

## Discussion Report

### The role of statements of reasons in out-of-court dispute settlement under the DSA

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#### **KEYWORDS:**

Statement of reasons; Article 17 DSA; standard of review of ODS bodies; fundamental rights; fact finding.

#### **INTRODUCTION**

The Article 21 Academic Advisory Board (the Board) discusses the most challenging issues arising in the development of out-of-court dispute settlement bodies under the DSA (ODS bodies). Article 21 DSA allows for different models of ODS bodies. The Board explores different models and discusses their up- and downsides. It provides guidance to ODS bodies and regulators and informs the work of academics and civil society organisations. It helps to develop reasonable solutions where the law and regulators leave ODS bodies discretion as to how they should operate.

The first meeting of the Board was based on the observation that neither the DSA itself nor authorities implementing the DSA provide specific guidance on how ODS bodies should resolve cases. More specifically, it is uncertain whether and, if so, how shortcomings related to the statement of reasons provided for content moderation decisions issued by platforms should impact the outcome of cases handled by ODS bodies. This raises the following concrete questions the Board discussed in its first meeting:

*How should shortcomings relating to statements of reasons impact the decisions of ODS bodies? Should ODS bodies comprehensively review compliance of platforms' content moderation*

*decisions with the DSA, including errors such as inadequate reasoning?*

The Board concluded that ODS bodies should adopt a differentiated approach based on the relevance of the requirements of Art. 17 DSA for ODS processes.

Art. 17 para. 3 DSA lists the information that any statement of reasons provided by platforms should contain. While some pieces of information listed in Art. 17 para. 3 DSA are necessary for users to exercise their right under 21 DSA and for ODS bodies to decide cases, others are not.

The question of whether and how ODS bodies should account for shortcomings in the statement of reasons of platforms also raises overarching issues relating to the nature and purpose of ODS bodies under the DSA. These include the standard of review of ODS bodies, the role of fundamental rights in dispute resolution, strategic cooperation of ODS bodies with other important actors (e.g. fact-checkers and the media, or their representative organisations), possibilities of ODS bodies to encourage platforms to provide statements of reasons that satisfy the requirements under Art. 17 DSA and the role of reporting data and sharing insights with other actors and academia. The Board reflected on these broader questions in its discussion and decided to tackle them in greater detail in future sessions.

## PROBLEM STATEMENT

Under the DSA, platforms are required to provide a clear and specific statement of reasons to users affected by content moderation decisions (Art. 17 DSA).

Yet, in practice, statements of reasons provided by platforms regularly fall short of this standard, which presents a challenge to both users and ODS bodies: Users may lack information that is essential for understanding why their content has been moderated, and make a reasoned decision on whether to file an appeal to an ODS body according to Art. 21 DSA. ODS bodies, in turn, may not have sufficient information to decide cases reliably and effectively.

ODS bodies therefore have to develop an approach on how shortcomings in statements of reasons impact their decisions. The Board considered three possible approaches.

## OPTIONS

### Option 1: No review of statements of reasons

Solution:

A separate and comprehensive examination of all the requirements of Art. 17 DSA is not appropriate in out-of-court dispute settlement processes under Art. 21 DSA.

#### Key considerations in favour of this option:

*Text of the DSA:* The DSA stipulates that ODS bodies shall decide on the outcome of complaints filed “on the grounds that the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions”, Art. 20 para. 1 Art. 21 para. 1 DSA. In light of the text of the DSA it can be argued that the core task of ODS bodies is to provide a substantive assessment as to whether content which was subject to a content moderation decision was actually incompatible with the relevant legal provision or terms and conditions and whether the platform adequately accounted for fundamental rights in its decision (Art. 14 para. 4 DSA), rather than reviewing formal requirements

related to the statement of reasons provided platforms.

*Limited mandate:* It can be argued that dispute settlement bodies are not mandated to examine the extent to which the actions of platforms comply with requirements of the DSA that are not specifically addressed in Art. 21 DSA. Other institutions, such as national authorities or the Commission, are entrusted with the enforcement of the DSA. They can assert any existing deficiencies, such as insufficient statement of reasons (Art. 17 DSA), in other proceedings. ODS bodies can contribute to the identification of such deficiencies through its reporting to authorities.

*Practical consequences:* Overturning content moderation decisions based on flawed reasoning could lead to harmful content being reinstated on platforms. This could have a detrimental impact on the rights of others, civic discourse, etc. It could also create massive operational challenges for platforms.

### Option 2: Comprehensive review of statement of reasons

Solution:

ODS bodies should comprehensively assess the requirements of Art. 17 para. 3. DSA and should decide in favour of the complainant if a platform’s statement of reasons falls short of these requirements.

#### Key considerations in favour of this option:

*Administrative law analogy:* Administrative court proceedings should serve as a model for ODS proceedings. Administrative courts regularly proceed to a comprehensive assessment of the statement of reasons provided by authorities to justify administrative decisions. The DSA introduces individual redress mechanisms and formal requirements relating to the reasoning behind content moderation decisions, because content moderation decisions are similar to administrative decisions. Because platforms are so large and powerful, users require similar

protections against platforms' unilateral decisions as they require against state measures.

*Individual Right to a Remedy:* Shortcomings in statement of reasons make it more difficult for users to effectively exercise their right to a remedy and should therefore be sanctioned.

*Task of ODS bodies:* The task of ODS bodies is to settle disputes comprehensively. ODS bodies should therefore consider all matters in disputes between users and platforms. This includes the requirements of Art. 17 DSA .

### **Option 3: Differentiated approach based on the purpose of Art. 17 para. 3 DSA requirements**

#### Solution:

The legal consequences of formal and procedural shortcomings, particularly of failures to comply with the requirements of Art. 17 para. 3 DSA, should be evaluated in a differentiated manner, in light of their purpose and relevance for the user's ability to effectively exercise their right to an effective remedy (Art. 47 of the EU Charter of Fundamental Rights). In proceedings following notifications of potentially illegal content, ODS bodies should assess the legality of the content based on all laws falling into their scope. In user complaint proceedings, however, they should account for shortcomings in statements of reasons in a differentiated manner.

Aspects of the statement of reasons which should impact the decision of ODS bodies in user complaint proceedings:

- Information on the legal or contractual ground relied on to justify a content moderation measure (first parts of Art. 17 para. 3 lit. d) and e) DSA) is essential for users to understand why their content has been moderated and to exercise their right under Art. 21 DSA. For ODS bodies, this information is necessary to determine the standard of review applicable to a case. ODS bodies will limit their assessment of illegality/incompatibility with terms and conditions of a content moderation measure

to those grounds specified in the platform's statement of reasons. They should not review whether a content moderation measure complies with other legal provisions/terms and conditions than those mentioned in the platform's statement of reasons since this would preempt the user's right to an effective remedy. Users base their decision to file complaints with ODS bodies on the information on the legal or contractual ground relied on to justify a content moderation measure provided by the platform in its statement of reason. They have a legitimate expectation that ODS bodies will not assess other legal provisions/terms of use.

- As a result, in cases where the platform does not specify the grounds relied on to justify a content moderation measure, ODS bodies should overturn the platform's decision on formal grounds.
- Explanations as to why user content is considered illegal or incompatible with terms of use (second parts of Art. 17 para. 3 lit. d) and e) DSA) are also important for users to understand why their content has been moderated. Furthermore, users need this information to challenge the reasoning of the platform and to explain why they disagree with a content moderation measure.
- In order not to frustrate the purpose of the provisions of Art. 17 (3) (b) DSA and Art. 17 (3) (e) 2nd condition DSA, ODS bodies should limit their assessment of the relevant facts and context to information that can be assumed to be readily available to the user, even if it is not included in the platform's reasoning.

Aspects of the statement of reasons which should not impact the decisions of ODS bodies in user complaint proceedings:

- Explanations as to the use of automated means, Art. 17 para. 3 lit. c) DSA, are not

essential for carrying out the process under Art. 21 DSA. Shortcomings related to this component of the statement of reasons should, therefore, not impact the outcome of the decisions of ODS bodies.

- Information related to the availability of redress mechanisms (Art. 17 para. 3 lit. f) DSA) is important for users to exercise their right under Art. 21 DSA. Yet, once a complaint has reached an ODS body, users are no longer dependent on this information. Consequently, the lack of this information in the statement of reasons provided by platforms should not impact the decision of ODS bodies.

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#### Key considerations in favour of this option:

*Purpose of ODS bodies:* In complaint proceedings by users, ODS bodies should only review content moderation decisions based on the grounds provided to the user. If ODS bodies were to generally assess the compatibility of content with the law or the platform's terms and conditions, they would no longer fulfil their purpose: Art. 21 DSA aims at providing an additional layer of review of decisions of platforms. It provides a remedy to users allowing them to challenge platforms' decisions and to request an independent review of these decisions. It does not aim at creating an additional layer of comprehensive review or even enforcement, where the compatibility of content with the law or terms and conditions is assessed generally. It can be argued that it would be contrary to the purpose of Art. 21 DSA and weaken rather than strengthen the user's rights if ODS bodies were to assume this role.

*Avoid negative impact on users:* If ODS bodies would not overturn the platform's decision based on the grounds of the platform failing to comply with Art. 17 para. 3 lit. d) and e) DSA, it had, due to the lack of any specific ground for the decision, to assess the compatibility of content with the law or platform's terms and

conditions generally. Assessing the compatibility of content with the platform's terms and conditions generally, rather than, as is done in cases where platforms reference the relevant grounds for removal, only on the specific grounds invoked by the platform, would unfairly disadvantage the user. The platform's failure to satisfy its legal obligations towards the user as established in Art 17 para. 3 lit. e) DSA cannot lead to an unfavourable outcome for the user.

*Purpose of Art. 17 DSA:* A comprehensive decision that also refers to policies/provisions that were not mentioned in the reasoning of the platform would be contrary to the purpose of Art. 17 para. 3 lit. d) and e) DSA. This purpose is to give users the opportunity to understand why their content has been removed and to decide on the basis of this knowledge whether to lodge a complaint pursuant to Art. 20 or 21 DSA or to seek judicial remedy and how this remedy is to be substantiated.

*The proposed approach does not lead to unreasonable results:* If a platform reaches the conclusion that the referenced law or policy has not been violated, but another law or policy might be, it can just take a new content moderation decision, inform the user of the reasons for that decision, and the user has the right to appeal that decision pursuant to Art. 20 or 21 DSA.

#### **CONCLUSIONS REACHED BY THE BOARD**

Favouring Option 3, the Board concluded that ODS bodies should adopt a differentiated approach based on the relevance of the requirements of Art. 17 DSA for ODS processes.

#### Key considerations of the Board:

In addition to the concrete arguments in support of Option 3 outlined above, the following considerations shaped the discussion of the Board and informed its conclusions:

*Uncertainty and evolution of ODS bodies:* The Board acknowledged that ODS bodies develop in a context of many unknowns. For example, it is impossible to predict if, how and at which scale

users will exercise their rights. Rather than being overly ambitious from the beginning, ODS bodies should aim to improve their practices over time. They need to identify how they fit into other mechanisms under the DSA and other laws, such as Article 18 of the Media Freedom Act that gives special treatment in content moderation to media as opposed to all other users. A crucial contribution that ODS bodies can make from the beginning is to be transparent, share data and contribute to a mapping of the emerging landscape of dispute settlement. ODS bodies do not need to be overambitious when beginning their operations and should work towards improving their operations over time.

*Contribute to gradual improvement:* It is unavoidable for ODS bodies to engage with reasoning of platforms and they need to develop a coherent approach. Statements of reasons are important for users, and the quality of statements of reasons so far provided by platforms is inadequate, not satisfying the requirements of Article 17. This could speak in favour of overturning the decisions of platforms on formal grounds. However, such a strict approach could prevent ODS from engaging in the core task, which is to provide substantive reviews of content moderation measures. It would be impractical and ignore the fact that platforms require time to fully comply with the requirements of Article 17. The quality of statement of reasons has improved since the obligations of the DSA entered into force, and the approach of ODS bodies should further encourage this improvement.

*Decision on formal grounds:* The Board also assessed the question from a public and administrative law point of view. It acknowledged that European primary law play a significant role in the interpretation and implementation of the DSA. Key questions include how to account for the horizontal effect of fundamental rights and Article 14 para. 4 DSA, which specifically requires that

fundamental rights should be taken into account when enforcing terms and conditions. The implementation of the DSA and standard of review which ODS bodies should apply can be informed by the approaches of Courts. From the view of public and administrative law, overturning a decision based on flawed reasoning would be a dismissal on formal grounds. Citizens can, for example, successfully challenge administrative acts before courts if these acts fail to articulate the legal provision on which they are based. The administrative law analogy does not fit dispute resolution for content moderation in all aspects, but identifying differences and similarities can improve the understanding of how ODS bodies should operate.

*Standard of review:* In addition to the question of when an act can be declared void on formal grounds, the Board explored what the standard of review should be for ODS bodies when reviewing whether terms and conditions are violated. The Board discussed cases where platforms may have a margin of discretion when enforcing their policies. In some instances, the standard of review applied by courts when reviewing the application of terms and conditions by platforms is a plausibility check. ODS bodies should explore when such a plausibility check is useful and sufficient. Much speaks in favour of developing different categories and clusters of cases, with cases in different categories requiring different levels of scrutiny. The processes of clustering cases can help to develop a nuanced approach. Because of the importance of these processes, they need to be transparent.

*Clustering of cases:* The Board emphasised that there is a need to further develop a consistent theory explaining when what standards of scrutiny should be applied, and how this can inform the clustering of cases. One aspect informing this theory should be fundamental rights considerations. Certain types of content moderation decisions may have a particularly great relevance for fundamental rights. The

removal of accounts for example, have greater impact on the user than decisions to remove or demote individual pieces of content. This may justify a stricter standard of review in these cases. The fundamental rights relevance may also depend on factors such as the substance of the content, its relevance for civic discourse and elections, the nature of the speaker or the size of the platform.

*Fact-finding:* The Board also noted that ODS bodies will have no or a very limited capacity to engage in fact-finding. ODS bodies therefore require an approach on how to evaluate the reasoning and information provided by parties, and how to decide cases in situations of uncertainty. Providing platforms with a margin of discretion, and erring on the side unless there are strong reasons to disagree with it, could be one solution. The Board noted, however, that this topic requires further analysis.

*Cooperation of ODS bodies with other important actors, such as fact checkers and the news media or their representative organisations:* The Board also discussed if and how ODS bodies should interact with existing mechanisms, such as relating to fact-checking. ODS bodies are likely ill-suited to carry out assessments of whether information contains harmful misinformation. Therefore, they need to develop strategies on how to integrate into the existing fact-checking landscape.

#### **NEXT MEETING AND CONTACT**

The Board will hold its next meeting at the end of September 2024. You can find all relevant information and news on the Board's website: <https://user-rights.org/de/advisory-board>.

To contact the Board, please write: [board@user-rights.org](mailto:board@user-rights.org)