

DOT Europe preliminary remarks on the DSA:
Consider the focus, scope and coherence of the proposal

On 15 December 2020, the European Commission published the Digital Services Act: a “modern rulebook across the Single Market”, to better protect citizens and fundamental rights online, and foster innovation, growth, and competitiveness in the EU.

DOT Europe – the voice of leading digital, online and tech companies in Europe – believes that the DSA has enormous potential to make a mark for the EU, especially in terms of setting a global bar for a new approach to digital policy-making.

The DSA should establish a robust framework to tackle illegalities online, which provides legal certainty for online services and the necessary assurances for stakeholders at large, without chaining itself to today’s technological reality. In January 2020, DOT Europe called on the European Commission to introduce [a new Online Responsibility Framework](#) to enable service providers to better tackle illegal content online, and we are encouraged to see that many of the points we raised then have been taken into account in this new proposal.

While there are significant details to iron out during the legislative process, we believe that the purpose of the DSA and the opportunity it represents must be kept in mind throughout. The DSA can and will bring about change in the online space, but it will not tackle all these concerns at once. The value of the DSA lies in its new regulatory approach, one that is forward-thinking, flexible and that takes account of all actors in the online ecosystem. While there is much to be debated in the coming months, at DOT Europe we believe the focus, scope and coherence of this new legislative framework must always remain at the heart of the DSA debate.

Consider the focus of the DSA

The DSA is intended to harmonise regulation across the Union. Unfortunately, before - and even after - the introduction of the DSA draft regulation, Member States introduced their own national initiatives in response to different concerns (including e.g. the German NetzDG revisions, the ongoing Austrian initiative on online hate speech, the recent French initiative implementing some of the due diligence obligations of the DSA, and the Hungarian and Polish initiatives on social media).

Instead of introducing new national laws - which can cause further fragmentation of the EU's Single Market and limit the potential of the DSA – Member States should be focusing on working towards a clear and workable DSA. The breadth of initiatives above shows the many directions in which it could be taken and illustrates the need to avoid duplication and confusion in EU law. This is especially the case when considering how several priority issues will be addressed by measures coming into force soon, such as VAT reform, the Goods Package and Consumer Omnibus changes. Additionally, there are the European Commission’s Customs and IP Action Plans, the Review of the General Product Safety Directive, not to mention the Regulation on Tackling the Dissemination of Terrorist Content Online, e-Evidence, the ePrivacy Regulation, as well as the upcoming CSAM legislation – all these instruments look to address a wide variety of issues at EU level.

Policy-makers ought to also consider the horizontal focus of the DSA. The proposal is a horizontal, technology-neutral instrument, which builds on the foundation of the e-Commerce Directive. It is aimed at putting in place systems to tackle illegalities online, with layered responsibilities targeted at different types of intermediary services.

By taking this horizontal view, the DSA can be applied flexibly to different services as they evolve, with the clarity that the same level of responsibilities will apply regardless of where that service is

established in the Internal Market – or indeed outside it. This will grant service providers the freedom to be adaptable, to implement the requirements of the DSA in a way that best reflects the nature of their services, the type of content they make available and their risk exposure.

Moreover, by maintaining the horizontal nature of the proposal, policy-makers can establish this baseline of legal certainty for service providers in the EU, while still adapting and clarifying rules in niche legislative proposals and other regulatory actions when more specific issues arise, in a manner that complements the DSA.

The focus for policy-makers must therefore be on getting a workable horizontal framework in place for digital services in the Internal Market, on getting this foundation right for the long-term future of digital services in Europe.

Consider the scope of the DSA

The scope of the liability regime encompassed in the DSA is limited to illegalities online, but we are concerned about the potential for overreach into content that is legal but harmful, via due diligence obligations and broad regulatory powers.

Content or activity that is illegal is defined at either national or EU level. These definitions are what ensures that online service providers have [a legal basis to act](#) against infringements that appear on their services - establishing the degree to which a service provider can act, the types of actions they can take, and the redress mechanisms required. Still, we are concerned that the DSA defines illegal content in too broad a manner. Article 2(g) of the proposal includes in its definition of illegal content any information “which by itself, or by reference to an activity” is illegal under Member State or EU law (emphasis added). This definition could lead to overbroad removals; for example, would a video showing a car exceeding a local speed limit be an impermissible reference to an illegal activity under the DSA? We believe this goes beyond the drafters’ intentions, and that the definition of illegal content should be narrowed down or clarified to avoid extreme results.

In the DSA proposal there are a variety of rules that would oblige service providers to review and assess many different types of content and activity, gather and publish information, continuously develop and disclose new systems to prevent bad actors from abusing their services, and remove or disable access to content. Much as the consequences of allowing illegal content to permeate on a service can be dire, so too can overzealous action on content that is legal - but which some may consider to be harmful. This ought to be kept in mind when considering the scope.

DOT Europe remains committed to tackling the issues stemming from “harmful” content such as disinformation and harmful speech, but we would stress that these issues require nuance and consideration. By starting with illegal content and then designing the appropriate actions to tackle it, service providers can more easily build a system with scaling action on the basis of potential risk. The DSA has the potential to put such a framework of responsibilities and responses in place, and it will be complemented by upcoming codes of conduct, as well as the European Democracy Action Plan.

The scope of the DSA will be as important as its focus in this debate. Given the breadth and depth of the due diligence obligations in the DSA, the limitation of the scope to illegal content will be an important element for policy-makers to keep in mind, in order to avoid unintended consequences.

Consider the coherence of the DSA

The DSA is meant to clarify – rather than confuse - the rules for stakeholders in the online space, and it will not exist in a vacuum.

There is already an existing body of legislation targeting online services (either directly or indirectly) at national and EU-level, so it will be crucial that the DSA works coherently with all the rules already in place - including the recently adopted Regulation on Tackling the Dissemination of Terrorist Content Online, the Directive on copyright in the Digital Single Market, the Platform to Business Regulation, the New Deal for Consumers, the Audiovisual Media Services Directive and the General Data Protection Regulation (to name a few). The DSA will also need to work with sets of rules that apply both on and offline, such as those on product regulation or the Services Directive.

This same point can be made when considering how the obligations in the DSA will interact with Internal Market rules and the spirit of the e-Commerce Directive. The Country-of-Origin (COO) principle has and continues to be essential for businesses operating in Europe, but it is not yet clear how some of the different elements of the DSA will adhere to this principle. For example, the cross-border removal rules, the governance mechanism, and some of the oversight rules within the DSA should respect the coherence of the COO principle as a key pillar for the functioning of the Internal Market.

It is also important to remember that this coherence concern will apply not only to the types of obligations proposed in the DSA, but also to the terminology used therein. For example, when it comes to transparency reporting as proposed in the DSA, due regard will need to be paid to existing obligations under the New Deal for Consumers and the Platform to Business Regulation, to avoid duplication or overlap in EU law. Similarly, when it comes to the requirement to provide out-of-court mechanisms, due regard will need to be paid to existing requirements under the ADR Directive, the P2B Regulation, the AVMSD and the Directive on copyright in the Digital Single Market.

Conversely, the terminology employed in the DSA can also have an impact on recently adopted or existing law. For example, while the proposed DSA does not define the illegality of content, Article 2(g) does define what it means by the term “content” more broadly – in the DSA this term refers to illegal actions as well, including the sale of products and provision of service, which is a more extensive use of the term “content” than how it is employed in e.g. the Regulation on Tackling the Dissemination of Terrorist Content Online.

When reading the DSA proposal, DOT Europe urges policy-makers to keep the existing body of EU law in mind, consider what rules already exist and how they should be complemented, not only what rules might be “missing” or need to be revised.