



## The Digital Services Act Out-of-Court Mechanism Non-paper

Article 18 of the proposed [Digital Services Act](#) (“DSA”)<sup>1</sup> introduces an out-of-court (“OOC”) mechanism, whereby users of online platform services may contest in an OOC forum “content moderation decisions”<sup>2</sup> by providers of such services. Users may contest *any* content moderation decision, whether made pursuant to a notification of illegal content, the service provider’s terms and conditions, or removal orders from a competent authority. There is *no* requirement for users to exhaust internal complaint-handling options offered by the service provider prior to having recourse to the OOC mechanism. Users (including sophisticated business users) are required to bear *no*, or only *little*, cost for use of the OOC mechanism, with the service provider bearing the brunt of it.<sup>3</sup> Any third-party body that fulfills a limited set of criteria may be certified as an OOC dispute settlement body which users may unilaterally engage to examine a dispute. Decisions of such certified bodies are binding on service providers, with the latter not having the option to appeal them before regular courts.

**We appreciate the opportunity to contribute constructively to discussions surrounding the DSA. It is in that spirit that we are sharing this non-paper. Whereas we support the overall DSA objective to provide users with effective redress options against content moderation decisions made by service providers, we are concerned about several potential unintended consequences that the OOC mechanism proposed in the DSA may have in its current form. Below we explain these concerns related to (a) legal uncertainty brought by overlapping OOC mechanisms introduced in other EU legislation, (b) the risk of fragmentation across the EU, (c) enabling bad actors, and (d) paralysing content moderation. We also suggest alternatives that would help alleviate these concerns, including amended language for Article 18 of the DSA.**

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<sup>1</sup> European Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services and amending Directive 2000/31/EC, COM(2020) 825 final, 15 December 2020.

<sup>2</sup> These are decisions to: (a) remove or disable access to users’ information; (b) suspend or terminate the provision of the service, in whole or in part, to users; or (c) suspend or terminate users’ accounts.

<sup>3</sup> Article 18 provides that the service provider shall reimburse the user for any fees and expenses in the event that the OOC dispute settlement body decides in favor of the user; whereas, in the event that the OOC dispute settlement body decides in favor of the service provider, the user shall have no obligation to reimburse any fees or expenses paid by the service provider.

## Potential unintended consequences

### a) Causing legal uncertainty

There is significant overlap between the OOC mechanism introduced by the DSA and existing OOC mechanisms introduced by other EU laws. For example:

- The [Audiovisual Media Services Directive](#) (“AVMSD”)<sup>4</sup> already provides for an OOC mechanism to settle disputes between users and video-sharing platforms relating to measures video-sharing platforms adopt to protect: (a) minors from content that may impair their physical, mental or moral development; and (b) the general public from content inciting to violence or hatred, provoking to commit a terrorist offence, constituting child pornography, or promoting racism and xenophobia<sup>5</sup>.
- The [EU Copyright Directive](#) (“EUCD”)<sup>6</sup> already provides for an OOC mechanism for users to have recourse to, for cases where rights holders request online content-sharing service providers to remove access to specific works or other subject-matter<sup>7</sup>.
- The [Platform-to-Business Regulation](#) (“P2B Regulation”)<sup>8</sup> already provides for an OOC mechanism to settle disputes between business users and providers of online intermediation services in relation to decisions by the service providers to restrict, suspend or terminate the provision of the online intermediation services concerned<sup>9</sup>.

This overlap leads to **legal uncertainty for service providers and confusion for users as to which OOC mechanism they may have recourse to for settling disputes arising in relation to content moderation decisions.**

### b) Risking fragmentation

Under the DSA, any third party that fulfills a limited set of criteria may apply to the Digital Services Coordinator of the Member State where it is established in order to be certified as an OOC dispute settlement body. Users from *across the EU* can have recourse to *any* such certified body in order to contest *any* content moderation decision by service providers, made both on the basis of the law and/or the providers’ terms and conditions.

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<sup>4</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services and amending Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018.

<sup>5</sup> Article 28(b)(7) AVMSD.

<sup>6</sup> Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>7</sup> Article 17(9) EUCD.

<sup>8</sup> Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

<sup>9</sup> Article 12 P2B Regulation.

This system is highly likely to result in contradicting decisions by different certified bodies in different Member States as regards the same legal provision or online platform policy.

For example, under the OOC mechanism that the DSA envisages, a user whose content has been removed or disabled in Austria because it is defamatory under Austrian law may have recourse to a certified body in Italy, where the content may still be available, to review that action. The body seized by the dispute may reach a decision that contradicts judicial precedent for defamation in Austria<sup>10</sup>. Given the DSA provides that decisions reached through use of the OOC mechanism are binding on online platforms, **the question arises what effect the use of the OOC mechanism for interpretations of the law may have on the coherence of the national *corpus juris*.**

Similar coherence issues may arise where the same online platform policy is interpreted differently by different certified bodies across the EU. A certified body in, say, Sweden may have very different views from a certified body in, say, Germany, as to how an online platform's policy on hate speech should be interpreted. Faced with a reality in which they need to make sense of a patchwork of contradicting decisions on their policies by different OOC dispute settlement bodies across the EU, **content moderators may face decision-paralysis and online platforms may be incentivised to refrain from adopting and enforcing detailed policies on matters where OOC decision-making fragmentation is high and there is an increased risk of having similar circumstances treated differently.**

Fragmentation may also result from users reverting to multiple OOC dispute settlement bodies to adjudicate the same issue, or from incentives OOC dispute settlement bodies may have to decide in favor of users in order to attract new cases.

Any OOC dispute settlement mechanism should be designed in a manner that avoids fragmentation and ensures high-quality decisions.

### c) [Enabling bad actors](#)

Under Article 18, users may have recourse to the OOC mechanism that the DSA provides for the *universe* of decisions made by providers of online platform services to remove or disable access to information. **This broad scope and lack of any exceptions or safeguards risks empowering bad actors and undermining fundamental rights of third parties.**

For example, a user could contest before an OOC dispute settlement body an online platform's decision to remove child sexual abuse material from its services, including where that decision was taken to comply with a confidential Member State authority order under Article 8 DSA.

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<sup>10</sup> In principle, defamatory content is removed, or access to it is disabled, at local level. This is because defamation laws may differ significantly from country to country, with some countries not considering defamation illegal. In this example, this would mean that the Italian OOC dispute settlement body could order the online platform to reinstate the content in Austria.

Disclosure of this information through the OOC mechanism would undermine authorities' investigatory efforts and disregard the rights of victims.

In addition, spammers or other bad actors may be able to piece together information about online platforms' content moderation systems and processes, disclosed through use of the OOC mechanism. This could allow them to undermine or circumvent those systems and processes in the future, putting user safety at risk.

#### d) [Paralysing content moderation](#)

The very scale at which content moderation takes place should not be underestimated. **The breadth of content moderation decisions falling within the scope of the OOC mechanism under the DSA may in practice *paralyse* content moderation efforts by online platforms to the detriment of user safety and innovation.** For example:

- What would the impact be on legitimate redress cases, if online platforms needed to divert internal resources to deal with and pay for frivolous complaints submitted to the OOC mechanism relating to the billions of pieces of spam and bad ads they moderate each year? In recognition of this scale issue, national laws such as the German NetzDG explicitly exclude the possibility for user redress (other than before regular courts) for certain content removal decisions (e.g. on spam grounds).
- What would the impact be on the swift and effective operation of content moderation systems, if online platforms received varying orders from many different OOC dispute settlement bodies hearing disputes brought to them by different users on the same type of content? Or if the same user brought the same matter before different OOC dispute settlement bodies across the EU, until one of them ruled in the user's favor?
- More generally, what would the impact be on innovation if, prior to launching a new service feature or functionality, online platform service providers had to counterbalance resources required for and costs associated with the operation of the OOC mechanism?

The overly broad scope of the OOC mechanism also indicates that **the Commission has failed to support both protecting users' freedom of expression and service providers' freedom to conduct a business.** The *requirement* for service providers to submit to a binding OOC mechanism for *all* kinds of content moderation decisions, and to incur costs notwithstanding how unmeritorious the complaint or the outcome of the process, is disproportionate. In its current form, the OOC mechanism could in fact threaten the ability of some service providers to operate innovative, open and inclusive online platforms.

## A better way forward

There are more appropriate means that both achieve the DSA policy objective of providing users with effective redress options, and avoid the unintended consequences that the OOC mechanism may have. In fact, such means are already provided for in the DSA proposal. In particular:

- **Article 17 of the DSA requires online platform service providers to introduce internal complaint-handling systems, whereby users may contest content moderation decisions they make. Service providers will need to heavily invest in building or expanding such systems (where they already exist) to allow for easy, effective and timely dispute resolution of user complaints in line with regulatory requirements.** In addition:
  - Service providers will need to be transparent about the use of these internal complaint-handling systems, being required under Article 13(1)(d) of the DSA to annually report on: (a) the number of complaints received; (b) the basis for those complaints; (c) decisions taken to resolve the complaints; (d) the average time needed to take such decisions; and (e) the number of instances where the initial content moderation decisions were reversed as a result of user complaints.
  - Articles 38 and 40 of the DSA provide that the Digital Services Coordinator of the Member State where the online platform service provider is established shall be responsible for the application and enforcement of the various obligations arising from the DSA. In other words, the obligations to provide an internal complaint-handling system and be transparent about its operation will be subject to regulatory oversight by Digital Services Coordinators.
  - Article 68 of the DSA grants users the right to mandate representative bodies, organisations or associations meeting a minimum set of requirements to exercise on their behalf the right to make use of the internal complaint-handling system under Article 17 of the DSA.
- Article 43 of the DSA enables users to directly complain to the Digital Service Coordinator of the Member State where they reside, if they consider that an online platform service provider has infringed any of its obligations under the DSA - including the obligations to provide an internal complaint-handling system and be transparent about its operation.
- Finally, if users do not agree with the decision reached through use of the internal complaint-handling system or the Digital Services Coordinator complaint process, they

may always avail themselves of the possibility to have judicial recourse against the content moderation decision of the online platform service provider.

**These possibilities, individually as well as in aggregate, empower users to contest content moderation decisions made by online platform service providers in ways that were not possible before.** It is not clear what additional benefit the introduction of an OOC mechanism would bring about.

In any event, even if policymakers deemed that an OOC mechanism should be provided for under the DSA for whatever reason, we consider that a more effective approach to Article 18 DSA is required. In particular:

- **The scope of online platform decisions to which the DSA’s OOC mechanism applies should be narrowed down to termination of consumer accounts or service provision to consumers, and exclude decisions made on spam grounds.**
  - This would be a more proportionate outcome: it would achieve the objective of protecting freedom of expression through effective user redress, without unduly restricting the freedom to conduct a business. As noted above, the DSA already requires, under Article 17, the introduction of a robust internal complaint-handling system for users to contest content moderation decisions by service providers, under regulatory oversight. **The OOC mechanism should be reserved as an additional, second-line redress option to contest a more limited set of decisions by service providers that may have a particularly significant impact on users’ fundamental freedoms.**
  - Clarifying that use of the OOC mechanism should be reserved to termination of *consumer* accounts or service provision to *consumers* would also help with legal certainty. Business users may already contest such termination decisions under the P2B Regulation.
  - Finally, narrowing down the scope in such a way and excluding decisions made on spam grounds, would avoid paralysing the scale of content moderation efforts by online platforms and help ensure that bad actors do not game content moderation systems in place.
- In order to avoid the risk of fragmentation, **providers of online platform services should identify in their terms and conditions specific OOC dispute settlement bodies that have been certified by Digital Services Coordinators on the basis of clear and appropriate criteria, and with which the service providers are willing to engage to resolve disputes with users.** This would ensure that the OOC dispute settlement bodies gain experience on the respective online platforms’ content

moderation systems, ensuring a certain level of consistency, quality and continuance in their decision-making.

- **Decisions reached through use of the OOC mechanism should not be legally binding and judicial recourse against them should always remain possible**, for both service providers and users concerned. This would help ensure the quality of OOC decisions and legal certainty at large<sup>11</sup>.
- In order to impede bad actors, deter frivolous complaints, and ensure scalability as well as high standards for decision-making, effective safeguards should be introduced. In particular:
  - (a) whereas service providers should engage in good faith in any attempt to resolve a dispute through the OOC mechanism, **participation in the mechanism should remain voluntary in nature;**
  - (b) users should be required to **exhaust internal appeals mechanisms offered by service providers** in accordance with Article 17 of the DSA, and provide evidence that they have done so, prior to requesting that disputes be submitted to the OOC mechanism;
  - (c) there should be a **clear time-limit within which users may request that disputes be submitted to the OOC mechanism;**
  - (d) users should only be **allowed to submit a request for recourse to out-of-court dispute settlement once for the same issue;**
  - (e) service providers and users should **bear a reasonable proportion of the total cost of using the OOC mechanism;**
  - (f) both users and service providers should be able to **appeal decisions issued by OOC dispute settlement bodies before regular courts;**
  - (g) service providers should have the **possibility to suspend the provision of their service to users that submit manifestly unfounded complaints to the OOC mechanism.**

Such an approach would be consistent with the OOC dispute settlement model endorsed by the European Parliament and the Council in other EU legislative instruments, most recently in the context of the P2B Regulation. It would also help improve concerns related to costs,

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<sup>11</sup> At a minimum, to the extent that decisions reached through use of the OOC mechanism are binding, it should be clarified that, where online platforms reinstate content pursuant to a decision by an OOC dispute settlement body, they will be immune from liability, if a court later finds the content was illegal or against the online platform's terms and conditions.

efficiency, and due process of law. We provide a proposed amendment to Article 18 DSA along these lines as an Annex to this non-paper.



## ANNEX: Proposed text for Article 18 DSA

1. Providers of online platform services shall identify in their terms and conditions two or more out-of-court dispute settlement bodies that have been certified in accordance with paragraph 2 and with which they are willing to engage to attempt to reach an agreement with recipients of the service on the settlement, out-of-court, of any disputes between the provider and the recipient of the service arising in relation to decisions to terminate the provision of the service to that recipient or terminate that recipient's account, with the exception of such decisions made on spam grounds, provided that the recipients of the service affected by those decisions:

- (a) are not traders within the meaning of Article 2(e) of this Regulation;
- (b) prior to having recourse to the out-of-court dispute settlement body, have exhausted the appeal possibilities offered to them by the internal complaint-handling system referred to in Article 17 and provided evidence that they have done so;
- (c) submit a request for recourse to out-of-court dispute settlement within two weeks from the decision reached through the internal complaint-handling system.

Providers of online platform services may only identify out-of-court dispute settlement bodies providing their services from a location outside the Union where it is ensured that the recipients of the service concerned are not effectively deprived of the benefit of any legal safeguards laid down in Union law or the law of the Member States as a consequence of the out-of-court dispute settlement bodies providing those services from outside the Union.

2. The Digital Services Coordinator of the Member State where the out-of-court dispute settlement body is established shall, at the request of that body, certify the body, where the body has demonstrated that it meets all of the following conditions:

- (a) it is impartial and independent;
- (b) it has the necessary expertise in relation to the issues arising in one or more particular areas of illegal content, or in relation to the application and enforcement of terms and conditions of one or more types of online platforms, allowing it to contribute effectively to the attempt to settle the disputes;
- (c) it offers dispute settlement that is easily accessible through electronic communication technology;
- (d) it is capable of settling disputes in a swift, efficient and cost-effective manner and in at least one official language of the Union;
- (e) it has in place clear and fair rules of procedure, including strict confidentiality safeguards.

3. Notwithstanding the voluntary nature of this out-of-court dispute settlement provision, providers of online platform services and recipients of the service concerned shall engage in good faith throughout any out-of-court dispute settlement attempts conducted pursuant to, and in accordance with, this Article.

4. Providers of online platform services and recipients of the service concerned shall each bear a reasonable proportion of the total costs of out-of-court dispute settlement in each individual case. A reasonable proportion of those total costs shall be determined, on the basis of a suggestion by the out-of-court dispute settlement body, by taking into account all relevant elements of the case at hand, in particular the relative merits of the claims of the parties to the dispute, the conduct of the parties, as well as the size and financial strength of the parties relative to one another.

5. Any attempt to reach an out-of-court agreement on the settlement of a dispute in accordance with this Article shall not affect the rights of the providers of online platform services and of the recipients of the service concerned to initiate judicial proceedings at any time before, during or after the out-of-court dispute settlement process.

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