



A European approach to the regulation of digital service providers

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In December 2020, the EU Commission presented its long awaited proposal for a regulation on digital services, the so-called Digital Services Act. In doing so, the EU Commission has fulfilled a key objective of its 2020 work programme. The proposal emphasises that the current legal framework, which is essentially governed by the E-Commerce Directive (2000/31/EC), will not be replaced but rather supplemented by the new rules in order to take into account the developments in the digital economy. Basic principles such as the 'country of origin principle', according to which the provision of the service is governed by the law of the member state where the establishment took place, will thus continue to be applicable. What concerns the liability of intermediary services, such as online platforms, so-called caching and hosting services remain in principle subject to a liability exemption.

The Digital Services Act provides for a variety of harmonised obligations for providers of digital services. For example, providers without an establishment in the EU, but who offer services in the EU, must appoint a legal representative in one of the member states where the provider offers its services. This ensures that such service providers may be held liable for non-compliance with obligations set out in the proposed regulation. Service providers will also be obliged to notify national law enforcement authorities in the event of suspicion of serious criminal offences involving a threat to the life or safety of a person. In addition, new rules will be introduced that specifically address so-called very large online platforms, i.e. those with an average of more than 45 million users per month. Violations may be sanctioned with penalties of up to 6% of the total annual turnover in the preceding year.

The key element of the proposal is the introduction of a user-friendly mechanism that would also allow private individuals to notify platforms of allegedly illegal content. A general monitoring obligation for platforms to detect illegal content, however, did not find its way into the proposal. The term illegal content is defined very broadly in the proposal, the recitals name hate speech and terrorist and discriminatory content as examples. In Position Paper No. 56/2020, the DAV already emphasised the high value of freedom of communication and maintains a critical view of any attempt to oblige the operators of online platforms to take action against "harmful" content, even though the content does not violate applicable law. Furthermore, in light of the concerns about the amendment of the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz – NetzDG), the provisions of the Digital Services Act are likely to add to an already disputed discussion. In principle, the DAV advocates for a greater harmonisation of substantive law on the use of artificial intelligence and on the

combat against hate speech. The Digital Services Act constitutes a first step in this regard.

A first round of discussions on the Digital Services Act already took place in January 2021 in the European Parliament's Committee on the Internal Market and Consumer Protection.