

DIGITAL SERVICES ACT

ensuring a safe and accountable
online environment



The Digital Services Act (DSA) is a new EU legislative act aimed at creating a safe and trusted online environment that guarantees users' access to legal and safe content, goods and services online, and safeguards their fundamental rights.

What is the Digital Services Act?

The DSA is part of the [digital services package](#) – a legislative initiative tabled by the European Commission in December 2020, in response to the need to regulate the digital space to make it safer for consumers and businesses. Besides the DSA, the package also comprises the [Digital Markets Act](#) (DMA) – an EU legislative act that aims to recalibrate competition in the most important sectors of the EU digital economy, boosting fair competition, innovation and growth.

Together, the DSA and the DMA are the centrepieces of the new EU digital regulation, which aims to improve the functioning of the EU single market by establishing new regulatory modalities for the digital environment and digital services in the EU.

By pursuing the principle that what is illegal offline should also be illegal online, the DSA seeks to adopt a set of clear and uniform EU-wide responsibilities for providers of online intermediary services to achieve a greater level of public oversight over digital services. The measures foreseen, some of which are discussed in more detail below, are designed to increase due diligence – leading to greater transparency and accountability of intermediary service providers – identify and address online risks, and tackle illegal content and goods online to protect users in the digital space.

Digital Services Act

When?

20 days

16 November
2022

Enters into force 20 days after its publication in the Official Journal of the European Union

15 months/
1 Jan 2024

The DSA will apply either 15 months after entry into force or from 1 Jan 2024

4 months
after
designation

For very large platforms and search engines – four months after they are designated to the 'very large platforms' category

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Why is the DSA needed?

Online development

Over the past two decades, the online environment has developed rapidly. It has seen the emergence of new digital technologies and digital services, in particular online platforms, which have transformed the way people live, work, consume and do business. Notwithstanding the immense benefits offered to consumers and businesses, online digital services have increasingly exposed users to a wide range of risks, including the spread and proliferation of illegal content and goods and online disinformation.

Limited number of regulatory tools

On the other hand, the EU legal framework governing digital services has not accompanied the pace and progress of digital change, remaining unaltered since the adoption of the [e-Commerce Directive](#) in the year 2000. As a result, EU regulatory tools and interventions in the online services sector have become limited in scope and in their ability to address existing gaps and legal issues posed by the accelerating digitalisation of societies and economies.

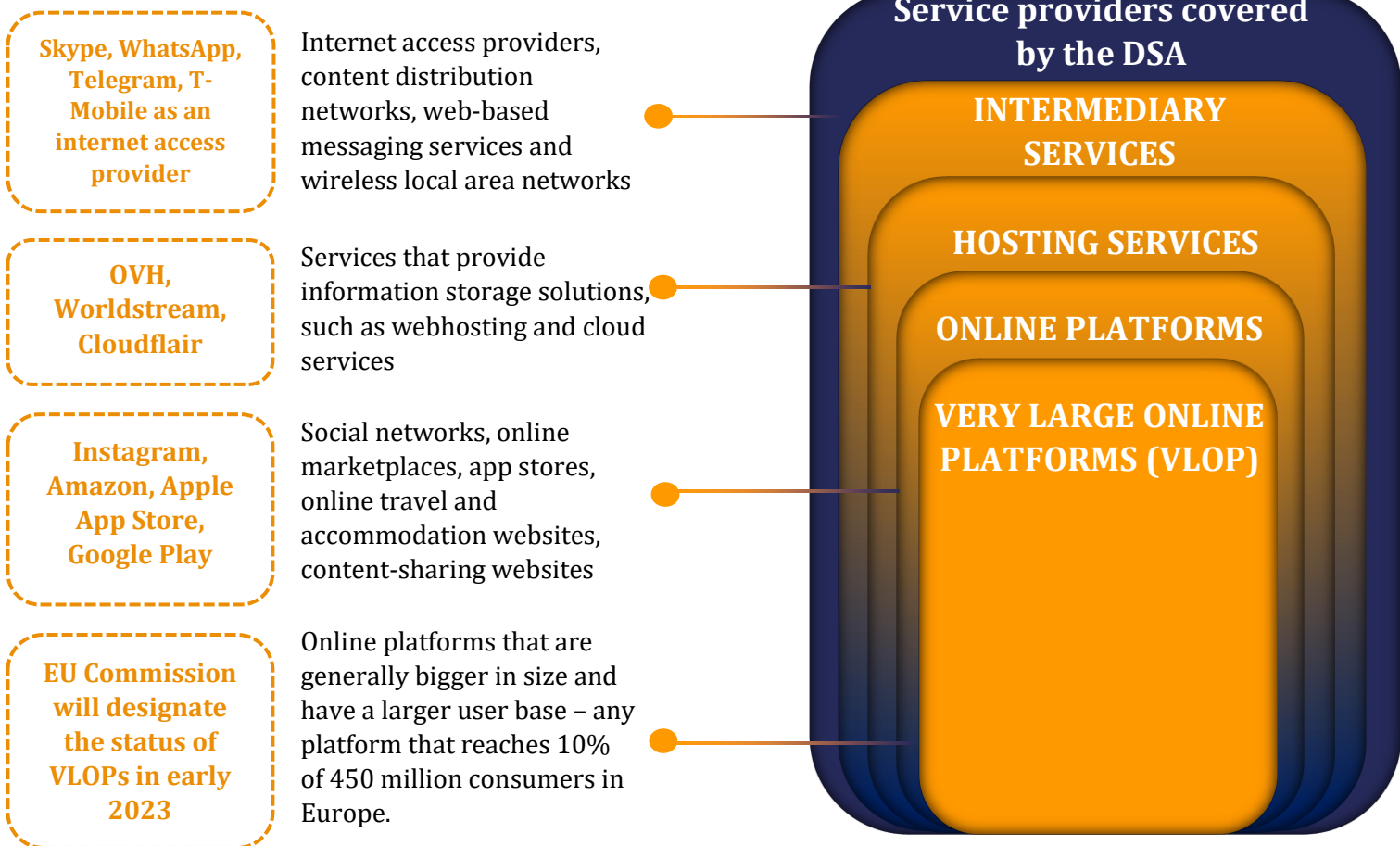
Reforming the e-commerce framework

Building on core principles of the e-Commerce Directive, the new Regulation for digital services aims to reform the e-commerce framework by creating a modern and robust European governance structure, able to respond to new digital challenges and provide the necessary conditions to stimulate innovation and growth in the digital economy. In doing so, the DSA will help to reform the legal framework on e-commerce and complement existing sector-specific legislation in this area, while harmonising national laws designed to tackle illegal content.

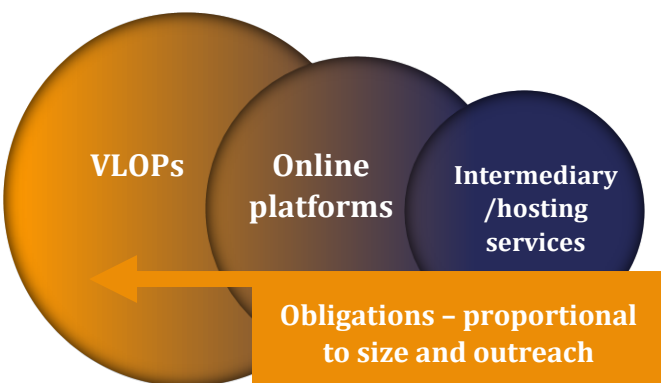
Europe – fit for the digital age

To whom does the DSA apply?

The rules set out in the DSA apply to online service providers that act as online intermediaries in the EU, connecting consumers with goods, services and content. Under the DSA, online service providers are grouped into different categories, each containing a set of specific due diligence obligations.



Source – EU Commission



Cumulative obligations

In line with the [principle of substantial connection](#), all the online intermediaries offering services in the European single market will be required to comply with the DSA rules irrespective of the location of their headquarters.

The obligations set out in the DSA are cumulative, which means that online platforms are subject to a specific set of due diligence obligations, in addition to all the obligations applicable to hosting service providers and intermediary service providers. Thus, the obligations set in the DSA are proportional to the role, size and impact of intermediary services in the online environment. Accordingly, stricter rules will apply to very large online platforms and very large online search engines, as a result of their extended reach and, consequently, the higher risk of potential societal harm and dissemination of illegal content. On the other hand, smaller companies will have obligations commensurate with their size and ability. This approach will help to ensure that smaller businesses remain accountable and competitive in the single market.

Failure to comply with the obligations laid down in the DSA could result in sanctions, including a **fine of up to 6% of the annual worldwide turnover** of the concerned intermediary service provider or a **ban to operate in the EU single market** in the event of repeated serious breaches.

Does the DSA apply to copyright violations?

1

Broad definition of 'illegal content'

Article 2(g) of the DSA:

'Illegal content' means any information, which, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with European Union law or the law of any Member State, irrespective of the precise subject matter or nature of that law.

2

Recital 12 of the DSA clarifies what acts could be considered as illegal content

Recital 12 of the DSA:

The concept should be defined broadly to 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 law is either itself illegal – such as illegal hate speech, terrorist content and unlawful discriminatory content – or that the applicable rules make illegal in view of the fact that it relates to activities that are illegal. Examples include the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, **the sale of non-compliant or counterfeit products**, the sale of products or the provision of services in infringement of consumer protection law, the **non-authorised use of copyright protected material**, the illegal offer of accommodation services or the illegal sale of live animals.

3

DSA applies to IP violations

The due diligence obligations of intermediary services introduced by the DSA will have a significant impact on copyright enforcement online and ensure a stronger enforcement of Intellectual Property rights online.

What is the Copyright Directive?

While the DSA aims to establish harmonised mechanisms in the field of online platform regulation, several sector-specific regulations are already in place. In the area of copyright-protected content, Article 17 of the [Directive on Copyright in the Digital Single Market](#) (Copyright Directive) establishes a new liability regime for certain information service providers. Both the DSA and Article 17 of the Copyright Directive set forth a number of obligations on how the information service providers should deal with illegal content, which raises a question about how the two documents interact.

Article 17 of the Copyright Directive prohibits content-sharing platforms from displaying unlicensed copyright content on behalf of their users.

Copyright Directive

Article 17 Obligations

To avoid being liable for its users' content, a content-sharing service must be able to demonstrate that it has made **BEST EFFORTS**

01

Not to display any copyrighted content which has been registered with the platform by rights-holders

02

To take down any copyrighted content on receipt of valid notice from the rights-holder

03

To prevent the re-upload of taken-down content

04

To obtain a license

Article 17 applies to online content-sharing service providers

[Article 2\(6\)](#)

What **is** an online content-sharing service provider?

What **is not** an online content-sharing service provider?

[Recital 63](#)

an **information society service**

whose **main or one of the main purposes** is to store and give the **public access** to a **large amount** of copyright-protected works uploaded by its users

which it **organises and promotes for profit-making purposes**

Non-profit online encyclopaedias

Non-profit educational and scientific repositories

Open-source software developing and sharing platforms

Electronic communication service providers

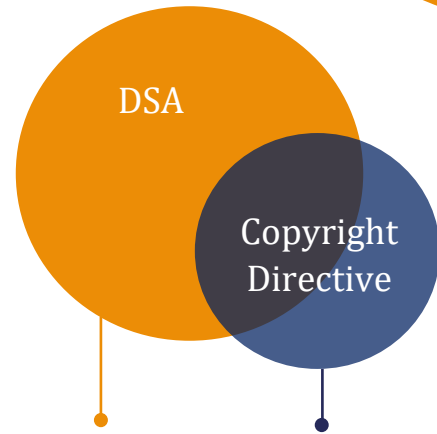
Online marketplaces (whose main activity is online retail)

Business-to-business cloud services, and cloud services that allow users to upload content for their own use

Interplay between DSA and Copyright Directive

Lex generalis vs lex specialis

The DSA addresses the potential overlap between the two legal regimes in [Article 2\(4\)\(b\)](#), which indicates that the Regulation is “without prejudice to the rules laid down by <...> Union law on copyright and related rights”. [Recital 11](#) adds that the “regulation is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected”. This means that the DSA clearly intends to establish a more general mechanism, which will be supplemented by sector-specific regulation.

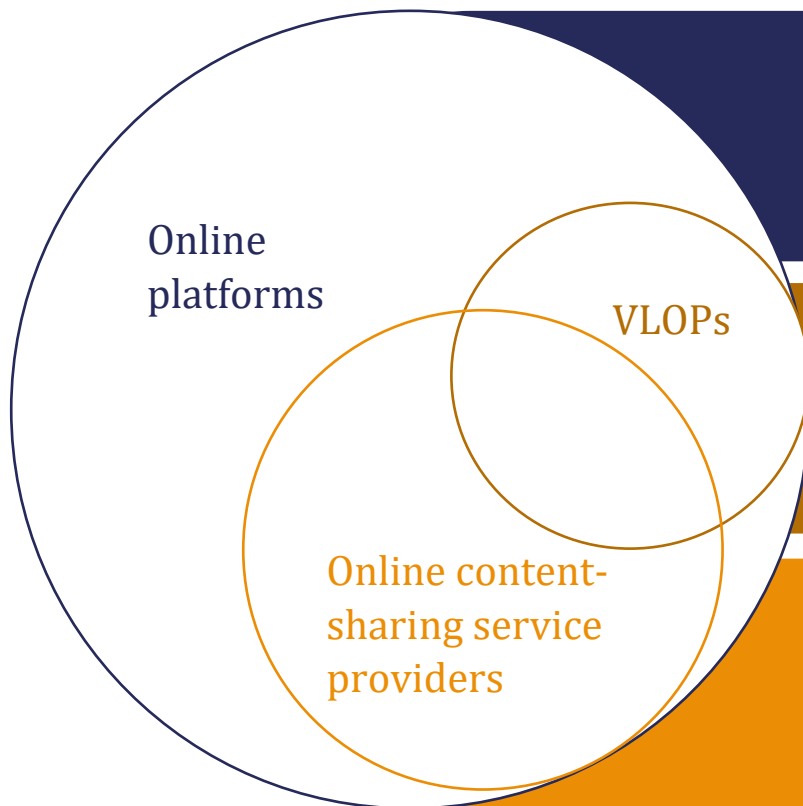


Lex generalis
The DSA establishes general rules and mechanisms applicable to service providers

Lex specialis
Copyright Directive is a sector-specific regulation applicable in areas not covered by the DSA

This makes the DSA *lex generalis* and Article 17 of the Copyright Directive – *lex specialis*, ‘*lex specialis derogat legi generali*’, which means that the DSA rules are applicable in matters not regulated by Article 17 of the Copyright Directive.

Interplay between service providers defined by the DSA and Copyright Directive



The DSA concept of ‘online platforms’ is any type of hosting service covering storage and dissemination of the information. This concept covers all social networks, online market places, content sharing websites and others.

The DSA concept of VLOP is a type of online platform with a high monthly active recipients’ number greater than or equal to 45 million (representing 10% of the European population).

While the Copyright Directive defines online content-sharing service providers as any service that stores or provides access to information, [Recital 63](#) defines a list of services not covered by the Copyright Directive.

Through the four categories of service providers, the DSA sets a broader scope of application. The Copyright Directive, on the other hand, only applies to online content-sharing service providers, which partially fall under the DSA’s concepts of online platforms and VLOPs.

What are the new liability regime rules?

Chapter II of the DSA regulates the liability of providers of [intermediary services](#). This chapter maintains key principles set in Articles 12-15 of the [e-Commerce Directive](#), transfers them to Articles 4 to 6 and 8, and provides some additional clarifications.

Similarities to e-Commerce Directive

Exemption from liabilities

Similarly to the principles of the e-Commerce Directive, the DSA regulates exemptions from liability of intermediary service providers, stating conditions under which providers of mere [conduit services](#), [caching services](#) and [hosting services](#) may not be held liable for illegal third-party information stored or transmitted via them.

Prohibition of general monitoring

The DSA further confirms the prohibition of general monitoring set in Article 15(1) of the [e-Commerce Directive](#).

Prohibition of general monitoring and copyrights

This prohibition of general monitoring corresponds to the provisions of Article 17(8) of the [Copyright Directive](#) meaning that intermediary service providers cannot conduct general monitoring of copyright-protected content. The prohibition of general monitoring and installation of filtering systems to prevent copyright infringements has also been confirmed by the Court of Justice of the European Union (CJEU) in [several cases](#). However, Recital 30 of the DSA indicates that monitoring obligations in specific cases would not be against the prohibition of Article 8 of the DSA. The legislator does not specify what would constitute a specific case – the clarification is left to the regulation of national legislation in compliance with the EU law as interpreted by the CJEU.

Novelty – Good Samaritan Protection

Having confirmed a majority of provisions in the e-Commerce Directive, the DSA introduces a novelty to the intermediary liability regime set out in the e-Commerce Directive. Pursuant to this new addition, the intermediaries will not automatically lose the conditional exemption from liability solely because they engage in voluntary investigations or other initiatives for [“detecting, identifying and removing, or disabling access to, illegal content”](#). In other words, voluntary measures taken by intermediaries on their own initiative and carried out in good faith should not be the sole reason for the loss of immunity. This provision is sometimes referred to as the **‘Good Samaritan Protection’**.

Good Samaritan Protection and copyrights

In terms of copyright-protected content, Article 17(4)(b) and (c) of the [Copyright Directive](#) already sets forth a liability exemption mechanism requiring online content-sharing service providers to make their **best efforts** to apply preventive measures to ensure the unavailability or removal of copyright-infringing content.

The Good Samaritan Protection has already been granted under US legislation called the Communications Decency Act, Section 230; however, EU legislation did not previously include such regulation.

What are the cooperation obligations?

Cooperation with national judicial and administrative authorities

Article 9 of the DSA

The DSA imposes an obligation on information service providers to cooperate with national judicial and administrative authorities by taking down illegal content or providing requested information about a specific user.

Orders to act against illegal content or to provide information could be closely linked with civil or criminal proceedings in national jurisdictions, as well as judicial cooperation mechanisms, which often relate to sensitive or classified information. For this reason, the DSA leaves a lot of room to avoid any prejudice to ongoing civil or criminal investigations and sets the conditions under which the provisions of the DSA would not be applicable.

Orders to provide information

The providers of intermediary services have an obligation to provide specific information about specific individual recipients upon receipt of an order from national judicial or administrative authority (Article 9 of the DSA).

Article 9 of the DSA establishes the requirements for the orders to provide information

The DSA obligation to provide information or take down illegal content shall not be prejudiced to the EU or national law. For this reason, Recital 30 sets a list of conditions for the orders to provide the information.

Condition

01

Orders to act against content that is considered illegal or orders to provide information should be based on the EU or national law. This should be without prejudice to EU law in the field of judicial cooperation in civil or criminal matters and national laws. If national laws provide additional or incompatible conditions, the DSA shall not apply.

The obligation to contain the statement of reasons on why the content is considered illegal may be adapted if specific criminal provisions apply for the prevention, investigation, detection and prosecution of criminal offences

Condition

02.

Condition

03.

The obligation to inform the recipient of the service may be delayed in accordance with applicable EU and national laws, in particular in the context of criminal and administrative proceedings.

Orders should be issued in compliance with:

- [Regulation \(EU\) 2016/679 \(GDPR\)](#)
- [Regulation \(EU\) 2021/784](#)
- [Regulation \(EU\) 2019/1020](#)
- [Regulation \(EU\) 2017/2394](#)

Condition

04.

What is the notice and action mechanism?

The DSA proposes to harmonise the ‘notice and action’ regime, which had been implemented in a very fragmented manner under the [e-Commerce Directive](#). This, together with other provisions in the DSA, maintains the cornerstones of the [e-Commerce Directive](#) in relation to the protection of the freedom of expression, namely conditional immunity from liability for hosting content (Article 5).

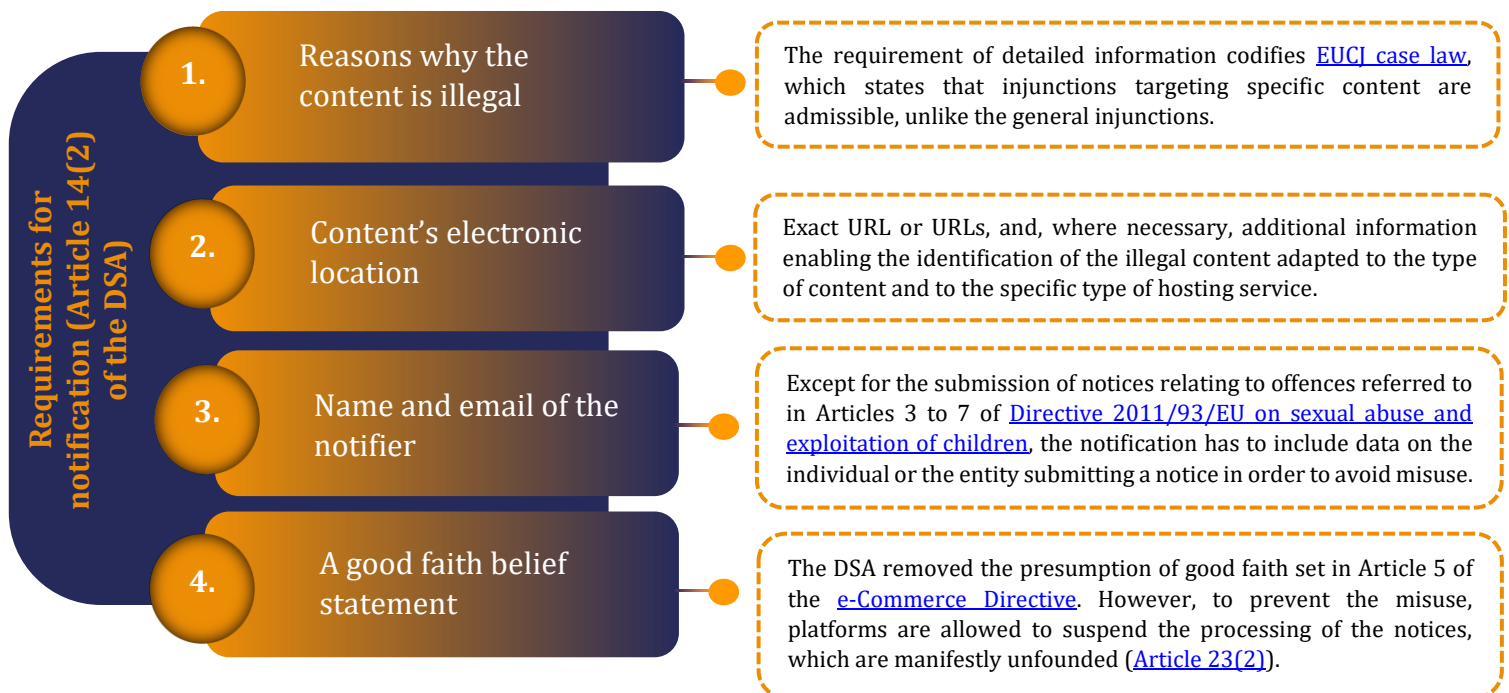
Possibility to notify about illegal content

Hosting services, including online platforms, are required to set up a notice and action mechanism through which any individual or entity could notify them of the presence of illegal content, including content infringing copyrights, patents, trademarks or other IP rights. Strict requirements for notices are set to ensure that they are precise and sufficiently substantiated.

Trusted flaggers

The DSA introduces the concept of ‘trusted flaggers’ (certified independent entities with expertise and competence in reporting illegal content). Online platform providers must ensure that reports from trusted flaggers are processed and decided on a priority basis.

In the context of copyright-protected content, following the addition of Recital 61 of the DSA, intellectual property rights organisations of industry and of right-holders could be awarded trusted flagger status, where they have demonstrated that they meet the applicable conditions.



Internal complaint handling and dispute mechanism

Together with the notice and action mechanism, the DSA imposes on the online platforms an obligation to ensure internal complaint handling and dispute settlement mechanisms that could be easily accessible for users who disagree with the decision to remove their content. The online platforms also need to set up certain safeguards against malicious notifications. These obligations will ensure a transparent and efficient notification system, allowing an efficient takedown of illegal content, including copyright-infringing content, and guaranteeing that all possible precautions are taken to reduce potential misuse of the notification mechanisms.

How is the notice and action mechanism applicable to copyright protected content?

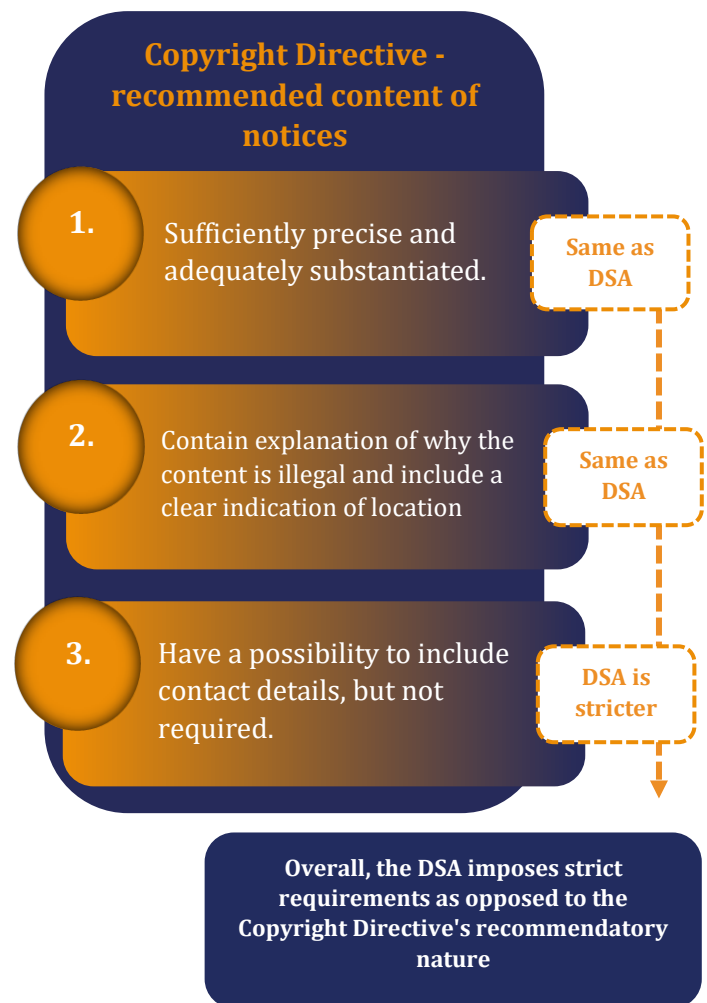
Notification obligations set in the Copyright Directive

In this regard, it is important to note that the [Copyright Directive](#) also established certain notice and action obligations in Article 17(4)(b) and (c). Unlike the DSA, the Directive merely indicates that the notifications have to be ‘sufficiently substantiated’ without giving further details on the type of information that needs to be included in the notification.

The term ‘sufficiently substantiated’ was further clarified in the [Commission’s Guidance on Article 17 of the Copyright Directive](#), which provides general recommendations.

However, the Commission Guidance only provides recommendations, with the goal of allowing the provider in question to make an informed and diligent decision about the content to which the notice refers.

Compared to the Copyright Directive, the DSA has stricter requirements. The most notable is the obligation to provide contact details, which is mandatory under the new DSA notification regime.



Is the obligation to notify about suspicious illegal activity apply to copyrights?

Article 18 obligations

Hosting services have an obligation to notify local authorities of activity that raises a suspicion that the recipient may have committed, may be committing or is likely to commit a criminal offence involving a threat to the life or safety of a person or persons ([Article 18 of the DSA](#)). The DSA sets strict requirements on which criminal offences are considered serious, thus obliging the hosting services to report them.

While [Recital 56](#) gives a non-exhaustive list of what could constitute suspicious criminal activity (incitement to commit terrorism, sexual abuse and exploitation of children, trafficking in human beings), the main criteria remains that such activity poses a threat to the life or safety of persons.

Given that IP crimes are often of a commercial nature, which does not pose a threat to the life or safety of persons, it could be argued that the hosting services do not have an obligation to inform the law enforcement authorities of such criminal offences. The obligation of notification could apply in cases of fake medicines or other counterfeit products, which could involve a threat to the life and safety of persons.

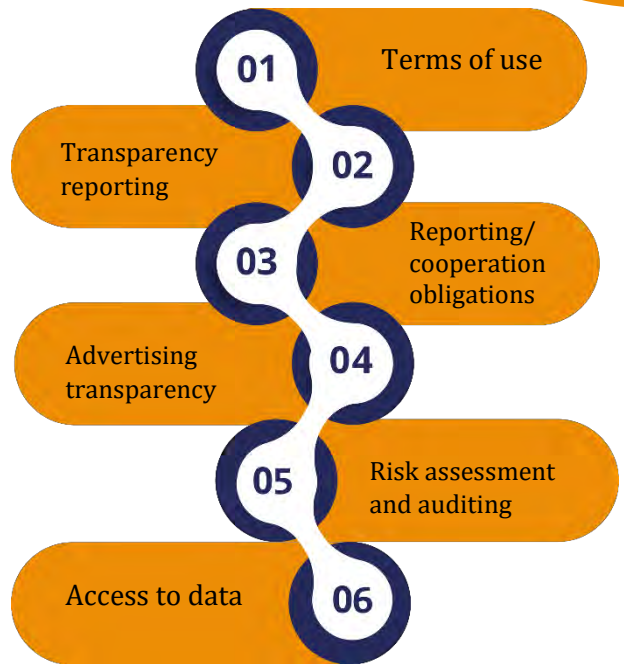
[Article 18](#) obligations **are not applicable to intellectual property crimes**, except when they involve a threat to the life and safety of persons.

What are transparency reporting obligations?

The DSA introduces multiple layers of transparency reporting obligations of intermediaries concerning content moderation activities, which is an essential element to ensure accountability. Transparency obligations depend on the type of service provider.

These requirements are designed to help online users, oversight bodies and the general public to understand how content moderation is conducted by large and very large online platforms, the most common types of illegal content and how it is taken down. These obligations will also help to ensure due diligence and a due process regime for online intermediaries.

These obligations are of particular importance in case of moderating illegal content related to copyrights and other IP-related rights. It would help to understand the latest trends and type of IP-infringing content as well as to assist law enforcement agencies in taking preventive actions.



	Intermediary services	Hosting services	Online platforms	VLOPs
Terms of use	Article 14	Article 14 Article 17	Article 14 Article 17 Article 23 Article 30	Article 14 Article 17 Article 23 Article 30 Article 38
Transparency reporting obligations	Article 15	Article 15	Article 15 Article 22 Article 24	Article 15 Article 22 Article 24 Article 42
Reporting/cooperation obligations	Article 9	Article 9 Article 18	Article 9 Article 18	Article 9 Article 18
Advertising transparency	X	X	Article 26	Article 26 Article 39
Risk assessment and auditing	X	X	X	Articles 34&35 Article 37
Access to data	X	X	X	Article 40 Article 79

How will the DSA be enforced?

In Chapter IV, the DSA outlines the framework for enforcement, implementation, cooperation and sanctions. The DSA combines the country-of-origin principle with a decisive centralisation of powers, in the hands of the Commission, when it comes to enforcement against the most powerful platforms. It provides sufficient tools to curb illegal content, including copyright-infringing content through various enforcement measures, including blocking orders against access providers.

The European Commission has significant supervisory and empowerment powers. The Commission is the primary regulator for VLOPs and very large online search engines (VLOSEs). The centralised approach is set due to the potential cross-border impact in case of failure to comply with the DSA obligations.

T a s k s

The Commission has exclusive powers for provisions in Section 5 of Chapter III, the due diligence obligations, including risk assessments, independent audits, and additional online advertising transparency.

Investigative powers, exercised either through its own initiative or at a request of a Digital Service Coordinator (DSC) upon suspicion of infringement by VLOPs or VLOSEs.

Enforcement powers, including the request to provide information, issue non-compliance decisions, impose fines and make legally binding commitments.



Articles 49 and 50 of the DSA establish the national DSC as a main enforcement authority.

In line with Recital 109, Member States could appoint more than one competent authority. This would enable the appointment of a separate DSC for the copyright protection.

EBDS is an independent advisory group aimed at supporting consistent application of the DSA. It comprises all DSCs who have voting power, and the Commission as a chair, without voting power.

Have vast investigation powers, including carrying out on-site inspections, interviewing staff members, and requiring the production of documents and information.

Have extensive enforcement powers, including making compliance agreements, imposing interim measures, fines and penalties.

Are responsible for coordinating the enforcement of the DSA – DSCs have to cooperate with each other, national authorities, EBDS and the Commission.

T a s k s

Primary role is advisory, which includes drafting codes of conduct and supporting joint investigations between the DSCs and the Commission.

Advises the DSCs and the Commission about appropriate enforcement measures, especially for the VLOPs.

T a s k s

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