

# DSA

## Proposed Plenary Amendments

1. Subsidiarity principle (Recitals 26, 40a, and 40b, Art. 8.2 (cb), Art. 14.6)
2. Search engines (Recital 27a)
3. Know Your Business Costumer (“KYBC”) (Art. 13b)
4. Commission’s Guidelines (Art. 1a)
5. Notice and Action (Art. 14.3a).

### **1. Subsidiarity principle (Recital 26, 40a, 40b, Art 8.2 (cb), Art 14.6)**

Some provisions in the IMCO text build on the so-called “subsidiarity principle”, which was originally introduced by the European Commission in Recital 26, but not supported by any provisions (Articles). This principle means that third parties that are affected by illegal content are required to act against direct infringers first, before going to the intermediary service. This is unhelpful, as it would make the fight against copyright infringement online ineffective and would negate the objective of the DSA, which is to increase the accountability of intermediaries.

#### **a) Recital 26**

##### *Text proposed by the Commission*

(26) Whilst the rules in Chapter II of this Regulation concentrate on the exemption from liability of providers of intermediary services, it is important to recall that, despite the generally important role played by those providers, the problem of illegal content and activities online should not be dealt with by solely focusing on their liability and responsibilities. Where possible, third parties affected by illegal content transmitted or stored online should attempt to resolve conflicts relating to such content without involving the providers of intermediary services in question. Recipients of the service should be held liable, where the applicable rules of Union and national law determining such liability so provide, for the illegal content that they provide and may disseminate through intermediary services. Where appropriate, other actors, such as group moderators in closed online environments, in particular in the case of large groups, should also help to avoid the spread of illegal content online, in accordance with the applicable law. Furthermore, where it is necessary to involve information society services providers, including providers of intermediary services, any requests or orders for such involvement

##### *Amendment*

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should, as a general rule, be directed to the actors technical and operational ability to act against specific items of illegal content, so as to prevent that has the and minimise any possible negative effects for the availability and accessibility of information that is not illegal content.

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**b) AM 42**  
**Recital 40a (new)**

*Text proposed by the IMCO*

*Amendment*

***(40a) Nevertheless, notices should be directed to the actor that has the technical and operational ability to act and the closest relationship to the recipient of the service that provided the information or content. Such hosting service providers should redirect such notices to the particular online platform and inform the Digital Services Coordinator.***

Deletion

**c) AM 43**  
**Recital 40b (new)**

*Text proposed by the IMCO*

*Amendment*

***(40b) Moreover, hosting providers should seek to act only against the items of information notified. Where the removal or disabling of access to individual items of information is technically or operationally unachievable due to legal or technological reasons, such as encrypted file and data storage and sharing services, hosting providers should inform the recipient of the service of the notification and seek action.]***

Deletion

**d) AM 153**

**Article 8(2)(cb) (new)**

*Text proposed by IMCO*

*Amendment*

**(cb) where more than one provider of intermediary services is responsible for**

Deletion

hosting the specific items of illegal content, the order is issued to the most appropriate provider that has the technical and operational ability to act against those specific items.

**e) Request a split vote on AM 211 on Art 14 (6)**

**Article 14(6)**

1<sup>st</sup> part: Text as a whole excluding “where the provider....Digital Service Coordinator”

**[IN FAVOUR]**

2<sup>nd</sup> part: “where the provider....Digital Services Coordinator” **[AGAINST]**

*Text proposed by IMCO*

*Amendment*

6. Providers of hosting services shall process any notices that they receive under the mechanisms referred to in paragraph 1 and take their decisions in respect of the information to which the notices relate, in a timely, diligent, **non-discriminatory and non-arbitrary** ~~objective~~ manner. Where they use automated means for that processing or decision-making, they shall include information on such use in the notification referred to in paragraph 4. **Where the provider has no technical, operational or contractual ability to act against specific items of illegal content, it may hand over a notice to the provider that has direct control of specific items of illegal content, while informing the notifying person or entity and the relevant Digital Services Coordinator.**

**1<sup>ST</sup> PART** 6. Providers of hosting services shall process any notices that they receive under the mechanisms referred to in paragraph 1 and take their decisions in respect of the information to which the notices relate, in a timely, diligent, **non-discriminatory and non-arbitrary** ~~objective~~ manner. Where they use automated means for that processing or decision-making, they shall include information on such use in the notification referred to in paragraph 4. **[IN FAVOUR]**

**2<sup>ND</sup> PART:** **Where the provider has no technical, operational or contractual ability to act against specific items of illegal content, it may hand over a notice to the provider that has direct control of specific items of illegal content, while informing the notifying person or entity and the relevant Digital Services Coordinator. [AGAINST]**

**Justification**

Some of the wording in Recital 26, which is further reflected in some proposed provisions (Article 8(2)(cb) (new), Article 14(6), Recital 40a (new), Recital 40b (new)), could mean that third parties that are affected by illegal content are required to first address the primary infringer before seeking the involvement of an intermediary. Such an approach would create a system where parties would be forced to target end users and where intermediaries would be given the opportunity to escape any obligation to operate diligently and expeditiously to remove illegal content online, arguing for example that they have no technical, operational or contractual ability to take action against illegal content

oractivity. Such a system would simply create less, not more, accountability of platforms and would negate the whole purpose of the DSA.

Different intermediaries can be involved in the distribution of illegal content. Limiting the ability of parties to only request the “specific provider” to act would ignore the complex Internet infrastructure and negate the whole objective of the DSA, which is to fight illegal content online effectively.

## **2. Search engines**

[The IMCO text introduces unclear language in Recital 27a for search engines which could be interpreted as qualifying them as “caching” services]. If adopted, the inclusion of search engines under the liability privileges would make them less accountable.

**Recommendation : Request a split vote on amendment 24 on Recital 27a.**

### **Recital 27a (new)**

#### *Text proposed by the IMCO*

**(27a) A single webpage or website may include elements that qualify differently between ‘mere conduit’, ‘caching’ or hosting services and the rules for exemptions from liability should apply to each accordingly. For example, a search engine could act solely as a ‘caching’ service as to information included in the results of an inquiry. Elements displayed alongside those results, such as online advertisements, would however still qualify as a hosting service.**

#### *Amendment*

*1<sup>st</sup> part:* “ A single webpage or website may include elements that qualify differently between ‘mere conduit’, ‘caching’ or hosting services and the rules for exemptions from liability should apply to each accordingly.” **[IN FAVOUR]**

*2<sup>nd</sup> part:* “For example, a search engine could act solely as a ‘caching’ service as to information included in the results of an inquiry. Elements displayed alongside those results, such as online advertisements, would however still qualify as a hosting service.” **[AGAINST]**

#### **Justification**

The proposal suggesting categorizing search engines as ‘caching’ or ‘hosting’ services goes against the objective of the DSA to make online platforms more accountable. The goal of increasing the accountability of search engines should be achieved through the introduction of effective due diligence obligations, not by making them beneficiaries of a broad and unjustified “safe harbour”. Instead, their eligibility for liability privileges should be determined on a case-by-case basis depending on the extent, in relation to any given content, they actually engage in activities covered by any of the existing safe harbour provisions.

## **3. Know Your Business Customer (KYBC)**

The narrow approach of limiting ‘Know Your Business Customer’ (KYBC) provisions to online marketplaces is a missed opportunity to ensure that the DSA provides a meaningful tool to address the broad range of illegal activities online. The rapporteur, Mrs Schaldemose, introduced in her original draft report the following amendment, which we consider very helpful.

## **Article 13 b (new)**

*Text proposed by the Commission*

*Amendment*

### **Article 13b**

#### **Traceability of business users**

- 1. A provider of intermediary services shall ensure that business users can only use its services if the provider of intermediary service has obtained the following information:**
  - (a) the name, address, telephone number and electronic mail address of the business user;**
  - (b) a copy of the identification document of the business user or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council<sup>1a</sup>;**
  - (c) the bank account details of the business user, where the business user is a natural person;**
  - (d) where the business user is registered in a trade register or similar public register, the trade register in which the business user is registered, and its registration number or equivalent means of identification in that register;**
- 2. The provider of intermediary services shall, upon receiving that information and until the end of the contractual relationship, make reasonable efforts to assess whether the information referred to in points (a) and (d) of paragraph 1 is reliable and up-to-date through the use of any freely accessible official online database or online interface made available by a Member States or the Union or through requests to the business user to provide supporting documents from reliable sources.**
- 3. Where the provider of intermediary services obtains indications that any item of information referred to in paragraph 1**

*obtained from the business users concerned is inaccurate or incomplete, that provider of intermediary services shall request the business user to correct the information in so far as necessary to ensure that all information is accurate and complete, without delay or within the time period set by Union and national law.*

*Where the business user fails to correct or complete that information, the provider of intermediary services shall suspend the provision of its service to the business user until the request is complied with.*

*4. The providers of intermediary services shall store the information obtained pursuant to paragraph 1 and 2 in a secure manner for the duration of their contractual relationship with the business user concerned. They shall subsequently delete the information.*

*5. Without prejudice to paragraph 2, the providers of intermediary services shall only disclose the information to third parties where so required in accordance with the applicable law, including the orders referred to in Article 9 and any order issued by Member States' competent authorities or the Commission for the performance of their tasks under this Regulation.*

*6. The providers of intermediary services shall make the information referred to in points (a) and (d) of paragraph 1 available to the recipients of the service, in a clear, easily accessible and comprehensible manner.*

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*<sup>1a</sup> Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC (OJ L 257, 28.8.2014, p. 73).*

## **Justification**

KYBC obligations should apply to all intermediary service providers. A business cannot operate online without being hosted, or without advertisement and/or payment services. Requiring that providers of intermediary services which have a direct relationship with the businesses concerned know the

identity of their business customers would automatically reduce illegal content online in a minimally burdensome way.

A broad KYBC [obligation?] is clearly in line with the express objectives of the DSA, namely ensuring a safe, predictable, and trusted online environment for businesses and consumers. KYBC duties will impose minimal burdens on legitimate businesses, all of which are easily identifiable, and consumers will benefit from an online environment where business operators are easily identifiable.

#### **4. Commission's Guidelines**

According to Article 1a and [the?] relevant recital (9) of the IMCO text, the European Commission should issue guidelines to clarify the relationship between the DSA (*lex generalis*) and the sector specific legislation (*lex specialis*). This request should be rejected. We believe that the interpretation of the Union law should be left to the Courts and ultimately to the CJEU.

#### **Recommendation: Request a split vote on amendment 106 on Article 1a (Scope) and on Amendment 8 on Recital 9.**

##### **Art 1.a**

*1<sup>st</sup> part:* Text as a whole excluding "4. By [12 months after... in Article 1a(3)]" **[IN FAVOUR]**

*2<sup>nd</sup> part:* 4. By [12 months after... in Article 1a(3)]" **[AGAINST]**

##### **Recital 9**

*1<sup>st</sup> part:* Text as a whole excluding "To assist ...prevail" **[IN FAVOUR]**

*2<sup>nd</sup> part:* "To assist ...prevail" **[AGAINST]**

*Text proposed by the Commission*

*Amendment*

##### **Article 1a**

##### **Scope**

**1<sup>ST</sup> PART** : 1. *This Regulation shall apply to intermediary services provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the providers of those services.*

2. *This Regulation shall not apply to any service that is not an intermediary service or to any requirements imposed in respect of such a service, irrespective of whether the service is provided through the use of an intermediary service.*

3. *This Regulation is without prejudice to the rules laid down by the following:*

(a) *Directive 2000/31/EC;*

(b) *Directive 2010/13/EC;*

(c) Union law on copyright and related rights, in particular Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market;

(d) Regulation (EU) .../...2021/784 on preventing addressing the dissemination of terrorist content online;

(e) Regulation (EU) ..../....on European Production and Preservation Orders for electronic evidence in criminal matters and Directive (EU) ..../....laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings [e-evidence once adopted]

(f) Regulation (EU) 2019/1148;

(g) Regulation (EU) 2019/1150;

(h) Union law on consumer protection and product safety, including Regulation (EU) 2017/2394, Regulation(EU) 2019/1020 and Directive 2001/95/EC on general product safety;

(i) Union law on the protection of personal data, in particular Regulation (EU) 2016/679 and Directive 2002/58/EC.

(j) Directive (EU) 2019/882;

(k) Directive (EU) 2018/1972;

(l) Directive 2013/11/EU. **(IN FAVOUR)**

**2<sup>ND</sup> PART 4.** By [12 months after the entry into force of this Regulation] the Commission shall publish guidelines with regard to the relationship between this Regulation and the legal acts referred to in Article 1a (3) **[AGAINST]**

## Amendment 8

### Recital 9

*Text proposed by the Commission*

(9) This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular Directive

*Amendment*

**1<sup>st</sup> PART :**

(9) This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of

2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended,<sup>28</sup> and Regulation (EU) .../. of the European Parliament and of the Council<sup>29</sup> – proposed Terrorist Content Online Regulation. Therefore, this Regulation leaves those other acts, which are to be considered *lex specialis* in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures ***at national level***.

intermediary services, in particular Directive 2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended,<sup>28</sup> and Regulation (EU) **2021/784** of the European Parliament and of the Council<sup>29</sup> – proposed Terrorist Content Online Regulation. Therefore, this Regulation leaves those other acts, which are to be considered *lex specialis* in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation ***should*** apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures [IN FAVOUR].

***2<sup>nd</sup> PART : To assist Member States and service providers, the Commission should provide guidelines as to how to interpret the interaction and complementary nature between different Union legal acts and this Regulation and how to prevent any duplication of requirements on providers or potential conflicts in the interpretation of similar requirements. In particular, the guidelines should clarify any potential conflicts between the conditions and obligations laid down in legal acts, referred to in this Regulation, explaining which legal act should prevail. [AGAINST]***

#### Justification

The suggestion that the European Commission should clarify the relationship between *lex generalis* (DSA) and *lex specialis*, such as for example the DSM Copyright Directive, is based on the wrong assumption that this relation is unclear and would bring uncertainty to the ongoing implementation of sector specific directives. The interpretation of the Union law should be left to the courts and ultimately to the CJEU.

## **5. Notice and Action**

The new Article 14 (3a) is very unhelpful. It jeopardises the effectiveness of the N&A system, as it requires that the information, which has been the subject of a notice, shall remain accessible while the assessment of its legality is still pending.

**Recommendation: Request a separate vote on amendment 207 on Article 14 (3a) [AGAINST]**

#### Justification

In order to meet the objective of the DSA, which is to ensure more, not less, accountability of platforms, the notice and action mechanism should remain clear on the need for intermediaries to act expeditiously upon receipt of a notice flagging illegal content or otherwise gaining knowledge of illegal activity or content, by taking the content down.