

Legislative Initiative Report on Digital Services Act “DSA: Improving the functioning of the Single Market” – IMCO Committee
Position of AFEP on tabled amendments and compromised amendments

Topics	Amendments	Position of AFEP	Remarks
General principles	CA A §1 and §4a	+	AFEP supports that the Commission should submit a proposal amending the e-commerce directive and a proposal for an ex-ante regulation on systemic operators with a gatekeeper role and that it should be kept as separate instruments .
	CA A §3 and CA F §25		AFEP strongly supports the principle of “what is illegal offline is also illegal online” and that a level playing field in the internal market between the platform economy and the offline economy, based on the same rights and obligations for all interested parties - consumers and businesses - is needed.
	CA A §3d		AFEP supports this compromise as it states that the revision must maintain the horizontal approach of the text and recognises the need to separate between different types of services rather than types of platforms, as well as between economic and non-economic activities. However, the compromise should make clear that all actors regardless of their sizes should be covered by the scope if they are engaged in hosting services that are likely to create risks for the recipients of the service. The <i>erga omnes</i> application of the rules on electronic commerce will make it possible to fight the proliferation of intermediaries taking advantage of the sale of counterfeit products to grow at the expense of the economy in general and of consumer protection in particular. However, the scope of these obligations should be proportionate, adaptable to the size of the company and to the degree of control it has over the content/goods that it hosts .
	CA E §20		AFEP supports the notion that a strict distinction should be made between illegal content , punishable acts and illegally shared content on the one hand, and harmful content , hate speech and disinformation on the other, and which should be dealt with separately. Focusing on illegal content, as defined by the Commission 2018 recommendation, would allow more legal certainty as well as faster and easier implementation of measures.
	70, 149		AFEP regrets that the compromise amendment does not propose a regulation . AFEP supports the drafting of a regulation to harmonise these new provisions and to reinforce consumer confidence within the single market, which must be equivalent to the one within physical trade.
	99, 159	-	
Territorial scope	CA A §2a 75, 156, 344, 417, 555	+	AFEP strongly supports the compromise amendment as it considers that all providers regardless of their country of establishment must adhere to the rules of the coming Digital Services Act when directing services to the Union. To

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	553, 809, 810	-	ensure effective protection of European consumers and intellectual property right holders, as well as the conditions for fair competition between players in e-commerce, it is necessary to extend the scope to services supplied to consumers in the EU, by a provider who is not established in the Union. European consumers and IP right holders must be protected whatever the country in which the service provider is established.
Transparency and consumer protection	CA F §26a	+	AFEP supports the urgent need to step up enforcement of EU rules and to enhance consumer protection from counterfeit, illegal or unsafe products; it agrees that the current transparency and information requirements should be strengthened. AFEP also supports the need for providers to inform consumers who have previously bought products which have been taken down following a notification from a right holder or an enforcement authority.
Identification of sellers	CA C §13, §14 and CA F§26 50, 206, 209, 210, 392, 422, 606	+	Internet should be considered as a commercial vehicle where the rights of any interested party (consumers, holders of intellectual property rights, etc.) must be ensured with a level of protection equivalent to that existing in physical sales points: as in any commercial relationship, business users using digital platforms acting under a pseudonym must be able to be identified through verification by the concerned platform (Know your business Customer principle).
	203, 204	-	AFEP thus supports the compromise amendments in that they require hosting providers to compare the identity of their business users with the identification data by the relevant EU databases in compliance with data protocol legislation; to ask their business users to ensure that the information they provide is accurate, complete and updated and to refuse or cease to provide their services if the information is false or misleading.
Automated tools	CA D §17c	+	All platforms should be transparent about their content policies, measures and effect to the regulators upon request. Automated tools used to detect illegal content, goods or services are useful and already implemented by major platforms. However, these tools can encompass bias, either voluntary or not, and allow the upload of content which should be blocked. To tackle this issue, more effective cooperation and audit mechanisms between the competent regulatory authority and the very large gatekeeping platforms should be implemented so that such platforms are regularly able to explain how these tools detect illegal content and demonstrate that they are not biased.
Clarification of passive and active host criteria	CA E§23, E§23a 86, 89, 237, 373, 377, 378, 379, 381, 382, 388, 565, 578, 703, 698, 704, 707, 708, 797, 798,	+	The forthcoming legislative proposal should integrate the case-law establishing the conditions under which intermediaries would become active hosts , hence not able to claim the protection of Article 14 and thus calling into question their non-liability. Consequently, only passive intermediaries, in particular cloud infrastructure services, should benefit from the safe harbour provisions.
	CA 12 ANNEXE 793	-	AFEPS therefore supports CA E, but underlines that the corresponding paragraph in the annexe (CA 12) on active and passive hosts gives a too narrow definition of an active host. Active hosts should be considered as such when they distribute/make their content accessible to the public and: - their activity goes beyond simple storage and transmission of data: they have visibility and control over this data by selecting, using, modifying and/or editing it to optimize or promote it, or - they refuse control over the processed content while this control is technically and contractually possible;

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			At a minimum, the previously proposed definition by the rapporteur of “tagging, organising, promoting, optimising, presenting or otherwise curating specific content” should be reintroduced.
Responsibility regime & Due diligence	CA E §21, §22, §22a, §22b, 23 252, 260, 301, 324, 325, 326, 381, 382, 401, 527, 528, 532, 600, 602, 654, 755, 812	+	<p>AFEP supports compromise amendment E as it goes in the right direction, but underlines that it is not ambitious enough to protect IP rights on platforms. AFEP indeed regrets that the notion of due diligence introduced by the rapporteur has been deleted and that amendments on this principle are not represented in the compromise.</p> <p>The responsibility of active hosts should be assessed as soon as they have fulfilled their duty of care for all their activities, implying an obligation of means to remedy the violations of rights on their platform. To do this, the hosts must set up an adapted vigilance plan, the practical modalities of which must be established by the national authorities and regulators concerned, in consultation with the stakeholders.</p> <p>This vigilance plan should be based on the following four principles: identify the risks; prevent infringements; remedy the negative consequences; report on the way they remedy it. AFEP therefore welcomes the addition of requirements for active hosts to publish reports with information about their notice and action mechanisms.</p>
	342, 346, 371, 383, 529, 603, 604, , 712, 805	-	<p>The introduction of this duty of care would thus induce a responsibility of active hosts not for the existence of illegal content on their sites but because of the absence of implementation of an effective vigilance plan, which would include both ex-ante control measures and reactivity after notification. In the event of litigation, it would be up to the judge to assess the implementation of his duty of vigilance concerning the content in question, with the most recent case-law.</p> <p>Moreover, all online platforms with the ability to moderate and disseminate content to the public should be subject to an obligation of means, to prevent the appearance and reappearance of illegal content, goods and services, as massive contents on platforms do not allow for an obligation of results.</p> <p>AFEP supports the fact that more than voluntary actions and self-regulation are needed. AFEP is opposed to the “good Samaritan clause”. The platforms are not sufficiently encouraged to set up proactive measures to fight against illegal contents. It would give online intermediaries exemptions from liability for any proactive removals they may decide to make, while not being necessary more efficient, and without any type of control on the measures taken. It would put at risks the users that the legislation seeks to protect.</p>
Ex-ante regulation of gatekeepers platforms	CA G	+	AFEP supports the introduction of a targeted ex-ante regulation envisaged in the DSA. A clear definition of these gatekeepers, based on clear indicators, is required beforehand to best classify the constraints weighing on economic players and targeting the most structured platforms. The measures aimed at defining a list of prohibited practices per se for large digital platforms will make it possible to correct their asymmetry with traditional players and prevent the effects linked to the vertical and horizontal integration policies of large structuring platforms.
Supervision	CA H	+	AFEP supports the compromise amendment which proposes a hybrid supervision system, based on an EU coordination in cooperation with the network of national authorities as the core of the supervision system.