# Digital Services Act as a New Era for Platform Liability

## A fine thread between copyright enforcement and freedom of expression

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# Abstract

Online platforms have gained significant economic and societal importance in the last decade; the public debate on their extending influence, responsibilities and liability has also reached unprecedented levels. Platforms entered most product and service markets and disturbed trade, information exchange and communication, by shifting the offline into the online environment; their use of existing data innovatively resulted in the adoption and delivery of a vast range of digital services.

This paper researches this fascinating field: how to effectively regulate online platforms, which use data/information flows globally and impact most aspects of our economic and social lives, sometimes eluding or keeping beyond legal systems and fundamental rights?

The DSA Regulation is an ambitious legislative act, designed to modernize and harmonize the digital services in the EU single market. It introduces extensive due diligence obligations towards online platforms/search engines, concerning all types of illegal information.

This paper is focused on two main areas surrounding the DSA Regulation. First, it looks at the evolution of the platform liability for copyright-relevant content and how the DSA regulation relates to the previous copyright acquis. Second, it questions how the individualised rules for platforms are expected to impact the freedom of expression.

The DSA Regulation shifts the focus from the existing platform liability issue, by devising different layers of responsibilities and enforcement, according to the type and influence of the intermediary; most requirements are to be fulfilled by individualised actors (VLOP/VLOSEs). At the same time, the DSA Regulation regards the freedom of expression as a main objective and uses several references to this fundamental right throughout.

# Foreword

*For my beloved father, for sharing time, lessons and lovely memories*.

# Abbreviations

| | |
|---|---|
| AI | Artificial Intelligence |
| ACR | Automated Content Recognition |
| CFR | Charter of Fundamental Rights |
| DMCA | Digital Millennium Copyright Act |
| DSA | Digital Services Act |
| DSC | Digital Services Coordinator |
| DSM | Digital Single Market |
| ECD | E-Commerce Directive |
| EU | European Union |
| GDPR | General Data Protection Regulation |
| IP | Intellectual Property |
| IPR | Intellectual Property Right |
| MS | Member States |
| OCSSP | Online Content Sharing Service Providers |
| TFEU | Treaty on the Functioning of the European Union |
| UGC | User Generated Content |
| US | United States |
| VLOP | Very Large Online Platforms |
| VLOSE | Very Large Online Search Engines |

# 1. Introduction

## 1.1 Background

On 15 December 2020, as part of its Digital Strategy, the EU Commission submitted a proposal on a Regulation for a Single Market for Digital Services.[1] The Digital Services Act[2] (DSA) was adopted on 19 October 2022; it will be applicable starting 17 February 2024, albeit some of its provisions are already in force. The DSA "seeks to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services".[3] To achieve these aims, the DSA introduces a set of due diligence obligations towards the intermediaries of online services concerning any type of illegal information, including copyright-infringing content.[4]

This paper will analyse the DSA provisions limited to and relevant to copyright. Whilst there are many other types of illegal content (such as harmful speech, child abuse, terrorist propaganda), the copyright infringements account for the majority of defined injunctions and removals on the online platforms used today.[5] It is thus relevant to explore how this additional legislative act is expected to bring a better governance of the entities which upload or make content available online. The platform liability may be defined as the legal responsibility incurred by these entities – collectively platforms - in relation with illegal or harmful content or products hosted in the frame of their operations.[6]

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[1] COM (2020) 825 final, procedure 2020/0361/COD.

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

[3] COM (2020) 825 final, p. 2.

[4] Recital 12 of the DSA.

[5] Google's official site, https://transparencyreport.google.com/copyright/overview (last accessed on 18 May 2023).

[6] EU Parliament Study, Liability of online platforms, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf (last accessed on 21 May 2023)

A new category of intermediaries of online services is introduced by the DSA and as such will be analysed in the current paper: the Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs).

The paper will also consider the relationship between fundamental rights, in particular freedom of expression and copyright protection in the DSA, or the eternal dilemma between the predominance of one fundamental right (freedom of expression) over another (right to property for the protection of intellectual property).

### 1.1.1 Platformised economy

This paper aims to look at the platformised economy, as the new reality of our times, to explain some of the drivers calling for increased regulation of platforms to protect copyright-related content.

The last 25-30 years marked the fast transformation of the internet from an open network, bringing the illusion of freedom over information exchange, to the so-called 'platformised internet', increasingly controlled by very few players.[7] The giant global tech companies, known under the acronym of GAFAM - Google (online search), Apple (mobile communications), Facebook (social collaboration), Amazon (e-commerce) or Microsoft (technical infrastructure) - constitute by far the largest 'monopolies' of the platform economy, with a hundred-folded increase of revenues and market capitalization during the last decade only, despite their short history.[8]

But what is a platform? A platform is one word which can have different meanings in usual language: from architecture (raised site) to geology (base layer), a figurative (foundation for an action) or political meaning (such as a forum for expression).[9] In technical language, a platform is usually seen as a distinct combination of hardware and software, allowing the development of technical solutions based on the respective combination; known examples here include the

[7] Flew, T. (2021) Regulating Platforms, Chapter 1.

[8] Ibid.

[9] Flew, T. (2021) Regulating Platforms, Chapter 1.

Microsoft Windows operating system versus Mac IOS or the mobile applications environments (app stores) of Apple and Google.[10]

In a study dedicated to platform infrastructure in the digital age, the authors defined a platform as "a set of digital resources (services and content) that enable value-creating interactions between external producers and consumers".[11] The platform's enabling role (creating new business opportunities, such as distributing content online), as well as the intermediation role (instantly connecting producers with customers or authors with their public) are among the drivers that allowed a fast spreading of the platform economy globally. It is important to note that the platforms allow several actors to participate – consumers, producers or third-party users - through a varied set of governing rules and incentives, which determine that different participants engage with the platforms and generate their own benefits.[12] A very useful representation of the multi-sided aspect of the platform interactions is shown in Appendix A.[13]

Online platforms are private technology companies who successfully addressed the question of "how to make money from information on a system designed to freely exchange information".[14] Google, the paradigm of "surveillance capitalism", was the "first truly successful data-driven online business", due to its innovative capacity to monetize the internet search.[15]

There is a distinction to be made between digital infrastructures, for example the internet and the digital platforms, which lie as a distinct layer on top of a digital infrastructure.[16] However, the generic term of platform will be used in this paper, to assimilate all intermediaries of digital technologies and related services, without being too specific on the exact technical terms.

[10] Flew, T. (2021) Regulating Platforms, Chapter 1.

[11] Constantinides, P., Henfirdsson, O., and Parker, G. (2018). Platforms and infrastructures in the digital age. Information Systems Research, 29(2), p. 381–400.

[12] Ibid., p. 381-400.

[13] Australian Competition and Consumer Commission (ACCC), Digital Platforms Inquiry Final Report, June 2019, p. 61.

[14] Flew, T., Regulating Platforms, Chapter 1.

[15] Zuboff S., The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power, Chapter 1.

[16] Constantinides, P., Henfirdsson, O., and Parker, G. (2018). Platforms and infrastructures in the digital age. Information Systems Research, 29(2), p. 383.

The platforms' ecosystem is obviously a vast area, which has evolved tremendously and has been explored in many academic papers. Given the limited scope of this paper, examples will mainly refer to platforms that are storing or distributing copyright-relevant content, thus excluding any e-commerce or payment services platforms. Examples of content hosting/sharing/generation platforms include YouTube for video or music, Spotify for music, Google as a search engine, Facebook (and its own applications WhatsApp or Instagram).

### 1.1.2 Platforms and freedom of expression

A different perspective in this paper considers the extent by which the platforms have had an impact on the respect of fundamental rights, in particular the freedom of expression.

This has been an on-going debate during the last years, especially since most of the large platforms considered themselves only intermediaries or "distributors" of digital content as opposed to creators of (original) content - thus trying to elude responsibility for the content uploaded by their users.[17] On the one hand, there is an ongoing concern that the platforms are being used for spreading harmful or illegal content (copyright infringements, but also hate speech or terrorist propaganda). On the other hand, there is a concern that excessive platform liability could have adverse effects on freedom of expression by forcing platforms to over-censor content. Another question that raises is who should bear the responsibility to reach the right balance between content which is "allowed" on a platform (freedom of expression) versus content to be removed for different reasons (copyright infringement).

[17] Flew, T. (2021) Regulating Platforms, 1st ed. Polity Press. Available at: https://www.perlego.com/book/3118806/regulating-platforms-pdf (Accessed: 16 April 2023), p. 39-40.

## 1.2 Purpose and research question

The purpose of this thesis is to discuss the requirements set out by the DSA Regulation for VLOP/VLOSEs in relation with copyright-relevant content.

To fulfil the purpose set out above, the following research questions will be answered:

1) In what respects is the DSA regulation expected to enhance the legal certainty for platform liability?
2) How is the freedom of expression promoted by the DSA?

## 1.3 Delimitations

This paper will examine the platform liability issues, as these have evolved in the EU within the applicable copyright legislation. The focus will be placed on the most recent act, the DSA Regulation; the relationship between platform liability and the respect of fundamental rights, particularly the freedom of expression, will be discussed in relation with copyright-relevant matters. The paper will focus on the analysis of the requirements addressed to the Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs).

## 1.4 Materials and method

Interpretation of the legal provisions is done using the legal dogmatic research, by attempting to provide a descriptive, prescriptive and justified view of the analysed legislation.[18]

Several types of sources were consulted while documenting for this paper. First, the applicable provisions of EU legislation (primary and secondary), were referred to when necessary. Primary law includes the Treaties and the EU Charter of Fundamental Rights (CFR) and represents the overarching hierarchy of EU law. The freedom of expression, which is a fundamental right enshrined in the Article

[18] Smits J., MEPL Working Paper No. 2015/06, <What is legal doctrine? On the aims and methods of legal dogmatic research>, p. 8-12.

11 CFR, is a source of primary law and therefore all secondary legislation needs to fully comply with it.[19] Secondary legislation – both regulations and directives - in the area of copyright are mentioned in the text when necessary. The EU regulations are part of EU secondary legislation and need to be adopted and applied directly by the MS, in the form adopted by the EU institutions. The regulations are used for creating a single rule and eliminate divergencies between MS' national legislations in view to enable or enhance the EU single market. The directives are also part of EU secondary legislation and need to be transposed by the MS in their respective national legislation within the indicated due date. The directives are used for harmonisation purposes among the EU MS and as such, their provisions generally have a higher authority than provisions of the national legislations of MS, when these exist; it is, however, up to the MS to implement the directives' provisions as they consider most appropriate, provided that the directives' requirements are met. In view to address the research questions, relevant provisions from the applicable laws were used for legal interpretation, followed by eventual clarifications offered in the recitals of their preambles. Additional clarifications related to the intent of the European legislator were brought by the EU Official documents, which were studies or communications from the EU Commission or EU Parliament; these documents were used to better understand the intended objectives of the legislative changes, the several analysed options and their impacts, as well as the arguments for selecting a specific option.

Second, case law in the area of copyright has been referred to when analysing specific legal provisions. CJEU judgements have the highest authority among the EU legislation and come ahead of any national legislation, since they provide an unitary legal basis and applicability within the EU. CJEU could also revoke existing provisions of EU secondary law, when these come against the EU primary legislation or create legal uncertainty. Cases relevant to platform liability issues or balancing freedom of expression with other fundamental rights for online intermediaries were reflected to identify issues discussed in the paper.

Third, legal literature and/or scholarly articles were used for a better understanding of key concepts used in the copyright debate, contentious points and eventual

[19] Article 6(1) of the Treaty on the European Union.

specialist points of view. These are opinions which bring structure or generalise statutory or case law, may provide additional perspectives, but do not have the authority of legal text.

Finally, several transparency reports issued by different platforms (such as Google, YouTube) were consulted to understand the voluntary reporting used by platforms prior to the DSA, business models or to provide relevant statistics. A comprehensive study of the digital platforms conducted at the initiative of the Australian Competition and Consumer Commission was also consulted, for understanding important insights about the platform business and their impact. Even though such reports do not have legal value, they may contain sensible information shedding a light on some legal concepts or helping to reach a particular conclusion.

## 1.5 Structure

The contents of the paper are further organised into three sections. Section 2 analyses the platform liability concept, as this evolved in the EU copyright acquis and addresses the first research question. Section 3 introduces and describes the provisions in the DSA Regulation applicable to the new category of online platforms - namely VLOP/VLOSEs, which are copyright relevant, while aiming to discuss the second research question. The final section 4 wraps up the main points identified during the discussion and the concluding remarks on the research questions.

# 2. Platform liability in the EU

## 2.1 Introduction

Copyright protection in the EU is threefold: (1) copyright and related rights originate and are protected under the national laws of the EU Member States (MS); (2) an extensive set of EU legislation - both directives and regulations - exists, recognising the copyright protection as a fundamental right under Art. 17(2) of the Charter of Fundamental Rights (CFR), as an enabler for the functioning of EU single market; (3) MS must also comply with rules derived from international instruments, such as the Berne Convention for the Protection of Literary and Artistic Works.[20]

The drivers of the EU policy agenda in the area of copyright have remained focused on four specific areas. First, to ensure a high-level of protection for copyright and related rights, in line with other social and economic objectives and priorities, such as to promote creativity and innovation. Second, to support the EU legislative action which should be comprehensive and consistent with other European policies and values. Third, to adapt the copyright legislation to the challenges raised by the digital technology. Fourth, to ensure a social legitimacy and a fair balancing of rights and interests, particularly fundamental rights and freedoms.[21]

The complexity of the EU copyright acquis derives from both a multitude of applicable legislative acts (regulations, directives) and their interference with relevant national laws. Given the diverse traditions linking to national cultural identities, copyright law has been one of the areas where political consensus could not be reached so far, despite some attempts by the EU Commission to implement a unique EU copyright regulation.[22]

[20] Pila J., Torremans P., European Intellectual Property Law (Oxford University Press, 2019, second edition), p. 222-223.

[21] Pila J., Torremans P., European Intellectual Property Law (Oxford University Press, 2019, second edition), p. 245-246.

[22] COM (2015) 516 final.

The challenges raised by the fast-evolving technology determined the adoption of two different pieces of legislation, which have had a significant impact on the area of copyright. First, the e-Commerce Directive (ECD)[23] was adopted to set the playfield for the digital services in the EU, covering a wide range of issues related to the use of information technology and the internet. One year later, the InfoSoc Directive[24] was adopted to define the specific rules for the protection of copyright in the internal market, "with a particular emphasis on the information society"[25]. During the next two decades, the InfoSoc Directive proved to be not so well-adapted for handling all the challenges brought on the very nature of copyright by modern technology, such as instant copying and use of uploaded content in the Cloud or on a platform, scanning and uploading any text on a phone. As a result, the DSM Directive[26] was adopted in 2019, in view to "adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights".[27] The DSM Directive is focused on extending and adapting the copyright-related rights (and exceptions and limitations) to the realities of the digital era, whereas the InfoSoc Directive provides the legal background for the functioning of digital services in the single market, some of these services being relevant for copyright law.

The most recent piece of legislation, the DSA Regulation was adopted in October 2022. It will apply starting January 2024, albeit some of its provisions are already applicable. The DSA is aimed "to contribute to the functioning of the internal market for intermediary services, by setting out harmonised rules for a safe, predictable and trusted online environment".[28]

This section will review the provisions included in the afore-mentioned pieces of legislation in regards to the platform liability for copyright-relevant content and

[23] 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 (*hereinafter ECD*)

[24] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (*hereinafter InfoSoc Directive*).

[25] Art. 1 of InfoSoc Directive.

[26] 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 (*hereinafter DSM Directive*).

[27] Recital 3 of DSM Directive.

[28] Article 1(1) of DSA Regulation.

address the first research question: “In what respects is the DSA regulation expected to enhance the legal certainty for platform liability?”

## 2.2 Platform liability defined

### 2.2.1 Introduction

As shown earlier, the ECD defined specific responsibilities for the participants in the information services. As mentioned in its Recital 8, the ECD had the objective to “create a legal framework to ensure the free movement of information society services between Member States”. Information society services are defined and detailed in Recital 10, including the role of on-line intermediaries, which provide “services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service”.

### 2.2.2 ECD – Provisions Introduced

The provisions related to the liability of intermediary service providers are defined in Articles 12 to 15 ECD.

Article 12 defines as mere conduit the situation where a platform does not initiate a transmission or communication, select the receiver nor modify the information transmitted. In such a case, the platform is exempted of liability for the contents of the transmission; nevertheless, Art. 12 (3) stipulates the right of a Court to prevent or terminate the service in case of an alleged infringement. An example of such a platform is an internet service provider, granting connectivity to its users.

Article 13 defines caching as “the automatic, intermediate and temporary storage of information, performed for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request”. Generally, the platforms performing caching are exempted from liability provided the specific conditions defined by Article 13 are fulfilled; Art. 13 (2) grants the Court or a MS administrative authority the possibility to terminate this service to prevent a copyright infringement. An example could be the history of a

Google search, where the user is able to retrieve, for a limited time, his recent searches consisting of fragments of content from other content providers.

Article 14(1) introduces the notion of hosting, whereby the platform is storing content and making it accessible to its users. In this case, the platform is exempted from liability for the content stored by its users, provided that (a) it does not have any actual knowledge of illegal activity or information or (b) upon this knowledge becoming apparent, the service provider acts expeditiously to remove such information or disable access to the information. Art. 14(3) states not only the possibility of any Court to order the service provider to terminate or prevent an infringement, but also gives to MS the possibility to establish procedures for the removal or disabling access to such information. Examples of platforms which perform hosting services are: YouTube or Facebook for any type of content – posted freely by their users, Spotify for music – subscription-based access.

Article 15 prohibits both a general obligation to monitor the services of information service providers and the seeking facts to prove the existence of an illegal activity. This would be in line with the aim of balancing several fundamental rights, such as the freedom of expressions for the users, right to intellectual property for the content owners and right to conducting a business for the platforms.

### 2.2.3 InfoSoc Directive – Confirmation of provisions

The InfoSoc Directive was adopted in 2001, with the clear intent to adapt the EU copyright framework to the new requirements of the digital technology, as earlier defined in the ECD. Recital 16 of InfoSoc Directive clarifies that the ECD is a horizontal piece of legislation, which provides "a harmonised framework of principles and provisions" relevant, inter alia, to copyright; consequently, the InfoSoc directive upholds all the provisions relating to platform liability in the ECD.[29]

Recital 59 of the InfoSoc Directive states that the use of platforms may encourage more infringing activities by third parties; nevertheless, platforms are best placed to identify and terminate a copyright infringement. This could be achieved by taking

[29] Recital 16 InfoSoc Directive.

the measures indicated in an injunction, which had been obtained in a Court - subject to the national law of a MS-, by the respective copyright holder. The regime of injunctions for copyright infringement is thus clearly asserting that the platforms' participation and cooperation in performing the actions indicated is expected.[30]

### 2.2.4 CJEU case law on platform liability

As shown in section 2.2.2, the ECD defined different liability exclusions that a platform may benefit of, depending on the degree of 'interference' over the information transmitted by it. But is it always obvious whose liability is it when copyright infringing content is available online, say on YouTube? Should the liability be attributed to the platform or its users, or to both?

This issue was addressed in the *GS Media Case*, whereby the CJEU clarified the notion of primary liability for a hosting platform. In essence, such a platform acts in a similar way to a media company, distributing the protected content on its site and making a communication to the public. In the GS Media case where the platform used hyperlinks to liaise with a different site on which the content had already been released, it is assumed that it did not know or could not reasonably be expected to know that the content had been illegal (or lacked authorisation from the copyright owner).[31] CJEU also differentiates between the *actual* knowledge – whereby the platform knows or can reasonably be expected to know about the infringing content and the *presumed* knowledge – whereby the platform pursues the act of distributing the content with the intent of pursuing a profit. [32] The primary responsibility of a platform relates therefore to situations where it communicates or distributes content with knowledge (actual or presumed) of an infringement.

The *YouTube & Cyando* joined cases are also relevant in further clarifying the platform liability. The first case involves sharing copyright-protected content without the rightsholder's permission via a video-sharing platform (YouTube), which however uses automated means for upload & distribution and requires users

[30] Art. 8(3) of InfoSoc Directive.

[31] Curia Case C-160/15 GS Media vs. Sanoma Media Netherlands et al, Judgement of the Court published 8 September 2016, para 47.

[32] Ibid., para 49, 51.

to respect its standard terms and conditions.[33] The second case involves distributing copyright-protected text via a file-hosting /-sharing platform (Cyando), which has a remuneration scheme defined for its users on the basis of the number of downloads performed.[34] Here, CJEU uses a slightly different view, by differentiating the actual knowledge of the platform in two sub-categories: (i) general – where the platform knows or ought to have known that its users are infringing copyright and it refrains from putting measures in place to restrain it and (ii) specific – where a specific infringing content has been detected, but the platform does not delete or restrain access to the infringing content.[35] As such, the platform may only be exempted of liability pursuant to Art. 14(1) ECD provided that it does not "play an active role" to give knowledge of or control over the content uploaded by its users.[36]

An interesting fact of these joint cases is the delimitation of the platform liability from the liability of its users in uploading the infringing content. Subject to the platform being or providing solely a technical means (or toolset) and not actively encouraging, cooperating to or contributing in the infringing activities, it can thus be exempted of its liability as per Art. 14(1).[37]

By contrast, in the *Filmspeler* case, the Court interpreted the act of sharing copyright-protected content via a hosting platform – connected to the television through a media-player which downloaded movies from an illegal site without the rightsholders' consent-, as being an act of communication to the public pursuing to Art. 3(1) InfoSoc Directive. The hosting platform's liability for making available the infringing content was established on the basis of its full knowledge.[38]

Similarly, in the *Stichting Brein* case, CJEU underlined the indispensable role played by the platform and the "deliberate" nature of its intervention in making a communication to the public. The platform was giving its customers access to

[33] Curia joined cases C682/18 YouTube and C-683/18 Cyando, para 18-38.
[34] Curia joined cases C682/18 YouTube and C-683/18 Cyando, para 40-56.
[35] Curia joined cases C682/18 YouTube and C-683/18 Cyando, para 102.
[36] Ibid., para 117-118.
[37] Ibid., para 118.
[38] Curia case C-527/15 Filmspeler, para 39-42.

protected works which could not have been accessible to them otherwise - thus it was acting in full knowledge of the consequences of its actions.[39]

### 2.2.5 Freedom of expression considerations

The freedom of expression was explicitly mentioned by the Court as a main criterion in several judgements, in relation with determining whether the platforms were in effect making communication to the public as per Art. 3(1) InfoSoc Directive, but also in relation with notice and take-down of infringing content pursuing to Art. 14 ECD. This represents a balancing act between protecting the rights and interests of the copyright holders in protecting their IPRs, as safeguarded by the Art. 17(2) CFR, and protecting the interests and fundamental rights of users of protected subject matter, in particular their freedom of expression and information, as safeguarded by Article 11 CFR.[40]

A case confirming this view of balancing different fundamental rights is *GS Media*, where the Court sustained the freedom of expression stating that "the 'Internet architecture' would be undermined if the users were more reticent to post links, fearing copyright infringements".[41]

Similarly, in *Public Relations Consultants*, the Court clarified that browsing is an activity that cannot be controlled by a rightsholder, on the same ground that, otherwise, the freedom of expression and information by using lawfully the internet would be limited.[42]

In *YouTube & Cyando* judgement, the Court explicitly mentions that any notice or take-down request of illegal content should include sufficiently detailed information to allow the platform to conclude - without having to undertake a detailed legal analysis - that the respective content represents an infringement which could be removed without impacting the users' freedom of expression.[43]

[39] Curia case C-610/15 Stichting Brein, para 26.
[40] Curia joined cases C682/18 YouTube and C-683/18 Cyando, para 65.
[41] Curia C-160/15 GS Media, para 46.
[42] Curia C-360/13 Public Relations Consultants Association, para 55-63.
[43] Curia joined cases C682/18 YouTube and C-683/18 Cyando, para 116.

### 2.2.6 Summary and conclusions

Both the InfoSoc Directive and the ECD should be regarded as instruments for creating or enhancing the harmonisation of the platform liability provisions within the EU. The ECD is setting the playfield for all digital services in the single market (horizontal application), while the InfoSoc Directive defines the specific rules for copyright protection in the context of the digital services.

As shown in the case law presented above, the degree of interference of the platform over the content uploaded by the users, its actual or specific knowledge of or control over the users' actions are key factors to consider when determining, on a case-by-case basis, whether the platform performed an act of communication to the public and thus bear the liability for copyright infringements. The freedom of expression perspective was used by the Court *ad casum* to add another angle to the market view of the directives.[44]

## 2.3 Platform Liability Narrowed Down

### 2.3.1 Introduction

Almost two decades after the adoption of the ECD/InfoSoc directives, the EU Commission pushed for the narrowing down of the rules related to the copyright protection in the EU. This was due to the evolution of the digital technologies (combined with new behavioural aspects of using these) that created new challenges which had not been sufficiently pinned down in the initial directives. The DSM Directive was adopted in June 2019 after generating intense discussions in academic and impacted industries alike, a large part of which arising due to the famous Article 17.[45]

[44] Klafkowska-Wasniowska K., "Communication to the public of works and freedom to receive and impart information in the Charter of Fundamental Rights" – included in Intellectual Property Law and Human Rights, edited by Paul Torremans, 2020, Wolters Kluwer, p. 324.

[45] European Journal of Risk Regulation (2022), 13, The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright? (191–217, doi:10.1017/err.2022.1), p. 195.

Article 17 is included in Chapter 2 of the DSM Directive and introduces the notion of Online Content Sharing Service Providers (OCSSP), as well as a new liability regime for the intermediaries qualifying as OCSSPs.

When discussing the main provisions of Article 17 of the DSM Directive, it is important to mention that this article was originally intended by the EU Commission to address the copyright's real "value gap", meaning the difference between the significant (advertising) revenues registered by content sharing platforms (such as YouTube) and the related low compensation received by the rightsholders for their copyright-protected content uploaded online.[46]

### 2.3.2 Applicability to OCSSPs

The notion of OCSSP is defined in the Art 2(6) DSM as being a provider of an information society service, which has as main purpose to "store and give the public access to a large amount of copyright-protected works…uploaded by its users, which it organises and promotes for profit-making purposes". This definition would then include a platform such as YouTube (as it allows users to upload and view any content for free, but in turn targets advertising based on the users' preferences and makes its profits from advertising), but exclude a platform such as Spotify (which stores/presents content for a subscription, but does not allow users to upload their own content directly).[47] The OCSSPs scope excludes the not-for-profit organisations (such as Wikipedia), the open-source platforms or other scientific and educational repositories, online marketplaces, business-to-business cloud services or cloud services that allow users to upload content for their own use only.[48]

The essential part of the OCSSP definition seems to be the ability of users to upload their own content, while the platform is organising this content (some of which copyright-protected) with a clear profit-making purpose. Even though Recital 62 aims to clarify more the definition, its effect is rather reverse: it states that "only online services that play an important role" on the content market while competing

[46] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 5-9.

[47] Ibid., p. 11.

[48] Art. 2(6) of DSM Directive.

with other online services for the same audience. It is not very clear what "important role" means, by reference to what criteria should such an assessment be made and also what kind of content is envisaged – should the referred content be only audio (music) or video (streaming), or could it also include text, pictures or code, as copyright subject-matter?[49]

It is in this sense that a narrowing down of the scope of the ECD occurs: the hosting platforms are narrowed down into OCSSPs – which are covered by Article 17 DSM Directive – and the remaining hosting platforms (which fall outside of this definition). As a result, Article 17 becomes a *lex specialis* within the copyright framework for the type of platforms qualifying as OCSSPs, by setting out a new liability regime for these platforms.[50]

### 2.3.3 New liability regime for OCSSPs

**Licensing obligation**

Article 17(1) of the DSM Directive states that an OCSSP performs an act of communication to the public or an act of making available to the public when "it gives access the public access to copyright-protected works and other protected subject-matter uploaded by its users". The second paragraph indicates a licensing agreement as a possible solution for obtaining an authorisation from the rightsholder, pursuing to Art. 3(1) of the InfoSoc Directive. OCSSPs become thus directly liable for the content uploaded by their users whenever such an authorisation does not exist.[51]

Article 17(2) states that, when OCSSPs had obtained an authorisation via a licencing agreement, this should also cover acts carried out by users of the services falling within the scope of Art 3 of the InfoSoc Directive, when they are not acting on a commercial basis or do not generate significant revenues.

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[49] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 11.

[50] Quintais J., Schwemer S., <The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?>, European Journal of Risk Regulation (2022), p. 192.

[51] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 12.

This means an extension of the licensing agreement to the users, who otherwise would face legal uncertainty; it is not clear, however, what is the meaning of "significant revenues" in the context of the so-called "YouTubers", some of which receiving significant revenues from the number of followers.[52] Who would establish what "significant revenues" means, as set out by Article 17(2)?

Article 17(3) paragraph 1 states that the liability exclusion previously applied pursuing to Article 14(1) of the ECD is no longer applicable to OCSSPs who are making a communication to the public under Article 17(1) of the DSM Directive. In other words, platforms qualifying as OCSSPs would be directly liable for the content uploaded by their users, irrespective of their previous knowledge regarding an alleged copyright infringement or of their actions to take down illegally such content. This would in turn "oblige" the platforms to actively moderate content uploaded by their users.[53] The impact of this provision is high from the perspective of the users' freedom of expression, since such an extensive active moderation would rather resemble censorship by the platforms.

**Filtering obligation**

For the situations where an authorisation from the rightsholder had not been obtained, Article 17(4) introduces a slightly diluted platform liability, in the sense that this can be exempted on the basis of satisfying three cumulative conditions. First, as per Article 17(4)(a), the OCSSP should prove that it had made "best efforts" to obtain an authorisation from the rightsholder. It is not clear, however, what this notion entails, meaning how an OCSSP would be able to prove such actions in the case where a licensing agreement could not be concluded with the copyright holder for different reasons. As for any Directive being implemented, it is up to each MS to establish the best method in their national legislation to allow platforms to prove this point. Secondly, Article 17(4)(b) imposes to OCSSPs an obligation to demonstrate that they have "made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightsholders have provided

[52] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 14.

[53] Ibid., p. 14.

the service providers with the relevant and necessary information". This is considered one of the most controversial aspects of the entire Article 17, since it is not clear what the "high industry standards of professional diligence" represent; furthermore, the absence of a copyright register would render the task of IP holders providing the platforms with "relevant and necessary information" pointless and impossible.[54] And finally, the Article 17(4)(c) asks OCSSPs to demonstrate that they "have acted expeditiously, upon receiving a sufficiently substantiated notice from rightsholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)." This is, in fact, altering the meaning of the Art. 14(3) which imposed a notice and take-down action on the platforms, by adding a stay-down nuance.[55]

Article 17(5) defines some criteria for the MS to establish if the OCSSPs have complied with the conditions set out by Article 17(4), among which the type, size and audience of the service and the type of content uploaded by the users, the availability of suitable and effective means and their cost for service providers. It is not very clear how this article is expected to clarify for the national authorities of MS the provisions of Article 17(4), not how the size and type of platform might result in an exclusion of the platform liability, but this seems to indicate that an individual assessment will be made for each platform.[56]

Article 17(6) limits the conditions under which newly set up or smaller OCSSPs (active for less than three years and having a turnover of under 10 million EUR) should benefit of a liability exclusion as per Article 17(4). These are limited to complying with Article 17(4)(a) and Article 17(4)(c), except the stay-down requirement, which only applies for new OCSSPs with more than 5 million users.

**Additional user privileges?**

Article 17(7) stipulates that the cooperation between the rightsholders and OCSSPs should not result in preventing the availability of works or other subject-matter

[54] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 16.

[55] Ibid., p. 17.

[56] Ibid., p. 17.

uploaded by the users, which do not infringe copyright or may be covered by an exception or limitation. This is strengthening the users' position, as it forbids the platforms to take down content which is already covered by an exception or limitation (such as citation, parody, etc).[57]

Article 17(8) states in its first paragraph that the application of Article 17 "shall not lead to a general monitoring obligation". The second paragraph provides the option for MS to request to OCSSPs to provide at the request of rightsholders information on their practices regarding cooperation with rightsholders or the content of licencing agreements (where these exist).

Article 17(9) stipulates the need for the introduction of an efficient complaint and redress mechanism to be available for users in case of disputes over the disabling access to or removal of works uploaded by the users. At the same time, the rightsholders may also request to have their content disabled or removed, without undue delay, subject to a duly justified reason for their request. It is for the MS to design the most efficient mechanisms of complaint and redress in their own judicial system, to ensure that the users can benefit of a judicial assertion of whether content makes the use of a limitation or exception. Also, the Directive shall in "no way affect legitimate uses", such as for provided exceptions or limitations or affect the user privacy.

Finally, the Article 17(10) states that the EU Commission will initiate stakeholders' dialogue to share best practices in cooperation between OCSSPs and rightsholders, and issue guidance regarding the expected cooperation envisaged by the Article 17(4).

### 2.3.4 Freedom of expression considerations

Article 17 was long debated ever since the DSM proposal was published by the EU Commission. Implications regarding a perceived negative impact on the freedom of expression, in relation with the users' content being filtered and/or removed by

[57] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 19.

the platforms, were analysed by scholars and fundamental rights organisations alike.[58]

Shortly after the approval vote of the DSM Directive in the EU Parliament, Poland raised a direct action for annulment on the basis of Art. 263 TFEU against the EU Parliament and the Council. This action was intended to annul articles 17(4)(b) and 17(4)(c) in fine – for the stay-down obligation; in case such an annulment was to be considered by the Court as not possible, the entire Article 17 of the DSM Directive was requested for annulment.[59]

The grounds of this direct action for annulment of part of or an entire article from a new directive was considered to be the alleged infringement of the right to freedom of expression and information, guaranteed in the Article 11 CFR.[60] The main argument used by the defendant was that the respective articles 17(4)(b) and (c) impose *de facto* an obligation of OCSSPs to carry out preventive monitoring of all the user-generated content (UGM) – an automated filtering obligation -, which was deemed to limit the exercise of the users' fundamental rights since no safeguards were put in place to prevent such a limitation on the freedom of expression.[61]

The Court dismissed the action for annulment using several arguments that proved a balancing of the rights concerned had been taken into account in the legislative process in drafting the article 17. More specifically, it was found by the Court that, even though the respective provisions do indeed limit the freedom of expression of the users more than it had been the case in the previous legislation, this limitation is needed in order to prevent repeated copyright infringements, while being in line with the proportionality principle enshrined in the Art. 52 of the Charter. The Court found that other available methods were defined to protect the platforms, resulting in a balanced approach regarding the different fundamental rights that need to be protected.[62] These methods refer to licencing content, ensuring users' rights to

[58] Ibid., p. 22-23.

[59] Curia case C-401/19, Republic of Poland vs EU Parliament and the Council of the European Union, the judgement of 26 April 2022, para 1.

[60] Ibid, para 23.

[61] Ibid., para 24.

[62] Ibid., para 39-100.

upload and use legitimate content are maintained (as per articles 17(7) and 17(9) above), as well as the obligation of not using a general monitoring (article 17(8)). It is interesting that Poland only chose to base its case arguments on the users' rights, instead of also including other potential fundamental rights limitations - for example, the freedom to conduct a business, as per Article 16 CFR.[63] Despite the case being unsuccessful in taking out parts of approved legislation due to an alleged non-compliance with the freedom of expression, it remains a significant case to analyse when discussing copyright acquis and the impact on this fundamental right on creativity in general.

Other authors point out that the challenge of Article 17 versus the freedom of expression is the "*de lege* reliance on stay down mechanisms and *de facto* reliance on filtering algorithms in the first place."[64] This was found to have inclined the balance of copyright from content being available until proven to be infringing to preventive removal – content filtered and removed unless explicitly authorised by the rightsholder.[65]

From the freedom of expression perspective, it is also relevant to consider closely the provisions of Article 17(8), which states that general monitoring of users' activities by OCSSPs is strictly prohibited. This seems to be in line with the provisions of Article 15 ECD. It has also been stated by the CJEU in several judgements in copyright infringement cases, such as *Netlog*.[66] However, how does this link back to the requirement of Article 17(4)(b), which requests that an OCSSP to apply "high industry standards of professional diligence" when using filtering technologies to prevent the upload of infringing content? Such technologies are automated content detection tools which may need to be applied on whole datasets used by the OCSSP, creating *de facto* a general monitoring of the UGC. Another aspect would also refer to the potential of such automated tools to generate false positives, meaning records which are wrongly detected as infringing content, thus leading to decisions which would impact the freedom of expression of the users

[63] Curia case C-401/19, Republic of Poland vs EU Parliament and the Council of the European Union, the judgement of 26 April 2022, para 75.

[64] Schwemmer S., Schovsbo J., <What is left of user rights: Algorithmic Copyright Enforcement and Free Speech in the light of the Article 17 Regime>, article included in Intellectual Property Law and Human Rights, Fourth Edition, Oxford University Press, p. 586.

[65] Ibid., p. 586-587.

[66] Curia case C-360/10 Netlog, para 45-47.

who had uploaded them. An example would be when a listed word or combination of words are automatically detected in a Facebook or Twitter post and as a result, the user's account is blocked and the post removed from the platform.

Another aspect worth considering regarding the freedom of expression is the implied scenario that Article 17 could lead to copyright infringement shifting from detective to preventive, which may in the end lead to the OCSSPs being allowed to censor content on the internet. It is certain that copyright infringement should be prevented, in the light of respecting the fundamental right of property. This has been confirmed by the CJEU in several cases, out of which the *Glawischnig-Pieszcek v Facebook* can be mentioned.[67] Despite the fact that this case does not refer to copyright infringing content, it is relevant since it involves a platform and it clarified the injunction regime which could be applied to copyright relevant content. The judgement clarified that the platform is requested to prevent any identical and similar future infringements; it is important to note that the Court views that such similar assessments do not "require the host provider to carry out an independent assessment of the content".[68] The question that arises in relation with the filtering content obligation relates to the emerging power of the platforms risking to extend their influence: how could platforms be allowed to censor UGC and based on what criteria? In this sense, considering all the impacts of this filtering process over the freedom of expression becomes an ethical question, transcending the territorial limits of copyright and cultural silos. A similar situation applies for multinational companies, which are pursuing their business across a global world, while failing to be accountable to a particular national state. Similarly, in the context of global platforms, UGC uploaded by the user in Europe - thus subject to the DSM Directive and national copyright legislation - may need to be filtered more extensively than in other parts of the world. Would this - as envisaged by the DSM- encourage user creativity and development of EU digital services?

[67] Curia case C-18/18, Glawischnig-Pieszcek vs Facebook Ireland, judgement of 3 October 2019.

[68] Curia case C-18/18, Glawischnig-Pieszcek vs Facebook Ireland, judgement of 3 October 2019, para 21-50.

### 2.3.5 Summary and conclusions

The DSM Directive caused a stir in the copyright area in Europe ever since it was proposed; even though most aspects contained were necessary to improve the copyright framework set out in the InfoSoc Directive, the intense discussions around Article 17 concerning the licensing and filtering obligations for the OCSSPs and the privileged UGC provisions in Article 17(7) to 17(9) seemed to overshadow the other provisions.[69] The DSM was meant to be transposed into national legislations of MS as of June 2021, meaning two years after being published; however, by mid-2022, there were still 10 MS which had not yet finalized their national implementation of the Directive – for different reasons-, which led the EU Commission to start the infringement procedure pursuant to Article 260(3) TFEU against these.[70]

The new liability regime introduced in Article 17 is oriented on three main routes: (i) the licensing route, (ii) the filtering route and (iii) offering additional privileges to the users.[71] It remains to be seen how these new rules related to platform liability will shape the future of the copyright content distributed online. It could also be that, considering the tightening of the rules for platforms, new forms of cooperation between platforms and rightsholders or new legal use for copyright protected content will develop. This has been the case in the past when the copyright content was safeguarded by either collective management organisations (usually representing authors against platforms) or by an innovative injunctions regime (users against platforms); such examples resulted from the cooperation of the stakeholders involved, which were all interested in promoting their own business and find a win-win model for all parties.[72] If such an evolution was to occur, then the DSM intense discussions around Article 17 would only remain history; this seems to be correct so far, as not a single case was raised with the CJEU for disputes around the DSM Directive and the Article 17 in particular.

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[69] Schwemer S., <Article 17 at the Intersection of EU Copyright Law and Platform Regulation> (published in NIR, 3/2020), p. 30.

[70] EU Commission, Press Release ”Copyright: Commission urges Member States to fully transpose EU copyright rules into national law”, published 19 May 2022.

[71] Senftleben M., <Bermuda Triangle – Licensing, filtering and privileging user-generated content under the new directive on copyright in the Digital Single Market>, p. 1-12.

[72] Husovec, M., Journal of Intellectual Property Law & Practice, 2023, Vol. 18, No. 2, <The DSA as a creators' charter?>, p. 1.

## 2.4 Platform Liability Individualised

In October 2022, the new Digital Service Act was adopted in the EU; it is part of a twofold legislation aimed at an "Europe fit for the digital age", by "empowering people with a new generation of technologies". This package consists of the DSA Regulation, aimed at "ensuring a safe and accountable online environment", on one side, and the Digital Markets Act (DMA) Regulation, aimed at ensuring "fair and open digital markets".[73] Both regulations are relevant for the online platforms and their users, in most areas of the digital services. While the DSA is essentially a risk-management regulation, setting new rules for the platforms when providing services online, the DMA is more concerned with competition law aspects, by focusing on platforms which act as gatekeepers for other businesses or services.

As previously mentioned, this paper will be limited to identifying and discussing the copyright-relevant provisions included in the DSA. The platform liability is individualised in the DSA in the sense that related provisions are gradually expanded, differentiated and adapted depending on type and size of platform. In Section 3, the paper will discuss the applicable requirements addressed to the platforms identified as VLOP/VLOSEs, which in fact cover the most extensive of the DSA provisions.

The current section 2.4 plans to identify the main reasons why this Regulation was put forward by the EU Commission, as well as discuss how it will be positioned in the overall context of the copyright acquis; the section will end with summarising the key points discussed throughout.

### 2.4.1 Reasons for the DSA - Impact assessment

The evaluation of the ECD was undertaken by the EU Commission and its results were summarised in the Impact Assessment which accompanied the DSA proposal.

[73] EU Commission site, available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en, (last accessed on 1st May 2023).

This evaluation confirmed that, whilst the principles laid out by the ECD remained valid, there are several factors which need further analysis and improvement to enable a more reliable digital environment in the EU. First, there still persists a legal fragmentation given by different national implementation of the Directive's provisions or by the MS not effectively using the defined cooperation mechanism. Second, the liability regime for online intermediaries provided for a legal minimum threshold, but several conflicting interpretations of national law, some raised to CJEU, mean that legal uncertainty still persists. It was found that several categories of online intermediaries became outdated, by comparison with the rapid change of the technology sector, which resulted in new and more challenges to be faced by the digital sector.[74]

Within the main problems identified in the Impact Assessment for the DSA, some could be arising in relation with copyright-relevant content, thus will be mentioned below. The first problem identified was that the digital services may bring serious risks and harms by the spread of illegal activities, to infringements of fundamental rights and other societal harms. Given the way online platforms are designed and depending on the nature/type of their business they operate, such players could "set the rules of the game", from spreading and amplifying the information flows, creating public opinion and discourse and influencing the choices people have (from design, to filtering data and availability of search information).[75] There are two aspects here which are relevant to copyright. First is that private companies are defining the rules, by influencing how the content would be uploaded, distributed and under what conditions. If YouTube is considered as an example, such rules have impact for both the remuneration of users for the uploaded content (existing value gap), as well as for linking the creator with his public (terms of use); information asymmetries still govern the relation between the platform and users, thus increased transparency for users is viewed as necessary. Second is that platforms are currently defining what public space is, meaning constructing the audience, spreading the message, collecting feedback – Facebook with its related

[74] SWD(2020) 348 final, Commission Staff Working Document, p. 11-12.
[75] Ibid., p. 39.

applications is a good example here; this is a global public space, which is not – but should definitely be - regulated similarly to a public utility in a national state.[76]

The significant impact of the platforms on the exercise of the freedom of expressions by their users is also a notable issue: this refers to allowing users to upload and distribute their own content -provided it is legal-, dealing with removals and/or protective measures to remove copyright infringing content, complaints and redress mechanisms. The balancing of the freedom of expression against other fundamental rights continues to be a challenge.

A second problem referred to the existence of legal barriers for digital services, which are preventing smaller companies from scaling up and creating/enhancing advantages for large platforms (which are equipped to bear the related costs). This problem derives from two separate causes. On one hand, an expanding legal fragmentation arises when MS address some issues unilaterally. For example, the notice-and-action procedure applicable for copyright infringements exists only in 13 of the 27 MS and confers different protection to the users or intermediary. On the other hand, the legal uncertainty over the liability regime for intermediaries still persists, alongside a disincentive for them to act.[77] Legal uncertainty may derive from the definition of the information society services and the blurring distinction between online services (offered remotely) and the underlying services (offered offline). In terms of disincentives to act, the liability regime set out by the ECD may come at a disadvantage for a smaller platform, who cannot afford to take legal risks, since preventive measures taken by it could be interpreted as leading to "an active role" and would thus dis-apply the ECD liability exemption.

A third main problem identified by the EU Commission in the Impact Assessment related to the ineffective supervision of digital services and the insufficient administrative cooperation, resulting in hurdles for services and weakening the single market.[78] In the complex EU system, with distinct MS traditions and legal systems and besides the legal fragmentation already mentioned, the lack of trust of

[76] Flew, T. (2021) Regulating Platforms, 1st ed. Polity Press. Available at: https://www.perlego.com/book/3118806/regulating-platforms-pdf (Accessed: 20 May 2023), Chapter 2, Platforms and Infrastructure.

[77] SWD(2020) 348 final, Commission Staff Working Document, p. 28-32.

[78] Ibid., p. 34-35.

the MS to cooperate and address issues identified nationally in a cross-border context, leads to further accentuating national differences, especially dealing with online borderless platforms.

### 2.4.2 DSA Objectives

The main objective of the DSA is to ensure the proper functioning of the single market, in particular for the provision of cross-border digital services, in view to address the main problems identified as affecting the digital services across the EU.

The specific objectives which the DSA Regulation aims to fulfil refer to several aspects. First, the DSA aims to ensure the best conditions for *innovative cross-border digital services* to develop; this refers to creating more legal predictability and avoiding duplication costs. Second objective is to *maintain a safe online environment*, with responsible and accountable behaviour from digital services, and online intermediaries in particular. Thirdly, the DSA intends to empower users and protect fundamental rights, and *freedom of expression* in particular. The fourth objective refers to the establishment of *appropriate supervision of online intermediaries* and cooperation between authorities.[79]

Looking critically at the semantics of the italicised words above, the intentions of the EU Commission seem quite clear - **supervise** <platforms> to **maintain** a safe online environment to **protect** the freedom of expression and ***develop*** innovative cross-border digital services. How could a dynamic development (innovative) be achieved when the other planned actions are only reactive?

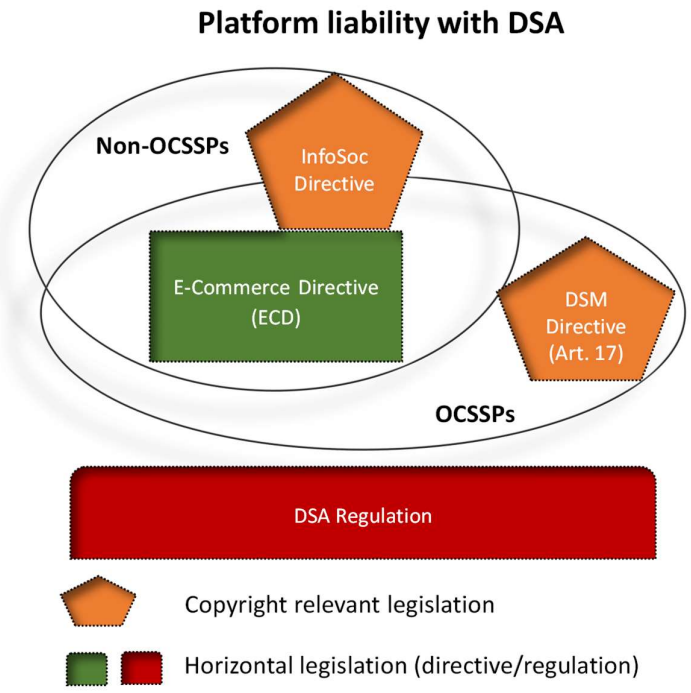
### 2.4.3 Welcome to the copyright acquis!

A first point to make here is that the DSA is adopted as a Regulation instead of a Directive, on the basis of Art. 114 TFEU, which allows the adoption of the measures considered necessary for the establishment or functioning of the single market. According to the subsidiarity principle laid out in Art. 5(3) TFEU and to reach the objectives mentioned, it was considered necessary that this piece of legislation be

[79] SWD(2020) 348 final, Commission Staff Working Document, p. 37-38.

adopted at the EU level, in view to eliminate duplicate or contradictory measures as adopted in some cases by MS in the national implementation of the previously mentioned directives.[80] As already proven by several other regulations adopted by EU (such as, for example the GDPR Regulation), the obligation for all MS to adopt such a legislative act in its approved form means the elimination of unnecessary burdens or delays.

The question that arises is how would the DSA Regulation fit in the already complex copyright acquis, looking solely through the platform liability lenses? The relationship is easier to understand as represented in the enclosed diagram:




According to Article 1(4)(b) DSA, the regulation will be "without prejudice to the rules laid by Union law in copyright and related rights"; this means that both the InfoSoc and the DSM Directives continue to have effect. The ECD will also remain into force, as stated in Article 1(3) DSA. Regarding the platform liability, the DSA is meant to complete both the ECD and the DSM Directive as regards specific provisions and these will be detailed in Section 3. DSM Directive remains *lex specialis* for the platforms qualifying as OCSSPs, but, subject to clauses added in

[80] SWD(2020) 348 final, Commission Staff Working Document, p. 36.

the DSA, there could be an overlapping effect, meaning that there may be OCSSPs which would need to apply either DSM or DSA or both provisions.[81]

### 2.4.4 Summary and conclusions

This section reviewed the main reasons why DSA was adopted as a Regulation, in view of eliminating duplications, differences and further delays in creating a cross-border regime for intermediaries in the single market. The DSA individualised the platform liability, in the sense that it used different requirements gradually, according to the particular type and size of platform provider. The most extensive category of applicable provisions refers to the newly identified VLOP/VLOSEs to be discussed in Section 3. Finally, the DSA is expected to complete and supplement the existing copyright acquis in the area of platform liability. Legal certainty will likely be obtained even for areas where duplication between DSA and DSM provisions might occur, since the regulation is expected to complement and clarify the existing framework and, at the same time, to define a unitary regime for EU MS.

## 2.5 Summary and conclusions

Section 2 analysed and discussed the several stages of defining and refining the platform liability concept in the EU copyright acquis. Starting two decades ago, with the ECD and InfoSoc Directives, the principles and main exemptions for platform liability were defined. Further interpretation was then needed from the CJEU following the development of technologies and identification of grey areas; the Court also identified needed requirements for complying with the freedom of expression principle or with balancing different fundamental rights. In 2019, with the adoption of the DSM Directive, the platform liability was narrowed down and a *lex specialis* was defined for a specific category of platform (hosting) intermediaries. Despite the many discussions and fears it raised and the delays in

[81] European Copyright Society – Comment on Copyright and the Digital Services Act Proposal, p.360-362.

transposing the Directive into the national legislation of several MS, it seems that it brought more legal clarity, or at least there were no further cases raised to CJEU in relation with the famous Article 17.

The DSA Regulation comes to conclude the discussion of platform liability and individualise it, meaning to apply requirements on differentiated, gradual bases according to the type and size of platform. The provisions applicable to the VLOP/VLOSEs will be detailed in Section 3 in relation with copyright relevant content. Freedom of expression considerations will also be discussed in relation with selected DSA provisions.

# 3. DSA or the new era for platform liability

## 3.1 Introduction

The DSA Regulation is aimed to "contribute to the proper functioning of the internal market for intermediary services" by creating or harmonising the rules for a "safe, predictable and trusted" online environment, in which "fundamental rights enshrined in the Charter…are effectively protected".[82]

In Section 3 the provisions applicable to the VLOP/VLOSEs will be detailed and discussed to the extent that they may be relevant to copyright. As indicated in the opening Article 1 DSA, the fundamental rights as enshrined in the Charter are to be effectively protected. Thus, we will examine the link between the freedom of expression and the identified provisions for VLOP/VLOSEs, where applicable and relevant. As a reminder to the reader, this section aims to address the second research question, namely "How is the freedom of expression promoted by the DSA?"

## 3.2 Existing players & New responsibilities

### 3.2.1 Introduction

The DSA Regulation is a horizontal piece of legislation, in the sense that it refers to all categories of online services performed by or attributable to providers of intermediary services. The intermediary services are defined in Article 3(g) as performing mere conduit, caching or hosting services, with the meaning already defined in the ECD. Article 3(i) defines an online platform as a "hosting service that, at the request of the recipient of the service, stores and disseminates information to the public …". Similarly, an online search engine is defined as an "intermediary service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of

[82] Article 1(1) of the DSA regulation.

a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found".

In terms of VLOP/VLOSEs, these are individualised platforms or search engines which need to be identified and designated as such by the EU Commission, following the process described in Article 33 DSA. [83] Given their "importance and reach in facilitating public debate, economic transactions or dissemination of information to the public", it was considered that VLOP/VLOSEs are those entities having an average monthly number of active recipients in the EU equal to or higher than 45 million, representing 10% of the EU population.[84] Following the information published by these platforms or engines (Art. 24(2) DSA) or as a result of subsequent information request (Art. 24(3) DSA), the EU Commission will adopt a decision designating the respective entities as VLOP/VLOSEs for the purpose of the DSA Regulation. Subsequently, the provisions intended for these intermediaries will be applied starting 4 months after the publication of such designation.

Following the adoption of the DSA Regulation in October 2022, online platforms and search engines were requested to publish their average monthly number of active users in the EU on 17 February 2023. Subsequently, the EU Commission identified and adopted the first decision to designate the initial list of VLOP/VLOSEs, which was published on the official site – please refer to this list in Appendix B.

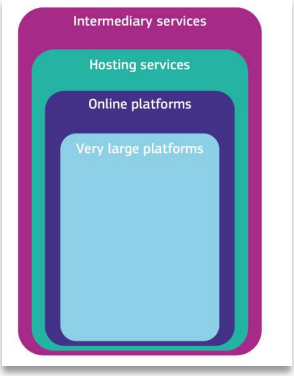
Out of the VLOP/VLOSEs identified, some of them may store copyright relevant content, thus are relevant for the scope of this paper. Examples include Facebook, Instagram and YouTube for storing and sharing content which may belong to creators, as well as the search engines identified (Google and Bing). All of these operators existed before the DSA, were known to the public and some have already been involved in known legal cases.[85] Pursuant to the DSA Regulation, to be allowed to continue providing their services in the EU (and avoid significant fines), these platforms will need to comply with the newly defined rules of the game.

[83] Article 33(1) and 33(4) of DSA Regulation.

[84] Recital 76 of the DSA Regulation.

[85] A known example would be the case Google vs Spain on the "right to be forgotten" (C-131/12).

The relationship between existing categories of intermediaries and the newly designated VLOP/VLOSE category is shown in the picture enclosed below:[86]




A question to address is what is the relationship between VLOPs (identified as per Art. 33 DSA) and OCSSPs (Art 17 DSM)? As mentioned in Section 2, there will be an overlap between these two terms, once the reference to VLOP is limited to copyright-relevant content. YouTube is a classic example of an OCSSP for copyright relevant content. If reference is made to copyright relevant content, then YouTube will keep the *lex specialis* regime of the DSM; for all other type of illegal contents, though, it will be a VLOP as defined in the DSA and will need to apply the relevant requirements set out by the DSA. In other words, the two regimes intersect, as YouTube will be considered an OCSSP (only for copyright relevant content) and a VLOP (for all other information).[87]

Another point to mention is the legal regime for a VLOSE. Everyone knows that Google is the largest search engine operating; pursuant to the Digital Millennium Copyright Act (DMCA), it has been regularly delisting, on a global basis, web sites notified for copyright infringers. According to the data published on its site, delisting requests addressed to Google for copyright reasons raised to 6.72 billion, out of which 4.5 million specific domains were indicated.[88]

[86] EU Commission site, available at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en, (last accessed on 6 May 2023).

[87] European Journal of Risk Regulation (2022), 13, The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright? (191–217, doi:10.1017/err.2022.1), p. 202-203.

[88] Google's official site, https://transparencyreport.google.com/copyright/overview (last accessed on 18 May 2023).

What is the legal status of a VLOSE in the EU copyright acquis? In the definition provided by Article 2(j) DSA, a mobile assistant such as Siri for iPhones or Alexa for Android are assimilated to a search engine. It is not clear, however, if search engines built by / with the help of artificial intelligence (AI), such as ChatGPT, should be included in the category of search engines – is the AI to be considered a form of 'other input'? It would not make much sense to exclude the search engines from the scope of the DSA, however what form of liability should such a provider bear? Is this going to be a caching provider, since the user is only using the search to obtain an answer to a query? Or is Google be rather considered a hosting service provider, given that advertisements are usually present while search results are displayed?[89] The answer will probably be provided by CJEU in the future.

### 3.2.2 DSA Content

The DSA intends to distinguish and gradually apply an enlarged set of obligations for online intermediaries, depending on their type, size or reach within the EU digital services market.

Chapter 1 DSA Regulation contains General Provisions, such as the subject matter, scope and definitions. Chapter 2 entitled "Liability of providers of intermediary services" starts by listing out the liability exemptions for mere conduit, caching and hosting in Articles 4-6, in a similar way as in the ECD. The remaining contents of Chapter 2 refer to general obligations applicable to all intermediaries, respectively to the possibility for them to pursue voluntary investigations and legal compliance while still benefiting of a liability exemption (Article 7), the interdiction to apply a general monitoring or active fact-finding (Article 8), orders to act against illegal content (Article 9) and orders to provide information (Article 10). Chapter 3 of the DSA is called "Due diligence obligation for a transparent and safe online environment" and it is here that the gradual allotment of responsibilities is made. Finally, Chapter IV of the DSA called "Implementation, Cooperation, Penalties and Enforcement" includes the general measures to be put in place by the EU

[89] European Copyright Society – Comment on Copyright and the Digital Services Act Proposal, p.365-366.

Commission in cooperation with MS, to set out the supervision and enforcement measures defined by the DSA Regulation.

### 3.2.3 Provisions applicable to VLOP/VLOSEs

As shown in section 3.2.2, the newly defined category of VLOP/VLOSEs encompasses the most extensive set of rules set out in the DSA. In view to apply a proportionate approach, the DSA Impact Assessment defined a gradual application of measures, from general ones dedicated to all categories of online intermediaries, to more specific ones for hosting providers or online platforms and to exclusive measures designed for VLOP/VLOSEs. Out of the measures defined for VLOP/VLOSEs, the copyright-relevant measures were identified in the table below.[90]

| INTERMEDIARIES | HOSTING SERVICES | ONLINE PLATFORMS | VLOPs / VLOSEs | Copyright relevance? |
|---|---|---|---|---|
| Transparency reporting | | | | Yes |
| Requirements on terms of service and due account of fundamental rights | | | | Yes |
| Cooperation with national authorities following orders | | | | Yes |
| Points of contact and, where necessary, legal representative | | | | No |
| | Notice and action and information obligations | | | Yes |
| | | Complaint and redress mechanism and out of court | | Yes |
| | | Trusted flaggers | | Yes |
| | | Measures against abusive notices and counter-notices | | Yes |
| | | Vetting credentials of third party suppliers ("KYBC") | | No |
| | | User-facing transparency of online advertising | | Yes |
| | | | Risk management obligations | Yes |
| | | | External risk auditing and | No |
| | | | Transparency of recommender systems | Yes |
| | | | Data sharing with authorities | No |
| | | | Codes of conduct | No |
| | | | Crisis response cooperation | No |

[90] Table adapted by the author, based on the scope of provisions defined in the DSA Impact Assessment, p. 74.

### 3.2.4 Summary and conclusions

The section 3.2 introduced the newly developed concept of VLOP/VLOSE, as set out by the DSA Regulation. In addition, the gradual and proportionate allocation of provisions to the VLOP/VLOSE, as well as the identification of those areas which are copyright-relevant was performed.

In the next section, we will discuss the identified copyright-relevant provisions applicable for VLOP/VLOSEs.

## 3.3 VLOP/VLOSEs copyright-relevant responsibilities

### 3.3.1 Introduction

This section will review the provisions applicable to VLOP/VLOSEs and identified above as relevant to copyright. Since the DSA is not yet fully applicable, case law has not yet appeared in relation to it; nevertheless, existing/previous case law may be used to argue on a particular point.

### 3.3.2 Requirements for all online intermediaries

**Transparency Reporting**

Pursuant to Article 15 DSA, all intermediaries of online services (except micro enterprises) are required to publish, at least once a year, a report detailing the number of orders to remove illegal content (Article 9, 10 DSA), as well as details on the automated content moderation tools they use and results of such moderation. In addition, hosting providers are also requested to report on the number of notices submitted by trusted flaggers, received in accordance with Article 16 DSA. The EU Commission may intervene- on the basis of the Article 88 DSA, to issue implementing acts providing templates for the required contents of the transparency reports, as defined by Article 15(1) DSA.

In addition to the general requirement in Article 15, the reporting for VLOP/VLOSEs is to be performed bi-annually, to include detailed numbers for recipients of services in each MS; also, the description of content moderation processes needs to include the number of persons working for this, as well as their qualifications.

**Requirements on terms of service and due account to fundamental rights**

These provisions are contained in Article 14 DSA and state the obligation for all providers to include in their terms of services any restrictions imposed for the use of services, a description of the moderation tools used, the policies and procedures used in the moderation - both automated and human review-, as well rules regarding the complaint process. In case restrictions are imposed on the use of services, these should be applied in an "objective and proportionate manner", with due regard to "the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service".[91] In addition to the above, the terms used by VLOP/VLOSEs should be concise and user friendly and published in the official languages of the MS where services are provided.

**Cooperation with national authorities following orders**

These provisions are included in the Articles 9 entitled "Orders to act against illegal content" and Article 10 "Orders to provide information". The first details on how the intermediaries are obliged to act to remove illegal content, following an order received from a competent authority. The intermediary is obliged to inform the issuing authority "without undue delay" of the result of the order, specifying "if and when effect was given to the order", as well as the recipient of the service of the removal due to an order.[92] The order issuing authority needs to inform the Digital Services Coordinator (DSC) – an institution created by the DSA Regulation to supervise the regulatory actions within each MS – of the order being issued and communication of such orders to the other DSCs is also requested.

While the process seems clear – similar to the injunctions' regime for copyright infringements – it is less obvious how the service providers and the other parties

[91] Article 14(4) DSA.
[92] Article 9(1) DSA.

are expected to deal with the volume of such requests in an orderly manner. According to Google Transparency Report, the volume of copyright infringements is huge, not to mention other types of illegal content.[93] How will VLOP/VLOSEs suddenly manage to process similarly high numbers and inform all affected parties, as intended by the regulation? Will this not mean that they will remain more passive, waiting to receive such injunction orders and only acting on such basis? While the requirement to inform all DSCs makes sense from a record-the-history-sharing-information perspective, it remains to be seen how effective it will prove in practice.

### 3.3.3 Requirements for online platforms, including VLOP/VLOSEs

**Notice and action and information obligation**

Article 16 DSA includes the process and mechanisms to allow users, either individuals or entities, to notify the hosting provider of the existence of content which is regarded as illegal. The notification should be detailed enough to allow the easy identification of such content by the provider, as well as the reasons why the content is alleged illegal. The platform is then required to act upon such notice with undue delay and notify the claimant on the selected resolution, by indicating also if the automated decision-making was used. Interestingly, the Article 16(3) states that such notices "shall be considered to give rise to actual knowledge or awareness for the purposes of Article 6". Nevertheless, the ending of this article seems to dilute the platform liability pursuant to Article 6, by limiting it to information which "allow a diligent provider of hosting services to identify the illegality of the relevant activity and information without a detailed legal examination". So, in situations where such provider was not 'diligent' (subjective call) or where it would need additional legal advice, would the liability pursuant to Article 6 not be applied?

[93] Google's official site, https://transparencyreport.google.com/copyright/overview (last accessed on 18 May 2023).

**Complaint and redress mechanisms**

These mechanisms refer to the possibility of users to contest decisions taken unilaterally by the platform within a period of 6 months from their effective date.[94] Such decisions may refer to the interruption of the provided services in whole or partially, the disabling of some functionalities, the suspension of the user's account or the interruption of his ability to monetize information provided by the user. The users may submit their complaints using a complaint mechanism which should be easily available electronically; the platform is required to respond to such complaints in due time and indicate also an out-of-court redress as per Article 21 DSA. Interestingly, the Article 20(6) DSA states that such complaints cannot be fully decided upon via automated means, instead such decisions should be reviewed by qualified staff. Article 21 (DSA) describes the out-of-court dispute settlement process, which includes one or several certified bodies of dispute resolution, to be certified as such by the DSCs of each MS. Even though such dispute resolution bodies do not have the power to impose a binding settlement on the parties, they can still recommend best practices and act in good faith, with a view to resolving such disputes. Platforms may refuse to participate in a dispute resolution for matters that have already been addressed, which concern the same information or same grounds.[95] The dispute resolution should be available for a reasonable fee for the platform, while being free-of-charge or at a nominal fee for recipients of services; the customary principle that "the loser pays it all" applies proportionately to the parties' perceived economic power, as the platform is requested to pay for dispute-related expenses, whereas the recipient of the service is not allowed to pay in a similar situation.[96]

**Trusted flaggers**

The institution of "trusted flagger" is a novelty introduced by the DSA. It refers to any individual or entity which needs to be nominated by the DSC, provided that three conditions are cumulatively met: (i) it has particular expertise and competence in identifying illegal content; (ii) it is independent from any provider of online

[94] Article 20(1) DSA.
[95] Article 21(2) DSA.
[96] Article 21(5) DSA.

platforms and (iii) its activity is carried out for the purpose of submitting notices diligently, accurately and objectively.[97] Trusted flaggers are requested to submit reports, at least annually, to the DSC – such reports should include the identity of the providers, the type of allegedly illegal content notified and the respective resolutions.[98] Where trusted flaggers are reported by platforms to have submitted incomplete or inaccurate notifications, their role may be suspended for investigation by the DSC; also, their activity may be revoked upon decision of the DSC.[99] Article 22(8) indicates that the EU Commission will issue specific guidance to assist DSCs with the criteria and application of paragraphs (2), (6), (7) or Article 22 DSA.

**Measures against abusive notices and counternotices**

These provisions are included in Article 23 DSA and grant the online platforms some breathing space. They are allowed to suspend the provision of their services towards recipients who have repeatedly used illegal content or the processing of claims towards users or entities (including trusted flaggers) who have repeatedly abused the notification or complaint mechanisms pursuant to Articles 16 and 20 DSA. Such suspension would need to be "for a reasonable period of time and after having issued a prior warning", even though it is not defined further what a reasonable period may be.

**User-facing transparency of online advertising**

The rules related to advertising on online platforms are included in Article 26 DSA. Platforms need to ensure that they present, for each advertisement presented to each recipient of the service, several compulsory details, such as: (a) specific nature of the information as an advertisement, (b) the natural or legal person to whom the advertisement relates, (c) who paid for the advertisement, if not the same person as in point (b) and (d) information about parameters used to select the recipient and ways to change such parameters. Also, pursuant to Article 26(2) DSA, platforms are also required to present to the recipients of services the option to declare if the content they provide is or contains commercial information. An example here

[97] Article 22(2) DSA.

[98] Article 22(3) DSA.

[99] Article 22(6), (7) DSA.

would be an influencer, such as a cooking expert, who may be uploading video recipes containing paid advertisements on YouTube.

According to Article 26(3), online platforms are not allowed to use profiling as defined in Article 4(4) of the Regulation (EU) 2016/679 using the special categories of personal data defined in the Article 9(1) of the same regulation. Recital 69 DSA describes such profiling as targeting the users' interests or appealing to some of their vulnerabilities, based on the collected personal data; in other situations, platforms may be using manipulative techniques to amplify some effects (such as disinformation campaigns) or amplify societal harms (such as discrimination).

**Transparency of recommender systems**

Article 27 DSA is no longer to be dedicated only to the VLOP/VLOSEs, as originally proposed by the EU Commission, instead it has been extended to all online platforms.[100] The requirement is that the recipients of the services should be able to identify, in the terms and conditions, the parameters used by the platform to bring out specific information, as well as be allowed to change these parameters or select their preferences directly in the user interface. Pursuant to Article 38 DSA, the VLOP/VLOSEs are additionally requested to provide at least one option for a recommender system which does not use profiling as defined in the GDPR Regulation.

### 3.3.4 Requirements dedicated to VLOP/VLOSEs

**Risk management obligations**

Out of the provisions applicable only to VLOP/VLOSEs, these are perhaps the most significant. After their designation as VLOP/VLOSEs pursuant to Article 33 (and annually thereafter), such entities are required to prepare an initial risk assessment, where systemic risks be identified and categorized based on their severity and probability. Among the systemic risks described by Article 34(1), the relevant ones for the purpose of copyright refer to (a) the dissemination of illegal content through their services; (b) any actual or foreseeable effect on the exercise of fundamental

[100] SWD(2020) 348 final, Commission Staff Working Document, p. 74.

rights, in particular (among others) freedom of expression and information, including freedom and pluralism of the media enshrined in Article 11 CFR. In order to conduct the risk assessments, VLOP/VLOSEs should take into account several drivers which may influence the identified systemic risks, such as: (a) the design of their recommender system or other algorithmic systems used; (b) their content moderation systems; (c) the applicable terms and conditions and their enforcement; (d) systems for selecting and presenting advertisements; (e) data related practices of the provider.[101] The risk assessment should also indicate how the identified risks could be influenced by the intentional manipulation of their service, "including by inauthentic use or automated exploitation of the service", as well as the amplification effect and rapid dissemination of illegal content or information incompatible with their terms and conditions. This last requirement seems a little bit odd – is it intended to eliminate from the provider's liability such instances? In such a case, what would be the point of conducting a risk assessment in the first place?

Article 35 DSA refers to the mitigation of the identified risks through "reasonable, proportionate and effective" measures, "with particular consideration of such measures on fundamental rights".[102] Several examples of appropriate measures are provided, such as adapting the terms of use, adjusting the online interfaces, reinforcing internal processes or cooperating with trusted flaggers or other entities as provided in other parts of the DSA Regulation. Article 35(2) DSA further indicates that the EU Commission, in cooperation with the Board, will publish annual reports to detail the identification and assessment of main systemic risks, as well as best practices for VLOP/VLOSEs to mitigate these systemic risks. Also, guidelines for the risk mitigation as per Article 35(1) may be elaborated by the EU Commission in cooperations with DSCs, following public consultations.

### 3.3.5 Summary and conclusions

As seen in the copyright-relevant DSA provisions presented above, it seems that the Regulation is mainly concerned with risk management and setting additional

[101] Article 34(2) DSA.
[102] Article 35(1) DSA.

due diligence obligations for intermediaries of information services. The platform liability exclusions instituted by the ECD remain largely unchanged and not further clarified. Whilst there is common scope with the DSM Directive in what concerns copyright-relevant content, the DSA is a horizontal legislation, covering all aspects of the digital services, thus all types of illegal content. The framework instituted by the DSA seems to move the attention from the platform liability issue, already in place since the ECD, and instead put in place a more comprehensive transparency reporting, risk management, content moderation and dispute management systems. These systems are seen necessary to move from the "voluntary" (codes of conduct) perspective towards a more regulated and enforcement-prone approach.[103]

Additionally, one needs to consider the resemblance between already used transparency reporting by online platforms and the DSA requirements. An example is the YouTube transparency report in relation to copyright, which has more or less the same headings as the ones described above.[104] According to this, a number of 757.9 million unique claims for content removal were performed using a fully automated tool (Content ID), representing 98.9% of the total number of requests, out of which 99.5% removed exclusively through automated means. The point to make here is twofold. First, these reported indicators are elected by the platform and cannot be easily checked. Generally, it is a good thing to be transparent, but every platform may choose different indicators to report on, leading to the impossibility to check, understand and compare the data. Transparency reporting for the purpose of the DSA should thus also consider duplication, in the context of the infoglut (huge and unmanageable amount of data) and the resulting "crisis of attention".[105] Second, the DSA is only defining high-level requirements, which may need to be implemented similarly to regulatory requirements imposed on public utilities companies; however, considering the many different nature of platforms and the big data they handle, this in itself may become a challenge. Alternatively,

[103] Husovec M., <On money and effort – Will the DSA work?>, available at: verfassungsblog.de /dsa-money-effort/ (last accessed on 21 May 2023), p 1.

[104] YouTube Copyright Transparency Report H1 2022, available at: https://transparencyreport.google.com/report-downloads, (last accessed 20 May 2023).

[105] Cohen, J., Between Truth and Power, 2019, Oxford University Press, p. 178-182.

it is also possible that a new governance may evolve, under a sort of public-private partnership?[106]

## 3.4 Freedom of expression in the DSA

Finally, this section will conclude with a (subjective) discussion on the relationship between the freedom of expression and the new DSA Regulation, while aiming to address the second research question.

One can easily notice that the DSA Regulation is the only act – among the ones discussed in this paper - making a direct reference to the fundamental right of freedom of expression. Not only does the DSA open its Article1 with a clear objective that "fundamental rights enshrined in the Charter…are effectively protected", but also several articles, as described previously, make explicit, though vague reference to this objective. But should this mean more than a declarative statement? What concrete steps are there to ensure that freedom of expression is preserved? And, perhaps more importantly, whose freedom of expression is concerned?

Regarding the declarative aspect of including the freedom of expression into the Regulation, there are voices who consider that any mention of fundamental rights would imply a "claim of legitimacy and universality".[107] Perhaps this was seen as necessary to obtain an easier political adoption for the Regulation, however it would not have been necessary since the Charter (primary EU law) supersedes anyhow the secondary legislation. Or perhaps this could be a hint for the platforms to change their primary focus, from profits to human rights?

In first item worth considering refers to the automated content moderation performed by the platforms to identify illegal content, which may lead to over-blocking, thus impeding on the freedom of expression for lawful content posted and subsequently removed. Here, it seems that the DSA contradicts itself by having algorithmic decision-making both as a reason for its proposal and as a measure

[106] Cohen, J., Between Truth and Power, 2019, Oxford University Press, p. 186-189.

[107] UN Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, Digital welfare states and human rights (A/74/493), dated 11 October 2019, p.14

accepted by it (see articles 14(1), 15(c), 16(6), 20(6)).[108] The fact that the DSA allows/encourages the use of automated decision-making also contradicts the earlier view that automated blocking should "in principle be limited to manifestly infringing uploads", whereas otherwise content "not manifestly infringing should in principle go online and be subject to an ex-post human review…".[109] Perhaps the EU Commission's realized that, in practice, this is how content is filtered by all platforms: to identify "manifestly infringing" content, algorithms need to run on trial and error basis?

Secondly, the risk management section dedicated to VLOP/VLOSEs asks these to evaluate the systemic risks which may have a negative impact on the respect of fundamental rights, particularly the freedom of expression. There are several things to consider in relation with the risk assessment / mitigation strategy. One is that such provisions seem too vague in terms of identifying what a systemic risk may be and especially how this would be affecting fundamental rights, on a systemic, rather than individual case; in human law cases, such impact is assessed on an individual basis.[110] Another objection identified by human rights scholars is that "any actual or foreseeable negative effects on fundamental rights" is by default illegal, not to mention that it would likely be very difficult to ascertain by VLOP/VLOSEs. Also, when does a risk become too risky (platform decision?) in order to be included in the risk assessment. Would the authorities who should review the proposed risk mitigations have the legitimacy to assess the impacts such measures could have on the freedom of expression?[111]

A final point here is that, so far, the platforms have been mastering the art of channeling the attention of the public in such a way to avoid too much transparency onto their business practices and specially algorithms used. This was sometimes

[108] Peukert, A., <Five Reasons to be Skeptical About the DSA>, VerfBlog, 2021/8/31, https://verfassungsblog.de/power-dsa-dma-04/, (last accessed 20 May 2023), p. 3.

[109] COM(2021) 288 final, Guidance on Article 17 of Directive 790/2019 on Copyright in the Digital Single Market, p. 21.

[110] Barrata J., <The Digital Services Act and its Impact on the Right to Freedom of Expression: Focus on Risk Mitigation Obligations>, p. 17-21.

[111] Ibid., p. 18-20.

using arguments such as supporting the freedom of expression, although such freedom rather referred to their own creative practices.[112]

The answer to the second research question is thus rather hesitant. On one hand, it seems that there is a *prima facie* concern and explicit mentions of measures adopted to effectively support the freedom of expression. On the other hand, such measures are kept at a rather vague level, probably for preserving a degree of flexibility for the DSA applicability. The real-life application of the Regulation will need to prove whether safeguards for the protection of this fundamental right are indeed sufficient and effective.

[112] Cohen J., Between Truth and Power, 2019, Oxford University Press, p. 134-137.

# 4. Summary and conclusions

The DSA Regulation is an ambitious legal act designed to harmonize the use of digital services offered in the EU while supervising better the increasing power and influence acquired by the platforms by increasing the overall transparency towards the platform practices. It is hoped to become a driving factor for safer and more effective digital services in the EU single market. After the successful implementation of the GDPR Regulation within the EU, the DSA marks again the more precautionary approach to regulation that the EU legislator used, as opposed to their US counterpart - where most of the largest platform originated-, who in turn, have always adopted a cost-benefit view and an "ask forgiveness, not permission" approach.[113]

The DSA Regulation is horizontal, aimed at all types of platforms and illegal content and is intended to upgrade the ECD directive following numerous technologies changes which occurred meanwhile; the regulation adopts a proportionate and gradual view over the responsibilities imposed onto different platforms, depending on their size and expected influence and economic power. For the first time, it individualizes certain actors under the VLOP/VLOSEs collective tag, that will need to comply with more measures and face stronger enforcement mechanisms. The DSA Regulation wisely departs from the long-exercised platform liability issues, which focused the public debate on the degree of knowledge and intent to determine if the platform had a direct role and subsequent liability regarding the illegal content uploaded by its users while using the services. By clarifying expectations on processes used so far (such as notice and take-down process) or by introducing new transparency reporting obligations (as opposed to recommendations), risk management assessment / mitigation practices or by creating new institutions, it intends to monitor and promote more clarity throughout the EU space. Adopting it as a regulation instead of a directive certainly would help in harmonizing the practices in all MS, even though a degree of autonomy will

[113] Cohen J., Between Truth and Power, 2019, Oxford University Press, p. 185-189.

remain through using national DSCs. The answer to the first research question: "In what respects is the DSA regulation expected to enhance the legal certainty for platform liability?" should hopefully be obvious to the reader. Due to the inherent space limitation, the paper could only delve into quite a narrow subject-matter: to analyze DSA requirements for VLOP/VLOSEs for copyright-relevant content and their impact on freedom of expression.

For any type of enacted legislation, it would be guesswork to predict what its impact will be; anticipating this impact on freedom of expression and other fundamental rights is probably even harder. The second research question: "How is the freedom of expression promoted by the DSA?" had therefore a more essay-type of answer. The interesting part is that, despite this freedom being used in a declarative manner and without too clear mechanisms designed to protect it, the EU legislator seems determined to keep this in focus during and following the DSA adoption.

This paper offered an interesting mix of reading materials – from the ones showing a high-level, systemic view of the platform phenomenon to legislation and case-law which need to provide sufficient details. I would summarize shortly my conclusions as follows. One – I believe regulation is needed, despite platforms sustaining that "the ability to innovate requires freedom, especially from regulation".[114] Two, that no matter how many rights are granted to users or rightsholders, they are not worth much unless they can be enforced, thus they need to be backed by opposing duties for platforms.[115] And finally, for this legislation to succeed, cooperation between all parties (regulator, platforms, users, DSCs, trusted flaggers, so on) will be needed during its implementation.[116]

Regarding the new era of platform liability induced by the DSA, the quote below serves as an open-ended conclusion:

"*The net interprets censorship as damage and routes around it*." (John Grisham)

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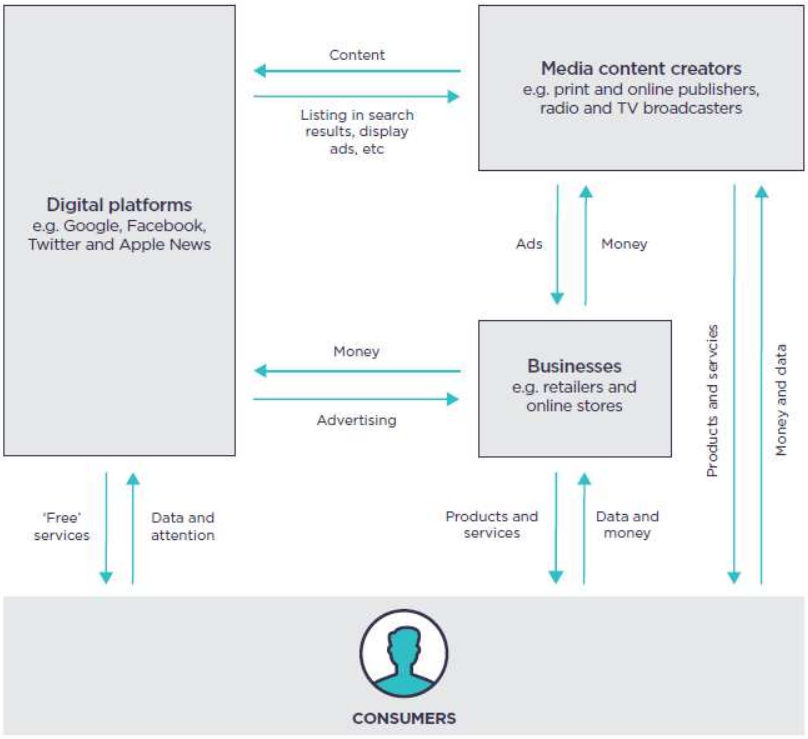
[114] UN Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, Digital welfare states and human rights (A/74/493), dated 11 October 2019, p.14

[115] Schwemmer S., Schovsbo J., <What is left of user rights: Algorithmic Copyright Enforcement and Free Speech in the light of the Article 17 Regime>, article included in Intellectual Property Law and Human Rights, Fourth Edition, Oxford University Press, p. 586.

[116] Husovec M., <On money and effort – Will the DSA work?>, available at: verfassungsblog.de /dsa-money-effort/ (last accessed on 21 May 2023), p 1.

# Appendix A

Figure 2.1 Relationships between digital platforms, consumers, businesses (advertisers) and media content creators



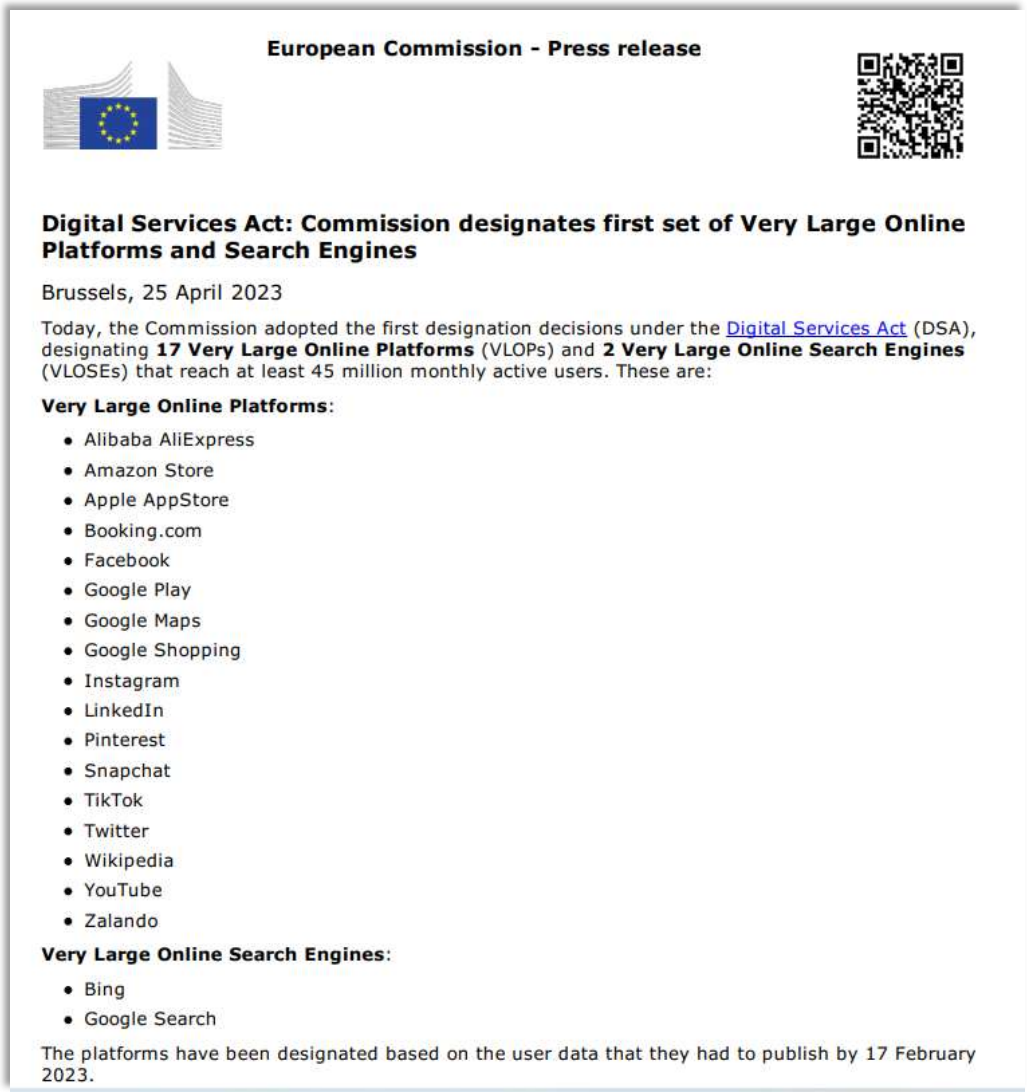

Source: ACCC Digital Platforms Inquiry Final Report, June 2019, p. 61

Available at: www.accc.gov.au (last accessed 20 May 2023)

# Appendix B

Please refer to the initial list of VLOP/VLOSEs identified by the EU Commission and published on 25 April 2023.

Obligations pursuant to the DSA Regulation start as of 25 August 2023 (4 months).



**European Commission - Press release**

**Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines**

Brussels, 25 April 2023

Today, the Commission adopted the first designation decisions under the Digital Services Act (DSA), designating **17 Very Large Online Platforms** (VLOPs) and **2 Very Large Online Search Engines** (VLOSEs) that reach at least 45 million monthly active users. These are:

**Very Large Online Platforms**:

- Alibaba AliExpress
- Amazon Store
- Apple AppStore
- Booking.com
- Facebook
- Google Play
- Google Maps
- Google Shopping
- Instagram
- LinkedIn
- Pinterest
- Snapchat
- TikTok
- Twitter
- Wikipedia
- YouTube
- Zalando

**Very Large Online Search Engines**:

- Bing
- Google Search

The platforms have been designated based on the user data that they had to publish by 17 February 2023.

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EPRS STU (2021)656318, Liability of online platforms.

SWD (2020)348 final, Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC

C (2023)1257 final, Commission Delegated Regulation of 2.3.2023 supplementing Regulation (EU) 2022/2065 of the European Parliament and of the Council with the detailed methodologies and procedures regarding the supervisory fees charged by the Commission on providers of very large online platforms and very large online search engines.

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