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## Digital Services Act Proposal (Social Media Regulation)

The purpose of this section is to bridge research, theory and policies, thus making academic publications more relevant and useful for stakeholders and policymakers. We pursue multidisciplinary exploration of issues and propose an approach that crosses boundaries among research fields such as political science (and its subfields public policies and political communication), law, or economy (e.g. in the case of financing of electoral campaigns or taxing technological companies). We present a mosaic of positions, opinions and views that summarise the gist of current national and international discussions. Last but not least – our publication reflects policy and research agendas of the day, thus keeping a record of history.

The focus of our section in this issue is on a seminal instrument proposed recently by the European Commission that will have a long lasting impact on the media regulation within and beyond Europe – the Digital Services Act (DSA) and Digital Markets Act (DMA) package.

We present some keywords that summarise the basic ideas in the texts below to guide our readers in their journey through the complicated European digital services and platforms regulatory landscape.

**Ondřej Moravec** – structural issues of DSA implementation into national legislation,

**Ivan Smieško** – DSA interim or preliminary measure,

**Ewa Galewska** – DSA maintains the liability rules for providers of intermediary services,

**Gergely Gosztanyi** – developments in social media regulation in Hungary,

**Sirio Zolea** – social media and fundamental principles of the constitutional order in Italy,

**Pascal Schneiders** – comparison of the German Network Enforcement Act (NetzDG) and the DSA in their approaches against the visibility of online hate speech and hate crime.

## Introduction

This particular contribution discusses a blueprint of the DSA submitted by the European Commission for public consultations on December 15, 2020. DSA is a regulatory proposal important for major social media platforms among which Facebook (FB) is no doubt the most prominent. In general, social media are widely seen as the central political communication tools of the 21<sup>st</sup> century. Therefore, it is absolutely necessary to discuss issues related to their operation and regulation within the ambit of political communication.

One of the explanations about the role of social media nowadays is that they represent a modern communication tool that serves populists. Through these channels populists can easily disseminate their ideas to the public without a need to rely on intermediaries such as allegedly or really biased legacy media. More precisely, FB is a communication channel thoroughly made use of by the majority of populists. Moreover, social media, but also some relatively niche (often labelled as controversial, alternative or conspiratory) news sites and online magazines, seem to serve the interests of local or foreign actors, to spread their messages, either as a form of public diplomacy or with a greater degree of viciousness and hidden desire for benefits. Finally, there have been issues such as Christchurch shooting broadcast live online via social media that related to public morals, and/or terrorism (see COM/2018/640 final)<sup>1</sup>, and raised an urgent need for efficient and effective social media regulation (see *EU Code of Practice on Disinformation*).<sup>2</sup> There have been many debates about the best way to face these challenges at different levels (e.g., for the European Commission, see further COM/2020/790 final<sup>3</sup> and in different countries, see e.g. Školkay 2020) and at the same time or as a consequence, early regulatory measures have been adopted by many European and non-European countries such as Germany or Australia. Although there are countries that managed to regulate very large social media within their territory, to adopt a broader and common regulatory framework for very large social media platforms is viewed as a better idea. Indeed, as mentioned, the European Commission submitted for public consultation a blueprint of Digital Services Act (“DSA”). Earlier versions received over 3,000 comments. This regulation should be directly applicable to the EU member states. In the following text we present a selection of topics that seem to be relevant for regulating large social media in general. Indirectly such themes also relate to populist political communication in particular, providing in one way or another way a feedback or an inspiration to the DSA draft.

<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018PC0640>

<sup>2</sup> <https://ec.europa.eu/digital-single-market/en/code-practice-disinformation>

<sup>3</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>

## What is the DSA About?

The DSA will tackle mainly platforms with at least 45 million users in the EU. Very small platforms should be exempted from the majority of obligations. According to the draft, all platforms, except the smallest, will be required to set up complaint and redress mechanisms and out-of-court dispute settlement mechanisms, cooperate with trusted flaggers, take measures against abusive notices, deal with complaints, vet the credentials of third party suppliers, and provide user-facing transparency of online advertising. Very large online platforms will have to meet risk management obligations, external risk auditing and public accountability, provide transparency of their recommender systems and user choice for access to information, as well as share data with authorities and researchers (see QANDA/20/2348).<sup>4</sup>

The definition of platforms includes not only social media but also online intermediaries such as internet service providers, cloud services, messaging and marketplaces that transmit or store content of third parties. The DSA proposal is complemented by measures envisaged in the Digital Markets Act (DMA). From a political communication perspective, this second regulatory document is also relevant since it focuses on ads in general (in addition there is a forthcoming initiative of the European Commission on political advertising).

Ondřej Moravec argues that DSA should not be seen as content-regulation that authoritatively defines limits of public debate. Rather, the DSA proposal states duties to intermediaries. The goal of this type of regulation should be establishing proper conditions for procedural framework that would allow accessible, efficient and effective ways for application of content regulation that already exists. He discusses this issue further.

## PART 1: The Political and Legal Regulatory Issues with Regard to Social Media

Developments in the Czech Republic, Hungary, Poland, Slovakia and Italy show that there are multiple issues that beg for faster, better, fair and transparent regulation of social media, or, in general, for regulation of online intermediaries, or political communication in general, be that with or without reference to populist subjects or “alternative/disinformation/controversial” sources. Moreover, some populist-lead governments seem to develop “dual” policies towards social media, as the Polish approach discussed further illustrates, while the Hungarian government seems to be moving fast towards social media regulation but not that much transparently in its regulatory intentions.

The Czech example shows that communication on FB in general is a double-edged sword. On the one hand, some populists face from time to time threats to ban their FB pages by FB itself. Thus, already in July 2020, FB issued a warning that it may ban FB pages of Tomio Okamura, his vice-chairman Radim Fiala, and FB page of their populist movement *SPD (Party of Direct Democracy)*.<sup>5</sup> Interestingly, Okamura and both party representatives (then MPs) announced that

<sup>4</sup> [https://ec.europa.eu/commission/presscorner/detail/en/QANDA\\_20\\_2348](https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348)

<sup>5</sup> POPPA dataset indicates 9,1 level of populism, <https://dataverse.harvard.edu/file.xhtml?persistentId=doi:10.7910/DVN/8NEL7B/RMH4MI&version=2.0>

if this would happen, all three entities would challenge such a decision at local and international courts. In two out of three cases FB announcements were indirect, just appearing in the section of the page “Quality of the Page”. In addition no specific reasons for breaking community rules were stated in those two cases (Fiala and *SPD*). For Okamura, the reasons were more explicit but, obviously, controversial: First, there was sharing of an adjusted photo of a political opponent who allegedly was involved in porno scandal. Second, there was sharing of a photo in which marching Wehrmacht GI were seen but allegedly with an anti-Nazi comment. Third, there was a public approval of a promised measure (the use of military) by the Serbian president against undocumented migrants who were to be involved in criminal activities.<sup>6</sup> FB soon stated that this was just a „technical mistake“ (Tvrdoň 2020). At that time, Okamura had 259,000 followers on FB, Fiala 29,000 and a FB nation-wide *SPD* profile was followed by 31,000 followers (Heller 2020).

On the other hand, Okamura himself faced legal proceedings due to communicating on FB. In 2019 a lower court issued a verdict that mandated Okamura to apologize to the Institute of Independent Journalism for calling it „fraudulent, connected with billionaire George Soros“, while also calling journalists „media septic tank“.<sup>7</sup> Conversely, Olga Richterová, vice-chairperson of the Czech Pirate Party sued a female activist who twice shared on FB the same hoax concerning her person, in 2019.<sup>8</sup>

Finally, the fact-checking portal *demagog.cz* contributed, after some hesitation – in spite of the traditional policy of the major social media platforms to not assess political statements – that both FB and Instagram had labelled Okamura’s contributions in 2020 as partially incorrect. That happened for the first time in the Czech Republic and in the case of a politician. There was actually in-house discussion about what is and what is not political expression. In the cited case, Okamura shared partially incorrect information produced by a third party. FB considered this as falling outside protected free speech of political parties and politicians (Jadrný 2020).

In the case of Hungary, Gergely Gosztonyi writes that one has to agree with the quotation of the European Court of Human Rights in *Cengiz and Others v. Turkey*, that the Internet “has now become the primary means by which individuals exercise their freedom to receive and impart information and ideas”.<sup>9</sup> Tech companies also perceived the recently changed worldwide political climate. In a conference in February 2020, the CEO of FB, Mark Zuckerberg said that there is frustration about how tech companies were taxed in Europe.<sup>10</sup> As one of the consequences, FB paid HUF 3.8 billion (EUR 10.6m) in advertising tax to the Hungarian budget.<sup>11</sup> The Justice Minister Judit Varga also stated it to be an “important step towards a good direction in lawful

<sup>6</sup> <https://www.parlamentnilisty.cz/arena/monitor/Facebook-hrozi-zrusenim-facebookove-stranky-Tomia-Okamury-Radima-Fialy-i-hnuti-SPD-Okamura-se-chce-branit-i-u-soudu-630531>

<sup>7</sup> <https://www.omeiach.com/cesko/16064-okamura-se-ma-ospravdlnit-ustavu-nezavislej-zurnalisty>

<sup>8</sup> [https://www.idnes.cz/zpravy/domaci/hoax-nepravdivy-vyrok-sireni-facebook-zaloba-piratska-strana-soud.A210317\\_104406\\_domaci\\_iri](https://www.idnes.cz/zpravy/domaci/hoax-nepravdivy-vyrok-sireni-facebook-zaloba-piratska-strana-soud.A210317_104406_domaci_iri)

<sup>9</sup> *Cengiz and Others v. Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), 49. More details: Gosztonyi, Gergely: The European Court of Human Rights and the access to the Internet as a means to receive and impart information and ideas. In: *International Comparative Jurisprudence*, 2020/2, p. 134–140.

<sup>10</sup> BBC: Facebook boss ‚happy to pay more tax in Europe‘. 14 February 2020, BBC News, <https://www.bbc.com/news/business-51497961>

<sup>11</sup> <https://www.facebook.com/VargaJuditMinisterofJustice/photos/a.2025259724159640/4118386184846973/>

and arranged cooperation with big technological companies”.<sup>12</sup> The Ministry of Justice started drafting a new bill that aims to make big platforms comply with the law and operate transparently, while at the same time participating in the preparation of similar regulations in the EU. The public knows little about the draft.. Attila Péterfalvi, Head of the National Authority for Data Protection and Freedom of Information, suggested in August 2020 that the government should pass a legislation on social media, giving a definition and case-law to which profiles can only be suspended with a legitimate cause.<sup>13</sup> The said reason behind the proposal was that “Today, everyone can be arbitrarily switched off from the online space without any official, transparent and fair proceeding and legal remedy.” – a question that the DSA also tackles.<sup>14</sup> Some suspect that the Hungarian government would wish to prevent controversial party leaders from being removed from their platforms prior to the 2022 election.” (Porter 2021). Similarly to what one could see worldwide, there is a growing criticism in Hungary that more and more government officials are complaining that their Christian, conservative, right-wing opinions and views are not reaching enough audience. They call it ‘Facebook censorship’ (Béni 2019). The Ministry of Justice will propose a law to the Parliament in spring 2021 according to the plans. One could learn from the Justice Minister’s FB page that Thierry Breton, European Commissioner for Internal Market ‘asked for (...) patience before submitting a Hungarian law’.<sup>15</sup>

In Poland, the Ministry of Justice has published a draft act on freedom of speech on social media platforms in February 2021. The draft act envisages establishment of the so-called Freedom of Speech Board, which would safeguard the constitutional freedom of expression on social media platforms. The Polish government viewed blocking then US President Donald Trump’s accounts on FB and Twitter as censorship. The Ministry of Digital Affairs and FB signed an agreement on the appeal procedure against content blocked on the website already in 2018. The draft act also provides that the user will be able to lodge a complaint with the service provider. Simultaneously, the government is working on legislation aimed at exerting control over online content (Gad-Nowak and Wnukowski 2021). A group of activists affiliated with the *PiS* (*Justice and Law* party)-friendly weekly *Gazeta Polska* has launched a local version of FB called *Albicla*. The founders mentioned a concern over the dominance of US social media platforms and their impact on free speech as reasons for their initiative (Inotai and Ciobanu 2021).

The Slovak example documents that independent attempts at debunking may face legal challenges. For example, there was a legal complaint by one of local “alternative” news websites (*hlavnespravdy.sk*) that protested to be included into an online list of de facto “fake news and hoaxes” run by an NGO. This legal intervention resulted in Preventive Measure 13C/6-2019/268 issued by a local court that officially stopped for a while such labelling. The complainant also lodged a legal action in a separate court suit claiming that as a result of such actions by a local NGO, it had suffered losses from a blocked ads income because of this labeling (3Cob/39/2019-301).

<sup>12</sup> <https://www.facebook.com/VargaJuditMinisterofJustice/photos/a.2025259724159640/4118386184846973/>

<sup>13</sup> MN: Nonsense: Attacks on the government for defending freedom of speech. 4 August 2020, Magyar Nemzet, <https://magyarnemzet.hu/belfold/2020/08/velemenynyilvanitast-sert-a-facebook-indokolatlan-cenzuraja>

<sup>14</sup> DSA, 42.: „provider should inform the recipient of its decision, the reasons for its decision and the available redress possibilities to contest the decision.”

<sup>15</sup> <https://www.facebook.com/VargaJuditMinisterofJustice/photos/a.2025259724159640/4183135275038730/>

At the same time, increasing occasional intervention from FB led to decreasing reach of some controversial websites in 2020 (Struhárik 2020b).<sup>16</sup> For example, the two FB pages of controversial online and offline magazine *Zem a vek* (Earth and Age) have been cancelled by FB in late 2020. A few years ago FB erased some FB pages affiliated with the right-wing radical Marián Kotleba.

The Police also raised criminal charges against a controversial webportal *badatel.net* in early 2021, following an initiative by the Minister of Health regarding dissemination of inflammatory news /related to COVID-19. This website was among the most popular FB pages in 2020, having over a quarter million interactions (engagement level) in 2019 (Struhárik 2020a).

On the other hand, there is a change in terminology used among some fact checkers and fake news debunking organisations when they increasingly put these activities and sources under a more neutral umbrella term “controversial” instead of outright “fake news” and “hoaxes” or disinformation sources.

The government attempts to pass legislation and strategies that would allow more successfully to block “illegal activities” which may, in some interpretations, include not only child pornography, but also “disinformation”.<sup>17</sup>

The Italian example shows that the choice of FB to block the public pages of several Italian political organizations and of their leaders has been seen as controversial in the country. It has even been the subject of a few judgments. In the absence – as opposed to more traditional media such as television (*par condicio* law) – of a specific statute law regulating the treatment and the visibility of political actors on social media, Italian judges had to seek a delicate balance of interests, applying principles from national and European law and from international conventions. In particular, the judgments concerning the “*CasaPound case*”, occasioned by the attempt of FB to remove the page of a far-right organization, establish by case law some fundamental principles, mostly derived from the Italian Constitution, which might be applied in the future. This verdict could be juxtaposed with the different decision which was, almost simultaneously, established in “*Forza Nuova case*”. Such a decision, though, seems to be more specifically influenced by the explicit propaganda, slogans and symbols published by the FB pages of this party and of its leaders, more directly linkable to Fascism, which is outlawed according to the Italian Constitution.

The association *CasaPound* and one of its leaders, whose FB account had been removed, took the ban to court, through the urgent procedure of article 700 of the Italian Civil Procedure Code. In accordance to this Code, the conditions to obtain an urgent measure from the judge are the plausible and probable existence of the claimed right (*fumus boni iuris*) and the present danger that such a right could actually suffer an imminent and irreparable injury, while waiting for the conclusion of an ordinary trial (*periculum in mora*). The Tribunal of Rome recognized the pres-

<sup>16</sup> mk, “Facebooku došla trpezlivosť už aj so Slobodným vysielateľom” [FB has lost patience with Free Broadcaster, too], O médiách, October 20, 2020, <https://www.omediach.com/hoaxy/19020-facebooku-dosla-trpezlivosť-uz-aj-so-slobodnym-vysielacom>

<sup>17</sup> <https://zive.aktuality.sk/clanok/150460/vlada-prijala-narodnu-strategiu-kybernetickej-bezpecnosti-dolezita-bude-aj-podpora-vyskumu/>, <https://zive.aktuality.sk/clanok/151295/pravomoci-nbu-v-oblasti-kybernetickej-bezpecnosti-by-sa-mali-posilnit/>

ence of both these conditions<sup>18</sup>. As for the *fumus boni iuris*, the judge stated that the exclusion of that association from Facebook was in contrast with the right to pluralism, because the relationship between FB and its user is not merely a relationship between private entities. In fact, FB holds a special position when bargaining with a user, this enterprise has to strictly adhere to the principles of the Constitution and of the overall national legal order, especially with regard to freedom of expression, unless, in a full trial, the violation of legal and constitutional principles from the user is, in turn, demonstrated. Social networks have nowadays a prominent role in the implementation of fundamental principles, such as pluralism of political parties (protected by art. 49 of the Constitution), because a political entity which is not on FB is practically excluded (or severely limited) from the Italian public debate. No post analyzed by the judge showed to be specifically directed to incite violence and hate against minorities (while the general behavior of *CasaPound* and of its members was not the subject of the trial, unlike several penal proceedings over time). As for the *periculum in mora*, the relevant and prominent role of FB among social networks, when it comes to the implementation of political pluralism, makes the exclusion from its community the source of an injury that is not likely to be (fully) repaid in money, especially with regard to the reputational damage. Already before the judicial decision, Italian legal commentators had highlighted<sup>19</sup> the important and general scope of this dispute. Indeed, the controversy directly involves the problematic issues regarding the transfer of the freedom of expression and related control functions from the well-known field of the constitutional safeguards, with a general competence of the State, to the undetermined field of the private policies, with a factual censorship activity of the social media platforms. This power is often exercised through the use of artificial intelligence algorithms and, in any case, without a consistent, appropriate and transparent sanctioning proceeding. Social networks like FB should be considered as a sort of public service, subjected to the related national legal principles in every country where it is available.

The decision was challenged by FB, pursuant to article 669 (13)<sup>20</sup> of the Italian Civil Procedure Code, and an appellate bench of three judges confirmed the judgment at first instance<sup>21</sup>. In particular, they stated that, even though the relationship between FB and its user fundamentally develops on the basis of a civil law contract, untyped in the Code, nevertheless its contractual qualification does not imply that the obligations between the parties exclusively depend on the clauses of the deal. The general limits to the sphere of private autonomy do apply, particularly the general clauses of the legal order (good faith, prohibition of abuse of right, etc.), interpreted in accordance with constitutional principles. Constitutional principles can also be directly implemented in order to limit private autonomy. If the position of FB is protected by art. 41 of the Constitution (freedom of enterprise), the position of the user is protected by its articles 21 (freedom of expression) and article 18 (freedom of associations), which are paramount in the

<sup>18</sup> *Tribunal of Rome, Section specialized in enterprise issues, n. 59264/2019, Ordinance of 11 December 2019.*

<sup>19</sup> See B. Mazzolai, *La censura su piattaforme digitali private: il caso CasaPound c. Facebook*, in *Il diritto dell'informazione e dell'informatica*, vol. XXXV, issue 1, 2020, pp. 104-121.

<sup>20</sup> Articles 669 and 669terdecies are two different articles of the Italian Civil Procedure Code.

<sup>21</sup> *Tribunal of Rome, XVII civil section, n. 80961/19, Ordinance of 29 April 2020*; for a short analysis in English language, see *Facebook v. CasaPound*, in *Global Freedom of Expression* (Columbia University), <https://globalfreedomofexpression.columbia.edu/cases/casapound-v-facebook/>.

constitutional system. Associations can be excluded from the service and specific behaviors on the social network can be prohibited only according to the limitations to the freedom of association and to the freedom of expression provided by the law, according to the Constitution and to international law sources. In this case, FB had not presented sufficient specific allegations to prove that *CasaPound*, for the purposes of the dispute, was an illicit organization (for example, because of reconstruction of the banned Fascist Party, for apology of Fascism, for incitement to discrimination or violence for racial, ethnic, national or religious reasons, for negationism, etc.: all violations punished by the penal law).

Between the two *CasaPound* judgments, the same Tribunal of Rome also decided the apparently similar *Forza Nuova* case, presented by another far-right political organization but this time the court dismissed the claim, pursuant to art. 700 C.P.C. Such a fact, at first glance, could show that there is still no precise orientation of the Italian judges on this matter. However, in the text of the decision<sup>22</sup>, some new reasons appear, possibly explaining the different outcome, without completely contradicting the *ratio decidendi* of the *CasaPound* case. In fact, the judge extensively analyses the public propaganda of *Forza Nuova*, in general and with particular reference to the posts published by the association and by its leaders that had made a claim against the removal of their own pages. The text of the decision highlights the presence of several symbols and slogans explicitly exalting Fascism and asserting racial discrimination. In this case, having in mind contents that are illicit under the Italian constitutional and legal order and once FB came to learn about them, and in connection with its terms<sup>23</sup> and community standards<sup>24</sup>, terminating the contracts with *Forza Nuova* and with its leaders, appeared to be not only legitimate, but also dutiful measures. Indeed, otherwise FB might even have incurred liability, also in light of the European legal framework.

In conclusion, it is my belief that Italian judges, faced (similar to their colleagues in many other countries) with delicate issues involving fundamental principles of the constitutional order to apply and balance. Judges are wisely trying to find an equilibrium point between allowing a (perilous) general and unlimited power of private political censorship of social network platforms and giving liberty to social networks to become a (likewise hazardous) unlimited amplifier for authoritarian and discriminatory illicit and anti-constitutional contents. Taking account of the importance of these issues, a specific legislative intervention might perhaps be the best way to regulate and balance both trends, particularly in a country like Italy where civil law prevails.

<sup>22</sup> *Tribunal of Rome, section specialized in rights of the person and immigration, n. 64894/2019, Ordinance of 23 February 2020*; cf. B. Mazzolai, *Hate speech e comportamenti d'odio in rete: il caso Forza Nuova c. Facebook*, in *Il diritto dell'informazione e dell'informatica*, vol. XXXV, issue 3, 2020, pp. 552-595.

<sup>23</sup> <https://www.facebook.com/terms.php>

<sup>24</sup> <https://m.facebook.com/communitystandards/>

## PART 2: Digital Services Act

### How Does DSA Compare with the German Network Enforcement Act?

Pascal Schneiders focuses on comparison of the DSA with the German Network Enforcement Act. The proposal for the Digital Services Act (DSA-P) has some interesting parallels to the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG) passed in Germany at the end of 2017. Both the NetzDG and the DSA-P address, more or less explicitly, (inter alia) the fight against the visibility of online hate speech and hate crime (which, as legal terms, are not likely to be defined by law throughout; see Valerius, 2020, pp. 667, 678). Both the NetzDG and the DSA-P do not introduce any new criminal offenses themselves but are intended to serve law enforcement. Both the NetzDG's and the DSA-P's measures against illegal content include notice and take-down mechanisms and, out-of-court dispute settlement bodies, cooperation with trusted organizations, and, last but not least, the duty of platform providers to inform law enforcement authorities of suspicions of serious criminal offences. The experiences gained with the NetzDG can help to understand the opportunities and risks associated with the content moderation obligations against illegal content provided for in the DSA. In the context of the NetzDG, particularly heated discussions have been held about the privatization of law enforcement (Eickelmann et al. 2017; Guggenberger, 2017, p. 100; Kasakowskij et al. 2020). This criticism might also be applied to the DSA-P.

Thus, in the first instance, the providers of social networks decide which reported content is (“manifestly”) unlawful (§§ 3 (2) Nr. 2-3 NetzDG) or illegal (Art. 14 in conjunction with Art. 5 (1) DSA-P) and must therefore be taken down or blocked (admittedly without the operators of social networks taking on the *prosecution* of criminally punishable content). Linked to this are concerns about the restriction of freedom of expression through over-removal by the service operators (Mchangama & Fiss 2019, p. 5; Liesching 2018, p. 27; Nolte 2017, p. 556). This is because there would be economic and regulatory incentives for service providers to remove content when in doubt in order to avoid reputational damage or fines under the NetzDG (Eifert et al., 2020, p. 52; Heldt 2019, pp. 4–5; Liesching 2018, p. 27; in contrast Theil, 2018).

In their evaluation of the law, Eifert et al. (2020) argue that the NetzDG (instead of enforcing criminal law) may have contributed to “network providers concretizing their community standards and intensifying their enforcement precisely because, at least from the point of view of some network providers, an examination and deletion according to community standards leads to the NetzDG regime with its fine provisions not applying” (Eifert et al., 2020, p. 50). That is, it can be assumed that the social networks concerned have expanded their community standards in the course of the NetzDG and are increasingly using these standards (instead of the criminal law) as a rationale for removing content (Fanta 2018; Heldt 2019, p. 9).

Whether the DSA-P creates regulatory disincentives for overblocking cannot yet be conclusively assessed, as the determination of the penalties that take effect in the event of infringements of the Regulation by providers of intermediary services is a matter for the Member States under Art. 42 (1) DSA-P. However, the DSA-P provides for measures against abuse of the notice and action mechanisms through frequent, manifestly unfounded notifications of allegedly illegal

content (Art. 20 (2) DSA-P). In addition, users should be able to challenge removals or blockings of content deemed illegal or incompatible with the terms and conditions of the service providers. This is to be enabled via an internal complaint-handlings system for a period of six months following the decision of the platform provider (Art. 17 (1) DSA-P). Ultimately, central to the identification and assessment of any over- or underblocking will be access to data. To date, Art. 31 (2) DSA-P provides for data access for “vetted researchers” to identify and understand systemic risks. These include the dissemination of illegal content and resulting negative effects, as well as intentional manipulation of the service (Art. 26 (1) DSA-P). This data access should be extended for analyses of potential negative consequences (just like overblocking) resulting from the content moderation obligations introduced in the DSA.

### **What is Problematic with the DSA Draft from National Perspectives? Structural Issues of DSA Implementation into National Legislation**

Ondřej Moravec has focused on fundamental issues that may stem from the local implementation of DSA. Recognizing that the subject of the analysis is a “mere proposal” for a DSA regulation, we will pay attention to those attributes that can be considered as its structural basis. I consider them (in addition to the direct form of regulation already mentioned) to be the content neutrality of the DSA and the mandatory procedural framework through which the content regulation provided by national law is to be applied. The method of regulation of user content also remains outside the scope of DSA regulation. The DSA does not seek to impose to platform operators the rules governing the insertion of user content, unless the latter is explicitly illegal.

The introduction of the platform operator’s obligation to establish and make available transparent rules according to which the operator will handle complaints about objectionable content should be done. Also the state’s obligation to create a mechanism through which persons certified by a national authority (digital services coordinator) should review internal platform decisions is important to be included. It will therefore be a matter of accompanying national legislation as to what the whole process will look like in its final form.

The national legislator will therefore have to determine at least who will act as national coordinator, how the persons responsible for deciding disputes between platforms and service users will be certified, the rules governing proceedings before certified persons and whether and how their decisions will be subject to judicial review.

### **Decision-making of the platform operator and its legal nature**

Platform operators are already setting rules that users of platform services must follow. If someone feels affected (typically her right to protection of personal honor or the right to privacy) by the content published through the platform, the only option is to contact the platform operator to seek redress, e.g. by removing defective content. In the case of a negative (or no)

reaction from the platform operator, the possibility of claiming the protection of personal rights through the courts is possible, but this possibility is rather theoretical. The practical effort to protect personal rights in these cases encounters such a number of pitfalls that the person concerned generally abandons the judicial exercise of his or her rights. In this respect, the DSA proposal is undoubtedly a step forward, since it obliges platform operators to accept and make available rules for dealing with complaints about illegal content that is made available through the platform.

The legal nature of these rules (where they exist) remains unchanged. These are private law rules based on a contract between the operator of the platform and its user and are designed unilaterally by the operator. However, the inequality can be taken into account when deciding on possible legal disputes between the operator and the user.

When applying DSA, the platform operator finds itself in a very specific situation. In some situations (typically hate speech) this decision will take place in the sphere of public law (the platform operator finds itself in the situation of a content regulator), in other cases it is a decision on private law disputes. However, in these cases, the platform operator is not entrusted with the power to exercise state power. The platform operator can be considered as a defining authority that controls the Internet by technical means (Polčák 2018, p.13). However, the relationship between the defining authority and the user of the platform remains a private relationship (Rámešová 2019, 35).

### **Digital Services Coordinator**

The DSA proposal envisages that the platform operator's internal decision will be reviewable in an out-of-court dispute resolution system. The task of national legislation will therefore be to determine who becomes the coordinator of digital services, which entities will be certified for out-of-court dispute resolution, the rules under which these proceedings will take place and whether and how these decisions will be judicially reviewable. According to the DSA proposal, the Digital Services Coordinator should be an independent administrative body. In the conditions of the Czech Republic, among the existing authorities it would be suitable in particular the Broadcasting Council.<sup>25</sup> The extension of the competences of the Broadcasting Council to be provided.<sup>26</sup> There is a presumption that the requirement of the necessary expertise of the body could be met.

If, in my view, the national legislature had opted for this solution, it would have to be preceded by a very thorough review of the position of the Broadcasting Council and whether the organization of the Council's activities would in all likelihood allow the effective exercise of the powers

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<sup>25</sup> However, it cannot be overlooked that the DSA also covers issues related to e-commerce (electronic marketplaces, etc.), an agenda that is far removed from the Broadcasting Council. However, the DSA makes it possible to entrust certain agendas to bodies other than the digital services coordinator.

<sup>26</sup> In the past, RRTV's scope has been extended to include the supervision of on-demand audiovisual media services.

conferred on the DSA by the Digital Services Coordinator (DSC).<sup>27</sup> The Council Office, which is established by law, is a purely service body without any powers of its own, all decisions are taken by the Council as such by voting at a meeting of the Council. The Czech Telecommunication Authority and possibly also (albeit only in part of the matter) the Personal Data Protection Authority stand closest to the agenda.

### **Certified arbitration centres and out-of-court dispute resolution system**

One of the coordinator's powers is to grant certification to entities that will decide disputes between platforms and users of their services if the user is not satisfied with the platform's decision. Certified persons should be platform independent, have sufficient expertise and have easy access to management using electronic means of communication. These may be bodies set up by the state or private individuals. The DSA talks about *dispute settlement*, but at the same time stipulates that the decision of the certified person is binding on the platform.

The decision-making of certified authorities is in many ways reminiscent of arbitration centres' decisions known from domain disputes. This is alternative dispute resolution (ADR) in arbitration<sup>28</sup>, which, however, does not have the nature of "classical arbitration", in which the jurisdiction of the arbitrators is based on the will of the parties. The DSA assumes that an arbitration centre may be established by the state as well as by a private body (eg an arbitration center), provided that it meets the requirements of Article 18 (2) of the DSA.

The nature of the arbitration centres decision is also an open question. The DSA stipulates that this will be a decision that will be binding on the platform. If the arbitration centre is an administrative body, it can probably be an administrative decision of its kind.<sup>29</sup> In the case of private arbitration centres, the legal nature of the decision is unclear. It is certainly conceivable that the decision of the arbitration centre will also be seen as an administrative decision.<sup>30</sup> The advantage of such a solution would be a uniform regime of decision-making of arbitration centres regardless of their nature. Another possibility is to consider the arbitration centre's decision as a legal proceeding taking place in the sphere of private law.

The resolution of these problems is crucial for the subsequent judicial review of the arbitration centre's decisions. In this respect, it is not possible to be fully inspired by functioning ADR dispute resolution systems in the field of domain names. The DSA proposal explicitly provides for judicial review of the court's decision in accordance with national law. In the conditions of the legal system of the Czech Republic, it will be a matter of proceedings in matters decided

<sup>27</sup> These are, for example, the issuance of interim measures or investigative powers.

<sup>28</sup> The decision in the ADR is not enforceable by a public authority (executor, etc.), its enforcement stems from the technical nature of the matter (the registrar cancels the domain registration, analogously the platform deletes the defective content or blocks the account).

<sup>29</sup> Administrative bodies can also decide on private law relations, in the conditions of the Czech Republic cf. eg decision-making of a financial arbitrator or the Czech Telecommunication Authority.

<sup>30</sup> In the conditions of the current state, it is no exception that the performance of administration is entrusted to a person of private law; however, it is essential that such a power be clearly established by law, cf. Rámešová, p. 35.

by an administrative body. In addition, the DSA proposal explicitly states that the out-of-court dispute resolution system does not replace and in no way affects the possibility for the persons concerned to assert their claims in court, typically in personality proceedings. These legal actions are decided by civil courts.

In conclusion, although the DSA is a directly effective regulation and as such does not require transposition into national law, it is clear that the final form of regulation, as it will be applied, depends to a large extent on the accompanying legislation. One of the most important tasks of a national authority is to prepare an appropriate institutional and procedural framework in which decisions on the handling of illegal content will be taken. The designation of a national digital services coordinator presupposes examining whether a state body already exists that could become a digital services coordinator.

The DSC should, among other things, certify the arbitration centres, which will be responsible for resolving any disputes between the platforms and persons who are not satisfied with how the platform has handled the warning of illegal content. Although the arbitration centre's decision will be platform-dependent, the DSA directly assumes that this decision will be subject to judicial review of the rules of national law. The whole system must therefore be properly linked to the judicial system of the Member State concerned.

It is clear from the above that the implementation of the DSA into national law will be a relatively challenging process, the success of which is conditioned by the cooperation of several administrative departments and political representation, on whose decision the final form of the system will depend.

### **The liability rules for providers of intermediary services**

Ewa Galewska argues that the blueprint of DSA was preceded by a variety of EU acts and documents that addressed the problem of tackling the illegal content online<sup>31</sup>. The measures proposed by the EU expressed the opinion that providers of intermediary services guard the Internet and should tackle illegal content online through self-regulatory measures. One of the most serious consequences of imposing such an important task upon intermediaries was the necessity

<sup>31</sup> E.g.: European Parliament resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI)) [https://www.europarl.europa.eu/doceo/document/TA-8-2017-06-15\\_EN.html#sdocta7](https://www.europarl.europa.eu/doceo/document/TA-8-2017-06-15_EN.html#sdocta7) COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONSTackling Illegal Content OnlineTowards an enhanced responsibility of online platforms <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-PDF>COMMISSION RECOMMENDATION (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018H0334&from=PL>; 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 (Audiovisual Media Services Directive) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=pl> 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 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=PL>

to refer to the system established in the eCommerce Directive<sup>32</sup>. Pursuant to thereof provisions providers of intermediary services should not be liable for the content if they lack knowledge or awareness of its illegality. In the light of new requirements based on more proactive attitude of intermediaries to detecting the illegal content provisions of eCommerce Directive seemed unclear and difficult to apply (e.g. Frosio 2018, Kaesling 2018).

In the light of the above it is astonishing that DSA maintains the liability rules for providers of intermediary services set out in e-Commerce Directive and describes them as “a foundation of the digital economy”<sup>33</sup> claiming that they were well interpreted in the ECJ case law<sup>34</sup>. Pursuant to Articles 3,4,5 of DSA the exemption from liability is based on lack of awareness of providers of intermediary services that the content in question is illegal. Thus such exemptions should not apply where provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over provided or processed information<sup>35</sup>. This could create the same difficulties the EU already experienced when trying to adjust the system of liability of providers of intermediary services to new requirements relating to their more proactive attitude. The EU legislator intends to solve this problem by applying the rule that providers of intermediary services shall not be deemed ineligible for the exemptions from liability solely because they carry out voluntary own-initiative investigations or other activities aimed at detecting illegal content or take the necessary measures to comply with the requirements set out in DSA (Article 6 DSA). However, it further explains that such activities should be carried out in good faith and in a diligent manner<sup>36</sup> that may also call the clarity of DSA provisions into doubts. The DSA also maintains the rule developed in eCommerce Directive that providers of intermediary services should not be subject to a general obligation to monitor the information which they transmit or store, nor actively to seek facts or circumstances indicating illegal activity (Article 7 of DSA). In order to strengthen this rule the legislator adds that nothing in DSA should be construed as an imposition of a general monitoring obligation or active fact-finding obligation, or as a general obligation for providers to take proactive measures in relation to illegal content<sup>37</sup>.

The analysis of DSA allows to draw the conclusion that the legislator did not resign from promoting the idea of more proactive attitude to tackling the illegal content by providers of intermediary services. Obligations of such a nature are imposed especially upon very large online platforms that are supposed to assess the systemic risks stemming from the functioning and use of their service, as well as by potential misuses by the recipients of the service, and take appropriate mitigating measures<sup>38</sup>. Among these risks DSA mentions risks associated with the misuse of their service through the dissemination of illegal content<sup>39</sup>. Risks assessments should be con-

<sup>32</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market („Directive on electronic commerce“) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32000L0031>

<sup>33</sup> Explanatory Memorandum., p. 3.

<sup>34</sup> Explanatory Memorandum., p. 3

<sup>35</sup> Motives 18.

<sup>36</sup> Motives 25

<sup>37</sup> Motives 28.

<sup>38</sup> Motives 56.

<sup>39</sup> Motives 57.

ducted by taking into account in particular how content moderation systems implemented by the very large online platform influence the systematic risks (Article 26 (2) of DSA). As a part of mitigation of risks a very large online platform shall put measures tailored to the identified risks. As one of such measures the legislator indicates adapting content moderation (Article 27 (1)(a) of DSA) that is defined as “ (...) the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service (...)” (Article 2(p) of DSA). Furthermore, pursuant to Article 12 (1) of DSA it is imposed upon providers of intermediary services that they in their terms and conditions should include information on any restrictions applied by them in relation to the use of their service in respect of information provided by the recipients of the service. That information should include information on any policies, measures and tools used for the purpose of content moderation. Also in the following Article 13 of DSA that concerns reports that providers of intermediary services are to publish every year, the legislator refers to the content moderation engaged in at the providers’ own initiative.

The analysis of DSA provisions leads to the conclusion that EU intends to sustain the regime of intermediaries liability that developed under the regime of eCommerce Directive. It also expressed its idea that providers of intermediary services should undertake voluntary measures to tackle the illegal content online, however these expectations are narrowed in comparison with EU soft law regulations in this area. On the other hand, as Article 1 (5) of DSA explicitly states it is to complement and does not affect sector-specific legislation that is addressed only to specified kind of content (e.g. terrorist content, child sexual abuse material) disseminated on certain types of services (e.g. video-sharing platforms, online platforms). Regulations that require more proactive measures from providers of intermediary services were criticized in the legal literature, as being contrary with main principles of the responsibility for the illegal content<sup>40</sup>. The European Commission noticed this problem before the blueprint of DSA was published. Therefore, whenever proactive measures are being promoted in the area of tackling the illegal content online and obligations of proactive nature are imposed, it emphasizes that they do not influence Articles 12-15 of eCommerce Directive. In the light of the above it is understandable that the EU legislator tries to clarify the situation in which internet intermediary fulfils its obligation to actively fight the illegal content online by for instance undertaking activities aimed at detecting such a content and at the same time its liability is exempted on the basis of DSA provisions. Still the question is if in the light of the existing sector specific acts and soft law the afore-mentioned provisions of DSA would effectively indicate providers of intermediary services that the fact that they obtained a knowledge or awareness of an illegal content as a result of their voluntary measures triggers their responsibility?

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<sup>40</sup> E.g. M. L. Montagnani, A. Trapova New Obligations for Internet Intermediaries in the Digital Single Market— Safe Harbors in Turmoil?, *JOURNAL OF INTERNET LAW* 2019, s. 3-4.

## “Interim” or “Preliminary” Measure

In the following pages Ivan Smieško analyses probably the most important tool in the DSA planned toolbox – “interim” or “preliminary” measure which is an extreme legal intervention in the case of violating DSA. According to Article 41 Section 1 of DSA Digital Services Coordinators („DSC“) can consider that the provider has not sufficiently complied with previous intervention. In such a case, if there is a serious harm, and that the infringement entails a serious criminal offence involving a threat to the life or safety of persons, DSC can request the competent judicial authority of that M.S.) to order the temporary restriction of access of recipients of the service concerned by the infringement.

Due to its radical impact on basic rights, it is necessary to set this institute as precise as possible in order to avoid illegal and unnecessary violation of user’s rights to freedom of speech.

The essential condition is that there must be a “serious criminal offence” which “threatens the life and security of the persons”.

There are three core legal issues enforcing authorities should deal with here. First, there can be different interpretations of the term “serious criminal offence”. Second, the interpretation of the act that “threatens the life and security of the persons” seems to be rather ambiguous. Third, it is unclear who has the right to define both notions when a serious criminal offence is committed.

These are serious legal challenges due to the diverse legal systems of M.S. We are going to discuss problems one by one from the point of view of the Slovak legal system and law enforcing authorities.

What is striking is that the term „serious criminal offence“ can be interpreted differently. Second, it can include a very heterogeneous aggregate of illegal conducts. Third, this term means that it cannot be included in any criminal offence. Yet there is no legal definition of this term in the DSA. For the time being there is no a unified European Criminal Code, where the term could be defined. At the European level some definitions of criminal offences do exist but these definitions are related only to the acts where they are placed. To apply these definitions to the DSA would be an inadmissible extensive interpretation.

By applying linguistic, logical and doctrinal interpretation we can hardly subsume under the term “serious criminal offence” for example criminal offence with a maximum three years of imprisonment. In Slovak legal context “serious” means “bad or dangerous”(OLD, n.d.-a). Slovak Penal Code provides for “particular serious crimes”, where the lowest level of penalty is 10 years of imprisonment, so the term “particularly serious” has a double effect.

Let us turn our attention now to the second legal term used – if it “threatens life and security of the persons”. First, the question is should these common goods be interpreted as objects of the criminal provisions protecting life and security of persons or do they represent a consequence of the criminal offence? Another question is why there is no mention of threats related to health? It is true, that if life is threatened, health is also threatened, however the opposite is not true. Threats to life and safety can be the result of several criminal offences, not only those whose objects directly relate to the protection of life and security. According to the linguistic interpretation, the threat to life and security should be the result of such an action. Life is the ability to breathe, grow, reproduce. This right belongs to living creatures and this makes them different

from “objects” that do not have such a right, it is about the state of being alive as a human; an individual person’s existence (OLD, n.d.-b).

Security can be defined as protection against something bad that might happen in the future and the activities cover the protection of a country, building or a person against attack, danger, etc. (OLD, n.d.-c).

The logical question is which criminal offences should be included into this list?

First, it must be a criminal offence committed by publishing some contribution or rather contributions of different types (images, videos, statuses, messages, etc.) which cause serious harm and the provider has not sufficiently dealt with such content. These will be therefore verbal ways of committing a crime (or part of it), which are directly capable of endangering the life and security of persons. Endangering the lives of people is quite simple to define, as it is clearly different from a crime where the consequence is death. Endangering the security of persons is a harder nut to crack. It is not clear from the text itself whether the threat to security is immediate or remote, not only in terms of time, but also in terms of the relationship to a particular person. For example, the commission of the criminal offence of sabotage would be a threat to the safety of persons or is the protection of the state system, its integrity, sovereignty, defense, security, independence is also automatically a threat to the security of all persons? Following a logical interpretation, it can be concluded that the threat to the security of persons is too broad. Thus, it cannot be de-contextualised. Because a security threat is an alternative to a life threat, it is only possible to recognize a security threat that, with its intensity, can achieve a life threat, i.e. a more serious security threat, more immediately in terms of time. It follows that, if we will have to follow the case law, that will already define what can be considered as endangering the security of persons. *De lege ferenda*, the EU-wide exhaustive calculation of criminal offenses should be set. Such a move would prevent different approaches by national courts in M.S. For example, a case against Slovakia would be sanctioned in a way that would be accepted in Hungary or in Austria. It is a legal norm of a European reach and should therefore apply equally.

In the case discussed, theoretically the following crimes according to the Slovak Criminal Code (next “CC”) could be included: the crime of participation in suicide according to § 154 CC, the crime of trafficking in human beings according to § 179 sec. 4 and 5 of the CC, the crime of extortion according to § 189 sec. 3 and 4 of the Criminal Code, the crime of gross coercion according to § 190 sec. 4 and 5 CC, and according to § 191 sec. 3 and 4 of the CC, the crime of coercion according to § 192 par. 3 and 4 of the CC, the crime of torture of a close and entrusted person according to § 208 sec. 3 and 4 of the CC, the crime of sabotage according to § 317 sec. 2 and 3 of the CC, crimes of intelligence and threats of classified information according to §§ 318 and 319 sec. 3 of the CC, the crime of abuse of power of a public official according to § 326 sec. 2 to 4 CC, crime of terrorist attack according to § 419 CC, crime of participation in combat activities of an organized group in another state according to § 419a CC, crime of some form of participation in terrorism according to § 419b CC, crime of terrorist financing according to § 419c CC, crime of establishment, support and promotion of the movement aimed at the suppression of fundamental rights and freedoms according to § 421 sec. 2 CC, the crime of production of extremist material according to § 422a CC, the crime

of spreading extremist material according to § 422b sec. 2 CC, incitement to national, racial and ethnic hatred according to § 424 sec. 3 CC, crime apartheid and discrimination of persons according to § 424a CC.

Finally, let us check the provision of article 41 sec. 3 letter b) of the DSA that tackles the right to define when a serious criminal offence is actually committed. Criminal law theory says that the so-called merit decisions are those which end criminal proceedings, i.e.. a decision on the criminal offence, its perpetrator and the imposition of a criminal or protective measure. The most important merit decisions are the resolution to stop the prosecution, liberating judgment or sentencing judgment, and the criminal order (Ivor, 2010b, p. 515). These decisions are issued exclusively by the prosecuting authorities and criminal courts after the submission of previous evidence in the preparatory proceedings or court proceedings, and not by civil courts. According to the above-mentioned logic and grammatical interpretation, one should wait for a merit decision in criminal proceedings, which would serve as a basis for the issuance of an interim measure by a civil court. However, if we look at how this would actually happen taking stock of the length of criminal proceedings, which expand at least for a few months, such a procedure is absurd and it would deprive an interim measure of its preventive and quick role in the criminal process. The correct procedure should be the one that if there is a suspicion of committing a criminal offence according to the list discussed before, such an initiative, or the criminal report should be sent to the relevant prosecuting authorities and the same criminal report should be attached to the initiative aiming to issue an interim measure. It is not possible to wait for the delivery of a decision in the so-called pre-trial proceedings pursuant to §§ 197 or 199 of the Criminal Procedure Code. Even in the clearest cases in which the criminal offence can be precisely determined, again the question about the passage of time between the filing of the complaint to the issuing of a decision arises. That period may again take a month and long duration could lead to particular obstructions for the institute to perform its role. *De lege ferenda*, the wording should be amended to “the infringement constitutes a suspicion of a serious criminal offence, etc.”

Institute of interim measure is itself a good instrument of law enforcement in case of serious violations of the DSA. However, the analysis showed that current draft text has serious deficiencies. These deficiencies have to be corrected because otherwise there will be breaches of freedom of speech and of the principle of legal certainty.

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