



Accelerating Innovation in
Technology, Data & Media

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Submitted electronically

Re: Consultation: European Commission Digital Services Act

The Software & Information Industry Association (SIIA) appreciates the opportunity to comment on the European Commission's *Digital Services Act: Open Public Consultation* ('The Consultation'). SIIA welcomes the Commission's observation that "the core principles of the [e-Commerce] Directive have been the cornerstone of the internal market for digital services. Whilst they may need certain adjustments, the underpinning basis is as valid today as it has been 20 years ago." While we agree with the objective to reevaluate the regulatory framework underpinning digital services in Europe, we caution that as changes are considered, care must be given to not unravel the benefits the current framework has delivered. Our comments will focus on a few priorities and issues of critical importance for our membership, and we respectfully request that the Commission continue to work in close cooperation with industry and other stakeholders throughout the process to define the necessary rules and parameters for an effective Digital Services Act.

By way of introduction, SIIA is the principal trade association for the software and digital information industries worldwide. SIIA's membership includes the global industry leaders for the digital age, including software, data analytics, online platforms, and information service companies. SIIA's membership reflects the broad and diverse landscape of digital content, including both B2B and B2C services, small specialized

providers, and large multinational industry leaders. Our comments build upon our previous contribution regarding the Communication for A European strategy for data¹

Harmonization and technologically neutral actions are necessary to provide legal certainty and enable innovation

The ability for businesses to provide services across borders without confronting internal barriers is vital to ensuring they can scale up across the EU as consistent with the key intention of a true Digital Single Market. SIIA has been a supporter of the ambition of the Digital Single Market ever since the strategy was announced in 2015, recognizing that an integrated digital Europe stands to benefit individuals and businesses on both sides of the Atlantic². However, increasing uncertainty due to fragmentation across Member States, and divergence in the case law, make it difficult for businesses, including small and medium-sized enterprises (SMEs), to predictably offer services across the Single Market. SIIA believes that ensuring harmonization through the Digital Services Act to avoid further fragmentation will be vital for maximizing the role that digital services have to play in the economy.

That said, while measures may be needed to harmonize policies across the EU, SIIA would underscore the importance that any such actions be flexible and technologically neutral. That is, they should avoid mandating specific technological fixes. Overly-prescriptive requirements would weaken the ability of digital services to innovate and

¹ SIIA Response: Communication A European strategy for data (May 2020) [LINK](#)

² SIIA Blog: European Digital Single Market: SIIA's Take (May 2015)
<https://www.siiia.net/blog/index/Post/62760>

generate value for consumers and businesses. Similarly, ex ante rules can become de facto bans and pose significant risks to consumer benefit, innovation incentives, and investment levels. Given the pace of technological change, mandating or banning specific practices may have an unintended consequence of adding barriers to innovation. SIIA stresses that the Commission's evaluation of policy options in the Digital Services Act should take flexibility and future-proofing into account.

Online platforms and digital services provide unique benefits to European consumers, businesses, and startups that are directly tied to economic strength

The Consultation asks a series of questions regarding the power of digital platforms, so within that context we would like to highlight the distinct benefits that these services provide to consumers, businesses, and startups alike, each of which has a significant and direct impact on overall economic growth.

For consumers, online platforms have significantly increased general welfare. Consumers benefit from the unprecedented choice, transparency, and access provided by online platforms to reach, discover, and review goods and services in digital markets. And thanks to industry led initiatives, consumers are also able to easily port their data between services. For example, the Data Transfer Project³ is a collaboration of organizations that is committed to building common ways for individuals to transfer data into and out of online services whilst balancing privacy and security. The contributors to the Data Transfer Project believe portability and interoperability are

³ <https://datatransferproject.dev/>

central to innovation and that making it easier for individuals to choose among services facilitates competition, and empowers and enables individuals to choose the offering that best suits their needs. As such, the partners of the Data Transfer Project have developed tools enabling users to initiate and transfer their personal data.

For businesses, online platforms and digital tools have lowered the cost and complexity of launching and selling internationally. With thanks to digital tools, over 70% of small businesses and 90% of medium businesses sell across borders, this dwarfs the percentage of overall companies with foreign customers (which for most countries is <10%). They have also enabled an unprecedented number of ‘global natives’ – or SMEs that sell abroad from point of launch.⁴ In addition to promoting strictly digital businesses, online platforms and digital services also provide tools to support traditional economic sectors, such as advertising opportunities to raise visibility and productivity tools to increase efficiency.

It is worth noting that online platforms and digital services are particularly helpful for startup companies. Lack of resources and access to technology present significant challenges to startups as they try to scale and reach a wider audience of users. Online platforms help address this challenge by integrating products and services that can deliver quality and relevant content for consumers, thereby helping startups be more efficient. They also help entrepreneurs to launch businesses at lower cost and complexity - allowing innovation to progress instead of replicating business operations with low productivity. Thanks to this assistance, European startups received a record

⁴ Global Natives, https://d37ugbyn3rpeym.cloudfront.net/newsroom/Globalization_Report_2019.pdf

breaking \$34 billion in venture capital funding in 2019, an increase of 40% year over year.⁵

Limited liability exemption must be preserved under the Digital Services Act

The e-Commerce Directive established a safe harbor that protects online intermediaries who act expeditiously to remove illegal material once they obtain actual knowledge of illegality, or become aware of facts from which illegality should be apparent. This limited (or secondary) liability exemption has been essential to the growth of the internet economy by, for example, providing copyright owners with a means to combat the proliferation of piracy while at the same time giving responsible platform providers the certainty they need to innovate. By contrast, a strict liability regime would have resulted in over-removal of content and prevented a wide range of innovative services from ever entering the market. Given its importance for the functioning of the internet and protection of fundamental rights, SIIA urges that the Digital Services Act preserve a form of limited liability for service providers at least as robust as that which exists in the E Commerce directive.

Additionally, removal of these liability exemptions would undermine the ability of online intermediaries to deliver value to consumers and businesses alike which in turn would impact the whole of the economy. By eroding the ability of platforms to host content, it would become more difficult for publishers to find audiences, SMEs to reach customers, and emerging creators to gain exposure. These spillover effects would have a broad

⁵ broke records with \$34 billion in venture capital funding

economic impact far beyond the viability of online platforms which is why the liability exemption under the e-Commerce Directive should be preserved.

Voluntary measures to tackle illegal content should be incentivized

SIIA member companies take seriously their responsibility to actively address abusive, harmful and illegal behavior and content that occurs on their platforms. Although the current framework does not compel intermediary service providers to provide general monitoring of content or activities, SIIA believes that they should also not be prevented nor discouraged from taking voluntary, good faith steps to reduce the prevalence of harmful content on their platforms. However, under the current framework there are some inherent risks associated with such voluntary actions since exercising too much control can compromise the neutral status of the service provider and, consequently, deprive them of the safe harbor. Additionally, service providers are not protected from liability should their voluntary measures prove imperfect. This lack of protection could effectively hinder any voluntary enforcement actions on part of intermediary service providers to reduce prevalence of harmful content on their platforms.

SIIA suggests that the upcoming Digital Services Act should address this situation by providing companies with clear rules and responsibilities that empower and encourage these voluntary actions to limit the distribution of illegal content online. Such measures would particularly enable smaller platforms and startups to continue to innovate and develop practical solutions within their resource constraints without the fear of liability.

'Country of Origin' Principle must be reinforced as the cornerstone of the Digital Single Market

The 'country of origin' principle in the e-Commerce Directive grants that companies are subject to the relevant rules within the jurisdiction in which they are established, rather than the jurisdiction where their services are received. This allows companies to set an establishment in their chosen Member State and operate seamlessly across the EU without being subject to 27 different legal regimes. In this way the 'country of origin' principle has been fundamental for the development of the internal market and facilitation of cross-border trade. SIIA strongly urges that this principle be reinforced under the Digital Services Act.

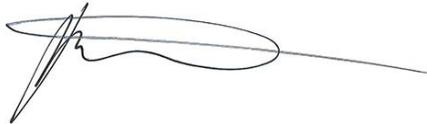
New regulatory body risks duplication, confusion, and inconsistent enforcement

On the question of establishing a new regulatory body for online platforms, SIIA would strongly caution that establishing such a body would create overlaps and inconsistent enforcement among new and existing regulators. Rather than an additional body, SIIA suggests that a deeper (institutional) cooperation among existing regulators, including competition authorities, DPAs, media regulators, consumer protection authorities etc., would lead to more effective enforcement.

Concluding assessment: Digital Services Act must preserve keystone elements of e-Commerce Directive to ensure digital services continue to thrive in Europe

In closing, we would like to reiterate our general support of the Commission's reexamination of the suitability of the regulatory framework for digital services operating in Europe. SIIA and our member companies look forward to continuing to work with the Commission on this important initiative moving forward. Please contact Jesse Spector, Director of Technology Policy, at (202) 789-4473 or jspector@siaa.net for any questions or requests for further information.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jesse Spector', with a long horizontal line extending to the right.

Jesse Spector
Director, Technology Policy
Software & Information Industry Association