

## Contribution of the German Association for the Digital Economy (BVDW) e.V. to the Consultation of the European Commission: Digital Services Package

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### Preliminary Remarks

The German Association for the Digital Economy (BVDW) e.V. has been representing businesses in online marketing since 1995. Nowadays, it also incorporates many members from the traditional industry as well as globally operating IT players from all over the world. The more than 700 companies that are now organized within the BVDW thus cover the entire spectrum of the diverse digital economy. Its positions therefore represent a valid compromise of interests that applies to the industry as a whole.

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### Answers to Section II and III

#### **Section II. Reviewing the liability regime of digital services acting as intermediaries?**

The liability of online intermediaries is a particularly important area of internet law in Europe and worldwide. The E-Commerce Directive harmonizes the liability exemptions applicable to online intermediaries in the single market, with specific provisions for different services according to their role: from Internet access providers and messaging services to hosting service providers.

The previous section of the consultation explored obligations and responsibilities which online platforms and other services can be expected to take – i.e. processes they should put in place to address illegal activities which might be conducted by users abusing their service. In this section, the focus is on the legal architecture for the liability regime for service providers when it comes to illegal activities conducted by their users. The Commission seeks informed views on how the current liability exemption regime is working and the areas where an update might be necessary.

**2. The liability regime for online intermediaries is primarily established in the E-Commerce Directive, which distinguishes between different types of services: so called 'mere conduits', 'caching services', and 'hosting services'.**

**In your understanding, are these categories sufficiently clear and complete for characterizing and regulating today's digital intermediary services? Please explain.**

### **ANSWER:**

*BVDW would like to stress in this context that it is generally important for our members to stick to the basic principles established in the E-Commerce Directive such as*

*the country of origin principle as well as the prohibition of general monitoring obligations. This is also the case for the basic principles of the liability regime and its limited exemptions from secondary liability. The regime and its categories should hence remain valid as it has been important in the past decades and is still important to enable innovation and to allow the digital economy to flourish. In our view it remains a good harmonized but graduated and conditional liability regime.*

*However, in order to take into account technological developments as well as the development of the ecosystem as such, BVDW is of the opinion that we should add to the existing regime by having a clear best efforts clause.*

*Companies acknowledge their own responsibility in dealing with illegal activities and therefore establish own procedures to tackle the problem. It would be therefore appropriate to acknowledge these industry best efforts by taking into account within the existing liability regime good faith measures that companies themselves chose in order to address illegal activities within their services. It would be unfortunate, if they would lose the protection from liability for exercising due diligence.*

*We will further explore this concept in the questions below.*

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For hosting services, the liability exemption for third parties' content or activities is conditioned by a knowledge standard (i.e. when they get 'actual knowledge' of the illegal activities, they must 'act expeditiously' to remove it, otherwise they could be found liable).

### **3. Are there aspects that require further legal clarification?**

#### **ANSWER:**

*BVDW is of the opinion that this basic structure is still valid, however we do have to discuss the scope of "actual knowledge" in the context of proactive measures. See our answer to question 4.*

### **4. Does the current legal framework dis-incentivize service providers to take proactive measures against illegal activities? If yes, please provide your view on how disincentives could be corrected.**

#### **ANSWER:**

*First of all, we would want to stress that the Digital Services Act needs to be seen in the context of all sectorial legislation and debates that have been held. It is very important that the DSA establishes a system that is coherent and aligns with this legislation.*

*We would like to stress here once again as well that the prohibition of imposing general monitoring obligations is still crucial and needs to be kept within the E-Commerce Directive. This general principle should however still allow proactive measures that do not equal a general monitoring of the services or impact freedom of expression.*

*BVDW is furthermore of the opinion that the current legal framework does dis-incentivize proactive measures and the E-Commerce Directive would hence benefit from changes in this regard.*

*As mentioned in question 2, we think that it would be a beneficial addition to the system and an incentive, if a company could take good faith proactive measures to fight illegal activity within their service, without being in danger of liability if they might have*

missed some information or content along the way of the proactive measure. Such a "best efforts" clause would ensure that a mistake would not result in the conclusion of additional "actual knowledge" and thereby liability. Having such a safeguard for proactive measures, next to the established notice-and take down procedure, would incentivize companies to take these measures more often and thereby making the internet safer. At the same time, it would reduce the risk of overblocking because companies have less fear of liability while taking proactive measures and in cases where they are not sure if an activity or content is actually illegal or not, they would rather keep it online than deleting it to evade liability.

Alongside with this "best efforts" clause for proactive measures, we need to ensure that there is also a remedy option. For a system allowing good faith proactive measures with an exemption from liability as described above, it is crucial that there is also a possible remedy for affected users/companies if they are of the opinion that content has been taken down without proper justification or if they have arguments that the content was not illegal. There is hence a need for a balanced approach ensuring that a remedy against take-downs is also available in the context of proactive measures and allowing a re-upload in case of mistakes.

**5. Do you think that the concept characterizing intermediary service providers as playing a role of a 'mere technical, automatic and passive nature' in the transmission of information ([recital 42 of the E-Commerce Directive](#)) is sufficiently clear and still valid? Please explain.**

**ANSWER:**

No, BVDW is of the opinion that this concept is not up to date anymore due to the distinction that that it suggests. A distinction between active and passive hosts is not reflecting today's realities anymore and creates rather uncertainties for current services. There are different degrees of involvement of service nowadays and almost no services are just active or just passive, even though there might still be some services of that kind left. Therefore, it is still very important for the digital economy to have a concept of distinction which clarifies that certain services are not able to control the content or certain activities within their service as others. It would hence be necessary to specify a new concept that reflects these realities. We take the view that the Digital Services Act should therefore explore better concepts such as the "degree of control" of a service provider or to focus generally on the actual knowledge of the service provider (together with the best efforts clause).

**6. The E-commerce Directive also prohibits Member States from imposing on intermediary service providers general monitoring obligations or obligations to seek facts or circumstances of illegal activities conducted on their service by their users.**

**In your view, is this approach, balancing risks to different rights and policy objectives, still appropriate today? Is there further clarity needed as to the parameters for 'general monitoring obligations'? Please explain.**

**ANSWER:**

Yes, BVDW is of the opinion that this concept is still very appropriate today and needs to be kept because it is crucial to protect fundamental rights, freedom of expression and privacy online.

### **Section III. What issues derive from the gatekeeper power of digital platforms?**

There is wide consensus concerning the benefits for consumers and innovation, and a wide-range of efficiencies, brought about by online platforms in the European Union's Single Market. Online platforms facilitate cross-border trading within and outside the EU and open entirely new business opportunities to a variety of European businesses and traders by facilitating their expansion and access to new markets. At the same time, regulators and experts around the world consider that large online platforms are able to control increasingly important online platform ecosystems in the digital economy. Such large online platforms connect many businesses and consumers. In turn, this enables them to leverage their advantages – economies of scale, network effects and important data assets- in one area of their activity to improve or develop new services in adjacent areas. The concentration of economic power in then platform economy creates a small number of 'winner-takes it all/most' online platforms. The winner online platforms can also readily take over (potential) competitors and it is very difficult for an existing competitor or potential new entrant to overcome the winner's competitive edge.

The Commission announced that it 'will further explore, in the context of the Digital Services Act package, ex ante rules to ensure that markets characterized by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants'.

This module of the consultation seeks informed views from all stakeholders on this framing, on the scope, the specific perceived problems, and the implications, definition and parameters for addressing possible issues deriving from the economic power of large, gatekeeper platforms.

The Communication 'Shaping Europe's Digital Future' also flagged that 'competition policy alone cannot address all the systemic problems that may arise in the platform economy'. Stakeholders are invited to provide their views on potential new competition instruments through a separate, dedicated open public consultation that will be launched soon.

In parallel, the Commission is also engaged in a process of reviewing EU competition rules and ensuring they are fit for the modern economy and the digital age. As part of that process, the Commission has launched a consultation on the proposal for a New Competition Tool aimed at addressing the gaps identified in enforcing competition rules. The initiative intends to address as specific objectives the structural competition problems that prevent markets from functioning properly and that can tilt the level playing field in favour of only a few market players. This could cover certain digital or digitally-enabled markets, as identified in the report by the Special Advisers and other recent reports on the role of competition policy, and/or other sectors. As such, the work on a proposed new competition tool and the initiative at stake complement each other. The work on the two impact assessments will be conducted in parallel in order to ensure a coherent outcome. In this context, the Commission will take into consideration the feedback received from both consultations. We would therefore invite you, in preparing your responses to the questions below, to also consider your response to the parallel consultation on a new competition tool.

**1. Do you believe that in order to address any negative societal and economic effects of the gatekeeper role that large online platform companies exercise over whole platform ecosystems, there is a need to consider dedicated regulatory rules?**

- I fully agree
- I agree to a certain extent
- I disagree to a certain extent
- I disagree
- I don't know

**2. Please explain**

**ANSWER:**

*BVDW has also shared its views during the national discussions in Germany on an updated Regulation in the area of competition law and possible additions to tackle the asymmetry in digital markets.*

*First of all, it is important to clarify in this context that market power as such and being a large online platform is not a negative trait. Having a successful business that flourishes and is used by many people and thereby resulting in market power is part of the economy and should not be seen as problematic as such. However, market power becomes problematic once this power is abused. This is the basis of competition law at national as well as EU-level and should remain the basis of these discussions.*

*At the same time BVDW recognizes that the digital economy is characterized by a clear asymmetry that has not been seen before and therefore it is crucial to adapt the current legal regime to ensure fair competition in digital markets and thereby a level playing field. The digital ecosystem has developed rapidly over the last decades and there are new practices that hinder competition which could not have been foreseen before. When developing new rules to tackle this problem, it is important to ensure at the same time that innovation is not hindered. We need deliberate policy to create conditions where competition and innovation can still flourish.*

**3. Do you believe that such dedicated rules should prohibit certain practices by large online platform companies with gatekeeper role that are considered particularly harmful for users and consumers of these large online platforms?**

- Yes
- No
- I don't know

**4. Please explain your reply and, if possible, detail the types of prohibitions that should in your view be part of the regulatory toolbox.**

**ANSWER:**

*BVDW recognizes the need to think about prohibiting certain practices to ensure fair competition. Given the wide range of online platforms and various practices that might be covered, potential prohibitions should however be tailored to the type of platform and be balanced. The list of prohibitions should hence not be vast but proportionate yet effective for the European market.*

Examples of prohibitions to consider would be in our opinion:

- The practice of excluding third-party services (e.g. ad servers, SSPs) from competing on their digital properties (e.g. ad exchange); or creating technical hurdles (latency, lack of interoperability) that disadvantage those services;
- To directly or indirectly hinder competitors in a market in which the large online platform can rapidly expand its position even without being dominant, if they have for example certain resources at their disposal with which they can gain a clear advantage over competitors in that other market. Such advantages could be access to customers or individual data collected over long periods of time on the behavior and preferences of a large number of consumers;
- In this context also the use of data that is relevant for competition from the opposite side of the market. This applies to constellations in which competition-relevant data can be collected in one dominant market, which is then used to unfairly hinder competitors in another, not yet dominant market. The combination of competition-relevant data from different sources has a particular potential for harm when used unfairly.
- Intentional obstruction of interoperability and portability
- Self-preferencing of its own services through algorithms or technical means (e.g. auction systems favoring own services)

When further thinking about and developing these ideas of possible prohibitions, it is important to make them as clear and specific as possible and ensure legal certainty. This is crucial for the digital market and all its players.

**5. Do you believe that such dedicated rules should include obligations on large online platform companies with gatekeeper role?**

- Yes
- No
- I don't know

**6. Please explain your reply and, if possible, detail the types of obligations that should in your view be part of the regulatory toolbox.**

**ANSWER:**

Next to the prohibitions, it would also be important to set obligations. When talking about obligations, we would like to raise that the implementation of already existing legislation such as the Platform to Business (P2B) Regulation should be kept in mind. As well as the ongoing consultation and discussions about a New Competition Tool (NCT) which will provide competition authorities with new powers. The P2B Regulation is of course a piece of legislation that addresses all online platforms, but it does create transparency requirements and rules for trading practices that also need to be fulfilled by large online platforms.

However, BVDW is of the opinion that obligations for platforms with gatekeeper role should go further than these horizontal measures, as these are not sufficient to cure the durable competitive issues associated with gatekeeping platforms, though being a good starting point.

Examples of obligations that we see fitting are the following:

Fair terms:

- limits on commission rates

- access to data on content consumption and marketing performance.

Competitive choice and control:

- access to platforms for third party tech solutions, including interoperability obligations.

Transparency:

- Independent audit of platforms' measurement with regard to audiences and advertising efficiency.
- ability for regulators to audit algorithms to prevent platform self-preferencing;
- more clarity over the functioning of advertising auctions, including the provision of log-level data and independent audits;
- Transparency of listing criteria.

Interoperability

**7. If you consider that there is a need for such dedicated rules setting prohibitions and obligations, as those referred to in your replies to questions 3 and 5 above, do you think there is a need for a specific regulatory authority to enforce these rules?**

- Yes
- No
- I don't know

**ANSWER:**

*The important element that we want to raise here is that of enforcement. Once prohibitions and obligations have been developed, there needs to be an entity that is allowed to enforce the rules. Whether this is done through a specific regulatory authority or an existing structure, is in our view secondary. In view of the need to reduce bureaucracy and budgets and to be as efficient as possible, it would be appropriate in our view to evaluate first, whether an existing EU-Agency or structure could take on this task, before creating any new regulatory authority.*

*Furthermore, we are of the opinion that the design and enforcement of remedies / obligations should be done on a case by case, targeted and evidence-based basis. The chosen existing or new authority in charge of designing and imposing remedies should be equipped with sufficient institutional fire-power to ensure meaningful and relevant intervention and harmonized ruling and enforcement across the EU to avoid fragmentation. Otherwise, the respective ex-ante regulatory regime runs into serious danger of becoming a toothless tiger, failing to restore effective and fair competition to the detriment of consumers and innovation.*