



EUROPE'S
VIDEO GAMES
INDUSTRY

ISFE Position Paper on the Digital Services Act

November 2020

Introduction

ISFE welcomes the Commission's plans to clarify, increase and harmonise the responsibilities of certain online platforms and digital services, whilst not detracting from the current liability regime in the E-Commerce Directive. We believe that the Digital Services Act (DSA) should complement and strengthen the responsibilities of certain digital services, but that it should not weaken the current safe harbour eligibility criteria.

The video games sector is a rapidly growing part of Europe's creative industries and relies on a strong IP framework. In 2019, Europe's video games industry was worth over €21bn, and the industry has registered a growth rate of 55% over the past 5 years in key European markets¹. The industry is a key driver of job creation, innovation and growth. Video games have a proven ability to successfully drive new business models and have truly embraced the digital transformation. Via the emergence of on-demand and streaming services and the launch of new high-performance consoles, together with the strong growth of mobile gaming, 76% of the industry's European revenues are now derived from the digital transformation.

Many ISFE member companies operate their own online platforms where users can purchase, download, stream and play video games, and where they can chat to, and share their own self-generated content with, other users. As a result, these companies are also intermediaries for the purposes of the E-Commerce Directive and are thus very sensitive to the need for balance in the online ecosystem.²

¹ ISFE Key Facts 2020 from GameTrack Data by Ipsos MORI and commissioned by ISFE <https://www.isfe.eu/isfe-key-facts/>.

² This paper seeks to address the key elements of the Commission's DSA package that concern the responsibilities and obligations of digital services. It does not seek to address issues dealing with potential *ex ante* rules applicable to large online platforms acting as gatekeepers, or other competition law aspects.

Executive summary

Illegal and harmful content

Regarding illegal content online, ISFE member companies are primarily focused on content that infringes their IP rights. Further, as operators of online platforms themselves, they take the presence (however rare) of illegal content on their own platforms very seriously, and they ensure a high level of consumer protection. The protection of players, and of minors in particular, is a foundational concern for video games publishers and their platforms. ISFE member companies also prohibit harmful content in their terms and conditions, breaches of which are actively monitored and enforced against in order to quickly address harmful activities.

- The DSA should not seek to regulate lawful but potentially harmful content since it is highly contextual, difficult to define and often subjective
- Harmful, but not necessarily illegal, content or activities should not form part of any revised liability regime

Responsibilities of online platforms

All online platforms should be required to do certain things, such as to maintain effective 'notice and action' systems and proportionate 'know your business customer' policies, and to implement effective 'repeat infringer' policies. Platforms at particular risk of exposure to users' illegal activities (such as large social media platforms) should also be required to have trained moderation teams, to cooperate with 'trusted flaggers' and to be transparent about their content policies, the measures they take against illegal activities and their effects. Online platforms of any kind should only be required to share data with competent authorities at the specific request of a law enforcement authority or of a court, or on a voluntary/contractual basis in the public interest or for other purposes. ISFE believes that the scope of any 'stay-down' obligation should be carefully considered to ensure that it does not impact innocent and responsible service providers that might struggle to fully comply with it. Any such obligation should be confined to hosting providers that host large amounts of illegal content.

- While all platforms should be required to do certain things, those at particular risk of exposure to users' illegal activities should bear additional responsibilities
- A 'stay-down' obligation should only be imposed upon hosting providers that host large amounts of illegal content

Categories of intermediary

While the E-Commerce Directive's simple framework of intermediary categories remains broadly relevant today, some clarifications could be provided to address the increasing complexity of today's services. We think that it would be better to have all intermediaries explicitly covered by the existing framework or included in new intermediary categories that would be subject to appropriate obligations. We also think that the distinction between 'active' and 'passive' intermediaries should be maintained to avoid altering the careful

balance in the E-Commerce Directive between the need to protect content owners and the need to enable the development of the Internet.

- The DSA should clearly identify and define the types of intermediaries that fall within the existing or new categories of intermediary, and should also define which of them should be regarded as ‘passive’ or ‘active’

The safe harbour

The DSA should not weaken the current safe harbour eligibility criteria, but should instead complement and strengthen the responsibilities of certain digital services. ISFE takes the view that the current legal framework does not disincentivise service providers from taking proactive measures and that no additional safeguard (such as a ‘Good Samaritan’ clause) is required to protect such providers from liability. ISFE believes that the concept of a platform role of a ‘mere technical, automatic and passive nature’ is still sufficiently clear and valid, and that the guidance provided by the E-Commerce Directive and its recitals, as interpreted by the CJEU, has been, and should continue to be, sufficient to produce generally satisfactory results

- The Commission should preserve and not weaken existing EU law, embodied in Recital 42³ of the E-Commerce Directive and the relevant CJEU case law

Ban on general monitoring obligations

ISFE regards the ban on general monitoring obligations for passive service providers as one of the three pillars upon which the E-Commerce Directive was built, believes that this framework remains fundamentally valid, and supports the Commission’s plans to uphold it while upgrading the liability regime.

- The DSA should preserve the E-Commerce Directive’s ban⁴ on general monitoring obligations for passive service providers

Updating the intermediary liability regime

As many games publishers operate their own online platforms (where users can purchase, download, stream and play video games, and where they can chat to, and share their own self-generated content with, other users), they are also now intermediaries for the purposes

³ “The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.” (Recital 42 of the E-Commerce Directive)

⁴ “Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.” (Article 15(1) of the E-Commerce Directive)

of the E-Commerce Directive and are thus very sensitive to the need for balance in the online ecosystem.

- New and specific obligations for intermediaries that would be complementary to the E-Commerce Directive's already well-functioning framework should be created, including the introduction of effective 'know your business customer' schemes with appropriate safeguards
- The DSA should require platforms to implement effective 'repeat infringer' policies and to enforce their own terms of service
- The DSA should also introduce rules for trusted flaggers, but should not pursue a 'one-size-fits-all' approach to illegal and harmful content on online intermediary services

Illegal content

1. Regarding illegal content online, ISFE member companies are primarily focused on content that infringes their IP rights, and they dedicate substantial resources to protect these rights and to detect and flag infringing content to relevant platforms, and also to address the damaging trade in unauthorised digital content or goods (i.e. digital assets that are available within game environments or that work alongside games, and that are traded in violation of publishers' rules and/or terms of service).
2. As operators of online platforms themselves, ISFE member companies take the presence (however rare) of any kind of illegal content on their own platforms very seriously. They prohibit such content in their terms and conditions, ban and terminate the accounts of users who violate such terms and conditions, employ technological detection and filtering tools, operate various reporting/flagging and blocking systems, remove such content from their platforms and work with law enforcement authorities where appropriate. They also ensure a high level of consumer protection, and the industry's extensive minor protection efforts, through its Pan European Game Information system (PEGI) and other tools, are an established model of European self- and co-regulation. The protection of players, and of minors in particular, is a foundational concern for games publishers and their platforms. ISFE member companies increasingly apply AI techniques in gameplay environments to complement the role of human moderators, and also use web-based moderation and legal-escalation systems for reactive moderation.

Harmful content

3. ISFE member companies also prohibit harmful content in their terms and conditions, breaches of which are actively monitored and enforced against in order to quickly address harmful activities. This is obviously important to video games companies from a compliance perspective, but it's also key to ensuring that they provide an enjoyable environment for their users to drive engagement. The [PEGI Code of Conduct](#) and ISFE member companies strive to ensure safe online gameplay environments, and to keep any user-generated content free of content that is illegal, offensive, racist, degrading, corrupting, threatening, obscene or that might permanently impair the development of minors. ISFE member companies use a variety of tools and safeguards to protect minors from potentially harmful content, including for voice and video chat. These include age gating, reporting tools, filtering software, moderation and muting tools. In addition, parental control tools allow for communication with others in a game to be restricted and are a safeguard against minors being exposed to inappropriate content introduced by other players.
4. ISFE does not believe that the DSA should seek to regulate lawful but potentially harmful content since such content is highly contextual, difficult to define and often subjective. It would be unreasonable, in our view, to expect online service providers to act as censors of 'legal harms', and they should be free to determine what content is suitable for their own platforms and communities. The DSA should clarify that it is within the service provider's discretion to decide which content is sufficiently harmful to warrant removal.

Harmful, but not necessarily illegal, content or activities should not form part of any revised liability regime.

Platform responsibilities

5. ISFE believes that all online platforms should be required to:
 - maintain effective ‘notice and action’ systems
 - cooperate with national authorities and law enforcement
 - maintain proportionate ‘know your business customer’ policies with appropriate safeguards
 - maintain effective ‘counter-notice’ systems for users whose content is removed
 - implement effective ‘repeat infringer’ policies and to enforce their own terms of service

6. Platforms at particular risk of exposure to the illegal activities of their users (such as large social media platforms) should be required to maintain systems to assess the risk of such exposure, have appropriately trained and resourced moderation teams, cooperate with ‘trusted flaggers’, and be transparent about their content policies, measures and their effects. Such platforms should also be required to issue comprehensive reports with aggregated figures twice a year, detailing their proactive measures (including the use of automated systems), the number of notices they have received and the actions they have taken in response. They should also be required to report serious cases to affected third parties and to the competent authorities. Online platforms of any kind should only be required to share data with competent authorities at the specific request of a law enforcement authority or of a court, or on a voluntary/contractual basis in the public interest or for other purposes.

A ‘stay-down’ obligation

7. ISFE member companies that operate online platforms are naturally concerned about the possible implications of the imposition of a ‘stay-down’ obligation on all hosting providers. ISFE believes that the scope of any such obligation should be carefully considered to ensure that it does not impact innocent and responsible service providers that might struggle to fully comply with it. We believe that any such obligation should be confined to hosting providers that host large amounts of illegal content.

Categories of online intermediary services

8. ISFE believes that the E-Commerce Directive’s simple framework continues to make sense and remains broadly relevant today. However, we also believe that some clarifications could be provided to address the increasing complexity of today’s services, and we acknowledge that some services today might be unsure which legal regime applies to them. This has led to some uncertainty and to the refusal of some intermediaries to remove infringing content on receipt of takedown notices, on the grounds that since they were outside the safe harbour, they were not subject to notice-

and-takedown requirements. We think that it would be better to have such intermediaries explicitly covered by the existing framework or included in new intermediary categories that would be subject to appropriate obligations. We also think that the legislation should clearly identify and define the types of intermediaries that fall within the existing or new categories, and should also define which of them should be regarded as ‘passive’ or ‘active’.

The distinction between ‘active’ and ‘passive’ providers

9. ISFE believes that the distinction between ‘active’ and ‘passive’ intermediaries should be maintained to avoid altering the careful balance in the E-Commerce Directive between the need to protect content owners and the need to enable the development of the Internet. The DSA should clearly define which intermediaries should be regarded as ‘passive’ or ‘active’. The legislation should not weaken the current safe harbour eligibility criteria, but should instead complement and strengthen the responsibilities of certain digital services.

Disincentives for platforms in current legal framework

10. ISFE takes the view that the current legal framework does not disincentivise service providers from taking proactive measures and that no additional safeguard (such as a ‘Good Samaritan’ clause) is required to protect such providers from liability. We do, however, acknowledge another sense in which one might regard the current framework as a disincentive and that is because platforms generally only have to act when in receipt of takedown notices and, therefore, frequently don't do anything more.

The concept of a platform role of a ‘mere technical, automatic and passive nature’

11. ISFE believes that this concept is still sufficiently clear and valid, and that the guidance provided by the E-Commerce Directive and its recitals, as interpreted by the CJEU, has been, and should continue to be, sufficient to produce generally satisfactory results. We urge the Commission to preserve and not weaken existing EU law, embodied in Recital 42 of the E-Commerce Directive⁵ and the relevant CJEU case law.

Ban on general monitoring obligations

12. ISFE regards the ban on general monitoring obligations for passive service providers as one of the three pillars upon which the E-Commerce Directive was built, believes that

⁵ “The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.”

this framework remains fundamentally valid, and supports the Commission's plans to uphold it while upgrading the liability regime.

Updating the intermediary liability regime

13. As many games publishers operate their own online platforms (where users can purchase, download, stream and play video games, and where they can chat to, and share their own self-generated content with, other users), they are also now intermediaries for the purposes of the E-Commerce Directive and are thus very sensitive to the need for balance in the online ecosystem.
14. Nevertheless, we agree that new and specific obligations for intermediaries that would be complementary to the E-Commerce Directive's already well-functioning framework should be created, and that these should include, inter alia, the introduction of effective 'know your business customer' schemes with appropriate safeguards.
15. The Commission should also use the DSA to require platforms to implement effective 'repeat infringer' policies and to enforce their own terms of service. The DSA should also introduce rules for trusted flaggers, but should not pursue a 'one-size-fits-all' approach to illegal and harmful content on online intermediary services. ISFE also supports the idea of a harmonised notice-and-action procedure across the EU to provide greater legal certainty.

About ISFE

ISFE represents the video games industry in Europe and is based in Brussels, Belgium. Our membership comprises national trade associations in 18 countries across Europe which represent in turn thousands of video games developers and publishers at national level, ranging from small-to-medium sized enterprises (SMEs) to large global companies. ISFE also has as direct members the leading European and international video games companies, many of which have studios with a strong European footprint, that produce and publish interactive entertainment and educational software for use on personal computers, games consoles, portable devices, mobile phones and tablets.

ISFE's purpose is to serve Europe's video games ecosystem by ensuring that the value of games is widely understood and to promote growth, skills, and innovation policies that are vital to strengthen the sector's contribution to Europe's digital future. The video games sector represents one of Europe's most compelling economic success stories, relying on a strong IP framework, and is a rapidly growing segment of the creative industries. In 2019, Europe's video games industry was worth over €21bn, and the industry has registered a growth rate of 55% over the past 5 years in key European markets⁶.

⁶ ISFE Key Facts 2020 from GameTrack Data by Ipsos MORI and commissioned by ISFE <https://www.isfe.eu/isfe-key-facts/>.

Video games have a proven ability to successfully drive new business models. Digital transformation with the growth of online and app-based gaming accounts today for 76% of the industry's European revenues. Via the emergence of on-demand and streaming services and the launch of new high-performance consoles, together with the strong growth of mobile gaming, the video games industry offers players across Europe and in all age groups the possibility to enjoy and engage with video games. Today, 51% of Europe's population plays video games, which is approximately 250 million people, and 45% of the players are women.

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