Committed to Europe

Orange position on the European Commission's proposal for a Digital Services Act Regulation

Executive Summary

We welcome the European Commission's proposal on the Digital Services Act Regulation, which puts forward a modernized framework for digital services while preserving the core principles of country of origin, limited liability and a prohibition on general monitoring. We support the clear and limited objective on the removal of illegal content online, and support the choice of the regulatory instrument ensuring a harmonised application across the EU Member States. The underlying principle should be to remove the illegal content as close to the source as possible, namely by targeting online platforms which engage in the dissemination of content to the public.

Cloud storage services form part of the definition of hosting services, but do not engage in the dissemination of content to the public. Therefore, the obligations falling on mere conduits and caching, namely to react to blocking injunctions, should also apply to those cloud hosting services. The increased duties related to Notice and Action mechanism as well as the obligation to adhere to orders should be targeted towards online platforms.

Towards a targeted approach to removing illegal content

The majority of our comments rely upon the need to make a clearer distinction between different intermediaries in that those companies who are closest to enabling the availability of illegal content/products online should also be targeted with the obligations to remove and restrict access to such material online. Where intermediaries – who provide services with no dissemination to the public – are targeted with notifications, such as injunctions, these entities should be more clearly protected by the liability exemption when acting expeditiously upon notification. The main focus of the Regulation should be on the removal of illegal content at a level as granular as possible, mainly targeting online platforms that allow sharing with the public and have the actual knowledge of, or exert control over, such content.

Make a clear distinction between passive and active intermediaries

As a provider of electronic communication services, Orange falls under the scope of the proposed regulation by virtue of providing recipients access to communication networks, such as internet access services (IAS) and caching, used for the purpose of making the service towards the recipient technically more efficient. In the context of mere conduit and caching, our role is of a mere technical, automatic and passive nature, as in this case, we do not host content, and as such neither have knowledge of, nor control over the content which is transmitted or stored. In the case of being notified of illegal content, we react upon receiving blocking injunctions from national

authorities. As no changes have occurred for passive providers, we welcome the approach for mere conduit and caching by maintaining the choice of blocking injunctions. The proposed DSA Regulation (Article 4 (e)) should, however, acknowledge that in the case of caching, since it is only about a mere technical, automatic feature to speed up the online delivery of information, the provider should fall under the same requirements that are applicable to providers falling under mere conduit (Article 3).

Introduce a better distinction between different hosting services

Not all hosting services impact society in the same way, and a better distinction should be made between different hosting services based on the aforementioned principle of acting as close to the source as possible. For instance, file storage – among which cloud hosting services – fall under "hosting services". In the proposed DSA, a more nuanced approach should be taken to cloud services providers taking into account: the provider's technical capability to identify and remove specific content; to which extent such provider disseminates illegal content to the public; and, whether the provider is exercising a role in organising and presenting the material to the recipients of the service. The wording proposed in the DSA regarding the dissemination to the public in Article 2(i) enables such a distinction to be made between online platforms and cloud hosting services providers, and could be used to separate the obligations made applicable on file storage service providers from those applicable on "online platforms". It should be noted that in such a move, the obligation to act on the basis of blocking injunctions would remain in place for file storage services, and that obligations on Notice and Action mechanisms would be placed on online platforms, who are the closest to the source of illegal content, and therefore able to remove content owing to the technical characteristics of the services they offer.

Maintain a blocking injunctions regime for providers where there is no dissemination to the public

In regards to the applicability of orders (Articles 8 and 9), providers of mere conduit and caching already today adhere to the system of receiving injunctions from national authorities. These are reacted upon expeditiously, and there is a great degree of trust related to receiving such injunctions as they are typically issued by the judicial authorities having already declared the subject of the injunction illegal content. We would like to maintain such a system for providers of mere conduit and caching.

In the proposed DSA, "orders" could be applicable on any type of intermediary and could be issued by an authority of any EU Member State. Last but not least, the draft DSA does not exclude for the intermediary a potential risk of having to make a legal assessment of the content of the order. We propose to maintain the injunctions regime for mere conduits and caching as well as for cloud hosting services as stated above, in that the providers of such services may indeed also be prevented from making an evaluation of the content itself. And to limit such risk, these orders should be delivered only to online platforms falling under Article 5, e.g. playing an active role in disseminating the content to the public and in the interaction with user-generated content.

In regards to blocking injunctions issued to intermediaries, the reporting on received injunctions (Article 13) should be limited to the issuing authority, who is the source of requesting the illegal content to be removed or blocked. Requiring the receiving party of a blocking injunction to report would duplicate the reporting obligations. We understand that such a reporting obligation by national authorities is already the case in some EU Member States (e.g. Italy).

We welcome the principle of maintaining the liability exemption regime and introducing reinforced duties of care (Article 14) with a targeted approach towards intermediaries falling under the notion of hosting. This approach should be further targeted by ensuring that reinforced duties of care centres on online platforms, where there is communication to the public. The same targeted approach should be taken in respect of Articles 15, 17-18.

On the out-of-court dispute provisions (Article 18), the recipient of the service, who has raised a case, should be obliged to pay a basic fee in order to avoid a misuse of the system, and to allow the dispute system not to be overloaded with petty cases. With the right of recipients of a service to lodge an out-of-court dispute, Article 43 appears to be duplicating the rights of recipients under this proposal to already lodge a complaint to the intermediary (Articles 14-15) of the service as well as requesting an out-of-court dispute resolution (Article 18), Article 43 should therefore be deleted.

KYBC rules should be targeted to online platforms selling goods online

The introduction of Know Your Business Customer (KYBC) obligations (Article 22) is a positive step, and should apply to online platforms that primarily deal with the selling of goods online (such as online marketplaces). However, online platforms are not always in the position of assessing or obtaining updated and verified information about the traders. In this respect, we support 'reasonable efforts' approach provided in Article 22(2). It should also be noted in the legislative process that an unintended expansion of the KYBC provisions on all digital services - beyond online platforms - would impact on existing cloud providers' scalability of their cloud services and create significant barriers to the delivery of cloud services in Europe.

Maintain the eCD's wording on sanctions for services with no communication to the public

On penalties (Article 42), the application of the article should be limited to online platforms where there is communication to the public. Providers of mere conduit and caching are hindered by the regulatory framework to actively engage in the search and blocking of illegal content and will only react to orders such as blocking injunctions issued by public authorities. We recommend that the wording of the current eCommerce Directive[1] on sanctions is preserved for the categories of mere conduit, caching and hosting service where there is no communication to the public.

[1] *Art. 20 - Sanctions: Member States shall determine the sanctions applicable to infringements of national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are enforced. The sanctions they provide for shall be effective, proportionate and dissuasive.*

Regulatory oversight should be targeted for the overview of the implementation and functioning of responsibilities related to the removal of illegal content

The proposal on establishing a network of Digital Services Coordinators as well as a European Board for Digital Services is a step in the right direction in order to avoid fragmented decisions being taken across the EU Member States.

Extend application of the Regulation to 12 months

The proposed Regulation raises a number of new obligations and the implementation of administrative procedures by intermediaries, which are very detailed and numerous. Furthermore, new enforcement mechanisms such as the introduction of Digital Services Coordinators, Digital Services Board and new rights to the European Commission are introduced, which leads us to request twelve months for the application of the Regulation rather than the three months proposed.

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