

Committed to Europe

Orange views on the future liability of online intermediaries

Orange welcomes the European Commission's policy objectives to provide a modernized framework for digital services. We believe that the future DSA package clarifying responsibilities for digital services should strive to provide a high level of legal certainty. Rules should be harmonised across the EU Member States maintaining the principle of Country of Origin and a clear objective on the removal of illegal content online. It should be applicable on all platforms directing their services and products towards end-users in the Union. The definition of a hosting service provider, as known under the article 14 of the eCommerce Directive, should be updated making a clear distinction between passive and active hosts. In this regard, considerations should be taken to ensure that cloud services are not burdened with content monitoring and removal that providers are unable to act upon, owing to the technical characteristics of the services they offer.

Towards a targeted approach to removing illegal content

As a provider of electronic communication services, we fall under the scope of the eCommerce Directive (ECD) by virtue of our status as a technical intermediary, with the obligation to implement blocking injunctions issued by a judicial authority, or at the request of an administrative authority. Our role is of a mere technical, automatic and passive nature as 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 injunctions, blocking is typically done at the domain name level of the site through our DNS servers. It does not amount to removing the illegal content itself from the internet, or a specific URL, but merely prevents access to such content through our services. Categories of contents being blocked by Orange relate primarily to copyright infringements, online gambling, child sexual abuse material and terrorism-related content on instructions from the authorities. As no changes have occurred for passive providers, this approach should be maintained with blocking injunctions only used as a last resort when content has been requested to be removed by the content provider or online platforms themselves.

The aim of the future DSA Package in relation to liability should be to prevent the publication of illegal content in the first place, and the removal of illegal content at source, or as close to the source as possible. Such rules should in particular target the active online platforms that allow sharing with the public and have actual knowledge of, or exert control over, such content. In this regard, the current definition of intermediaries falling under the article 14 of the ECD should be modernized ensuring a clear distinction between passive and active intermediaries.

The notion of having actual knowledge of or exerting control over content is especially important in relation to cloud services, and when making a distinction between passive and active intermediaries falling under the article 14 of the ECD. Cloud services should not be unfairly burdened with obligations for content monitoring and removal that providers are unable to act upon, owing to the technical characteristics of the services they offer.

As a basic principle, the liability exemption regime should be maintained with duties of care on active hosting providers reinforced based on the country of origin principle, making the legislative instrument a regulation, thus improving cooperation among Member States through harmonised rules. In this regard, online intermediaries targeting end-users within the EU should be obliged to have a legal representation in at least one of the EU Member States.

The ECD's article 15 prohibiting general monitoring should be maintained. Active hosting service providers should be allowed to take proactive, voluntary measures to monitor and remove illegal material, including for the purpose of preventing and detecting fraud, without losing their liability exemption when those proactive measures remain targeted and do not constitute general monitoring.

Sanctions should only be used as a last resort where active hosting platforms repeatedly fail to remove illegal content expeditiously.

While we support the DSA to have a clear target for the removal of illegal content, the tackling of political advertising and harmful content, such as disinformation, is becoming even more critical to ensure that citizens can maintain their trust in society and public authorities. Content, which might cause harm, but is not necessarily illegal, such as disinformation and some political advertising, would be better placed to be regulated under the Democracy Act in order to avoid a misconception between illegal and harmful content, if treated under the same legislative act.

Where rules on harmful content are developed (e.g. under the Democracy Action Plan) it should be ensured that such rules are distinctively different than rules applicable to illegal content; e.g. an application of proactive measures, similar to what could be envisioned in the DSA to remove illegal content, could risk having a potential strong negative impact on the freedom of speech if applied to harmful content generally.

As a technical intermediary, Orange can provide education and raise awareness of these issues to its customers, and if required to by the judicial authorities, block access to such content.

For more information: <https://oran.ge/in-Brussels>, or follow us on Twitter: @Orange_Brussels