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Summary and Overview of the EU Digital Services Act (Draft)

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Preface

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A. Introduction

In January 2021, one day after Donald Trump's supporters besieged the Capitol, the main social media platforms decided to permanently block the personal account of the then President of the United States.[1] The online platform Twitter released a communiqué stating the following: "After close review of recent Tweets from [Donald Trump's] account and the context around them […] – we have permanently suspended the account due to the risk of further incitement of violence".[2] These events in the United States have brought to light the crucial link between the digital world and the real world. It showed deeply how much of an impact social media – or at least what goes on in it – can have on the real world. Consequently, Thierry Breton, European Commissioner for the Internal Market, hastened to evoke this event by referring to it as an "online 9/11",[3] affirming that there will be "a before and an after"[4], following the attack on the US Capitol. According to him, the European Union should "set the rules of the game and organize the information space with clearly defined rights, obligations and guarantees".[5]

This is one of the aims of the draft regulation that was presented by the Commission on December 15, 2020, named the "Digital Services Act"[6] or the more commonly called "DSA". The same day, the executive body of the Union also made a proposal for a Digital Markets Act[7] whose goal it is to "ensure fair and open digital markets".[8] This momentum of the Commission reveals the aim of the institution to regulate digital services in the European Union. The Commission sends a strong signal to digital services like the "GAFA" – Google, Amazon, Facebook, and Apple – without naming them anywhere in the proposal.

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[1] *Carrie Wong*, Facebook to suspend Trump's account for two years, https://www.theguardian.com/us-news/2021/jun/04/facebook-donald-trump-oversight-board-instagram (last accessed on 01.08.2022).
[2] *Twitter*, Communiqué, Permanent suspension of @realDonaldTrump, https://blog.twitter.com/en_us/topics/company/2020/suspension (last accessed on 01.08.2022).
[3] *Breton*, Thierry Breton: «les défis numériques auxquels sont confrontées nos démocraties sont mondiaux» https://www.lefigaro.fr/vox/societe/thierry-breton-les-defis-numeriques-auxquels-sont-confrontees-nos-democraties-sont-mondiaux-20210110 (last accessed on 01.08.2022).
[4] Ibid.
[5] Ibid.
[6] *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
[7] *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.
[8] *European Commission*, Digital Markets Act: Commission welcomes political agreement on rules to ensure fair and open digital markets, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1978 (last accessed on 01.08.2022).

This new legal framework aims at protecting internet users in the European Union by tackling the spread of illegal content – namely incitement to hatred or violence, harassment, child pornography, apology for terrorism[9]. As well as aiming to stop the sale of illegal products online and limit disinformation[10]. Put briefly, the DSA wants to "make sure that what is illegal offline is illegal online" as affirmed by Margrethe Vestager, Executive Vice-President of the European Commission in charge of Europe fit for the Digital Age, and Commissioner for Competition. [11]

A regulation on this subject has been long-awaited, as the last European act on the matter dates back to 2000 with the e-Commerce directive[12] that is nowadays seen as obsolete.[13] The DSA is in itself the most considerable reform of digital services legislation that there has been in twenty years. This can be explained by the fact that since 2000, our use of digital services has increased exponentially.[14] Digital Services like social media – Facebook (now Meta), YouTube, Snapchat and more – are part of our everyday life. This was even more intensified with the pandemic, as we all noticed our dependence on these digital services for work or for school.

In early 2020, the Communication of the Commission "Shaping Europe's Digital Future"[15] called for an update for the responsibilities and obligations of providers of digital services and especially online platforms. There were also three different resolutions adopted by the

[9] *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, recital 12.
[10] Ibid., recital 68.
[11] *Vestager*, Tweet, https://twitter.com/vestager/status/1517658709052297218 (last accessed on 01.08.2022)
[12] 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 L 178, 17.7.2000.
[13] Droit des affaires – Le blog des juristes, Le Digital Services Act (DSA) au service d'une protection accrue des consommateurs face aux plateformes numériques, https://droit-des-affaires.efe.fr/2020/10/02/le-digital-services-act-dsa-au-service-dune-protection-accrue-des-consommateurs-face-aux-plateformes-numeriques/ (last accessed on 01.08.2022).
[14] *Ortiz-Ospina*, The rise of social media, https://ourworldindata.org/rise-of-social-media (last accessed on 01.08.2022). This article provides the reader with different charts which reveal that since 2004, the number of people using online platforms has increased. On top of that, the article shows a much greater use of these platforms as people spent more time on those platforms. These numbers correspond to the United States of America, but one can assume that the same phenomenon could be observed in the European Union and in the world in general.
[15] *European Commission*, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Shaping Europe's digital future, COM/2020/67 final.

European Parliament which in substance recommended that fundamental rights in the online environment are protected, as well as online anonymity wherever technically possible.[16]

Returning to the e-Commerce directive, though it is thought to be obsolete, it will not disappear completely with the creation of the Digital Services Act. In fact, many principles featured in the e-Commerce directive have also been added to the new draft regulation. For instance, this is the case for the protection of fundamental rights in the digital world.[17]

A notable difference between the e-Commerce directive and the draft regulation of the DSA is the type of act that was chosen by the Commission. Unlike the e-Commerce directive, the DSA is a draft regulation. This is of importance as a regulation does not need transformation, it is self-applicable and has a direct effect.[18] This reveals the intention of the Commission to harmonize legislation on digital services throughout the European Union.

The draft regulation is addressed to all digital services: Firstly, the new legal framework presents intermediary services as intermediary services consisting of services known as 'mere conduit', 'caching' and 'hosting' services[19]. For example, access providers. Then, hosting services are defined as online services like cloud or webhosting services which also cover online platforms. As for the online platforms, which are defined in Article 2 of the proposed regulation as platforms that "store and disseminate information to the public". The platforms allow consumers and sellers to meet. They can be online marketplaces (e.g., Amazon), app stores (e.g., Google Play or Apple Store), collaborative platforms and also social media platforms (e.g., Facebook or SnapChat). Lastly, the Commission made a distinction between online platforms and very large online platforms. Very large online platforms (hereinafter VLOPs) are platforms with "more than 45 million monthly active users".[20] Very large online

[16] *European Parliament*, European Parliament resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market, (2020/2018(INL)), *European Parliament*, European Parliament resolution of 20 October 2020 with recommendations to the Commission on a Digital Services Act: adapting commercial and civil law rules for commercial entities operating online, (2020/2019(INL)), *European Parliament*, European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed, (2020/2022(INI))

[17] See Explanatory Memorandum of the Digital Services Act

[18] See Article 288, paragraph 2 TFEU

[19] *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, Article 2 (f).

[20] Ibid, Article 25 paragraph 1.

search engines were also added as digital services in the DSA and just like the VLOPs, they must represent a user number of 10% of the European population.

Regarding the scope of application, as long as they provide services in the European Union, the new rules will apply to all digital services whether they are established in the EU or not[21]. The Commission made the choice of extraterritoriality, just as it did for the GDPR. This is a major change from the e-Commerce directive. The draft regulation will regulate the activities of digital services that are established outside the Union, and which offer services in the internal market. As for the users of digital services, according to Article 1 paragraph 3 of the draft regulation, the DSA will apply to them if they have their place of establishment or residence in the EU.[22]

This paper analyses the most important obligations that the DSA will introduce for the digital services and that allow the users established in or resident of the Union to enjoy a safer online and more transparent environment than it existed before the DSA proposal. The notion of improvement is to be read as giving more rights (e.g., through transparency) or making these rights more effective (i.e., with more efficient procedures) for users, who will also benefit from the removal of illegal content online by the online platforms. However, this paper will also show that even though the DSA represents a progress, it has also brought to life some shortcomings which will constitute challenges. Improvements as well as shortcomings of the DSA are evoked in section B.

B. The Digital Services Act: An unprecedented reform for the digital world in the EU with shortcomings

The Digital Services Act represents an unprecedented reform for the digital world thanks to the regime of liability of digital services that is analysed in subsection I. Subsection II discusses the notice and action mechanism and its flaws. The possible infringement of the freedom of expression by the "delete first, think later" approach is the focus of subsection III, whereas subsection IV concentrates on the uncertain notion of illegal content. Subsection V considers

[21] Ibid, recital 76.

[22] *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, Article 1 paragraph 3.

the management of systemic risks by VLOPs. Subsection VI refers to the principle of transparency as a big part of the DSA. After presenting the limits to targeted advertising and its prohibition for minors in subsection VII, subsection VIII focuses on the delicate problem of disinformation. Finally, the last subsection, subsection IX, deals with the enforcement of the DSA.

I. Liability of digital services

The system of liability in the DSA works as follows: the more influence the digital service provider has on users and on society, the bigger its liability is. The first focus in subsubsection 1 is on intermediary services which benefit from a liability exemption. The liability of online platforms and VLOPs will then be mentioned, in subsubsection 2.

1. The liability exemption for providers of intermediary services

The Commission decided that the proposed regulation retains the same liability exemption for providers of intermediary services as it had been previously enshrined in Articles 12 to 15 of the e-Commerce directive.[23] These articles are now deleted from the e-Commerce directive and appear in the draft regulation in Articles 3, 4 and 5 instead[24]. Be it for 'mere conduit' services – Article 3, 'caching' services – Article 4 – or hosting services – Article 5, the same rules that existed before are going to apply.

Furthermore, the Court of Justice of the European Union (hereinafter CJEU) had already given its interpretation on the subject in many cases, and it contributed to bring forward some guidance. In the case *Google France SARL and Google Inc. v Louis Vuitton Malletier SA et al.*, the Grand Chamber of the Court found that if a service provider has only a technical, automatic, and passive behaviour, which does not allow it to play an active role so that it does

[23] *European Commission*, 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 L 178, 17.7.2000.
[24] *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, Articles 3, 4 & 5.

not have any knowledge or control over the stored data, that service provider is not liable.[25] This was confirmed one year later in the case *L'Oréal SA and Others v eBay International AG and Others.*[26] Though this is questionable because providers of services can apply their business model as they please by "filtering, sorting and optimising content for profit"[27] which is still understood to be a "purely technical and passive"[28] activity. According to *Buiten*, it should be considered as an active role instead.[29] The conservation of this "passive/active" distinction to know whether a services provider is liable or not, remains disputable.[30] One can only suggest that the next regulation on digital services should be more revolutionary on this behalf. However, the DSA added an exception to the liability exemption for providers of intermediary services in Article 5 paragraph 3. In the case where the host has provided information in such a way as to lead the user to believe that the product or service in question is supplied by him or by a person acting under his control, only in that case the liability exemption does not apply.[31] This seems to be a relatively positive change because it would enable user protection. Still, under the draft regulation, the hosting service can only be held liable if the content was clearly unlawful and if it did not act swiftly to remove it after notification. As for access providers, they will still benefit from an exemption of liability for contents that are transmitted by them, if they are not the originator of that content, if they do not select the recipient of the transmission and if they do not select and modify the content of the transmission.[32]

[25] CJEU (Grand Chamber), Judgement of 23 March 2010, 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), ECLI:EU:C:2010:159, Findings of the Court, point 3.
[26] CJEU (Grand Chamber), Judgment of 12 July 2011, Case C-324/09, *L'Oréal SA and Others v eBay International AG and Others*, ECLI:EU:C:2011:474, Findings of the Court, point 6.
[27] *Buiten*, The Digital Services Act From Intermediary Liability to Platform Regulation, 12, 2021, JIPITEC p.361, 371, paragraph 37.
[28] *Buiten*, The Digital Services Act From Intermediary Liability to Platform Regulation, 12, 2021, JIPITEC p.361, 371, paragraph 37.
[29] Ibid.
[30] Ibid.
[31] *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, Article 5 paragraph 3.
[32] Ibid., Chapter II – Liability of providers of intermediary services.

2. Liability for online platforms and very large online platforms

The DSA does not introduce a new regime of liability for online platforms and VLOPs. Just like the hosting services, online platforms and VLOPs will benefit from a regime of diminished liability as platforms are considered to be hosting services.[33] One could argue that given the impact that the online platforms can create, it would have been more fitting to introduce a stricter liability regime for those platforms. Still, under the DSA, the aforementioned platforms will have new obligations. The DSA introduces them to more responsibility[34] for what goes around on their platforms. In an article, *Bryony Hurst* suggests that a shift "from liability to responsibility" takes place with the DSA[35].

This idea of proportionality seems quite logical so that it prevents the spread of illegal content in a more efficient way.

II. The notice and action mechanism and its flaws

In the manner of Russian dolls, all obligations for intermediary services will also apply for hosting services, online platforms, and very large only platforms. The DSA is made in a manner where first the obligations of all intermediary services are written in Section 1, Chapter III of the DSA, then additional obligations are mentioned for provider of hosting services including online platforms under Section 2 of Chapter III. Section 3 of Chapter III considers additional obligations for online platforms and Section 4 of Chapter III of the DSA refers to additional obligations for VLOPs. After presenting the mechanism of "notice and action" and its procedure under subdivision (1), subdivision (2) focuses on the status of "trusted flaggers" and the limits to this status.

1. Overview of the mechanism and its procedure

One of the obligations of the hosting services mentioned in Article 14 of the draft regulation, is the implementation of a "notice and action mechanism". The latter is the possibility for

[33] Ibid., Article 2 (h).
[34] *Hurst*, A New Year, a new approach to digital regulation: the DSA and Online Harms, https://mediawrites.law/a-new-year-a-new-approach-to-digital-regulation-the-dsa-and-online-harms/ (last accessed on 01.08.2022).
[35] Ibid.

users to report content and products that they suspect to be illegal. When a user is faced with what she/he thinks is an illegal product or content then she/he can submit a notice of alleged illegality to the provider of hosting services. The notice of alleged illegality needs to contain certain elements:

- the reasons why the content was considered illegal by the user that reported the content or product – the notifier,
- the location of the alleged illegal content (where can it be found in the digital space?) in order to identify it,
- the name of the notifier and her/his email,
- a statement where the notifier testifies that she/he acted in good faith.[36]

These notices – referring to an alleged illegal content that has not been assessed by the provider of hosting services – that are fully completed with the mentioned elements give rise to a presumption of knowledge/awareness of the existence of an illegal content or product[37], making the provider of hosting services liable if manifestly illegal content has not been removed.[38] The provider of hosting services must confirm that the notifier's notice was well received and provided information on how the notice will be processed.

After the report is assessed, providers of hosting services decide to suppress or not the content or product. When there the content or product is deleted, the user whose alleged illegal content or product was suppressed will be informed of the reasons why by the provider of hosting services.[39] Information on how to challenge the decision must also be provided.[40] There is a possibility to challenge the decision by an internal mechanism, by an out-of-court settlement or by a judicial redress mechanism.[41]

This new obligation on all providers of hosting services allows for a level of harmonization that did not exist before. Indeed, many online platforms – for example Twitter[42], Facebook (now

[36] *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, Article 14 paragraph 2 (a), (b), (c), (d).
[37] *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, Article 14 paragraph 3.
[38] Ibid., Article 5 paragraph 1 (b).
[39] Ibid., Article 15 paragraph 1.
[40] Ibid., Article 15 paragraph 2.
[41] Ibid., Article 15 paragraph 2 (f).
[42] *Twitter*, Help Center, https://help.twitter.com/en/rules-and-policies (last accessed on 01.08.2022).

Meta[43]) and more – had their own rules on reporting illegal content. The DSA makes it possible to unify all those existing rules so each and every provider of hosting services applies the same standards.

In addition to that, Article 20 adds that when a user "frequently provides manifestly illegal content" then said user is to be suspended for a "reasonable period of time".[44] The same goes for notifiers whose complaints were "manifestly unfounded"[45] – this includes the trusted flaggers, presented below. The different requirements that are to be filled by the user that reports illegal content are necessary and well-thought in order to prevent abusive reporting.

2. Trusted flaggers and limits to their creation

Furthermore, the draft regulation also presents "trusted flaggers" to help in the notice and action mechanism. These trusted flaggers can be NGOs or law enforcement authorities such as Europol and others.[46] In order to obtain the status of trusted flagger, certain conditions are to be fulfilled. A special level of expertise in the identification of illegal content is mandatory, just like the proof that the soon-to-be trusted flagger is independent and does not answer to an online platform.[47] Finally, the notice needs to be precise and sent swiftly, it must also show objectivity.[48] As a result, upon submission of an application by the entity, the Digital Services Coordinator will grant the status of trusted flagger to the entity that met all of the conditions.[49] Notices submitted by trusted flaggers should be taken care of by the online platforms "with priority and without delay".[50]

Still, some flaws remain to this concept: As previously mentioned, trusted flaggers are granted a special privilege as their notices are treated as a priority. This introduction of a special

[43] *Meta*, Facebook Community Standards, https://transparency.fb.com/en-gb/policies/community-standards/ (last accessed on 01.08.2022).
[44] *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, Article 20 paragraph 1.
[45] Ibid., Article 20 paragraph 2.
[46] The Commission presents a list of all possible trusted flaggers in recital 46 of the DSA.
[47] *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, Article 19 paragraph 2 (b)
[48] Ibid., Article 19 paragraph 2 (a), (b), (c).
[49] Ibid, Article 19 paragraph 2.
[50] Ibid., Article 19 paragraph 1.

category of notifiers raises some questions. Even though trusted flaggers need to fulfil some requirements that are listed in Article 19 paragraph 2 of the DSA, they need to be reliable. So, what happens if trust is given to unreliable entities?

Electronic Frontier Foundation (EFF), an NGO focused on digital rights, fears that it could open "the door to potential notice, action, and human rights misuse."[51] One entity that could be granted the status of "trusted flagger" and the DSA clearly names it, is Europol.[52] *EFF* argues that there is no special reason why Europol should be trusted.[53] In their view, being a law enforcement entity does not necessarily mean that it is a trustworthy entity.[54] In fact, recently, the European Data Protection Supervisor rendered a decision[55] in which Europol is proved to have unlawfully collected user data.[56] Such a collection could be used to survey users. Therefore, giving entities such as Europol the possibility to become a trusted flagger could turn out to be dangerous as it could be used as a weapon of mass surveillance, thus violating users' fundamental rights such as the respect for private and family life protected under Article 7 of the Charter of Fundamental Rights. Again here, the DSA might have created an unintended loophole.

The same can also be applied to the police. Indeed, *EFF* fears that in Member States where governments have restrictive views on abortion or LGBTQ+ people, the status of trusted flagger could be used and lead to possible human rights violations and this is a point that seems quite relevant in the author's opinion. Be that as it may, this privilege given by "trusted flaggers" could be used by Member States' governments as a weapon.[57]

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[51] *Electronic Frontier Foundation* (*EFF*), DSA Joint Letter to the EP, https://www.eff.org/document/dsa-joint-letter-ep (last accessed on 01.08.2022). It is a joint letter with other NGOs which have regard to users' digital rights.
[52] Short for European Union Agency for Law Enforcement Cooperation, See DSA draft recital 46.
[53] *Komaitis & Rodriguez & Schmon*, Enforcement Overreach Could Turn Out To Be A Real Problem in the EU's Digital Services Act, https://www.eff.org/fr/deeplinks/2022/02/enforcement-overreach-could-turn-out-be-real-problem-eus-digital-services-act (last accessed on 01.08.2022).
[54] *Komaitis & Rodriguez & Schmon*, Enforcement Overreach Could Turn Out To Be A Real Problem in the EU's Digital Services Act, https://www.eff.org/fr/deeplinks/2022/02/enforcement-overreach-could-turn-out-be-real-problem-eus-digital-services-act (last accessed on 01.08.2022).
[55] EDPS, Decision on the retention by Europol of datasets lacking Data Subject Categorisation, https://edps.europa.eu/system/files/2022-01/22-01-10-edps-decision-europol_en.pdf (last accessed on 01.08.2022).
[56] *Komaitis & Rodriguez & Schmon*, Enforcement Overreach Could Turn Out To Be A Real Problem in the EU's Digital Services Act, https://www.eff.org/fr/deeplinks/2022/02/enforcement-overreach-could-turn-out-be-real-problem-eus-digital-services-act (last accessed on 01.08.2022).
[57] Ibid.

What can be said is that when power falls into the wrong hands, it can cause severe damage and human rights violations. Maybe a solution would be to prohibit the possibility for law enforcement bodies to be granted the status of trusted flagger. All in all, "trusted flaggers should have the collective interests of the public and the protection of fundamental rights in mind"[58]. The presentation of the "trusted flaggers" and also the "notice and action" mechanism in the DSA emphasizes the aim of the Commission to eliminate illegal online content. Moreover, with the possibility to suspend, the DSA includes some protection against abusive reports and the input of illegal content by users. One might wonder if those safeguards are enough to effectively protect users.

III. The "delete first and think later" approach and Article 11 of the Charter of Fundamental Rights of the European Union

Placing more responsibilities on intermediary service providers may lead them to act in a disproportionate manner, by taking excessive measures such as the unnecessary deletion of contents. They may fear being charged with violations of their obligations under the DSA, such as the above-mentioned removals of reported illegal contents or products.

Especially since they are encouraged to detect, identify, and act against illegal contents as set out in recital 25, which states they can still be exempted from responsibility even if they engaged into such activities. Such an explanation before entering into the details of the legal framework shows the intent of the legislator to encourage moderation of contents to a great extent.

Moreover, the liability of intermediary service providers is engaged when a content is notified as being potentially illegal, since it triggers their knowledge or awareness. Some authors fear this attitude may prove detrimental especially with regard to the freedom of expression[59]. *Ilaria Buri and Joris van Hoboken* have criticized the "delete first, think later"-approach that is affirmed by *Jan Penfrat.*[60] In their view: "It is safe to assume that the threat of liability will

[58] Ibid.
[59] Protected by the Charter of Fundamental Rights of the European Union under Article 11 and by the European Convention on Human Rights by Article 10.
[60] *Penfrat*, Delete first, think later, https://edri.org/our-work/delete-first-think-later-dsa/ (last accessed on 01.08.2022).

induce many platforms to adopt a "delete first, think later" type of approach, leading to the over-removal of legal content and to a later re-assessment of the removal (only if and where a user challenges the takedown)."[61] This is explained by the swiftness with which service providers must answer to notices if they hope to be exempted from liability.

This way, recital 22 of the DSA reads: "In order to benefit from the exemption from liability for hosting services, the provider should, upon obtaining actual knowledge or awareness of illegal content, act expeditiously to remove or to disable access to that content. The removal or disabling of access should be undertaken in the observance of the principle of freedom of expression".[62]

The juxtaposition of the obligation to act swiftly and the freedom of expression is very telling. It shows a commitment to the respect of this freedom, and an awareness of the possible conflict between such obligations and the freedom of expression.

However, one could that any deletion is subject to a statement of the reasons that led to it, as stipulated in Article 15 of the draft regulation. This means platforms will act thoughtfully, because they must ponder arguments in favour or against the measure, in order to be able to provide explanatory information to the user.

Moreover, the DSA foresees other provisions to frame the recourse to removal and disabling of access to content. It creates complaint mechanisms supported by the service providers, and external out-of-court dispute resolution[63] as stated in Articles 17 and 18 of the draft DSA. The internal complaint mechanism should take place "electronically and free of charge"[64]. At a practical level, this means that services providers will assume a great deal of work and one could argue that they might opt for the easy solution which is using "automated means". When a user is in a situation where his/her account has been suspended or content deleted, he/she also has the possibility to submit a complaint before an out-of-court dispute settlement body[65] – which needs to be certified by the Digital Services Coordinators – to

[61] *Buri & van Hoboken*, The Digital Services Act (DSA) proposal: a critical overview, 2021, p. 21.
[62] *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, recital 22.
[63] *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, Articles 17 and 18.
[64] Ibid., Article 17 paragraph 1.
[65] Ibid., Article 18 paragraph 2.

resolve such a dispute. The draft regulation also emphasises that submitting a dispute to an extrajudicial dispute resolution body – which must be independent of platforms and users – does not preclude pursuing an action in a traditional national court.[66]

Even though a few safeguards to the freedom of expression exist in the DSA, many uncertainties remain around it. When services providers receive a notice from a notifier, it activates a presumption of knowledge, thus imposing on them a system of "delete first and think later". Consequently, service providers will have to face many notices and the approach of "delete first and think later" will likely cause many internal complaints. It is thus to be expected that freedom of expression will be infringed. This is one of the great challenges that the DSA will face in its practical application.

IV. The uncertain notion of illegal content

As previously discussed, the "notice and action" mechanism is based on the notion of "illegal content". One of the major flaws of the DSA can be found in this notion of "illegal content", more precisely, in the definition of it which is very uncertain.

Article 2 (g) of the DSA states: "[...] 'illegal content' means any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law".[67]

What can be understood from this is that a common definition of what illegal content is, is not provided. All the DSA explains is that it refers to the notion of "illegal content" that can be found in European regulations or national laws of the Member States. It should also be remembered that no definition of "illegal content" appeared in the e-Commerce directive.[68] The DSA does not innovate and thus does not enable to have a clear and uniform definition all over the Member States of the Union.

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[66] Ibid. Article 18 paragraph 1 subparagraph 2.

[67] *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, Article 2 (g).

[68] *Dreyfus*, En quoi le Digital Services Act va-t-il modifier le cadre juridique des services sur Internet ?, https://www.dreyfus.fr/2021/05/26/en-quoi-le-digital-services-act-va-t-il-modifier-le-cadre-juridique-des-services-sur-internet/ (last accessed on 01.08.2022) & 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 L 178, 17.7.2000.

However, recital 12 of the DSA refers to the notion as follows: "the concept of "illegal content" should be defined broadly and also covers information relating to illegal content, products, services, and activities. In particular, that concept should be understood to refer to information, irrespective of its form, that under the applicable law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or that relates to activities that are illegal, such as the sharing of images depicting child sexual abuse, unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the non-authorised use of copyright protected material or activities involving infringements of consumer protection law. In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is consistent with Union law".[69]

This recital seems to be very comprehensive, but questions and remarks can be raised. Firstly, one might wonder why this did not appear in Article 2 of the DSA but instead in the recital of the DSA. Writing it down in an article could have brought more importance. Secondly, the last part of the recital reproduced hereinabove alludes to Union law and national law: here it is made clear that what is illegal in one Member State might not be illegal in another. What is defined as illegal can originate from EU law but as well as national law, both of which need to be in conformity with EU law. What can be drawn from this is that not every Member State has the same definition of illegal content. However, is it not the point of the DSA to make rules on the digital world harmonised and unified?

The legal basis for the DSA proposal was Article 114 paragraph 1 of the Treaty on the Functioning of the European Union (hereinafter TFEU) which states the following:

"The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[70]

One of the objective of the DSA was to harmonise all existing rules from all Member States that had been already legislated in the area so that the existing fragmented framework

[69] *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, recital 12.

[70] Article 114 first paragraph of the TFEU.

becomes one unified legal framework.[71] It would have been necessary to clearly define the notion of "illegal content" and not leave a grey area, a legal void.

As a consequence, this would mean that online platforms would need to be up to date on all twenty-seven definitions of illegal content online, in order to follow the rules imposed by the DSA. A content that is deemed illegal, for example, in France might be deleted for citizens living in the country but that same content might not be illegal in Hungary.

This unclarity allows divergences to occur within the European Union, where laws are supposed to be the same when the EU can regulate on that area. The DSA was supposed to allow harmonization of existing national laws but, one could argue that it did not succeed in that.

Nevertheless, one could find an answer to why that is in the composition of one of the legislators. Indeed, the Council is constituted of twenty-seven representatives "at ministerial level".[72] They represent therefore their own State which could possibly not agree with the total harmonisation of digital rules in the EU, which would maybe mean updating their national legislation so that the DSA would function without impediment. With the understanding that for the ordinary legislative procedure, a qualified majority is required in the Council most of the time, getting at least fifteen Member States to agree with one another[73] can be a challenge. In fact, illegal content was "one of the most fiercely debated"[74] topic of the DSA. That might be the reason why no common ground was found.

All in all, one can wonder if the promise made by the Commission to harmonise fragmented laws was kept. The proposed regulation does not eliminate these grey areas and will not enable the providers of hosting services to apply one legal framework, but as many frameworks as there are different definitions of illegal content. As the definition of illegal content is an important part of the notice and action mechanism, this might have some consequences on the application of the DSA.

[71] Explanatory Memorandum of the Digital Services Act.
[72] Article 16 paragraph 2 of the Treaty on the European Union.
[73] Article 294 TFEU. Fifteen Member States that represent more than 65% of the European Union
[74] *Hurst*, A New Year, a new approach to digital regulation: the DSA and Online Harms, https://mediawrites.law/a-new-year-a-new-approach-to-digital-regulation-the-dsa-and-online-harms/ (last accessed on 01.08.2022).

V. The management of systemic risks, an obligation for very large online platforms

Stricter rules apply to VLOPs as they gather 45 million active users or more in the European Union in total. To keep up to date with the online platforms that enter the category of VLOPs or that leave that same category, the Digital Services Coordinator of establishment – which will be defined and analysed later on in the paper – will have to evaluate, every six months, that online platforms gather or no longer gather these 45 million active users in the EU.[75]

Given the risk that VLOPs can pose in the spread of harmful content, the Commission decided to address it by assigning VLOPs a very important job in risk assessment[76] and mitigation of risks.[77] The Commission explained the reasons in recital 56 of the draft regulation, highlighting the "societal and economic harm they can cause"[78]. This obligation represents a core provision of the Digital Services Act.

According to Article 26 of the DSA, VLOPs are supposed to "identify, analyse, and assess […] at least once a year thereafter, any significant systemic risks stemming from the functioning and use made of their services in the Union". The first paragraph of that same article requires them to monitor the following risks:

- "the dissemination of illegal content through their services,
- 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, as enshrined in Articles 7, 11, 21 and 24 of the Charter respectively,
- intentional manipulation of their service, including by means of inauthentic use or automated exploitation of the service, with an actual or foreseeable negative effect on

[75] *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, Article 25, paragraph 4.
[76] Ibid., Article 26.
[77] *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, Article 27.
[78] Ibid., recital 56.

the protection of public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and public security."[79]

If systemic risks are detected, VLOPs should, according to Article 27 of the DSA, set up "reasonable, proportionate and effective mitigation measures" which can consist, for example, of "adapting content moderation or recommender systems".[80]

Moreover, it is important to mention that the conformity by very large online platforms with the obligations laid down in the draft regulation will be monitored, once a year, by an independent auditor, which is presented in Article 28 of the DSA.

By imposing this new obligation on VLOPs, the Commission decided to take a step towards an effective dissemination of risks that could hurt the society. This means a great deal of progress. However, it should be noted that this new obligation could have some negative impacts on fundamental rights through the "delete first, think later" approach, as discussed earlier in subsection III.

VI. Transparency

Another advancement of the DSA is the obligation from digital services to offer Europeans more transparency, which is one of the core principles in the European Union. The DSA set forth different adaptative transparency obligations depending on the digital service.

1. Transparency obligation for all intermediary services

All intermediary services are asked to provide reports that are "easily comprehensible and detailed"[81]. The frequency of those reports should be of one each year at minimum[82]. Furthermore, the reports should contain certain pieces of information. Indeed, certain

[79] *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, Article 26 paragraph 1 (a), (b), (c).
[80] Ibid., Article 27 paragraph 1.
[81] *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, Article 13 paragraph 1.
[82] Ibid., Article 13 paragraph 1.

elements, that are enumerated in article 13 of the DSA, are to be found on the reports, such as:

- "the number of orders received from Member States' authorities"[83] (the type of illegal content in question should be classified),
- the number of notices filed by notifiers with the notice and action mechanism,[84]
- the kind of content moderation measures that were decided by providers on their own initiative, reasons of those measures taken should appear in the report also,[85]
- the "number of complaints received through the internal complaint-handling system".[86]

With this obligation, the Commission wants to bring some clarity to the way the intermediary services work. However, the draft regulation does not stop here, it goes deeper by providing additional obligations to online platforms and also VLOPs, which can be found respectively under Articles 23 and 33.

2. Additional transparency obligations for online platforms

Regarding the transparency obligations for online platforms, in addition to the obligation described in Article 13, online platforms will need to provide further information on those reports, for instance:

- information on how many disputes were taken to out-of-court settlements and their results,[87]
- "the number of suspensions […] distinguishing between suspensions enacted for the provision of manifestly illegal content, the submission of manifestly unfounded notices and the submission of manifestly unfounded complaints"[88]
- "any use made of automatic means for the purpose of content moderation".[89]

[83] Ibid., Article 13 paragraph 1 (a).
[84] Ibid., Article 13, paragraph 1 (b).
[85] Ibid., Article 13 paragraph 1 (c).
[86] Ibid., Article 13 paragraph 1 (d).
[87] *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, Article 23 paragraph 1 (a).
[88] Ibid., Article 23 paragraph 1 (b).
[89] Ibid., Article 23 paragraph 1 (c).

Moreover, the new legal framework imposes online platforms to communicate twice a year "information on the average monthly active"[90] users of the platform, "in each Member State".[91]

Moreover, this did not appear in the proposal of the DSA but is part of the political agreement that was reached between the legislators but an obligation regarding the recommendation systems was added to "allow users to be better informed about how content is recommended to them".[92] Therefore, the recommendation system of the platforms will be more transparent.

As far as VLOPs are concerned, the reports under Article 13 are to be published twice a year. The transparency rule on their recommendation system also affects VLOPs. Moreover, Article 28 of the DSA imposes on VLOPs an obligation to carry out audits every year in order to check their compliance with the "obligations set out in Chapter III" of the DSA,[93] that is to say the notice and action mechanism, transparency obligation, mitigation of risks and more.

Regarding online advertisement, platforms are also subject to some transparency obligations. It is required from them to give users information "in a clear and unambiguous manner and in real time"[94] why they are seeing that advertisement in particular. These transparency obligations are going to provide some clarity to users and other entities in the way reports are taken care of and also some indication on why a user is seeing a particular advertisement at a particular time.

This represents an important step as transparency is one of the core constituents of the EU, the citizens that are established or resident in the Union will enjoy a more transparent environment online.

[90] Ibid., Article 23 paragraph 2.
[91] Ibid., Article 23 paragraph 2.
[92] *European Parliament*, Digital Services Act: agreement for a transparent and safe online environment, European Parliament, https://www.europarl.europa.eu/news/en/press-room/20220412IPR27111/digital-services-act-agreement-for-a-transparent-and-safe-online-environment (last accessed on 01.08.2022).
[93] *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, Article 28 paragraph 1 (a).
[94] *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, Article 24.

VII. Targeted Advertising

Targeted advertising cannot be missed online. That is one of the reasons why the legislators decided to tackle it. Targeted advertising – or its prohibition – did not appear on the draft regulation of the DSA, it was part of the amendments that the European Parliament strongly suggested[95] and that was accepted by the Council. On April 23, 2022, a provisional political agreement was reached by the legislators[96], which means that the amendments on targeted advertising will enter into force.

As previously mentioned, the DSA only introduced transparency rules on online advertising. However, targeted advertising featured twice in the recitals of the DSA[97] and once in the explanatory memorandum of the DSA.

According to data made available by Flurry Analytics[98] with the 14.5 iOS version of Apple, it showed that when users had the choice between allowing or not to be tracked, only 4% of users accepted to be tracked – the rest, namely 96%, refused. [99] The conclusion that can be drawn from this, is that users, in an overwhelming majority, when given the choice, will refuse to be tracked online for targeted advertising.

Even though, this data is from the United States, this could still apply in the European Union, and maybe even more citizens of the Union are more careful with their data,[100], proof is also the existence of the General Data Protection Regulation (GDPR).[101]

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[95] *Bertuzzi*, DSA: MEPs boost measures on targeted ads in new compromise proposal, https://www.euractiv.com/section/digital/news/dsa-meps-boost-measures-on-targeted-ads-in-new-compromise-proposal/ (last accessed on 01.08.2022)

[96] *European Parliament*, Press release, Digital Services Act: agreement for a transparent and safe online environment, https://www.europarl.europa.eu/news/en/press-room/20220412IPR27111/digital-services-act-agreement-for-a-transparent-and-safe-online-environment (last accessed on 01.08.2022)

[97] *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, Recital 52 & 63

[98] *Flurry Analytics*, iOS 14.5 Opt-in Rate - Daily Updates Since Launch, https://www.flurry.com/blog/ios-14-5-opt-in-rate-att-restricted-app-tracking-transparency-worldwide-us-daily-latest-update/ (last accessed on 01.08.2022). This company analyses data from consumer interactions with mobile applications.

[99] Ibid.

[100] *Beens*, The Privacy Mindset Of The EU Vs. The US, https://www.forbes.com/sites/forbestechcouncil/2020/07/29/the-privacy-mindset-of-the-eu-vs-the-us/ (last accessed on 01.08.2022). The author explains that Europeans are more considerate with what they do with their data online than United States' counterparts.

[101] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 04.05.2016.

In any case, what was added by the European Parliament, was the prohibition of targeting people with online advertisements based on sensitive date, meaning on their "religion, sexual preferences, health information or political beliefs."[102] Furthermore, the European Parliament introduced a full prohibition on targeted advertising to minors sending a message[103]: online platforms must protect minors.

This represents a huge step in a safer online environment for users and also even more for children who are increasingly younger when first exposed to platforms.

VIII. The delicate problem of disinformation

Disinformation online has become present everywhere on the online environment. Disinformation, according to the definition of the Commission, means "verifiably false or misleading information created, presented and disseminated for economic gain or to intentionally deceive the public".[104] It poses a serious threat to democracy and a challenge to overcome because this instrument – as highlighted by the definition – aims to mislead people. Other definitions of disinformation such as the one from *Wardle and Derakhshan* who wrote a report with a focus on disinformation for the Council of Europe,[105] do not include the element of economic gain,[106] one that appears in the definition of the Commission. In this paper, both definitions will be useful as they offer a broader view.

The European Union has had to deal with disinformation several times. We have seen this during the period of vaccination against COVID-19 and even since the beginning of the pandemic.[107] This was and still is a very dangerous practice as misleading people with health information could get them hospitalized or worse. To borrow the wording of the Council or of

[102] *European Parliament*, Press release, Digital Services Act: agreement for a transparent and safe online environment, https://www.europarl.europa.eu/news/en/press-room/20220412IPR27111/digital-services-act-agreement-for-a-transparent-and-safe-online-environment (last accessed on 01.08.2022).
[103] Ibid.
[104] *European Commission*, Tackling online disinformation, https://digital-strategy.ec.europa.eu/en/policies/online-disinformation (last accessed on 01.08.2022).
[105] *Wardle & Derakhshan*, Information disorder: Toward an interdisciplinary framework for research and policy making, 2017.
[106] *Ó Fathaigh & Helberger, & Appelman*, The perils of legally defining disinformation. *Internet Policy Review*, *10*(4), 2021.
[107] *Council of the EU & European Council*, Disinformation during the COVID-19 pandemic https://www.consilium.europa.eu/fr/documents-publications/library/library-blog/posts/disinformation-during-the-covid-19-pandemic/ (last accessed on 01.08.2022).

the European Council, "since the outbreak of COVID-19, disinformation and misinformation have spread worldwide, just like the virus itself".[108] Furthermore, recently it was Russia that seized disinformation in the middle of the invasion of Ukraine by evoking the "Nazification" of Ukraine on digital platforms such as Facebook or Twitter[109]. It can be said that disinformation may be used like a digital weapon.

Many documents of the Commission, such as a Communication[110] and a Code of Practice available for big online platforms to be signed,[111] mention the tackling of online disinformation. Those documents are not binding. However, that does not mean that disinformation is being efficiently suppressed. The barrage of Russian disinformation came – and is still coming – as the Digital Services Act was being debated by legislators. Many were hopeful that the DSA would pronounce the end of disinformation.[112]

In certain Member States, legislators have already regulated that area but not specifically mentioning the term "disinformation" but using "false information" or "false news" which they consider illegal – or mostly its dissemination.[113] The following States have adopted such legislation: Austria, Croatia, Cyprus, the Czech Republic, France, Greece, Hungary, Malta, Romania, and Slovakia.[114] However, only one Member State of the Union, Lithuania, has declared disinformation to be prohibited with a clear definition of the notion. [115] Consequently, we are left with different views within the European Union with regard to the notion of disinformation and to its illegality or not.

It is therefore understandable that the Commission did not want to go out on a limb and set a standard as the Member States do not agree with each other. However, is it not the point of the European Union to create harmonised definitions?

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[108] *Council of the EU & European Council*, Disinformation during the COVID-19 pandemic https://www.consilium.europa.eu/fr/documents-publications/library/library-blog/posts/disinformation-during-the-covid-19-pandemic/ (last accessed on 01.08.2022).
[109] *Colbert*, De-Nazification' & Putin's Disinformation War, https://bylinetimes.com/2022/04/05/de-nazification-and-putin-disinformation-war/ (last accessed on 01.08.2022).
[110] *European Commission*, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, Tackling Online Disinformation: A European Approach, COM/2018/236 final.
[111] *European Commission*, Code of Practice on disinformation.
[112] *Meyers*, Will the Digital Services Act save Europe from disinformation? https://www.cer.eu/insights/will-digital-services-act-save-europe-disinformation (last accessed on 01.08.2022).
[113] *Ó Fathaigh & Helberger, & Appelman*, The perils of legally defining disinformation. *Internet Policy Review*, *10*(4), 2021.
[114] Ibid.
[115] Ibid.

While the DSA aims to encourage the deletion of illegal content, legal harmful content like disinformation is not affected in the same way. [116] The proposed regulation aims to limit their propagation not by deleting them, which would be contrary to freedom of expression, but by requiring platforms to re-examine the algorithms that allow their amplification.[117] As mentioned, the freedom of expression – more extensively freedom of speech – could be affected by the different applicable laws on disinformation in the Member States. In addition to being protected by the European Convention on Human Rights and the Charter of Fundamental Rights, this freedom also features in the International Covenant on Civil and Political Rights in its Article 19.[118]

The *UN special rapporteur* on freedom of expression stated that the notion of disinformation is "an extraordinarily elusive concept to define in law, susceptible to providing executive authorities with excessive discretion to determine what is disinformation, what is a mistake, what is truth".[119] In 2017, the "Joint Declaration on Freedom of Expression"[120] highlighted that legislation that contains provisions on the prohibition of the spread of "false news" that are "vague and ambiguous ideas, including "false news" […] are incompatible with international standards for restrictions on freedom of expression […] and should be abolished".[121] The *UN special rapporteur* added that "In other words, the penalization of disinformation is disproportionate".[122] Internationally, there seem to clearly exist opinions making a point that the existing laws prohibiting disinformation, or the dissemination of disinformation are restrictive of the freedom of expression.

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[116] *European Parliament*, Parliament's ideas for tackling harmful or illegal content online, https://www.europarl.europa.eu/news/en/headlines/economy/20201022STO89919/meps-iOS-for-tackling-harmful-or-illegal-content-online (last accessed on 01.08.2022). This naming falls to the European Parliament.
[117] *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, recital 68.
[118] UNGA Res 2200A (XXI) International Covenant on Civil and Political Rights of 16.12.1966, UN Doc. A/RES/ 2200A (XXI) Article 19.
[119] *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Report on disease pandemics and the freedom of opinion and expression, 23 April 2020, paragraph 42.
[120] United Nations, Organization of American States, Organization for Security and Co-operation in Europe and African Commission, Joint Declaration by Special Rapporteurs on "Fake News", 2017, https://www.law-democracy.org/live/legal-work/standard-setting/ (last accessed on 01.08.2022).
[121] United Nations, Organization of American States, Organization for Security and Co-operation in Europe and African Commission, Joint Declaration by Special Rapporteurs on "Fake News", 2017, https://www.law-democracy.org/live/legal-work/standard-setting/ (last accessed on 01.08.2022), paragraph 2 (a).
[122] *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, Report on disease pandemics and the freedom of opinion and expression, 23 April 2020, paragraph 42.

On the European continent, in 2005, the European Court of Human Rights (hereinafter the ECtHR or the Court) stated in a case regarding Ukraine's election legislation that "a prosecution for dissemination of false information"[123] under that legislation represents a violation of Article 10 of the Convention. In that case the Court held unanimously that "Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful."[124] Even though this case or joint declarations do not necessarily refer to disinformation in the digital world, one can reckon that the same opinion would be held if it a similar case had been situated in an online environment.

What can be retained, is that laws that prohibit disinformation or its diffusion, can represent a restriction of the freedom of expression. This amounts to an issue because the distinction between "fake news" or disinformation and what is a legitimate opinion is often a blurry line.

This paper assumes that, as previously stated, the Commission did not want to go out on a limb. It chose a rather cautious view on disinformation by not prohibiting it. The Digital Services Act does not provide a clear and precise answer to disinformation, its drafters choose to not compromise themselves by imposing on online platforms to review their algorithms in order to prevent a further development of disinformation. The Commission missed the point of the draft regulation and did not take the plunge to enlighten European citizens in this regard or national laws.

IX. The enforcement of the DSA

It is necessary to also take a look at the enforcement side of the Digital Services Act. The European Commission decided on a multi-level system for the application of the DSA. Part of that system are the Digital Services Coordinators. As defined in the DSA, Digital Services Coordinators are appointed by Member States,[125] two months after the entry into force of the DSA,[126] with the ratio of one Digital Services Coordinator for each Member State which adds

[123] *Ó Fathaigh & Helberger, & Appelman*, The perils of legally defining disinformation. *Internet Policy Review*, *10*(4), 2021.
[124] ECtHR, *Case of Salov v. Ukraine*, App. No. 65518/01, 06 September 2005, paragraph 113.
[125] *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, Article 38 paragraph 2
[126] Ibid., Article 38 paragraph 3

up to a total of twenty-seven Digital Services Coordinators. The Digital Services Coordinator "is responsible for all matters relating to application and enforcement of this Regulation in that Member State".[127] The DSA establishes that those coordinators should ensure the "coordination at national level"[128] in order to obtain an "effective and consistent application and enforcement".[129]

Article 39 of the DSA establishes the requirements needed for the Digital Services Coordinators. The latter are supposed to show "complete independence" and required to "remain free from any external influence, whether direct or indirect".[130] In spite of that, as Member States are asked to appoint their Digital Services Coordinator, the question is: How can it be ensured that the Digital Services Coordinators are independent if they are directly appointed by the Member States? This remains an uncertainty regarding the DSA proposal.

Given what has been previously stated about the divergences of national laws about disinformation or about the definition of illegal content, how can the Digital Services Coordinators do their work in a uniform manner? They are supposed to cooperate with the rest of the Digital Services Coordinators. However, if national laws diverge on disinformation and also on the definition of illegal content, all twenty-seven Member States will have a divergent application of the DSA.

Furthermore, the second level for the application of the DSA is the European Board for Digital Services (hereinafter "the Board") presented in Article 47 of the DSA. It is inside this board that all twenty-seven Digital Services Coordinators are supposed to cooperate. The Board, as an "independent advisory group"[131] supports the Digital Services Coordinators in coordinating the application of the DSA with the other Coordinators[132] and "contributing to the consistent application"[133] of the draft regulation all of that by drafting reports and recommendations[134].

[127] Ibid., Article 38 paragraph 2
[128] Ibid., Article 38 paragraph 2
[129] Ibid., Article 38 paragraph 2
[130] Ibid., Article 39 paragraph 2
[131] *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, Article 47 paragraph 1.
[132] Ibid., Article 47 paragraph 2 (b).
[133] Ibid., Article 47 paragraph 2 (a).
[134] Ibid., Article 49 paragraph 1 (c).

The Commission "chairs" the Board.[135] In addition, another part of their job consists of assisting the Digital Services Coordinators and the Commission in the supervision of online platforms",[136] which brings this paper to the next level of the application of the DSA.

As previously mentioned, the Commission is charged with the supervision of VLOPs. Even though it was not part of the proposal in itself but an amendment of one of the legislators, these new powers of the Commission need to be looked at. The press release of the European Parliament explains that the "Commission will have exclusive power to demand compliance" in regard to VLOPs[137].

What this means is that the Board will not be able to oversee the VLOPs. This task of oversight but also of investigative and monitoring powers will be reserved exclusively for the Commission. The reason behind this is to ensure that VLOPs' work is monitored in an efficient and swift manner.[138] Moreover, it could be that this centralization will allow the Commission to "intervene" in Member States where the judiciary lacks independence and is controlled by the state.[139] However, *Pirkova* argues that this will not solve all existing problems regarding the independence of the judiciary[140]. In addition to that, the centralization will prevent enforcement problems from taking place as it happened with the GDPR[141].

All in all, another challenge of the Digital Services Act lies in the enforcement part. Since there are twenty-seven Digital Services Coordinators, it raises the question of the uniform application of the legislation. It must be ensured that divergent applications are not implemented in the European Union. In order for that to happen and for the DSA to be properly implemented, all levels of enforcement must cooperate and coordinate their actions.

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[135] Ibid., Article 48 paragraph 3.
[136] Ibid., Article 47 paragraph 2 (c).
[137] *European Parliament*, Digital Services Act: agreement for a transparent and safe online environment, https://www.europarl.europa.eu/news/en/press-room/20220412IPR27111/digital-services-act-agreement-for-a-transparent-and-safe-online-environment (last accessed on 01.08.2022).
[138] *Pirkova*, The EU Digital Services Act won't work without strong enforcement, https://www.accessnow.org/eu-dsa-enforcement/ (last accessed on 01.08.2022).
[139] Ibid.
[140] Ibid.
[141] *Zeybek & van Hoboken*, The Enforcement Aspects of the DSA, and its Relation to Existing Regulatory Oversight in the EU, https://dsa-observatory.eu/2022/02/04/the-enforcement-aspects-of-the-dsa-and-its-relation-to-existing-regulatory-oversight-in-the-eu/ (last accessed on 01.08.2022)

C. Conclusion

Conclusively, one can say that the Digital Services Act is an ambitious proposal that wishes to put in place a new set of rules after the ones of the e-Commerce directive twenty years ago. For the Commission, the DSA constitutes an essential piece of legislation which is a major achievement as it protects the European users in the digital world from illegal content and will offer a safer place online which has long been awaited. By giving users a way for transparency and digital services obligations, the Commission takes a step ahead towards the protection of users in the EU.

Regarding the liability regime, the changes brought by the DSA are an improvement. The liability exemption will not apply if the hosting service has left information that could lead users to believe that the latter is actually the one supplying a product or a service, or if it controls the person supplying the product or service.

Moreover, the DSA presents new obligations which are applicable to providers of hosting services which also include online platforms and VLOPs. This new obligation called the "notice and action" mechanism – that actually already existed in many VLOPs such as Facebook – gives users the possibility to report illegal content whenever they notice it. This is an achievement, especially since it includes every provider of hosting services. There are different requirements that are to be fulfilled by the notifier. They are necessary and well-thought in order to prevent abusive reporting. In addition to that, trusted flaggers are presented to help with the deletion of illegal content. It is to fear that when this status of trusted flagger is granted to unreliable entities, it could lead to human rights violations. All of those measures in the DSA emphasize the aim of the Commission to eradicate illegal content.

Additionally, one obligation is reserved for the VLOPs only and it is the management of systemic risks. Risks that could result from the very functioning of the service need to be controlled and monitored. VLOPs are imposed audits regarding the management of those risks. With this obligation, the Commission decided to take a step towards an effective dissemination of risks that could harm society. This means a great deal of progress.

Regarding transparency obligations, the DSA offers many improvements. More clarity will be provided to users and other entities in the way reports are taken care of and also some indication on why a user is seeing a particular advertisement at a particular time. As far as

targeted advertising is concerned, a new limit is imposed. The DSA introduces the prohibition of targeting people with online advertisements based on sensitive data, meaning on their "religion, sexual preferences, health information or political beliefs". Furthermore, the European Parliament also introduced a full prohibition on targeted advertising to minors.

Another interesting aspect is that in the case where digital services violate an article of the DSA, they will face penalties. Fines of up to 6% of the annual global turnover are possible for online platforms.[142] The Commission will have the sole enforcement power over VLOPs,[143] which is a solution after some difficulties were experienced with national authorities in regard to the GDPR[144].

At the same time, the DSA will have to face some challenges and limits because in attempting to regulate online platforms, the EU institutions have also created their own flaws.

Firstly, the uncertainty around the definition of "illegal content" leaves a loophole that could have many consequences. All the more as the notice and action mechanism is based on the notion of "illegal content". The Commission missed its chance to harmonise that term, hence leaving the DSA with a large gap.

Secondly, the notice and action mechanism could cause some problems with regard to the freedom of expression. Indeed, when a notice is received by a service provider, it raises a presumption of knowledge, meaning that if the illegal content that was notified is not deleted soon enough, the service providers will be held responsible for it. Consequently, it is feared that the service providers will apply a "delete first, think later" approach, leading to possible infringements of the freedom of expression.

Thirdly, there are different views within the European Union with regard to the notion of disinformation and to its illegality. One wonders why the Commission did not decide to

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[142] *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, Article 42 paragraph 3.

[143] This was part of one of the amendments of the legislators. Digital Services Act: agreement for a transparent and safe online environment, European Parliament, https://www.europarl.europa.eu/news/en/press-room/20220412IPR27111/digital-services-act-agreement-for-a-transparent-and-safe-online-environment (last accessed on 01.08.2022).

[144] *Buiten*, The Digital Services Act From Intermediary Liability to Platform Regulation, 12, 2021, JIPITEC p.361, 378. "With respect to VLOPs, the DSA thus envisages a highly centralised regulatory model with the Commission as the sole regulator. This choice appears to be a response to the difficulties that arose in enforcing the GDPR; experience with the GDPR has shown that the Irish data protection authority was overwhelmed and, therefore, slow to respond to complaints".

harmonise those views. An explanation could be that as it is difficult to get twenty-seven Member States to agree with one another, it might be impossible to find a common definition of that term. This remains to be regretted. Moreover, disinformation is not affected in the same way as illegal content. In fact, all that is required from online platforms is the examination of their algorithms that allow its amplification. Deletion could be rendered contrary to the freedom of expression.

Given what was stated and in regard to the enforcement of the DSA, a divergent application is to be feared because of the existence of different national laws on disinformation but also on the definition of illegal content. The independence of the Digital Services Coordinators is questioned. In the author's opinion, if one were to weigh the successes and shortcomings of the DSA, the improvements would prevail.

Has the DSA gone far enough? Perhaps more time should have been dedicated to elaborating on some of the proposal's provisions and other obligations and thus allow no legal vacuum to exist. More harmonisation in the definitions of important concepts in the text would have been necessary. However, in the end, it is easy to understand that this was not done because of Member States that do not necessarily want to harmonise said definitions.

The question of whether the DSA has the potential to become a new GDPR arises. The GDPR is a proof that the "Brussels Effect"[145] exists as it was an inspiration for many other States of the world to pass similar legislation. Even though for the time being no replica of the DSA exists elsewhere, the negotiations have been followed by other States, which could be a sign that the DSA will soon be exported.

The DSA might help the EU into becoming the digital sovereign that it wishes to be, but it will all depend on its practical success. Albeit the DSA contains loopholes, it still constitutes an improvement which could turn out to be the new "gold standard", as the GDPR has, leading the EU to digital sovereignty.

[145] *Bradford*, The Brussels Effect: How the European Union Rules the World, Introduction (page XIV). The "Brussels Effect" is a theory developed by the author and it describes the influence of European legislation in the world.

On July 5, 2022, the Digital Services Act[146] was adopted by the European Parliament and will be adopted by the Council in September 2022. It will enter into force twenty days after its publication in the Official Journal of the European Union. With the entry into force the DSA will likely show its highs and lows in practical application.

[146] *European Parliament*, Digital Services: landmark rules adopted for a safer, open online environment, https://www.europarl.europa.eu/news/en/press-room/20220701IPR34364/digital-services-landmark-rules-adopted-for-a-safer-open-online-environment (last accessed on 01.08.2022).

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