Compromise amendments

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

2020/0361 (COD)

Rapporteur: Christel Schaldemose
Chapter I – General provisions

Article 1
Subject matter and scope

1. This Regulation lays down harmonised rules on the provision of intermediary services in the internal market. In particular, it establishes:

   (a) a framework for the conditional exemption from liability of providers of intermediary services;

   (b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services;

   (c) rules on the implementation and enforcement of the requirements set out in this Regulation, including as regards the cooperation of and coordination between the competent authorities.

2. The aims of this Regulation are to:
(a) contribute to the proper functioning of the internal market for intermediary services;

(b) set out uniform harmonised rules for a safe, accessible, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected.

(ba) promote a high level of consumer protection and contribute to increased consumer choice while facilitating innovation, support digital transition and encourage economic growth within the internal market.

Article 1a
Scope

1. This Regulation shall apply to intermediary services provided to recipients of the service that have their place of establishment or residence in the Union, irrespective of the place of establishment of the providers of those services.

2. This Regulation shall not apply to any service that is not an intermediary service or to any requirements imposed in respect of such a service, irrespective of whether the service is provided through the use of an intermediary service.

3. This Regulation is without prejudice to the rules laid down by the following:
   (a) Directive 2000/31/EC;
   (b) Directive 2010/13/EC;
   (c) Union law on copyright and related rights, in particular Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market;
   (d) Regulation (EU) 2021/784 on preventing addressing the dissemination of terrorist content online;
   (e) Regulation (EU) …/….2021/784 on preventing addressing the dissemination of terrorist content online;
   (f) Regulation (EU) 2019/1148;
   (g) Regulation (EU) 2019/1150;
   (i) Union law on the protection of personal data, in particular Regulation (EU) 2016/679 and Directive 2002/58/EC.
   (j) Directive (EU) 2019/882;
   (l) Directive 2013/11/EU.

4. By [12 months after the entry into force of this Regulation] the Commission shall publish guidelines with regard to the relationship between this Regulation and the legal acts referred to in Article 1a (3).
Article 2
Definitions

For the purpose of this Regulation, the following definitions shall apply:

(a) ‘information society services’ means services within the meaning of as defined in Article 1(1)(b) of Directive (EU) 2015/1535;

(b) ‘recipient of the service’ means any natural or legal person who uses the relevant intermediary service in order to seek information or to make it accessible;

(c) ‘consumer’ means any natural person who is acting for purposes which are outside his or her trade, business, craft, or profession;

(d) ‘to offer services in the Union’ means enabling legal or natural persons in one or more Member States to use the services of a provider of information society services which has a substantial connection to the Union; such a substantial connection is deemed to exist where the provider has an establishment in the Union; in the absence of such an establishment, the assessment of a substantial connection is based on specific factual criteria, such as:
   - a significant number of users in one or more Member States; or
   - the targeting of activities towards one or more Member States.

(da) ‘substantial connection to the Union’ means the connection of a provider with one or more Member States resulting either from its establishment in the Union, or in the absence of such an establishment, from the fact that the provider directs its activities towards one or more Member States;

(e) ‘trader’ means any natural person, or any legal person irrespective of whether privately or publicly owned, who is acting, including through any person acting in his or her name or on his or her behalf, for purposes directly relating to his or her trade, business, craft or profession;

(f) ‘intermediary service’ means one of the following services:
   - a ‘mere conduit’ service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network including technical auxiliary functional services;
   - a ‘caching’ service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
   - a ‘hosting’ service that consists of the storage of information provided by, and at the request of, a recipient of the service;

(g) ‘illegal content’ means any information or activity, including the sale of products or provision of services which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law;

(h) ‘online platform’ means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that
activity is a minor or a purely ancillary feature of another service or functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation.

(i) ‘dissemination to the public’ means making information available, at the request of the recipient of the service who provided the information, to a potentially unlimited number of third parties;

(j) ‘distance contract’ means a contract within the meaning of Article 2(7) of Directive 2011/83/EU;

(k) ‘online interface’ means any software, including a website or a part thereof, and applications, including mobile applications which enables the recipients of the service to access and interact with the relevant intermediary service;

(ka) ‘trusted flagger’ means an entity that has been awarded such status by a Digital Services Coordinator;

(l) ‘Digital Services Coordinator of establishment’ means the Digital Services Coordinator of the Member State where the provider of an intermediary service is established or its legal representative resides or is established;

(m) ‘Digital Services Coordinator of destination’ means the Digital Services Coordinator of a Member State where the intermediary service is provided;

(n) ‘advertisement’ means information designed and disseminated to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and displayed by an online platform on its online interface against remuneration specifically in exchange for promoting that information message;

(na) ‘remuneration’ means economic compensation consisting of direct or indirect payment for the service provided, including where the intermediary service provider is not directly compensated by the recipient of the service or where the recipient of the service provides data to the service provider, except where such data is collected for the sole purpose of meeting legal requirements;

(o) ‘recommender system’ means a fully or partially automated system used by an online platform to suggest, prioritise or curate in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed;

(p) ‘content moderation’ means the activities, either automated or not automated, undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, delisting, demonetisation or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account;

(q) ‘terms and conditions’ means all terms and conditions or specifications, by the service provider irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the services;
‘persons with disabilities’ means persons with disabilities within the meaning of Article 3(1) of Directive (EU) 2019/882;

CA A

Recitals

Compromise amendment replacing all relevant amendments, including AMs JURI 1, ECON 1, 1, 183, ECON 2, JURI 2, LIBE 1, ECON 3, ITRE 1, 184, CULT 1, TRAN 1, FEMM 1, LIBE 2, 185, 186, TRAN 2, JURI 3, LIBE 3, ECON 4, ITRE 2, 187, 188, 189, CULT 2, 1, TRAN 3, FEMM 2, FEMM 3, FEMM 4, JURI 4, ECON 5, ITRE 3, 190, 191, TRAN 4, 192, 193, 194, 195, ECON 6, ITRE 4, 196, TRAN 5, FEMM 5, ECON 7, 197, 198, 199, 200, 201, TRAN 6, 202, 203, 204, TRAN 7, JURI 5, LIBE 4, ECON 8, ITRE 5, 205, 206, 207, 208, 209, 210, 2, JURI 6, LIBE 5, ITRE 6, 211, 212, 213, 214, 215, 216, CULT 3, FEMM 6, 217, 218, JURI 7, 219, 220, 3, JURI 8, LIBE 6, ITRE 7, 221, 222, CULT 4, JURI 9, LIBE 7, ECON 9, ITRE 8, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, CULT 5, 4, TRAN 8, FEMM 7, JURI 10, ECON 10, 235, FEMM 8, FEMM 9, FEMM 10, JURI 11, LIBE 8, ECON 11, ITRE 9, 236, 237, 238, 239, 240, 241, CULT 6, 5, 242, 243, JURI 12, LIBE 9, ECON 12, ITRE 10, 244, 245, 246, 247, 248, 249, 250, 251, 252, LIBE 10, ECON 13, ITRE 11, 253, 254, CULT 7 and LIBE 11

(1) Information society services and especially intermediary services have become an important part of the Union’s economy and daily life of Union citizens. Twenty years after the adoption of the existing legal framework applicable to such services laid down in Directive 2000/31/EC of the European Parliament and of the Council, new and innovative business models and services, such as online social networks and marketplaces, have allowed business users and consumers to impart and access information and engage in transactions in novel and innovative ways, transforming their communication, consumption and business habits. A majority of Union citizens now uses those services on a daily basis. However, the digital transformation and increased use of those services has also resulted in new risks and challenges, both for individual users, companies and for society as a whole.

(2) Member States are increasingly introducing, or are considering introducing, national laws on the matters covered by this Regulation, imposing, in particular, diligence requirements for providers of intermediary services, and resulting in a fragmentation of the internal market. Those diverging national laws negatively affect the internal market, which, pursuant to Article 26 of the Treaty, comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured, taking into account the inherently cross-border nature of the internet, which is generally used to provide those services. The conditions for the provision of intermediary services across the internal market should be harmonised, so as to provide businesses with access to new markets and opportunities to exploit the benefits of the internal market, while allowing consumers and other recipients of the services to have increased choice, without lock-in effects, and reducing administrative burden for intermediary services, especially for micro, small and medium sized enterprises.

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Responsible and diligent behaviour by providers of intermediary services is essential for a safe, accessible, predictable and trusted online environment and for allowing Union citizens and other persons to exercise their fundamental rights and freedoms guaranteed in the Charter of Fundamental Rights of the European Union (‘Charter’), in particular the rights to privacy, to protection of personal data, respect for human dignity, private and family life, the freedom of expression and information, the freedom and the pluralism of the media, and the freedom to conduct a business, a high level of consumer protection, the equality between women and men and the right to non-discrimination. Children have particular rights enshrined in Article 24 of the Charter and in the United Nations Convention on the Rights of the Child (UNCRC). As such, the best interests of the child should be a primary consideration in all matters affecting them. The UNCRC General comment No. 25 on children’s rights in relation to the digital environment formally sets out how these rights apply to the digital world.

Therefore, in order to safeguard and improve the functioning of the internal market, a targeted set of uniform, effective and proportionate mandatory rules should be established at Union level. This Regulation provides the conditions for innovative digital services to emerge and to scale up in the internal market. The approximation of national regulatory measures at Union level concerning the requirements for providers of intermediary services is necessary in order to avoid and put an end to fragmentation of the internal market and to ensure legal certainty, thus reducing uncertainty for developers, protecting consumers and fostering interoperability. By using requirements that are technology neutral, innovation should not be hampered but instead be stimulated, while respecting fundamental rights.

Given the importance of digital services, it is essential that this Regulation ensures a regulatory framework which ensures full, equal and unrestricted access to intermediary services for all recipients of services, including persons with disabilities. Therefore, it is important that accessibility requirements for intermediary services, including their user interfaces, are consistent with existing Union law, such as the European Accessibility Act and the Web Accessibility Directive and that Union law is further developed, so that no one is left behind as result of digital innovation.

This Regulation should apply to providers of certain information society services as defined in Directive (EU) 2015/1535 of the European Parliament and of the Council, that is, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. Specifically, this Regulation should apply to providers of intermediary services, and in particular intermediary services consisting of services known as ‘mere conduit’, ‘caching’ and ‘hosting’ services, given that the exponential growth of the use made of those services, mainly for legitimate and socially beneficial purposes of all kinds, has also increased their role in the intermediation and spread of unlawful or otherwise harmful information and activities.

In practice, certain providers of intermediary services intermediate in relation to services that may or may not be provided by electronic means, such as remote information technology services, transport of persons and goods, accommodation or delivery services. This Regulation should apply only to intermediary services and not affect requirements set out in Union or national law relating to products or services.

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intermediated through intermediary services, including in situations where the intermediary service constitutes an integral part of another service which is not an intermediary service as specified in the case law of the Court of Justice of the European Union.

(7) In order to ensure the effectiveness of the rules laid down in this Regulation and a level playing field within the internal market, those rules should apply to providers of intermediary services irrespective of their place of establishment or residence, in so far as they provide services in the Union, as evidenced by a substantial connection to the Union.

(8) Such a substantial connection to the Union should be considered to exist where the service provider has an establishment in the Union or, in its absence, on the basis of the existence of a significant number of users in one or more Member States, or the targeting of activities towards one or more Member States. The targeting of activities towards one or more Member States can be determined on the basis of all relevant circumstances, including factors such as the use of a language or a currency generally used in that Member State, or the possibility of ordering products or services, or using a national top level domain. The targeting of activities towards a Member State could also be derived from the availability of an application in the relevant national application store, from the provision of local advertising or advertising in the language used in that Member State, or from the handling of customer relations such as by providing customer service in the language generally used in that Member State. A substantial connection should also be assumed where a service provider directs its activities to one or more Member State as set out in Article 17(1)(c) of Regulation (EU) 1215/2012 of the European Parliament and of the Council. On the other hand, mere technical accessibility of a website from the Union cannot, on that ground alone, be considered as establishing a substantial connection to the Union.

(9) This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular Directive 2000/31/EC, with the exception of those changes introduced by this Regulation, Directive 2010/13/EU of the European Parliament and of the Council as amended, and Regulation (EU) 2021/784 of the European Parliament and of the Council – proposed Terrorist Content Online Regulation. Therefore, this Regulation leaves those other acts, which are to be considered lex specialis in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation should apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures. To assist Member States and service providers, the Commission should provide guidelines as to how to interpret the interaction and complementary nature between different Union legal acts and this Regulation and how to prevent any duplication of requirements on providers or

5 Regulation (EU) 2021/784 of the European Parliament and of the Council – proposed Terrorist Content Online Regulation
potential conflicts in the interpretation of similar requirements. In particular, the guidelines should clarify any potential conflicts between the conditions and obligations laid down in legal acts, referred to in this Regulation, explaining which legal act should prevail.

(9a) In line with Article 167(4) of the Treaty on the Functioning of the European Union, cultural aspects should be taken into account, in particular in order to respect and to promote the cultural and linguistic diversity. It is essential that this Regulation contributes to protect the freedom of expression and information, media freedom and to foster media pluralism as well as cultural and linguistic diversity.


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\(^9\) Regulation [.../…] on temporary derogation from certain provisions of Directive 2002/58/EC.


the processing of personal data is solely governed by the rules of Union law on that subject, in particular Regulation (EU) 2016/679 and Directive 2002/58/EC. This Regulation is also without prejudice to the rules of Union or national law on working conditions.

(11) It should be clarified that this Regulation is without prejudice to the rules of Union law on copyright and related rights, in particular Directive (EU) 2019/790 of the European Parliament and of the Council, which establish specific rules and procedures that should remain unaffected.

(12) In order to achieve the objective of ensuring a safe, accessible, predictable and trusted online environment, for the purpose of this Regulation the concept of “illegal content” should underpin the general idea that what is illegal offline should also be illegal online. The concept of “illegal content” should be defined appropriately and should also cover information relating to illegal content, products, services and activities. In particular, that concept should be understood to refer to information, irrespective of its form, that under the applicable Union or national law is either itself illegal, such as illegal hate speech, or terrorist content and unlawful discriminatory content, or that is not in compliance with Union law since it refers to activities that are illegal, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, illegal trading of animals, plants and substances, the non-authorised use of copyright protected material or activities involving infringements of consumer protection law, the provision of illegal services in particular in the area of accommodation services on short-term rental platforms non-compliant with Union or national law. In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is in conformity with Union law, including the Charter and what the precise nature or subject matter is of the law in question.

(13) Considering the particular characteristics of the services concerned and the corresponding need to make the providers thereof subject to certain specific obligations, it is necessary to distinguish, within the broader category of providers of hosting services as defined in this Regulation, the subcategory of online platforms. Online platforms, such as social networks or online marketplaces, should be defined as providers of hosting services that not only store information provided by the recipients of the service at their request, but that also disseminate that information to the public, again at their request. However, in order to avoid imposing overly broad obligations, providers of hosting services should not be considered as online platforms where the dissemination to the public is merely a minor and or a purely ancillary feature of another service or functionality of the principal service and that feature or functionality cannot, for objective technical reasons, be used without that other, principal service, and the integration of that feature or functionality is not a means to circumvent the applicability of the rules of this Regulation applicable to online platforms. For example, the comments section in an online newspaper could constitute such a feature, where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. For the purposes of this Regulation, cloud computing services should not be considered to be an online platform in cases where allowing the dissemination of specific content constitutes a minor or ancillary feature. Moreover, cloud computing services, when serving as infrastructure, for example, as the underlining infrastructural storage and computing services of an internet-based application or online platform, should
not in itself be seen as disseminating to the public information stored or processed at the request of a recipient of an application or online platform which it hosts.

(14) The concept of ‘dissemination to the public’, as used in this Regulation, should entail the making available of information to a potentially unlimited number of persons, that is, making the information easily accessible to users in general without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access the information in question. Accordingly, where access to information requires registration or admittance to a group of users, that information should be considered to have been disseminated to the public only where users seeking to access the information are automatically registered or admitted without a human decision on whom to grant access. Information exchanged using interpersonal communication services, as defined in Directive (EU) 2018/1972 of the European Parliament and of the Council, 17 such as emails or private messaging services, are not considered to have been disseminated to the public. Information should be considered disseminated to the public within the meaning of this Regulation only where that occurs upon the direct request by the recipient of the service that provided the information.

(15) Where some of the services provided by a provider are covered by this Regulation whilst others are not, or where the services provided by a provider are covered by different sections of this Regulation, the relevant provisions of this Regulation should apply only in respect of those services that fall within their scope.