

DSA - KEY PRIORITIES

1. NO “SAFE HARBOUR” FOR SEARCH ENGINES

The E-Commerce Directive sets out a number of ‘safe harbours’ for intermediary services. However, unlike for instance under US law, there is no specific safe harbour in the Directive for search engines. Their eligibility for the liability privileges is determined on a case-by-case basis depending on whether and to what extent, in relation to any given content, they actually engage in activities covered by any of the existing safe harbour provisions. In its original DSA proposal, the European Commission confirmed this approach. The European Parliament confirmed overall the approach of the Commission, except for an unhelpful new recital (27a) suggesting that certain activities of search engines could be treated as ‘caching’. Article 4 of the Council’ position proposes to align search engines to ‘caching’ services. Such an amendment is technically incorrect (search engines are not ‘caching’) and would have a very negative impact on our ability to ask search engines to demote services or remove links or prevent the generation of autocomplete suggestions that lead to illegal content. Such a proposal would in fact make the EU regime fall below the existing standards, including those provided under the US DMCA law.

Objective:

- *Option 1* – Go back to the European Commission’s proposal. No inclusion of search engines in any safe harbour provisions in the DSA.
- *Option 2* – If the Council insists on the necessity of including search engines in the DSA, it should do so only through the introduction of effective due diligence obligations for search engines, without creating safe harbours.

2. SUBSIDIARITY PRINCIPLE

Recital 26 of the European Commission proposal expressed the principle that “*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*”. The intention, as expressed by Commissioner Breton, was to “stop infantilizing” direct infringers. Such a principle was confirmed by Member States in the Council General Approach. The European Parliament went much further than that and complemented Recital 26 with several unhelpful amendments proposing concrete provisions, 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 or activity (**Article 8(2)(cb) (new), Article 14(6), Recital 40a (new), Recital 40b (new)**).

Objective:

Option 1 - Push back on all Parliament amendments and delete subsidiarity principle in Recital 26 of the Commission.

Option 2 - Leverage on the Council’ position, aiming to reject all Parliament amendments and keep the Commission Proposal as it is.

3. NOTICE AND ACTION - RISK OF LOWERING DOWN CURRENT STANDARDS FOR COPYRIGHT

1) **URL:** Article 14.2 (and Recital 40) of the Commission proposal proposed URL and exact location as a mandatory requirement in a notice. We fear this would be a significant step backwards compared to the existing EU acquis (asking the notice only to be sufficiently substantiated) and would constitute an obstacle to positive national and EU case law on “stay down”. Despite some small positive amendments, the Council General Approach confirmed overall the line taken by the European Commission. On the contrary, the Parliament text clarifies that URL, and the indication of an exact location can be imposed only “where relevant”, which is a significant step forward compared to the original proposal.

Objective:

- *Option 1* - Delete any reference to URL or exact location requirement – as in our original position.
- *Option 2* - Promote a solution like the European Parliament’s, where it is clarified that the indication of the exact URL and exact location should be required only “where relevant” or strictly necessary to identify the illegal/unauthorised content.

2) **Assessment of illegality after a notice:** the European Parliament has introduced a new paragraph (Article 14.3a) stating that “*Information that has been the subject of a notice shall remain accessible while the assessment of its legality is still pending*”. While the same article (14.3) also clarifies that a notification in line with DSA requirements (14.2) should be enough “**to establish the illegality of the content in question without conducting a legal or factual examination**”. Such a provision is unhelpful, creates a lot of uncertainty and should be deleted, in line with the position taken both by the Council and by the European Commission.

Objective: rejection of 14.3a proposed by the Parliament.

4. NO BAN ON AUTOMATIC MEASURES (ARTICLE 7)

Several attempts were made by the Greens and by the Committee on Civil Liberties to leverage the no general monitoring obligation to introduce a ban on content recognition technologies (“upload filters”) in the Parliament text. None of these proposals were adopted by the Parliament. Nevertheless, the need to find a compromise led to unclear and contradictory language in the final text of the Parliament (Articles 7.1 and 7.1a). This lack of clarity might impact on our ability to impose preventive measures by law or judicial order, outside Article 17. It is therefore our objective to push towards the Commission and Council texts that are more neutral in that respect.

Objective: reject Parliament amendments on Article 7.1 and to Article 7.1a.

5. EXTENSION OF KYBC (Know Your Business Customer)

Since the beginning of the DSA process our position has been that the ‘Know Your Business Customer’ (KYBC) obligation should be broadened and applied to all information society services. The Commission’s original proposal (Art 22) does not include all digital services within the scope of the KYBC provision. The Council’s text limits it to online marketplaces only. The European Parliament’s amendment requesting the extension of KYBC (Article 13b) was formally rejected only by one vote (309 vs 308). Considering that the extension of the scope is supported by the Rapporteur, Christel Schaldemose, and by several important Member States in the Council (Italy, Spain, Portugal, Denmark, the Netherlands and Austria), it is still possible to bring this solution back to the negotiating table in the trilogue.

Objective: Obtain an extension of KYBC to all providers of intermediary services.