



THE DIGITAL SERVICE ACT AND THE UPCOMING REFORM OF THE DIGITAL SERVICES

Already in 2020, the European Commission presented the draft for a new EU regulation on a single market for digital services, through which the latest developments in the field of digital services are to be incorporated and regulated at EU level. The Regulation amends the current Directive 2000/31/EC with the aim of creating a new legal framework directly applicable in the Member States.

The proposal aims at better protection of consumer rights in the digital environment and at the joint internal market-related enforcement potential of the EU Member States.

I. HOW WILL ILLEGAL CONTENT BE HANDLED IN THE FUTURE?

“Illegal content” is defined in the new regulation as all information that does not comply with Union law or the law of a Member State. This rule applies both to the information itself and to mere references to other activities, including the sale of products or the provision of services.

Providers of intermediary services have to identify illegal content and eliminate it by taking concrete measures - such as blocking, adapting or even removing the content concerned or restricting users’ rights to provide such content. In the latter case, the provider may close the user’s account, for example, permanently or temporarily.

The liability of (pure) hosting service providers for illegal information is excluded in certain cases, whereby the liability under consumer protection law of online platforms operating in the field of distance selling contracts can only be waived in exceptional cases.

The draft provides for certain requirements on transparency and concrete information obligations for orders issued by the state judicial or administrative authority against illegal content. The orders must state the reasons why the information is illegal and on the basis of which sources the content has been identified. In addition, the legal remedies available to the user or the service provider shall be indicated.

Hosting service providers are also required to put in place procedures for reporting illegal content, mainly electronically. Furthermore, the provider must provide the user with a justification at the latest when removing or blocking information provided by the user, the minimum content of which is regulated in detail in the new regulation; the new regulations contained in the regulation are intended to prevent the erroneous deletion of content. This is especially true for very large online platforms when managing systemic risk; online platforms are defined as very large if they reach at least 45 million users per month through their services.



II. WHAT RULES WILL BE INTRODUCED FOR ONLINE ADVERTISING?

Particular attention will be paid in the new regulation to transparency and accountability to users for online advertising. For example, online platforms are responsible for ensuring that when online advertising is displayed, it is visible and clearly recognisable to individual users that it is advertising. In addition, the legal entity or the natural person on whose behalf the advertisement is displayed shall be indicated. The criteria for selecting those users to whom the advertising is displayed must also be clearly stated.

On the other hand, the display of advertising by very large platforms may also be restricted in relation to the services they offer to avoid certain systemic risks.

Very large online platforms that display third-party advertising on their interfaces must create a publicly accessible archive on their websites, which must remain accessible for a period of one year after the last display of the respective advertisement. This archive must not contain any personal data of users. The ordinance regulates the minimum content of the respective archive for each advertisement displayed.

To ensure transparency, fair competition within the Union and compliance with data protection rules, the European Commission supports the creation of codes of conduct at Union level. These should include at least the transmission of information by the intermediary services to the users or to the archive concerning the criteria for determining the selection of users and concerning the natural and legal persons on whose behalf the advertising is displayed.

The codes of conduct are to be finalised no later than one year after the regulation becomes applicable and are also to be made applicable no later than six months thereafter.

III. SAME OBLIGATIONS FOR EVERYONE?

The new regulation aims at a safe and transparent online environment that takes into account the market conditions and the possibilities of influence of the individual participants. To this end, a uniform framework is envisaged for all network services and hosting service providers. For example, all intermediary services must set up a central contact point that is available to state authorities, the EU Commission and certain bodies. In addition, providers of intermediary services without an establishment in the EU must appoint a legal representative in one of the Member States in which they offer their services. These legal representatives, in addition to the providers themselves, are liable for the enforcement of the ordinance and for the actions of the providers who have commissioned them in accordance with the ordinance.

Providers must include certain content in their general terms and conditions and publish once a year a written report on the monitoring of illegal content, the orders received from the Member States and the reports made of illegal content by individuals as well as other data listed in the Regulation. A separate notification and redress procedure regarding action against illegal content is provided for all hosting service providers. The removal of content deemed illegal by hosting service providers shall be accompanied by a justification and a review report to avoid erroneous deletions.

In addition, more specific obligations exist for larger online platforms. These do not apply to online platforms that are to be classified as small and medium-sized enterprises within the



meaning of the respective recommendation of the EU Commission. Such additional obligations are, for example, the establishment of an internal complaints management system for the benefit of users with the possibility of contacting an out-of-court dispute resolution body as well as taking measures to protect against online abuse by those users who frequently and obviously publish illegal content. Large online platforms are also required to file reports with the competent authorities of the member states if they suspect the existence of serious criminal offences. The specific obligations for large online platforms also include certain obligations of conduct towards those companies that offer users the conclusion of distance contracts as well as the transparency obligation for online advertising.

Further additional obligations are foreseen in the new regulation for very large online platforms. These are obliged to introduce risk assessment systems and risk avoidance measures as well as additional transparency measures for online advertising.

IV. IMPLEMENTATION OF THE REGULATION AND SANCTIONS

For the enforcement of the regulation, the establishment of coordination bodies for digital services in the member states is foreseen. The duties and responsibilities of the coordinators are regulated in great detail in the draft.

It is also left to the Member States to determine the sanctions for non-compliance with the new requirements.

However, the penalties may not exceed 6% of the annual revenue or turnover of the intermediary service provider concerned.

Penalties for providing incorrect, incomplete or misleading information, for failing to reply or for failing to correct incorrect, incomplete or misleading information shall not exceed 1% of the annual revenue or turnover of the provider concerned.

Some Member States have already expressed their agreement with the new regulations. It remains to be seen whether the draft will be adopted in this version, as various opinions with proposed amendments from the different committees within the Union are currently available.

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