ACT PERSPECTIVES ON THE DIGITAL SERVICES ACT

Note to reader

This paper outlines the ACT's views on the DSA by responding to the issues and questions set out in the Commission Consultation. It serves as guidance for the Commission as regards the views of commercial broadcasters and is to be read in conjunction with the answers to the multiple choice questions set out in the questionnaire.

ABOUT THE ASSOCIATION OF COMMERCIAL TELEVISION IN EUROPE (ACT)

The European commercial broadcasting sector is a major success story. We entertain and inform hundreds of millions of EU citizens each day via thousands of channels available across Europe. The Association of Commercial Television in Europe represents the interests of 29 leading commercial broadcasters across Europe. The ACT member companies finance, produce, promote and distribute content and services benefiting millions of Europeans across all platforms. At ACT we believe that the healthy and sustainable commercial broadcasting sector has an important role to play in the European economy, society and culture.

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TELEVISION IN EUROPE – WHY IT MATTERS

DIVERSE

+8,000 channels in Europe, 50% of VoD services.

Commercial broadcasting is the driving force in that growth story. A European success story in delivering plurality of news and programming through free-to-air, paid and hybrid offers.

INVESTED

+20 billion in production, distribution and technology.

The motor of Europe's AV creation, production and cross-platform distribution and innovation. We invest in stories, people and networks. We invest in Europe in all its creative facets.

TRUSTED

Most trusted medium with radio.

That's several notches above social media. We follow strict rules and believe all audiences should be equally protected no matter how they choose to access content.

EVERYWHERE

Hundreds of millions of Europeans watch daily.

Television is in the living room and in the living space. Ample choice, offers, access. The series that we are passionate about, the news we follow, the sports we crave. Multiplatform, multipurpose, multicultural.

EXECUTIVE SUMMARY

BACKGROUND

Commercial broadcasters are at the heart of Europe's media landscape as producers and distributors of European original content and news. Commercial broadcasters have embraced the digital environment providing new services, formats and content to meet growing European demand for quality content. As European audiences move online, so have broadcasters with new and diversified offerings; establishing and working with digital services, large and small, to create new and innovative ways to reach viewers. Yet in grasping the opportunities of online, broadcasters have faced challenges to protect their content online and grow and develop new services as well. These impacts have been magnified by the COVID-19 crisis. Infringement of IPRs, continues to drain Europe's creative and cultural ecosystems' growth and jobs. The issue of content piracy needs to be addressed with better enforcement tools and liability standards across all digital services. Tackling the specific competition issues emanating from large online platforms means addressing exclusionary practices and exploitative behaviour that inherently limits consumer choice and innovation. In parallel, the proliferation of disinformation and other harmful content, particularly impacting minors, has demonstrated the need for more measures on online platforms to protect democratic discourse and public safety.

Building on existing instruments such as the Audio-Visual Media Services and Copyright Directives, the Digital Services Act ("DSA") is an opportunity to strengthen and complete the core value at the heart of Europe's regulatory and competition regimes. The 'holistic' approach taken by the Commission is welcome as it seeks to address the multi-faceted nature of the issues at hand. In so doing, we encourage the Commission to consider the impacts that illegal/harmful activities have on Europe's ability to sustain cultural diversity and media pluralism. For broadcasters this can only be achieved by delivering a pro-recovery set of measures with high liability standards to ensure the protection/value of AV content while fixing the fact that online platforms are not playing by the same rules as their competitors. This means new rules to keep their services safe, legal and pro-competitive to establish a level playing field that sustains investment in media pluralism & cultural diversity to the benefit of all Europeans. Finally, the Digital Services Act should not lead to a situation where platforms have an oversight role over broadcasters' content, which is already heavily regulated and controlled by media regulators under the AVMS Directive.

OBJECTIVES

We look forward to working with the European Commission to ensure a successful DSA. Our views on how this success can be achieved are set out in this paper and summarised below in the following areas:

E-commerce review: an evolution not a revolution

- **The DSA should retain the fundamental principles of the ECD (active/passive distinction, specific monitoring) with targeted solutions** to tackle specific illegal/harmful activities whilst being coherent with sector specific regulations, existing CJEU and national case law.
- **Maintain, build on, but do not undermine, the active/passive distinction**. The limited e-Commerce liability regime is meant for passive services and should not apply to active ones.
- **The Good Samaritan is a Bad Solution**. Exempting all service providers, including active ones, from liability under certain conditions will not deliver a safer online environment.
- **General monitoring ban allows for specific monitoring obligations that should be upheld**. These specific obligations are rooted in the e-Commerce directive and do not stand in the way of protecting freedom of speech.

Illegal content: fighting piracy means effective, transparent & cost-effective policies/tools applied across all platforms within and beyond the EU

- **Piracy continues to drain the creative ecosystem, with a spike noted during Covid-19 crisis**.
- **The DSA should reinforce the liability regime** to deliver effective enforcement and technical measures across all platforms.
- **Automated content management tools are required to achieve specific monitoring mandated by the e-Commerce directive**. These tools work and do not conflict with the general monitoring ban. So-called "overblocking" remains extremely marginal. The core issue is lack of transparency (notably on algorithms), unequal implementation and the burden on rightholders of operating different tools on different platforms**.**
- **Enforcement policies need more robust rules to effectively protect content.** This requires expeditious and transparent removal procedures, stay down measures across active and passive players and treating IP rightholders as trusted flaggers based on objective criteria.
- **Enforcement tools can help lower cost and speed up** judicial redress with the possibility of issuing dynamic injunctions, catalogue or repertoire-wide injunctions, and including hyperlink directories in scope.
- **Stepping up action at international level** to ensure access to **WHOIS** information is restored, **Know Your Business Customer** protocols are in place and ongoing measures are developed to **identify/tackle illegal offers from third countries**.

Harmful content online: stepping up obligations on large online platforms to tackle online disinformation, political advertising & protection of minors

- **The Covid-19 crisis has accelerated and magnified the impact of disinformation online**. There is an urgent need for effective instruments, transparency and oversight.
- **An overall comparable set of rules for platforms is essential to ensure symmetry of regulation** applying to media providers and online platforms/social media to ensure equal protection for Europeans, including the most vulnerable ones, when accessing content online.
- **Co-regulation is the logical next step to plug the gaps identified in the Code of Practice** on disinformation and ensure independent regulatory oversight. This means transparency and access to data obligations, clear KPIs, sanctions, and a structured dialogue involving trusted media and civil society to assess progress/next steps.
- **The effective protection of minors should ensure high and enforceable standards** including fines or loss of license as is the case for broadcasters. The current systems used by broadcasters are good examples of cooperation at national level with regulators.
- **Rules for online political and issue ads advertising are required** to ensure greater transparency and limit practices that erode the democratic discourse.

Gatekeepers: ex ante rules are needed to tackle uncompetitive practices by large online platforms and deliver a level playing field, particularly regarding data and advertising markets

- **The definition of gatekeeper platforms must be well scoped** to avoid adding regulation on services/companies that are already subject to regulatory scrutiny.
- **In certain circumstances, competition policies and tools have proven to be too slow or ineffective at providing remedies**. An approach that tackles practices of platforms with significant market power is welcome.
- **The specific ex ante provisions are an opportunity to ban a range of ongoing anticompetitive practices** and discriminatory treatment
- **Unfair competition in the online advertising market requires a regulatory toolbox** setting prohibitions and obligations to large online platform companies with gatekeeper role.
- **Additional rules granting access to data generated from the use of the broadcasters' services or content on some large online platforms are needed**.

E-COMMERCE REVIEW

Ongoing relevance of active/passive distinction & categories

Whereas it does certainly not constitute the only area covered by the e-Commerce directive, the introduction of liability privileges for certain types of intermediaries has clearly been the most litigious area of the legislation. Originally meant to exempt "dumb pipes" (i.e. mere conduit, caching and hosting services) from liability, CJEU jurisprudence has over time further clarified the differentiation between active and passive providers – depending on their engagement with the content – and imposed a duty of care on passive providers and the non-application of liability exemptions for active providers.

ACT would caution against any idea to do away with this distinction between "active" and "passive" providers, particularly in the context of the liability privileges granted in Articles 12 to 15 of the e-Commerce directive.

The e-Commerce directive Recital 42, and interpretations made by the Court of Justice of the European Union, are very clear on this point. Active players, e.g. those that optimise the presentation of illegal content or promote it, are not entitled to safe harbour provisions referred to in Articles 12 to 15 of the e-Commerce directive. This continuity will deliver a DSA that "upgrades our liability and safety rules for digital platforms", "within safe and ethical boundaries" as set out by President von der Leyen's political guidelines. We regret that the Glossary of the DSA Public Consultation blurs the active/passive distinction: although hosting services providers are rightly defined as covered by the liability exemption in Article 14 of the e-Commerce directive, the examples provided encompass clearly active players such as VSPs, which promote and monetize UGC and UUC, and video streaming services[1].

Dominant large online platforms have taken advantage of legal grey areas to build their business models which have exploited the liability privileges well beyond the mere provision of technical and passive activities. The DSA's effectiveness on liability supposes a continuity with well-established and functioning European practice of placing liability on active service providers when they do more than provide technical infrastructure.

The limited e-Commerce liability regime is meant for passive services and should not apply to active ones:

- Articles 12-14 of the e-Commerce directive (so-called "online safe harbour" provisions) provide that the liability privileges apply only to providers which do not engage in an active role, i.e. if it is a service whose role is to make the transmission more efficient and the activity is "of a mere technical, automatic and passive nature".
- Article 15 on the ban on the general monitoring obligation is a part of this section and also meant for the services targeted by Articles 12-14, as long as they do not obtain actual knowledge of illegal activity.
- Once these services' activity is not of a "mere technical, automatic and passive nature", the ban on general monitoring is not applicable; Member States are prevented from imposing a general obligation to monitor only in relation to the beneficiaries of Articles 12-14.
- In any event, passive services are subject to a duty of care under the e-Commerce directive (cf. Recitals 40 and 48).
- The prohibition of a general obligation to monitor for passive services in Article 15 of the e-Commerce directive does not concern monitoring obligations in specific cases (Recital 47).

[1] Definition of hosting service provider in the DSA Consultation Glossary: "**Hosting service provider** means a provider of information society services consisting of the storage of information provided by the recipient of the service at her request, within the meaning of Article 14 of Directive 2000/31/EC, irrespective of its place of establishment, which directs its activities to consumers residing in the Union. Examples include social media platforms, video streaming services, video, image and audio sharing services, file sharing and other cloud services, websites where users can make comments or post reviews."

Any new classifications should uphold relevant CJEU case law and Commission communications

Should the concepts of passive/active be further clarified they should build upon existing case-law (e.g. L'Oréal v. eBay, The Pirate Bay, Filmspeler, GS Media) and Commission's recent Communications.

CJEU case-law

- "*Where, by contrast, the operator has provided assistance which entails, in particular,* ***optimising the presentation of the offers*** *for sale in question or* ***promoting*** *those offers, it* ***must be considered not to have taken a neutral position*** *between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of or control over, the data relating to those offers for sale.* ***It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 222/31."*** (Case C-324/09 *L'Oréal and others)*

- "*if the fact remains that those operators,* ***by making available and managing an online sharing platform*** *such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by* ***indexing*** *on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network. In this respect […] without the aforementioned operators making such a platform available and managing it, the works could not be shared by the user or, at the very least, sharing them on the internet would prove to be more complex"* (C-610/15 *Stichting Brein v. Ziggo – The Pirate bay case)*

- "[...] *user makes an act of communication to the public when he intervenes, in full knowledge of the consequences of his action, to give access to a protected work to his customers and does so, in particular, where,* ***in the absence of that intervention, his customers would not, in principle be able to enjoy the broadcast work****"* (Case C-527/15 *Stichting Brein v. Filmspeler)*

- "*it is to be determined whether those links are provided without the* ***pursuit of financial gain*** *by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that* ***knowledge must be presumed***." (Case C-160/15 *GS Media*)

Communication 555/2017 of 28/09/17 on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms

- "Online platforms may become aware of the existence of illegal content in a number of different ways, through different channels" which "include (i) court orders or administrative decisions; […] or (iii) through the platforms' own investigations or knowledge." (pp.6-7)

- "In addition to legal obligations derived from EU and national law", they have a "duty of care" and should "ensure a safe online environment for users, hostile to criminal and other illegal exploitation, and which deters as well as prevents criminal and other infringing activities online." (p.7)

- "Online platforms should, in light of their central role and capabilities and their associated responsibilities, **adopt effective proactive measures to detect and remove** illegal content online and not only limit themselves to reacting to notices which they receive." (p.10)

Communication 70/8/2017 of 29/11/17 on Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights

- The European Commission clarified that "some Member States provide for the possibility of issuing forward-looking, catalogue-wide and dynamic injunctions" (p.21). Catalogue or repertoire-wide injunctions are defined as injunctions requiring e.g. intermediaries to prevent further infringements of all rights held by a rightholder or that are part of a licensee's catalogue or repertoire, based on an established infringement of a sample of those rights.

Liability of active hosting platforms needs to be bolstered not watered down

The so-called "Good Samaritan" concept as proposed by large online platform representatives (i.e. exempting all service providers, including active ones, from liability under certain conditions) would only benefit certain large online platforms, but not the European interest or a safer online space. Furthermore, the assumption that introducing such a concept would allow platforms to tackle illegal content more swiftly (as they wouldn't fear losing their "passive host" status – for the truly passive service providers) disregards the fact that duties of care already apply to passive hosts (Recitals 40 and 48 e-Commerce directive). European decision-makers would be well advised to disregard this call which goes against established EU doctrine, and would create a weaker system.[2]

In its reflections on the limited liability principle, the European Regulators Group for Audiovisual Media Services (ERGA) rejected introducing a 'Good Samaritan' provision under the DSA Package. This approach was indeed considered "insufficient"[3]. Such an approach does not formally require platforms to demonstrate that they are compliant with agreed principles and objectives of regulation. The Good Samaritan allegory is certainly not a relevant, nor a useful, concept to rely on. It would not give any legal certainty compared to the clear and long-established CJEU jurisprudence on "active hosts". In sum, the EU currently has all the tools it needs to ensure that citizens in the EU are afforded a high level of protection, alongside being well informed from a plurality of perspectives.

General monitoring, freedom of expression and copyright protection

Intrinsic to commercial broadcasters' societal and commercial value is a wide-reaching pluralistic freedom of speech and expression. Commercial broadcasters rely on freedom of expression to deliver content serving the largest audience possible and more specifically to deliver trusted information. At the same time, commercial broadcasters contribute to freedom of expression. It is absolutely essential to our work, our services, our products and our role in society. Protecting copyright does not stand in the way of protecting freedom of speech. Thus, claiming that acting to protect copyright will hinder freedom of speech, because for example an automated or unsophisticated process might lead to wrongful take downs, is simply denying the possibility of a proportionate regulatory system. The right to intellectual property (Art. 17(2) of the Charter) as well as other fundamental rights all need to be well balanced in legislative exercises.

To ensure our services' value creation we need high liability standards for protection of copyright. We firmly believe that using freedom of expression as an argument to escape liability for illegal use of content protected by copyright is not only misleading but also gravely erroneous. There is an essential difference in liability for copyright protected material and in monitoring utterances. Copyright concerns a designed piece of work which right-holders should get paid for, and thus be cleared before publication. Whereas the kernel of the utterance itself is about thoughts, facts and perspectives, which should be monitored after publication.

These two principles can and should be kept separate. In any event, passive services are subject to a duty of care under the e-Commerce directive (e.g. preventive duties in Recitals 40 and 48):

- The prohibition of a general obligation to monitor for passive services in Article 15 e-Commerce directive does not concern monitoring obligations in specific cases (Recital 47)
- This is also in line with CJEU rulings clarifying that a ban is not absolute, a certain degree of monitoring can be applied even to passive services (cf. Case C-70/10 *SABAM vs Scarlet*, C-360/10 *SABAM vs Netlog*)
- The 2019 Facebook case mirrors this logic by stating that a specific monitoring obligation applies to identical as well as equivalent information (Judgment in Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, 3 October 2019)

[2] *Writing with an Eraser: Online Platform Position on Digital Services Act*, Netopia, 24 January 2020
[3] *ERGA Position Paper on the Digital Services Act*, ERGA 2020 Subgroup 1 – Enforcement, June 2020

ILLEGAL CONTENT

General remarks

This Commission will steer the transposition of the Copyright, AVMS and P2B instruments alongside the DSA, Competition, Market Definitions and other crucial reforms. **The industry expects strong and clear liability standards, notably on notions of best efforts and diligence. Copyright infringement is a prejudice to consumers and society.** Without copyright, Europe's creativity and culture is devalued and unsustainable. The Digital Services Act should, as a priority, reinforce active platforms' liability regime. This must be to a far higher standard than the "duty of care" accorded to players who carry out mere technical and passive activities.

The presence of unauthorised copyright protected content on online content sharing service providers (OCSSPs) infringes rights, undermines the exclusivity and therefore the value of the rights. The longer the illegal content stays online, the higher is the damage caused to the audio-visual industry. The removal shall be performed expeditiously, and in particular special consideration should be given to live content. If the value of audio-visual rights are undermined, this also impacts upon the diversity of offers; damages growth, employment and investment; harms consumers; and threatens one of Europe's biggest economic and cultural success stories.

Attention needs to be placed on User Uploaded Content (UUC) platforms incentives to maximise the scale of their illegal content offer and for that content to remain up for as long as possible in order to increase attractiveness to advertisers. Certain practices of User Uploaded Content (UUC) platforms are problematic as they move from the role of passive hosting service providers to active involvement in the presentation, arrangement, usage and distribution of the content they store. These activities enable UUC Platforms to drive strong advertising revenue, frequently on the back of content that has been illegally uploaded.

This main revenue stream is increasingly a result of the platform's active role rather than passive hosting. Depending on who they speak to, UUC platforms may take different postures. On the one hand, they promote their targeted advertising to brand owners. On the other hand, when rightholders attempt to enforce the IPR regarding the content that the platforms are indirectly selling to advertisers, the same platforms claim to be purely storage providers, shielding behind the "safe harbour" provisions set out in Articles 12 to 15 of the E-commerce directive. Legal clarification, in light of CJEU jurisprudence, is required. This is a form of semi-protected appropriation of the commercial return of those who are taking the investment risk on content production, and leads to:

- lower levels of investment in content origination
- lower employment in creative industries
- less tax revenue
- less cultural diversity and plurality (for example as seen with the overall decline of the press media across the EU)

Special attention needs to be devoted to effective enforcement measures and technical measures across all platforms. Europe's audio-visual community should benefit from a system that is un-burdensome and effective at managing content uploaded by third parties. ACT calls for higher standards and more focus on enforcement enablers to free up legal and administration costs worth billions, which can be returned to the creative cycle.

Europe needs to demonstrate it can effectively tackle the issue of pirated content, including unlawful live streaming content. This requires, effective procedures for automatic take down and stay down obligations. Procedures for appeals against these notifications should avoid removal of illegal or potentially illegal content being delayed.

Broadcasters view on existing measures to improve/bolster

The e-Commerce directive is relevant for broadcasters not only in relation to the liability regimes of passive vs active services, but also, for the fact that it is the legal basis for the technical measures used to manage content uploaded by third parties. These measures are, in practice, used both by active and passive services. Some are more efficient than others, but a set of common standards should be met.

Commercial broadcasters make massive investments to monitor content on OCSSPs and to request immediate take down and stay down measures. In order to foster a wider accountability of platforms and to protect the reinvestment in creative content, several conditions are needed:

- **Technical measures to filter the content**. The use of automated tools is necessary for the detection and identification of illegal content and has proved successful. See further detail below.

- **Fast removal of illegal content**. The removal shall be performed expeditiously and in particular special consideration should be given to live content. In case of appeal procedures, there should be no delays in the removal of illegal or potentially illegal content. Since OCSSPs have been taking advantage of the Digital Millenium Copyright Act (DMCA) system via "non-expeditious" removal of the reported content, they should be required to expeditiously remove content flagged by broadcasters, providing for a sound redress mechanism. In addition to information on the time for processing, OCSSPs should also communicate to rightholders information on actions taken as well as information on how the actions are effective regarding closed, private and secret groups that rightholders cannot monitor.

- **Stay down measures to prevent the re-appearance of illegal content**. Both passive and active hosting providers should adopt measures in order to prevent the repeated uploading of illegal content and effectively disrupt its dissemination. This would be possible through the use of automated re-upload content recognition tools. Stay down obligations for illegal content - including for identical or similar illegal content - should also be properly enforced to minimise the capital intensive nature of issuing multiple take down requests for the same, identical or similar illegal content.

- **IP rightholders and partners as trusted flaggers**. In the case of services that fulfil a mere technical and automatic role and need to obtain a notice, e.g. from rightholders, about the appearance of illegal content on their platform, every owner of an IP right should be considered a trusted flagger by default as well as every entities (e.g. association) bringing together IP rightholders. The ratio of rightful notifications could be used as an objective benchmark. The criteria to establish the status of a trusted flagger should not be left to the platforms, but rather be established objectively and in a transparent manner, in a way that a rightholder has the possibility to fulfil the criteria, e.g. by taking into account, among others, the ratio of rightful notifications. Third parties who work for rightholders should also have the possibility to send information and notices. The research can be carried out by the broadcaster and/or an external technical service provider.

- **Title and logo are sufficient for a notice to be valid.** Court rulings have ascertained that the title of the copyrighted content and the broadcasters' logo are relevant and necessary information needed for the notice to be valid. Hosting providers often demand unnecessary detailed proof of ownership or other information, such as all the URL addresses of the illegal content. This is difficult to provide as well as time-consuming. In the meantime, the illegal content stays online seriously damaging the creative sector. Some Member State legislations (e.g. France) request that the notice includes "a copy of the correspondence addressed to the author or publisher of the litigious contents requesting their interruption, withdrawal or modification, or justification that the author or publisher could not be contacted". However, most of the time, the identification of the author or publisher is not possible (information disclosed by the website itself or by the WHOIS database is often ineffective). It is time consuming to bring such a justification in the notice. Member States shall thus be prevented from requesting right-holders to detail their notice in a way that exceed what is requested under EU law, in this respect.

- **Full transparency**. It is important that hosting providers communicate detailed information on actions taken and on the notices received, as well as on the time for processing. Confirmations of receipt should be sent to notice providers to avoid that the latter has to check manually whether his/her request has been followed. This can also serve as evidence in judicial or out-of-court proceedings. The information obligation incumbent to all OCSSPs covered by the Copyright Directive should include (but not be limited to) the number of times the footprint has matched with content uploaded by users and analytics data on users' videos that have a fingerprint matched with the broadcasters' content.

  Platforms should be obliged to report to a regulator on all the processes they set in place to meet the obligations listed above, their successes, and the cases in which improvement may be needed. This reporting would engage the platforms in an administrative responsibility vis-à-vis the regulator, but it would be disjoint from the liability regime which remains separate and governed by the existing rules as further specified by case law.

- **Cost efficient processes.** The costs of operating of the content recognition tools and the costs of sending notices to OCSSPs which do not even provide such tools are substantial and increase depending on how much content commercial broadcasters need to block and how many platforms are being monitored. There are technical elements, administrative elements and labour elements to be included in those costs. In addition, these costs have to be replicated across each OCSSP. The less efficient the platforms tools are, the more resources need to be mobilised by commercial broadcasters.

Automated tools: risks and opportunities

The use of automated content management tools is necessary for the detection and identification of illegal content and has proved successful. Hosting providers should adopt measures to prevent the repeated uploading of illegal content and aim to effectively disrupt the dissemination of illegal content. This would be possible through greater adoption of automated content management services. So far, only a few platforms have developed their own content recognition technologies (e.g. Content ID for YouTube, Rights Manager for Facebook). The (many) others do not have recognition tools (e.g. Twitter, Periscope, Twitch) and rely on a notice and take down system. Each OCSSP has different requirements to operate against infringing copyright protected content, forcing broadcasters to duplicate costs for the protection of their content online, thus making the process extremely burdensome and often forcing broadcasters to outsource this task to specialised companies.

First, content recognition technologies deployed by User Uploaded Content (UUC) platforms should be subject to a transparency obligation with no possibility to oppose trade secret. This obligation would consist in opening up their algorithms to a Regulator/Regulators' group (at national or European level) which would assess whether those services effectively fight against illegal content uploaded by third parties. This assessment would rely on source codes provided by UUC platforms upon request of the competent Regulator. Without transparency, UUC platforms could manipulate at any time the efficiency of content recognition technologies they use and not constantly upgrade them to avoid new forms of circumvention. Furthermore, for content recognition technologies the Commission should support the development of ad hoc solutions supported by broadcasters. Algorithmic transparency is also key to unveiling opaque business models which monetise dubious and false content. As the Code of Practice on disinformation produced mixed results for this purpose, mandatory transparency obligations also for content recommendation algorithms, should be put in place. These measures would enable Regulators to have a clear overview of the promotion and monetisation practices carried out by UUC platforms on their services.

Second, UUC platforms should make the policies targeting repeat infringers public to ensure their more uniformed application and enforcement. UUC platforms have in place policies to target repeat infringers, for example restricting access to users who have been flagged to the platform on more than one occasion for uploading illegal content. However, such policies are not made public and they are applied in a haphazard way across the same platform.

"Overblocking"

Platforms have had content recognition technologies in place for many years now, which have proven to be an efficient way of checking the legality of content uploaded online by users. However, many online platforms are reluctant to use efficient technologies to fight against intellectual property rights infringement because it is precisely this kind of content - professional copyrighted materials illegally uploaded onto video sharing services - that attracts and retains users on the platform.

In addition, content over-blocking issues should be put into perspective. A recent study from CSPLA, HADOPI and CNC4, confirms that only a minority of internet users, just 4%, have already had their audio or video content blocked. Furthermore, the study states that very often, take downs resulting from the use of content recognition technologies are not contested and when they are, the reasons put forward only rarely fall under the scope of exceptions.

Last but not least, the study also states that the percentage of false positives (i.e. content which is wrongly identified) related to the use of existing content recognition technologies is also insignificant. Automated procedures can contribute to improve the functioning and performance of content recognition technologies. Algorithms, which are already used for non-copyright protected content, could complement and enhance existing practices. False positives could be integrated within the reference base to help these algorithms to better distinguish what should be recognised and what should not.

The number of complaints coming from users, following a take down, is in general very low. Users usually understand and accept that they have infringed rights. In most cases, complaints do not result in maintaining protected content online, except in the case of obvious good faith of the user (e.g. when the user shared a video of an interview in which he/she appeared). In reality, the number of erroneous take- down of content is extremely low as numbers show a ratio of 0.0002 % in the case of audiovisual content, 0.04 % in the case of music.

Data coming from content recognition technologies could be analysed, within the limits of data protection rules. This would allow OCSSPs to better identify users' history, and to prioritise cases requiring human review.

OCSSPs' pre-treatment of users' claims by artificial intelligence (pre-qualification by context analysis and users' history/track record) would facilitate and accelerate the manual treatment of these claims by rightholders (by reducing the number of claims to be reviewed manually once the complaint and redress mechanism is triggered). The principles and rules of this pre-treatment process have to be discussed between OCSSPs, rightholders and a public authority who is in charge of extra-judicial users' claims investigation, if any. Artificial intelligence can contribute to improve the functioning and performance of content recognition technologies. Algorithms, which are already used for non-copyright protected content, could complement and enhance existing practices. False positives could be integrated within the reference base to help these algorithms to better distinguish what should be recognised and what should not.

[4] *Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward*, Mission Report, French Ministry of Culture, 28 November 2019

Additional measures to detect, prevent and act on piracy

While maintaining liability exemptions for *passive* service providers, additional measures should be put in place to encourage all players to engage in a responsible behaviour to prevent the proliferation of illegal content and allow right holders proper information to verify:

- First, intermediaries providing commercial services to online businesses should implement a "**Know Your Business Customer**" protocol, i.e. verify the identity of their business customers and users wishing to monetise their content online as it is the case for providers of goods and services in the offline world. Otherwise, the default of identification of a potential infringer prevents from requesting for sentence or damages.

- Second, ACT members regularly use **WHOIS information** about the registration of domain names and related information[5]. In May 2018, Internet Corporation for Assigned Names and Numbers adopted a temporary policy intended to comply with the GDPR. This policy gave the relevant registrar or registry the authority to decide whether to accept or reject each access request and required that they grant access to entities that have a legitimate purpose for such access. In practice, almost all access requests (well over 90% in the practical experience of one group) are now denied, even when they conform with the requirements of ICANN's temporary policy. This contributes to a lack of accountability and facilitates the use of domain names for illegal purposes. It also contributes to decreased compliance with Article 5 of the e-Commerce Directive, which affirmatively requires online service providers to make publicly available a set of basic identity and contact information that is very similar to WHOIS data. The GDPR was never intended to cut off access to data for legitimate purposes; the unintended consequences it has had on the availability of WHOIS data deserve careful scrutiny.

- Third, the possibility of issuing **dynamic injunctions, catalogue or repertoire-wide injunctions**, as it is already the case in some EU Member States (e.g. Ireland), should be encouraged in other EU Member States. Service providers getting an injunction should act immediately.

- Fourth, the legal regime applicable to creators of hyperlinks who actively contribute to the dissemination of illegal streams should be clarified. Internet users wishing to watch infringing streams often use websites structured as **hyperlink directories**. These websites do not directly host infringing streams or content but point to them through hypertext links. The content can then be streamed by the user either on a third-party website (simple or deep link) or directly on the link directory (framing).

- Fifth, tackling **illegal offers from non-EU countries**. Infringements of intellectual property rights taking place outside the EU indeed constitutes a major source of concern. The European Commission's efforts to address this problem through bilateral and international trade initiatives, notably at the World Intellectual Property Organisation, are to be supported strongly. We would urge the Commission and Member States to continue to work at the global level for such an improved level of protection in order to grant a safer environment to those stakeholders who ensure the financing of professional quality content which lies at the heart of a thriving convergent media environment. In particular, the private copying exception should not be used to justify the online communication to the public of broadcasters' signals, for commercial gain or otherwise, without the owners' permission.

[5] Anticounterfeiting and antipiracy groups use such information to help identify, contact and/or take legal action against registrants of Internet domains where illicit activity, such as copyright infringement, is taking place. Other organizations similarly use this data to fight a wide range of online harms, including serious crimes such as fraud, cyber threats (e.g. phishing), fake pharmacies, and child exploitation. There is simply no question that the use of WHOIS data has many benefits for the protection of the public interest and the secure and stable operation of the Internet. Even the inaccurate or outdated information contained in WHOIS served as key indicators allowing investigators to link together entire networks of bad actors.

Covid-19 and the explosion of illegal content

In the context of Covid-19 crisis and vulnerability of EU consumers, illicit websites and illegal online services have prospered. Findings from digital piracy data specialist MUSO reveal that content piracy has significantly increased, with unprecedented gains for film piracy, since social distancing and lockdown measures were enforced in March.

When comparing the last seven days of March to the last seven days of February 2020, MUSO's data shows global film piracy increased by 33%. The study reveal insights for a number of EU Member States: Italy + 66%; Spain + 50%; Portugal + 47%; UK + 43%; France + 41%; Germany + 36%. This increase in visits to online film piracy sites in the last week of March reveals that as more countries enforced lockdown, and required citizens to self-isolate, demand for pirated online content grew exponentially.[6]

Major film titles have seen nearly three times as many links to illegal streams appearing online during the lockdown period, reports UK intellectual property protection body FACT. Analysis of specific films between April and May 2020 reveals an increase across titles in illegal streaming links since people started staying at home, with the number of infringing links more than doubling from February to April.[7]

[6] *Film & TV piracy surge during covid-19 lockdown*, Muso, 2020
[7] FACT: Illegal streaming triples during COVID lockdown, Piracy Monitor, May 15 2020

HARMFUL CONTENT: DISINFORMATION, POLITICAL ADVERTISING & PROTECTION OF MINORS

Disinformation – General remarks

Commercial broadcasters are professional media companies that focus on quality of news and reliability. This underpins viewer trust and with it loyalty. Viewer trust is a core driver of our activities and a key asset. Each broadcaster has one set of rules governing what it publishes and meets the responsibilities expected of them according to the laws in place that are there to ensure a functioning democracy. Broadcasters invests enormously in quality journalism, assign internal teams of experts who verify the authenticity of news content and proactively collaborate with experts to find disinformation that is circulating as they have an important role in promoting reliable and truthful information.

While each news organisation may have different criteria to assess disinformation, a consistent criterion throughout is whether the text, audio and/or video news piece intentionally misinterprets or distorts reality or constitutes statements that have no grounding in fact. It is important to exclude from this satire or other expressions that would qualify as opinions or predictions. Indeed, any definition should carefully preserve online individuals' freedom while respecting other individuals' right to be properly informed.

Disinformation, which is not necessarily illegal and therefore falls under the harmful content category, has been identified by International, EU and national bodies as one of the most detrimental negative externalities of online uploaded content, notably for the sustainability of democratic discourse and in the context of the current public health crisis. This should be the focus to ensure business models do not take advantage of disinformation or other harmful content.

Disinformation - Impact of Covid-19

The Covid-19 crisis has accelerated and magnified the impact of disinformation online, sometimes with deadly impact. There is an urgent need for effective instruments to better assess and successfully tackle the issue. This is highlighted in numerous reports. For the sake of brevity, we only mention here the EEAS Special Report: Disinformation on the Coronavirus – Short Assessment of the Information Environment (Link)

"With the outbreak of COVID-19, we have seen the proliferation of significant quantities of news, myths, and disinformation about it – coming from various sources both within and outside of the European Union. The World Health Organisation has stated that the outbreak of and response to COVID-19 has been accompanied by a massive "infodemic", which the WHO describes as an over-abundance of information – some accurate and some not – rendering it difficult to find trustworthy sources of information and reliable guidance […] despite their publicly announced measures, evidence indicates that platforms are continuing to host false and harmful ads that for example propagate "numerical codes" as a cure for COVID-19 or misrepresent quarantine as the first step in imposing NATO rule over Europe. ***This suggests that platforms have difficulties adhering to their own published standards and public commitments on preventing the proliferation of dangerous coronavirus-related disinformation, despite allocating significant resources to this task. As a result, this raises concerns that the problem is not merely the prevalence of harmful speech online but rather a system of broken incentives which prevents internet platforms from adequately protecting the public interest*** *[Bold and italic added for emphasis]. Moreover, the scope, impact, and success of the actions that platforms are taking is hard to assess independently, especially considering the restrictions on privacy-compliant access to public interest data for researchers."*

Disinformation – root causes

Providing a comparable set of rules for platforms is essential to ensure symmetry of rules applying to broadcasters and online platforms/social media. The latter have an impact on democracy and are far from being neutral, especially in opinion making. All should comply equally with basic sets of rules concerning privacy, transparency and truth. Especially more transparency should be requested with regards to prioritising, selecting and publishing which means how algorithms operate in their selection/choices.

Tangibly, viewers should be able to expect fast removal of disinformation, within a clearly defined timeframe, and a permanent removal of accounts whose core purpose is to produce/distribute/promote mis/disinformation. European regulators should also aim at tackling the root causes of this phenomenon, namely related to technological, economic and regulatory aspects. In this regard, the ACT welcomes the recent publication of a public consultation on the European Democracy Action Plan and will fully take part in this fundamental debate.

- **Technology/transparency**: Due to many readers relying on social media for information where they can access it for free and where no binding regulation on editorial responsibility exists, disinformation phenomenon has spread significantly. Tools/algorithms that are being used to select and promote content on platforms have been used to tailor news offerings to individuals. They are in this way contributing to the formation of echo chambers reinforcing biases based on assumptions of user's interest. Additionally, there is also a lack of procedures involving trusted, established and reliable journalists.

- **Economic**: The current online environment is advertising dominated resulting in a need to generate high levels of traffic in order to support the costs of storing such data. As such there is an economic disincentive for platforms or social networks to act decisively on content that generates high levels of traffic. Disinformation at its core is seeking to exist by creating buzz i.e. generating traffic.

- **Regulatory**: Due to over two decades of light touch regulation on platforms and social networks, users do not have the same level of protection when consuming media on platforms rather than on licensed broadcast channels. As such there is a general lack of media readability and literacy; contributing to general users' confusion. Advertising policy is a big part of the solution. Online platforms are clearly the publishers of the advertisements they display and should take responsibility for the content and placement of these advertisements on their networks. The lack of equivalent rules is creating economic and social harm; fuelling a wider public trust crisis with online disinformation threatening to drown out quality news and democratic debate (see our focus on disinformation).

Disinformation logical next step to fix gaps in Code of Practice is co-regulation

The ACT, along with other members of the Sounding Board (SB), calls for more ambitious proposals in line with the European Commission's own assessment report (VVA)[8] and ERGA's assessment[9] on the Code of Practice (CoP) on online disinformation.

Several European and national authorities have come to identical conclusions concerning the CoP. The instrument, while initiating an important dialogue and assessment period, has shown to be inadequate to address the source and drivers of disinformation propagated online as foreseen in the SB's assessment of the CoP.[10] This is having, in the context of the Covid-19 crisis where online disinformation has thrived, having a devastating impact on public health efforts.

[8] VVA study on the "Assessment on the implementation of the code of practice on disinformation" published on 8th May, 2020.
[9] ERGA'S Report on Disinformation, an Assessment on the Implementation of the Code of Practice on Disinformation published on 12th May
[10] Joint Press Statement of the Sounding Board of the Forum on Disinformation Issues; Their Unanimous Final Opinion on the so-called Code of Practice, Brussels September 26 2018, Link

The Sounding Board as such calls for progress on five dimensions – set out below – to support the fight against what the Director-General of the World Health Organization (WHO) has coined an infodemic[11]. A number of analyses at European and national level – regulators, legislators, academics, news professionals – paint a concerning picture that requires more than just reporting obligations. The Covid-19 crisis has accelerated and magnified the impact of disinformation online, sometimes with deadly impact (see below report from EEAS). There is an urgent need for effective instruments to better assess and successfully tackle the issue.

We note the announcements and modifications made by signatories of the CoP in regard to fighting disinformation related to Covid-19 on their networks. This demonstrates that, where willingness is present, these actors have the technical capacities to deploy solutions at scale to curb harmful content on their networks. It also demonstrates Europe's over-reliance on the good will of systemic players on vital issues. Terms of service and community guidelines cannot be a valid substitute for laws that must be applicable to all online players and are inherent to maintaining democratic discourse and public safety.

Co-regulation is welcome whereby the CoP did not constitute self-regulation, so this is a step in the right direction towards better oversight and incentives to effect change for the platforms that are co-signatories to the CoP. Co-regulation must ensure in its application that it boosts rather than penalises media; i.e. the measures in place should ensure journalistic freedom, fundamental rights and editorial freedom are guaranteed. We consider that the cooperation mechanism established under ERGA based on the Country of Origin is a welcome development.

As such ACT, along with other members of the Sounding Board (SB), calls on European policy-makers to ensure the following co-regulatory system would have the following measures in place:

- **Transparency and access to data obligations**. The lack of transparency, access to relevant/useful datasets, third party oversight has been a major impediment. Transparency and how it is delivered is a corner stone to achieve any progress on independently assessing disinformation, its effects and the effectiveness of measures in place. There is clearly a need for greater data sharing obligations between platforms and authorities.

- **Key Performance Indicators (KPIs)**. Strong indicators as part of the assessment tools used need to effectively describe meaningful progress within and between platforms signed up to the CoP.

- **Sanctions**. A meaningful sanctions regime should be put in place to ensure the co-signatories of the CoP have an incentive to act. This will also allow for a co-regulatory process that is financially self-sufficient rather than resting on public contributions. In so doing, European and national regulators should look at existing sanction regimes under the AVMS Directive as a model.

- **Structured Dialogue**. We have seen a number of Commissioners reaching out to individual signatories of the CoP. We would highlight the need for this conversation to be opened up as part of a structured dialogue with regular consultations including with the regulators (ERGA).

The ACT believes that the response to disinformation needs to be first and foremost borne by platforms. By putting all the responsibility on civil society and news media, the EU would essentially be advocating for a privatisation of gains from disinformation and a mutualisation of the risks of disinformation to society. While we encourage civil society to play a part, platforms should lead the way by investing and recruiting staff to ensure the environment they provide is trustworthy and safe.

[11] Secretary General, WHO, Munich Security Conference – 15 February 2020

Protection of Minors

Protection of minors is paramount for commercial broadcasters. Viewers' trust in our services is crucial for our reputations, and we all operate under the strict, and directly enforceable, content standards regulations of a national media regulator.

Although granular practices may vary slightly across territories and providers, all members are required to use a mixture of acoustic and visual warnings before challenging content, and restrict content unsuitable for children until after an agreed time in the schedule, known as "the watershed". PIN protection, managed by parents on the home set top box or device, is increasing widely available on linear and digital services.

Failure to adequately protect children from seeing harmful or unsuitable content can result in a broadcaster being publicly warned, fined, or barred from broadcasting.

The ACT believes that platforms should be held to similar high and enforceable standards, with an active enforcement by competent authorities.

We understand that broadcast codes of practice cannot be transplanted directly onto the online environment, but strongly believe that enforceable general principles can work on a European level, based on a co-regulation model of regulation, with an appropriate level of public authority involvement.

When it comes to harmonisation in this field, we believe that it is a very difficult task, mainly due to cultural differences. It has been discussed before that programme classification cannot be harmonised, due to the various different systems developed in the Member States. This remains valid. We also point at the principle of subsidiarity in this respect.

Political advertising

The term political advertising is used in practice, but it is not always clear what is meant by it.

Election and political broadcasts which are broadcast free of charge by broadcasters, must be distinguished from paid-for political advertising. This distinction is important for a number of commercial, compliance and legal reasons. There is a distinction between "paid for" and "free" political advertising:

"Free" political advertising is in the most cases an obligation to public and/or commercial broadcasters during election campaigns. These obligations are statutory, sometimes just mandatory by regulators and being derived from case law. The broadcasters are usually reimbursed for their technical costs either by the State or by the political parties (e.g. in Germany political parties are obliged to reimburse commercial broadcasters for the transmission costs – so called "Selbstkosten": self-costs).

We should also note that even unpaid political broadcasting causes real operational and compliance concerns. Problems have arisen in particular in the UK where the system guarantees a broadcast to any party fielding a certain number of candidates. Historically, there have been few problems with mainstream parties but with the cost of standing for election historically low in real terms, a number of fringe groups have recently qualified for a party election broadcast (PEBs). There are precedents where broadcasters have refused to air PEBs, notably from far-right or religious fundamentalist groups, on the grounds that the content would incite racial hatred. Typically, this is solved by editing changes, though there has been litigation on these points. On TV also general political communication is strictly regulated. For instance in Italy where political advertising on TV is banned, the time allocated to each political party is closely monitored, broadcasters face high compliance costs to provide equal treatment to all political parties and may be sanctioned by the Italian NRA if the timeslots are not balanced.

With regard to **"paid-for" political advertising,** at least three categories could be distinguished:

- **Paid-for party political advertising.** This category of advertising is banned in many European countries from television (while permitted in other media);
- **Paid-for "campaigner" advertising** have been banned from advertising in many television markets, although their aim (freedom for prisoners of conscience) may be thought uncontroversial. If the ECHR rulings do lead to a more open approach here, this could be of interest to companies given the increased involvement of NGOs in political life.
- **Paid-for "general interest" advertising** – such as get out the vote campaigns.

Europe needs new safeguards to guarantee transparency in digital political advertising, especially in times of electoral campaigns, that allow regulators to oversee who is funding what online, which means establishing an obligation for large online platforms to put a link on the person responsible for the uploading of content and, if the content has been sponsored, the platform should specify the uploader and corresponding financial transactions. The Code of Practice on disinformation does not foresee clear enforcement or sanction mechanisms. Having media strictly regulated while large online platforms can micro target voters and promote political campaigns with no transparency nor regulatory oversight is seriously affecting the broadcasters' capacity to with compete and risks drowning out quality news at great cost with severe impacts for our democratic processes. We encourage European policy-makers to adopt rules for online political and issue ads advertising in order to ensure greater transparency and limit practices that erode the democratic discourse.

GATEKEEPERS

General remarks

We welcome the Commission's intention to address the dominance of so-called 'gatekeeper platforms' as this is an issue crucial to the future sustainability of the audio-visual sector in Europe. Over the past decade gatekeeper platforms have had a significant adverse impact on news publishers – now mediating 40% of traffic to news websites and extracting extortionate 'rents' from their gatekeeper position over access to online audiences.[12] As audience behaviour changes and gatekeeper platforms start to play an increasingly important role in the supply of audio-visual content, there is a risk that these same platforms will engage in the same behaviour in the audio-visual sector: deciding what content is presented and promoted to European consumers; extracting gatekeeper 'rents'; and requiring that content providers use their own proprietary advertising services.[13]

While, larger content providers may have sufficient bargaining power to offset these issues, smaller operators, including those serving national and regional audiences, may face little choice but to pay with other currencies including adverse, windowing conditions, advertising revenue share, access to consumer relationships or valuable first party data – all of which increases the competitive strength of the gatekeeper platforms and reinforces their dominance. And, of course, the gatekeeper platforms are able to promote their own content services at the expense of the competition. Without regulatory intervention, these gatekeeper platforms will have little incentive to alter this behaviour. It is therefore crucial that the Commission takes action to address these issues.

In certain areas and certain circumstances, competition law cannot be sufficient to deal with all these issues and ensure competition in the platforms' economy. This is why ACT encourages the Commission to explore *ex ante* rules that may be needed on an ongoing basis to ensure that markets characterised by these gatekeeper platforms remain fair and contestable for broadcasters in Europe.

Gatekeeper platforms distort competition due to their multi-sided nature. If the challenges set by large online platforms as gatekeepers of the online economy can be addressed, Europe's media sector and media pluralism stands to benefit.

ACT supports policy options presented by the EC in the IIA where they aim at introducing an effective *ex ante* regulatory framework which would ensure that online platform ecosystems, controlled by gatekeeper platforms that benefit from significant network effects, remain fair and contestable. It is particularly necessary to intervene where such platforms, acting as gatekeepers, engage in anti-competitive practices such as self-preferencing, bundling strategies, predatory pricing, impeding access to data and/or abuse of data collection, etc.

These unfair commercial practices effectively hamper the ability for pure content players to compete on a level playing field and reinforce the dominance of large online platforms in distribution networks. The detrimental effects of these market distorting practices are compounded by gatekeeper platforms' dual role as distributors/publishers of content and their engagement in multiple activities across online markets, ranging from tech-products providers to online marketplaces. In certain circumstances, competition policies and tools have proven to be too slow or ineffective at providing remedies. An approach that builds on regulatory initiatives identifying the many issues raised by some practices of platforms with significant market power is welcome. Policy options should pay specific attention to large online advertising, access to data and market distortions caused by vertically integrated large online platforms acting as gatekeepers.

[12] *UK CMA Online platforms and digital advertising market study*, final report 1 July 2020, paras 6.36-6.43

[13] For example, Amazon's standard published terms for Fire TV Ad-Enabled apps states that "*Within six months of Amazon's request, Fire TV Ad-Enabled Apps must remove all third-party ad network monetization software and may only access third-party ad networks through Amazon Publisher Services*"

Gatekeepers: definition and characteristics

We welcome the Commission's intent to seek clear definitions are well established to ensure the focus of legislative intervention is well targeted. ACT broadly supports the approach taken by the European Commission and outlined in the DSA public consultation:

- Large user base
- Wide geographic coverage in the EU
- They capture a large share of total revenue of the market you are active/of a sector
- Impact on a certain sector
- They build on and exploit strong network effects
- They leverage their assets for entering new areas of activity
- They raise barriers to entry for competitors
- They accumulate valuable and diverse data and information
- There are very few, if any, alternative services available on the market
- Lock-in of users/consumers

ACT supports the view taken that flexibility in application, i.e. that gatekeepers may exhibit a combination of the traits above, will be needed given the variety of services under consideration and their interlinkages. We would also add other criteria to the list in the EC consultation:

- **Business dependency**: if a platform has the power to make or break the businesses that rely on its service it should be considered a gatekeeping platform, as confirmed by Executive Vice-President Vestager in her speech on 26 June 2020 "Not every platform is one of those huge gatekeepers, with the power to make or break the businesses that rely on it".
- **Market power**: the level of the market capitalisation of the company owning the platform is a relevant indicator. This indicator was particularly revealing in the context of the health crisis where global players were the only ones to have emerged stronger.
- **Online advertising**: the capture of a very large part of the income from online advertising is also a relevant indicator to consider in characterizing the role of gatekeeper of large online platforms.

We also, in accordance to the Commission's Consultation, would indeed identify all and any data driven business integration within a single company, especially when these entities leverage their power by combining data collected on their different proprietary services, as further strengthening the gatekeeper role of large online platforms. To which we would add audiovisual media services as well as voice assistance services as a further service to be considered specifically.

The definition of gatekeeper platforms must be well scoped to specifically target systemic platforms and avoid adding regulation on services and companies that are already under significant regulatory scrutiny. Regulation should focus on bringing proportionate remedies. We further point out the use of a conglomerate effect by large online platforms, where such effect gives the capacity "to leverage a strong market position in one product market across to a complementary or similar product market in which the merging party is also active". In the case of online gatekeepers, this effect can reach across seemingly unrelated markets.

We note and commend the conclusions drawn by the UK Competition and Markets Authority which, following its market study into online platforms and digital advertising concluded that "*a lack of competition in digital advertising, combined with other features of the market including lack of transparency and the role of data, creates an ability for Google and Facebook to exercise market power and leads to worse outcomes for advertisers and*

publishers".[14] We would encourage the Commission to adopt a similarly flexible approach to tackle large online platforms and their network effects.

ACT foresees that this ultimately means measures that are respectful of sector specific rules, notably as concerns media and copyright laws. Sector-specific regulation should remain *lex specialis*. This should lead to pro-competitive structural changes to deliver a level playing field and fair competition in the digital sphere, ensuring notably that broadcasters have fair access to the data they generate whilst enabling the vast revenues generated by digital advertising to be redirected to Europe's creative ecosystem.

Unfair practices: What are the issues faced / What is the impact on the media sector?

Broadcasters are increasingly reliant on the large online platforms for access to audiences and are at the mercy of how these platforms choose to surface their products and services.

General Online Search: Commercial broadcasters' websites and other legal services feature in online search engines' results yet rarely appear in top results of user queries. Results displayed often favour the platform's own or subsidiary services. An even more damaging situation occurs when results pointing to illegal services and/or infringing content are preferred to right holders' (e.g. broadcasters') own services.

App Stores: Commercial broadcasters offer their services through mobile applications that are available to users via Platform owned/controlled app stores. Such app stores do fall under the definition of an online intermediation service. As business users of large online platforms, broadcasters encounter issues concerning trading conditions on large online platform companies.

Specialist Search and Audio-visual Services: increasingly audiences expect search and curation tools for specific good and services e.g., shopping, flights, hotels, location/maps and video. The large online platforms have all developed (or are rumoured to be developing) devices and user interfaces that provide a curated audiovisual experience. Given the dominance that these platforms have over other digital services, it is highly like that these interfaces will be crucial routes to market for broadcasters in the future. For example, Google (Android TV) and Amazon have ambitions, through arrangements with OEMs to become the default provider of operating systems for a potentially wide range of connected (IoT) devices: connected TVs, soundbars and speakers etc.[15]

In all of these areas, broadcasters encounter precisely the behaviour outlined in the Consultation (e-commerce marketplaces, app stores, search engines, operating systems and social networks) which is designed to entrench the dominance of the large online platforms. Examples of general practices that have very detrimental effects are:

- Exploitative charges for content prominence including fees, advertising revenue share, control over advertising inventory and access to first party data (e.g. viewing behaviour)
- Discriminating competitors' services for the benefit of their own services (referencing, prominence…)
- Impeding access to markets
- Using abusively data collected from third party
- Complicating interoperability
- Impeding multihoming

[14] UK CMA Online platforms and digital advertising market study, final report 1 July 2020, para 5.3: https://www.gov.uk/cma-cases/online-platforms-and-digital-advertising-market-study

[15] *Fire TV Edition expands to more soundbars, plus cars, cable boxes and more*, TechCrunch, Sarah Perez, January 6, 2020

Focus on commercial terms: billing, differential treatment and access to data

Commercial terms and conditions are an additional identified concern when accessing services provided by large online platform. This is notably prevalent in billing, differentiated treatment, access to and transparency of data, and use of data for competing services.

Providers of online intermediation services often impose their own billing systems in their Terms and Conditions. For instance, they automatically charge a non-negotiable part of the revenue to every business user. App-stores take up to 30% of the value of every transactions made inside their platforms. This artificially imposed charge together with the dominance of only few large online platforms results in an unjustified 'tax' that all app developers have to pay to gain access to consumers. Business users should be given the chance to negotiate it. This loss of revenues is affecting our ability to reinvest in creative quality content. In addition, content providers often choose to implement a complicated browser-based payment route, rather than incur the charge. This is a poor consumer outcome as it would be far better if users were able to directly transact through the app. It also favours platform providers competing services as they can provide a smoother customer journey. Business users should also be able to have recourse to other forms of billing system than the one imposed by online intermediation services.

In certain cases, differentiated treatment results from preferential deals being made between the online intermediation service or one of its vertically integrated services and content providers. Such deals prevent the content providers from negotiating similar or better conditions (e.g. on pricing policies) with other business users that are competing on the same market as the online intermediation service's controlled business user/subsidiary.

Broadcasters invest billions of euros each year in content and, thus, should have access to valuable data generated from the consumption of their content. The P2B Regulation[16] was a first step towards bringing more transparency in large online platforms' trading practices. However, additional rules granting access to data generated from the use of the broadcasters' services or content on some large online platforms are needed. Regulation on handling of data must make sure markets are kept viable, contestable and balanced.

Broadcasters' analysis of own content consumption's data is key to:

- Operate and improve services offered;
- Make the best choice in terms of content production and financing;
- Enhance the content's value on the advertising market.

Access to data generated from the use of the broadcasters' services or content on a platform is therefore extremely important, mainly to improve and adapt the broadcasters' services/content to the viewers' expectations (e.g. on social media). Currently, there is often a lack of transparency about the usage of personal data by online intermediation services (e.g. the way personal data is used by the online intermediation services to boost their revenue). The use of data by the online intermediation service should be limited to the sole purpose of providing their service. To increase transparency, the online intermediation service provider should precisely list and communicate to the business user the information it has access to.

It is currently impossible to prevent online intermediation services from having access to the business users' customer base data, which does not benefit consumers in the European Union. Such data, when processed by the online intermediation services, should be aggregated and anonymised for data protection purposes. This would prevent providers of online intermediation services from having unjustified and broad access to the broadcasters' customers' data.

Access to data is indispensable for competing in the market. Currently, it is largely unsettled who owns which data (and, in some cases, to which degree). Main issues broadcasters are facing with regard to access to data, relate to advertising but also to users' consumption of content. Additional rules granting access to data generated from the use of the broadcasters' services or content on some large online platforms are needed. The EU institutions should

[16] Regulation on promoting fairness and transparency for business users of online intermediation services

explore creating obligations to ensure data generated from content viewing is made accessible to the media companies financing the content whilst limiting platform providers' ability to collect non-essential data especially for the benefit of their own competing services.

Platforms deny broadcasters access to data related to the usage of their services, with the excuse of privacy. Platforms, which are in direct contact with the consumers and easily collect their consent, have expanded into other related businesses, with the objective of accessing more data. Also, while some gatekeeping platforms are collecting consent in non-transparent and potentially non-GDPR compliant ways, they are claiming GDPR compliance to close the market to competitors. This increases their advertising revenues and their understanding of the consumer in markets where they are both player and referee. Ultimately, it leads these platforms to increasingly propose services similar to the one offered by broadcasters.

Focus on the online advertising market

Unfair competition in the online advertising market comprises several anti-competitive practices (e.g. unequal access to user data; vertical integration and conflicts of interest). Some large online platforms have consolidated dominance in the ad-tech market via distortive practices. The regulatory toolbox should aim at setting prohibitions and obligations to large online platform companies with gatekeeper role:

- Favouring integration with their own technologies, therefore limiting the monetisation opportunities for broadcasters which have not adopted the platform's proprietary Adserver (technology that manages advertising spaces on digital properties, such as mobile, desktop and connected TVs)
- Providing free to use data on Buying Platform, thus limiting the opportunities for broadcasters to offer profiled advertising spaces
- Controlling the timing when competing offers can be integrated in the buying platform, thus making market access very difficult for independent technology providers
- Imposing on their services their own proprietary Adserver, which limits the opportunities to monetise content cross-platforms
- Selling advertising space on broadcaster's content once it is uploaded on the platform and retaining a share over the broadcaster's own sales
- Impeding competitors from achieving scale on their platform as dominant platforms can create conditions so that other sales houses cannot aggregate different content owners (like broadcasters and publishers)
- Preventing access to platforms' own advertising inventory, i.e. broadcasters are prevented from serving advertising against their own content in proprietary services (e.g. YouTube)

Data provides broadcasters with important insights on how content is consumed by audiences and helps them make important business decisions on improving services, content programming and advertising deals. At present, broadcasters can't access data on the number of views of their content on the platforms nor data on the number of users viewing the related advertising. Data is the new currency for programmatic advertising. This is controlled by a global dominant player which requires access to its clients' data (both on the supply and on the demand side) to monetize on the client's data. Publishers/broadcasters have no other choice but to make their data available to a global dominant platform, which gains access to and processes more and more data, and consequently takes hold of the client's assets in a way which cannot be considered fair.

The EU institutions should study the broad issues at stake and reflect on solutions enabling a pro-competitive online advertising market. Digital advertising is a vital part of content providers' business. Mechanisms that address distortive and exclusionary practices, carried out by gatekeeping players in the online advertising market, are essential to ensure broadcasters' ability to continue to invest in quality content and deliver a rich and varied offer in the Digital Single Market. Unfair competition in the online advertising market is a facet of a wider picture which comprises several anti-competitive practices (e.g. unequal access to user data; vertical integration and conflicts of

interest). In competition terms, this ultimately means weighing the competitive outcomes of significant changes to search, social networking and advertising services.

Impact on media sector, economy and society

ACT agrees with the general impacts noted by the EC in its Ex Ante IIA, namely:

- *imbalances in the bargaining power between large online platforms on the one hand and their users and rivals on the other, a trend which is expected to increase in the future.*
- *reduced competition and dynamism and consequently reduced choice for consumers and business users in the long-run and their ability to take full advantage of the digital single market.*
- *risk of adjacent market also tipping in favour of small number of large online platforms to the detriment of innovation and consumer choice.*

As concerns media specifically, we would encourage the Commission to highlight - beyond the ambition of ensuring contestability, fairness, innovation and market entry - the need to also promote a level playing field that supports essential values such as cultural diversity and media pluralism. This dimension needs to be further emphasised in the scope of the issues covered, the associated impact assessments and the social/economic impacts under consideration.

In so doing, we recall that "Media freedom and pluralism are pillars of modern democracy as they are essential components of open and free debate. The European Union's commitment to respect the freedom and pluralism of the media as well as the right to freedom of expression - which includes the right to receive and impart information without interference by public authority - are enshrined in Article 11 of the EU's Charter of Fundamental Rights. The latter mirrors Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms"[17].

Media pluralism will require specific attention because of its economic and wider social implications, which cannot be divorced from the DSA discussion as regards impact assessment. The *Council conclusions on the strengthening of European content in the digital economy*[18] point to:

> *"global online platforms* […] *in particular the algorithm-driven business models of those online platforms which offer cultural and creative content, including media content, and which are based on the personalised distribution of content and advertising targeted at users have raised questions concerning transparency, disinformation, media pluralism, taxation, remuneration of content creators, protection of privacy, promotion of content and cultural diversity;*

The Conclusions go on to set out the following political priorities*:*

> *A. Fostering diversity, visibility and innovation*
> *B. Establishing a level playing field*
> *C. Strengthening trust in information and sources*
> *D. Improving skills and competences.*

The above set of "questions" and the political priorities continue to be relevant for the approach to ex ante rules. The level playing field, media pluralism, trusted information, diversity and innovation are all part of the impacts to be assessed. The DSA, and the specific ex ante provisions, are an opportunity to deliver a toolkit of measures towards shaping a comprehensive balanced, healthy and competitive online environment for Europeans and their media ecosystems. This means addressing a number of negative societal and economic effects of the gatekeeper role that large online platform companies exercise over whole platform ecosystems through dedicated regulatory

[17] EC Website - Media Freedom and Pluralism
[18] Council conclusions on the strengthening of European content in the digital economy (2018/C 457/02)

rules. These rules should prohibit certain practices by large online platform companies with gatekeeper role that are considered particularly harmful for business users and consumers of these large online platforms.

Governance

As a trade association ACT does not believe that it is its role to define how Governance measures are defined and where authority should reside as regards regulatory oversight and the application of remedies.

The ACT would however necessarily foresee that, given the scope of the actors concerned and their large presence across European markets, an intervention at EU level would be required with stronger and more efficient cooperation mechanisms with national competition and other authorities. The focus should be on ensuring rapid intervention, reduce fragmentation and apply remedies effectively.