Kraul

New Digital Services Act

A Practitioner's Guide

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Torsten Kraul

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Preface

The Digital Agenda for Europe for the decade 2020–2030 is the European Commission's approach to promoting secure digital spaces and services, a level playing field in digital markets with large platforms, and Europe's digital sovereignty. To this end, European legislators are currently pursuing new regulatory initiatives at a rapid pace.

Among the key regulatory instruments are the Digital Markets Act (DMA), which is intended, as a special element of antitrust law, to counter unfair practices by large online platforms designated 'gatekeepers', and the Digital Services Act (DSA). The DSA came into force on 16.11.2022, with most of its obligations applying from 17.2.2024. It is relevant for all digital services that act as intermediaries and, in particular, give consumers access to goods, services and content, including search engines and online marketplaces. While the DSA, which evolved from the E-Commerce Directive, maintains the tried-and-tested rules on the liability privilege applying to intermediaries, it also imposes obligations on the intermediaries in a graduated regulatory regime depending on their type and size. The aim of these obligations is to ensure better protection for users and fundamental rights on the internet, provide a solid framework for the transparency and accountability of online platforms, and offer a single standardised framework throughout the EU.

This Practitioner's Guide sets out to provide a practical introduction to the far-reaching regulations of the DSA. Following the DSA's structure and against the backdrop of its new regulations, this book describes the scope of application and the provisions on the liability privilege of intermediaries, which have progressed compared to the E-Commerce Directive. A core part of this Practitioner's Guide focusses on the extensive obligations imposed on platforms as well as the system of official and private enforcement of those obligations and the sanctions for non-compliance with the DSA. This is followed by the provisions stating precisely when these obligations apply.

It is worth noting, though, that we are still in the early stages of dealing with the DSA. Many factual questions will only arise once its rules are applied in practice, and legal issues will be addressed over time by legal commentaries and the courts. This book is therefore also intended to aid future discussion among practitioners and academics. Feedback, questions and suggestions are most welcome.

As the editor, I would like to take this opportunity to thank all the co-authors for their contributions and the in-depth and productive discussions.

Berlin, May 2024 *Torsten Kraul*

Contents

CHAPTER 3
LIABILITY OF PROVIDERS OF INTERMEDIARY SERVICES

Patrick Neidinger/Julia Wildgans

CHAPTER 4
DUE DILIGENCE OBLIGATIONS OF PROVIDERS OF INTERMEDIARY SERVICES

Niklas Maamar

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CHAPTER 1
INTRODUCTION

Torsten Kraul

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A. A 'Constitution' for Digital Services?

1 When the European Commission Executive Vice-President Margrethe Vestager presented the Digital Services Act (DSA) and the Digital Markets Act (DMA) in December 2020, she spoke of '**milestones** in our journey to make Europe fit for the **Digital Age**'.[1] The DSA, she said, could be compared to the first US traffic lights set up in Cleveland, Ohio at the beginning of the 20th century that brought order to the streets. Like those first traffic lights, the DSA, a little more than a hundred years later, is intended to create a regulatory system capable of application worldwide to make the online world a safe, reliable and secure place for all users. In pursuit of this aim, the DSA sets out three specific goals: first, to improve the safety of users; second, to increase the transparency of platforms; and third, to strengthen law enforcement *vis-à-vis* digital actors.

2 In brief, the DSA creates a **harmonised horizontal legal framework for digital services** offered in the EU, covering providers ranging from individual Wi-Fi networks to social media platforms with millions of users. The DSA addresses the intermediary services on the Internet, i.e. access, caching and hosting providers, and imposes **specific requirements and obligations** on them depending on their role, size and impact in the digital ecosystem. In pursuit of its goal to deliver a safe, predictable and trusted online environment (see Chapter 2 of this Practitioner's Guide), the DSA maintains a framework for the conditional exemption from liability of intermediary services providers established since the E-Commerce Directive (see Chapter 3). The DSA supplements existing rules regarding liability for third-party content with a system of far-reaching due diligence obligations tailored to certain specific categories of providers of intermediary services (on this, Chapter 4) and rules on the implementation and enforcement of the Regulation (on this, Chapter 5).

[1] European Commission, 'Statement by Executive Vice-President Vestager on the Commission proposal on new rules for digital platforms'.

The DSA has frequently been referred to as a **'constitution' for the Internet**.[2] It attempts to horizontally translate European constitutional values into private relationships between service providers and users to limit the power of digital platforms.[3] In this respect, the DSA reflects the position that, because of their central role as forum for public discourse, large platforms should increasingly be bound to respect the fundamental rights of users.[4] The rules set out by the DSA are thus a **balancing act** between the need for increased protection of users against illegal and harmful content and the preservation of freedom of expression in the digital space. Politically, the negotiations around the DSA were shaped by the controversial discussions taking place on the issues of hate speech, fake news and coordinated campaigns to manipulate and influence election processes. At the same time, the technical landscape of intermediary services is constantly changing. Recommender systems based on artificial intelligence present users with personalised suggestions for content to consume and goods to buy. Apps like TikTok are no longer designed to help users find the content they want to watch. Instead, the content itself finds the appropriate user – with the help of algorithms that control what the user sees. This further increases the importance of digital platforms as transmitters and disseminators of information. Meanwhile, entirely new risks are emerging, such as the phenomenon of echo chambers or filter bubbles. Against this background, the DSA should be seen as an attempt to **renegotiate the social compromise** between the opportunities and risks presented by intermediaries in the digital space. **3**

Whether the DSA thereby acquires the character of a digital constitution is probably rightly doubted.[5] Nonetheless, with its **comprehensive and ambitious regulatory approach**, the DSA does provide a central regulatory framework for 'A Europe fit for the digital age',[6] though its effectiveness in combating illegal content and resolving social conflicts through intermediary services remains to be proven in the future. **4**

B. The DSA as part of the EU Digital Strategy

The DSA represents a continuation in the development of the EU Digital Strategy. European digital policy has a long history: initially focused on communication infrastructure,[7] with the development of the Internet the policy shifted its attention to e-commerce. In line with almost synchronous legal development worldwide, the European legislator enacted the **E-Commerce Directive in 2000** that featured a far-reaching liability exemption scheme for intermediaries and a basic regulatory framework for contracts concluded electronically. Since the exchange of information, goods and services beyond national borders is technologically inherent on the Internet, this was soon expanded with the **creation of a comprehensive Digital Single Market**. The cross-border nature of digital technologies, which are gradually detaching from static infrastructures and can be accessed globally, is thus both a driver of social and economic integration and a regulatory challenge from a European perspective. **5**

[2] Kühl, 'Das neue Grundgesetz für Onlinedienste'; Schmid/Grewe MMR 2021, 279; Hessel/Reusch, 'Kommentar: Der Digital Services Act – ein 'Grundgesetz für das Internet'?'.

[3] De Gregorio/Pollicino, 'The European Constitutional Road to Address Platform Power'.

[4] Raue NJW 2022, 209; critical Denga EuR 2021, 569 (584 et seqq.).

[5] Podszun/Langenstein, 'Gatekeeper im Visier'.

[6] European Commission, 'A Europe fit for the digital age'.

[7] Cf. Directive 90/387/EEC, Directive 95/62/EC and Decision No 1336/97/EC.

CHAPTER 4
DUE DILIGENCE OBLIGATIONS OF PROVIDERS OF INTERMEDIARY SERVICES

Niklas Maamar

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A. Introduction

1 'The time of online platforms behaving like they are "too big to care" is coming to an end.' With these striking words, EU Internal Market Commissioner Thierry Breton announced that an agreement on the DSA had been reached.[1] The allusion to the 2008 financial crisis and the so-called 'too big to fail' banks underlines the significance and impact the Commission attaches to the **regulatory framework for the digital space**. The DSA is a **first-of-its-kind legislation**, creating binding obligations for online intermediary services, large and small, which apply directly and uniformly across the European Union.

2 The starting point for discussions on the harmonisation of due diligence obligations in the DSA was the realisation that the problem of illegal content and illegal activities online cannot be dealt with by focusing on liability provisions for intermediaries alone (rec. 27 DSA).[2] Instead, the DSA takes a dual approach by adopting the previous liability exemptions known from the E-Commerce Directive (→ Ch. 3 mn. 26) and supplementing them with specific due diligence obligations. The regulatory system aims to minimise the **negative externalities of intermediary services** – in particular, the spread of illegal goods, fake news and hate speech – through organisational and procedural requirements, and to internalise the social costs among the providers without relying on the heavy-handed instrument of imposing liability for third-party content.[3] The due diligence obligations are therefore designed as **genuine obligations to act** on the part of the **intermediary services** which are independent of the question of liability for third-party illegal content under Art. 4–10 DSA and are therefore regulated in a separate chapter of the DSA (rec. 41 DSA).

3 The following chapter provides an overview of the structure of the due diligence obligations and their scope of application before going on to discuss individual obligations. It will show that, in contrast to the issue of liability for third-party content, in this regard the DSA pursues many **novel regulatory concepts** and introduces **very comprehensive duties** for various digital services.

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[1] European Commission, 'Sneak Peek: how the Commission will enforce the DSA & DMA – Blog of Commissioner Thierry Breton', Statement 22/4327', @ThierryBreton on X (23.4.2022 at 2:17 AM) <https://x.com/thierrybreton/status/1517658796927164417> (last accessed: 23.5.2024).

[2] European Commission, 'Impact Assessment', SWD(2020) 348 final, Part 1, p. 25. Mere liability provisions are insufficient, e.g. for tackling fake news and disinformation or the danger of overblocking.

[3] Eifert et al. CMLR 2021, 987 (995 et seq.).

B. Tiered due diligence obligations for intermediary services

Online business models are subject to constant change and have become significantly more diverse in the two decades since the introduction of the E-Commerce Directive. In 2000, the E-Commerce Directive distinguished between **three basic intermediary services**: the mere conduit of information by access providers, temporary storage for caching and the hosting of third-party information. 23 years later, a wide variety of intermediary services have been developed, in particular in the field of hosting services, which pose various and quite different risks that were hardly foreseeable at the time the E-Commerce Directive was adopted. The DSA takes account of this diversification by refining the category of hosting services into several subcategories and providing for a **tiered system of due diligence obligations** for different intermediary services, where these obligations increase with the size and risk profile of the service.[4] **4**

The European legislator's aim was to create a **safe and transparent online environment** by establishing due diligence obligations. These obligations are intended to protect the fundamental rights of users, especially vulnerable groups such as minors, potential victims of hate speech and consumers on online marketplaces, and to strengthen trust in digital markets (rec. 40 DSA). In the public perception, this centers around **regulation of the Silicon Valley big tech companies** (Amazon, Facebook, YouTube, X & Co.). However, the scope of obligations in the DSA is much broader. According to a Commission study, there are **about 10,000 online platforms in the EU**, of which more than 90 % are small and medium-sized services.[5] A uniform European legal framework should allow these smaller providers to scale their services by eliminating the costs of fragmented national regulations.[6] At the same time, the legislator faced the challenge that far-reaching due diligence and information obligations tend to burden smaller providers disproportionately. While the already dominant platforms are able to cope with stronger regulation and the resulting higher regulatory costs due to their size, the same obligations may create a barrier to market entry for new services because of the significant initial investment required. This would contradict the economic policy goal to build a digital economy in the EU that can compete with Silicon Valley. **5**

In pursuit of these political goals, the DSA seeks to strike a balance between **strict due diligence obligations for the very large platforms and search engines**, on the one hand, and a more lenient regulation with less obligations for smaller services, on the other, to allow such smaller services to grow at the beginning of the innovation cycle. This is intended to enable them to compete with large intermediary services. Whether this **balancing act** is successful will likely only become apparent in a few years or decades – just as the consequences of the liability privileges of the E-Commerce Directive for the digital economy only became apparent over time. **6**

[4] Gerpott CR 2022, 516 (517).
[5] European Commission, 'A Europe fit for the Digital Age: New online rules for businesses'.
[6] European Commission, 'Impact Assessment', SWD(2020) 348 final, Part 1, p. 55 and Part 2, p. 49.

CHAPTER 5
ENFORCEMENT

Marvin Bartels

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A. Introduction

1 The law is only as good as its enforcement. For many observers from politics and civil society, this has been brought home by their experiences with the GDPR. Although the EU has assumed a global pioneering role in digital regulation, there are complaints that it has failed to live up to its claims. The enforcement of the GDPR has considerable gaps and cannot prevent systematic data protection violations.[1] One reason for this is that the data protection authorities do not always have sufficient financial and personnel resources. In particular, some smaller data protection authorities of Member States have proved to be **bottlenecks of enforcement**, as the authorities of other Member States and the EU are unable to exert sufficient influence.[2] With the DSA, the legislator is keen to avoid repeating these perceived shortcomings of the GDPR enforcement regime.[3] To this end, and further influenced by contributions from the legal academia and the civil society, numerous provisions of the DSA can be understood as a direct response to the **experiences with the GDPR**.[4] Thierry Breton, the EU Commissioner for the Internal Market, who is jointly responsible for the DSA, emphasises: **'Enforcement is key'**.[5] The importance given to the enforcement in the DSA is highlighted by the scope of Chapter IV, which regulates implementation, cooperation, penalties and enforcement: Its Art. 49–88 DSA account for about 43 % of all provisions of the DSA.

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[1] From the media, e.g. Satariano, 'Europe's Privacy Law Hasn't Shown Its Teeth, Frustrating Advocates'; Bodoni, 'Europe's Data Law Is Broken, Departing Privacy Chief Warns'; Burgess, 'How GDPR Is Failing'. Likewise and with further references and reference to the DSA also Vergnolle, 'Enforcement of the DSA and the DMA: What did we learn from the GDPR?'.

[2] See, for example, Ryan/Toner, 'Europe's Enforcement Paralysis: ICCL's 2021 Report on the Enforcement Capacity of Data Protection Authorities'. In fact, some Member States' data protection supervision costs high tens of millions of euros per year, while the Irish data protection authority has a budget in the low tens of millions, cf. Brave, 'Europe's Governments are failing the GDPR: Brave's 2020 Report on the Enforcement Capacity of Data Protection Authorities', p. 5; Statista, 'Budget of the European data protection authorities (DPAs)'.

[3] Cf. European Commission, 'Impact Assessment', SWD(2020) 348 final, Part 1, p. 25.

[4] See, for example, Monti/De Streel, 'Improving EU institutional design to better supervise digital platforms'; Van Hoboken, 'European Lessons in Self-Experimentation: From the GDPR to European Platform Regulation'. See further Zuboff at the 'Digital Services Act: A Game Changer for our Fundamental Rights?' (event on 7.7.2021) <https://www.youtube.com/watch?v=ZTViF6U4d5Q> (last accessed: 23.5.2024): 'If you design and pass good laws, you must also ensure the funding and capabilities to enforce those laws. My friends, if we have learned anything from the GDPR, it is that great law without committed unrelenting muscular enforcement only strengthens the surveillance empires, their audacity, their lobbyists and their litigators.'

[5] European Commission, 'Sneak Peek: How the Commission will enforce the DSA & DMA – Blog of Commissioner Thierry Breton'. See also European Commission, 'Impact Assessment', SWD(2020) 348 final, Part 1, p. 22 et seq. and 42 et seqq.

In addition to particularly far-reaching powers for national authorities, the **regulatory innovations of the DSA** include the shift of key powers to the European Commission, the introduction of deadlines for action and decision-making by Member State authorities, and the provision for considerable mutual influence among the authorities involved. The effective and timely enforcement of the DSA is also seen as particularly important since illegal digital content can spread very quickly, not only in the platform economy but on the internet in general.[6] 2

In describing the implementation and enforcement of the DSA, this section will first describe the new structure of authorities and the investigative and enforcement powers of Member State authorities and the Commission. This will be followed by an outline of the judicial redress available to providers. The section will conclude with certain criticisms of the enforcement regime and a brief outline of private enforcement by users. 3

B. Enforcement by public authorities

Apart from the notification and complaint procedures of users (→ Ch. 4 mn. 60 et seqq., 106 et seqq.) and possible subsequent private enforcement in court (→ mn. 110 et seqq.), the **enforcement of the DSA is mainly** carried out **by public authorities**. The legislator is particularly ambitious here: In addition to new authority responsibilities and very far-reaching powers of investigation and enforcement, a complex network of possibilities and requirements for cooperation between authorities has been created. 4

I. Authorities

Rather than leaving enforcement of the DSA to the Member States alone and once again running the risk of inconsistent and sometimes cumbersome law enforcement, the DSA provides for a **division of tasks between Member State and European authorities**. 5

1. Member State authorities

In principle, enforcement of the DSA lies with Member State authorities. They apply the DSA in accordance with the respective administrative law of the Member State (cf. Art. 291(1) TFEU). 6

a) Competent authorities and Digital Services Coordinators (DSC)

The Member State authorities responsible for the supervision of providers and the enforcement of the DSA are defined as **competent authorities** (Art. 49(1) DSA). They have far-reaching **powers of investigation and enforcement** (→ mn. 29 et seqq.). The Member States are free to determine the number of competent authorities. They may also assign specific responsibilities to respective competent authorities: for example, to individual sectors of the economy (rec. 109 sent. 2 DSA). In addition, each Member State had to designate one of its competent authorities as its Digital Services Coordinator (**DSC**) by 17.2.2024 (Art. 49(2) subpara. 1 and (3) subpara. 2 DSA). If a Member State designates several competent authorities in addition to its DSC, the respective tasks of the authorities must be clearly differentiated from one another (Art. 49(2) subpara. 3 DSA). 7

[6] Cf. also Eifert et al. CMLR 2021, 987 (1018).

Index

Bold numbers refer to chapters, normal ones to margin numbers.