

# Information and technology law course

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LECTURE 21 – 11 DECEMBER 2024

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# Digital Services Act - DSA

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Adopted in 2022

We need to know what is the e-commerce directive, thinking about internet as a marketplace.

Idea: we need to regulate this new environment over which we can buy and sell things.

Justification to intervene: internal market. Idea: market segmented both from side of service providers and the consumers. Also control

## E-Commerce Directive (Directive 2000/31/EC)

↳ big definition that could cover hosting providers and also network providers

✓ **Scope:** all information society services (ISS) established in a MS [Including (what, where), online intermediaries such as mere conduits]

✓ **Objective:** contribute to the proper functioning of the internal market.

✓ **Country of origin principle** – Derogation only possible on the basis of limited reasons and procedural requirements.

✓ **Limited liability exemption for intermediaries**, without prejudice to court orders [now replaced by DSA]

↳ Make sure to protect country of origin principle: services following national rules; make sure to apply to you, as a service provider are national ones, not the ones of the user.

NOTE: ISP interpreted as mere intermediates.

Whenever you have a content and the content flows without your interference, you are free of liability; ex- hosting providers sharing content on the platform. BUT, there was an exception, as long as you don't know about unlawful, illegal etc.

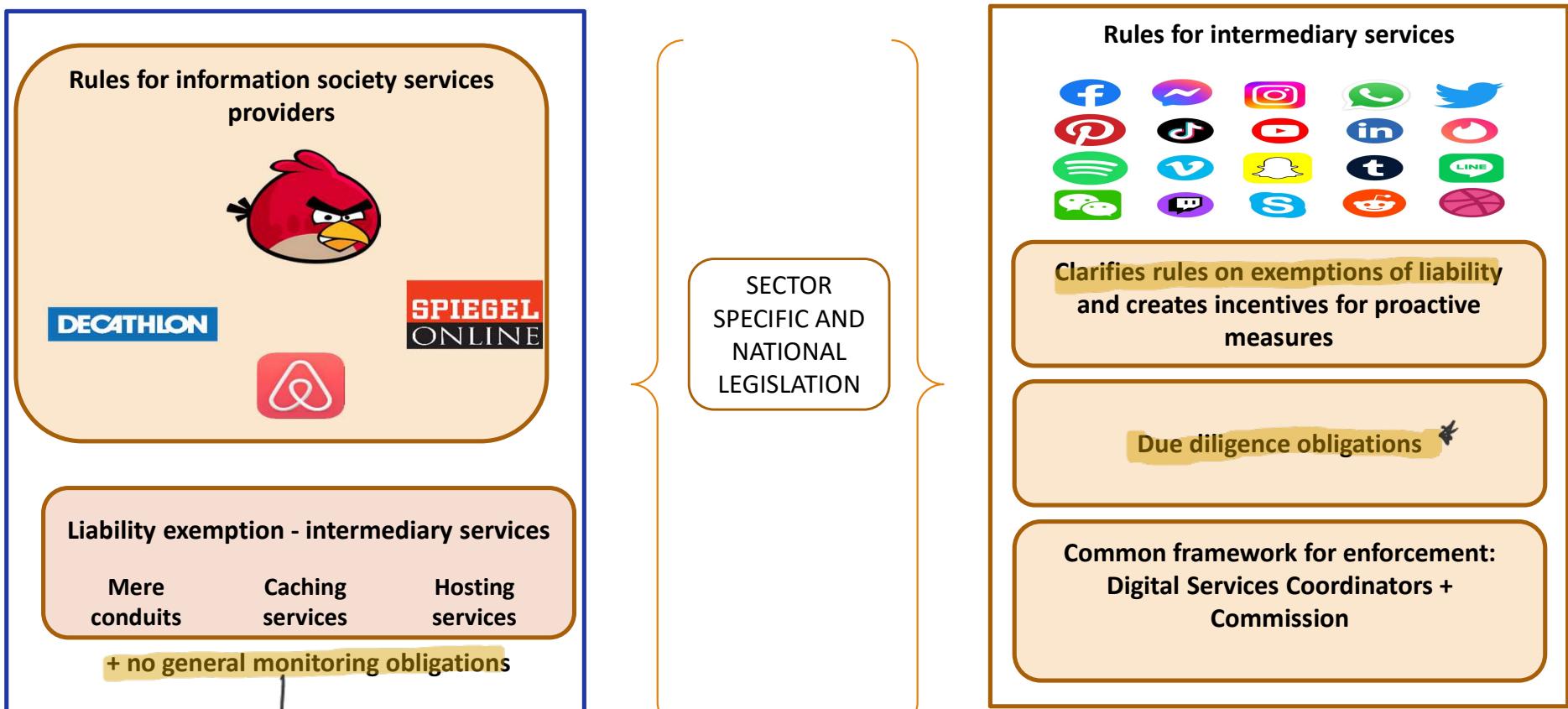
You would then be allowed, obliged, to take action. Erase or modify ~~marks~~.

IDEA: Notice and Take down.

→ Structure was very difficult to change. Strong interest for ISP not to change it. But in 2022 we had so many hosting providers providing activities. They could be able to flourish. But at one point they were so strong in term of marketability, that there was a lot of unlawful content. So now we work with revision of a system.

E-Commerce Directive (2000)

Digital Services Act (2022)



If I am Google, FB etc., how do I have  
possibility to control what's on my platform?

I don't have to search! If obligations are  
there, how deeply do you have to search? Problem.

\* Activities that some type of actors should do  
to ensure that their behavior is correct.

Adopted in 12/2022, became enforceable 02/2024.

# DSA features

## Aims to

- Ensure online safety
- Reduce the spread of illegal and harmful content.
- Promote a more open and transparent internet
- Safeguard freedom of speech
- Improve the protection for minors

\* Whatever type of illegality

- Still liability exemption. But complex:

recommended on yr: one you shall an intermediary role if you can recognise users, understand what they are doing and what they might like? Understanding role for hosting providers is complex (Active/Passive brokering: change exempt of liability)

## Horizontal application

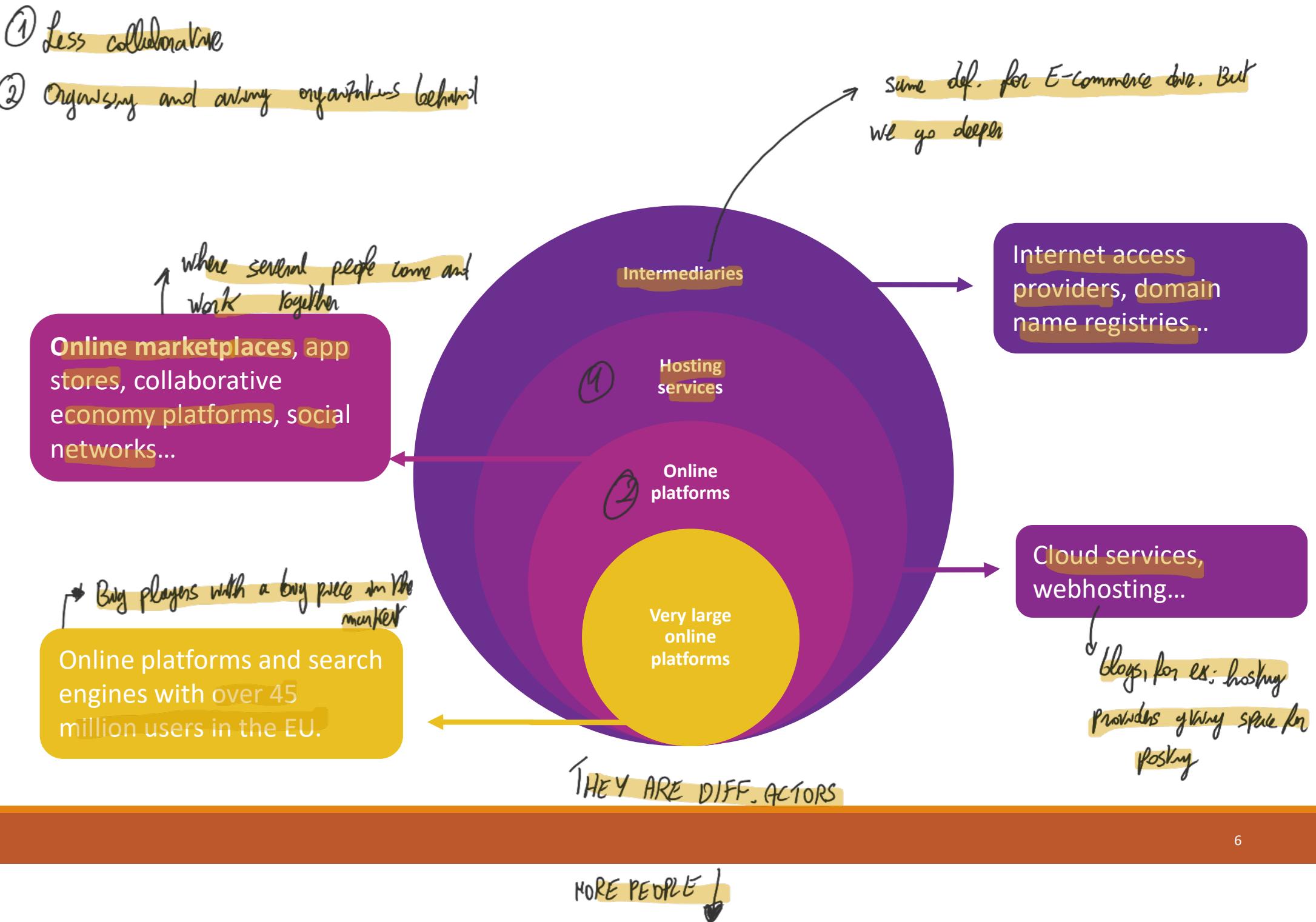
- All types of online intermediaries and all types of illegal content (copyright ex.)  
Neutral ↗ is whatever because it relies on national or EU law.\*
- Illegality is defined by national or EU law
- But injunctive relief is always possible
  - In line with national legislation and the conditions set out in the DSA

## Harmonisation of liability exemptions

- does not attribute liability for content

## Self-standing due diligence obligations

imposing them



Who they are, what they do, compliance with terms

make available how the users should behave to use services

Obligations for all of them

## Due diligence obligations

	Intermediaries	Hosting services	Online platforms	VLOPs & VLOSEs
Transparency reporting	✓	✓	✓	✓
Terms & conditions	✓	✓	✓	✓
Cooperation with national authorities	✓	✓	✓	✓
Points of contact & Legal representatives	✓	✓	✓	✓

# Due diligence obligations for Hosting services, Online platforms, VLOPs & VLOSEs

	Intermediaries	Hosting services	Online platforms	VLOPs & VLOSEs
Notice and action		✓	✓	✓
Reporting criminal offences		✓	✓	✓

When you have illegal content what do you do? Intermediaries usually don't have possibility to handle content. For others no.

also possibility to flag for example. Notice us related to that. Or even AI recognition.

# Notice and action

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The continuity between DSA and e-commerce directive

- Arts 4, 5, 6 DSA = art, 12, 13, 14 e-commerce directive
  - Distinction between mere conduit, caching, hosting
  - Liability can emerge from any type of illegal content (regardless of the nature or the origin)

Novelties in DSA

- Art 6(3) on liability under consumer protection law
- Exception of liability is connected with due diligence obligations

Also addressed in several cases by courts of Justice, decides only when national court needs to interpret national law in the light of EU law.

## Existing CJEU jurisprudence

ISP should be a neutral actor : no active role that could give the ISP knowledge of or control over the content (Recital 18)

- Google France – Joined cases C-236/08 to C-238/08 (2010)
- L'Oréal v eBay – C-324/09 (2011) (incl. Storing offers for sale, setting ToS, being remunerate and provide gen info, BUT excl. optimisation of offers for sale and promotion of offers)  
↳ in this case this is not intermediary anymore
- Youtube – Joined cases C-682/18 and C-683/18 (2021)\*

Mere conduit, caching and hosting ISP are different = mere technical and automatic processing should be adapted to the type of services

- McFadden – C-484/14 (2016)①

Counterfactual claims: eBay claims to not have knowledge. CJ says yes, you are right, but it is up to the states to verify if the role is actually just intermediary.

\* Regarding available content on platform.

① Distinguishing between different kind of activities of ISP. So a lot of discussion about interpretation.

# Existing CJEU caselaw *also for ISP*.

Good samaritan clause – Art 7 DSA *Someone helping, not interfering with system*

- Exemption of liability still applies in case of voluntary measures aimed at tackling illegal content
- Youtube – Joined cases C-682/18 and C-683/18 (2021)
- According to art. 7 DSA : measures should be applied in good faith and diligently
  - Terminology to be defined by new rulings

Such as algorithms.  
↑ Skill up to the law enforcement to prove that you know it.

# Due diligence obligations for Online platforms, VLOPS & VLOSEs

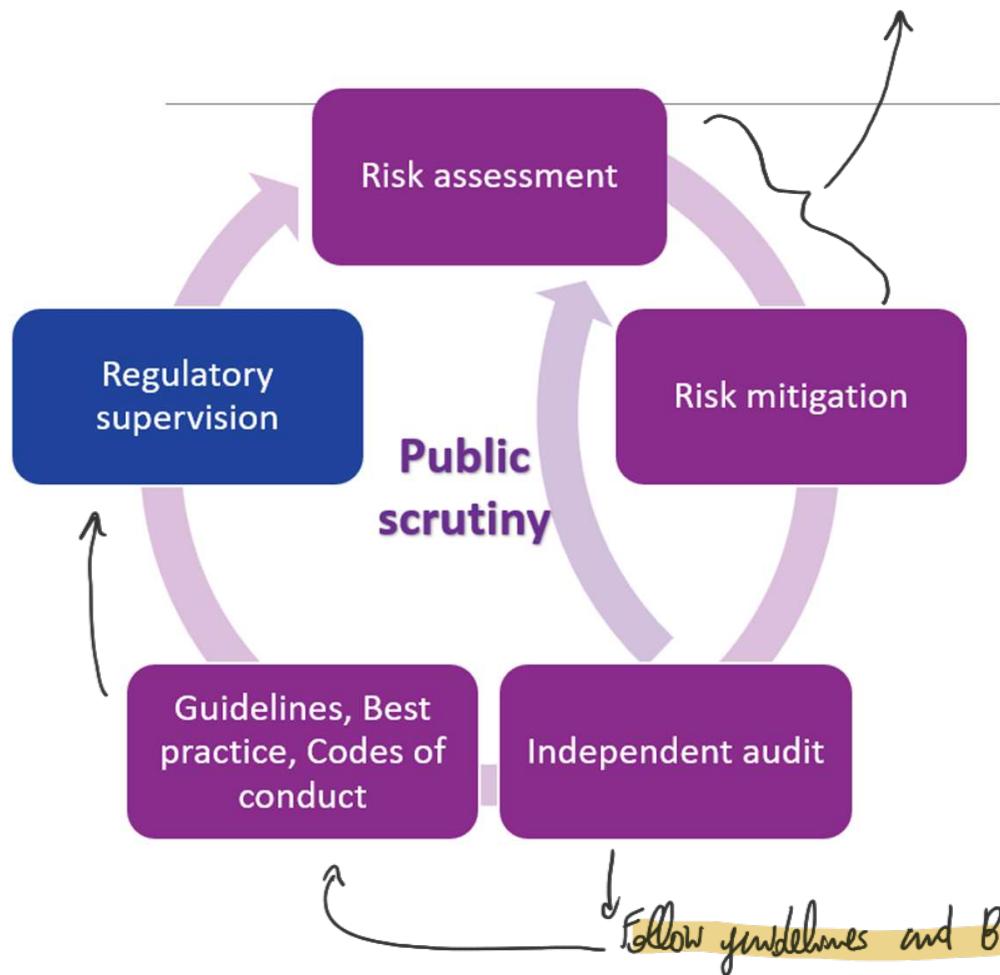
	Intermediaries	Hosting services	Online platforms	VLOPs & VLOSEs
Bans on targeted ads to children and special categories of data <b>PEOPLE</b>	<i>Cannot put ads because you know that the person is underage.</i>		✓	✓
Accessibility	<i>Make sure that system is accessible ①</i>		✓	✓
Transparency of recommender systems			✓	✓
Advertising transparency	<i>See that with ad, you can also click to see where the info comes etc.</i>		✓	✓

①For blind persons, or users with hearing problems

# Due diligence obligations for Online platforms, VLOPS & VLOSEs

	Intermediaries	Hosting services	Online platforms	VLOPs & VLOSEs
Risk management + systemic risks info or control over the possibility that content disseminated				✓
Terms & conditions	does not have potential impact on society.			✓
Cooperation with national authorities				✓
Points of contact & Legal representatives				✓

Idea: Very large OP evaluate what could be the risks of dissemination of this kind of content or their platform.



Societal risks and interests **top priorities** in design of platforms' systems

**Dynamic approach** to identify and address emerging societal risks

Covers the **core design of a service**, from its T&C, to its algorithmic systems and optimisation choices

Robust **oversight** with feedback loops:

- Independent audits
- Regulatory supervision
- **Public scrutiny**: e.g. transparency reports, data access for researchers, consultation on guidelines, involvement in risk assessment & mitigation design

when platforms do their activities.

# Governance and enforcement

## Digital Services Coordinator - National level

- Independent authorities
- Coordination and exchanges with other national competent authorities
- Direct supervision and enforcement

## European Board for Digital Services *Representative for all DSC at en level: provide recommendations.*

- Ad-hoc independent advisory group
- Composed by national Digital Services Coordinators
- Chaired by the Commission
- Advises DSCs and COM, issues recommendations

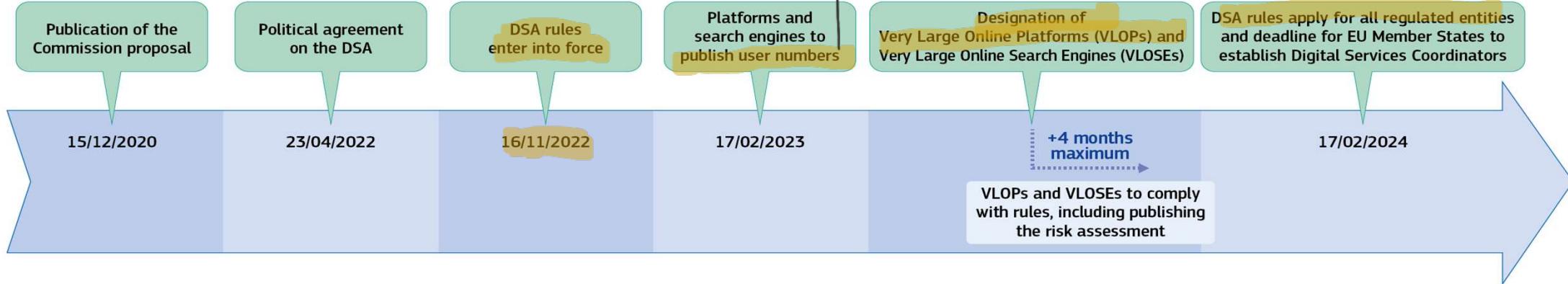
*gives definitions.*

## European Commission

- Direct/primary enforcement powers vis-à-vis VLOPs/VLOSEs
- Advises on cross border disputes
- Intervenes following DSC requests

*↳ looks at very large OP.*

## Timeline for Digital Services Act



**Maximum harmonization effect:** MS are precluded from adopting or maintaining overlapping laws, or laws contradicting or stricter in the DSA regulated fields

**Any national Court** called upon to apply the DSA is under a duty to give full effect to those provisions

# Why DSA is interesting

[https://www.canva.com/design/DAGYbEVMmA8/vjqD3NhJxpmLHkGfvSUxqw/view?utm\\_content=DAGYbEVMmA8&utm\\_campaign=designshare&utm\\_medium=link&utm\\_source=viewer#9](https://www.canva.com/design/DAGYbEVMmA8/vjqD3NhJxpmLHkGfvSUxqw/view?utm_content=DAGYbEVMmA8&utm_campaign=designshare&utm_medium=link&utm_source=viewer#9)

✓ Notice and take down

Systemic risk: decision of a country, steered through manipulation on one social media platform.

Free and informed decision can be hampered by recommendation of content on a platform.

TikTok did not act as a mere conduit of information (Georgescu). Not like panopticon nr. 17