

MARCH 2021

ISSUE: XIX.

ECTA BULLETIN

47 PAGES

INSIGHTS OF THE EUROPEAN COMMUNITIES TRADE MARK ASSOCIATION

INTERVIEW WITH
ANETTE RASMUSSEN

THE DIGITAL SERVICES
ACT- A CURRENT VIEW
WITH AN EYE TO THE
FUTURE
NICOLE VAN ROON



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Enjoy !

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THE DIGITAL SERVICES ACT (DSA) WAS PUBLISHED ON 15 DECEMBER 2020. IT HAS BEEN AWAITED WITH BATED BREATH BY STAKEHOLDERS IN THE ONLINE INDUSTRY AND BY IP RIGHT HOLDERS ALIKE. THE DSA IS CONCEIVED AS ONE OF THE CENTRAL PILLARS FOR THE EU COMMISSION'S AMBITION TO SHAPE EUROPE'S DIGITAL FUTURE. ALONGSIDE THE DIGITAL MARKETS ACT (DMA) IT FORMS A PIVOTAL PART OF THE EU COMMISSION'S DIGITAL STRATEGY AIMING TO REINFORCE THE SINGLE MARKET FOR DIGITAL SERVICES, TO ENSURE BETTER PROTECTION TO CONSUMERS AND TO FUNDAMENTAL RIGHTS ONLINE, AND TO CREATE A MORE LEVEL PLAYING FIELD FOR BUSINESSES OF ALL SIZES ACROSS THE EU. The DSA provides for a staggered set of obligations and liability rules for all intermediaries (including Internet access providers, domain name registrars and search engines), for online platforms (such as social media platforms, app stores and online marketplaces), as well as for hosting services (such as cloud services and webhosting), with additional obligations for very large online platforms (those reaching more than forty-five million EU users each month).

Prior to the publication on 15 December 2020 there had been a public consultation on 'the main challenges arising around the provision of digital services, and online platforms in particular' from 2 June until 8 September 2020, open to all interested

parties by means of a questionnaire. The consultation results, which summarized the 2863 responses and 300 position papers that were filed, providing an indication of the interest in this area, were published on the same day as the draft Digital Services Act and the results show that, although there is clear consensus that action has to be taken against harmful and illegal content, goods or services online, there will be much debate on many of the envisaged aspects of reform between the different and varied interest groups. Whereas on one hand there is overall agreement that consumers should be protected against unsafe and counterfeited goods and IP right holders should have the right tools to counter illegal goods and to take action against the infringer directly, the discussion is open as to what is technically manageable and financially reasonable for digital service providers, and for platform operators in particular, in order to tackle counterfeit and illegal content. Business organisations and start-ups, for example, have expressed their concern that some of the proposed new obligations would disproportionately affect the growth and evolution of smaller platforms. Also, many categories of stakeholders emphasised that any new measure to tackle illegal content, goods or services online should not lead to unintentional, unjustified limitations on citizens' freedom of expression or

***The Digital Services Act
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fundamental rights to personal data and privacy. All these different rights and interests of all parties involved in the exchange of content online will have to be carefully balanced and the end result should reflect the key goals of the Digital Services Act, which are *'better protection to consumers and to fundamental rights online, establish a powerful transparency and accountability framework for online platforms and lead to fairer and more open digital markets'*.

The European Parliament and the Council of Ministers (where each government is represented) will now discuss the Commission's proposal and we can certainly anticipate controversial debate given its strategic importance and we have yet to see the final outcome. The below sets out an overview of aspects of the new rules to come.

THE ROLE OF ONLINE PLATFORMS IN THE REMOVAL OF ONLINE ILLEGAL CONTENT

We first have to take a step back and look at the (sometimes underlying) issues the questionnaire addressed with regard to the role online platforms play in the removal of harmful and illegal content, goods and services. As a next step we will look at how these issues are implemented in the draft Digital Services Act.

Issues that currently arise are the failing notice and action mechanisms of platforms and the failing transparency as to whether action was taken. Furthermore, platforms currently do not have unified legal requirements to implement effective and appropriate safeguards and there is no unified liability regime for platforms, which could achieve a more proactive approach from the side of platforms against counterfeits.

HOW TO EFFECTIVELY KEEP USERS SAFER ONLINE

Online platforms cover a wide range of activities including online marketplaces, social media, creative content outlets, app stores, price comparison websites, platforms for the collaborative economy as well as search engines. Although several steps have been taken over the years to stop online illegal content and counterfeiting, for example the E-Commerce Directive of 2000 whose core provisions on the liability safe harbour for online intermediaries have over time witnessed diverging approaches across the Member States, this still remains a very serious issue. The majority of online platform users have come across illegal content, goods and services online. In order to limit the wider dissemination of illegal content and to stop counterfeiting fast action is essential.

The first issue addressed by the European Commission in the questionnaire is the issue of the failing notice and action mechanisms of many online platforms. Whereas it seems that it is now somewhat easier to report illegal content to online platforms, many remain in the dark as to whether the platform has taken action, what action has been taken and often there is dissatisfaction with the ineffectiveness of reporting mechanisms themselves. Moreover, as rapid action is crucial, the current timeline from filing a notice to removal of the illegal content concerned is often too long; many respondents have indicated that it often can take several weeks before the content is finally removed. During such a long period the illegal content remains and is further disseminated online.

Platforms are often accused of lacking fast and effective procedures to take down illegal content, and where they are in place some platforms are accused of not being proactive enough in their implementation. To be fair it is accepted that progress has been made in many instances. As to the procedures themselves, and what should be legally obliged, there appears to be room for improvement. Some of the suggestions included in the questionnaire and in the summary of the consultation seem to be relatively easy to set up and do not appear to be too costly or time consuming; nor do they appear to conflict with applicable laws



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on, for example, the protection of personal data. Other proposed measures may be too disproportionate for smaller platforms which, due to their size or scale, have only limited resources or expertise. An example of a measure that could be relatively easy to set up would be the obligation for online platforms to have clear Terms and Conditions that contain information on policies, procedures, restrictions, measures and tools which are used for content moderation. It has to be clear which behaviours can lead to (temporary) suspension of the service and, in case of misuse, the online platform should proceed with the suspension of the user. Another proactive measure for all online platforms would be the obligation to install a 'know your customer' policy, where professional users on online platforms will be obliged to clearly identify themselves. The information, of course, should be safely stored and deleted once the professional user no longer uses the online platform, but could, under specific conditions, be disclosed to third parties in accordance with applicable law; for example: to an IP right holder in case of illegal content in order to take action against the infringer directly. Finally, smooth and effective cooperation between competent authorities, law enforcement and (perhaps) even trusted organisations with proven expertise and online platforms when tackling illegal content online should be ensured.

Other suggestions for proactive measures include maintaining a system for assessing the risk of exposure to illegal goods or content, the implementation of an effective 'counter-notice' system for users whose goods or content is removed to dispute erroneous decisions and the implementation of content moderation teams, which are appropriately trained and resourced. These would seem to be supported by a majority of the respondents to the questionnaire.

Based on the outcome of the consultation, however, there seems to be no uniformity as to whether the measures should be taken by all platforms, or whether the smaller ones are excluded as they may be too disproportionate. We will have to await for the next steps in the legislative procedure before we will know which measures will make the final version (and in which form), but we can certainly expect to see hot debate.

UNIFIED LIABILITY REGIME FOR PLATFORMS

It was advocated by some parties (mainly IP right holders and IP lawyers) that (at least large) online platforms should be held liable for contributory infringement, by means of facilitating illegal content or product sales. This is not a new argument. Such liability would, on the one hand, they argue, create a self-regulatory effect for platforms and force them to be more proactive when it comes to illegal content and goods online and, on the other hand, would enable IP right owners to recover illegal profits made by the online platforms in the form of commission with the content or goods infringing their respective IP rights. Although there is a lot to be said about this view and the potential positive effects it can have, the burden on online platforms would be significant and the European Commission has largely maintained the current liability regime under the E-Commerce Directive in the draft Digital Services Act and contributory infringement, thus far, has not been imposed. As to voluntary measures for content moderation, the draft contains a clause protecting platform providers when they take voluntary actions to detect illegal content. With regard to the illegal content that is identified on their own initiative it is set out that the platform providers are still eligible for the exemptions from liability as set out in the draft.

THE DIGITAL SERVICES ACT

Most of the issues addressed above have (at least in some form) been included in the draft that has been published by the European Commission.

Through this draft Digital Services Act the European Commission introduces a highly detailed set of rules for online platforms on tackling illegal content through a harmonised Notice and Action mechanism which every online platform must put in place in a user-friendly and easy to access format. This includes provisions on minimum requirements for notices, decision transparency providing an explanation to the person who uploaded the content if removed, internal complaint-handling mechanisms and significant reporting obligations. Where the notice contains the name and email address of the individual or entity submitting the notice, a confirmation of receipt has to be sent and, furthermore, there is an obligation to inform that same individual or entity of the decision whether or not the content or goods will be removed in a timely manner. It is, however, not specified what 'a timely manner' is and this could still cause issues for IP right holders and IP lawyers if, in practice, the new mechanisms still take too long.

The draft further contains specific rules for online platforms to act against a specific item of illegal content when the order is issued by the relevant national judicial or administrative authorities and also inform the authority issuing the order of the effect given to the orders, without undue delay. Online platforms will be required to specify the action taken and the moment when the action was taken.

Furthermore, providers of intermediary services must have clear Terms and Conditions containing information on policies, procedures, restrictions, measures and tools which are used for

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content moderation including algorithmic decision-making and human review and which are easily accessible and publicly available. As set out in the questionnaire, it has to be clear which behaviour can lead to (temporary) suspension of the service and, in case of misuse, the online platform should proceed with the suspension of a user that has frequently provided illegal content after a prior warning has been issued. It will be assessed by the online platform on a case-by-case basis, whether there indeed is frequent misuse.

The proposed Digital Services Act explicitly recognises this that WHOIS is vital to the security and stability of the Internet as well as the need for data accuracy, something which the Commission has repeatedly underlined as being of prime importance for the purpose of maintaining a secure and resilient Internet Domain Name System.

The 'know your customer' policy, where professional users on online platforms will be obligated to identify themselves clearly, applies to operators of online marketplaces only. Besides the name, address and other contact information, additional information such as bank account details and an identification document are required. Operators of online marketplaces will have the obligation to make reasonable efforts to check whether specific information (specified in the draft) is correct and are obligated to take action if this is not the case. The information should be safely stored and deleted once the professional user no longer uses the online platform but could, under specific conditions, be disclosed to third parties in accordance with applicable law. IP right holders or IP attorneys, unfortunately, do not fall under the specified third parties covered by this article in the draft.

A special section addresses additional obligations for very large platforms that

have more than forty-five million monthly active users in the EU. These *inter alia* include additional obligations, which are deemed to be disproportionate for smaller online platforms such as obligations to carry out risk assessments and audits, to provide a high level of transparency on recommender systems and online advertising, and to cooperate with Digital Services Coordinators designated by the Member States to ensure compliance with the Digital Services Act.

Finally, it is worth mentioning that the draft introduces a new out-of-court dispute settlement system, with independent bodies reviewing the decisions of online platforms to take down content, as an alternative road for uploaders to going to court.

SANCTIONS FOR NON-COMPLIANCE

The DSA also introduces severe penalties for digital service providers who fail to comply with the new regulations.

Following the example of the General Data Protection Regulation, the proposed sanctions for non-compliance would be calculated on the basis of up to 6 percent of the global annual turnover.

Although the above only covers a part of the Digital Services Act it is, in a nutshell, a summary of the obligations and rules for online platforms to tackle online illegal content and goods that will, hopefully, prove to be a success in the battle against online illegal content and goods.

CONCLUSION

The Digital Services Act is an ambitious project, both in terms of the scope of topics it covers, but also the depth in

which it addresses them. The potential to affect not only the large Internet platforms but also the majority of digital service providers along with their business users and customers is profound. Whether all the goals of the European Commission will be achieved for both consumers, business users and for providers of digital services remains to be seen as the legislative procedure on the Digital Services Act continues. What is clear is that the Digital Services Act will have an enormous impact on the future of the digital market in the EU and all its players. Wherever this ends up after the inevitable heated debates to follow, a move towards harmonised EU rules will certainly be welcomed by all interested parties.«

