evolution of digital technologies and business models has exacerbated some of the barriers to the effectiveness of the ECD, and the vulnerabilities of the internal digital market have led to the emergence of new risks for citizens and businesses.³⁰ The DSA package aims to address the problems that have arisen in these areas over the last 20 years, as well as dealing with the market distortions created by online platforms and their growing market power.³¹

The analysis of the existing problems presented below is based on a review of the issues identified by the European Commission in its DSA package initiative, and the analysis of the contributions expressed by diverse stakeholders through the public consultation on the DSA launched by the Commission in June 2020.³²

The problems identified by the European Commission

The Commission has launched the DSA package initiative in response to four problems identified in the functioning of digital services in Europe:³³

- 1 Fragmentation of the Single Market and limited cross-border cooperation. Member States have responded to the evolution of digital services by developing national legal frameworks. These frameworks have different approaches, imposing different obligations on operators and protecting citizens' rights differently, thus fragmentating the DSM and creating legal uncertainty. This fragmentation particularly affects service providers willing to operate cross-border and imposes extra costs that may be difficult to

²⁸ There is extensive literature analysing the problems faced by the Digital Single Market. See References section.

²⁹ European Commission (2020). [e-Commerce Directive](#).

³⁰ European Commission (2020). [The Digital Services Act package](#).

³¹ Ibid.

³² European Commission (2020). [Consultation on the Digital Services Act package](#).

³³ European Commission (2020). Combined evaluation roadmap/Inception Impact Assessment of the Digital Single Act package and Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's internal market.

tackle, in particular for SMEs. Fragmentation also hampers enforcement of existing rules and hinders cooperation when addressing the problems derived from online platforms.

2 Risks for the online safety of citizens and threats to their fundamental rights.

Counterfeit, unsafe, harmful or illegal contents and products proliferate in the online ecosystem, particularly in the platform ecosystem, with unclear responsibilities and varied levels of consumer protection amongst different types of services.

Measures for detecting illegal content are mostly voluntary and the decision about what content should be removed is in the hands of providers. This results in legal uncertainty for both service providers and users, and in a lack of accountability for online platforms. This lack of accountability includes relevant aspects of the platform business model, which are the use of data and the role of online advertisement. Third-country providers, currently outside the scope of the ECD, also remain unaccountable.

3 Information asymmetries and lack of monitoring.

The digital ecosystem is characterised by noteworthy information asymmetries between users and service providers. The spread of the use of algorithms and artificial intelligence has worsened this problem. Transparency is voluntary, and as a result the information provided by businesses is incomplete and heterogeneous, making comparison across services complicated and preventing any real assessment of the measures put in place to combat harmful content.

4 Competition problems.

Network effects and economies of scale are key to the platform business model; however, this gives platforms a market power that can be used to establish unfair entry barriers for other competitors, particularly small business. The dependence of other traditional actors on online platforms, from a growing number of sectors, is increasing, leading to significant imbalances in bargaining power. This power translates into less choice and higher prices for consumers, and less dynamism and innovation for the European market. Additionally, access to data from large platforms allows them to easily expand their scope of action, accessing other related markets where they can also easily acquire a position of power.

The problems identified by stakeholders

Stakeholders³⁴ have brought up the following concerns regarding the scope of the DSA:

- Definition of information society services remains unclear. In particular, definitions of intermediary services are ambiguous and, as a result, obligations are not clear;
- Lack of alignment of rules across Member States, resulting in barriers to cross-border activities (higher entry costs) and legal uncertainty;
- Weak enforcement of measures within the EU, and particularly for third-country providers;
- Existence of a large amount of illegal and unsafe products and contents in online marketplaces, due to the lack of liability of online marketplaces and platforms;
- Lack of clarity on safe harbour system and notice-and-action obligations.;
- Absence of clear differentiation between illegal and harmful content;

³⁴ The position papers from the following organisations have been reviewed: TIE (Toy Industries of Europe); EU Travel Tech; Nordic Commerce Sector; European Tech Alliance; EDiMA (European trade association representing online platforms and other innovative tech companies); Ecommerce Europe; DIGITALEUROPE (trade association representing the digital technology industry in Europe); EDRI (European Digital Rights); BEUC (European Consumers Organisation); IAB Europe (European-level association for the digital advertising and marketing ecosystem); BusinessEurope (European association of national business federations); Toy Industries of Europe, Danish Chamber of Commerce.

- Lack of interoperability of large platforms;
- Poor information for consumers on online platforms;
- Lack of transparent and understandable terms of service for online platforms;
- Lack of transparency on how platforms curate, moderate and remove online content, and how they allow their customers to target online advertising.

Based on the academic literature,³⁵ the EC's position and stakeholders' contribution, the main clusters of problems that create obstacles for the provision of digital services in the EU can be summarised as follows:

- 1 Limited and uneven protection of digital service users (businesses, particularly SMEs, and citizens) due to:
 - Uncertainty derived from the lack of clarity around service providers' obligations.
 - Fragmentation of the internal digital market and increasing dispersion of legal provisions in Member States, delving into legal uncertainty, imposing added costs for businesses operating cross-border (particularly SMEs) and hindering cooperation.
- 2 Current market power of online platforms is generating asymmetries and distorting competition.
- 3 New and increased risks derived from the use of digital services threaten citizens' rights and freedoms.

Another general problem, which acts as a driver for the other three, is the absence of effective legal enforcement mechanisms. This issue is particularly relevant when considering that many digital services are provided by non-EU firms, and they are currently outside the scope of the ECD.

These issues affect the various markets that are part of the digital services ecosystem differently. The following chapter describes the state of play of the affected markets, on the one hand to get an idea of the scope of the problem and, on the other hand, to understand the specific barriers each market faces and the drivers behind these problems. Understanding these drivers will allow to know which measures would be the most appropriate to eliminate or minimise the problems, and to understand the economic impacts of dealing with them.

2.2 Evolution of digital sectors in the EU and obstacles to their development

After reviewing the development of the single digital services market and describing the overall economic benefits and barriers that still prevent its full implementation, this chapter provides a detailed outlook on the evolution of key digital sectors and activities in the EU, and the specific

³⁵ Iacob N., Simonelli F. (2020). How to fully reap the benefits of the internal market for e-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce directive; De Streel A. et al (2020). Online platforms' moderation of illegal content online; Sartor G. (2020). New aspects and challenges in consumer protection. Digital services and artificial intelligence; De Streel A., Husovec M., (2020). The e-commerce Directive as the cornerstone of the Internal Market. Assessment and options for reform; Madiaga T. (2020). Reform of the EU liability regime for online intermediaries. Background on the forthcoming digital services act; Smith, M. (2020). Enforcement and cooperation between Member States. E-Commerce and the future Digital Services Act; Pedreschi D., Miliou I. (2020). Artificial Intelligence (AI): new developments and innovations applied to e-commerce; Nordemann J.B. (2020). The functioning of the Internal Market for Digital Services: responsibilities and duties of care of providers of Digital Services Challenges and opportunities; Schulte-Nölke H., Rüffer I., Nobrega C., Wiewórowska-Domagalska A. (2020). The legal framework for e-commerce in the Internal Market. State of play, remaining obstacles to the free movement of digital services and ways to improve the current situation.

obstacles affecting each of them. The objective of the chapter is twofold: (1) help policymakers understand the market dynamics of each sector; (2) identify specific issues that negatively impact their development, particularly those related to the two pieces of regulation that the proposed DSA package is likely to review, namely the e-Commerce Directive and the Platform to Business Regulation.

The economic analysis and description of obstacles will focus on e-commerce, maybe the most paradigmatic digital activity linked to the DSM. Additionally, other relevant digital sectors are also analysed to give a comprehensive picture of the current standing of the digital economy in the EU, and the associated issues. The following figure summarises the digital sectors considered in the analysis.

Figure 1: Main digital sectors



Source: Authors' own elaboration.

2.2.1 e-Commerce

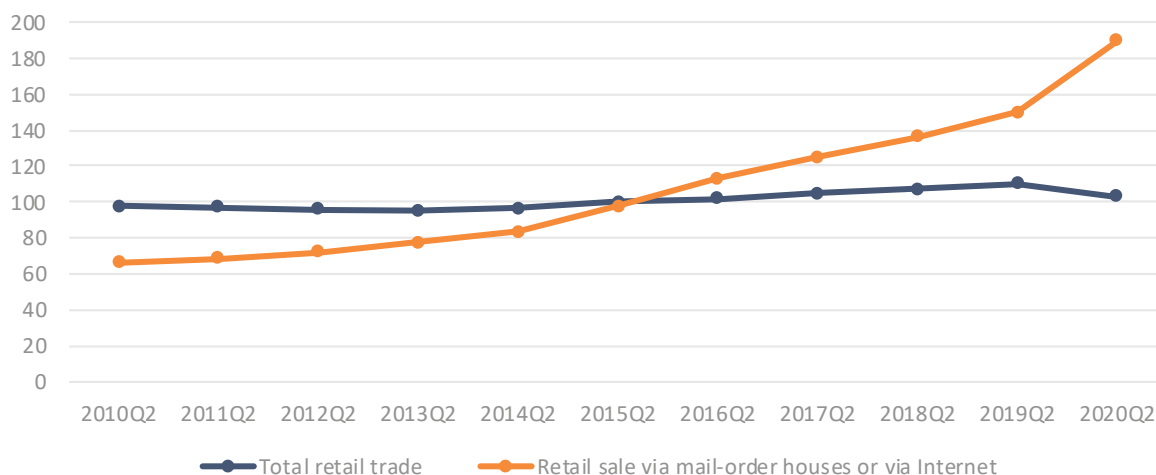
The acquisition of goods and services through e-commerce services of a diverse nature (online marketplaces, retail sellers' websites) is an unstoppable trend, which has accelerated during the COVID-19 pandemic. e-Commerce brings consumers more choice, more convenience, and lower prices, amongst other benefits. From the supply side, e-commerce allows service providers, particularly SMEs, to expand their business with lower costs, to achieve economies of scale and to improve efficiency and competitiveness.³⁶

The following picture shows the evolution of the total retail trade and retail sales through digital means in the last 10 years.³⁷

³⁶ Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

³⁷ Eurostat. Turnover and volume of sales in wholesale and retail trade – annual data. Database sts_trtu_a; unit of measure: index of the volume of retail trade 2015=100.

Figure 2: Evolution of retail trade in the EU (2015=100)

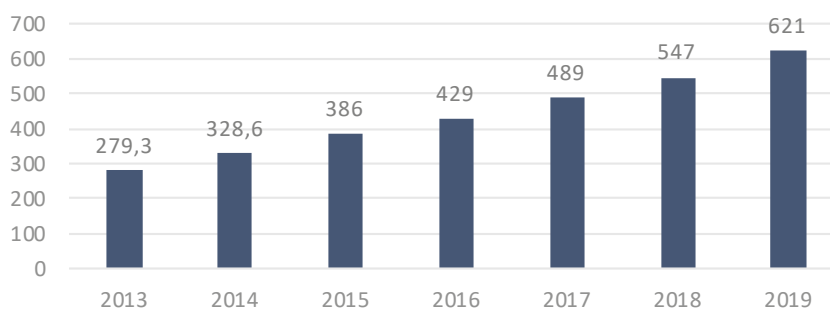


Source: Eurostat (2020). Turnover and volume of sales in wholesale and retail trade. Database sts_trtu_a

The annual growth rate of retail sales via mail-order houses or via the internet between 2014 and 2020 has exceeded 14%, while the rate for total retail trade barely reaches 1%. During the period 2015-2019, which coincides with the implementation of the DSM Strategy, retail sales via e-commerce have grown steadily until the turning point caused by the coronavirus crisis in 2020, whose long-term effects on e-commerce are yet to be verified.

In absolute terms, e-commerce sales in Europe reached €621 billion in 2019, and were expected to grow to €717 billion in 2020:³⁸

Figure 3: e-Commerce turnover in Europe (€ billion)



Source: e-Commerce Foundation (2019). European e-Commerce Report.

The constant growth of e-commerce sales does not directly entail a similar increase of total retail trade, which could be an expected positive economic impact. It depends on the level of substitution between online and offline sales.³⁹ The crowding out effect of online sales seems higher in some sectors (travel and tourism) than in others (consumer electronics).

³⁸ Ecommerce Foundation (2019). European Ecommerce Report. Data refers to the EU27 except Slovenia and Slovakia, plus Iceland, North Macedonia, Norway, Russia, Serbia, Turkey, Switzerland, UK and Ukraine.

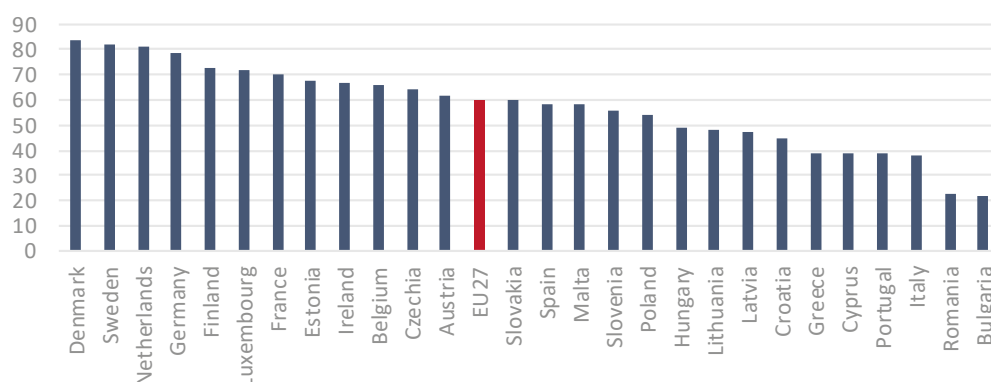
³⁹ JRC/IPTS (2015). The European Single Market. Its Role in Economic Activity in the EU.

After presenting the overall figures, the following sections describe the impact of e-commerce from both the demand (consumers) and the supply (online sellers) sides.

e-Commerce from the demand side

EU inhabitants are increasingly using e-commerce services. The percentage of individuals who bought online in the last 12 months has grown from 49 % in 2015 to 60 % in 2019.⁴⁰ However, great differences in the percentage of online shoppers persist between EU countries. While 84 % of Denmark's population has purchased online in the last 12 months, only 22 % of Bulgarians have used e-commerce services in the same period.

Figure 4: Individuals who have purchased online in the last 12 months by MS (%)



Source: Eurostat (2020) Last online purchase by individuals. Database iso_ec_ibuy

Considering sociodemographic variables, the highest percentage is found amongst people between 20 and 34 years old (80 %). The percentage decreases to 38 % between 55 and 74 years old. However, the annual growth of e-commerce penetration rate by age between 2015 and 2019 is higher in older groups (7.9 % for individuals aged 55 to 74; 3.8 % for individuals aged 25 to 34).

Education level is also a driver for e-commerce. Within the same age group, penetration of e-commerce can vary significantly regarding level of education. For instance, the percentage of individuals aged 25 to 64 with low formal education that have purchased online in the last 12 months is 35 %, while it raises to 83 % when considering individuals with higher formal education. This could suggest that barriers to e-commerce depend not only on regulatory drawbacks but also on users' skills in accessing these services, as confirmed by Duch-Brown N. et al (2015).⁴¹

Another relevant indicator related to e-commerce from the demand side is the distribution of online sales by product category, as it allows detection of which economic sectors can benefit most from e-commerce growth. According to the study 'e-Commerce in Europe 2018',⁴² the top 12 product categories purchased by Europeans online are: (1) clothing and footwear; (2) home electronics; (3) books/audiobooks; (4) cosmetics, skincare and haircare; (5) home furnishings; (6) films; (7) sports and leisure products; (8) food; (9) CDs; (10) car accessories; (11) toys; and (12) children's items. This

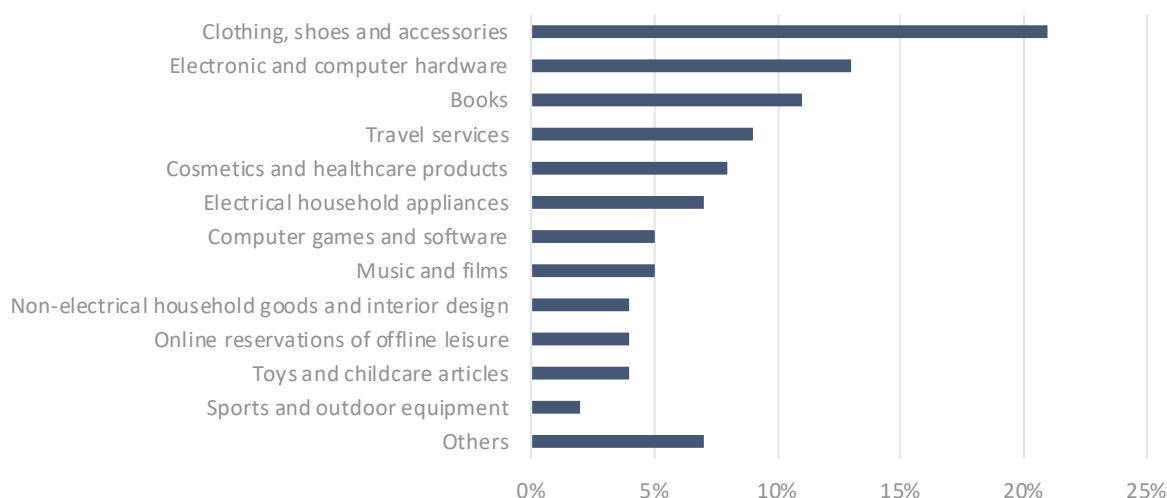
⁴⁰ Eurostat. Last online purchase by individuals: in the 12 months. Database iso_ec_ibuy

⁴¹ JRC/IPTS (2015). The European Single Market. Its Role in Economic Activity in the EU.

⁴² PostNord (2018). [e-Commerce in Europe 2018](#).

ranking is consistent with the results of an online survey conducted by the European Commission in 2015 aimed at identifying the main cross-border obstacles to the DSM.⁴³

Figure 5: Most purchased product categories (% relating to last purchase)



Source: European Commission (2015). Identifying the main cross-border obstacles to the Digital Single Market and where they matter most.

To complete the overview of e-commerce from the demand side, it is worth noting the annual average spending per user. This information is useful in order to estimate the expected increase in consumption if new regulatory measures were to allow current barriers to be lifted. However, data provided by several sources differs. Table 9 summarises this data:

Table 9: Average annual spending per user in e-commerce provided by diverse sources

Source	Data
Statista: <i>Average annual spending per capita for online shopping in Europe, by country</i> https://www.statista.com/statistics/435928/online-shopping-e-commerce-spending-per-capita-by-country-europe/	Germany: €784 Nordics: €769 France: €746 Italy: €668 Spain: €665 Poland: €419 Belgium: €478 UK: €921
Postnord (2019): <i>e-Commerce in Europe 2018</i> https://www.postnord.fi/siteassets/raportit/raportit/postnord-ecommerce-in-europe-2018.pdf	Germany: €670 Nordics: €717 France: €584 Italy: €396 Spain: €538 Poland: €352 Belgium: €453 UK: €942 Netherlands: €565

⁴³ European Commission (2015). Provision of two online consumer surveys as support and evidence base to a Commission study: Identifying the main cross-border obstacles to the Digital Single Market and where they matter most.

e-Commerce Foundation (2019): <i>e-Commerce in Europe. Average online shopper spending in Europe</i> https://ecommercenews.eu/e-commerce-in-europe-e621-billion-in-2019/	EU: €1 346 Northern Europe: €2 046
J. P. Morgan Payment Insights https://www.jpmorgan.com/merchant-services/insights?tab=global-payment-reports	Europe: €2 186 Belgium: €1 473 Czechia: €737 Denmark: €3 345 Germany: €1 149 Ireland: €2 767 Spain: €1 306 France: €1 820 Italy: €1 032 Luxembourg: €1 571 Austria: €1 442 Poland: €581 Portugal: €1 236 Sweden: €1 477 UK: €3 344

Source: Authors' own elaboration based on the sources included in the first column.

e-Commerce from the supply side

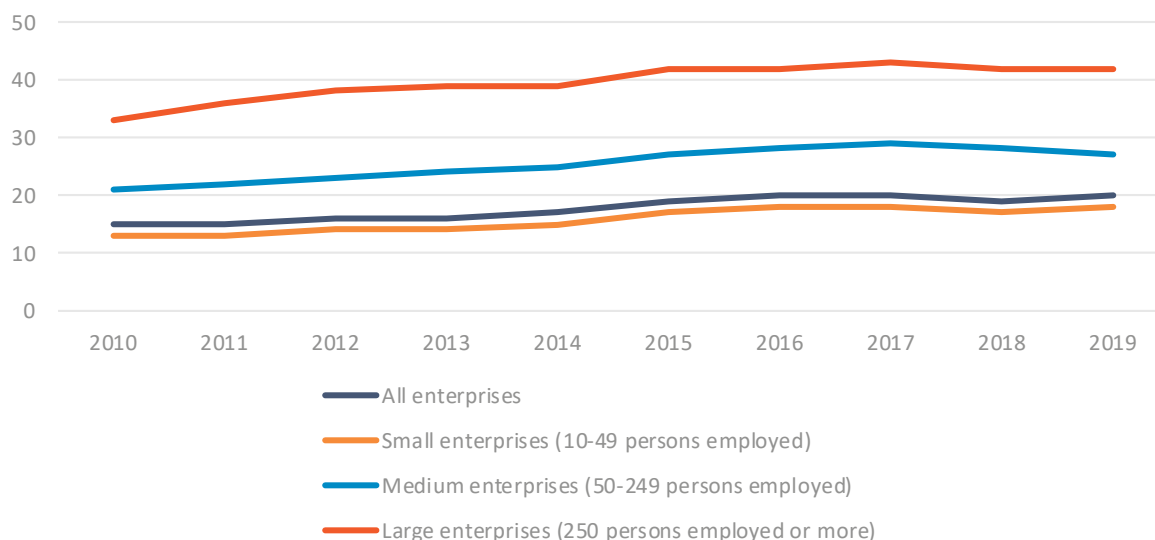
Unlike EU users of e-commerce services, the percentage of enterprises that sell online has remained constant in recent years. In 2019, only 20 % of EU companies with 10 employees or more reported selling through diverse e-commerce channels. A similar percentage has been seen since 2015.

The highest percentages of companies selling online are reported in Ireland (39 %), Denmark (34 %) and Sweden (33 %). On the contrary, the Member States with the lowest percentages of firms selling through e-commerce are Romania (12 %), Bulgaria (11 %) and Greece (11 %). Regarding very small companies (0-9 employees), there is no reliable data about the percentage that sell online, as few Member States (Germany, Spain, Portugal, and Sweden) provide this information. The comparison of this scarce information with the overall data for all enterprises suggests that the percentage of small companies selling online is about 50 % lower than that seen for companies with 10 or more employees (around 10 %).

Analysis of the percentage of companies selling online by size shows that the larger the companies, the higher the percentage that sell online. This could suggest that companies selling online have greater opportunities to expand their business, and thus grow faster.⁴⁴

⁴⁴ Iacob N., Simonelli F. (2020). How to fully reap the benefits of the internal market for e-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce directive.

Figure 6: Enterprises with e-commerce sales at the EU level by company size (%)



Source: Eurostat (2020). Percentage of enterprises with 10 or more employees with e-commerce sales. Database isoc_ec_eseln2

Online marketplaces, platforms that connect sellers and buyers by providing a wide range of tools to facilitate commercial transactions (payment gateways, user statistics, logistic support, sponsored advertising), are becoming one of the main channels for e-commerce sales. It is estimated that the total sale of goods on the top 100 online marketplaces accounts for 58 % of global e-commerce sales.⁴⁵ Despite the opportunities that online marketplaces offer to enterprises, only 6 % of EU companies sold goods through this channel in 2019.⁴⁶ Ireland is the Member State with the highest percentage of companies selling through online marketplaces (11 %).

The company website or app are the preferred e-commerce channels for EU companies. 14 % reported having used these channels in 2019. Ireland, Denmark, Sweden and Belgium are the Member States with the highest percentages (29 %, 24 %, 24 % and 23 %, respectively), while Greece, Italy and Luxembourg reported the lowest percentage (9 %).

Regarding sales destination by type of buyer, 13 % of EU companies sell goods to final customers (B2C), while 11 % sell to other companies or government bodies (B2B/B2G).⁴⁷ Ireland, Belgium and Lithuania are the Member States with most companies selling to final customers (28 %, 22 % and 20 %, respectively). The countries with the highest percentage of companies selling to other firms and government institutions are Belgium, Czechia and Denmark (all with 19 %).

Turnover from e-commerce sales represents 18 % of total turnover of EU companies. The share of turnover from e-commerce varies amongst EU countries, ranging from 34 % in Ireland and 33 % in Belgium, to 4 % in Bulgaria and Greece.

Gaps in the e-commerce sector from the demand side

As mentioned above, e-commerce brings consumers welfare gains as it allows more choice, more convenience and lower prices. These benefits increase if consumers can access wider markets.

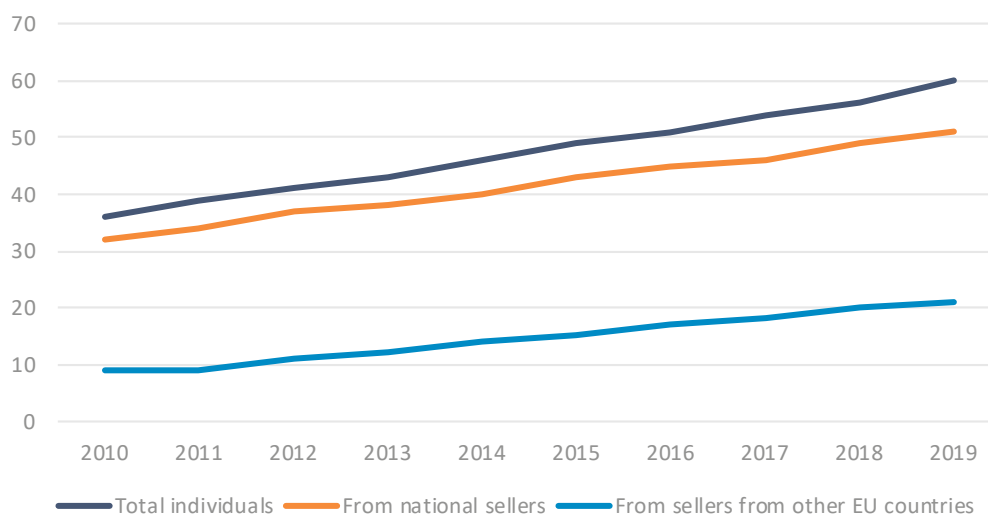
⁴⁵ Digital e-commerce 360 (2019). [2019 e-commerce in review: online marketplaces](#).

⁴⁶ Eurostat. Enterprises with web sales via e-commerce marketplaces. Database isoc_ec_eseln2

⁴⁷ Eurostat. Enterprises with web sales: B2C and B2B/B2G.

However, the percentage of Europeans that purchase online from sellers established in other EU countries is significantly lower than those who purchase from national sellers.⁴⁸

Figure 7: Individuals purchasing from their own country vs other EU countries (%)



Source: Eurostat (2020). Internet purchases by individuals. Database: isoc_ec_ibuy

Only 1 in 5 EU individuals purchased from other EU countries. Additionally, the gap between those who buy from national sellers and those who purchase from other EU countries has widened in the last decade, increasing from 23 percentage points in 2010 to 30 percentage points in 2019.

According to the Consumer Conditions Scoreboard, in 2018 71.7 % of EU consumers declared that they felt confident buying online in their own country. However, the percentage of consumers who trusted online purchases from other EU countries is substantially lower (48.3 %).⁴⁹ The lack of trust when buying online partially derives from the barriers and problems that consumers still experienced. 73.3 % of consumers with cross-border e-commerce experience have encountered problems when trying to buy online from other EU countries. The main problems are related to payment security, geo-blocking practises and delivery issues, which have already been addressed in specific regulations. Other barriers refer to the lack of trust in the information consumers have access to when buying online. At the domestic level, 6 % of EU individuals do not trust the terms and conditions they must agree to when buying online, and 5 % do not trust the information provided by the online seller.⁵⁰ When it comes to cross-border e-commerce, these barriers increase to 9 % and 10 % respectively.

Consumers are also worried about the possibility of encountering unsafe or counterfeit goods when buying online. 19 % of consumers reported this concern when buying online in their own country and 14 % when buying in other EU countries.⁵¹ To give an idea of the size of this problem, the British Toy and Hobby Association recently conducted research on the safety of toys (one of the most

⁴⁸ Eurostat (2020). Internet purchases by individuals. Database: isoc_ec_ibuy

⁴⁹ European Commission (2019). Consumer conditions scoreboard: consumers at home in the Single Market.

⁵⁰ European Commission (2015). Identifying the main cross-border obstacles to the Digital Single Market and where they matter the most.

⁵¹ Ibid.

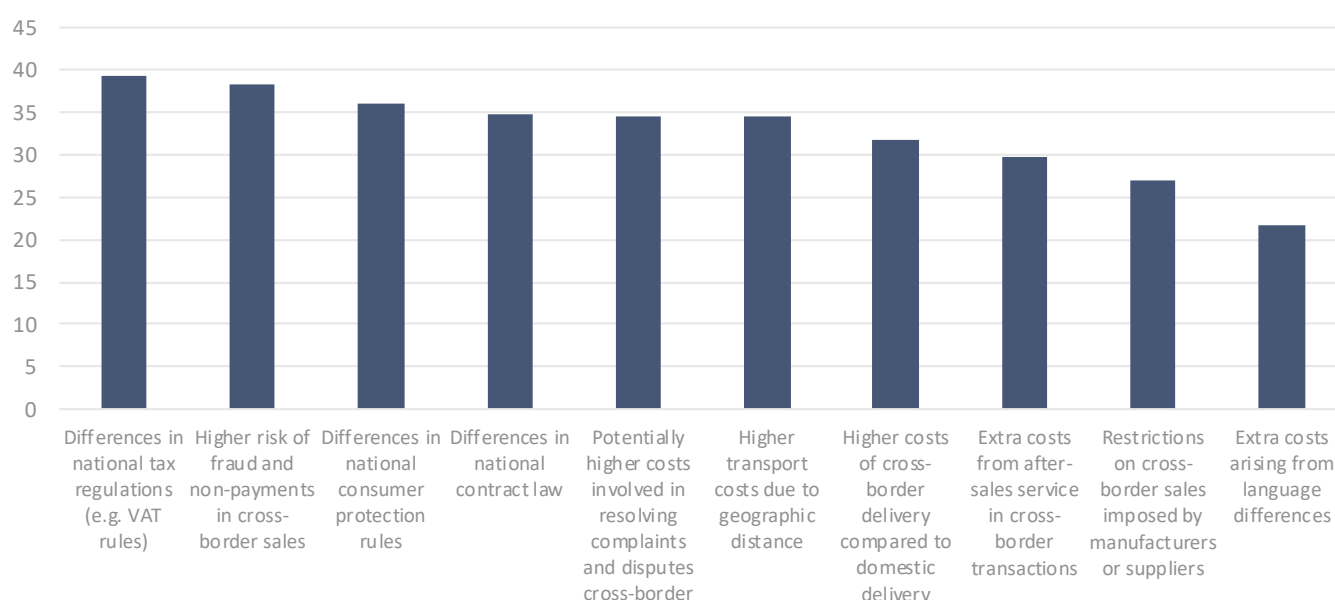
sensitive product categories when referring to safety) sold online in the UK. They found that 22 % of toys bought online were unsafe.⁵²

In conclusion, from the consumer's perspective, diverse barriers still prevent wider use of e-commerce, particularly cross-border e-commerce. Some of these problems have already been addressed by specific regulations (geo-blocking, delivery issues, payment security). However, problems related to consumers' lack of trust in the information provided by online sellers (information about products and providers, unclear terms and conditions, mechanisms to ensure consumer protection rights, liability of the online seller, guarantees, complaints, redress), and to the existence of unsafe and counterfeit goods in online marketplaces, remain unresolved.

Gaps in the e-commerce sector from the supply side

While 20 % of EU companies sell their goods through e-commerce services, only 9 % sell online in other EU countries.⁵³ This gap shows that EU companies are also experiencing diverse barriers to fully leveraging the benefits of e-commerce, particularly when selling abroad. Costs due to fragmentation of national legislation on diverse topics (taxation, consumer protection, contract law) as well as the complexity of resolving cross-border complaints and disputes are some of the main obstacles for companies that already sell online in other EU countries.⁵⁴

Figure 8: Obstacles to cross-border e-commerce (% of retailers selling online)



Source: European Commission (2019). Consumer conditions scoreboard: consumers at home in the Single Market.

The growth of e-commerce sales through online marketplaces⁵⁵ is creating new problems for companies that sell online. e-Commerce platforms may leverage their market power to impose

⁵² British Toy and Hobby Association (2019). [Don't toy with children's safety](#).

⁵³ Eurostat (2020). E-commerce sales. Database isoc_ec_esel2

⁵⁴ European Commission (2019). Consumer conditions scoreboard: consumers at home in the Single Market.

⁵⁵ It is estimated that marketplace sales account for 57 % of global online retail sales. <https://www.digitalcommerce360.com/article/infographic-top-online-marketplaces/>

unfair conditions to sellers, for example refusing access to the platform, competition from the platform's own services, lack of transparency, and obstacles to accessing data about customers.⁵⁶

Online marketplaces are benefiting from the large amount of data they collect from commercial transactions between sellers and consumers. This data can become a source of market domination for online marketplaces.⁵⁷ In this regard, about 30 % of companies selling through online marketplaces consider that the information they receive about the behaviour and preferences of their customers is not useful for improving their services or products. Moreover, 42 % of companies using online marketplaces do not usually obtain the data they need about their customers from online marketplaces, and 37 % do not even know what data is collected by online marketplaces about their activity and how it is used.⁵⁸ Difficulties in commercial data portability and interoperability between e-commerce marketplaces is also a relevant barrier that can lead to the lock-in of sellers.⁵⁹ 47 % of e-commerce marketplace sellers cannot easily transfer key commercial data from one online marketplace to another.⁶⁰

Again, some specific regulations at the EU level have been enacted to solve these problems (directive on contracts for the supply of digital content,⁶¹ directive on contracts for the sale of goods,⁶² regulation and directive on VAT for e-commerce,⁶³ platform to business regulation⁶⁴). However, there are still obstacles to be removed, particularly those related to the imbalanced bargaining power that online marketplaces (and, in general, any online platform) exert on sellers, and the absence of efficient enforcement rules and mechanisms to prevent the sale of unsafe and counterfeit goods through online marketplaces.

2.2.2 Online advertising

The digital advertising market in Europe reached €64.8 billion in 2019, with an annual average increase of €4 billion since 2006. In 2019, spending on digital advertising surpassed spending on all other media combined (€63.7 billion) for the first time in Europe. However, IAB has estimated that the COVID-19 crisis will result in a 16.3 % decline in digital advertising spending for the year 2020.⁶⁵

⁵⁶ Iacob N., Simonelli F. (2020). How to fully reap the benefits of the internal market for e-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce directive.

⁵⁷ Dittrich P. (2018). [Online platforms and how to regulate them: an EU overview](#). Jacques Delors Institut Policy Paper

⁵⁸ European Commission (2016). Flash Eurobarometer 439. The use of online marketplaces and search engines by SMEs.

⁵⁹ Duch-Brown N. (2017). [The competitive landscape of online platforms](#). JRC Digital Economy Working Paper 2017-04.

⁶⁰ European Commission (2016). Flash Eurobarometer 439. The use of online marketplaces and search engines by SMEs.

⁶¹ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

⁶² Directive (EU) 2019/771 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.

⁶³ Council Directive (EU) 2019/1995 of 21 November 2019 amending Directive 2006/112/EC as regards provisions relating to distance sales of goods and certain domestic supplies of goods; Council Implementing Regulation (EU) 2019/2026 of 21 November 2019 amending Implementing Regulation (EU) No 282/2011 as regards supplies of goods or services facilitated by electronic interfaces and the special schemes for taxable persons supplying services to non-taxable persons, making distance sales of goods and certain domestic supplies of goods.

⁶⁴ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

⁶⁵ IAB Europe (2020). [AdEx Benchmark 2019 Study](#).

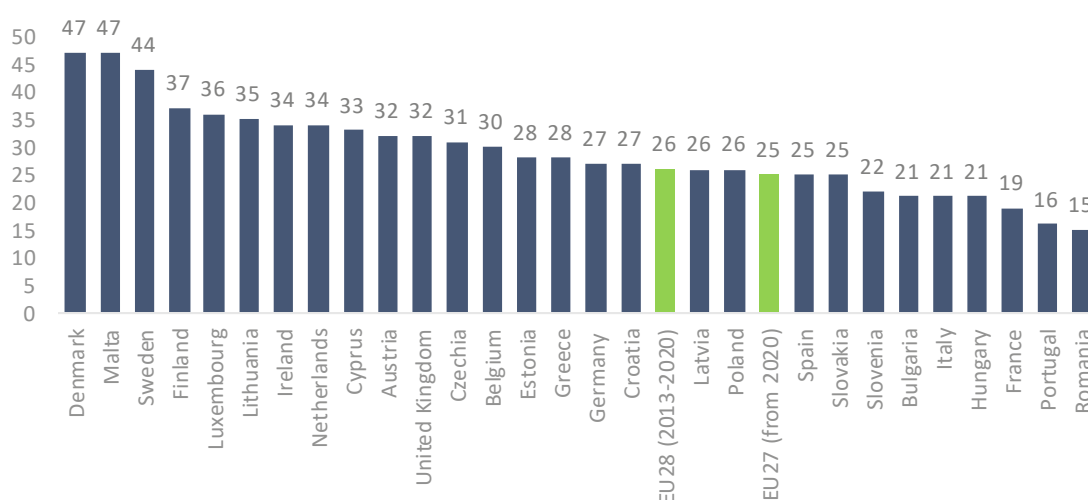
The top ten markets in Europe concentrate 86 % of all digital spending, with the UK being the biggest market (€21.4 billion), followed by Germany, France, Russia, Italy, Spain, Sweden, Netherlands, Switzerland, and Norway.⁶⁶

Mobile, video and social ads are the drivers of growth in the market. Mobile ads represent over half of the European market.⁶⁷

The three main categories of online ads are: (1) paid-for-search advertising, (2) classified advertising and directories, and (3) display advertising.⁶⁸ In 2019, search ads accounted for 46.9 % of total digital advertising spending in Europe, classifieds and directories 10.8 %, and display 43.4 %.⁶⁹

According to Eurostat, 26 % of EU businesses paid for online advertising in 2018. Member States with the most businesses advertising online were Denmark (47 %), Malta (47 %) and Sweden (44 %). France (19 %), Portugal (16 %) and Romania (15 %) were the Member States with the least businesses investing in this type of advertising.

Figure 9: Enterprises that pay to advertise on the internet in 2018 (%)



Source: Eurostat (2020). Social media use by type, internet advertising. Database isoc_cismt

Online advertising catered to specific audiences is called targeted advertising. It focuses on the interests, preferences, location and other characteristics of users to personalise adverts and make them more relevant to consumers. There are three main ways of targeting advertising: (1) contextual advertising, which targets users based on the content of the web pages visited; (2) behavioural targeting, based on cookies information on past browsing activities; and (3) geotargeting, which personalises advertising on the basis of the user's location through IP addresses or geolocation services.⁷⁰

⁶⁶ Ibid.

⁶⁷ Ibid.

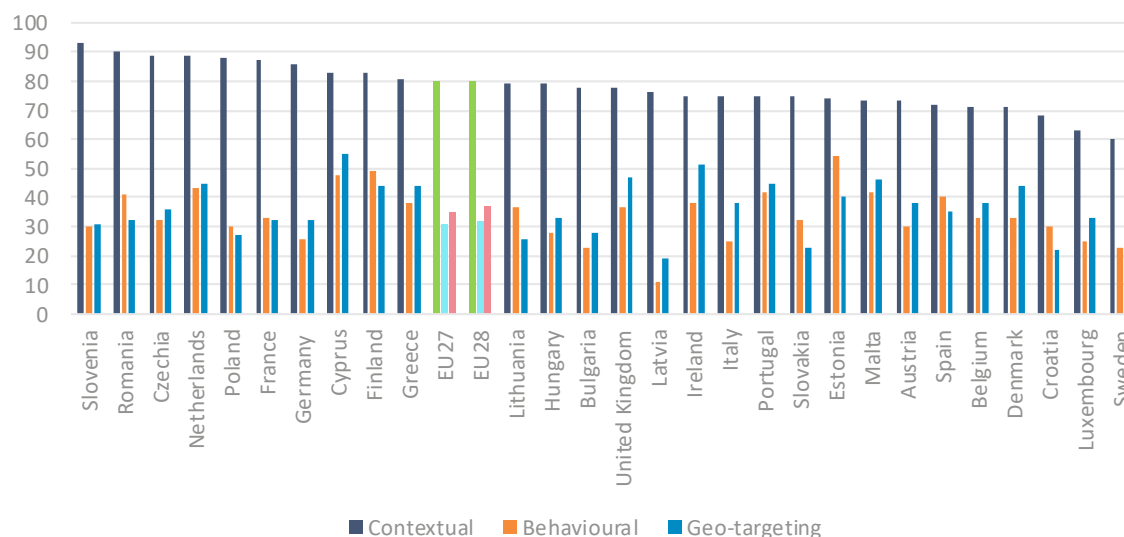
⁶⁸ Paid-for-search refers to the advertising showed by search engines to their users when they carry out a search. Advertisers pay a fee to the search engine when the user clicks on the ad (pay-per-click model), although other types of interaction with the ad can also be considered. Classified advertising refers to specific websites or platforms that group online ads by topics (real estate, cars, furniture, etc.). Display advertising refers to graphic ads (text, images, videos) that appear on specific areas of a website.

⁶⁹ IAB Europe (2020). [AdEx Benchmark 2019 Study](#).

⁷⁰ Eurostat (2020). Social media use by type, internet advertising.

Contextual adverts, the most basic form of targeted advertising, are the most usual form of online advertising in the EU. This type was used by over 80 % of European businesses that paid for advertising in 2018 (80 % of SMEs and 82 % of large companies). 31 % of SMEs used behavioural targeting and 36 % geotargeting, while the percentages for large companies were 46 % and 44 %, respectively.

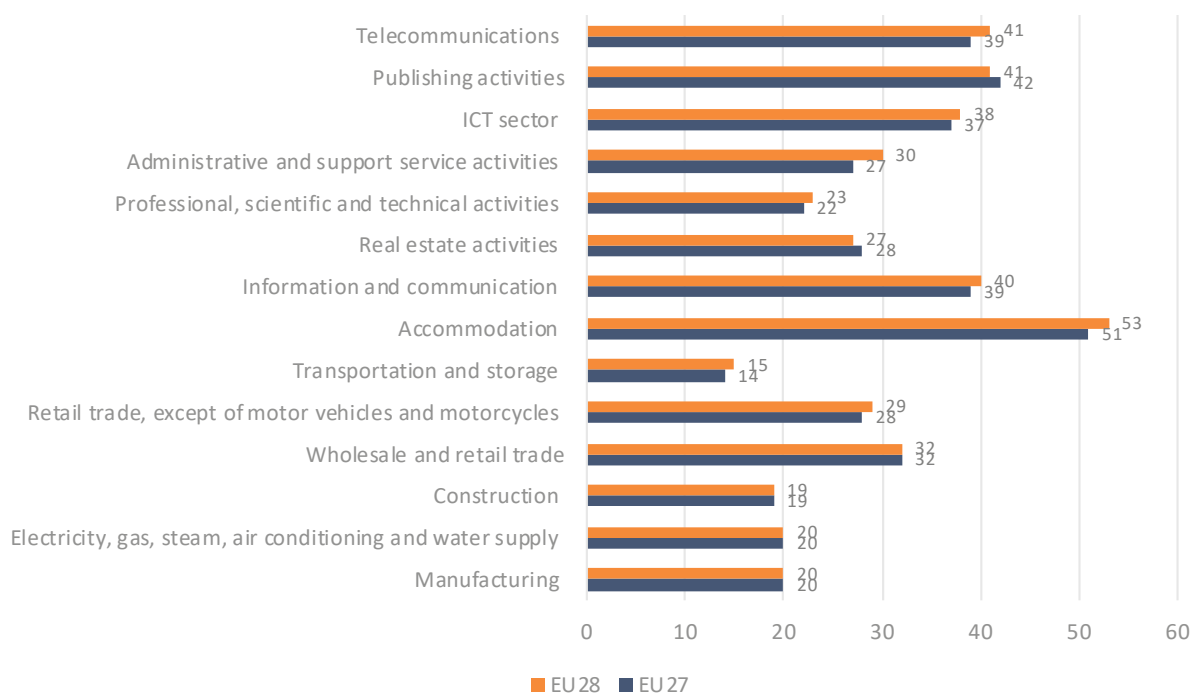
Figure 10: Type of targeted ads paid for by companies advertising online (as % of those that paid for advertising) (2018)



Source: Eurostat (2020). Social media use by type, internet advertising. Database isoc_cisnt

Accommodation is the sector that invests most in online advertising in the EU, with over half of businesses paying for online adverts in 2018. About 40% of companies in telecommunications, publishing activities and information and communication services also pay to advertise online.

Figure 11: Enterprises that pay to advertise online by sector (%) (2018)



Source: Eurostat (2020). Social media use by type, internet advertising. Database isoc_cisnt

In 2015, it was estimated that overall, digital advertising contributed €118 billion to the EU28 economy (including direct and indirect effects), and that 1.5 million jobs were directly and indirectly (in the supply chain of the sector) dependent on this activity.⁷¹

Targeted advertising promises to optimise the advertising expenditure for marketers, while also improving the relevance of the adverts received by users, therefore resulting in benefits for all parties involved. Some sources claim that personalisation allows 5 to 8 times higher return on advertising investment than other forms of marketing, and may increase sales by 10%.⁷² Meanwhile, some studies suggest that consumers find non-personalised ads more annoying and almost half of consumers are willing to consume from brands that better personalise their commercial communications.⁷³ In fact, a Salesforce survey claimed that 53 % of consumers expect to receive personalised offers.⁷⁴

However, the use of personal data to personalise advertising is becoming increasingly controversial. According to the Consumer Conditions Scoreboard 2019, between 36 % to 49 % of EU users, depending on the personalisation practice, are worried about the use of their personal data in

⁷¹ IHS Markit (2015). [The Economic Contribution of Digital Advertising in Europe](#).

⁷² Shepherd S. (2020). [The powerful potential of personalisation in digital marketing](#).

⁷³ Salesforce Research (2018). [Trend in customer trust. The future of personalisation, data, and privacy in the fourth industrial revolution](#).

⁷⁴ Salesforce Research (2019). [State of the customer experience](#).

targeted advertising.⁷⁵ A 2019 Pew Research Study⁷⁶ showed that half of US Facebook users were not comfortable with the platform using their data to categorise them.

At the same time, some doubts are beginning to emerge about the economic benefits of behavioural advertising, particularly for some stakeholders in the value chain of the sector. A recent study has found that behavioral targeting increases publishers' revenue by only 4 % compared to other forms of online advertising.⁷⁷

The lack of transparency in the sector and recent cases of fraud⁷⁸ make it difficult for marketers to know the real economic impact that personalised digital advertising has on consumers.

Problems related to targeted advertising

The growing sophistication of personal data collection to feed the ad-driven business model, the main source of income for a large part of digital service providers and in particular companies such as Google and Facebook, has created additional problems.

Problems linked to data protection are subject to the General Data Protection Regulation (GDPR) and the ePrivacy Directive. Other problems related to unfair commercial practices are also arising and need to be addressed. For example, a behavioural study from the Commission found that 36 % of users had problems identifying disguised advertising.⁷⁹ The 2018 Salesforce State of Marketing Report found that globally, marketers are now more concerned about finding the right balance between personalisation and privacy protection, and 70 % of them are still trying to achieve that balance.⁸⁰

Yet another two problems have arisen from this business model with potentially significant effects on citizens' rights and freedoms: the proliferation of fake news and hateful content, and the use of targeted advertising techniques for political purposes.

2.2.3 Other intermediary online platforms

Most digital sectors rely on online intermediary platforms. Two of them, social networks and search engines, are closely related to online advertising (digital market described above), as a substantial part of their revenue comes from this source. Collaborative economy platforms stand out as one of the fastest growing digital services in recent years.

Digital platforms provide significant benefits for both types of users (business partners and final consumers). Platforms allow enhanced matching between the offer of and demand for products and services, lowering transaction costs and providing more convenience for both sides. Platforms linked to the collaborative economy are also generating additional value from underutilised assets. However, the high level of concentration in some of the platform ecosystems, such as social

⁷⁵ European Commission, Consumer Conditions Scoreboard. 2019 Edition.

⁷⁶ Pew Research Center (2019). Facebook Algorithms and Personal Data.

⁷⁷ Marotta V., Abhishek V., Acquisti A. (2019). [Online tracking and publishers' revenues: an empirical analysis](#).

⁷⁸ In 2018, [BuzzFeed Newsdigital](#) revealed an advertising fraud scheme involving more than 125 Android apps and websites that defrauded thousands of companies by using bots instead of actual humans. In 2019, one of the main companies measuring web traffic, Comscore, was involved in a fraud scandal. <https://www.theverge.com/2019/9/24/20882240/comscore-sec-serge-matta-financial-fraud-charges-settlement>

⁷⁹ Disguised advertising is defined as commercial communications that present themselves as non-commercial. European Commission (2018). [Advertising and marketing practices in online social media](#).

⁸⁰ Suarez J. (2018). [Introducing the 5th Salesforce State of Marketing Report: Here are the top trends redefining the profession](#).

networks and search engines (described below), where a few giant players might be acting as gatekeepers by adopting exclusionary conduct and limiting competition, is raising concerns amongst authorities at both the EU and national level. They are proposing diverse regulatory mechanisms to ensure fair competition in these ecosystems.⁸¹ Existing competition tools, as they are defined today, may not be the best way to address anticompetitive actions of systemic⁸² platforms.⁸³ Difficulties in defining relevant markets in digital ecosystems, or in assessing market power based on traditional indicators (market share, number of firms on the market), are some of the challenges that competition authorities face when deciding on potential anticompetitive behaviour of systemic platforms.⁸⁴ However, the most decisive factor that indirectly contributes to consolidating the role of systemic platforms as gatekeepers in digital ecosystems, and a potential source of irreparable harm to competition in such ecosystems, is perhaps the long timeframe involved in conducting competition investigations,⁸⁵ compared to the rapid evolution of digital services. For instance, it took the European Commission seven years to decide on Google's illegal abuse of dominance in the search engine market to favour its own shopping comparison tool.⁸⁶ Although the fine was high (€2.42 billion), during that time any other shopping comparison tool could hardly contest Google under fair conditions.

The following sections provide a brief description of the main platform-based markets, and the specific problems that both business partners and consumers are facing.

Social networks

Participating in social networking platforms is one of the main online activities for EU inhabitants. 54 % of Europeans engaged in social networks in 2019.⁸⁷ When the number of internet users is taken into account, this percentage rises to 63 %. Almost two thirds of internet users participated in a social network in 2019. Regarding companies, 48 % use social networks for commercial purposes. The percentage for small enterprises is quite similar (46 %), while almost three out four large companies reported using these services.⁸⁸

The social network market is highly concentrated in few platforms. At the European level, the leading social network is Facebook, with 72.1 % market share in late 2019.⁸⁹

⁸¹ World Economic Forum (2019). Competition policy in a globalized, digitalized economy.

⁸² 'Systemic' is the term used by the European Commission when referring to large online platforms leveraging strong network effects to exert significant control on the whole platform ecosystem, which is practically incontestable for new potential entrants. Other authorities use similar concepts. For instance, the French competition authority calls these platforms 'structuring'. In this section, the term defined by the European Commission is considered.

⁸³ Crémer J., de Montjoye Y. A., Schweitzer H. (2019). Competition policy in the digital era.

⁸⁴ Franck J. U., Peitz M. (2019). Market definition and market power in the platform economy. Centre on regulation in Europe.

⁸⁵ World Economic Forum (2019). Competition policy in a globalized, digitalized economy.

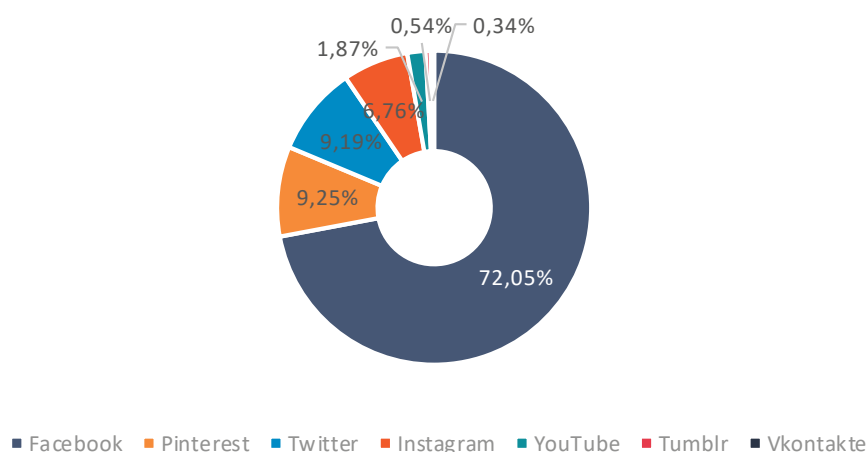
⁸⁶ Trésor-Economics (2019). Digital platforms and competition.

⁸⁷ Eurostat, internet use. Individuals participating in social networks (creating user profile, posting messages or other contributions to Facebook, Twitter, etc.). Database isoc_ci_ac_i

⁸⁸ Eurostat, Social media use by type, internet advertising. Percentage of enterprises using social networks. Database isoc_cismt

⁸⁹ Source: [StatCounter Global Stats](#). The market share is measured as the percentage of total page views per month.

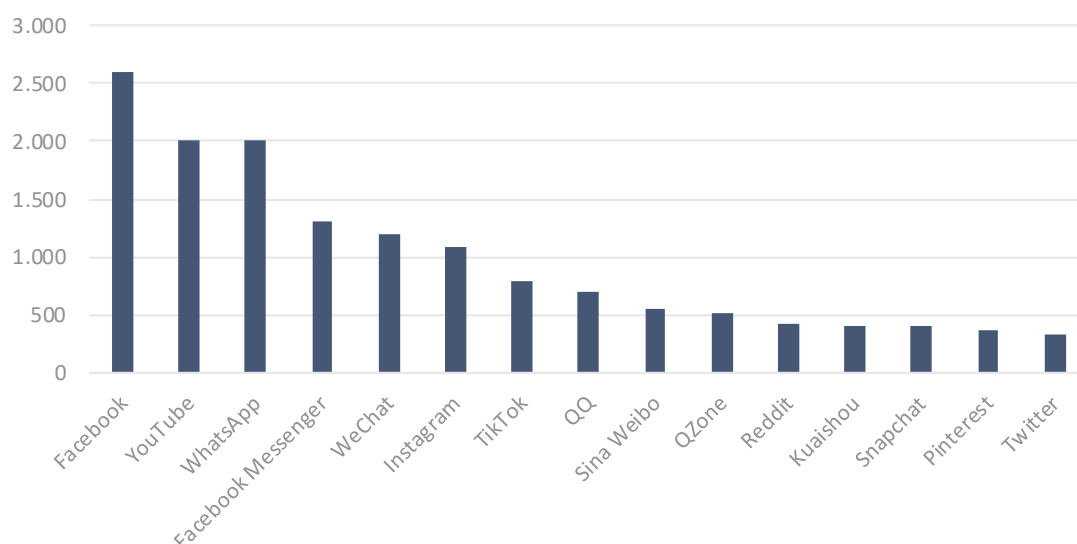
Figure 12: Market share of social networks in Europe (December 2019)



Source: Statcounter – GlobalStats (2020). Social media stats.⁹⁰

Facebook is, by far, the most-used social network worldwide. In July 2020, this social network reached 2 603 million active users. YouTube and WhatsApp have 2 000 million users each. Of the top 15 most used social networks, nine originated in the US, and six in China.⁹¹

Figure 13: Social networks ranked by number of active users (millions; July 2020)



Source: Statista (2020). Most popular social networks worldwide ranked by number of active users.

Revenue of social networks can come from four main sources:⁹²

- Displaying advertising and marketing content. The advertising shown to users is based on their search history and cookies. The adverts can come from third-party advertising

⁹⁰ Data extracted on 14th August 2020. <https://gs.statcounter.com/social-media-stats/all/europe/#monthly-201907-202007>

⁹¹ Statista (2020). [Most popular social networks worldwide as of July 2020, ranked by number of active users.](#)

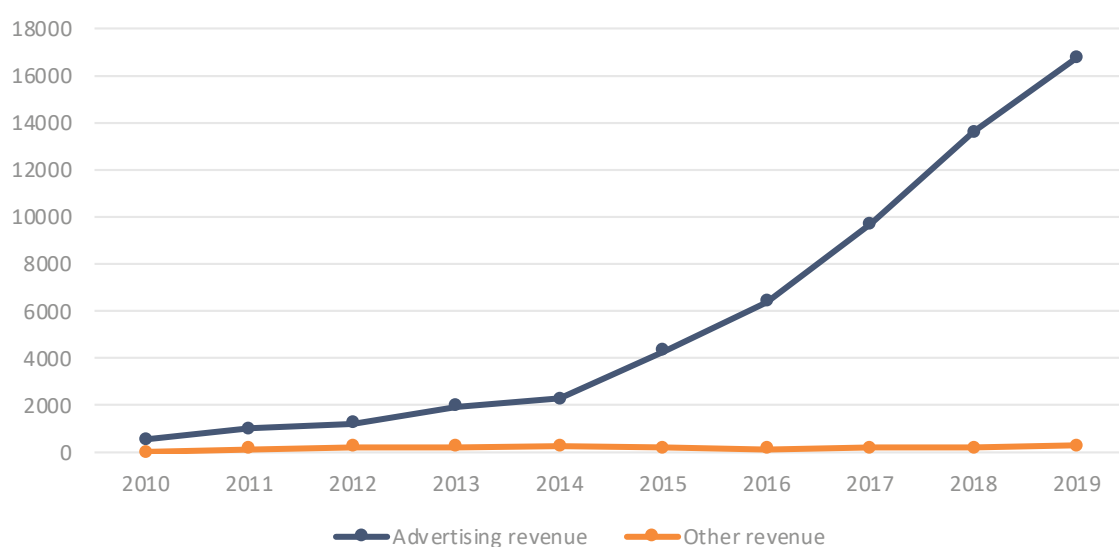
⁹² European Commission (2018). Behavioural study on advertising and marketing practices in online social media.

networks, or the social network's own advertising platform (e.g. Facebook ads, LinkedIn ads, etc.).

- Displaying targeted advertising and marketing content. This particular type of advertising is based not only on search history and cookies, but also on users' personal data and past behavioural information (likes, follows, shared content, etc.), which is collected by the social network.
- Subscription fees for accessing premium services and exclusive content. Subscription fees can be aimed at both sides of the platform: end users pay periodic fees for enjoying advanced and enhanced services, and business partners pay for accessing improved features related to data analytics.
- Acquisition of virtual goods to improve users' social network experience. Virtual goods are linked to activities such as gaming (acquisition of virtual items allowing better progress in the game).

It is difficult to estimate the total revenue of social networks in the EU, as many of them do not disclose such information. To provide readers with some references about this digital market's revenue, financial statements of the main social networks operating in the EU have been reviewed. Facebook, the leading social network, reported worldwide revenue worth US\$70.7 billion in 2019, which represents a 27 % year-over-year increase.⁹³ 98.5 % of revenue came from advertising, and 1.5 % from other revenue streams. According to Statista,⁹⁴ Facebook's European revenue reached US\$17 billion in 2019.

Figure 14: Evolution of Facebook's revenue in Europe (US\$ million)



Source: Statista (2020). Facebook's revenue in Europe from 1st quarter 2010 to 2nd quarter 2020, by segment.

Revenue from Instagram, a social network acquired by Facebook in 2012, is included in the previous data.

⁹³ Facebook (2020). [Facebook reports fourth quarter and full year 2019 results.](#)

⁹⁴ Statista (2020). [Facebook's revenue in Europe from 1st quarter 2010 to 2nd quarter 2020, by segment.](#)

Pinterest reported worldwide revenue worth US\$1.1 billion in 2019 (without regional disaggregation), 51 % higher than 2018.⁹⁵

In 2019, Twitter's revenue reached US\$3.5 billion, representing 13.7 % year-over-year growth.⁹⁶ 86.5 % of revenue came from advertising services, and 13.5 % from data licensing (services that allow business partners to access, search and analyse Twitter historical data and real-time data), and other services.

Finally, Alphabet, YouTube's parent company, reported that this social platform generated US\$15.1 billion in advertising revenue (without considering subscription fees) in 2019.⁹⁷

Problems related to social networks

The main problems of social networks that affect both business partners and final users are related to their market power, advertising and content management issues.

Social networks are large platforms that benefit from indirect network effects and the huge amount of data collected from their users' interactions, amongst other factors.⁹⁸ Those benefits provide them with a strong market power that can be used to impose unfair conditions on their business partners, as outlined when describing online marketplaces (section 2.2.1).

Advertising issues are also similar to those explained in section 2.2.2. Users can be exposed to diverse kinds of disguised advertising which can negatively affect their online behaviour and trust.

The most specific issue is content management. It involves both AI-based functionalities that social networks use to recommend content, and content moderation mechanisms for flagging and/or removing content.

The content provided by social networks to their users is decided upon and sorted by algorithms, which base their decisions on information from the users' profile, and past interactions (searches, likes, etc.) on the social network, or even on other websites. These algorithms learn about users' preferences and the users only receive personalised information and content that match such preferences. This phenomenon is known as 'filter bubble'.⁹⁹ On the one hand, it can have positive effects, as it might help users to access accurate content and information. It also allows the social network to improve user engagement, which is, in the end, one of its main goals. On the other hand, algorithms prevent users receiving alternative information, which can increase their polarisation.¹⁰⁰

Content moderation mechanisms are used by social networks to flag and/or remove content considered illegal once it has been identified. Currently EU law only makes four types of content illegal: (1) child sexual abuse material; (2) racist and xenophobic hate speech; (3) terrorist content; (4) content infringing intellectual property rights.¹⁰¹ However, social networks, either on their own

⁹⁵ Pinterest (2020). [Pinterest announces fourth quarter and full year 2019 results](#).

⁹⁶ Twitter (2020). [Fiscal year 2019 annual report](#).

⁹⁷ Alphabet (2020). [Alphabet announces fourth quarter and fiscal year 2019 results](#).

⁹⁸ Duch-Brown N. (2017). [The competitive landscape of online platforms](#), JRC Digital Economy Working Paper 2017-04.

⁹⁹ Klung K., Strang C. (2019). [The filter bubble in social media communication: How users evaluate personalised information in the Facebook newsfeed](#), Media trust in a digital world, pp. 159-180.

¹⁰⁰ Berman R., Katona Z. (2020). [Curation algorithms and filter bubbles in social networks](#), Marketing Science, Vol. 39, Issue 2.

¹⁰¹ De Streel A. et al. (2020). [Online platforms' moderation of illegal content online](#). One positive economic effect of improving content moderation mechanisms, not only for social networks but also for all online platforms, could be the reduction of illegal content online and the increased consumption of legal content.

initiative (in an attempt to seem more concerned about the negative effects of disinformation campaigns and fake news on Western societies) or due to obligation by specific national regulations, are also applying content moderation mechanisms to flag and/or remove what it is known as 'harmful content'. The problem is that neither the ECD nor other regulations define this concept, leaving it up to social networks to decide what content is harmful and how to proceed, according to their policies. This, in turn, may harm users' fundamental rights, such as freedom of expression or freedom to seek information.¹⁰²

The last problem related to content moderation is that some EU countries are developing national rules to deal with this issue, particularly for hate speech and disinformation. The global nature of social networks, which runs in all Member States, would require a standardised approach at the EU level. Otherwise, fragmented regulation would be detrimental to the DSM.

Search engines

Search engines are the main gateways to the content indexed on the internet. Finding information about goods and services is the second most popular activity amongst EU citizens on the internet, only surpassed by sending and receiving emails. 66 % of the EU population aged 15 and over searched for information on the internet in 2019.¹⁰³ Although almost all intermediary platforms provide search tools to help their users search the platform,¹⁰⁴ in this section general search engines that browse the whole internet are considered.

If the markets analysed previously showed high degrees of concentration, search engines are probably the most concentrated market in the digital ecosystem. On average, Google's market share in the EU27 accounted for 95.6 % of the total market in July 2020.¹⁰⁵ The second most used search engine in all Member States (except in Czech Republic, where the local search engine Seznam reaches second position) is Bing, with 2.3 % market share. The remaining 2.1 % is distributed between Yahoo!, DuckDuckGo, Ecosia, the Russian-based search engine Yandex and some local providers (Qwant in France, the aforementioned Seznam in Czech Republic and neighbouring countries, t-online in Germany, and onet.pl in Poland).

Search engines' business model is based on revenue obtained from sponsored links related to the search keywords typed by the user. Depending on the action taken by the user with the sponsored link (the link is only displayed, the user clicks the link, the user gives information through the link, the user buys products or services through the link), the search engine charges diverse fees to advertisers.

Around US\$98 billion, 61 % of Alphabet's¹⁰⁶ total income, came from advertising provided through its search engine, Google, in 2019.¹⁰⁷ Alphabet only provides disaggregated information about

¹⁰² EDRI (2020). Platform regulation done right. EDRI position paper on the EU Digital Services Act.

¹⁰³ Eurostat, internet use. Individuals finding information about goods and services. Database isoc_ci_ac_i

¹⁰⁴ Duch-Brown N. (2017). [The competitive landscape of online platforms](#). JRC Digital Economy Working Paper 2017-04

¹⁰⁵ StatCounter Global Stats. <https://gs.statcounter.com/search-engine-market-share/all/europe>. The market share is measured as the percentage of total page views per month. Average market share from individual data from Member States.

¹⁰⁶ Google's parent company.

¹⁰⁷ Alphabet (2020). [Alphabet announces fourth quarter and fiscal year 2019 results](#).

income for four regions: the US, EMEA,¹⁰⁸ APAC¹⁰⁹ and Other Americas.¹¹⁰ Income from EMEA accounted for 33 % of total income in 2018.¹¹¹

Problems related to search engines

Search engines share the same competition problems as other types of online platforms. In this sector, the extreme market concentration increases the risk of the market leader developing monopolistic practices. That is the case of Google, which has been fined several times for abusive practices of its market power. For instance, the aforementioned case regarding the illegal advantage provided to its shopping comparison tool,¹¹² and another fine of €1.49 billion in 2019 for preventing third-party websites from allowing Google's competitors to include their search ads on these websites.¹¹³

Collaborative economy platforms

Collaborative economy platforms allow decentralised peer-to-peer interactions between owners of underutilised assets and users who want to access or use those assets.¹¹⁴ Petropoulos G. (2016) pointed out the following sectors in which collaborative economy platforms have significant presence:¹¹⁵ (1) accommodation; (2) transportation; (3) online labour markets for micro-tasking; (4) finance. In a PWC study commissioned by the European Commission,¹¹⁶ the scope of the collaborative economy was extended to the following activities: (1) peer-to-peer accommodation; (2) peer-to-peer transportation; (3) on-demand household services; (4) on-demand professional services; (5) collaborative finance. The main difference between both categorisations was the inclusion of on-demand professional services on the list proposed by PWC, which refers to freelancer marketplaces where businesses can find skilled professionals for specific tasks (accounting, graphic design, consultancy, etc.). As the second categorisation is more complete, it will be taken into consideration when estimating the collaborative economy platform market.

The revenue obtained by collaborative economy platforms comes from service fees charged to one side by the platform (asset owners or users of these assets) or even to both sides. For instance, the accommodation platform Booking.com charges an average commission fee of 15 % of the total accommodation costs only to their business partners (accommodation owners). Airbnb, however, charges fees to both hosts and guests.¹¹⁷

According to the aforementioned PWC study, in 2015 the main five representative activities within the collaborative economy generated revenue worth €3.6 billion in Europe.¹¹⁸ Additionally, these

¹⁰⁸ Europe, Middle East and Africa.

¹⁰⁹ Asia-Pacific.

¹¹⁰ Canada and Latin America.

¹¹¹ Alphabet (2019). [Annual report for fiscal year 2018](#).

¹¹² European Commission (2017). [Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service](#).

¹¹³ European Commission (2019). [Antitrust: Commission fines Google €1.49 billion for abusive practices in online advertising](#).

¹¹⁴ Petropoulos G. (2016). [An economic review on the Collaborative Economy](#). Report requested by the IMCO Committee of the European Parliament.

¹¹⁵ Ibid., p. 13.

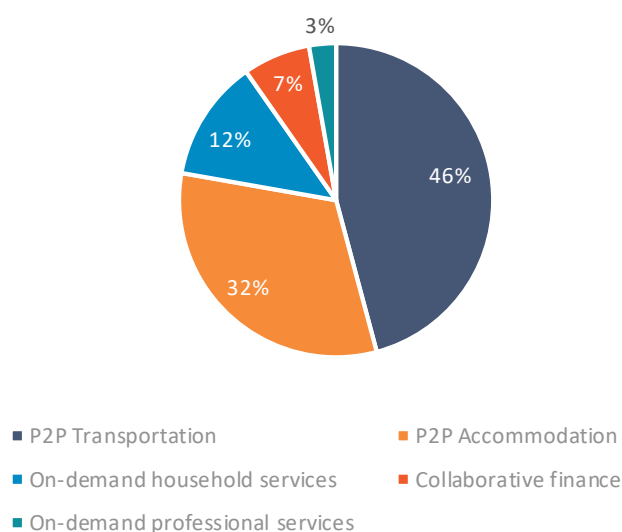
¹¹⁶ Vaughan R., Daverio R. (2016). Assessing the size and presence of collaborative economy in Europe. PWC UK.

¹¹⁷ <https://www.investopedia.com/articles/investing/112414/how-airbnb-makes-money.asp>

¹¹⁸ Vaughan R., Daverio R. (2016). Assessing the size and presence of collaborative economy in Europe. PWC UK.

platforms enabled transactions estimated at €28.1 billion. The following figure shows the market share of each activity.

Figure 15: Distribution of revenue of collaborative economy platforms (%)



Source: Vaughan R., Daverio R. (2016). Assessing the size and presence of collaborative economy in Europe. PWC UK.

A more recent analysis of the economic development of the collaborative economy in Europe estimated the revenue at €26.5 billion,¹¹⁹ with the following distribution: financial services (36.2 %); accommodation (27.5 %); online skills (21.1 %); and transport (15.1 %). This analysis also provided estimations on the employment generated by the collaborative economy, with around 395,000 workers across the EU.

21 % of EU citizens used collaborative economy platforms to arrange accommodation provided by another individual in 2019.¹²⁰ The penetration of this type of services ranges from 46 % in Luxembourg and 34 % in Ireland to 5 % in Czechia and Cyprus. The second most popular collaborative economy platforms in the EU are those intended to arrange transportation between individuals. They were used by 8 % of EU citizens in 2019. Estonia and Ireland were the countries where the highest percentage of individuals relied on these services to manage their journeys (29 % and 26 %, respectively).

Problems related to collaborative economy platforms

Collaborative economy platforms share similar problems with other online platforms (market concentration, market power derived from network effects and large quantities of information collected, imbalanced bargaining power between the platform and its business partners). The main issue for the development of these platforms, particularly for newer European platforms, is the lack of legal certainty when operating in European markets. The legal uncertainty is derived from the lack of a clear definition about these online intermediaries, and from the fact that these digital providers enter other regulated markets (transport, accommodation, finance). Specific regulation

¹¹⁹ Eljas-Taal K., Kay N., Porsch L., Svatikova K. (2018). [A methodology for measuring the collaborative economy](#).

¹²⁰ Eurostat, Use of collaborative economy. Database isoc_ci_ce_i

should be adapted to create a level playing field that allows both incumbents and new digital platforms to compete on equal terms.¹²¹

2.2.4 Enabling technologies

The provision of most of online services described in previous sections would not be possible without the existence of enabling digital technologies. In some cases, they represent the core competitive advantage of a leading service (for instance, AI algorithms for search engines or recommendation systems), or they are key elements in rapidly scaling up and entering new markets (cloud computing). As they are an essential part of the digital ecosystem, their main market indicators and the regulatory challenges they pose are briefly presented.

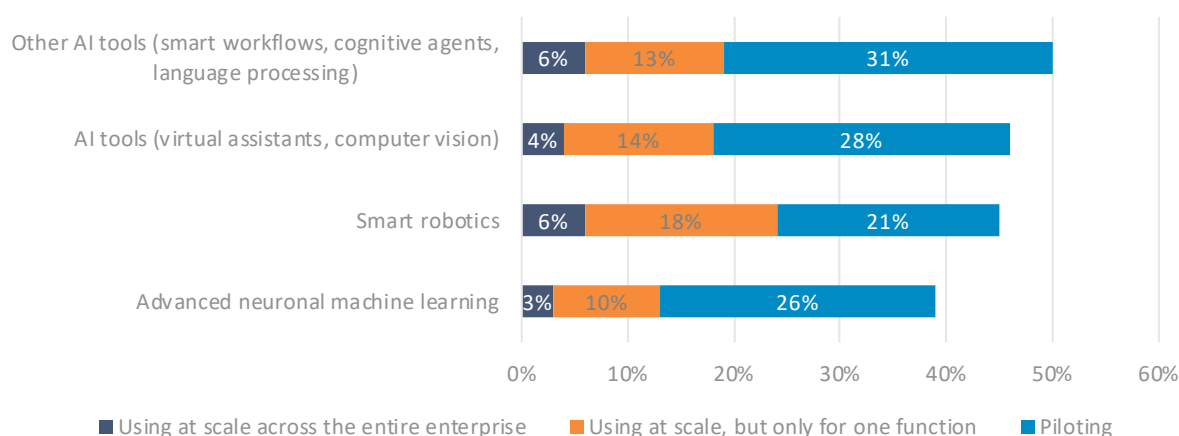
Artificial intelligence

Artificial intelligence (AI) technologies encompass a wide range of products and services: manufacturing robots, natural language processing (NLP) software, machine learning, chatbots and automated conversational tools, financial robo-advisors, media monitoring and moderation tools, amongst others.

The adoption of AI technologies in Europe is still low compared to other digital technologies. Additionally, most companies are only using AI technology in pilot projects to test their applicability.

¹²²

Figure 16: Types of AI technologies adopted by large European companies (%)



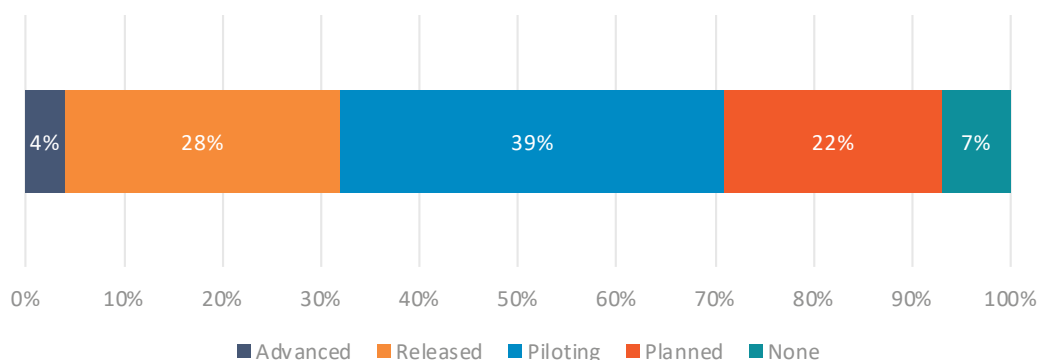
Source: Bughin J., Seong J., Manyka J., Härmäläinen L., Windhagen E., Hazan E. (2019). Notes from the AI frontier. Tackling Europe's gap in digital and AI. McKinsey Global Institute.

Another study¹²³ confirms the low maturity of AI adoption amongst European companies, with only 4 % making advanced use of these technologies.

¹²¹ Petropoulos G. (2016). [An economic review on the collaborative economy](#).

¹²² Bughin J., Seong J., Manyka J., Härmäläinen L., Windhagen E., Hazan E. (2019). Notes from the AI frontier. Tackling Europe's gap in digital and AI. McKinsey Global Institute.

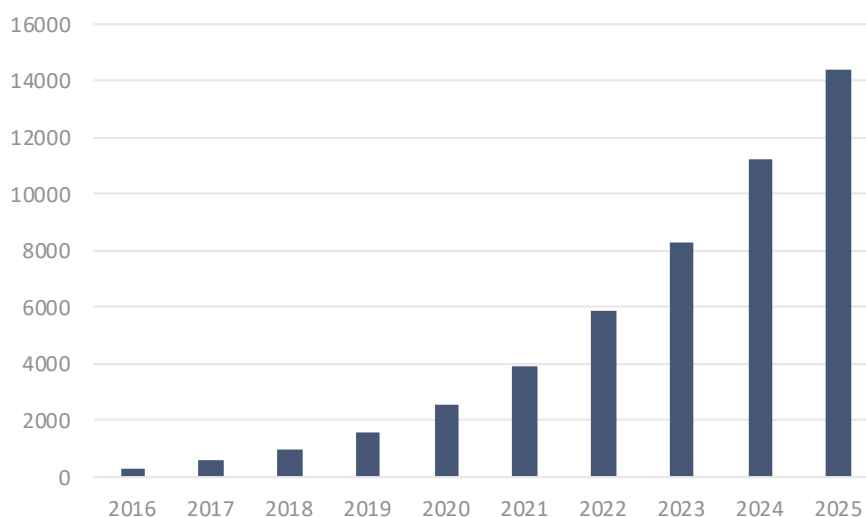
¹²³ EY (2018). Artificial Intelligence in Europe. Outlook for 2019 and beyond. Study commissioned by Microsoft.

Figure 17: Types of AI technologies adopted by large European companies (%)¹²⁴

Source: EY (2018). Artificial Intelligence in Europe. Outlook for 2019 and beyond.

The low adoption and maturity levels of AI amongst European companies suggest that this is an emerging market, which is confirmed when analysing the evolution of revenue since 2016, and the forecast for the coming years.¹²⁵

Figure 18: Revenue from the AI market in Europe (US\$ million)



Source: Statista (2019) Revenue from the artificial intelligence market in Europe (2016-2025).

Revenue in 2019 was estimated at US\$1.6 billion. The European market of Artificial Intelligence is forecasted to grow with a 44 % CAGR (compound annual growth rate) between 2019 and 2025. Despite this expected market growth, not all EU countries will be able to exploit the benefits of AI technology equally. McKinsey Global Institute has created an AI readiness index to measure how

¹²⁴ 'Advanced' level refers to AI technologies contributing to many processes in the company and enabling diverse advanced operations; 'Released' means that AI is used in one of a few processes and/or not enabling advanced tasks; 'Piloting' means that the company has only incorporated AI technologies in testing stages; 'Planned' refers to companies that intend to use AI technologies but they have not yet been incorporated into company processes; 'None' refers to companies that have not yet thought about using AI.

¹²⁵ Statista (2019). Revenue from the artificial intelligence market in Europe (2016-2025).

prepared Member States are to translate the potential of AI technologies into economic growth.¹²⁶ This source has also found interesting correlations between the country's score in the AI readiness index and the growth in employment and GDP. Sweden, Finland and Ireland are the EU countries best prepared to leverage AI technologies. In contrast, Hungary, Croatia, Poland, Greece and Romania do not currently have the optimal conditions to improve economic gains by using AI technologies.

Problems derived from the use of AI technologies

The use of AI technologies for the provision of digital services presents diverse challenges that might affect EU citizens' consumer protection.

AI-based digital services rely on consumers' data to provide personalised recommendations about what the consumer may be interested in. However, they can limit the autonomy of consumers, as their ability to make informed choices based on their own preferences might be biased by the influence of automated recommendations. In the end, the influence of AI technologies in consumers' decisions might result in overspending, purchasing unrequired goods and financial risks.¹²⁷

AI technologies can also incur discriminatory practices. Some areas in which algorithmic discrimination has already happened include predicting certain racial groups' probability of committing crimes,¹²⁸ selecting employees or students at universities,¹²⁹ and advertising¹³⁰ or price discrimination.¹³¹ If AI algorithms are trained on biased data or they learn from biased samples, they will reproduce such bias in their outcomes.¹³² Data protection law, particularly GDPR, has already defined requirements to reinforce consumers' right to non-discrimination when using specific types of automated individual decision-making tools. However, algorithmic discrimination is an issue that goes beyond personal data protection, as it is not only personal data that is involved, but also the lack of transparency and explainability of algorithms, problems that remain unresolved.

Blockchain

Blockchain is a specific implementation of the so-called distributed ledger technologies (DLTs).¹³³ Blockchain technology allows the integrity and reliability of the information stored in a decentralised peer-to-peer network to be ensured by using diverse consensus mechanisms between the participants in the network. It removes the need for central authorities to confirm the

¹²⁶ Bughin J., Seong J., Manyka J., Hämmäläinen L., Windhagen E., Hazan, E. (2019). Notes from the AI frontier. Tackling Europe's gap in digital and AI. McKinsey Global Institute. Page 40.

¹²⁷ Sartor G. (2020). [New aspects and challenges in consumer protection. Digital services and artificial intelligence.](#)

¹²⁸ Angwin J., Larson J., Mattu S., Kirchner L. (2016). [Machine bias.](#)

¹²⁹ For instance, Amazon's AI-based recruiting system discriminated women in recruitment processes <https://www.reuters.com/article/us-amazon-com-jobs-automation-in...-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>

¹³⁰ The issue of disguised advertising is already described in section 3.2.1.

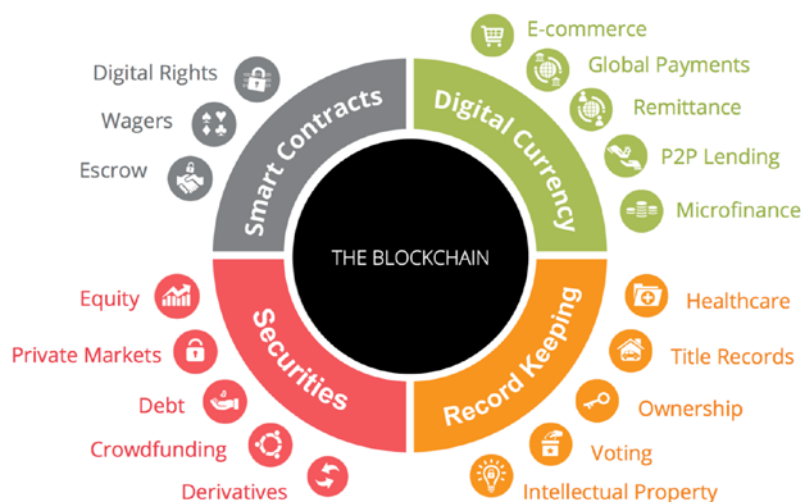
¹³¹ AI systems can set different prices for the same product based on consumers' information, charging them with the maximum price they are willing to pay. However, decisions about prices may also be based on personal information such as gender or ethnic group.

¹³² Zuiderveen F. (2018). [Discrimination, artificial intelligence, and algorithmic decision making.](#)

¹³³ 'Databases that keep the accounting of a specific asset and incorporates mechanisms that allow the following: (1) sharing the accounting among multiple sites, being updated almost in real-time, so all tenants keep identical copies; (2) cryptographic support to enforce security of the information; (3) updating specific management rules as agreed by network owners or participants'. Source: Fraile et al. (2018). Competition issues in the area of financial technology (Fintech). Study requested by the ECON Committee of the European Parliament.

accuracy of the information stored, it can reduce administrative costs of managing information and the risks of fraud, which, in the end, allow trust to be increased. Blockchain technologies can have many applications, as any activity involving an exchange of information between stakeholders might be manageable through them. The following image shows some potential activities where blockchain might be applied.

Figure 19: Potential applications of blockchain technologies

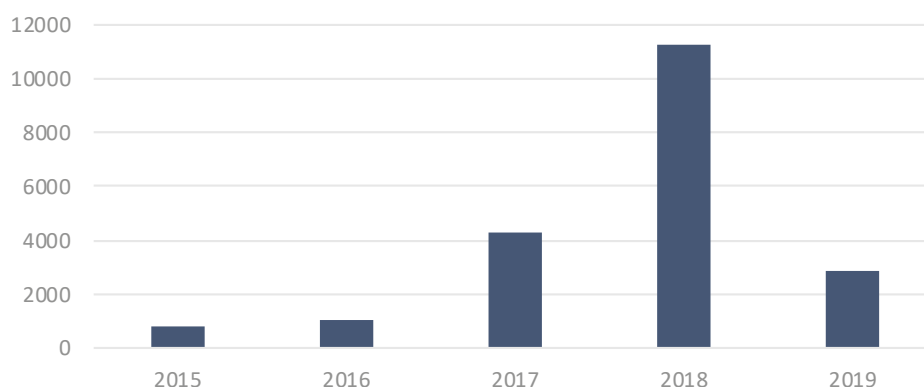


Source: IBM (2015). Making blockchain real for businesses.

Despite the considerable number of potential applications of blockchain technologies, actual use cases in the EU are focused on the financial sector.¹³⁴

Blockchain technology is still in its infancy. Blockchain projects boomed across the world between 2017 and 2018. In that period, the number of blockchain initiatives reached 750 per year. However, this number has decreased to approximately 150 in 2019.¹³⁵ Accordingly, 2018 was the year when blockchain projects raised the most funding, surpassing €11 billion.

Figure 20: Evolution of funding raised by blockchain projects in the world (€ billion)



Source: EU Blockchain Observatory and Forum (2020). 2018-2020 Conclusions and reflections.

¹³⁴ EU Blockchain Observatory and Forum (2020). 2018-2020 Conclusions and reflections.

¹³⁵ EU Blockchain Observatory and Forum (2020). 2018-2020 Conclusions and reflections.

Blockchain projects are usually developed by consortia, which bring together tech companies and representatives from the sectors where the blockchain application will be used: financial sector, logistic sector, etc.

A large part of the blockchain ecosystem remains focused on researching the most suitable applications of this technology. That is the reason why blockchain market figures are modest compared to the other digital markets analysed. IDC estimated that blockchain spending across Europe would reach US\$800 million in 2019 and was expected to reach US\$4.9 billion by 2023.¹³⁶

Problems related to blockchain

Regulatory problems of blockchain technologies are linked to the management of personal data and the impact of smart contracts (blockchain-based computer programs which automatically execute an action when certain conditions, included in a contract or agreement, are met) in EU contract law.

One of the key characteristics of blockchain technologies is the immutability of the transaction information recorded in the distributed network.¹³⁷ Both the immutability of the information and the inexistence of a centralised entity responsible for the information, as it is replicated in all network nodes, clashes with two main provisions of the GDPR: the figure of the data controller (blockchain systems are highly decentralised and responsibility for the data is diluted amongst many agents) and the possibility of modification or removal of personal information (for instance the right to be forgotten).¹³⁸

Regarding smart contracts, there is a debate about whether they should be considered a true legal contract, and thus legally binding, or if there is only a translation of a previous legal contract written in natural language into algorithmic code in a blockchain system.¹³⁹ Other concerns related to consumer protection, such as how to exert withdrawal rights when a clause has been automatically executed by the software, are also arising.¹⁴⁰

Cloud computing

Cloud computing is the most mature enabling technology of the digital ecosystem. It allows companies to deploy their digital services faster, reduce their IT costs and improve security, amongst other benefits.

The level of adoption of cloud computing services by companies varies between economic sectors. While two out of three companies from the IT sector declared that they bought cloud computing services over the internet in 2018, only 16 % of companies devoted to accommodation and food and beverage services acquired such services.¹⁴¹

¹³⁶ <https://www.idc.com/getdoc.jsp?containerId=prEUR145465319>

¹³⁷ Shah P. et al. (2019). [Blockchain technology: data privacy issues and potential mitigation strategies](#).

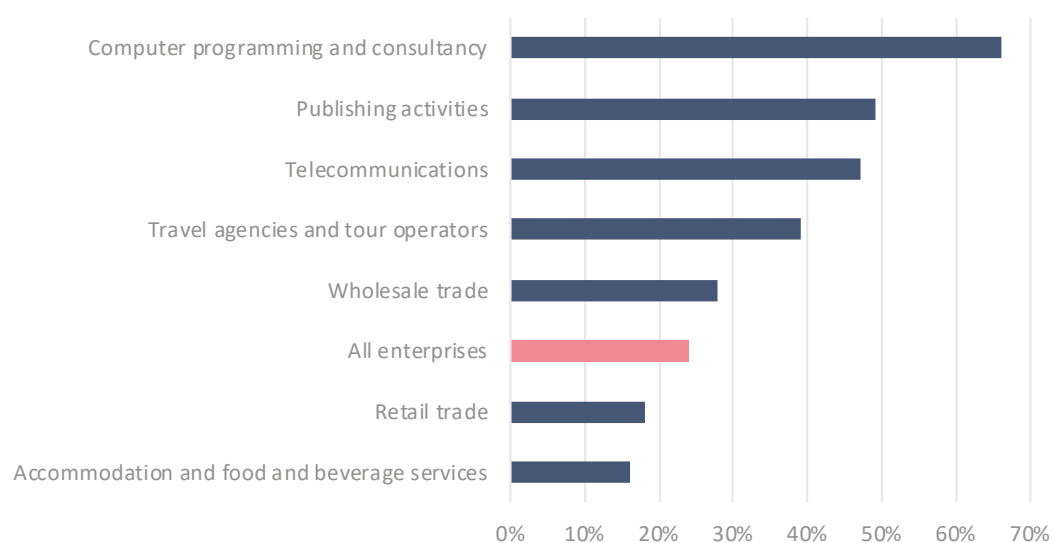
¹³⁸ Finck M. (2019). [Blockchain and the General Data Protection Regulation. Can distributed ledgers be squared with European data protection law?](#)

¹³⁹ Sanz P. (2019). [Key legal issues surrounding smart contract applications](#).

¹⁴⁰ Spindler G. (forthcoming). Digital Services Act: Adapting commercial and civil law rules for commercial entities operating online: legal assessment (to support JURI INL 2020/2019).

¹⁴¹ Eurostat (2018). Cloud computing services. Database isoc_cicce_use

Figure 21: Companies that have bought cloud computing services over the internet in the EU (%)



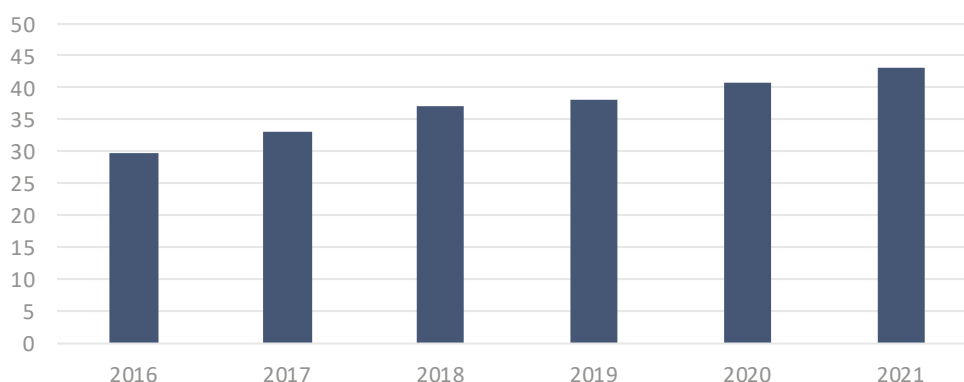
Source: Eurostat (2018). Cloud computing services. Database isoc_cicce_use.

The use of cloud computing services also depends on the size of the company. 53 % of large companies, irrespective of the economic sector, have bought cloud computing services. In contrast, only 21 % of small companies have paid to use these services.

From the individual's side, 32 % of EU citizens used internet storage space to save documents, pictures, music, video or other files in 2019. This use is more frequent in Sweden, Denmark, and Netherlands (63 %, 62 % and 56 %, respectively).¹⁴²

Cloud service revenue in Europe was expected to reach US\$38.2 billion in 2019.¹⁴³ The expected CAGR between 2016 and 2021 was 7.8 %, a modest growth rate compared to other booming digital services, which confirms the maturity of this market.

Figure 22: Cloud services market revenue in Europe (US\$ billion)



Source: Statista (2020). Cloud services market revenue in Europe from 2016 to 2021.

¹⁴² Eurostat (2019). Individuals – use of cloud services. Database isoc_cicci_use

¹⁴³ Statista (2020). [Cloud services market revenue in Europe from 2016 to 2021](#).

Problems related to cloud computing

As already mentioned, cloud computing is the most mature enabling technology, and it is widely used by EU companies. However, firms, particularly SMEs, still encounter contract-related problems when using cloud computing services. The Commission conducted a study on the economic detriment to SMEs from unfair and unbalanced cloud computing contracts.¹⁴⁴ It found that the most serious problems experienced by SMEs were: (1) unsatisfactory availability or discontinuity of the service (26 % of SMEs); (2) low speed of the service (22 %); (3) forced updates to the service that eliminated or changed a necessary function (13 %); (4) unsatisfactory amount of data that could be processed (4 %); (5) incident management (3 %). Regarding the causes of such problems, while only 13 % of SMEs reported that problems were caused by technical issues, 51 % considered that problems stemmed from the non-conformity of the service to the contractual terms and conditions. 12 % of SMEs referred to unfairness of the contractual terms and conditions as the main cause of the problems with the service, due to the impossibility of negotiating its content, as the contract might have included limited liability of the providers and/or the possibility of the provider unilaterally changing one or more clauses.¹⁴⁵

The negative consequences stemming from contract-related problems were the loss of clients, reputational damages, loss of profit and loss of turnover. The gross economic detriment of contract-related problems in cloud computing services, considering the loss of turnover, ranged from €650 million (in a scenario of 15.9 % of total enterprises using cloud computing services) to €2.1 billion (49.9 % of companies using cloud computing services). In both scenarios, SMEs accounted for about 70 % of the gross economic detriment.

2.2.5 Summary of sectoral analysis

Sectoral analysis has shown how digital sectors are evolving across the EU, and has allowed the main problems that still hamper their appropriate development to be identified from a double perspective: economic growth and respect for EU citizens' rights (both their rights as consumers and their fundamental rights). Table 10 summarises the findings for each digital market.

Table 10: Summary of sectoral analysis: main magnitudes and specific problems

Digital sector	Main magnitudes	Specific problems
e-Commerce	<p>Usage:</p> <ul style="list-style-type: none"> In 2019, 60 % of EU individuals had bought online in the past 12 months. 20 % of EU companies sell through e-commerce channels. <p>Market indicators:</p> <ul style="list-style-type: none"> e-Commerce sales in Europe reached €621 billion in 2019. Sales in the top 100 online marketplaces account for 58 % of global e-commerce sales. 	<p>Consumer side</p> <ul style="list-style-type: none"> Low cross-border consumption due to lack of trust: payment security; geo-blocking practices; delivery issues; low confidence in terms and conditions and information provided by the seller; existence of unsafe or counterfeit goods in online marketplaces. <p>Service provider side</p> <ul style="list-style-type: none"> Few EU companies selling cross-border: increased costs due to regulatory fragmentation (taxation, consumer protection, contract law); complexity of complaints and dispute resolution;

¹⁴⁴ European Commission (2019). [Study on the economic detriment to small and medium-sized enterprises arising from unfair and unbalanced cloud computing conditions](#).

¹⁴⁵ Ibid., p. 52.

Digital sector	Main magnitudes	Specific problems
		platforms impose conditions derived from their position of power in the market that distort fair competition (unfair terms and conditions to sellers; use of data from sellers and consumers).
Online advertising	Usage <ul style="list-style-type: none"> 26 % of EU companies paid for online advertising in 2018. Market indicators <ul style="list-style-type: none"> Online advertising market in Europe reached €64.8 billion in 2019. In 2015 it was estimated that overall, online advertising contributed €118 billion to the EU28 economy, and that 1.5 million jobs were directly and indirectly dependent on the sector. 	<ul style="list-style-type: none"> Unfair commercial practices: disguised advertising. Lack of transparency that may lead to fraudulent practices. Proliferation of false or harmful information to improve advertising effectiveness. Use of targeted advertising techniques for political purposes.
Social networks	Usage <ul style="list-style-type: none"> 54 % of Europeans engaged in social networks in 2019. 48 % of EU companies used social networks for commercial purposes in 2019. Market indicators <ul style="list-style-type: none"> Main revenue source: advertising. (98.5 % of Facebook's revenue). Facebook accounts for 72.1 % market share in 2019. Total revenue of social networks in the EU is not disclosed. Facebook's revenue from Europe reached US\$17 billion in 2019. 	<ul style="list-style-type: none"> Strong market power (due to indirect network effects and large quantities of data) can be used to impose unfair conditions on business partners. Exposure to disguised advertising. Content selection and filtering is carried out by algorithms. Potential negative consequence: polarisation of users. Lack of clear definition of 'harmful' content hinders the application of notice-and-action mechanisms. Fragmented regulation to deal with harmful content, a transnational phenomenon, is detrimental to the DSM.
Search engines	Usage <ul style="list-style-type: none"> 66 % of EU population searched for information on the internet in 2019. Market indicators <ul style="list-style-type: none"> The most concentrated market in the digital ecosystem. Google's market share accounted for 95.6 % in EU27 in July 2020. 61 % of Alphabet's revenue (US\$98 billion) came from advertising provided through its search engine Google in 2019. Income from EMEA accounted for 33 % of Alphabet's total income in 2018. 	<ul style="list-style-type: none"> Same competition issues as other digital markets based on platforms: risk of using market power to impose unfair conditions on business partners. The extreme market concentration increases the risk of the market leader developing monopolistic practices.
Collaborative economy platforms	Usage <ul style="list-style-type: none"> 21 % of EU citizens used collaborative economy platforms to arrange accommodation and 8 % to 	<ul style="list-style-type: none"> Similar problems to other online platforms: market concentration, market power derived from network effects and large quantities of

Digital sector	Main magnitudes	Specific problems
	<p>arrange transportation from another individual in 2019.</p> <p>Market indicators</p> <ul style="list-style-type: none"> The five main activities in the collaborative economy generated revenue worth €3.6 billion in Europe in 2015. In 2018, revenue was estimated at €26.5 billion. 	<p>information collected, imbalanced bargaining power between the platform and its business partners.</p> <ul style="list-style-type: none"> Legal uncertainty when operating in EU markets due to the lack of a clear definition of online intermediaries.
Artificial intelligence	<p>Usage</p> <ul style="list-style-type: none"> Low maturity of AI adoption amongst EU companies. Only 4 % employ advanced use. <p>Market indicators</p> <ul style="list-style-type: none"> Revenue in Europe was estimated at US\$1.6 billion in 2019. Expected CAGR 2019-2025: 44 %. 	<ul style="list-style-type: none"> AI can limit the autonomy of consumers, as automated decisions can bias their ability to make informed choices. Potential risks: overspending, purchasing unrequired goods and financial risks. Discriminatory practices related to personal data (issue already addressed by GDPR) and lack of transparency and explainability of algorithms (still unresolved).
Blockchain	<p>Market indicators</p> <ul style="list-style-type: none"> Global funding raised by blockchain projects in 2018: €11 billion. Spending on blockchain technologies in Europe in 2019: US\$800 million. Expected revenue in Europe in 2023: US\$4.9 billion. 	<ul style="list-style-type: none"> Management of personal data in blockchain records. Problems derived from immutability of the information recorded and the inexistence of a centralised entity responsible for the information. Doubts about the legal binding of smart contracts. Concerns related to consumer protection (respect for withdrawal rights when a clause is automatically executed by software).
Cloud computing	<p>Usage</p> <ul style="list-style-type: none"> 32 % of EU citizens used internet storage space in 2019. 24 % of EU companies bought cloud computing services on the internet in 2019. <p>Market indicators</p> <ul style="list-style-type: none"> Most mature enabling technology. Cloud service revenue in Europe was expected to reach US\$38.2 billion in 2019. 	<ul style="list-style-type: none"> Unfairness of contractual terms and conditions, particularly affecting SMEs: impossibility of negotiating content; limited liability of service providers; service providers can unilaterally change contract clauses. The economic detriment of contract-related problems to EU companies in cloud computing services has been estimated at between €650 million and €2.1 billion.

Source: Authors' own elaboration.

2.3 Introduction to the economic benefits of improving the regulatory framework of digital services

Improving the existing regulatory framework would allow the aforementioned problems to be addressed and digital services in the EU to be boosted, while enhancing the protection of citizens' rights and freedoms.

It is expected that this would create new value for the EU, including economic value.

Firstly, it is expected that the predicted economic benefits of the measures already approved will be achieved by ensuring more effective implementation. The new measures would also bring extra benefits. For instance, according to the aforementioned study 'Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses',¹⁴⁶ additional gains of €83.7 billion would be obtained if new measures to reinforce the DSM are enacted. These gains would come in the form of a reduction of administrative and compliance costs for service providers and producers, an increase in consumption through e-commerce, savings for both consumers and producers, and extra income for public administrations. Marcus et al. (2019) estimated that only 25 % of these gains is currently achieved, and those potential consumer gains alone could reach €31.4 billion per year.¹⁴⁷

The European Commission expects the economic impacts of the DSA to include:¹⁴⁸

- Common rules for the whole EU and greater legal certainty for users and service providers would increase consumption and boost the ability of innovative European SMEs to scale up across borders within the internal market.
- Greater competitiveness thanks to a level playing field for all stakeholders would result in a stronger and more innovative digital service sector.

The economic benefits of addressing the current problems in providing digital services in the EU would be driven by two main factors: (1) greater competition within the EU digital market, and (2) better consumer protection. Table 11 summarises the potential benefits from the consumer and the service provider perspectives, and their main drivers.

Table 11: Potential economic benefits of addressing current problems

	General effects	Benefits from the consumer's perspective	Benefits from the service provider's perspective
Diminishing uncertainty caused by a lack of clarity of service providers' obligations and fragmentation of the internal digital market	<ul style="list-style-type: none"> • Greater competition • More trust 	<ul style="list-style-type: none"> • More choices and convenience • Lower prices • More quality • Fewer costs from disputes <p>= Higher consumption</p>	<ul style="list-style-type: none"> • Lower adaptation costs for cross-border operations • Lower administrative costs • Lower costs derived from disputes • Better performance • More innovation
Creating a level playing field for all stakeholders and limiting the power of "gate-keepers"	<ul style="list-style-type: none"> • Greater competition • More trust 	<ul style="list-style-type: none"> • More choices • Lower prices • More quality <p>= Higher consumption</p>	<ul style="list-style-type: none"> • Better economic performance • More innovation • Easier entry to the market

¹⁴⁶ Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

¹⁴⁷ Ibid.

¹⁴⁸ European Commission (2020). Combined evaluation roadmap/Inception Impact Assessment of the Digital Single Act package and Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market.

Minimising the risks derived from the use of digital services threatening citizens' rights and freedoms	<ul style="list-style-type: none"> • Better protection for users • Less illegal and harmful contents and goods 	<ul style="list-style-type: none"> • Better quality of goods and services • Fewer costs from disputes = Higher consumption of legal goods and services 	<ul style="list-style-type: none"> • Lower adaptation costs for cross-border operations • Fewer reputational risks • Positive impacts on stock prices, market capitalisation, and cost of capital • Fewer costs from disputes
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Source: Authors' own elaboration.

However, the gains of having a vibrant digital ecosystem and a true Digital Single Market go beyond economy. This would particularly be the case for minimising the risks derived from the use of digital services that currently threaten citizens' rights and freedoms. Online intermediaries and platforms, particularly social media platforms, play a critical role in preventing and mitigating risks. The lack of accountability of platforms regarding content, the lack of transparency of algorithms, the fragmentation and ambiguity of notice-and-action procedures, and the fact that current control measures are voluntary put certain freedoms at risk (such as privacy, freedom of expression or information¹⁴⁹ or freedom of business¹⁵⁰), but also pose a threat to the stability of democracy and political processes.¹⁵¹ In this sense, disinformation plays a special role. Disinformation is 'verifiably false or misleading information created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm'.¹⁵² Disinformation campaign promoters take advantage of the numerous options to spread information opened by digital platforms and can threaten democratic political and policy-making processes; put the protection of EU citizens' health, security and their environment at risk; erode trust in institutions and in digital and traditional media; harm democracy by hampering the ability of citizens to make informed decisions; polarise debates; deepen tensions in society and undermine electoral systems.¹⁵³ Therefore, a legal framework that helps prevent such threats to the stability of institutions and the welfare of European citizens would have undeniable medium- and long-term value, although it is difficult to quantify economically.

Also, Iacob and Simonelli (2020) point out at least two significant social benefits of improving the ECD:¹⁵⁴

- e-Commerce can contribute to increasing social cohesion. Distance is becoming less relevant in commercial transactions and both consumers and sellers, particularly SMEs, can seize the opportunities of digital economy, even if they are in remote or poorer areas.

¹⁴⁹ Woods L., Perrin W. (2019). Online harm reduction – a statutory duty of care and regulator. Carnegie Trust UK.

¹⁵⁰ Spindler G. (forthcoming). Digital Services Act: Adapting commercial and civil law rules for commercial entities operating online: legal assessment (to support JURI INL 2020/2019).

¹⁵¹ McCarthy M. (2020). Transparency Requirements for Digital Social Media Platforms: Recommendations for Policy Makers and Industry. Georgetown University.

¹⁵² European Commission (2018). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: A European Approach. [COM\(2018\) 236 final](#).

¹⁵³ European Commission (2019). [Tackling online disinformation | Shaping Europe's digital future](#).

¹⁵⁴ Iacob N., Simonelli F. (2020). How to fully reap the benefits of the internal market for e-commerce? New economic opportunities and challenges for digital services 20 years after the adoption of the e-Commerce directive.

- e-Commerce is also a fantastic opportunity for elderly people and people with disabilities to access products and services that they cannot buy due to the barriers that persist in traditional offline commerce (physical or architectural barriers).

Existing literature suggests that there is an opportunity to create value in the EU, both economic and social, if policies are put in place to remove the current barriers to the provision of digital services on the internal market. The following chapters aim to estimate whether and to what extent adopting different policy options for EU actions on the DSA package would create value for the EU.

3 Description of policy options

Based on existing literature, the Commission's DSA package proposal and stakeholders' position papers, three groups of policies to address the limitations in the current legal framework regulating digital services in the EU are identified. The three groups correspond to the three problems defined in section 2.1.2:

- Limited and uneven protection of digital service users (businesses, particularly SMEs, and citizens).
- Current market power of online platforms is generating asymmetries and distorting competition.
- New and increased risks derived from the use of digital services that threaten citizens' rights and freedoms.

A fourth policy package is identified to deal with the cross-cutting issues that are common to all or a large part of digital services, and whose implementation would help address all the above problems. These cross-cutting issues include:

- Lack of common and clear definitions

One of the problems generating uncertainties and fragmentation in the EU market is the lack of an updated and clear definition of which services fall within the scope of digital services, and how these services are categorised. For example, in their position papers regarding the DSA proposal, stakeholders often ask for clarification on what intermediary services are, or for a clear distinction between harmful and illegal content. Experts also ask for a definition of systemic platforms as a pre-requisite for regulation.

- Clarifying liability exceptions

Linked to the need for clarification of definitions, it is also necessary to clarify the exemptions from liability currently contained in the ECD. The interpretation of these exemptions by national jurisprudence is very fragmented and gaps have emerged in recent years.¹⁵⁵

- Lack of transparency of algorithms

Algorithms are an increasingly crucial element of digital services, as they are used for pricing, placing advertisements, making comparisons, developing voice assistants, suggesting content, detecting harmful content, etc. A lack of transparency in algorithms affects all types of digital services (e-commerce, social networks, entertainment content platforms, etc.) and has an impact not only on consumers and businesses' rights but also on fundamental rights and freedoms. Regulating the transparency of algorithms would be critical in protecting freedoms, ensuring fair competition in e-commerce and platform ecosystems, as well as in improving consumer protection.

- Weak enforcement of measures

Enforcement of the ECD relies on a self-regulation approach and leaves the definitions of standards, sanctions and enforcement measures to Member States. Cooperation between Member States is limited to a mandate for information exchange. The lack of transparency

¹⁵⁵ Madiaga T. (2020). Reform of the EU liability regime for online intermediaries. EPRS, European Parliament.

in the functioning of platforms and algorithms compounds the problem.¹⁵⁶ Another relevant aspect affecting the enforcement of measures is the lack of accountability of service providers established outside the EU. In general, there is a wide consensus that self-regulation and the current fragmentation of enforcement measures is inefficient, and more effective enforcement is required to protect EU citizens and ensure better coordination.

Table 12 summarises the four policy packages discussed in this research paper for a possible future DSA package.

Table 12: Policy packages assessed

	Problem	Policy package
1	Limited and uneven protection of digital service users (businesses, particularly SMEs, and citizens)	Enhanced consumer protection and common e-commerce rules
2	New and increased risks derived from the use of digital services that threaten citizens' rights and freedoms	Creating a framework for content management and curation that guarantees the protection of rights and freedoms
3	Current market power of online platforms is generating asymmetries and distorting competition	Specific regulation to ensure fair competition in online platform ecosystems
4	Cross-cutting issues: lack of transparency of algorithms, lack of common and clear definitions of digital services, weak enforcement	Cross-cutting policies to ensure enforcement and guarantee clarity

Source: Authors' own elaboration.

3.1 Enhanced consumer protection and common e-commerce rules

The weak protection of digital service users' rights, including both businesses and final consumers, is derived from uncertainty and fragmentation of definitions and obligations within the internal market. Therefore, policies addressing this issue should be aimed at improving transparency, clarity and standardising obligations for digital service providers. The policy options are complementary to each other, so all or only some of these measures could be implemented.

The policy options within this package include:

- Fair and transparent contract terms and general conditions for business partners and consumers

Regulations impose stricter rules on the clarity and limits of digital services' terms and conditions, in particular for platforms, whose terms and conditions are non-negotiable and usually establish the applicable jurisdiction as being outside the EU, hindering access to justice for European citizens and businesses. Rules should require service providers to provide clear information about the general aspects of the service (which should not deprive citizens or businesses of their rights), the use of data and the application of

¹⁵⁶ Smith M. (2020). Enforcement and cooperation between Member States. E-Commerce and the future Digital Services Act. Policy Department for Economic, Scientific and Quality of Life Policies. European Parliament.

algorithms. Rules should also limit the unilateral modification of contractual terms, and ensure effective access to justice in EU courts.

- Reinforcement of the minimum information requirements for commercial communications

General information requirements are currently established in Article 5 of the ECD. Measures taken in this regard should reinforce the provisions of that article to ensure information is accurate and updated, align obligations with those of the Unfair Contract Terms Directive (93/13/EEC),¹⁵⁷ and include the “Know Your Business Customer” principle, aimed at ensuring that service providers verify the identity of their partners in B2B relationships.

Regarding the information requirements of online marketplaces, suppliers should be clearly identified, and marketplaces should be liable for providing false or misleading information to consumers.

- Increase transparency of commercial communications

Measures should be implemented to reinforce Article 6 of the ECD on the transparency of advertising, making it possible to clearly identify the nature of ads and the agents who are accountable for them.

- Extend the scope of the ECD to service providers from non-EU countries.

The Internal Market Clause is a core feature of the ECD. It allows service providers to operate in any Member State by complying only with the rules of the country of establishment, and not with those of the other countries in which they operate. As a result, providers established outside the EU can operate without necessarily respecting EU or national rules.¹⁵⁸ The new regulations should also ensure third-country compliance and that consumers are adequately protected.

- Limit the intrusiveness of advertising

Measures to limit targeted advertising could be included in the package.

3.1.1 Direct economic impacts resulting from the policy package

Enhancing consumer protection when using digital services, particularly e-commerce services, will contribute to the effective implementation and smooth functioning of the EU internal market. By reducing the current levels of uncertainty stemming from unclear digital service providers' obligations and liabilities, and removing regulatory fragmentation across the EU, free movement of digital services will become easier. As a result, consumers will face less obstacles to accessing digital services, especially outside their own country. If such obligations are common to the EU, service providers will be able to widen their potential market, entering new EU markets under the same conditions as they operate domestically. The following paragraphs describe the direct economic

¹⁵⁷ Also the provisions of the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules.

¹⁵⁸ De Streel A., Husovec M. (2020). [The e-commerce directive as the cornerstone of the internal market. Assessment and options for reform.](#)

impacts that could be yielded by policy actions aimed at enhancing consumer protection in the digital sphere.

Increase in e-commerce consumption

Removing barriers related to consumers' lack of trust in the contractual information provided by sellers when purchasing online could lead to an increase in e-commerce consumption, particularly in terms of cross-border transactions. It is estimated that lifting such barriers would increase the number of consumers making cross-border purchases online by around 13.5 %. ¹⁵⁹ According to Eurostat, 21 % of Europeans purchased online from sellers in other EU countries in 2019. ¹⁶⁰ In absolute terms, around 94 million Europeans made a cross-border purchase online in 2019. Multiplying this figure by the increase expected in the number of consumers as a result of removing current barriers (the aforementioned 13.5 %), there would be around 12.7 million new consumers buying online cross-border in the EU. Considering the average spending per consumer on cross-border sales, which ranges from €150 ¹⁶¹ to €524.6 ¹⁶², these additional users of cross-border e-commerce services would contribute to an increase in annual cross-border e-commerce sales of between €1.9 billion and €6.6 billion.

In addition, addressing consumers' concerns on the contractual information of e-commerce services could increase current users' annual average spending on cross-border e-commerce by around 14 %. ¹⁶³ Based on this, current consumers (94 million) would spend between €21 and €73.4 extra on cross-border e-commerce. ¹⁶⁴ Therefore, the direct economic impact of this additional effect on cross-border e-commerce sales is estimated to be between €2 billion and €6.9 billion.

Table 13: Possible economic impact of fair contract terms and conditions in cross-border e-commerce services (EU27)

Effect	Users benefited	Estimated economic impact
More consumers making cross-border purchases online	12.7 million new consumers making cross-border online purchases in the EU	€1.9 billion–€6.6 billion

¹⁵⁹ European Commission (2015). Commission Staff Working Document. Impact assessment accompanying the document 'Proposals for Directives of the European Parliament and the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods'.

¹⁶⁰ Eurostat (2020). Internet purchases by individuals. Table isoc_ec_ibuy.

¹⁶¹ This figure is estimated based on the Europe average annual spending per user in e-commerce provided by Postnord in its report 'E-commerce in Europe 2018' (€625). It is assumed that cross-border average annual spending per user accounts for 24% of the total average annual spending in e-commerce (estimation from Cross Border Commerce Europe).

¹⁶² This figure is estimated based on the Europe average annual spending per user in e-commerce provided by JP Morgan in its report series '2019 global payments trends report' (€2 186). It is assumed that cross-border average annual spending per user accounts for 24% of the total average annual spending in e-commerce (estimation from Cross Border Commerce Europe).

¹⁶³ European Commission (2015). Commission Staff Working Document. Impact assessment accompanying the document 'Proposals for Directives of the European Parliament and the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods'.

¹⁶⁴ These figures are estimated by multiplying the aforementioned bounds of average spending on cross-border e-commerce (€150 and €524.6) by the expected increase (14%).

More spending on cross-border e-commerce by current consumers	94 million current consumers who make cross-border online purchases in the EU will increase their spending	€2 billion-€6.9 billion
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Source: Authors' own estimations based on Eurostat, JP Morgan, Postnord and Cross Border Commerce Europe.

Domestically, the economic impacts of regulatory provisions aimed at improving consumers' trust in the terms and conditions of e-commerce services could also be important. However, the number of additional consumers of domestic e-commerce services, and the increase in current consumers' average spending due to fairer terms and conditions, is difficult to estimate. Most of the research conducted so far is focused on cross-border e-commerce and there is no reliable data with which to make an accurate estimation at the domestic level. Assuming the same percentage as in the case of cross-border e-commerce consumption (13.5 % of additional new consumers), there would be 1.3 million new consumers buying online domestically at the EU level.¹⁶⁵ The growth in domestic e-commerce consumption is estimated to be between €613 million and €2.1 billion.¹⁶⁶ If current users of domestic e-commerce services (229.6 million, according to Eurostat) increase their average spending by 14 %, ¹⁶⁷ e-commerce sales would grow between €15.3 billion and €53.4 billion. In the absence of accurate estimations of both impacts at domestic level, they have not been included in the macroeconomic modelling. However, these estimates offer an indicative picture of the potential impact of fairer terms and conditions on domestic e-commerce services, which should be corroborated by further research.

For these estimates to occur, it is necessary that obligations and requirements are common to the whole EU, so that there is no fragmentation within the single market. If each Member State applied its own rules, domestic consumption would benefit, but the impact on cross-border consumption would be smaller.

Increase in turnover of business users of digital services

Obliging digital service providers to establish fair contract terms and general conditions would have positive impacts not only on the free movement of goods through e-commerce services, but also on the provision of digital services. The service sector accounts for almost three quarters of the total economy in the EU,¹⁶⁸ but the DSM has been more effective in facilitating the movement of goods through e-commerce than services.¹⁶⁹ An example of a digital service whose users, particularly SMEs, can benefit from having fair contract terms and conditions is cloud computing.¹⁷⁰ An increasing number of companies rely on cloud computing services to store their data, access corporate software or host websites, amongst other applications. However, almost 25 % of SMEs using cloud

¹⁶⁵ According to Eurostat, there would around 159.5 million EU internet users that do not purchase online from domestic sellers. 6 % of them (9.5 million) do not purchase because they do not trust the terms and conditions they have to agree with the online seller (data from survey conducted by the European Commission in 2015 on the main cross-border obstacles to the Digital Single Market). The number of additional new consumers due to the removal of the barrier is obtained multiplying 9,5 million by 13.5 %.

¹⁶⁶ Based on average annual domestic cross-border spending of between €475 and €1 661.4. It is estimated that the average spending per user in domestic e-commerce accounts for 76 % of total average spending per user in e-commerce (lower bound: €625; upper bound: €2 186).

¹⁶⁷ Between €66.5 and €232.6 (14 % of €475 and €1 661.4).

¹⁶⁸ Eurostat (2019). [World trade in services](#).

¹⁶⁹ Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

¹⁷⁰ European Commission (2019). Study on the economic detriment to small and medium-sized enterprises arising from unfair and unbalanced cloud computing contracts.

computing services face diverse contract-related problems.¹⁷¹ If unfair contractual terms and conditions of cloud computing services were removed, about 257 000 EU SMEs¹⁷² would increase their turnover by around €290 million.¹⁷³

Table 14: Possible economic impact of fair contract terms and conditions on cloud computing services (EU27)

Effect	SMEs that benefit	Estimated economic impact
Increase in turnover	260 000 SMEs acting as consumers of cloud computing services will benefit from fair contract terms	€290 million additional turnover

Source: Authors' own estimations based on Eurostat and European Commission.

The effect on cloud services, quantified and included in the macroeconomic model, is only an example of other potential services that could benefit from the DSA.

Cost savings for e-commerce providers selling abroad

From the provider's perspective, complying with policy actions aimed at ensuring fair contract terms and general conditions and improving transparency in commercial communications will involve additional costs: legal services for drafting new terms and conditions, adapting their online channels, informing customers about changes in the terms and conditions, etc. It is estimated that 1.2 million companies selling online in the EU¹⁷⁴ would have to adapt their terms and conditions, with a total one-off cost of €8.1 billion.¹⁷⁵ If the policy actions are coordinated at the EU level, and the same contract terms and conditions are valid for operation in any EU country, companies making cross-border sales online (around 537 000) could save €15.5 billion,¹⁷⁶ as they would not need to further adapt their contractual conditions to specific national regulations. The net effect of having

¹⁷¹ Ibid.

¹⁷² Five economic sectors have been considered in the analysis: Manufacturing; Wholesale and retail trade; Information and communication; Professional, scientific and technical activities; Administrative and support service activities. They encompass 80 % of total SMEs buying cloud computing services in the EU. The total number of SMEs benefited has been estimated from Eurostat data (table cloud computing services isoc_cicce_use).

¹⁷³ The economic detriment of having unfair terms and conditions on cloud computing services is estimated at €1 119.9 per SME by the European Commission (2019). It is assumed that removing this barrier could increase their turnover the same amount.

¹⁷⁴ Estimation based on Eurostat data. The following sectors have been considered: textile and leather; computer, electronics and optical products; furniture; wholesale excluding motor vehicles; retail excluding motor vehicles; transport and warehousing services; postal and courier services; accommodation and food services; publishing activities; motion picture, video and television; telecommunication; computer programming and information services; advertising and market research; rental and leasing; travel agency.

¹⁷⁵ The average compliance cost per company is estimated at €6 800 (source: European Commission (2015). Impact assessment accompanying the document 'proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods).

¹⁷⁶ Calculated from the number of companies making cross-border sales online (537 000; estimated from Eurostat) by the average number of EU countries where they sell online (3.21) and the average contract-law related costs that each company would bear in order to sell in other EU countries if there was not common regulation (€9 000). The source of the last two figures is the study cited in footnote 163.

coordinated rules for e-commerce providers would be a cost saving of €7.4 billion when selling abroad.

Table 15: Possible economic impact of adapting contract terms and conditions for e-commerce providers (EU27)

Effect	Enterprises affected	Estimated economic impact
One-off compliance costs to adapt contractual terms and conditions	1.2 million enterprises selling online through e-commerce channels	€8.1 billion
Cost savings from having coordinated regulation	537 000 enterprises selling online through e-commerce channels in other EU countries	€15.5 billion
Net effect (cost savings – one-off costs)	537 000 enterprises selling online through e-commerce channels in other EU countries ¹⁷⁷	€7.4 billion

Source: Authors' own estimations based on Eurostat and European Commission.

Reduction of litigation and alternative dispute resolution costs

Consumers may occasionally experience problems when buying online, resulting in them taking the case to court, or trying to reach an agreement with the provider through alternative dispute resolution (ADR) mechanisms. Both procedures involve costs for both consumers and service providers. An enhanced and coordinated consumer protection framework, obliging digital service providers to establish fair contractual terms and conditions, as well as reinforcing the minimum information and transparency requirements for commercial communications, will reduce costs for both consumers and service providers. It has been assumed that coordination of the new legal provisions at the EU level would reduce the costs of legal proceedings at the same rate as adopting minimum standards for civil procedures: 10 % in cross-border cases and 0.5 % in domestic cases.¹⁷⁸ It is also assumed that both consumers and service providers would benefit equally from the reduction of litigation and ADR costs.

The number of EU citizens that take problems experienced when making online cross-border purchases to court is estimated at 483 000 annually,¹⁷⁹ and total litigation costs are estimated at €26 billion.¹⁸⁰ A 10% reduction in costs (discussed above) would therefore save citizens and service providers €260 million per year. In the case of domestic markets, 1.3 million EU citizens¹⁸¹ take e-

¹⁷⁷ Only e-commerce providers selling cross-border will benefit from common legal provisions at the EU level to ensure fair contract terms and conditions, as they can then sell in other EU countries without further adaptations to national regulatory frameworks.

¹⁷⁸ Evas T., van Ballegooij W. (2019). Common minimum standards of civil procedure. European Added Value Assessment. The same percentages have been used to estimate the reduction of alternative dispute resolution costs.

¹⁷⁹ Based on Eurostat data and the survey conducted by the European Commission in 2015 on the main cross-border obstacles to the Digital Single Market.

¹⁸⁰ The figures used to estimate the total cross-border litigation costs are from Evas T. and van Ballegooij W. (2019)

¹⁸¹ Based on Eurostat data and the survey conducted by the European Commission in 2015 on the main cross-border obstacles to the Digital Single Market.

commerce problems to court annually, with total litigation costs of €6.8 billion.¹⁸² Reducing the costs 0.5 % would imply annual savings for consumers and service providers totalling €34 million.

Regarding ADR, it is estimated that each year 1.2 million EU citizens¹⁸³ use these mechanisms to solve cross-border e-commerce related problems. The costs of ADR have been estimated at a quarter of the litigation costs of every Member State,¹⁸⁴ totalling €1.58 billion across the EU.¹⁸⁵ Applying the same reduction as in court cases, citizens and service providers could therefore save €158 million. Domestically, around 3.1 million EU citizens¹⁸⁶ rely on ADR annually when experiencing problems with online purchases, resulting in total costs of €4 billion.¹⁸⁷ A reduction of 0.5 % would mean savings of €20 million.

Common measures at the EU level would lead to savings in both cross-border and domestic cases, while individualised Member States' measures would only lead to a reduction in costs associated with domestic cases.

Table 16: Possible economic impact of fair contract terms and conditions, and transparency in commercial communications: reduction in litigation and ADR costs (EU27)

Effect	Users who benefit	Estimated economic impact
Reduction in litigation costs (cross-border)	483 000 EU consumers experience problems when making cross-border purchases online and take the case to court	€130 million per year
	e-Commerce service providers	€130 million per year
Reduction in litigation costs (domestic)	1.3 million EU consumers experience problems when making domestic purchases online and take the case to court	€17 million per year
	e-Commerce service providers	€17 million per year
Reduction in ADR costs (cross-border)	1.2 million EU consumers experience problems when making cross-border purchases online and take the case to ADR	€79 million per year
	e-Commerce service providers	€79 million per year

¹⁸² The figures used to estimate the total domestic litigation costs are from Evas T. and van Ballegooij W. (2019).

¹⁸³ Based on Eurostat data and the survey conducted by the European Commission in 2015 on the main cross-border obstacles to the Digital Single Market.

¹⁸⁴ De Palo G., Feasley A., Orecchini F. (2011) ADR Centre. Quantifying the cost of not using mediation – a data analysis. Policy Department C: Citizens' Rights and Constitutional Affairs. European Parliament.

¹⁸⁵ The figures used to estimate the total cross-border ADR costs are from Evas T. and van Ballegooij W. (2019).

¹⁸⁶ Based on Eurostat data and the survey conducted by the European Commission in 2015 on the main cross-border obstacles to the Digital Single Market.

¹⁸⁷ The figures used to estimate the total domestic ADR costs are from Evas T. and van Ballegooij W. (2019).

Reduction in ADR costs (domestic)	3.1 million EU consumers experience problems when making domestic purchases online and take the case to ADR	€10 million per year
	e-Commerce service providers	€10 million per year

Source: Authors' own estimations based on Eurostat, European Commission and Evas T., van Ballegooij W. (2019).

Increase domestic (EU) production of legal goods due decreased imports of counterfeit goods

Because the ECD does not currently apply to service providers established outside the EU, their accountability is limited, allowing illegal trade of online content and goods through e-commerce channels to flourish. As the Nordic Commerce Sector states:¹⁸⁸

'When goods are sold to European consumers via an online marketplace from a supplier which is not established in the EU, a legal loophole occurs. The responsible actor is not established in the EU and there is therefore no possibility to hold them liable [...]. Even though the new enforcement and compliance regulation [...] will allow authorities to control private imports from 3rd countries, this will not solve the problem. The sheer number of parcels means that it is impossible to check everything at customs [...]. The lack of enforcement means, in practical terms, that products imported directly to consumers from non-EU countries (through both EU and non-EU platforms) do not require the same level of compliance, as if the products were bought through the traditional chain'.

Online marketplaces are the main distribution channel for counterfeit goods in the EU, of which about 70 % come from China.¹⁸⁹ This illegal activity takes advantage of online marketplaces as counterfeiters evade customs controls by sending products directly to consumers via postal or courier services. To give an idea of the magnitude of the problem, intellectual property rights (IPR) intensive industries account for 45 % of the EU GDP, 29 % of employment and constitute 96 % of EU goods exports.¹⁹⁰

EU imports of counterfeit and pirated goods accounted for 6.8 % of total EU imports in 2016, an increase of 1.8 percentage points from 2013, amounting to €121 billion.¹⁹¹ In 2018, 84 % of detentions at EU borders were postal or courier services, with products coming mainly from e-commerce purchases.¹⁹²

Intellectual property (IP) infringements are potentially harmful to the health and safety of consumers, to the environment, and also damage the economy by reducing revenue for legal business, resulting in job destruction. The direct lost sales are estimated at €50 billion per year, and job losses at 416 000. Considering the indirect effects on other sectors, total sale losses could reach €83 million, with over 671 000 jobs lost and a loss of income to the public coffers via taxes and social

¹⁸⁸ Nordic Commerce Sector (2020). Revision of the E-commerce directive/Digital services act. Position paper.

¹⁸⁹ EUIPO, EUROPOL (2017). 2017 Situation Report on Counterfeiting and Piracy in the European Union.

¹⁹⁰ EUIPO (2020). 2020 Status report on IPR Infringement: Why IP Rights are important, IPR infringement, and the fight against counterfeiting and piracy.

¹⁹¹ OECD/EUIPO (2019). Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris/European Union Intellectual Property Office.

¹⁹² European Commission (2019). Report on the EU customs enforcement of intellectual property rights: Results at the EU border, 2018. 2019

security of €15 billion a year.¹⁹³ Assuming that around 70 % to 80 % of counterfeit goods were purchased in online marketplaces,¹⁹⁴ between €35 and €40 billion in legitimate sales would be directly lost every year in the EU through e-commerce.

This negative impact of the proliferation of counterfeit goods mainly affects SME's, which cannot compete in terms of prices:¹⁹⁵

'The current legal framework also affects the competitiveness of European companies, especially SMEs. A study by the Finnish Commerce Federation estimates that the average purchasing price for a (on the surface) comparable product that does not comply with European product safety legislation can be sold to consumers at a significantly lower price and still be profitable. This means that it is impossible for responsible European companies to compete with the price of the products sold without complying with the EU-regulation on product safety'.

IPR infringements also have relevant direct economic impacts on innovation because companies do not receive the expected returns from their investments in innovation, reducing them in the long run.¹⁹⁶

The potential economic benefits of increasing e-commerce service providers obligations and liabilities towards removing listings of potentially illegal and counterfeit goods can be estimated based on data from the European Union Intellectual Property Office (EUIPO)¹⁹⁷ on the propensity of imports being counterfeit goods in certain sectors. As mentioned above, the report states that 6.8 % of total imports to the EU are counterfeit goods. It also highlights those sectors (clothing, footwear, watches, etc.) where imports are more likely to be infringing copyright. Single item purchases are estimated to account for 39 % of all counterfeit imports. These purchases have the highest probability of being B2C direct purchases through online platforms. Based on these estimations and assuming that legislation can effectively remove 50% of these listings, it is estimated that about €4.6 billion of illegal trade can be removed. This in turn could lead to an increase in legal purchases, of which a relevant part could be internal to the EU market.

Table 17: Possible economic impact of reducing counterfeit trade to the EU (EU27)

Effect	Enterprises affected	Estimated economic impact
Reduction of trade in counterfeit goods	Producers of counterfeit goods in third countries	€4.6 billion illegal trade removed

Source: Authors' own estimations based on Eurostat and European Commission.

Impact of limiting the intrusiveness of advertising on consumption

Online advertising is constantly evolving towards personalisation. It was estimated that behavioural advertising¹⁹⁸ revenues would grow by 106 % between 2016 and 2020, reaching a value of €21.4

¹⁹³ EUIPO (2020). 2020 Status report on IPR Infringement: Why IP Rights are important, IPR infringement, and the fight against counterfeiting and piracy.

¹⁹⁴ Assumption based on EUIPO data from 2020 referring to detentions in EU borders in 2018.

¹⁹⁵ Nordic Commerce Sector (2020). Revision of the E-commerce directive/Digital services act. Position paper.

¹⁹⁶ EUIPO (2020). 2020 Status report on IPR Infringement: Why IP Rights are important, IPR infringement, and the fight against counterfeiting and piracy.

¹⁹⁷ OECD/EUIPO (2019). Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris/European Union Intellectual Property Office.

¹⁹⁸ Type of personalised advertising that targets users based on cookies' information on past browsing activities.

billion in Europe.¹⁹⁹ This type of advertising is more effective than standard advertising, which does not use behavioural data. The click-through rate of behavioural advertising is 5.3 times higher than that for standard advertising. If behavioural advertising is used to retarget consumers who have previously shown interest in a product, the click-through rate is 10.8 times higher than that for standard advertising.²⁰⁰ In this sense, behavioural advertising clearly benefits advertisers, as their chances of engaging consumers increase.

From the consumer's perspective, several studies show contradictory results about the acceptance of personalised advertising. For instance, 55 % of Europeans feel uncomfortable with search engines using information about their previous online activity and personal data to personalise advertisements.²⁰¹ Users' unease with these practices also reaches similar percentages in online marketplaces and social networks (56 % and 58 %, respectively). On the contrary, another study reveals that 72 % of consumers would only engage with personalised ads and 63 % would stop buying from brands that use poor personalisation practices.²⁰² More than one third of consumers expressed interest in buying personalised products and services.²⁰³ Some specific categories of products and services reach higher percentages (holidays: 53 %; hotels: 47 %; flights: 44 %). Based on the research conducted so far, it seems that consumers would be more receptive to personalised advertising, although it remains unclear how their consumption behaviour would be affected.

While new regulatory provisions to limit the intrusiveness of advertising could be detrimental to advertisers, the effect on consumers is less clear. Nevertheless, given the growing trend towards personalised advertising, and its effectiveness compared to other types of advertising, the restriction of personalised advertising could potentially lead to negative impacts on household consumption and revenues for marketers. This idea remains in the realm of hypothesis, and further research is needed to corroborate it. For that reason, this potential impact is not included in the macroeconomic assessment.

3.2 Creating a framework for content management and curation that guarantees the protection of rights and freedoms

Threats to fundamental rights and freedoms mainly derive from the absence of clear, transparent and standardised obligations and procedures regarding content management and from the platforms' lack of accountability. A package of policies to address this issue should focus on the definition of clear obligations for content platforms (including social media platforms, marketplaces and search engines) regarding content management and curation that goes beyond the current voluntary model, strengthening cooperation between the private sector, citizens and public authorities, and overcoming the current fragmentation. Policy options that could be implemented within this package include:

- Clear and standardised notice-and-action procedures to deal with illegal and harmful content

Both users and public authorities should know and understand the standards and procedures applied by service providers to curate and moderate content (including those

¹⁹⁹ IHS Markit (2017). The economic value of behavioural targeting in digital advertising.

²⁰⁰ Ibid.

²⁰¹ European Commission (2016). Special Eurobarometer 447. Online platforms.

²⁰² SmarterHQ (2020). Privacy & Personalisation. Consumers share how to win them over without crossing the line.

²⁰³ Deloitte (2015). The Deloitte Consumer Review. Made-to-order: The rise of mass personalization.

carried out through automated systems such as AI tools). The transnational nature of digital services, especially platform business models, calls for the alignment of such standards and procedures to guarantee the rights and freedoms of EU citizens and to make it easier for smaller providers to adapt to them and provide their services throughout the internal market on an equal footing. Measures should include clarifying 'safe harbour' conditions and the distinction between the 'passive' and 'active' role in content monitoring. Greater transparency and specific obligations would ease the effective protection of consumers and users against harmful and illegal content.

- Enhanced transparency on content curation and reporting obligations for platforms

Creating obligations to report both notice-and-take-down procedures and dispute settlement mechanisms, and specific figures on numbers of notices and removal requests received, as well as other key indicators such as average response times, would improve transparency and enforcement of measures.

- Out-of-court dispute settlement on content management, particularly on notice- and action procedures

Facilitating and creating out-of-court dispute settlements would increase trust and reduce the costs for both service providers and customers, while allowing more effective (more agile and cheaper) protection of rights and freedoms.

3.2.1 Direct economic impacts resulting from the policy package

This policy package will result in the following direct economic impacts. However, it must be remembered that the policy options proposed in this package are primarily aimed at addressing other essential issues that go beyond the economy, such as protecting fundamental rights and freedoms of EU citizens, and protecting democratic values in the digital sphere. In fact, the benefits for European citizens in this area could far exceed the direct economic impacts.

Increase in consumption by coordinated removal of illegal digital content

The policy package is expected to make an impact through the prompt and coordinated removal of illegal content at EU level, such as pirated digital goods.²⁰⁴ While there is no full consensus on the economic impact of removing pirated goods from the market, recent studies²⁰⁵ show that coordinated and systematic removal of illegal digital goods could lead to increased legal consumption.

An EU coordinated shutdown of websites distributing pirated content has led to a 6.5-15% increase in legal consumption across several content types and countries.²⁰⁶ An estimate of the direct economic impact of this element of the policy package requires this scale of effect to be applied for different segments of the digital goods market. This can be estimated for several Member States

²⁰⁴ Member States are currently implementing measures to remove harmful and illegal content. However, a very important limitation in the fight against this phenomenon is the low coordination of measures between countries. For example, a website taken down by a national authority (e.g. The Pirate Bay in Spain) could still be accessible in that state via a VPN if that service is still active in another Member State. Therefore, the benefit of this policy has been considered from the perspective of a coordinated action at EU level.

²⁰⁵ Danaher et al. (2020). [Piracy Landscape Study: Analysis of Existing and Emerging Research Relevant to Intellectual Property Rights \(IPR\) Enforcement of Commercial-Scale Piracy](#).

²⁰⁶ Ibid.

using disaggregated consumption data based on a study²⁰⁷ by the University of Amsterdam and can be extended by using subscription video-on-demand (SVOD) penetration²⁰⁸ as a benchmark for other Member States. The results of the estimation show that the share of legal digital goods in the consumption of recreational goods (movies, music, games) is between 1.03% (Hungary) and 16.27% (France).

The current level of piracy should also be taken into account when estimating the total impact of substitution from illegal to legal goods, as it has been shown that where the current penetration of illegal activity is higher, the effect of substitution may also be higher.²⁰⁹ Levels of digital piracy are reported in the EUIPO report on online copyright infringement.²¹⁰ According to the report, total activity of audio-visual piracy was the highest in Greece and the lowest in Finland. Activity is measured in the number of site visits to sites with illegal content, which ranges from 0.5 per month to 4.9 depending on the Member State. Taking levels of piracy into account, it is estimated that the consumption gain from the coordinated and standardised removal of illegal digital goods could be as much as €2.8 billion from film, music and games, and a further €300 million from digital books.

Table 18: Possible economic impact of coordinated removal of illegal digital content (EU27)

Effect	Estimated economic impact
Increase in legal consumption of film, music and games	€2.8 billion
Increase in legal consumption of digital books	€300 million

Source: Authors' own estimations based on Danaher et al (2020), University of Amsterdam, European Audiovisual Observatory and EUIPO.

Cost of compliance for notice-and-action procedures

The challenge in quantifying this economic impact is defining intermediaries and locating them in specific sectors. Based on the literature, intermediaries are companies who (1) host user-generated content, (2) are active within EU borders, and (3) engage in revenue-producing activities (and are thus captured in economic statistics). Locating these companies within the industry structure is not straightforward. Six sectors (defined on NACE Rev 2)²¹¹ potentially contain most of what it would be considered digital intermediaries or online service providers (OSPs) based on the above definition: retail, publishing, computer programming, information services, head offices / business services and advertising. Copenhagen Economics²¹² estimated that consumption through online intermediaries could be as much as €270 billion in the EU. Comparing this to the scale of total B2C e-commerce in

²⁰⁷ IViR (2018). [Global Online Piracy Study](#).

²⁰⁸ European Audiovisual Observatory (2019). [Pay AV services in Europe: The state of play](#).

²⁰⁹ Danaher B., Smith M. (2013). [Gone in 60 Seconds: The Impact of the Megaupload Shutdown on Movie Sales](#).

²¹⁰ EUIPO (2019). [Online Copyright Infringement in the European Union](#).

²¹¹ Based on classification of well-known companies: Amazon, G2A, GoG (retail); Deezer, Scribd (computer programming); eBay (head offices); Spotify (advertising); Soundcloud, Unsplash, Allegro Group (information services); Vimeo (publishing).

²¹² Copenhagen Economics (2015). [Online Intermediaries: Impact on the EU economy](#).

the EU (€361 billion in 2014) shows that consumption through OSPs could be as much as 74.8%²¹³ of e-commerce, while overall production of these sectors is around €2 000 billion.²¹⁴

Introducing a common EU legislation on content management issues as described above would mean that all OSPs should implement processes to comply with notice-and-action (NaA) regulations, and with reporting requirements (content management transparency). While certain firms have already made such investments,²¹⁵ most of the impacted OSPs would have to develop new technical, legal and business solutions. The extent of these costs depends largely on the number of users and the size and type of content managed by the OSPs.

The potential extent of these costs is estimated based on compliance costs for NaA procedures and the costs of annual transparency reporting. SMEs and large enterprises bear different costs, as they have different user numbers and content volumes. For small businesses, an annual rate of €706 can be assumed for NaA compliance based on the market price of DMCA compliance services,²¹⁶ and €245 per year for transparency reporting. Large enterprises will have a much larger average cost: €144 000²¹⁷ per year for NaA compliance and €50 000 annually for transparency reporting. These are annual costs, as while part of these processes can be automatised with higher investment, they usually require human labour, and many firms will choose to purchase market services to deal with them. There are several Member States where some form of NaA regulation is already in place.²¹⁸ In these cases, it is likely that firms will face a lower additional cost as an impact of the regulation, as they are already complying with a similar legal environment.

Under these assumptions the annual economic cost of compliance on the side of the service providers is around €380 million for NaA measures and €210 million for transparency reporting given the current estimated size of the OSP market.

If compliance procedures are different in each Member State these costs would be multiplied according to the number of countries in which the company wants to operate and the degree of differentiation between those procedures.

Table 19: Possible economic impact of creating notice-and-action procedures (EU27)

Effect	Enterprises affected	Estimated economic impact
Costs for compliance with NaA procedures	239 000 small companies 1 400 large companies	€380 million per year
Costs for compliance with transparency reporting obligations	239 000 small companies 1 400 large companies	€210 million per year

²¹³ The exact figure is also dependent on how online intermediaries are classified.

²¹⁴ E3ME data.

²¹⁵ European Commission (2018). [Overview of the legal framework of notice-and-action procedures in Member States SMART 2016/0039](#), p125.

²¹⁶ DMCA Services Ltd. (2020). [Pricing](#).

²¹⁷ Based on subscription price for Audible filtering services 12,000 x 12 = €144,000. European Commission (2018). [Overview of the legal framework of notice-and-action procedures in Member States. SMART 2016/0039](#).

²¹⁸ European Commission (2018). [Overview of the legal framework of notice-and-action procedures in Member States. SMART 2016/0039](#).

Source: Authors' own estimations based on Eurostat, DMCA and European Commission

Additional impacts not included in the macroeconomic assessment

The economic impacts discussed above will be considered in the macroeconomic modelling assessment (to identify the wider economic impacts). There are other potential economic effects of the policy actions considered in this package which are not included in the modelling assessment (they cannot be well-represented in modelling or there is no consensus as to the route of impact). These are discussed here.

Increase in stock prices of digital service providers due to transparency reporting

Transparency reporting on content management could positively impact the economic performance of OSPs, particularly improving their stock price and market capitalisation, and reducing the cost of capital. To estimate these impacts, it is assumed that they could have similar effects to those resulting from due diligence and sustainability obligations. Estimates provided in the OECD and Columbia SIPA report by Mittal et al. (2016)²¹⁹ have mostly been used in this analysis. Given that the estimations included in the mentioned report refer to the whole economy, some assumptions have been made to provide the quantitative estimates of the economic effects of the policy measures on the EU digital economy. The resulting estimates should be considered with caution. Nevertheless, they are still useful, providing a sense of the potential magnitude of transparency reporting's impact on content management and curation.

According to Mittal et al. (2016) and Eccles et al. (2011),²²⁰ companies with strong sustainability substantially outperform companies with low sustainability in terms of stock market and accounting measures. Eccles et al. (2011) estimate that the outperformance for US listed companies was 4.8 % annually for the period from 1993 to 2010. This estimate has been used to evaluate the potential impact of transparency reporting policy measures on stock price and market capitalisation.

To assess the impact of the new legal provisions on stock price, data on the index of share prices for EU countries has been collected from the OECD and Trading Economics. It is assumed that the index of share prices would increase following the DSA measures on transparency reporting, all else being equal. Given the lack of readily-available data on stock prices for digital economy companies, it is also assumed that the potential change (based on the increase of 4.8 %) in the index of share prices for listed companies could be a lower bound for companies from the digital sector. This assumption is justified by the fact that, in general, digital companies are in a relatively better financial situation in the current COVID-19 pandemic. The potential change in the index of share prices has been estimated with respect to the base year of 2015 and the previous year of 2019. The estimates for the index of share prices for the euro area (19 countries) are 109.96 (with respect to 2015) and 104.45 (with respect to 2019). Using the Dow Jones Euro Stoxx 50 price index in the estimations, the results indicate that the index of stock prices for digital companies would increase at least up to 104.44 (with respect to 2015) and 106.31 (with respect to 2019).

Increase in market capitalisation of digital service providers due to transparency reporting

²¹⁹ Mittal A., Chung C., Zhou K., Suladze G. (2016). Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct, Framework and Assessment Tool, OECD and Columbia SIPA.

²²⁰ Eccles R., Ioannou I., Serafeim G. (2011). The Impact of a Corporate Culture of Sustainability on Corporate Behavior and Performance, Harvard Business School, Working Paper 12-035

Assessment of the impact in the market capitalisation of digital companies uses data from the World Bank.²²¹ It is assumed that the percentage of market capitalisation of digital companies out of total market capitalisation lies between the digital economy's shares in the global and the advanced economies. The Digital Economy Report²²² reports the digital economy's shares in the world and advanced economies are 15.5 % and 18.4 %, respectively. These percentages are used to estimate the lower and upper bounds of the economic impact. Assuming an increase of 4.8 % (Eccles et al., 2011) due to the policy measures on transparency reporting, the market capitalisation of digital companies has been estimated at between €818.33 billion and €971.44 billion while the respective growth in market capitalisation would be from €37.48 billion to €44.49 billion.²²³

Reduction of cost of capital for digital service providers due to transparency reporting

The data on the cost of capital is scarce and not systematic. The best source found, with disaggregated data for EU countries, is Moreno and Loschky (2010).²²⁴ Although the latest available year for the data is 2009, it is still worth for consideration, given the similarities of the EU's economic situation in the years 2009 and 2020. In both years, short-term interest rates were at the zero lower bound, and unconventional monetary policy measures were implemented in EU countries.

According to Cajias et al. (2012),²²⁵ and Clark et al. (2015),²²⁶ the cost of capital is lower for companies with better sustainability practices by 0.0561 percentage points. In line with the estimation for stock prices, it is again assumed that digital companies are generally in a better financial situation in the current pandemic. This estimate of the reduced cost of capital could serve as an upper bound for the impact on the cost of capital for digital companies. Based on this assumption, the cost of capital would be at most 3.99 % for digital companies in the EU27 following the content management policy measures.

Given the estimates for stock prices, market capitalisation, and the cost of capital, it can be inferred that the potential economic benefits of the policy measures aimed at improving transparency reporting in content management could be substantial for digital service providers, although they cannot be captured by the macroeconomic model.

Economic gains by tackling online disinformation

The creation of a framework for content management and curation that guarantees the protection of rights and freedoms is closely linked to fighting disinformation and potentially harmful content. From an economic perspective, there are two aspects to consider when assessing the impacts of a more effective legal framework on fighting disinformation. On the one hand, the phenomenon has a clear economic component linked to advertising. Fake news has become a source of revenue for

²²¹ <https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?view=chart>

²²² United Nations (2019). Digital Economy Report - Value Creation and Capture: Implications for Developing Countries, UNCTAD.

²²³ Based on the latest available data for the EU (2018),

²²⁴ Moreno D. G., Loschky A. (2010). Cost of Capital Indicator for EU Member States, Joint Research Centre, European Commission.

²²⁵ Cajias M., Fuerst F., Bienert S. (2012). Can Investing in Corporate Social Responsibility Lower a Company's Cost of Capital? University of Regensburg and University of Cambridge.

²²⁶ Clark G., Feiner A., Viehs M. (2015). From the Stockholder to the Stakeholder – How Sustainability Can Drive Financial Outperformance, University of Oxford and Arabesque Partners.

marketers and advertisement intermediaries.²²⁷ Fake news tends to spread faster than true news²²⁸ and advertisers could take advantage of this phenomenon to increase their revenue. One way to counter it relates to the establishment of limitations on certain forms of personalised advertising which were discussed in section 3.1.1.

On the other hand, in terms of consequences, disinformation plays an increasing role undermining political and institutional stability and democratic processes and values. One of the goals of disinformation campaigns is to increase the polarisation of democratic societies. Research shows that such polarisation has a negative impact on GDP per capita in democratic countries.²²⁹ Another relevant goal of disinformation is to threaten economic stability. Trustworthiness is key to a functional economy and disinformation campaigns can also be a threat to it.²³⁰ Recent studies²³¹ have shown that false information is being used to influence trading activity and stock price volatility and global annual losses to stock markets have been estimated at US\$39 billion.²³²

Although the economic benefits of tackling online disinformation by improving content management in digital services cannot be quantitatively captured, they may well be amongst the most relevant in the long term of all those analysed so far.

3.3 Specific regulation to ensure fair competition in online platform ecosystems

Competition authorities have developed a complete set of rules for protecting competition in a wide range of markets, based on Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).²³³ However, traditional competition tools present some limitations, as described in section 2.2.3, to cope with potential anticompetitive behaviours of systemic platforms.²³⁴ This is one of the main reasons why authorities (particularly European institutions, and some Member States) are considering enacting new ex-ante regulatory mechanisms to level the playing field regarding competition between systemic platforms and other small innovative players. As the Commission 'Competition Law 4.0' of the Federal Ministry for Economic Affairs and Energy of Germany states, 'given the ability of such platforms to steer the behaviour of their users, the rapid pace of market developments and the significance of first-mover advantages, the costs of non-intervention or of a failure to halt abusive conduct in time tend to be particularly high in such cases'.²³⁵

²²⁷ Vian B., McStay A. (2018). Fake news and the economy of emotions: problems, causes, solutions. *Digital Journalism* 6(2), pp.154-175.

²²⁸ Vosoughi S., Roy D., Aral S. (2018). [The spread of true and false news online](#). MIT media lab.

²²⁹ Mehdi M.Z., Siddiqui D.A. (2020). The Effect of Polarization on Democracy, Social Capital, and Economic Growth: A Cross-Country Study.

²³⁰ Wilson P., Kennedy A. (1999). [Trustworthiness as an Economic Asset](#). *International Food and Agribusiness Management Review*, 2(2), pp. 179–193.

²³¹ Kogan S., Moskowitz T., Niesner M. (2019). [Fake News: Evidence from Financial Markets](#).

²³² Cavazos R. (2019). [The economic cost of bad actors on the internet: Fake news](#). CHEQ & University of Baltimore.

²³³ Crémer J., de Montjoye Y. A., Schweitzer H. (2019). Competition policy in the digital era.

²³⁴ Digital Competition Expert Panel UK (2019). Unlocking digital competition.

²³⁵ Commission 'Competition Law 4.0' (2019). A new competition framework for the digital economy, p. 5. Federal Ministry for Economic Affairs and Energy (BMWi).

The new ex-ante rules aimed to reinforce competition in digital platform ecosystems could be developed in several ways. According to the European Commission,²³⁶ ex-ante rules could be formulated with at least three different approaches. The first approach could include new horizontal rules in the Platform to Business Regulation²³⁷ for all digital platforms to strengthen transparency obligations, limit self-preferencing practices,²³⁸ and facilitate business partners' access to data.

Another mechanism could be to reinforce oversight of the behaviour of systemic platforms with the aim of early detection of any market distortion. This would require the creation of a specialised body that would collect information about how systemic platforms' practices affect both sides of the market: business partners and final consumers.

A third approach would be to create specific ex-ante rules that would only apply to systemic platforms. This approach would firstly involve defining specific criteria for qualifying a platform as systemic. The specific ex-ante provisions would be aimed at banning or restricting certain unfair business practices when they prevent other players from competing or even entering the market.²³⁹

- self-preferencing practices,
- unfair restrictions on accessing consumers' data,
- restrictions on data portability,
- restrictions on service interoperability,
- predatory acquisitions of innovative start-ups to limit competition,
- best price clauses,²⁴⁰
- unfair restrictions on multi-homing.²⁴¹

The ex-ante regulatory remedies could be applied equally to all systemic platforms or could be adopted on a case-by-case basis depending on the unfair practices that each systemic platform might develop.

The new ex-ante provisions could be part of a new regulation whose scope would be limited to systemic platforms.²⁴² This new regulation might also include alternative dispute resolution and redress mechanisms to provide other enterprises with adequate tools to face potential anticompetitive conduct of systemic platforms.

²³⁶ European Commission (2020). Inception Impact Assessment. Digital Services Act Package: ex ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union's internal market.

²³⁷ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

²³⁸ Self-preferencing refers to practices by which the platform gives preference to its own services over those offered by its business partners.

²³⁹ European Commission (2020). Inception Impact Assessment. Digital Services Act Package: ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market; Crémer J., de Montjoye Y. A., Schweitzer H. (2019), Competition policy in the digital era; Autorité de la Concurrence (2020), The Autorité de la Concurrence's contribution to the debate on competition policy and digital challenges.

²⁴⁰ Best price clauses refer to a commercial practice by which a platform prevents a provider from selling its products or services at lower prices through others platform (or directly).

²⁴¹ Multi-homing refers to the possibility of consumers switching between different platforms to access the same services or products.

²⁴² Commission 'Competition Law 4.0' (2019). A new competition framework for the digital economy. Federal Ministry for Economic Affairs and Energy (BMWi).

3.3.1 Direct economic impacts resulting from the policy package

Market competition has traditionally been associated with diverse benefits for consumers:²⁴³ lower prices, greater product variety, and higher product quality, which, in the end, help to improve citizens' living conditions.²⁴⁴ From a business perspective, competition is one of the main drivers for innovation, both in products and processes, and plays a key role in productivity gains, an essential factor for economic growth.²⁴⁵

While the economic benefits of competition in traditional markets are evident, the quantification of these benefits is not so clear when it comes to the platform economy. Some factors make the estimation of the economic effects of enhanced competition in platform ecosystems difficult: the complexity of defining markets given the wide variety of platforms and business models, the absence of reliable data due to the lack of transparency of platforms' operators, and the fact that many services are provided by platforms for free (so potential procompetitive conduct cannot be translated into price reduction).²⁴⁶ In addition, as Crémer et al (2019) suggest, 'because of the innovative and dynamic nature of the digital world, and because its economics are not yet completely understood, it is extremely difficult to estimate consumer welfare effects of specific [competition] practices'.²⁴⁷

These limitations hinder the estimation of the overall direct economic impact of ex-ante competition rules for systemic platforms from the consumers' perspective and, therefore, the macroeconomic modelling of this policy package. Nevertheless, specific analyses have shown positive impacts on the application of ex-ante competition mechanisms to particular platform-based markets. Research conducted on the evolution of online hotel prices listed on the leading online travel agency (OTA) in the EU, Booking.com, found that antitrust interventions of several National Competition Authorities (NCAs), which finally led Booking.com to remove best price clauses in the whole EU, resulted in a reduction on hotel prices offered through this platform.²⁴⁸ Another study showed that removing best price clauses not only benefited consumers but also the other platform side, hotels. As price constraints were lifted, hotels were more actively engaged in promoting other sales channels, and thus increased their business opportunities.²⁴⁹

Another example of the potential benefits of increased platform competition for consumers is found in the remittance market. Increasing competition, driven by fintech platforms, could help remittance senders make annual savings of US\$1.59 billion in Europe and Central Asia.²⁵⁰

Both examples show the relevance of having efficient regulatory measures to reinforce competition in platform-based markets. They also highlight the difficulty in producing overall figures on the economic impact of enacting such regulatory measures on consumers' welfare, as the platform economy is disrupting a wide range of traditional markets, there is a lack of clear identification of the systemic platforms distorting competition in each market and data on which other platforms are competing in these markets is limited.

²⁴³ For an overview, see Kovacic, W. E., Shapiro, C. (2000). Antitrust policy: a century of economic and legal thinking.

²⁴⁴ Council of Economic Advisers (2016). Benefits of competition and indicators of market power.

²⁴⁵ OECD (2014). Factsheet on how competition policy affects macro-economic outcomes.

²⁴⁶ KPMG (2018). Unlocking the value of the platform economy. Dutch Transformation Forum.

²⁴⁷ Crémer J., de Montjoye Y. A., Schweitzer H. (2019). Competition policy for the digital era, p. 76.

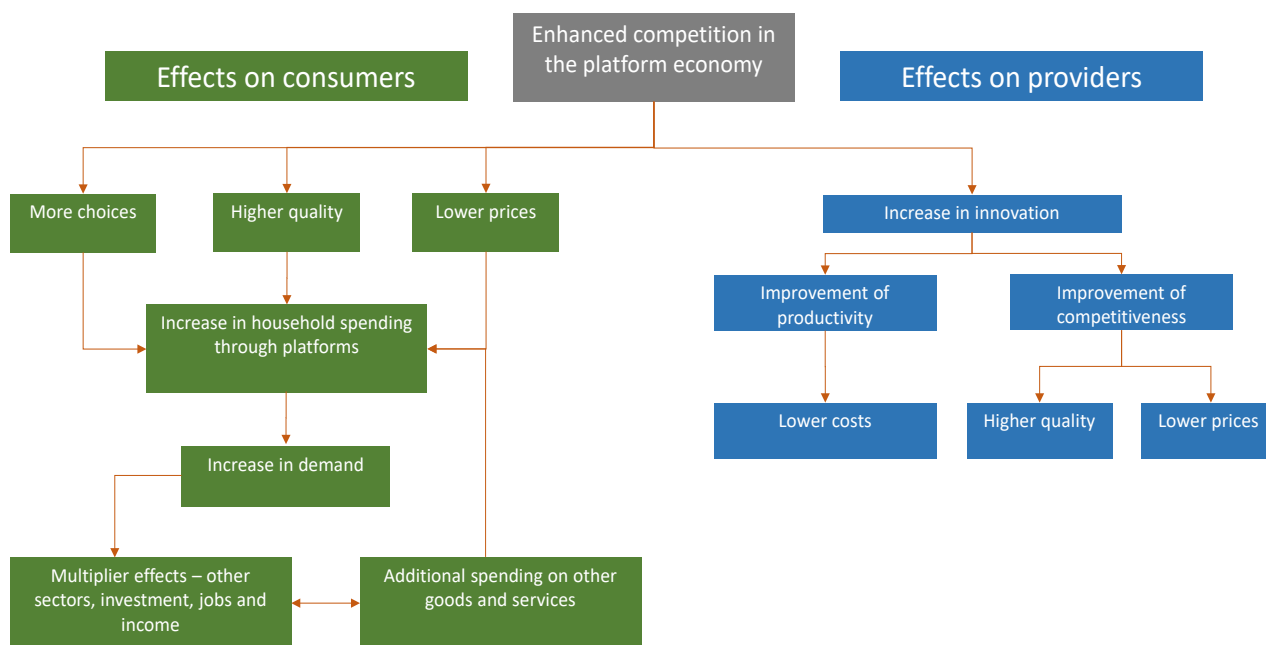
²⁴⁸ Mantovani A., Piga C., Reggiani C. (2017). The dynamics of online hotel prices and the EU Booking.com case.

²⁴⁹ Hunold M., Kesler R., Laitenberger U., Schütter F. (2017). Evaluation of Best Price Clauses in Hotel Booking. Centre for European Economic Research.

²⁵⁰ World Bank Group (2020). Fintech in Europe and Central Asia: Maximising benefits and managing risks.

Despite the difficulties in estimating the direct economic impacts of regulatory measures to boost competition in platform-based markets, it is worth describing the logic of such impacts from a qualitative perspective. Figure 23 provides an overview of this logic.

Figure 23: The logic of the economic impacts of enhanced competition on platform-based markets



Source: Authors' own elaboration.

In addition to improving consumer welfare and business partners' opportunities to grow, the new ex-ante competition rules seek to restrict potential anticompetitive conduct of systemic platforms in order to help small companies compete. According to the European Commission, there would be over 10 000 platforms, mainly SMEs, which could benefit from the value created by the platform economy if systemic platforms did not capture most of this value.²⁵¹ However, as mentioned above, there is very little quantitative evidence on the extent to which those platforms could benefit from enhanced competition. Thus, it has not been possible to quantify the economic impacts of this policy package and, therefore, they have not been included in the macroeconomic modelling.

3.4 Cross-cutting policies to ensure enforcement and guarantee clarity

Part of the problem facing the current regulatory framework for digital services is the fragmentation of rules and weak enforcement, due to the cross-border nature of digital services. Both problems are highly interrelated. A set of policy options to improve coordination across the internal market and ensure the effectiveness of the aforementioned policies should include:

²⁵¹ European Commission (2020). Inception Impact Assessment. Digital Service Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union's internal market.

- Clarification of key definitions

The DSA should first clarify and unify some relevant definitions of digital services. Clarifying what digital services are, and especially what is considered an intermediary, will make it possible to clarify the responsibilities and obligations of the various operators and to homogenise the application of standard rules throughout the internal market.

- Clarification of liability exemptions for online intermediaries

This applies not only to marketplaces but also to content platforms and other types of digital services. Once the concept of the intermediary is clarified, it will be necessary to clarify the exemptions from liability and the operators who benefit from a safe harbour regime.

- Establishment of transparency and explainability standards and procedures for algorithms

The use of algorithms is one of the main concerns currently affecting the provision of digital services, especially regarding the lack of transparency of services and threats to citizens' fundamental rights. Therefore, setting up mechanisms for transparency and explainability of algorithms and mechanisms to monitor their neutrality (no discrimination) is a relevant aspect of the DSA.

- Ensure enforcement and create a European supervision body or agency

Digital services are cross-border by nature. This means that supranational supervision and cooperation between countries are measures that help ensure the effectiveness of policies. Policy options to improve enforcement range from (1) the current ECD self-regulation model; (2) enhanced self-regulation mechanisms, in line with the Audiovisual Media Services Directive,²⁵² with National Enforcement Body supervision (but with no sanctioning powers) and compliance and monitoring in the hands of providers; (3) enforcement with a focus on cross-border cooperation, as used in the Consumer Protection Cooperation Regulation (CPCR) with the Mutual Assistance Mechanism; (4) a comprehensive model oriented towards the protection of fundamental rights, in a framework similar to that of the GDPR.²⁵³ Considering that one of the objectives of the DSA is to overcome the enforcement problems faced by the ECD, a pure model of self-regulation (1) seems unsuitable, and the policy options should opt for a model with more coordination and supervision. In this sense, one policy option is particularly important, the creation of a European supervisory body.

The creation of a European agency to monitor and enforce compliance with content management and transparency rules, including those of algorithms, is considered relevant for the effectiveness of the DSA. An effective agency should have powers of investigation and sanction, and a key role in ensuring active cooperation between Member States. It

²⁵² Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities

²⁵³ Smith M. (2020). Enforcement and cooperation between Member States. E-Commerce and the future Digital Services Act. Policy Department for Economic, Scientific and Quality of Life Policies. European Parliament.

should be an agency to which private entities can report in response to common standards.

3.4.1 Direct economic impacts resulting from the policy package

Impacts of enhanced enforcement

The lack of effective enforcement and cross-border cooperation have been two of the main impediments to full realisation of the DSM in general, and to obtaining all the benefits expected from the ECD in particular. All estimates of the economic impacts of the DSM and the ECD assumed a full implementation of measures. However, Marcus et al. (2019) estimate that only 25 % of the potential gains of cross-border e-commerce in the EU are currently being achieved.²⁵⁴ Consequently, more than specific economic impacts, measures to improve enforcement are essential to ensure that the full economic potential of the rest of the policies becomes a reality. In this sense, the policy with the most comprehensive enforcement approach, such as a framework with strengthened corrective powers for National Enforcement Bodies, specific cooperation tools and EU supervision, would bring the greatest benefit²⁵⁵ because it would better guarantee enforcement and cooperation.

As per concrete policies within enforcement measures, the creation of a European agency or supervisor would be a key policy. Taking into consideration other similar bodies in the field of the digital economy,²⁵⁶ such an agency would have an estimated annual cost of between €12 million and €16 million to the EU budget. Although the direct economic impact of such an agency is not monetised,²⁵⁷ it is possible to infer a positive economic impact derived from greater collaboration between Member States and cooperation in cross-border cases, given that fragmentation is one of the most important barriers to the smooth provision of digital services, fairer competition, and effective consumer protection within the EU.

Figure 24 provides an overview of the logic of the expected economic impacts of defining enhanced enforcement measures in the provision of digital services and the creation of a European agency.

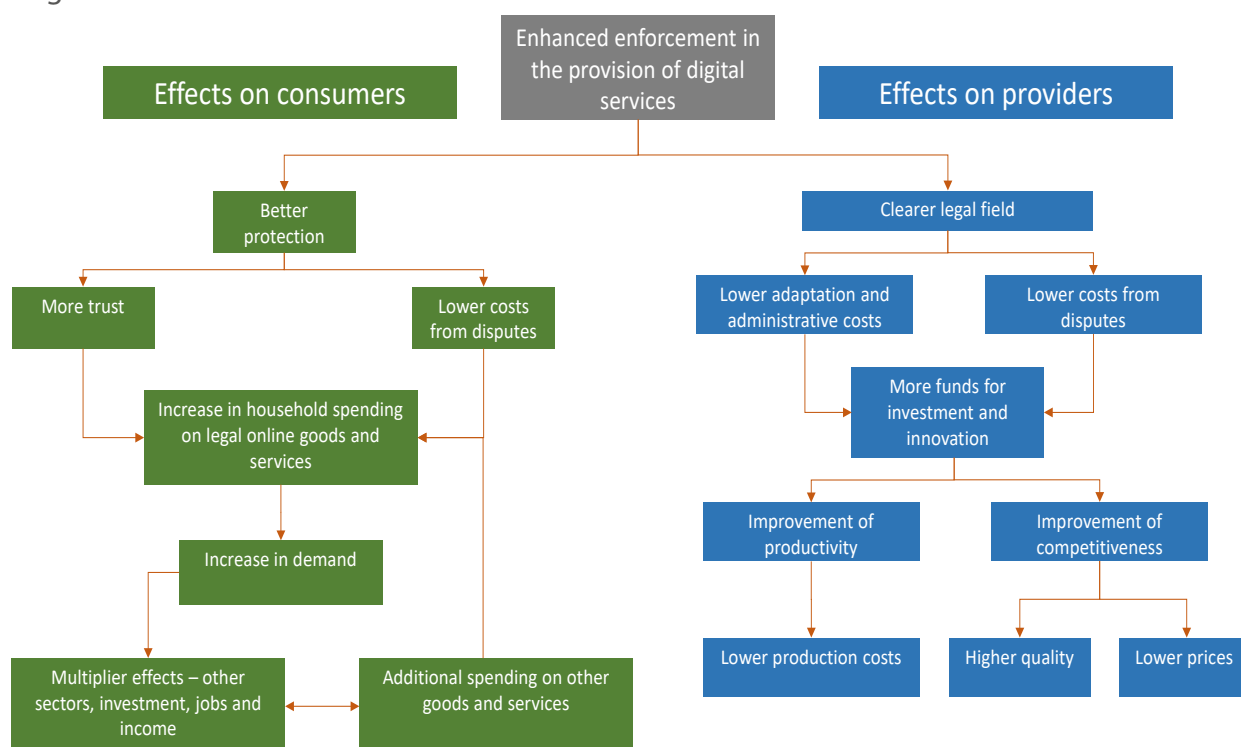
²⁵⁴ Marcus J., Petropoulos G., Yeung T. (2019). Contribution to growth: The European Digital Single Market. Delivering economic benefits for citizens and businesses.

²⁵⁵ Smith M. (2020). Enforcement and cooperation between Member States. E-Commerce and the future Digital Services Act. Policy Department for Economic, Scientific and Quality of Life Policies. European Parliament.

²⁵⁶ The annual budget of the European Data Protection Supervisor in 2018 was €14 449 068. ENISA, the EU Cybersecurity Agency, had a total budget of €16 932 952 in 2019. BEREC, the Body of European Regulators for Electronic Communications has an EU contribution of €5 701 000. However, its powers are more limited than those of ENISA or the EDPS. For that reason, it is estimated that the costs of a new agency would be in line with those of the first two bodies.

²⁵⁷ Isolating the positive effects of creating an enforcement body from the effects of the measures it helps to implement is complex. This is especially so in sectors such as platforms, whose scope is not yet clearly defined and data on its economic impact is still lacking. This is also the case, for example, of ENISA, whose impact assessment concluded that it was not possible to quantify the agency's impact. See: Commission Staff Working Document Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on ENISA, the "EU Cybersecurity Agency", and repealing Regulation (EU) 526/2013, and on Information and Communication Technology cybersecurity certification ("Cybersecurity Act").

Figure 24: The logic of the economic impacts of enhanced enforcement in the provision of digital services



Source: Authors' own elaboration.

Impacts of establishing transparency and explainability standards and procedures for algorithms

Improving the transparency and explainability of algorithms would contribute to overcoming consumers' reluctance towards automated decision-making processes implemented by digital service providers, especially when such automated decisions can have real-life consequences.²⁵⁸ For instance, a survey conducted in 2018 revealed that only around one-third of consumers considered acceptable the use of algorithms, whose functioning is not known, to make automated decisions in key life events such as defining a personal finance score or analysing a video of a job interview.²⁵⁹ In the business world, two-thirds of CEOs thought that AI and automation would have a negative impact on stakeholder trust in their industry over the next five years.²⁶⁰ In the end, enhanced transparency and explainability of algorithms, which would help users to understand how AI-based services make their decisions, could bring more trust to customers when using these services, which could in turn result in increased online consumption.

While transparency and explainability of algorithms could have a positive impact on increasing households' online consumption by improving consumers' trust in digital services, it also could lead to detrimental consequences and risks for digital providers. Increasing transparency of algorithms could make them more vulnerable to cyberattacks and more prone to hacking. IPR could also be

²⁵⁸ Council of Europe (2017). Algorithms and human rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications.

²⁵⁹ Smith A. (2018). Public attitudes toward computer algorithms. Pew Research Center.

²⁶⁰ PWC (2017). Accelerating innovation. How to build trust and confidence in AI.

threatened if digital providers are obliged to disclose information about their algorithms. The potential opposing effects on consumers and digital service providers have been called the 'AI transparency paradox'.²⁶¹

In summary, defining transparency obligations for algorithms could boost online consumption, but may also pose significant risks for digital providers. Both effects should be cautiously assessed when implementing the policy action in order to reach an appropriate balance between benefits and drawbacks.

3.5 Summary of the expected economic impacts

Table 20 summarises the expected economic impacts of potential policy actions that may be included in the DSA proposal, as described in the previous sections. For each economic impact, it shows whether it has been quantified, and whether it is included in the macroeconomic modelling exercise or whether it has only been analysed qualitatively.

Table 20: Expected economic impacts of potential DSA policy actions

Policy package	Expected impact	Level of analysis
Enhanced consumer protection and common e-commerce rules	Increase in cross-border e-commerce consumption	Quantified and used as input for the macroeconomic assessment
	Increase in domestic e-commerce consumption	Quantified
	Increase in turnover of business users of cloud computing services	Quantified and used as input for the macroeconomic assessment
	Compliance costs for e-commerce providers	Quantified and used as input for the macroeconomic assessment
	Cost savings for e-commerce providers selling cross-border	Quantified and used as input for the macroeconomic assessment
	Reduction of litigation costs and ADR costs for consumers and service providers	Quantified and used as input for the macroeconomic assessment
	Increase in domestic (EU) production of legal goods due to decreased imports of counterfeit goods	Quantified and used as input for the macroeconomic assessment
	Increase in innovation due to enhanced IPR protection	Analysed qualitatively
	Impact of limiting intrusiveness of advertising in consumption	Analysed qualitatively
Creating a framework for	Increase in legal consumption of digital content	Quantified and used as input for the macroeconomic assessment

²⁶¹ Burt, A. (2019). The AI transparency paradox. Harvard Business Review.

Policy package	Expected impact	Level of analysis
content management and curation that guarantees the protection of rights and freedoms	Compliance costs for digital service providers	Quantified and used as input for the macroeconomic assessment
	Costs of transparency reporting for digital service providers	Quantified and used as input for the macroeconomic assessment
	Increase in stock prices of digital service providers due to transparency reporting	Quantified
	Increase in market capitalisation of digital service providers due to transparency reporting	Quantified
	Reduction of cost of capital for digital service providers due to transparency reporting	Quantified
	Economic gains by tackling online disinformation	Analysed qualitatively
Specific regulation to ensure fair competition in online platform ecosystems	Lower prices for consumers	Analysed qualitatively
	Greater product variety for consumers	Analysed qualitatively
	Higher product quality for consumers	Analysed qualitatively
	Increase in innovation of digital service providers	Analysed qualitatively
Cross-cutting policies to ensure enforcement and guarantee clarity	Costs for public budgets to create enforcement bodies	Analysed qualitatively
	Increase in online consumption due to transparency of algorithms	Analysed qualitatively
	Potential economic detriment to digital service providers due to transparency of algorithms	Analysed qualitatively

Source: Authors' own elaboration.

4 Macroeconomic analysis

4.1 Methodological approach

4.1.1 Description of the macroeconomic modelling

Cambridge Econometrics' E3ME model is a computer-based model of the world's economic and energy systems and the environment. It was originally developed through the European Commission's research framework programmes and is now widely used in Europe and beyond for policy assessment. A short description of the model is provided in Annex 1.²⁶²

E3ME provides an economic accounting framework that can be used to evaluate the effects of economic shocks (in this research paper, mainly higher consumer spending and costs to service providers) on the wider economy. Behavioural relationships in the model are estimated using econometric time-series analysis based on a database that covers the period since 1970 annually. The main data sources for European countries are Eurostat and the IEA, supplemented by the OECD's Structural Analysis Database (STAN) and other sources where appropriate. Gaps in the data are estimated using customised software algorithms.

A key feature of the E3ME model is its level of disaggregation. The model is global but breaks the world economy into 61 regions, including all individually identified EU Member States. Within each European country the economy is broken down into 69 sectors. The key sectors in this study are the wholesale and retail sectors, computer programming and information services, sectors linked to logistic activities etc., but there may be secondary impacts on any other sector of the economy. For example, if households must spend a larger share of income on basic food products, providers of other consumer goods may see a loss of revenue.

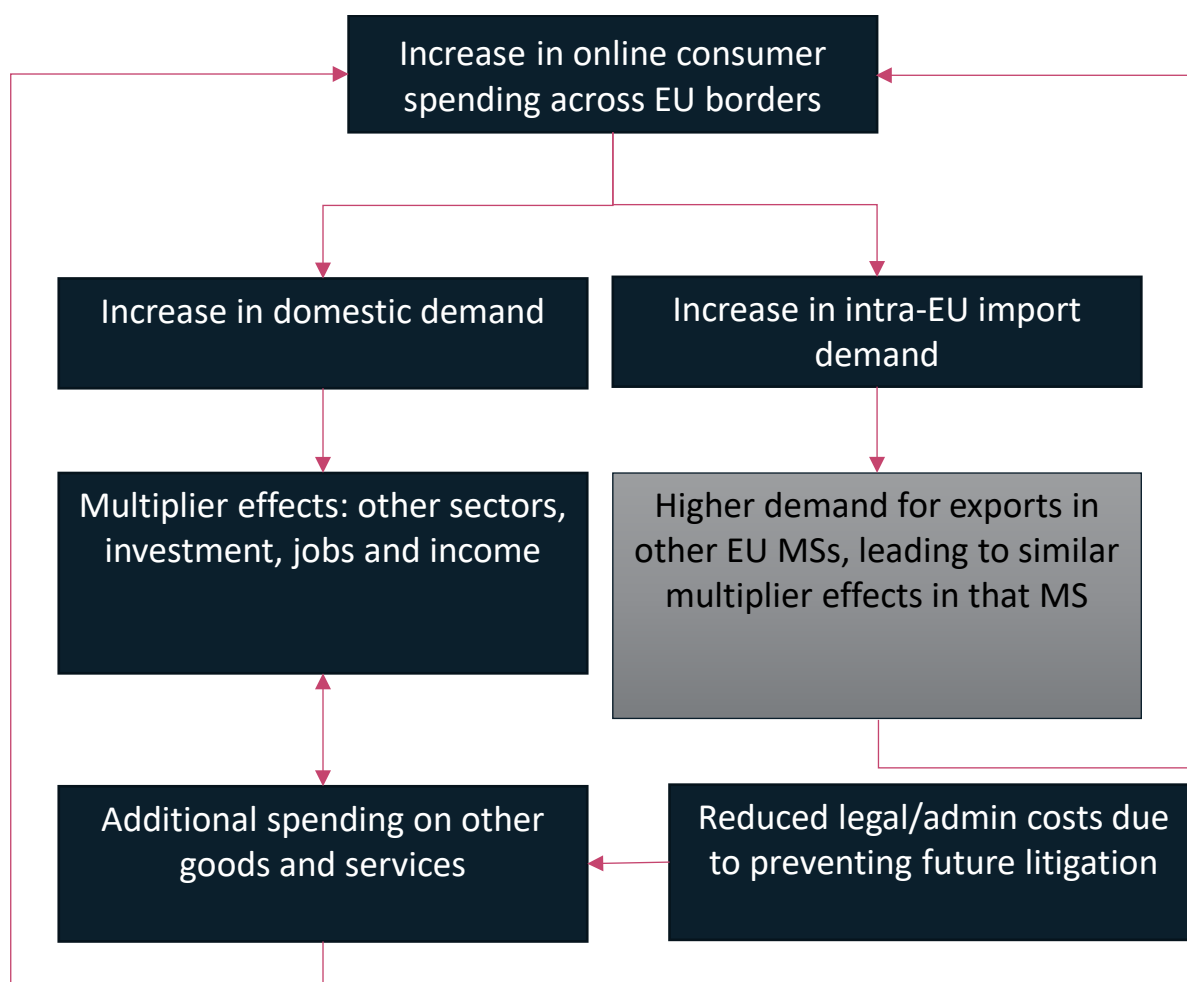
E3ME extends its treatment of the economy to cover physical measures of energy, food and material consumption. However, the focus of this research paper is the core economic indicators, particularly the secondary and induced impacts on consumer spending, sector investment, competitiveness and prices, as well as employment, from the potential policy options that will likely be included in the DSA package.

Modelling the policy packages

The two main routes through which the DSA will impact the macroeconomy are consumer spending and increased costs. Figure 25 shows how changes in consumer spending impact the wider economy within the E3ME framework. The DSA will mean it is easier to make online purchases across EU borders.

²⁶² More detail is available at www.e3me.com and the technical manual is available [here](#).

Figure 25: Modelling the increase in consumer spending



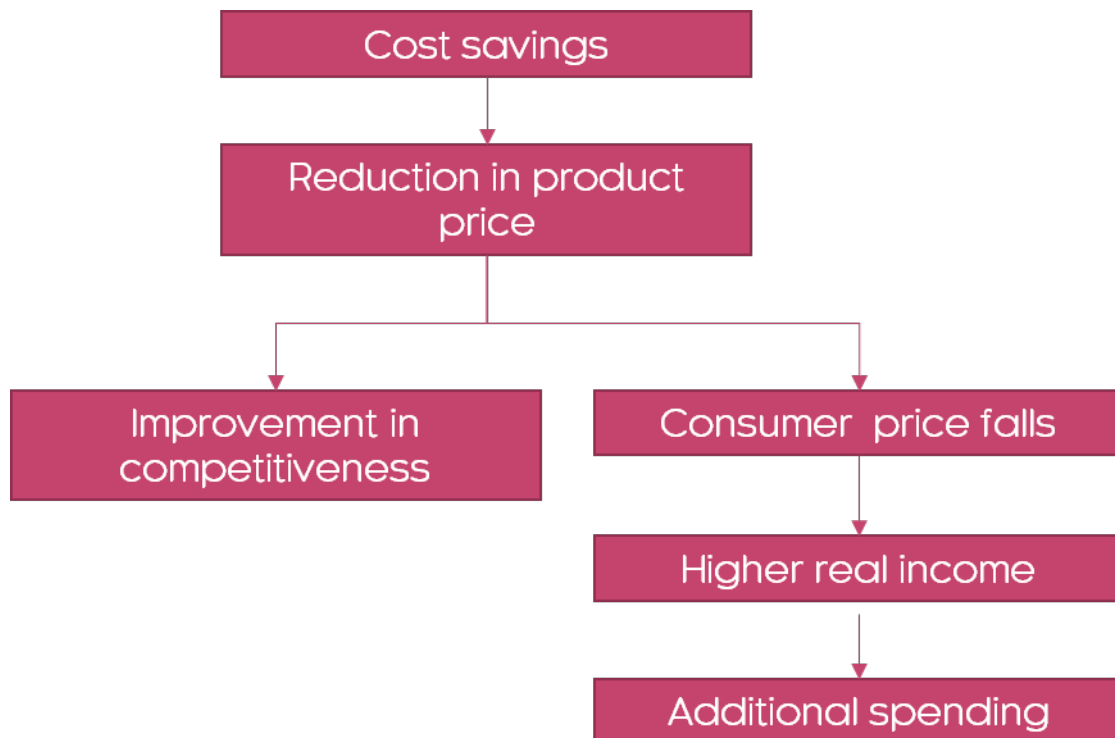
Source: Authors' own elaboration.

The increase in consumer spending across EU borders will lead to an increase in both domestic and intra-EU demand. Increase in demand for goods and services in turn leads to higher sectoral output, investment, employment and disposable income. Higher income leads to additional spending on goods and services.

Implementation of the new legal provisions will also bring about changes in rules and conditions that service providers will need to comply with. Initially, this legal framework will lead to compliance costs for service providers and investment in adapting to the new changes. The initial investment and costs will be one-off and will be mainly felt in 2021. From 2022 onward, the increase in cross-border e-commerce will bring cost savings.

Figure 26 shows the impact of cost savings for service providers which will lead to a reduction in the selling price of goods and services. The reduction in price will improve the competitiveness of products sold online both inside and outside the EU market. Consumers might face lower prices for online purchases, which will lead to higher disposable income that they can use for additional spending.

Figure 26: Modelling the increase in cost savings

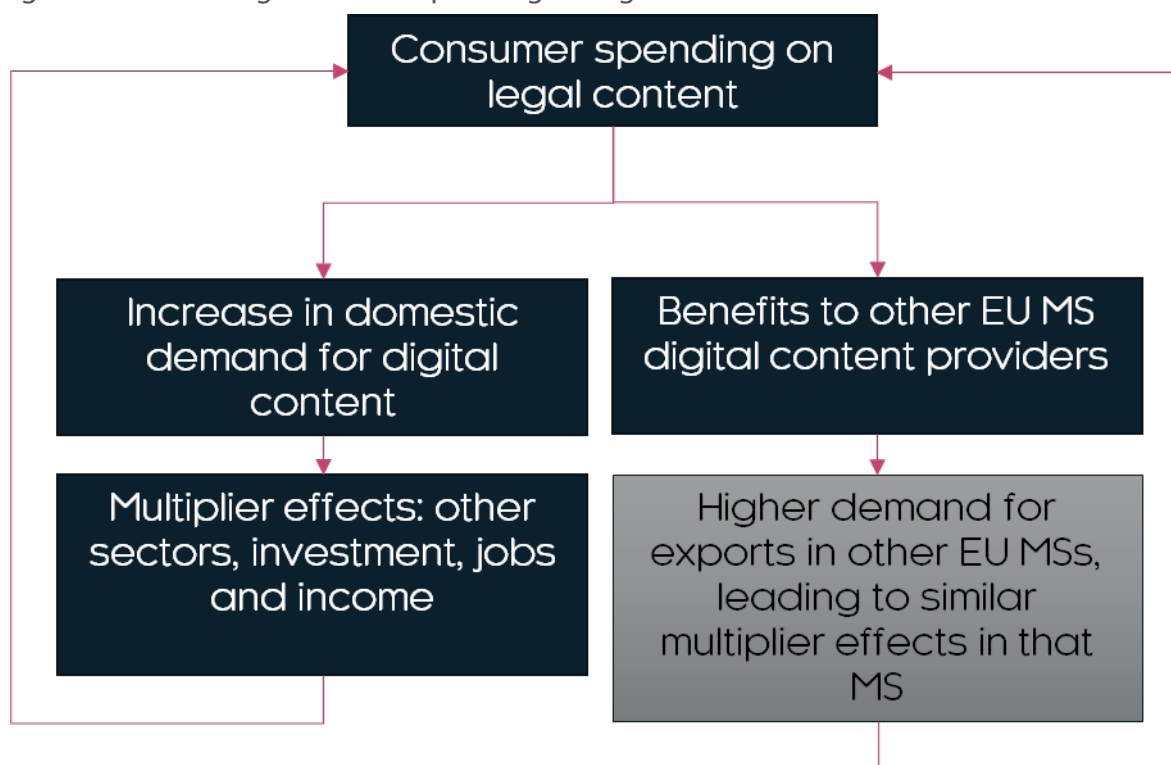


Source: Authors' own elaboration.

Further clarification of the legal framework concerning e-commerce will bring about additional cost savings by preventing legal costs arising from cross-border litigation or avoiding dispute settlement costs from non-court cases. An increase in consumer spending is based mainly on increased trust, however some of the spending will not be truly additional but displaced from spending on illegal goods.

The DSA proposal is expected to tackle illegal online content, amongst other issues. If there are more stringent rules on illegal online content, consumers will switch their consumption towards legal content, i.e. displacement of illegal digital goods rather than new demand. Figure 27 shows the impact of increased spending on legal content, which will increase demand for digital content both domestically and within the EU borders. In turn, the increase in demand will have a multiplier effect on the economy.

Figure 27: Modelling consumer spending on legal contents

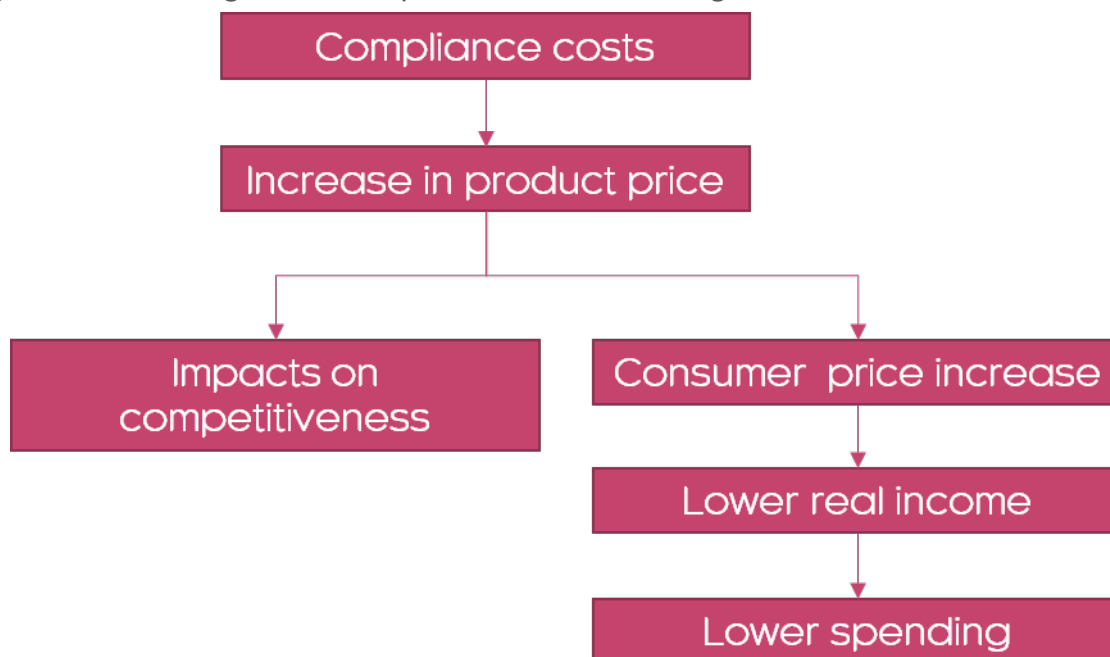


Source: Authors' own elaboration.

Online service providers will be expected to bear a one-off compliance cost (with notice-and-action measures and with transparency requirements) that will be spread over the period 2021-23. Figure 28 shows the impact of an increase in compliance costs, which will lead to an increase in the cost of digital products. This will have a temporarily negative impact on the competitiveness of EU digital products. In the short term, consumers will face higher prices which will reduce their disposable income and lower their future spending. It should be noted, however, that the initial cost increases faced by service providers are likely to be offset by cost savings in the long term, and the increase in online service demand is expected to outweigh the reduction from cost increases.

The legal costs avoided were found to be negligible in magnitude, therefore they will not be considered.

Figure 28: Modelling cost of compliance with the new legal framework



Source: Authors' own elaboration.

4.1.2 Assumptions

The modelling approach makes a number of further assumptions:

Timeline

The enhanced consumer protection policy package is assumed to be applicable within one year from the moment that the European Commission presents the proposal for legislation. It is assumed that the European Commission will present a proposal in the first quarter of 2021 and that the law will be in place by the first quarter of 2022. During 2021, economic operators will assess and prepare their systems to create an adequate e-commerce environment with transparency, clarity and enhanced coordination. By 2022, all economic operators in the EU e-commerce market will be compliant with the rules in the legislative package and consumers will benefit from these changes. By 2025, all possible benefits to the EU e-commerce market will be achieved.

The content management policy package is also assumed to be applicable within one year from the moment that the European Commission presents the proposal for legislation, i.e. the legal framework will be in place by the first quarter of 2022. During 2021, online service providers will assess and prepare their systems to create an adequate environment for the provision of digital services where consumers' rights are respected, and illegal and harmful content is prevented. In 2022, all online service providers in the EU market will be compliant with the rules in the legislative package, and consumers will start benefiting from the new rules. By 2025, all possible benefits both for actors in the market will be achieved.

Underlying development of digital markets

According to an impact assessment of the Commission,²⁶³ the harmonisation of rules for both the supply of digital content and the online sale of goods could lead to:

- growth in the number of new online users that purchase cross-border: 13.5%; and
- growth of online cross-border purchases made by users who already buy cross-border: 14%.

The above growth rates are the direct result of the new legal framework (policy package 1 as described in section 3.1.1) but the EU e-commerce market also grows naturally with a 10% annual growth rate.²⁶⁴ This annual growth rate is already implicitly included in the baseline,²⁶⁵ as the baseline considers economic growth based on historical data. This annual growth rate is also used in some of the cost assumptions (see Table 21).

The increase in annual online spending of new cross-border e-commerce consumers is calculated based on the assumed growth in the number of new consumers, the average annual online spending per user,²⁶⁶ and the average annual online spending per user in cross-border transactions.²⁶⁷ This amount will be considered as a gradual increase from the moment the regulation enters into force, i.e. 2022.

Cost assumptions

In order to comply with increased transparency and consumer protection obligations, and fair commercial conditions for consumers, all e-commerce providers will adapt their terms, conditions and contracts to the new EU common legal framework. This is a one-off cost, i.e. an average cost of adaptation amounting to €6 800 per e-commerce provider and country,²⁶⁸ and will be incurred in 2021. This cost is also applied to new entrants (i.e. firms entering the market after 2021). The current number of enterprises that sell online (by sector and Member State) was identified using Eurostat data. The total compliance cost per sector and per Member State is used in the modelling of policy package 1.

Consumers will face an increase in costs as e-commerce providers are assumed to pass on their cost increase in the form of price increases.

For policy package 2, in order to comply with the notice-and-action procedures, online service providers will face a total annual cost of €0.4 billion.²⁶⁹ Additionally, they incur annual costs of €0.21

²⁶³ European Commission (2015). [Impact assessment on certain aspects concerning contracts for the supply of digital content](#).

²⁶⁴ Ecommerce Europe (2018). [European Ecommerce Report 2018 Edition](#); growth of B2C eCommerce between 2013-2017 was used as a benchmark, CAGR for the period was 11.7 %, with a decreasing trend (down from 17.6 % in 2014 to 11.3 % in 2017). Based on this, average annual growth of 10 % was assumed.

²⁶⁵ Ibid.

²⁶⁶ Extracted from [JP Morgan payment reports](#).

²⁶⁷ The percentage of cross-border sales provided by e-commerce in the EU is 24% (<https://ecommercenews.eu/24-of-e-commerce-in-europe-is-cross-border/>)

²⁶⁸ European Commission (2015). [Impact assessment on certain aspects concerning contracts for the supply of digital content](#).

²⁶⁹ Calculated as a cost paid by online intermediaries, as defined in Copenhagen Economics (2015). [Online Intermediaries Impact on the EU economy](#); depending on their size (i.e. large enterprise or SME). For small firms the compliance cost is assumed to be comparable to costs for complying with DMCA (US) (DMCA Services (2020). [Pricing](#)). For large

billion²⁷⁰ for reporting on enhanced transparency in terms of content curation and reporting obligations for platforms.

Assumptions on beneficial impacts

In policy package 1, the increase in number of consumers buying cross-border will have two economic effects:

- increased competition in domestic markets,
- decrease in consumer prices.

The increase in e-commerce activity is modelled as an increase in consumption in the impacted sectors due to increased trust, legal certainty and lowered barriers to entry both for new players on EU markets and old players entering new markets inside the EU. The annual legal costs saved when entering new markets are assumed to be €2.1 billion, while the annual cross-border litigation cost savings are assumed to be €0.4 billion.

In the absence of a common framework across the EU, the average contract-law related costs for entering the e-market of one Member State is €9 000 per company.²⁷¹ On average, e-commerce providers sell online in around three different countries.²⁷² As a result, the total cost savings resulting from an EU common action for digital service providers selling abroad is calculated based on the cost they incurred in the absence of the common legal framework. They are assumed to be annual costs and fixed in real terms.

At the same time, increased transparency, consumer protection and fair commercial conditions will mean consumers as a whole incur lower legal costs. e-Commerce providers will also benefit from cost savings by avoiding legal costs when entering a new market, from growth within existing markets and avoiding cross-border litigation.

In the treatment of counterfeit goods, the main measure in online marketplaces is to impede actors from selling products that do not comply with EU safety or consumer protection rules. This will lead to a reduction in value of imports of €4.6 billion annually that will benefit domestically produced products. For consumers, the benefits of reduction of counterfeit goods on the market are not monetary,²⁷³ thus will not be included in the modelling.

A further benefit of the policy package is that it ensures fairer contract conditions in business-to-business relations. As mentioned in section 2.2.4., while cloud services are now widely used by businesses (including SMEs) in Europe, they often face diverse contract-related problems. The removal of unfair contractual terms and conditions is assumed to lead to benefits of €290 million for European firms, which is modelled as a cost reduction.

In policy package 2, a brief review of the literature shows that legal costs are unlikely to be avoided because of NaA regulations. For example, in the case of Spain the number of IP infringement cases is rather low (approximately 50 cases), but in 2014 legislation was introduced that extended NaA

enterprises, it is based on costs collected in the EC report on notice-and-action procedures (European Commission (2018): Overview of the legal framework of notice-and-action procedures in Member States [SMART 2016/0039](#)).

²⁷⁰ Ibid.

²⁷¹ Data from European Commission (2015). [Impact assessment on certain aspects concerning contracts for the supply of digital content](#).

²⁷² Ibid.

²⁷³ For example, health benefits as a result of using better quality goods.

liability to OSPs and even though the number of overall cyber-crimes (including hate speech, with a landmark case on this matter in 2015-16) has fallen, the number of litigated cases have not experienced the same drop.²⁷⁴ Therefore, legal cost savings will not be assumed in this case.

Cost of controls

At Member State level, regulatory bodies or competent authorities will be designated to check compliance with the criteria established in the regulations. This will require increased government spending, both for creating the regulatory body (or expanding the functions of an existing one) and the cost of annual compliance controls.

Summary

Table 21 summarises the cost assumptions used in the macroeconomic modelling of each policy package. The figures in the table reflect the information that has been obtained from the literature review.

²⁷⁴ Litigation numbers are based on Spanish cybercrime statistics from Statista and from reports of the Ministry of Finance (Spain, e.g.: https://www.fiscal.es/memorias/memoria2017/FISCALIA_SITE/recursos/pdf/MEMFIS17.pdf). Developments in the relevant legislation in Spain is described in European Audiovisual Observatory (2015). [Copyright enforcement online](#), and European Commission (2018), Overview of the legal framework of notice-and-action procedures in Member States [SMART 2016/0039](#), p39.

Table 21: Summary of assumptions used in the E3ME modelling

Policy package	Growth rate of online market (e-commerce)	e-Commerce provider/ online service provider		Consumers	
Consumer protection package		Cost	Benefit	Cost	Benefit
Initial investment (e.g. adapting terms and conditions; contracts; transparency in commercial communication; know-your-business-customer measures)	10% annual growth	€8 billion one-time cost; annual cost for growth proportion (€0.19 bn) (€6 800/firm)		Cost increase due to increase in passed-on producer costs	
Increased e-commerce activity due to increased trust, legal certainty and lowering of entry barriers			€3.8 billion annually, gradually introduced over 3 years (€1.7 billion new consumption)		
Legal cost of entering new markets avoided (increased activity - new consumer part)			€2.10 billion - total over 3 years	Cost decrease	
Legal cost of entering new markets avoided (natural growth part)			€0.37 billion annual saving (increasing with market growth)	Cost decrease	
Cross-border litigation avoided			€0.40 billion annually	Cost decrease	

Counterfeit goods (displacement)			€4.60 billion annually	Not modelled	
Benefits of fairer contract terms in cloud computing services			€0.29 billion annually		
Content management	Growth in online service market	Cost	Benefit	Cost	Benefit
Displacement of legal digital goods avoided	10% annual growth		€3.1 billion annually, gradually introduced		
Cost of compliance for notice-and-action procedures		€0.40 billion annual cost (increasing with market growth)			
Cost of annual transparency reporting		€0.21 billion annual cost (increasing with market growth)			
Legal costs avoided			Not modelled		

Source: Authors' own elaboration.

4.1.3 Limitations of the model

Models represent simplifications of a complex reality and are therefore subject to assumptions and limitations. The aim of the modelling exercise is to capture the most important mechanisms as accurately as possible, while simplifying less important factors to keep the analysis tractable. Where there is uncertainty, a cautious approach with assumptions that favour the status quo has been adopted.

Like any macroeconomic model, the E3ME model is subject to its own limitations, some of which are described in the model manual.²⁷⁵ For example, as an econometric model, it depends on historical data with which to estimate behavioural parameters. It is assumed that these behavioural responses do not change over time or in response to policy changes.

Some aspects that might be covered under the DSA might not have an impact that can be measurable in economic terms. For example, damage to reputation and improved governance with the companies will not be captured by the macroeconomic modelling, nor will the enhanced protection of fundamental rights and freedoms of EU citizens.

Additionally, in some cases it has only been possible to include specific impacts on certain areas in the model only due to the lack of reliable data. This is the case, for example, with the effect of improved terms and contracts in digital services, which has been included in relation to cloud computing services, but additional impacts can be expected in other similar areas.

4.2 Quantitative macroeconomic assessment

In this section, the results of an EU common action for the policy packages 1 and 2 are presented and discussed, in comparison with the baseline scenario. As discussed above, the first impacts of the policies are assumed for 2021 and have been modelled up to 2030.

Table 22 summarises baseline population, GDP and employment levels in the EU over the period to 2030. Little population growth is projected over this period. This means that the potential for GDP growth is also reduced. Total employment in the EU is also expected to show low growth, followed by a slight decline by 2030 due to an ageing population. Over the full ten-year period, the pattern of population and employment growth are similar.

Table 22: Baseline GDP and employment in the EU

	2020	2021	2030	Average annual growth (%pa)
Population ('000 people)	446 555	446 878	448 751	0.05
GDP (€ million)	12 748 534	12 943 846	13 755 540	1.35
Total employment ('000 people)	203 352	203 820	205 671	0.00

Source: Authors' own elaboration, based on European Commission publications.

²⁷⁵ See Annex 1.

The baseline in E3ME used for scenario comparison is consistent with the future trends published by the European Commission.²⁷⁶ The E3ME model baseline does not currently take the ongoing COVID-19 pandemic into account, but because the time horizon for the scenarios is 2030 and the exercise follows a conventional relative difference-to-baseline approach, results from the modelling exercise can still be considered as indicative outcomes.

4.2.1 Macroeconomic impacts of policy package 1

The key assumptions and inputs for this scenario are described in Section 3.1.1. The first policy package is expected to lead to an initial additional cost for compliance with the new legal framework for e-commerce providers, an increase in consumer spending on e-commerce (see Figure 25) and cost savings for both consumers and e-commerce providers (see Figure 26).

Table 23: Economic impact of policy package 1 by sector (% difference compared to the baseline), EU

Broad sector (NACE Rev.2)	2020	2021	2025	2030
Gross Value Added				
Agriculture and extraction (A-B)		0.00	0.03	0.03
Manufacturing (C)		0.00	0.11	0.10
Energy (E)		0.01	0.04	0.04
Construction (F)		0.01	0.02	0.03
Retail (G)		0.00	0.06	0.07
Transport (H)		0.00	0.04	0.04
Recreation (I+J58-J60)		-0.01	0.05	0.07
ICT (J61-J63)		0.02	0.04	0.05
Finance (K)		0.02	0.03	0.03
Real estate (L)		0.01	0.01	0.01
Professional, scientific and technical activities (M)		0.33	0.00	0.01
Administrative and support service activities (N)		0.03	0.07	0.07
Others (O-U)		0.00	0.01	0.01
Employment				
Agriculture and extraction (A-B)		0.00	0.00	-0.01
Manufacturing (C)		0.00	0.07	0.07
Energy (E)		0.00	0.00	0.00
Construction (F)		0.00	0.02	0.02
Retail (G)		0.00	0.02	0.02
Transport (H)		0.01	0.01	0.01

²⁷⁶ EU Reference Scenario 2016: Energy, transport and GHG emissions Trends to 2050, European Commission and The 2012 Ageing Report: Economic and budgetary projections for the 27 EU Member States (2010-2060), European Commission.

Recreation (I+J58-J60)		0.00	0.02	0.03
ICT (J61-J63)		0.02	0.02	0.02
Finance (K)		0.00	0.01	0.00
Real estate (L)		0.00	0.00	0.00
Professional, scientific and technical activities (M)		0.08	0.01	0.00
Administrative and support service activities (N)		0.02	0.03	0.03
Others (O-U)		0.00	0.00	0.01

Source: Authors' own elaboration based on E3ME.

Table 23 shows the impacts of the policy package on sectoral output proxied by gross value added (GVA) by sector, and on employment. The new regulatory framework is announced in 2021 and enters into force one year later; therefore, there is no impact compared to the baseline in 2020. In 2021, e-commerce providers start preparing their systems for the new rules and the cost is passed on to consumers as higher prices and other benefits have not yet started to be observed, thus there is a small impact in terms of GVA for all sectors. In the case of professional, scientific and technical activities (NACE Section M), in order to adapt to the new rules, e-commerce providers will consume more services such as legal services or consulting and this shows up as an increase in production in this sector. Some spill-over effects are also observed in other sectors of the economy. For example, cloud computing benefits are expected to induce cost decrease for enterprises throughout the economy.

By 2025, all possible benefits of the new legal framework on the EU e-commerce market will have been achieved, therefore increases in output are observed in almost all sectors. By 2030, the increase in consumer spending outweighs all the costs, but the impact is small. The increase in retail and wholesale commerce (G) of 0.07 % compared to the baseline leads to a higher increase in manufacturing (0.1 %), as more goods are being demanded. Growth in manufacturing is also driven by the policies' effect on counterfeit imports, as their volume is reduced and EU-internal production increases in multiple areas.

Not all the increase in consumer spending in e-commerce results in an increase in total consumer spending, as part of it is due to traditional commerce being substituted by e-commerce. Modelling of this effect is limited, as from a macroeconomic point of view both types of consumption usually belong to the same category.

The increase in e-commerce is accompanied by increases in transport and logistics (0.03%), energy (0.04 %) and ICT (0.05 %). Some of these effects are direct, as transport services or computer programming are increasingly sold online, but they also include indirect effects, e.g. a growth in retail sales will induce gains in transport, while the expansion of e-commerce in general increases ICT spending.

The impact on employment mirrors the change in sectoral output. In 2030, manufacturing will see a boost in employment of 0.07 % compared to the baseline while the employment impact in other sectors is more modest.

Overall, the package increases EU GDP by 0.05 % over the baseline (see Table 24). The impact by Member State depends primarily on the structure of the economy. The most affected countries are those with the greater representation of sectors most affected by the change in the legal framework, including Ireland, Czech Republic, Belgium, Austria, Malta and the Netherlands (which have the highest share of enterprises selling online to other EU Member States). Together with Denmark,

Sweden and Finland, they are also the Member States with the highest number of enterprises selling online generally.

The Netherlands is also one of the countries that will see high average cost savings when selling abroad if action at the EU level related to transparency, consumer protection and fair commercial conditions for consumers is enacted. Other countries with high average cost savings include Germany, Italy, France and Spain.

There are also countries, such as Slovenia or Slovakia, that profit from the reduction of EU external trade. In these cases, the reduction in imports from third countries makes them competitive in the EU market, leading to an increase in production in specific sectors for domestic consumption, and for exports to the EU internal market as well.

Table 24: GDP impact of policy package 1 by MS (% difference compared to the baseline)

Member State	2020	2021	2025	2030
EU27	0.00	0.00	0.05	0.05
AT	0.00	0.00	0.04	0.04
BE	0.00	0.00	0.05	0.05
BG	0.00	0.01	0.07	0.07
CY	0.00	-0.01	0.06	0.09
CZ	0.00	-0.07	0.04	0.04
DE	0.00	0.00	0.05	0.05
DK	0.00	0.00	0.06	0.08
EL	0.00	-0.03	0.04	0.04
EE	0.00	-0.01	0.07	0.06
ES	0.00	0.00	0.05	0.05
FI	0.00	-0.01	0.05	0.05
FR	0.00	0.00	0.04	0.05
HR	0.00	-0.01	0.08	0.07
HU	0.00	-0.03	0.09	0.08
IE	0.00	-0.02	0.09	0.09
IT	0.00	0.00	0.04	0.05
LT	0.00	0.01	0.07	0.07
LV	0.00	0.00	0.06	0.05
LU	0.00	0.00	0.03	0.03
MT	0.00	-0.04	0.12	0.09
NL	0.00	0.02	0.10	0.10
PL	0.00	0.00	0.03	0.03
PT	0.00	-0.01	0.05	0.06
RO	0.00	-0.01	0.03	0.03

SI	0.00	-0.01	0.06	0.12
SK	0.00	0.00	0.08	0.08
SE	0.00	0.00	0.06	0.04

Source: Authors' own elaboration based on E3ME.

The changes in GDP are mirrored by changes in employment (see Table 25). In general, e-commerce is less labour intensive than traditional commerce. Moreover, digitalisation is expected to lead to less job growth compared with the growth in GDP terms. Therefore, the increase in employment compared to the baseline in Table 25 is much lower than the increase in GDP compared to the baseline in Table 24.

Table 25: Employment impact of policy package 1 by MS (% difference compared to the baseline)

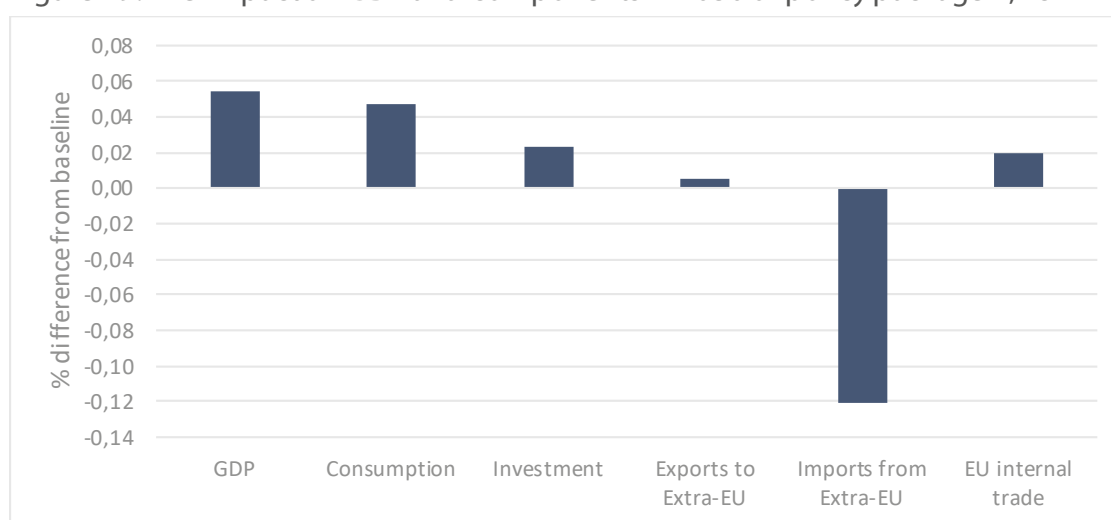
Member State	2020	2021	2025	2030
EU27	0.00	0.01	0.02	0.02
AT	0.00	0.00	0.01	0.02
BE	0.00	0.00	0.01	0.00
BG	0.00	0.02	0.04	0.06
CY	0.00	0.00	0.01	0.03
CZ	0.00	0.02	0.01	0.01
DE	0.00	0.00	0.03	0.02
DK	0.00	0.00	0.02	0.02
EL	0.00	0.01	0.02	0.02
EE	0.00	0.01	0.01	0.02
ES	0.00	0.02	0.04	0.04
FI	0.00	0.00	0.02	0.02
FR	0.00	0.00	0.01	0.02
HR	0.00	0.00	0.05	0.05
HU	0.00	0.02	0.02	0.01
IE	0.00	0.00	0.01	0.02
IT	0.00	0.02	0.02	0.02
LT	0.00	0.01	0.01	0.01
LV	0.00	0.01	0.01	0.01
LU	0.00	0.00	0.00	0.00
MT	0.00	-0.01	0.01	0.02
NL	0.00	0.01	0.03	0.02
PL	0.00	0.01	0.01	0.01
PT	0.00	-0.01	0.02	0.03
RO	0.00	0.01	0.00	0.00

SI	0.00	0.01	0.02	0.05
SK	0.00	0.00	0.01	0.02
SE	0.00	0.02	0.02	0.00

Source: Authors' own elaboration based on E3ME.

Figure 29 shows that the main drivers of the GDP increase at the EU level are the increase in consumption through e-commerce, and the net trade effect, which comes from a reduction of illegal imports from third countries. This in turn increases EU internal trade. Finally, investment also increases, partially due to increased consumption, which drives investment in new businesses, but also because firms involved in e-commerce will employ external services to develop their processes and implement systems to comply with new regulations.

Figure 29: The impact on GDP and components in 2030 of policy package 1, EU



Source: Authors' own elaboration based on E3ME.

It should be noted that the macroeconomic impact of this package only partially captures the potential positive impacts on B2C and B2B digital services. While the impact on e-commerce is broadly captured, the direct impact on other services is limited to cloud computing services for the business segment. A similar positive impact is likely in other digital services. In Chapter 5 a broader view of the policy packages, including qualitative and quantitative perspectives, will be provided to enable a more complete picture of their real impact.

4.2.2 Macroeconomic impacts of the policy package 2

It is assumed that the second policy package will result in initial and recurring costs for compliance with the new legal framework for online service providers (see Figure 28), and an increase in consumer spending on legal content (see Figure 27).

Table 26: Economic impact of policy package 2 by sector (% difference compared to the baseline), EU

Broad sector (NACE Rev.2)	2020	2021	2025	2030
Gross Value Added				
Agriculture and extraction (A-B)		0.00	0.02	0.03
Manufacturing (C)		0.00	0.03	0.03

Energy (E)		0.00	0.08	0.08
Construction (F)		0.00	0.03	0.03
Retail (G)		0.00	0.03	0.03
Transport (H)		0.00	0.02	0.03
Recreation (I+J58-J60)		0.00	0.15	0.15
ICT (J61-J63)		0.00	0.04	0.04
Finance (K)		0.00	0.02	0.02
Real estate (L)		0.00	0.01	0.01
Professional, scientific and technical activities (M)		0.00	0.04	0.04
Administrative and support service activities (N)		0.00	0.04	0.05
Others (O-U)		0.00	0.04	0.05
Employment				
Agriculture and extraction (A-B)		0.00	0.00	-0.01
Manufacturing (C)		0.00	0.01	0.01
Energy (E)		0.00	0.00	0.00
Construction (F)		0.00	0.01	0.02
Retail (G)		0.00	0.01	0.02
Transport (H)		0.00	0.01	0.01
Recreation (I+J58-J60)		0.00	0.05	0.07
ICT (J61-J63)		0.00	0.02	0.03
Finance (K)		0.00	0.00	0.01
Real estate (L)		0.00	0.00	0.00
Professional, scientific and technical activities (M)		0.00	0.01	0.02
Administrative and support service activities (N)		0.00	0.02	0.02
Others (O-U)		0.00	0.02	0.03

Source: Authors' own elaboration based on E3ME.

Table 26 shows the impacts of the policy package on gross value added (GVA) and employment by sector. The new regulatory framework is to be announced in 2021 and enters into force one year later; therefore, no impact compared to the baseline is observed for 2020. In 2021, online service providers prepare to comply with the notice-and-action system, but the overall one-off investment is small and results in little impact on output. In the period 2025-30, both online service providers and consumers benefit from the new legal changes, with the recreational sector benefitting most. Production of digital entertainment goods and services is within the recreational sector category, therefore the impact seen here is driven by the redirection of spending from illegal to legal consumption.

The impact of the policy package on employment mirrors that for output.

The impact on EU27 GDP increases over time but remains small. By 2030, it is 0.04 % higher than the baseline (see Table 27).

The most affected Member States are France, Denmark and Sweden, economies where the rate of digital market maturity is already high, but there is still a considerable level of digital piracy. For example, it is estimated that in France about 16 % of recreation consumption is spent on digital goods, while piracy activity is 2.7 accesses per internet user, per month.²⁷⁷ Under these assumptions, legal consumption of recreational goods increases by 3.4 % because of the reduction in illegal sales. This can be compared to a Member State with a lower rate of digital piracy, e.g. Germany, where, although the digital market maturity is similar, the piracy rate is 0.8, which leads to a 1.4 % estimated increase in consumption for the sector.

Table 27: GDP impact of policy package 2 by MS (% difference compared to the baseline)

Member State	2020	2021	2025	2030
EU27	0.00	0.00	0.04	0.04
AT	0.00	0.00	0.01	0.01
BE	0.00	0.00	0.02	0.02
BG	0.00	0.00	0.01	0.01
CY	0.00	0.00	0.02	0.02
CZ	0.00	-0.01	0.01	0.01
DE	0.00	0.00	0.03	0.03
DK	0.00	0.00	0.05	0.07
EL	0.00	0.00	0.01	0.01
EE	0.00	0.00	0.01	0.01
ES	0.00	0.00	0.04	0.06
FI	0.00	0.00	0.02	0.02
FR	0.00	0.00	0.07	0.08
HR	0.00	0.00	0.01	0.01
HU	0.00	0.00	0.01	0.01
IE	0.00	0.00	0.02	0.02
IT	0.00	0.00	0.01	0.01
LT	0.00	0.00	0.02	0.02
LV	0.00	0.00	0.02	0.01
LU	0.00	0.00	0.01	0.01
MT	0.00	0.00	0.02	0.01
NL	0.00	0.00	0.04	0.04
PL	0.00	0.00	0.06	0.06
PT	0.00	0.00	0.04	0.05
RO	0.00	0.00	0.02	0.01
SI	0.00	0.00	0.02	0.03
SK	0.00	0.00	0.03	0.03
SE	0.00	0.00	0.06	0.07

Source: Authors' own elaboration based on E3ME.

²⁷⁷ Illegal audio-visual consumption per month per user. EUIPO (2019). [Online Copyright Infringement in the European Union](#).

The changes in overall employment by Member State mirror those for GDP (see Table 28), although because digitalisation leads to less labour intensity, the relative increase in employment is lower than that for GDP increase.

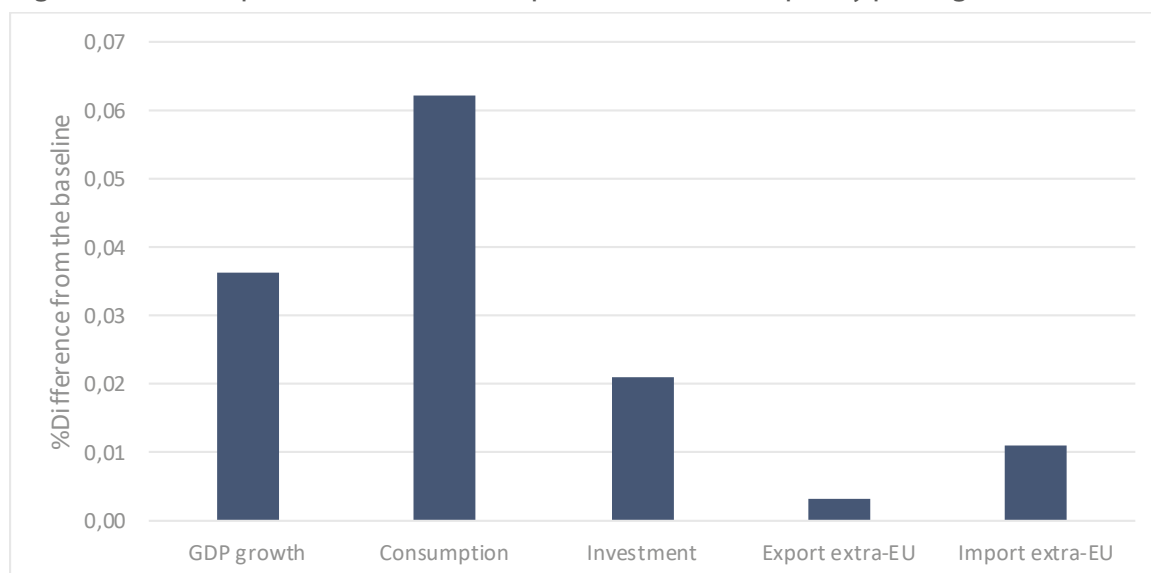
Table 28: Employment impact of policy package 2 by MS (% difference compared to the baseline)

Member State	2020	2021	2025	2030
EU27	0.00	0.00	0.01	0.02
AT	0.00	0.00	0.00	0.01
BE	0.00	0.00	0.00	0.00
BG	0.00	0.00	0.00	0.00
CY	0.00	0.00	0.01	0.02
CZ	0.00	0.00	0.00	0.01
DE	0.00	0.00	0.01	0.02
DK	0.00	0.00	0.02	0.03
EL	0.00	0.00	0.00	0.00
EE	0.00	0.00	0.00	0.01
ES	0.00	0.00	0.02	0.05
FI	0.00	0.00	0.01	0.01
FR	0.00	0.00	0.03	0.04
HR	0.00	0.00	0.01	0.00
HU	0.00	0.00	0.00	0.00
IE	0.00	0.00	0.01	0.02
IT	0.00	0.00	0.00	0.01
LT	0.00	0.00	0.00	0.01
LV	0.00	0.00	0.00	0.01
LU	0.00	0.00	0.00	0.00
MT	0.00	0.00	0.00	0.00
NL	0.00	0.00	0.01	0.01
PL	0.00	0.00	0.01	0.03
PT	0.00	0.00	0.01	0.02
RO	0.00	0.00	0.00	0.00
SI	0.00	0.00	0.01	0.01
SK	0.00	0.00	0.01	0.01
SE	0.00	0.00	0.04	0.01

Source: Authors' own elaboration based on E3ME.

Figure 30 summarises the impact on the key GDP components for the EU27 as a whole.

Figure 30: The impact on GDP and components in 2030 of policy package 2, EU



Source: Authors' own elaboration based on E3ME

Consumption, driven by the increase in the consumption of legal digital goods, is the main contributor to the estimated GDP increase. Investments, driven by growing consumption, and the demand for services to implement processes that comply with the new regulations are also main contributors to the GDP increase. While both EU external imports and exports increase, the growth in imports is stronger, therefore the net trade effect on GDP is slightly negative. The reduction of illegal consumption also induces an increase in legal trade of recreational digital goods.

EU internal cross-border trade activity also increases slightly, gaining 0.014% in value by 2030 (considering current trade figures, an increase of about €500 million), with the trade of electronics and entertainment (as well as other sectors) being a major driver.

All in all, the macroeconomic model for this package captures fewer impacts than in the case of package 1. For example, it has not been possible to capture the economic impact of better governance or avoidance of reputational risks derived from the increased transparency obligations described in section 3.2.1. Nor does the model include the positive economic impacts that better management of certain threats such as disinformation could generate in terms of institutional stability and democratic values, as it is not possible to quantify them.

As in the case of the policy package on consumer protection and the other policy packages, a combined view of the qualitative and quantitative European added value of each package is presented in the following chapter for comparison and assessment.

5 European Added Value assessment

European Added Value (EAV) can be defined as ‘the value resulting from an EU intervention which is additional to the value that would have been otherwise created by Member State action alone’.²⁷⁸ According to this definition, the EAV of the policy packages is assessed by taking three scenarios into consideration:

- 1 Maintaining the current framework (baseline scenario).
- 2 Minimum coordination at the EU level, leaving the definition of specific regulation to Member States.
- 3 Common action at the EU level, with all Member States implementing the same legal requirements.

The EAV of the policy packages has been assessed according to both qualitative and quantitative approaches. The EAV qualitative assessment is conducted for all policy packages. Scenario 2 (EU minimum coordination) and scenario 3 (EU common action) are compared to the baseline scenario considering the following criteria:

- 1 **Effectiveness and sustainability:** whether the policy is expected to be successful in achieving the desired results and contributes to making digital ecosystems more sustainable, especially by facilitating the participation of SMEs.
- 2 **Innovation:** whether the policy contributes to increasing innovation in Europe.
- 3 **Subsidiarity and proportionality:** whether the policy respects the principles of subsidiarity and proportionality that must govern any political action in the EU.
- 4 **Political feasibility:** whether the policy is likely to achieve wide political consensus and support.

The criteria are qualitatively assessed using a six-level scale: high positive impact (+++); medium positive impact (++); low positive impact (+); low negative impact (-); medium negative impact (--); high negative impact (---). The scores are based on previous reflections on the problems and potential solutions for improving digital services in the EU.²⁷⁹

The EAV quantitative assessment considers:

- 1 the estimates of the direct economic impacts (costs and benefits) of each policy package,²⁸⁰ comparing scenario 2 (minimum coordination) and 3 (common action) to the baseline scenario;
- 2 the macroeconomic estimates of the impact on GDP growth and job creation of policy package 1 (enhanced consumer protection and common e-commerce rules) and policy package 2 (creating a framework for content management and curation that guarantees the protection of rights and freedoms), comparing scenario 3 (common action) to the baseline scenario.²⁸¹ Section 5.5 also provides a joint estimation of the value added by the two policy options considered in the macroeconomic analysis compared to the baseline scenario.

²⁷⁸ European Commission (2011). The added value of the EU budget. Accompanying the document Commission Communication A budget for Europe 2020. Commission staff working paper SEC(2011) 867 final.

²⁷⁹ See Chapters 2 and 3.

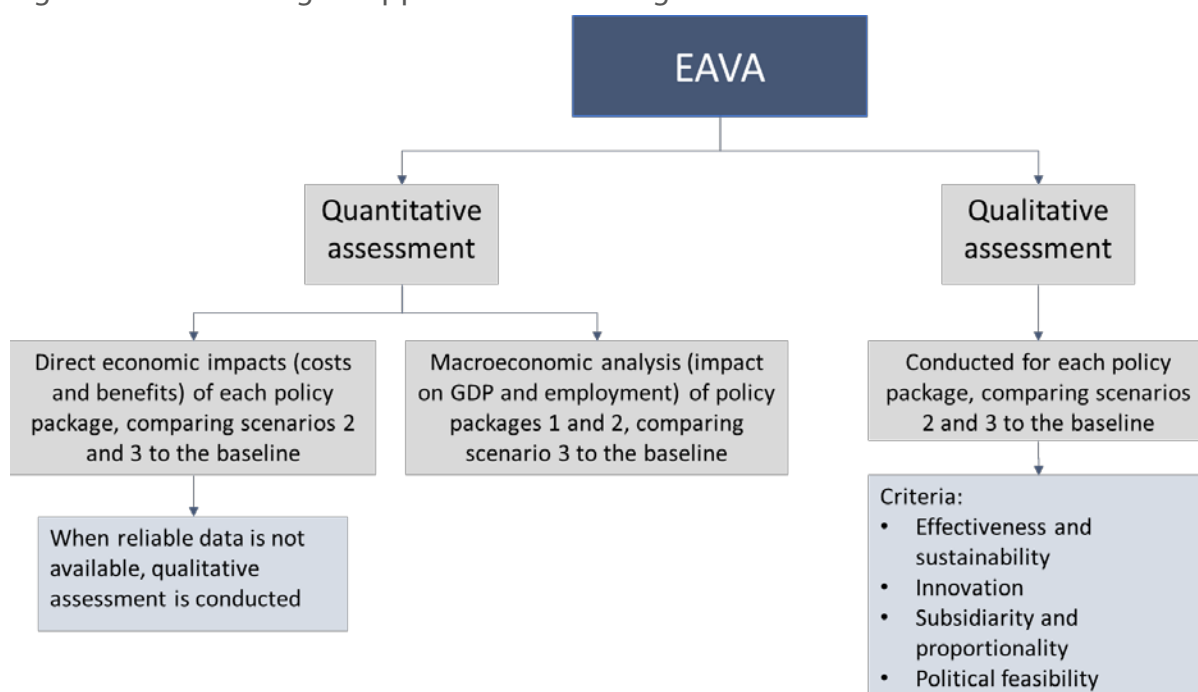
²⁸⁰ See Chapter 3.

²⁸¹ See Chapters 4.2.1 and 4.2.2.

It should be noted that these quantitative estimates are a lower bound of the overall value of each policy, given that various specific impacts have not been quantified, either because there is no reliable data or because the impact goes beyond the purely economic. The value of the impacts that have not been quantified is assessed from a qualitative perspective by applying the same six-level scale mentioned above. This qualitative assessment complements quantitative assessment and allows the expected non-economic impacts of each policy option for each scenario to be compared, as well as their feasibility.

Figure 31 summarises how the policy options' EAV is assessed.

Figure 31: Methodological approach for assessing the EAV



Source: Authors' own elaboration

5.1 Enhanced consumer protection and common e-commerce rules

Effectiveness and sustainability

The internal market clause of the e-Commerce Directive only obliges a digital service provider to comply with the national regulation of the country where it is established. If each Member State regulates contractual conditions and information requirements of digital services on its own, the rights of consumers accessing digital services in other EU countries could have different levels of protection. This in turn could contribute to reducing citizens' trust in cross-border digital services. Therefore, common action to enhance consumer protection when accessing digital services at the EU level would be more effective than leaving Member States to define their own legislation, or keeping the current fragmented regulation, which has proven to be inefficient.

A common framework would also allow service providers to face lower compliance costs when operating in other EU countries and more companies could be willing to sell and provide services online. SMEs in particular could start operating in other countries more easily, helping them scale up.

Innovation

According to a study produced by the European Commission,²⁸² the main barrier to innovation is the existence of conflicting requirements between different regulations. Common regulatory action at EU level aimed at enhancing consumer protection when using digital services could reduce the presence of conflicting legal provisions among Member States. Therefore, EU companies could be more willing to invest in innovation to deliver better digital services.

Subsidiarity and proportionality

Competences in consumer protection issues are shared between the EU and Member States.²⁸³ In this case, the policy aims to tackle potential infringements of consumer rights when accessing digital services. These services are, by nature, cross-border and all Member States face similar problems in ensuring the protection of their citizens in the digital arena. Therefore, a common intervention at the EU level would be compatible with the principles of subsidiarity and proportionality.²⁸⁴ The option of minimum coordination at the EU level and leaving each Member State to define its own regulation would also be aligned with both principles.

Political feasibility

The increased use of digital services (e-commerce marketplaces, e-learning and leisure platforms, teleworking tools, etc.) during the COVID-19 pandemic has led to an escalation of online scams, particularly involving medical products, and unfair practices.²⁸⁵ This has only stressed the necessity of improving protection of EU citizens in the digital ecosystem. Societal and political consensus on this issue is wide. Therefore, political feasibility of this policy package would also be high, regardless of the scenario considered.

Costs and benefits

The policy package aimed at enhancing consumer protection and improving e-commerce rules could first have a clear economic benefit of increasing cross-border e-commerce consumption:

- Around 12.7 million new users of cross-border e-commerce services could spend between €1.9 billion and €6.6 billion on cross-border purchases.
- Current users of cross-border e-commerce services could increase their average spending, raising total spending by €2 billion to €6.9 billion.

Both effects could only be achieved if the DSA proposal includes common actions at the EU level, allowing customers the same experience and level of trust with e-commerce providers as when they buy domestically.

At the domestic level, additional regulation to improve the transparency, clarity and information obligations of service providers could also contribute to increasing consumption through e-commerce services:

²⁸² European Commission (2017). [Assessing the impacts of EU regulatory barriers on innovation](#).

²⁸³ Valant J. (2015). [Consumer protection in the EU](#).

²⁸⁴ Dumitru O. (2020). The role of subsidiarity and proportionality principles in the development of a future Digital Single Market and a common European contract law. Proceedings of the 14th International Conference on Business Excellence 2020 pp. 1178-1186

²⁸⁵ United Nations Office on Drugs and Crime (2020). [COVID-19-related trafficking of medical products as a threat to public health](#).

- New users of domestic e-commerce services could spend between €0.61 billion and €2.1 billion on online purchases.
- Current users of domestic e-commerce services could increase their total spending by €15.3 billion to €53.4 billion.

In this case, the economic impact of both scenarios could be similar, as users of domestic e-commerce services could benefit from enhanced terms and conditions and better information, regardless of which authorities (EU or national bodies) implement the legal provisions. Something similar happens when it comes to the economic benefits to business users (€0.29 billion), particularly SMEs, of removing contract-related problems when accessing cloud computing services. Such benefits can be achieved irrespective of the administration that obliges cloud computing providers to lay down fair terms and conditions in their contracts.

In order to adapt their legal information, e-commerce providers across the EU could have to bear one-off costs of €8.1 billion. If legal requirements to enhance their terms and conditions and the information provided to customers are unified at the EU level, e-commerce providers would not have to incur added costs in order to sell in other EU countries. On the contrary, if each Member State were to enact its own regulations, e-commerce providers would face additional costs of €15.5 billion when adapting their legal information to national regulations.²⁸⁶

Both consumers and service providers could benefit from lower litigation and alternative dispute resolution (ADR) costs if DSA proposals improve consumer protection. A clearer legal framework and greater legal certainty would reduce both costs regardless of the scenario. But a common action will bring about greater savings by creating a framework of equal protection and obligations in all countries, thus reducing the costs of cross-border cases, which would otherwise only be noticed in domestic disputes.

The last quantified economic impact of this policy package is the decrease in illegal trade of counterfeit goods through e-commerce. This decrease can, in turn, result in increased legal purchases, of which a relevant part could be internal consumption within each Member State market. Both scenarios could yield similar economic benefits (around €4.6 billion), given that these benefits would come mostly from national markets and unification of rules at EU level would not provide additional gains.

The economic benefits of a scenario of DSA provisions to enhance consumer protection with common action at the EU level could reach between €25.1 billion and €74.3 billion per year. The cost of this scenario would be €8.1 billion (one-off cost). The scenario with minimum coordination at the EU level complemented with national regulations could provide benefits worth between €20.8 billion and €60.4 billion per year and one-off cost of €23.6 billion.

There are other relevant aspects that should be considered, even though they could not be quantified. The reduction of counterfeit and unsafe goods in online marketplaces, as well as easier access to new markets for service providers, could also have a positive impact on a fundamental activity for improving companies' competitiveness: innovation. A digital environment with less piracy and counterfeiting could incentivise investments in innovative products and services.²⁸⁷ The possibility of entering an EU-wide digital market by lifting current barriers derived from regulatory fragmentation is also a key driver that could boost innovation of EU companies. If the DSA proposals on consumer protection in the digital sphere were not unified and each Member State could adapt

²⁸⁶ This conservative estimation considers that cross-border e-commerce providers sell in another three EU countries on average.

²⁸⁷ OECD (2008). [The economic impact of counterfeiting and piracy](#).

them on its own, it is unlikely that the current barriers would be overcome, and a true digital single market would not be achieved in the EU.

Advertising is one of the main income sources for many business models in the digital ecosystem. Personalised advertising is the ‘trendiest’ type of advertising, as it increases the effectiveness of ads and encourages the engagement between consumers and brands. However, this kind of advertising is also accused of being intrusive, and raises concerns about how consumers’ information is used to personalise ads. From the perspective of service providers, limiting personalised advertising would be detrimental, as this could reduce their income. From the consumer’s point of view, the impact remains unclear regardless of which scenario is adopted.

Table 29 shows the costs and benefits of the scenarios compared to the baseline, considering both the impacts that have been quantified and the impacts that have been qualitatively analysed.

Table 29: Costs and benefits of the policy package aimed at enhancing consumer protection

Expected impact	Scenarios			
	Common action at the EU level		Minimum coordination at the EU level and national regulations	
QUANTIFIED IMPACTS COMPARED TO THE BASELINE				
	Costs	Benefits	Costs	Benefits
Increase in cross-border e-commerce consumption	-	€1.9 billion-€6.6 billion from new consumers €2 billion-€6.9 billion from additional spending by current consumers	-	-
Increase in domestic e-commerce consumption	-	€613 million-€2.1 billion from new consumers €15.3 billion -€53.4 billion by additional spending of current consumers	-	€613 million-€2.1 billion from new consumers €15.3 billion-€53.4 billion from additional spending by current consumers
Increase in turnover of business users of cloud computing services	-	€290 million per year	-	€290 million per year
Compliance costs for e-commerce providers	€8.1 billion (one-off cost)	-	€23.6 billion (one-off cost) ²⁸⁸	-
Reduction of litigation costs and ADR costs for consumers and service providers	-	€418 million per year	-	€54 million per year
Increase in domestic (EU) consumption of legal goods due	-	€4.6 billion per year	-	€4.6 billion per year

²⁸⁸ €8.1 billion (one-off compliance costs) + €15.5 billion (additional costs for selling cross-border in other EU countries).

Expected impact	Scenarios			
	Common action at the EU level		Minimum coordination at the EU level and national regulations	
to a decrease in imports of counterfeit goods				
NON-QUANTIFIED IMPACTS (QUALITATIVE ASSESSMENT COMPARED TO THE BASELINE)				
Increase in innovation due to enhanced IPR protection and better access to new markets		+++		-
Impact of limiting intrusiveness of advertising on consumption		-		-
TOTAL	€8.1 billion (one-off cost)	€25.1 billion-€74.3 billion per year	€23.6 billion (one-off cost)	€20.8 billion-€60.4 billion per year

Source: Authors' own elaboration based on estimations for the macroeconomic assessment.

Economic growth and job creation

It is expected that defining common actions at the EU level could add €47 billion to EU GDP over the period 2020-30 compared to the baseline scenario. It represents a 0.05 % increase over the estimated baseline.²⁸⁹

A common regulatory framework to enhance consumer protection when accessing digital services could also have positive effects on job creation. It is estimated that employment in the EU could grow by 0.02 % by 2030 due to the implementation of such scenario for this policy package (40 000 new jobs).

EAVA of the policy package

Table 30 summarises the European Added Value of this policy package.

Table 30: EAVA of the policy package aimed at enhancing consumer protection

Assessment criteria	Enhanced consumer protection and common e-commerce rules		
	Baseline scenario	EU minimum coordination + national regulation	EU common action
Effectiveness and sustainability	---	-	++
Innovation	-	-	+++

²⁸⁹ See Chapter 4.2.1

Assessment criteria	Enhanced consumer protection and common e-commerce rules		
Subsidiarity and proportionality	-	++	++
Political feasibility	+	+++	+++
Cost and benefits	N/A	Costs: €23.6 billion (one-off cost) Benefits: €20.8 billion – €60.4 billion per year	Costs: €8.1 billion (one-off cost) Benefits: €25.1 billion – €74.3 billion per year
Economic growth and job creation	N/A	N/A	0.05 % increase in EU GDP by 2030 (€47 billion over the period 2020-2030). 0.02 % increase in employment at EU level by 2030 (40 000 new jobs over the period 2020-2030).

Source: Authors' own elaboration.

5.2 Control and curation of content in digital services

Effectiveness and sustainability

Reinforced mechanisms (notice-and-action procedures, content curation, content removal, transparency reporting, etc.) to manage the content distributed through digital services would be more effective if they were implemented in the most coordinated way by all Member States.

From the perspective of providers, compliance costs would skyrocket if each Member State defined its own requirements and service providers had to implement 27 different procedures to deal with content management.

If the package is adopted with minimum coordination at the EU level and complemented by national regulations, it could be a greater barrier to the development of new services and products and the entry of service providers into new markets, especially in the case of SMEs, putting their long-term sustainability at risk.

A more aligned framework and greater legal certainty would also result in more effective cross-border pursuit of offenders, enforcement and resolution of cases, and thus more effective protection of citizens' rights and freedoms.

Innovation

The costs of implementing enhanced mechanisms for content management could divert investment away from innovation. National approaches could aggravate this issue, as service providers would have to invest much more in content management if they wanted to provide services in more than one Member State, which is usually the case with digital services. This would mean reducing investments in more innovative products and processes.

Subsidiarity and proportionality

The mechanisms for control and curation of content are aimed at managing two main content categories: illegal and harmful content. Illegal online content is clearly defined at the EU level,²⁹⁰ but content management procedures and potential sanction regimes to tackle it should be implemented respecting the legal system in force in each Member State. The concept of harmful content remains undefined and each Member State could interpret it according to its own tradition, developing its own mechanisms to tackle it. Therefore, minimum coordination at the EU level and leaving Member States to decide how digital services should manage illegal and harmful content would be more aligned with the principles of subsidiarity and proportionality than common action at the EU level.

Political feasibility

This policy package has special relevance, as it is aimed at tackling not only issues related to digital market failures but also the serious problem of disinformation. This issue goes very far beyond purely economic matters, as it threatens the very essence of democracy in the EU. However, actions aimed at enhancing the control and curation of online content could be interpreted as potential restrictions to fundamental rights. In this sense, political consensus could be very difficult to achieve, particularly at the EU level, in sensitive issues such as the definition of harmful content.

Costs and benefits

Service providers should bear the cost of implementing notice-and-action procedures and the cost of reporting requirements related to content management. The former has been estimated at €380 million per year, while the latter could reach €210 million per year, considering an aligned scenario in which service providers would have to implement only one procedure for the whole EU. If different national requirements are enacted, both figures would increase substantially as service providers would need to adapt their procedures to multiple national specificities.

The economic benefits of coordinated mechanisms for content management and curation would come from the reduction of illegal digital content distributed through online services. This, in turn, could contribute to increasing the legal consumption of digital content. It is assumed that common rules would facilitate the coordinated shutdown of digital services providing illegal content across the EU. The consumption gain of such coordinated action is estimated at €3.1 billion per year.

Improving transparency reporting mechanisms to publicly inform how service providers deal with content-related issues (number of complaints, contents removed, etc.) might positively affect their reputation. This, in turn, might improve their economic performance. Economic indicators such as stock prices, market capitalisation and the cost of capital could positively evolve in the coming years, independently of the authority (the EU or Member States) setting the transparency requirements. However, such benefits could be partially offset by the costs of implementation if they were addressed according to national approaches.

The creation of a framework for content management and curation that guarantees the protection of rights and freedoms would help tackle the increasingly worrying phenomenon of online disinformation more effectively. It can have diverse objectives and, directly or indirectly, could lead to negative economic consequences: online disinformation could be used to artificially increase advertising revenue (false news spreads faster than true news and can be a more effective channel for advertising); polarisation of society due to online disinformation could negatively affect GDP evolution in democratic countries; online disinformation could be used to maliciously alter the economic performance of companies (for instance, spreading false negative information about a

²⁹⁰ See Chapter 2.2.3.

company could lead to a sharp drop in its stock price). Disinformation promoters are currently benefiting from the fragmentation of the regulatory approaches defined to tackle this phenomenon across the EU. Therefore, a common framework could help to better fight disinformation and its negative economic consequences.

Table 31 shows the costs and benefits of the two potential policy scenarios for this package, compared to the baseline scenario.

Table 31: Costs and benefits of the policy package on content management and curation

Expected impact	Scenarios			
	Common action at the EU level		Minimum coordination at the EU level and national regulations	
QUANTIFIED IMPACTS COMPARED TO THE BASELINE				
	Costs	Benefits	Costs	Benefits
Increase in legal consumption of digital content	-	€3.1 billion per year	-	-
Compliance costs for digital service providers	€380 million per year	-	€380 million x number of MSs with different requirements for content management per year ²⁹¹	-
Costs of transparency reporting for digital service providers	€210 million per year	-	€210 million x number of MSs with different reporting requirements per year ²⁹¹	-
Increase in stock prices of digital service providers due to transparency reporting	-	Lower bound of potential increase of stock prices for digital companies: 109.96 respect to 2015 (2015 index = 100) 104.45 respect to 2019 (2015 index = 100)	-	Lower bound of potential increase of stock prices for digital companies: 109.96 respect to 2015 (2015 index = 100) 104.45 respect to 2019 (2015 index = 100)
Increase in market capitalisation of digital service providers due	-	€37.5 billion-€44.5 billion (one-off benefit)	-	€37.5 billion-€44.5 billion (one-off benefit)

²⁹¹ The costs would probably not increase in proportion to the number of Member States, as service providers could readapt one common procedure to national requirements. Given that is not possible to estimate what the additional cost to adapt a common procedure to national specificities would be, the formula reflects the maximum potential costs that service providers would incur if they had to create procedures adapted to national requirements from the scratch.

Expected impact	Scenarios			
	Common action at the EU level		Minimum coordination at the EU level and national regulations	
to transparency reporting				
Reduction of cost of capital for digital service providers due to transparency reporting	-	Upper bound of cost of capital: 3.99%	-	Upper bound of cost of capital: 3.99%
NON-QUANTIFIED IMPACTS (QUALITATIVE ASSESSMENT COMPARED TO THE BASELINE)				
Economic gains from tackling online disinformation		++		+
TOTAL	€590 million per year	€3.1 billion per year + One-off benefit of €37.5 billion-€44.5 billion	At least €590 billion per year	One-off benefit of €37.5 billion-€44.5 billion

Source: Authors' own elaboration based on estimations for the macroeconomic assessment.

Economic growth and job creation

It is expected that defining common actions at the EU level for this policy package could add €29 billion to EU GDP over the period 2020-2030 compared to the baseline scenario. It represents a 0.04 % increase over the estimated baseline.²⁹²

A common regulatory framework designed to improve content management in digital services could also have positive effects in job creation. It is estimated that employment in the EU could grow by 0.02 % by 2030 due to the implementation of this policy package (43,000 new jobs).

EAVA of the policy package

Table 32 summarises the European Added Value of this policy package.

Table 32: EAVA of the policy package on content management and curation

Assessment criteria	Creating a framework for content management and curation that guarantees the protection of rights and freedoms		
	Baseline scenario	EU minimum coordination + national regulation	EU common action
Effectiveness and sustainability	---	-	+++

²⁹² See Chapter 4.2.2.

Assessment criteria	Creating a framework for content management and curation that guarantees the protection of rights and freedoms		
Innovation	-	-	+
Subsidiarity and proportionality	++	++	-
Political feasibility	-	-	--
Costs and benefits	N/A	Costs: at least €590 million per year Benefits: €37.5 billion-44.5 billion (one-off benefit)	Costs: €590 million per year Benefits: €3.1 billion per year + one-off benefit of €37.5 billion-€44.5 billion
Economic growth and job creation	N/A	N/A	0.04 % increase in EU GDP by 2030 (€29 billion over the period 2020-2030). 0.02 % increase in employment at EU level by 2030 (43 000 new jobs over the period 2020-2030).

Source: Authors' own elaboration

5.3 Ensuring fair competition in online platform ecosystems

Effectiveness and sustainability

Systemic platforms that act as gatekeepers of specific digital markets usually operate across countries. Given the supranational nature of the problem, the effectiveness of implementing common regulation to ensure fair competition in those digital markets at the EU level would be greater than each country enacting its own regulation.

Keeping the baseline scenario and not reforming the current legal framework is particularly damaging for SMEs that have problems accessing digital markets, particularly outside their own country. Therefore, enacting ex-ante regulations for systemic platforms, both at the national and the EU level, would have positive effects on small innovative companies. However, the more aligned the regulation, the easier for these businesses to develop and offer their services in the whole internal market, which would bring greater possibilities of success and growth.

Even if the regulation is aligned at the EU level, its effectiveness would also depend on whether it is applied to all systemic platforms equally, or whether a case-by-case approach is adopted. The second option could be more accurate, but it could take long time for the authorities to decide the specific actions to be implemented by each systemic platform. This delay could be used by such platforms to reinforce their market power and further reduce competition.

Innovation

The implementation of common actions for this policy package could contribute to boosting innovation in digital ecosystems across the EU. By levelling the playing field to prevent systemic platforms imposing unfair conditions on competitors, small EU digital companies could have more incentives to innovate. From the perspective of systemic platforms, the definition of ex-ante rules to

ban anticompetitive practices could reduce their market power. This, in turn, could lead them to innovate more in order to regain market power by fair means.

Subsidiarity and proportionality

Given the difficulties of applying anti-trust and competition policies to digital platforms and the current lack of consensus, national authorities are ruling differently in similar cases across Europe.²⁹³ Although there is not yet a clear definition of what a systemic platform is, it seems difficult to find such a digital platform operating only at the national or regional level. The problems and anticompetitive practices are the same in all EU countries, and digital companies, including small companies, usually aspire to compete in the global market, even more so in the EU internal market, so fragmented regulation could result in more problems than benefits. There does not, therefore, seem to be any indication that the principle of subsidiarity is of major importance in this case.

Political feasibility

There is often resistance to the unification or centralisation of measures from certain political circles, but in the case of systemic platforms there is a high degree of consensus on the need to address the problem in as coordinated a manner as possible, as well as clear demand from the industry to do so. As a result, the least viable option seems to be to do nothing, while the options for action at the European or national level may have similar support, albeit from different spheres.

Costs and benefits

Increased competition in digital markets could benefit the diverse agents involved. On the one hand, competitors of systemic platforms, mainly digital SMEs, could have better opportunities to gain market share and reinforce their position. On the other hand, banning the unfair conditions systemic platforms impose on their business partners could balance the bargaining power between them, reduce switching costs and favour multi-homing. In the end, final consumers could get lower prices, wider selection and higher quality when it comes to products and services accessed through platforms.

Obliging systemic platforms to comply with ex-ante obligations could imply additional costs that platforms could pass on, either to business partners or end users. For instance, technical costs for facilitating interoperability between platforms and data portability could be shared with business partners. The costs could be substantially higher if platforms have to adapt their conditions to multiple national regulations.

Economic growth and job creation

Although this policy package has not been assessed at the macroeconomic level, it could be expected that common actions ensuring fair competition in platform-based markets could help small digital companies to grow. Consequently, more high-skilled jobs could be created in the EU.

The expected growth could only be achieved if digital companies enter new national markets. For that reason, a common framework to boost competition in digital ecosystems at EU level would make more sense than national regulations.

Table 33 summarises the European Added Value of this policy package.

²⁹³ For example, in cases against Google or Booking. See Coyle, D. (2018). Practical competition policy implications of digital platforms. Bennett Institute for Public Policy working paper no: 01/2018. University of Cambridge.

Table 33: EAVA of the policy package to ensure fair competition in online platforms ecosystems

Assessment criteria	Specific regulation to ensure fair competition in online platform ecosystems		
	Baseline scenario	EU minimum coordination + national regulation	EU common action
Effectiveness and sustainability	-	--	+
Innovation	-	--	++
Subsidiarity and proportionality	+	+	++
Political feasibility	-	+	+
Cost and benefits	N/A	--	++
Economic growth and job creation	N/A	N/A	++

Source: Authors' own elaboration

5.4 Cross-cutting policies complementing the other initiatives

Effectiveness and sustainability

Most actions included in this package (clarifying definitions, liability exemptions and enhancing enforcement) aim to overcome relevant limitations of the current framework with a clear focus on improving cross-border cooperation. Lessons from the enforcement of the ECD so far suggest that self-regulation and action at Member State level adversely affects effectiveness of the regulation. This approach would reduce added value of measures. The creation of a supervisory body at the EU level would help to address the currently weak cross-border cooperation, an issue that would not otherwise be solved through national agencies or supervisors alone.

In the case of establishing transparency and explainability standards and procedures for algorithms, a national approach could be followed with similar effectiveness, but an EU common action would allow for a smoother provision of cross border AI and digital services based on algorithms.

The sustainability of digital services depends largely on their ability to enter new markets and generate new services and business models, which is more likely in larger markets such as the EU single market. In the case of SMEs, it is essential that the regulatory framework favours their ability to scale up. Leaving this task to each Member State would make it more difficult, as scaling up normally requires accessing foreign markets, which is already a very important problem in the European digital sector.

Innovation

Different standards, definitions and enforcement measures might lead to limiting innovation in a field (particularly when algorithms and platforms are taken into account) that is supranational in nature and heavily depends on network effects. Some Member States are already implementing

different measures to address some of the problems this package aims to tackle. Such fragmentation creates an uneven playing field for providers and platforms in different countries, limiting their capacity for innovation and competitiveness. Legal uncertainty also reduces investment in innovation. Therefore, from an innovation point of view, a common EU approach would provide greater benefits than leaving clarifications and enforcement to Member States or maintaining the current framework.

Subsidiarity and proportionality

Digital services are less sensitive to national particularities than other types of services, so the principle of subsidiarity is generally less relevant. Unifying definitions and setting common standards is key to achieving a digital single market. Such measures should therefore be defined at the EU level, otherwise it would mean little progress in relation to the current situation of fragmentation. However, the implementation of enhanced enforcement measures could, from a subsidiarity and proportionality point of view, be left in the hands of Member States, which could better adapt those measures to their circumstances.

Political feasibility

Establishing common definitions at EU level would be very feasible, while there could be greater barriers to increasing enforcement measures in a centralised way. In this sense, keeping the baseline scenario or leaving the decision on how to enhance enforcement to the Member States are the more politically feasible options.

Costs and benefits

The administrative costs of establishing enforcement measures at the EU level (following the one-stop-shop principle) would be, altogether, lower than those of establishing the national mechanisms plus coordination mechanisms that are key for the DSA. As for a supervisory body, the estimated annual budget of a European agency would be €12-16 million.

Regulating algorithms at the national level may have similar benefits (although economic benefits are still unclear) as doing so at the EU level. However, the costs of facing fragmented regulation for service providers would increase exponentially, as they would have to adapt and report differently to each Member State.

Economic growth and job creation

The impossibility of quantifying the economic impacts of this package has prevented the effect from being modelled at the macroeconomic level. However, it is estimated that enforcement at European level would allow the economic estimates for the rest of the packages to be reached, while national action would not be as effective, therefore reducing economic growth and job creation.

Table 34: EAVA of cross-cutting policies complementing the other policy packages

Assessment criteria	Cross-cutting policies		
	Baseline scenario	EU minimum coordination + national regulation	EU common action
Effectiveness and sustainability	-	++	+++

Innovation	-	+	++
Subsidiarity and proportionality	++	+++	
Political feasibility	+	++	+
Cost and benefits	N/A	-	++
Economic growth and job creation	N/A	N/A	++

Source: Authors' own elaboration

5.5 EAVA from a macroeconomic perspective

From a macroeconomic perspective, EAV is quantified as the additional net benefit that can be generated from common action at the EU level (scenario 3) compared to the current regulatory framework (baseline scenario).

Two policy packages are analysed: enhanced consumer protection and common e-commerce rules; and creation of a framework for content management and curation that guarantees the protection of rights and freedoms.²⁹⁴ As the two packages address the issues of the current regulatory framework in different markets (the first mainly in e-commerce services and the second in other online digital services such as social networks and search engines), their combined effect is also quantified.

The main inputs in the macroeconomic analysis are assumptions on changes in consumer spending; the net effect of compliance costs and cost savings from the implementation of the policies; and reduction in the import of counterfeit goods. The combined scenario includes all the costs and the benefits of the separate scenarios.

Table 35 provides a summary of the estimated EAV over the period up to 2030. There are positive effects on both GDP and employment, with larger economic impacts for policy package 1 (focused on consumer protection). For both policy packages, the impact of the change in compliance costs on the EU economy is felt most at the beginning of the period. The benefits from the common implementation of the legal framework in both packages are assumed to be achieved by 2025, and all the benefits outweigh all the costs by 2030.

The combined policy package reflects all the distribution of costs and benefits of each of the individual packages over different sectors. EU-level common action most benefits recreational activities and manufacturing, followed by transport and retail. The relative impact on employment is smaller than on GDP, reflecting that e-commerce and online services are less labour-intensive than traditional means of service delivery. Overall, the combined effect of the policies shows that the economy recovers faster from the burden of cost of compliance that individual packages are imposing on the economy.

²⁹⁴ For more details, see Chapters 4.2.1 and 4.2.2.

Table 35: All policy packages: summary of economic impacts, EU27

	2021	2025	2030	2020-30
Policy package 1				
GDP (% difference)	-0.002	0.05	0.05	0.06*
GDP (€ million)	-250	7 088	7 743	47 630**
Total employment (% difference)	0.008	0.02	0.02	0.02*
Total employment ('000)	17	41	40	40***
Policy package 2				
GDP (% difference)	-0.001	0.04	0.04	0.05*
GDP (€ million)	-83	5 026	6 019	29 162**
Total employment (% difference)	0.000	0.01	0.02	0.02*
Total employment ('000)	0	29	43	43***
Combined policy packages				
GDP (% difference)	-0.003	0.09	0.09	0.11*
GDP (€ million)	-332	12 116	13 755	76 786**
Total employment (% difference)	0.01	0.03	0.04	0.04*
Total employment ('000)	17	71	82	82***

Note: * Difference in growth between the scenario and the baseline over the period 2020-30, expressed in percentage points. ** Aggregated difference between the scenario and the baseline over the period; GDP values are discounted at 5% per year to make the € values comparable over time. *** Additional employment by 2030 compared to baseline.

Source: Authors' calculation based on E3ME model.

The last column in Table 35 shows the accumulated effect over the period of the EU-level common action compared to the baseline. Over the period 2020-30, policy package 1 will increase growth in EU GDP by 0.06 percentage points over the baseline (an additional €47 billion over the 10 years). The impact of policy package 2 is lower, producing a cumulative GDP impact of €29 billion. The combined effect of these two policies is 0.11 percentage points more GDP growth than in the absence of EU-level common action (€76.8 billion over the period 2020-30). By 2030, the two policy packages will create 82 000 new jobs compared to the baseline.

Table 36: Direct and indirect effects of policies (€ million)**

	2020-2025	2020-2030
Policy package 1		
Direct import effects	13 109	26 277
Net costs*	-3 339	1 457
Consumption growth	3 250	8 603
Legal growth (investment)	1 668	-725
TOTAL DIRECT IMPACT	14 687	35 612
TOTAL INDIRECT IMPACT	6 419	12 018
TOTAL IMPACT	21 105	47 630

Multiplier	1.44	1.34
Policy package 2		
Consumption growth	6 965	19 120
Net costs*	-2 710	-6 130
Government expenditure	3	7
TOTAL DIRECT IMPACT	4 258	12 996
TOTAL INDIRECT IMPACT	5 382	16 166
TOTAL IMPACT	9 640	29 162
Multiplier	2.26	2.24
Combined policy packages		
Direct import effects	13 109	26 277
Consumption growth	10 214	27 723
Net costs*	-6 050	-4 673
Legal growth (investment)	1,668	-725
Government expenditure	3	7
TOTAL DIRECT IMPACT	18 945	48 608
TOTAL INDIRECT IMPACT	11 807	28 178
TOTAL IMPACT	30 752	76 786
Multiplier	1.62	1.58

Note: * Net costs are the difference between cost savings and cost of compliance. ** 2010 prices, values discounted at 5% per year to make the impacts comparable over time.

Source: Authors' calculation based on E3ME model.

Table 36 compares the total impact and the direct impact of the policy implemented in a uniform way across the EU. The direct impacts are those that were used as assumptions for the macroeconomic modelling.²⁹⁵ The overall impact on the economy is limited because the direct impacts (costs and benefits)²⁹⁶ that were used as model inputs are themselves limited (about 0.04% of GDP in policy package 1 and about 0.02% of GDP in policy package 2). Moreover, some of the effects are displacement activities, for example consumption moves from traditional sources to online consumption, increasing online consumption but not increasing overall consumption. In this case there is no direct macroeconomic boost; the impact comes through differences in the supply chains of the respective service providers. The policy has the effect of increasing EU internal trade. However, this does not necessarily result in higher added value for all Member States. For example, a Member State that is net exporter will benefit while one that is net importer will lose. In policy package 1, the reduction in imports provides direct increase of GDP. However, this reduction in imports produces less indirect and induced effects when compared to benefits that directly affect EU consumption, government spending and investment. This explains why the multipliers are lower in policy package 1 than in policy package 2.

²⁹⁵ See Chapter 4.1.2.

²⁹⁶ They do not include all the impacts mentioned in Table 25 and Table 27.

Overall, for the policy packages assessed at macroeconomic level, the relative size of GDP impacts reflects the relative size of the direct impacts. Due to data availability and methodological approach, explained in the macroeconomic analysis, some direct economic impacts were considered as inputs for the macroeconomic model. However, there are other impacts that might increase the overall economic impact. Therefore, the above estimation of the macroeconomic impact should be considered a lower bound of the overall impact on the economy.

6 Conclusions

Many challenges still prevent EU citizens and businesses leveraging the potential of digital services

The EU has been able to reap some benefits of the digitisation of social and economic relationships. Both citizens and companies are increasingly leveraging the digital economy. The description of the digital markets in the EU showed their positive evolution in recent years, and their potential for growth. However, many challenges still affect the free movement of digital services across the EU, hindering the full realisation of these potential benefits. Some of these challenges have been addressed by specific pieces of legislation, but others remain unresolved. The latter include the limited and uneven protection of digital service users due to uncertainty and fragmentation of the internal digital market and increasing dispersion of legal provisions in Member States. The growing trend towards the provision of digital services by means of online platforms, which leverage network effects and large quantities of data collected from their users to gain strong market power, also represents a challenge for ensuring a level playing field where all digital ecosystem agents, not only digital platforms, can compete on equal terms, thus having the same opportunities to grow. The protection of citizens' rights when using digital services (both their rights as consumers and their fundamental rights) is the last main challenge that current regulation has not properly addressed yet. The absence of effective enforcement mechanisms aggravates the negative consequences of these challenges.

The sectoral analysis showed how these three main problems materialise in each digital market and what their drivers are. Table 37 summarises all these problems and their associated drivers.

Table 37: Summary of problems and drivers

Problem	Drivers
Limited and uneven protection of digital service users (businesses, particularly SMEs, and citizens)	<ul style="list-style-type: none"> • Uncertainty: lack of common and clear definitions of digital services; unclear information on obligations for providers (service terms and conditions, knowledge of business customers); unclear transparency obligations regarding commercial information; lack of transparency of algorithms; absence of clear mechanisms to remove unsafe/counterfeit goods and illegal content. • Fragmentation: differences in information obligations for providers (service terms and conditions, knowledge of business customers); differences in transparency obligations regarding commercial information; lack of alignment of accountability mechanisms; absence of clear mechanisms to remove unsafe/counterfeit goods and illegal content. • Weak enforcement: lack of accountability of third-country providers; absence of effective enforcement mechanisms; absence of clear mechanisms to remove unsafe/counterfeit goods and illegal content.
Current market power of online platforms is generating asymmetries and distorting competition	<ul style="list-style-type: none"> • Lack of common and clear definitions of digital services. • Different (or even lack of) transparency obligations. • Lack of transparency of algorithms. • Lack of interoperability between platforms. • Lack of alignment of accountability mechanisms.

	<ul style="list-style-type: none"> • Unbalanced bargaining power between platforms and business partners. • Absence of enforcement mechanisms.
New and increased risks derived from the use of digital services threaten citizens' rights and freedoms	<ul style="list-style-type: none"> • Lack of common and clear definitions of digital services. • Unclear terms and conditions of services. • Lack of clear transparency obligations regarding content management. • Lack of transparency of algorithms. • Lack of alignment of accountability mechanisms. • Lack of alignment in national approaches to harmful content. • Absence of enforcement mechanisms.

Source: Authors' own elaboration.

Some drivers are common to all problems (for instance, the lack of common and clear definitions of digital services, the lack of transparency of algorithms or the absence of enforcement mechanisms), so any regulatory intervention to address them will contribute to the overall improvement of digital service provision across the EU.

Enabler services of the Digital Single Market can benefit from removing current obstacles

Sectoral analysis has also allowed identification of the digital activities and technologies with greatest impact on the expected evolution of the Digital Single Market: e-commerce, advertising and AI.

e-Commerce is the digital sector that can most benefit from removal of the aforementioned problems. Improving consumers' trust when selling online might notably help to bridge the growing gap between domestic and cross-border e-commerce.

Advertising is the main source of revenue for many business models built around digital services, particularly search engines and social networks. The ongoing debate about the necessary balance between effectiveness of advertising and the level of intrusiveness that must be allowed should guide potential legal provisions addressing this issue.

The direct economic contribution of AI, in terms of revenue, can be considered small compared to other digital markets. However, the enormous influence that AI algorithms exert on every aspect of citizens' lives (from obtaining a loan to being recruited in a selection process) goes beyond economic implications and should be considered when regulating this phenomenon.

Diverse policy options are proposed to tackle existing problems

The EU aims to undertake a thorough review of the current legal framework of digital services, the ECD being the most relevant, as the evolution of these services has been so rapid and profound in recent years. The new regulatory framework, named the 'Digital Services Act Package', implies the introduction of several policy options at the EU level. In this research paper, these options have been grouped into four policy packages, namely: enhanced consumer protection and common e-commerce rules; a framework for content management and curation that guarantees the protection of rights and freedoms; specific regulation to ensure fair competition in online platform ecosystems; cross-cutting policies to ensure enforcement and guarantee clarity. All policy packages have been assessed quantitatively and qualitatively.

Macroeconomic assessment forecasts positive impact of policy options on the EU economy

The two first policy packages are modelled within the E3ME macro econometric model to quantify the wider spill-over effects on the EU27 economies of an EU common action compared to a baseline scenario.

The first policy package, which involves enhanced consumer protection and common-commerce rules, has an additional initial cost for compliance with the new rules for e-commerce providers, an increase in consumer spending on e-commerce and cost savings for both consumers and e-commerce providers. At the beginning of the period 2021-24, the investment costs might outweigh the benefits in terms of cost savings, while after 2025, the benefits are dominant. The policy package also boosts consumer spending on e-commerce, both through increasing demand for online goods/services and by consumption switching from traditional commerce models. The latter will not result in any benefit compared with the current situation from a macroeconomic perspective. The third impact of the policy package stimulates more firms to enter the e-commerce market.

The first package could increase EU GDP by 0.05 % over the baseline by 2030. The impact on Member States depend primarily on the structure of their economy and the share of e-commerce presence, both at the EU level and in their domestic markets. In terms of sectors, wholesale, retail and manufacturing benefit most.

The second policy package, which creates a framework for content management and curation that guarantees the protection of rights and freedoms, is expected to lead the switch from consuming illegal to legal digital content, as well as an annual cost for firms of notice-and-action compliance and its respective reporting to the public authorities. The package could increase EU GDP by 0.04 % over the baseline by 2030. The impact on Member States also depend on the structure of the economy and the share of their digital markets. In terms of sectors, the benefits seen on digital entertainment goods within the recreational sector category is driven by the redirection of spending from illegal to legal consumption.

The larger impact of the first policy package is due to it covering more of the economy and that the relative scale of cost/benefit on any one firm or individual is smaller/larger, respectively. These results should be considered as the lower bound of economic impacts, given the conservative inputs used in the macroeconomic assessment, and that the policies are expected to have some other impacts that have could not quantified in the modelling.

Common regulation at the EU level could bring more added value

It should be noted that one of the main goals of the DSA is to update a legal framework that has shown limitations. One of the main drivers of the existing problems is the current fragmentation of the regulatory framework related to the provision of digital services. These services are cross-border by nature, and EU citizens and businesses might not be fully leveraging their potential due to the lack of a true single market. In this sense, it is important to consider that some of the policies proposed imply a greater coordination and homogenisation. This in turn demonstrates the need for greater alignment at the EU level. In general, the characteristics of the digital services within the scope of the DSA proposals suggest that there are important advantages of a supranational approach.

The analysis of the European Added Value of the different policy packages considered has shown that a common action to tackle the current issues on the provision of digital services at the EU level could yield more benefits for EU citizens and businesses than minimum coordination at the EU level complemented by national regulations. However, common EU rules might not be, in some cases, the best option to comply with the principle of subsidiarity. In addition, political consensus on

sensitive policy actions included in the packages such as the definition of harmful content or the implementation of enforcement mechanisms could be low.

If the first policy package (enhanced consumer protection and common e-commerce rules) were to be addressed following common actions at the EU level, the direct economic benefits, compared to the baseline, could reach between €25.1 billion and €74.3 billion annually, while the one-off costs would be €8.1 billion. If minimum coordination at the EU level complemented by national regulations is adopted, economic benefits could be between €20.8 billion and €60.4 billion per year, with one-off costs of €23.6 billion. From a macroeconomic perspective, it is expected that the economic impacts of an EU-level common action for this policy package could add €47 billion to EU GDP over the period 2020-30 and 40 000 new jobs could be created by 2030.

The second policy package (creation of a framework for content management and curation that guarantees the protection of rights and freedoms) is expected to yield lower economic benefits than the first policy package. Direct economic benefits of a common action could exceed to those reached by adopting national regulations by €3.1 billion. At macroeconomic level, an EU-level common action could add €29 billion to EU GDP over the period 2020-2030 and 43 000 new jobs could be created by 2030.

As stated in the introduction of Chapter 5, the policy packages are not mutually exclusive. If both policy packages were implemented in a common way in the EU, their combined effects could add around €76.8 billion to EU GDP over the period 2020-2030 and create 82 000 new jobs by 2030. As few direct economic impacts have been considered in the macroeconomic analysis, this estimation should be considered as a lower bound of the overall impact on the EU economy.

Although the impacts of the other two policy packages (specific regulation to ensure fair competition in online platform ecosystems and cross-cutting policies to ensure enforcement and guarantee clarity) have not been quantitatively assessed, it is expected that both contribute to the implementation of the Digital Single Market, boost innovation and provide SMEs with better opportunities to grow.

Table 38 provides an overview, based on qualitative and quantitative criteria, of the European Added Value of the four policy packages in order to facilitate their comparison.

Table 38: EAVA of the four policy packages

Assessment criteria	Policy options											
	Enhanced consumer protection and common e-commerce rules			Creating a framework for content management and curation that guarantees the protection of rights and freedoms			Specific regulation to ensure fair competition in online platform ecosystems			Cross-cutting policies to ensure enforcement and guarantee clarity		
	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action	Baseline scenario	National approach	EU common action
Effectiveness and sustainability	---	-	++	---	-	+++	-	-	+	-	++	+++
Innovation	-	-	+++	-	-	+	-	-	++	-	+	++
Subsidiarity and proportionality	-	++	++	++	++	-	+	+	++	++	+++	+
Political feasibility	+	+++	+++	-	-	--	-	+	+	+	++	+
Cost and benefits	N/A	Costs: €23.6 billion (one-off cost) Benefits: €20.8 billion-€60.4 billion per year	Costs: €8.1 billion (one-off cost) Benefits: €25.1 billion-€74.3 billion per year	N/A	Costs: at least €590 million per year Benefits: €37.5 billion-44.5 billion (one-off benefit)	Costs: €590 million per year Benefits: €3.1 billion per year + one-off benefit of €37.5 billion-€44.5 billion	N/A	-	++	N/A	-	++
Economic growth and job creation	N/A	N/A	€47 billion (2020-2030) 40 000 new jobs by 2030 (over baseline)	N/A	N/A	€29 billion (2020-2030) 43 000 new jobs by 2030 (over baseline)	N/A	N/A	++	N/A	N/A	++

Source: Authors' own estimates.

Annex 1. A short description of E3ME

This annex describes the E3ME model. The first section provides a brief overview of the theory behind the model and the basic structure of the model. The second section discusses how the E3ME model differs from other common modelling approaches. The third section describes E3ME's economic model. The text in this Annex draws on more detailed descriptions already published by Cambridge Econometrics.²⁹⁷

Overview of the E3ME model

The theoretical background

Economic activity undertaken by persons, households, firms and other groups in society has effects on other groups after a time lag. These effects, both beneficial and damaging, accumulate in economic and physical stocks. The effects are transmitted through the environment, through the economy and the price and money system (via the markets for labour and commodities), and through the global transport and information networks.

The markets transmit effects in three main ways: through the level of activity creating demand for inputs of materials, fuels and labour; through wages and prices affecting incomes; and through incomes leading to further demands for goods and services. The economic and energy systems have the following characteristics:

- economies and diseconomies of scale in both production and consumption
- markets with different degrees of competition
- the prevalence of institutional behaviour whose aim may be maximisation, but may also be the satisfaction of more restricted objectives
- rapid and uneven changes in technology and consumer preferences

An energy-environment-economy (E3) model capable of representing these features must therefore be flexible, capable of embodying a variety of behaviours and of simulating a dynamic system.

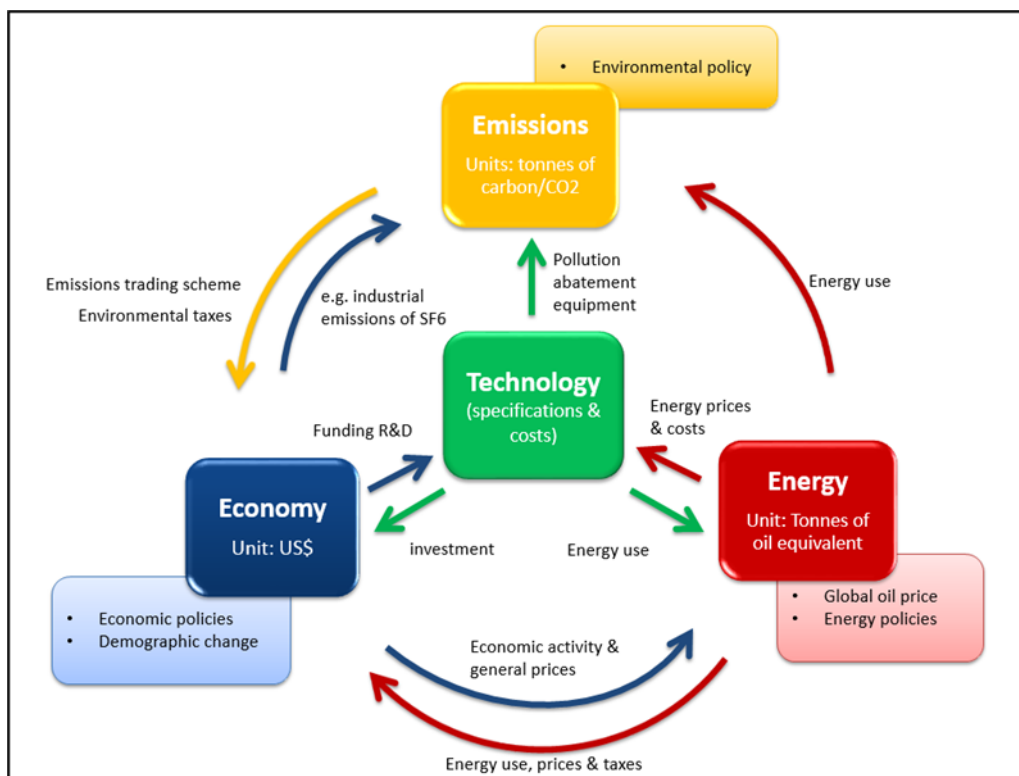
Structure of the E3ME model

E3ME is a macroeconomic model of the world's economic and energy systems and the environment that is developed and maintained by Cambridge Econometrics in the UK. E3ME was originally developed through the European Commission's research framework programmes and is now widely used in Europe and beyond for policy assessment, for forecasting and for research purposes.

The E3ME model is well suited to analysing the linkages between the economic and energy systems, with links to environmental emissions. Figure 32 (below) shows how the three main components (modules) of the model - energy, environment and economy - fit together. Each component is shown in its own box. Each data set has been constructed by statistical offices to conform with accounting conventions. Exogenous factors coming from outside the modelling framework are shown on the outside edge of the chart as inputs into each component.

²⁹⁷ Cambridge Econometrics (2019). [E3ME Technical Manual v6.1](#).

Figure 32: The main modules in E3ME



Source: Cambridge Econometrics.

Key dimensions of E3ME

The main dimensions of E3ME are:

- 61 regions – all major and G20 economies, the EU27 and candidate countries plus other countries' economies grouped
- 43 industry sectors, based on standard international classifications
- 28 categories of household expenditure
- 22 different users of 12 different fuel types
- 14 types of air-borne emission (where data are available) including the six greenhouse gases monitored under the Kyoto protocol

The econometric specification of E3ME gives the model a strong empirical grounding. E3ME uses a system of error correction, allowing short-term dynamic (or transition) outcomes, moving towards a long-term trend. The dynamic specification is important when considering short and medium-term analysis (e.g. up to 2020) and rebound effects, which are included as standard in the model's results.

Further information

Further information about E3ME is available in the model manual, which is published on the model website www.e3me.com.

E3ME compared to other macroeconomic models

Comparing E3ME to Computable General Equilibrium (CGE) models

E3ME is often compared to Computable General Equilibrium (CGE) models. The CGE model has become the standard tool for long-term macroeconomic and energy-environment-economy (E3) analysis. CGE models are used all over the world; notable examples include GTAP,²⁹⁸ the Monash model²⁹⁹ and GEM-E3.³⁰⁰ Many of these models are based on the GTAP database that is maintained by Purdue University in the US.

In many ways, the modelling approaches in CGE models and E3ME are similar; they are used to answer similar questions and use similar inputs and outputs. However, underlying this there are important theoretical differences between the modelling approaches, and it is important to be aware of this when interpreting model results.

The CGE model favours fixing behaviour in line with economic theory. In a typical CGE framework, optimal behaviour is assumed, output is determined by supply-side constraints and prices adjust fully so that all the available capacity is used. CGE models typically assume constant returns to scale; perfect competition in all markets; maximisation of social welfare measured by total discounted private consumption; no involuntary unemployment; and exogenous technical progress following a constant time trend.³⁰¹

In contrast, econometric models like E3ME interrogate historical data sets to try to determine behavioural factors on an empirical basis and do not assume optimal behaviour. In E3ME, the determination of output comes from a post-Keynesian framework and it is possible to have spare capacity. The E3ME model is demand-driven, with the assumption that supply adjusts to meet demand (subject to any constraints), but at a level that is likely to be below maximum capacity. Unlike CGE models, E3ME does not assume that prices always adjust to market clearing levels.

The treatment of the financial sector in E3ME is also very different to that in CGE models. E3ME does not assume that there is a fixed stock of money but instead allows for the potential of endogenous money, i.e. banks increasing lending for investment, which in turn stimulates demand. This is broadly consistent with how the financial system works in reality.³⁰²

The differences described above have important practical implications for scenario analysis. The assumptions of optimisation in CGE models mean that all resources are fully utilised, and it is not possible to increase output and employment by adding regulation. E3ME, on the other hand, allows for the possibility of unused capital and labour resources that may be utilised under the right policy conditions, making it possible (although certainly not guaranteed) that additional regulation could lead to increases in investment, output and employment. The range of policy options also increases

²⁹⁸ Hertel T. (1999), *Global Trade Analysis: Modeling and Applications*, Cambridge University Press.

²⁹⁹ Dixon P. B., Rimmer M. T. (2002), *Dynamic, General Equilibrium Modelling for Forecasting and Policy: a Practical Guide and Documentation of MONASH*.

³⁰⁰ Capros P., Van Regemorter D., Paroussos L., Karkatsoulis P. (2012), *The GEM-E3 model*, IPTS Scientific and Technical report.

³⁰¹ For a more detailed discussion see Barker, T. S. (1998), *Large-scale energy-environment-economy modelling of the European Union*, in Iain Begg and Brian Henry (eds), *Applied Economics and Public Policy*, Cambridge University Press.

³⁰² For a description see McLeay M., Radia A., Thomas R. (2014), *Money creation in the modern economy*. Bank of England Quarterly Bulletin, Q1, 14–27. For a wider discussion see Pollitt H., Mercure J. F. (2017), *The role of money and the financial sector in energy-economy models used for assessing climate and energy policy*, *Climate Policy*, 18:2, 184–197.

once assumptions about optimal behaviour (e.g. profit and utility maximising, perfect competition or fully rational behaviour) are dropped.

Many of the assumptions that underpin CGE (and DSGE) models have been increasingly questioned as to whether they provide an adequate representation of complex real-world behaviour. Examples include perfect competition, perfect knowledge and foresight, and optimal rational behaviour and expectations. Some CGE models have been adapted to relax certain assumptions but the underlying philosophy has not changed.

Comparing E3ME to econometric forecasting models

E3ME is sometimes also compared to short-term econometric forecasting models. These models are usually used for short-term forecasting exercises, often with a quarterly or even monthly resolution, and are used to describe short and medium-term economic consequences of policies with a limited treatment of longer-term effects. This restricts their ability to analyse long-term policies and they often lack a detailed sectoral disaggregation.

E3ME, on the other hand, combines the features of an annual short- and medium-term sectoral model estimated by formal econometric methods, providing analysis of the movement of the long-term outcomes for key E3 indicators in response to policy changes. Economic theory, for example theories of endogenous growth, informs the specification of the long-term equations and hence properties of the model; dynamic equations which embody these long-term properties are estimated by econometric methods to allow the model to provide forecasts. The method utilises developments in time-series econometrics, with the specification of dynamic relationships in terms of error correction models (ECM) which allow dynamic convergence to a long-term outcome.

Comparative advantages of E3ME

To summarise, compared to the other macroeconomic models in operation currently across the world (both CGE and otherwise), E3ME has advantages in the following four important areas:

Geographical coverage

The current version of E3ME provides global coverage, with explicit representation of each Member State in the European Union and explicit coverage of the world's major economies.

Sectoral disaggregation

The detailed nature of the model allows the representation of fairly complex scenarios, especially those that are differentiated according to sector and to country. Similarly, the impact of any policy measure can be represented in a detailed way, for example showing the winners and losers from a particular policy.

Econometric pedigree

The econometric and empirical grounding of the model makes it better able to represent performance in the short to medium terms, as well as providing long-term assessment. It also means that the model is not reliant on the rigid assumptions common to other modelling approaches.

E3 linkages

E3ME is a hybrid model. A non-linear interaction (two-way feedback) between the economy, energy demand/supply, material consumption and environmental emissions is an undoubted advantage over models that may either ignore the interaction completely or only assume a one-way causation.

E3ME's economic model

The economic structure of E3ME is based on the system of national accounts, with further linkages to energy demand and environmental emissions. The labour market is also covered in detail, including both voluntary and involuntary unemployment. In total, there are 33 sets of econometrically estimated equations, also including the components of GDP (consumption, investment, international trade), prices, energy demand and materials demand. Each equation set is disaggregated by country and by sector.

E3ME's historical database covers the period 1970-2016 and the model projects forward annually to 2050. The main data sources for European countries are Eurostat and the IEA, supplemented by the OECD's STAN database and other sources where appropriate. For regions outside Europe, additional sources for data include the UN, OECD, World Bank, IMF, ILO and national statistics. Gaps in the data are estimated using customised software algorithms.

Economic interdependence

Output and employment in E3ME are determined by levels of demand, unless there are constraints on available supply. This results in four loops or circuits of economic interdependence, which are described below.

The full set of loops comprises:

- Interdependency between sectors: If one sector increases output it will buy more inputs from its suppliers who will in turn purchase from their own suppliers. This is similar to a Type I multiplier.
- The income loop: If a sector increases output it may also increase employment, leading to higher incomes and additional consumer spending. This in turn feeds back into the economy, as given by a Type II multiplier.
- The investment loop: When firms increase output (and expect higher levels of future output) they may also increase production capacity by investing. This creates demand for the production of the sectors that produce investment goods (e.g. construction, engineering) and their supply chains.
- The trade loop: Some of the increase in demand described above will be met by imported goods and services. This leads to higher demand and production levels in other countries. Hence there is also a loop between countries.

Output and determination of supply

Total product output, in gross terms, is determined by summing intermediate demand and the components of final demand described above. This gives a measure of total demand for domestic production.

Subject to certain constraints, domestic supply is assumed to increase to match demand. The most obvious constraint is the labour market (see below). However, the model's 'normal output' equations provide an implicit measure of capacity, for example leading to higher prices and rates of import substitution when production levels exceed available capacity.

The labour market and incomes

Treatment of the labour market is one area that distinguishes E3ME from other macroeconomic models. E3ME includes econometric equation sets for employment (as a headcount), average working hours, wage rates and participation rates. The first three of these are disaggregated by economic sector while participation rates are disaggregated by gender and five-year age band.

The labour force is determined by multiplying labour market participation rates by population. Unemployment (including both voluntary and involuntary unemployment) is determined by taking the difference between the labour force and employment.

Due to limitations in available time-series data, E3ME adopts a representative household for each region. Household income is determined as:

Income = Wages – Taxes + Benefits + Other income

Household income, once converted to real terms, is an important component in the model's consumption equations, with a one-to-one relationship assumed in the long run.

Price formation

For each real variable, there is an associated price, which influences quantities consumed. Aside from wages, there are three econometric price equations in the model: domestic production prices; import prices; and export prices. These are influenced by unit costs (derived by summing wage costs, material costs and taxes), competing prices and technology. Each one is estimated at the sectoral level.

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Digital services act: Adapting commercial and civil law rules for commercial entities operating online: Legal assessment

Research paper

The study reflects on the future legal regulation of digital services in the digital single market and discusses policy options for a possible future EU Digital Services Act. It is focused on an assessment of European Added Value. The paper covers topics currently not regulated on the European level such as curation of content.

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ADMINISTRATORS RESPONSIBLE

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Executive summary

Platforms have become a pivotal point in the digital economy. When the EU established the initial provisions for the emerging digital market, such as the E-Commerce-Directive in 2000, most business models of today were still unknown, in particular platforms were not curating content (organizing and promoting content of third-parties (users)) or smart contracts. The use of social media, online platforms and marketplaces is now commonplace at all levels, be it private or business, this raises a number of new legal questions. It is now becoming increasingly apparent that many of the rules in force do not provide a suitable solution to the problems that these new phenomena bring with them on several levels. Sector-specific regulations such as the Audiovisual Media Services Directive as well as not platform-specific regulations such as the E-Commerce Directive cannot satisfactorily meet the differentiated requirements that regulation of the various online platforms entails. New business practices, the concentration of market power on a few corporations, the emergence of new players such as « prosumers » (user which create their own content based upon content of others) have not been anticipated at the beginning of the digital single market ; hence, many of the earlier provisions have not aimed at coping with these new features and phenomena system. In the recent past, attempts have been made at national and EU level to cope with the new phenomena, but there is still a lack of uniform, comprehensive provisions.

Problems refer to illegal or harmful content on platforms and different national approaches dealing with these problems. Given the scattered landscape of regulations and the resulting legal insecurities for a digital single market, a recommendable solution could be EU-wide harmonized rules and standards for content control.

Closely connected to the control of content is the use of algorithms which are also used for the curation of content. Up to now, there is only very limited regulation, that is lacking a broad and clear framework. To remedy these issues, a risk-based approach of categorizing and regulating algorithms is proposed. Such an approach would foster legal certainty and set clear rules to enhance innovation while guaranteeing a high level of protection and supervision.

Moreover, notice (and take-down) procedures for online platforms differ widely across the EU. Hence, different frameworks for notice procedures are discussed. Since differing national rules result in a fragmented legal framework, EU-harmonized minimum rules are recommended. To ensure further EU-wide harmonization regarding the application of those procedures by courts and/or authorities, those rules should be supplemented by European guidelines.

Further, regarding the managing of content, a large problem for consumers has been the extensive duration and high cost that litigation of online complaints may require in court. Since this may deter users from accessing their rights, options for dispute settlements based on the platforms with panels consisting external experts are proposed.

One essential part of income for platforms refers to personal data used for personalized advertisement. While in this area the GDPR applies, the crucial provisions for personalized advertisement remain unclear in scope. Options for more legal clarity are therefore proposed.

Concerning the enforcement of platform regulation, an EU-wide harmonized legal framework is still lacking. If provisions concerning platforms (curation of content) should be introduced, the implementation of a European agency, as it has been propounded in the report, would help to avoid different levels of enforcement in member states.

In addition, transparency rules for digital platforms are suggested to ease enforcement and set incentives for compliance.

Moreover, concerning the phenomenon of smart contracts, regulations should be introduced that deal with problems of circumventing consumer protection provisions such as the right to withdrawal or of undermining foreclosure protection provisions. For instance, technical measures in order to stop the enforcement, such as so-called reverse transaction, could be mandatory (as part of a corresponding EU regulation/directive).

Finally, in business-to-business relations, the applicable contract law can be chosen by the parties which can prevent the application of EU-law when large platforms dictate contract terms and conditions to their business partners. Thus, in particular small and medium enterprises may lose the protection level envisaged by EU provisions. Hence, conflict-of-law rules should be implemented in the digital service act that guarantee the application of EU law on the level of Platform-to-business relations, at least for small and medium enterprises that lack the market power to deal with dominant platforms, for instance by rendering EU provisions to be mandatory so they apply, even when a different law is chosen by the parties.

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List of Abbreviations

ADR	Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Alternative Dispute Resolution)
Avia act	La loi contre les contenus haineux sur Internet (dite « loi Avia »)
AVMD	Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)
BGH	German Federal Court
B2B	Business-to-Business
CDEJ	Centre for Data Ethics and Innovation
cf.	confer
CJEU	Court of Justice of the European Union
CMA	Competition and Markets Authority (UK)
CMPF	Centre for Media Pluralism and Media Freedom
CNIL	Commission Nationale de l'Informatique et des Libertés (FR)
DSM-D	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Digital Single Market Directive)
EAVA	European Added Value Assessment
ECD	Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce-Directive)
ECFR	The Charter of Fundamental Rights of the European Union
EMAS	EU Eco-Management and Audit Scheme
ESMA	European Securities and Markets Authority
Et al.	and others
Etc.	et cetera
EU	European Union
e.g.	exempli gratia, for example
fn.	footnote
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation)
ICO	Information Commissioner's Office (UK)

InfoSoc-Directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive)
JURI	European Parliament Committee on Legal Affairs
J. Disp. Resol.	Journal of Dispute Resolution
LG	District Court
MIFID II	Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
ODR	Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Online Dispute Regulation)
OECD	Organisation for Economic Cooperation and Development
Ofcom	Office of Communications (UK)
OJ	Official Journal of the European Union
OLG	Higher Regional Court
Paras.	paragraphs
pp.	pages
p.	page
P2B	platform-to-Business
P2B Regulation	Regulation (EU) No 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.
P2P	platform-to-platform
Rome I	Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
SME	small and medium-sized enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
€	Euro

1. Introduction and Scope of the Study

Since the adoption of the E-Commerce-Directive¹ (as well as other internet-related directives such as the InfoSoc-Directive),² several phenomena have developed over time which were not known as such at the time of the preparation of the E-Commerce-Directive, such as social networks, platforms like Airbnb, Uber, or App Stores like iTunes or Google's Play Store, marketplaces like Amazon or eBay, etc. In general, all these internet intermediaries can certainly be categorized in the three-folded approach of the E-Commerce-Directive, being access provider (Art. 12 ECD), host providers (Art. 14 ECD)³ or content providers, the last one being regulated by member states law.

However, such a categorization would remain superficial and would neither respect the different grades of control exercised by platforms nor the different business models.⁴ Platforms do not act as mere brokers or intermediaries anymore, but rather exercise (to some extent) control concerning offers of third parties (landlords, drivers, traders, etc.), even prescribing contract terms and conditions. As electronic platforms are qualified as host providers, they benefit grosso modo from the safe harbour privileges laid down in Art. 14 ECD. Nevertheless, platforms differ substantially from one another; hence, applying the same rules to all of them might not be appropriate. In light of the different types of platforms (or host providers) the general one-size-fits-all solution of Art. 14 ECD does not fit anymore, even more so given the fact that these platforms generate a (sometimes huge) profit out of their business while declining any responsibility for third party offers. Compared to other, already regulated platforms such as in financial markets (like multilateral trading facilities under the MIFID II⁵), "normal" platforms are not subject to specific duties; in contrast, they are exempted from general monitoring obligations without any regard to their specific business model. All these platforms are typically active on a European scale; purely national platforms are seldom.

Thus, a mere analysis of liability privileges would be too short-sighted as phenomena like social networks or platforms curating content (in the sense that content uploaded by their users is being sorted, monitored, and pushed to other users) cannot be coped with by using the simple safe harbour privilege of the ECD. In particular, the impact on fundamental freedoms of users like freedom of speech or access to information and the role of the platforms as gatekeepers would be ignored.

Moreover, contractual provisions in the standard terms and conditions of providers (enabling them to manage the user's content) are not dealt with by the ECD rather than other regulations such as the Digital Content Directive or Directive on Unfair Standard Terms and Conditions, restricted to consumer protection. Thus, the phenomenon of curation of content (or management of content)

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-Commerce-Directive), OJ L 178, pp. 1-6.

² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (Information Society Directive), OJ L 167/10, pp. 10-19.

³ We leave out Art. 13 ECD (caching) as practical applications are rare.

⁴ See also *Pieter Nooren/Nicolai van Gorp/Nico van Eijk/Ronan O Fathaigh*, Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options. (2018) *Policy & Internet*, vol. 10, no. 3, pp. 264, in particular pp 267 – 275 for a typology of platforms and business models; also for taxonomy *Teresa Rodríguez de las Heras Ballell*, The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU. (2017) 3 *The Italian Law Journal*, num. 1/3, 2017, pp. 149, 157 - 160

⁵ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, pp. 349-496.

by host providers (those who are not mere host providers but are to some extent exercising control over content) must be dealt with.

Furthermore, concerns about international private law have to be addressed, in particular the jurisdiction clauses in the relationship between (market-dominant) platforms and business. If jurisdictions of third countries could be chosen in platform-to-Business contracts (P2B-contracts), EU regulations that seek to also protect EU based enterprises may be undermined.

Other issues have to be considered as they are related to new ways of E-Commerce, such as questions of how contracts are concluded automatically, using different techniques, like the so-called smart contracts, referring to contracts that are encoded and enforced (mostly) automatically. Thus, trading can be facilitated, also using P2P-Blockchain-technology.⁶ In most cases, these contracts are not bound to certain member states but are often used for cross-border issues, not limited to B2B-deals (e.g. car loans which are combined with smart execution, such as blocking the car if the interest rate is not being paid). They raise substantial questions from the legal perspective, in particular their impact on foreclosure, standard terms and conditions, and consumer protection.

The research paper will not deal with non-commercial entities – according to the Terms of Reference of the European Parliamentary Research Service. However, we should bear in mind that sometimes the dividing lines between commercial and non-commercial may be blurred, for instance, concerning so-called “influencers” on social networks or other alike platforms.

Other areas such as Tax Law should, for the time being, be kept out of the scope as they are related to more specific issues. Concerning data roaming issues, they need to be kept out of the study as these questions are highly interrelated with new (intellectual) property rights, antitrust law, and fundamental issues regarding how markets should be kept open. Moreover, these topics are already being discussed at the EU-Level under the flag of data ownership etc.; several studies have been already presented.⁷

⁶ For general reference see *Olaf Meyer*, Stopping the Unstoppable: Termination and Unwinding of Smart Contracts, *Journal of European Consumer and Market Law* 2020, 17; *Riccardo De Caria*, The Legal Meaning of Smart Contracts, *European Review of Private Law* 26 (2018), 731; *Larry A. Dimatteo, Cristina Poncibó*, Quandary of Smart Contracts and Remedies: The Role of Contract Law and Self-Help Remedies, *European Review of Private Law* 26 (2018), 805; *Maren K. Woebeking*, The Impact of Smart Contracts on Traditional Concepts of Contract Law, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2019), 105 para 1.

⁷ Cf. JRC Technical Report, JRC Digital Economy Working Paper 2017-01 The economics of ownership, access and trade in digital data <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc104756.pdf>; Study on emerging issues of data ownership, interoperability, (re-) usability and access to data, and liability, 2016, <https://ec.europa.eu/digital-single-market/en/news/study-emerging-issues-data-ownership-interoperability-re-usability-and-access-data-and>.

2. Focus and Methodology

2.1. Methodology

As a first step, the relevant problems need to be identified (given the limited scope of the study), followed by a short overview of relevant European legislation, and (as far as possible) identifying different relevant national provisions.

In a second step, policy options should be discussed together, then in a third step the European added value of the different approaches. Differences between member states or singular approaches (such as the German Network Enforcement Act) may point to a European Added Value of directives and/or regulations on a European level to create a level playing field.

2.2. Identifying Possible Policy Solutions and Typology

2.2.1. Principles

Concerning the identification of possible policy solutions, the study discusses different approaches and their immediate effects.

Solutions should not be pinned to an only one-size-fits-all approach but should discuss different options, including a regulatory mix of public law (with supervising authorities) and civil law.⁸

The enforcement aspect also has to be considered so that different civil actions (like class actions, actions of associations, etc.) have to be compared (and combined) with supervising authorities. Also, the establishment of a network of existing supervision authorities (such as data protection, financial services, audio-visual, or broadcasting controlling authorities) should be discussed.

These rules may be flanked by transparency obligations, for instance concerning social networks concerning hate speech or political advertising.

2.2.2. Typology of Policy Options

2.2.2.1. “Do Nothing” on the EU-Level (keep Member States Law)

First, one option would be not to do anything – with the effect, that no European harmonization would take place and solutions would be left to national law and national courts. Actual directives and regulations would not be changed or modified.

The deficits of such an approach are evident: different handling of the same phenomena across the EU would persist, without any chance of convergence due to the missing unification of jurisdiction by the CJEU. On the other side, local needs and peculiarities might be better respected.

2.2.2.2. Basic rules with general clauses – minimum harmonization and/or opening clauses for member states

Another option would refer to adopting European-wide basic rules, for instance concerning monitoring obligations of platforms but restrict these rules to more or less general clauses such as monitoring depending on the specific platform (trading platform, B2B-platform, social network,

⁸ See Pieter Nooren/Nicolai van Gorp/Nico van Eijk/Ronan O Fathaigh, Should We Regulate Digital Platforms? A New Framework for Evaluating Policy Options. (2018) Policy & Internet, vol. 10, no. 3, pp. 283-287; William A. Bogart, Permit But Discourage Regulating Excessive Consumption, 2011, pp. 49; Nick Malyshev, The revolution of regulatory policy in OECD countries, available at <https://www.oecd.org/gov/regulatory-policy/41882845.pdf>; Neil Gunningham/Darren Sinclair, Designing Smart Regulation, available at <https://www.oecd.org/environment/outreach/33947759.pdf>.

etc.). Moreover, such a directive and/or regulation could refrain from maximum harmonization rather than opting for a minimum harmonization, leaving it to the member states to establish stronger obligations and thus enabling chances to respect local circumstances.

Another technique would not refer to minimum harmonization rather than opening clauses for member states like the GDPR contains in data protection. Such opening clauses could even allow member states to lower the level of obligations that are enshrined in a directive and/or regulation.

The disadvantages of such an approach for a digital single market are obvious: As the experiences in the field of consumer protection have shown, a minimum harmonization does not abolish the problem of divergent legal rules in each jurisdiction; thus, barriers to entry markets of other member states persist. The same is true for opening clauses (and part of the criticism concerning the GDPR).

However, a minimum harmonization at least provides some certainty for players in the digital single market and some minimum protection, for instance for consumers. They can be assured that at least some protective rules are in place, such as withdrawal rights etc.

Finally, using a general clause may serve as an opener for the unification of jurisdiction as national courts have to defer their cases to the CJEU. Nevertheless, it may take a long time to develop rules on a more specific level by interpretation of the CJEU – as it depends on a case-by-case approach, moreover as sometimes national courts are reluctant to defer their cases to the CJEU, thus leaving players (and users) uncertain about the general red lead to follow. A good example of this ongoing long process is copyright law, here the interpretation of the notion “making available to the public”.⁹

2.2.2.3. Basic rules with general clause – fully harmonizing

A more intense form of EU harmonization refers to fully harmonizing directives or regulations without any opening clauses, again combined with general clauses, for instance introducing monitoring obligations for platforms depending upon the content they host and the likelihood of infringements.

Problems of deviation by member states would thus be solved; however, the problem of specifications on a lower level would persist as still the CJEU would have to develop interpretations for specific cases. However, the technique of using general clauses allows for more flexibility in the future, for instance modifying the interpretation of general clauses according to new technologies and/or business models.

2.2.2.4. Basic rules with general clause and self-regulation

Going beyond full harmonization with general clauses would be a model that uses self-regulation as the GDPR does in Art. 40, enabling associations to create new codes of conduct that have to be respected (to some extent) by supervising authorities.¹⁰

A huge advantage of such a model would be to use resources of professional associations in order to finetune obligations etc. Moreover, these codes can be European-wide so that no divergence of codes is at risk.

On the other side, it is not clear how and to what extent those codes are legally binding for courts – as the base of democratic legitimation of such codes often remains unclear. For instance, codes that are heavily influenced by industry or are outpaced by new developments may not be used as a base

⁹ See for example CJEU 8.0.2016 - C-160/25 GS Media BV v Sanoma Media Netherlands BV and Others.

¹⁰ However, note that the extent of how codes of conduct could bind supervising authorities is not yet clarified.

to specify general clauses (and bind supervising authorities and courts). Thus, a critical issue regarding self-regulation is to control the codes established by self-regulating associations.

2.2.2.5. Basic rules with general clause – specifications by half-binding “technical standards” and specifying catalogues

Also, going even further would be a legal regulation that still uses a general clause – but one that would be specified by a non-exhaustive catalogue in an annex allowing courts to use the annex as a guideline to which (unknown) cases may be handled in an analogous way.

To cope with all different kinds of business models and phenomena of platforms, one solution could be to refer to a gliding scale of obligations (“duties of care”), always considering the necessity of applying automated tools in order not to undermine possibilities of E-Commerce whilst safeguarding interests of third parties/contracting parties. The above-mentioned rules such as Art. 17 DSM-Directive (DSM-D) may serve as an example. The DSM-D provides for guidance to be adopted by the EU-Commission (Art. 17 (10) DSM-D) in order to specify the abstract categories enshrined in Art. 17 (1), (4) DSM-D.

Moreover, the role of “technical” standards like in the New Approach of the EU (regarding product safety) or of regulated self-regulations (which is not the same as codes of conduct or pure self-regulations) may be taken into account whilst considering legal concepts – including tools like seals (as used for instance by the EMAS¹¹).

These EU-wide standards specify the general principles laid down in directives (or regulations), but allow for deviation if the producer can prove that his solution is adequate to the one provided by the technical standard. If not, the producer has to comply with the standard. Thus, it is possible to break down the general rules to specific sectors and respect their specific conditions.

Likewise, such an approach could be adopted to cope with the huge variety of E-commerce-services, thus allowing new business models and technologies to evolve whilst safeguarding European-wide standards and creating legal certainty.

2.2.2.6. Specific rules

The end of the scale of regulatory approaches (in the sense of strictness) is represented by a fully harmonizing directive empowering the EU-Commission (or other bodies) to regulate details (delegated regulations etc.). The blueprint for such a strict approach is the MiFID II for financial markets, which empowers the EU commission to adopt specific rules, for instance on algorithm trading etc.¹² However, those rules are highly inflexible and need to be evaluated constantly as they do not allow for leeway for market participants to develop their specific rules.

2.3. European added value

2.3.1. The Basic definition of European added value

The guiding principle for EU regulation should always be Art. 5 (3) TEU which states that any action for which the EU does not have the absolute legal competency, shall only be applied in a subsidiary manner, meaning only in cases no national provision applies, and based on the principle of

¹¹ EU Eco-Management and Audit Scheme (EMAS).

¹² Commission Delegated Regulation (EU) 2017/584, Commission Delegated Regulation (EU) 2017/589.

proportionality. Therefore, EU-regulation in those fields should only be implemented when national rules do not suffice, and EU-wide rules have an added value.

This is stated similarly in the EU-approach for better regulation,¹³ whereby regulatory actions should only be taken where it is necessary, and when action on an EU-wide level seems mandatory. European added value is the value resulting from an EU intervention which is additional to the value that would otherwise have been created by Member State action alone.¹⁴

This value can be determined by considering various criteria, depending on the field of legislation, such as coordination gains, legal certainty, greater effectiveness, complementarities.¹⁵ Additionally, when assessing the European value of proposed legislation, there are three key criteria which are effectiveness, efficiency, and synergy.¹⁶

Effectiveness refers to the question of whether or not an EU-regulation is the only way to avoid fragmentation, create missing connections between member states and realise the cross-border potential within the EU.¹⁷

Efficiency addresses the question if a certain topic is best regulated by the EU because thereby money and resources can be pooled and used more efficiently and more general problems can be addressed easily. One branch of efficiency for example is the acknowledged principle of the cheapest-cost-avoider.¹⁸

Lastly, synergy is regarded as the matter of increasing coherence between different policies and to raise the overall standards of regulation.¹⁹

The proposed policy option shall therefore be assessed regarding their European added value.

Also, budgetary concerns must be considered.

When proposing policy options, the accompanying costs and benefits of those policies for the affected parties and stakeholders have to be taken into account. However, to be able to reliably assess the ensuing costs, the costs of no or different policies must also be evaluated.

2.3.2. Aspects of European added value

2.3.2.1. In general

On the one hand, the costs of implementing the proposed policies for the respective stakeholders must be evaluated. Those costs can be monetary, e.g. how much it costs to technically program the

¹³ European Commission, Better regulation, available at https://ec.europa.eu/commission/priorities/democratic-change/better-regulation_en.

¹⁴ Commission Staff Working Paper, SEC(2011) 867 final, p.2.

¹⁵ Commission Staff Working Paper, SEC(2011) 867 final, p.3.

¹⁶ Terms defined in Commission Staff Working Paper, SEC(2011) 867 final, p. 4.

¹⁷ Commission Staff Working Paper, SEC(2011) 867 final, p. 4.

¹⁸ Principle by *Guido Calabresi*, *The Cost of Accidents*, 1970, *Stephen G. Gilles*, *Negligence, Strict Liability, and the Cheapest Cost-Avoider*, *Virginia Law Review* 78 (1992), 1291; *Stanford Encyclopedia of Philosophy*, *The Economic Analysis of Law*, 2017, available at <https://plato.stanford.edu/entries/legal-econanalysis/>; cf. for the usage on platforms *Susana Navarro*, *Journal of European Consumer and Market Law* 2019, 34 (37); *Rolf. H. Weber*, *Liability in the Internet of Things*, *Journal of European Consumer and Market Law* 2017, 207 (211).

¹⁹ Commission Staff Working Paper, SEC(2011) 867 final, p.4.

required changes and how the policies may affect revenue or how much- existing structures have to change to match the new criteria.

On the other hand, the potential benefits need to be explored. Those benefits can be direct monetary gains for stakeholders, e.g. by increasing revenue or reducing costs. They can however also consist of better consumer protection and protection of fundamental rights.

Weighing cost and benefits with specific regards to platforms or other phenomena of E-commerce business, has to consider that platforms usually act on a European level (cross-border). Hence, the relevance of regional peculiarities – one of the strongest arguments for subsidiarity in favor of regulation by member states – is lower than for regular local business. The more international (European) business becomes and the more local (cultural) preferences are diminishing, the more the scale will be pointing to a EU-wide regulation.²⁰

2.3.2.2. In particular: Cost of legal uncertainty

One aspect that will play an important role in assessing proposed policies is the matter of legal clarity or certainty. Legal certainty refers to the status of knowing what law is applicable in a certain situation and what exactly the content of that law entails. In the cross-border context especially, legal uncertainty is a driver for increased costs, thus forming barriers to market entry. Those costs can consist of an increased need for information regarding a foreign legal system and the applicable rules as well as increased costs in (cross-border) litigation.²¹

Also, legal uncertainty can deter innovation by making it less secure to invest resources in a certain field that is potentially subject to future regulation and can also deter people from enforcing their rights by making the outcome of a legal process unclear.

On the flipside, legal uncertainty can also lead to cases in which disputes could have been settled consensually but are brought to court in the hopes of a more beneficial judgement.²²

Finally, legal uncertainty can be looked at from a socio-economic standpoint. Since it poses a risk for businesses and consumers, naturally more risk affine parties benefit. In a contractual relation or negotiation, the more risk affine party will usually be the party with more resources. Therefore, legal uncertainty disproportionally will put less wealthy people at a disadvantage. In return, legal certainty also prompts a socio-economic benefit.²³

When evaluating the costs of a proposed policy, this report will therefore also address the consequences of legal uncertainty in the respected area.

2.3.2.3. Harmonisation and functionality of the digital single market

Closely connected to legal clarity is the issue of European harmonization.

While national sovereignty should remain wherever possible, additional value can be gained from harmonizing the applicable legislative rules for players in the digital single market. While not an intrinsic value in itself, harmonization of rules in the digital single market can lead to reduced transaction costs. Many platforms and businesses are acting on a cross-national level and can

²⁰ See also *Teresa Rodríguez de las Heras Ballell*, *The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU*. (2017) 3 *The Italian Law Journal*, num. 1/3, 2017, pp. 149, 155.

²¹ *Helmut Wagner*, *Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?*, available at https://www.researchgate.net/publication/237223734_Costs_of_Legal_Uncertainty_Is_Harmonization_of_Law_a_Good_Solution1/stats.

²² *Kevin E. Davis*, *The Concept of Legal Uncertainty*, S. 31.

²³ Cf. for detailed discussion on this topic *Uri Weiss*, *The Regressive Effect of Legal Uncertainty*, *J. Disp. Resol.* (2019) available at <https://scholarship.law.missouri.edu/jdr/vol2019/iss1/13>.

therefore be subject to many different regulations. Every deviation of laws and the accompanying costs of adaptation can cause the European market to be less attractive for businesses. Furthermore, equal rules can lead to more competition among businesses and therefore increase quality and foster innovation.

Accordingly, when harmonization of rules leads to decreased costs for businesses and a strengthening of the digital single market, additional European value ensues. When evaluating the European added value of a policy proposal, the effects of harmonization will also be considered.

2.3.2.4. Consumer Protection

Another facet of European value is the increased protection of consumers in the digital single market.

While the economic benefits for businesses are an important factor when assessing legislative impact, consumer protection always has to be kept in mind as well. Consumer protection entails not only transparency for consumers, allowing them to make informed decisions in a digital environment that can become increasingly opaque. It also includes the protection to enter into agreements that disproportionately disadvantage the consumer.

Another major aspect of consumer protection is the enforcement of those given rights. Especially in a digital and international environment, enforcement of rights can often be difficult or expensive. Ensuring effective and accessible enforcement of rights and dispute settlement therefore holds an additional European value.

3. Legal issues to be studied

3.1. Impact of Fundamental Rights

Fundamental rights – of course – play an essential role in determining policy options as well as setting the framework for all kinds of legal regulation. Especially concerning platforms, freedom of speech as well as freedom of information (Art. 11 (1) ECFR (the Charter of Fundamental Rights of the European Union²⁴) are crucial in the multilateral relationship between users, recipients (of information), platform operators and potentially affected third parties. For instance, the CJEU derived from the fundamental rights of platform operators to conduct business (Art. 16 ECFR) a prohibition of general monitoring duties, here regarding the monitoring of data flow and hosted data (concerning their potential infringements of copyrights which fall under Art. 17 (2) ECFR).²⁵ Concerning the responsibility of access providers, the CJEU also maintained the importance of balancing the fundamental rights of users as well as of providers against those of third parties (once again, copyright-rightsholders).²⁶

Also – and even more evidently – freedom of speech is affected if platform operators have to block certain content like it is provided in the German Network Enforcement Act.²⁷ Vice versa, if platforms curate content in the sense of selecting and pushing content according to their own criteria (enshrined in their standard terms and conditions), they influence freedom of speech and democratic debates. The German constitutional court has already pointed out that platforms like Facebook may be treated as public space; thus, they may be subject to a direct (!) application of fundamental rights, even regarding private law.²⁸ Hence, a balance has to be struck regarding all affected fundamental rights of users, third parties, and platforms.

3.2. Content management

3.2.1. General Problem

As already indicated, today platforms (as host providers according to Art. 14 ECD) do not act as mere hosts rather than gatekeepers for a variety of functions, be it marketplaces,²⁹ social networks³⁰ or content sharing platforms.³¹ In many cases they exercise control upon user-generated or uploaded content, for instance, to ban bullying or defaming content as well as to categorize content, also to generate income by personalized advertisements or by pushing specific content to users. Thus, they are the key player in multilateral markets, establishing the rules on how to access or upload content.

²⁴ OJ C 326, 26.10.2012, p. 391.

²⁵ CJEU 16.12.2012 – C-360/10 Sabam/Netlog, CJEU 24.11.2011 – C-70/10 Sabam/Scarlet.

²⁶ CJEU 27.3.2014 – C 314/12 UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH.

²⁷ Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), available at https://www.bmji.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2.

²⁸ German Constitutional Court Decision of 22.5.2019 - 1 BvQ 42/19 Neue Juristische Wochenschrift 2019, 1935 p. 15.

²⁹ Amazon marketplace, ebay, or Alibaba (which is the dominant retail platform in China, but also serves an international market).

³⁰ Notably Facebook, Instagram, or Twitter, just to name the most prominent ones.

³¹ Such as YouTube or flickr etc.

Hence, from a legal perspective, platforms are raising two major problems which are (more or less) flip sides of the same “coin”

- on one side platform operators are in the driver’s seat when it comes to monitoring activities on their platform, in particular, to prevent illegal actions or content. To some extent, European legislation is already obliging platform operators to monitor activities on their platforms, be it in copyright (Art. 17 DSM-Directive), anti-money laundering,³² or fighting terrorism.
- on the other side users usually cannot negotiate terms and conditions under which they are entitled to upload content (right to access and upload). Moreover, in many cases the degree of discretion for platform operators to ban or block content remains unclear, for instance, general clauses in standard terms and conditions enabling platform operators to block content;³³ thus, aspects of preventing discrimination are at stake. Further, controlling of uploaded content is being carried out by automated tools and algorithms that are not transparent to users, in particular when it comes to finding out if potential acts of discrimination happened.³⁴ Finally, the enforcement of users’ rights and efficient dispute settlements are closely related to rights to access and upload as usual court procedures may often take too long and are not adjusted to digital platforms.

Furthermore, platforms often have a system in place that makes it more likely for certain content to be seen than other content (prioritisation). On many platforms, content is recommended to a user based on that user’s profile, compiled from collected data and wholly depending on the platform’s algorithm. Examples for content curation by algorithms are the recommended videos section on YouTube, the order in which products show up on amazon or posts that appear on a timeline on Facebook. Depending on how prominently the content is pushed, it is more likely to be seen and to become popular. Additionally, these concepts can lead to so-called “echo chambers of opinions”.³⁵

However, regulating algorithms involves several problems:

- on one hand, transparency is missing on how exactly a platform’s algorithm functions,

³² Directive 2015/849 (4th. Anti-money laundering directive) and Regulation 2015/847, amended by 5th. Anti-Money Laundering Directive 2019/1153.

³³ The blocking of content has been the point of contention for many court decisions, cf. OLG (Higher Regional Court) Munich, Decision from 7.1.2020 – 18 U 1491/19 paras. 65; OLG (Higher Regional Court) Munich, Decision from 7.1.2020 – 18 U 1491/19 paras. 24; OLG (Higher Regional Court) Stuttgart, Decision from 6.9.2018 – 4 W 63/18 para. 25; LG (District Court) Frankfurt, decision from 4.5.2018 – 2-03 O 182/18 paras. 32; OLG (Higher Regional Court) Karlsruhe, Decision from 28.2.2019 – 6 W 81/18 para. 20; LG (District court) Nürnberg-Fürth, Decision from 7.6.2019 – 11 O 3362/19 paras. 25; LG (District court) Bamberg, Decision from 18.10.2018 – 2 O 248/18 para. 37;

³⁴ Cf. *Mario Martini*, Fundamentals of a Regulatory System for Algorithm-based Processes, 2019, p. 8, p. 23; *Meredith Whittaker et al.*, AI Now Report 2018, pp. 18; *Christian Sandvig et al.*, Auditing Algorithms: Research Methods for Detecting Discrimination on Internet Platforms, Data and Discrimination: Converting Critical Concerns into Productive Inquiry (2014).

³⁵ See *Walter Quattrociocchi, Scala, Antonio Scala, Cass R. Sunstein*, Echo Chambers on Facebook, 2016, available at SSRN: <https://ssrn.com/abstract=2795110> or <http://dx.doi.org/10.2139/ssrn.2795110>; *Kiran Garimella et al.*, Political Discourse on Social Media: Echo Chambers, Gatekeepers, and the Price of Bipartisanship, WWW '18: Proceedings of The Web Conference 2018, 913; critical *Eytan Bakshy, Solomon Messing, Lada A. Adamic*, Exposure to ideologically diverse news and opinion on Facebook, Science Vol. 348 Issue 6239, 1130; critical towards the negative impacts R. Kelly Garrett, Social media’s contribution to political misperceptions in U.S. Presidential elections, available at <https://doi.org/10.1371/journal.pone.0213500>.

- on the other hand, the algorithm is an integral part of a platform's functionality, thus benefitting from the protection provided by the trade secret directive.³⁶

Furthermore, in light of the huge amount of content available on modern platforms, some form of content curation is needed to ensure that users can get access to the content they are interested in or that matters to them.

Within this regard, fundamental rights have a strong impact on the mentioned aspects:

- concerning monitoring obligations, platform operators are not generally obliged to supervise their platforms, as set out above (concerning relevant CJEU-decisions).³⁷ However, they may be obliged to specific monitoring obligations depending upon the importance of the public interest (for instance, anti-terrorism, as is regulated by Art. 21 anti-terrorism directives³⁸).
- regarding users' rights, freedom of expression (Art. 11 ECFR) or to conduct a business (Art. 16 ECFR) and not to be discriminated against are at stake, in particular concerning the balance with the freedom of business regarding the platform operator.
- the curation of content can also have an impact on a user's right to access information (Art. 11 ECFR) as well as direct consequences for content providers, who often are relying on their content to be seen by as many people as possible to generate revenue. Therefore, the content creators' right to conduct business can also be affected.

3.2.2. Control of content, in particular automatic (algorithm) control and Right to upload and access

3.2.2.1 Problems and existing legislation

Regarding moderation of content by platform operators, there are scarcely any specific legal provisions on the European level. Whereas the EU has enacted several specific directives or regulations aiming at fostering control of activities on platforms (such as copyright, anti-terrorism etc.), there are no provisions that assign to users' rights to upload content or have access to content on platforms. Neither the ECD nor the DSM-D provides such mandatory rights for users (even though Art. 17 (9) DSM-Directive (2019/790)³⁹ can be read as implicitly conferring rights to the user to upload non-infringing content); also, EU provisions regarding contract law such as the directive on unfair terms⁴⁰ do not refer to standard terms and conditions of platforms. Even the recently adopted

³⁶ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, p. 1–18; regarding how algorithms relate to trade secrets see *Mario Martini*, Fundamentals of a Regulatory System for Algorithm-based Processes, 2019, p. 7; *Mariateresa Maggolino*, EU Trade Secrets Law and Algorithmic Transparency, Bocconi Legal Studies Research Paper No. 3363178; *Guido Noto La Diega*, Against the Dehumanisation of Decision-Making – Algorithmic Decisions at the Crossroads of Intellectual Property, Data Protection, and Freedom of Information, Journal of Intellectual Property, Information Technology and Electronic Commerce Law 9 (2018), 3.

³⁷ Cf. above fn. 25.

³⁸ Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88, 31.3.2017, p. 6–21.

³⁹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

⁴⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and

Digital Content Directive (2019/770)⁴¹ does not refer explicitly to rights of users to upload content – even though the general clauses of conformity (Art. 6 – 8) can be construed in such a way.

A first regulatory step can be seen in Art. 28b AVMD⁴² which requires video-uploading platforms such as YouTube to establish certain protection mechanisms against harmful content and to establish notice procedures. The new Art. 28b AVMD has to be implemented into national law by September 19th 2020.⁴³ The German legislator has proposed a Draft for such an implementation in which they *inter alia* provide for complaint procedures for users and information requests for authorities by adding those provisions to the Network Enforcement Act.⁴⁴ This also includes dispute settlement bodies in § 3f, which are allowed under Art. 28b AVMD. Likewise, the UK-government is working on a draft for the implementation of the directive but has not finalized a proposal yet.⁴⁵ Similar drafts have been proposed, for example in Liechtenstein⁴⁶ and Ireland.⁴⁷ Liechtenstein's draft proposes dispute settlement rules and also includes specific regulation that obligates video-sharing platforms to ensure the protection of minors and to prevent hate speech in Art. 82c. In Ireland, a new Media Commission is established that is empowered to set up obligations for media service providers. These obligations may include complaint procedures and minimum standards regarding harmful content but have yet to be put forth by the newly formed commission. The Irish legislation also does not define harmful content but rather describes paradigmatic situations in which content may be harmful.⁴⁸

However, while minimum standards can be ensured this way on a national level, there are still no EU-wide uniform rules; thus, platforms might take advantage of the least strict regulation available (regulation shopping).

On the national level, some member states like Germany have adopted specific acts for some platforms (with a huge community of users), obliging these platforms to react immediately to

repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64–88.

⁴¹ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services, OJ L 157, 15.6.2016, p. 1–18.

⁴² Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.

⁴³ Art. 2 (1) Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28.11.2018, p. 69–92.

⁴⁴ Draft available at https://www.bmiv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_NetzDGAendG.pdf?__blob=publicationFile&v=3.

⁴⁵ Cf. Harbottle and Lewis, Implementation of revisions to Audiovisual Media Services Directive in the UK, available at <https://www.harbottle.com/audiovisual-media-services-directive-uk/>; consultation document available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820196/AVMS-D_VSP_Consultation_Document.pdf.

⁴⁶ Draft available at https://www.llv.li/files/srk/vnb_avmd.pdf pp. 41 ff.

⁴⁷ General Scheme of the Online Safety & Media Regulation Bill 2019, available at https://www.dccae.gov.ie/en-ie/communications/legislation/Documents/154/General_Scheme_Online_Safety_Media_Regulation_Bill.pdf.

⁴⁸ Cf. General Scheme of the Online Safety & Media Regulation Bill 2019, p. 78.

complaints and to establish an efficient compliance system, also to periodically report about the status of these systems (German Network enforcement act).⁴⁹

Likewise, the French “AVIA act” establishes similar obligations.⁵⁰ Notably, the Avia act was just recently struck down by the French constitutional court.⁵¹ The Avia act required that certain illegal content has to be deleted by the platform operator within 24 hours and provided fines up to 250.000 € for platform operators in cases of violation. The court argued that the short time frame available and the high fines are likely to cause over-blocking by platform operators and thereby violate freedom of expression and freedom of information.⁵² It also considered that as a result of these rules platform operators are likely to also block content that is legal but controversial.

In Italy, video-sharing platforms and broadcasting institutions are subject to special regulation to counter hate speech,⁵³ but the law is very limited in scope and relies on co-regulation. In the UK, the Ofcom agency was recently put in charge of monitoring social platforms and harmful content.⁵⁴

However, overall (European) standards are missing; the compatibility of such national approaches with the country of origin principle is highly doubtful.⁵⁵ None of those acts enshrine any kind of rights that users can claim concerning decisions of platform operators to ban their content (as well as those of state authorities regarding complaint mechanisms) – which raised certain concerns in legal and political debates.

Courts have started to deal with user rights to upload content; in numerous decisions regarding blocking of content by Facebook, (lower) courts have argued that users have a “sui generis” contractual right to upload content. Standard terms and conditions of platforms giving a right to the platform operator to ban content have been declared void on grounds of disregarding fundamental rights of users (freedom of expression) or at least have been interpreted narrowly not leaving discretion to the platform operators.⁵⁶ As already mentioned, one of the first decisions of a constitutional court (German Constitutional Court) even declared fundamental rights directly applicable to these social networks even though they are based on private law (contracts).⁵⁷ However, the extent and base of such rights remain unclear, for instance, if fundamental rights also apply to other kinds of platforms (beyond market-dominant networks such as Facebook).

⁴⁹ Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), at: https://www.bmjb.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?sessionid=098B928E89522565C48AABEE0C512E33.2_cid324?__blob=publicationFile&v=2.

⁵⁰ La loi contre les contenus haineux sur Internet (dite « loi Avia »), see https://fr.wikipedia.org/wiki/Proposition_de_loi_contre_les_contenus_haineux_sur_Internet.

⁵¹ Décision n° 2020-801 DC du 18 juin 2020, available at <https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>.

⁵² Décision n° 2020-801 DC du 18 juin 2020, para. 19.

⁵³ Delibera n. 157/19 / CONS, available at <https://www.agcom.it/documents/10179/13511391/Delibera+157-19-CONS/568d8b16-6cb6-4ea1-b58c-c171c2e24367?version=1.0>.

⁵⁴ Cf. Online Harms White Paper, available at <https://www.gov.uk/government/consultations/online-harms-white-paper/online-harms-white-paper>.

⁵⁵ Gerald Spindler, Der Regierungsentwurf zum Netzwerkdurchsetzungsgesetz – europarechtswidrig?, *Zeitschrift für Urheber- und Medienrecht* 2017, 473 (476); critical however *Thomas Wischmeyer*, What is illegal offline is also illegal online’ – The German Network Enforcement Act 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3256498; *Pedro De Miguel Asensio*, Conflict of Laws and the Internet, 2020, para 2.60.

⁵⁶ See fn. 33.

⁵⁷ German Constitutional Court Decision of 22.5.2019 - 1 BvQ 42/19 *Neue Juristische Wochenschrift* 2019, 1935 p. 15.

Moreover, neither on the European level nor on the national level are there specific provisions on algorithms that control the uploading of content (or blocking). A lot of countries have just recently been starting to develop strategies to deal with algorithms on a national level such as the German AI-strategy report,⁵⁸ the Swedish National approach to artificial intelligence,⁵⁹ the Portuguese AI Portugal 2030 Portuguese national initiative on digital skills,⁶⁰ the Spanish Estrategia española I+D+I en inteligencia artificial⁶¹ or the Proposte per una strategia italiana per l'intelligenza artificiale.⁶²

At present, only Art. 22 GDPR (regarding data protection) refers to automated decision making, giving individuals a right to request a human being's decision. Likewise, Art. 17 (9) DSM-Directive entitles users to ask for a human review of an automated decision regarding the blocking of user-generated content (for alleged copyright infringement). Moreover, Art. 13 (2) lit. f and Art. 14 (2) lit. g GDPR provides information obligations to inform about fully automated decisions but again refer back to Art. 22 GDPR.⁶³ However, none of these provisions provide transparency regarding the content of algorithms or a right to inspect them. Only general provisions concerning discrimination may step in, such as the Directive on equal treatment irrespective of race or origin⁶⁴ and the Directive for equal treatment in the workplace⁶⁵ or on the national level specific anti-discrimination acts.

One especially controversial topic about algorithms on platforms has been the use of upload-filters.⁶⁶ (Large) Platforms may use algorithms to monitor and filter content before it is uploaded to the platform to comply with regulation and not be liable themselves. This is already being carried out by social networks like Facebook using tools to find and block certain content that is deemed to be offending or extremist.⁶⁷ This should be avoided if possible, since the risks of censorship is high. Consequently, platforms should not be subject to regulation that could only (or most easily) be complied with by using such technology. The heated debate regarding upload filter in Art. 17 DSM-Directive in copyright has highlighted the huge impact of automated tools on freedom of speech.⁶⁸

⁵⁸ Available at https://ec.europa.eu/knowledge4policy/ai-watch/germany-ai-strategy-report_en.

⁵⁹ Regarding algorithms p. 8, available at <https://www.government.se/491fa7/contentassets/fe2ba005fb49433587574c513a837fac/national-approach-to-artificial-intelligence.pdf>.

⁶⁰ Available at https://www.incode2030.gov.pt/sites/default/files/julho_incode_brochura.pdf.

⁶¹ Available at https://www.ciencia.gob.es/stfls/MICINN/Ciencia/Ficheros/Estrategia_Inteligencia_Artificial_IDI.pdf.

⁶² Available at <https://www.mise.gov.it/images/stories/documenti/Proposte-per-una-strategia-italiana-2019.pdf>.

⁶³ For the limited scope of these provisions see *Mario Martini*, Regulatory System for Algorithm-based Processes, 2019, p. 10.

⁶⁴ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180, 19.7.2000, p. 22–26.

⁶⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

⁶⁶ Cf. for further references Open Letter to Members of the European Parliament and the Council of the European Union, available at https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_22_02_2017.pdf.

⁶⁷ Cf. update on April 21.2020: increasing the use of automation, available at <https://about.fb.com/news/2020/05/coronavirus/#content-review>; Facebook, Open-Sourcing Photo- and Video-Matching Technology to Make the Internet Safer, available at <https://about.fb.com/news/2019/08/open-source-photo-video-matching/>.

⁶⁸ *Gerald Spindler*, The Liability system of Art. 17 DSMD and national implementation – contravening prohibition of general monitoring duties?, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2020), paras. 44; *Martin Husovec and João Quintais*, How to Licence Art. 17?, Working Paper, 1.10.2019; *Thomas*

3.2.2.2 Policy-Options

Policy options would grosso modo refer to two alternatives:

- “Do nothing” and leave the evolution of user rights and control of algorithms to national contract law and courts, in particular to constitutional courts concerning discrimination, etc., or
- European regulation, introducing mandatory rights for users in contract law and establishing standards for contract terms regarding control of content. Concerning algorithms, regulation as discussed below may be introduced.

Such legislation does not need to harmonize contract law in general; it could rather be restricted to introduce mandatory user rights, establishing also a prohibition of discriminatory decisions based for instance on religion, sex, etc. (according to the interpretation of the principle of equality and non-discrimination enshrined in Art 21 European Charter of Fundamental Rights).⁶⁹ Such legislation should also make clear if stricter rules, set out by platforms in their general terms and conditions, are allowed or not, as this has been another point of legal discussion.

Since online platforms are an important aspect of the digital single market and have intrinsic cross border influences, Art. 114 TFEU can be used as legal grounds to implement the discussed rules.⁷⁰

Moreover, European legislation could specify obligations to render access and control of algorithms, also establishing a general right to review automated decisions by a human operator (such as in Art. 17 (9) DSM-Directive or Art. 22 GDPR). Such control rights could be assigned to state authorities or to individuals based on civil law claims, respecting trade secrets by limiting the inspection to trusted third parties. Regulating this field of contention should not be sector-specific but rather provide a flexible and comprehensive legislation that can be applied not only to social platforms like Facebook but also to all other kinds of platforms that use algorithms.

A similar approach has been developed by the German Data Ethics Commission,⁷¹ as well as later by the EU Commission’s White Paper on artificial intelligence.⁷² The commission proposes a risk-based approach in the shape of an EU regulation, that provides different regulative measures depending on the severity and likeliness of a violation of users’ rights.⁷³ Those measures can reach from doing nothing over transparency rules, ex-ante approval and live oversight up to a straight-up ban of the used algorithm. This way, a flexible and future-proof system can be implemented that is

Spoerri, On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2019), para. 10; *Giancarlo Frosio*, To Filter or not to Filter – that is the question in EU Copyright Reform, 36(2) *Cardozo Arts & Entertainment Law Journal* 331-368 (2018), Available at SSRN: <https://ssrn.com/abstract=3058680> pp 125 - 134

⁶⁹ Art. 21 (1) Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Art. 21 (2) Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

⁷⁰ Cf. COM(2018) 238 final, p. 4.

⁷¹ Opinion of the Data Ethics Commission - Executive Summary, pp. 17.

⁷² White Paper On Artificial Intelligence - A European approach to excellence and trust COM/2020/65 final, pp. 16.

⁷³ Opinion of the Data Ethics Commission - Executive Summary, p. 20.

able to provide solid protection of users while regulating on a case by case basis ensuring overregulation can be avoided.

This approach can be supplemented by guidelines that specify the allowed content of the algorithm: it could require valid mathematical-statistical procedures and define what criteria of profile allocation (such as gender, sexuality or ethnicity) are not allowed to be used in certain situations.⁷⁴ Particularly, these provisions should include strict regulation of methods of ex-ante screening and blocking of content as they have a distinctly high chance of over-blocking, and therefore censorship of content. Since the regulation of algorithms often affects data protection, regulation should be conducted at an EU-wide level.

Transparency obligations can be added, using Art. 13 or Art. 14 GDPR as a blueprint.

Also, given the different national approaches and the lack of a EU-wide regulation, a patchwork of legislation across the EU is the likely outcome. Therefore, fully harmonized rules for the categorization of algorithms, based on the involved risk for fundamental rights should be implemented, supplemented by a list of regulated criteria.

Since regulating algorithms directly impacts the digital single market and aims to ensure a harmonized playing field for platforms, the legal ground for regulation can once again be Art. 114 TFEU.

3.2.2.3. Added value

To leave the evolution of rights for users to national courts (and general clauses in their respective contract law) would obviously lead to a pan-European patchwork of court decisions, moreover as the CJEU cannot harmonize jurisdiction if there is no European legislation. As long as specific contract law regarding platforms is missing in member states and user rights are not acknowledged in general contract law, it is very likely that courts will diverge largely concerning the balance of fundamental rights of users and those of platform operators. Since national law may handle the application of fundamental rights regarding platforms differently - resulting in huge differences between member states - great legal uncertainty may result for users and platforms alike: The extent of users' rights remains unclear, therefore users may be deterred from a dispute with providers (in order to enforce their rights).

Also, on the other hand, platforms may be prone to apply the stricter-than-necessary measures to ensure they comply with regulation and not be liable themselves, a danger which just led the French national high court to declare the AVIA act void due to expected over-blocking.⁷⁵ This can have a negative impact on a users' personality rights and on freedom of expression.

On the flipside, unclear regulation can also lead to unregulated online environments that potentially allow harmful content. This can lead to great costs for consumers, not only in legal fees but also in emotional damage due to unregulated internet platforms (for instance, massive mobbing etc.).⁷⁶ While not of immediate monetary value, protecting consumers against harmful content certainly constitutes a benefit: Negatively impacted platform users can lose trust in online platforms, making them less likely to engage in discussions and in the digital market as a whole.

⁷⁴ Mario Martini, *Regulatory System for Algorithm-based Processes*, 2019, p. 21.

⁷⁵ See above p. 11.

⁷⁶ See Caroline Rizza and Ângela Guimarães Pereira, *Social Networks and Cyber-Bullying among Teenagers*, available at <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/social-networks-and-cyber-bullying-among-teenagers>; also p. 11.

Therefore, national rules will have very low effectiveness. Rules will be fragmented, and the digital single market does not benefit. They are also inefficient since platforms will have to adapt to many different rules and are subject to increased costs, while every member state bears the costs of implementing their own rules. Increased costs will be expected due to enforcement and supervision in the individual member states. Moreover, in case of cross-border platforms costs will arise just due to the fact of assessing the relevant jurisdiction and competence of supervising authorities.

Finally, synergy effects are missing. There may be some national synergies, depending on the individual national law. However, for platforms the country of origin principle laid down in Art. 3 (2) ECD diminishes the effects of further national rules regarding content control, meaning regulation done by member states can only apply to platforms that are resident in that state (but not to platforms based in other EU-member states), so synergy effects will be lacking. Furthermore, other rules that apply for content control are regulated at an EU-level, such as Art. 22 GDPR when it comes to content control done via automated tools; national laws cannot easily be fine-tuned to synergize with these relevant European regulations. Lastly, rules for transparency and enforcement of these rules will be done best at an EU-level, so national rules for content control will not be able to synergize well with the adjacent EU-rules.

Hence, a European legislation would benefit an EU-wide level playing field, be it social networks or trading platforms. Platforms would know what laws to abide by and would be able to set up their policies accordingly, without having to adapt to a multitude of regulation, therefore not only strengthening the digital single market and lowering adaptation costs for platforms but also providing legal clarity regarding users' rights. Obviously, platforms will burden the cost of implementing such regulations. However, these costs would likely be minimal since platforms only have to adapt their existing rules to a set standard.

Platforms would also benefit from legal clarity and fewer legal disputes. As a result, the process of monitoring content will be more efficient and therefore safe costs, while the number of legal disputes would be reduced so costs are reduced even more. It will be clearer for consumers to know, in what instances a violation of rights has occurred and they will have a more secure legal basis on which they can decide to take further action, therefore saving costs as well. All in all, platforms and platform users will both benefit from clear cut rules on content control.

In conclusion, having EU-wide standards on content control would be more efficient than national rules, because these rules will avoid fragmentation of laws and bring about legal clarity. Since only one set of rules needs to be implemented and platforms often have transnational reach already, it will be a lot more efficient to do so at an EU-level. The proposed rules on content control will synergize well with the rules regarding transparency, notice procedures and dispute settlement proposed below.

Lastly, regulating algorithms will also greatly benefit the digital single market. Considering the vast potential of such technologies, a clear and comprehensive legal framework is essential for a future proved economy and the European economy. Having a risk-based regulation provides a lot of room for innovation while also guaranteeing consumer protection and flexible options for regulation in the future.

Once again, platforms using algorithms will have to burden the cost of technically implementing the required changes. Additionally, administrative costs for monitoring and for providing transparency will induce substantial costs.

These costs would however be somewhat mitigated by the achieved legal clarity that is brought about by EU-wide regulation since platforms will know exactly what technology they should and should not invest resources in. Depending on the regulation, the possible effects and incentives for innovation have to be considered. Regulating too strictly can hamper innovation in the field of

algorithms while smart and appropriate regulation can create legal certainty and incentives for innovation.

Furthermore, consumers will be able to feel more comfortable with the use of algorithms on platforms due to more transparency that is provided to them.

Once again, EU-wide regulation will be most effective to avoid legal fragmentation in this cross-border matter. Platforms will have legal clarity on what rules apply. Since the matter of algorithms is very much a technical topic, national peculiarities will not have much impact on regulation, therefore an EU-wide regulation will also be most efficient.

Synergy effects will exist especially with the proposed EU-agency that oversees the control of algorithms. If the control of content is done at an EU-level, regulating the algorithms that are used to carry out those rules on an EU-level will also synergize well with other regulations in place, such as the already mentioned GDPR (here Art. 22).

Table 1: Summary Control of content

Policy option	Keep the status quo	Set EU-wide mandatory standards for content control	Risk-based regulation for algorithms
Regulatory content	No action regarding or guideline regarding the control of content on platforms is taken.	Regulation is introduced, making certain minimum rules mandatory for all contracts between platforms and users.	A risk-based regulation framework, as discussed above, is implemented to oversee and regulate algorithms that control content
Legislation needed?	None	Yes	Yes
Regulatory impact	None	Medium	High
Impact on the Coherence of legal framework	---	+++	+++
Impact on Legal clarity	---	+++	+++
Impact on the Effective and efficient law enforcement	---	++	+++
Impact on the Digital single market	--	++	+++
Impact on consumer rights	---	++	++
Impact on fundamental rights	---	++	+++
Benefits	None	Platforms and users gain legal clarity, the digital single market	Consumer protection can be achieved while having flexible

		improves by more equalized regulation.	regulation options; a risk-based approach guarantees an appropriate level of regulation, therefore avoiding overreaching; legal clarity for platform operators and other algorithm users is achieved; legal clarity for future technological development
Costs	Control of content will remain the role of platform operators, who set the standards which are possibly stricter than fundamental rights. Member states are going to independently evaluate those standards under national law; higher legal cost of consumers, no guaranteed protection against cyber bullying.	Potential collision with national contract law; costs of implementing technical changes for platform operators.	Stark intervention in platforms' business models; potentially high adaptation costs for platforms; potentially disadvantage for EU-resident platforms against international competition that is less regulated; high costs for observation and transparency

3.2.3. Curation of content

3.2.3.1. Problems and existing legislation

As mentioned before, the curation of content is in large part what distinguishes one platform from another and is part of a platform's main activity. It is also touching upon many different fundamental rights and has only recently become the focus of regulation efforts.

Since the curation of content is often based on user-specific data collected on the platform, the GDPR applies. Especially the legal basis for the large amounts of collected data can be a point of contention. However, unlike regarding data collection for purposes of advertising, collecting data to curate the content for a user in order to be able to offer the best experience possible can (arguably) be allowed under Art. 6 b) or f) GDPR.

Also relevant are Art. 5 of the P2B-Regulation⁷⁷ and Art. 3 Enforcement Directive of consumer protection,⁷⁸ which inter alia modifies the unfair commercial practices directive.⁷⁹ Both pieces of legislation state that platforms have to inform users about the general criteria used when ranking search results. These rules are, however, very limited in scope: They do only apply to platforms that arrange the sale of goods or services but not to other platforms such as for instance social networks. Also, the information given does not have to be very specific: platforms only have to inform about general criteria used to determine the search result and how important those criteria were for the specific search result.

⁷⁷ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186, 11.7.2019, p. 57.

⁷⁸ Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, 18.12.2019, p. 7.

⁷⁹ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, 11.6.2005, p. 22.

Additionally, the “filter bubbles” or “echo chambers” constitute a related problem as⁸⁰ they only show content that happens to agree with one’s personal views on a platform, therefore enhancing or radicalising users. They have therefore been deemed as a matter of public interest by a German lower regional court.⁸¹ Similarly, the CJEU has decided multiple times already, that pluralism of media and opinions is in the public interest.⁸² Most recently, the AVMD, while not applicable to social media platforms,⁸³ acknowledges media pluralism as one of its goals.⁸⁴ Finally, Art. 11 (2) ECFR acknowledges pluralism of the media as a fundamental right. However, it has long been unclear whether or not the EU has the competence to regulate the issue of media pluralism since the content of media and broadcasting has traditionally been subject to member states’ autonomy and explicit competencies are missing.⁸⁵ EU-regulation regarding media pluralism has often come from a standpoint of competition law since the EU has the competence to regulate this field.⁸⁶ Art. 167 (5) TFEU limits the Union’s powers to incentive measures and recommendations when it comes to cultural issues, which media pluralism is regarded as.⁸⁷ The EU, therefore, does not hold the competence to directly regulate media pluralism.

Besides that, there are no clear rules for platforms on how they curate content – or at least minimum standards that they have to comply with. If the curation of content results in a de facto eliminating of the content, because it is difficult to find specific content on the platform, a right for users to upload their content and to make it accessible to other users (as developed by some national courts) could be a remedy.

Knowing how the algorithm functions can be of great importance for a user or content provider (transparency): If they know which parameter leads to a desired result, e.g. uploaded content being supported, they can adapt their content accordingly and the negative impacts of algorithms are diminished. Likewise, if a user knows on what ground content is shown to them, they can better evaluate beforehand if the offered content is interesting to them without consuming it. Thus, more transparency could also lead to enhance market forces in the sense of a quality competition amongst platforms as users are able to make informed choices amongst platforms with different algorithms

⁸⁰ See fn. 35.

⁸¹ LG (District Court) Mannheim, 27. 11. 2019, – 14 O 181/19 (still subject to appeal).

⁸² CJEU 16.12.2008 – C-213/07 – Michaniki, para. 59; CJEU 13.12.2007 – C-250/06, United Pan-Europe Communications Belgium SA et. Al – paras. 41; CJEU 26.6.1997 – C-368/95 – Familiapress, para 18.

⁸³ Art. 1 (a) i AVMD requires an editorial responsibility.

⁸⁴ Cf. Art. 30 (2) and recitals 16 (2), 49 (2), 53 (7), 61 AVMD.

⁸⁵ Cf. for procedure from 1990 till 1995 Resolution on the Green Paper, 'Strategy options to strengthen the European programme industry in the context of the audiovisual policy of the European Union' (COM(94) 0096 - C3-0222/94); also addressed at Liverpool conference of 2005, see EU Press release IP/07/52, available at https://ec.europa.eu/commission/presscorner/detail/en/IP_07_52.

⁸⁶ Artt. 101, 102, 106, 107; cf. for detailed analysis CMPF, European Union Competencies in Respect of Media Pluralism and Media Freedom, pp. 47, available at https://cadmus.eui.eu/bitstream/handle/1814/26056/RSCAS_PP_2013_01.pdf?sequence=1&isAllowed=y; Kristina Irion, The independence of media regulatory authorities in Europe, 2019, pp. 20, available at <https://rm.coe.int/the-independence-of-media-regulatory-authorities-in-europe/168097e504>.

⁸⁷ Cf. 6 Protocol (No. 29) on the system of public broadcasting in the member states, OJ C-326, 26.10/2012, p. 312; Kristina Irion, The independence of media regulatory authorities in Europe, 2019, p. 20, available at <https://rm.coe.int/the-independence-of-media-regulatory-authorities-in-europe/168097e504>;

Even more importantly, algorithms can hugely impact the traffic to websites, e.g. the google-search algorithm,⁸⁸ and can therefore affect development of public opinion on certain topics.

Similarly, the British Centre for Data Ethics and Innovation has recently called for regulation to introduce more transparency when it comes to content control on social platforms,⁸⁹ but no actions have been taken so far. In their report, they propose a three-pronged approach which focuses on increasing accountability of platforms, improve transparency, and empowerment of users. Accountability in this case refers to a general code of conduct for platforms to provide risk assessments and to document the purpose and the impact of their content curation.⁹⁰ To achieve a transparent process, the CDEI recommends that independent researchers may gain access to the platforms data if necessary and that, for certain especially problematic content such as political advertisement, the platforms provide publicly accessible archives.⁹¹ To empower the users, the CDEI calls for more information and choices when it comes to the recommended content, e. g. by showing the parameter by which they were categorized or by changing the default settings.⁹²

Up to now, state jurisdiction has been very restrictive when it comes to claims for disclosing information about algorithms and their structure, usually valuing the interest of the algorithm user (trade secrecy) higher than the opposing interest of users (or “victims” like in the cases of credit scoring) in that information.⁹³ Therefore, it could happen that courts will in general not provide users with a right to information about a platform’s algorithm.

3.2.3.2. Policy-Options

One option would be not to regulate this phenomenon at all at the European level but rather accept it as a necessary aspect of how platforms work (“Do-Nothing-option”). Since most problems up until now occur in cases where a platform drastically suppresses content that supports unwanted opinions, it could be left to the national courts and member states law to define concrete boundaries.

However, in many cases, affected users do not realize or even know that they have been negatively impacted by an algorithm, let alone being able to prove such a treatment in court.⁹⁴

Therefore, some rules of transparency are needed. Those should ensure that, firstly, a user is aware of how an algorithm considers his content, be it by de-prioritizing it or by supporting it, and by which criteria the algorithm determines that. Secondly, a content consumer should be made aware of the criteria the provided content is shown to them.

This not only allows for content producers to either adapt to a platforms’ algorithm or to challenge it in court if they deem it illicit but is also not overly intrusive for the platforms, which value their

⁸⁸ Cf. Google Webmaster Guidelines, available at <https://support.google.com/webmasters/answer/35769?hl=en>; regarding how google determines what constitutes “quality content” see mhc, How Will Google Demote Russian Propaganda in Their Search Results?, available at <https://www.mariehaynes.com/how-will-google-demote-russian-propaganda-in-their-search-results/>.

⁸⁹ CDEI, Review of online targeting: Final report and recommendations, para. 8, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/864167/CDEI7836-Review-of-Online-Targeting-05022020.pdf.

⁹⁰ CDEI, Review of online targeting: Final report and recommendations, paras. 290.

⁹¹ CDEI, Review of online targeting: Final report and recommendations, paras. 325 ff.

⁹² CDEI, Review of online targeting: Final report and recommendations, paras. 365 ff.

⁹³ Cf. BGH (German Federal Court), Decision from 7.1.2014 – IV ZR 216/13, para. 19 concerning algorithm used by credit scoring institutions; also BGH (German Federal Court), Decision from 2.12.2015 – IV ZR 28/15 para. 16.

⁹⁴ Cf. Mario Martini, Regulatory System for Algorithm-based Processes, 2019, p. 10; cf. also Recital 61 GDPR.

algorithms as one of their most important assets. To achieve a degree of coherency, regulation should be written in a way similar to the existing regulation concerning the ranking of algorithms mentioned above. Regulation should not be restricted to commercial users but should also address consumers.

Moreover, many platforms provide for ways to opt-out of the content curation in favour of more objective criteria such as time of the upload or general popularity of content.⁹⁵

One possible path of legislation could be a mandatory objective default standard, similar to an opt-in approach. That way, users are on the one hand made aware that there are different methods of content curation and on the other hand they are more likely to opt for the way of curation they prefer. This would still maintain minimal intrusion while guaranteeing users' choices and could be done by either a minimum or fully harmonizing directive.

Additionally, the curation of content is closely tied to the control of algorithms mentioned above and would fit in seamlessly into the recommended framework. More precisely, content-curating algorithms would likely have a low to medium risk of violating users' rights and be therefore subject to transparency and monitoring rules. This can be done by having a minimum harmonized directive that includes general clauses that provide transparency while giving member states the option to introduce stricter rules if necessary.

Alternatively, there could be fully harmonized rules that set mandatory transparency and curation rules across all member states.

As the curation of content is an important part of a platform's business, regulating this area would impact the digital single market, therefore, once again Art. 114 TFEU can be used as a legal basis.

3.2.3.3. Added value

Not regulating the curation of content will not solve the raised issues. While some platforms may adapt their own standards and may even protect users sufficiently, this cannot be expected for all of the many existing platforms.

The status quo mostly places the costs and risks involved on platform users, be it consumers or content providers. Content providers lose potential monetary benefits by being negatively affected by a platform's algorithm, e.g. by getting fewer views and thereby less revenue from advertisement. The existing uncertainties may prevent digital entrepreneurs from using those platforms.

More crucially however, the risk of echo chambers and filter bubbles can affect democracy as a whole by skewing public opinion.⁹⁶ Many people use social media and other online platforms as a source for news or political education. By being shown disproportional amounts of the same opinion rather than a diverse spectrum that more realistically reflects the actual range of opinion, people tend to become more radicalised. Furthermore, platforms may be subject to national regulation, forcing them to adapt to different standards of content curation. This also leads to increased adaptation costs for platforms and once again constitutes legal uncertainty for platforms and users alike which results in higher adaptation costs and more legal disputes.

⁹⁵ For example, it is possible to sort results by number of views, time of upload or user-rating on Youtube, cf. Advanced search, available at <https://support.google.com/youtube/answer/111997?co=GENIE.Platform%3DAndroid&hl=en>; also, sorting by price or time of arrivals on amazon, <https://www.amazon.com/qp/help/customer/display.html?nodeId=201889520>.

⁹⁶ See fn. 35.

Thus, not regulating content curation (or simply leaving it to the member states) would again not be effective since it leads to legal uncertainty and fragmentation, some member states might not take action at all meaning regulation is not guaranteed. It would not be efficient for the national legislators either because every state has to do their own research and come to their own conclusion regarding the need for regulation.

Lastly, there would also be no synergy effects. Content curation is closely tied to the regulation of algorithms discussed above and also largely depends on the lawfulness of data processing which is regulated by Art. 6 GDPR. Besides that, similar regulations regarding the ranking of products are regulated on an EU-level, so national rules will not have great synergy effects.

Therefore, implementing regulation regarding the curation of content on the EU level is advised.

However, a European added value of such proposed measures will be hard to quantify in numbers. The benefits lie in increased consumer protection, transparency, and easier enforcement of rights by easing the burden of proof for platform users. If such an approach was to be taken, the only reasonable option regarding transparency would be an EU-wide fully harmonized regulation. Assuming platforms use the same parameter in their rankings across all countries, national legislation going beyond EU directives would have an indirect effect on other states, so that platforms would have to follow de facto the highest standard in EU member states that applies if they want to avoid additional costs for every EU member state market. Thus, a minimum harmonising approach will probably not suffice.

Also, EU-wide legislation would support the idea of the digital single market and the one-stop-shop principle laid down by the GDPR. In other words, it would counteract these goals when platforms on the one hand are supposed to keep only one set of rules for data protection in mind while on the other hand having to adapt to many different legislative frameworks when it comes to using that same data. Especially, larger platforms would be affected by these rules, since they might somewhat lose their competitive advantage over smaller platforms, that do not yet use algorithms as sophisticated, but once again especially larger platforms are the ones that develop algorithms and can therefore benefit from clear legal guidelines.

Besides that, the costs for implementing the new rules would be a factor. However, those costs would likely be low since many platforms already provide an opt-in option and are already subject to transparency rules regarding their algorithms.

On the flip side, consumers benefit from more transparency and gain more agency when using the internet and content providers can make more informed decisions in regard to where and how they want to provide their content. While consumers may not directly see monetary changes but rather an improvement of enforcement of fundamental rights, content providers may see immediate and tangible benefits.

Conclusively, a fully harmonized set of rules for content curation would be most effective in ensuring legal certainty for transnational platforms and in avoiding legal fragmentation across member states. It would also be most efficient since only one piece of legislation is needed. Also, since the regulation of online platforms is subject to constant changes, a centralized EU-regulation would be most flexible in dealing with these matters.

Lastly, EU-regulation would synergize best with the complementary areas of regulation already mentioned. For example, the lawfulness of data processing, regulated in Art. 6 GDPR, can have far-reaching effects on content curation. Also, similar regulations for certain platforms already exist, for example Art. 5 P2B-Regulation and Art. 3 Enforcement Directive, therefore EU-wide regulation would make sure that a comprehensive regulation framework exists.

Table 2: Summary Curation of content

Policy option	No action taken	Minimum harmonized EU-regulation with general clauses	Fully harmonized EU-regulation with set rules
Regulatory content	No action regarding content curation is taken.	Mandatory minimum rules for more transparency and user options are implemented, member states are free to introduce stricter rules for resident platforms	Set rules on how platforms are to design their content curation process are implemented. There can be a mandatory opt-in or opt-out procedure. Rules regarding the information and parameters that must be provided are set.
Legislation needed?	None	Yes	Yes
Regulatory impact	None	Low-medium	Medium
Impact on the Coherence of legal framework	-	++	+++
Impact on Legal clarity	--	+	+++
Impact on the Effective and efficient law enforcement	---	+	+++
Impact on the Digital single market	--	++	+++
Impact on consumer rights	---	++	+++
Impact on fundamental rights	--	++	+++
Benefits	Cases of content curation may be subject to national court procedures	While many platforms already provide for some transparency and opt-in or opt-out options legal certainty will be augmented across the EU; also, lower level of regulatory impact.	Guaranteed harmonised rules regarding content curation across the union, no differences for platforms based on residency, however, the increased value compared to a minimum harmonisation would be relatively small.
Costs	Different speeds and intensities of national law, fragmenting the digital single market; enforcement of violated rights and showing evidence in court may be difficult; higher legal costs and less protection for consumers, less legal clarity for platforms.	Implementation may differ across the union, providing limited legal clarity; adaptation costs for platforms.	No flexibility on national level to adjust to local needs.

3.2.4. Notice procedure

3.2.4.1 Problems and existing legislation

As already pointed out, host providers (platforms) are not liable for any third-party content (users) as long as they do not have positive knowledge of illegal content or activities, Art. 14 ECD. Thus, in practice, notice-and-takedown procedures have been established. However, European legislation such as the ECD does not provide any design of such procedures (notice-and-take-down) leaving it to member states (and national courts) to establish standards for such procedures.⁹⁷

Already during the evaluation of the ECD, it turned out that member states have a different interpretation of the notice-and-take-down procedures; for instance, Spain seemingly restricted the right to notify a host provider to the police or state prosecutors⁹⁸ for a longer time while other member states such as Germany assigned the right to everyone.⁹⁹

Regarding copyright infringements Art. 17 (9) DSM-Directive contains some basic rules for a procedure to be followed after a piece of content has been blocked; however, details of the procedure are lacking.¹⁰⁰

Moreover, the procedure to follow, after a host provider had been notified, is still not regulated on a European level. Some courts of member states, such as (concerning defamation) the German Federal Court, have developed a procedure that obliges host providers to pass on the complaint to the concerned user, allowing them to comment on the complaint in a given short time. In case of no comment of the concerned user the content then must be blocked (turned down), in case of a comment justifying the content this has to be passed to the complainant. If the complainant does not react in due time, the content will remain online.¹⁰¹ However, this kind of dealing with complaints has been restricted to defamation cases and so far has not been extended to other kind of content or infringements.

Another point of contention is the relation to the aforementioned country of origin principle laid down in Art. 3 ECD. Following this principle, platforms only have to abide by the rules laid down by their country of origin. Therefore, it has been widely argued that legislation set up by member states does not apply to platforms established in another member state.

3.2.4.2 Policy-Options

Following the structure mentioned above, one alternative would be to stick to national rules. As already indicated, this has led to very different ways in which courts established standards for notice-and-take-down procedures in the past.

⁹⁷ See now CJEU 3.10.2018 - C-18/18 Glawischnig-Piesczek v Facebook Ireland Limited concerning personality rights and stay down obligations.

⁹⁸ Cf. Art. 16 Ley 34/2002, de 11 de julio, de servicios de la sociedad de la información y de comercio electrónico, available at <https://www.boe.es/buscar/act.php?id=BOE-A-2002-13758>. The relevant section reads: "Se entenderá que el prestador de servicios tiene el conocimiento efectivo a que se refiere el párrafo a) cuando un órgano competente haya declarado la ilicitud de los datos, ordenado su retirada o que se imposibilite el acceso a los mismos, o se hubiera declarado la existencia de la lesión, y el prestador conociera la correspondiente resolución, sin perjuicio de los procedimientos de detección y retirada de contenidos que los prestadores apliquen en virtud de acuerdos voluntarios y de otros medios de conocimiento efectivo que pudieran establecerse"

⁹⁹ Cf. § 10 TMG (German Telemedia Act) that simply refers to knowledge of the host provider.

¹⁰⁰ *Gerald Spindler*, The Liability system of Art. 17 DSMD and national implementation – contravening prohibition of general monitoring duties?, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2020), 344 paras. 29, 38.

¹⁰¹ BGH (German Federal Court), Decision of 25.10.2011 - VI ZR 93/10 – Mallorca Blogger.

As illegal activities or content affect individual rights based also on fundamental rights such as personality rights, notice-and-take-down procedures have to also be accessible to individuals. Therefore, one option would be to implement mandatory minimum standards for the implementation of notice-procedures that ensure those rights for users.

Besides, regarding standard terms and conditions platform operators may be required to respect mandatory minimum rules for complaint procedures, such as transparency of criteria for decisions to block content, set by a minimum harmonizing EU-legislation. This would leave room for member states to impose higher standards.

Finally, EU-wide fully harmonized standards for notice procedures are also an option. To ensure a coherent national implementation, this could be supplemented by European guidelines.

As a vital part of platform regulation and directly connected to content control, regulating notice procedures can be based upon Art. 114 TFEU.

3.2.4.3. Added-Value

Not taking action would again lead to fragmented regulation and the additional cost of implementing different national procedures. Also, still burdening them with the connected costs. In addition, national legislators would be met with the cost of supervising and administrating these notice procedures. The German Legislator has estimated in 2017, that the Network Enforcement Act, requiring transparency of providers, will produce an annual cost of about 4 Million € in administration costs for the government.¹⁰² Similar costs can be expected, depending on a state's population.

Not taking action results in ineffectiveness due to legal uncertainty and fragmentation, also inefficiency due to cumulative national administration cost.

Further, there would be no synergy effects with rules regarding content control discussed earlier and overall standards may be lower than is appropriate.

Similar arguments are true for a minimum harmonization approach. While it would be somewhat effective at instating notice procedures, platforms would still be subject to different regulations and therefore suffer from legal uncertainty. Minimally harmonized rules would also not increase efficiency since there still has to be an evaluation process in every member state. Finally, synergy effects with other regulation for platforms may arise but are not guaranteed and depend on the level of national implementation; an overall higher standard is not certain.

A EU-wide full harmonization would, therefore, add the most value as third parties (injured) as well as content uploaders (users) would have legal certainty which procedure is applicable. Thereby, platforms can save the costs of providing different notice systems, ensuring improvements to the digital single market. Given the variety of platforms, such legislation could confer to the EU commission the right to adopt technical regulations, fine-tuned to different business models and platforms, meaning that, for instance, rules on social networks may differ from those on trading platforms.

It should, however, always be considered that:

- often times, the legality of content depends on a difficult legal question, which platform operators may not be qualified to fully determine themselves; thus,

¹⁰² BT-printed matter 18/12356, p.4.

independent committees of legal experts that could deal with disputes quickly would be recommendable

- large amounts of complaints are brought forward every day with the result that thoughtful human consideration of each case cannot always be done rapidly,
- the effects of taking down content can now always be completely undone by re-uploading it in cases where it was finally deemed lawful.

If such balanced rules were implemented on a European level, on the one hand there would be costs for implementing the rules on the platform's side and for monitoring and administrating the rules on the agencies' side.

On the other hand, platforms would save costs since they only have to adapt to one set of legal requirements and gain legal clarity. Furthermore, if implemented correctly, users would benefit from more comprehensive procedures, leading to more trust in institutions and in the platform operator which in return benefits platforms.

In conclusion, a fully harmonizing approach will be most effective in bringing about legal clarity and in avoiding legal fragmentation by ensuring that a platform is only subject to one set of procedure rules across the union. This approach will also be most efficient since the EU-wide impact and thereby necessary adjustments will be most easily assessed by a central European entity, which in this case would be the EU commission. This way, legislation can be crafted in a way that synergizes with other EU-rules. For example, the timeframe that is set for a platform to deal with a complaint can be adjusted depending on the level of content control that is implemented.

Table 3: Summary Notice procedures

Policy option	No action, keep status quo	Minimum harmonized EU-regulation with general clauses	Harmonized legislation with general clauses and technical guidelines
Regulatory content	No action is taken in regard to notice procedures	EU-wide minimum standards for a notice procedure are set, obligating member states to implement procedures.	EU-wide standards for notice procedures on platforms are implemented. Those standards can be adjusted based on technical guidelines set up by the EU commission
Legislation needed?	None	Yes	Yes
Regulatory impact	None	Low	Medium
Impact on the Coherence of legal framework	--	O	+++
Impact on Legal clarity	---	O	+++
Impact on the Effective and efficient law enforcement	--	O	+++
Impact on the Digital single market	-	-	+++
Impact on consumer rights	--	-	+++
Impact on fundamental rights	--	-	++
Benefits	Member states' autonomy remains untouched.	EU-wide minimum standards ensure that basic procedural principles are met. Platforms have legal clarity regarding the procedure they have to abide by.	EU-wide notice procedures help harmonizing the procedures for all platforms in the Union, bringing legal clarity for platforms and users alike. Technical guidelines enable a flexible and appropriate treatment of different sector-specific platforms.
Costs	Notice procedures will continue to divert between member states, users and platform operators will have to adapt to rules depending on the member state; the compatibility of national rules with regard to Art. 3 (2) ECD remains unclear; adaptation costs for platforms and hampered enforcement of consumer rights can ensue.	Differences in procedure between different platforms, depending on their residency, persist; the danger of forum shopping; remaining legal uncertainty.	Higher administrative costs due to the need for constantly updated guidelines.

3.2.5. Dispute settlement

3.2.5.1. Problems and existing legislation

One of the major problems concerning complaints about content refers to rapid dispute settlements. Usually, traditional court procedures are too slow and not adapted to the digital environment. On the other hand, platform operators are neither legitimated to settle disputes (from a judicial perspective) nor do they want to be engaged in assessing users' rights like an arbitrator. Thus, independent bodies based in the digital environment are needed which can react quickly, without being arbitrators or blocking access to national courts.

On the European level, the Online Dispute Regulation¹⁰³ provides such mechanisms by establishing an ODR platform operated by the EU commission which can be used for Alternative Dispute Resolution; however, ODR is used on a voluntary base and restricted to consumer-to-business relationships. Moreover, it seems that the ODR scheme is not widely accepted as evidence shows that most e-commerce traders opt out of ODR and ADR.¹⁰⁴ Furthermore, ODR cannot tackle third party issues, such as defamation or hate speech, etc.

Also, the Small Claims Regulation¹⁰⁵ provides a simplified procedure for claims worth up to 5000 €. This regulation does however not apply to violations of personality rights, including defamation (Art. 2 (h)), and does therefore not apply to most cases that relate to social media.

In the Platform-to-Business sector, Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services¹⁰⁶ aims to improve the legal protection possibilities against potentially unfair practices. The declared aim is to enable a fast procedure;¹⁰⁷ hence, two further possibilities were introduced in addition to the classic civil procedure. According to Art. 11 P2B Regulation, the platform operators are obliged to set up an internal complaint management system. This should enable to resolve disputes between platform operators and commercial users bilaterally and at short notice. This is supplemented by the obligation of online service operators to name at least two mediators in the terms and conditions of business, Art. 12 P2B Regulation. Art. 13 P2B Regulation obliges the Commission, in cooperation with the Member States and the relevant industry associations, to create bodies offering mediation. To these mediators apply special conditions, they have to, for instance, be available immediately. However, the mediation procedure is voluntary.

Furthermore, the specific implementation is left to the member states. Art 15 (2) P2B Regulation merely provides that they may take actions in case of violations. It is not specifically regulated how incentives for the use of the mediation procedure should be set and there are also no rules on what should happen in case of a circumvention of this procedure – in particular, no special sanctions are provided, so that even under the P2B regulation it is not certain that the suggested procedures will be used by default. Moreover, as already mentioned, the regulation only applies to P2B relationships and not to platform users.

¹⁰³ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165, 18.6.2013, p. 1–12.

¹⁰⁴ However, in order to check if and how ODR works in practice, an empirical study would be needed – which goes far beyond the scope of this study.

¹⁰⁵ Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p. 1.

¹⁰⁶ Regulation (EU) No 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 156, 11.7.2019, p. 57.

¹⁰⁷ See recital (38) and (40) of Regulation 2019/1150 (EU).

As arbitration and civil procedure rules (beyond issues of international competence of jurisdiction) are not harmonized, dispute settlements are in (the digital) reality left to the standard terms and conditions of platform operators. As far as can be seen there are still no decisions concerning legal standards for such dispute settlement procedures – which also may be due to the fact that most platform operators do not want to be pushed in a judge-like role.

Besides that, claims originating in an online environment, e.g. because of claimed content on a social network, are often not challenged since the effort is neither worth the monetary risk involved nor would a decision be made in a timespan that meets the ephemeral nature of most of the online content. Therefore, a quicker, cheaper and more transparent procedure is needed.

3.2.5.2. Policy-Options

A first option would again be not to regulate dispute settlement at all. This would not address any of the problems mentioned above. Platform operators would likely continue to renounce establishing dispute settlements, thus leaving users with the only option to resort to national courts. Even if platform operators established dispute settlement “courts”, there are no mandatory standards to protect users (and third parties) or to comply with minimum procedural standards. Also, there are going to be differences in the access to litigation across the member states, directly opposing the effort to harmonize the ability to exercise rights across the Union.

The mentioned problems for consumers will persist: Dispute settlement will be costly in comparison to the required goal, which is often to remove or to restore content. Since these goals rarely have direct monetary advantages for users, high procedural costs will deter them from enforcing their rights. Furthermore, traditionally dispute procedures in courts are generally slow, which, due to the ephemeral nature on social media, does often not align with the needs of users who pursue legal action. A more tangible option would therefore be to implement national dispute settlement bodies by having an EU-directive that obligates member states to set up their dispute settlement bodies for platform-related disputes.

Supplementing this approach, could be additional EU-guidelines to ensure EU-wide similar interpretation of similar dispute cases.

A third option would be to completely take dispute settlement out of the hands of national bodies and instead have dispute settlement be implemented by the platforms themselves. This can for example be done by having rules in place that provide legal experts to oversee the dispute cases.

Added value

Having no legislation would be ineffective in changing the status quo and therefore have no beneficial effect on effective dispute settlement. Therefore, it is not a matter of efficiency and synergy already.

As fundamental rights are often affected, in particular concerning disputes about content on social networks (freedom of speech), a European legislation introducing mandatory dispute settlement (composed by independent legal experts) as well as fundamental mandatory procedural standards would result in a European added value. Thus, enforcement of rights of users would be highly fostered. Also, regulating on a European level would ensure that all citizens in the Union would have equal chances to enforce their rights against the same operator. This not only benefits consumers but also platforms by levelling the international playing field and not giving any national platforms an advantage by being subject to less strict dispute rules.

Not to be overlooked, however, are the accompanying costs that dispute settlement and legal experts require. This would therefore result in substantial costs for platform operators.

Besides that, clear and publicly accepted dispute settlement procedures can also help fostering trust in platforms in the long term. As a result, users would likely engage more in platforms and are more likely to pursue the enforcement of their rights – which in turn would foster the trust in platforms and commerce being carried out on platforms.

Conversely, easier and cheaper dispute settlement might also act as a deterrence for users or traders to provide harmful content if injured parties are more likely to pursue action, thereby decreasing violation of rights.

Carrying out the dispute settlement by the member states via a minimum harmonising directive would surely be more effective than no regulation at all. However, differences in national procedure would likely remain, for example when it comes to terms which need interpretation, so national rules will be not as effective in avoiding fragmentation, which may create an unequal playing field for competing platforms. Therefore, supplementing the national dispute institutions with EU-guidelines would be more effective.

Regarding efficiency, national institutions would not be the most cost-effective way to handle this issue: There would have to be similar settlement bodies in every state so that one platform is supervised by many settlement bodies. Instating national dispute settlement institutions would also synergize well with existing rules regarding dispute settlement, such as the aforementioned online dispute resolution.

The approach to establish special platform dispute settlements would likely be more effective in some areas. If a specialised settlement institution is established, there would likely be great legal certainty for rules regarding a single platform. It has to be considered however that different standards between platforms may arise.

In terms of efficiency, this approach seems best suited since the platform related expertise is pooled in the relevant place and the legal experts are going to be highly specialised in the matters of that platform.

In terms of synergy, once again synergetic effects in regard to the online dispute resolution are possible, depending on the respective scope of the regulation.

Table 4: Summary Dispute settlement

Policy option	No action taken	National dispute settlement	National dispute settlement with EU-guidelines	Platform based dispute settlement with independent legal experts, EU-wide mandatory
Regulatory content	No actions regarding dispute settlement are taken.	EU-wide mandatory dispute settlements carried out by national institutions.	EU-wide mandatory dispute settlements, carried out by national institutions; dispute settlement is regulated by EU-guidelines.	Platforms are obligated to set up their own dispute settlement bodies that are bound by European guidelines and run by legal experts
Legislation needed?	None	Yes	Yes	Yes
Impact on the Coherence of legal framework	--	0	+	++

Impact on Legal clarity	-	+	++	+++
Impact on the Effective and efficient law enforcement	--	+	++	+++
Impact on the Digital single market	-	-/+	++	++
Impact on consumer rights	--	+	++	+++
Impact on fundamental rights	--	+	++	+++
Regulatory impact	None	Medium	Medium-high	Medium-high
Benefits		Easier enforcement of rights is enabled, while possible differences in interpretation across member states remain.	Easier enforcement of rights, better chances of harmonized interpretation and guidelines, legal security.	Clear EU-wide mandatory rules; clear access to the dispute settlement
Costs	No improvement for users; costly and low dispute settlement continues.	Possibly different settlement standards and interpretation of rules between member states; legal uncertainty for platforms and consumers.	Differences in procedural quality, e.g. procedural speed, will remain.	No national courts involved, acknowledgement by national courts arguable; high implementation and maintenance cost.

3.3. Advertisement

3.3.1. Problems and existing legislation

Entertainment platforms such as YouTube or Instagram are often used for a new form of advertising, the «*influencer marketing*»¹⁰⁸, which is a sub-form of native marketing. The commercial users of these platforms incorporate product advertising into their entertainment content and give the impression that the content is not advertising in the first place. To some extent this is very often part of the contract with the company of the advertised product. Particularly younger users are often unable to distinguish independent recommendations from product placement, so that there is especially a need for action in terms of labelling obligations; in this regard, an important question is who should reasonably be expected to perform these duties and whether in addition to the actual advertisers the platforms also have to meet any transparency obligations.

Moreover, online search engines, and ranking systems of marketplaces can have a significant impact on the commercial success of those who are proposed and “pushed” to the top. Therefore, even in

¹⁰⁸ In detail about the concept of influencers and how influencer marketing works: *Lilian Körberlein*, *Influencer Marketing und Vertriebsrecht*, *Zeitschrift für Vertriebsrecht* (2020), p. 221.

the absence of a contractual relationship with retailers, providers of online search engines or marketplace operators may engage in unilateral conduct that may be unfair and may harm the legitimate interests of commercial retailers and, indirectly, consumers in the Union. The same applies to entertainment platforms with a commercial character (such as YouTube), where the profit of commercial users correlates with «*click and/or like counts*» and therefore indirectly with the ranking of the videos. The algorithm that determines this ranking and also has an influence on how often a particular video is proposed, thus has a great impact on the revenue that can be generated. Sometimes, traders pay platform operators to rank their offers first if search engines for product offers etc. are used, for instance in the case of Amazon's "sponsored" product offers.

Moreover, a particular problem refers to vertically integrated platforms, such as Amazon, which not only act as a intermediary service, but also offer their own services or goods. This dual role puts such platform operators in a position to use the transaction data they receive to identify market trends early on and to put competitors on the platform in a disadvantaged position by giving them a low ranking while at the same time advertising their own products (self-serving behavior).

Another problem concerns the use of user-targeted advertisement and marketing, based upon data platforms (and other intermediaries such as search engines) collect about the behaviour of users on their platforms, oftentimes done by collecting so-called cookies.¹⁰⁹

Concerning these marketing practices, some legal provisions are already in place at the European level: the GDPR as well as the Directive on unfair commercial practice.¹¹⁰ As tracking users usually involves the collection of personal data, all restrictions and justifications of the GDPR apply, in particular, the requirement of consent or carrying out contractual obligations. In practice, most tracking practices are not to be justified by Art. 6 (1) (b – f) GDPR rather than by consent. Here, it is arguable if required consent constitutes an infringement of the prohibition of tying clauses (Recital 21, Art. 7 (4) GDPR).¹¹¹ Besides that, the CJEU, with regard to Art. 5 (3) E-privacy-directive,¹¹² has declared some specific methods of acquiring consent for tracking by using a pre-checked checkbox for the usage of cookies unlawful.¹¹³ This judgment, however, does only refer to the way in which consent can be given but does not address the question whether or not giving consent for the specific data processing was possible or required in the first place.

Also, regarding consent for cookies, the French data protection agency CNIL has made clear that according to their opinion cookies for the use of advertisement require consent; only those cookies that are necessary for the electronic way of communication (so-called functional cookies) do not require consent.¹¹⁴

¹⁰⁹ Cf. for an explanation of cookies ICO, <https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/what-are-cookies-and-similar-technologies/#cookies1>.

¹¹⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'), OJ L 149, p. 22 of 11.6.2005.

¹¹¹ See also Article 29 Working Party, WP259 rev.01, Guidelines on consent under Regulation 2016/679 adopted on 28 November 2017 as last Revised and Adopted on 10 April 2018,

¹¹² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201, 31.7.2002, p. 37–47

¹¹³ CJEU 01.10.2019-C-673/17 Planet49 para. 63.

¹¹⁴ CNIL, Délibération n° 2019-093 du 4 juillet 2019, Article 1, available at <https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000038785140&fastReqId=1514380106&fastPos=1>.

A similarly narrow approach is taken by the British IOC, that lays out that, in their opinion, only strictly necessary data storage does not require consent which has to be interpreted very narrowly.¹¹⁵

Finally, the envisaged e-Privacy Regulation may cope with the issue of tracking users' behaviour as data collected on terminals, etc. shall be regulated. A first draft of the e-Privacy Regulation was proposed in 2017.¹¹⁶ Since then, the proposal has been discussed thoroughly and last been changed on June 3rd which is currently being discussed further within the European Council.¹¹⁷ Notably, even in this latest discussion, there were demands for more clarity regarding services financed by advertisement.¹¹⁸

Regarding sponsored product offers and the requirement of transparency, the Directive on unfair commercial practice (Art. 6: misleading information) could apply even though the exact scope has to be analysed as platforms are not directly acting as a trader rather than assisting them. In a similar manner, sponsored product ratings have to be dealt with. If businesses pay platforms to prominently display positive ratings of certain businesses without disclosing that relationship, it could be seen as a misleading commercial practice in the sense of Art. 6 UCP-D together with Nr. 11a Annex UCP-D.¹¹⁹ Also, not related to data collection but directly tied to advertisement on platforms is the fact that large platforms like Facebook take up a huge share of the market when it comes to selling spots for advertisement. To cope with this issue, the British CMA has proposed a number of measures that range from ex-post control via anti-trust rules to ex-ante regulation.¹²⁰

Especially regarding the protection of retailers, the P2B Regulation provides some rules concerning the ranking on digital platforms. According to Art. 5 (1) – (3) P2B Regulation, providers of online search engines and intermediation services must disclose the parameters that determine the ranking and the relative weighting of those parameters, online search engines must also disclose the reasoning for the relative weighting; in addition, it has to be specifically explained how external circumstances such as the payment of a fee affect the ranking. However, according to Art. 5 (2) only the "most significant" parameters have to be disclosed. It is questionable whether these provisions create the necessary transparency for commercial users, especially since it is not specified how this significance has to be determined. Furthermore, neither online intermediation services nor search engines are under Art. 5 (6) P2B Regulation obliged to disclose algorithms or information that would allow with sufficient certainty to deceive or harm consumers by manipulating search results. Moreover, trade secrets protected by the Directive (EU) 2016/943¹²¹ have not to be disclosed. The

¹¹⁵ ICO, Guidance on the use of cookies and similar technologies, available at <https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/what-are-cookies-and-similar-technologies/#cookies1>.

¹¹⁶ Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), COM/2017/010 final - 2017/03 (COD).

¹¹⁷ Procedure 2017/0003/COD, available at https://eur-lex.europa.eu/procedure/EN/2017_3.

¹¹⁸ Procedure 2017/0003/COD, para. 9, available at https://eur-lex.europa.eu/procedure/EN/2017_3.

¹¹⁹ Louisa Specht-Riemenschneider et al. Grundlegung einer verbrauchergerichten Regulierung interaktionsmittelnder Plattformfunktionalitäten (2020), p. 50, available at https://www.svr-verbraucherfragen.de/wp-content/uploads/SVRV_Stellungnahme_Regulierung_Plattformfunktionalitäten.pdf.

¹²⁰ CMA, Online platforms and digital advertising, Para. 6.7, available at https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf#page=229&zoom=100,93,796.

¹²¹ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure OJ L 157, 15.6.2016, p. 1.

effectiveness of the disclosure obligation can therefore be doubted. Art 7 P2B Regulation aims at the abuse of ranking systems by vertically integrated platform operators; however, it only provides for disclosure obligations and does not prohibit or sanction any abuse. It should also be noted that the P2B Regulation does not apply equally to all platforms. The focus is on search engines and intermediation services¹²², entertainment platforms – even if they are heavily involved in the advertising industry – do not fall within the scope of application, although the ranking and recommendation system can have a strong impact on commercial users there as well.

Regarding the labelling of advertising on platforms such as Instagram, there have been (court) decisions in several Member States in recent months¹²³ whereas a final clarification does not appear to be in sight. However, the discussions are mainly about the question of whether and how the influencers themselves have to label their posts. If the platforms are also obliged in this respect has been largely excluded, the AVMD or the UCP-D certainly do not provide comprehensive rules in this regard. The labelling requirements of Art. 9 (1) (a) AVMD relate to audiovisual commercial communication and so-called user-generated videos within the meaning of Art. 1 (1) (ba) AVMD. The latter are videos that are a sequence of moving images with or without sound, regardless of their length, which constitute a single component and are created by a user and uploaded by the user or another user to a video sharing platform within the meaning of Art. 1 (1) (ba) of the AVMD. This means that image advertising as it often appears on Instagram is not covered, and the AVMD is also very vague about the labelling obligation. It only stipulates that commercial programs must be easily recognizable as such.

3.3.2. Policy options

Concerning the provisions already in place it is arguable if there is still a strong need for further action. To the extent that targeted advertisement is considered a problem, it so far seems to be more of a problem of interpretation and enforcement of law rather than a legislative one.

If, however, action is considered, it could be advisable to amend the Unfair Commercial Practice Directive with a new article regarding platform marketing activities or to amend the Annex to bring about more clarity for the affected parties. Regulation in this field can be based on Art. 103 TFEU.

Also, in light of the newly implemented Digital Content Directive that explicitly mentions data as means of payment in Art. 3 (1), the EU legislator could seize the opportunity to clarify the tying clause provisions in the GDPR in order to cope with tracking issues, not allowing for any more legal uncertainty.

In a similar matter, there seems to be no regulatory need for an opt-out option for targeted advertisement. As mentioned above, targeted advertisement is mostly done based on data that was either collected unlawfully, meaning its use was prohibited in the first place or done based on data collection the user gave his consent for. In the latter case, the consent is tied to the specific purpose the data is collected for and the user can withdraw that consent anytime (Art. 7 (3) GDPR) and can

¹²² See Art. 1 (2) P2B Regulation.

¹²³ **Italy:** Autorità Garante della Concorrenza e del Mercato (AGCM), Order no. 27787 of the 22.5.2019 available at: [https://www.agcm.it/dotcmsCustom/tc/2024/6/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/E6B624BBD0F6A573C12584150049D1EE/\\$File/p27787.pdf](https://www.agcm.it/dotcmsCustom/tc/2024/6/getDominoAttach?urlStr=192.168.14.10:8080/C12560D000291394/0/E6B624BBD0F6A573C12584150049D1EE/$File/p27787.pdf); also several interim injunctions: n. 43/20 of the 28.7.20 available at <https://www.iap.it/2020/07/n-43-20-del-28-07-20-intimissimi-uomo/>; n. 7/20 of the 7.2.20 available at <https://www.iap.it/2020/02/n-7-20-del-7-02-20-linea-intimo-uomo-intimissimi/>; n. 52/19 of the 20.9.2019 available at <https://www.iap.it/2019/09/n-52-19-del-20-9-2019-prodotti-clementoni/>; **Germany:** KG (Court of Appeal) Berlin, Decision from 8.1.2019 – 5 U 83/18; (LG) Regional Court Karlsruhe, Decision from 21.3.2019 – 13 O 38/18 KfH; (LG) Regional Court Frankfurt a.M., Ruling from 2.4.2019 – 2-06 O 105/19; (LG) Regional Court Munich I, Decision from 29.4.2019 – 4 HK O 14312/18; OLG (Higher District Court) Frankfurt a.M., Ruling of 28.6.2019 – 6 W 35/19; **Sweden:** Patent and Trademark Court (PMÖD), Decision from 12.5.2019 - PMT 2054-18; Decision from 31.1.2020 - PMT 798-19.

also ask for all the collected data to be deleted (Art. 17 GDPR). The EU can regulate data protection based on Art. 16 (2) TFEU.

In order to prevent the abuse of ranking mechanisms, the P2B Regulation provides a solid basis, but the pursued goal of transparency and fairness cannot be achieved by mere disclosure obligations as provided in Arts. 5 and 7 P2B Regulation. In addition to these, a ban on self-preference should be introduced; also, infringements of this obligation should be sanctioned. The disclosure obligations should also be made more specific; it should not be left to the platform operators to decide which parameters they disclose. In addition, a more extensive disclosure obligation to European competition authorities should be considered in case of suspicion of unfair behavior.

Concerning the labelling obligations the focus should indeed be on the influencers themselves, and responsibility should not be unreasonably shifted by obliging the platform operators to review all posts and label them if necessary. However, the platforms could be obliged to assist the influencer by offering them tools in order to flag their advertisement. On the most relevant platforms for influencer marketing, such as Instagram, 'pure' advertising posts, mainly from corporate accounts (such as Nike, Zalando etc), are specially marked as *'sponsored'*.¹²⁴ This is not the case concerning advertising posts from private persons, they either have to use a hashtag or indicate in the caption that the post is sponsored. Recently, Instagram has introduced the tool 'branded content tag', where the user can specify who they are working with for this post, then the reference *'paid partnership with'* appears clearly above the photo.¹²⁵ However, this tool is not mandatory.

Platforms should be required to impose the obligation on all users to indicate whether a post is a sponsored post when they create it. Then the platforms should set the sponsored tag clearly visible, this should not only be done by the influencers themselves, the danger of surreptitious advertising would then be eliminated. If the tag appears above the photo, it cannot be overseen, unlike in the caption or in the hashtags. As the lack of labelling of advertisement is an ubiquitous problem in online marketing, it would not be effective to adjust only sector-specific regulations such as those of the AVMD. Instead, it would be more appropriate to adapt the general competition rules in the Unfair Commercial Practice Directive to include all platform operators respectively the operations on all platforms, regardless of the form of the content. Currently, the labelling obligation for those who carry out commercial activities arises from Art. 7 (2) UCPD respectively from the national implementation of the provision; the scope of application could be extended in such a way that also platforms that enable commercial activities must ensure that the users fulfil their obligation.

3.3.3. Added value

As there are existing regulations in place already, not taking further action would not have detrimental consequences. However, some legal uncertainty regarding the discussed issues will remain. These uncertainties can have potentially harmful effects since they may either deter businesses from generating profits via advertisement out of fear of acting unlawfully or make maliciously affected consumers abstain from taking legal action. Furthermore, the lack of clarity with regard to transparency obligations means that operators in the digital single market can remain at a disadvantage and consumers can be misled by algorithms that may have been influenced. So once again, legal uncertainty raises costs for businesses and consumers alike. Increasing transparency would therefore benefit consumers meaning they are enabled to make better informed decisions

¹²⁴ detailed information on advertising opportunities for business partners:

https://business.instagram.com/advertising?locale=de_DE.

¹²⁵ More details: https://business.instagram.com/a/brandedcontentexpansion?locale=de_DE.

when making use of an online service. They also once again gain more agency (in the sense of social science)¹²⁶ in their general online behaviour and can better evaluate their data.

So, if no action was taken, legal uncertainty and a distortion of competition would persist. Therefore, this is not an effective approach.

Consequently, creating legal clarity in any way, be it by amending the GDPR or adding provisions regarding personalised advertisement to the Unfair Commercial Practices Directive and also by adjusting the P2B Regulation and expand the scope of application of the UCP-D will be effective in restoring legal clarity and avoid fragmenting legal judgements across the EU and an increase in distortions of competition. Since the relevant legislations in question are all EU-law, regulation can only be done at an EU-level.

Table 5.1: Summary Advertisement (personalised ads)

Policy Option	No action taken	Clarify existing legislation (GDPR)	Adding personalised advertisement to the Unfair Commercial Practice Directive
Regulatory Content	No new legislation about personalised advertisement is proposed.	The GDPR is amended for example in a way that personalised advertisement is included in the recitals or explicitly in Art. 6 so that it will be clear how this practice relates to the different legal bases laid out in Art. 6 GDPR.	The Unfair Commercial Practice Directive is amended by setting clear guidelines regarding how personalised advertisement should be designed to be considered fair; possibly also resolve the relation to the GDPR.
Legislation needed?	None	Yes	Yes
Regulatory impact	None	Low	medium
Impact on the Coherence of legal framework	0	++	+++
Impact on Legal clarity	0	++	+++
Impact on the Effective and efficient law enforcement	-	++	+++
Impact on the Digital single market	-	++	++
Impact on consumer rights	-	++	+++
Impact on fundamental rights	-	+	+
Benefits	Existing (EU) law should cover most of the aspects in question.	By clarifying how the collection of Data relates to the GDPR, platforms gain legal clarity and enforcement agencies have clear ground to take action. Also, the existing business model will likely be made unlawful;	By explicitly setting the rules for personalised advertisement, users and platform operators achieve great legal clarity. By amending the Unfair Commercial Practice Directive, precise procedures can be

¹²⁶ Cf. Marc Jeannerod, The mechanism of self-recognition in humans, Behavioural Brain Research 142 (2003) p. 1.

		strengthening consumers data-protection rights.	implemented without being inappropriately placed.
Costs	Legal uncertainty may remain regarding the interpretation of certain provisions in the GDPR; no improvement in legal clarity.	Potentially impacting the data economy, producing high adaptation costs for businesses.	High chance of overreaching regulation; adaptation to new regulation will produce costs for businesses.

Table 6.2: Summary Advertisement (ranking and recommender systems)

Policy Option	No action taken	Introduction of a tiered disclosure system, specification of the disclosure obligations under Arts. 5 and 7 P2B-R and introduction of sanctions for unfair influence on ranking mechanisms	Adding obligations for platform operators to the Unfair Commercial Practice Directive
Regulatory Content	No new legislation about ranking and recommender systems is proposed.	The P2B Regulation is amended by specifying which parameters must be disclosed or according to which criteria the importance and thus the need for disclosure must be determined; a more extensive disclosure obligation to competition authorities should be introduced if there is suspicion of unfair practices. In addition, a ban on self-preference and sanctions for the use of unfair practices should be introduced.	The Unfair Commercial Practice Directive is adapted in such a way that Art. 7 (2), which imposes a labelling obligation, covers not only the commercial operators themselves, but also the platforms that enable these activities
Legislation needed?	No	Yes	Yes
Regulatory impact	None	medium	medium
Impact on the Coherence of legal framework	O	+	+
Impact on Legal clarity	O	++	+
Impact on the Effective and efficient law enforcement	O	++	++
Impact on the Digital single market	--	++	++
Impact on consumer rights	-	++	++
Impact on fundamental rights	-	+	+

Benefits		By specifying which parameters have to be disclosed, real transparency is created, and the prohibition of self-interest with the threat of punishment creates a real incentive not to behave unfairly. Through the transparent and fair ranking mechanisms, consumers are not deceived and the market opportunities of the traders are not unduly reduced.	By extending the scope of the UCPD, it is ensured that consumers are able to make informed choices and distortions of competition due to omission of labelling can be eliminated.
Costs	Distortions of competition would still be possible, which could hinder the development of the digital single market, and consumers would continue to be exposed to possible misinformation.	Extended disclosure requirements could lead to tensions with the Trade Secrets Directive.	The adaptation of the platform environment is associated with costs for the platform operators.

3.4. Enforcement

3.4.1. European Agency

3.4.1.1. Problems and existing legislation

Establishing mandatory standards for curating content as well as advertisement does not involve effective enforcement mechanisms per se. There are no provisions on the European level concerning a European agency for platforms nor control of algorithms. As the experience in other e-commerce-related sectors has shown, namely for the former data protection directive, enforcement practices differ widely across the EU.¹²⁷ Enforcement is mostly left to member states; dependent on the design of the European legislation in question, member states also decide how to enforce the European legislative act, be it by civil law, by criminal law or administrative law or a combination of all of these elements. Thus, the EU legislator opted in particular in data protection with good reasons for a European Data Protection Board and procedures on how to coordinate supervising authorities. The same is true for the financial markets after the crisis in 2008.¹²⁸ Also, member states might be inclined to implement low enforcement standards to be more attractive to platform operators, posing the risk of a regulatory “race to the bottom”.

3.4.1.2. Policy options

The first option would consist in continuing the traditional approach, hence, to leave enforcement to member states which decide on how to incentivize providers to comply with the provisions regarding curating content and advertisement.

¹²⁷ Cf. First report on the implementation of the Data Protection Directive (95/46/EC), COM(2003) 265 final, pp. 12, 22; Communication from the Commission to the European Parliament and the Council on the follow-up of the Work Programme for better implementation of the Data Protection Directive, COM(2007) 87 final, p. 5; *Neil Robinson et al*, Review of the European Data Protection Directive, pp. 35; *Peter Hustinx*, EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation, pp. 27.

¹²⁸ *Jacques de Larosière*, Report on financial supervision, 2009, paras. 159; cf. also Recital 1 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84–119.

The second option refers to the establishment of a European Agency, adding on to the proposed approach for regulating algorithms, which can classify and regulate these algorithms. This could be quite important for platforms which thrive on the possibility to have their algorithms be regulated by a single body instead of having to adapt to different regulatory standards (one-stop-shop principle). Therefore, establishing a newly formed EU-agency can be an option. Such an approach would not bar actions by individuals (users) based on civil law; rather it is a combined approach of civil and public law that effectuates mandatory standards for curating content clauses in contracts.

On the other hand, since building up a newly formed EU-institution to supervise algorithms would take a lot of specialised know-how and require human capital resources, it could be advisable to commission existing data supervisory authorities with these tasks – as they already have to cope with automated decisions according to Art. 22 GDPR.¹²⁹

3.4.1.3. Added value

If enforcement would still be left to member states alone – without any kind of harmonization - enforcement standards could also differ just based on the resources an agency can dispose of, for instance depending on the manpower employed by that institution. Therefore, different enforcement standards will be the result, leading to a de facto fragmentation of law across the Union. Also, since algorithms are an integral part of a platforms' functionality, having differing standards for control of these algorithms across national enforcement agencies can lead to an uneven playing field among platforms, so all in all no action would result in a weaker digital single market as well as in some kind of "forum shopping" (or regulatory arbitrage) between member states. As a result, the cost of not taking action is burdened onto platforms that have to adapt to different enforcement standards and have to split their resources. Also, levels of consumer protection can differ, resulting in legal unclarity for consumers, possibly dissuading them from enforcing their rights, hence making this approach not effective in achieving the Union's goals of a harmonized digital single market.

Establishing a new EU-institution will condense the necessary financial means and enforcement standards to achieve harmonized enforcement procedures, thus resulting in a strengthened digital single market and an overall lower sum of administration costs. However, implementing a newly formed institution would also need a lot of specialised know-how and expertise in many different fields. An increased value could, therefore, be achieved by adding on the capacities and responsibilities to an existing agency such as the European data protection agency. The administrative costs of such an institution should be passed on to the platforms that benefit from it. Consequently, the platforms will burden the ensuing costs.

As platforms usually act on a European level (cross-border), the relevance of regional peculiarities – one of the strongest arguments for subsidiarity in favour of regulation by member states – does not seem to have the same importance as for normal business.

Conclusively, a European agency that regulates the aforementioned areas will be most effective in avoiding legal uncertainty and in harmonizing the enforcement of EU-rules for platforms. Since platforms usually have a cross-border reach and are active in many states, a single EU-agency that does not need to coordinate with many different national agencies will be most efficient.

¹²⁹ Mario Martini, *Regulatory System for Algorithm-based Processes*, 2019, p. 31.

Table 7: Summary European Agency

Policy option	Enforcement is completely left to member states	General EU-wide standards with national enforcement	European agency
Regulatory content	No rules regarding enforcement are implemented, thus leaving it to the discretion of the member states to decide on how to enforce the legislation.	Enforcement of the implemented rules is left to the member states, which can choose how to best implement enforcement practices, such as by civil or public law; however, the severity of the enforcement action, such as the sum of fines and other penalties are set on an EU-wide level.	A European agency is created that is responsible for the enforcement and transparency measures provided in this legislation.
Legislation needed?	None	Yes	Yes
Regulatory impact	none	Low-medium	high
Impact on the Coherence of legal framework	--	+	++
Impact on Legal clarity	--	+	+++
Impact on the Effective and efficient law enforcement	---	+	+++
Impact on the Digital single market	--	+	++
Impact on consumer rights	--	+	+++
Impact on fundamental rights	-	+	++
Benefits	Autonomy of member states is secured	Member states can incorporate enforcement of rules as they see fit, thereby choosing the way that fits best into their national system of law. Outcome of enforcement differs less compared to absolute national enforcement.	Good coordination across the Union, equal enforcement of legislation leads to better user protection; Having a centralised agency eases procedures for platforms.
Costs	Vastly differing practices of enforcement are likely, leading to a potential fragmentation across the Union and incentivizing lower enforcement standards; high costs of legal uncertainty and differing levels of consumer protection.	Differences remain with regard to effectiveness and strictness; still some increased costs due to legal uncertainty.	Ensuring administrative cost; sharpest regulatory impact.

3.4.2. Transparency

3.4.2.1. Problems and existing legislation

Closely related to the enforcement of complaint mechanisms and actions of platform operators to block content are transparency issues. As long as users and the public have no knowledge on how platforms carry out their policies of curating content (by blocking or pushing content) it is hard to control the behaviour of platforms. Publicity is one of the well-known tools to foster the enforcement of material provisions. Some larger platforms like Facebook have independently taken steps to provide comprehensive transparency reports,¹³⁰ but industry-wide standards are lacking.

On the European level, there are scarcely any obligations to report notice-and-take-down procedures or dispute settlement mechanisms; moreover, there are no report obligations for the concrete figures of notices received by providers or removal requests nor about time spans between complaints and removals. On the national level, the German Network Enforcement Act as well as the French “AVIA law”¹³¹ provide for obligations to report systematically and periodically on compliance with notice-and-takedown obligations including details on how the complaint management system works in practice.

3.4.2.2. Policy Options

The first option would consist – as before – in just keeping the status quo, leaving it to member states to cope with transparency and reporting obligations of platforms, such as social networks.

The second option could be to set EU-wide minimum standards for transparency obligation that member states have to implement while allowing them to impose stricter rules if deemed necessary from the perspective of specific member states.

A third option would be to implement European-wide mandatory fully harmonizing standards for transparency of compliance. Those can consist of periodical reports, either to an agency or to the public, that includes the number of reported cases and information regarding the procedure that a platform has in place.

3.4.2.3. Added value

If no action was to be taken, it goes without saying that again a patchwork of different obligations would be the result, also potentially coming into conflict with the country-of-origin principle of Art. 3 ECD (like the German Network Enforcement Act).¹³² Platforms would either burden the costs of legal uncertainty and have to adapt to many different legal requirements (if Art. 3 ECD would not step in), thus resulting in a de facto obligation to comply with the highest standard of reporting in order to cut down costs¹³³; or (if Art. 3 ECD applies) the level of reporting would be very different according to the report standards of the seat of the platform provider.

Also, levels of effective consumer protection would differ across the EU. This not only leads to more legal uncertainty for consumers and less effective protection but can also increase costs of legal procedures since more information needs to be collected by dispute parties rather than being

¹³⁰ Facebook transparency report, available at <https://transparency.facebook.com/community-standards-enforcement>.

¹³¹ Cf. above fn. 50.

¹³² See for a criticism of the German Network Enforcement Act related to Art. 3 ECD *Gerald Spindler*, *Rechtsdurchsetzung von Persönlichkeitsrechten*, *Zeitschrift für Urheber- und Medienrecht* 2018, 365 (367).

¹³³ What of course assumes that reporting standards are comparable and not totally different.

provided by the platform. As a result, costs of enforcement of consumer rights would differ as well, counteracting the goals of the digital single market.

On the other hand, EU-wide obligations of reporting compliance to the public and state authorities are a highly efficient tool to enhance the effectiveness of such procedures, giving an additional incentive to providers, in particular, if also European standards for notice-and-take-down procedures were to be adopted, having mandatory EU-wide rules would ensure a level playing field for platforms across the EU and ease the hurdle of entry to the market, therefore strengthening the European digital single market.

This can be effective because it leads to more legal certainty and avoids fragmentation of regulation. Having many different national agencies would (as shown above¹³⁴) not be the most efficient way of supervising global platforms. Also, synergetic effects and benefits arising from the aforementioned EU-agency would be hugely diminished in case of different reporting standards.

Also, administrative costs would be lower for one reporting standard rather than many different ones: Once again, the German legislator has, in preparation for the Network Enforcement act, which in § 2 requires platforms to provide transparency reports, estimated costs of about 50 000 € for a platform per report.¹³⁵

An EU-wide mandatory reporting standard would also be effective in preventing legal uncertainty and fragmentation and be a lot more efficient since technical know-how and human resources are pooled to increase output.

Table 8: Summary Transparency

Policy option	No action taken	Transparency reports to national institutions	Transparency reports to an EU-institution
Regulatory content	No policy action is taken regarding transparency obligations of platforms	Mandatory transparency reports regarding a predefined set of questions submitted to state bodies	Mandatory transparency reports regarding a predefined set of questions submitted to an EU-agency.
Legislation needed?	No	Yes	Yes
Regulatory impact	None	Medium	Medium
Impact on the Coherence of legal framework	---	+	+++
Impact on Legal clarity	---	+	+++
Impact on the Effective and efficient law enforcement	---	+	+++

¹³⁴ See fn. 112.

¹³⁵ BT-printed matter 18/12356, p.3.

Impact on the Digital single market	--	+	++
Impact on consumer rights	--	+	++
Impact on fundamental rights	-	+	+
Benefits		Improved transparency, incentive to abide by the proposed rules, improved public awareness	Improved transparency, incentive to abide by the proposed rules, improved public awareness.
Costs	No improvements in transparency, access to rights remains unimproved, a potential patchwork of regulations; adaptation costs for platforms	Potential unnecessary bureaucracy in the form of communication between national and EU-agencies; somewhat diminished transparency by having multiple reports; higher administrative costs	Up-front administrative costs

3.5. Smart contracts

3.5.1. Problem and existing legislation

Related to the role of platforms (but not identical) are smart contracts: As they are self-executing based on an encoded contract and can even be concluded automatically (machine-to-machine communication), it is arguable whether or not they are legally binding.

Moreover, as they are self-executing (for instance, blocking a car if rent was not paid) and do not need any enforceable title, they raise concerns regarding consumer protection, in particular withdrawal rights.¹³⁶ Furthermore, there are doubts if control of unfair standard terms and conditions can be carried out as filing a claim in court is not necessary anymore in order to execute contractual obligations. Finally, self-executing smart contracts can undermine provisions of foreclosure aiming at the protection of debtors as there is no court procedure necessary anymore to execute the contract.¹³⁷

¹³⁶ *Maren K. Woebeking*, The Impact of Smart Contracts on Traditional Concepts of Contract Law, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2019), 105 para 28; *Larry DiMatteo and Christina Ponciba*, Quandary of Smart Contracts and Remedies: The Role of Contract Law and Self-Help Remedies, *European Review of Private Law* 6-2019, 805, 815; *Mark Giancaspro*, Is a 'smart contract' really a smart idea? Insights from a legal perspective, *Computer Law & Security Review* Volume 33, Issue 6, December 2017, 825 para. 3.6; arguing for an improvement in consumer protection; *Oscar Borgogno*, Smart Contracts as the (new) Power of the Powerless? The Stakes for Consumers, *European Review of Private Law* 6-2018, 885.

¹³⁷ Cf. regarding insolvency ESMA, Report The Distributed Ledger Technology Applied to Securities Markets, paras 53, 57, available at https://www.esma.europa.eu/sites/default/files/library/dlt_report_-_esma50-1121423017-285.pdf; *Robin Matzke*, Smart Contracts statt Zwangsvollstreckung?, in Martin Fries and Boris Paal (eds.), *Smart Contracts*, 2019, p. 110; *Alan Rosenberg*, Automatic Contracts and the Automatic Stay, *American Bankruptcy Institute*, 7, 2019, available at http://www.mrthlaw.com/wp-content/uploads/2019/07/feature1_07-19.pdf; *Christoph Paulus and Tom*

On the European level, there are no directives or provisions that directly regulate this new phenomenon; even though the Unfair contract terms Directive (UCTD)¹³⁸ in principle applies, it does not foresee any specific rules for smart contracts, neither for acknowledging legally binding effects of smart contracts nor for providing minimum protection for contracting partners in case of foreclosure. It does however, according to letter q) of the annex, apply when contract terms provide for a burden of proof on a consumer that should by law lie with another party. When enforcing a smart contract, the debtor does not actively transfer the money to the contract partner. Rather, the payment is enforced automatically. If, for whatever reason, the debtor feels like he was not obligated to fulfill the contract, the debtor now has to pursue legal action himself instead of the contract partner. Therefore, the burden to take action and prove a claim is switched onto the debtor.¹³⁹ However, this obviously will have to be dealt with on a case by case basis and is open to further legal interpretation. Overall, there is no sufficient legislation at the EU-level.

Besides that, all problems are left to member states and their courts applying traditional rules of contract law. Also, neither the ECD nor the Directive on Digital Content regulates conclusion of (smart) contracts.

For the time being, at national level there are very few existing regulations that specifically target smart contracts or blockchain technology, even though there are plans to do so in many different member states. Those plans are progressing at different paces: The German government has recently decided on a strategy regarding the regulation of blockchain technology,¹⁴⁰ though no legislation has been adopted as a result, yet. In this strategy, the legislator plans to, inter alia, open up regulation regarding electronic bonds, in particular implementing an ex ante certification program and information obligations for smart contract-technology.¹⁴¹

In France, regulation that specifically aims at crypto currency and initial coin offerings has been implemented,¹⁴² but the technological aspect of smart contracts was not addressed.

In the UK, the UK Jurisdiction Taskforce, which was partially established by the UK Government, has released a report regarding smart contracts and blockchain regulation¹⁴³ based on which legislation is planned. The Taskforce concludes that a smart contract can be a legally binding contract under British law and the content of that contract can be defined without needing new legislation.

Italy has taken steps to legally define “distributed ledger technology” and “smart contract”, which include a dependency from guidelines, set up by the Agenzia per l’Italia digitale and requires the

Braegelmann in Braegelmann/Kaulartz (eds.), *Rechtshandbuch Smart Contracts*, Chap. 18 para. 34; *Mark Giancaspro*, Is a ‘smart contract’ really a smart idea? Insights from a legal perspective, *Computer Law & Security Review* Volume 33, Issue 6, December 2017, 825 para. 3.6.

¹³⁸ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29.

¹³⁹ *Thomas Riehm*, in Braegelmann/Kaulartz (eds.), *Rechtshandbuch Smart Contracts*, Chap. 9 para 29.

¹⁴⁰ Blockchain-Strategie der Bundesregierung from 18.9.2019, available at https://www.bmwi.de/Redaktion/DE/Publikationen/Digitale-Welt/blockchain-strategie.pdf?__blob=publicationFile&v=10.

¹⁴¹ Blockchain-Strategie der Bundesregierung from 18.9.2019, p. 15.

¹⁴² PACTE law n° 2019-486 of 22; see *François Barrière*, Blockchain-Based Financial Services and Virtual Currencies in France, *Journal of European Consumer and Market Law* (2020), 40.

¹⁴³ The LawTechDeliveryPanel, Legal statement on cryptoassets and smart contracts, 2019, available at https://35z8e83m1ih83drye280o9d1-wpengine.netdna-ssl.com/wp-content/uploads/2019/11/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf

written form.¹⁴⁴ Additionally, Italian courts have addressed the issue of crypto currency by declaring them financial services but again did not address the underlying technology.¹⁴⁵

However, There is no existing legislation that is specific to smart contracts in Spain.¹⁴⁶

One prominent role in the development of smart contracts has been taken by Malta with a three-pieced legislation effort. As early as 2018, Malta adopted the Virtual Financial Assets Act (VFA)¹⁴⁷ to regulate crypto currency, the Digital Innovation Authority Act (MDIA)¹⁴⁸ to set up an observative and regulative body to monitor blockchain-technology and finally the Innovative Technology Arrangements and Service Act (ITAS)¹⁴⁹ that inter alia regulates the technology of smart contracts. For smart contracts, the ITAS provides for an ex ante approval process of the underlying technology.¹⁵⁰ To gain approval, smart contract software must fulfil the criteria set out by the MDIA. The criteria include most notably a required option for haltering and intervention by authorities in cases of violation of law.¹⁵¹

In general, smart contracts do not only pose risks for consumers but also provide great opportunities for businesses by lowering transaction costs and easing cross border execution of contracts. When regulating, a balance has to be struck between the protection of consumers and stifling potential innovation of a technology that has great future potential.

The same is true for contracts being concluded by the use of autonomous systems (artificial intelligence). The major problem for most of the jurisdiction refers to the doctrine of free human will, necessary to declare an offer and the acceptance for concluding a contract. As autonomous systems are not predictable in their behaviour and as they are not human beings it is hard to apply the doctrine of principal and agent to these systems. On the other hand, the usual approach for computer declarations to handle them as predetermined declarations of will is neither feasible as the systems are not predictable.¹⁵² European directives or regulations are not dealing with these

¹⁴⁴ Art. 8-ter Legge 11 febbraio 2019, n.12, Gazzetta Ufficiale n.36 v.12. 2. 2019, available at <https://www.gazzettaufficiale.it/eli/qu/2019/02/12/36/sq/pdf>.

¹⁴⁵ Tribunal of Verona II section 24 January 2017 n 195; for detailed discussion see *Maria Concetta Causarano*, *Journal of European Consumer and Market Law* (2020), 71.

¹⁴⁶ *Antonio Legerén-Molina*, *Los Contratos inteligentes en Espana La disciplina de los smart contracts*, *Revista de Derecho Civil*, vol. V, núm. 2 (2018), Estudios, pp. 193, 210.

¹⁴⁷ Virtual Financial Assets Act, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12872&l=1>.

¹⁴⁸ Digital Innovation Authority Act, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12873&l=1>.

¹⁴⁹ Arrangements and Service Act, available at <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12874&l=1>.

¹⁵⁰ Art. 7 ITAS.

¹⁵¹ Art. 8 (4 (d iii)) ITAS; for more requirements see *Innovative Technology Arrangements Guidelines*, available at https://mdia.gov.mt/wp-content/uploads/2018/10/Innovative-Technology-Arrangements-Guidelines-30Oct2018_Final.pdf.

¹⁵² For further elaboration cf. EU-Blockchain Observatory and Forum, *Legal and regulatory framework of blockchains and smart contracts*, p.32, available at https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf; detailed discussion in *Friedemann Kainer and Lydia Foerster*, *Autonome Systeme im Kontext des Vertragsrechts*, *Zeitschrift für die gesamte Privatrechtswissenschaft* 2020, 275, 282 ff. with further references; *Larry DiMatteo and Christina Ponciba*, *Quandary of Smart Contracts and Remedies: The Role of Contract Law and Self-Help Remedies*, *European Review of Private Law* 6-2019, 805, 810 ff; *Mark Giancaspro*, *Is a 'smart contract' really a smart idea? Insights from a legal perspective*, *Computer Law & Security Review* Volume 33, Issue 6, December 2017, 825 para. 3.4.

issues – as they belong to “core” civil law features that still are not harmonized on a European scale. Therefore, the E-Commerce-Directive and the Digital-Content-Directive do not apply since they both do not regulate those areas.

3.5.2. Policy options

One policy option would refer to maintaining the status quo, hence, leaving it to the evolution of civil law jurisdiction in each member state. Since smart contracts are being dealt with like usual contracts, all withdrawal rights also apply to smart contracts; hence, in principle, there is no need for further legal action rather than for enforcement against such smart contracts circumventing consumer protection. As long as the result remains the same, i.e. that consumers can use their rights, e.g. the right to withdrawal, there seems to be no drawback of consumer protection.

Nevertheless, there is a chance for smart contracts to impede consumers’ rights by being, for the most part, irreversible in nature due to the used blockchain technology. In those cases, regulation could be advisable. Namely, regulation could provide for technical measures being included in the smart contract’s code that makes the use of consumer rights possible, such as mandatory reverse transactions.¹⁵³

Moreover, since regulating smart contracts will mostly impact e-commerce, consumer protection and the consumer finance industry, which are all regulated on an EU-level, regulation should also be done on an EU-level to keep the applicable law harmonized and to ensure legal clarity and certainty. The focus should be on clarifying that consumer rights have to be guaranteed when using smart contracts as well, since not providing mandatory consumer rights in smart contracts would likely violate the corresponding legislation already in place. In other terms: the focus lies not on confirming that consumer rights exist also in smart contracts rather than they can effectively being used.

Since the proposed policy’s aim is to harmonize the digital single market and to create a level playing field when it comes to smart contracts, Art. 114 TFEU can be used as a legal basis.

More crucial, however, seems to be the prevention of undermining foreclosure protection provisions. As smart contracts are also used in cross border circumstances to avoid complicated national foreclosure procedures, there is a specific need for European provisions giving debtors instruments in order to invoke foreclosure protection in court against a creditor who is using smart contract enforcement. One possible legislative approach could be to require options for the halting of a smart contract’s execution.¹⁵⁴ Further, consumer protection directives could be amended in a way that smart contracts have to contain such encoded tools to stop enforcement in case of foreclosure. This could be modelled after the Maltese requirements mentioned above.

However, this poses the problem of devaluing the use of smart contracts by nullifying one of its greatest advantages which is the security of enforcement. To strike a balance between these positions, one option could be that either enforcement or the technical enforcement stop can only be executed by providing security beforehand. That way, contractual rights can be enforced while providing adequate protection for both parties.¹⁵⁵ Some providers of smart contracts already

¹⁵³ Reverse transactions are fictive transactions which state the opposite of the actual transaction and are retroactively being applied to the blockchain until the desired outcome is achieved.

¹⁵⁴ For the technical implementation see *Maren K. Woebbecking*, *The Impact of Smart Contracts on Traditional Concepts of Contract Law*, *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 10 (2019), 105 paras 27 ff; *Gerald Spindler and Maren K. Woebbecking*, in *Braegelmann/Kaulartz* (eds.), *Rechtshandbuch Smart Contracts*, Chap. 11 paras. 28 ff.

¹⁵⁵ Cf. EU-Blockchain Observatory and Forum, *Legal and regulatory framework of blockchains and smart contracts*, p. 24.

include such collateral provisions in their smart contracts, especially in cases of loans provided via smart contract.¹⁵⁶ Such means of security could be mandated by law to be implemented in every smart contract transaction or to provide an alternative option to an emergency break. As a result, businesses could choose either to incorporate security measures or to enable an option to alter the contracts executions. Even a combined approach, in which the haltering of the contract via such an “emergency break” is only possible if sufficient securities have been provided, seems possible. This way, a remedy is provided for cases in which the execution has to be halted and the potential of exploiting this remedy is contained by the provided securities.

Another option would consist in introducing damage claims for contracting parties in case of self-enforcement (contrary to contractual rights). An extreme option could be finally to require a “backdoor” in all smart contracts that would allow courts to interfere with self-execution. However, such a backdoor gives rise to security concerns as these could also be used by third parties (hackers).

3.5.3. Added Value

The disadvantage of a no-action approach is evident: Whereas the different national civil law regimes of conclusion of contracts would likely in the end converge with the result of acknowledging a contract, the danger of undermining consumer protection is still present. Not regulating will once again leave great legal uncertainty, resulting in increased cost of regional legal adaptation and information for the contract user. Also, consumers are affected if they are subject to a smart contract that does not account for consumer protection provisions, substantially increasing their cost for rescission of contract.

Consequently, this approach would also be the most inefficient way to achieve the desired results of consumer protection and legal certainty. Every national legislator would have to conduct their research, making it less efficient, which may lead to different outcomes.¹⁵⁷

Finally, synergy effects would somewhat exist with national rules since, as shown above, smart contracts *inter alia* may collide with foreclosure rules, which are regulated on a national level. Other rules however, such as a consumers’ withdrawal rights are regulated on an EU-level and cannot be coordinated well on national levels.

Therefore, a favourable option would once again refer to an EU-harmonized approach, even more as smart contracts are very likely to be used in cross-border relations as they can overcome complicated court procedures to execute a contract. A EU-added value of such a proposal can be seen in the harmonization of how to implement consumer protection so provider of smart contracts only have to adapt to one set of regulations, therefore strengthening the digital single market while avoiding legal fragmentation. This would reduce costs of legal uncertainty for contract users about consumer protection and foreclosure. However, costs for cross-border adaptation of contracts will remain and core problems of smart contracts such as their relation to foreclosure rules remain unanswered.

Moreover, an additional EU-wide regulation of foreclosure procedures implemented in smart contracts would be beneficial as it would guarantee equal protection of consumers across the Union and strengthen the digital single market by providing legal clarity for businesses. However, such a regulation tends to increase costs for businesses in cases of foreclosure against consumers since the

¹⁵⁶ Cf. List of Accepted Collateral for ETHLend Loans, available at <https://github.com/ETHLend/Documentation/wiki/List-of-Accepted-Collateral-for-ETHLend-Loans>.

¹⁵⁷ Cf. Communication from the commission to the council and the European Parliament, COM(2004) 487 final, p. 8.

smart contract's execution is hampered with the effect that additional procedural costs would ensue. An essential element of smart contracts thus would be watered down by such a regulation.

In a similar matter, the last option proposed, namely requiring "backdoors" in smart contracts, would surely provide for enhanced consumer protection but would also greatly diminish the effectiveness of smart contracts and would bring about little improvements for businesses, therefore weakening the EUs' digital single market. The option of having a "backdoor" in a smart contract will force businesses to invest in extra safety measures or dissuade them from using smart contracts in the first place.

If this approach was to be followed, once again an EU-regulation would be most effective. Thus, it could be ensured that no national business would have a competitive advantage. Also, member states are not incentivised to implement the least strict regulation possible to attract businesses. Due to a combined and pooled expertise, technical regulation and supervision of smart contracts would be done most efficiently at an EU-level. Since the more important issues related to smart contracts are those of consumer protection, EU-wide rules regarding smart contracts can be crafted so that they synergize well with those consumer protection rules.

Table 9: Summary Smart contracts

Policy option	No action taken	Harmonized guidelines for implanting consumer protection	Harmonizing different aspects on an EU-level
Regulatory content	No action regarding smart contracts is taken.	EU-wide rules for the technical steps to ensure consumer protection in smart contracts are implemented (e.g. mandatory reverse transactions).	Mandatory EU-wide rules regarding smart contracts are implemented, regulating different aspects of the used technology, including but not limited to consumer protection, foreclosure procedure and insolvency; possibly done by implementing mandatory reverse transactions and obligations for providing security before foreclosure.
Legislation needed?	No	Yes	Yes
Regulatory impact	None	Medium-high	High
Impact on the Coherence of legal framework	--	+	+++
Impact on Legal clarity	--	++	+++
Impact on the Effective and efficient law enforcement	-	++	++
Impact on the Digital single market	-	+	++

Impact on consumer rights	-	+++	+++
Impact on fundamental rights	O	O	O
Benefits	Smart contracts can be regulated under national law as member states deem it to be adequate	EU-wide legal clarity for consumers and businesses, consumer rights are ensured; clarity for smart contract providers on how to implement consumer protection measures.	Legal clarity regarding the use of smart contracts is achieved, leading towards a digital single market and fostering innovation in the EU; potential critical aspects such as the relation to foreclosure and insolvency can be addressed more specifically.
Costs	Unharmonized law across member states, legal uncertainty in cases of cross border contracts are likely. Less ground for innovation regarding smart contracts; mandatory consumer protection might be achieved in different ways; costs of legal uncertainty and risks for consumers remain	Potentially stifling innovation, devaluing some of a smart contract's advantages such as security and ease of execution, higher transaction costs for smart contract users.	Potentially restricting the benefits of smart contracts, potential overreaching in regulation and competitive disadvantage in international competition.

3.6. International Private Law (Conflict of Laws)

3.6.1. Problem and existing legislation

A lot of platform operators, in particular the market-dominant platforms like Facebook, eBay, Amazon, or Google, are not based in the EU (or only by means of subsidiaries). Usually, contracts between traders and these platforms (Platform-to-business, P2B) contain a choice of jurisdiction and also of courts referring to the jurisdiction of the seat of the platform operator (mother corporation), thus, avoiding the application of EU law as well as the jurisdiction of EU courts as usually some third-party jurisdiction is opted for, such as Californian law. Moreover, arbitration clauses are widely used. Whereas consumers are protected against such choice-of-law clauses by Art. 6 Rome-I-Regulation,¹⁵⁸ in business-to-business relations no legal provision on the level of international private law protects the business partner, having no regard to market power etc. Only by antitrust law and discriminatory practices traders may be protected against illegal practices of big platforms; however, this kind of protection still seems to be rare even though antitrust authorities obviously are closely observing the behaviour of some platforms, such as Amazon by the German Antitrust Authority. Moreover, this kind of control often takes effect too late meaning a regulation ex-ante seems to be necessary.

As already indicated, on the European level there are no provisions protecting business against choice-of-law clauses neither against arbitration clauses. Notably, there is no mention of addressing of these problems in the newly adopted P2B-Regulation that regulates terms and conditions between businesses and platforms. Overall, for contractual relations with international influence, the ROME-I regulation applies according to Art. 1 (1), Art. 2 ROME-I regulation. Thus, according to

¹⁵⁸ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6–16

Art. 3 (1) ROME-I regulation, the contractual parties can freely choose the applicable, in other words it is left to private autonomy of the contracting parties (business-to-business or platform-to-business) to use choice-of-law-clauses as well as arbitration or jurisdiction clauses.

3.6.2. Policy options

As before, the first option would consist of leaving the international protection of traders vis-à-vis platform operators to national conflict of laws regime (as the Rome-Regulation does not apply), coping with P2B-contracts with third country-based parties.

However, conflict of law rules enshrined in a Digital Services Act would be preferable (as a second option) if small and medium traders should be protected against dominant market power of platform operators whereas large traders could be able to negotiate with large platform operators. Thus, consumer protection rules in international private law can be taken as a blueprint for protecting those SME-traders. This could be done by amending the P2B-Regulation, in which such a provision would fit in well.

This same result could also be achieved by declaring the scope of application of the digital service act similar to GDPR. In Art. 3 GDPR, the scope of its application is laid out. The GDPR therefore applies when either the data controller is established in the Union or the subject of data processing is in the Union and the controller does business there. As a result, even when a non-Union law is applicable to a case, the GDPR can still be applicable as well (and mandatory), contractual parties cannot opt out of this application.¹⁵⁹ The application of the digital service act can be handled in the same way by stating to be applicable if the place of establishment or the area in which a platform does business is relevant. When doing so, it should also be noted that Art. 3 GDPR is not a regular conflict-of-law-rule since it does not directly declare a certain law of a member state to be applicable.¹⁶⁰ Since this has led to some legal uncertainty when it comes to the GDPR,¹⁶¹ an actual conflict of law rule could be implemented or at least existing rules (such as the Rome-I Regulation) should be declared applicable to avoid further uncertainty.

Finally, another option could be to declare curation of content standards as applicable and 'mandatory rules' for P2B-platform contracts without changing or introducing explicit conflict of law-rules. Thus, it should be very likely that the CJEU would also qualify them as internationally binding in accordance with Art. 9 (1) Rome-I Regulation and thereby achieving a mandatory minimum of applicable rules.¹⁶² As a result, according to Art. 3 (3) ROM-I regulation EU law would be applicable. This could be worded in a manner similar to Art. 6 (2) ROME I regulation to protect SME-traders.

Art. 81 (2) TFEU can be used as a legal basis for regulation regarding international private law.

3.6.3. Added Value

The first approach would be to start with the principle of freedom of contract and not changing the existing patterns of conflict of laws (or just simple "do-nothing"). However, the risk is evident that the level of protection for traders in the EU could widely differ and end up in a patchwork. Small and medium-sized businesses would continue to bear the costs connected with applicable foreign

¹⁵⁹ Adèle Azzi, *The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation*, Journal of Intellectual Property, Information Technology and Electronic Commerce Law Vol. 9 (2018), p.126 para. 11; Maja Brkan, *Data Protection and Conflict-of- laws* 2016, 324, 333 f.

¹⁶⁰ Maja Brkan, *Data Protection and Conflict-of- laws* 2016, 324, 336.

¹⁶¹ Maja Brkan, *Data Protection and Conflict-of- laws* 2016, 324, 337.

¹⁶² Cf. CJEU 17.10.2013 - C-184/12 Unamar v Navigation Maritime Bulgare para. 50; CJEU 9.11.2000 - C-381/98 Ingmar GB Ltd v Eaton Leonard Technologies Inc. Para. 15; cf. also CJEU 23. 11. 1999 - C-369/96 – Arblade para. 30.

jurisdiction; thus, they are potentially discouraged from pursuing legal action, being hampered in their ability to enforce their rights. In return, dominant platforms benefit by strengthening their market position even more. This can also result in higher prices for consumers.

Accordingly, not regulating conflict of law issues for SME-traders will not be effective in dealing with the discussed issues.

The second approach would refer to implement conflict of law rules for SME-traders in particular, making EU-standards mandatory and shield them against choice-of-law clauses. Consequently, future regulation to support such businesses would be made more effective, resulting in improvements to the digital single market. Also, since no further CJEU-judgement is needed to declare certain rules to be legally binding, this would bring about a lot of legal clarity. The resulting costs would only impact the platforms if there are legal conflicts with small and medium-sized traders.¹⁶³ The latter would in turn benefit from reduced legal costs. This can also support traders to engage in legal disputes with platforms and thereby giving smaller businesses more leverage in contract negotiations. This can directly result in a more fair and diverse digital single market and incentivizes innovation and entrepreneurship.

In terms of efficiency, a single legislative act on an EU-level is required. Such regulation would synergize well with the regulation laid down in the P2B-regulation and will ensure that these and future legislation would have the most impact. Furthermore, since the conflict of law rules decide the general applicability of EU-law, they can enable the effectiveness of EU-law in the first place.

The third option would first and foremost ensure the application of EU law for all cases that refer to EU territory while also leaving the freedom of contract for the contract partners untouched. It would therefore be very effective in achieving the set goal of ensuring the application of EU-law while avoiding any legal uncertainty. As usual when it comes to international private law, having EU-wide rules would be most efficient. The proposed regulation would also harmonize well with the described scope of the GDPR, since both pieces of legislation would be based on similar conditions. As a result, a harmonized digital environment for the EU is created in which international parties are subject to either all or none of the applicable rules. Therefore, no inconsistencies would exist.

The last option would also allow traders to benefit from general protection against misuse of choice-of-law clauses ensuring they are not subject to different international private law rules. Also, it would ensure that future regulation in this field of law can be effective by securing its application while impacting freedom of contract less than the second option. However, some legal uncertainty would remain since this approach relies on CJEU-jurisdiction for legal clarity. Just like the previously mentioned option, the costs and risks of this approach will mostly impact platforms while smaller and medium-sized businesses profit.

This last option would be similarly effective and lead to the same synergetic results the previous approach would bring. However, this last approach would likely not be as efficient as the second one even though it requires less legal intervention, since it remains unclear which standards/provisions of EU-directives will be declared by the CJEU as mandatory.

¹⁶³ However, it is likely that these costs would be passed on to the traders in form of higher prices etc.

Table 10: Summary International private law

Policy Option	No action taken	Conflict of law rules for contracts between SME-trades and platforms are implemented	Scope of Application similar to Art. 3 GDPR, supplemented by conflict of law rules	Expanding curation of content rules to P2B relation as well
Regulatory content	No action regarding choice-of-law clauses between (small)businesses and platforms is taken, leaving it to anti-trust and discrimination	For contracts between small and medium-sized businesses, conflict of law clauses in general terms and conditions are prohibited and EU law applies; possibly achieved by amending the P2B	The general scope of the digital service act is set to apply to EU-resident businesses and those who target the EU-market; applicable conflict of law rules such as ROME I regulation are declared applicable for remaining cases.	Regulation regarding control of content also applies to contracts between businesses and platforms.
Legislation needed?	No	Yes	Yes	Yes
Regulatory Impact	None	Low-Medium	Medium	Low
Impact on the Coherence of legal framework	O	++	+++	+
Impact on Legal clarity	--	+++	+++	+
Impact on the Effective and efficient law enforcement	--	++	+++	++
Impact on the Digital single market	--	++	++	+
Impact on consumer rights	-	+	+	+
Impact on fundamental rights	O	+	++	++
Benefits	This would be most consistent with the freedom of contract, also best aligning with Art. 16 ECFR.	Small and medium businesses are supported while not impacting the freedom of contract of larger businesses; ensuring the effectiveness of future regulation in the P2B-area.	Great legal clarity, application of EU-legislation is ensured, good synergy with GDPR, freedom of contract remains untouched	Making the rules regarding control of content applicable to P2B contracts as well openingup the option for the CJEU to apply certain mandatory rules from other jurisdictions; achieving a good balance between protection for

				businesses and freedom of contract.
Costs	Uneven footing between contract partners; often avoidance of EU-law; different protection standards depending on national conflict of law regulation; costs burdened on SME-traders, potential reluctances to pursue legal action.	Freedom of contract is impacted; monetary costs now burdened onto platforms.	Potentially international because of an extraterritorial application	Potentially relying on a CJEU-judgement for legal clarity; adaptation costs for both platforms and traders.

4. Conclusion

Overall, it can be concluded that there is a need for action at several levels. Due to the rapid technical progress made in recent years, the E-Commerce Directive alone cannot be sufficient to regulate these new forms of digital platforms. In many cases, even more recent directives, like the DSM-D, the AVMD or the GDPR, do not meet the requirements to adequately protect consumer rights on the one hand and not to hinder the development of the digital single markets by imposing excessive burdens on platform operators on the other hand, as they are often not made for the specific case of digital platforms and therefore do not adequately address the resulting challenges. In some areas, there is even a complete lack of uniformly applicable regulations, resulting in increasing legal uncertainty.

With regard to content regulation, the following picture emerges: the aim of regulatory action in this field is to avoid illegal or harmful content, but at the same time not to interfere with the fundamental rights of platform operators and users in an excessive manner - the exercise of the freedom of speech and information and the freedom to conduct business must be guaranteed. At present, however, there are hardly any regulations at European level that seriously focus on the rights of users, who are practically given no rights when it comes to their content. While it would be possible to maintain the status quo and presume that these issues are regulated appropriately at national level, however this would not do justice to the higher goal of a uniform level of protection and legal clarity. A more effective approach would be a regulatory intervention by the EU, whereby it would then be necessary to decide how strictly to intervene. Possible options would be both a minimum set of rules applicable to all and the introduction of a complex risk-based framework. When drafting this legislation, it is important not to overregulate, as this could permanently hamper the development of the digital single market.

A similar picture arises with regard to the curation of content, notice procedures and dispute settlements. The existing EU-wide regulations do not offer a solution that is in line with the interests of all parties and/or newly introduced national regulations diverge and deepen legal uncertainties. Also on these matters, inaction by the EU would have a negative impact on the digital single market and all parties involved. It would therefore be more appropriate to have a certain form of regulation, whereby a thorough examination is always necessary as to how high the level of regulation must be and to what extent full harmonisation is actually necessary in order to achieve the intended objectives in the least intrusive way.

A slightly different picture emerges regarding the regulation of personalised advertising. There is already European legislation concerning the data required for this purpose, particularly in the General Data Protection Regulation. It is therefore not absolutely mandatory to create new rules in this area, but adjustments should nevertheless be made to the provisions which are still unclear in order to achieve the highest degree of legal certainty and avoid fragmenting legal judgements within the EU.

In the area of enforcement, there are currently no EU-wide rules and consumers still face the problem of the lengthy and costly court proceedings for online complaints. In order to resolve these issues and to avoid the undue restriction of consumer rights, options for dispute resolution based on platforms with panels of external experts could be introduced.

There is also a need for action in the field of smart contracts, as inaction in this area would lead not only to different rules with regard to the conclusion of contracts, but also to different mandatory consumer protection rules in the various member states, although the aim should actually be to achieve a uniform standard of protection for consumers in smart contracts as in conventionally concluded contracts. In this context, it is important to ensure that regulation does not undermine

the advantages of smart contracts, which lie in low transaction costs and easy cross border execution. In the B2B sector, conflict-of-law rules should be established to guarantee the application of EU law at the level of relations between platforms and businesses, at least for small and medium-sized enterprises that do not have the market power to deal with dominant platforms, for example by making EU rules mandatory, so that they apply even if the parties choose a different law.

In terms of enforcement of platform regulation, a harmonised legal framework across the EU is still lacking. If provisions on platforms (curating of content) were to be introduced as suggested, the creation of a European agency would help to avoid different levels of enforcement in the Member States. In addition, transparency rules for digital platforms should be considered in order to facilitate enforcement and provide incentives for compliance.

All in all, there is a need for action at EU level in many sectors, but the choice of specific measures must always be made with a view to maintaining a balance between the objectives of legal certainty, protection of consumer rights and platform operators, and preservation of the development potential of the digital market. There is no one-size-fits-all solution; what is needed is a comprehensive cost-benefit analysis in the various areas in order not to neglect or favour any of the objectives inappropriately.

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Digital services act: Improving the functioning of the single market

Research paper

The study reflects on the future legal rules for digital services in the digital single market and discusses policy options for a possible future EU digital services act. It is focused on an assessment of European Added Value. The paper covers topics currently regulated in the e-Commerce Directive, but also other emerging issues.

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Executive summary

The E-Commerce-Directive (ECD) and beyond: The E-Commerce Directive (ECD) is aimed at regulating digital services. It came into effect in 2000. At its 20th anniversary, this Study reflects on the future legal rules for digital services in the digital single market and discusses policy options for a possible future EU Digital services act (DSA). It is focused on a European Added Value assessment. This Study covers topics currently regulated in the ECD, but also covers other emerging issues.

European Added Value: For the assessment of European Added Value, in particular the following factors are taken into account:

- (1) The well-functioning of the digital single market,
- (2) Coherence of the European legal framework,
- (3) Reducing fragmentation of the digital single market,
- (4) Legal clarity, and
- (5) More effective and efficient enforcement.

The internal market clause: The internal market clause (IMC) allows providers of information society services to operate in other Member States under the same standards as in its home Member State. Other Member States are prohibited to impose higher standards. This IMC seems as one of the success stories of the E-Commerce-Directive, achieving European Added Value through fostering the well-functioning of the digital single market, and reducing fragmentation of the digital single market. The IMC should in principle remain as is. Specifically, further added value could be generated by addressing on the EU level the following policy options:

- *Cooperation and mutual assistance of member states:* The improvement of the cooperation procedure between Member States would have a potential to enhance European Added Value by reducing costs and inefficiencies related to the enforcement of a possible future DSA, which Member States could remain responsible for.

Based on the assessment of the current practice (i.e. private enforcement), the creation of a new central regulatory authority on the EU level is unlikely to generate further added value related to enforcement. There is an exception, where the creation of a central regulatory authority on the EU level could create European Added Value: For important model cases and for ex-ante regulation of systematic platforms (gatekeepers), which could be treated centrally on the EU-level (see below).

- *Coordinated Field:* Concerning the Coordinated Field by the ECD (information society service/ISS), there is a policy option to codify the CJEU case law regarding the definition of ISS providers, as this might increase legal clarity and thus European Added Value. Another policy would be to not codify, as the CJEU already provided for a vastly coherent legal framework over the past two decades. Further defining the notions of the coordinated field and of the ISS provider going beyond the case law might even lead to a decrease of legal certainty, given that it would take some time until the CJEU had the chance to interpret and apply the new provisions. In addition, the CJEU would be bound by new and more specific definitions, potentially limiting the court's possibility to adapt to unknown business models in the future, which could run counter to European Added Value (legal clarity).
- *Extension of the IMC to non-EU providers:* The IMC does only apply to ISS providers established in the European Union. More recent European legislation in related fields, however, extends to non-EU providers targeting EU residents (e.g. GDPR, AVMSD).

Currently, Member States are free to regulate non-EU providers, which could lead to a fragmentation of legislation on the national level. EU rules should be considered as a policy option in order to enhance European Added Value.

- *National legislation within the Coordinated Field:* Coordinated Field of the ECD has seen national legislation. This does not necessarily enhance European Added Value. In a new Digital services act, a new common approach to regulate national legislation within the Coordinated Field could be found.
- *Multiple claims to jurisdiction:* As a policy option to achieve European Added Value, multiple claims to jurisdiction could be avoided, in particular to increase efficiency of enforcement, but also legal clarity. Further, a mechanism of settlement of multiple claims to jurisdiction could lead to European Added Value due to the increased coherence of the European legal framework.
- *Conflict of laws:* It is a policy option to clarify that the internal market clause has to be applied as a conflict of law rule. Regarding European Added Value, this will lead to more legal clarity and also more efficient enforcement.
- *Derogations and exceptions:* consumer protection rules in general seem to be vastly harmonised on the European level. Against this background, it is a policy option that consumer protection may be deleted as a possible case of the derogation. Regarding European Added Value, this would also add to legal clarity and less complex enforcement.

The exceptions under the annex to the ECD seem to be justified regarding more specific legislation on the European level; the status quo should be retained, in particular for intellectual property rights. No additional European Added Value could be envisaged here.

Definitions:

- *Definitions under Article 2 ECD:* There are several policy options, to newly formulate the definition of information society service in Article 2 ECD (see above).
- *New definitions under the DSA:* Depending on the answer to the question, which new regulatory aspects a new possible digital services act will cover, also new definitions could be introduced. This is in particular true in case of an ex-ante-regulation of systematic platforms.

General information requirements: General information requirements are set out in Art. 5 ECD.

- *Lack of compliance with Art. 5 ECD:* Enforcement of the general information requirement pursuant Art. 5 ECD follows different tools in the EU member states. It is a policy option to reform enforcement of Art. 5 ECD if it is deemed necessary to increase the compliance with the information requirements under the ECD. This would also bring European Added Value due to an increased coherence of the European legal framework and more efficient and effective enforcement, because digital service providers may be better identified.
- *Operators of illegal offers hide their identity (KYBC):* The information requirements of Art. 5 ECD cannot not work regarding operators of illegal business models online. Such operators will hide in anonymity. It is a policy option to introduce know-your-business-costumer (KYBC) obligations for digital service providers serving such digital illegal business models. From an European Added Value perspective, this would significantly increase the effectivity and efficiency of enforcement against operators of structurally infringing services because the EU providers would be kept from

providing their (legitimate) services to illegal business model, which would also drive illegal activity outside the EU.

Tackling illegal content online: The liability rules in Art. 12 to 15 ECD are one of the cornerstones of the ECD.

- *New safe harbour provisions for certain intermediaries?* Art. 12 to 15 ECD only regulate the larger groups of access providers, cache providers and hosting providers. In the last years, several new business models have emerged, which cannot be clearly classified into one of the three groups. It is a policy option to legislate these new business models to achieve European Added Value through more legal clarity. But still, it also remains a policy option not to create further safe harbour provisions for new groups of providers, as business models keep constantly changing. The existing groups could be deemed sufficient for courts to decide liability privileges even for new business models. Effective and efficient enforcement as European Added Value may be sufficiently achieved through case law, which has properly worked in the past also concerning new business models.

In particular regarding search engines, to establish a new safe harbour could not lead to more legal clarity as a European Added Value. Rather, it seems important for legal clarity and coherence of the legal framework on the European level to harmonise the rules to establish liability for search engines (see below).

- *Abolishing the distinction between active and passive hosting providers?* It is discussed as a policy option that the distinction between active and passive hosting providers as established by CJEU case law should be abolished. This has to be set against the policy option to maintain the distinction. Abolishing the distinction could – contrary to European Added Value – create new legal uncertainty by establishing new categories, which must be newly interpreted by courts. It may also be deemed justified to provide a stricter liability regime to active role hosting providers, as they actively intervene into (infringing) third party activity.
- *EU rules to establish liability:* It should be kept in mind that the existing rules in Art. 12 to 14 ECD only provide for an EU harmonisation of rules which work as a shield against liability. They do not establish liability. To achieve European Added Value through coherence of the EU legal framework and more legal certainty on the EU level, as a policy option EU rules could be explored to establish liability of intermediaries to a limited but sufficient extent. This is in particular true for systematic platforms (gatekeepers), see below. An EU legal framework to establish liability could be created without changing the ECD and only where no sector specific rules already exist in EU law. For rules to establish liability, a distinction could be made between (1) the accountability for injunctions (for mere passive intermediaries) and (2) ordinary liability which entails the concept determining intermediaries as infringers (for active/essential role providers).
- *Scope of duties - Stay down and prevention duties for infringements of the same kind:* It is a policy option to implement stay down duties for an effective enforcement of rights on the digital single market (European Added Value). Mere take down duties would not secure that an infringement reappears again and again. Stay down duties would also be in line with Art. 15 E-Commerce-Directive and the underlying fundamental rights.

Ex-ante-regulation of systemic platforms: A small number of large online intermediary platforms is said to capture the biggest shares of the value of the digital single market and exercise control over whole platform ecosystems. Such platforms are referred to as systemic platforms or gatekeeper platforms in the report.

- *Systemic platforms (gatekeepers) hampering others:* Ex-ante-regulation of systemic platforms (gatekeepers) is a policy option from a perspective of European Added Value. All such gatekeepers act on a pan-EU level and can most efficiently and effectively be addressed by harmonized EU framework – and not by national regulation. In particular, such EU rules for gatekeepers should not require market dominance in the usual sense as set out currently in Article 102 TFEU. New concepts will have to be developed to catch the cross-market significance of such gatekeepers beyond the usual elements to find market dominance such as market shares. Also, improving data interoperability and data compatibility should be an issue.
- *Tackling illegal content online provided by systematic intermediary platforms (gatekeepers):* Specifically, for systemic platforms (gatekeepers), harmonized EU rules to establish liability for intermediaries seem to be a pressing policy option, when assessing European Added Value. Articles 12 to 14 ECD only provide for a shield against liability for intermediaries, but they do not harmonize the rules to establish liability for intermediary gatekeepers. This will also make enforcement against intermediary gatekeepers more effective and more efficient. It will also provide more legal clarity for gatekeepers, injured parties, and users of gatekeepers. Against this background, the introduction of rules to harmonize responsibility and liability of intermediary gatekeepers on the EU level seems even more pressing than for other digital service providers covered by the possible digital services act.

For the scope of such rules to establish liability for intermediary gatekeepers, a differentiated approach could be considered as a policy option (like the approach discussed above for all intermediaries):

- Concerning the mere accountability for injunctions (due to helping duties for gatekeepers as they are best placed to prevent infringements), the model of intellectual property law in Article 11 3rd sentence Enforcement Directive 2004/48 and Article 8(3) Copyright Directive 2001/29 for intermediaries could be followed. A similar accountability for injunctions for intermediaries outside the area of intellectual property rights infringements could be introduced. The duty could be shaped according to the principle of proportionality. Mere accountability for injunctions should be considered for merely passive gatekeepers.
- Concerning ordinary liability, it is a policy option to harmonize the understanding of the term “infringer” regarding intermediary gatekeepers, namely harmonizing under which circumstances gatekeepers may be classified as “infringers”. This should be considered for essential/active role gatekeepers.
- For gatekeepers, which operate as hosting providers, EU rules could also set out staydown duties and duties to prevent infringements of the same kind. Otherwise, there would be not been effective and efficient enforcement (European Added Value). If gatekeepers only faced mere takedown duties, infringements could be re-uploaded again and again.

Creation of a central regulatory authority: This report explores the creation of a central regulatory agency for digital services on the EU level with far reaching enforcement competences. Another policy option would be a more differentiated approach, which could

produce increased European Added Value. Regulatory activity could go side-by-side with the option for civil action by injured parties. Regulatory activity could in principle be left to national agencies. Nevertheless, the creation of a central EU regulatory agency from a perspective of European Added Value could make sense for the following tasks: (1) Fostering cooperation between national agencies; (2) Initiating model cases regarding important legal questions; (3) Addressing centrally systemic platforms (gatekeepers) usually operating on the pan-EU level.

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1. Introduction

1.1. Background: the E-Commerce Directive (ECD) and its general principles

The E-Commerce-Directive (ECD)¹ has been the core legal instrument for Information Society Services² for about two decades. While the regulatory framework for online services has been supplemented by a multitude of other EU legal instruments³, the ECD kept its key role for businesses in the online environment, in particular with its cornerstone provisions on intermediary liability. However, since its adoption both markets and technology have undergone significant changes. In particular, the rise of large online platforms that have developed to gatekeepers for the entrance to the (digital) single market has triggered calls for legislative reform to adapt the regulatory framework to today's (and future) market conditions and challenges. According to the Adjusted Commission Work Programme 2020⁴, the European Commission will introduce a new "Digital services act" (DSA) that will reinforce the single market for digital services and help provide smaller businesses with the legal clarity and level playing field they need.⁵ In her agenda "A Union that strives for more", the President of the European Commission, Ursula von der Leyen, stated that the DSA "will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market."⁶

1.2. Scope of the Study

This study addresses several selected issues regarding the application of the ECD and discusses policy options for the envisaged DSA package with a particular focus on the comparative (qualitative) assessment of the European Added Value (EAV) of the various policy options. The most important factors of the European Added Value Assessment include (1) the well-functioning of the digital single market, (2) coherence of the European legal framework, (3) reducing fragmentation of the digital single market, (4) legal clarity, (4), and (5) more effective and efficient enforcement. This study specifically discusses what EAV could be generated by taking policy action on the EU level with regards to the following emerging issues in the context of the ECD:

- Practical issues of the Internal Market Clause (Chapter 2.1.);
- Definitions in the ECD (Chapter 2.2.);
- General Information Requirements (Chapter 2.3.), in particular:
 - Practical compliance with Article 5 ECD;

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), hereinafter "ECD".

² As defined in Article 1(1) lit. b) of Directive (EU) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification).

³ Such as the Platform-to-Business Regulation; the revised Audiovisual Media Services Directive, the Copyright in the Digital Single Market Directive, the proposed E-Privacy Regulation, and the proposed Terrorist Content Regulation.

⁴ Communication from the Commission of 27 May 2020, COM(2020) 440 final.

⁵ Communication from the Commission of 29 January 2020, COM(2020) 37 final, at p. 4.

⁶ Political guidelines for the next European commission, "A Union that strives for more – My agenda for Europe" by Ursula von der Leyen, p. 13.

- Introduction of a moderated KYBC model;
- Tackling illegal content online (Chapter 2.4.);
- Ex-ante regulation of systemic platforms (gatekeepers) (Chapter 2.5.);
- Creation of a central regulatory authority (Chapter 2.6.).

1.3. European Added Value

The main focus of the present study is on the assessment of the European Added Value of policy options for the Digital services act. Each paragraph of the second chapter will identify the drivers and analyse the potential additional value that could be generated at the European level by taking policy actions to remedy the existing shortcomings of the ECD, compared to the preservation of the status quo or a legislative intervention on the national level. The present section introduces the overall approach on the mechanisms and drivers of the European Added Value (EAV). Those mechanisms and drivers of EAC are not to be seen independently. However, they are interrelated and only lead to significant added value, if combined.

To avoid repetitions, this section clarifies certain notions which further chapters will refer to in assessing EAV of specific policy interventions. Furthermore, this paragraph will outline the methods used to determine the EAV and identify crucial aspects for EAVA.

Methods used

In general, the study's European Added Value Assessment should be based on both quantitative and qualitative aspects. The study aims to identify gaps in the European legal framework and develop policy options to strengthen provisions governing the internal market. Due to its legal background, the study will primarily focus on the qualitative assessment. The study does not provide a quantitative assessment of possible benefits and costs of failure of the common EU approach.

Hereinafter, the most important drivers of the European Added Value, which the study is based upon, will be briefly summarized.

1.3.1. Well-functioning of the (digital) single market

The single market is one of the greatest achievements of the European Union. Not only regarding digital services, the well-functioning of the single market is crucial, because it stimulates competition and trade, increases quality and positively impacts prices and choice for consumers. Improving the well-functioning of the digital single market (DSM) not only adds to the implementation of an important objective of the EU treaties (Article 3(3) TEU, Article 26 TFEU), and therefore adds EU value, but is also a key factor to assess potential policy action on the EU level.

The current state of the ECD poses certain challenges to the well-functioning of the digital single market, leading to negative economic impacts⁷. Policy options discussed in the following chapters will identify potential to revert negative economic impacts into economic potential.

The discussed policy options would not only have positive macro-economic impact, but directly benefit ISS providers, consumers and other stakeholders regulated under the ECD. ISS providers

⁷ Negative economic impacts can be of various characteristics. This section refers to, inter alia, higher market entrance costs for ISS providers, less competition ultimately resulting in a decrease of competitiveness of EU businesses, the decrease of quality negatively impacting consumers. However, this list is not exclusive; economic impacts may be of further shape referred to in specific EAV sections below.

could further reduce costs when entering the market, eventually increasing quality, and decreasing prices on the side of consumers.

From a qualitative perspective, future policy can have positive economic impact, if the drivers referenced hereinafter are strengthened and, directly or indirectly, contribute to the well-functioning of the single market. An improved coherence of the European legal framework, defragmentation of national legislation (where necessary), an increased legal clarity and a more effective and efficient enforcement, may be the basis for economic growth in the (digital) single market.

1.3.2. Coherence of the European legal framework

The coherence within each legislative act and among European laws and policies is one of the main principles of the Commission's *Better Regulation Guidelines*⁸ and a possible driver of the further added value. Therefore, in assessing policy options to address existing regulatory gaps, the study specifically focuses on the coherence. The discussed policy options, and the suggestions on how to improve legal coherence that would potentially lead to the European Added Value, take into account the development of EU law, in particular since the enactment of the ECD. Whenever possible, more recent legislation in related fields of the (digital) single market (e.g. AVMSD, GDPR) serve as role models for reform options of the ECD. In particular, the study draws connections to more recent legislation targeting information society services, which underwent further development.⁹

1.3.3. Reducing fragmentation of the digital single market

E-commerce largely takes place on the international level. The number of providers of ISS services exclusively operating on a national level is insignificant. Hence, fragmentation of the applicable legal framework may lead to obstacles or hindrances to the well-functioning of the digital single market. Therefore, the preferable level on which legislation concerning digital services can successfully be implemented seems to be the European level. Currently, the ECD sets minimum standards and partially harmonises national legislation. However, taking into account the development of e-commerce in the past twenty years as well as divergent approaches to enforcement of the rules on the national level, this study discusses, inter alia, policy action, which could further harmonise the applicable legal framework in the coordinated field of the ECD. Defragmentation by harmonising the applicable regime could be a driver of EAV.

However, defragmentation and harmonisation must not be an end in itself but need to reflect specific needs on the European level and of the Member States and be conform to the subsidiarity principle set out by Article 5(1), (3) of the Treaty on the European Union (TEU).

This study assess, in which fields national initiatives would threaten the well-functioning of the digital single market by posing obstacles and hindrances. It carefully evaluates each policy option, as to assess if full-harmonisation is necessary or the subsidiarity principle requires an implementation of minimum standards or other less binding options that could prevent further fragmentation in an equally effective manner.

Further harmonisation, as a side effect, also improves the level of legal clarity. ISS providers, consumers and other stakeholders affected by the ECD and future legislation under the DSA could

⁸ Commission Staff Working Document of 7 July 2017, *Better Regulation Guidelines*, SWD(2017)350, p. 62-63.

⁹ Inter alia, General Data Protection Regulation (GDPR, Regulation (EU) 2016/679), Audiovisual Media Services Directive (AVMSD, Directive 2010/13/EU as amended and updated by Directive (EU) 2018/1808), Digital Single Market Directive (DSM Directive (EU) 2019/790), Platform to Business Regulation (P2B, Regulation (EU) 2019/1150).

better rely on the implementation of rules in the Member States, without having to expect major differences in their application.

1.3.4. Legal clarity

The uniform interpretation and, thus, application of European law by national jurisdiction is the ultimate aim of European legislation. But national jurisdictions may differ when interpreting the European rules. In a lot of cases, the preliminary rulings by the CJEU pursuant Article 267 Treaty on the Functioning of the European Union (TFEU) will guarantee a sufficient degree of harmonisation, even if this may take some time. Clear and precise European legislation may help to avoid such from the start. But it does not seem possible and advisable to legislate all the details. This is in particular true in a field like the digital single market, which is subject to fast technical progress and evolving business models. Courts may be better placed to fill the gaps necessarily left by legislation.

Against this background, the “ideal” detail level of legislation is a question which cannot be answered in the abstract. Rather, it must be seen individually for every single legislative issue, if the legislator should make less detailed or more detailed rules. This study tries to identify such cases and develops policy options increasing the legal clarity, aiming to prevent future divergences on (key) legal questions by national courts.

1.3.5. More effective and efficient enforcement

The enforcement of the ECD’s legislative framework currently relies on the national enforcement tools, which may be very different. In cross-border scenarios, effective and efficient enforcement also requires cooperation and mutual assistance between Member States. Regarding enforcement, the ECD only provides for vague stipulations and refrains from putting forward clear guidelines for the enforcement of the ECD’s legal framework. In a nutshell, the current legal framework does not seem to impose effective and efficient enforcement on the national members states.

However, successful enforcement of the legal framework is key to its effectiveness and essential to the well-functioning of the (digital) single market. Therefore, policy options enhancing and further strengthening the ECD’s system of enforcement would add value on the European level. This will also be assessed in this study.

1.4. Method of overview tables

The present study uses overview tables in order to visualize discussed policy options per subject, their potential European Added Value, especially with regard to the mechanisms and drivers of European Added Value described under 1.3., and their impact on consumer and fundamental rights. The table compares different policy options (not necessarily three, as provided in the example) and visualizes their potential impact by ratings (+++ to ---) and provides brief comments on potential costs and benefits. The following table shows the method used and helps understand the tables used in the following chapter:

Table 1: Methods of overview tables

Policy option	Base line (current situation)	First option	Second option	Third option	Explanation on how to answer
Regulatory content	In this field, the status quo of the legal framework and its shortcomings is briefly described.	The first option would usually describe how policy could fully harmonize the relevant field of law.	In general, the second option proposes to retain the status quo (with slight alternations).	The third option generally proposes moderate policy action.	Explanatory sentence(s)
Legislation needed?					No/Yes (if possible what kind)
Regulatory impact					+++ / ++ / + / 0 / - / -- / ---
Impact on the coherence of legal framework					+++ / ++ / + / 0 / - / -- / ---
Impact on legal clarity					+++ / ++ / + / 0 / - / -- / ---
Impact on effective and efficient law enforcement					+++ / ++ / + / 0 / - / -- / ---
Impacts on the digital single market					+++ / ++ / + / 0 / - / -- / ---
Impacts on consumer rights					+++ / ++ / + / 0 / - / -- / ---
Impacts on fundamental rights					+++ / ++ / + / 0 / - / -- / ---
Benefits					Explanatory sentence(s)
Costs					Explanatory sentence(s)

2. Problem Definition, Policy Options and European Added Value

This chapter focusses on four important issues within the ECD related to digital services: the internal market clause is analysed first (2.1.), which remains one of the most important and successful provisions to secure the digital single market. Afterwards, we will examine the definitions relevant for the ECD's application (2.2.). The study will not be able to cover all specific aspects brought up the ECD for a possible future Digital services act. Rather, the study analysis selected topics, starting with the general information requirements (2.3.), which oblige commercial internet players to be transparent. As illegal content online plays an important role, the study also examines the provisions related to illegal content online in Articles 12-15 (safe harbours) (2.4.). Beyond the scope of the current ECD, the present chapter discusses ex-ante regulation of systemic platforms (2.5.) and the potential creation of a central regulatory authority on EU level (2.6.).

2.1. The Internal Market Clause

According to Article 3(1) ECD, the Member States are obliged to ensure, that providers of information society services (ISS providers) established in their jurisdiction comply with the national law, even when operating in another Member State. In return, this provision excludes other Member States from imposing higher standards; they may not restrict the ISS provider's freedom to provide services on the internal market, thus in all other Member States (Article 3(2) ECD). In short, an ISS provider will be able to operate in the entire EU just by complying with the law of its home country.

The internal market clause (IMC) is one of the success stories of the ECD.¹⁰ In its first evaluation of the ECD in 2003,¹¹ the Commission characterised the IMC as "the core feature of the Directive" and upheld this position in its evaluation in 2012.¹² Due to the overall positive evaluation of the IMC, in general the IMC could remain as is.

However, twenty years after the ECD's enactment, even the IMC gives room for (limited) improvement of certain aspects, especially considering the further harmonisation of EU law and the development of European integration. This study tries to reveal weaknesses, which the legislator could address to further strengthen the clause.

Important for the continuous success of the ECD under a potential future DSA would be to closely observe that no amendment will affect its core principal, while reforming single aspects.

¹⁰ Same opinion: *De Streel/Husovec*, The e-commerce Directive as the cornerstone of the Internal Market, In-Depth Analysis requested by the IMCO Committee, May 2020; SEC(2011) 1641 final, Commission Staff Working Document "Online Services, including e-commerce, in the Single Market", p. 8.

¹¹ COM(2003) 702 final, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee, „First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)", p. 8.

¹² SEC(2011) 1641, p. 8.

2.1.1. Problem Definition

Cooperation and Mutual Assistance of Member States

The consequent application of the IMC indirectly entails administrative challenges regarding the enforcement of law against ISS providers.

While this clause is the “cornerstone” of the digital single market, it leads to certain practical difficulties, especially given that the aforementioned jurisdiction rule also applies in cases, where ISS providers have several branches in different Member States.¹³ Enforcement against an ISS provider is only possible under the jurisdiction of the seat of establishment. Authorities of other Member States must request assistance of their counterparts in the respective jurisdiction, to enforce against a provider, e.g. requests for information.

Hence, the cooperation and mutual assistance between Member States is key to the effectivity and efficiency of enforcement against ISS providers. However, the IMC does not establish a procedure of cooperation. Neither are Member States forced to support requests of other Member States.

Since the enactment of the ECD in 2000, certain mechanisms have been introduced to facilitate cooperation and mutual assistance between the authorities of the Member States, inter alia, an *expert group on electronic commerce*¹⁴ and the *Internal Market Information System (IMI)*¹⁵. However, the introduced mechanisms still seem to give room for improvement.

Coordinated Field

While the “coordinated field” is defined in Article 2 ECD, the aspect will already be analysed in this section, because it is an inseparable part of the ECD’s core principle, the IMC. The broad notion posed problems to national jurisdictions when interpreting the field of application of the IMC and the ECD in general. The CJEU clarified the notion in several landmark cases. In *eDate Advertising*¹⁶, the court found that ISS providers cannot be further restricted than by the law of the country of establishment. In *Ker-Optika*¹⁷, the court decided that the online selling of contact lenses falls under the “coordinated field”, while the physical supply of contact lenses, however, is not covered. According to the ruling in *Vandenborgh*¹⁸ case, a national law prohibiting any form of advertising for the provision of dental care services is, regarding electronic commercial communications, covered by the coordinated field.

¹³ Administrative Court of Berlin, judgement of 20.07.2017, case 6 I 162/17, para. 33-39; Detailed Analysis of the E-Commerce Directive in: *Mark D. Cole/Christina Etteldorf/Carsten Ullrich*, Cross-Border Dissemination of Online Content, p. 173-174.

¹⁴ Commission Decision 2005/752 of 24 October 2005 establishing an expert group on electronic commerce [2005] OJ L282/20. The group has proven successful especially with regard to discussing derogation to the IMC; see also *De Streel/Husovec*, p. 30-31.

¹⁵ Regulation 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (the IMI Regulation), OJ [2012] L 316/1, as amended by Directives 2013/55, 2014/60, 2014/67 and Regulation 2016/1191, 2016/1628 and 2018/1724.

¹⁶ CJEU Case C-509/09 of 25 October 2011 – *eDate Advertising*.

¹⁷ CJEU Case C-108/09 of 2 December 2010 – *Ker-Optika*.

¹⁸ CJEU Case C-339/15 of 4 May 2017 – *Vanderborgh*.

The notion of the ISS provider has been subject to a series of further CJEU rulings. For example, in the cases *Uber Spain*¹⁹ and *Uber France*²⁰, the CJEU had to analyse the service at trial of Uber. The CJEU concluded that the main component of the specific service offered by Uber was a transportation service.²¹ The online intermediation service (which could have come under the ECD as an “information society service”/ISS) was classified as merely accessory. Consequently, Uber’s service at trial did not fall under the definition of an ISS provider and the ECD did not apply. Rather, the service may be regulated by transport law and does not fall under the IMC pursuant Article 3 ECD. In contrast, according to the CJEU in *Airbnb Ireland*²², the service of Airbnb was covered by the definition of ISS providers because the platform did not – unlike Uber – exercise decisive influence over the conditions under which the accommodation services at trial were conducted.²³ Therefore, the service fell into the coordinated field, leading to the applicability of the ECD.

This differentiation by the CJEU and the relevance of decisive control resembles the differentiation between active role and passive role hosting providers for Article 14 ECD.²⁴ Hosting providers playing an active role as to the access to the content they are hosting were not seen as coming under the liability privilege for hosting providers pursuant Article 14 ECD²⁵ (see in more detail 2.4.1. below). In summary, it is the role of the ISS provider which determines the necessary case-by-case analysis. If this emphasis of the role is not on the information society service regulated by the ECD, the ECD does not apply.

The European Commission in its “European agenda for the collaborative economy” used similar but more specific criteria to determine the role of the service provider: “(1) Price: does the collaborative platform set the final price to be paid by the user, as the recipient of the underlying service. Where the collaborative platform is only recommending a price or where the underlying services provider is otherwise free to adapt the price set by a collaborative platform, this indicates that this criterion may not be met. (2) Other key contractual terms: does the collaborative platform set terms and conditions, other than price, which determine the contractual relationship between the underlying services provider and the user (such as for example setting mandatory instructions for the provision of the underlying service, including any obligation to provide the service). (3) Ownership of key assets: does the collaborative platform own the key assets used to provide the underlying service.”²⁶ The first two criteria would also have carried the e.g. the *Uber Spain* judgment by the CJEU, while the third criterion should indeed gain no further weight, as it is the role and the influence of the service provider which counts - and not the assets it controls.²⁷

While concrete differentiation between the roles played by the service providers may seem open to discussion, nevertheless, especially with regard to potential European added value (see 2.1.3.), it does not seem advisable to legislate on this issue and define the term of ISS provider further. Ever emerging new business models in the digital context are better dealt with by the courts on a case-by case basis than by legislative definition, which may become out of date quickly. That said,

¹⁹ CJEU Case C-434/15 of 20 December 2017 – *Uber Spain*.

²⁰ CJEU Case C-320/16 of 10 April 2018 – *Uber France*.

²¹ *De Franceschi*, *Uber Spain* and the “Identity Crisis” of Online Platforms, EuCML 1/2018, p. 2.

²² CJEU Case C-390/18 of 19 December 2019 – *Airbnb Ireland*.

²³ CJEU Case C-390/18 of 19 December 2019, para. 69 – *Airbnb Ireland*.

²⁴ *De Franceschi*, *Uber Spain* and the “Identity Crisis” of Online Platforms, EuCML 1/2018, p. 2.

²⁵ Judgment of the Court (Grand Chamber) of 23 March 2010, *Google France*, Joined cases C-236/08 to C-238/08, EU:C:2010:159 and eBay.

²⁶ European Commission, A European agenda for the collaborative economy, COM(2016) 356 final, p.6.

²⁷ *De Franceschi*, *Uber Spain* and the “Identity Crisis” of Online Platforms, EuCML 1/2018, p. 2.

the abstract approach of the CJEU trying to use the role of the service provider seems more open to the ever-changing world.

Extension of the IMC to non-EU providers

The IMC does only apply to ISS providers established in the European Union.²⁸ More recent European legislation in related fields, however, extend to non-EU providers targeting EU residents (e.g. GDPR, AVMSD). Currently, Member States are free to regulate non-EU providers, which should lead to a fragmentation of legislation on the national level.

National Legislation within the Coordinated Field

In the past few years, several Member States have adopted national legislation (e.g. NetzDG²⁹ in Germany, Loi Avia in France³⁰) targeting hate crime and illegal content. Regarding the broad definition of the coordinated field, aforementioned national legislation raises concerns regarding their compatibility with the IMC. Moreover, national legislation in this field would likely lead to a fragmentation of the set of rules applicable to the digital single market. In particular, national legislation deviating from the country-of-origin-principle or even advocating for the contrary, a country-of-destination-clause, appears to be problematic in this context.

Multiple Claims in Jurisdiction

Article 3(1) ECD stipulates that only the Member State, where the provider is established according to the definition of EU law, shall have jurisdiction. This provision seems to prevent, *prima facie*, multiple claims in jurisdiction. However, the problematic of multiple claims in jurisdiction by different Member States arises for two reasons.

Firstly and primarily, the definition of establishment (Article 2(c) ECD) does not refer to an official registration of establishment, but is based on the “actual pursuit of an economic activity through a fixed establishment for an indefinite period”.³¹ If a provider has established more than one branch, the “it is important to determine from which place of establishment the service concerned is provided”.³² Whenever such determination is difficult, it shall be “the place where the provider has the centre of his activities relating to this particular service”.³³ It is obvious, that this substantive definition allows for several Member States to claim jurisdiction.

Secondly, multiple claims in jurisdiction may arise whenever a non-EU provider is concerned, given that the IMC does not extend to such providers.

²⁸ Article 3(1) ECD.

²⁹ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG) of 1 September 2017, [Act to Improve Law Enforcement in Social Networks], Federal Law Gazette (BGBl.) I. p. 3352, hereinafter „NetzDG“.

³⁰ “Proposition de loi visant à lutter contre les contenus haineux sur internet”; adopted Text n° 419 of Assemblée Nationale. This law has, however, been held (partially) unconstitutional by the French Conseil Constitutionnel, Décision n° 2020-801 DC du 18 June 2020, see: <https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>.

³¹ Recital 19, ECD.

³² Recital 19, ECD.

³³ Recital 19, ECD.

Conflict of Laws

In *eAdvertising*³⁴ the CJEU decided, that Article 3(1), (2) ECD must “be interpreted as not requiring transposition in the form of a specific conflict-of-laws rule”.³⁵ Following this decision, the German Federal Court (Bundesgerichtshof) construed the article’s implementation into German law (§ 3 German Telemedia Act - TMG) as a substantive ban on restrictions.³⁶ However, the CJEU did not clarify, if the clause could be transposed as conflict of laws rule, wherefore this question remains unanswered.³⁷ And the matter seems to be of (practical) importance. If you made Article 3 ECD a substantive law provision, the applicable law would be determined by – depending on the case – European or autonomous international private law, in most cases by the Rome-II Regulation³⁸. Consequently, the applicable law will in most cases differ from the provider’s country of establishment. As a result, the competent jurisdiction would have to apply two national laws: the applicable law and, within the scope of a comparison, the law of the country of establishment. On the other hand, the interpretation as a conflict of laws rule would result in a distinction between online and offline cases: Online cases would be subject to the IMC, while offline cases would be governed by the Rome-II Regulation. While in most cases decisions by national jurisdictions would not differ, the application of two national laws is practically more challenging. In a nutshell, it may be questioned if the aforementioned landmark decision of the CJEU aligns with the core principle of the IMC.³⁹

Conditions of Derogation & Exceptions

The conditions of derogation under Article 3(4) ECD, even though rarely used,⁴⁰ appear too broad with regard to the contemporary level of harmonisation of the legal framework on the national level. Consumer protection may not be deemed necessary any longer to serve as exception for Member States to demand that ISS providers comply with stricter rules than in its country of establishment. The level of consumer protection has been (almost) fully harmonised on European level. The exceptions stated in the annex to the ECD, however, still seem necessary, given more specific regulation on European level in this field.

2.1.2. Policy Options

In order to address the existing gaps and further enhance European Added Value of the EU legislative action a number of policy options are possible. Considering that the IMC has proven to be a significant driver of the EAV, the suggested policy options as a starting point assume that the core principle of the IMC would remain. The additional EAV could be generated by optimizing the modalities of application of the IMC. Generally, this can be done in three ways: first, through measures aiming to clarify and potentially streamline and/or extend the scope of the existing definitions; second by further strengthening procedural rules and third, through measures improving coordination and assistance between Member States.

³⁴ CJEU Case C-509/09 of 25 October 2011 – *eDate Advertising*.

³⁵ CJEU Case C-509/09 of 25 October 2011 – *eDate Advertising*, marg. no. 68.

³⁶ BGH GRUR 2012, 850 (852) marg. no. 30 – www.rainbow.at II.

³⁷ *Hausmann/Obergfell* in: Fezer/Büscher/Obergfell, 2016, marg. no. 124; *Oster*, European and International Media Law, Cambridge University Press, 2016, p. 225–227.

³⁸ Regulation (EC) No 864/2007 of the European Parliament and of the council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

³⁹ Detailed analysis if the topic (before the CJEU decision): *Hellner*, in: RGSL Working Papers No. 6, The country of origin principle in the E-commerce Directive: A conflict with conflict of laws?, Riga 2003, p. 5–6 & 15–25.

⁴⁰ Detailed Analysis of the E-Commerce Directive in: *Mark D. Cole/Christina Etteldorf/Carsten Ullrich*, Cross-Border Dissemination of Online Content, p. 175.

Initiatives aiming to replace the country of origin principle, e.g. with the country of destination principle, would contradict the ECD and the European legal framework, wherefore they will not be considered in this study. This report discusses policy options which may lead to a further strengthening of the IMC and thus a further European Added Value.

In this regard, the least effective policy option would be to remain with the status quo, not addressing the aforementioned issues. The IMC as a strong driver of EAV would remain, however, no additional value would be created.

In the following sub-sections, the study suggests policy options for each specific problem described above in 2.1.1.

Cooperation and Mutual Assistance of Member States

The most far-reaching policy option would be the full harmonisation of national law in this field. ISS providers would have to comply with a uniform set of rules, which would not diverge any longer on the national level. To achieve full harmonisation, the ECD and national legislation targeting ISS providers would need to be replaced by a European regulation (in the meaning of Article 288(2) TFEU), directly applicable in all Member States. Member States would no longer need to rely on the assistance of the country of establishment to govern ISS providers, because the applicable legal framework would not defer. However, the IMC would still need to define the competent jurisdiction. Regarding the enforcement against individual ISS providers, the Member States would still rely on the assistance by the country of establishment. Hence, even in the state of full harmonisation, the effective enforcement against ISS providers calls for a well-functioning cooperation mechanism. In this regard, Article 19 ECD named "Cooperation", which is currently limited to vague stipulations, would need to be reviewed together with the IMC to create a more effective and efficient mechanism.

A less far-reaching option would be to retain the status quo regarding divergences of national law applicable to ISS providers, but to implement a more specific coordination and mutual assistance mechanism. Such mechanism also needs to go along with a revision of Article 19 ECD (see above). One option of such mechanism could be the establishment of a central European authority (see below under Section 2.6). In a nutshell, this body could coordinate National Enforcement Bodies (NEB) and efforts to effectively govern and enforce against ISS providers. The concrete appearance of such authority depends on the path the European legislator chooses to take regarding the level of harmonisation in this field.

Another option does not require the establishment of a European authority but would implement more specific and binding stipulations about the cooperation and mutual assistance between Member States. The European legislator would have to specify, under which conditions another Member State may require assistance by the national authority of the country of establishment, under which delay the latter is required to take action and how to settle disputes between the Member States.

Coordinated Field

A considerable policy option is to retain the status quo, given that the CJEU has already clarified the notion in aforementioned landmark cases to an extent providing for sufficient legal clarity. The legislator would leave the definition under Article 2 ECD and thus the reference in Article 3 ECD untouched.

Another option with a comparable outcome would be the codification of the court's key decisions under Article 2 ECD. The definition could incorporate criteria developed by the CJEU, clarifying the scope of applicability.

The most far-reaching option would be to codify CJEU decisions both regarding the coordinated field and the definition of ISS providers in Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. This would both clarify which business models do or do not fall within the coordinated field and prevent legislative action on national level in a more effective manner.

Extension of the IMC to non-EU providers

Retaining the status quo would mean to further exclude ISS providers established in non-EU countries from the scope of application of the ECD.

The policy option different to the aforementioned “do nothing option” is the reform of Article 3(1) ECD, extending its application to non-EU providers. Implementing this policy option would need to be accompanied by further provisions regarding the definition of establishment and provisions determining the competent national authority to regulate and enforce against non-EU providers.

Regarding the determination of the competent national authority, the future legislation could be inspired by the mechanism under Article 28a AVMSD. Article 28a(2) AVMSD provides that a platform established in a non-EU country is deemed to be established on the territory of a Member State, if it has a parent or subsidiary undertaking or it is part of group where an undertaking is established in that Member State. The article also provides a mechanism to settle multiple claims to jurisdiction by Member States.⁴¹

The provision under the P2B Regulation⁴² is much broader. Article 1(2) P2B-Regulation extends the territorial scope to search engines and online intermediation services, irrespective of their place of establishment, if their services are provided to business users established in the EU, which offer goods or services to consumers in the EU.⁴³

Another policy option would be the implementation of a mechanism similar to the solution under the GDPR. Article 3(2) GDPR extends the territorial scope of the regulation under certain conditions to processors or controllers established outside the EU, if personal data of data subjects who are in the EU are processed. The respective processor or controller must designate a representative in the EU.⁴⁴

In a nutshell, policy options for the extension of the territorial scope of the ECD need to include provisions to determine the applicable national legislation and jurisdiction, as well as a mechanism to settle multiple claims to jurisdiction.

On a side note, should the European legislator opt to fully harmonise national law targeting ISS providers within the coordinated field, the determination of the applicable national law would no longer be of importance. However, in this case, the determination of the competent jurisdiction would still need to be regulated. This could be achieved by adapting the conflict of jurisdiction rules under the Brussels-Regulations.

⁴¹ *deStreel/Husovec*, p. 42.

⁴² Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

⁴³ *deStreel/Husovec*, p. 42.

⁴⁴ *deStreel/Husovec*, p. 42.

National Legislation within the Coordinated Field

National legislation (see above, e.g. *Loi Avia* in France and *NetzDG* in Germany) already raises concerns regarding their compatibility with the ECD, because they fall under the coordinated field of the IMC.⁴⁵ Hence, the problem cannot be solved by reforming the coordinated field itself.

In the case of the German *NetzDG*, for example, the justification of the law refers to the possibility of derogation under Article 3(4) (a) (i) ECD.⁴⁶ However, the wording of said article refers to “a given information society service”, while the *NetzDG*, in contrast, governs a group of ISS providers.⁴⁷ Hence, even a reform of the conditions of derogations might not be effective, as they already do not allow for general legislation on the national level.

Concluding that the status quo already prohibits such national legislation, the underlying problem seems rather a political than a legal one. The European legislator could wait for the CJEU to decide that such legislation cannot be imposed against ISS providers established in other Member States. Alternatively, the conditions of derogation could be further clarified in the recitals of future legislation or the wording of the conditions of derogation could explicitly exclude general legislation, so that the aforementioned wording cannot be subject to differing interpretations.

Lastly, national legislation in this field regarding non-EU providers can be prevented by extending the IMC to such providers (see above).

Multiple Claims to Jurisdiction

The current provision under Article 3(1) ECD could be retained under future legislation. It has proven successful that ISS providers do not need to face enforcement by all Member States in which they are operating, but only in their country of establishment. This has led to legal clarity and coherence of measures undertaken by the competent national authorities.

As a policy option to further strengthen the IMC and to avoid multiple claims in jurisdiction, the legislator could consider a transparent online register managed by the Commission. Member States would be required to register all ISS providers under its jurisdiction. Cases, where several Member States claim to have jurisdiction, because the respective provider has branches in more than one Member State, would become apparent and could be settled. The mechanisms of settlement in such cases would need to be governed by future legislation. In addition, the European legislator could provide for a procedure to frequently update the information provided by the register and define how national jurisdiction could challenge the information if necessary.

Should the legislator choose to fully harmonise the legal framework governing ISS providers, repealing the current clause limiting jurisdiction to the country of establishment might seem appropriate as a policy option. National law would no longer differ, wherefore Member States might move to gain jurisdiction over ISS providers irrespective of their country of establishment. The legislator would need to abolish the respective clause and either refer to Brussels-Ia Regulation⁴⁸ or establish a novel clause to attribute jurisdiction. But the attribution of jurisdiction to more than one Member State per ISS provider could negatively impact the successful mechanism of the IMC, decrease legal certainty and increase costs for ISS providers to enter the market and to conduct business. The fair objective to make enforcement more effective and

⁴⁵ Hoven/Gersdorf in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 28th edition 2019, § 1 NetzDG, marg. No. 9-10; Spindler, ZUM 2017, 473, 475-478.

⁴⁶ BT-Drs. 18/12356 (Bundestagsdrucksache - official document of the German parliament), p. 14.

⁴⁷ See also Spindler, ZUM 2017, 473, 475-478.

⁴⁸ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

efficient for the country of destination could be achieved by less far-reaching measures (see above, Cooperation and Mutual Assistance).

Lastly, the problem of multiple claims to jurisdiction regarding non-EU providers could be solved according to policy options developed in the section prior to this.

Conflict of Laws

The European legislator could address the question, whether Article 3(1) ECD shall be construed as a conflict of laws rule or substantive law. The policy option will mainly depend on the chosen level of harmonisation because this will ultimately impact the importance of the IMC under future legislation.

Should the legislator opt to reform the ECD and to retain the IMC, the simplest policy option would be to retain the status quo (“do nothing”), relying on the interpretation of the CJEU. The article would mainly be interpreted as a substantive provision, but discussions on the legal character would not come to an end; more so in the academic discourse than in practice. As a result, the court in charge would have to apply the national law determined by international private law and also consider the provisions of the law of the ISS provider’s country of establishment. Both laws would need to be compared to determine, whether the applicable law imposes stricter obligations than the country of establishment and therefore cannot be imposed against the specific ISS provider. While in most cases the competent national court would come to the right conclusions, the simultaneous application of two national laws remains challenging.

As another policy option, the legislator could codify the CJEU decision in *eDate-Advertising*. As substantive law, the provisions of the IMC prohibiting national legislators to impose higher restrictions than the law of the provider’s country of establishment would be taken into account within the scope of a comparison of the applicable law and the law of the country of establishment. Stricter provisions of the applicable law could not be imposed regarding the specific provider. This option is like retaining the status quo (“do nothing”), with the difference that it would end the (academic) discourse in this regard.

Following the two aforementioned policy options, the provider would be subject to the applicability of diverse national legislation, although national law different to the country of establishment may not impose higher restrictions. This perception of the IMC seems to be in conformity with Article 1(4) ECD, which clarifies that “the directive does not establish additional rules on private international law”. In return, it may contradict the ECD’s intention that “the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level”.⁴⁹

Against this background, an alternative policy option could be considered. The legislator could characterise the IMC as a conflict of laws rule. In this case, Article 1(4) ECD would need to be supplemented by an exception to the IMC. The law of the country of establishment would always be applicable, avoiding the need for a comparison between two laws (see above). This would simplify the judge’s mission seized with a case within the coordinated field of the ECD. However, with regard to European private international law, this characterisation would lead to a differentiation between offline⁵⁰ and online cases.

The most far-reaching option would be the full harmonisation of provisions governing ISS providers, currently regulated on the national level. The IMC and, in particular, the discussion around the characterisation of the IMC would become less important. Retaining the status quo –

⁴⁹ Recital 60, ECD.

⁵⁰ Conflict of laws cases would be decided by the Rome-I and Rome-II regulations.

the interpretation as substantive law – in this case would do no harm to the effectiveness of the IMC, because the applicable “national law” would refer to the harmonised European legislation. However, the full harmonisation seems to be a very far-reaching option. In addition, such option would need to be carefully evaluated; a comparative in-depth analysis of the national legislation in all Member States would have to be conducted prior to a legislative proposal. This exceeds the scope of the present study, wherefore a detailed proposal for a full harmonisation is not provided.

Conditions of Derogation & Annex

The conditions of derogation under Article 3(4) ECD could be limited by future legislation.

One policy option could be to newly regulate consumer protection as a derogation. The protection of consumers could no longer serve as a reason to derogate from the IMC, given the contemporary level of protection guaranteed by European legislation. The most far-reaching policy option would be to delete the last bullet point under Article 3(4) lit. a. (i) ECD. This option would be in line with the more recent legislation of article 3(2) AVMSD, limiting the conditions of derogation to public policy, public health and security reasons.⁵¹

In addition, the procedural provisions of derogation under Article 3(4) lit. b ECD should be more specific and need to be reviewed together with the policy options implementing a mechanism of cooperation and mutual assistance (see above). In particular, future legislation should implement time limits for national authorities of the country of establishment to take action following a request by another Member State, especially the country of destination.⁵²

The exceptions under the annex to the ECD seem to be justified regarding more specific legislation on the European level, wherefore the only veritable policy option is to retain the status quo (“do nothing”). One example is intellectual property. Such exceptions could remain unchanged.

2.1.3. European Added Value

The IMC has proven successful on the European level and has been a strong driver of European Added Value. However, the IMC revealed certain weaknesses, as described above. The policy options outlined above, in general, could further strengthen the IMC, which shall ultimately lead to more coherence of the European legal framework, to a higher level of legal certainty and to a more effective and efficient system of enforcement against ISS providers. This section is again divided into brief paragraphs, describing the drivers and mechanisms leading to an European Added Value regarding each aspect described above. The interplay between various drivers and mechanisms of European Added Value is not repeated in this paragraph (see 1.3.). The study provides an overview of potential impact of the various policy options under 2.1.4. (overview tables).

Cooperation and Mutual Assistance of Member States

Improving the cooperation between the Member States would be aligned with the objective found in Article 4(3) TEU and thus add EU value. In all scenarios described above, the Member States will remain responsible for the enforcement of the ECD (and future legislation). Therefore, the implementation of an improved and more binding mechanism than currently provided for in

⁵¹ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

⁵² *deStreel/Husovec*, p. 43.

Article 19 ECD could lead to a more effective and efficient enforcement of the ECD and future legislation (see 1.4.5.).

When opting for full harmonization, a better cooperation and mutual assistance of Member States would not be of an equally high importance compared to the status quo, because the applicable legal framework would not differ and therefore reduce the number of cases, where the country of destination needs to request the country of establishment of an ISS provider to regulate the latter. However, cooperation and mutual assistance would still be of importance, because the enforcement would remain in principle within the competencies of the Member States. Reforming the vague stipulations of Article 19 ECD in this context could lead to more legal clarity and a more effective and efficient enforcement.

The policy option proposing to establish a central regulatory authority could lead to more bureaucracy and, as a result, negatively impact the efficiency of rights enforcement and the well-functioning of the digital single market (see 2.6.3. for an in-depth EAV assessment to this regard).

Limiting the task of a European body to the facilitation of cooperation and the observance of compliance with European law under the DSA and the coordination of NEBs, however, could result in a more efficient and effective enforcement. Furthermore, a central EU regulatory agency could also be charged with initiating and enforcing model cases regarding important legal questions. Finally, they could play a key role regarding systematic platforms (gatekeepers), see below 2.5. and 2.6.

Coordinated Field

The codification of CJEU case law regarding the coordinated field and further definition of ISS providers might seem to increase legal clarity, at first glance. However, the CJEU already provided for a vastly coherent legal framework over the past two decades. Codifying these decisions does not seem necessary. In return, further defining the notions of the coordinated field and of the ISS provider going beyond the case law might even lead to a decrease of legal certainty, given that it would take several years until the CJEU had the chance to interpret and apply the new provisions. In addition, the CJEU would be bound by new and more specific definitions, potentially limiting the court's possibility to adapt to unknown business models and services in the future. The benefit of more defined legislation may not supersede the need to maintain successful case law, especially with regards to the fast development of new business models, rendering the new provisions outdated rather sooner than later. Hence, retaining the status quo ("do nothing") could also be considered as the simplest policy option against the background of EVA.

Extension of the IMC to non-EU providers

Under current law, ISS providers established in non-EU countries are excluded from the scope of application of the ECD. Retaining the status quo without extension of the IMC to non-EU providers would allow for further fragmentation of the applicable regime on the national level. With regard to the international character of business models in this field and the aim to establish an internal market without hindrances to stakeholders, including service providers, national fragmentation of policy would especially disadvantage non-EU providers. However, weaker competition might ultimately lead to less innovation on the European market and thereby disadvantage the consumer. In a nutshell, this policy option could not improve the well-functioning of the digital single market and no other important driver of European Added Value could be found.

The policy option to do nothing regarding Art. 3(1) ECD but extend it to non-EU providers could, in return, improve enforcement and the coherence of the European legal framework with regard to more recent policy (e.g. GDPR). It could also defragment the applicable regime by further harmonising policy concerning the digital single market and increase its well-functioning, as also non-EU providers are active on the digital single market.

National Legislation within the Coordinated Field

Preventing national legislation in this field serves not only the defragmentation of the applicable regime, but also the coherence of the European legal framework. Further allowing for national legislation in this field would contravene the aim of the directive that “the legal framework must be clear and simple, predictable and consistent with the rules applicable at international level”⁵³, because dissenting national legislation could be implemented and enforced at least until a decision of the CJEU. Ultimately, the prevention of national legislation in this field might lead to a higher incitation of the Member States to agree on a common approach regarding the desired legislation (e.g. hate speech). A common approach resulting in European legislation would further add to the defragmentation of policy concerning the digital single market. Lastly, the ISS providers would not face an unlimited number of national legislations supplementing or diverging from the European legal framework, effectively reducing costs necessary to comply with all legal provisions.

Multiple Claims to Jurisdiction

The provision under the IMC that only the country of establishment has jurisdiction over their ISS providers has proven to be a strong driver of European Added Value, because it serves legal clarity and the coherence of the European legal framework. However, the existence of multiple claims to jurisdiction under the status quo negatively impacts the well-functioning of the digital single market, given that it hinders a more effective and efficient enforcement and harms legal clarity. Hence, further avoiding multiple claims to jurisdiction increases the efficiency of enforcement, because the country having jurisdiction would be clear without having to adapt the substantive definition of “establishment”.

Implementing a central transparent register informing on which Member State has jurisdiction over a given ISS provider would serve legal clarity and also contribute to the well-functioning of the digital single market, because all stakeholders could rely on the information provided. Adding a procedure to challenge the information provided by the register would further add value, because national jurisdiction could not claim jurisdiction contradicting the register, but would need to follow a defined procedure, again increasing the level of legal certainty. Lastly, a mechanism of settlement of multiple claims could lead to swift decisions, avoiding lengthy proceedings.

Conflict of Laws

Retaining the status quo will neither have a further positive nor negative effect on the assessment of EAV. Regarding the other policy option, the clarification of this aspect should lead to more legal certainty. If the policy option of substantive law is chosen, the national court will face more difficulties compared to the characterisation as a conflict of laws rule. Nevertheless, the coherence with the European legal framework is maintained. Should the legislator opt for a conflict of laws rule, the enforcement by national courts will be more efficient. But if this policy option does not go along with a comprehensive reform of the European international private law, online and offline cases would be judged differently, constituting a malus for the coherence of the EU legal framework. In return, in case European private international law is adapted accordingly, the coherence of the EU legal framework will be positively affected.

Conditions of Derogation & Annex

Deleting consumer protection as possible case of derogation would add to the coherence of the European legal framework, considering the comprehensive development of consumer protection

⁵³ Recital 60, ECD.

on the European level since the enactment of the ECD. In addition, the reform would align with more recent legislation on the European level, as stated above.

More specific procedural conditions would add to a better cooperation between the Member States; the EAV in this regard has already been analysed above.

2.1.4. Overview tables

Table 2: Cooperation and Mutual Assistance of Member States

Policy option	Base line (current situation)	First option	Second option	Third option
Regulatory content	Lack of a mechanism of cooperation and mutual assistance between the Member States, Art. 19 ECD, no central European authority	Full harmonisation of national law	Retain the status quo; implement a more specific coordination and mutual assistance mechanism (central European authority)	Retain the status quo; implement more specific and binding stipulations regarding the cooperation and mutual assistance between Member States
Legislation needed?		Yes	Yes	Yes
Regulatory impact		+++	++	+
Impact on the coherence of legal framework		+++	++	++
Impact on legal clarity		+++	++	++
Impact on effective and efficient law enforcement		++	+/-	++
Impacts on the digital single market		+	+/-	-
Impacts on consumer rights		+	+	+
Impacts on fundamental rights		+	+	+
Benefits		No need to rely on assistance of the country of establishment any longer	Central leadership to coordinate national authorities	Better framework for national authorities to coordinate
Costs		significant	moderate	low

Table 3: Coordinated Field and national Legislation within the Coordinated Field

Policy option	Base line (current situation)	First option	Second option	Third option
Regulatory content	Coordinated field and particularly definition of ISS provider against the background of CJEU case law, Art. 2 ECD	"Do nothing"	Codification of CJEU case law	New definition of ISS provider in Article 1(2) Directive 98/34/EC as amended by Directive 98/48/EC
Legislation needed?		No	Yes	Yes
Regulatory impact		---	+	+++
Impact on the Coherence of legal framework		+++	++	+/-
Impact on legal clarity		+++	++	+/-
Impact on the Effective and efficient law enforcement		+	+	+/-
Impacts on the digital single market		+	+	+/-
Impacts on consumer rights		+	+	+/-
Impacts on fundamental rights		0	0	0
Benefits		It is left to the courts to find answers in individual cases.	Statutory law more transparent than case law, but new technologies and business models may render statutory law outdated	Statutory law more transparent than case law, but new technologies and business models may render statutory law outdated
Costs		no costs	No costs	Significant costs to adapt to new regime

Table 4: Extension of the IMC to non-EU providers

Policy option	Base line (current situation)	First option	Second option
Regulatory content	Extend Art. 3(1) ECD to non-EU providers	"Do nothing"	Change of Art. 3(1) ECD
Legislation needed?		No	Yes
Regulatory impact		---	+++
Impact on the Coherence of legal framework		-	++
Impact on Legal clarity		-	+
Impact on the Effective and efficient law enforcement		-	+++
Impacts on the Digital single market		---	+++
Impacts on consumer rights		---	+++
Impacts on fundamental rights		-	+
Benefits			An extension of the IMC to non-EU providers would provide for a more coherent regulation of ISS providers; also non-EU providers operate on the digital single market

Table 5: Multiple Claims to Jurisdiction and Conflict of Laws

Policy option	Base line (current situation)	First option	Second option	Third option	Fourth option
Regulatory content	Art. 3(1) and (2) ECD do not prevent multiple claims to jurisdiction and it is not defined as a conflict of law rule	Do nothing	Online register managed by Commission, where Member States register all ISS providers under their jurisdiction	Make the IMC in Art. 3(1) ECD a conflict of law rule	Full harmonization of the provisions governing ISS providers
Legislation needed?		No	Yes	Yes	Yes

Regulatory impact		---	+	++	+++
Impact on the coherence of legal framework		--	+	+++	+++
Impact on legal clarity		-	+	++	++
Impact on the effective and efficient law enforcement		-	+	+++	+++
Impacts on the digital single market		-	+	++	++
Impacts on consumer rights			+	+	+
Impacts on fundamental rights					
Benefits		-	Foster transparency	Make enforcement easier	Provide for full harmonisation in all member states
Costs			moderate	low	significant

Table 6: Conditions of Derogation & Annex

Policy option	Base line (current situation)	First option	Second option	Third option
Regulatory content	Conditions of derogation and annex provide for limited application of ECD (Art. 3(4) ECD)	Do nothing, retain the status quo	Delete derogation of consumer protection	Delete exceptions from the annex, such as intellectual property
Legislation needed?		No	Yes	Yes
Regulatory impact		---	+	+++
Impact on the coherence of legal framework		--	+++	--
Impact on legal clarity		--	++	-

Impact on the effective and efficient law enforcement		+/-	+++	+/-
Impacts on the digital single market		+/-	++	+/-
Impacts on consumer rights		-	++	
Impacts on fundamental rights		+/-	+	---
Benefits			Consumer protection is vastly harmonized on the EU level. A deletion of the derogation could provide for easier enforcement	As the IP rights system has been harmonized through regulations and directive, the exception may be maintained

2.2. Definitions

The framework of definitions concerning e-commerce and the digital single market in general are neither to be found in one place but in an infinite number of legislative acts on the European level, nor exhaustive and up to date with regard to the technical developments within the past twenty years since the enactment of the ECD. This section is not limited to the definitions under Article 2 ECD but extends to further definitions which should be included in future legislation under the DSA.

2.2.1. Problem Definition

Definitions under the ECD

The definitions under Article 2 ECD are mostly unproblematic, given that the provisions refer to other European legislation (e.g. information society service, regulated profession), guaranteeing the coherence of the legal framework, or concern timeless notions (e.g. service provider, recipient of the service).

Of course, definitions should also be regarded from a conceptual point of view. One example is the definition of ISS providers. Such conceptual questions are discussed in the specific section, which materially analyses this aspect. For example, for ISS providers, the study envisaged in a section above to not further regulate on this issue, because the notion may be better interpreted on a case-by-case basis by national jurisdiction and ultimately the CJEU (see above 2.1.).

Further definitions raise concerns regarding the coherence of the European legal framework, e.g. "consumer". There is no consistent and uniform definition of the consumer in EU law and there are divergences amongst Member States.⁵⁴ During the comprehensive reform of the digital services

⁵⁴ Valant, Jana, Consumer protection in the EU, EPRS In-Depth Analysis, 2015, available at: [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf).

act, the European legislator could attempt to unify the notion on the European level. However, the scope of this concern is too broad and will not be subject to policy options in the section below.

Depending on which policy options the European legislator opts for, the definition of the “established service provider” (to be read together with recital 19) could be revised.

The definition of the “coordinated field” has already been discussed above (section 2.1., Internal Market Clause).

New Definitions under the DSA

Definitions under the ECD only clarify a very limited amount of notions contained in the ECD. Further relevant terms are – more or less directly – defined by relevant articles of the ECD, in particular in chapter II, section 4.

With regard to the technical evolution of ISS providers and their business models, it often remains unclear, under which article “new digital services” (e.g. social media networks, collaborative economy services, search engines, Wi-Fi hotspots, online advertising, cloud services, content delivery networks, domain name services) are regulated.

Further terms, which are frequently used in the field of e-commerce and digital services, currently lack a precise legal definition. Content hosting intermediaries and commercial online marketplaces could be further defined. Furthermore, the rules could more clearly draw the line between commercial and non-commercial content. The notion of “illegal content” could be defined regarding the European legal framework; this is in particular true for national law provisions and if they make content illegal in the sense of the ECD.

2.2.2. Policy Options

This study primarily presents options, how to regulate definitions within the context of the Digital services act. Concrete definitions of the respective terms exceed the limits of this study, considering that for each term an extensive amount of case law by the CJEU and differences in Member States would have to be considered.

Full Harmonisation of Definitions under a new Regulation

As a policy option, the most effective approach to implement the aforementioned notions on European level would be to include them into a newly adopted regulation under the DSA. Full harmonisation ensures that the notions are used in a uniform way both on European and national level regarding the field of digital services. However, if the European legislator opts for this policy option, it must be ensured that the notions are not used in a different way by other European legislation. The example of “consumer” perfectly illustrates the dilemma of a legal term defined divergently by several legislative acts. To prevent this, the legislator could – on the one hand - opt for the “simple” option, limiting the applicability of the definition to the regulation under the specific regulation. On the other hand, focussing on the coherence of the European legal framework, the legislator could opt for the comprehensive option. Before regulating definitions, the legislator should request legal studies or conduct public consultation about each term, to draft a definition, which can be adopted in a uniform way to every European legislative act using the term. The respective legislative acts would have to be reformed in the context of the Digital services act.

Minimum Harmonisation of Definitions under a reformed directive

Should the European legislator opt against a regulation, relevant definitions can also be stipulated in a reformed directive. This option would also increase legal certainty by achieving a minimum harmonisation on the national level.

Retaining the Status Quo

Retaining the status quo would leave the update of outdated definitions and the development of new definitions to national and European jurisdiction. Essentially, the legislator would abstain from its prerogative to adapt legislation to the development of business models and technical features since the ECD's enactment.

2.2.3. European Added Value

Fully harmonising legal definitions in the field of e-commerce law would add to legal certainty regarding all stakeholders, including consumers, ISS providers and both national jurisdiction and authorities. More legal clarity would positively impact the well-functioning of the internal market (1.4.4.). In addition, the full harmonisation of definitions could lead to a less fragmented digital single market and an increased coherence of the European legal framework.

Introducing definitions by means of a minimum harmonisation bears the risk that national legislators do not transpose them at wording, leading to potential divergences in the application by national jurisdiction. However, this option would be preferable compared to retaining the status quo.

2.2.4. Overview table

Table 7: Definitions

Policy option	Base line (current situation)	First option	Second option	Third option	Fourth option
Regulatory content	Art. 2 ECD - Some uniform definitions are missing (e.g. consumer) - Some definitions unclear	Full harmonisation of definitions – new regulation under the DSA (“simple” option , limiting the applicability of the definition to the regulation under the specific regulation)	Full harmonisation of definitions – new regulation under the DSA (comprehensive option , drafting a definition, which can be adopted in a uniform way to every European legislative act using the term) reform the definition of information society service in Article 2 ECD	Minimum harmonisation of definitions under a reformed directive	Retaining the status quo
Legislation needed?		Yes	Yes	Yes	No
Regulatory impact		+++	++	+	0
Impact on the coherence of legal framework		++	++	+	0

Impact on legal clarity		++	++	++	-
Impact on effective and efficient law enforce.		+	+	- / risk diverg. application	0
Impacts on the Digital single market		++	++	+	0
Impacts on consumer rights		++	++	+	0
Impacts on fundamental rights					
Benefits		See above	See above	See above	
Costs					

2.3. General Information Requirements

2.3.1. Problem Definition

Practical compliance with Article 5 ECD

To provide transparency to the user of information society services, Article 5 ECD obliges the ISS provider to render easily, directly and permanently accessible various information on the ISS provider, among them such important information as the name of the service provider, its geographic address, further details of the service provider, including its electronic mail address, which allow the service provider to be contacted rapidly and communicated with in a direct and effective manner, furthermore the trade register in which the service provider is entered and its registration number, or equivalent means of identification in that register. While the EU member states have implemented Article 5 ECD into their national laws, it seems an open question, if in practice compliance is satisfying in all EU member states. In particular member states, which merely relied on administrative enforcement may have seen a lower level of enforcement. Given the vast amount of ISS providers caught by Art. 5 ECD, it seems a too great task for administrative bodies to secure enforcement of Art. 5 ECD. In any case, there seems to be a lack of public and reliable studies looking into the practical compliance with Article 5 ECD.

One example, Germany, shows that Article 5 ECD and the German implementation have gained larger practical importance. Article 5 ECD has been implemented more or less literally by § 5 German Telemediengesetz (TMG). Breaches of § 5 TMG may be sanctioned by administrative fines, which is very rare in practice. But competitors and associations with legal standing may enforce compliance under civil law and more specifically under law of unfair competition. In practice, there has been a very high number of legal actions outside court and before courts. Likely, one of the reasons for the high level of legal action in particular by competitors is due to cost reimbursement

for outside court warning letters justified under unfair competition law.⁵⁵ This has led to a remarkably high level of compliance with § 5 TMG and thus Article 5 ECD in Germany. More or less every website of an ISS provider contains an “imprint” (“Impressum”), listing all information requirements of Article 5 ECD.

The DSA could bear the chance to introduce mechanisms to secure compliance with and enforcement of the information requirements of Article 5 ECD, adding to the coherence of the European legal framework. In addition, future legislation could harmonise information requirements regarding Article 10 ECD and other legislation in relevant fields, increasing legal clarity and leading to a more effective and efficient enforcement.

Operators of illegal offers hide their identity

Article 5 ECD contains legal duties for service providers to provide certain information to reveal their identity. There are considerable amounts of illegal offers online, e.g. in the field of intellectual property rights infringements, that – by the nature of their business, which needs to hide in anonymity – operate their business without providing any of the required information. For such businesses which by intent perform illegal activity, it can be assessed that the legal duties according to Article 5 ECD will not be respected. Right holders that are affected by such illegal offerings, such as structurally copyright infringing websites that offer copyright protected content such as films, TV series, books, or games on a massive scale⁵⁶, are lacking efficient tools to enforce their rights against these infringers, which – by the nature of their illegal business model – will not provide any information to identify them. Against this background, it is understandable that, in the ongoing discussions on the Digital services act (DSA), there have been calls for the introduction of a revised set of provisions that strengthen the general information requirements under Article 5 ECD.⁵⁷

2.3.2. Policy Options

Practical compliance with Article 5 ECD

A full harmonisation of the enforcement of information requirements, replacing enforcement divergences currently existing on the national level, could help to provide the desired transparency to consumers and would provide a sound level playing field for ISS providers on the European level. Future legislation should streamline the enforcement of Article 5 ECD. Furthermore, the applicable system should be inspired by more recent legislation, e.g. under the Consumer Rights Directive and the Platform to Business Regulation.⁵⁸

⁵⁵ See German Ministry of Justice and Consumer Protection: „Hat ein Anbieter kein Impressum hinterlegt, obwohl er dazu nach dem Gesetz verpflichtet ist, droht ihm eine Geldbuße von bis zu 50 000 Euro. Daneben begeht er einen Wettbewerbsverstoß. Daraus können sich Unterlassungsansprüche ergeben, die nicht selten mithilfe von kostenpflichtigen Abmahnungen durchgesetzt werden.“ English translation: “If a provider has not provided an imprint, while it is obliged to do so by law, he is liable to an administrative fine of up to EUR 50,000. In addition, it commits an infringement of laws of unfair competition. This can result in civil claims for injunctive relief, which are often enforced by means of outside court warning letters leading to cost reimbursement.” https://www.bmjd.de/DE/Verbraucherportal/DigitalesTelekommunikation/Impressumspflicht/Impressumspflicht_node.html

⁵⁶ See for examples the list of online and physical marketplaces that are reported to engage in counterfeiting and piracy included in the European Commission’s “Counterfeit and Piracy Watch List” of 7 December 2018, available at <https://euipo.europa.eu/ohimportal/de/news/-/action/view/4872528>.

⁵⁷ See also Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 54 et seq.

⁵⁸ Consumer Rights Directive: DIRECTIVE (EU) 2019/2161 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the

The compliance with the information obligations and the enforcement of Article 5 (and 10) ECD can be increased by improving the general system of enforcement under the DSA, as discussed in other sections of this study (2.1. & 2.6.). There is no need to develop an own mechanism limited to information obligations only, wherefore the study refrains from providing further policy options under this section and refers to the aforementioned sections.

Operators of illegal offers hide their identity

Strengthening the general information requirements already provided for in Article 5 ECD could substantially reduce the amount of illegal content available online. At least, such providers of illegal content would not be served by EU providers any longer, which act in compliance with the ECD. One policy option to achieve that goal would be the introduction of so-called “know your business customer” duties (KYBC duties). KYC duties (the broader concept of “know your customer” – without the limitation to “business customers”) are already existing in other sectors throughout the EU. The most prominent example are KYC duties aiming at the financial sector contained in the 3rd Anti-Money-Laundering Directive.⁵⁹ These provisions are trying to prevent banks and financial institutions from keeping anonymous accounts or anonymous passbooks by providing for certain verification duties that must be complied with before entering in a business relationship with a customer.⁶⁰

One policy option could be the introduction of KYBC duties as strict as in the financial sector that would cover all types of Internet service providers. However, given that the introduction of such a comprehensive scheme could cause significant costs and burdens for all types of Internet service providers, it is questionable whether such a strict regime as in the financial sector seems feasible and worth advocating for.

Against this background, another policy option may be envisaged: This is the introduction of a *moderated KYBC model* that is not as far reaching as that employed in the financial sector.⁶¹ Such a moderated KYBC scheme could provide for a twofold approach: First, before entering into a contractual relationship with a business customer, the Internet service provider would collect and verify certain data in order to reveal its identity; these data should at least be verified by checking available information provided by company registers, such as the European Business Register (EBR) and the future European network of Ultimate Beneficial Owners (UBO) registers. The legal instrument introducing the KYBC duties would need to legally ensure that Internet service providers have free access to these databases to verify the customer data. Second, the moderated KYBC model could provide for rules allowing any interested party (including owners of IP rights) to trigger a further round of identity verification plus disclosure by notifying the Internet service

European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules. Platform to Business Regulation: REGULATION (EU) 2019/1150 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

⁵⁹ Directive 2005/60/EC of 26 October 2005, which was recently updated by the 5th Anti-Money-Laundering Directive (2018/843/EU) of 30 May 2018.

⁶⁰ These due diligence measures include (1) the identification of the customer and verifying the customer's identity on the basis of documents, data or information obtained from a reliable and independent source, (2) obtaining information on the purpose and intended nature of the business relationship, and (3) conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship; the specific verification procedure is further specified in the MS's national laws implementing the AML-Directive, such as the German Anti-Money Laundering Act.

⁶¹ See in more detail: Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 54 et seq.

provider of credible evidence that a commercial has failed to comply with the legal requirements to disclose its identity.

Noncompliance with the aforementioned duties could have clear consequences: the online service provider would have to terminate the provision of services to the respective business customer. For instance, a hosting provider would need to take down the entire website. This could provide for a strong incentive against the dissemination of illegal or harmful content or from the distribution of illegal or harmful products.

It seems important to exclude private end user customers from the moderated KYBC obligations and to limit this scheme to commercial customers. In order to have a broad impact on illegal activities and to strengthen the system of information duties under the ECD, the KYBC duties could apply to a variety of intermediaries, in particular to hosting providers, content delivery network (CDN) service providers, payment service providers, domain name service providers (in particular registrars), advertising service providers and proxy service providers (such as Cloudflare).

In the event an online service provider does not comply with the KYBC duties sketched out above the question of potential legal consequences for the noncompliant intermediary arises. One could think of fines imposed by the competent national administrative bodies. The question of legal consequences may also be raised in the event the intermediary has fully complied with the KYBC procedure, yet the information provided by the business Customer turns out to be false. Here, administrative fines may not seem appropriate. However, a duty to re-verify the identity of the respective customer, and – if verification fails – the termination of their contractual relationship with the customer may be sensible and proportionate consequences.

2.3.3. European Added Value

Following the structure of the Problem Definition and the Policy Options under this sub-chapter, the assessment of EAV will also split in two paragraphs, analysing potential EAV with regard to the lack of compliance with Article 4 ECD and operators of illegal offers who hide their identity.

Practical compliance with Article 5 ECD

It remains an open question, if the level of enforcement and compliance is already in conformity to the requirements under Article 5 ECD. This deserves further attention. Reforming Article 5 ECD by fully harmonizing the provisions could significantly increase the compliance with and enforcement of information requirements under the ECD. Uniformly applying a framework of enforcement in all Member States could elevate the level of compliance in the single market and add both to the coherence and to the defragmentation of the European legal framework. Naturally, the enforcement would become more efficient and effective because national authorities and civil parties could revert to the information provided in case enforcement of rights appears to be necessary.

Furthermore, a uniform application of information requirements in all Member States would positively affect the well-functioning of the single market. Consumers would benefit, because the information requirements, *inter alia* designed to protect the recipients of the services, would be matched in all Member States. This will decrease obstacles to the freedom of movement and services on the (digital) single market, which will ultimately benefit competition leading to better quality and reduced prices.

A more coherent framework of enforcement in all Member States would also increase legal certainty for ISS providers, reducing their costs to enter the market in further Member States. While they are already required to fulfil the requirements under Article 5 ECD, streamlining its enforcement will still positively affect legal certainty.

In addition, opting for a policy option referring to more recent legislation, the coherence of the European framework would be increased.

Operators of illegal offers hide their identity

The information requirements fall short regarding operators of structurally infringing online services. Therefore, only reforming the framework of enforcement will not be enough to effectively fight illegal content online.

The introduction of KYBC obligations could significantly increase the effectivity and efficiency of enforcement against operators of structurally infringing business models because ISS providers would be forced to identify their customers and would be kept from servicing illegal business models which cannot reveal their identity. Structurally infringing business models would be driven out of the EU, because at least, such providers of illegal content would not be served by EU providers any longer, which act in compliance with the ECD.

Introducing KYBC obligations would also add to the coherence of the European legal framework, as other fields of law already work with such mechanisms (as shown above).

Ultimately, laying grounds for a more effective enforcement against operators of illegal content online would also benefit operators of legitimate business models on the digital single market. Their business could profit; this could lead to more (legitimate) competitors on the digital single market and would therefore foster competition.

Consumer could also profit. More competition may mean lower prices. Anyway, usually the product or service quality will be better in case of legitimate offers. Also, illegal business models will – by their nature – not respect consumer rights.

However, the implementation of equally strict KYBC obligations as already known in the banking sector would create new restrictions that could lead to disproportionate hindrances for businesses and harm the well-functioning of the digital single market.

Therefore, this study suggests an alternative option, advocating a more moderate KYBC model, which would add EU value with regard to the aforementioned drivers and mechanisms. However, the impact would be less far reaching. In turn, the moderate approach would not harm the well-functioning of the digital single market and therefore add more EU value, than a strict KYBC model could.

2.3.4. Overview table

Table 8: General Information Requirements

Policy option	Base line (current situation)	First option	Second option	Third option
Regulatory content	The general information requirement, Art 5 ECD	Full harmonisation of the enforcement of information requirements; improving the general system of enforcement under the DSA	(Additional to option 1) The introduction of so-called “know your business customer” duties (KYBC duties) as strict as in the financial sector	(Additional to option 1) Introduction of a <i>moderated KYBC model</i>
Legislation needed?	No	Yes	Yes	Yes

Regulatory impact		+	+++	+
Impact on the Coherence of legal framework	--	++	++	++
Impact on legal clarity	-	++	Depends on rules	Depends on rules
Impact on the Effective and efficient law enforcement		+++	+++	+++
Impacts on the Digital single market		++	+	+
Impacts on consumer rights		++	+	+
Impacts on fundamental rights		++	+	+
Benefits		<ul style="list-style-type: none"> - Uniformly applying a framework of enforcement in all Member States - the enforcement would become more efficient and effective - will decrease obstacles to the freedom of movement and services on the (digital) single market - would also increase legal certainty for ISS providers, reducing their costs to enter the market in further Member States - coherence of the European framework would be increased - transparency - level playing field for ISS providers 	<ul style="list-style-type: none"> - ISS providers would be forced to identify their customers and would be kept from servicing illegal business models - operators of legitimate business models on the digital single market would benefit more (legitimate) competitors - would foster competition. - More competition may mean lower prices 	<ul style="list-style-type: none"> - ISS providers would be forced to identify their customers and would be kept from servicing illegal business models - operators of legitimate business models on the digital single market would benefit more (legitimate) competitors - would foster competition. - More competition may mean lower prices - incentive against the dissemination of illegal or harmful content

Costs		Not specified	significant	moderate
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2.4. Tackling illegal content online

2.4.1. Problem Definition

Emerging issues with Article 12-15 ECD

- New safe harbour provisions for certain intermediaries?

Articles 12-14 ECD contain safe harbour provisions for certain groups of intermediaries, such as “mere conduits” (Article 12 ECD), “cache providers” (Article 13 ECD) and “hosting” (Article 14 ECD).

While the aforementioned categories of intermediaries cover a wide range of services, there is some legal uncertainty for specific sub-groups of intermediary service providers that play an “in-between” role between access providers (Article 12 ECD) and hosting providers (Article 14 ECD). This is in particular true of services such as upstream providers, CDN providers, domain name services or search engines. For these business models – which have gained special importance only after the ECD entered into force – there seems to be some legal uncertainty regarding the application of the provisions of the ECD, in particular whether Article 12 ECD or Article 14 ECD applies. The European Commission has picked-up on this certain legal uncertainty and pointed to the fact that there are some grey areas as regards the wide range of services across the entire stack of digital services in the EU and criticized that a variety of online intermediaries, such as content delivery networks or domain name registrars and registries are not sure what the legal regime is under which they operate. It was expressed in that context that the safe harbour provisions of the ECD may need to be updated and reinforced so that the notions of mere conduit, caching and hosting services could be expanded to include explicitly some other services. It therefore needs to be assessed whether there is indeed need for legislative action regarding these intermediaries.

- Hosting Providers (Article 14 ECD)

Abolishing the distinction between active and passive hosting providers?

In legal practice, the most relevant group of intermediaries are hosting providers pursuant to Article 14 ECD. Article 14 ECD contains a conditional liability exemption for information society services which provide hosting services. The limitation does not apply to activities going beyond hosting. Specifically, Article 14 ECD is not available where an information society service is directly liable for the illegal information. Even where a hosting provider is not directly liable, Article 14 ECD is still not available where it plays an “active role” such as to give it knowledge or control over the information relating to the illegal conduct.⁶² Specifically, the CJEU has held that the privilege is not available where the online marketplace “*has provided assistance which entails, in particular optimizing the presentation of the offers for sale in question or promoting those offers*”. Finally, even passive platforms can only avail themselves of the liability limitation provided that they (i) do not have actual knowledge of illegal activity or information and, as regards claims for damages, are not aware of facts or circumstances from which the illegal activity or information is apparent, and (ii) upon obtaining such knowledge or awareness, they act expeditiously to remove or to disable access to the information.

At the time, the ECD was enacted, services were very different from those existing today; that explains why the ECD envisaged a neutral and passive hosting provider, which simply stored content, or hosted websites. While such hosting providers still exist, today there are further

⁶² CJEU C-236/08 to C-238/09 of 23 March 2010 – *Google France* and CJEU C-324/09 of 12 July 2011 – *L’Oréal*.

categories of platforms that actively build their business model on the privilege and which makes application of Article 14 less straightforward: (i) platforms which actively curate user-generated content for commercial gain, such as YouTube, Amazon and Facebook; and (ii) platforms which turn a wilful blind eye to illegal and unlawful content on their services. In order for a hosting provider to be able to benefit from the safe harbour, the CJEU has ruled, with reference to Recital 42⁶³, that the hosting provider's services must be of a "*mere technical, automatic and passive nature*" and the provider must be neutral in relation to the content hosted.⁶⁴

The distinction between active and passive has been welcomed. According to this view, there is a difference between a hosting provider which merely stores content for a third party – and a host which takes an active role vis-à-vis the users' content indexing it, suggesting it to users and branding it to be of a particular quality. Accordingly, "active role" hosting providers intervene into third-party infringements and deserve stricter rules for liability than mere passive and neutral hosting providers.⁶⁵

But the concept has also been criticized and there are voices that seek to abolish this distinction. The main two arguments for this demand can be summarized as follows:

- Some critics argue that Recital 42 of the ECD, from which the "passive" language derives, does not relate to Article 14, but only to Articles 12 and 13.⁶⁶ This argument seems somewhat academic in light of the case law of the CJEU that has interpreted Article 14 by explicit reference to Recital 42.⁶⁷
- Another argument against the exclusion of "active role" hosting providers from Article 14 ECD is a possible contradiction to the aim of making the hosting provider proactively remove infringements. Accordingly, platforms would find themselves in an uncomfortable position when they proactively remove illegal content.

⁶³ The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

⁶⁴ CJEU C-236/08 to C-238/09 of 23 March 2010 – *Google France*, and CJEU C-324/09 of 12 July 2011 – *L'Oréal*.

⁶⁵ Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 38 et seq., 46.

⁶⁶ See, for example, Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk – *MIR*, Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, p. 31 et seq.; available here: https://www.ivir.nl/publicaties/download/hosting_intermediary_services.pdf. See also Aleksandra Kuczerawy, Active vs. passive hosting in the EU intermediary liability regime: time for a change?, 2018, "The distinction between passive and active hosts is based on the expansive application of Recital (42), which requires intermediaries' activities to be of a mere technical, automatic, and passive nature. The CJEU applied Recital (42) to hosting services in *Google France*, and *L'Oréal v. eBay*, initiating the division between active and passive hosts. This approach, however, is questionable. While Recital (42) purports to address all of the exemptions of the Directive, some argue that the scope of this recital should be seen as limited to the transmission and access services identified in Articles 12 (mere conduit) and 13 (caching). In fact, Article 14 does not actually require a passive role of the hosting provider in order for the protection regime to apply – as long as it does not have knowledge or control over the data which are being stored."; available here: <https://www.law.kuleuven.be/citip/blog/active-vs-passive-hosting-in-the-eu-intermediary-liability-regime-time-for-a-change/>

⁶⁷ *Google France* and *eBay*, both at note 64. We note that in *L'Oréal v eBay*, Advocate General Jääskinen in his Opinion said that Recital 42 is not applicable to Article 14. However, directly citing the wording adopted in *Google France*, the CJEU in *L'Oréal v eBay* endorsed its previous finding, thereby decisively rejecting the Advocate General's proposition to the contrary.

The (second) argument that taking away the liability privilege from “active role” providers would disincentivize them to proactively remove infringements is also addressed as the “Good Samaritan’s Paradox”.⁶⁸ It is argued that that the prohibition to play an active role as a hosting provider may lead to hosting providers turning a blind eye on infringements in order not to get too close to an active role.⁶⁹

Scope of duties: Staydown and prevention of infringements of the same kind?

Another issue in the context of hosting providers refers to the scope of their duties. In particular the prevention duties of hosting providers in the area of intellectual property rights infringements have been subject to debate. The German Federal Court (BGH) – relying on CJEU case law – has identified a duty of care of a hosting provider after notification of a clear intellectual property rights infringement for (1) take down, (2) stay down, and (3) prevention of similar clear right infringements of the same kind.⁷⁰ This has been criticized, in particular by the French Federal Supreme Court (Cour de Cassation). The Court rejected stay down obligations for hosting providers as conflicting with the prohibition of general monitoring duties under Article 15 ECD.⁷¹ It therefore needs to be asked whether there is need for legislative action in order to clarify the scope of duties of intermediary service providers, in particular hosting providers.

What level of “knowledge” is required under Article 14(1) lit. a ECD?

Another emerging issue regarding Article 14 ECD is the question of what level of “knowledge” is required pursuant to Article 14(1) lit. a ECD in order to exclude the liability shield for a hosting provider.

To recap, Article 14(1) lit. a ECD only provides for a liability shield in case the hosting provider does not have actual knowledge of illegal activity or information and – regarding damage claims – is not aware of facts or circumstances which make the illegal activity or information apparent. According to the case law of the CJEU, the “diligent economic operator” is the standard for hosting providers to keep up the liability shield.⁷² As currently pending before the CJEU⁷³, it is an open question of whether the actual knowledge of the unlawful activity or information and the awareness of the

⁶⁸ Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk – *IVIR*, Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, p. 39; also Christine Angelopoulos, Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market; January 2017, pages. 43, 44, available at: <https://ssrn.com/abstract=2947800>; see also Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 40.

⁶⁹ Christine Angelopoulos, Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market; January 2017, p. 11 with further references, available at: <https://ssrn.com/abstract=29447800>; Joris van Hoboken/Joao Pedro Quintais/Joost Poort/Nico van Eijk – *IVIR*, Hosting intermediary services and illegal content online – an analysis of the scope of Article 14 E-Commerce Directive in light of developments in the Online service landscape, 2018, p. 40 et seq (item 4.).

⁷⁰ German Federal Court (BGH) GRUR 1030 para. 46 (2013) – File-Hosting-Dienst I; see for a detailed analysis of the BGH case law Jan Bernd Nordemann 59 (no. 4) Journal Copyright Society of the USA (2012), 773 and 778 et seq.; Jan Bernd Nordemann, Liability for Copyright Infringements on the Internet: Hostproviders (Contentproviders) – The German approach, 2 (2011) JIPITEC 37; further on general monitoring obligations, see Giancarlo Frosio, To filter, or not to filter? That is the question in EU copyright reform, Cardozo Art&Entertainment, Law Journal, 2018, p. 331–368, at 348 et seq., available at <https://ssrn.com/abstract=3058680>.

⁷¹ Cour de Cassation Arêt No. 831, 11-13.669, 12 July 2012 – Google France/Bach Films; Cour de Cassation Arêt No. 828 of 12 July 2012 – Google France/Bach Films

⁷² CJEU C-324/09 of 12 July 2011, para. 120 et seq. – *L’Oréal/eBay*.

⁷³ See pending CJEU case C-683/18, question 2.

facts of circumstances for which the unlawful activity is apparent relate to “specific unlawful activities or information” pursuant to Article 14 (1) ECD. The referring court (the German BGH) in the aforementioned CJEU proceedings held that there was only a duty by the share hosting provider to act as a “diligent economic operator” after it gained specific knowledge of the unlawful activities or information.⁷⁴ Therefore, the question arises whether there is need for legislative activity to clarify what level of “knowledge” is required – or whether this issue should rather leave to the jurisprudence of the CJEU.

Emerging issues with Article 18 ECD

Access to jurisdiction, especially in cross-border cases, is still an important issue. Already before the enactment of the ECD, the parliament suggested to include in Article 18 ECD that Member States have to ensure that court actions under this article “are not inadmissible on the grounds that the complaint is transmitted by electronic means, or is drafted in a Community language other than that of the Member State where the court is located.”⁷⁵ The Commission found that this motion was too ambitious for the time. However, after twenty years of further digitalisation and European integration, this idea could be given a thought.

2.4.2. Policy Options

New safe harbour provisions for certain intermediaries?

As outlined above, the ECD does not provide specific provisions for certain intermediaries, such as CDN providers, domain name services (such as domain registrars and registries) or search engines. For instance, despite the major importance of search engines, the application of the liability privileges of Articles 12 to 14 ECD is still unclear to a certain extent. To date, the CJEU has (only) clarified that search engines – which are referred to as “referencing service providers” – fall within Article 14 ECD for their paid-for links, i.e. the links advertising third-party products and services.⁷⁶ The Court held that the “referencing service provider” at issue⁷⁷ qualified as an “information society service” within the meaning of Article 14 ECD⁷⁸; moreover, the Court found that Google “stored” certain data, such as the keywords selected by the advertiser, the advertising link and the accompanying commercial message as well as the address of the advertiser’s site.⁷⁹ It is not clear, however, whether Article 14 ECD also applies to editorial, i.e. non-advertising, links made publicly available in search engines. According to one opinion, search engines are not caught by Article 14 ECD; they needed to follow their own liability regime for published editorial links⁸⁰. Others argue that Article 14 ECD did apply to editorial links in particular of search engines⁸¹. Against this

⁷⁴ BGH of 20 September 2018, I ZR 53/17 para. 36 – *Uploaded*.

⁷⁵ OJC 279/401 of 1 October 1999.

⁷⁶ CJEU C-236/08 to C-238/09 of 23 March 2010 – *Google France*.

⁷⁷ Google’s “AdWords” service.

⁷⁸ CJEU C-236/08 to C-238/09 of 23 March 2010 – *Google France*, para. 110.

⁷⁹ CJEU C-236/08 to C-238/09 of 23 March 2010 – *Google France*, para. 111. In *Google France*, the Court did not suggest that its findings were limited to advertising links, yet the Court only looked into the question of whether Google’s “AdWords” service qualified as an “information society service” under the ECD.

⁸⁰ German Federal Supreme Court (BGH) GRUR 209 (2016), para. 12 – *Haftung für Hyperlink*; BGH GRUR 178 (2018), para. 60 et seq. – *Vorschaubilder III (Thumbnails III)*. The most important argument against an application of Article 14 E-Commerce Directive comes from the E-Commerce Directive itself. Article 21 (2) E-Commerce Directive requires the Commission to regularly examine and analyse “the need for proposals concerning the liability of providers of hyperlinks”. This implies that providers of hyperlinks are not regulated by the E-Commerce Directive.

⁸¹ *Jan Bernd Nordemann*, Liability of online service providers for copyrighted content – Regulatory action needed? In-Depth analysis for the IMCO Committee, 2018, p. 15; in favour of an application of Article 14 E-Commerce Directive *mutatis mutandis Leistner* GRUR 1145 at 1154 (2014); *Ohly* GRUR 1155 at 1157 (2016).

background, there is a policy option to create new safe harbours for certain intermediaries such as search engines.

However, this has to be evaluated against another policy option to create rules on the EU level to establish liability. It is important to note that the policy option to extend the liability privileges of Art. 12-14 ECD would not cover rules establishing liability; it would only provide new shields once liability has been established. Without a harmonisation of EU law to establish liability, especially search engines will be subject to different national rules to establish liability. A harmonisation on the EU level would always remain incomplete. This could be seen as unsatisfying e.g. for search engines. Despite their important role for the legitimate use of the internet, search engines play an important role in finding infringing information on the internet. This could justify holding them responsible and develop – on the European level - adequate rules to establish their responsibility. For example, duties of care could be created after carefully balancing the interests of link providers, internet users and right holders.⁸²

One example where this has worked properly is copyright law. Through recent case law in *GS Media*, *Filmspeler* and *The Pirate Bay*, the CJEU has created a patchwork of pan-EU liability rules for link providers⁸³ (which also apply to search engines). Some academics have argued that these new liability rules require the introduction of (new) liability privileges as a shield against the now too far-reaching liability of search engines.⁸⁴ This argument does not seem convincing. The liability rules for link providers (including search engines) follow a flexible approach establishing adequate duties of care, which in particular involve a balancing of interests between the link providers, internet users and right holders. As a result, the CJEU liability rules should provide for fair results in all linking scenarios.⁸⁵ Finally, there have not been any reports from the Member States that ‘overbroad’ copyright liability for linkers has created any particular issues.

Another possible policy option relates to domain name services. For domain name services (such as domain registries and registrars), there are no specific EU-level provisions. It is unclear whether Article 14 ECD applies to these types of services. There is no CJEU case law on the availability of the liability limitations for domain registries or registrars. For a service that offered IP address rental and registration, the Court held in *SNB-REACT* that Articles 12-14 ECD apply if the service constituted a mere conduit, caching or hosting service, and met all respective requirements since the service providers activities were of a mere technical, automatic and passive nature which implied that the service provider had neither knowledge of more control over the information that was transmitted or stored.⁸⁶ This shows that such ISS providers play an “in-between” role between access providers and host providers. It is a policy option to not create any new safe harbours and leave the application to the courts whether Article 12 E-Commerce Directive (or Article 13 for caching providers or Article 14 for hosting providers) is the correct provision to regulate the respective business. Following this policy option, it is not advisable to establish further categories of providers. One should be careful to create new categories of intermediaries as the world of intermediaries and their factual set-up is constantly changing. So far, the courts seem to have

⁸² Jan Bernd Nordemann, in: *The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services*, IMCO Study, 2020, p. 48 et seq.

⁸³ See in detail in the below section on Rules on Liability.

⁸⁴ Gruenberger ZUM 2016, 905; Ohly GRUR 2016, 1155.

⁸⁵ See in more detail Jan Bernd Nordemann „Liability of Online Service Providers for Copyright Content – Regulatory Action needed?”, In-Depth Analysis for the IMCO Committee, 2018, p. 48 et seq.

⁸⁶ CJEU C-521/17 of 7 August 2018, C-521/17, para. 47 – *SNB-REACT v Deepak Mehta* (ECLI:EU:C:2018:639).

properly played the role of applying the existing liability privileges to the relevant factual scenarios at trial.⁸⁷

In light of the above, this report does not see convincing benefits to create new safe harbours as a policy option. Rather, the policy option to introduce rules to establish liability could be considered for all intermediaries.

Hosting Providers (Article 14 ECD)

(1) Abolishing the distinction between active and passive hosting providers?

As outlined above, some voices argue that the distinction between active and passive hosting providers as established by the CJEU should be kept, others want it to be abolished. It therefore needs to be asked whether it is a viable policy option to abolish this distinction by legislative action.

Assessing the arguments advocating for the abolishment of the distinction, the criticism of the differentiation between passive role hosts (coming under Article 14 ECD) and active role hosts (not within the liability privilege) does not seem convincing. Hosting providers that merely store content for third parties and hosting providers which take an active role vis-à-vis the users by indexing, branding or recommending content, seem to be quite different. “Active role” services intervene into third party information and make the information part of their business model – in contrast to merely providing the technical services as a host. Given that the interaction with content uploaded by their users is part of their business model, it seems justified that they such active role providers are facing a different level of responsibility and duty of care than mere neutral and passive providers that offer technical services.⁸⁸ This position seems to find support in the case law of the CJEU. If an intermediary plays an “indispensable role”⁸⁹ or “essential role”⁹⁰ to provide access to copyright infringements, the CJEU has held that such intermediaries even infringe e.g. copyrights if they breach certain duties of care. Such an essential role should also rule out the application of Article 14 ECD. Furthermore, the CJEU has excluded service providers from the application of the ECD⁹¹ if they played an “integral part of an overall service”⁹², which seems to be a similar criterion as “essential role”. Such service providers are no longer genuine intermediaries, which deserve the specific liability privileges of Art- 12-14 ECD.

Also the issue of the “Good Samaritan’s Paradox” should not stand in the way of excluding active role hosting providers from Article 14 ECD.⁹³ In its Communication of 28 September 2017 Tackling Illegal Content Online, the Commission expressed the view that taking voluntary proactive

⁸⁷ Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 34. See for the same result concerning Article 12 E-Commerce Directive: Jan Bernd Nordemann, Liability of Online Service Providers for Copyrighted Content – Regulatory Action Needed? In-Depth Analysis for the IMCO Committee, 2018, pages 13 to 14.

⁸⁸ Jan Bernd Nordemann „Liability of Online Service Providers for Copyright Content – Regulatory Action needed?“, In-Depth Analysis for the IMCO Committee, 2018, p. 10, see also Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 38 et seq., 46.

⁸⁹ CJEU of 14. June 2017, C-610/15 para 26 – *Ziggo/Brein*.

⁹⁰ CJEU of 14. June 2017, C-610/15 para. 37 – *Ziggo/Brein*.

⁹¹ Because they would not be an information society service in the meaning of Article 2 E-Commerce Directive.

⁹² See decisions of 19 December 2019, C-390/18 para 50 – *Airbnb Ireland*, and CJEU of 20 December 2017, C- 434/15 para. 40 – *Uber Spain*.

⁹³ Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 40 et seq.

measures against infringement would not lead to a loss of the benefit of the safe harbour.⁹⁴ Also, available case law does not support the fear that proactively working against the upload of infringements will mean a loss of the liability privilege due to an “active role”. For example, German courts have found that the most prominent “Good Samaritan” filtering system, YouTube’s ContentID does not lead to YouTube play an active role excluding the application of Article 14 ECD to YouTube.⁹⁵

Reviewing the case law of the CJEU, it seems to be the convincing approach that proactively removing or blocking illegal content will not lead to an active role excluding the application of Article 14 ECD. According to the CJEU, “active role” hosting providers are excluded if they play an active role by promoting access to illegal content, be it through directly advertising specific content or through indexing, suggesting or branding third party information.⁹⁶ Accordingly, it is not the “active role” to identify infringements which leads to the hosting provider losing the liability privilege of Article 14 ECD. Rather, it is the active role *to promote the content*. With such an understanding of “active role” no “Good Samaritan’s Paradox” will emerge from the start.

In light of the above it does not seem a sensible policy option to abolish the distinction of active vs. passive hosting providers. It should also be considered that excluding active role hosting providers from the liability privilege of Article 14 ECD does not seem to be sufficient to provide a sound system for responsibility and duty of care for active role hosting providers on the EU level. To achieve that, a system of EU rules to *establish* responsibility (including liability) for active role and passive role providers should be envisaged. This could be done as already suggested to the European Parliament in a separate study: “The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services - Challenges and opportunities”:⁹⁷

Considering the long-standing tradition of national liability systems, EU rules could be explored which establish liability of intermediaries to a limited, but sufficient extent. This could be done even without changing the E-Commerce Directive and only where no sector specific rules already exist in EU law. For rules to establish liability, a distinction needs to be made between (1) the accountability for injunctions and (2) ordinary liability which entails the concept determining intermediaries as infringers.

(1) Concerning the mere accountability for injunctions (due to helping duties for intermediaries as they are best placed to prevent infringements), the model of intellectual property law in Article 11 3rd sentence Enforcement Directive and Article 8 (3) Copyright Directive 2001/29 should be followed. It is recommended to introduce a similar accountability for injunctions for intermediaries outside the area of intellectual

⁹⁴ Communication of 28.09.2017 Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms, COM(2017) 555 final, p. 11: “This suggests that the mere fact that an online platform takes certain measures relating to the provision of its services in a general manner does not necessarily mean that it plays an active role in respect of the individual content items it stores and that the online platform cannot benefit from the liability exemption for that reason. In the view of the Commission, such measures can; and indeed should, also include proactive measures to detect and remove illegal content online, particularly where those measures are taken as part of the application of the terms of services of the online platform. This will be in line with the balance between the different interests at stake which the ECommerce Directive seeks to achieve. Indeed, it recalls that it is in the interest of all parties involved to adopt and implement rapid and reliable procedures for removing and disabling access to illegal information.”

⁹⁵ Court of Appeal (Oberlandesgericht) of Hamburg 1 July 2015, 5 U 87/12 juris para. 198.

⁹⁶ CJEU C-324/09 of 12 July 2011, para. 114 – *L’Oréal/eBay*.

⁹⁷ Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 9 et seq.

property rights infringements. The intermediaries' duties should be shaped according to the principle of proportionality.

(2) Concerning ordinary liability, it does not seem realistic to harmonise all national concepts of intermediaries' fault and strict liability, e.g. for damages. However, it is recommended to harmonise the understanding of the term "infringer" regarding intermediaries, namely harmonising under which circumstances intermediaries can be classified as "infringers". If the intermediary has to be classified as an "infringer", the intermediary would be liable in the same way as a direct third-party infringer. A general rule could be introduced into EU law that "essential role" intermediaries which sufficiently intervene into third-party infringements intermediaries have to be treated as infringers themselves. In case the intermediary does not act with intent, one could discuss to limit this rule by a proportionate duty of care. The intermediary's duties could be shaped in accordance with the principle of proportionality and would be comparable to the duties for a mere accountability for injunctions. The justification for this more extensive liability (which includes e.g. damages) lies in the fact that the "essential role" intermediary intervenes into third-party infringements and thus should face the same liability as the third-party infringer.

(2) Scope of duties: Staydown and prevention of infringements of the same kind?

As stated above, another emerging issue regarding Article 14 ECD concerns the scope of duties of the hosting provider: Do the current rules include staydown duties and duties to prevent infringements of the same kind? The question is whether there is need for legislative action to clarify the scope of duties of hosting providers.⁹⁸

It is a policy option to clarify that staydown duties and duties to prevent infringements of the same kind are part of the legal consequences.⁹⁹ Otherwise, there would not be an effective and efficient enforcement. If hosting providers only faced mere takedown duties, infringements could be re-uploaded again and again.

As shown above, some voices have argued a conflict with Article 15 ECD. This, however, does not seem convincing.¹⁰⁰ Prevention duties of hosting providers and in particular staydown obligations and obligations to prevent similar infringements of the same obvious kind should not conflict with Article 15 ECD.

- According to the CJEU case law, Article 15 ECD helps to balance the fundamental rights at stake by the internet provider, its users and the right holders.¹⁰¹ Insofar, the CJEU has found that an injunction imposed on a hosting provider requiring it to install a filtering system to actively monitor all the data relating to all of its users in order to prevent any future infringement of intellectual property rights is incompatible with Article 15 ECD.¹⁰²

⁹⁸ On this issue, see also *Giancarlo F. Frosio*, From horizontal to vertical: an intermediary liability earthquake, *JILP* 2016, Vol. 12, No. 7, p. 565 et seq. at 569; *Jan Bernd Nordemann*, in: *The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services*, IMCO Study, 2020, p. 32 et seq.

⁹⁹ *Jan Bernd Nordemann*, in: *The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services*, IMCO Study, 2020, p. 42 et seq., 46.

¹⁰⁰ *Jan Bernd Nordemann*, Liability of online service providers for copyrighted content – Regulatory action needed? In-depth analysis for the IMCO Committee, 2018, p. 17.

¹⁰¹ CJEU C-70/10 of 14 April 2011, para. 69 – *Scarlett/SABAM*; CJEU C-360/10 of 16 February 2012, para. 39 – *SABAM/Netlog*; CJEU C-484/14 of 15 September 2016, para. 87 – *McFadden*.

¹⁰² CJEU C-360/10 of 16 February 2012, para. 38 – *SABAM/Netlog*.

- But this CJEU case law only relates only to a system that prevents “any future infringement”. It does not seem convincing that the staydown and even more prevention duties for specific infringements are always made impossible by the prohibition of general monitoring duties pursuant to Article 15 ECD. If one would apply Article 15 ECD in all cases that involve any processing of general data, no room for cases outside of Article 15 ECD would remain. Rather, it must be possible to maintain filtering duties for specific scenarios. This has been confirmed by the CJEU in *Eva Glawischnig-Piesczek/Facebook Ireland Limited (“Facebook”)*.¹⁰³ According to the CJEU, Article 15 ECD did not preclude an injunction requiring Facebook to takedown (1) identical information and (2) equivalent information to the defamatory information at trial. The necessary test seems to be that Facebook does not have to carry out a (new) independent assessment for equivalent information.

In our view, this CJEU ruling makes clear that there is a differentiation to be made between the technical side of filtering, on the one hand, and the normative view, on the other hand. While all filtering measures may make it technically necessary to look at all the data, specific filtering duties (only related to specific infringements occurred in the past) must be separated under normative aspects. Normatively seen, specific filtering duties impose a lesser filtering duty than looking at all the infringements. This differentiation between the technical approach and the normative approach is also necessary in order to leave Article 15 ECD open for technical progress in filtering, which in the future may no longer require for filtering to look at all the data processed by the hosting provider.¹⁰⁴ Consequently, Art. 15 ECD does not stand against staydown and duties to prevent infringements.

Emerging issues with Article 18 ECD

Requesting Member States to ensure that court actions under Article 18 ECD (or a similar provision under future legislation) may not be invalid on the grounds that submissions have been transmitted by electronic means or written in another official language of the European Union is an ambitious goal. It would for sure ease access to jurisdiction in cross-border cases. However, as to ensure coherence of the European legal framework, such a project would need to be regulated on a bigger scale, including the reform of similar provisions in other legislation. There is no point in limiting this to cases under Article 18 ECD. While the author of the study strongly welcomes the idea to further ease access to national jurisdiction in the European Union, the subject exceeds the scope of this study. However, an in-depth analysis of the matter at hand is recommended.

2.4.3. European Added Value

Further extending liability shields without fully harmonising the regime of liability and responsibility of providers will not add European value, because it will remain unclear and depend on national legislation, whether liability is established in the first place. Hence, it is advisable to not extend existing liability shields before further harmonising the liability regime itself.

With regard to new business models, implementing their definitions into new legislation might, at first glance, seem to improve legal clarity. However, the past twenty years since the enactment of the ECD have shown that such models are constantly changing, wherefore new definitions might be outdated sooner than later. The CJEU has shown that the European jurisdiction can apply existing law to new business models. New definitions would create uncertainty regarding the

¹⁰³ CJEU C-18/18 of 3 October 2019, – *Eva Glawischnig-Piesczek v Facebook Ireland Limited*.

¹⁰⁴ Jan Bernd Nordemann, in: *The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services*, IMCO Study, 2020, p. 43.

jurisprudence of the CJEU; precedents might need to be revised, harming the court's coherent application of the legal framework.

Retaining the difference of active and passive hosting providers will preserve the coherence of the European framework regarding its liability regime, given that the business models of active and passive hosting providers are not only technically but also commercially different. Therefore, a distinction of their liability shall be preserved, conserving the well-functioning of the digital single market. Abolishing the distinction would either complicate the work of passive hosting providers, or unduly facilitating the business model of active hosting providers. Both results would negatively impact the well-functioning of the digital single market and also the effective enforcement against active hosting providers, should the legislator opt to extend the liability shield.

Implementing staydown duties would add to an effective enforcement of rights on the digital single market and would not contrast with the current European legal framework, as shown above.

Regarding reforming Article 18 ECD, the European Added Value would be a better access to national jurisdiction for persons not originating from or established in that country. The increase of access to jurisdiction would significantly improve the well-functioning of the digital single market because it would further reduce (economic) burdens for all stakeholders. While national jurisdiction would not give up their official language, not invalidating such actions submitted to court by electronic means or in another official language of the European Union would be an important step towards a more coherent legal framework.

2.4.4. Overview table

Table 9: Tackling illegal content online

Policy option	Base line (current situation)	First option	Second option	Third option	Fourth option
Regulatory content	The liability privileges of Articles 12 to 14 ECD – safe harbour provisions	New safe harbour provisions	Abolishing the distinction between active and passive hosting providers	EU rules to establish liability	Stay down duties
Legislation needed?	No	Yes	Yes	Yes	Yes (for clarification)
Regulatory impact		+++	+++	+++	+
Impact on the coherence of legal framework		-	--	++	+++
Impact on legal clarity		+/-	--	+++	+
Impact on the effective and efficient law enforcement		-	---	+	+
Impacts on the digital single market		+/-	-	+++	+
Impacts on consumer rights		0	-	+	+++

Impacts on fundamental rights					
Benefits		New technologies and business models may outdate new rules; more legal clarity for new business models not specifically regulated, but merely regulating safe harbours will always only lead to partial harmonisation	Creation of legal in-certainty; for active role providers stricter liability justified	Harmonisation of liability and injunction responsibility will improve the EU framework, better protect injured parties and create a better level playing field for all ISS providers in case of illegal content	Clarification and harmonisation of law, no conflict with art. 15 ECD

2.5. Ex-Ante Regulation of Systemic Platforms

2.5.1. Problem Definition

Systemic Platforms (gatekeepers) hampering others

The benefits of online platforms for consumers and innovation throughout the EU seem unchallenged. While most of the active online platforms operating in the EU are SMEs, a small number of large online platforms are said to capture the biggest shares of the value and exercise control over whole platform ecosystems.¹⁰⁵ Such platforms – also referred to as “systemic” or “gatekeeper” platforms – are benefitting from strong network effects providing them with such a strong position that it is said to be essentially impossible for new market operators to compete at eye level. The role of such online platforms could endanger the single market by unfairly excluding innovative new players, including SMEs. According to the European Commission, “Europe’s estimated 10,000 online platforms are potentially hampered in scaling broadly and thereby contributing to the EU’s technological sovereignty, as they are increasingly faced with incontestable online platform ecosystems”.¹⁰⁶

In its current initiative “Digital services act package: Ex-ante regulatory instrument for large online platforms with significant network effects acting as gatekeepers in the European Union’s internal market” of 2 June 2020 (hereinafter: “Inception Impact Assessment Paper”)¹⁰⁷, the Commission points to various problems that large online platforms constitute for platform ecosystems in the digital economy.¹⁰⁸ In particular, the Commission illustrates that traditional businesses are increasingly dependent on a limited number of large online platforms leading to imbalances in the bargaining power between large online platforms on the one

¹⁰⁵ European Commission, Inception Impact Assessment, “Digital Services Act package: Ex ante regulatory instrument for large online platforms with significant network effects acting as gate-keepers in the European Union’s internal market”, Ref. Ares(2020)2877647 - 04/06/2020, p. 1.

¹⁰⁶ European Commission, Inception Impact Assessment Paper, p. 2.

¹⁰⁷ European Commission, Inception Impact Assessment Paper p. 1.

¹⁰⁸ Note that the possible ex-ante regulation of digital platforms is only one of three pillars of the Commission’s ambitious “holistic and comprehensive approach” to ensure the contestability and fair functioning of markets across the economy; the two other pillars are (2) the continued vigorous enforcement of the existing competition rules, and (3) a possible new competition tool to deal with structural competition problems across markets which cannot be tackled or addressed in the most effective manner on the basis of the current competition rules, see Press release of 2 June 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_977.

hand and their users or rivals on the other hand.¹⁰⁹ The difficulties to bring innovative solutions and innovative alternatives to these large online platforms raises the risk of reduced competition and dynamism and consequently reduces the choice for consumers and business users in the long run and their ability to take full advantage of the digital single market. A small number of large online platforms is in a position to easily enter adjacent markets since they benefit from the use of data gathered from one area of their activity to improve or develop new services in these adjacent markets; this is thought to increase a risk of these adjacent markets also tipping in favour of these large platforms to the detriment of innovation and consumer choice.¹¹⁰

Systemic Platforms (gatekeepers) and tackling illegal content online

In the Inception Impact Assessment Paper, the Commission also points out that the rules for the responsibility of digital services should be revised e.g. in a possible Digital services act (DSA).¹¹¹ This should be particularly true for the small number of gatekeepers, which benefit from strong network effects. They provide intrinsic and systemic cross-border services. While such gatekeepers may be legally established in one Member State, they provide their services usually to almost the entire EU.¹¹² Their nature of their services makes clear no EU member state by itself may be in a position to regulate responsibility effectively. Also, it should be no policy option that such gatekeepers operating on an EU-wide level are made subject to national laws in 27 different member states. Rather, such fragmentation should be avoided. Against this background, it seems even more necessary for gatekeepers to regulate responsibility (including liability) on the EU level. This is in particular true for rules to *establish* liability and responsibility. Reference is made to the chapter above 2.3. “Tackling illegal content online”. Against this background, in particular for gatekeepers, the policy options already outlined above in item 2.3.2. should be considered on the EU-level.

2.5.2. Policy Options

Systemic Platforms (gatekeepers) hampering others

The Inception Impact Assessment Paper outlines a series of policy options for an effective ex ante regulatory framework intended to ensure that online platform ecosystems controlled by large online platforms remain fair and contestable. According to the Inception Impact Assessment Paper, the Commission will consider the following initial policy options:

- (1) Revise the horizontal framework set in the Platform-to-Business Regulation (EU) 2019/1150,
- (2) Adopt a horizontal framework empowering regulators to collect information from large online platforms acting as gatekeepers, and
- (3) Adopt a new and flexible ex-ante regulatory framework for large online platforms acting as gatekeepers. The latter option is said to include to sub-options:

¹⁰⁹ European Commission, Inception Impact Assessment Paper, p. 2.

¹¹⁰ European Commission, Inception Impact Assessment Paper, p. 2.

¹¹¹ European Commission, Inception Impact Assessment Paper p. 1; regarding responsibilities of online platforms, the Commission points at a different Inception Impact Assessment “Digital Services Act package: deepening the Internal Market and clarifying responsibilities for digital services”, Ref. Ares(2020)2877686 - 04/06/2020, which may be found here: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12417-Digital-Services-Act-deepening-the-Internal-Market-and-clarifying-responsibilities-for-digital-services>

¹¹² European Commission, Inception Impact Assessment Paper, p. 3.

(3a) Prohibition or restriction of certain unfair trading practices by large online platforms acting as gatekeepers (“blacklisted” practices), and

(3b) Adoption of tailor-made remedies addressed to large online platforms acting as gatekeepers on a case-by-case basis where necessary and justified.¹¹³

As policy option 3 (above) with its sub-options expressly suggests the introduction of a new ex-ante regulatory framework, this option shall be commented on more closely in the following.

As mentioned in the Initial Impact Assessment Paper, experience from the ex-ante regulation of telecommunication services should be taken into account.¹¹⁴ Recital 27 of Directive 2002/21/EC¹¹⁵ states that it is essential that ex-ante regulatory obligations should only be imposed where there is no effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Union competition law remedies are not sufficient to address the problem. The Commission has established criteria to identify markets that are susceptible to ex ante regulation in the first place. According to the Commission’s recommendations¹¹⁶, ex-ante regulation requires the presence of high and non-transitory barriers to entry. Furthermore, only markets whose structure does not tend towards effective competition within the relevant time horizon, should be subject to ex-ante regulation. Lastly, ex ante regulation requires that the application of existing competition law alone would not adequately address the market failure concerned.¹¹⁷ Before adopting a new ex-ante regulatory framework, it should be analysed whether these criteria also apply to large online platforms acting as gatekeepers. The outcome of the initial impact assessment should be important for this assessment.

Moreover, at the outset, the notion of “large online platforms acting as gatekeepers” needs to be defined. The Inception Impact Assessment Paper already outlines several criteria, such as significant network effects, the size of the user base and an ability to leverage data across markets.¹¹⁸ These criteria are rather broad. Also, the concept seems to be different from the known competition law concept of a “dominant position”, as laid down in Article 102 TFEU and does not seem to relate to known factors to determine dominance such as market share. Against this background it seems advisable to develop more granular definitions to limit the set of platforms that should be subject to the intended new regulatory regime.

In any case, in particular intermediaries should be envisaged who play the role of a gatekeepers. Intermediaries can be classified as middlemen, acting between one internet user and another party, also using the internet.¹¹⁹ Gatekeeper intermediaries may abuse their influence on both sides of their business model, which is why a regulation seems particularly useful. While not all

¹¹³ See in detail European Commission, Inception Impact Assessment Paper, p. 3 et seq.

¹¹⁴ See European Commission, Inception Impact Assessment Paper, p. 4.

¹¹⁵ Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

¹¹⁶ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, “Commission Recommendation”.

¹¹⁷ “Commission Recommendation”, recital 5.

¹¹⁸ See European Commission, Inception Impact Assessment Paper, p. 4.

¹¹⁹ Christina Angelopoulos, European Intermediary Liability in Copyright: A Tort-Based Analysis, 2017, pages 15 to 16; Martin Husovec, Injunctions against Intermediaries in the European Union – Accountable But Not Liable?, 2017/2018, page 87; Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 13;

gatekeepers will be acting as intermediaries, this specific abuse potential for intermediary gatekeepers could be deemed sufficient to consider the policy option to legislate intermediary gatekeepers.

Sub-option 3a suggests that the ex-ante regulatory tool would establish clear obligations that these platforms would be required to comply with and establish prohibited or restricted unfair trading practices (“blacklisted” practices). This approach does not seem new to EU law. For the process of establishing a set of blacklisted practices, the Unfair Commercial Practices Directive 2005/29/EC may provide guidance¹²⁰. This directive includes a list of practices which in all circumstances unfair. Recital 17 of said directive stresses the objective of this tool, namely, to provide greater legal certainty. Like in the context of unfair competition law, a set of blacklisted practices in the context of ex-ante platform regulation would have a clarifying function, signal effect, and facilitate enforcement. However, what seems important from a high-level perspective, is that a new tool introducing a set of blacklisted practices does not undermine the applicable regime of EU competition law, in particular Article 102 TFEU. In particular in the interest of legal certainty, it seems crucial that normative coherence be sought as a main objective in the legislative process.

Experience and ideas from Member States that are currently in the process of tackling competition law issues of large gatekeeper platforms, should also be considered. For instance, in Germany there is a first draft bill for the amendment of the German Act Against Restraints of Competition (“GWB”) that, inter alia, introduces new remedies against large platforms besides the known remedies against abuse of market dominant undertakings. The draft proposes the introduction of a new abuse provision catching “undertakings with outstanding cross-market significance for competition” (“Unternehmen mit überragender marktübergreifender Bedeutung für den Wettbewerb”). The draft also focusses on certain practices, such as “self-preferencing” – which should also be addressed according to the Initial Impact Assessment Paper (sub-option 3a).¹²¹ That said, the German draft has been criticized as being not sufficiently based on economic analysis.¹²² It should be avoided to impose further regulatory burden upon ISS providers below the threshold of a gatekeeper, i.e. that do not fall under the definition of “systemic operator”.

If a list of blacklisted practices aligned with existing EU competition law can be established, a regular evaluation to allow for adaptations to changed market conditions seems important. In other words: Also, the new tool should have the flexibility that is inherent to the provisions of EU competition law currently in place, in particular Article 102 TFEU, and the respective case law of the CJEU. The same holds true with regards to the proposed adoption of “tailor-made” remedies addressed to large online platforms on a case-by-case basis where necessary and justified (sub-option 3a). The Inception Impact Assessment does not make clear, however, whether there is any specific “ex-ante” element to the envisaged remedies, which could usually only be applied on an “ex-post” basis after an illegal practice has been identified.

That said, as a policy option it does not seem a must that new EU rules for gatekeepers require market dominance in the usual sense as set out currently in Article 102 TFEU. New concepts may

¹²⁰ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”).

¹²¹ Draft of a Tenth Bill amending the Act against Restraints of Competition for a focused, proactive and digital competition law 4.0 (“GWB Digitalisation Act”), available here: <https://www.bmwi.de/Redaktion/DE/Downloads/G/gwb-digitalisierungsgesetz-referentenentwurf.html>.

¹²² See for example *German Monopoly Commission (Monopolkommission)*, 4. Policy Brief zum GWB-Digitalisierungsgesetz, S. 3.

be developed to catch the cross-market significance of such gatekeepers beyond the usual elements to find market dominance such as market shares. Also, improving data interoperability and data compatibility should be an issue as a policy option.

Systemic Platforms (gatekeepers) and tackling illegal content online

Gatekeepers play on the EU level and therefore deserve EU-wide attention also regarding the regulation of their responsibility. This is in particular true for their liability for illegal content online, in case they play a role as intermediary for such illegal content (see above 2.5.1.). For such gatekeepers, which act as intermediaries, the policy options already outlined above in item 2.3.2. could be considered on the EU-level, as follows:

- For gatekeepers, a policy option for EU rules should not consider revising the (existing) liability privileges in 12-14 ECD for intermediaries. This would not cover rules establishing liability; it would only provide a shield once liability has been established. Without a harmonisation of EU law to establish liability, especially gatekeepers operating on the EU level in all member states will be subject to different national rules to establish liability. This seems unsatisfying and fragmenting. It would be an option to develop – on the European level – adequate rules to establish their responsibility. These have been outlined above for all ISS providers (2.3.2.), but this European approach could make sense even more so for gatekeepers:¹²³
 - Concerning the mere accountability for injunctions (due to helping duties for intermediaries as they are best placed to prevent infringements), the model of intellectual property law in Article 11 3rd sentence Enforcement Directive 2004/48 and Article 8 (3) Copyright Directive 2001/29 could be followed. It is a relevant policy option to introduce a similar accountability for injunctions for intermediaries outside the area of intellectual property rights infringements. The intermediaries' duties could be shaped according to the principle of proportionality.
 - Concerning "ordinary" liability, it is a policy option to harmonise the understanding of the term "infringer" regarding intermediaries, namely harmonising under which circumstances intermediaries can be classified as "infringers". If the intermediary must be classified as an "infringer", the intermediary would be liable in the same way as a direct third-party infringer. A general rule could be introduced into EU law that "essential role" intermediaries which sufficiently intervene into third-party infringements intermediaries must be treated as infringers themselves. In case the intermediary does not act with intent, one could discuss to limit this rule by a proportionate duty of care. The intermediary's duties could be shaped in accordance with the principle of proportionality and would be comparable to the duties for a mere accountability for injunctions. The justification for this more extensive liability (which includes e.g. damages) lies in the fact that the "essential role" intermediary intervenes into third-party infringements and thus should face the same liability as the third-party infringer.
- For Gatekeepers, which operate as hosting providers, there is a policy option that EU rules provide duties securing effective and efficient enforcement. As set out above (2.3.2.), in

¹²³ See also: Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 9 et seq.

principle, staydown duties and duties to prevent infringements of the same kind could be part of the legal duties of gatekeepers.¹²⁴ If gatekeeper hosting providers only faced mere takedown duties, infringements could be re-uploaded again and again. This is in particular true for gatekeepers with their strong and example role on the relevant markets.

2.5.3. European Added Value

Systemic platforms, in an unregulated shape, could pose threats to the well-functioning of the digital single market. Due to the platform's international character, the only level to adequately implement effective legislation would be the European level.¹²⁵ National legislation would only add to a fragmentation of the market and hinder effective enforcement against the operators.

Key aspect of the assessment of EAV in this section is, as part of the well-functioning of the digital single market, the economic impact of future legislation. Implementing ex-ante regulation of systemic platforms on the European level, including a regime of responsibility and liability of operators, would positively impact the competition on the digital single market. Legislation would be defragmented, resulting in a better harmonisation of the single market, more legal certainty and an increased level playing field. This will primarily benefit innovative small and medium sized businesses, because the regulation would allow for a more equal access to the market. This would eventually increase the level of innovation, resulting in higher standards and better quality, ultimately benefitting both businesses and consumers. In addition, increased competition and innovation will add to the competitiveness of European businesses. New concepts will have to be developed to catch the cross-market significance of such gatekeepers beyond the usual elements to find market dominance such as market shares in Article 102 TFEU. Also, improving data interoperability and data compatibility could be a specific policy option, which would enhance European Added Value in the form of the well-functioning of the single market by reducing barriers to entry.

Ex-ante regulation would implement clear legislation for operators, increasing legal clarity. Further defining the character of systemic platform, limiting the scope of application of new legislation, will also serve legal clarity within the framework of European competition law, ultimately benefitting the coherence of the European legal framework.

The implementation of ex-ante regulation would further add to a more effective and efficient enforcement, because the lack of harmonisation of national legislation would vanish and a uniform legal framework would create a much stronger position. Operators of systemic platforms would benefit from a better harmonisation, reducing costs for compliance. However, non-compliance would not only threaten access to the market of one Member State, but to the entire single market. Hence, the incentive to comply is much higher. In addition, the feasibility to comply with a harmonised legal framework is – practically spoken – significantly better regarding the international character of the platform's business models.

2.5.4. Overview table

Table 10: Ex-Ante Regulation of Systemic Platforms

Policy option	Base line	First option	Second option
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¹²⁴ Jan Bernd Nordemann, in: The functioning of the Internal Market for digital services: Responsibilities and duties of care of providers of digital services, IMCO Study, 2020, p. 42 et seq., 46.

¹²⁵ On the international character of platforms see Teresa de las Heras Ballell, The Legal Anatomy of Electronic Platforms: A Prior Study to Assess the Need of a Law of Platforms in the EU, The Italian Law Review, Vol. 3, No. 1, 2017, p. 149–176, at p. 155.

Regulatory content	Specific regulation of systematic platforms (gatekeepers)	Introduction of rules to avoid that gatekeepers hamper others in their business activity, creation of a central regulatory authority for such gatekeepers	Harmonisation of EU law to establish liability for such gatekeepers, in particular through harmonizing term „infringer“ and establishing staydown duties
Legislation needed?	Yes	Yes	Yes
Regulatory impact		+++	++
Impact on the coherence of legal framework		+++	+++
Impact on legal clarity		++	+++
Impact on the effective and efficient law enforcement		++	++
Impacts on the digital single market		+	+
Impacts on consumer rights		+	+++
Impacts on fundamental rights		+	+
Benefits		<ul style="list-style-type: none"> - harmonisation of the single market, increased level playing field - a more equal access to the market, less barriers to entry for SMEs 	<ul style="list-style-type: none"> - less national fragmentation of liability of gatekeepers for illegal content - more legal certainty - more efficient protection for harmed parties and consumers

2.6. Creation of a Central Regulatory Authority

2.6.1. Problem Definition

The ECD does not provide for a central EU regulatory authority that would supervise (with National Enforcement Bodies - NEBs¹²⁶) or enforce the regulatory framework of the ECD. The ECD rather provides for a “soft system” of enforcement where intermediaries provide for self-regulation schemes, e.g. by providing voluntary codes of conduct (Art. 16 ECD) and some rather vague

¹²⁶ In the area of mobility and transport, “national enforcement bodies” (NEBs) enforce EU regulatory provisions, e.g. under Regulation [EC] 261/2004, [EC] 181/2011 and [EC] 1371/2007.

obligations for member states to provide for a “rapid adoption of measures, including interim measures, designed to terminate any alleged infringement and to prevent any further impairment of the interests involved” (Art. 18(1) ECD).¹²⁷ In the context of the DSA more effective supervision and enforcement mechanisms are called for. *Smith* proposes that the supervision and enforcement of the DSA should be improved by the creation of a central regulatory authority which should be responsible for overseeing compliance with the DSA and improve external monitoring, verification of platform activities, and better enforcement.

2.6.2. Policy Options

The model proposed by *Smith* advocates the designation of National Enforcement Bodies (NEB), which would regulate ISS providers and should be attributed enforcement and sanctioning powers. *Smith* further suggests seeking inspiration with the (rather complex) model of the GDPR¹²⁸ and the Consumer Protection Cooperation Regulation (CPCR)¹²⁹. These NEBs would be part of a European network of enforcement bodies across all Member States, which would need to be coordinated by a central regulatory authority. NEBs would have a duty to report to an EU central regulator and to work within a network across Member States.¹³⁰

There are several policy options how to formally implement such Central Regulatory Authority.

Smith advocates the creation of a specialised agency. However, it could also be established directly with the Commission.

More relevant is the question of competences to be attributed to the Central Regulatory Authority. This will mainly depend on the legislative character of the DSA. If the legislator opts for a new regulation fully harmonising the field of law, the central regulator could easily observe compliance with binding European law. However, if ISS providers remain (partially) subject to national legislation, observing the compliance of the efforts by NEBs will be difficult, not only regarding the framework of national and European competences.

A broad range of policy options for potential competences are conceivable.

- In a “basic option”, the central regulator would only observe the efforts of NEBs and coordinate between the Member States, characterising it as a facilitator without own powers. However, to ensure the coordination between Member States does not necessarily require a Central Regulatory Agency.
- Beyond the facilitation, the Central Regulatory Agency could be tasked with the observation of compliance of enforcement and governing efforts by NEBs. In case of non-compliance, the Central Regulatory Agency would have the power to demand compliance.

¹²⁷ See *Smith*; Enforcement and cooperation between Member States, IMCO Study PE 648.780 – April 2020, p. 26 with further references.

¹²⁸ See Chapter VI of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). A more detailed analysis of the GDPR model with regard to the establishment of a Central Regulatory Agency can be found in *Smith*, Enforcement and cooperation between Member States, IMCO Study PE 648.780 – April 2020, p. 7-8, p. 26-29 with further references.

¹²⁹ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on the cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

¹³⁰ See *Smith*; Enforcement and cooperation between Member States, IMCO Study PE 648.780 – April 2020, p. 7-8, p. 26-29 with further references.

- In addition, the Central Regulatory Agency could be empowered to settle disagreements between NEBs from different Member States and organise a transparent online register providing information on the competent jurisdiction regarding individual ISS providers (see above).
- The most far-reaching option would be the implementation of a Central Regulatory Agency, replacing NEBs. This option could only be considered in case of full harmonisation in this field. The Central Regulatory Agency would be the only authority competent to regulate and enforce against ISS providers regardless of their country of establishment.¹³¹ However, this option would need to be accompanied by extensive reforms of primary EU law and constitutional provisions on the national level going beyond the scope of this study, wherefore it shall not be considered in more detail at this point.

The enforcement of ISS provider obligations under the ECD could be improved. One example is Article 5 ECD with its information duties (see above 2.2.). Also, more extensive duties of care in case of provision of services for infringements could be introduced (see above 2.3., e.g. duties to secure staydown and duties to prevent infringements of the same kind).

That said, merely relying on central EU regulatory agency action may not be efficient and effective. A differentiated approach could be envisaged:

- Enforcement would not merely rely on state action through a central EU regulator. Civil enforcement by injured parties could remain a relevant tool to ensure powerful enforcement. Regulators could have the role in this system to complement civil enforcement, e.g. for cases where the investigative powers of the state are needed or for model cases.
- In principle, enforcement would be left to national agencies. Nevertheless, the creation of a central EU regulatory agency could make sense for the following tasks:
 - Foster cooperation between national agencies.
 - Further, it could be welcomed regarding European Added Value, if an EU regulatory body initiated model cases regarding important legal questions.
 - For systemic platforms (gatekeepers), which usually operate on the pan-EU level, a central regulatory agency as the sole regulator could make sense to avoid fragmented national regulation.

2.6.3. European Added Value

The implementation of a Central Regulatory Agency can both have positive and negative impacts on the assessment of European Added Value, depending on its concrete implementation, especially regarding attributed rights and duties. Therefore, this report suggests a differentiated approach, also against the background of European Added Value.

Such authority could have positive impacts on the cooperation and mutual assistance of Member States, who are competent to enforce against ISS providers. Procedures of cooperation could be facilitated, adding to a more efficient enforcement. The positive assessment of the EAV regarding the cooperation mechanism has been described in more detail above (2.1.3.).

However, implementing another level of competences might have the opposite impact. The enforcement of law naturally is a national competence of the Member States, in particular where

¹³¹ Including providers established in non-EU countries, if the legislator opts to extend the scope of applicability.

platforms may be primarily addressed to the public of one Member State. While a Central Regulatory (and Enforcement) Agency might be a great asset, the European legal framework does not allow for such construct at this point. Therefore, NEBs should remain crucial for an effective and efficient enforcement.

Also, civil enforcement in particular by injured parties should be kept as the other (additional) path for effective and efficient enforcement. Injured parties have an intrinsic motivation to bring action and enforce. Providing injured parties with the option to enforce themselves under civil law could thus gain importance for European Added Value, where administrative enforcement may not take place due to the limited personal and financial resources of an administrative authority.

Against the background of EAV, the following differentiated model for the creation of a central EU regulatory body could envisaged:

- The EU regulatory body could foster cooperation between national agencies, leading to a better procedural cooperation and mutual assistance between the Member States.
- If an EU regulatory body initiated model cases regarding important legal questions, this would add EU value due to the increase of legal clarity and the increased coherence within the EU legal framework.
- In any case, central EU regulatory activity for systemic platforms (gatekeepers) would European Added Value, because such gatekeepers usually operate on the pan-EU level and would be difficult to regulate on a national level. Therefore, a central regulatory agency could make sense to avoid fragmented national regulation.

2.6.4. Overview table

Table 11: Creation of a Central Regulatory Authority

Policy option	Base line (current situation)	First option	Second option
Regulatory content	No central EU regulatory authority, but only national authorities	Central Regulatory Authority on the EU level	NEBs as a part of a European network; coordination by a Central Regulatory Authority with enforcement competences for model cases and systematic platforms (gatekeepers)
Legislation needed?		Yes	Yes
Regulatory impact		+++	++
Impact on the coherence of legal framework		+++	++
Impact on legal clarity		++	++
Impact on the effective and efficient		--	+++

law enforcement			
Impacts on the digital single market		+	+
Impacts on consumer rights		++	+++
Impacts on fundamental rights		+	+
Benefits		<ul style="list-style-type: none"> - A central authority would avoid fragmented national application - such an authority could deal with important legal issues in model cases - loss of efficiency for smaller cases or cases with emphasis in one member state 	<ul style="list-style-type: none"> - Would foster cooperation between national agencies - would help avoid fragmented national regulation (systematic platforms/gatekeepers) - such an authority could deal with important legal issues in model cases
Costs		significant	moderate

3. Conclusions

Does the current legal framework applicable to electronic commerce need a refit for the digital age? The Study reflects on the future legal rules for digital services in the digital single market and discusses policy options for a possible future EU Digital services act (DSA). The paper covers topics currently regulated in the E-Commerce Directive (ECD), but also covers other emerging issues. Over the preceding chapters, this study has analysed the necessity in detail and outlined specific policy options.

Specific emphasis is given to an analysis of the European Added Value (EAV), based on the drivers and mechanisms referred to under sub-chapter 1.3. The most important factors of the European Added Value Assessment include (1) the well-functioning of the digital single market, (2) coherence of the European legal framework, (3) reducing fragmentation of the digital single market, (4) legal clarity, and (5) more effective and efficient enforcement. This study specifically discusses what EAV could be generated by taking policy action on the EU level with regards to the following emerging issues in the context of the ECD:

- Practical issues of the Internal Market Clause (Chapter 2.1.);
- Definitions in the ECD (Chapter 2.2.);
- General Information Requirements (Chapter 2.3.), in particular:
- Lack of compliance with Article 5 ECD;
- Introduction of a moderated KYBC model;
- Tackling illegal content online (Chapter 2.4.);
- Ex-ante regulation of systemic platforms (gatekeepers) (Chapter 2.5.);
- Creation of a central regulatory authority (Chapter 2.6.).

This study adopts a differentiated approach. Legislation under the ECD that has proven successful, inter alia the Internal Market Clause, shall be retained and further strengthened, while in other cases the policy options for future legislation may have to be explored. The present conclusion will not summarize all policy options mentioned above. In a nutshell, a possible new Digital services act (DSA) would be a chance to strengthen the coherence of the European legal framework, to further harmonise relevant fields of the single market and rendering the enforcement of legislation more effective and efficient, ultimately benefitting the well-functioning of the (digital) single market.

- *Practical issues of the Internal Market Clause:* Roughly speaking, the Internal Market Clause makes it possible for the providers of information society services (ISS providers) to operate in the entire EU just by complying with the law of its home country. The Internal Market Clause has proven successful under the ECD and has been a strong driver of European Added Value, wherefore it shall be retained, but further strengthened under future legislation. Improving the cooperation and mutual assistance of the Member States will be a key driver of European Added Value and an important asset to achieve this goal. Policy options to change the coordinated field and in particular the definition of “information society service” should be carefully evaluated. Specific questions could be answered on a case-by-case basis by the courts as in the past.
- *Definitions:* Should the European legislator conclude that the implementation of new definitions is necessary, these definitions should be fully harmonised, preventing diverging application of legal notions on the national level. This could add EU value by increasing legal clarity and improving the EU legal framework.

- *General Information Requirements (1)*: The enforcement of information requirements may be further harmonised by defragmentation of the applicable legal framework, replacing practical enforcement divergences which may be currently existing on the national level. This could ultimately lead to the desired transparency to consumers and could provide a sound level playing field for ISS providers on the European level, adding EU value by improving the well-functioning of the internal market. Future legislation in this area should be inspired by more recent legislation, e.g. under the Consumer Rights Directive and the Platform to Business Regulation, fostering the coherence of the EU legal framework and thereby adding EU value. In general, the DSA needs to focus on effective and efficient enforcement mechanisms.
- *General Information Requirements (2)*: A moderated KYBC model could be implemented under future legislation, providing for a twofold approach: First, before entering into a contractual relationship with a business customer, the Internet service provider would collect and verify certain data in order to reveal its identity. Second, any interested party could have a legal basis to trigger a further round of identity verification plus disclosure by notifying the ISS provider of credible evidence that a commercial has failed to comply with the legal requirements to disclose its identity. Implementing a KYBC model would improve the coherence of the EU legal framework and render the enforcement more effective and efficient, thereby increasing European Added Value.
- *Tackling illegal content online*: For the tackling of illegal content online and intermediary liability, the extension of the existing safe harbours is seen critical as a policy option. The same is true for the policy option to abolish the distinction of active and passive hosting providers. Concerning the scope of duties of hosting providers, staydown duties and duties to prevent infringements of the same kind are a policy option to be considered, as this should not produce any conflict with Art. 15 ECD and its underlying fundamental rights.
- *Ex-ante regulation of systemic platforms (gatekeepers)*: Concerning ex-ante regulation of systematic platforms (gatekeepers), the experience from ex-ante regulation of telecommunication services could be considered. As the notion of “large online platforms acting as gatekeepers” seems to be different from the known competition law concept of a “dominant position” (as laid down in Article 102 TFEU), it would need to be defined under future legislation. To limit the set of platforms that should be subject to the intended new legal framework for gatekeepers, it seems crucial to develop more granular definitions. Also, improving data interoperability and data compatibility should be an issue. Experience and ideas from Member States that are currently in the process of tackling similar competition law issues of large gatekeeper platforms, should be considered.

Additionally, there is a policy option that systematic platforms (gatekeepers) could require legislative attention regarding their responsibility as intermediary and liability for illegal third-party content they provide. Here, it could be a primary task to establish new rules establishing liability for gatekeepers, which act as intermediaries which exist only sector specific so far on the EU level. Without a harmonisation of EU law to establish liability, especially intermediary gatekeepers operating on the EU level in all Member States will be subject to different national rules to establish liability. This leads to fragmentation, while such gatekeepers usually operate on a pan-EU level. In order to create European Added Value, a uniform regulation of such gatekeepers could be envisaged. Such EU rules to establish their responsibility and liability could differentiate between a mere injunction responsibility (accountability) for merely

passive gatekeepers and rules to establish ordinary liability for essential/active role gatekeepers.

For Gatekeepers, which operate as hosting providers, EU rules could as a further policy option provide for efficient and effective duties of care. In principle, staydown duties and duties to prevent infringements of the same kind could be part of the legal duties of gatekeepers. This would lead to more effective and efficient rights enforcement as a European Added Value.

- *Creation of a central regulatory authority:* The implementation of a Central European Regulatory Authority with a central mandate to enforce the ECD could be considered as a policy option. Other policy options include a more differentiated and limited policy option, only including the coordination of efforts on the national level and serving as an instance to solve multiple claims to jurisdiction and disagreements between several Member States. Even with such a limited competence, such body could increase European Added Value. The same is true if the central authority dealt with model cases on important issues. Finally, also for systematic platforms (gatekeepers), a central regulatory authority on the EU level could be seen as a more pressing policy option to avoid fragmented national regulation and thus achieving European Added Value.

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This study analyses the potential European added value (EAV) that could be achieved by enhancing the current EU regulatory framework on digital services. The scope of the assessment includes the analysis of the e-Commerce Directive and more broadly of commercial and civil law rules applicable to commercial entities operating online. The EAV is assessed quantitatively and qualitatively. Based on the comparative legal analysis, 22 main gaps and risks that currently affect provision of online services in the EU are identified, and policy solutions are proposed to address these shortcomings.

The results of macroeconomic modelling suggest that taking common EU action to enhance consumer protection and common e-commerce rules, as well as to create a framework for content management and curation that guarantees business competitiveness and protection of rights and freedoms, would potentially add at least €76 billion to the EU GDP over the 2020-2030 period. This quantitative estimate provides a lower bound of direct economic impacts, and does not quantify/monetise the EAV of qualitative criteria, such as consumer protection, coherence of the legal system and fundamental rights. Therefore, the overall European added value would be considerably higher.

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