



FEDERATION OF EUROPEAN DIRECT AND INTERACTIVE MARKETING

A FIRST LOOK AT THE DIGITAL SERVICES ACT (DSA)

I. Summary

The European Commission [Proposal for a Digital Services Act](#) (DSA), released on 15 December 2020, is one of the cornerstones of the Commission's 'A Europe Fit for the Digital Age' political agenda. As the official successor of the E-Commerce Directive (ECD) from 20 years ago, the DSA focuses on regulating illegal content such as misleading information from digital services which connect consumers to goods, services or content. In the form of a Regulation, the proposed framework is intended to rebalance the rights and responsibilities of users, platforms, and public authorities, thus fostering legal certainty, harmonization of rules and a level-playing field. Overall, the Commission's proposal is wide-ranging and represent an important step forward in the Commission's ambition to set new standards for the governance of the online space. However, taking into account that the final form of the DSA will change possibly substantially in its journey through the European Parliament and Council before final approval, the current proposal already raises some questions and concerns in terms of its interplay with other legislations, overlaps with existing industry initiatives/bodies, competition and enforcement.

II. Overview of the proposal for a Digital Services Act (DSA)

The **proposed DSA applies to online intermediary services** through a graduated approach with cumulative obligations applying to different platform 'sizes' and impact in the online ecosystem. Among the regulated groups are (i) intermediary services offering network infrastructure (Internet access providers, domain name registrars), (ii) hosting services such as cloud and webhosting services, (iii) **online platforms bringing together sellers and consumers such as online marketplaces, app stores, collaborative economy platforms and social media platforms**, and (iv) **very large online platforms (VLOPs)** which reach more than 10% of the EU's population (currently 45 million users).

Though the draft DSA maintains the pillars of the liability regime under the ecommerce Directive (ECD) (limited liability, no general monitoring obligations, country of origin principle), the Commission has **introduced a "good Samaritan" principle**, under which providers of intermediary services can still enjoy their liability exemptions if they carry out voluntary activities to detect and remove illegal content.

In this context, **all intermediaries falling under the scope of the DSA will have obligations in terms of transparency and fundamental rights protection**, cooperation with national authorities, and the designation of a legal representative in the EU for all intermediaries not established in the Union but offering services to one or more Member States.

For online platforms and hosting services, the proposal includes:

- (i) requirements for more detailed notice & action provisions
- (ii) (ii) introduces the **concept of trusted flaggers** whose notices should be processed with priority and
- (iii) (iii) lays down a **"Know your business customer" principle**, under which platforms will be required to obtain and verify identification information from the traders prior to allowing them to use their services.

Transparency obligations for online advertising will require online platforms to provide their users **information on the sources of the ads they see online, including on why an individual has been targeted with a specific advertisement**.



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For VLOPs, the proposal provides that :

- they will be subject to specific obligations to control their own systemic risks, thus conducting yearly risk analyses and independent audits.
- They will also have to adhere to transparency obligations for recommender systems, comply with additional measures for online advertising transparency as well as appoint one or more compliance officers responsible for monitoring their compliance with the DSA.

Member States will be required to lay down the rules on penalties and appoint a “**Digital Services Coordinator**” (DSC) to oversee enforcement of the regulation. An **independent advisory group of DSCs named the “European Board for Digital Services” (EBDS)** will be established, which will contribute to the guidance and consistent application of the regulation and assist the DSCs. For the case of VLOPs, the Commission will have direct supervision powers and, in the most serious cases, will be able to impose fines of up to 6 percent of the global turnover of a service provider.

III. Key takeaways & questions

- a) What would be the impact of the proposed transparency measure for advertising for the ad ecosystem?

The draft provisions on **transparency measures on online advertising aim to reinforce the process initiated under the GDPR to empower end-users** and facilitate public oversight over an ecosystem increasingly dubbed as opaque.

- **Art. 24 applies to both online platforms and VLOPs and states that “recipients” must be provided with individualized information on the advertisements displayed to them,**
- **Art. 30 states that VLOPs must ensure public access to repositories of advertisements** displayed on their online interfaces to facilitate supervision and research into emerging risks brought about by the distribution of advertising online. However, as some of the information that these repositories should provide include the total number of recipients reached out by a service providers for a specific ad campaign, this would likely raise competition concerns among services providers: this information could indeed allow the advertisers paying different services providers for the delivery of the same campaign to easily compare the performance of the campaign and therefore compare the costs of the different services providers for the same campaign.

- b) What would be the impact of the proposed co-/self-regulatory tools for advertising services?

The proposed Regulation envisages the **setting of voluntary industry standards and codes of conduct to support and complement the transparency obligations related to advertising services.** In this regard, the DSA provisions on advertising echo some of FEDMA’s work through EDAA and EASA. However, **there remain questions** concerning (i) the technical implementation of some of the envisaged measures, especially the setting of interoperable advertisement repositories, (ii) the compliance costs for both publishers and advertisers, (iii) consistency with self-/co-regulatory solutions in other pieces of legislations, e.g. GDPR and (iv) the involvement of civil society organizations in the setting up of CoCs.

- c) Does the proposal create overlaps with the GDPR and/or strengthen the walled garden position of VLOPs?

Articles 26 and 27 require VLOPs to conduct impact assessments and adopt mitigating measures against specific systemic risks stemming, for example, from the design of their **algorithmic systems**



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which may have an impact on the exercise of fundamental rights, e.g. the right to private life. However, **these provisions raise questions regarding their interplay with the GDPR** which already mandates the implementation of a DPIA to identify and minimize data protection risks. Additionally, further clarifications are needed in terms of the range of possible solutions that VLOPs can implement to mitigate such systemic risks as VLOPs may increasingly justify the adoption of technical solutions (e.g., phasing out 3rd party cookies) aimed at protecting the privacy of their users while also strengthening their “walled garden” position, thus having negative consequences on competition. This last concern, however, is slightly softened on Recital 58 where the Commission lists some possible mitigating measures, e.g. codes of conducts, and provides that VLOPs *should, where appropriate, conduct their risk assessments and design their risk mitigation measures with the involvement of representatives of the recipients of the service, representatives of groups potentially impacted by their services, independent experts and civil society organizations*

- d) Does the proposal need to clarify the proposed governance structure and its interplay with other areas?

The Commission seems to have drawn some lessons from the enforcement of the GDPR. Though the **DSA would create a structure similar to the European Data Protection Board** and the various Data Protection Authorities, the proposed **European Board for Digital Services (EBDS) only has an advisory role vis-à-vis the Commission**. In fact, the latter would be empowered to initiate proceedings against VLOPs simply after consulting the Board and when the concerned DSC has not taken any action or made an explicit request for the Commission’s intervention. While this could foster speedier enforcement actions in regard to VLOPs, it may also create tensions between the Commission and the DSCs when the latter is “accused” of not taking any action. Additionally, depending on the nature of the infringement, the enforcement of the DSA may create overlaps among different regulatory authorities, thus stressing the need to clearly allocate responsibilities to each regulatory authority.

- e) Does the proposal need to clarify the criteria for trusted flaggers and audit organizations?

The introduction of the notion of trusted flaggers is likely aimed to support online platforms in their content moderation efforts, speed up notice & actions procedures and ensure content oversight from independent actors without incurring in a general monitoring obligation by platforms. In this regard, the proposal provides the conditions that an entity must meet in order to be granted the status of “trusted flagger”, i.e. expertise, independence, collective interests representation, and efficiency. Nevertheless, **it remains unclear** whether only civil society organizations and NGOs could become trusted flaggers, thus excluding industry self-regulatory bodies. Similar concerns are also raised in regard to the obligations for VLOPs to be subject to an annual independent audit assessing compliance with the proposed Regulation.