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Second Edition

Digital Services Act

Intro, Art. 1, 14, 17, 27, 28, 30, 38 DSA

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Authorship of the Commentaries on the Digital Services Act

This book is an Annex to the second edition "Schulze/Staudenmayer (eds), EU Digital Law", published in February 2025, which contains errors regarding the Authorship of the following contributions on the Digital Services Act:

Introduction, Articles 1, 14, 17, 27, 28, 30, 38, which were written by Prof. Dr. Alberto De Franceschi (University of Ferrara and Katholieke Universiteit Leuven).

Please refer to this book for the citation of the abovementioned contributions.

The publisher sincerely apologises with the Author and kindly asks for your attention and understanding.

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**REGULATION (EU) 2022/2065 OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL of 19 October 2022
on a Single Market for Digital Services and amending Directive
2000/31/EC (Digital Services Act)**

Introduction to the Digital Services Act

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A. Background and general framework

- 1 The Digital Services Act (DSA) is rooted in the changed nature, scale and influence of digital services, in particular online platforms, and is part of the European Digital

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Strategy. While the DSA mainly focuses on setting fairness and transparency rules for online platforms of various dimensions to strengthen the rights of users online, the Digital Markets Act (DMA) regulates the market power of large online platforms ('gatekeepers') and aims to safeguard contestability.¹

The general framework regulating the provision of digital services in the internal market was defined in the E-Commerce Directive, whose objective was to create a legal framework to ensure the free movement of information society services between Member States, by allowing borderless access to digital services across the EU and by harmonising the core aspects for such services. Since then, the dimension and importance of **digital services** has **largely changed** through the arrival of large online platforms such as social networks or marketplaces, which are used by EU citizens on a daily basis and which create strong network effects. At the same time, several changes affected other aspects of EU legislation as the consumer *acquis*, data protection, copyright rules and rules concerning audiovisual services. The evaluation of the E-Commerce Directive highlighted the main elements which have led to societal and economic challenges posed by the digital services ecosystem and posed the question about the options to address them and to improve the functioning of the digital single market.²

The solutions provided by the conditional exemptions from liability laid down in the E-Commerce Directive with regard to the liability exemption created the right conditions for many digital services to flourish. That framework should therefore be preserved. However, in view of the divergences when transposing and applying the E-Commerce Directive rules at national level, the EU legislator decided to transpose many of them into the Digital Services Act, also implementing in it European case-law.³

At the same time, Member States have been increasingly starting to regulate several aspects now covered by the Digital Services Act, as e.g.: criteria for the determination of the **role of online platforms**,⁴ **diligence requirements** for providers of intermediary services, criteria regarding the way they should **tackle illegal content**, online **disinformation**, **societal risks**. As this is suitable to create additional fragmentation among the legislations of EU Member States, it stimulated an even faster reaction from the EU.⁵ The approximation of national regulatory measures at Union level concerning the requirements for providers of intermediary services is necessary to avoid fragmentation of the internal market and to ensure legal certainty, thus reducing uncertainty for developers and fostering interoperability.⁶

More recently, the EU has also taken a series of additional measures as well as coordinated enforcement actions in the framework of the Consumer Protection Cooperation Regulation, for addressing the spread of certain types of illegal activities online such as practices infringing EU consumer law, dangerous goods, copyright-protected content, illegal hate speech, terrorist content, or child sexual abuse material.⁷

¹ Dregelies, 1033; Duivenvoorde, 43; Gerdemann/Spindler 3, 115; Raue/Heesen, 3537; Simoncini, 1031; Spindler, 73; Spindler/Seidel, 2730; Wiedemann, 364.

² See the evaluation of the E-Commerce Directive in SWD (2020) 349 final, Annex 5.

³ Recital 16. Cf. Janal, 227; Kuhlmann/Trute, 115; Kumkar, 530.

⁴ The Directive 2019/770/EU on the Supply of Digital Content and Digital Services (DCD) left this explicitly in the hands of national legislators (see Recital 18 DCD). On this see *De Franceschi/Schulze*, 9 et seq.

⁵ Recital 2.

⁶ Recital 4. See *Wischmeyer/Meißner*, 2673.

⁷ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004.

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B. Legislative objective

- 6 With the entry into force of the Digital Services Act, the fundamental **structure of the liability exemptions** for intermediary services⁸ **remains in place**:⁹ intermediaries will not automatically be responsible for hosting unlawful third-party content,¹⁰ as the liability of intermediary services providers is still conditionally exempted.
- 7 The Digital Services Act should apply to providers of certain **information society services** as defined in Directive 2015/1535/EU,¹¹ that is, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient. Specifically, the Digital Services Act should apply to providers of intermediary services, and in particular intermediary services consisting of services known as ‘mere conduit’, ‘caching’ and ‘hosting’ services.
- 8 In addition to specifying the existing legal framework for illegal third-party content, the Digital Services Act also introduces **new obligations** for ‘intermediary services’, and in particular specific due diligence obligations that are tailored to certain categories of providers of intermediary services. In particular, it differentiates according to: **type** of the intermediary service (access, caching, hosting service provider and online platform); **size** (cf. Art. 33 et seq.) and **function** (cf. Art. 29 et seq.) of the service provider.
- 9 The **duties** are structured according to a **pyramid**: some rules apply to all intermediary services; some to hosting service providers or to online platforms (sub-category of hosting service providers) and some only to very large online platforms and very large online search engines.¹² The latter – who are assumed to pose particular risks – are required to have a risk management system, according to the so-called risk-based regulatory approach. A distinction is made here not only between the different types of intermediaries and their size, but also according to their function.¹³
- 10 The Digital Services Act also aims to improve the **enforcement** of intermediary regulation by creating an EU centralised enforcement system.¹⁴ As regards private enforcement, the Digital Services Act proposal did not foresee any claim for damages and, more in general, any provision granting individual remedies to consumers. Thanks to the strong call by literature¹⁵ and the European Parliament,¹⁶ individual remedies are now

⁸ cf. e.g. *Gielen/Uphues*, 632.

⁹ Recital 16.

¹⁰ → Introduction to Art. 4 et seq. mn. 1 et seq. and mn. 68 et seq.

¹¹ Directive 2015/1535/EU of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services.

¹² cf. e.g. *Schmid/Grewe*, 279; *Spindler*, 545.

¹³ cf. Arts 3 und 4.

¹⁴ According to Art. 49 Member States shall designate one or more competent authorities to be responsible for the supervision of providers of intermediary services and enforcement of this Regulation (‘competent authorities’). Furthermore, Member States shall designate by 17 February 2024 one of the competent authorities as their Digital Services Coordinator, which is responsible for all matters relating to supervision and enforcement of the DSA in that Member State, unless the Member State concerned has assigned certain specific tasks or sectors to other competent authorities. The Digital Services Coordinator shall in any event be responsible for ensuring coordination at national level in respect of those matters and for contributing to the effective and consistent supervision and enforcement of this Regulation throughout the Union. Art. 52 DSA then imposes to Member States the duty to lay down rules on penalties applicable to infringement of the DSA. Such penalties shall be proportional to the annual turnover of the annual worldwide turnover of the provider of intermediary services concerned in the preceding financial year (see Art. 52(3) and (4) DSA). See *Buchheim/Schrenk*, 1; *Zurth*, 1331.

¹⁵ *Busch/Mak*, 112; *Spindler*, 661. See, after the entry into force of the DSA: *Schulte-Nölke*, 719.

¹⁶ European Parliament, Legislative Resolution of 5 July 2022 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act),

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contained in the final text of the Digital Services Act: breaches of user-related due diligence obligations of the Digital Services Act trigger claims for damages under private law (cf. Art. 54 DSA),¹⁷ and there is also space for injunctive relief under private law.¹⁸ Considering the decision in *Simone Leitner*,¹⁹ it was rightly suggested to grant compensation under Art. 54 DSA also of damages for pain and suffering.²⁰

According to Recital 121 DSA, the claim according to Art. 54 DSA is without prejudice to the provisions on the exemption from liability regulated in the Digital Services Act as regards the information transmitted or stored at the request of a recipient of the service. However, this liability exemption does not find application in cases referred to in Art. 6(3) DSA when consumers are involved. For this reason, at least consumer users should benefit from Art. 54 DSA in any case.²¹ 11

C. Legislative process

I. Summary

The Digital Services Act was published in the Official Journal as of 27 October 2022 and came into force on 16 November 2022. It is directly applicable across the EU and applies as of 17 February 2024. In preparation of the Digital Services Act, the Commission consulted a wide range of stakeholders using an array of targeted consultation steps. 12

II. Implementation

1. Reporting duties

Following the entry into force of the Digital Services Act on 16 November 2022, online platforms had, as mentioned above, three months to report the number of active end users on their websites. This means that as of 17 February 2023, all platforms had to publish the number of monthly users, which must now be updated every six months. 13

Based on the numbers published by the platforms and its investigative powers, the Commission can assess whether a platform is to be designated as a Very Large Online Platform (VLOP) or Very Large Online Search Engine (VLOSE). Following such a designation decision by the Commission, the entities in question become regulated entities, like financial institutions, and have four months to comply with the obligations under the Digital Services Act, including carrying out and providing the first annual risk assessment exercise.²² 14

On 25 April 2023, the first designation decisions of Very Large Online Platforms (*Alibaba AliExpress; Amazon Store; Apple AppStore; Booking.com; Facebook; Google Play; Google Maps; Google Shopping; Instagram; LinkedIn; Pinterest; Snapchat; TikTok; Twitter;* 15

Document P9TA(2022)0269, Recital (83a). cf. the Report of the Committee on the Internal Market and Consumer Protection (IMCO) of 20.12.2021 on the Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/71/EC, Document A9-0356/2021, Amendment 398, which contained the proposal to introduce a claim for the compensation of the sole 'direct damage or loss'.

¹⁷ Cf. Art. 54 DSA.

¹⁸ Hofmann/Raue, mn. 5–6.

¹⁹ CJEU, C-168/00, *Simone Leitner* EU:C:2002:163.

²⁰ So Schulte-Nölke, 720.

²¹ Schulte-Nölke, 715, 719.

²² Härting/Adamek, 165; Torchia, 1101–1112.

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Wikipedia; *YouTube*; *Zalando*) and of Very Large Online Search Engines (*Bing*; *Google Search*) were made. The first VLOPs and VLOSEs had time until the end of August 2023 to comply with the Digital Services Act. In case of non-compliance, companies can be subject to fines of up to 6% of global turnover, enhanced supervision and even a temporary ban on operating in the EU Single Market in case of repeated serious breaches threatening people's life or safety.

Further Very Large Online Platforms were designated on 20 December 2023 (*Pornhub*, *Stripchat* and *XVideos*), on 26 April 2024 (*Shein*) and on 31 May 2024 (*Temu*).²³

- 16 The **supervision and enforcement** of the provisions introduced by the Digital Services Act will be shared among the EU Commission and Member States. To allow for the supervision and enforcement of the Digital Services Act, Member States had to empower their **Digital Services Coordinators** (DSCs) by 17 February 2024, the general date of entry in application of the Digital Services Act. DSCs can request access to VLOPs and VLOSEs data, order inspections and impose fines in the event of an infringement. They will be responsible for certifying 'trusted flaggers' and out-of-court dispute settlement bodies.
- 17 Finally, for the efficient **enforcement** of the Digital Services Act, the EU Commission is building a network that will involve the relevant European authorities and leading experts in the field covered by the Digital Services Act.
- 18 On 18 April 2023, the EU Commission launched the **European Centre for Algorithmic Transparency** (ECAT),²⁴ a first-of-its-kind scientific centre in Sevilla which will support the Commission and national authorities in the monitoring of the application of the Digital Services Act. Among others, ECAT will: conduct technical tests on algorithmic systems to understand their functioning; analyse transparency reports, risk assessments and independent audits; support investigations and inspections; identify emerging risks associated with the use of VLOPs/VLOSEs; act as a knowledge hub for research conducted thanks to access to data provided by the Digital Services Act.
- 19 In this framework, ECAT has also signed a cooperation agreement with the French Centre '*Pole d'expertise du Regulation du Numerique*', one of the world's first data science teams working on the issues covered by the Digital Services Act. It has also appointed the members of the special group on the EU code of conduct on age-appropriate design, which started its work on 13 June 2023.

2. Next steps for designated platforms and search engines

- 20 Following their designation, the companies have to comply, within four months, with the full set of new obligations under the Digital Services Act. These aim at empowering and protecting users online, including minors, by requiring the designated services to assess and mitigate their systemic risks and to provide robust content moderation tools. This includes:
- 21 **More user empowerment** (users will receive clear information on why they are recommended certain information and will have the right to opt-out from recommendation systems based on profiling; users will be able to report illegal content easily and platforms have to process such reports diligently; advertisements cannot be displayed

²³ For the updated list of designated platforms, see <https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses>.

²⁴ See https://algorithmic-transparency.ec.europa.eu/index_en (accessed 26 May 2024).

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based on the sensitive data of the user (such as ethnic origin, political opinions or sexual orientation)²⁵;

Informing recipients on who is promoting them (platforms need to provide an easily understandable, plain-language summary of their terms and conditions, in the languages of the Member States where they operate);

Strong protection of minors (platforms will have to redesign their systems to ensure a high level of privacy, security, and safety of minors; targeted advertising based on profiling towards children is no longer permitted);

Special risk assessments (including for negative effects on mental health will have to be provided to the Commission four months after designation and made public at the latest a year later);

Redesign of the platforms services (including their interfaces, recommender systems, terms and conditions, to mitigate these risks);

More diligent content moderation, less disinformation (platforms and search engines need to take measures to address risks linked to the dissemination of illegal content online and to negative effects on freedom of expression and information; platforms need to have clear terms and conditions and enforce them diligently and non-arbitrarily; platforms need to have a mechanism for users to flag illegal content and act upon notifications expeditiously; platforms need to analyse their specific risks, and put in place mitigation measures – for instance, to address the spread of disinformation and inauthentic use of their service);

More transparency and accountability (platforms need to ensure that their risk assessments and their compliance with all the Digital Services Act obligations are externally and independently audited; they will have to give access to publicly available data to researchers; later on, a special mechanism for vetted researchers will be established; they will need to publish repositories of all the ads served on their interface; platforms need to publish transparency reports on content moderation decisions and risk management).

By four months after notification of the designated decisions, the designated platforms and search engines had to adapt their systems, resources, and processes for compliance, set up an independent system of compliance and carry out, and report to the EU Commission, their first annual risk assessment.

3. Risk assessment

Platforms will have to identify, **analyse and mitigate** a wide array of **systemic risks** ranging from how illegal content and disinformation can be amplified on their services, to the impact on the freedom of expression and media. Similarly, specific risks around gender-based violence online and the protection of minors online and their mental health must be assessed and mitigated. The risk mitigation plans of designated platforms and search engines will be subject to an independent audit and oversight by the EU Commission.

4. A new supervisory architecture

The Digital Services Act will be enforced through a pan-European supervisory architecture. While the **European Commission** is the competent authority for supervising the designated platforms and search engines, it will work in close cooperation with

²⁵ See https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/legal-grounds-processing-data/sensitive-data/what-personal-data-considered-sensitive_en (accessed 26 May 2024).

the **Digital Services Coordinators** in the supervisory framework established by the Digital Services Act. These national authorities, which are responsible as well for the supervision of smaller platforms and search engines, needed to be established by EU Member States by 17 February 2024. That same date was also the deadline by which all other platforms must comply with their obligations under the Digital Services Act and provide their users with protection and safeguards laid down therein.

- 31 To enforce the Digital Services Act, the European Commission is also bolstering its expertise with in-house and external multidisciplinary knowledge and recently launched the European Centre for Algorithmic Transparency (ECAT).²⁶ It will provide support with assessments as to whether the functioning of algorithmic systems is in line with the risk management obligations. The European Commission is also setting up a **digital enforcement ecosystem**, bringing together expertise from all relevant sectors.

5. Delegated Regulation on independent audits under the Digital Services Act

- 32 The European Commission Delegated Regulation of 20 October 2023 provides a framework to guide providers of VLOPs and VLOSEs and auditing organisations in the preparation and issuance of audit reports and audit implementation reports. The publication of audit reports and audit implementation reports shall bring about a step-change in the transparency and accountability of such providers and shall offer a comparative basis for public scrutiny. The audit reports should also be a valuable source of information for the Commission and Digital Services Coordinators and other competent authorities under the framework of Regulation 2022/2065/EU.²⁷

Article 1 Subject matter

1. The aim of this Regulation is to contribute to the proper functioning of the internal market for intermediary services by setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected.

2. This Regulation lays down harmonised rules on the provision of intermediary services in the internal market. In particular, it establishes:

- (a) a framework for the conditional exemption from liability of providers of intermediary services;
- (b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services;
- (c) rules on the implementation and enforcement of this Regulation, including as regards the cooperation of and coordination between the competent authorities.

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²⁶ See https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2186 (accessed 26 May 2024).

²⁷ European Commission, *Delegated Regulation of 20 October 2023 supplementing Regulation 2022/2065/EU of the European Parliament and of the Council, by laying down rules on the performance of audits for very large online platforms and very large online search engines.*

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A. Function

The Digital Services Act introduces harmonised rules for the provision of intermediary services in the internal market (Art. 1(2)). According to Art. 3(1)(g) DSA 'intermediary service' means one of the following information society services: (i) a 'mere conduit' service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network; (ii) a 'catching' service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request; (iii) a 'hosting' service, consisting of the storage of information provided

by, and at the request of, a recipient of the service. This should at the same time create a safer environment for all market players.¹

- 2 Specifically regulated are, for example, social media, internet access providers or proxy servers.² It would have been reasonable to give a broader formulation of this definition. In any case, it seems reasonable to include in the scope of application of this definition also the cases in which the consumer provides data as counter-performance (cf. Art. 3 DCD).³ The consumer shall be protected against the diffusion of illegal contents – in particular in the form of disinformation,⁴ also with regard to passive users – and against discrimination.⁵ This should avoid connected risks regarding manipulation (cf. Art. 25) and keep under strict control personalised practices and algorithms.⁶ In this regard further protection is ensured also by the Unfair Commercial Practices Directive and in particular by its Art. 7 (cf. Art. 26 and Art. 3(3)).⁷
- 3 The overall goal is to ensure a good balance between innovation and consumer protection,⁸ while respecting the principle of proportionality.

B. Explanation

I. Aim of the Regulation

- 4 The Digital Services Act contains harmonised rules on the provision of intermediary services in the internal market by establishing in particular a framework for: the **conditional exemption from liability** of providers of intermediary services (Art. 1(2)(b), Arts 4 et seq.); rules on specific **due diligence obligations** tailored to certain categories of providers of intermediary services (Art. 1(2)(b), Arts 26 and 27) – in this regard the EU legislator provided different duties depending on platform's nature, function and dimension (cf. Arts 33 et seq.) –; special provisions on content moderation (Arts 16 et seq.); provisions to avoid the exploitation of vulnerabilities (Art. 25).
- 5 Finally, the DSA contains rules on its implementation and enforcement, including regarding the cooperation of and coordination between the **competent authorities** (Art. 1(2)(c)). Furthermore, the Digital Services Act contains rules not only regarding **private enforcement** (Art. 54), but also with reference to **public enforcement** (see Art. 63 (19)).⁹

II. Relationship with other EU legal instruments

- 6 The Digital Services Act should be without prejudice (Art. 2(4) and Recital 10) to other acts of Union law regulating the provision of **information society services** in general, regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing the harmonised rules set out in the Digital Ser-

¹ Recital 2; cf. Hofmann in: *Hofmann/Raue*, Art. 1 DSA mn. 11 et seq.

² Recital 29.

³ See *Lohsse/Schulze/Staudenmayer*, p. 9–10; *De Franceschi/Schulze*, p. 4 et seq.

⁴ Recitals 9, 12, 40, 72, 109.

⁵ cf. Recital 3; see also Recital 68(2).

⁶ *Busch*, 279.

⁷ See *Martini/Kramme/Kamke*, 323 et seq.

⁸ Recital 9.

⁹ *Janal*, 228; *Raue/Heesen*, 3537; Hofmann in: *Hofmann/Raue*, Art. 1 DSA, p. 46; *Kraul*, § 2 mn. 10.

vices Act, such as the Audiovisual Media Services Directive¹⁰ and the e-Privacy Directive,¹¹ the Regulation on the marketing and use of explosives precursors,¹² the Platform Regulation,¹³ Terrorist Content Regulation,¹⁴ the Regulation number-independent interpersonal communications services,¹⁵ and the Regulation on European Production and Preservation Orders.¹⁶

Similarly, for reasons of clarity, the Digital Services Act should be without prejudice to Union law on **consumer protection**, in particular Regulations 2017/2394/EU¹⁷ and 2019/1020/EU,¹⁸ Unfair Terms Directive, General Product Safety Directive,¹⁹ Unfair Commercial Practices Directive,²⁰ Consumer Rights Directive, ADR Directive, and on the **protection of personal data**, in particular the GDPR and Directive 2002/58/EC.²¹

The Digital Services Act should also be without prejudice to Union rules on **private international law**, in particular rules regarding jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as the Brussels I bis Regulation, and rules on the law applicable to contractual and non-contractual obligations. The Digital Services Act should also be without prejudice to Union law on working conditions and Union law in the field of judicial cooperation in civil and criminal matters.

However, to the extent that those Union legal acts pursue the same objectives as those laid down in the Digital Services Act, the rules of the Digital Services Act should apply in respect of issues that are not addressed or not fully addressed by those other legal acts as well as issues on which those other legal acts leave Member States the possibility of adopting certain measures at national level.²²

Some of the above listed instruments deserve a specific mention.

¹⁰ Directive (EU) 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

¹¹ Directive (EU) 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

¹² Regulation (EU) 2019/1148 of the European Parliament and of the Council of 20 June 2019 on the marketing and use of explosives precursors, amending Regulation (EC) No 1907/2006 and repealing Regulation (EU) No 98/2013.

¹³ Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

¹⁴ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online.

¹⁵ Regulation (EU) 2021/1232 of the European Parliament and of the Council of 14 July 2021 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communications services for the processing of personal and other data for the purpose of combating online child sexual abuse.

¹⁶ Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings.

¹⁷ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

¹⁸ Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products.

¹⁹ Directive (EC) 2001/95 of the European Parliament and of the Council of 3 December 2001 on general product safety.

²⁰ Directive (EC) 2005/29 of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices.

²¹ Directive (EC) 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

²² Recital 10. See *Kuhlmann/Aydik*, 244.

1. Unfair Terms Directive

- 11 Directive 1993/13/EEC on unfair terms in consumer contracts and the related case law of the CJEU finds application to business to consumers contracts unless the Digital Services Act sets stricter rules.²³ CJEU case law shall be useful also for the interpretation of non B2C contracts.²⁴

2. Platform Regulation

- 12 According to Art. 2, the Digital Services Act is without prejudice to the rules laid down by the Platform Regulation. Therefore, the **Platform Regulation** has – as *lex specialis* – **precedence over Art. 14 DSA**.
- 13 Art. 3 Platform Regulation contains transparency and content criteria regarding general terms and conditions and restrictions, rules for changing terms and conditions, and consequences for the non compliance with the previous paragraphs.²⁵
- 14 Art. 7 Platform Regulation imposes to providers of online intermediation services and to providers of online search engines the duty to include in their terms and conditions a description of any differentiated treatment.²⁶
- 15 Art. 10 Platform Regulation imposes then to providers of online intermediation services, which restrict the ability of business users to offer the same goods and services to consumers under different conditions through other means than through those services, the duty to include the grounds for that restriction in their terms and conditions and make those grounds easily available to the public.²⁷

3. Terrorist Content Regulation

- 16 Given the mention in Art. 2(4)(c), the Terrorist Content Regulation prevails as *lex specialis* over the Digital Services Act.
- 17 Art. 5 Terrorist Content Regulation provides that a hosting service provider exposed to terrorist content shall – in a diligent, proportionate and non-discriminatory manner, with due regard, in all circumstances, to the fundamental rights of the users – include in its terms and conditions and apply provisions to address the misuse of its services for the dissemination to the public of terrorist content. In doing so, it shall take into account, in particular, the fundamental importance of the freedom of expression and information in an open and democratic society, with a view to avoiding the removal of material, which is not terrorist content.
- 18 As regards safeguards and accountability, Art. 17 DSA contains transparency obligations for hosting service providers: they shall set out clearly in their terms and conditions their policy for addressing the dissemination of terrorist content, including, where appropriate, a meaningful explanation of the functioning of specific measures, including, where applicable, the use of automated tools. Additionally, after having taken action to address the dissemination of terrorist content or having been required to take action pursuant to the Digital Services Act in a given calendar year, they shall make publicly available a transparency report on those actions for that year, by publishing it before 1 March of the following year.

²³ cf. Art. 2(4)(f) and Recital 10(2).

²⁴ *Gerdemann/Spindler*, 8.

²⁵ For details Platform Regulation → Platform Regulation Art. 3–10.

²⁶ For details → Platform Regulation Art. 7 mn. 5–8.

²⁷ For details → Platform Regulation Art. 10 mn. 5.

III. Conditional liability exemption

1. Introduction

Following the approach already taken by Arts 12 et seq. E-Commerce Directive, the rules on liability of providers of intermediary services set out in the Digital Services Act should indeed only establish when the provider of intermediary services concerned cannot be held liable in relation to illegal content provided by the recipients of the service.²⁸ Those rules should not be understood to provide a positive basis for establishing when a provider can be held liable, which is for the applicable rules of Union or national law to determine. Furthermore, the **exemptions from liability** established the Digital Services Act should apply in respect of any type of liability as regards any type of illegal content, irrespective of the precise subject matter or nature of those laws.²⁹

Arts 4 et seq. presuppose the existence of a basis for liability under European or national law. The rules on conditional exemption from liability are flanked by **procedural requirements** for taking action against illegal content (cf. Arts 16, 20–23).³⁰ Procedural requirements in this regard are also provided (Art. 1(2) (c)).

2. Limits of the liability exemption

Art. 8 contains a prohibition of general monitoring. Newly introduced is the rule on voluntary compliance measure of Art. 7, according to which providers of intermediary services shall not be deemed ineligible for the exemptions (Arts 4, 5 and 6) solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of EU law and national law in compliance with EU law, including the requirements set out in the Digital Services Act. This means that the fundamental structure of the E-Commerce Directive was preserved and because of that it is still necessary to refer to the specific due diligence obligations developed under the concerning CJEU case law.³¹

As specifically regards hosting services, Art. 16 provides a further fine tuning of the **notice-and-takedown** mechanism to allow any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content. Those mechanisms shall be easy to access and user-friendly, and shall allow for the submission of notices exclusively by electronic means (Art. 16(1)). This has significant consequences on the applicability and functioning of the privilege, as notices referred to in this Art. 16 shall be considered to give rise to ‘actual knowledge or awareness’ for the purposes of Art. 6 in respect of the specific item of information concerned where they allow a diligent provider of hosting services to identify the illegality of the relevant activity or information without a detailed legal examination (Art. 16(3)).³²

Positive obligations are also foreseen (see Art 1(2)(b)), although the DSA does not introduce new grounds of liability: the legal basis for claims shall be therefore be found outside the Regulation itself.

²⁸ Gerdemann/Spindler, 5 et seq.

²⁹ See Legner, 99; Nägele, 1137.

³⁰ cf. Art. 17 DSA.

³¹ CJEU, C-682/18 and C-683/18, *Peterson/Google and Elsevier/Cyando* EU:C:2021:503.

³² Hofmann in: *Hofmann/Raue*, Art. 1 DSA, p. 48; *Gerdemann/Spindler*, 5.

IV. New diligence obligations

1. Grounds

- 24 The Digital Services Act sets out basic obligations applicable to all providers of intermediary services, as well as additional obligations for providers of hosting services and, more specifically, providers of online platforms and of very large online platforms and of very large online search engines. Those harmonised **due diligence obligations** are needed to address the identified public policy concerns, such as safeguarding the legitimate interests of the recipients of the service, addressing illegal practices and protecting the fundamental rights enshrined in the EU Charter. The due diligence obligations are independent from the question of liability of providers of intermediary services which need therefore to be assessed separately.³³
- 25 The Digital Services Act aims at establishing a clear, effective, predictable, and balanced set of harmonised due diligence obligations for providers of intermediary services. The main goal is to safety and trust of the **recipients of the service**, including consumers, minors and users at particular risk of being subject to hate speech, sexual harassment or other discriminatory actions, the protection of relevant fundamental rights enshrined in the EU Charter, the meaningful accountability of those providers and the empowerment of recipients and other affected parties, whilst facilitating the necessary oversight by competent authorities.³⁴ Such due diligence obligations are tailored to the nature, type³⁵ and size³⁶ of the intermediary service concerned.

2. Due diligence obligations applicable to all providers of intermediary services

- 26 Due diligence obligations applicable to **all providers of intermediary services** regard: Points of contact for Member State's Authorities, the Commission and the Board (Art. 11); Points of contact for recipient of the service (Art. 12); Legal representatives (Art. 13); Terms and conditions (Art. 14); Transparency reporting obligations for providers of intermediary services (Art. 14); Transparency reporting obligations for providers of intermediary services (Art. 15).
- 27 Further provisions applicable to **providers of hosting services**, including online platforms, regard: notice and action mechanisms (Art. 16); Statement of reasons (Art. 17); Notification of suspicions of criminal offences (Art. 18). Additional rules apply to **providers of online platforms** (Arts 19–32). Regarding the category of 'online platforms', the EU legislator introduced specific rules for those platforms allowing consumers to conclude distance contracts with traders: Exclusion for small and medium enterprises (Art. 29 DSA); Traceability of traders (Art. 30); Compliance by design (Art. 31); Right to information (Art. 32).

3. Additional obligations applicable to VLOPs and VLOSEs

- 28 Specific obligations are applicable to very large online platforms (VLOPs) and to very large online search engines (VLOSEs) to manage systemic risks (Arts 33–43).³⁷

³³ Recital 41.

³⁴ Recital 40.

³⁵ Arts 29 et seq.

³⁶ Arts 33 et seq.

³⁷ cf. *Rössel*, 102 et seq.; *Schmidt/Grewe*, 279 et seq.

Art. 33 contains the definition and designation process of VLOPs and VLOSEs, thereby detailing also the powers of the EU Commission in the case of lack of communication of the relevant data. 29

Further provisions regard the risk assessment duty, that is the duty of providers VLOPs and VLOSEs to diligently identify, analyse and assess any **systemic risks** in the European Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services. Four categories of systemic risks should be assessed in-depth by the providers of very large online platforms and of very large online search engines. 30

A **first category** concerns the **risks associated with the dissemination of illegal content** (Art. 34(1)(a)), such as the dissemination of child sexual abuse material or illegal hate speech or other types of misuse of their services for criminal offences, and the conduct of illegal activities, such as the sale of products or services prohibited by Union or national law, including dangerous or counterfeit products, or illegally-traded animals. For example, such dissemination or activities may constitute a significant systemic risk where access to illegal content may spread rapidly and widely through accounts with a particularly wide reach or other means of amplification. Providers of very large online platforms and of very large online search engines should assess the risk of dissemination of illegal content irrespective of whether or not the information is also incompatible with their terms and conditions. This assessment is without prejudice to the personal responsibility of the recipient of the service of very large online platforms or of the owners of websites indexed by very large online search engines for possible illegality of their activity under the applicable law.³⁸ 31

A **second category** concerns the actual or foreseeable **impact of the service on the exercise of fundamental rights** (Art. 34(1)(b)), as protected by the EU Charter, including but not limited to human dignity, freedom of expression and of information, including media freedom and pluralism, the right to private life, data protection, the right to non-discrimination, the rights of the child and consumer protection. Such risks may arise, for example, in relation to the design of the algorithmic systems used by the very large online platform or by the very large online search engine or the misuse of their service through the submission of abusive notices or other methods for silencing speech or hampering competition.³⁹ 32

A **third category** of risks concerns the **actual or foreseeable negative effects on democratic processes** (Art. 34(1)(c)), civic discourse and electoral processes, as well as public security.⁴⁰ 33

A **fourth category** of risks stems from similar concerns relating to any actual or foreseeable negative effects in relation to **gender-based violence**, the **protection of public health and minors** and serious negative consequences to the **person's physical and mental well-being** (Art. 34(1)(d)). Such risks may also stem from coordinated disinformation campaigns related to public health, or from online interface design that may stimulate behavioural addictions of recipients of the service.⁴¹ 34

When assessing such systemic risks, providers of very large online platforms and of very large online search engines should focus on the systems or other elements that may contribute to the risks, including all algorithmic systems that may be relevant, in particular their recommender systems and advertising systems, paying attention to the related data collection and use practices. They should also assess whether their 35

³⁸ Recital 80.

³⁹ Recital 81.

⁴⁰ Recital 82.

⁴¹ Recital 83.

terms and conditions and the enforcement thereof are appropriate, as well as their content moderation processes, technical tools and allocated resources. When assessing the systemic risks identified in the Digital Services Act, those providers should also **focus on the information** which is not illegal, but contributes to the systemic risks identified in the Digital Services Act. Such providers should therefore pay particular attention on how their services are used to disseminate or amplify misleading or deceptive content, including disinformation. Where the algorithmic amplification of information contributes to the systemic risks, those providers should duly reflect this in their risk assessments.⁴²

4. Role of codes of conduct

- 36 The Commission and the Board shall encourage and facilitate the drawing up of voluntary **codes of conduct** at Union level to contribute to the proper application of the Digital Services Act, taking into account in particular the specific challenges of tackling different types of illegal content and systemic risks, in accordance with Union law in particular on competition and the protection of personal data. Specific rules in this regard are contained in Art. 45 (Codes of conduct), Art. 46 (Codes of conduct for online advertising) and Art. 47 (Codes of conduct for accessibility).
- 37 Codes of conduct should also **support** and **complement the transparency obligations** relating to advertising for providers of online platforms, of very large online platforms and of very large online search engines set out in the Digital Services Act to provide for flexible and effective mechanisms to facilitate and enhance the compliance with those obligations, notably as concerns the modalities of the transmission of the relevant information. This should include facilitating the **transmission of the information** on the advertiser who pays for the advertisement when they differ from the natural or legal person on whose behalf the advertisement is presented on the online interface of an online platform. The codes of conduct should also include measures to ensure that meaningful information about the **monetisation of data** is appropriately shared throughout the value chain. In order to ensure the effectiveness of codes of conduct, the Commission should include **evaluation mechanisms** in drawing up the codes of conduct. Where appropriate, the Commission may invite the Fundamental Rights Agency or the European Data Protection Supervisor to express their opinions on the respective code of conduct. When assessing risks to the rights of the child, providers of very large online platforms and of very large online search engines should consider for example how easy it is for minors to understand the design and functioning of the service, as well as how minors can be exposed through their service to content that may impair minors' health, physical, mental and moral development. Such risks may arise, for example, in relation to the design of online interfaces which intentionally or unintentionally exploit the weaknesses and inexperience of minors or which may cause addictive behaviour.⁴³
- 38 Providers of very large online platforms and of very large online search engines shall be subject, at their own expense and at least once a year to independent audits to assess compliance with the obligations set out in Chapter III DSA (Arts 11–48) as well as with any commitments undertaken pursuant to the codes of conduct referred to in Arts 45 and 46 (Codes of conduct and Codes of conduct for online advertising) and the requirements set by Art. 48 (Crisis protocols).

⁴² Recital 84.

⁴³ Recital 81.

5. Transparency requirements

There are several **transparency** requirements which give concretisation to the due diligence rules contained in the Digital Services Act: general transparency obligation regarding **terms and conditions** (Art. 14); special provisions for **advertising on online platforms** (Art. 26), for recommender systems (Arts 27 and 38).⁴⁴ The interplay with the **GDPR** is particularly relevant, and specifically with its Art. 22 (Automated individual decision-making, including profiling), according to which the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.⁴⁵ Equally relevant is the interplay with the **Unfair Commercial Practices Directive**, and in particular of its Arts 6 and 7 on misleading actions and omissions. In this regard, it was rightly pointed out that Unfair Commercial Practices Directive should expand the vulnerability criteria to also include e. g. ethnicity or gender that might be relevant both in the digital and physical market. In this regard, the Digital Services Act takes on a more holistic approach to vulnerability by banning advertisements based on profiling of special categories of personal data, such as ethnicity, religious and political beliefs (Art. 26(3)). It seems reasonable that in the future the Unfair Commercial Practices Directive will follow an approach like that of the Digital Services Act to take a greater variety of consumer characteristics into account when assessing the fairness of practices.⁴⁶

Furthermore, providers of intermediary services shall make publicly available, in a machine-readable format and in an easily accessible manner, at least once a year, clear, easily comprehensible reports on any **content moderation** that they engaged in during the relevant period (Art. 15(1)). Those obligations apply in addition to the transparency reporting obligations applicable to all providers of intermediary services under the Digital Services Act.⁴⁷

The reporting of **suspicious of criminal offences** (Art. 18), the provision of an **internal complaints management** system (Art. 20) together with the provision of **risk management tools** (Arts 35 et seq.) are equally due.

A clear prohibition of **dark patterns** is contained in Art. 25, whereby providers of online platforms shall not design, organise or operate their online interfaces in a way that deceives or manipulates the recipients of their service or in a way that otherwise materially distorts or impairs the ability of the recipients of their service to make free and informed decisions.⁴⁸

⁴⁴ See the proceeding opened by the *Commission* on 30 April 2024 against *Facebook* and *Instagram* for alleged violation of Arts 14(1), 16(1), 16(5), 16(6), 17(1), 20(1), 20(3), 24(5), 25(1), 34(1), 34(2), 35(1) and 40(12) DAS (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2373 accessed 26 May 2024).

⁴⁵ See on this *Comelles*, 193; *Tambou*, 529.

⁴⁶ See *Kaprou*, 78.

⁴⁷ Recital 65.

⁴⁸ See *Kühling/Sauerborn*, 226. See the proceeding opened on 18 December 2024 by the *Commission* in order to assess whether *X* may have breached the DSA in areas related to risk management, content moderation, dark patterns, advertising transparency, and data access for researchers (https://ec.europa.eu/commission/presscorner/detail/en/ip_23_6709 accessed 26 May 2024). Cf. *Kaesling*, 1609 ff.; *Versaci*, 1130.

Art. 1 DSA

V. Enforcement

- 43 The Digital Services Act contains also rules on implementation and enforcement, including regarding cooperation and coordination between competent authorities (Art. 1(2)(c)).⁴⁹
- 44 The Digital Services Act foresees a mix of **private and public enforcement**.
- 45 According to Art. 54, recipients of the service shall have the right to seek, in accordance with Union and national law, compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under the Regulation itself.
- 46 Furthermore, the Digital Services Act establishes a supervision and enforcement regime, which shall be in the hands of one or more competent authorities, designated by the Member States, to be responsible for the supervision of providers of intermediary services and enforcement of the Digital Services Act ('competent authorities').
- 47 Each Member State shall designate one of the competent authorities as their **Digital Services Coordinator** (Art. 49(2)), which shall be responsible for all matters relating to supervision and enforcement of the Digital Services Act in that Member State, unless the Member State concerned has assigned certain specific tasks or sectors to other competent authorities. Digital Services Coordinators shall cooperate with each other, other national competent authorities, the Board and the Commission. Art. 51 lists the powers of the Digital Services Coordinators, which comprise, in particular: the power to provide information relating to a suspected infringement of the Regulation (Art. 51(1)(a)); the power to carry out, or to request a judicial authority in their Member State to order, inspections of any premises that those providers or those persons use for purposes related to their trade, business, craft or profession, or to request other public authorities to do so (Art. 51(1)(b)); the power to ask any member of staff or representative of those providers or those persons to give explanations in respect of any information relating to a suspected infringement and to record the answers with their consent by any technical means (Art. 51(1)(c)).
- 48 The powers of the Digital Services Coordinators include the power to accept the commitments offered by the providers (Art. 51(2)(a)), the power to order the cessation of infringements and to impose proportionate remedies (Art. 51(2)(b)), the power to impose fines (Art. 51(2)(c)), the power to impose a periodic penalty payment, or to request a judicial authority in their Member State to do so (Art. 51(2)(d)), the power to adopt interim measures or to request the competent national judicial authority in their Member State to do so, to avoid the risk of serious harm (Art. 51(2)(e)).
- 49 Breaches of due diligence obligations can be fined via private enforcement (Art. 54).
- 50 The establishment of a **European Data Protection Board** is also foreseen (Arts 68 et seq.).

⁴⁹ Falce/Faraone, 5–6.

Article 14

Terms and conditions

1. Providers of intermediary services shall include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service, in their terms and conditions. That information shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system. It shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible and machine-readable format.

2. Providers of intermediary services shall inform the recipients of the service of any significant change to the terms and conditions.

3. Where an intermediary service is primarily directed at minors or is predominantly used by them, the provider of that intermediary service shall explain the conditions for, and any restrictions on, the use of the service in a way that minors can understand.

4. Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.

5. Providers of very large online platforms and of very large online search engines shall provide recipients of services with a concise, easily-accessible and machine-readable summary of the terms and conditions, including the available remedies and redress mechanisms, in clear and unambiguous language.

6. Very large online platforms and very large online search engines within the meaning of Article 33 shall publish their terms and conditions in the official languages of all the Member States in which they offer their services.

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A. Function

- 1 Art. 14 is a pillar regarding **diligence obligations**. It aims at strengthening transparency, moderating party autonomy, protecting vulnerable persons, positively steering the platforms' behaviour, also by setting enhanced duties on very large online platforms and very large online search engines.
- 2 Art. 16 EU Charter provides 'The freedom to conduct a business in accordance with Union law and national laws and practices'.¹ Now, as a result of Art. 16, this freedom will be significantly restricted.

B. Context

I. Introduction

- 3 The Digital Services Act sets certain rules on the content, application and enforcement of the terms and conditions of those providers in the interests of transparency, the **protection of recipients** of the service and the avoidance of unfair or arbitrary outcomes (Art. 14(1)).² Within this framework, it is particularly important that providers of intermediary services inform the recipient of the service of any significant change to the **terms and conditions** (Art. 14(2)). Here is not clear why the legislator decided to make relevant only the 'significant' changes, and not rather all changes. We think that it is important that all changes that alter the equilibrium of rights and duties are notified to the recipient of the service, and that only those which can be qualified as merely formal.
- 4 This is all the more important when **minors** are involved: in this regard, providers of intermediary services that are primarily directed at minors, for example through the design or marketing of the service, or which are used predominantly by minors, should make particular efforts to render the explanation of their terms and conditions easily understandable to minors (Art. 14(3)).³
- 5 As regards restrictions provided in the general terms and conditions, it is particularly important that providers of intermediary services act in a non-arbitrary and **non-discriminatory manner** and consider the rights and legitimate interests of the recipients of the service, including fundamental rights as enshrined in the EU Charter and in the United Nations Guiding Principles on Business and Human Rights (Art. 14(4)).
- 6 Given their special role and reach, the EU legislator considers appropriate to impose on very large online platforms and very large online search engines **additional requirements** regarding information and transparency of their terms and conditions. Consequently, providers of very large online platforms and very large online search engines should provide their terms and conditions in the official languages of all Member States in which they offer their services and shall also provide recipients of the services with a concise and easily readable summary of the main elements of the terms and conditions, including the available remedies and all redress mechanisms. Such summaries should

¹ CJEU, C-314/12, *UPC Telekabel* EU:C:2014:192.

² Recital 45.

³ Recital 46.

identify the main elements of the information requirements, including the possibility of easily opting out from optional clauses (Art. 14(5)).⁴

To ensure an adequate level of transparency and accountability, providers of intermediary services should make publicly available an **annual report** in a machine-readable format, in accordance with the harmonised requirements contained in the Digital Services Act, on the content moderation in which they engage, including the measures taken as a result of the application and enforcement of their terms and conditions. However, in order to avoid disproportionate burdens, those transparency-reporting obligations should not apply to providers that are **micro or small enterprises**⁵ and which are not very large online platforms within the meaning of the Digital Services Act itself.⁶

Furthermore, very large online platforms and very large online search engines (cf. Art. 33) shall publish their terms and conditions in the **official languages** in all the Member States in which they offer their services (Art. 14(6)). In this regard, it is not entirely clear why only VLOPs and VLOSEs shall comply with this duty and not all providers of intermediary services. Of course, providing the different language versions will cause additional burden to the provider of intermediary services, but the availability of the terms and conditions in the language of the recipient of intermediary services shall be considered as a fundamental feature due for all intermediary services.

II. Definitions used in Art. 14 DSA

Art. 14 uses the following definitions: content moderation (Art. 3(t)), online platform (Art. 3(i)), online search engine (Art. 3(j)), terms and conditions (Art. 3(u)), very large online platform and very large online search engine (Art. 33(1)), intermediary service (Art. 3(g)).

III. Other transparency and accountability mechanisms

Several provisions of the Digital Services Act set additional transparency and accountability mechanisms, which complement what provided by Art. 14. The usual risk is that 'too much information is no information'.⁷

According to Art. 15, Providers of intermediary services – with exception of micro or small enterprises as defined in Recommendation 2003/361/EC⁸ – shall make publicly available, in a machine-readable format and in an easily accessible manner, at least once a year, clear, easily comprehensible **reports** on any **content moderation** that they engaged in during the relevant period. The same provision contains further specifications in that regard.

According to Art. 17, providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service for any of the following **restrictions** imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions.

⁴ See *Berz/Engel/Hacker*, 589.

⁵ As defined in Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises.

⁶ Recital 49.

⁷ See e.g. *Kuß/D. Lehmann*, 609; *Gielen/Uphues*, 636.

⁸ Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.

- 13 Art. 23(4) complements Art. 14(1) by imposing that providers of online platforms set out, in a clear and detailed manner, in their terms and conditions their policy in respect of the **misuse** referred to in Art. 23(1) and (2), and shall give examples of the facts and circumstances that they take into account when assessing whether certain behaviour constitutes misuse and the duration of the suspension.
- 14 Art. 24 contains an additional series of **transparency reporting** obligations for providers of online platforms and clarifies that providers of online platforms shall, without undue delay, submit to the Commission the decisions and the statements of reasons referred to in Art. 17(1) for the inclusion in a publicly accessible machine-readable database managed by the Commission – also ensuring that the information submitted does not contain personal data.
- 15 Providers of online platforms that use recommender systems shall also set out in their terms and conditions, in plain and intelligible language, the main **parameters** used in their **recommender systems**, as well as any options for the recipients of the service to modify or influence those main parameters (Art. 27(1)).
- 16 At the same time, the EU Commission shall support and promote the development and implementation of **voluntary standards** set by relevant European and international standardisation bodies (Art. 44).
- 17 Providers of online platforms shall set up an **internal complaint-handling system**, *inter alia* by providing recipients of the service, including individuals or entities that have submitted a notice, for a period of at least six months following the decision referred to in Art. 20(1) DSA, with access to an effective internal complaint-handling system that enables them to lodge complaints, electronically and free of charge, against the decision taken by the provider of the online platform upon the receipt of a notice or against the following decisions taken by the provider of the online platform on the grounds that the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions (Art. 20(1)). A certified **out-of-court dispute settlement body** shall resolve disputes relating to those abovementioned decisions, including complaints that have not been resolved by means of the internal complaint-handling system referred to in Art. 20 (Art. 21).⁹
- 18 Providers of very large online platforms and of very large online search engines shall – by the date of application referred to in Art. 33(6), second subparagraph and at least once every year thereafter, and in any event prior to deploying functionalities that are likely to have a critical impact on the risks – diligently identify, analyse and assess any **systemic risks** in the EU stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services (Art. 34(1)).¹⁰
- 19 Providers of very large online platforms and of very large online search engines may be required to adapt their terms and conditions and their enforcement for the purpose of **mitigation of risks** (Art. 35).

C. Explanation

- 20 Art. 14 addresses intermediary services.¹¹ Art. 14(5) and (6) apply only to VLOPs and VLOSEs. The provision has great relevance in particular for web hosting services, cloud

⁹ cf. Recital 39(4).

¹⁰ cf. Recital 87.

¹¹ cf. Art. 3(g).

storage services, app stores, access and catching services.¹² Those services can determine content available to the recipients and influence moderation practices. On the contrary, the Digital Services Act does not cover financial service providers, like Mastercard, Visa or Paypal.¹³

I. Information on any restrictions

Providers of intermediary services shall include information on any restrictions that they impose in relation to the use of their service in respect of information provided by the recipients of the service, in their terms and conditions (Art. 14(1)). 21

That information shall include information on any policies, procedures, measures and tools used for the purpose of **content moderation**, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system. It shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible and machine-readable format.¹⁴ 22

This list shall not be considered exhaustive. 23

Content moderation is defined by Art. 3(t) as the **activities**, whether automated or not, undertaken by providers of intermediary services, that are **aimed, in particular, at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions**, provided by recipients of the service, including measures taken that affect the **availability, visibility**,¹⁵ and **accessibility** of that illegal content or that information, such as **demotion, demonetisation, disabling of access to, or removal** thereof, or that affect the ability of the recipients of the service to provide that information, such as the termination or suspension of a recipient's account. 24

'**Demonetisation**' is a particular form of demotion and can be defined according to Art. 20(1)(d), which refers to decisions whether or not to suspend, terminate or otherwise restrict the ability to monetise information provided by the recipients. 25

The list contained in Art. 3(1)(t) shall not be considered exhaustive and it is not relevant whether or not the restrictions are a result of a human decision.¹⁶ 26

The intermediary service can also go beyond account restrictions and suspend or terminate the provision of the service to all recipients in whole or in part.¹⁷ 27

The restrictions and their conditions are then subject to **judicial review**, as they cannot be qualified as a part of the subject matter of the contract.¹⁸ 28

Only online platforms have the duty to establish an **internal compliant procedure**, not all intermediary services. 29

A parallel provision – limited to the B2B relationships is contained in Art. 8 Platform Regulation, whereby **providers of online intermediation services** shall: (a) impose retroactive changes to terms and conditions, except when they are required to respect a legal or regulatory obligation or when the retroactive changes are beneficial for the business users; (b) ensure that their terms and conditions include information on the conditions under which business users can terminate the contractual relationship with the 30

¹² See *Busch*, 32 et seq.

¹³ Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 23.

¹⁴ Further insights on the content moderation are contained in Art. 15(1)(2)(c), Art. 17(1) and Art. 20(1).

¹⁵ cf. Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 32.

¹⁶ cf. Art. 15(1)(2)(c) DSA.

¹⁷ cf. Art. 17(1)(c) and Art. 20(1)(b) DSA.

¹⁸ See BGH 29.7.2021 - III ZR 179/20, NJW 2021, 3179.

provider of online intermediation services; and ensure that their terms and conditions include information on the conditions under which business users can terminate the contractual relationship with the provider of online intermediation services; and (c) include in their terms and conditions a description of the technical and contractual access, or absence thereof, to the information provided or generated by the business user, which they maintain after the expiry of the contract between the provider of online intermediation services and the business user.¹⁹

- 31 The Digital Services Act contains also dedicated complementary provisions regarding **policy against misuse** (Art. 23(4)) and parameters to be used by the **recommender system** (Art. 27).

II. Drafting information on restrictions

- 32 According to Art. 14(1), information shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be **publicly available** in an **easily accessible** and machine-readable format.
- 33 In the B2C contractual relationships, the providers of intermediary services shall comply with the provisions of the Consumer Rights Directive and in particular with its Art. 6 (Information requirements for distance and off-premises contracts)²⁰ and Art. 8 (Formal requirements for distance contracts)²¹. Those provisions shall be read together with the provisions of the Unfair Commercial Practices Directive, and in particular with its Art. 7 (Misleading omissions), and with Art. 4 and 5 Unfair Terms Directive. As regards B2B contracts, Art. 3(1)(a) Platform Regulation shall apply.²²
- 34 According to Recital 45, providers of intermediary services may use **graphical elements** in their terms of service, such as icons or images, to illustrate the main elements of the information requirements set out in the same regulation. Providers should inform recipients of their service through appropriate means of significant changes made to terms and conditions, for instance when they modify the rules on information that is permitted on their service, or other such changes which could directly impact the ability of the recipients to make use of the service.²³
- 35 Given the abovementioned requirements, it does not seem appropriate that the duty set by Art. 14(6) – to publish the terms and conditions in the **official languages** of all the Member States in which the providers offer their services – should be limited only to very large online platforms and to very large online search engines: it should be rather extended to all provider of intermediary services.
- 36 As regards the requirement of ‘**easily accessible**’, the providers of intermediary services shall make available terms and conditions directly on their homepage. As concerns the requirement of ‘**public availability**’, this should be complied with if the terms and conditions are available for the general public and not only to the recipients of the service. Actually, this last provision sounds quite pleonastic, as it goes without saying that terms and conditions are publicly available in order to be subject of acceptance by the recipients.

¹⁹ For details → Platform Regulation Art. 8 mn. 1 et seq. See also Graf von Westphalen in: *Busch*, Art. 8 P2B-VO, 353.

²⁰ For details Consumer Rights Directive → CRD Art. 6 mn. 1 et seq.

²¹ For details Consumer Rights Directive → CRD Art. 8 mn. 1 et seq.

²² For details → Platform Regulation Art. 3 mn. 9–10.

²³ See *Hofmann*, 785; *Specht*, 1042.

The infringement of the rules on terms and conditions leads to a series of consequences. In B2B relationships, Art. 3(3) Platform Regulation provides the clause's nullity. In the B2C sector, Art. 6 Unfair Terms Directive provides that the term not in compliance is not binding on the consumer. 37

III. Duty to provide information on significant changes of terms and conditions

According to Art. 14(2), providers of intermediary services shall **inform the recipients of the service of any significant change to the terms and conditions.** 38

A non-exhaustive list of what the European legislator considers as a significant change is contained in **Recital 45 DSA**, which considers the modification of the rules on information that is permitted on their service, or other such changes which could directly impact the ability of the recipients to make use of the service.²⁴ 39

The formulation is remarkably weak and opens the door to a significant (and so far unjustified) freedom of providers of intermediary services. 40

According to Art. 14(1), providers have already to give information on any restrictions they may impose in relation to the use of their services. In any case, changes of terms and conditions – and not only those which can be qualified as ‘significant changes’ – shall be subject: in the **B2C sector**, to the control provided by Art. 1(j) Annex to the Unfair Terms Directive; in the **B2B sector**, to the control provided in Art. 3(2) Platform Regulation. 41

According to **Art. 1(1)(j) Annex the Unfair Terms Directive**, a term may be regarded as unfair if it enables the seller or supplier to alter (any alteration) the terms of the contract unilaterally without a valid reason which is specified in the contract. 42

According to **Art. 3(2) Platform Regulation**, providers of online intermediation services shall notify, on a durable medium, to the business users concerned *any proposed changes* (and not only a *significant* change) of their terms and conditions. 43

The proposed changes shall not be implemented before the expiry of a **notice period** which is reasonable and proportionate to the nature and extent of the envisaged changes and to their consequences for the business user concerned. That notice period shall be at least 15 days from the date on which the provider of online intermediation services notifies the business users concerned about the proposed changes. Providers of online intermediation services shall grant longer notice periods when this is necessary to allow business users to make technical or commercial adaptations to comply with the changes. 44

The business user concerned shall have the **right to terminate** the contract with the provider of online intermediation services before the expiry of the notice period. Such termination shall take effect within 15 days from the receipt of the notice pursuant to the first subparagraph, unless a shorter period applies to the contract. 45

The business user concerned may, either by means of a written statement or a clear affirmative action, **waive the notice period** referred to in the second subparagraph at any moment from the receipt of the notice pursuant to the first subparagraph. 46

During the notice period, submitting new goods or services to the online intermediation services shall be considered clear **affirmative action to waive the notice period**, except in cases where the reasonable and proportionate notice period is longer than 15 days because the changes to the terms and conditions require the business user to make significant technical adjustments to its goods or services. In such cases, the notice period 47

²⁴ Recital 45.

shall not be considered automatically to be waived where the business user submits new goods and services.

- 48 **Changes** to terms and conditions implemented by a provider of online intermediation services contrary to the abovementioned provisions shall be **null and void**.
- 49 The Digital Services Act leaves completely open the question of which **consequences a violation of Art. 14** can have for the **validity of the terms and conditions**. It was rightly noted that the European Parliament proposed to introduce an explicit rule providing that terms not complying with the requirements contained in Art. 14 'shall not be binding on the recipients'.²⁵ This important clarification was erased during the trilogue and is not present in the final text of the Digital Services Act.²⁶
- 50 It seems reasonable to fill the gap through Art. 6 Unfair Terms Directive²⁷ and to conclude that any terms which do not meet the transparency criteria set by Art. 14 shall be not binding.²⁸
- 51 In addition to that, recipients of the service shall have the right to seek, in accordance with Union and national law, **compensation** from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under the Digital Services Act.²⁹
- 52 In any case, also the information to be given to the recipients of the service of any significant change to the terms and conditions shall have the same characteristics provided by Art. 14(1) for information on any restrictions in relation to the use of their service, and therefore they shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be publicly available in an easily accessible and machine-readable format. According to Recital 45(6), providers should inform recipients of their service through appropriate means of significant changes made to terms and conditions. In this regard, it seems appropriate to impose to providers of intermediary services to 'actively' inform the recipient and not only to simply update their website.³⁰

IV. Services primarily directed at minors or primarily used by them

- 53 Art. 14(3) provides that where an intermediary service is primarily **directed at minors** or is predominantly used by them, the provider of that intermediary service shall explain the conditions for, and any restrictions on, the use of the service in a way that minors can understand. The rule does not touch situations in which the services are exclusively directed to minors.³¹ To 'explain the conditions ... in a way that minors can understand' means that e.g. the provider of intermediary services shall put at the dispos-

²⁵ See *Schulte-Nölke*, 717, who refers to the Document P9 TA(2022)0014, Amendment 539 of the European Parliament of 20 January 2022 on the 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 ('Terms that do not comply with this Article shall not be binding on recipients').

²⁶ On this choice, see *Schulte-Nölke*, 717, who highlights that 'one of the problems of the proposed radical solution whereby terms contradicting the requirements of the DSA should be invalid could be that this would also cover non-transparent terms simply due to their non-transparency, regardless of their content. If understood literally, non-transparent terms would be invalid even if they are favourable to the consumer.'

²⁷ 'Member States shall law down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.'

²⁸ *Schulte-Nölke*, 717.

²⁹ cf. Art. 54.

³⁰ See Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 46 et seq.

³¹ Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 70–71.

al of the minor a specific document or webpage with a layout tailored to their level of understanding. That is a quite vague provision, which will need to find clarification in case law.

V. Application and enforcement of the restrictions

According to Art. 14(4), providers of intermediary services shall act in a diligent, ob- 54
jective and proportionate manner in applying and enforcing the restrictions referred to
in Art. 14(1), with due regard to the rights and legitimate interests of all parties involved,
including the fundamental rights of the recipients of the service, such as the freedom of
expression, freedom and pluralism of the media, and other fundamental rights and free-
doms as enshrined in the European Charter of Fundamental Rights.³²

Providers of the intermediary services should clearly indicate and maintain up to 55
date in their terms and conditions the information as to the **grounds on the basis of**
which they may restrict the provision of their services. In particular, they shall **include**
information on any policies, procedures, measures and tools used for the purpose of
content moderation, including algorithmic decision-making and human review, as well
as the rules of procedure of their internal complaint-handling system. They shall also
provide easily accessible information on the **right to terminate** the use of the service.
Providers of intermediary services may use graphical elements in their terms of service,
such as icons or images, to illustrate the main elements of the information requirements
set out in the Digital Services Act. Providers should inform recipients of their service
through appropriate means of significant changes made to terms and conditions, for
instance when they modify the rules on information that is permitted on their service,
or other such changes which could directly impact the ability of the recipients to make
use of the service.³³

The requirements set out in Art. 14(4) shall be read jointly with Art. 20(4) and 56
Art. 16(6).

According to Art. 20(4), providers of online platforms shall handle complaints sub- 57
mitted through their internal complaint-handling system in a timely, non-discriminatory,
diligent and non-arbitrary manner. Where a complaint contains sufficient grounds
for the provider of the online platform to consider that its decision not to act upon the
notice is unfounded or that the information to which the complaint relates is not illegal
and is not incompatible with its terms and conditions, or contains information indicat-
ing that the complainant's conduct does not warrant the measure taken, it shall reverse
its decision referred to in Art. 20(1) without undue delay. In addition, according to
Art. 16(6) providers of hosting services shall process any notices that they receive under
the mechanisms referred to in Art. 16(1) and take their decisions in respect of the infor-
mation to which the notices relate, in a timely, diligent, non-arbitrary and objective
manner. Where they use automated means for that processing or decision-making, they
shall include information on such use in the notification referred to in Art. 16(5). The
forementioned rules shall be jointly read with Recitals 51 and 52.

³² See e.g. Müller-Riemenschneider/Specht, 547.

³³ Recital 45.

VI. Diligent manner

- 58 First of all, providers of intermediary services shall identify and adequately consider the interests of the subjects, which may be impacted by the restrictions, by considering all information, including e.g. relevant legislative innovation and case law. This requires adequate structures and persons. The lack of diligence in this regard may be relevant also as an unfair commercial practice according to Art. 5 et seq. UCPD.
- 59 With regard to the B2B relationships, Art. 11(1)(2) Platform Regulation finds application, according to which, as part of their internal complaint-handling system, providers of online intermediation services shall: (a) duly consider complaints lodged and the follow-up which they may need to give to the complaint in order to adequately address the issue raised; (b) duly consider complaints lodged and the follow-up which they may need to give to the complaint in order to adequately address the issue raised; (c) communicate to the complainant the outcome of the internal complaint-handling process, in an individualised manner and drafted in plain and intelligible language.³⁴

VII. Objectivity

- 60 No treatment discrimination is allowed based on subjective grounds, especially as regards sex, race, language, religion, political opinion, personal and social conditions.³⁵ In this regard, it can be suggested that providers of intermediary services indicate the criteria according to which they will take their decisions regarding application and enforcement of decisions.³⁶ It is in particular important to treat similar situations in a similar way: a comparative analysis of the precedents is therefore unavoidable. In this regard, a useful interpretation tool is to be found in Recital 47, according to which when designing, applying and enforcing those restrictions, providers of intermediary services should act in a **non-arbitrary** and **non-discriminatory** manner and take into account the rights and legitimate interests of the recipients of the service, including fundamental rights as enshrined in the EU Charter. For example, providers of very large online platforms should in particular pay due regard to freedom of expression and of information, including media freedom and pluralism. All providers of intermediary services should also pay due regard to relevant international standards for the protection of human rights, such as the United Nations Guiding Principles on Business and Human Rights.

VIII. Proportionality

- 61 Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in Art. 14(1). Here the case law of the CJEU shall be taken into consideration.
- 62 In accordance with Art. 52(1) EU Charter, any **limitation on the exercise of the rights and freedoms** recognised by that charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others.

³⁴ → Platform Regulation Art. 11. See also Busch in: *Busch*, Art. 11 P2B-VO, mn. 1 et seq.

³⁵ cf. e.g. *Spindler*, 238.

³⁶ Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 82–83.

In that regard, the Court has held that the requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the act which permits the interference with those rights must itself define the **scope of the limitation** on the exercise of the right concerned.³⁷ 63

As regards observance of the **principle of proportionality**, that principle requires that the limitations which may, in particular, be imposed by acts of EU law on rights and freedoms enshrined in the EU Charter do not exceed the limits of what is appropriate and necessary in order to meet the legitimate objectives pursued or the need to protect the rights and freedoms of others; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.³⁸ 64

Morover, where **several fundamental rights and principles** enshrined in the Treaties are at issue, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them.³⁹ 65

In addition, to satisfy the requirement of proportionality, the legislation which entails an interference with fundamental rights must lay down **clear and precise rules governing the scope and application** of the measure in question and imposing minimum safeguards, so that the persons whose exercise of those rights is limited have sufficient guarantees to protect them effectively against the risk of abuse. That legislation must, in particular, indicate in what **circumstances** and under which conditions such a measure may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater where the interference stems from an automated process.⁴⁰ 66

As regards, in particular, a limitation to the exercise of the **right to freedom of expression and information** such as that at issue in the present case, it follows from the case law of the European Court of Human Rights that, although Article 10 ECHR does not prohibit prior restraints on a means of dissemination as such, such restraints nonetheless pose such a risk to compliance with that fundamental right that a particularly tight legal framework is required.⁴¹ 67

In observance of the principle of proportionality, an intermediary service should as first measure taken **not just delete** the account **but rather disable the access** for the time necessary for the compliant and redress procedure to be concluded. If the complaint turns out to be ungrounded, then the intermediary service has the duty to make the information again available.⁴² 68

From the complexity of Chapter III it can be derived, however, that a recipient has no right to be heard before the intermediary service restricts the content. Nevertheless, providers of intermediary services shall inform their recipients, at the latest at the time of the time of the restriction (see Art. 17(3)).⁴³ 69

³⁷ CJEU, C-311/18, *Facebook Ireland and Schrems*, EU:C:2020:559, mn. 175.

³⁸ See to that effect CJEU, C-128/17, *Poland v Parliament and Council*, EU:C:2019:194, mn. 94 and the case-law cited; CJEU, C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:1031, mn. 64 and the case-law cited.

³⁹ See CJEU, C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, EU:C:2020:1031, mn. 65.

⁴⁰ See CJEU, C-311/18, *Facebook Ireland and Schrems*, EU:C:2020:559.

⁴¹ ECtHR, 18.12.2012, *Ahmet Yıldırım v. Turkey*, CE:ECHR:2012:1218JUD000311110, mn. 47 and 64 and the case-law cited; CJEU, C-401/19, *Poland/Parliament and Council*, EU:C:2022:297 mn. 66.

⁴² cf. Art. 20(4).

⁴³ Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 75. cf., regarding the *status quo* prior to the entry into force of the DSA: BGH 29.7.2021 – III ZR 179/20, NJW 2021, 3179, according to which a social network with a strong market position should hear the user before deciding to block or delete the account. For

IX. Measures and protection against misuse

- 70 According to Art. 23, providers of online platforms shall suspend, for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content (Art. 23(1)).
- 71 Furthermore, providers of online platforms shall suspend, for a reasonable period of time and after having issued a prior warning, the processing of notices and complaints submitted through the notice and action mechanisms and internal complaints-handling systems (cf Arts 16 and 20), respectively, by individuals or entities or by complainants that frequently submit notices or complaints that are manifestly unfounded (Art. 23(2)).
- 72 When deciding on suspension, providers of online platforms shall assess, on a **case-by-case** basis and in a **timely, diligent and objective manner**, whether the recipient of the service, the individual, the entity or the complainant engages in the misuse referred to in Art. 23(1) and (2), taking into account all relevant facts and circumstances apparent from the information available to the provider of online platforms. Those circumstances shall include at least the following: (i) the absolute **numbers of items** of manifestly illegal content or manifestly unfounded notices or complaints, submitted within a given time frame; (ii) the **relative proportion** thereof in relation to the total number of items of information provided or notices submitted within a given time frame; (iii) the **gravity of the misuses**, including the nature of illegal content, and of its consequences; (iv) where it is possible to identify it, the **intention of the recipient** of the service, the individual, the entity or the complainant (Art. 23(3)).
- 73 Providers of online platforms shall set out, in a clear and detailed manner, in their terms and conditions their policy in respect of the misuse referred to in Art. 14(1) and (2), and shall give examples of the facts and circumstances that they take into account when assessing whether certain behaviour constitutes misuse and the duration of the suspension (Art. 23(4)).
- 74 Art. 14(4) provides that, in applying and enforcing the restrictions, providers of intermediary services shall act in a diligent, objective and proportionate manner, with due regard to the **rights and legitimate interests of all parties involved**, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the EU Charter. Here, Recital 52 provides a **non exhaustive list of fundamental rights** which may be relevant: for the recipients of the service, the right to freedom of expression and of information,⁴⁴ the right to respect for private and family life,⁴⁵ the right to protection of personal data,⁴⁶ the right to non-discrimination⁴⁷ and the right to an effective remedy;⁴⁸ for the service providers, the freedom to conduct a business, including the freedom of contract;⁴⁹ for parties affected by illegal content, the right to human dignity,⁵⁰ the rights of the child,⁵¹ the right to protection of property, including in-

criticism see *Raue*, 209, who underlined that in certain cases there is a threat of further significant breaches, situation which requires a fast move by the provider of intermediary service, which is incompatible with a previous hearing. See, along the same line, *Heymann/Götz*, 1494, who underline that all subjects involved may have a legitimate interest in preventing illicit behaviour on platforms.

⁴⁴ Art. 11 EU Charter.

⁴⁵ Art. 7 EU Charter.

⁴⁶ Art. 8 EU Charter.

⁴⁷ Art. 21 EU Charter.

⁴⁸ Art. 47 EU Charter.

⁴⁹ Art. 16 EU Charter.

⁵⁰ Art. 1 EU Charter.

⁵¹ Art. 24 EU Charter.

tellectual property,⁵² and the right to non-discrimination.⁵³ Providers of hosting services should act upon notices in a timely manner, in particular by taking into account the type of illegal content being notified and the urgency of taking action. For instance, such providers can be expected to act without delay when allegedly illegal content involving a threat to life or safety of persons is being notified. The provider of hosting services should inform the individual or entity notifying the specific content without undue delay after taking a decision whether or not to act upon the notice.⁵⁴

Furthermore, Recital 47 stresses that when designing, applying and enforcing those restrictions, providers of intermediary services should act in a non-arbitrary and non-discriminatory manner and take into account the **rights and legitimate interests of the recipients of the service**, including fundamental rights as enshrined in the EU Charter. For example, providers of very large online platforms should in particular pay due regard to freedom of expression and of information, including media freedom and pluralism. All providers of intermediary services should also pay due regard to relevant international standards for the protection of human rights, such as the United Nations Guiding Principles on Business and Human Rights.⁵⁵

The **German Constitutional Court** (*Bundesverfassungsgericht*) elaborated useful criteria regarding the compression of fundamental rights: the inevitability of the situation, the imbalance between the parties, the social meaning of the service, the social power of a party.⁵⁶ In particular, there is a direct correlation between the impairment of the protected interests and the level of dependency on the service.⁵⁷

The **duties** which can be concretely imposed on platforms are **proportional to the social impact** they have. The more an intermediary service is successful, Lock-in and network effects should be considered, especially with regard to successful intermediary services.⁵⁸ So, for instance, online platforms are suitable to have a huge impact on fundamental rights.⁵⁹ In this regard, it was rightly stated that intermediary services shall differentiate terms and conditions depending on whether a measure was taken with regard to a contribution which concerns a major political election⁶⁰ or the admissibility of a holiday photo.⁶¹

Additional to that, according to Art. 34(1) providers of very large online platforms and of very large online search engines shall diligently identify, analyse and assess any systemic risks in the EU stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services. They shall carry out the risk assessments by the date of application referred to in Art. 33(6) 2nd subpara., and at least once every year thereafter, and in any event prior to deploying functionalities that are likely to have a critical impact on the risks identified pursuant to Art. 34. This risk assessment shall be specific to their services and propor-

⁵² Art. 17 EU Charter.

⁵³ Art. 21 EU Charter.

⁵⁴ See in this regard Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 24; *Augsberg/Petras*, 105.

⁵⁵ cf. *Wendel*, 71–72.

⁵⁶ BVerfG 6.11.2019 - 1 BvR 16/13, NJW 2020, 300; Raue in: *Hofmann/Raue*, Art. 14 DSA mn. 254.

⁵⁷ BVerfG, 11.4.2018 - 1 BvR 3080/09, NJW 2018, 1667; *Raue*, 209.

⁵⁸ See *Kumkar*, 536.

⁵⁹ *Augsberg/Petras*, 102; Raue in: *Hofmann/Raue*, Art. 14 DSA, 255, who underlines that it is not realistic option for the majority of recipients of the service to delete the account on an intermediary service just because of the circumstance that they are not satisfied with their terms and conditions.

⁶⁰ See *Commission*, Communication from the Commission – Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065 C/2024/2537, OJ C, C/2024/3014, 26.4.2024.

⁶¹ Raue in: *Hofmann/Raue*, Art. 14 DSA, 256.

tionate to the systemic risks, taking into consideration their severity and probability, and shall include a series of systemic risks listed in Art. 34, and in particular any actual or foreseeable negative effects on civic discourse and electoral processes, and public security (Art. 34(1)(c)).⁶²

X. Special rules for VLOPs and VLOSEs

- 79 Providers of very large online platforms and of very large online search engines shall provide recipients of services with a **concise, easily-accessible** and **machine-readable summary** of the terms and conditions, including the available remedies and redress mechanisms, in clear and unambiguous language (Art. 14(5)).
- 80 It is not reasonable to limit to VLOSEs and VLOPs the duty to provide the aforementioned summary. This provision would have been better drafted if it had more appropriately coordinated by the legislator with the already existing *acquis*. Already Art. 6 CRD provides indeed, for B2C contracts, that before the consumer is bound by a distance or off-premises contract, or any corresponding offer, the trader shall provide the consumer, in a clear and comprehensible manner, all elements mentioned in Art. 14(5). Even more insightful is in this regard Art. 8 CRD, which introduces 'Formal requirements for distance contracts', by stating that with respect to distance contracts, the trader shall give the information provided for in Art. 6(1) CRD or make that information available to the consumer in a way appropriate to the means of distance communication used in plain and intelligible language. In so far as that information is provided on a durable medium, it shall be legible. If a distance contract to be concluded by electronic means places the consumer under an obligation to pay, the trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order, of the information provided for in points (a)⁶³, (e)⁶⁴, (o)⁶⁵ and (p)⁶⁶ of Art. 6(1) CRD (that is: information regarding the essential elements of the contract).⁶⁷ The above mentioned duties shall be applied to all providers of intermediary services, both in the B2C and in the B2B sector.

Article 17

Statement of reasons

1. Providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service for any of the following restrictions

⁶² See *Bredler/Markard*, 870: the silencing effect of a hateful atmosphere should be considered.

⁶³ 'the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services.'

⁶⁴ 'the total price of the goods or services inclusive of taxes, or where the nature of the goods or services is such that the price cannot reasonably be calculated in advance, the manner in which the price is to be calculated, as well as, where applicable, all additional freight, delivery or postal charges and any other costs or, where those charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable. In the case of a contract of indeterminate duration or a contract containing a subscription, the total price shall include the total costs per billing period. Where such contracts are charged at a fixed rate, the total price shall also mean the total monthly costs. Where the total costs cannot be reasonably calculated in advance, the manner in which the price is to be calculated shall be provided.'

⁶⁵ 'the duration of the contract, where applicable, or, if the contract is of indeterminate duration or is to be extended automatically, the conditions for terminating the contract.'

⁶⁶ 'where applicable, the minimum duration of the consumer's obligations under the contract.'

⁶⁷ See in this regard *De Franceschi*, 871. For details on Art. 6 CRD see Consumer Rights Directive → CRD Art. 6 mn. 1 et seq.

imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions:

- (a) any restrictions of the visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting content;
- (b) suspension, termination or other restriction of monetary payments;
- (c) suspension or termination of the provision of the service in whole or in part;
- (d) suspension or termination of the recipient of the service's account.

2. Paragraph 1 shall only apply where the relevant electronic contact details are known to the provider. It shall apply at the latest from the date that the restriction is imposed, regardless of why or how it was imposed.

Paragraph 1 shall not apply where the information is deceptive high-volume commercial content.

3. The statement of reasons referred to in paragraph 1 shall at least contain the following information:

- (a) information on whether the decision entails either the removal of, the disabling of access to, the demotion of or the restriction of the visibility of the information, or the suspension or termination of monetary payments related to that information, or imposes other measures referred to in paragraph 1 with regard to the information, and, where relevant, the territorial scope of the decision and its duration;
- (b) the facts and circumstances relied on in taking the decision, including, where relevant, information on whether the decision was taken pursuant to a notice submitted in accordance with Article 16 or based on voluntary own-initiative investigations and, where strictly necessary, the identity of the notifier;
- (c) where applicable, information on the use made of automated means in taking the decision, including information on whether the decision was taken in respect of content detected or identified using automated means;
- (d) where the decision concerns allegedly illegal content, a reference to the legal ground relied on and explanations as to why the information is considered to be illegal content on that ground;
- (e) where the decision is based on the alleged incompatibility of the information with the terms and conditions of the provider of hosting services, a reference to the contractual ground relied on and explanations as to why the information is considered to be incompatible with that ground;
- (f) clear and user-friendly information on the possibilities for redress available to the recipient of the service in respect of the decision, in particular, where applicable through internal complaint-handling mechanisms, out-of-court dispute settlement and judicial redress.

4. The information provided by the providers of hosting services in accordance with this Article shall be clear and easily comprehensible and as precise and specific as reasonably possible under the given circumstances. The information shall, in particular, be such as to reasonably allow the recipient of the service concerned to effectively exercise the possibilities for redress referred to in of paragraph 3, point (f).

5. This Article shall not apply to any orders referred to in Article 9.

Bibliography: *Busch (ed.)*, P2B-VO (C.H.Beck 2022); *Hofmann/Raue (eds)*, Digital Services Act (Nomos 2023); *Leerssen*, 'An end to shadow banning? Transparency rights in the Digital Services Act between content moderation and curation' (2023) *Computer Law & Security Review*, 105790 1–13; *Leistner*, 'Filtertechnologien und das Urheberrecht – Acht Thesen zur Umsetzung des Art. 17 DSM-RL mit einem Vorschlag für ein komplementär menschlich-algorithmisches Durchsetzungssystem für OCSP-Plattformen' (2020) ZUM 505–513; *Peifer*, 'Netzwerkdurchsetzungsgesetz: Selbstbehauptung des Rechts oder erster Schritt in die selbstregulierte Vorzensur? – Zivilrechtliche Aspekte' (2018) AfP 14–23; *Spindler*, 'Der Vorschlag für ein neues Haftungsregime für Internetprovider – der EU-Digital Services Act (Teil 1)' (2021) GRUR 545–553; *Wiedemann*, 'Transparenzberichtspflichten für Anbieter von Online-Plattformen nach dem DSA' (2024) ZUM 364–368.

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A. Function

- 1 Art. 17 aims to put the recipient in the condition to have clear information about the **reason for the restriction**.¹ Where a provider of hosting services decides, on the ground that the information provided by the recipients is illegal content or is incompatible with its terms and conditions, to remove or disable access to information provided by a recipient of the service or to otherwise restrict its visibility or monetisation, for instance following receipt of a notice or acting on its own initiative, including exclusively by automated means, that provider should inform in a clear and easily comprehensible way the recipient of its decision, the reasons for its decision and the available possibilities for redress to contest the decision, in view of the negative consequences that such decisions may have for the recipient, including as regards the exercise of its fundamental right to freedom of expression. That obligation should apply irrespective of the reasons for the decision, in particular, whether the action has been taken because the information notified is considered to be illegal content or incompatible with the applicable terms and conditions.² This follows the wide criticisms that were expressed before the adoption of the Digital Services Act regarding the not always fair behaviour of platforms regarding the reasons of the restriction.³
- 2 A particular technique, which is addressed by Art. 17 is the 'shadow banning', by means of which the service was restricted without notifying the recipients of the services who are impacted by that decision. Restriction of visibility may indeed consist in demotion in ranking or in recommender systems, as well as in limiting accessibility by one or more recipients of the service or blocking the user from an online community without the user being aware ('shadow banning'). The monetisation via advertising revenue of

¹ Raue in: *Hofmann/Raue*, Art. 17 DSA mn. 15–16.

² Recital 54.

³ *Peifer*, 20.

information provided by the recipient of the service can be restricted by suspending or terminating the monetary payment or revenue associated to that information. The obligation to provide a statement of reasons should however not apply with respect to deceptive high-volume commercial content disseminated through intentional manipulation of the service, in particular inauthentic use of the service such as the use of bots or fake accounts or other deceptive uses of the service. Irrespective of other possibilities to challenge the decision of the provider of hosting services, the recipient of the service should always have a right to effective remedy before a court in accordance with the national law.

B. Context

I. Position within the Digital Services Act

Art. 17(1) defines which restrictions let arise the duty to provide information, whereas Art. 17(2) limits the application of the previous para. (1) to the cases in which the relevant contact details are known to the provider and excludes the application for the cases in which the information is deceptive high-volume commercial content. Art. 17(3) indicates the **minimum content** of the statement of reasons, while Art. 17(4) sets **additional transparency criteria** for the information due according to the previous para. Art. 17(5) excludes the application of Art. 17 to any orders referred to in Art. 9. 3

Art. 17 makes reference to a series of **definitions** contained in the Act.⁴ 4

The information to be provided according to Art. 17 is essential for the recipient to have access to an effective internal complaint-handling system that enables them to lodge complaints, electronically and free of charge, against the decision taken by the provider of the online platform upon the receipt of a notice or against the following decisions taken by the provider of the online platform on the grounds that the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions (Art. 20). After the adoption of the restriction decision, providers of online platforms shall, without undue delay, submit to the Commission the decisions and the statements of reasons referred to in Art. 17(1) for the inclusion in a publicly accessible machine-readable database managed by the Commission. Providers of online platforms shall ensure that the information submitted does not contain **personal data** (Art. 24(5)).⁵ 5

Art. 9(5) provides that at the latest when effect is given to the order or, where applicable, at the time provided by the issuing authority in its order, providers of intermediary services shall inform the recipient of the service concerned of the order received and to the effect given to it. Such information provided to the recipient of the service shall include a statement of reasons, the possibilities for redress that exist, and a description of the territorial scope of the order, in accordance with Art. 9(2).⁶ 6

⁴ And precisely to: ‘Terms and conditions’ (Art. 3(u)), ‘Hosting service’ (Art. 3 (g)(iii)), ‘Recipient of the service’ (Art. 3(b)), ‘Illegal content’ (Art. 3(h) and Recital 12).

⁵ Recitals 66, 101.

⁶ cf. in this regard CJEU, C-314/12, *UPC-Telekabel* EU:C:2014:192, mn. 57.

II. Relationship with the CDSM Directive

- 7 Directive 2019/790/EU (CDSM Directive) does not contain any specific requirement with regard to the subject matter of Art. 17, which therefore remains fully applicable in the cases regulated by the latter.

III. Relationship with the Platform Regulation

- 8 The provision contained Art. 17 echoes that of Art. 4(5) Platform Regulation, according to which the statement of reasons referred to in Art. 4(1) and (2) Platform Regulation and in Art. 4(4) 2nd subpara. shall contain a reference to the specific facts or circumstances, including contents of third-party notifications, that led to the decision of the provider of online intermediation services, as well as a reference to the applicable grounds for that decision referred to in Art. 3(1)(c) Platform Regulation.⁷
- 9 Where a provider of **online intermediation services** decides to **terminate** the provision of the whole of its online intermediation services to a given business user, it shall provide the business user concerned, at least 30 days prior to the termination taking effect, with a statement of reasons for that decision on a durable medium (Art. 4(2) Platform Regulation).⁸
- 10 In any case, the provisions of the Digital Services Act are without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing the Digital Services Act (Art. 2(4)(e)). The provisions of the Platform Regulation therefore have precedence over Art. 17.

IV. Relationship with the Terrorist Content Regulation

- 11 According to Art. 2(4)(c), the Digital Services Act is without prejudice to the rules laid down by Regulation 2021/784/EU on addressing the dissemination of terrorist content online, whose Art. 11 has therefore precedence over Art. 17. Art. 11 Terrorist Content Regulation provides that where a hosting service provider removes or disables access to terrorist content, it shall make available to the content provider **information** on such **removal or disabling**. Upon request of the content provider, the hosting service provider shall either inform the content provider of the reasons for the removal or disabling and its rights to challenge the removal order or provide the content provider with a copy of the removal order (para. 2). The abovementioned obligation shall not apply where the competent authority issuing the removal order decides that it is necessary and proportionate that there is no disclosure for reasons of public security, such as the prevention, investigation, detection and prosecution of terrorist offences, for as long as necessary, but not exceeding six weeks from that decision. In such a case, the hosting service provider shall not disclose any information on the removal or disabling of access to ter-

⁷ See Art. 4(5) Platform Regulation, according to which a provider of online intermediation services does not have to provide a statement of reasons where it is subject to a legal or regulatory obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or where a provider of online intermediation services can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in termination of the provision of the whole of the online intermediation services in question. See → Platform Regulation Art. 4 mn. 9–13.

⁸ → Platform Regulation Art. 4 mn. 9–13.

rorist content. That competent authority may extend that period by a further six weeks, where such non-disclosure continues to be justified (para. 3).

C. Explanation

According to Art. 17(1), providers of hosting services shall provide a **clear and specific statement of reasons**⁹ to any affected recipients of the service for any of the following restrictions imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions: (i) any restrictions of the visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting content; (ii) suspension, termination or other restriction of monetary payments; (iii) suspension or termination of the provision of the service in whole or in part; (d) suspension or termination of the recipient of the service's account.

It follows from the formulation 'any affected recipient' that also indirect recipients of the information, who no longer have access to the information or can no longer inform another user, must also be informed.¹⁰

I. Restrictions of the visibility of specific items of information

Providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service for any restrictions of the visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting content (Art. 17(1)(a)).¹¹

That obligation shall apply **irrespective of the reasons** for the decision, in particular whether the action has been taken because the information notified is considered to be illegal content or incompatible with the applicable terms and conditions. Where the decision was taken following receipt of a notice, the provider of hosting services shall only reveal the identity of the person or entity who submitted the notice to the recipient of the service where this information is necessary to identify the illegality of the content, such as in cases of infringements of intellectual property rights.¹² The provision includes **content demotion**.¹³

The obligation to provide a statement of reasons should however not apply with respect to **deceptive high-volume commercial content** disseminated through intentional manipulation of the service, in particular inauthentic use of the service such as the use of bots or fake accounts or other deceptive uses of the service. Irrespective of other possibilities to challenge the decision of the provider of hosting services, the recipient of the service should always have a right to effective remedy before a court in accordance with the national law.

Also included is the **search results exclusion**. It is not clear whether Art. 17(1)(a) covers also all cases of restriction of a specific information for giving preference to other

⁹ See Recital 54.

¹⁰ Expresses some doubts in this regard Raue in: *Hofmann/Raue*, Art. 17 DSA mn. 22.

¹¹ See *Wiedemann*, 364.

¹² Recital 54.

¹³ According to Recital 55, restriction of visibility may consist in demotion in ranking or in recommender systems, as well as in limiting accessibility by one or more recipients of the service or blocking the user from an online community without the user being aware ('shadow banning').

items.¹⁴ Looking at the systematic framework, the affirmative solution seems the most reasonable one.

II. Suspension, termination or other restriction of monetary payments

- 18 The **monetisation via advertising revenue** of information provided by the recipient of the service can be restricted by suspending or terminating the monetary payment or revenue associated to that information.¹⁵ Providers of hosting services shall give a clear and specific statement of reasons to any affected recipients of the service for any suspension, termination or other restriction of **monetary payments** imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions (Art. 17(1)(b)).
- 19 Only monetary payments are covered by the provision. In this regard it seems appropriate to provide an analogic extension of Art. 17(1)(b) to all kinds of incentive schemes put in place by providers of hosting services.¹⁶

III. Suspension or termination of the provision of the service in whole or in part

- 20 Providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service for suspension or termination of the provision of the service in whole or in part on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions (Art. 17(1)(c)). ‘Suspension’ should mean the temporary exclusion from the entirety or a part¹⁷ of the service, while ‘termination’ means the exclusion of the recipient from access to the service. This is without prejudice to the freedom by providers of online platforms to determine their terms and conditions and establish stricter measures in the case of manifestly illegal content related to serious crimes, such as child sexual abuse material. For reasons of transparency, this possibility should be set out, clearly and in sufficient detail, in the terms and conditions of the online platforms. Providers of online platforms should send a prior warning before deciding on the suspension, which should include the reasons for the possible suspension and the means of redress against the decision of the providers of the online platform. When deciding on the suspension, providers of online platforms should send the statement of reasons in accordance with the rules set out in the Digital Services Act. The rules of the Digital Services Act on misuse should not prevent providers of online platforms from taking other measures to address the provision of illegal content by recipients of their service or other misuse of their services, including through the violation of their terms and conditions, in accordance with the applicable Union and national law. Those rules are without prejudice to any possibility to hold the persons engaged in misuse liable, including for damages, provided for in Union or national law.¹⁸

¹⁴ Leerssen, 7.

¹⁵ Recital 55.

¹⁶ cf. Raue in: *Hofmann/Raue*, Art. 17 DSA mn. 29, who underlines in this regard that limitations regarding benefits of different nature are not covered by the provision (e.g. benefits of monetary value and immaterial benefits).

¹⁷ e.g. suspending the processing of notices (Art. 16) or compliants (Art. 20). cf. Art. 23.

¹⁸ Recital 64. cf. Art. 23(2).

IV. Suspension or termination of the service

Providers of hosting services shall provide a clear and specific statement of reasons to any affected recipients of the service for **suspension** (prohibition of the access to the account for a period of time) or **termination** (block or deletion of the account) of the recipient of the service's account imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and condition (Art. 17(1)(c)). 21

V. Exception to provide a clear and specific statement of reasons

The duty to provide a clear and specific statement of reasons to any affected recipients of the service for the abovementioned restrictions does not apply: (i) where the relevant electronic contact details are unknown to the provider;¹⁹ (ii) where the information is deceptive²⁰ high-volume commercial²¹ content;²² (iii) to orders under Art. 9.²³ 22

As regards the second ground for exclusion, it would have been more reasonable to erase the word 'commercial', in order to make sure that the provision covers also misuses in political contexts.²⁴ 23

Such duty applies also in the case of **repeated infringements** by the recipient of the terms and conditions of the service. This solution differs from what provided by Art. 4(5)(2) Platform Regulation, according to which a provider of online intermediation services does not have to provide a statement of reasons where it is subject to a legal or regulatory obligation not to provide the specific facts or circumstances or the reference to the applicable ground or grounds, or where a provider of online intermediation services can demonstrate that the business user concerned has repeatedly infringed the applicable terms and conditions, resulting in termination of the provision of the whole of the online intermediation services in question.²⁵ 24

VI. Minimum content of the statement of reasons

Art. 17(3) provides the minimum content of the statement of reasons due according to Art. 17(1)(a)–(f): the statement should regard measures taken (a), facts and circumstances (b), use of automated means (c), legal ground (d), terms and conditions (e), redress available (f). Of course, the provider of hosting services is free to supply additional 25

¹⁹ cf. Art. 16(2)(2)(c) and (4).

²⁰ e.g. misleading advertising or fake news.

²¹ cf. Art. 2(f) E-Commerce Directive.

²² According to Recital 55 this should be the case in particular in the case of inauthentic use of the service such as the use of bots or fake accounts or other deceptive uses of the service (as e.g. through spamming). See *Leerssen*, 7.

²³ Art. 9(5) contains its dedicated (less detailed) statement of reasons. In any case, the conditions and requirements laid down in Art. 9 shall be without prejudice to national civil and criminal procedural law. cf. Recital 34, according to which the DSA should be without prejudice to Union law in the field of judicial cooperation in civil or criminal matters, including Regulation 1215/2012/EU and a Regulation on European production and preservation orders for electronic evidence in criminal matters, and to national criminal or civil procedural law. Therefore, where those laws in the context of criminal or civil proceedings provide for conditions that are additional to or incompatible with the conditions provided for in the DSA in relation to orders to act against illegal content or to provide information, the conditions provided for in the DSA might not apply or might be adapted.

²⁴ In this sense see Raue in: *Hofmann/Raue*, Art. 17 DSA mn. 39; *Leerssen*, 8.

²⁵ → Platform Regulation Art. 4 mn. 9–13.

information, but this shall not impair the clarity which is due with regard to the statement of reasons.

- 26 According to Art. 17(4) information supplied by the providers of hosting services shall be clear and easily comprehensible²⁶ and as precise and specific²⁷ as reasonably possible under the given circumstances. The information shall, in particular, be such as to reasonably allow the recipient of the service concerned to effectively exercise the possibilities for redress referred to in Art. 17(3)(f).²⁸
- 27 In absence of a specific provision in that regard and looking at the system of the Digital Services Act (see e.g. Art. 16(1)(2)) and taking into consideration the Platform Regulation (Art. 4(1))²⁹ as well as Art. 2(10) CRD, the statement of reasons must be **transmitted in electronic form**.³⁰ Art. 17(2)(1) provides that the statement of reasons shall be provided at the latest from the date that the restriction is imposed, regardless of how why or how it was imposed. In this regard it seems reasonable to make reference not at the date,³¹ but rather at the time in which the restriction takes effect.³²

Article 27

Recommender system transparency

1. Providers of online platforms that use recommender systems shall set out in their terms and conditions, in plain and intelligible language, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters.

2. The main parameters referred to in paragraph 1 shall explain why certain information is suggested to the recipient of the service. They shall include, at least:

- (a) **the criteria which are most significant in determining the information suggested to the recipient of the service;**
- (b) **the reasons for the relative importance of those parameters.**

3. Where several options are available pursuant to paragraph 1 for recommender systems that determine the relative order of information presented to recipients of the service, providers of online platforms shall also make available a functionality that allows the recipient of the service to select and to modify at any time their preferred option. That functionality shall be directly and easily accessible from the specific section of the online platform's online interface where the information is being prioritised.

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²⁶ The parameter should be here the 'average user'.

²⁷ cf. Art. 4(5)(1) Platform Regulation, LG Hannover 22.7.2021 – 25 O 221/21, MMR 2021, 835; LG München I 12.5.2021 – 37 O 32/21, MMR 2021, 995, mn. 78.

²⁸ See *Spindler*, 553.

²⁹ See *Busch* in: *Busch*, Art. 12 P2B-VO mn. 132.

³⁰ *Raue* in: *Hofmann/Raue*, Art. 17 DSA mn. 56.

³¹ With regard to Art. 17 Directive 2019/790/EU on copyright and related rights in the Digital Single Market, see e.g. *Leistner*, 512.

³² This is e.g. the solution provided by Art. 4(1) Platform Regulation.

Flamme, ‘Schutz der Meinungsvielfalt im digitalen Raum – Transparenzpflichten für Intermediäre im nationalen und europäischen Vergleich’ (2021) MMR 770–774; *Gielen/Uphues*, ‘Digital Markets Act and Digital Services Act’ (2021) EuZW 627–637; *Hacker*, ‘Personalized Law and the Behavioral Sciences, in: Busch/De Franceschi (eds), Algorithmic Regulation and Personalized Law (C.H.Beck/Hart/Nomos 2021), p. 241–263; *Hofmann*, ‘Lauterkeitsrechtliche Haftung von Online-Plattformen. Die neuen Transparenzvorgaben im UWG 2022 im Kontext lauterkeitsrechtlicher Plattformregulierung’ (2022) GRUR 780–786; *Hofmann/Raue (eds)*, Digital Services Act (Nomos 2023); *Janal*, ‘Haftung und Verantwortung im Entwurf des Digital Services Acts’ (2021) ZEuP 227–263; *Kalbhenn/Hemmert-Halswick*, ‘EU-weite Vorgaben für die Content-Moderation in sozialen Netzwerke’ (2021) ZUM 184–194; *Kuhlmann*, ‘Der Digital Services Act und seine Folgen für das nationale Medienrecht’ (2023) ZUM 170–177; *Kühling*, ‘Gemeinwohlorientierte Regulierung der Medienintermediäre Verantwortungszuweisung durch Recht’ (2022) MMR 1016–1021; *Montinaro*, ‘When ‘Clicks Are Cheating’. The Deployment of Recommender Systems by Traders Under EU Consumer Law’ (2023) EuCML 252–258; *Narciso*, ‘The Unreliability of Online Review Mechanisms’ (2021) 349–368; *Ohly*, ‘Die ab 28.5.2022 geltenden Änderungen des UWG im Überblick’ (2022) GRUR 763–772; *Peifer*, ‘Die neuen Transparenzregeln im UWG (Bewertungen, Rankings und Influencer)’ (2021) GRUR 1453–1453; *Podszun/Offergeld*, ‘Plattformregulierung im Zivilrecht zwischen Wissenschaft und Gesetzgebung: Die ELI Model Rules on Online Platforms’ (2022) ZEuP 244–272; *Ricci/Rokach/Shapira*, ‘Introduction to Recommender Systems Handbook’ in: Ricci/Rokach/Shapira (eds), *Recommender Systems Handbook* (3rd edn, Springer 2022), 1–38; *Wagner/Eidenmüller*, ‘In der Falle der Algorithmen? Abschöpfen von Konsumentenrente, Ausnutzen von Verhaltensanomalien und Manipulation von Präferenzen: Die Regulierung der dunklen Seite personalisierter Transaktionen’ (2019) ZfPW 220–246.

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A. Function

The manner in which information is prioritised and presented on its online interface 1
to facilitate and optimise access to information for the recipients of the service is core
part of the online platform’s business. Examples of this are prioritisation of information,
ranking, algorithmic suggestion, distinction through text or other visual representations
or otherwise.

Recommender systems are capable to exert a significant impact on the ability of 2
recipients to interact with information online. They also play an important role in the
amplification of certain messages, the viral and sometimes dangerous dissemination of
information and steering online behaviour.

It is therefore necessary to ensure that recipients of platforms services are adequately 3
informed about how recommender systems influence the way information is vehiculated
and displayed. Providers of online platforms should clearly present the **parameters** for
such recommender systems in an easily comprehensible manner to ensure that the re-

ipients of the service understand according to which criteria information is prioritised for them.¹

- 4 **Ranking** has a significative influence on the commercial decision.² Platforms decide which elements are displayed but also which elements are concealed. Online reviews convey pre-contractual information to consumers and shape the content of the contract. For this reason, it has been stressed that online reviews could potentially be seen as a complement of the flawed EU law-based information paradigm and regulatory improvement options based on reviews could be explored.³ Further to the Digital Services Act, also standardisation and self-regulation play a significant role in creating a safe environment for online review systems. Both the rules on pre-contractual information duties and the law on unfair commercial practices play a significant role in tackling and steering this phenomenon in a virtuous way.
- 5 Against that background, Art. 27 aims to put the recipients of the service in the best conditions to take conscious decisions.⁴ The overall aim is to **protect freedom of information and opinion**.⁵ For this purpose, it is of utmost importance that recipients know why a product or service is ranked higher or lower.

B. Context

I. Overall framework

- 6 The EU aims to stimulate the development and implementation of **voluntary standards** for choice interfaces and presentation of information on the main parameters of different types of recommender systems (Art. 44(1)(i)). Providers of online platforms that present advertisements on their online interfaces shall ensure that, for each specific advertisement presented to each individual recipient, the recipients of the service are able to identify, in a clear, concise and unambiguous manner and in real time, according to what provided in Art. 26.⁶
- 7 According to Art. 19, Art. 27 shall not apply to providers of online platforms that qualify as **micro** or **small enterprises** as defined in Recommendation 2003/361/EC.
- 8 Pursuant to Art. 29 Commission DSA draft, the duties concerning recommender systems were applicable only to very large online platforms.⁷ In the end, according to Art. 38 DSA, in addition to the requirements set out in Art. 27, providers of very large online platforms and of very large online search engines that use recommender systems shall **provide at least one option** for each of their recommender systems which is not based on profiling as defined in Art. 4(4) GDPR.
- 9 With regard to even more sensitive content, such as political matters or news, a such strict rules seem to be appropriate. The European legislator is already working on further instruments in this regard.⁸

¹ Recital 70. See *Montinaro*, 252.

² Grisse in: *Hofmann/Raue*, Art. 27 DSA mn. 1; *Feddersen*, 791; *Flamme*, 770.

³ *Narciso*, 349; *Janal*, 266; *Kühling*, 1016; *Wagner/Eidenmüller*, 234 et seq.

⁴ See *Podszun/Offergeld*, 253.

⁵ *Kalbhenn/Hemmert-Halswick*, 186.

⁶ Grisse in: *Hofmann/Raue*, Art. 26 DSA, mn. 1 et seq.

⁷ COM(2020) 825 final.

⁸ See e.g. Art. 12 COM(2021) 731 final; Art. 17 COM(2022) 457 final; Art. 3(1) COM(2021) 206 final, which contains a very broad definition of artificial intelligence, which may comprise also recommender systems. cf. *Kühling*, 1021.

II. Relationship with the Platform Regulation

The Platform Regulation continues to apply as a *lex specialis* and complements the provision of Art. 27.⁹ According to Art. 5 Platform Regulation, providers of online intermediation services shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters. This should take place by providing an easily and publicly available description, drafted in plain and intelligible language, on the online search engines of those providers. Such description shall be kept up to date. Where the main parameters include the possibility to influence ranking against any direct or indirect remuneration paid by business users or corporate website users to the respective provider, that provider shall also set out a description of those possibilities and of the effects of such remuneration on ranking. Again, where a provider of an online search engine has altered the ranking order in a specific case or delisted a particular website following a third-party notification, the provider shall offer the possibility for the corporate website user to inspect the contents of the notification.¹⁰

III. Relationship with the Unfair Commercial Practices Directive

The Unfair Commercial Practices Directive is not mentioned in the list of legal acts which the Digital Services Act leaves unaffected (Art. 2(4)), but that list is not exhaustive and therefore does not exclude the application of the Unfair Commercial Practices Directive also given the statement contained in Recital 10(2) DSA.

Art. 7(4 bis) UCPD¹¹ states that when providing consumers with the possibility to search for products offered by different traders or by consumers on the basis of a query in the form of a keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products presented to the consumer as a **result of the search query** and **the relative importance of those parameters**, as opposed to other parameters, shall be regarded as material.¹²

Providing search results in response to a consumer's online search query without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products within the search results is now qualified as a commercial practice which is in all circumstances considered unfair (see the new Nr. 11a of Annex I UCPD).¹³ Of course Art. 27 has a broader scope of application (as the provisions of the Unfair Commercial Practices Directive apply only to B2C relationships) and applies also in the case in which the platform does not commercial interest throughout the recommender system. Furthermore, the transparency obligations contained in Art. 27 can be considered 'information requirements' according to Art. 7(5) UCPD: the non-compliance with them shall be regarded as 'material' according to the same provision.

⁹ See Art. 2(4)(e).

¹⁰ → Platform Regulation Art. 5 mn. 13; cf. *Alexander*, 14; Busch in: *Busch*, Art. 5 P2B-VO mn. 1 et seq.

¹¹ Introduced by Art. 3(4)(b) Modernisation Directive.

¹² This paragraph does not apply to providers of online search engines as defined in Art. 2 No. 6 Platform Regulation. See → Platform Regulation Art. 2 mn. 13–16.

¹³ See *Cauffman*, 469 et seq.

IV. Relationship with the Consumer Rights Directive

- 14 The Digital Services Act leaves the Consumer Rights Directive explicitly unaffected. According to Art. 6a(1)(a) CRD,¹⁴ before a consumer is bound by a distance contract, or any corresponding offer, on an online marketplace, the provider of the online marketplace shall, without prejudice to the Unfair Commercial Practices Directive, provide the consumer with the following information in a clear and comprehensible manner and in a way appropriate to the means of distance communication: general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the offers are presented, on the main parameters determining ranking, as defined in Art. 2 No. 1(m) UCPD, of offers presented to the consumer as a result of the search query and the relative importance of those parameters as opposed to other parameters.

V. Relationship with the Digital Markets Act

- 15 **Gatekeepers** are often in a dual-role position: as intermediaries for third-party undertakings and as undertakings directly providing products or services. Consequently, such gatekeepers have the ability to directly undermine the contestability for those products or services on those core platform services, to the detriment of business users which are not controlled by the gatekeeper.¹⁵
- 16 To address this situation, Art. 6(5)(1) DMA provides that the gatekeeper¹⁶ shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking. Such provision complements what already provided by the Digital Services Act and therefore is perfectly compatible with it. Nevertheless, the duties contained in Art. 27 may overlap with provisions of national media regulation.

C. Explanation

I. Scope of application

1. Providers of online platforms

- 17 Art. 27 addresses online platforms, which, according to Art. 3(1)(i), are hosting services that, at the request of a recipient of the service, **store and disseminate information** to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of the Digital Services Act.
- 18 The scope of application of Art. 27 DSA is extended by Art. 38 to providers of very large online search engines.¹⁷

¹⁴ Introduced by Art. 4 Modernisation Directive.

¹⁵ Recital 51 DMA.

¹⁶ See Art. 2 No. 1 and Art. 3 DMA.

¹⁷ cf. *Kuhlmann*, 175.

2. Recommender systems

Recommender systems **prioritise information**. A core part of the online platform's business is indeed the manner in which information is prioritised and presented on its online interface to facilitate and optimise access to information for the recipients of the service. This is done, for example, by algorithmically suggesting, ranking and prioritising information, distinguishing through text or other visual representations, or otherwise curating information provided by recipients.¹⁸ Restriction of visibility may consist in demotion in ranking or in recommender systems, as well as in limiting accessibility by one or more recipients of the service or blocking the user from an online community without the user being aware ('*shadow banning*').¹⁹

Filtering tools select according to certain criteria. Art. 3(s) defines recommender systems as a fully or partially automated system used by an online platform to **suggest** in its online interface²⁰ specific information to recipients of the service or **prioritise** that information, including as a result of a search initiated by the recipient of the service or otherwise determining the relative order or prominence of information displayed. For the purpose of the above mentioned provision, it is irrelevant whether the recipient seeks actively for recommendation or whether it is the provider which makes recommendations on its own initiative.

Prioritising consists in giving prominence and determining the order of results – what is usually called '**ranking**'. Art. 2(m) UCPD, Art. 2 No. 8 Platform Regulation and Art. 2 No. 22 DMA already contain definitions of 'ranking'.²¹

Recommender systems base their functioning on the identification of user interests, which leads to an increased level of personalisation.²²

There are several types of recommender systems: **collaborative filtering** (based on the behaviour of other users with similar preferences), **community-based filtering** (based on the preferences of the community), **content-based filtering** (based on the content consulted by the recipient in the past).²³

II. Information duties

1. Introduction

Providers of online platforms that use recommender systems must set out in their terms and conditions, in plain and intelligible language, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters (Art. 27(1)). In particular, such main parameters shall explain why certain information is suggested to the recipient of the service and include, **at least** the criteria which are **most significant** for determining the information suggested and the reasons for their relative importance (Art. 27(2)).²⁴

In this regard, the Guidelines on ranking transparency pursuant to the Platform Regulation play an important interpretative role also for the purpose of the Digital Ser-

¹⁸ Recital 70.

¹⁹ Recital 55.

²⁰ According to Art. 3(m) DSA 'online interface' means any software, including a website or a part thereof, and applications, including mobile applications.

²¹ → Platform Regulation Art. 2 mn. 18; Digital Markets Act → DMA Art. 2 mn. 80–84; cf. also *Ohly*, 766.

²² See *Hacker*, 251.

²³ Grisse in: *Hofmann/Raue*, Art. 27 DSA mn. 16; *Ricci/Rokach/Shapira*, 1 et seq.

²⁴ See Recital 70.

vices Act. Of course, **other parameters** may be relevant as influencing factors and therefore require disclosure. **Information overload** should be equally avoided²⁵ and even configure a misleading commercial practice according to Art. 6 UCPD. The question is whether the information model contained in Art. 27 DSA is properly structured and effective.²⁶ In any case, such solutions can lead to increase social awareness and the level of attention of recipients.²⁷

2. Predictability

- 26 As explained in Recital 24 Platform Regulation, predictability entails that providers determine **ranking** in a **non-arbitrary** manner. Where this is a main parameter, an explanation of the use of personalisation, its key features as well as its impact on ranking, including the volatility (i.e. the extent of the difference in ranking for different consumers),²⁸ could help improve predictability and avoid the risk of ranking being determined in an arbitrary manner. Providers may therefore have to reflect on how and if so, to what extent personalisation affects ranking in the case of their specific online intermediation services or online search engines. This could require that providers analyse the potentially very long list of **factors** that are used for this **personalisation**, such as consumers' personal profiles, interests, search behaviour, their actual geographic location, the time of day the search takes place, their use of cookie blockers or other technical tools and more generally, the wealth of data held on the specific consumer as well as their use of **default settings** (i.e. their ability to undo default setting or to apply filtering mechanisms).²⁹
- 27 As a type of personalisation, **default settings** which can be rearranged, undone, or 'overridden' by consumers using sorting or filtering tools can have an important impact on the ranking of offers of goods and services of business users. These mechanisms could be 'main parameters' in and of themselves, for example where their use by consumers is very frequent and they are particularly relevant to ranking.³⁰
- 28 In addition, given the logically increased importance of the **parameter used** (i.e. the filter) in specific filtering mechanisms (e.g. price or review score), other parameters that apply besides the filter might equally increase in importance in terms of the weighting applied to them relative to the situation where no filter is applied. This heavier weighting may namely be necessary to allow a large number of offers that may not differ significantly on elements such as price or review score (i.e. the filter), to still be ranked effectively. Such other parameters may then, depending on the case, constitute 'main parameters' under Art. 27. Besides those situations, it can be important for business users to understand the possible implications of the use of filters for the relative weight of parameters other than the filter that is applied.³¹
- 29 Business users often tend to simultaneously offer their goods or services across different online intermediation services in order to maximise sales ('**multi-homing**'). In addition, independent third-party providers exist that collect user reviews of businesses. In practice, some providers may consider the activities or the presence of business users

²⁵ See e.g. *Gielen/Uphues*, 636. cf., for a more positive evaluation, *Peifer*, 1454; *Hofmann*, 785.

²⁶ See e.g. *Bayer*, 84.

²⁷ Grisse in: *Hofmann/Raue*, Art. 27 DSA mn. 34.

²⁸ This may range from, for example, several products or services seeing only a marginal change in their relative prominence on only a limited number of occasions, to entirely different products or services being featured for different consumers on a regular basis.

²⁹ See paras 50 and 51 OJ 2020 C 424, 1, Annex I.

³⁰ *ibid.*, para. 56.

³¹ *ibid.*, para. 57.

on third party services an indicator of quality or relevance of business users on the on-line intermediation services in question. Where that is the case, and the relevance of this factor for ranking is such that it is to be considered a 'main parameter', those providers should inform users that, and how, this factor is taken into account in ranking.³²

In practice, certain providers may use techniques to **reorganise** the relative **prominence** given to offers of goods and services (partly) in a random manner, for example, to refresh the look of a landing page. Randomisation can also be applied, for example, to make ranking more dynamic, to distinguish the relevant online intermediation services or online search engine from others. Where such factors constitute 'main parameters', the providers concerned have to take this into account in their descriptions. They could, for example, explain how such techniques are applied (by reference to when they are used, how long they are used, how significant the use is, etc.), as well as their impact.³³

Some providers may **edit** or 'tidy up' offers of goods and services by users as presented, organised or communicated on their services. For example, they may 'treat' or qualify offers of goods that have featured on their e-commerce online intermediation services without being purchased for a long time as being 'old' and thus featured lower for the purposes of ranking. Where such factors amount to 'main parameters', a description of the relevant practices will need to be provided.³⁴

In certain cases, providers design their ranking mechanism so that the use by users of ancillary **services** of the same provider (offered together with the relevant online intermediation services or online search engines, or those offered separately) can affect these users' ranking. Where it is so, providers have to explain, with an appropriate degree of detail, that this is the case, so that the users can decide whether to use such ancillary services, knowing that these ancillary services, for example, offer not just ease (i.e. all being available from the same provider in a 'one-stop-shop') but that their use may be important in optimising sales.³⁵

As with ancillary services, some providers may offer technical tools to users, possibly in return for remuneration. The use or effect of such tools may equally have an impact on ranking and – if the relevance is such that this factor constitutes a 'main parameter' within Art. 27– therefore require the same approach as described in the previous section.³⁶

Providers will have to determine whether **machine learning** is a 'main parameter'. If so, even if this is dynamic, it could be captured by a more 'static' description. In line with the guiding principles to adopt a user-oriented approach, which provides the right level of detail, providers could focus on explaining the expected 'amplitude' i.e. size of the impact of machine learning on ranking. This may include whether it affects all main parameters equally and, for example, give an indication of the timing and frequency with which machine learning may lead to 'main parameters' changing.³⁷

A provider of an online search engine may take into account certain characteristics of websites to evaluate them in terms of the trust they enjoy among users or their safety, authenticity, popularity or technological features. If a provider does so, it should consider and explain to what extent its **evaluation of a website's characteristics** affect ranking, to the extent that such factors constitute 'main parameters'.³⁸

³² *ibid.*, para. 58.

³³ *ibid.*, para. 63.

³⁴ *ibid.*, para. 64.

³⁵ *ibid.*, para. 65.

³⁶ *ibid.*, para. 66.

³⁷ *ibid.*, para. 68.

³⁸ *ibid.*, para. 69.

- 36 This entails that providers assess on an individual basis what they do to evaluate websites and how this affects ranking. This may include, for example, how providers develop specific **scores** of websites calculated based on several variables, such as whether a website is trusted by users and whether it has a history of sharing links or misinformation. Thus, the quality of the content or how authoritative the website is may be relevant for its performance in ranking. Alternatively, the focus may be on the **popularity** of the website measured through, for example, the number of unique visitors and page views in a given period. Similarly, certain technical aspects may be taken into account, for example, **load speed, mobile-friendliness, domain age or security** and **accessibility** of the website.³⁹
- 37 If certain characteristics of websites are more important than others, and the evaluation of these aspects is reflected in ranking to such an extent that it qualifies as a ‘**main parameter**’, this is important for users to understand. This should also be reflected in the level of detail that is provided in the description to ensure that users have sufficient clarity.⁴⁰
- 38 Providers tend to use sophisticated **fraud prevention mechanisms**⁴¹ and shall therefore carefully assess whether they need to describe the constituent elements of their fraud fighting mechanisms. While by definition those mechanisms cannot be revealed in detail without potentially undermining their purpose and effectiveness, providers should at least inform about their existence and provide high-level information about how they can influence ranking – where these amount to ‘main parameters’.⁴²
- 39 If consumer reviews are a ‘main parameter’ for a given ranking mechanism, the providers concerned should include this factor in their descriptions required under Art. 5 with a sufficient level of **detail and clarity**. For example, it could be explained that the reviews are generated on the relevant online intermediation service or online search engine, or, it may be reviews hosted outside those services. In such cases, it can also be important for users to know what, if any, steps are taken to verify the veracity of such reviews.⁴³
- 40 If consumer reviews are a ‘main parameter’ for a given ranking mechanism, the providers concerned should include this factor in their descriptions required under Art. 5 with a sufficient level of detail and clarity. For example, it could be explained that the reviews are generated on the relevant online intermediation service or online search engine, or, it may be reviews hosted outside those services. In such cases, it can also be important for users to know what, if any, steps are taken to verify the veracity of such reviews.⁴⁴
- 41 If rankings are influenced by **payments**, this must be equally clarified.⁴⁵

3. Presentation in plain and intelligible language

- 42 Art. 14(1)(3) already provides that information about terms and conditions shall be set out in clear, plain, intelligible, user-friendly and unambiguous language, and shall be **publicly available in an easily accessible and machine-readable format**. A similar formulation is used by Art. 27(1) to ensure that the recipients of the service understand how information is prioritised for them.

³⁹ *ibid.*, para. 70.

⁴⁰ *ibid.*, para. 71.

⁴¹ *ibid.*, para. 72.

⁴² *ibid.*, para. 73.

⁴³ *ibid.*, para. 74.

⁴⁴ *ibid.*, para. 75.

⁴⁵ See No. 11a Annex I UCPD.

They should ensure that the information is **salient**, including through standardised visual or audio marks, clearly identifiable and unambiguous for the **average recipient** of the service, and should be adapted to the nature of the individual service's online interface.⁴⁶ Furthermore, providers should also consider who their audience is when drafting the description. In certain cases, more technical descriptions may be appropriate and required, bearing in mind that the descriptions are intended for professional users. Without prejudice to the requirement of using plain and intelligible language, professionals may in principle be assumed to require and be able to understand more detailed and more technical information than consumers.⁴⁷

In addition, recipients of the service should have information **directly accessible from the online interface** where the advertisement is presented, on the main parameters used for determining that a specific advertisement is presented to them, providing meaningful explanations of the logic used to that end, including when this is based on profiling. Such explanations should **include information on the method used** for presenting the advertisement,⁴⁸ for example whether it is contextual or other type of advertising, and, where applicable, the main profiling criteria used; it should also inform the recipient about any means available for them to change such criteria.⁴⁹

4. Modification or influence of the main parameters used

According to Art. 27(3), providers of online platforms shall also make available a functionality that allows the recipient of the service to **select** and to **modify** at any time their preferred **option**. That functionality shall be directly and easily accessible from the specific section of the online platform's **online interface** where the information is being prioritised.⁵⁰ The recitals to the Digital Services Act do not provide any specific guidance in this regard. In any case, providers must explain whether and how recipients can e.g. set their own filters or priorities, or choose between different recommendation methods. In this regard, it was stressed that it would be more user-friendly if the functionality is made available directly with the information.⁵¹ Furthermore, it should be also possible to fully **'deactivate'** recommendations. In this latter case, it seems reasonable that the function for modifying the parameters should be not only 'accessible from the specific section of the online platform's interface, but rather directly from the homepage of the online platforms.⁵²

Article 28

Online protection of minors

1. Providers of online platforms accessible to minors shall put in place appropriate and proportionate measures to ensure a high level of privacy, safety, and security of minors, on their service.

2. Providers of online platform shall not present advertisements on their interface based on profiling as defined in Article 4, point (4), of Regulation (EU) 2016/679 us-

⁴⁶ Recital 68.

⁴⁷ See para. 105 OJ 2020 C 424, 1, Annex I.

⁴⁸ See *Hofmann*, 785.

⁴⁹ Recital 68.

⁵⁰ See Recital 70(5).

⁵¹ In this sense see Grisse in: *Hofmann/Raue*, Art. 27 DSA mn. 36.

⁵² *ibid.*, who rightly underlines that it would be not enough if the functionality would be made available directly with the information.

ing personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor.

3. Compliance with the obligations set out in this Article shall not oblige providers of online platforms to process additional personal data in order to assess whether the recipient of the service is a minor.

4. The Commission, after consulting the Board, may issue guidelines to assist providers of online platforms in the application of paragraph 1.

Bibliography: Cerulli-Harms et al., 'Loot boxes in online games and their effect on consumers, in particular young consumers. Study requested by the IMCO committee' (2020); Döll, 'Schutz vor Sexting – Aber wie?' (2017) FamRZ 1728–1730; Duidenvoorde, 'Redesigning the UCPD for the Age of Personalised Marketing. A Proposal to Redesign the UCPD's Consumer Benchmarks and General Clauses' (2023) EuCML, 177–184; Grisse, 'Elterliche Sorge und Aufsichtspflichten bei der Nutzung digitaler Medien durch Kinder' (2022) NZFam 189–199; Kühling/Buchner (eds), DS-GVO (4th edn, C.H.Beck 2024); Kuner/Bygrave/Docksey (eds), The EU General Data Protection Regulation (OUP 2020); Lievens/Verdoot, 'Looking for Needles in a Haystack: Key Issues Affecting Children's Rights in the General Data Protection Regulation' (2018) Computer Law & Security Review 269–278; Malgieri, Vulnerability in Data Protection Law (OUP 2023).

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A. Function

1 Children are exposed to or targeted by a range of online marketing techniques. Through social media recommendation systems, and other algorithms, targeted advertising, influencer marketing and gamification of marketing, harmful or inappropriate content is proposed to young users, exploiting their inexperience and lack of self-control.¹ The marketing of products high in fat, sugar or salt among children can exacerbate inappropriate dietary behaviour, for example.² Similarly, the aggressive marketing to children of risky investments as safe bets can lead to severe financial consequences. To address the risks and harms associated with this for children, the Digital Services Act puts forward a number of duties. These include a **prohibition** on online platforms **to present minors with advertising based on profiling**, and a duty for online platforms to provide transparency about their recommender systems and options for users to modify or influence the main parameters used in the recommender systems.³

¹ See Cerulli-Harms et al., 27–29; Döll, 1728; Duidenvoorde, 177; Raue/Heesen, 3537 et seq.

² See Spotlight on adolescent health and well-being, available at <https://www.who.int/europe/publications/item/9789289055000> (accessed 26 May 2024).

³ See the proceeding opened on 16 May 2024 by the Commission in order to assess whether Meta may have breached the DSA in areas linked to the protection of minors (https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2664 accessed 26 May 2024).

Digital services now continuously collect and share data on children and ‘datafication’ starts even before birth. While aggregated big data can allow ground-breaking insights, e.g. into children’s health and education, the datafication of childhood may also have a potentially lifelong adverse impact on children’s well-being and development. Both children and parents lack awareness of the extensive sharing of personal data that may result from using digital services, notably those without monetary payments.⁴ While so many data are collected by industry on children’s use of digital services and related risks, academics and legal practitioners have a very limited access to these important data-sets. Children are now systematically exposed to **inappropriate content and commercial practices**. Research on the long-term neurologic impact on children of methods used for commercial purposes such as persuasive design, for example games of chance mechanisms such as ‘loot boxes’, is still needed.

Art. 28 aims at **providing a high level of protection minors** accessing online platforms to ensure a high level of their **privacy, safety and security**, by essentially tackling: harmful or age-inappropriate content, harmful behaviour of others, dangerous influences and risks of addiction. An online platform can be considered to be accessible to minors when its terms and conditions permit minors to use the service, when its service is directed at or predominantly used by minors, or where the provider is otherwise aware that some of the recipients of its service are minors, e.g. because it already processes personal data of the recipients of its service revealing their age for other purposes.⁵ Art. 28(4) traces a link with the work of the Commission in this regard, by recalling the guidelines issued to assist providers of online platforms.

The first DSA-Draft presented on 15 December 2020 by the EU Commission did oblige (see Arts 26 and 27 DSA-Draft) only very large online platforms and very large online search engines to assess and mitigate their negative impact on minors. Thanks to the pressure made by the European Parliament,⁶ some more systematic provisions were introduced into the Digital Services Act.

The Digital Services Act contains further provisions for the protection of minors: Art. 14(3), regarding **terms and conditions**; Art. 34(1)(b) and (d) on **risk assessment**; and Art. 35(1)(j) on **mitigation of risks**.

In particular, as part of the Digital Markets Act’s risk management framework, systemic risks relating to minors require specific attention. Very large online platforms are obliged to consider how easy it is for children to understand the **design and functioning** of their service, as well as how children can be exposed to content that may impair their physical and mental health, and moral development. Such risks may arise, for example, in the **design of online interfaces** which intentionally or unintentionally exploit the inexperience of children or which may cause addictive behaviour. In this regard, very large online platforms will have to adopt targeted measures to protect the rights of the child, including use of age verification and parental control tools, or tools aimed at helping children signal abuse or obtain support. Cyber-violence, including non-consensual sharing of intimate content, is an example of content that requires rapid processing if flagged by users, including children, and appropriate adaptation of the content moderation practices.⁷

⁴ See Italian Competition Authority, 16 November 2021, PS11147-PS11150, available at <https://www.agcm.it/media/comunicati-stampa/2021/11/PS11147-PS11150> (accessed 26 May 2024).

⁵ Recital 71(1), which nevertheless does not mention the concrete threats that the EU legislator was referring to.

⁶ See COM(2020) 825 final.

⁷ COM(2022) 212 final, 3.

- 7 Children may be **groomed online** for the purpose of sexual abuse or trafficking, and are at risk of having explicit images and videos, whether created in a consensual relationship with peers or under coercion, shared further without their consent.
- 8 Globally, more than a third of young people have reported being a victim of cyberbullying.⁸ Children may be exposed to and participate in toxic, aggressive, disruptive or addictive behaviour or be targeted by inappropriate, sexist or racist content. This can in turn discourage participation in online activities, and impact children's rights.⁹
- 9 Also for covering these cases, the Commission initiated the EU Code of Conduct on countering illegal hate speech online.¹⁰
- 10 Beyond age verification for accessing certain online content, the Commission will include in the code of conduct for online providers to be set up under the gender equality strategy 2020–2025, a section targeting adult-only content, aiming in particular to combat the sharing of non-consensual intimate images, whether authentic or manipulated, which might also involve children – although not only.¹¹
- 11 The EU co-funded safer internet helplines and hotlines will continue to assist the public, in particular children, when confronted with harmful and illegal content. If granted the status of 'trusted flaggers' under the conditions of the Digital Services Act, they will be able to contribute to a swifter assessment of and action upon notifications of illegal content online.¹²
- 12 For these purposes, the Commission will encourage and facilitate the design of a comprehensive EU code of conduct on age-appropriate design building on the framework provided in the Digital Services Act, by 2024; issue a standardisation request for a European standard on online age assurance / age verification in the context of the eID proposal.¹³ At the same time, the EU Commission requests the Industry to: **consistently assess and address specific risks to children** emerging from the use of their products and services including safety risks, as well as relevant marketing practices; contribute and commit to a comprehensive EU code of conduct on age-appropriate design, as well as the section on adult-only content in the code of conduct to be set up under the gender equality strategy 2020–2025; effectively implement measures on access to **age-restricted content**, including adult-content websites and 18+ games, in line with national and European rules; cooperate with **trusted flaggers** to swiftly assess and take down illegal content and act on notification of harmful content; allow academic researchers access to relevant data and information on opportunities and risks for children in full compliance with data protection rules.

⁸ See <https://www.unicef.org/press-releases/unicef-poll-more-third-young-people-30-countries-report-being-victim-online-bullying> (accessed 26 May 2024).

⁹ UNICEF, Recommendations for The Online Gaming Industry on Assessing Impact on Children (page 15) (2020).

¹⁰ See https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en (accessed 26 May 2024).

¹¹ COM(2022) 212 final, mn. 5.1.

¹² Examples of such content are child sexual abuse material, and racist and xenophobic hate speech in line with the code of conduct on countering illegal hate speech online, including antisemitic hate speech as set out by the EU strategy on combating antisemitism and fostering Jewish life. See above fn. 10.

¹³ *ibid.*, mn. 5.1.

B. Context

2012 marked the first European strategy for a better internet for kids (**BIK**). The updated strategy for a better internet for kids (**BIK+**)¹⁴ – as well as by a series of further instruments will ensure that children are protected, respected and empowered online.

Since 2012, children's use of digital technologies has changed dramatically. Modern devices enable child users to interact, contact, play and share with others, often without parental supervision. The 2020 'EU Kids Online' findings show that a majority of children report using their smartphones 'daily' or 'almost all the time', with the time spent online almost doubled compared to 2010 in many countries. The age at which children start to use digital devices is also decreasing.

A closely linked provision it to be found in Art. 8(1) GDPR, regarding the conditions applicable to **child's consent** in relation to information society services.

In accordance with the **GDPR** notably the principle of **data minimisation** as provided for in its Art. 5(1) (c), this prohibition should not lead the provider of the online platform to maintain, acquire or process more personal data than it already has to assess if the recipient of the service is a minor. Thus, this obligation should not incentivise providers of online platforms to collect the age of the recipient of the service prior to their use. It should be without prejudice to Union law on protection of personal data.¹⁵

Nr. 28 of Annex I UCPD qualifies as a commercial practice which is in any case considered unfair the behaviour consisting in including in an advertisement a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them.¹⁶

The Audiovisual Media Services Directive (AVMSD) provides a series of mechanisms for **access controls**¹⁷ as well as for **notification procedures, age verification, parental scrutiny, content rating, media literacy and awareness raising**.¹⁸ Art. 6a(2) and Art. 28b(3) 4th subpara. AVMSD **focus not just on profiling**, as they prohibit *tout court* video-sharing platform providers from using personal data of minors for commercial purposes such a **direct marketing, profiling and behaviourally targeted advertising**.

A remarkable step forward is to be expected from the outcome of the Proposal for a Regulation of the European Parliament and of the Council laying down rules to prevent and combat child sexual abuse.¹⁹

Despite existing EU law (in particular, AVMSD and GDPR), age verification mechanisms and parental consent tools are still ineffective in many cases, with users often only required to enter their birth date upon registration.²⁰

¹⁴ See <https://digital-strategy.ec.europa.eu/en/policies/strategy-better-internet-kids> (accessed 26 May 2024).

¹⁵ See Recital 71.

¹⁶ This provision is without prejudice to Article 16 of Directive (EEC) 89/552 on television broadcasting.

¹⁷ Art. 28b(3) 2nd subpara. (4) (access controls) Directive (EU) 2010/13.

¹⁸ Art. 28b(3) 3rd subpara. (notification procedures, age verification, parental scrutiny, content rating, media literacy and awareness raising) Directive (EU) 2010/13.

¹⁹ COM(2022) 209 final.

²⁰ See Study on the implementation of the new provisions in the revised Audiovisual Media SMART 2018/0066: see <https://op.europa.eu/en/publication-detail/-/publication/6d536c6f-5c68-11eb-b487-01aa75ed71a1/language-en> (accessed 26 May 2024).

C. Explanation

I. Scope of application

1. Advertisements based on profiling

- 21 According to Art. 28(1) online platforms should not present advertisements based on profiling using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor.
- 22 The overall aim is to ensure data minimisation and to protect minors against personalised advertising.²¹ The addressees of the provision are **online platforms** as defined by Art. 3(i) DSA that are **accessible to minors**.²² There is no harmonised EU rules about what can be considered minority or majority of age, so member States are free to set the corresponding thresholds. Nevertheless, currently in all 27 EU Member States the age of **majority is reached at 18 years**.
- 23 Several criteria for assessing **whether a platform** can be considered **accessible to minors** are contained in Recital 71(2): when its **terms and conditions** permit minors to use the service; when its service is directed at or **predominantly used** by minors; or where the provider is otherwise aware that some of the recipients of its service are minors, for example because it already processes personal data of the recipients of its service revealing their age for other purposes.²³
- 24 To assess whether a service can be considered as ‘**directed to minors**’ (cf. Art. 8(1) GDPR), its content and the way recipients are addressed should be determinant.²⁴ With regard to the formulation ‘directly to a child’ contained in Art. 8(1) GDPR it has been stressed that it should not be read as covering only services that are exclusively directed to children (such as e.g. *YouTube Kids*) because this interpretation would excessively limit the scope of the provision.²⁵ That considered, information society services falling under Art. 8 GDPR should be considered as those who target either only children or both adults and children. Nevertheless, the same provision should not cover services which explicitly exclude users below a certain age, except in the case in which the services are directed *de facto* to children.²⁶ The same interpretative criteria are suitable to be used with regard to Art. 28 DSA: for its application it should suffice that the provider has actual **knowledge** or should – acting diligently – have knowledge of the circumstance that its services may be accessible to minors. This should be the case for instance if for the use of the service a registration with indication of age is required.²⁷

2. Exclusion of search engines

- 25 Differently from Art. 28(1) DSA, which applies only to ‘providers of online platforms’ that are accessible to minors, Art. 28(2) and (3) are directed **to all online platforms**. Nevertheless, Art. 28 DSA does **not apply to search engines**, as those cannot fundamen-

²¹ See Grisse, mn. 3nn; Cerulli-Harms *et al.*, 29.

²² No indications are contained in the DSA in order to define when an online platform can be considered as ‘accessible to minors’.

²³ Recital 71 DSA.

²⁴ Cf. BGH 17.7.2013 – I ZR 34/12, MMR 2014, 169 mn. 19.

²⁵ Lievens/Verdoot, 272.

²⁶ *ibid.*

²⁷ See Grisse, mn. 6.

tally be qualified as a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public (Art. 3(i)).²⁸

3. Exclusion of micro and small enterprises

According to Art. 19 DSA, the entire Art. 28 shall **not apply** to providers of online platforms allowing consumers to conclude distance contracts with traders that qualify as **micro or small enterprises** as defined in Recommendation 2003/361/EC. Art. 28 equally does not apply to providers of online platforms allowing consumers to conclude distance contracts with traders that previously qualified for the status of a micro or small enterprise as defined in Recommendation 2003/361/EC during the 12 months following their loss of that status pursuant to Art. 4(2) thereof, except when they are very large online platforms in accordance with Art. 33. Nevertheless, Art. 28 applies to providers of online platforms allowing consumers to conclude distance contracts with traders that have been designated as very large online platforms in accordance with Art. 33, irrespective of whether they qualify as micro or small enterprises (see Art. 19). 26

II. Measures to ensure the protection of minors

Providers of online platforms accessible to minors shall put in place **appropriate and proportionate measures** to ensure a high level of privacy, safety, and security of minors, on their service (Art. 28(1)). 27

The Digital Services Act therefore does not concretely indicate specific measures to be taken. 28

In this regard a little support comes from Recital 71(3), which provides a non exhaustive list of such measures: for example, by designing their **online interfaces** or parts thereof with the **highest level of privacy, safety and security** for minors by default where appropriate or adopting **standards** for protection of minors,²⁹ or participating in **codes of conduct** for the same reason.³⁰ 29

Also the BIK+ strategy suggests a series of measures: providing age-appropriate information; supporting effective **age-verification methods**, in line with the eID proposal; **information on products and services** to be used by children should be provided in a age appropriate, easily understandable and accessible manner; providing **simple report measures** for harmful content; including instruction and warnings; supporting, including with trained staff, the **harmonised number 116 111** to address cyberbullying; assessing and **addressing specific risks** to children emerging from the use of their products and services including safety risks, as well as relevant marketing practices; contributing and committing to a comprehensive **EU code of conduct** on age-appropriate design, as well as the **section on adult-only content** in their platforms; adopting **measures on access to age-restricted content**, including adult-content websites and 18+ games, in line with national and European rules; **cooperating with trusted flaggers** to swiftly **assess and take down illegal content** and act on notification of harmful content; **allowing academic researchers access to relevant data** and information on opportunities and risks for children in full compliance with data protection rules. 30

²⁸ *ibid.*, mn. 8.

²⁹ cf. Art. 44(1)(j) and Art. 44.

³⁰ cf. Art. 45.

- 31 In this regard, the **Code of Conduct on countering illegal hate speech online**³¹ and the **Code of Practice on Disinformation** should serve as a source for determining the duties indicated in Art. 28(1).
- 32 It would be of considerable assistance if the EU Commission were to issue **guidelines** specifically regarding these aspects.

III. Prohibition of personalised advertising

- 33 Providers of online platform shall **not present advertisements** on their interface **based on profiling** as defined in Art. 4(4) GDPR using personal data of the recipient of the service when they are aware with reasonable certainty that the recipient of the service is a minor (Art. 28(2)).
- 34 According to Art. 4(4) GDPR ‘profiling’ means **any form of automated processing of personal data** consisting of the use of personal data to **evaluate certain personal aspects** relating to a natural person, in particular to analyse or predict aspects concerning that natural person’s performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.³² Such criterion refers only to the means of processing: differently from what provided in Art. 22(1) GDPR, it does not exclude human input. Art. 4(4) GDPR seems therefore to include both the process of **profile generation** and that of **profile application**.³³ Situations in which a controller merely attempts to profile a natural person seem to fall outside the scope of the definition. The same provision does not require the element of intentionality of evaluation.³⁴ Repositories should include the content of advertisements, including the name of the product, service or brand and the subject matter of the advertisement, and related data on the advertiser, and, if different, the natural or legal person who paid for the advertisement, and the delivery of the advertisement, in particular where targeted advertising is concerned. This information should include both information about targeting criteria and delivery criteria, in particular when advertisements are delivered to persons in vulnerable situations, such as minors.³⁵
- 35 Art. 28(2) does **not provide a total prohibition** of personalised advertising to minors: indeed, it excludes only cases in which personalised advertising to minors is conducted using minors’ personal data, and not cases in which the online platform provider: (i) derives information about the recipient from non-personal data; (ii) makes advertising on the basis of personal data without profiling.³⁶
- 36 Art. 28(2) finds application only when the provider has a **reasonable certainty** that the recipient of the service is a minor. This can happen when the provider: (i) by automatically assessing the data available to him (e.g. likes, posts, accesses, friends) can infer that the recipient of the service is a minor; (ii) already knows the recipient’s age because their insertion was requested for registering for a service.

³¹ See https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en (accessed 26 May 2024).

³² See BGH 28.1.2014 - VI ZR 156/13. See Buchner in: *Kühling/Bucher*, Art. 4 Nr. 4 DS-GVO mn. 5 et seq.

³³ So Bygrave in: *Kuner/Bygrave/Docksey*, Art. 4(4) GDPR, 130.

³⁴ cf. *Malgieri*, 196 et seq.

³⁵ Recital 95.

³⁶ Art. 26. cf. *Grise*, mn. 18.

IV. No duty to collect data for age assessment

In relation to the offer of information society services directly to a child, the processing of the personal data of a child shall be lawful where the child is at least 16 years old. Where the child is below the age of 16 years, such processing shall be lawful only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child (Art. 8(1) GDPR).³⁷ 37

According to Art. 28(3), in order to comply with Art. 28 providers of online platforms have no duty to process additional personal data to assess whether the recipient of the service is a minor. This excludes also that the trader uses the 'door' of Art. 6(1)(c) GDPR in order to justify the processing of personal data.³⁸ This is in line with the principle of data minimisation as provided for in Art. 5(1)(c) GDPR, thereof, this prohibition should not lead the provider of the online platform to maintain, acquire or process more personal data than it already has in order to assess if the recipient of the service is a minor. Thus, this obligation should not incentivise providers of online platforms to collect data about the age of the recipient of the service prior to their use. 38

V. Guidelines to assist providers

Art. 28(4) provides that the Commission, after consulting the Board, may issue **guidelines to assist providers** of online platforms in the application of Art. 28(1). 39

Such guidelines may consist in provisions aimed at: **adapting the design** of online platforms and their online interface, especially when their services are aimed at minors or predominantly used by them; ensuring that their services are organised in a way that allows minors to access easily mechanisms provided for in the Digital Services Act, where applicable, including notice and action and complaint mechanisms; **protecting minors** from content that may impair their physical, mental or moral development and provide tools that enable conditional access to such information. 40

Furthermore, the Commission shall **consult the Board**, and support and promote the development and implementation of voluntary standards set by relevant European and international standardisation bodies for targeted measures to protect minors online (Art. 44(1)(j)). 41

Providers of intermediary services are free to **adopt the standards**, but their adoption does not presume compliance with the Digital Services Act. At the same time, by providing best practices, such standards could in particular be useful for relatively small providers of intermediary services. The standards could distinguish between different types of illegal content or different types of intermediary services, as appropriate.³⁹ 42

Article 30 Traceability of traders

1. Providers of online platforms allowing consumers to conclude distance contracts with traders shall ensure that traders can only use those online platforms to promote messages on or to offer products or services to consumers located in the Union if,

³⁷ Member States may provide by law for a lower age for those purposes provided that such lower age is not below 13 years (Art. 8(1)(2) GDPR).

³⁸ Art. 6(1)(c) GDPR: '...processing is necessary for compliance with a legal obligation to which the controller is subject.'

³⁹ Recital 102.

prior to the use of their services for those purposes, they have obtained the following information, where applicable to the trader:

- (a) the name, address, telephone number and email address of the trader;
- (b) a copy of the identification document of the trader or any other electronic identification as defined by Article 3 of Regulation (EU) No 910/2014 of the European Parliament and of the Council (40);
- (c) the payment account details of the trader;
- (d) where the trader is registered in a trade register or similar public register, the trade register in which the trader is registered and its registration number or equivalent means of identification in that register;
- (e) a self-certification by the trader committing to only offer products or services that comply with the applicable rules of Union law.

2. Upon receiving the information referred to in paragraph 1 and prior to allowing the trader concerned to use its services, the provider of the online platform allowing consumers to conclude distance contracts with traders shall, through the use of any freely accessible official online database or online interface made available by a Member State or the Union or through requests to the trader to provide supporting documents from reliable sources, make best efforts to assess whether the information referred to in paragraph 1, points (a) to (e), is reliable and complete. For the purpose of this Regulation, traders shall be liable for the accuracy of the information provided.

As regards traders that are already using the services of providers of online platforms allowing consumers to conclude distance contracts with traders for the purposes referred to in paragraph 1 on 17 February 2024, the providers shall make best efforts to obtain the information listed from the traders concerned within 12 months. Where the traders concerned fail to provide the information within that period, the providers shall suspend the provision of their services to those traders until they have provided all information.

3. Where the provider of the online platform allowing consumers to conclude distance contracts with traders obtains sufficient indications or has reason to believe that any item of information referred to in paragraph 1 obtained from the trader concerned is inaccurate, incomplete or not up-to-date, that provider shall request that the trader remedy that situation without delay or within the period set by Union and national law.

Where the trader fails to correct or complete that information, the provider of the online platform allowing consumers to conclude distance contracts with traders shall swiftly suspend the provision of its service to that trader in relation to the offering of products or services to consumers located in the Union until the request has been fully complied with.

4. Without prejudice to Article 4 of Regulation (EU) 2019/1150, if a provider of an online platform allowing consumers to conclude distance contracts with traders refuses to allow a trader to use its service pursuant to paragraph 1, or suspends the provision of its service pursuant to paragraph 3 of this Article, the trader concerned shall have the right to lodge a complaint as provided for in Articles 20 and 21 of this Regulation.

5. Providers of online platforms allowing consumers to conclude distance contracts with traders shall store the information obtained pursuant to paragraphs 1 and 2 in a secure manner for a period of six months after the end of the contractual relationship with the trader concerned. They shall subsequently delete the information.

6. Without prejudice to paragraph 2 of this Article, the provider of the online platform allowing consumers to conclude distance contracts with traders shall only disclose the information to third parties where so required in accordance with the applicable law, including the orders referred to in Article 10 and any orders issued by Member States' competent authorities or the Commission for the performance of their tasks under this Regulation.

7. The provider of the online platform allowing consumers to conclude distance contracts with traders shall make the information referred to in paragraph 1, points (a), (d) and (e) available on its online platform to the recipients of the service in a clear, easily accessible and comprehensible manner. That information shall be available at least on the online platform's online interface where the information on the product or service is presented.

Bibliography: *Busch (ed)*, P2B-VO (C.H.Beck 2022); *Busche/Fischer*, 'Lauterkeitsrechtliche Haftung von Internetportalen' (2023) GRUR 23–29; *Cauffman/Goanta*, 'A New Order: The Digital Services Act and Consumer Protection' (2021) European Journal of Risk Regulation 758–774; *De Franceschi*, 'Informationspflichten und „formale Anforderungen“ im Europäischen E-Commerce' (2013) GRUR Int. 866–875; *Dregelies*, 'Territoriale Reichweite von Unterlassungsansprüchen' (Mohr Siebeck 2020); *Dregelies*, 'Verbraucherschutz im DSA' (2023) VuR 175–181; *Gsell*, 'Informationspflichten im europäischen Verbraucherrecht' (2022) ZfPW 130–153; *Hofmann/Raue (eds)*, Digital Services Act (Nomos 2023); *Janal*, 'Haftung und Verantwortung im Entwurf des Digital Services Acts' (2021) ZEuP 227–273; *Schmidt*, 'Neue Anforderungen für Online-Marktplätze und Bewertungsplattformen im Zivil und Lauterkeitsrecht' (2022) VuR 131–138; *Schulte-Nölke*, 'The EU Digital Services Act and EU Consumer Law' in: *De Franceschi/Schulze (eds)*, Harmonizing Digital Contract Law (C.H.Beck/Hart/Nomos 2023), p. 705–714; *Wang*, 'Personal Data Breach Notification System in the European Union: Interpretation of "Without undue delay"' (2011) 741–757; *Wolters*, "Know-your-customer" in het DSA-voorstel' (2021) Tijdschrift voor Consumentenrecht en handelspraktijken 134–136.

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A. Function

To contribute to a safe, trustworthy and transparent online environment for consumers, as well as for other interested parties such as competing traders and holders of intellectual property rights, and to deter traders from selling products or services in violation of the applicable rules, online platforms allowing consumers to conclude distance contracts with traders should ensure that such **traders are traceable**.¹

¹ Recital 72. See *Cauffman/Goanta*, 758; *Dregelies*, 'Verbraucherschutz im DSA' (2023) VuR 175–181.

B. Context

- 2 Already Art. 5 E-Commerce Directive and Art. 6 CRD already impose a wide array of information duties on the trader.²
- 3 According to **Art. 5 E-Commerce Directive** the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information: the name of the service provider; its the geographic address; the contact details of the service provider; where the service provider is registered in a trade or similar public register and the trade register in which the service provider is entered and his registration number; where the activity is subject to an authorisation scheme, the relevant supervisory authority; additional duties as concerns the regulated professions; where the service provider undertakes an activity that is subject to VAT and the identification number referred to in Art. 22(1) Directive 77/388/EEC; whether the indicated prices are inclusive of tax and delivery costs.
- 4 Under **Art. 6 CRD**, before the consumer is bound by a distance contract, or any corresponding offer, the trader shall *inter alia* provide the consumer with the following information in a clear and comprehensible manner: main characteristics of the goods or services; identity of the trader; geographical address at which the trader is established and its contact details; total price of goods or services inclusive of taxes or the manner in which the price is to be calculated; cost of using the means of distance communication for the conclusion of the contract; arrangements for payment, delivery, performance, time by which the trader undertakes to deliver the goods or to perform the services and, where applicable, the trader's complaint handling policy; where a right of withdrawal exists, the conditions, cost, time limit and procedures for exercising that right; where a right of withdrawal is not provided, the information that the consumer will not benefit from a right of withdrawal or, where applicable, the circumstances under which the consumer loses his right of withdrawal; a reminder of the existence of a legal guarantee of conformity for goods; after sales services; codes of conduct; duration of the contract; the minimum duration of the consumer's obligations; financial guarantees; functionality and interoperability of digital content; possibility of having recourse to an out-of-court complaint and redress mechanism, to which the trader is subject, and the methods for having access to it.³
- 5 **Art. 6a CRD**, introduced by the Modernisation Directive, provides additional specific information requirements for contracts concluded on online marketplaces: general information on the main parameters determining ranking⁴ of offers presented to the consumer and the relative importance of those parameters; whether the third party offering the goods, services or digital content is a trader or not, on the basis of the declaration of that third party to the provider of the online marketplace; where the third party offering the goods, services or digital content is not a trader, that the consumer rights stemming from Union consumer protection law do not apply to the contract; where applicable, how the obligations related to the contract are shared between the third party offering the goods, services or digital content and the provider of the online marketplace.⁵
- 6 Furthermore, **Art. 7(4)(a) UCPD**, introduced by the Modernisation Directive, added, for the case of an invitation to purchase for products offered on online marketplaces, the following information among the list of information which shall be regarded as material,

² See e.g. *De Franceschi*, 866.

³ See e.g. CJEU, C-179/21 *Victorinox* EU:C:2022:353, para. 26; CJEU, C-529/19 *Möbel Kraft* EU:C:2020:846, para. 26; CJEU, C-649/17 *Amazon EU* EU:C:2019:576, para. 43.

⁴ As defined in Art. 2(1)(m) UCPD.

⁵ For details Consumer Rights Directive → CRD Art. 6a mn. 1 et seq.

if not already apparent from the context: **whether the third party offering the products is a trader or not**, on the basis of the declaration of that third party to the provider of the online marketplace.

Art. 30 DSA goes much further, as it **imposes on providers of online platforms the duty to search for information** to a certain extent: providers become ‘watchdogs’ of the compliance with the information duties of Art. 5 E-Commerce Directive and of Art. 6a CRD and play a crucial role in stimulating and ensuring their observance.⁶

C. Explanation

I. Subjective scope of application

Art. 30 addresses providers of **online platforms allowing consumers to conclude distance contracts with traders**. Considering the particular characteristics of the services concerned and the corresponding need to make the providers thereof subject to certain specific obligations, the EU legislator decided to focus, within the broader category of providers of hosting services as defined in the Digital Services Act, on the subcategory of online platforms. According to Art. 3(1)(i), as ‘online platform’ shall be qualified a **hosting service** that, at the request of a recipient of the service, **stores and disseminates information to the public**, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of the Digital Services Act.

In particular, **online platforms**, such as social networks or online platforms allowing consumers to conclude distance contracts with traders, should be **defined as providers of hosting services that not only store information** provided by the recipients of the service at their request, **but that also disseminate** that information to the public at the request of the recipients of the service. However, in order to avoid imposing overly broad obligations, providers of hosting services should not be considered as online platforms where the dissemination to the public is merely a minor and purely ancillary feature that is intrinsically linked to another service, or a minor functionality of the principal service, and that feature or functionality cannot, for objective technical reasons, be used without that other or principal service, and the integration of that feature or functionality is not a means to circumvent the applicability of the rules of the Digital Services Act applicable to online platforms. For example, the comments section in an online newspaper could constitute such a feature, where it is clear that it is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. In contrast, the storage of comments in a social network should be considered an online platform service where it is clear that it is not a minor feature of the service offered, even if it is ancillary to publishing the posts of recipients of the service. For the purposes of the Digital Services Act, cloud computing or web-hosting services should not be considered to be an online platform where dissemination of specific information to the public constitutes a minor and ancillary feature or a minor functionality of such services. Moreover, cloud computing services and web-hosting services, when serving as infrastructure, such as the underlying infrastructural storage and computing services of an internet-based application, website or online platform, should not in themselves be

⁶ cf. Busche/Fischer, 25.

considered as disseminating to the public information stored or processed at the request of a recipient of the application, website or online platform which they host.⁷

- 10 The concept of **'dissemination to the public'**, as used in the Digital Services Act, should entail the **making available of information to a potentially unlimited number of persons**, meaning making the information easily accessible to recipients of the service in general without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access the information in question. Accordingly, where access to information requires registration or admittance to a group of recipients of the service, that information should be considered to be disseminated to the public only where recipients of the service seeking to access the information are automatically registered or admitted without a human decision or selection of whom to grant access. **Interpersonal communication services**, as defined in Directive 2018/1972, such as emails or private messaging services, **fall outside the scope of the definition of online platforms** as they are used for interpersonal communication between a finite number of persons determined by the sender of the communication. However, the obligations set out in the Digital Services Act for providers of online platforms may apply to services that allow the making available of information to a potentially unlimited number of recipients, not determined by the sender of the communication, such as through public groups or open channels. Information should be considered disseminated to the public within the meaning of the Digital Services Act only where that dissemination occurs upon the direct request by the recipient of the service that provided the information.⁸

II. Information duties

1. Introduction

- 11 Providers of online platforms allowing consumers to conclude distance contracts with traders shall ensure that traders can only use those **online platforms to promote messages or to offer products or services to consumers located in the EU** if, prior to the use of their services for those purposes, they have obtained the information contained in Art. 30(1). The main goal of this provision is to trace traders and therefore to strengthen the position of their counterparties.⁹ Of course the information duties contained in Art. 30(1) do not apply in case the promotion of message on or the offer of products or services to consumers located in the EU is made by subjects, which cannot be qualified as traders within the meaning of Art. 3 No. 1(f).
- 12 Art. 30(1) does not impose on traders an obligation to provide the information.¹⁰ However, the **lack of provision of information** may have consequences – for both the platform and the trader – according to the Unfair Commercial Practices Directive, as such behaviour can be regarded as contrary to good faith (Art. 5 UCPD) and as a misleading omission (Art. 7 UCPD) towards consumers purchasing on that platform.
- 13 Having regard at the scope of application of the Digital Services Act, the provision of information mentioned in Art. 30(1) cannot be considered as subject of an obligation.¹¹

⁷ Recital 13.

⁸ Recital 14.

⁹ Dregelies in: *Hofmann/Raue*, Art. 30 DSA mn. 14, who rightly wishes a harmonisation of the different sets of information duties already existing in the *acquis communautaire*.

¹⁰ *ibid.*

¹¹ *ibid.*, mn. 13.

The platform shall allow traders to **advertise products and services on the platform** 14 only if traders already provided the information required according to Art. 30(1) and, additionally, if such information is reliable and complete (Art. 30(2)).¹²

In absence of the information required, the trader may use the platform to **advertise 15 or offer products** – e.g. through Geoblocking – **to consumers non located in the EU**.¹³

The data provided by the traders shall be processed according to Art. 4(2) and Art. 6(1) 16 (1)(c) GDPR.

2. Information to be provided

The duty to provide **name, address,**¹⁴ **telephone number**¹⁵ **and email address** of the 17 trader (Art. 30(1)a) is contained already in Art. 6 CRD).¹⁶ The Digital Services Act strengthens the latter provision as it charges the providers of online platforms with the role of controllers of the compliance with the Consumer Rights Directive. In case of information society services, he should comply also with Art. 5(1) E-Commerce Directive.¹⁷

The trader has to also provide a copy of his identification document or any other 18 electronic identification¹⁸ as defined by Art. 3 eIDAS Regulation.

A further information duty regards the **payment account details**: here it is possible 19 to make reference to the definition contained in Art. 4 No. 12 PSD2 – according to which ‘payment account’ means an account held in the name of one or more payment service users which is used for the execution of payment transactions – and to the concerning CJEU case law, according to which a savings account which allows for sums deposited without notice and from which payment and withdrawal transactions may be made solely by means of a current account does not come within the concept of ‘payment account’.¹⁹

Where the trader is registered in a trade register or similar public register, he shall 20 provide information about the **trade register** in which the trader is registered and **its registration number** or equivalent means of identification in that register (Art. 30(1)(d)).

Finally, the trader has to provide a **self-certification** committing to only offer prod- 21 ucts or services that comply with the applicable rules of Union law (Art. 30(1)(e)).

¹² cf. *ibid.*, mn. 10, who considers that ‘other preparatory actions, such as setting up a web shop without advertising products and services, are permissible even if no information has been transmitted yet’.

¹³ See *Dregelies* (2020), 99.

¹⁴ cf. Art. 7(5), Art. 17(2) and Art. 63(1)(b) and (c) Regulation 2012/1215/EU.

¹⁵ See, with regard to Art. 6 CRD: CJEU, C-649/17 *Amazon EU* EU:C:2019:576, paras 47, 51, which concluded that it suffices to offer a ‘quick and effective’ means of communication.

¹⁶ According to Art. 6(1)(c) CRD trader’s telephone number, fax number and e-mail address, shall be communicated ‘where available’. Art. 30 DSA does not refer to their ‘availability’, so that information regarding trader’s telephone number, fax number and e-mail address shall always be communicated. See e.g. *Gsell*, 130 et seq.

¹⁷ Art. 5(1)(c) E-Commerce Directive requires merely the communication of ‘the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner’.

¹⁸ Art. 3 ‘electronic identification’ means the process of using person identification data in electronic form uniquely representing either a natural or legal person, or a natural person representing a legal person.

¹⁹ cf. CJEU, C-191/17 *ING-DiBa Direktbank Austria* EU:C:2018:809, para. 33.

3. Duty to assess reliability and completeness of information

- 22 Upon receiving the information referred to in Art. 30(1) and prior to allowing the trader concerned to use its services, **the provider** of the online platform allowing consumers to conclude distance contracts with traders shall²⁰ **make best efforts to assess whether the above mentioned information²¹ is reliable and complete**. For the purpose of the Digital Services Act, **traders shall be liable for the accuracy** of the information provided (Art. 30(2)(1)).
- 23 Recital 73 DSA gives more substance to the duty contained in Art. 30(2), by providing a non-exhaustive **list of efforts**: using freely available official online databases and online interfaces, such as national trade registers and the VAT Information Exchange System; requiring the traders concerned to provide trustworthy supporting documents, such as copies of identity documents, certified payment accounts' statements, company certificates and trade register certificates; using other sources, available for use at a distance, which offer a similar degree of reliability for the purpose of complying with this obligation. However, the same Recital underlines that providers should not be required to engage in excessive or costly online fact-finding exercises or to carry out disproportionate verifications on the spot.
- 24 According to Art. 30(2) 1st subpara. providers shall make best efforts to assess whether the information is reliable and complete. Art. 30 2nd subpara. stresses that traders and not providers shall be liable for the accuracy of the information provided. It remains questionable whether information can be 'reliable' ('*verlässlich*', '*provenant de sources fiables*', '*provenienti da fonti affidabili*') without being 'accurate' ('*richtig*', '*exactitude des informations fournies*', '*accuratezza delle informazioni fornite*'). It seems that the wording of the French and the Italian DSA-texts are the most 'accurate': therefore, it seems that, for the purpose of Art. 30(2) 1st subpara., one should make reference to the **reliability of the source** and, for the purpose of Art. 30(2) 1st subpara., to the accuracy of the information provided.
- 25 Some commentators consider that the wording does not require the platform operator to check whether the information submitted also belongs to the person submitting it.²² However, if also Art. 30(2) 1st subpara. DSA should be read as requiring the reliability of the source, it is reasonable to put on the provider of online platforms the duty to **assess whether the information submitted also belongs to the person submitting it**.
- 26 Of course – given such formulation – providers of online platforms will be **not liable according to the Digital Services Act** for the accuracy of the information provided. However, as providers have to make 'best efforts' for the purpose of the assessment of the compliance with the aforementioned duties, they may be **liable according the Unfair Commercial Practices Directive** towards consumers, if it can be acknowledged that their effort did not reach the threshold of professional diligence set in Arts 5 et seq. UCPD – which is of course a variable threshold, which very much depends also on a series of characters like e.g. the trader's dimension, number of employees, etc. – and if at the same time the commercial practice materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or the average member of the group when a com-

²⁰ Through the use of any freely accessible official online database or online interface made available by a Member State or the Union or through requests to the trader to provide supporting documents from reliable sources.

²¹ Art. 30(1)(a)–(e). The same obligation does not apply to online marketplaces according to the CRD.

²² Wolters, 135; Dregelies in: *Hofmann/Raue*, Art. 30 DSA mn. 31.

mercial practice is directed to a particular group of consumers (Arts 5 et seq. UCPD).²³ Given the cross-cutting character of the Unfair Commercial Practices Directive – which equally applies to commercial practices put in place before and after the conclusion of the contract – it seems reasonable to infer that providers of online platforms have the duty to make best efforts to assess whether the information referred to in Art. 30(1) (a)–(e) remains reliable and complete even after the contract’s conclusion.

In particular, according to **Art. 11a UCPD**, EU Member States shall grant **proportional and effective remedies to consumers harmed by unfair commercial practices**, including compensation for damage suffered by consumers and, where relevant, a price reduction or the termination of the contract. It is up to the Member States to determine the conditions for the application and the effects of those remedies. However, it remains to be seen whether this will actually lead to a real harmonisation among the EU Member States. The solution provided in Art. 54 should be particularly welcomed²⁴ also in this case, as it grants to recipients of the service the right to seek compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement by those providers of their obligations under the Digital Services Act.

This **‘permanent monitoring duty’** is confirmed also by a systematic analysis of the Digital Services Act, and in particular by its Art. 31(3), according to which providers allowing the trader to offer products or services on their online platform to consumers shall make **reasonable efforts** to randomly check in any official, freely accessible and machine-readable online database or online interface whether the products or services offered have been identified as illegal.

A similar wording to that of Art. 30(2) is contained in Art. 17(4)(b) Directive 2019/790/EU (CDSM), according to which the service provider shall make best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; here the EU legislator identified the threshold with the high industry standards of professional diligence.²⁵

In case of a **breach of the platform’s obligation**, recipients of the service will have the right to seek, in accordance with EU and national law, compensation from providers of intermediary services, in respect of any damage or loss suffered due to an infringement.²⁶

The **liability of the platforms** can be proven also in the case in which it is not (or no longer) possible to identify the contractual counterparty of the consumer and because of this the consumer is not able to enforce his rights.²⁷

Art. 30(2) 2nd subpara. contains a specular provision to that of Art. 30(2) 1st subpara.: as regards **traders that are already using the services** of providers of online platforms **on 17 February 2024**, providers shall make best efforts to obtain the information listed

²³ See e.g. Autorità Garante della Concorrenza e del Mercato 9.3.2016, PS9353 (available at https://www.agcm.it/dotcms/DOC/allegati-news/PS9353_chiusura.pdf accessed 26 May 2024) with regard to business to consumer Sales Contracts concluded on the Platform *Amazon Marketplace*. In this regard, the AGCM assessed that *Amazon* did not provide consumers with adequate information: the identity of the trader; the regime of the right of withdrawal and the legal guarantee. After the consumer’s complaint regarding the lack of conformity, *Amazon* did limit itself to assert its extraneity to the contract between the actual seller and the consumer. However, in this case the AGCM did fine *Amazon* on the basis of the Italian implementing provisions of Art. 6 and 8(2) CRD (respectively: Art. 49 and 51(2) Consumer Code). cf. *Schmidt*, 134.

²⁴ So *Schulte-Nölke*, 719.

²⁵ *Wolters*, 135.

²⁶ See Art. 54.

²⁷ Dregelies in: *Hofmann/Raue*, Art. 30 DSA mn. 31.

from the traders concerned within 12 months (that means by **16 February 2025** at the latest). Where the traders concerned fail to provide the information within that period, the providers shall **suspend the provision** of their services to those traders until they have provided all the information.

4. Duty to update information

- 33 According to Art. 30(3) 1st subpara., where the provider of the online platform allowing consumers to conclude distance contracts with traders obtains sufficient indications or has reason to believe that any item of information referred to in Art. 30(1) obtained from the trader concerned is **inaccurate, incomplete or not up-to-date**, that provider shall request that the trader **remedy that situation without delay** or within the period set by EU and national law.
- 34 Such provision not only sets a **duty to activate** on the provider of online platforms. First and foremost it complements what provided by Art. 30(2) DSA. That means: information shall not only be **reliable** (*rectius*, for the reasons above: the *source* of information shall be reliable) and **complete**, but also **up-to-date**: it can be therefore inferred that the trader has a **permanent duty to update information** on the platform, **independently from a request** in that sense by the platform.

5. Request to renew information

- 35 Specularly, Art. 30(3) imposes a **permanent monitoring duty** on the providers of online platforms.
- 36 This recalls what Art. 16 provides with regard to ‘Notice and action mechanisms’: a notice referred there shall be considered to give rise to **actual knowledge or awareness** for the purposes of Art. 6 (‘Hosting’) in respect of the specific item of information concerned if they **allow a diligent provider** of hosting services to **identify the illegality** of the relevant activity or information **without a detailed legal examination** (Art. 16(3)).²⁸
- 37 Where the provider of online platforms obtains actual knowledge or has reason to believe, it should **request the trader to remedy** that situation **without undue delay**²⁹ or within the period set by EU or national law (Art. 30(3)(1)). In this regard, it has been rightly noted that the lower the amendment effort is, the shorter should be the deadline for remedying to the situation.³⁰ Some authors consider in this regard no more than two working days will be necessary.³¹ That may be a good solution in most cases. However, in some cases a longer period maybe adequate, as e.g. where – given a particular complexity – remedying the above mentioned situation may require longer time, for instance when the request by the trader is accompanied by a extensive statement, which requires thorough examination and internal coordination.

III. Suspension of the service

- 38 Where the traders concerned fail to provide the information within that period, the providers shall suspend the provision of their services to those traders until they have

²⁸ cf. Recital 22.

²⁹ On the meaning of the expression ‘without undue delay’, see Wang, 741 et seq.

³⁰ See Dregelies in: Hofmann/Raue, Art. 30 DSA mn. 42. No indications in this regard are available in the Recitals of the DSA. cf. BGH 25.10.2011 - VI ZR 93/10, GRUR 2012, 311.

³¹ Dregelies in: Hofmann/Raue, Art. 30 DSA mn. 42.

provided all the information (Art. 30(3) 2nd subpara.). This could be done e.g. through geoblocking.³²

IV. Right to lodge a complaint

According to Art. 4 Platform Regulation, in the case of restriction, suspension or termination, the provider of online intermediation services shall give the business user the opportunity to clarify the facts and circumstances in the framework of the internal complaint-handling process referred to in Art. 11.³³ 39

Without prejudice to Art. 4 Platform Regulation, if a provider of an online platform refuses to allow a trader to use its service pursuant to Art. 30(1), or suspend its service pursuant to Art. 30(4), the trader concerned shall have the right to lodge a complaint as provided for in Arts 20³⁴ and 21³⁵ DSA. In general, according to Art. 2(4), the **Platform Regulation has precedence** over the Digital Services Act.³⁶ 40

V. Duty to store

Pursuant to Art. 30(5), providers of online platforms shall **store the information** obtained according to Art. 30(1) and (2) in a **secure manner** for a period of **six months** after the end of the contractual relationship with the trader concerned. They shall subsequently delete the information. In this regard, processing is lawful as it is necessary for compliance with a legal obligation to which the controller is subject (Art. 6(1)(1)(c) GDPR). This obligation leaves unaffected potential obligations to preserve certain content for longer periods of time, on the basis of other Union law or national laws, in compliance with Union law.³⁷ 41

VI. Duty to disclose and to provide information

Without prejudice to Art. 30(2), the provider of the online platform **shall only disclose the information** to third parties where so required **in accordance with the applicable law**, including the orders referred to in Art. 10 and any orders issued by Member States' competent authorities or the Commission for the performance of their tasks under the Digital Services Act (Art. 30(6)).³⁸ 42

The provider of the online platform allowing consumers to conclude distance contracts with traders **shall make the information** referred to in Art. 30(1), points (a), (d) and (e) available on its online platform **to the recipients** of the service in a clear, easily accessible and comprehensible manner.³⁹ That information shall be available at least on the online platform's online interface where the information on the product or service is presented (Art. 30(7)). Recital 43 provides a non exhaustive list of **'easily accessible** 43

³² *ibid.*, mn. 45.

³³ See Graf von Westphalen in: *Busch*, Art. 4 P2B-VO mn. 1 et seq.

³⁴ See Raue in: *Hofmann/Raue*, Art. 20 DSA mn. 5–6.

³⁵ See Raue in: *Hofmann/Raue*, Art. 21 DSA mn. 1 et seq.

³⁶ On the relationship between the DSA and Platform Regulation, see Raue in: *Hofmann/Raue*, Art. 20 DSA mn. 10.

³⁷ Recital 72(2)(2) DSA.

³⁸ See Hofmann in: *Hofmann/Raue*, Art. 10 DSA mn. 7 et seq.; *Janal*, 260 et seq. cf. Art. 8(1)(c) Directive 2004/84/EC on the enforcement of intellectual property rights.

³⁹ See Art. 6(1)(1)(c) GDPR.

means’ such as telephone numbers, email addresses, electronic contact forms, chatbots or instant messaging.

- 44 The **disclosure duty** therefore does **not cover**: the **copy of the identification document** of the trader or any other electronic identification (Art. 30(1)(b)); the **payment account details** of the trader (Art. 30(1)(c)); the **self-certification** by the trader committing to only offer products or services that comply with the applicable rules of Union law (Art. 30(1)(f)).

Article 38 Recommender systems

In addition to the requirements set out in Article 27, providers of very large online platforms and of very large online search engines that use recommender systems shall provide at least one option for each of their recommender systems which is not based on profiling as defined in Article 4, point (4), of Regulation (EU) 2016/679.

Bibliography: *Busch (ed.)*, P2B-Verordnung (C.H.Beck 2022); *Busch*, ‘From Algorithmic Transparency to Algorithmic Choice: European Perspectives on Recommender Systems and Platform Regulation’, in: *Genovesi/Kaesling/Robbins (eds)*, *Recommender Systems: Legal and Ethical Issues* (Springer 2023) 31–54; *Hofmann/Raue (eds)*, *Digital Services Act (Nomos 2023)*; *Genovesi/Kaesling/Robbins (eds)*, ‘Introduction: Understanding and Regulating AI-Powered Recommender Systems’, in: *Genovesi/Kaesling/Robbins (eds)*, *Recommender Systems: Legal and Ethical Issues* (Springer 2023) 1–12; *Janal*, ‘Haftung und Verantwortung im Entwurf des Digital Services Acts’ (2021) ZEuP 227–263; *Kandov*, ‘Regulatorische Ansätze für Algorithmen auf Online-Plattformen. Analyse der Regelungen für algorithmenbasierte, automatische Filtersysteme im DSA’ (2023) MMR 659–664; *Ricci/Rokach/Shapira*, ‘Recommender Systems: Introduction and Challenges’, in: *Ricci/Rokach/Shapira*, *Recommender Systems Handbook* (Springer 2015) 1–35; *Schwartmann/Hermann/Mühlenbeck*, ‘Eine Medienordnung für Intermediäre. Das Zwei-Säulen-Modell zur Sicherung der Vielfalt im Netz’ (2019) MMR 498–503.

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A. Function

- 1 Providers of very large online platforms and of very large online search engines play an **increasingly important role** in society. This is linked with **greater responsibility**. In particular, given their importance, due to their reach, in particular as expressed in the number of recipients of the service, in facilitating public debate, economic transactions and the dissemination to the public of information, opinions and ideas and in **influencing** how recipients obtain and communicate information online, the Digital Services Act imposes specific obligations on the providers of those platforms, in addition to the obligations applicable to all online platforms.¹
- 2 As specifically regards **recommender systems**, they should assess and, where necessary, **adjust their design**, for example by taking measures to prevent or minimise biases that lead to the discrimination of persons in vulnerable situations, in particular where

¹ Recital 75. See *Busch*, 31; *Kandov*, 659; *Genovesi*, 1.

such adjustment is in accordance with data protection law and when the information is personalised on the basis of special categories of personal data referred to in Art. 9 GDPR.²

Art. 38 aims to ensure that, complementing the transparency obligations applicable to online platforms as regards their recommender systems, providers of **very large online platforms** and of **very large online search engines** should consistently ensure that recipients of their service **enjoy alternative options** which are **not based on profiling**, within the meaning of the GDPR, for the main parameters of their recommender systems. Such choices should be directly accessible from the online interface where the recommendations are presented.³

B. Context

The EU legislator already introduced **transparency duties regarding ranking criteria** through Art. 5(1) Platform Regulation, according to which **providers of online intermediation** services shall set out in their terms and conditions the main parameters determining ranking and the reasons for the relative importance of those main parameters as opposed to other parameters. Furthermore, for providers of **online search engines**, Art. 5(2) Platform Regulation imposes that they shall set out the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters, by providing an easily and publicly available description, drafted in plain and intelligible language, on the online search engines of those providers, and they keep such description up to date.⁴

C. Explanation

I. Profiling-free information duty

Art. 38 complements the provision of **Art. 27** and sets additional **transparency and fairness duties** for very large online platforms and very large online search engines. Further to the requirements set out in Art. 27, Art. 38 imposes on providers of very large online platforms and of very large online search engines that use recommender systems the duty to provide **at least one option** for each of their recommender systems **which is not based on profiling** as defined in Art. 4 GDPR. However, the Digital Services Act does not set any fix requirements for the option not based on profiling.⁵

As Art. 38 provides an extension and specification of what provided in Art. 27, the transparency duties contained in the latter rule shall apply also to the matter regulate by the first one.

Providers of very large online platforms and of very large online search engines that use recommender systems shall therefore **set out in their terms and conditions**, in plain and intelligible language, not only the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters (cf. Art. 27(1)). They shall also provide a clear description of the **one option (or more options)** for each of their recommender systems **which is not based on**

² Recital 94(1). See Ricci/Rokach/Shapira, 1; Schwartmann/Hermann/Mühlenbeck, 498.

³ Recital 94(2) and (3).

⁴ See Graf von Westphalen in: Busch, Art. 3 P2B-VO mn. 1 et seq.

⁵ See Grisse in: Hofmann/Raue, Art. 38 DSA mn. 10.

profiling as defined in Art. 4 GDPR. In addition to that, they shall set out in their terms and conditions, in plain and intelligible language, **how** that profiling-free option can be **selected and activated**.

- 8 In any case, according to Art. 27(2), the main parameters referred to in Art. 27(1) shall explain why certain information is suggested to the recipient of the service. They shall include, at least: the criteria which are most significant in determining the information suggested to the recipient of the service; and the reasons for the relative importance of those parameters.
- 9 The functionality that allows the recipient of the service to select and to modify at any time their preferred option shall be **directly and easily accessible** from the specific section of the online **platform's online interface** where the information is being prioritised.

II. The design of the profiling-free option

- 10 In respect of the **design of choice interfaces** and presentation of information on the main parameters of different types of recommender systems (Arts 27 and 38), the Commission shall consult the Board, and shall support and promote the development and implementation of **voluntary standards** set by relevant European and international standardisation bodies (Art. 44(1)(i) DSA).⁶

D. Enforcement

- 11 According to Art. 64, very large online platforms and very large online search engines are subject to the dedicated supervision, investigation, enforcement and monitoring powers provided in Section 4 DSA (Arts 64–83), as well as to the independent audit procedure provided by Art. 37. In case of non compliance with Art. 38 DSA, also the implementing provisions of the Unfair Commercial Practices Directive may apply: this is in particular the case of Arts 6 and 7 UCPD on, respectively, misleading actions and misleading omissions.

⁶ See Legner in: *Hofmann/Raue*, Art. 44 DSA mn. 25–26.