verizon media

Department for Enterprise, Trade and Employment:
Call for views in response to the European Commission's
Digital Services Act and Digital Markets Act proposals

Comments from Verizon Media EMEA
January 2021

1. Introduction

1.1. Verizon Media appreciates the opportunity to respond to this call for views.

1.2. The Digital Services Act (DSA) and Digital Markets Act (DMA) proposals would introduce significant new regulation for certain firms operating in the EU single market. This will have particular impact on Ireland as a digital 'front runner'.

1.3. We therefore welcome Government calling for views early in the process in order to gauge stakeholders' feedback on the proposals and shape discussions in the legislative process from the outset. The DSA and DMA are very complex proposals and the drafting raises a number of questions. We provide here some preliminary comments and may add to them after further study and as the legislative process moves forward. We encourage Government to continue with this engagement throughout the process.

2. About Verizon Media

2.1. Verizon Media is a global house of digital media and technology brands. Verizon Media's brands include Yahoo, AOL, Ryot, TechCrunch and BUILD. We are a challenger in digital advertising and a competitor to the market leaders. Through our own operations, and in partnership with others, Verizon Media helps drive diversity and choice in consumer services and brand advertising.

2.2. Verizon Media EMEA operates as a business division of Verizon Communications Inc. Verizon Media operates in Ireland as Verizon Media (EMEA) Ltd.

3. General comments

3.1. The proposals to introduce a Digital Services Act and Digital Markets Act sit within a wider EU digital policy strategy which aims to support growth and investment in the digital sector as the EU's economy recovers from the impact of the pandemic. It is also driven by a desire to see competing EU businesses and inward investors thrive in the EU and bring greater diversity and competition to the digital single market. The economic intentions behind this strategy are very welcome.

3.2. However, policy-makers must be mindful of the current pace and veracity of new regulation in digital markets. There has been a rapid increase in EU regulation

targeting digital businesses in recent years, including P2B, AVMSD, GDPR and now DSA and DMA. The cumulative effect of new regulation needs very careful consideration. For example, common features such as transparency reporting and turnover fines bear heaviest on competing firms and market entrants. More regulation based on this model will, over time, increase the cost and risk of doing business in the EU and could erode business cases for new investment including by EU firms.

3.3. When growth is depressed, as it is now as a result of Covid-19, the design and implementation of new legislation and regulation requires particularly careful consideration in order to balance competing policy goals. Specifically, it must be appropriately targeted, proportionate to the policy goal and based on robust evidence so that competition can thrive.

3.4. Many of these points were acknowledged in the IIAs (Inception Impact Assessments) on which the European Commission consulted in 2020. The intention was welcome. On the other hand, the DSA and DMA proposals are very broad in their scope of application and, in their current form, would extend further than originally intended and are insufficiently precise and nuanced. Exceeding what is the most appropriate and least intrusive instrument to achieve the desired objective could see the EU fall short on its economic goals. We comment on this point in more detail below.

3.5. Finally, policymakers must also consider the impact of member states rules which sit alongside EU ones. Companies increasingly have to comply with a complex patchwork of overlapping, and sometimes conflicting, rules at both member state and EU level, in addition to company and industry initiatives designed to tackle online harms. This is a particular feature of digital regulation and adds further complexity and risk to investors in the EU digital single market. It also undermines many of the benefits of the single market for business.

3.6. While a key justification for market intervention at the EU level is to avoid fragmentation, it is unclear whether member states are required to repeal their domestic measures or forebear new ones. This will need clarification.

Digital Services Act

Chapter II

4. Limitations to liability

4.1. The European Commission's renewed commitment to the legal principles limiting the liability of online intermediaries is very welcome, as is the intention behind the Good Samaritan protection for action against illegal content introduced in Article 6. The Government's early engagement on this issue has helped raise political awareness of the continued importance of these principles to support growth and innovation in the digital economy.

4.2. The current limitations to liability framework is essential to the effective functioning of the internet and provides a flexible and foreseeable framework to navigate a fast-evolving environment.

4.3. We note below, however, that the design and operation of the 'notice and action ' process presents a number of issues which will need to be addressed so that the limitations to liability principles provide the certainty and support intended.

5. Scope

5.1. The stated purpose of the DSA is to set out what action responsible providers can and should take to address illegal content and conduct on digital services. The policy discussion until now has focused on services which present identifiable risks present on particular types of online services but the DSA proposals go considerably further.

5.2. The DSA creates an extremely broad scope of regulated activity which encompasses a wider spectrum of online activities than the IIA seemed to propose. The threshold for statutory intervention is set low and seems not to be tied to the level of risk to consumers, unlike the Online Safety and Media Regulation Bill. We comment on the specific proposals in more detail below.

5.3. The DSA proposes some exclusions, focusing on services which do not disseminate information to the public (such as private communications including email) or where this feature is ancillary to the main service (such as user comments in news articles). This is very welcome.

Chapter III

6. Section 1 - All providers of intermediary services

6.1. This section requires all intermediaries to provide a point of contact and clear terms and conditions. This does not seem onerous and broadly mirrors existing obligations in the eCommerce Directive.

6.2. There are additional requirements, however, which are more significant. For example, all providers would be required to publish details of "*procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review*" (Article 12). Such obligations could be interpreted as requiring companies to disclose details of methodology to detect suspect activity or commercially sensitive information, for example about algorithms.

6.3. There is also a requirement for all intermediaries to publish transparency reports (Article 13).

6.4. The requirements of Article 12 and 13 seem designed for intermediary activities involving disseminating information or providing interactive services or marketplaces to end users. Yet the obligations extend to *all* intermediary activities - mere conduit, caching and hosting - and all providers of them. This is a vast number

of providers, including providers of B2B intermediary services deep within digital supply chains.

6.5. The case for applying these requirements to such a broad range of intermediaries is not at all clear and would be disproportionate for some intermediary activities. It also ignores that some B2B activities are subject to other regulations or industry standards and may require independent audits or transparency reporting of intermediary activities. For example, there is a large number of such schemes in the digital advertising ecosystem to address - among other things - fraud, misplacement and transparency in the supply chain.

6.6. The scope of Articles 12 and 13 should therefore be reconsidered and narrowly targeted on specific categories of intermediary activities where there is a clear need and purpose for these measures. These rules must not create overlapping obligations with established and well-functioning schemes already in operation. This approach would be more scalable and avoid member state authorities quickly becoming overwhelmed by the volume of businesses these articles would require them to engage with.

6.7. Additionally, this section needs to establish a hierarchy of action to account for the fact that multiple intermediaries may be involved in delivering the same service. The Regulation should establish the principle that the action should be taken by the party with the most direct control and able to intervene in the most targeted way. For example, Verizon Media's algorithmic search results are provided by Microsoft; Verizon Media does not control the search results or the order in which they appear to our users.

7. Section 2 - Hosting providers

7.1. The obligations set out in Section 2 apply to a very broad spectrum of hosting providers including B2B hosting and hosting of services which do not disseminate information to the public.

7.2. Policy initiatives elsewhere with similar goals - such as the Online Safety Bill and the UK's Online Harms framework - have paid careful attention to identifying a specific justification for intervention and propose to designate services for statutory regulation based on their risk to consumers, together with a mechanism to bring unregulated services or categories of service in to scope if their risk to consumers increases later. The EU Regulation on preventing the dissemination of terrorist content online also has a narrow scope, focusing obligations only on "*hosting providers exposed to terrorist content*".

7.3. This scope should therefore be narrowed to focus on specific categories of hosting which pose identifiable risks to consumers.

7.4. Separately, the obligations in Article 14 aim to clarify what steps hosting providers should take when they acquire actual knowledge of illegal activity on the intermediary activities they operate. Greater precision is needed, in particular:

7.4.1. Article 14(2) sets out the information that should be contained in a notice but does not stipulate that a notice *must* contain these elements in order to be considered legally valid and trigger an obligation for the hosting provider to act; and

7.4.2. Article 14(3) states that *any* notice containing these elements should be deemed to give rise to actual knowledge, seemingly regardless of the quality of the notice and whether or not the content the URL identifies is actually illegal. This would be a significantly lower standard than that in the eCommerce Directive.

7.5. This approach to 'notice and action' would seem to enable notices to hosting providers to become self-executing, which would conflict with the detailed provisions of member state law in areas like defamation and copyright which require a careful balancing of rights and evidence as well as consideration of lawful exemptions or defences. A hosting provider is not in a position to do this alone and introducing such a requirement would open hosting providers to considerable legal risk and a slew of vexatious claims in the absence of any countervailing requirement on claimants e.g.: making their claims subject to pain of perjury. It would also undermine the benefits the EU intends by reconfirming the principle of limited liability and diminish protections for third party rights.

7.6. Additionally, the types of illegal content that are intended to be subject to this process are not clear. In fact, the DSA only specifies this for very large online platforms in Article 25(2). This provides far more precise regulation for this small category of providers than for the rest of the market. The design of this process merits reconsideration.

7.7. Some sectors have specific schemes for the detection and removal of illegal content. The proposals in section 2 should not seek to override these.

7.8. Finally, the statement of reasons required in Article 15 would be superfluous to B2B hosting services which are subject to a negotiated commercial agreement and processes agreed between contracting parties. This requirement seems most relevant to services covered in sections 3 and we would suggest that it is moved there.

8. Section 3 - Online platforms

8.1. Section 3 applies to "online platforms" which are defined in Article 2(h) in a way that is both broad and vague. As a result of the general term "information", this definition could be interpreted as including curated content services such as editorial news and video content. The obligations set out in Articles 19-24, however, suggest that this section is mainly aimed at addressing issues arising from platforms that allow social interactions between users and the uploading of user generated content or platforms that bring together third party buyers and sellers in an online marketplace.

8.2. Curated content services on the other hand involve either content created by the service provider under their editorial control or content supplied under license or other commercial arrangement agreed with the content owner. These are not open platforms where users or other third parties can register and upload content without prior authorisation of the service provider. Such services - including news and video entertainment content - should therefore be specifically excluded from the definition of online platforms in Article 2.

8.3. The importance of providing this clarity has been demonstrated by France's recently adopted fake news law. The law relies on an outdated definition of in scope services which includes any service that involves content provided by a third party, regardless of whether it is content uploaded by a user to an open platform or content supplied under license or other commercial arrangement to a curated content service, such as a digital news aggregator or entertainment service.

8.4. Like the DSA, the compliance requirements of this law are tailored to issues which arise on open platforms where there is little or no prior control over who can upload content. This has raised practical issues for providers of other types of services as to how they should comply. As a result, non-social media companies are now experiencing a prolonged period of legal uncertainty as to their standing under the new law and the risks or harms, if any, to be solved for on their respective services. This comes with exposure to statutory fines for non-compliance. In addition, the regulator was unprepared for the number of providers that would need to seek their guidance, while the issues could have been settled at an earlier stage.

8.5. We encourage Government to support narrowing the scope of Article 2 to avoid similar uncertainty for providers of curated content services established in Ireland and to align the scope of Section 3 with the specific risks identified in the IIA.

9. Section 4 - Very large online platforms

9.1. We have suggested above that the definition of 'online platforms' in Article 2 should be revisited and narrowed to align scope with the objectives set out in the IIA.

9.2. Notwithstanding, Section 4 raises further troubling issues by inferring that services serving a large community of customers by definition present risks to their customers and therefore merit a higher level of regulation in each and every case. Article 25 seeks to establish this principle in law.

9.3. This principle would set a troubling international precedent and is inconsistent with the objectives set out in the IIA. Government should advocate for an approach which introduces a further test such that large providers can only be designated for additional regulation where their activities also meet an evidence-based and risk-based threshold. This would align the DSA with the risks identified in the IIA and mirror proportionate and narrowly targeted approaches taken in other countries including in the Online Safety and Media Regulation Bill in Ireland.

Chapters IV and V

10. Oversight, enforcement and sanctions

10.1. The DSA proposes a very novel oversight and enforcement framework. This process seems to be the European Commission's response, among other things, to Government's wish for a regulatory framework that is capable of resolving disputes between member states and does not result in the burden of regulation falling disproportionately on a small number of member states.

10.2. As drafted, the process seems primarily designed to ensure decisions can be made at speed and with minimal friction. As a consequence, the duration of investigations is extremely short and providers would have very limited time to prepare responses at each stage. There seem no barriers to the resolution of complaints by the European Commission becoming the norm, and this would serve to undermine the one stop shop which is a key factor in companies' decision to have a single establishment in the EU.

10.3. Article 43 seems as if it could confer a private right of action on EU consumers which was not intended in the IIA and something the Online Safety and Media Regulation Bill specifically rejected as disproportionate for providers and something that would quickly overwhelm a regulator. It is also notable that the Digital Services Coordinator with jurisdiction has broad discretionary powers to intervene in individual infringements of the Regulation in all areas and the threshold for intervention feels low.

10.4. Turnover fines are once again the sanction of choice. As noted above, policymakers should be mindful of the cumulative effect of multiple EU regulations opening the same revenue streams to different turnover fines. This is highly likely to have a chilling effect on investment and innovation and feels contrary to the objective of enabling the emergence and growth of European digital firms.

10.5. We recommend that Government consults further with stakeholders on the design and implementation of the proposed oversight and enforcement framework.

Digital Markets Act

11. General comments

11.1. The IIA raised concerns about the functioning of digital markets and the role of firms with substantial, entrenched market power. A number of competition authorities are examining this issue with a view to removing barriers to competition and creating a climate that allows space for meaningful competition. These exercises focus on preventing firms with market power taking advantage of their market position on the one hand and addressing the root causes of market power and promoting competition on the other.

11.2. The strength of such proposals lies in how they narrowly target interventions on firms with proven market power and focus on removing barriers which hinder

competition. Some, such as the CMA Market Study, go further and caution against the design and implementation of digital policy which disadvantages competing firms.

11.3. In contrast, the DMA proposals set out a process in Article 3(2) that deems a company could have an entrenched and durable market position merely because of the size of its turnover and customer base. This approach sets a troubling international precedent for market intervention.

11.4. This appears to be in tension with the objectives set out in the IIA to ensure digital markets characterised by platforms with significant network effects acting as gatekeepers remain fair and contestable by targeting a closed list of core platform services and addressing specific practices which demonstrably hamper market contestability and competition.

11.5. Instead, the DMA could unintentionally capture competing providers which may seem large in size but which no competition authority would consider to exercise market power in a core platform service. Moreover, Article 3(3) proposes that providers meeting the thresholds in Article 3(2) would be automatically designated by the Commission within a mere 60 days "*unless they can present sufficiently substantiated arguments to demonstrate that, in the circumstances in which the relevant core platform service operates, and taking into account the elements listed in paragraph 6, the provider does not satisfy the requirements of paragraph 1*". Thus, the burden is on the provider, rather than a competition authority, to prove it cannot exercise market power.

11.6. This is in contrast with the view of the Digital Market Taskforce, for example, which has recommended to the UK government that designation should be preceded by a targeted and in-depth assessment process by an expert competition authority that lasts 6 months.

11.7. The application of regulation under the DMA should therefore be reconsidered and refined. The designation process set out in Article 3(2)-3(6) should be more narrowly focused, led by an expert competition authority, and avoid triggers which would unintentionally ensnare competing providers. Subjecting these providers to regulation intended for providers with market power would further disadvantage them in the market and diminish competition, falling short of the competition objectives set out in the IIA and the DMA's preamble.