THE IMPLICATIONS AND PREDICTED IMPACT OF THE DIGITAL SERVICES ACT IN ROMANIA

Ana-Maria CORUGĂ*
Cristiana CHELU-PRODESCU**

Abstract

Increased transparency in the online environment is a theme that runs throughout the Digital Services Act, circumstance which has led to the writing of this paper, intended to be an overview of this "old but new" and comprehensive set of rules, with the authors' personal notes. Building on the premise that the responsible and diligent behaviour of intermediary services is essential for a safe, predictable and trustworthy online environment, the Digital Services Act harmonizes, by means of a directly applicable legal act, the provision of information society services in the form of intermediary services, by preserving, in principle, the main rules regulating the (exemption from) liability of the intermediary services providers, while also regulating an extensive set of due-diligence and transparency obligations for the later. Such harmonization is desirable bearing in mind that online platforms are part of the macro-system that determines future innovations and consumer choice. To what extent the DSA will succeed in doing its part in transforming digital space into a safer one, where the fundamental rights of users (and especially of consumers) are protected, remains to be seen. Meanwhile, the authors are nevertheless assured that the impact will be significant, especially on the topics consciously chosen to be addressed hereafter.

Keywords: *digital services act, intermediary services, marketplace, digitalization, transparency, consumer protection, neutrality test, good Samaritan protection, online platforms.*

1. Introduction

27 October 2022 marks the day when the long-awaited Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC[1] (hereinafter referred to as "Digital *Services Act"* or "*DSA"*) has been published in the Official Journal of the European Union.

DSA has entered into force on the twentieth day following that of its publication and shall become directly applicable into the national legislation of the Member States, including in Romania, starting with 17 February 2024. Specific provisions of DSA, as expressly indicated, are nevertheless applicable since 16 November 2022.

DSA modifies Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of

* Attorney at Law, Bucharest Bar Association; Co-Founder of Corugă & Prodescu Law Firm; LLM in Criminal Law, Faculty of Law, University of Bucharest (e-mail: anamaria.coruga@corugaprodescu.ro).
** Attorney at Law, Bucharest Bar Association; Co-Founder of Corugă & Prodescu Law Firm; LLM in Labour, Employment and Industrial Relations Law, Faculty of Law, University of Bucharest (e-mail: cristiana.prodescu@corugaprodescu.ro).
[1] 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).

information society services, in particular electronic commerce, in the Internal Market (hereinafter referred to as the "*e-Commerce Directive*"), by eliminating Articles 12 – 15 of the normative act.

However, the principles under which the intermediary service providers could be held responsible for the content provided through acts of '*mere conduit'*, '*caching'* or '*hosting'*, as previously regulated through Article 12 – 15 of the e-Commerce Directive, are not forgotten. The main rules governing the liability of intermediary services are incorporated into the DSA legal framework, thus seeking to preserve the intermediary liability framework of the e-Commerce Directive, but also to clarify certain elements, by considering the case law of the Court of Justice of the European Union (hereinafter referred to as "*CJEU*").

The necessity of a new legal framework aiming at regulating, through a directly applicable normative act, the liability of the intermediary services, arose from at least two perspectives. On the one side, the transposition of the e-Commerce Directive in the Member States left room for divergences in both the law-making and the application of the legislation at the national level. On the other side, clarity and coherence in regulation were required, especially having regard to the case-law built by the European Union's (hereinafter referred to as "*EU*") Court of Justice under the provisions of Articles 12 – 15 of the e-Commerce Directive[2].

This paper aims at presenting, while also opening the floor for further debates on, the conditions under which the providers of online platforms allowing consumers to conclude distance contract with traders may be held liable toward the consumers for the content stored within the online platform, at the request of the trader, as a recipient of the service.

The legal regime of the responsibility the providers of online platforms allowing consumers to conclude distance contract with traders have toward the consumers, is a subject of utmost importance in a context where intermediary services in e-commerce sector, as a sub-category of information society services, have become a part of the daily life of citizens in EU.

The focus of this paper however is to identify and excite the appetite for further discussions in relation to the main challenges the DSA, as directly applicable in the national legislation in Romania, may pose in the context of its implementation and enforcement, considering its proclaimed complementarity with the existing consumer protection legislation in force, both at the EU and national level.

As acknowledged in the DSA Explanatory Memorandum, the rules set out in the normative act *will be complementary to the consumer protections acquis and specifically with regard to Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU which established specific rules to increase*

[2] Preamble (16) of DSA specifically states in the sense that "*(T)he legal certainty provided by the horizontal framework of conditional exemptions from liability of providers of intermediary services, laid down in Directive 2000/31/EC, has allowed many novel services to emerge and scale up across the internal market. The framework should therefore be preserved. However, in view of the divergences when transposing and applying the relevant rules at national level, and for reasons of clarity and coherence, that framework should be incorporated in this Regulation. It is also necessary to clarify certain elements of that framework, having regard to the case-law of the Court of Justice of the European Union*".

transparency as to certain features offered by certain information society services[3].

In addition, Article 2 paragraph 4 of the DSA specifically states that the DSA is without prejudice to the rules laid down by EU law on consumer protection and products safety.

With a desire to ensure full consistency with the existing EU policies, the DSA is construed based on a horizontal approach in relation to a series of existing EU legislative instruments that the first would leave unaffected and with which it would be consistent[4].

Based on the consistency purpose, the direct applicability of the DSA into the national legislation in Romania would inherently involve the necessity of identifying the corresponding mechanisms and solutions as to ensure the implementation of the DSA requirements in the context of the existing legislative framework (including in the field of consumer protection).

While the core legislative framework in the field of consumer protection at the national level resides in normative acts that transpose the EU pieces of legislation, it is important to bear in mind that the central legislative act that governs the business-to-consumers relationships subject to the national legislation in Romania, at the moment when this piece of paper is made available, resides in Government Ordinance no. 21/1992 on consumers protection, as republished (”*GO no. 21/1992”*).

2. Liability of online platforms allowing consumers to conclude distance contracts with traders under the DSA Regulation

2.1. Territorial scope of the Digital Services Act.

As specifically stated, the DSA is intended to apply to intermediary services offered to recipients of the service that have their place of establishment or are located in the EU, irrespective of where the providers of these intermediary services have their place of establishment.

Under the DSA, the *recipient of the service* shall designate *any natural or legal person who uses an intermediary service, in particular for the purpose of seeking information of making it accessible.* As indicated through the Preamble to the DSA, the recipients of the service shall encompass business users, consumers and other users.

Thus, the DSA chooses one interesting solution in establishing its territorial scope, by reference to the place of establishment or location of the recipients of the intermediary services providers, regardless of the place of establishment of the intermediary services provider.

2.2. Material scope of Digital Services Act. Status qualification of online platforms allowing consumers to conclude distance contracts with traders.

The DSA shall govern the provisions of intermediary services consisting in one of the following information society services:

[3] 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 (European Commission, December 2020), p6 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0825&from=en.

[4] Caroline Cauffman, Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection*, https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1.

"mere conduit", "caching" and *"hosting"* services.

The *hosting* service shall designate the activity of the intermediary service provider which ensures the storage of information provided by, and at the request of, a recipient of the service.

Furthermore, within the broader category of providers of hosting services, the DSA specifically sub-categorizes the online platforms allowing consumers to conclude distance contracts with traders (simply put, business-to-consumer ("*B2C*") online marketplaces), as providers of *hosting* services, since those platforms not only store information provided by the recipients of the service at request, but also disseminate that information to the public upon request of the recipients of the service.

Thus, the B2C online marketplaces shall observe a set of extended requirements, considering the layered regulatory model governing their legal regime under the DSA. Specific obligations imposed to online platforms, in general, and to online platforms allowing consumers to conclude distance contract with traders, in particular, are built on the general requirements set forth for the hosting services providers to observe.

In order to avoid disproportionate burdens however, providers that are micro or small enterprises, as defined in Commission Recommendation 2003/361/EC[5], are exempted from various requirements regulated by DSA while large and very large online platforms are subject to specific additional obligations, as to ensure the management of systemic risks.

2.3. Between the principle of neutrality and extended due-diligence obligations imposed through DSA.

The uninterrupted growth of the early Internet has been built on a set of regulatory assumptions. Unnecessary regulation should be avoided, the e-commerce should be promoted, and the intermediaries should be given a neutrality status from a liability regime standpoint[6].

2.3.1. To be or not to be liable, as a hosting service provider.

In the context of the legal regime established through the provisions of the DSA for hosting services providers, including B2C online marketplaces, it is worth mentioning that the EU legislation only aims at covering the exemption criteria under which the hosting services provider would not incur liability. Situations in which a hosting services provider may be held liable however are to be subject to other EU or national laws[7].

As expressly stated through the preamble to the DSA, the rules that frame the liability regime of the hosting services providers are not meant to provide *a positive basis* for establishing when a provider can be held liable, and only to determine the exemptions under which the service provider cannot be held liable in relation to

[5] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

[6] Andrej Savin, *The EU Digital Services Act: Towards a More Responsible Internet (Copenhagen Business School Law),* https://research.cbs.dk/en/publications/the-eu-digital-services-act-towards-a-more-responsible-internet.

[7] Caroline Cauffman, Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection*, https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1.

illegal content provided by the recipients of the service.

It should be noted that **the DSA does not harmonize what content or behavior counts as illegal. Thus, the qualification and interpretation of the "illegal content" remains under the sovereignty of Member States.**

2.3.2. Neutrality of the hosting service provider.

The situations under which the hosting service provider is exempted from liability are expressly provided in Article 6 of the DSA, namely:

(i) the provider does not have actual knowledge of illegal activity or illegal content, or

(ii) upon obtaining such knowledge or awareness, the provider acts expeditiously to remove or to disable access to the illegal content.

The exemptions, however, do not apply in cases where the recipient of the service is acting under the authority or the control of the provider.

To put it simple, in order for the liability exemption to be applicable, the behavior of the hosting services provider shall pass the neutrality test. This is not a novelty brought by the DSA, since the issue has been extensively analyzed by the CJEU under the e-Commerce Directive.

In its case-law, CJEU formulated the core criterion to be fulfilled by the hosting services providers in order to pass the neutrality test. Thus, the hosting service provider may rely on the exemption from liability provided by the EU law if they took a neutral position in relation to their users'[8] content, which would involve that no active role is played as to confer them knowledge of or control over that content[9].

As CJEU has stated:

(i) the mere fact that the operator of an online marketplace store offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability[10];

(ii) the exemption applies in the case where the service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored; the service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned[11].

The principles established by the CJEU case law have been now codified in Recital 17 and Recital 18 of the DSA. The DSA follows, in particular, the CJEU's ruling in L'Oréal v. eBay. The clarifications provided in L'Oréal v. eBay (para. 115-116) are that storing offers for sale, setting the terms of service, being remunerated for the service and providing general information to users do not make a hosting service provider "*too active*". The ruling also clarifies that

[8] Given the wording of the relevant provisions, online platforms may need to take into account users beyond just those registered with accounts (where relevant).

[9] Folkert Wilman, *The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law,* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), https://verfassungsblog.de/dsa-preservation-clarification/.

[10] C-324/09 L'Oréal SA and Others v eBay International AG and Others ECLI:EU:C: 2011:474.

[11] Joined Cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), EU:C:2010:159.

this would be different, however, where a provider optimizes the presentation of the offers for sale or promotes those offers.

The national courts in Romania have followed in turn the rationale expressed by CJEU and also stated in the favor of the neutrality principle by not holding liable those intermediary services providers that did not remove *ex officio* the alleged illicit content, without a specific request to be submitted in this respect, as to ground that the intermediary services provider would have become aware of the illicit character of the said content[12].

Nonetheless, one should not ignore the fact that the above case law conveys that intermediary service providers (our note: predominantly hosting service providers) can play an active role to some extent, provided such role is not likely to give them knowledge of or control over the content that they share or store for their users.

2.3.3. Good Samaritan Exemption.

As opposed to the applicable legal regime in the United States[13], in the EU, the e-Commerce Directive did not explicitly protect internet intermediaries involved in good faith measures against illegal or inappropriate content.

DSA comes with an update and regulates the so-called "*Good Samaritan*" protection rule, through the provisions of Article 7, stating that voluntary own-initiative investigations or other measures taken by the providers of intermediary services, aiming at detecting, identifying and removing, or disabling access to, illegal content, or simply measures that are necessary as to comply with requirements of EU law and national law in compliance with EU law, shall not preclude the exemptions from liability regulated by the DSA in relation to hosting services providers[14].

It is important to underline that the "*Good Samaritan"* protection is dependent on the intermediary service provider acting in good faith and in a diligent manner.

Considering the wording of Article 7 of the DSA and the provisions of Recital 26[15], it has been underlined that the principle of good faith and diligence are meant to strike a balance between the interests of the intermediary services provider and the fundamental rights of internet service users[16].

At least in theory, the codification of the "*Good Samaritan*" protection rule through the DSA seems to be welcomed by the stakeholders, since it appears as a firm confirmation of the recent judgment delivered by the CJEU in the *YouTube*

[12] First Civil Division of High Court of Cassation and Justice, Decision no. 338/2021; Ploiesti Court of First Instance, Civil Division, Decision no. 2082/2021.

[13] For a very insightful contextual presentation of the relevant legal provisions in the United States that ground an exemption from liability for internet intermediaries in relation to any voluntary actions taken in good faith against certain types of objectionable content, see Aleksandra Kuczerawy, *The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act*, https://verfassungsblog.de/good-samaritan-dsa/.

[14] To be borne in mind however that the so-called "*Good Samaritan*" protection rule is regulated as to apply for all the information society services covered by the DSA (*mere conduit, caching* and *hosting*).

[15] Recital 26 specifically states in the sense that "*(…) The condition of acting in good faith and in a diligent manner should include acting in an objective, non-discriminatory and proportionate manner, with due regard to the rights and legitimate interests of all parties involved and providing the necessary safeguards against unjustified removal of legal content, (…).*"

[16] Jacob van de Kerkhof, *Good Faith in Article 6 Digital Services Act (Good Samaritan Exemption* (The Digital Constitutionalist, 15 February 2023), https://digi-con.org/good-faith-in-article-6-digital-services-act-good-samaritan-exemption/?utm_source=rss&utm_medium=rss&utm_campaign=good-faith-in-article-6-digital-services-act-good-samaritan-exemption.

case[17], whereby the CJEU specifically expressed itself in the sense that if an intermediary undertakes technological measures aimed at detecting content which may infringe the applicable legal requirements in force (the case under discussion was expressly referring to infringement of copyrights) does not mean, by itself, that said operator plays an active role, giving it knowledge of and control over the content uploaded by a service recipient.

Going further, it is worth mentioning that the final thesis of Article 7 of the DSA, when specifically stating that the liability exemption provided for intermediaries remains applicable also in cases where the intermediaries take the necessary measures to comply with the requirements of the EU law or national law, including the requirements established by the DSA, should not be undermined under a potential "stating the obvious" rationale.

As it has been pointed out, the final thesis of Article 7 of the DSA, regulating the "*Good Samaritan*" protection rule, may prove to be an opportune regulatory inventive for those who would need to be reassured that compliance with the extensive due-diligence obligations will not lead, by itself, to failing the neutrality test and thus, becoming "*too active*"[18].

2.3.4. The specific case of hybrid marketplaces

It has been statistically shown that consumers are increasingly buying goods online and the e-commerce marketplace is inherently growing, thus including more and more examples of hybrid marketplaces also[19].

The DSA covers, in terms of liability, the specific situation of online hybrid marketplaces, by expressly stating that platform that allow consumers to conclude distance contracts with traders are not exempted from liability provided by Article 6 of the DSA where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the products or services that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control[20].

The specific case of hybrid marketplaces' liability has been subject to a very recent judgment of the CJEU. While the judgment has been rendered following the adoption of the DSA, with the joined cased being however submitted with CJEU before the moment of the DSA adoption, the rationale of the Court of Justice follows and are mirrored into the regulatory mechanism chosen by the DSA.

The judgment of the CJEU highlights a set of essential criteria to be considered when analyzing whether a hybrid marketplace may fall under the scenario provided for through Article 6 paragraph 3 of the DSA, scenario that impedes the application of the liability exemption regulated through Article 6 paragraph 1 of the Digital Services Act.

---

[17] Joined Cases C-682/18 and C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18) and Elsevier Inc. v. Cyando AG (C-683/18), EU:C:2021:503.

[18] Folkert Wilman, *The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law,* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), https://verfassungsblog.de/dsa-preservation-clarification/.

[19] European E-commerce Report 2022, https://ecommerce-europe.eu/wp-content/uploads/2022/06/CMI2022_FullVersion_LIGHT_v2.pdf.

[20] Article 6 paragraph 3 of the DSA.

CJEU points out that, when establishing if a hybrid online market place leaves room for confusion among consumers in relation to the identity and/or characteristics of the trader providing the products and/or services made available on the online marketplace, the following are relevant: the marketplace using a uniform method of presenting the offers published on its website, displaying both the advertisements relating to the good sold by the marketplace in its own name and on its own behalf and those relating to good offered by third-party sellers on that marketplace, the fact that the marketplace offers third-party sellers, in connection with the marketing of goods bearing the sign at issue, additional services consisting inter alia in the storing and shipping of those goods[21].

The criteria provided by CJEU are to be, of course, analyzed and applied on a case-by-case basis.

Under the national legislation, however, various challenges may be predicted in relation to the application of Article 6 paragraph 3 of the DSA. One of the many challenges would reside in the interpretation conferred to the *average consumer*, especially considering the lack of any express definition or specific criteria provided by the national legislation in this respect, on the one hand, and the restrictive approach endorsed by the national authorities in the field.

2.3.5. Extended due-diligence obligations under the DSA.

The B2C online marketplaces would be bound to observe an extensive set of due-diligence requirements under the DSA, including (without being limited to) transparency and reporting obligations, compliance-by-design requirements, especially in relation to a general prohibition of using dark patterns, traceability obligations in relation to traders, as recipients of the intermediary services provided by the B2C online marketplace.

Especially in the field of the extended due-diligence obligations set forth in the DSA for online platforms, the implementation and enforcement of the legal requirements at the national level in each Member State, including in Romania, is clearly highly dependent on the way the designated national authorities will understand to use their enforcement powers[22].

One of the main challenges we anticipate that the B2C online marketplaces will confront at the national level, in Romania, resides in the manner in which the priority of the specialized norms regulated through the DSA, as a directly applicable legal act, would be recognized and endorsed within the practice of the competent national authorities in the field of consumers protection.

This prediction follows a long standing practice of the competent national authorities revealing an obvious reluctance in giving full effect to the specialization requirement when comes to the general –

[21] Joined Cases C-148/21 and C-184/21, Christian Louboutin v. Amazon Europe Sarl (C-148/21), Amazon EU Sarl (C-148/21), Amazon Services Europe Sarl (C-148/21), Amazon.com Inc (C-184/21), Amazon Services LLC (C-184/21), EU:C:2022:1016.

[22] For a strong point of view on the codependency between the DSA's success and its enforcement within the Member States, along with a parallel with GDPR (weak) enforcement over the past several years, please see, Julian Jaursch, *Platform Oversight. Here is what a Strong Digital Services Coordinator Should Look Like* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), https://www.stiftung-nv.de/en/publication/platform-oversight-what-strong-digital-services-coordinator-should-look.

special law relationship and thus, getting to enforce the specialized norms (even in case of harmonized specialized norms at the European Union level) in light of the general legal provisions applicable in the field of consumers protection in Romania, mainly codified through Government GO no. 21/1992 on consumers protection, as republished.

A strong point of reference in the DSA enforcement should reside however in the practice that the European Commission is expected to crystallize within the market. Thus, the monitoring and enforcement actions that will be conducted by the European Commission in relation to the online platforms are reasonably expected to constitute, for the national legislators, enforcement bodies and courts of law, the main landmark of good practice when talking about monitoring the activity and behavior of an online platform[23].

Moreover, in order for the Member States to provide the necessary support and reaction as to ensure that the harmonization goal of the DSA is properly achieved, the national legislators, enforcement bodies and even the courts of law should be opened to make use of the instruments offered by the EU, in this case, especially of those instruments designed to gather and analyze data on online platforms' activity and general behavior, data which would be further translated in feedback to be considered and recommendations and guidelines to be followed under the main scope of improving the online environment and make it safer for both the business users and consumers[24].

3. Conclusion

The DSA is a shield of legal liability that aims to incentivize companies to be more proactive and legally assertive when moderating the content on their online platform. DSA will apply across online marketplaces, social networks, app stores, travel and accommodation platforms, and many others.

On one note, as an EU Regulation, the DSA's provisions are directly applicable in every Member State and enforcement will be split between national regulators and the European Commission, whilst interested parties will be having access to dispute resolution mechanisms in their own country, where the implementation and enforcement modalities of the DSA are effectively judicially clarified.

On another note, clarifications on the intermediary liability regime and service providers' active role tend to build on existing CJEU case law and will, undoubtedly, along the way generate new case law. DSA's rules on matters as due

[23] It is worth mentioning that, at the date when this research paper is written, the European Commission has already launched its proposal on a Commission Implementing Regulation on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to the Regulation (EU) 2022/2065 of the European Parliament and of the Council ("Digital Services Act"). For consulting the current form of the proposal, along with detailed information on the legislative procedure status and future outcomes, please see: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13565-Digital-Services-Act-implementing-regulation_en.

[24] A very useful and somehow underrated instrument resides in the *Observatory on the Online Platform Economy*, which monitors the evolution of the online platform economy to advise and support the Commission in its policy making in relation to online platforms. The Observatory aims to contribute to an environment of fair and trusted cooperation between business users and online platforms. However, the outcome delivered to the consumers is also under the scrutiny of the Observatory. An interesting piece of paper delivered by the Observatory, along other expert groups, which includes some good remarks on the dark patterns and their incidence in the online platform, with negative effects on the consumers, may be consulted here: https://op.europa.eu/en/publication-detail/-/publication/ee55e580-ac80-11eb-9767-01aa75ed71a1/language-en/format-PDF/source-206332284.

diligence and risk assessments signal without question a different approach adopted by the European legislator in terms of liability-related matters.

Besides, a legal foresight might materialize – more precisely, the concept of "intermediary service provider" may well change by virtue in view of the differing contextualization under the DSA umbrella – whereas under the e-Commerce Directive the liability exemption was rather the common rule.

Furthermore, what emerges from the foregoing study is that a major importance in the application of DSA's Article 6 is the "*diligent economic operator test*" applied by the CJEU in the past, which should also be considered going forward in distinguishing active intermediaries from passive ones. This test resembles the reasonable person test stemming from tort law, which essentially asks what a reasonable person of ordinary prudence would have done under the same or similar circumstances.

As such matter is left to domestic courts to decide under their applicable common civil law, divergent interpretations and applications of the test will not be inevitable. The highest risk in practice will consist in having a uniform understanding of the term "diligence" which will consequently, most likely, lead to fragmented applications across the EU - until the CJEU perhaps will further clarify this notion and will clearly set up the "*standard of care*" viewed under Article 6 of the DSA.

Nevertheless, it should be underlined that Article 6 does not protect intermediaries against the fact that voluntary actions could lead intermediaries to have "actual knowledge" of illegal content. Hence, the provision protects an intermediary only from being considered "active" solely based on actions taken to remove illegal content voluntarily. The "Good Samaritan" clause on the other hand, illustrates the difficulties of trying to hold on to the legal distinction between passive and active service providers in the moderated online world. This aspect will be left, in any case, firstly, to the assessment of the consumer protection bodies and, secondly, to the assessment of the national courts that would settle disputes arising in this legislative context.

It may be particularly difficult to prove in court when and if we are discussing "actual knowledge" of illegal content on the platform in certain situations where online platforms are highly automated - for example, it remains to be seen how the situation will be judicially assessed when discussing the fact that online platforms are largely AI-moderated using algorithms designed to identify, filter and eliminate certain "risks", even if it could be proven that the algorithms were set in a very diligent way[25].

DSA is still novel, so new but old legal issues will arise, and it will be worth observing how will DSA adapt also in the context of national law.

It is therefore of paramount importance to point out that private individual remedies, such as claims for damages, injunctive reliefs or preliminary injunctions, do not follow the obligations set out in the DSA. Injured parties will continue to rely on national civil (tort or contractual) law provisions when claiming damages, which is not favored by the exemption from liability.

Certainly, many questions of a procedural nature will also emerge when it

[25] Miriam C. Buiten, Alexandre De Streel and Martin Peitz, *Rethinking Liability Rules for Online Hosting Platforms Rethinking Liability Rules for Online Hosting Platforms,* (2019) 27 International Journal of Law and Information Technology (IJLIT) 139.

comes to litigation arising out of the infringements underpinning DSA. One may think for instance of the situation of preliminary injunctions against intermediaries - who in certain circumstances should be considered as the persons who have standing and an interest in being ordered to temporarily remove certain online content or to take other temporary measures (i.e., they may be treated as accountable), although this would not mean that they should also be liable for damages on the merits (i.e., they may be treated as not liable).

The DSA is yet another tangible proof of the fact that the legislation regulating digital technologies is emerging gradually and is likely to produce a major impact on the way we have been applying and interpreting the legislation so far. All actors thus involved in the practical implementation or enforcement of the DSA, need to equip themselves with a new mindset that must be compatible both with the technological progress perceptible day by day, as well as with the rule-making requirements for providing effective protection to services users and beyond.

References

- Aleksandra Kuczerawy, *The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act*, available at https://verfassungsblog.de/good-samaritan-dsa/, 2021;
- Andrej Savin, *The EU Digital Services Act: Towards a More Responsible Internet* (Copenhagen Business School Law), available at https://research.cbs.dk/en/publications/the-eu-digital-services-act-towards-a-more-responsible-internet, 2021;
- Caroline Cauffman, Catalina Goanta, *A New Order: The Digital Services Act and Consumer Protection*, available at https://www.cambridge.org/core/journals/european-journal-of-risk-regulation/article/new-order-the-digital-services-act-and-consumer-protection/8E34BA8A209C61C42A1E7ADB6BB904B1, 2021;
- Case C-324/09 L'Oréal SA and Others v eBay International AG and Others ECLI:EU:C: 2011:474;
- Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises, 2003;
- Decision no. 338/2021 rendered by First Civil Division of High Court of Cassation and Justice in Romania;
- Decision no. 2082/2021 rendered by Ploiesti (Romania) Court of First Instance, Civil Division;
- 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;
- 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;
- European E-commerce Report 2022, available at https://ecommerce-europe.eu/wp-content/uploads/2022/06/CMI2022_FullVersion_LIGHT_v2.pdf;
- Folkert Wilman, *The Evolution of the DSA's Liability Rules in Light of the CJEU's Case Law*, (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), available at https://verfassungsblog.de/dsa-preservation-clarification/, 2022;
- Jacob van de Kerkhof, *Good Faith in Article 6 Digital Services Act (Good Samaritan Exemption* (The Digital Constitutionalist, 15 February 2023), available at https://digi-con.org/good-faith-in-article-6-digital-services-act-good-samaritan-

exemption/?utm_source=rss&utm_medium=rss&utm_campaign=good-faith-in-article-6-digital-services-act-good-samaritan-exemption, 2023;

- Joined Cases C-682/18 and C-683/18, Frank Peterson v. Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18) and Elsevier Inc. v. Cyando AG (C-683/18), EU:C:2021:503;
- Joined Cases C-236/08 to C-238/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), EU:C:2010:159;
- Joined Cases C-148/21 and C-184/21, Christian Louboutin v. Amazon Europe Sarl (C-148/21), Amazon EU Sarl (C-148/21), Amazon Services Europe Sarl (C-148/21), Amazon.com Inc (C-184/21), Amazon Services LLC (C-184/21), EU:C:2022:1016;
- Julian Jaursch, *Platform Oversight. Here is what a Strong Digital Services Coordinator Should Look Like* (Putting the DSA into Practice: Enforcement, Access to Justice, and Global Implications), available at https://www.stiftung-nv.de/en/publication/platform-oversight-what-strong-digital-services-coordinator-should-look, 2022;
- Miriam C. Buiten, Alexandre De Streel and Martin Peitz, *Rethinking Liability Rules for Online Hosting Platforms Rethinking Liability Rules for Online Hosting Platforms*, International Journal of Law and Information Technology (IJLIT), 2019;
- Regulation (EU) 2022/2065 of the European Parliament and of the Council on a Single Market for Digital Services and amending Directive 2000/31/EC.