

Online Harms: A comparison of the online safety bill and digital services act as at 1 January 2022

This table sets out a high-level comparison of the proposals in the European Union Digital Services Act (DSA) and the UK's Online Safety Bill (OSB) as at 1 January 2022 (including recommendations of the Internal Market and Consumer Protection Committee Report (IMCO Report) published on 13 December 2021, and the UK Parliamentary Joint Committee Report (PJC Report) published on 14 December). Both pieces of legislation are still in draft form and subject to scrutiny and further change.

	DIGITAL SERVICES ACT (EU)	ONLINE SAFETY BILL (UK)
Scope		
Who it applies to 	<p>“Online intermediary services.”</p> <p>There are sub-categories of:</p> <ul style="list-style-type: none"> • Intermediary service: platforms offering network infrastructure, including Internet access providers and domain name registrars. • Hosting services: cloud and web hosting services. • Online platforms: platforms bringing together sellers and consumers, such as online marketplaces, app stores, collaborative economy platforms, and social media platforms. • Very large online platforms (VLOPs): platforms with at least 45 million monthly active users in the EU. 	<p>Services that provide online user interactions and user-generated content and search services.</p> <ul style="list-style-type: none"> • Services covered include social media platforms, consumer cloud storage sites, video sharing platforms, online forums, gaming sites, online marketplaces, and search engines. • Providers will be classified into Category 1, Category 2(A), and Category 2(B), with Category 1 companies being those considered as “high-risk and high-reach.”
Territorial scope 	<p>Online intermediary services offering their services in the EU.</p>	<p>Service with links to the UK.</p> <p>A service has links to the UK if:</p> <ul style="list-style-type: none"> • It has a significant number of UK users; or • UK users form one or the only target market for the service; or • It is capable of being used in the UK by individuals and there are reasonable grounds to believe that there is a material risk of significant harm to individuals in the UK from content present (user-to-user services) or content that might be encountered in or via search results (search services).

<p>What type of content/activity is covered?</p> 	<p>Unlawful content or content that may have negative effects for the exercise of fundamental rights or intentional manipulation of services with an action or foreseeable effect on public health, minors, civic disclosure, electoral process, or public security.</p> <ul style="list-style-type: none"> • Unlawful content is content that is unlawful under national or EU laws, such as hate speech, terrorist propaganda, and intellectual property infringement, or relates to illegal activities, such as the sharing of images depicting child sexual abuse. • As well as illegal content, the DSA also covers illegal goods and services. • It is unclear whether the DSA covers private communications. To the extent that private communication services also double as an intermediary service (or another category of provider), they may also become subject to the DSA, but the proposals are currently unclear on this point, and it should hopefully be clarified as part of the co-decision process. 	<p>Illegal content and “legal but harmful content.”</p> <ul style="list-style-type: none"> • Illegal content means illegal under UK law. Priority categories of criminal offences are likely to include hate crime, revenge pornography, promoting or facilitating illegal immigration, and the sale of illegal drugs and weapons. • PJC Report recommends a wide range of offences that should be made illegal, including (i) content promoting self-harm; (ii) cyber-flashing; (iii) promoting or “stirring up” violence against women, or based on gender or disability; and (iv) the deliberate sending of flashing images to people with photosensitive epilepsy. • PJC Report proposes that the OSB should cover “content and activity” and recommend tools/algorithms used by the service, and move away from a focus on moderation of content to wider considerations in respect of the design of online platforms. • The term “legal but harmful content” has come under some criticism as vague, but it includes “content which gives rise to a reasonably foreseeable risk of a significant adverse physical or psychological impact on individuals.” It is proposed that “legal but harmful content” will be further defined in the legislation and Ofcom codes. Harmful content could include online bullying and abuse, advocacy of self-harm, and spreading disinformation and misinformation.
<p>Protection of children</p> 	<p>Addressed broadly – no specific obligations.</p> <ul style="list-style-type: none"> • Companies will have to assess and limit the risks their platforms pose to children. 	<p>Specific duties if services are likely to be accessed by children.</p> <ul style="list-style-type: none"> • Services will have to have extra systems in place to stop children from coming across harmful content. This includes conducting a child safety risk assessment, implementing mitigations to protect children, and making certain information available in the terms of service (e.g., how children are prevented from encountering illegal/harmful content and how they are judged to be at risk of harm). • PJC Report also includes recommendations to impose a legal duty on pornography sites to prevent children from accessing them (even if the sites do not include user-to-user content), and that companies should reveal how many underage users are on their platforms.
<p>Online advertising</p> 	<p>Included.</p> <ul style="list-style-type: none"> • All online platforms will have to show certain information, such as who is paying for the displayed ads and the target audience of the ads, and they must clearly identify ads as such. • VLOPs will also be required to keep databases of verified ads, containing historic information as to the content and targeting of ads and the total number of recipients reached. Such records must be kept for one year after the ad is displayed for the last time. The IMCO Report extends the list of transparency requirements (for example, to contain the name of the product, service, or brand and information about any parameters used to exclude particular groups from receiving an ad) and suggests that the databases would also have to be easily accessible via multi-criteria search options, allowing individuals to search ads by advertiser, target audience, or reach. • The IMCO Report would also go further and require each ad to be identified through prominent and harmonised marking. The IMCO Report would also prohibit online platforms from using personal data for commercial purposes related to direct marketing, profiling, or behavioural targeting of ads specifically towards minors. 	<p>Not currently included.</p> <ul style="list-style-type: none"> • PJC Report calls for the OSB to cover paid-for ads, such as those involving scams and fraud. Under the recommendation, Ofcom would be charged with acting against platforms that consistently allow the publication of harmful ads.

<p>Cookies</p> 	<p>Not currently included.</p> <ul style="list-style-type: none"> The IMCO Report tackles the use of “dark patterns” in cookie consent banners and elsewhere. It would require intermediary service providers, including online platforms, to give equal weight to the different options available to users when asking them for consent, and prevent them from repeatedly requesting a user to consent to data processing when such consent has already been refused, especially via the use of pop-ups that interfere with the user experience. 	<p>Not currently included.</p>
<p>Obligations – what do you have to do to comply</p>		
<p>Overall duty</p> 	<p>No overall duty. Obligations vary depending on the sub-category of service caught but center around four main principles: (i) transparency, (ii) empowering users, (iii) risk management obligations, and (iv) industry cooperation.</p> <ul style="list-style-type: none"> All service providers without an establishment in the EU must appoint a contact/legal representative in a member state where they offer services. Online platforms and VLOPs will have to publish transparency reports at least every six months, including information such as the number of accounts that were suspended, content that was removed, and the time it took. Only annual reports are required for intermediary services. Online platforms and VLOPs must display trader information to users. They are also required to vet the credentials of any third-party suppliers. All service providers must include information on any content restrictions in their terms of service. 	<p>Overriding duty of care on all services to “take action to prevent user-generated content or activity on their services causing significant physical or psychological harm to individuals.”</p> <ul style="list-style-type: none"> Publish annual transparency reports. Exactly what should be included in PJC Reports is to be defined by Ofcom. Set clear and accessible terms of service that state how users (including children) are protected from illegal content.
<p>User controls and redress</p> 	<ul style="list-style-type: none"> All online platforms that provide hosting services are required to put in place a notice mechanism for users to report illegal content. Platforms must provide a statement of reasons when they remove or disable access to specific content. Online platforms and VLOPs must provide content dispute resolution mechanisms that allow users to appeal decisions. 	<ul style="list-style-type: none"> All services must have systems and processes in place that allow users to report illegal content or legal but harmful content, and a complaints procedure. PJC Report also recommends that individual users should be able to make complaints to an ombudsman when platforms fail to comply with the new law.
<p>Safety, risk management, and reporting requirements</p> 	<ul style="list-style-type: none"> Obligations to remove illegal goods, services, or content. Online platforms and VLOPs are required to report criminal offenses. In addition, VLOPs are required to: (i) produce an annual risk assessment and independent audit, (ii) have risk mitigation measures in place, and (iii) appoint a compliance officer. 	<ul style="list-style-type: none"> All services must carry out and maintain illegal content risk assessments and keep a written record of every assessment. All services must take steps to mitigate and manage risks of harm caused by illegal content (as identified by the risk assessment). All services are required to put in place appropriate systems and processes to improve user safety (e.g., to swiftly remove any illegal content). PJC Report recommends the need to have an Online Safety Policy (similar to the terms of service) and appoint a “Safety Controller” at board level or reporting to board level. PJC Report also recommends carrying out internal risk assessments on the potentially harmful impact of systems, processes, and algorithms (not just content).

Sanctions and enforcement

<p>Regulator</p> 	<p>Each member state must designate a “Digital Services Coordinator” (DSC).</p> <ul style="list-style-type: none"> • DSCs will be responsible for ensuring compliance with the DSA, verifying platform user numbers in the EU, and designating platforms as VLOPs at least every six months. • Powers include carrying out on-site inspections, interviewing staff members, and requiring the production of documents and information. • In cases concerning VLOPs, issues can be escalated to the European Commission. The Commission will have the same investigatory and enforcement powers as the DSCs. 	<p>Ofcom.</p> <ul style="list-style-type: none"> • Ofcom will be required to (i) publish codes of practice (e.g., on terrorism and child exploitation content), (ii) establish an appeals and super-complaints function, and (iii) establish appropriate mechanisms for user advocacy. • PJC Report recommends that Ofcom should have more powers in terms of investigations, audits, and fines and should create mandatory codes of practice.
<p>How will companies be punished?</p> 	<ul style="list-style-type: none"> • Fines – up to 6 percent of global annual turnover. Member states or the Commission may also impose fines of up to 1 percent of annual income or turnover of the provider or platform for providing incorrect, incomplete, or misleading information in response to a request for information. • Interference – DSCs can impose interim measures and order the cessation of infringements. 	<ul style="list-style-type: none"> • Fines – up to 10 percent of global turnover or £18 million (whichever is higher). • Interference – requiring Internet service providers to block access to sites and third parties to withdraw access to key services. • Criminal sanctions – against named senior managers of offending companies. PJC Report recommends that the Safety Controller would be made liable for an offense if there were “repeated and systemic failings.”

Exemptions

	<p>Freedom of speech.</p> <ul style="list-style-type: none"> • Services must mitigate how their content moderation systems impact freedom of expression. 	<p>Freedom of speech and journalistic exemption.</p> <ul style="list-style-type: none"> • All services have a duty to protect users’ rights to freedom of expression within the law. • Category 1 service providers will also be required to balance their obligations in relation to harmful content, with a separate obligation to protect information of democratic importance and journalistic content. • PJC Report also proposes an automatic exemption for recognised news publishers.
---	--	---

Timeline

	<ul style="list-style-type: none"> • The European Parliament (EP) and Council of the EU are separately revising the proposals. The IMCO Report is expected to be put to a vote during the EP plenary session in the week of 17 January, and further negotiations between the EP, Council of the EU, and the European Commission will take place in 2022 in order to agree on the final legislation, with the DSA expected to come into force on 1 January 2023. 	<ul style="list-style-type: none"> • The Joint Legislative Committee produced the PJC Report on 14 December 2021. The UK government is expected to respond to PJC Report in early 2022, followed by the publication of a revised OSB, a second reading in parliament by April 2022, and then the OSB becoming law in late 2022 or early 2023.
---	--	--