

European Union Update: The Digital Services Act

ICANN Government & Intergovernmental
Organization (IGO) Engagement

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Foreword

This paper provides an update and analysis of the Digital Services Act (DSA) initiative launched by the European Union (EU). The DSA initiative was identified in the first of the series of the ICANN Government & Intergovernmental Organization (IGO) Engagement papers capturing EU policy updates as an area of potential relevance to the ICANN community and to ICANN's technical role in the Internet ecosystem.¹ This paper broadly explains the initiative to date and its potential impact.

It is worth noting that the European Commission launched a public consultation on the DSA initiative that will remain open until 8 September 2020.² ICANN org will submit a contribution to the open consultation and encourages the community to take this opportunity to contribute as well.

ICANN organization will continue to monitor the DSA initiative and will provide updates as relevant developments unfold.

¹ <https://www.icann.org/en/system/files/files/eu-policy-update-03apr20-en.pdf>

² <https://ec.europa.eu/digital-single-market/en/news/consultation-digital-services-act-package>

What is the Digital Services Act?

The upcoming legislative proposal is a response to growing concern over the roles and responsibilities of online platforms in recent years; and is the latest attempt to update elements of the 2000 e-Commerce Directive, including the liability provisions for intermediaries.³

The Digital Services Act (DSA) will update the e-Commerce Directive, turning it into a Regulation that applies directly across the European Union (EU), rather than having to be incorporated into national legislation. In addition to creating a Regulation, the DSA is expected to introduce updated rules on removing illegal content posted online, and to address concerns about algorithm transparency, disinformation, and targeted advertising.⁴

The DSA is also expected to introduce additional measures for so-called “gatekeeping platforms,” an indirect reference to large online actors, to prevent them from abusing their scale to harm competitors. The upcoming proposal will forbid large platforms from imposing unfair terms, such as using data created by businesses using their platform for their own growth.

Why a DSA?

The main objective of the law is to update the existing EU legislation and place a single set of rules across the EU.⁵ France and Germany have laws and legislative proposals on the removal of illegal and harmful content online, notably from media platforms.⁶ Other countries are considering doing the same.⁷ Illegal content online is considered a problem in Europe across the political spectrum, giving the European Commission confidence in its pan-EU approach.

The DSA also seeks to address a gradual erosion of the e-Commerce Directive principles that absolve intermediaries, including broadband providers and social networks, from responsibility for illegal content under certain circumstances. These principles have been affected by recent

³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>

⁴ According to the initiative’s Inception Impact Assessment, the Impact Assessment that will be conducted on the initiative will analyze in detail a series of problems including: “Options for addressing harmful, but not necessarily illegal content, would also be in scope [of the Impact Assessment], while respecting the important distinction between the two” as regards to fragmentation in the EU Single Market and need for reinforced cross-border cooperation.

⁵ Inception Impact Assessments on e-Commerce aspects, see at <https://ec.europa.eu/info/law/better-regulation/>

⁶ France with the so-called “Avia Law”, from the name of the MP proposing the legislation, http://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_contre_haine_internet; the French Conseil Constitutionnelle struck down recently almost entirely the proposed legislation on grounds that it has a disproportionate impact on freedom of expression, <https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm>. The German law with a similar aim is the so-called “NetzDG” (abbreviation from *Netzwerkdurchsetzungsgesetz*), <https://www.gesetze-im-internet.de/netzdg/BJNR335210017.html>. The Bundestag passed the law in June 2017.

⁷ Austria, for instance, proposed a bill with mechanisms to identify the responsible person posting content, https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00134/index.shtml; it appears that no significant progress has been made in approving the legislation

EU laws governing online platforms, such as the Audiovisual Media Services Directive,⁸ the Copyright Directive,⁹ and the Regulation on Preventing Terrorist Content Online.¹⁰

What will the DSA likely contain?

The DSA will not prescribe what illegal content is. That decision will remain with member states. Rather, it will put in place a system, the “notice and action” mechanism, to ensure that online services have similar processes to remove content flagged as illegal. Key principles of the e-Commerce Directive will most likely be maintained in the DSA. Website hosts and “digital lockers” will not have “editorial responsibility” or be made responsible for users’ content; and EU member states will continue to be banned from forcing platforms to have general monitoring obligations on content.¹¹

However, large platforms may be considered to have a special responsibility and could be subject to additional rules, either through legislation or additional self-regulation/co-regulation. This could be the case for content such as disinformation (“fake news”). The EU is conscious of the difficulty in balancing the desire to remove unwanted content with freedom of expression. It is therefore likely to limit its intervention to disinformation that has malicious intent designed to deceive the public or polarize public opinion, for example, through coordinated disinformation campaigns by state and non-state actors.

It is not yet clear if new obligations will be extended to caching and mere conduit providers, such as broadband operators and content delivery networks.

The DSA will apply to companies operating in the EU regardless of whether they have their headquarters in the bloc, which is similar to the EU General Data Protection Regulation (GDPR).

The European Commission has launched an open consultation, asking organizations and the public about the proposed approach.¹² The consultation includes questions on digital service providers’ experience with removing the sale of illegal goods online; their experience with illegal content during the COVID-19 crisis; how services approach harmful but not illegal content, including disinformation, cyberbullying, and violence against women online; and the systems introduced by digital services to report unwanted content.

The consultation also seeks feedback on whether enforcement should be at the EU or national level. This may generate an important discussion about whether a new regulatory authority at the EU level is necessary.

⁸ E.g. Art. 28a AVMSD <https://eur-lex.europa.eu/eli/dir/2018/1808/oj>

⁹ E.g. Art. 17 <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

¹⁰ In truth, the Regulation on preventing terrorist content online, has an impact on this principle. While not approved yet the Regulation would impose on platforms obligations of speedy removal of terrorist content and take “preventative actions” against terrorist content (these obligations are still disputed between Parliament and Council)

¹¹ As per articles of 12-15 of the e-Commerce Directive

¹² Digital Services Act package: open public consultation, European Commission, https://ec.europa.eu/eusurvey/runner/Digital_Services_Act; the consultation is open until 8 September

How are ICANN and the ICANN community affected?

The scope of the DSA (e.g., which “services” will be affected by the new law) will determine which organizations will be covered by the new rules and will be material for ICANN and its community. Each platform presents its own set of challenges and one of the most complex tasks will be clarifying key definitions such as “digital service.”

The consultation questionnaire indicates that the Commission is considering measures that might be applicable to DNS services: “What would be appropriate and proportionate measures for digital services acting as online intermediaries, other than online platforms, to take – e.g. web hosts, [...] DNS services, etc.?”¹³

Website hosts could be affected, as they may be asked to perform either ex-ante checks in certain cases (e.g., in relation to the sale of illegal goods) or introduce notice-and-action mechanisms.

Within the DNS ecosystem, registrars could be affected. ICANN’s Registrar Accreditation Agreement already provides that registrars shall be able to receive and act upon notification of providers of illegal content “by law enforcement, consumer protection, quasi-governmental or other similar authorities.”¹⁴ Under the DSA, digital services providers would be required to extend such notification systems to the general public, for reporting unwanted content.

The consultation asks specific questions related to registration data directory services (commonly known as WHOIS): “do you use the WHOIS?”, “is it valuable?”, “is the information sufficient?”, and “are there similar sources for such data?”¹⁵ The questions probe how effective registration data is for the identification of illegal content, which could yield feedback about the impact GDPR has had on the registration data search functionality provided by registries and registrars.

Finally, there may be new rules on advertising, including behavioral and targeted advertising, which could introduce constraints on how these services operate. This could, for example, affect how registrars offer digital marketing support to their customers.

The existing EU legislative framework, which consists of Directive 2015/1535/16 and the e-Commerce Directive, is establishing rules on “information society services”, including the liability of intermediaries. It is worth noting that in recent years, jurisprudence in Europe has opened a debate on whether DNS operators can be considered information society services and to what extent the liability exemption regime of the existing e-Commerce Directive applies to them.

Next steps

The consultation will close on 8 September 2020. After that, feedback from stakeholders will continue through targeted meetings and public events. The legislative proposal is due at the end of 2020 or early 2021.

¹³ Digital Services Act package: open public consultation, European Commission, Page 22, https://ec.europa.eu/eusurvey/runner/Digital_Services_Act

¹⁴ ICANN’s 2013 Registrar Accreditation Agreement (RAA 3.18.2), <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>

¹⁵ Digital Services Act package: open public consultation, European Commission, page 15, https://ec.europa.eu/eusurvey/runner/Digital_Services_Act

¹⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L1535&from=EN>

The European Parliament is producing its own report on the proposal.¹⁷ The report will not be binding for the European Commission but will serve as an important indication on the position of the Members of the EU Parliament (MEPs). Similarly, the Council (EU Member States) will launch informal discussions to identify common positions or areas of disagreement on key issues.

Once the DSA has been proposed by the European Commission, the European Parliament and Council will separately analyze the text and negotiate a compromise between their respective versions.

The legislative proposal is expected to be controversial and high profile, given that it affects large companies, politically sensitive debates like misinformation or election interference, privacy-related concerns like targeted advertising, and the general trend toward digitization, which increases society's reliance on digital platforms. Similar debates in the United States will inevitably also influence how the EU discussions evolve.

The negotiations on the DSA will likely continue until 2023-2025.

¹⁷ European Parliament, 2020/2018 (INL)

https://www.europarl.europa.eu/doceo/document/IMCO-PR-648474_EN.pdf

In the context of this report, an amendment has been proposed to a paragraph noting the difficulty in identifying companies that sell fake goods online as follows: "Notes that the WHOIS database register has been a critical instrument to allow interested third parties to find bad actors on the internet; calls on the Commission and the European Data Protection Board to find a concrete solution to ensure interested trusted third parties can have a controlled access to it" (European Parliament PE648.474v02-00, amendment 211,

[https://www.europarl.europa.eu/RegData/commissions/imco/projet_avis/2020/650712/amendements/IMCO_AM\(2020\)650712_EN.pdf](https://www.europarl.europa.eu/RegData/commissions/imco/projet_avis/2020/650712/amendements/IMCO_AM(2020)650712_EN.pdf))

