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Vija Kalniņa, *Mg. iur., PhD student*
University of Latvia, Faculty of Law

LIABILITY OF INTERMEDIARY SERVICE PROVIDERS UNDER THE DIGITAL SERVICES ACT

STARPNIEKU PAKALPOJUMU SNIEDZĒJU ATBILDĪBA DIGITĀLO PAKALPOJUMU AKTĀ

Kopsavilkums

2020. gada beigās Eiropas Komisija prezentēja tās priekšlikumu Digitālo pakalpojumu aktam. Šis akts aizstās starpnieku pakalpojumu sniedzēju atbildības regulējumu, kas šobrīd iekļauts Direktīvā par elektronisko tirdzniecību. Lai arī normas, kas tiks pārņemtas no Direktīvas par elektronisko tirdzniecību, tiks tikai nedaudz grozītas, starpnieku pakalpojumu sniedzēju atbildība un pienākumi palielināsies. Tas netiks sasniegts, atkāpjoties no vispārēju pārraudzīšanas saistību neesamības principa, bet gan nosakot preventīvu pasākumu veikšanas pienākumus, tiešsaistes satura uzraudzīšanu, ko veiks trešās personas, un ieviešot institucionālo uzraudzību.

Keywords: intermediary service providers, liability, the Digital Services Act, no general obligation to monitor, the e-Commerce Directive

Atslēgvārdi: starpnieku pakalpojumu sniedzēji, atbildība, Digitālo pakalpojumu akts, vispārēju pārraudzīšanas saistību neesamība, Direktīva par elektronisko tirdzniecību

Introduction

The Directive on electronic commerce, also known as the e-Commerce Directive[1] was adopted 20 years ago. The main goal of this directive has been and still remains to ensure that the EU can provide an open and secure place for

[1] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Available in English: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32000L0031 [viewed 08.11.2021.]

development of new digital services, thus enabling an economic growth in this sector of services.[2]

Since the adoption the e-Commerce Directive has not been amended once. However, during the last 20 years there has been a significant development and many changes in the digital environment. Although the e-Commerce Directive has laid the main principles for the liability framework, it can no longer effectively address various problems that have emerged in the recent years, such as disinformation.[3] Namely, the e-Commerce Directive does not offer sufficient protection of human rights, no solution for automated messages, no unified understanding of neutrality of service providers, there are new digital services that fall outside the scope of the e-Commerce Directive, and the directive focuses on the limitation of the liability of the intermediary service providers but does not address the issue of deleting the illegal content.[4]

The Digital Single Market has been a priority already for the previous president of the European Commission that has taken many serious steps to achieve this goal.[5] The Digital Single Market has also remained one of priorities also for von den Leyen.[6] The Digital Services Act presented last year in December is a step towards this goal.

The proposal of the European Commission for the Digital Services Act is supposed to be an answer to the new problems that the e-Commerce Directive cannot solve, keeping the best from the directive. The Digital Services Act is going to revise the liability regulation of the e-Commerce Directive and to supplement it. The aim of this article is to describe the goals of the Digital Services Act, compare the existing and proposed regulations and analyse additional obligations that the Digital Services Act will impose on the intermediary service providers.

1. The state of play and a need for a change in the existing regulation

The e-Commerce Directive covers various central issues regarding electronic commerce, such as commercial communications, formations of online contracts,

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[2] Ibid., Art. 1 para. 1. See also: Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC. COM(2020) 85 final, 15.12.2020., Explanatory memorandum, p. 7.

[3] This issue has become topical in the light of *Brexit*, US presidential election and Covid-19.

[4] Commission staff working document. Impact assessment accompanying the document "Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC". SWD(2020) 348 final, 15.12.2020., pp. 5–7.

[5] For more detail, see: Schulze R., Staudenmayer D. (eds.). EU Digital Law: Article-by-Article Commentary. Baden-Baden: Nomos Verlag, 2020, p. 498.

[6] Bassot É. The von der Leyen Commission's six priorities: State of play in autumn 2020. European Parliamentary Research Service, September 2020. Available: https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/652053/EPRS_BRI(2020)652053_EN.pdf [viewed 08.11.2021].

etc., but the most significant are the liability rules of intermediary service providers. Although one dimension of the directive is to ensure greater clarity and predictability of regulation, the other dimension of the directive is to secure various benefits to the information society service providers, thus encouraging provision and development of such services.[7]

Liability of intermediary service providers is regulated in four articles of the e-Commerce Directive. These rules are not applicable to all digital services but only those that are *mere conduit* i.e., transmission of information (Art. 12), *caching* that is a faster transmission of information with temporary storage of that information (Art. 13) and hosting (Art. 14). Hosting does not cover hosting in a traditional sense of hosting services, where one stores information in servers, but any digital service that offers its users to store, publish and spread information. Thus, all kinds of online platforms, such as social media, trading platforms are considered as hosting services providers.[8] Art. 12–14 establish that intermediary service providers cannot be held liable for information or content that is being transmitted and/or stored by their service users, if the service provider was impartial. That is, if the service provider does not initiate transmission, does not modify the information, does not have actual knowledge of illegal activity or information, it is considered as impartial and cannot be held liable for activities carried out by the users of its services.[9] In addition, Art. 15 of the e-Commerce Directive establishes the 'no general obligation to monitor' principle. This principle means that Member States cannot impose a general obligation on the intermediary service providers to monitor information, actively seek facts or circumstances indicating illegal activity. All these rules and limitations of the liability are very significant for service providers, because without any doubt they release the service providers from costly obligations and offer more freedom to develop digital services.[10]

The proposal for the Digital Services Act has been introduced as a solution to problems that the e-Commerce Directive can no longer address. The connection between both normative acts is very clear. The Digital Services Act will take over the Art. 12–15 of the e-Commerce Directive, improve them and add new rules to involve the intermediary service providers in achieving better online environment.

The main goals of the Digital Services Act as highlighted by the European Commission are, as follows: 1) better conditions for innovative cross-border

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[7] Lodder A. R., Murray A. D. (eds.). EU Regulation of E-Commerce. A Commentary. Cheltenham: Edward Elgar Publishing, 2017, p. 18.

[8] The CJEU has acknowledged that *eBay*, *Google AdWords*, *Facebook* services are hosting services. See the CJEU judgment of 23 March 2010 in joined cases C-236/08, C-237/08 and C-238/08 *Google France and Google*, the CJEU judgment of 12 July 2011 in case C-324/09 *L'Oreal*, and the CJEU judgment of 3 October 2019 in case C-18/18 *Glawischnig-Piesczek*.

[9] See, for example, the CJEU judgment of 15 September 2016 in the case C-484/14 *Mc Fadden*, para. 49–50.

[10] See the CJEU judgment of 16 October 2008 in case C-298/07 *deutsche internet versicherung*, para. 21.

digital services through legal certainty (regulation can secure a stronger and deeper harmonisation that a directive), 2) safe online environment through responsible involvement of intermediary service providers in securing that (the safe online environment must become a partial responsibility of intermediary service providers), 3) protection of digital services users' rights (not only contractual rights, but also fundamental rights), especially freedom of speech and 4) proper supervision of intermediary service providers and stronger cooperation between national institutions (through establishing a multi-level supervision of intermediary service providers).[11]

These goals will be achieved by introducing the following measures. Firstly, the Digital Services Act will take over and modernize only 4 articles of the e-Commerce Directive – Art. 12–15 that limit the liability of the intermediary service providers. Secondly, the Digital Services Act will impose new responsibilities on the intermediary service providers. Thirdly, the Digital Services Act will establish an institutional system for supervising the intermediary service providers, the goal of which is to support service providers to clearly and certainly identify illegal content and precisely address it. However, these last measures do not concern the liability of the intermediary service providers, therefore this issue will not be addressed in this paper.

2. Comparison of e-Commerce Directive and the Digital Services Act

Taking into consideration that the Digital Services Act will take over the liability regulation from the e-Commerce Directive, it is necessary to compare, if there are any changes to the existing regulation.

Firstly, Art. 12 and 13 of the e-Commerce Directive that concern transmission of the information (*mere conduit* and *caching*) will be moved to Art. 3 and 4 of the Digital Services Act without any changes. However, this is not surprising because the cause of problems indicated before are not really related to these services.

Secondly, Art. 14 of the e-Commerce Directive that limits liability of hosting service providers will also be moved to the Art. 5 of the Digital Services Act without significant changes. However, new additional rules and limitations that will concern online trading platforms that allow trading with consumers will be added. In case there can be justified confusion with whom the distance trading had taken place – the platform itself or another trader that uses the platform – the platform will not be able to rely on the liability limitations.[12] These rules will

[11] Commission staff working document. Impact assessment accompanying the document "Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Sevices Act) and amending Directive 2000/31/EC". SWD(2020) 348 final, 15.12.2020., pp. 36–37.

[12] See the Art. 5 para. 3 of the Digital Services Act.

concern online market platforms that trade their own products but also allow other traders to trade through these platforms, such as *Amazon*.

Thirdly, the 'no general obligation to monitor' principle that is stipulated in the Art. 15 of the e-Commerce Directive will be kept and word for word copied to the Art. 7 of the Digital Services Act. Thus, it will be emphasized that this principle remains a cornerstone of the digital services regulation. However, the further articles of the Digital Services Act additionally establish a clearer procedure, how actions against illegal content must be taken and how national institutions can request information from intermediary service providers. This will harmonize the procedures of national institutions securing that in every Member State the competent institutions will follow the same model which currently is not the case.

So far, changes that the Digital Services Act provides are not that impressive, as they mostly amount to copying norms from the e-Commerce Directive and offer little changes and improvements. Hence, it can be concluded that the liability of the intermediary service providers regimen will not change significantly. However, the Digital Services Act consists of much more than just 4 articles, and its significant impact on the online environment rather stems from the additional new rules concerning the involvement of intermediary service providers securing that.

3. Additional obligations of intermediary service providers

In comparison to the existing regulation, the Digital Services Act will involve digital service providers in securing a safe online environment by imposing new obligations the service providers. This means that the service providers will have to be more active and involved in addressing the illegal content online.

The list of obligations is quite long, and the number of obligations will increase based on the type of services that are provided and on the size of the service provider. This can be best illustrated with this table 1 created by the European Commission:[13]This long list of obligations raises the question – is this compatible with the much praised 'no general obligation to monitor' principle? Indeed, at first glance some of these new obligations might seem like unambiguous obligations to monitor the online content.

However, as the analysis of these obligations indicate, the European Commission has very carefully and successfully avoided imposing any general monitoring obligations. It was possible because, firstly, general monitoring of information online is not the only instrument to achieve better environment online. It can also be attained by transparency and preventive measures which is

[13] Commission staff working document. Impact assessment accompanying the document "Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC". SWD (2020) 348 final, p. 73.

Table 1. **Obligations of intermediary service providers**

Intermediaries	Hosting Services	Online Platforms	Very Large Platforms
Transparency reporting			
Requirements on terms of service and due account of fundamental rights			
Cooperation with national authorities following orders			
Points of contact and, where necessary, legal representative			
	Notice and action and information obligations		
		Complaint and redress mechanism and out of court dispute settlement	
		Trusted flaggers	
		Measures against abusive notices and counter-notices	
		Vetting credentials of third-party suppliers ("KYBC")	
		User-facing transparency of online advertising	
			Risk management obligations
			External risk auditing and public accountability
			Transparency of recommender systems and user choice for access to information
			Data sharing with authorities and researchers
			Codes of conduct
			Crisis response cooperation

one type of obligations that will be imposed on the intermediary service providers. For example, Art. 22 of the Digital Services Act requires that online platforms will have to verify persons that want to provide services or trade goods using the platform. Although this obligation can be considered a control and monitoring of platform users, and the result of these actions should be reduced illegal content online (reduced number of fraudulent offers of services or goods), it is not a monitoring of the content.

Secondly, monitoring of the information online can be performed by third parties – service users or trusted flaggers. As soon as a specific illegal information is identified, the service provider just needs to react to it. It is considered that taking actions against identified specific illegal information is easier, as well as

cheaper for the service provider than monitoring of the whole content and thus proportionate. It must be emphasized that this is how it also works currently – the intermediary service provider must take action against identified illegal information.[14] Accordingly, the second type of obligations in the Digital Services Act consists of reaction mechanisms to information about illegal content provided by third parties.

Although none of the new obligations imposed on intermediary service providers by the Digital Services Act can be considered as a general obligation to monitor, they illustrate a significant shift in the division of responsibilities and obligations. For example, Art. 14 of the Digital Services Act requires that the hosting service provider creates a notification system enabling any individual or legal person to notify about illegal content. After receipt of a notification, the service provider will have to check and evaluate these notifications and decide whether this information needs to be deleted or restricted. Furthermore, if the service provider were to conclude that the notified information did not contain illegal content and were not to take any actions against it, the service provider would thereby risk its liability for this content, should the competent institution later decide that the particular information were illegal.

The only new obligation that is almost at odds with the 'no general obligation to monitor' principle is the identified risk management obligation stipulated in the Art. 27 of the Digital Services Act. Para. 1 of this article contains a list with specific activities that can be used to address risks such as adjustments of content management or recommendation systems, limitation of advertisements, initiation or adjustment of cooperation with trusted flaggers or other online platforms, etc. This list is not exhaustive and very large online platforms can choose other measures that are not mentioned in this list in order to fulfil their obligations, but these measures need to be reasonable, proportionate and effective. Although the Art. 27 of the Digital Services Act does not *expressis verbis* imply that very large online platforms need to conduct monitoring of the information published by their service users, such activities are not completely excluded. The author thinks that it could even be argued that very large online platforms are not only allowed to conduct such activities but in specific situations such measures might be required as the most appropriate. There are various aspects that could justify these measures, such as the size of the platform (only very large platforms), since that usually means more serious damage that the illegal content can cause and more extensive resources available to the platform. However, most likely the question whether these obligations are compatible with the 'no general obligation to monitor' principle, or if this principle is even applicable in these situations, will develop in practice based on case-by-case approach.

[14] See Art. 12 para. 3, Art. 13 para. 2, Art. 14 para. 3 of the e-Commerce Directive.

Conclusions

1. Overall, the Digital Services Act does not propose significant changes in the existing liability rules that are determined in the Art. 12–15 of the e-Commerce Directive. These articles are word for word copied to the Digital Services Act. However, the Digital Services Act will impose new obligations on the intermediary service providers based on the type of services provided. The liability of the service providers will be affected through these new obligations, since these obligations will increase the awareness of the intermediary service providers about illegal content published or transmitted using their services.
2. The Digital Services Act illustrates a strong commitment to stick to the 'no general obligation to monitor' principle as a cornerstone of legal framework of digital services liability.
3. The Digital Services Act offers creative and effective alternatives to the general monitoring of the online content – various preventive measures and monitoring of the content performed by third parties (service users, trusted flaggers, state institutions). Furthermore, the proportionality of these new obligations and the burden they impose on the service provider is achieved through diversifying obligations based on the type (impact) and size of the service.
4. None of the proposed additional obligations that will be imposed on the intermediary service providers by the Digital Services Act is a general obligation to monitor. However, it could be argued that obligations that are defined in the Art. 27 of the Digital Services Act might be almost at odds with the 'no general obligation to monitor' principle. Namely, this article might include obligation to monitor the content in specific cases, if this were to be the most effective and proportionate measure available.
5. Adoption of the Digital Services Act in the form of regulation will achieve a higher level of harmonization and establish a more uniform understanding of activities that can be requested from intermediary service providers, liability framework and procedures how institutions of Member States can request information or activities against identified illegal content. That will be a significant contribution to the transparency, uniformity, and predictability of these rules regardless of the Member State in which the service provider operates or the information that is published or transmitted.

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