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Compromise AMs

on the Draft Report

on Digital Services Act: Improving the functioning of the Single Market

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DRAFT COMPROMISE AMENDMENTS ON DIGITAL SERVICES ACT: IMPROVING THE FUNCTIONING OF THE SINGLE MARKET

2 July 2020

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AM 503- 546 and AM 547

I. GENERAL PRINCIPLES

The Digital Services Act should contribute to the strengthening of the internal market by ensuring the free movement of digital services *and the freedom to conduct a business*, while at the same time guaranteeing a high level of consumer protection, *and* the improvement of users' *rights, trust and* safety online;

The Digital Services Act should guarantee that online and offline economic activities are treated equally and on a level playing field, which fully reflects the principle *according to which* “what is illegal offline is also illegal online”, *taking into account the specific nature of the online environment*;

The Digital Services Act should provide consumers and economic operators, especially micro, small and medium-sized enterprises, with legal certainty and transparency. *The Digital Services Act should contribute to supporting innovation and removing unjustified and disproportionate barriers and restrictions to the provision of digital services*;

The Digital Services Act should *-be without prejudice to* the broad framework of fundamental -rights *and freedoms* of users and consumers, such as the protection of *private life and the protection of personal data*, non-discrimination, dignity, *the freedom of expression and the right to effective judicial remedy*;

The Digital Services Act should build upon the rules currently applicable to online platforms, namely the E-Commerce Directive and the Platform to Business Regulation¹.

The Digital Services Act package should include:

)] a comprehensive revision of the E-Commerce Directive, *based on Articles 53(1), 62 and 114 TFEU*, consisting of:

🍏 | a revised framework with clear *obligations with regards to* transparency and information;

¹ 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).

- 🍏 | clear and detailed procedures and measures related to *effectively tackle and remove* illegal content online, including a, harmonised legally-binding European notice-and-action mechanism
 - 🍏 | effective supervision, cooperation and *proportionate, effective and dissuasive* sanctions;
-)] an internal market legal instrument *based on Article 114 TFEU*, imposing *ex-ante* obligations on large platforms with a gatekeeper role in the digital ecosystem, complemented by an effective institutional enforcement mechanism.

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AM 547- 569

II. SCOPE

In the interest of legal certainty, the Digital Services Act should clarify which digital services fall within its scope. The new legal act should follow the horizontal nature of the E-Commerce Directive and apply not only to online platforms, but to all *providers of information society services as defined in EU law*;

One-size-fits-all approach should be avoided and different measures might be necessary for digital services offered in a purely business-to-business relationship, services which only have limited or no access to third parties or general public and services, which are targeted directly at consumers and the general public;

The territorial scope of the future Digital Services Act should be extended to cover also the activities of companies, service providers *and information society services* established in third countries, when their *activities are related to the offering of* services or goods to *and directed at* consumers or users in the Union;

If the Commission following its review, considers that the Digital Services Act should *amend* the Annex of the E-Commerce Directive *in respect of the derogations set out therein, it should not amend*, in particular, the derogation of contractual obligations concerning consumer contracts;

The Digital Services Act should ensure that the EU and the Member States maintain a high level of consumer protection and that Member States can pursue legitimate public interest objectives, *where it is necessary, proportionate and* in accordance with EU law;

The Digital Services Act should define in a coherent way how its provisions interact with other legal instruments, aiming at facilitating free movement of services, in order to clarify the legal regime applicable to professional and non-professional services in all sectors, including activities related to transport services and short-term rentals, where clarification is needed;

The Digital Services Act should also clarify in a coherent way how its provisions interact with recently adopted rules on geo-blocking, product safety, *market surveillance, platforms to business relations*, consumer protection, *sale of goods and supply of digital content and digital services*,² among others, *and other announced initiatives such as the AI regulatory framework*;

The Digital Services Act should apply without prejudice to the rules set out in other instruments, such as the General Data Protection Regulation³ (“GDPR”), the Copyright Directive⁴ and the *Audiovisual Media Services Directive*⁵.

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AM 570- 598

III. DEFINITIONS

In its definitions, the Digital Services Act should:

-)] clarify *to what extent* new digital services, such as social media networks, collaborative economy services, search engines, wifi hotspots, online advertising, cloud services, *web hosting, messaging services, app stores, comparison tools, AI driven services*, content delivery networks, and domain name services fall within the scope of the Digital Services Act;
-)] clarify the nature of the content hosting intermediaries (text, images, video, or audio content) on the one hand, and commercial online marketplaces (selling goods, *including goods with digital elements, or services*) on the other;
-)] *clarify the difference* between *economic* activities and content or transactions provided against remuneration, *as defined by the Court of Justice*, which also cover advertising

² *Directive (EU) 2019/770 and Directive (EU) 2019/771*

³ 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) (OJ L 119, 4.5.2016, p. 1).

⁴ 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 (OJ L 130, 17.5.2019, p. 92).

⁵ 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).

and marketing practices on the one hand, and non-*economic* activities and content on the other;

-)] clarify what falls within the remit of the “illegal content” definition making it clear that a violation of EU rules on consumer protection, product safety or the offer or sale of food or tobacco products, *cosmetics* and counterfeit medicines, *or wildlife products* also falls within the definition of illegal content;
-)] define “systemic operator” by establishing a set of clear – indicators that allow regulatory authorities to identify platforms *which enjoy a significant market position* with a “gatekeeper” role, *thereby* playing a systemic role in the online economy; such indicators could include considerations such as whether the undertaking is active to a significant extent on multi-sided markets *or has the ability to lock-in users and consumers*, the size of its network (number of users), *and the presence of network effects; barriers to entry*, its financial strength, *the ability to access data and the accumulation of data and the combination of data from different sources*; vertical integration *and its role as an unavoidable partner and* the importance of its activity for third parties’ access to supply and markets, etc.
-)] *seek to codify the decisions of the European Court of Justice, where needed, and while having due regard to the main different pieces of legislation which use these definitions;*

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AM 599- 621

IV. TRANSPARENCY AND INFORMATION OBLIGATIONS

The Digital Services Act should introduce clear *and proportionate* transparency and information obligations; those obligations should not create any derogations or new exemptions to the current liability regime set out under Articles 12, 13, and 14 of the E-Commerce Directive and should cover the aspects described below:

1. General information requirements

The revised provisions should strengthen the general information requirements with the following requirements:

-)] the information requirements in Article 5 *and Article 6 and 10* of the E-Commerce Directive should be reinforced;
-)] the “Know Your Business Customer” principle, *limited to the direct commercial relationships of the hosting provider*, should be introduced *for business users*; *hosting providers should compare the identification data provided by of their business users*

*against the EU VAT and Economic Operator Identification and Registration databases, where a VAT or EORI number exists; where a business is exempt from VAT or EORI registration, proof of identification should be provided; when a business customer is acting as an agent for another business(es), it should declare itself as such; hosting providers should ask their business customer to ensure that all information provided is accurate and updated, subject to any change, and hosting providers should not be allowed to provide services to **business users** when the information is incomplete or when the hosting provider has been informed by the competent authorities that the identity of their business user is false, misleading or otherwise invalid;*

-)] that measure should apply only to **contractual** business-to-business relationships and should be without prejudice to the rights of **data subjects** under the GDPR. **That measure should be without prejudice to the protection of online anonymity for users, other than business users.**The new general information requirements should further enhance Articles 5, 6 and 10 of the E-Commerce Directive in order to align those measures with the information requirements established in recently adopted legislation, in particular the Unfair Contract Terms Directive⁶, the Consumer Rights Directive and the Platform to Business Regulation.
-) **The provisions of Article 5 of the E-Commerce Directive should be further modernised by requiring digital service providers to provide consumers with direct and efficient means of communication such as electronic contact forms, chatbots, instant messaging or telephone callback, provided that the information relating to those means of communication is accessible to consumers in a clear and comprehensible manner.**

⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, most recently amended by 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).

CA 5

AM 622- 640

2. Fair contract terms and general conditions

The Digital Services Act should *establish minimum standards for* service providers to adopt fair, *accessible, non-discriminatory* and transparent contract terms and general conditions in compliance with at least the following requirements:

- ⌋ *to define clear and unambiguous contract terms and general conditions in a plain and intelligible language;*
- ⌋ *to explicitly indicate in the contract terms and general conditions what is to be understood as illegal content or behaviour according to Union or national law and to explain the legal consequences to be faced by users for knowingly storing or uploading illegal content;*
- ⌋ *- to notify users whenever a change is made to the contract terms and general conditions and to provide an explanation about any substantial and significant change that can affect users rights,*
- ⌋ *to ensure that pre-formulated standard clauses in contract terms and general conditions, which have not been individually negotiated in advance, including in End-User Licensing Agreements, start with a summary statement based on a harmonised template, to be set out by the Commission;*
- ⌋ *to ensure that the cancellation process is as effortless as the sign-up process (with no “dark patterns” or other influence on consumer decision);*
- ⌋ *where automated systems are used, to specify clearly and unambiguously in their contract terms and general conditions the exact inputs and targeted outputs of their automated systems, and the main parameters determining ranking and the reasons for the relative importance of these main parameters as compared to other parameters, while ensuring consistency with the Platforms-to-Business Regulation-;*
- ⌋ *to ensure that the requirements on contract terms and general conditions, set out in the Digital Services Act are consistent with and complement information requirements established by Union law, including those, set out in the Unfair Contract Terms Directive, the Unfair Commercial Practices Directive, the Consumer Rights Directive, as amended by Directive 2019/2161/EU, and with the GDPR;*

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AM 641- 649, 651-654

3. Transparency requirements on commercial communications

-  The revised provisions should strengthen the current transparency requirements regarding commercial communications by establishing the principles of transparency-by-design and transparency-by-default;
-  Building upon Article 6 *and* 7 of the E-Commerce Directive, the new measures should establish a new framework for Platform to Consumer relations on transparency provisions regarding *online* advertising, digital nudging, *micro targeting*, *recommended systems for advertisement* and preferential treatment; *those measures should:*
 - *include the obligation to disclose clearly defined types of information about the online advertisement to enable effective auditing and control, such as information on the identity of the advertiser and the direct and indirect payments or any other remuneration received by service providers; this should also enable consumers and public authorities to identify who should be held accountable in case of, for example, false or misleading advertisement; the measures should also contribute to ensure that illegal activities cannot be funded via advertising services;*
 - *clearly distinguish between commercial and political online advertisement and ensure transparency of criteria for profiling targeted groups and optimisation of advertising campaigns; enable consumers with an option by default not to be tracked or micro-targeted and to opt-in for the use of behavioural data for advertising purposes, as well as an opt-in option for political advertising and ads;*
 - *provide consumers with access to their dynamic marketing profiles, so that they are informed on whether and for what purposes they are tracked and if the information they receive is for advertising purposes and guarantee their right to contest decisions that undermine their rights;*
 - *ensure that paid advertisements or paid placement in a ranking of search results should be identified in a clear, concise and intelligible manner, in line with Directive 2005/29/EC, as amended by Directive (EU) 2019/2161;*
 - *ensure compliance with the principle of non-discrimination and with minimum diversification requirements and identify practices constituting aggressive advertising whilst encouraging consumer-friendly AI-technologies;*

- *introduce accountability and fairness criteria of algorithms used for targeted advertising and ad optimisation, and allow for external regulatory audits by competent authorities and verification of algorithmic design choices that involve information about individuals, without risk to violate user privacy and trade secrets;*
- *provide access to advertising delivery data and information about the exposure of advertisers, when it comes to where and when ads are placed, and the performance of paid vs unpaid advertising;*

CA 7

AM 655- 687

4. Artificial Intelligence and machine learning

The revised provisions should *establish the following principles regarding the provision of information society services, which are enabled by AI, make use of automated decision-making tools or machine learning tools:*

-) *ensure that consumers have the right to be informed if a service is enabled by AI, makes use of automated decision-making or machine learning tools or automated content recognition tools, in addition to the right not to be subject to a decision based solely on automated processing and the possibility to refuse, limit or personalise the use of any AI-enabled personalisation features especially in view of ranking;*
-) *establish comprehensive rules on non-discrimination- and transparency of algorithms and data sets;*
-) *make sure that algorithms are explainable to competent authorities who can check when they have reasons to believe that there is an algorithmic bias;*
-) *provide for a case-by-case oversight and recurrent risk assessment of algorithms by competent authorities, as well as human control over decision-making, in order to guarantee a higher level of consumer protection; such requirements should be consistent with the human control mechanisms and risk assessment obligations for automating services set out in existing rules, such as the Proportionality Test Directive) and should not constitute an unjustified or disproportionate restriction to the free movement of services;*
-) *establish clear accountability, liability and redress mechanisms to deal with potential harms resulting from the use of AI applications, automated decision-making and machine learning tools;*

- Ñ establish the principle of safety, security *by design and* by default *and set out effective and efficient rights and procedures for AI developers in instances where the algorithms produce sensitive decisions about individuals and to properly address and exploit the impact of upcoming technological developments;*
- Ñ *ensure consistency with confidentiality, user privacy and trade secrets;*
- Ñ *ensure social dialogue and effective information and consultation of workers when introducing AI technologies and solutions with direct impacts on working and employment conditions, in particular with regard to the use of algorithms;*

5. Penalties

The compliance of the provisions should be reinforced with effective, proportionate and dissuasive penalties, including the imposition of *proportionate* fines.

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AM 688- 717

V. MEASURES RELATED TO TACKLING ILLEGAL CONTENT ONLINE

The Digital Services Act should provide clarity and guidance regarding how online intermediaries should tackle illegal content online. The revised rules of the E-Commerce Directive should:

- ⌋ clarify that any removal or disabling access to illegal content should not affect the fundamental rights and the legitimate interests of users and consumers *and that legal content should stay online;*
- ⌋ *improve the legal framework taking into account the* central role played by online intermediaries *and the internet* in facilitating the public debate and the free dissemination of facts, opinions, and ideas;
- ⌋ preserve the underlying legal principle that online intermediaries should not be held directly liable for the acts of their users and that online intermediaries can continue moderating content under fair, *accessible, non-discriminatory* and transparent terms and conditions of service;
- ⌋ *clarify that a decision made by online intermediaries as to whether content uploaded by users is legal should be provisional and that online intermediaries should not be held liable for it, as only courts of law should decide in the final instance what is illegal content;*

-)] *ensure that the ability of Member States to decide which content is illegal under national law is not affected;*
-)] *ensure that the measures online intermediaries are called upon to adopt are proportionate, effective and adequate to effectively tackle illegal content online;*
-)] *adapt the severity of the measures that need to be taken by service providers to the seriousness of the infringement;*
-)] *ensure that the access to and the removal of illegal content does not require blocking the access to the entire platform and services which are otherwise legal;*
-)] introduce new transparency and independent oversight of the content moderation procedures and tools related to the removal of illegal content online; such systems and procedures should be *accompanied by robust safeguards for transparency and accountability and be* available for auditing and testing by *competent* authorities.

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AM 718- 761

1. A notice-and-action mechanism

The Digital Services Act should establish a harmonised and legally enforceable notice-and-action mechanism based on a set of clear processes and precise timeframes for each step of the notice-and-action procedure. That notice-and-action mechanism should:

-)] apply to illegal online content or behaviour;
-)] *differentiate among* different types of providers, sectors and/or illegal content *and the seriousness of the infringement;*
-)] create easily accessible, reliable and user-friendly procedures *tailored to the type of content;*
-)] allow users to easily notify by electronic means potentially illegal online content or behaviour to online intermediaries;
-)] clarify, in an intelligible way, existing concepts and processes such as “expeditious action”, “actual knowledge and awareness”, “targeted actions”, “notices’ formats”, and “validity of notices”;

- ⌋ guarantee that notices will not automatically trigger legal liability nor should they impose any removal requirement, for specific pieces of the content or for the legality assessment;
- ⌋ **require notices to be sufficiently precise and adequately substantiated so as to allow the service provider receiving them to take an informed and diligent decision as regards the effect to be given to the notice and** specify the requirements necessary to ensure that notices **contain all the information necessary for the** swift removal of illegal content;
- ⌋ **notices** should include **the location** (URL **and timestamp where appropriate**) of the allegedly illegal content in question, **an indication of the time and date when the alleged wrongdoing was committed**, the stated reason for the claim including an explanation of the reasons why the notice provider considers the content to be illegal, and if necessary, depending on the type of content, additional evidence for the claim, **and a declaration of good faith that the information provided is accurate**;
- ⌋ **notices should** allow for the **notice providers to provide its contact details; where they decide to do so, their anonymity should be safeguarded toward the content provider; anonymous notices should not be permitted when they concern the violation of personality rights or intellectual property rights**;
- ⌋ set up safeguards to prevent abusive behaviour by users who systematically and repeatedly and with *mala fide* submit wrongful or abusive notices;
- ⌋ create an obligation for the online intermediaries to verify the notified content and reply **in a timely manner** to the notice provider and the content uploader with a reasoned decision; **such a requirement to reply should include the reasoning behind the decision, how the decision was made, if the decision was made by a human or an automated decision agent and information about the possibility to appeal this decision by either party with the intermediary, courts or other entities**;
- ⌋ provide **information and** remedies to contest the decision via a counter-notice, including if the content has been removed via automated solutions, unless such a counter-notice would conflict with an ongoing investigation by law enforcement authorities.
- ⌋ **safeguard that judicial injunctions issued in a Member State other than that of the online intermediaries should not be handle within the notice-and-action mechanism.**

The Digital Service Act notice-and-action mechanism should be binding only for illegal content. This, however, should not prevent online intermediaries being able to adopt a similar notice-and-action mechanism for other content.

CA 10

AM 760, 762- 775

2. Out-of-court dispute settlement related with the notice-and-action mechanisms

- ⌋ The decision taken by the online intermediary on whether or not to act upon content flagged as illegal should contain a clear justification on the actions undertaken regarding that specific content. The notice providers should receive a confirmation of receipt and a communication indicating the follow-up given to the notification.
- ⌋ The providers of the content that is being flagged as illegal should be immediately informed of the notice and, that being the case, of the reasons and decisions taken to remove, *suspend* or disable access to the content; all parties should be duly informed of all existing available legal options and mechanisms to challenge this decision;
- ⌋ All interested parties should have the right to contest the decision through a counter-notice *which must be subject to clear requirements and accompanied by an explanation; interested parties should also have* recourse to out-of-court dispute settlement mechanism;¹¹
- ⌋ *The right to be notified and the right to issue a counter-notice by a user before a decision is taken to remove a content shall only be restricted or waived, where:*
 - a) online intermediaries are subject to a legal requirement which requires online intermediation services to terminate the provision of the whole of its online intermediation services to a given user in a manner which does not allow it to respect that notice-and-action mechanism; or,*
 - (b) the notification or counter-notice would impede an ongoing criminal investigation that requires to keep the decision to suspend or remove access to the content a secret;*
- ⌋ The rules of Article 17 of the E-Commerce Directive should be revised to ensure that *independent out-of-court dispute settlement mechanism are put in place and are available to users in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.*
- ⌋ *The out-of-court dispute settlement mechanism should meet certain standards, notably in terms of procedural fairness, independence, impartiality, transparency and effectiveness; Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law,*

without prejudice to the rights of users to have recourse to efficient judicial remedies.

- ⌋ If the redress and counter-notice have established that the notified activity or information is not illegal, the online intermediary should restore the content that was removed *or suspended* without undue delay or allow for the re-upload by the user.
- ⌋ *When making, contesting or receiving a notice, all interested parties should be notified of both the possibility of making use of an alternative dispute resolution mechanism and of the right to recourse to a competent national court;*
- ⌋ The out-of-court dispute settlement mechanisms should in no way affect the rights of the parties involved to initiate legal proceedings.

CA 11

AM 755, 776-789

3. Transparency of the notice-and-action mechanism

The notice-and-action mechanisms should be transparent and *publicly* available; to that end, online intermediaries should be obliged to publish annual reports, *which should be standardized and contain* information on:

- ⌋ the number of all notices received under the notice-and-action system and the types of content they relate to;
- ⌋ *the average response time per type of content;*
- ⌋ *the number of erroneous takedowns;*
- ⌋ the type of entities that issued the notices (private individuals, organisations, corporations, trusted flaggers, etc.) and the total number of their notices;
- ⌋ information about the nature of content's illegality or type of infringement for which it was removed;
- ⌋ the number of contested decisions received by online intermediaries and how they were handled;
- ⌋ the description of the content moderation model applied by the hosting intermediary, as well as *if any automated tools, including meaningful information about the logic involved*
- ⌋ *the measures they adopt with regards to repeated infringers to ensure that the measures are effective in tackling such systemic abusive behaviour.*

The obligation to publish and the required detail of this report should take into account the size or the scale on which online intermediaries operate and whether they have only limited

resources and expertise. Microenterprise and starts up should be required to update this report, where there is significant change from one year to the next.

Online intermediaries should also publish information about their procedures and timeframes for intervention by interested parties, such as the time for the content uploader to respond with a counter-notification, the time at which the intermediary will inform both parties about the result of the procedure and the time for different forms of appeal against the decision.

CA 12

AM 790 - 805

4. Safe harbour provisions in Article 12, 13 and 14 of the E-Commerce Directive

The Digital Services Act should protect and uphold the current limited exemptions from liability for information society service providers (online intermediaries) provided for in Article 12, 13, and 14 of the current E-Commerce Directive.

5. Active and Passive -The Digital Services Act should *maintain its derogations of intermediaries playing a neutral and passive role and* address the lack of legal certainty regarding the concept of “active *role*” by codifying *the case-law* of the *Court of Justice on the matter. It should also* clarify *that* the hosting providers *play an active role when creating the content or contributing to* a certain degree *to the illegality of the* content, *or if it* amounts to adoption of the third-party content as one’s own (as judged by average users or consumers).

The Digital Service Act should maintain the exemptions from liability for backend and infrastructure services, which are not party to the contractual relations between online intermediaries and their customers and which merely implement decisions taken by the online intermediaries or their customers.

6. Ban on General Monitoring - Article 15 of the E-Commerce Directive

The Digital Services Act should maintain the ban on general monitoring obligation under Article 15 of the current E-Commerce Directive. Online intermediaries should not be subject to general monitoring obligations.

CA 13

AM 806- 846, 554, 650 and 791

VI. ONLINE MARKET PLACES

The Digital Services Act should propose specific rules for online market places for the online sale *promotion or supply* of products and *provision of* services to consumers.

Those new rules should:

- ⌋ *be consistent with and complementary to a reform of the General Product Safety Directive;*
- ⌋ cover all entities that offer *and direct* services and/or products to consumers in the Union, including if they are established outside the Union;
- ⌋ distinguish online marketplaces from other types of service providers, including other ancillary intermediation activities within the same company activity; if one of the services provided by a company fulfils the criteria necessary to be considered as a marketplace, the rules should fully apply to that part of the business regardless of the internal organisation of that company;
- ensure that online marketplaces make it clear *from* which country the products *are sold* or services are being provided, regardless whether they are provided *or sold* by that marketplace, a third party or a seller established inside or outside the Union;
- ensure that online marketplaces remove *quickly* any *known* misleading information given by the supplier -, including misleading *implicit* guarantees and statements made by the supplier;
- ⌋ *ensure that online market places, offering professional services indicate when a profession is regulated within the meaning of Directive 2005/36/EC in order to enable consumers to make an informed choice and verify, where necessary, with the relevant competent authority if a professional meets the requirement for possessing a specific professional qualification;*
- *ensure that online marketplaces are transparent and accountable and cooperate with MS competent authorities to identify, where serious risks of dangerous products exist and to notify them as soon as they become aware of such products on their platforms;*
- *ensure that online marketplaces consult the Union Rapid Alert System for dangerous non-food products (RAPEX) and carry out random checks on recalled and dangerous products and, wherever possible, take appropriate action in respect to products concerned;*

-)] once products have been identified as unsafe *and/or counterfeit* by the Union’s rapid alert systems, *by national market surveillance authorities, by customs authorities* or by consumer protection authorities, it should be compulsory to remove products from the marketplace *expeditiously and maximum within two working days of receiving notification*;
-)] *online marketplaces should inform consumers once a product they bought has been removed from their platform following notification on its non-compliance with the EU product safety and consumer protection rules; they should also* inform consumers of any safety issues and of any action required to ensure that recalls are carried out effectively;
-) *online marketplaces should put in place measures to act against repeat offenders offering dangerous products in cooperation with authorities in line with the Platforms to Business Regulation and should take measures aimed at preventing the reappearance of dangerous product listings already removed*;
-)] *consider the option of requiring suppliers which are established in a third country to set up a branch in the EU or designate a legal representative, established in the Union, who can be held accountable for the selling of products or services to European consumers which do not comply with Union rules of safety*;
-) *address the liability of the online marketplaces for consumer damages, for failure to take adequate measures to remove illegal products after obtaining the actual knowledge of such illegal products*;
-)] address the liability for the online marketplaces when platforms have predominant influence over suppliers and essential elements of the economic transactions such as payment means, prices, default terms conditions, or conduct aimed at facilitating the sale of goods to a consumer on the European market, and there is no manufacturer, importer, or distributor established in the Union that can be held liable;
-)] address the liability for online marketplaces if the online marketplace has not informed the consumer that a third party is the actual supplier of the goods or services, thus making the marketplace contractually liable vis-à-vis the consumer; liability should also be considered in case the marketplace *knowingly* provides misleading information;
-) *guarantee online marketplaces the right to redress towards the supplier or producer at fault*;
- explore expanding the commitment made by some e-commerce retailers and the Commission to *respectively* remove dangerous *or counterfeit* products from sale more rapidly under the voluntary commitment *schemes* called “Product Safety Pledge” *and "Memorandum of Understanding on the sale of counterfeit goods via the internet"* and indicate which of those commitments could become mandatory;

CA 14

AM 847-890

VII. EX-ANTE REGULATION OF SYSTEMIC PLATFORMS

The Digital Services Act should put forward a proposal *for a new separate instrument aiming at ensuring* -that the systemic role of specific online platforms will not endanger the internal market by unfairly excluding innovative new entrants, including SMEs, *entrepreneurs and start-ups thereby reducing consumer choice*;

To that end, the Digital Services Act should, in particular:

- ⌋ set up an *ex-ante* mechanism to prevent (instead of merely remedy) market *failures caused by* “systemic platforms” in the digital world, building on the Platform to Business Regulation; such mechanism should allow regulatory authorities to impose remedies on *systemic* companies *with a significant market position, with a “gatekeeper” role* in order to address market failures, without the establishment of a breach of *competition* rules;
- ⌋ empower regulatory authorities to *impose proportionate and well-defined remedies on these companies* which have been identified as “systemic platforms” *based on the criteria set out within the legal instrument and a closed list of the positive and negative actions these companies are required to comply with and/ or forbidden to engage in; in its impact assessment, the Commission should make a thorough analysis of the different issues observed on the market so far, such as:*
 - *the lack of interoperability and appropriate tools, data, expertise, and resources deployed by systemic platforms to allow consumers switch or connect and interoperate between digital platforms or internet ecosystems*
 - *the systematic preferential display, which allows systemic platforms to provide their own downstream services with better visibility;*
 - *data envelopment used to expand market power in one market into adjacent markets, incurring in self-preferencing of their own products and services and engaging in practices aimed at locking-in consumers;*
 - *the widespread practice of banning third-party business users from steering consumers to their own website through the imposition of contractual clauses;*
- ⌋ undertakings should be given the possibility to demonstrate that the behaviour in question is justified,

- ⌋ clarify that some regulatory remedies should be imposed on all "systemic platforms", such as ***transparency obligations in the way systemic platforms conduct business, in particular how they collect and use data; and a prohibition for "systemic platforms" to engage in - - any practices aimed at making it more difficult for consumers to switch suppliers or use services across different, or other forms of unjustified discrimination*** that exclude or disadvantage other businesses;
- ⌋ empower regulatory authorities to adopt interim measures and to impose ***penalties*** on "systemic platforms" that fail to respect the different regulatory obligations imposed on them;
- ⌋ ***reserve to the Commission the power to ultimately decide if an information society service provider is a "systemic platform" based on the conditions set out in the ex ante mechanism;***
- ⌋ ***empower users of "systemic platforms" to be informed, deactivated and be able to effectively control results of algorithms suggesting them specific content; users should be properly informed of all the reasons why specific content is suggested to them;***
- ⌋ ensure that the rights, obligations and principles of the GDPR – including data minimisation, purpose limitation, data protection by design and by default, legal grounds for processing – must be observed
- ⌋ ***ensure -appropriate*** levels of interoperability measures requiring "systemic platforms" to share appropriate tools, data, expertise, and resources deployed in order to limit the risks of users and consumers' lock-in and the artificially binding users to one systemic platform with no ***realistic*** possibility or incentives for switching between digital platforms or internet ecosystems ***and to empower users in deciding what kind of content they want to see.*** As part of those measures, the Commission should explore different technologies and open standards and protocols, including the possibility of a - ***technical*** interface (Application Programming Interface) that allows users of competing platforms to dock on to the systemic platform and exchange information with it. ***Systemic platforms may not make commercial use of any of the data that is received from third-parties during interoperability activities for purposes other than enabling these activities. Interoperability obligations should not limit, hinder or delay the ability of intermediaries to patch vulnerabilities.***
- ⌋ ***empower the Commission to impose further conditions and decisions in relation to the rules of competition, including on self-preferencing and overall vertical integration, while ensuring that both policy tools are completely independent***

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VIII. SUPERVISION, COOPERATION AND ENFORCEMENT

The Digital Services Act should *improve supervision and enforcement of the existing rules and* strengthen the internal market clause as the cornerstone of the Digital Single Market by complementing it with a new cooperation mechanism aimed at improving the *exchange of information, the* cooperation, *mutual trust* and *upon request, mutual* assistance between Member States, in particular between the home country *authorities* where the service provider is established and the host country *authorities* where the provider is offering its services.

The supervision and enforcement *of the provisions regarding the different measures aimed at tackling illegal content online, including the notice-and-action mechanism* – should be *the responsibility* – of a central regulatory authority –. *The central regulatory authority should coordinate the work of the different authorities dealing with illegal content online, enforce compliance, impose fines and be able to carry out auditing of intermediaries and platforms. Through the Joint Research Centre, the regulatory authority should offer its expertise and analysis upon request, including aid during investigations, to the work of the different authorities dealing with illegal content online.*

In what concerns the enforcement of the internal market legal instrument imposing ex-ante obligations on large platforms, the Commission -should prioritise cooperation between the Member States to address complex cross-border issues; to that end, it should work together with the network of independent *bodies (NEBs)* and have detailed and extensive enforcement powers to launch initiatives and investigations into cross-border systemic issues.

The - *Commission* should report to the - *Parliament and the Council*, and, *together with the network of independent bodies NEBs*, maintain a *public* ‘Platform Scoreboard’ with relevant information on the *compliance* – of *the Digital Services Act by the* online platforms *and should facilitate and support the creation and maintenance of a European research repository that would combine data from multiple platforms.*

The Digital Services Act should also introduce new enforcement elements into Article 16 of the E-Commerce Directive regarding self-regulation.