



GIGAEurope Position Paper on the Digital Services Act

June 2021

GIGAEurope generally supports the balance of obligations as contained in the European Commission's proposal and we believe that the amendments below represent a sweeping change to that approach. We are concerned that, by extending the obligations described underneath to **passive** intermediaries, Parliament fails to take into account the intermediaries' technical effectiveness and ability to operationalize the obligations, which ultimately will not contribute to reaching the overarching objectives of the DSA. We further warn against creating legal uncertainty by amendments that would apply to certain due diligence obligations service providers are already subject to sectoral legislation under the European Electronic Communications Code.

- We support the updating and clarifying of the existing liability regime of the E-Commerce Directive, as it applies to providers of passive intermediary services (mere conduit, caching, hosting) whereby providers are not held directly liable for the acts of their users and cannot be subjected to a general obligation to monitor.
- We support the transparency due diligence obligations for all intermediary service providers in Chapter III Section 1, but we oppose amendments that impose new transparency obligations, the implementation of which would *de facto* undermine the 'mere conduit' status of passive intermediaries and consequently deprive passive intermediary service providers of existing liability exemptions.
- We need clarification as to how the proposed 'notice & action' mechanism for hosting providers in Article 14 relates to the provisions regarding 'orders to act against illegal content' that apply to passive hosting providers in Article 8, which is an essential pillar of the incumbent liability exemption. We are concerned that as drafted, the proposals in relation to illegal content could be over-burdensome for passive service providers.
- We strongly oppose amendments that extend the scope of rules designed for online platforms to all intermediaries, including providers of passive intermediary services. Applying rules on **traceability of traders** (Article 22) and **online advertising transparency** rules to providers of passive intermediary services, fails to take account of the technical features and specific functionalities of the passive technical services that form the backbone of the Internet. We do not believe there to be any added benefit in applying such provisions to digital services that do not exhibit platform characteristics (ability to upload and share user generated content, funded via targeted advertising). Practically, it is not clear to us how a provider of an Internet Access Service (mere conduit) for example would be able to comply with advertising transparency as the access service does not carry advertising.
- Mindful of the fact that providers of electronic communications services (in this case of Internet Access Services covered by the liability regime for mere conduits) are already subject to an extensive regulatory framework, the European Electronic Communications Code (EECC), we believe that any **overlap** with this Regulation should **be avoided** with regard to the application of the proposed rules on fair, non-discriminatory and transparent ('FNDR' **terms & conditions (Article 12)** and on establishing a **single point of contact for customers (new Article 10a)**.

1. Incumbent liability regime ‘mere conduit’ intermediaries

Art.	AMENDMENT	GIGAEurope position	Explanation
5	<ul style="list-style-type: none"> Amendment 8 to Recital 22 Amendment 71 to Article 5 	☒	<p>We believe that the imposition of a new 24hr time frame to remove seriously harmful illegal content is a disproportionate departure from the current condition for hosting providers to be exempted from liability, namely the condition that requires “expeditious” action from the hosting provider upon obtaining knowledge or awareness.</p> <p>We believe that a 24hr timeframe should not be applicable to hosting providers that only allow users to store and upload materials privately and not share this with the public as well as enterprise cloud services. In the spirit of what the DSA aims to achieve, any such timeframe for content removal should only apply to hosting services that disseminate material to the public.</p>
6	<ul style="list-style-type: none"> Amendment 11 to Recital 25 	☑	<p>We support new rules that stipulate that providers of intermediary services will not lose their liability exemption when they carry out voluntary own initiative investigations to detect, identify and remove, or disable access to illegal content.</p>
8	<ul style="list-style-type: none"> Amendments to article 8 and 9: including the word ‘swiftly’ 	☒	<p>Under Articles 8 and 9, the draft Report has added a requirement for intermediaries to give effect to orders from judicial or competent authorities ‘swiftly’, in addition to ‘without undue delay’. It is not clear however what this would mean in practice, as we consider that ‘without undue delay’ would ensure that action is taken to give effect to the order as soon as possible. The addition of ‘swiftly’ to the text adds unnecessary legal uncertainty and is also inconsistent with the newly adopted Terrorist Content Regulation.</p>
9	See above	See above	See above

2. Transparency due diligence obligations for all intermediary services providers

Art.	AMENDMENT	Our position	Explanation
10	<ul style="list-style-type: none"> Amendment 13 on a new Recital 36a Amendment 80 establishing a new Article 10a 	☒	The establishment of a customer single point of contact would represent an overlap with the EECC. The EECC already requires providers of electronic communications services (ECS, such as ISPs) to provide end-users with detailed contact information, including for complaints. ECS are also subject to close monitoring of quality-of-service parameters such as customer service call waiting times.
12	<ul style="list-style-type: none"> Amendment 14 to Recital 38 Amendment 82 to Article 12.1 Amendment 83 to new Article 12.1a Amendment 84 to new Article 12.1b Amendment 86 to new Article 12.2a Amendment 87 to new Article 12.2b Amendment 88 to Article 13.2 	☒	<p>Whereas the Commission proposal is aimed at imposing greater transparency for customers through T&Cs in case of user restrictions related to content moderation, amendments 14 and 82 impose a blanket regulatory obligation ('FNDR'), the imposition of which would normally have to be justified on the basis of a thorough assessment procedure by NRAs under the EECC. We believe the amendments depart from the intention of this Regulation by removing the focus on online content and place a disproportionate regulatory obligation on providers of electronic communications services (in this case of passive connectivity intermediary services) without any assessment of market behavior or market power as required under the EECC.</p> <p>Amendments 83, 84, 86, 87, 88 seek to regulate elements of T&Cs that, for providers of electronic communications services (in this case of passive connectivity intermediary services) already fall under the scope of the EECC.</p>
13	<ul style="list-style-type: none"> Amendments 16, 17, 18 establishing new Recitals 39a, 39b, 39c Amendment 89 on a new Article 13a Amendment 90 on new Article 13b 	☒	ISPs, as 'mere conduit' providers have no knowledge of the content flowing through their networks, and do not play an active role in the organization and presentation of this material to their users. It is therefore not proportionate or technically feasible to impose any rules on traceability of traders, like applying identification and verification measures, on ISPs. Extension of the principle of identification to ISPs would undermine the existing liability regime.
	<ul style="list-style-type: none"> Amendment 91 establishing a new Article 13c Amendment 92 on the new Article 13d 	☒	ISPs are merely transmitting signals and, in keeping with this 'mere conduit' role, they do not display advertisements and therefore do not monitor or register any information about

			the senders/financers of online advertisements or about the placement of online advertisements, as this would undermine their liability exemption under this Regulation. In the same vein, it would be disproportionate and technically unfeasible to impose on ISPs to ensure users give their consent for advertising.
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3. Additional provisions applicable to online platforms

Art.	AMENDMENT	GIGAEurope position	Explanation
22	Amendment 119 on Art. 22.2	☒	It is not feasible to impose any rules on traceability of traders, like applying identification and verification measures, on ISPs. Extension of the principle of identification to ISPs, as passive intermediaries, would undermine the existing liability regime.
