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The e-Commerce Directive and its relation to the proposed Digital Services Act: is the European Union ready for a new digital age?

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Section 1. Introduction

On 15 December 2020 the European Commission (hereinafter « Commission ») announced new rules regarding digital services and online platforms. The new legislation should prepare the European Union (hereinafter « EU ») for the digital age and will be better fit to protect its citizens and businesses against the infringement of fundamental values of the Union by digital service providers and the platforms[2]. The proposed legislative package will elaborate on the e-Commerce Directive (hereinafter « ECD »)[3] that came into force in the year 2000. This directive has proven to be insufficient to protect consumers and businesses against the ever evolving dynamics of the digital market. This contribution will go into the effects and shortcomings of the ECD.

The proposed legislative package of the Commission consists of two regulations. The first regulation is the Digital Services Act (hereinafter

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2 European Commission, « Europe fit for the Digital Age: Commission proposes new rules for digital platforms » European Commission Press release of 15 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2347.

3 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (« Directive on electronic commerce »), OJ 2000, L 178/1.

« DSA »),[4] which will set out rules for a wide variety of digital services. The second regulation is the Digital Market Act (hereinafter « DMA »),[5] which will set out rules and prohibited conduct for so called « gatekeeper platforms ».

This contribution will focus on two questions. Firstly is what is the existing legal regime regarding the ECD, also in the light of relevant case law of the Court of Justice of the European Union (« ECJ »)? Secondly is how does the new DSA go beyond the old directive and which elements of the old directive are used and/or adapted?

The structure of this contribution is therefore as follows. Following this introduction (Section 1), I will provide a description of the functioning of the e-Commerce Directive, as the existing legal regime for online services, including the relevant case law of the ECJ (Section 2). The following section will provide an outline of the content of the draft Digital Services Act, and it will show how the envisaged DSA will go beyond the current ECD regime (while taking up the building blocks of the e-Commerce Directive) (Section 3). I will complete this contribution with a brief conclusion on the interaction between the ECD and the DSA (Section 4).

Section 2. The e-Commerce Directive

The ECD was transposed into the national legislative systems of the EU Member States by 2002. The ECD aims to remove legal obstacles and facilitate cross-border trade and stimulate the freedom of establishment and the freedom to provide services. The ECD allows for a bi-annual re-examination by the Commission. The Commission reports its findings to the Council, European Parliament and the Economic and Social Committee and proposes amendments to account for possible legal, technological, or economic developments regarding Information Society Services[6].

4 European Commission, « 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 », COM (2020) 825 final.

5 European Commission, « Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) », COM (2020) 842 final.

6 Directive 2000/31/EC, Article 21.

§ 1. The scope of the e-Commerce Directive

The ECD's scope focuses on the provision of Information Society Services (hereinafter « ISS »). These ISS are described as « any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services »[7]. As previously mentioned, the ECD came into force almost 20 years ago. It is therefore not surprising that over the years the ECJ has elaborated on what constitutes an ISS over the years.

Firstly, in the *McFadden* judgement, the ECJ had to answer the question whether a service provided free of charge could fall under the definition of an ISS as described by the ECD[8]. The ECJ first decides that ISS are services under Article 57 TFEU and therefore covers only services normally provided for remuneration[9]. However, this does not mean that a service of an economic nature provided free of charge cannot by definition constitute an ISS. Indeed, not all services are paid for by the recipient. This is the case according to the ECJ, where the service is provided for the sake of advertising other goods or services[10]. The ECJ further consolidated this point in subsequent cases[11].

In several landmark judgements, the ECJ decided on the status of two major collaborative economy platforms;[12] namely Uber and Airbnb[13]. In two judgements relating to Uber, the ECJ ruled that Uber provided transport services instead of ISS. The ECJ determined the nature of the provided services by assessing the main services provided as well as the accessory services[14]. In the Uber case, the ECJ decided that its main service constitutes a transportation service, rather than an ISS. The ECJ came to its conclusion following a two-step test. Firstly, without Uber, non-professional drivers and users would not provide and receive the respective service. Secondly, Uber could exert considerable influence over the

7 Directive 2000/31/EC, Article 2(a) ;Directive 2015/1535/EU, Article 1(1)(b).

8 ECJ, 15 September 2016, *Tobias McFadden v. Sony Music*, C-484/14, ECLI:EU:C:2016:689, par. 34.

9 *Ibidem*, paras. 39-40.

10 *Ibidem*, paras. 41-43. See also: Directive 2000/31/EC, Recital 18.

11 ECJ, 11 September 2014, *Papasavvas*, C-291/13, ECLI:EU:C:2014:2209, paras. 29-30.

12 Collaborative economy platforms like Uber and Airbnb facilitate access to rather than ownership of goods and services. The party making available services can be either a peer (someone who does it on occasion) or a professional service provider. See: V. HATZOPOULOS, *The Collaborative Economy and EU Law*, Hart Publishing, 2018, p. 7.

13 ECJ, 20 December 2017, *Asociación Profesional Élite Taxi v. Uber Systems Spain*, C-434/15, ECLI:EU:C:2017:981; ECJ, 10 April 2018, *Uber* France, C-320/16, ECLI:EU:C:2018:221; ECJ, 19 December 2019, *Airbnb Ireland*, C-390/18, ECLI:EU:C:2019:1112.

14 A. DE STREEL and M. HUSOVEC, « The e-commerce Directive as the cornerstone of the Internal Market », *European Parliament*, 2020, p. 19.

transport service, e.g. regarding fares and quality of the vehicles[15]. Uber's intermediary service, in principle, constituted an ISS[16]. However, the fact that it subsequently created a market for transport services and could control said services, led the ECJ to conclude the intermediary service would become an integral part of the transport service. Therefore, it did not fall within the scope of the ECD[17].

The ECJ came to a different conclusion in the case of *Airbnb Ireland*. In that case, the ECJ qualified Airbnb's intermediary service indeed as an ISS. It started by saying that Airbnb fulfils the four cumulative criteria of a provider of ISS[18]. The ECJ continued to apply the *Uber*-test (« market creation » and « control ») by examining whether the ISS forms an integral part of an underlying service that is not an ISS[19]. It considered that Airbnb did not provide a service without which no accommodations would or could be rented. Contrary to the *Uber* judgements, where non-professional drivers could not provide services without the platform, hosts can still rent their accommodation without the help of Airbnb, as there are a number of other long-established channels available[20]. Moreover, Airbnb lacked the decisive influence over the hosts using its platform, because it could not determine the rents charged[21]. This premise does not change because of the fact that Airbnb provides additional (optional) services like a tool to estimate the appropriate rent[22]. The factors mentioned above led the

15 ECJ, 20 December 2017, *Asociación Profesional Élite Taxi v. Uber Systems Spain*, C-434/15, ECLI:EU:C:2017:981, par. 39.

16 *Ibidem*, par. 35.

17 ECJ, 20 December 2017, *Asociación Profesional Élite Taxi v Uber Systems* Spain, C-434/15,ECLI:EU:C:2017:981, par. 42. Later reiterated by the ECJ in the *Uber France* case, par. 21. In « *Star Taxi App* », the Court discussed another intermediary service for transport. Relying on the Uber-criteria, it found that Star Taxi App was not creating a market, as, contrary to Uber, the drivers using its service were professional taxi drivers. Moreover, Star Taxi App did not decisively control the transport service. See ECJ, 3 December 2020, *Star Taxi App*, C-62/19,ECLI:EU:C:2020:980, paras. 52-53. Unfortunately, the judgement is not available in English. For a clear discussion of the case in English, see: C. GARDINER, « Star Taxi App is an "Information Society Service": But is the Meter Still Running for the Classification of Platform Services? », Journal of European Consumer and Market Law, vol. 2, 2021, p. 71.

18 ECJ, 19 December 2019, Airbnb Ireland, C-390/18, ECLI:EU:C:2019:1112, par. 42-49.

19 C. BUSCH, « The Sharing Economy at the CJEU: Does Airbnb pass the "Uber test"? », *Journal of European Consumer and Market Law*, vol; 4, 2018, p. 173.

20 ECJ, 19 December 2019, *Airbnb Ireland*, C-390/18, ECLI:EU:C:2019:1112, par. 55. Although it has been argued that Airbnb can in fact be considered a market maker. See: A. CHAPUIS-DOPPLER and V. DELHOMME, « Regulating Composite Platform Economy Services: The State-of-play After Airbnb Ireland », *European Papers*, vol. 5(1), 2020, p. 420; L. VAN ACKER, « C-390/18 – The CJEU Finally Clears the Air(bnb) Regarding Information Society Services », *Journal of European Consumer and Market Law*, vol. 2, 2020, p. 79.

21 *Ibidem*, par. 56.

22 ECJ, 19 December 2019, *Airbnb Ireland*, C-390/18, ECLI:EU:C:2019:1112, par. 56.

ECJ to conclude that Airbnb is not providing accommodation. Instead, Airbnb is active as an intermediate service, using an electronic platform, to connect professional and non-professional hosts offering short-term accommodation, with potential guests in exchange for remuneration[23].

In conclusion, whether or not an intermediate service is considered an ISS depends on whether the service provider establishes a market creator, combined with the amount of influence it can exert on the underlying service (be it transport or accommodation)[24].

§ 2. The four pillars of the ECD

The ECD's provisions are divided in four pillars. The ECD sets up minimum rules for Member States and therewith strives for minimum harmonisation within existing national legislation regarding the provision and free movement of ISS[25].

A. First pillar: a coordinated field for ISS

The first pillar aims at creating an area without borders or barriers for the provision of ISS by creating a coordinated field[26]. This is achieved firstly, by prohibiting the home Member State (*i.e.* the one in which the ISS provider is established) from requiring any prior authorisation that is specifically and exclusively targeted at ISS[27]. Secondly, the ECD obliges host Member States to accept any ISS providers as long as they adhere to the regulatory requirements of the home Member State[28]. The ECD lays down two exemptions to this rule. Firstly, there are eight areas mentioned

23 *Ibidem*, par. 69. See also: L. VAN ACKER, « C-390/18 – The CJEU Finally Clears the Air(bnb) Regarding Information Society Services », *Journal of European Consumer and Market Law*, vol. 2, 2020, p. 80.

24 The relative importance of both criteria is yet to be determined by the ECJ. Still, A-G Szpunar has made a compelling case for the « influence » criterion as more important, since existing markets could also end up being controlled by an intermediary service provider. See: Opinion of A-G Szpunar, 30 April 2019, case C-390/18 (« *Airbnb Ireland* »), paras. 61-68.

25 A. DE STREEL and M. HUSOVEC, « The e-commerce Directive as the cornerstone of the Internal Market», European Parliament, 2020, p. 14.

26 *Ibidem*, p. 15.

27 Directive 2000/31/EC, Article 4(1) and (2). Authorization schemes not « specifically and exclusively » targeting ISS can still be scrutinized under Article 9 and Article 10 of Directive 2006/123/EC (Services Directive). See Case C-62/19 3 December 2020 ECLI:EU:C:2020:980 (« *Star Taxi App* »), paras. 86-92.

28 Directive 2000/31/EC, Article 3(2).

in the ECD that are exempt[29]. Secondly, there is a specific exemption in light of, for example, the public interest or proportionality[30].

This coordinated field needed some elaboration over the years, which has been kindly given by the ECJ. In *eDate advertising* the ECJ stated that ISS providers cannot face stricter regulatory regimes than the substantive regime of the Member State in which they are established[31]. This helps to create a coordinated field for the providers of ISS. However, the ECJ also clarified that the ECD does not create a conflict-of-laws rule[32]. Additionally, the ECJ decided that for the application of Article 3 of the ECD, the provider of the ISS has to have a known place of establishment in a Member State.

The ECJ has defined the scope of the coordinated field in a number of judgements. Firstly, it decided that the freedom to provide ISS covers online activities and not offline activities[33]. The ECJ decided that national laws could not limit the online sale of goods (in this case contact lenses) but could influence the supply or delivery of the goods over which a contract was concluded by electronic means[34]. This shows the online-offline divide made in the ECD. This division hampers the effectiveness of the ECD[35].

Secondly, the ECJ decided that a general and absolute prohibition on advertising related to a regulated profession is not allowed under the coordinated field inasmuch as it also includes electronic commercial communications. Regulated professions should have the ability to promote their business themselves, not only via a professional provider of ISS[36]. A general and absolute prohibition on advertising is therefore not allowed under Article 3 ECD[37]. In a later case, the ECJ decided that advertising practices for online sales services fall entirely under Article 3 ECD. The ECJ considered these advertising practices ancillary and inseparable to the online sales service[38]. In this case, the contested advertising practice

29 Directive 2000/31/EC, Article 3(3).

30 Directive 2000/31/EC, Article 3(4).

31 ECJ, 25 October 2011, *eDate Advertising*, C-509/09 and C-161/10, ECLI:EU:C:2011:685, par. 66.

32 ECJ, 25 October 2011, *eDate Advertising*, C-509/09 and C-161/10, ECLI:EU:C:2011:685, paras. 57-61.

33 ECJ, 2 December 2010, *Ker-Optika*, C-108/09, ECLI:EU:C:2010:725.

34 *Ibidem*, paras. 29-31.

35 M.Y. Schaub, « Why Uber is an information society service », *Journal of European Consumer and Market Law*, vol. 7(3), 2018, p. 111.

36 ECJ, 4 May 2017, *Vanderborght*, C-339/15, ECLI:EU:C:2017:335, paras. 31-40.

37 *Ibidem*, par. 50.

38 ECJ, 1 October 2020, *Daniel B*, C-649/18, ECLI:EU:C:2020:764, par. 59.

was the distribution of promotional leaflets[39]. The aforementioned means that both physical and electronic ways of advertising are covered by the ECD as long as it is ancillary and inseparable from the ISS[40]. This is an interesting contradiction with the clear online/offline divide made in the *Ker-Optika* case where the supply and distribution was not considered ancillary[41].

Lastly, the ECJ used the *Airbnb*-judgement to further clarify Article 3(4) ECD, which contains a procedural obligation next to its substantive conditions[42]. Procedural rules regarding derogations consist of requesting the host Member State to change alleged burdensome legislation they also consist of notifying the Commission and the host Member State of the derogation when the aforementioned change in legislation does not take place[43]. If this obligation is not adhered to by the host Member State, the law used is rendered unenforceable against the ISS concerned[44].

B. Second pillar: user protection

The second pillar focuses on the protection of the users of ISS. This pillar aims at creating transparency within ISS[45]. To achieve this, the ECD obliges providers of ISS to provide general information to their users e.g. name, geographic address or relevant supervisory authority (if relevant)[46]. The ECD furthermore obliges ISS providers to act transparently considering their commercial communication and promotional offers[47]. This includes among others the provision of clear and applicable terms and conditions[48]. Lastly, the ECD wants to achieve more transparency and user protection by harmonising the possibility of entering into electronic contracts. The ECD makes sure that these contracts have equal legal validity as traditional contracts and provide users the same legal protection[49].

39 *Ibidem*, par. 21.
40 *Ibidem*, paras. 59-62.
41 ECJ, 2 December 2010, *Ker-Optika*, C-108/09, ECLI:EU:C:2010:725, paras. 29-31.
42 ECJ, 19 December 2019, *Airbnb Ireland*, C-390/18, ECLI:EU:C:2019:1112, paras. 84-85.
43 Directive 2000/31/EC, Article 3(4b).
44 *Ibidem*, par. 100. ECJ, 1 October 2020, *Daniel B*, C-649/18, ECLI:EU:C:2020:764, par. 43.
45 A. DE STREEL and M. HUSOVEC, « The e-commerce Directive as the cornerstone of the Internal Market », *European Parliament*, 2020, pp. 15-16.
46 Directive 2000/31/EC, Article 5.
47 Directive 2000/31/EC, Article 6-7.
48 Directive 2000/31/EC, Article 6(d).
49 Directive 2000/31/EC, Article 8-10.

C. Third pillar: the division of liability

The third pillar tries to harmonise the liability risks of providing ISS. The ECD creates a so-called « safe harbour » for three types of activities of ISS, called intermediary services. In these situations, the provider of ISS is not liable for the information from third parties. However, the provider is still liable for its own editorial content[50]. Liability is excluded when the ISS is a mere conduit for the provided information from a third party/user,[51] when the ISS is merely automatically, temporarily, and intermediately storing data from a third party or user (caching)[52] or lastly, when the ISS is merely hosting information upon request of a third party or user[53].

The ECJ has given its judgement regarding the division of liability in numerous cases. By doing so, it has clarified for a number of undertakings whether they can make use of the « safe harbours » mentioned in Articles 12-15 ECD and under which conditions they may rely on these exemptions. The first case considered online search engines and specifically keyword advertising[54]. The ECJ firstly establishes what kind of role ISS providers should assume to be able to qualify for the liability exemptions of the ECD. It states that ISS providers should play a neutral role providing a service that is merely technical, automatic, and passive[55]. This would imply a lack of knowledge regarding the actual content of the stored information[56]. The aforementioned lack of knowledge is also referred to as the « requirement of passivity »[57]. Receiving remuneration or connecting certain keywords to search words does not imply an active role for the provider of the ISS[58].

This requirement of passivity was further elaborated regarding online marketplaces (in this case eBay) and illegal content posted on their marketplace by users[59]. It considered that when marketplaces store offers for sale, set the terms for this service, get remunerated for this service and provide general information on the offer, this does not render the « safe harbour » inapplicable. In contrast, if providers offer assistance with the

50 A. DE STREEL and M. HUSOVEC, *op. cit.*, p. 16.
51 Directive 2000/31/EC, Article 12.
52 Directive 2000/31/EC, Article 13.
53 Directive 2000/31/EC, Article 14.
54 ECJ, 23 March 2010, *Google France*, C-236/08 to C-238/08, ECLI:EU:C:2010:159.
55 ECJ, 11 September 2014, *Papasavvas*, C-291/13, ECLI:EU:C:2014:2209, par. 40.
56 ECJ, 23 March 2010, *Google France*, C-236/08 to C-238/08, ECLI:EU:C:2010:159, par. 114.
57 A. DE STREEL and M. HUSOVEC, *op. cit.*, p. 20.
58 ECJ, 23 March 2010, *Google France*, C-236/08 to C-238/08, ECLI:EU:C:2010:159, paras. 116-117.
59 ECJ, 12 July 2011, *L'Oréal v. eBay*, C-324/09, ECLI:EU:C:2011:474.

optimisation of the offer or promote the offer, this means providers are actively involved in the offer, consequently losing their neutral position between buyer and seller. Thus, in these cases, ISS providers cannot make use of the safe harbour[60]. Interestingly, the ECJ entrusts ISS providers with an additional duty of care. In essence, when a provider of an ISS becomes aware of certain unlawful information, it has to act expeditiously to delete or block access to said information[61]. When failing to do so, the provider cannot make use of the exemptions given under the « safe harbour »[62]. Interestingly however, information location services like search engines are outside the scope of these « safe harbours »[63].

The three « safe harbours » are not absolute, yet article 15 ECD prevents Member States from forcing ISS providers to act as « cyber patrols »[64]. In other words, they may not impose an obligation to actively screen information, nor a general obligation to seek out illegal activity[65]. Moreover, Member States are prohibited to add any carve-outs in the « safe harbours ». On the other hand, Member States can oblige ISS providers to inform them of illegal activities as soon as they come to their attention.

In further case law, the ECJ has elaborated on the preventive duties of ISS providers. It decided firstly, that the « safe harbour » exemptions are equally applicable to internet access providers[66]. In this case, the ECJ decided that the installation of a filtering system, which led to the general filtering of all incoming electronic communications without any time-limit or content limit, would not strike a fair balance between the freedom of the ISS provider and the protected interests[67]. This shows that monitoring requests need to have a certain degree of specificity and certain limitations[68].

60 *Ibidem*, paras. 115-117.

61 V. MAK, « De Richtlijn Elektronische Handel en de Platformeconomie », *Nederlands tijdschrift voor Europees recht*, vol. 1(2), 2020, p. 4.

62 ECJ, 12 July 2011, *L'Oréal v. eBay*, C-324/09, ECLI:EU:C:2011:474, para. 124.

63 A. DE STREEL and M. HUSOVEC, *op. cit.*, p. 16.

64 A. LODDER, « Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market », in A. LODDER and D. MURRAY (eds), *EU Regulation of E-Commerce: a Commentary*, Edward Elgar Publishing, 2017, p. 53.

65 Cf. V. MAK, « De Richtlijn Elektronische Handel en de Platformeconomie », *Nederlands tijdschrift voor Europees recht*, vol. 1(2), 2020, p. 4.

66 ECJ, 24 November 2011, *Scarlet v. Sabam*, C-70/10, EU:C:2011:771, par. 30.

67 *Ibidem*, paras. 47-50.

68 A. DE STREEL and M. HUSOVEC, *op. cit.*, p. 20.

The aforementioned specificity is further illustrated regarding social networks which can equally make use of the exemptions of the ECD[69]. In *Facebook v. Eva Glawischnig-Piesczek*, Facebook was obliged to protect a person's reputation against defamatory information that was deemed unlawful. However, the obligation could not impose an excessive burden on the host provider[70]. The injunction requiring certain information from being filtered out needs to contain specific elements regarding the content. This means that enough information needs to be available for the social network to automatically filter this content without human intervention[71].

D. Fourth pillar: effective enforcement

The fourth pillar focuses on the creation of a system of effective enforcement[72]. The ECD promotes the use of alternative out-of-court systems to settle disputes[73]. Member States may not hamper the use of such systems[74]. Member States must set up adequate national legislation that allows for the quick adoption of measures through legal actions that are able to put a stop to an alleged infringement and to prevent any further damage[75]. Additionally, the ECD promotes mutual assistance and cooperation between Member States, which can, for example, consist of the establishment of national contact points[76]. Lastly, the ECD addresses the sanctioning of breaches of national law adopted pursuant to the ECD. These national sanction rules need to be effective, proportionate, and dissuasive[77].

69 Cf. ECJ, 3 October 2019, *Facebook v. Eva Glawischnig-Piesczek*, C-18/18, ECLI:EU:C:2019:821, par. 22.

70 *Ibidem*, paras. 44.

71 *Ibidem*, par. 45.

72 A. DE STREEL and M. HUSOVEC, *op. cit.*, p. 18.

73 A. LODDER, « Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the internal market », in A. LODDER and D. MURRAY (eds), *EU Regulation of E-Commerce: a Commentary*, Edward Elgar Publishing, 2017, p. 55.

74 Directive 2000/31/EC, Article 17.

75 Directive 2000/31/EC, Article 18.

76 Directive 2000/31/EC, Article 19.

77 Directive 2000/31/EC, Article 20. For a more elaborate description of the requirement of effectiveness, proportionality and dissuasiveness, see ECJ, 21 September 1989, *Commission v. Greece*, C-68/88, ECR 2965, paras. 23-24.

Section 3. The Digital Services Act

At 21 years of (digital) age, the ECD does not appear fit for the ongoing technological developments and the changes they bring about. Where, in 2000, the main need was to regulate intermediaries, now in 2021, platforms and the collaborative services economies set the unscrutinised tone[78]. The increased demand for legislation led to a proposed digital services package. The package will produce two regulations: the Digital Services Act (« DSA ») and the Digital Markets Acts (« DMA »). Together, they deploy a three-step approach. Firstly, the ECD will largely stay in force, whilst Articles 12 to 15 ECD regarding the « safe harbours » will be transferred to the DSA. Secondly, the ECD will be used as a building block for the DSA[79]. As such, the DSA does not change the definition of an ISS[80]. It applies in essence to a novel subcategory of ISS, namely those that constitute « intermediary services », where their recipients are established in the EU[81]. Thirdly, the DMA will create an *ex-ante* regime for « gatekeeper platforms »[82].

Please note that the draft DSA and draft DMA are still proposals at the time of finalising this contribution[83]. Certain provisions or obligations can still be « lobbied out » of the proposed regulations.

§ 1. The first and second chapter: the ECD revisited

The first chapter of the DSA covers the general provisions[84] and definitions of key terms used in the Regulation[85]. The second chapter deals with the safe harbours considering the provision of a « mere conduit »,[86]

78 A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021, p. 2.

79 See also: COM (2020) 825 final, p. 2.

80 P. VAN CLEYNENBREUGEL, « The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules? », *Maastricht Journal of European and Comparative Law*, vol. 20(1), 2021, p. 4.

81 DSA, Article 1(3). Van Cleynenbreugel points out that, in light of the ECJ's Uber judgements, some online service providers are kept outside the DSA's reach anyhow as they cannot qualify as ISS. See P. VAN CLEYNENBREUGEL, « The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules? », *Maastricht Journal of European and Comparative Law*, vol. 20(1), 2021, p. 4.

82 A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021, p. 4.

83 The manuscript of this contribution was closed on 1 October 2021.

84 DSA, Article 1.

85 DSA, Article 2.

86 DSA, Article 3.

caching services[87] and hosting services[88] that were mentioned already under the ECD. These articles do not contain fundamental changes except for Article 5(3), which states that hosting services are not exempt from liability where a reasonable customer could presume that a certain product offered by a distance contract is under the control of the hosting service[89].

At the same time, the DSA lays down an additional rule in Article 6. This « good Samaritan » clause prevents the liability of ISS providers when they execute voluntary investigations and, following these investigations, take steps to stop an infringement or in any other way comply with the law[90]. Furthermore, obligations to generally monitor or to actively search for certain facts are still prohibited[91]. However, the DSA now also obliges intermediaries to comply with orders from national judicial or administrative authorities regarding the acting against illegal content[92] or the exchange of information[93]. Articles 8(2) and 9(2) DSA set out clear procedural requirements that orders based on those articles should adhere to. This seems to be an implementation of, among others, the *Facebook* judgement in which defamatory content only had to be filtered out if the injunction was specific enough[94].

§ 2. The third chapter: the Matryoshka approach

The third chapter of the DSA is layered like a Matryoshka-doll and considers the due diligence of intermediary service providers. In this way, the DSA seeks to establish a safe and transparent online environment[95]. The first section applies to all intermediary service providers. The basic obligations for all these providers are firstly the establishment of a single point of contact or legal representative for direct communication with all Member States' authorities, the Commission, and the European Board for Digital Services[96] (the functioning of the « EBDS » is further elaborated in

87 DSA, Article 4.
88 DSA, Article 5.
89 A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021, p. 5.
90 A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021,, p. 6.
91 DSA, Article 7.
92 DSA, Article 8.
93 DSA, Article 9.
94 ECJ, 3 October 2019, *Facebook v. Eva Glawischnig-Piesczek*, C-18/18, ECLI:EU:C:2019:821, paras. 44-45.
95 DSA, Recital 34.
96 DSA, Article 10-11.

section 3.3.). Secondly, all intermediary service providers have to clearly state in their terms and conditions whether they put any restrictions in the use of their service regarding the information provided by the user[97]. Thirdly and lastly, intermediary service providers have to be transparent about their content moderation regarding illegal content. This transparency materialises through annual reporting requirements[98].

The second section provides additional rules for hosting services (including online platforms), which store information at the request of the recipient[99]. This shows the layered build-up of the DSA. Every subsequent section adds additional rules for a smaller group of intermediary service providers[100]. The second section of the third chapter of the DSA requires the providers of hosting services to establish a mechanism with which any individual or entity can notify the provider of illegal content[101]. It furthermore obliges these providers to, when these providers decide to remove or disable access to specific information of their recipients, inform these recipients of the reasons for the disabling or removing of information[102].

The third section of the third chapter of the DSA is only applicable to online platforms, which are a subcategory of hosting services[103]. This section is however not applicable to micro and small enterprises[104]. Online platforms are obliged to set up an internal complaint-handling system. This system should allow recipients whose information has been deemed illegal or liable and who have been faced with the removal or disabling of this information, to electronically and free of charge lodge a complaint against this decision[105]. Secondly, it obliges online platforms to set up an alternative dispute settlement system for their users. This can be any out-of-court dispute settlement system[106]. Thirdly, this section obliges online platforms to block users that frequently provide manifestly illegal content and to report suspicions of criminal offences relating to the safety

97 DSA, Article 12.
98 DSA, Article 13.
99 DSA, Article 2(f).
100 J. DE PREE, « Digital Services Act and Digital Markets Act: Commission flexes its muscles », *DBBW*, 17 December 2020, available at https://www.debrauw.com/articles/digital-services-act-and-digital-markets-act-commission-flexes-its-muscles.
101 DSA, Article 14.
102 DSA, Article 15.
103 DSA, Article 2(h).
104 DSA, Article 16. The definition of these enterprises is taken from the Annex to Commission Recommendation 2003/361/EC.
105 DSA, Article 17.
106 DSA, Article 18.

or life of persons, to the authorities in the relevant Member States[107]. Fourthly, this section obliges online platforms to trace professional traders on their platform and to require from them all the relevant information[108]. Fifthly, this section expands the reporting requirements based on Article 13 DSA to include reports on out-of-court disputes and suspensions from the platform[109]. Lastly, this section sets rules for online advertisement put on online platforms. The advertisement should be clearly identifiable as being an advertisement, retraceable to a natural person or entity and contain meaningful information about the used parameters to determine the recipient[110].

The fourth and final section of the third chapter of the DSA sets a number of additional requirements and higher standards that only apply to very large online platforms. Very large online platforms are those that provide their services to a number of active monthly recipients in the EU equal or greater than 45 million[111]. This section aims to avoid systemic risks posed by and on the platform[112].

Firstly, these platforms must, at least once a year, identify and analyse which systemic risks stem from the use of their platform[113]. There are three kinds of systemic risks identified:[114]

1. Dissemination of illegal content;

2. Any negative effects for the exercise of the fundamental rights to respect for private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child (this includes the use of algorithms which tend to reproduce discriminatory or biased input from human interaction);

3. Intentional manipulation of their service with an actual or foreseeable negative effect on the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security (this includes the spreading of fake news or the use of trolling accounts)[115].

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107 DSA, Article 20-21.
108 DSA, Article 22.
109 DSA, Article 23.
110 DSA, Article 24.
111 DSA, Article 25.
112 COM (2020) 825 final, p. 14.
113 DSA, Article 26.
114 DSA, Article 26(1) (a), (b), (c).
115 J. DE PREE, « Digital Services Act and Digital Markets Act: Commission flexes its muscles », *DBBW*, 17 December 2020, available at https://www.debrauw.com/articles/digital-services-act-and-digital-markets-act-commission-flexes-its-muscles.

These very large platforms have to take reasonable, proportionate and effective measures to mitigate the aforementioned systemic risks pursuant to Article 26 DSA[116].

Secondly, very large platforms are subject to an annual independent external audit, in which their compliance with Chapter III of the DSA as well as commitments based on their Code of Conduct[117] and Crisis Protocol[118] will be scrutinised[119]. Additionally, very large platforms are required to hire one or more compliance officers who monitor the compliance of the platform with the DSA[120]. The Commission and the Digital Services Coordinator can request information from these very large platforms regarding their compliance with the DSA requirements[121] (the tasks and role of the Digital Services Coordinator are further elaborated in section 3.3.).

Thirdly, very large platforms have to fulfil additional requirements regarding transparency in advertising and data collection. They are required to be transparent regarding the parameters that are used in their recommender systems (if relevant)[122]. Furthermore, they must create a repository with certain information regarding their projected online advertisements. This is an additional requirement based on Article 24 DSA. Fourthly and lastly, very large platforms have the obligation to release reports referred to in Article 13 DSA every six months. Additionally, they have to annually release a report which includes the risk assessment based on Article 26 DSA, the measures taken to mitigate these risks based on Article 27 DSA and the audit report based on Article 28 DSA[123]. Thereby, the risk assessment and mitigation obligations put on very large online platforms are far-reaching[124].

Section five of the third chapter of the DSA allows the Commission to standardise reporting requirement and draw up Code of Conducts and Crisis Protocols[125].

116 DSA, Article 27.
117 DSA, Articles 35-36.
118 DSA, Article 37.
119 DSA, Article 28.
120 DSA, Article 32.
121 DSA, Article 31.
122 DSA, Article 29.
123 DSA, Article 33.
124 P. VAN CLEYNENBREUGEL, « The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules? », *Maastricht Journal of European and Comparative Law*, vol. 20(1), 2021, p. 8.
125 Respectively DSA, Articles 34-37.

§ 3. The fourth chapter: on implementation, cooperation, sanctions, and enforcement

The first article of chapter 4 requires Member States to designate the competent authorities who are to be in charge of the application and enforcement of the DSA[126]. One of these competent authorities will be deemed the Digital Services Coordinator (« DSC »)[127]. The appointment of a national supervisory body is new compared to the ECD, however it is in line with current practice in EU legislation[128]. The DSC will be responsible for the coordination on a national level and for the effective and consistent application and enforcement of the DSA throughout the Union. This is an important task, given that the Commission may enforce the DSA on its own vis-à-vis very large online platforms[129]. Thus, in order to achieve this consistent application, national DSC's will cooperate and coordinate their tasks with the Commission and the Board[130]. Article 39 DSA sets the requirements for the DSC.

The DSA confers the following powers to DSC's:

- To request information about possible infringements;
- To perform on-site inspections at the relevant premises of the provider;
- To ask questions to relevant persons involved where the alleged infringement took place[131].

Article 41(2) and (3) DSA provides additional powers if necessary. Article 41 DSA closes off with procedural rules for DSC's.

Based on Article 43 DSA, every recipient of a service provided by an intermediary service, has the right to lodge a complaint with the competent DSC alleging an infringement of DSA provisions. If the recipient lodges a complaint with the wrong DSC, the DSC has to make sure the complaint lands with the competent DSC. This cross-border co-operation of DSC's is further elaborated under Article 45 DSA. This provision allows for cross-border co-operation between DSC's when a DSC of one Member

126 DSA, Article 38(1).

127 DSA, Article 38(2).

128 A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021, p. 12. See for example: Regulation 2016/679/EU (GDPR), Article 51. For a more general discussion on the « Europeanisation » of EU law enforcement, see: M. Scholten, « Mind the trend! Enforcement of EU law has been moving to "Brussels" », *Journal of European Public Policy*, vol. 24(09), 2017, pp. 1348-1366.

129 DSA, Article 51.

130 DSA, Article 38.

131 DSA, Article 41.

State suspects an intermediary service provider in another Member State of infringing the DSA. To this end, Article 45 DSA contains detailed procedural and substantive requirements in case of cross-border co-operation. When intermediary service providers are active in multiple Member States, DSC's can jointly work together or ask the Commission for intervention.

Article 40 DSA deals with the jurisdiction of Member States. It decides that the Member State in which the provider has its main establishment has jurisdiction[132]. If the provider has no establishment within the territory of the Union, the Member State in which the legal representative resides shall have jurisdiction[133]. If no legal representative is assigned, all Member States will have jurisdiction[134]. The fourth chapter of the DSA also obliges Member States to put penalties on infringements by providers. These penalties have to be effective, proportionate and dissuasive as per ECJ case law and cannot exceed the threshold of 6 % of the annual turnover of a provider[135].

The second section of chapter four of the DSA establishes the European Board for Digital Services, whose main purpose is to advise the Commission and relevant DSC's regarding the consistent application of the DSA and analyses made by the DSC's or the Commission[136]. It is furthermore responsible for the provision of assistance to the Commission in its supervision of the very large platforms[137]. Articles 47, 48 and 49 DSA lay down the setup of the Board, the structure and its tasks. The Board consists of a DSC from every Member State and votes by simple majority[138]. Every DSC has one vote[139]. The Board is chaired by the Commission[140]. Article 49 DSA sets out the tasks of the Board, which it can use to fulfil the objectives set out in Article 47(2) DSA. These tasks include the support of the coordination of joint investigations,[141] the setting up of opinions and recommendations for the DSC's or the Commission[142] and advising the Commission to take measures according to Article 51 DSA[143]. DSC's and other national competent authorities have to provide reasoned

132 DSA, Article 40(1).
133 DSA, Article 40(2).
134 DSA, Article 40(3).
135 DSA, Article 42.
136 DSA, Article 47(2) (a) and (b).
137 DSA, Article 47(2) (c).
138 DSA, Article 48(1) and (3).
139 DSA, Article 48(2).
140 DSA, Article 48(4).
141 DSA, Article 49(1) (a).
142 DSA, Article 49(1) (c) and (d).
143 DSA, Article 49(1) (d).

opinions for not following the opinions, recommendations or advises of the Board[144].

The third section of chapter four of the DSA lays down the powers of the relevant authorities to enforce the DSA vis-à-vis very large platforms. Article 50 DSA allows for the DSC's to carry out an enhanced supervision where it is suspected that a very large online platform has infringed the DSA. This enhanced supervision can also be requested by either the Commission or the Board. The enhanced supervision means that the very large platform in question needs to send in an action plan on how to remedy the infringement. It is for the DSC, based on an opinion from the Board and the Commission, to decide whether or not the action plan suffices to remedy the infringement.

Pursuant to Article 51 DSA, the Commission can intervene and start proceedings in case of a suspected infringement of the DSA. The intervention is allowed when the relevant DSC has not taken any action or has requested the Commission to take action regarding the concerned very large platform. The Commission has been assigned certain powers to successfully fulfil its proceedings. These powers are:

- to request information;[145]
- to take interviews and statements;[146]
- to conduct on-site inspections;[147]
- the taking of interim measures;[148]
- to accept commitments offered by the very large platforms in question;[149]
- the monitoring of very large platforms to ensure conformity with the Regulation[150].

The Commission can take three decisions based on these proceedings. Firstly, it can decide to take a decision of non-compliance when a very large platform does not adhere to the relevant provisions of the DSA, the interim measures ordered under Article 55 DSA or the commitments offered by it under Article 56 DSA[151]. Secondly, the Commission can decide to give a fine to the very large platform infringing the DSA, interim measures or commitments given, reaching a maximum of 6 % of

144 DSA, Article 49(2).
145 DSA, Article 52.
146 DSA, Article 53.
147 DSA, Article 54.
148 DSA, Article 55.
149 DSA, Article 56.
150 DSA, Article 57.
151 DSA, Article 58.

its annual turnover[152]. Thirdly, the Commission can decide, under certain circumstances, to order periodic penalty payments of a maximum of 5 % of the average daily turnover of the platform[153].

Both the powers of the Commission under Articles 59 and 60 DSA and the enforcement of these Articles are subject to a limitation period of five years[154]. Based on Article 63 DSA, very large platforms have the right to request access to the files and can request to be heard before the Commission takes a decision based on Articles 58(1), 59 and 60 DSA. Subsequently, the decisions taken by the Commission will have to be published[155]. In the case of exhaustion of Commission powers to no avail, the Commission can request the DSC to make use of its powers under Article 41(3) DSA to request an action plan or to ask the competent judicial authority to restrict (access to) the platform. The Commission can provide written observations to the competent judicial authority[156].

The fourth section of chapter four of the DSA considers some common enforcement provisions. It first establishes rules for a system in which information can easily be exchanged between the DSC's, the Board, and the Commission[157]. Secondly, it establishes the right for recipients of intermediary services to appoint a body to represent them to defend their rights based on Articles 17, 18, and 19 DSA[158].

Section 4. In conclusion: How do the ECD and DSA interact?

Instead of fully doing away with the ECD regime, the DSA builds on its 21-year-old cousin. However, the DSA will be a Regulation instead of a Directive like the ECD and will therefore go further in the (regulatory) unification of digital services legislation[159]. The first two pillars of the ECD will stay in force, as will the fourth pillar. On the other hand, the DSA almost *verbatim* incorporates the former third pillar of the ECD (Articles 12 to 15 ECD).

152 DSA, Article 59.
153 DSA, Article 60.
154 DSA, Articles 61 and 62.
155 DSA, Article 64.
156 DSA, Article 65.
157 DSA, Article 67.
158 DSA, Article 68.
159 Cf. A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021, p. 4.

By doing so, the DSA still shields ISS providers from liability for illegal content posted on their services by third parties as long as they do not have knowledge of it. However, intermediary service providers, hosts, online platforms and very large platforms get a lot more responsibilities in the way they manage their services[160]. This can be seen as an implementation of the duty of care that the ECJ has set out for intermediary service providers when it comes to illegal content[161]. This responsibility does not regard or define the meaning of illegal content, but sets rules for the way providers are tracking and monitoring the content[162] on their services. These obligations increase in severity depending on the size of the provider and are aimed at making these providers more transparent and stop the spread of misinformation. Therefore, hosting service providers and (very large) online platforms to some extent have to operate as quasi law enforcement authorities[163].

The fourth pillar of the ECD is expanded in the DSA by the establishment of a DSC in every Member State. Furthermore, it requires the providers of intermediary services to set up contact points for both their users, the Commission, and the Board of Digital Service Coordinators. Whereas the fourth pillar of the ECD remained rather stuck in vague coordination measures between the EU Members States and the Commission, the DSA pursues a fully-fledged EU-wide communication and cooperation system.

It will be interesting to see how the DSA eventually emerges from the EU legislative process. It looks like the DSA will contain enough novelty, especially in its procedural parts, to yield a truly new set of rules,[164] but it will always be indebted to the original principles and ideas enshrined in the ECD.

160 P. VAN CLEYNENBREUGEL, « The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules? », *Maastricht Journal of European and Comparative Law*, vol. 20(01), 2021, p. 9.

161 ECJ, 12 July 2011, *L'Oréal v. eBay*, C-324/09, ECLI:EU:C:2011:474, par. 124.

162 DSA, Article 2(g) upholds a broad definition of « illegal content », stipulating that it can be any information that is contrary to Member State or European Union law.

163 P. VAN CLEYNENBREUGEL, « The Commission's digital services and markets act proposals: First step towards tougher and more directly enforced EU rules? », *Maastricht Journal of European and Comparative Law*, vol. 20 (01), 2021, p. 9.

164 A. SAVIN, « The EU Digital Services Act: Towards a More Responsible Internet », *Copenhagen Business School Law Research Paper*, vol. 21(04), 2021, p. 16.