Implementation of the Digital Services Act (DSA)

Recommendations on out-of-court dispute settlement bodies

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Introduction

The Computer & Communications Industry Association (CCIA Europe) has been supporting the implementation of the Digital Services Act (DSA)[1] to ensure a harmonised approach to key provisions, especially those enacted by national Digital Services Coordinators (DSCs).

Article 21 of the DSA creates the possibility for European Union users to bring complaints to out-of-court dispute settlement bodies about an online platform's moderation decision regarding their content, account, service (such as removals, suspensions or restrictions) or their notices about other users. Online platforms of different sizes and business models are covered in this new mechanism. These bodies should resolve the dispute via a non-binding decision. DSCs are in charge of certifying the out-of-court dispute settlement bodies and online platforms are required to engage in this dispute resolution process "in good faith" before the bodies resolve the dispute via a non-binding decision. In most circumstances, online platforms must pay the fees of the bodies - regardless of the outcome - as well as the user's reasonable expenses, if their complaint is successful.

This provision of the DSA is creating an important novel user redress mechanism to address online content moderation complaints. To make sure that Article 21 is applied harmoniously and consistently across 27 Member States, CCIA Europe would like to suggest five key recommendations to support the European Commission and DSC's implementation.

I. Harmonise the level of expertise required from out-of-court dispute settlement bodies
II. Set a baseline of procedural rules to ensure efficient and timely treatment of user requests for out-of-court dispute settlement
III. Define necessary safeguards to uphold data protection and security rules
IV. Provide guidance on reasonable fees and online platforms' payments
V. Introduce safeguards to prevent abuse of the dispute settlement system

I. Harmonise the level of expertise required from out-of-court dispute settlement bodies

Article 21 of the DSA requires that out-of-court dispute settlement bodies possess the necessary expertise to receive certification from the DSC. However, the term "necessary" is open to interpretation, creating uncertainty about how each national DSC will establish certification criteria to determine expertise and assess whether an out-of-court dispute settlement body meets these standards.

[1] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), available here.

Certified out-of-court dispute settlement bodies with differing or insufficient levels of expertise may lead to inconsistent decisions and subpar outcomes for users seeking redress. There is also ambiguity regarding the overall level of expertise out-of-court dispute settlement bodies must maintain to handle a wide range of cases across the EU, which may involve linguistic, contextual, platform-specific, or legal expertise. Additionally, it remains unclear how out-of-court dispute settlement bodies are expected to consistently apply their expertise in decision-making processes.

- ➔ Provide guidelines to help DSCs establish the expertise for out-of-court dispute settlement bodies during the certification and recertification process, to ensure maintenance of that expertise over time, including via knowledge of online platforms, as well as national laws and platforms' terms and conditions and ability to follow their updates. For example, setting out guidance on how out-of-court dispute settlement bodies may be required to demonstrate that decision-makers will have the necessary knowledge, expertise and skills in the type/s of illegal content or platform's terms and conditions for which they are seeking certification for and appropriate market or regional expertise on how that expertise should be evaluated and re-assessed to ensure it is maintained.
- ➔ Provide evidence of certification via presentation of their certificate, and create a repository of certified out-of-court dispute settlement bodies on the European Commission's website (as is already the case for trusted flaggers), with their certification, their areas of expertise, the types of online platforms they deal with, languages available (including available translation services), fees, and rules of procedure.
- ➔ Establish a framework to ensure consistency of decisions by out-of-court dispute settlement bodies to avoid forum-shopping concerns, among others.

II. Set a baseline of procedural rules to ensure efficient and timely treatment of user requests

To avoid operational delays and uncertainty in the administration of matters, out-of-court dispute settlement bodies need to observe a baseline of common procedural rules. Since Article 21 of the DSA lacks guidance on these procedural rules, guidelines from the European Commission should fill this gap to ensure efficient timely treatment of user requests.

These include, among other things, conducting admissibility checks in advance of forwarding disputes to the provider of the relevant online platform, using channels specified by the various providers of online platforms rather than unverified email addresses the out-of-court dispute settlement bodies identify online, sufficiently identifying the content in question (e.g. by pointing to a specific URL) as well as the nature of the alleged illegality or policy violation, and providing appropriate confidentiality safeguards.

As part of these rules, we also recommend that out-of-court dispute settlement bodies encourage users to engage with the relevant online platform's internal appeals mechanism prior to resorting to out-of-court dispute settlement and that they provide the relevant internal appeals reference received from the online platform in the context of that process to ensure the swift re-examination of the matter when the case reaches the out-of-court dispute settlement process.

- ➔ Define and harmonise the method for out-of-court dispute resolution bodies to notify online platforms of complaints received and their procedure for resolving the dispute, and ensure a coherent method to identify content moderation actions and track disputes.
- ➔ Ensure that users entering the dispute resolution process are asked to complete a verified statement and declare that they have exhausted the internal dispute resolution mechanisms provided by the online platform (including any appeal process).

III. Define necessary safeguards to uphold data protection and security rules

Article 21 of the DSA requires online platforms to engage "in good faith" with out-of-court dispute settlement bodies to facilitate effective dispute resolution. However, the definition of "good faith engagement" remains ambiguous, particularly regarding the type and extent of information online platforms are expected to provide to out-of-court dispute settlement bodies. Online platforms must balance the need to provide sufficient data for dispute resolution with the need to ensure user safety and platform security, as well as compliance with cybersecurity, data protection and privacy laws, such as the General Data Protection Regulation (GDPR)[2]. In the case of the GDPR, this includes adhering to data minimisation principles and ensuring the legal basis for sharing personal data.

In addition, out-of-court dispute resolution bodies will need to handle large amounts of potentially sensitive user and platform data, depending on the nature of the dispute. Without clear and secure data-sharing protocols, users may face an inefficient, uncertain and inconsistent dispute-resolution process, and online platforms may face challenges in complying with conflicting applicable EU laws, such as GDPR, and ensuring the security of their products.

- ➔ Create harmonised data protection and privacy standards for out-of-court dispute settlement bodies and require them to provide evidence of adequate standards to ensure a sufficient level of data protection and security before online platforms share data with them.
- ➔ Define a harmonised approach to how out-of-court dispute bodies should notify providers of complaints received, how data should be transferred during dispute resolution processes (e.g. via online platforms' existing data exchange mechanisms) and reasonable turnaround times for platforms' response to the complaint and any data transfer to take place.

IV. Provide guidance on reasonable fees and online platforms' payments

Article 21 outlines that out-of-court dispute settlement bodies can be funded through independent sources, platform fees, and nominal fees charged to users. Out-of-court dispute settlement bodies are permitted to charge platforms a reasonable fee per case,

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), available here.

which must not exceed the actual costs incurred by the bodies, and they may also retain the nominal fee paid by users if their complaint is unsuccessful. On the other hand, if the user's complaint is successful, the platform must cover the user's costs. However, the DSA does not specify how these fees and expenses are to be defined and regulated. For example, out-of-court dispute resolution schemes may apply per-case fees, subscription models or volume pricing arrangements.

Where subscription models are used, in particular, the out-of-court dispute settlement body should ensure those are complemented by other fee possibilities that are reasonable alternatives. This will ensure avoiding abuse of the process and allow providers of online platforms to scale their participation in out-of-court dispute settlement as the number of disputes they receive grows.

Additionally, out-of-court dispute settlement bodies could have significantly different operational frameworks, leading to varying interpretations of what constitutes a "reasonable" fee. Without clear and practical guidelines on reasonable costs, there is a risk that out-of-court dispute settlement bodies might impose excessive fees, creating financial burdens on platforms and possibly encouraging inefficient operating practices. For example, subscription models are unlikely to make sense where the volumes a platform receives from the relevant out-of-court dispute settlement body are low; and any alternative fee per-case model the out-of-court dispute settlement body also offers must not be excessive in a way that obliges the platform to pick the subscription model nonetheless.

- ➔ Maintain reasonable fees for online platforms by defining maximum costs incurred by case, a fee methodology per case type and ensure adherence of out-of-court dispute settlement bodies via their certification process.
- ➔ Develop guidance on case types where it may be appropriate for bodies to have no- or low-cost fee arrangements, such as where the user did not originally utilise the online platform's internal complaints handling mechanism or where the case submitted was inadmissible.
- ➔ Define a harmonised process and timeframe for payment.
- ➔ Provide guidelines for online platforms to challenge fees and report abuse and introduce a deterrent to bad faith processes by returning the nominal fee in case an online platform is successful.
- ➔ Limit the scope of user expenses to complaints regarding illegal content only, where legal expenses are more likely to apply.
- ➔ Develop transparency requirements to ensure out-of-court dispute settlement bodies are not imposing excessive fees.

V. Introduce safeguards to prevent abuse of the dispute settlement system

Article 21 opens the out-of-court dispute settlement process to all EU users and covers all types of content moderation decisions. Limited safeguards against nuisance, frivolous, or bad faith submissions to out-of-court dispute settlement bodies are foreseen in the Article. This includes users filing illegitimate claims or repeatedly submitting the same complaint to multiple out-of-court dispute settlement bodies.

Nevertheless, there is no clear guidance on how out-of-court dispute settlement bodies and platforms should prevent and tackle these types of abuse. Without safeguards to prevent abuse, Article 21 risks being overwhelmed by excessive, unnecessary claims, placing a heavy burden on out-of-court dispute settlement bodies and imposing undue costs on online platforms.

- ➔ Define harmonised conditions under which online platforms can refuse to engage in the dispute resolution process to prevent, for example, multiple similar complaints.
- ➔ Engage with all relevant stakeholders to define harmonised solutions to avoid duplicate complaints and abusive mass appeals (e.g. small fee for users to start the process to be returned if the claim is legitimate, coordination to flag coordinated campaigns to flood out-of-court dispute settlement bodies systems).

Conclusion

CCIA Europe's recommendations on the certification and functioning of out-of-court dispute settlement bodies aim at making sure that this new dispute resolution mechanism functions well for all, including the bodies and online platforms. By defining harmonised approaches to key elements, from the certification of the bodies, procedural rules, data-sharing, and definition of fees to safeguards, this redress mechanism has the opportunity to be a useful tool for European users to seek redress and continue enjoying their favourite online services.

Guidelines from the European Commission to ensure the harmonious application of Article 21 across the 27 Member States are needed. These guidelines would provide clarity for the various online platforms that will engage with out-of-court dispute settlement bodies. Furthermore, given the clear link between Article 21 and Articles 34 and 35 of the DSA, it will be important to establish a framework around the interconnection between the decisions of dispute settlement bodies and the broader systemic risk obligations of the DSA.

About CCIA Europe

The Computer & Communications Industry Association (CCIA) is an international, not-for-profit association representing a broad cross section of computer, communications, and internet industry firms.

As an advocate for a thriving European digital economy, CCIA Europe has been actively contributing to EU policy making since 2009. CCIA's Brussels-based team seeks to improve understanding of our industry and share the tech sector's collective expertise, with a view to fostering balanced and well-informed policy making in Europe.

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