Digital Services Act: Where are we at? Where are we headed to?

21 March 2023

Anthonia Ghalamkarizadeh

anthonia.ghalamkarizadeh@hoganlovells.com
1. Scope of Application
2. Key themes and core obligations
3. Hosting Services & Online Platforms
4. Notice and Action
5. Dark Patterns
6. Transparency Obligations
7. Additional VLOP Obligations
8. Oversight, Enforcement & Fines
9. Outlook
10. Q&A
**Intermediary Services (ISPs)**

- „conduit“, Art. 4 – eg internet exchange points, wireless access points, interpersonal communication services
- „caching“, Art. 5 – eg content delivery networks: automated and temporary transmission and storage of data
- „hosting“, Art. 6 – eg cloud computing, web hosting

**Territorial scope, Art. 3**

- requires a „substantial connection“:
  - ISP established in the Union and it is possible for EU users to use the service,
  - significant number of recipients of the service in one or more MSs in relation to population, or
  - service is targeted towards one or more MSs
Key themes and core obligations
Key Themes of the DSA

Harmonization
- Covers all intermediary services active in the EU, regardless of place of establishment, Art. 1, 3
- Detailed uniform notice and takedown process, Art. 6, 16, 17

Transparency
- Informative T&Cs, Art. 14
- (Bi-)annual reporting, Art. 15, 24, 42
- KYBC obligations, Art. 30, 31
- Recommender systems, Art. 27
- Online advertising, Art. 26, 39

Cooperation
- Single point of contact, Art. 11, 12
- Legal representative, Art. 13
- Notification obligations, Art. 9, 10
- Risk assessments and mitigation of risks, Art. 34, 35
- Data access, Art 40
- Compliance Function, Art. 41
- Industry standards and Codes of Conduct, Art. 44 ff.
- Crisis protocols, Art. 36, 48

Enforcement
- New oversight bodies
  - Digital Services Coordinators, Art. 49 ff.
  - European Board for Digital Services, Art. 61 ff.
  - Enhanced supervision of VLOPs and wide investigative powers and intervention rights for Commission, Art. 64 ff.
- Penalties and Fines, Art. 52, 74 ff.
Obligations per type of intermediary business

• Intermediary Services
  – Content moderation T&Cs; transparency reporting

• Hosting Services
  – Notice and action mechanism

• Online Platforms
  – Internal complaint-handling system; out-of-court dispute settlement; additional reporting; avoid “dark patterns”; transparent advertising; transparent recommender systems; “Know your business customer” (B2C OPs)

• Very Large Online Platforms (VLOPs)
  – Additional transparency reporting; audits; data sharing
General requirements for all intermediaries

• Blocking – Art. 9: Disable access to illegal content on request by authorities
• Information orders – Art. 10: Provide information on users on request by authorities
• Cooperation:
  – EU single point of contact – Art. 11, 12
  – EU legal representative (if service is not established in the EU) – Art. 13
• Terms and Conditions – Art. 14:
  – Must be clear, plain, user-friendly and machine-readable; must cover policies, measures and tools of content moderation, algorithmic decision-making
  – Application of the T&C must be diligent, objective and proportionate towards all involved parties
• Transparency reporting – Art. 15:
  – Detailed (bi-)annual reporting on content moderation statistics
Hosting Services & Online Platforms

- Hosting service: "storage of information provided by, and at the request of, a recipient of the service“
  - ex.: chat functionality with stored communication

- Online platform: "hosting service that, at the request of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service“
  - "public": must be potentially unlimited; not the case if limited user registration includes human decisions
  - interpersonal communication (eg private messaging): also not "public"
  - minor or ancillary: "comments section in an online newspaper could be considered ancillary“
  - but: comment storage in a social network: clearly not minor
Hosting Services & Online Platforms

Content created by recipients
- Stored
- Disseminated
- Unlimited public access
- Not ancillary

= Online Platform
Hosting Services & Online Platforms

- Content created by recipients
- Stored
  - Not disseminated to the public

= Hosting service? (note: no „ancillary“ clause for hosting services)
Hosting Services & Online Platforms

- Platform for medical professionals
- Chat function, chats are stored
- Dissemination to the public?
  - Who can access chats?
  - Who can access platform?

If open access and automated registration:
- Online platform
Hosting Services & Online Platforms

- Highly complex platform system with numerous (probably optional) modules
- Some of these store patient data
- Some allow for communication
- Importance not obvious
- Hosting service / online platform check on case-by-case basis
Liability for Illegal 3rd Party Content

Liability principles of eCommerce Directive – Art. 4 - 8 DSA

No liability without positive knowledge

• Court orders to terminate and prevent infringements remain possible
• No general monitoring obligation
• Proactive monitoring not detrimental to liability ("Good Samaritan")
Harmonized Notice and Action Obligations

For hosting services

• **Notice and action** and obligation to provide information to users – Art. 16, 17

For online platforms

• **Notice and action** and obligation to provide information to users – Art. 16, 17

• **Complaint and redress mechanisms** and out-of-court dispute settlement – Art. 20, 21

• **Trusted flaggers** enjoy priority, but must publish notice reports – Art. 22

• Measures against repeat infringers and abusive notices – Art. 23
Harmonized Notice and Action Obligations

• General setup:
  – Mandatory electronic **intake channel**
  – **Any individual or entity** has standing to file notices
  – Priority notices by **trusted flaggers** – awarded by DSCs on application
  – Mandatory “effective” **internal complaint-handling processes** (“right to appeal”, human review)
  – **Out-of-court** dispute resolution for both uploaders and notice submitters
  – **NTD database**: Extensive reporting on content moderation by **platforms**, on notices by **trusted flaggers**

• Specific notice procedure:
  – **Explanation** of notice reasons and, where necessary, additional information for identification
  – Mandatory **pushback** options for uploaders: internal complaint-handling-system, out-of-court settlement
  – Repeated posting of illegal content shall lead to **user suspension**
  – Repeated unfounded takedown notices can lead to **notice-filing suspension**

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Notice and Action: Hosting Service

- Fake online pharmacy
- Hosting providers now have stricter and more standardized notice & takedown obligations
Notice and Action: Online Platform

- Content created by recipients
- Stored
- Disseminated
- Unlimited public access
- Not ancillary

= Online Platform

Therefore:
- Notice and action system obligation
- Trusted Flagger status
Additional Obligations for Online Platforms

• **Dark Patterns – Art. 25**
  – Interface design must not unduly restrict user choice

• **User-facing transparency of online advertising – Art. 26**
  For each individual ad, the following must be displayed clearly, and in real time:
    
    o that the information displayed is an advertisement;
    o the person on whose behalf the ad is displayed and who commissioned it (if different);
    o the main parameters used to determine the user to whom it is displayed

• **Transparency of Recommender systems – Art. 27**
  – Disclosure of the main parameters and give options to modify or influence those (available directly from the interface where the information is being prioritized)

• **Know your business customer – Art. 30, 31**
  – Trader vetting obligations for B2C platforms
Dark Patterns
• Interfaces must not be **designed in a way** that significantly impairs users' ability to make free and informed decisions, **Art. 25 (1)**
  
  – no **deceiving** or **nudging** of users
  
  – no distorting or impairing the autonomy, decision-making and choice of the users via the structure, design or functionalities of the interface
  
  – eg **exploitative design choices** to direct the recipient to actions that benefit the provider of online platforms, but which may not be in the recipients' interests, **Rec. 67**
  
  – eg **presenting choices in a non-neutral manner**, such as giving more prominence to certain choices through visual, auditory, or other components, **Rec. 67**

• Balancing Act:

  Effective advertising comes with elements of persuasion

  **Unlawful impairment of decision making**
What indications/guidance do we have?

- Currently, there are no official guidelines for “Dark Patterns” under the DSA, but ...
  - **Art 25 (3) DSA** gives mandate to the European Commission to publish guidelines in particular for three groups of cases:
    - (a) more prominence to certain choices
    - (b) repeatedly requesting (esp. by presenting pop-ups)
    - (c) terminating a service made more difficult than subscribing
  - **Known case groups in data protection law** (esp. cookie selection) – useful first indication

Guidelines from the European Data Protection Board on dark patterns on social media platform interfaces: “How to recognise and avoid them”
„Dark Patterns“: Categories of the European Data Protection Board

- **Overloading** = confrontation with large quantity of requests, information, options or possibilities
- **Skipping** = designing the interface in a way that users forget or do not think about data protection aspects
- **Steering** = affects the choice users would make by appealing to their emotions or using visual nudges
- **Hindering** = making it hard for users to get informed or manage their data – e.g. “dead end”, “longer than necessary” and “misleading information”
- **Fickle** = interface design is inconsistent/ unclear
- **Left in the dark** = interface design leaves users unsure

Choice prominence?

This is asking you to accept our use of cookies to (1) customize your experience and (2) analyze our website traffic. This will allow us to present commercial and non-commercial content on our and our partners’ websites which will be more relevant and more customized to your interests to offer you an optimal experience.

I AGREE

Learn more
Transparency Obligations
Transparency of recommender systems

• Art. 27 (1):
  – Outline in the T&Cs the main parameters used for recommender systems and any opportunities for users to change or influence them

• Art. 27 (3):
  – Providing a functionality through which the user can change preferred recommender system instantly and easily
Transparency of online advertising

• Art 26 (1):
  – **Real-time presentation** of the following information in a clear, precise and unambiguous manner from the ad interface:
    – that the content is an advertisement;
    – name of the advertiser;
    – main parameters why this advertisement is displayed to this user; and
    – information on how to change these parameters

• Art 26 (2):
  – Functionality through which each user can declare that the content he/she provides is commercial communication
  – This information should be directly accessible from the interface where the content is presented
Transparency of online advertising

- Content created by recipients of the service, stored and disseminated to the public
- Ancillary in an online shop?
- Here clearly part of the overall service (see age rating)
- Online platform
Transparency of online advertising

• However: Ads only link to product’s store section
• No other transparency elements
Transparency of online advertising

Why am I seeing this ad?

BMW wants to reach members with similar company size as the current employer listed on your profile.

BMW wants to reach members based on their profile location.

There can be other reasons not listed here. Learn more about reasons or managing ad preferences.

Is this information helpful? Yes No

Save
Share via
Report this ad
I don’t want to see this ad in my feed
Improve my feed
Get recommended sources to follow

Why am I seeing this ad?
Manage your ad preferences

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Overview of VLOP Obligations
Overview of core VLOP obligations

- **Risk assessment – Art. 34**: Identify, analyse and assess any systemic risks stemming from the design, incl. algorithmic systems, functioning and use made of the services, esp. for *certain systemic risks* = dissemination of illegal content; exercise of fundamental rights; electoral processes and public security; gender-based violence, public health, minors

- For the first time after 4 months from the date of the designation; at least once every year thereafter; and always before the introduction of new big functionalities

- **Mitigation of risks – Art. 35**: Implement mitigation measures, tailored to specific risks identified

- **Publishing more extensive bi-annual transparency reports on content moderation – Art. 42**: Each category comes with more extensive obligations: Art. 15 (ISP) < Art. 24 (OP) < Art. 42 (VLOP)
Overview of core VLOP requirements

- Transparency of recommender systems – Art. 27 (OP) + Art. 38 (VLOP):
  - Provision of at least one option not based on profiling for each recommender system

- Transparency of online advertising – Art. 26 (OP) + Art. 39 (VLOP):
  - Provision of a publicly accessible advertising archive
  - All ads until 1 year post campaign end
  - Provision of a searchable and reliable tool that can be queried with multiple criteria
  - The archive shall include information on the content of the ad, product name, brand, advertiser, payer, advertising period, target groups (incl. main parameters), number of recipients, ...
Overview of core VLOP requirements

- Crisis response mechanism – Art. 36
- Independent audits – Art. 37
- Data access and scrutiny – Art. 40
- Compliance function – Art. 41
Oversight, Enforcement & Fines
Oversight, Enforcement & Fines

• **Primary oversight by EU Member States:**
  – Each Member State appoints a Digital Services Coordinator (DSC)
  – Independent authority for supervising the intermediary services established in that Member State and/or for coordinating with specialist sectoral authorities
  – Coordination via the new European Board for Digital Services

• **Enhanced supervision for VLOPs:**
  – Commission will have direct supervision powers / intervention rights
  – Information requests, power to interview employees, on-site inspections, interim measures, ...

• **Non-compliance decisions:**
  – Orders to implement necessary measures
  – Fines of up to 6% of global annual turnover and/or periodic payments
  – Last resort: Temporary access restrictions
Outlook
Outlook

The final step: signing the Digital Services Act 😊

Approved last July by @EUCouncil and @Europarl_EN, the #DSA has now been signed by @MikulasBek @EU2022_CZ and @EP_President and is ready to enter into force.

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16 Nov 2022
Entry into force;
The EC can now publish delegated and implementing acts

By 17 Feb 2023
Online platforms had to publish information on average monthly active recipients of their service, Art. 24 (2)

Intermediate time
Stay on the lookout for new DSA developments: Amendments to national laws (e.g., German NetzDG), methodology for user numbers calculation, advertising transparency standards...

17 Feb 2024
Application, cf. Art. 93 (2) (VLOPs earlier)
THANK YOU!

URL: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.277.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A277%3ATOC
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