

Position on the proposal for Digital Services Act

egta is the media trade body for television and radio advertising, representing 160 companies in Europe and beyond. egta members come from both public and private sectors and cover respectively 80% and 60% of the total TV and radio ad spend in Europe, thus playing a fundamental role in the sustainable funding of the European audiovisual and radio industries.

INTRODUCTION

egta welcomes the European Commission’s proposal for a Digital Service Act (DSA) and its objective to update the rules governing digital services to address the challenges posed by online platforms.

The monetisation of TV and radio broadcasters’ content relies on a variety of resources, including advertising. While other models exist, such as pay-to-access, they cannot be considered as viable alternatives to all TV and radio offers as they would drastically limit the funding of and access to content to many. Ultimately, maintaining a free and pluralistic media environment depends on advertising revenues.

This paper puts forward recommendations to ensure the DSA maintains the goals of the proposal while safeguarding the advertising-funded model of TV and radio broadcasters:

- Display advertising should be understood as encompassing all formats;
- Online platforms should be understood to include advertising servers;
- Hosting service providers should be required to comply with the consumer and privacy standards attached to the content disseminated, when displaying advertising;
- Online platforms¹ and very large online platforms (VLOPs)² when displaying advertising should provide further information, enabling recipients to understand the selection of one service or product over another.

RECOMMENDATIONS

1. Scope for intervention on advertising-related issues

a. Definition of advertisement

- Advertising, when online, can be displayed using moving or still images, with or without sound, or sound only. The definition must therefore be broadened to cover all types of advertising that exist online and ensure the proposed provisions apply **irrespective of the format used**.

¹ Article 2 (h) of the proposal.

² Article 25 of the proposal.

- As it currently stands, the definition of advertisement refers to both commercial and non-commercial advertising. Most commercial advertising is already regulated at EU and national level, complemented by self-regulation. Applying rules irrespective of the nature of the advertising may lead to unintended consequences that do not take into consideration (national) sector specific legislation.

b. Definition of illegal content

- We support the introduction of provisions to regulate ‘*information*’ as encompassing both illegal content and advertising³, and the acknowledgement of illegal content as not being in compliance with EU or national law. This ensures a degree of liability of intermediary services, and their compliance with the obligations outlined in Chapter III of the proposal, for the advertising they store.

c. Categories of hosting service providers

- We welcome the acknowledgement **that advertising servers are hosting service providers**⁴ as they store information provided by and at the request of the recipient. We recommend that they are considered as **online platforms** within the meaning of article 2 (h) of the proposal as they store, manage and serve (disseminate) advertising/information. A clarification in this regard would provide further legal certainty as to the application of the rules in Chapter III. This is particularly key as online platforms may also play a dual role as advertising server and social network or video-sharing platforms⁵, thereby wielding significant power on consumer trust and safety online.

2. Ensuring a robust liability regime for hosting service providers with regard to advertising

- The Court of Justice of the European Union (CJEU) adopted a rich jurisprudence interpreting the E-Commerce Directive, providing a distinction between the passive and active role that a provider of intermediary services plays, hence the application of a liability regime. The reference in recital 18 to an active role of a provider of intermediary service as dependent on its capacity to offer a service to a recipient itself is **reductive and incomplete** with regards to the case law from the CJEU. This recital would also gain in legal certainty by referring to the passive v. active distinction developed by the CJEU, instead of incorporating any reference to a neutral role.
- The CJEU ruled⁶ that a hosting service provider plays an ‘*active role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them*’ (§123), thereby foreseeing the liability of hosting providers for the illegal content they promote, which includes illegal advertising. **The codification of this interpretation**

³ Article 2 of the proposal.

⁴ Recital 40 of the proposal.

⁵ This is the case with Facebook who is a social network that has its own ad server (Facebook Ads Manager) that enables the recipient to create, thereby storing information, and manage advertising for their dissemination on the platform.

⁶ CJEU Judgment, L’Oréal SA and Others v eBay International AG and Others, 12 July 2011 (Case C-324/09).

in the DSA would guarantee the accountability of hosting service providers when playing an active role in the online advertising market.

- These hosting service providers find themselves in a position of selling access to their services to users or having exclusive access to valuable user data⁷, and would play an active role by having control⁸ over the data stored. **We call on EU lawmakers to ensure that service providers and online platforms are liable for the illegal content they store or transmit when they play an active role. This is relevant for sales houses because:**
 - When broadcasters sell their online inventory on proprietary websites and apps (such as VOD services or radio aggregators) or on third-party services (such as online social networking services or third-party radio aggregators), they must rely on advertising servers. The opacity of the advertising system may not ensure a satisfactory level of protection to consumers in the advertising displayed by these service providers.
 - The monetisation of illegal and harmful information by online platforms is a threat to society and democracy at large. Ultimately, revenue is diverted toward other sources that are not required to abide by the same quality standards, and therefore can be illegal or harmful and that do not invest in quality content or trusted information, which also constitutes a significant loss of financing for TV and radio content.
- The liability regime should be understood as applicable to providers of intermediary services by default to ensure swift implementation of the regulation. National authorities may adopt decisions ruling out the application of the liability regime on a case-by-case basis, in accordance with Chapter II of the proposal.

3. Strengthening the due diligence obligations placed on hosting service providers

- Actions undertaken by hosting service providers to minimise risks for consumers to be exposed to scams and other harmful practices are often unclear. The automatic filtering technology they establish is merely based on declarations from advertising buyers and does not amount to an appropriate level of protection.
- In comparison, advertising displayed by broadcasters' sales houses abide by European and national rules, complemented by self-regulation. Hosting service providers, when optimising or promoting the presentation of broadcasters' content should be required to abide by the same quality standards as those broadcasters who request the dissemination of their content those broadcasters This would ensure an adequate level of protection in connection to the said content prior to its display to viewers and listeners. **In practice, providers of intermediary services should**

⁷ 'Hosting Intermediary services and illegal content online: An analysis of the scope of article 14 ECD in light of developments in the online service landscape', Study prepared for DG CNECT by the Institute for Information Law, 2018, p. 18.

⁸ §114 of CJEU Judgement, Google v Louis Vuitton and others, 23 March 2011, Joined Cases C-236/08 to C-238/08.

comply, in their terms and conditions⁹, with the consumer and privacy standards attached with the content disseminated when displaying advertising.

- Conversely, a provider of intermediary services should not remove, disable access to or otherwise interfere with the advertisement it does not market, sell or arrange¹⁰ the advertising. **It should not interfere, whether it plays an active role or not, with pre-vetted advertising it has no control over in the sense that it does not market, sell or arrange the latter.** This is particularly important for these online players who play a dual role as advertising servers and social networks.

4. Clarifying the advertising transparency obligations provisions

- egta supports the new transparency provisions in articles 24 and 30 building on article 6 of the E-Commerce Directive and trusts that the legal basis of this regulation will ensure the effective implementation of such principles. The transparency of online advertising is a key component to empower users and enable a safe environment. Similarly, we welcome the transparency rules for recommender systems as they influence the visibility of information.
- On scope, the approach based on the size of the online platform with specific measures applying to very large online platforms (VLOPs) is welcome. It is important that advertising servers are deemed to be online platforms within the meaning of recital 13 (see point 1.c) so that the transparency obligations provided in articles 24 and 30 apply.
- The transparency obligations in article 24 warrant clarifications so recipients are provided further information. **We recommend that online platforms that display and sell, market or arrange advertising provide information on users' tracking, data usage and data access that enables recipients to understand the selection of one service or product over another in its promotion.**
- The public advertising repository is a positive step towards reducing the opacity of the online advertising ecosystem. As broadcasters are required to share data on the advertising they display, the transparency obligations placed on VLOPs would foster fair competition. **To further this goal, article 30 (2) should mention the obligation for VLOPs to share the spending cost attached to advertising and impose on VLOPs to accurately identify ad buyers pursuant to article 30 (2)(b), taking reasonable effort to assess whether the information is reliable¹¹.**

⁹ Article 12 of the DSA proposal on terms and conditions.

¹⁰ In the meaning of article 28b (2) of the Audiovisual Media Services Directive as amended in 2018.

¹¹ Similarly to the obligations referred to in article 22 (2) on the traceability of traders.