9

Introduction to Accountability Framework

9.1 The EU Landscape of Digital Services

It is hard to think about digital services in the abstract. This chapter, therefore, outlines the European Union's (EU) Digital Services Act (DSA) regime and how it will likely apply to specific services in the coming years. The goal is not to be exhaustive, and it is possible that the services mentioned might have changed by the time you read this book. My hope is that having some specific names behind abstract concepts will give you a more concrete view of the ecosystem.

9.1.1 VLOSEs, VLOPs, and other platforms

On 25 April 2023, the European Commission published the first list of designated very large online platforms (VLOPs) and very large online search engines (VLOSEs).[1] The designations are based on the first round of disclosures from 17 February 2023. The first designation round covered 19 separate services, comprising two search engines, two app stores, four marketplaces, eight social media, one encyclopaedia, one price comparison site, and one online map service. Many of the providers will have their European base in Ireland. This matters particularly in the event of violations of the DSA's standard due diligence obligations, where the European Commission shares competence with the national Digital Services Coordinators (DSCs). In December 2023, the Commission designated three further VLOPs. All three are content-sharing services

[1] European Commission, 'DSA: Very Large Online Platforms and Search Engines' (*Shaping Europe's Digital Future*, 25 April 2023) <https://digital-strategy.ec.europa.eu/en/policies/dsa-vlops> accessed 10 August 2023.

hosting pornography. Finally, in April and May 2024, the European Commission designated another two marketplaces as a VLOP. Table 9.1 provides an overview of existing 22 VLOPs and 2 VLOSEs at the time of writing.

Table 9.1 Designations as VLOPs and VLOSEs.

	Company	Digital Service	Type	DSC-COO	Users (mil): 1st disclosure (Feb 2023)[a]	Users (mil): 2nd disclosure (Aug 2023)[b]
Search	Alphabet	Google Search	VLOSE	Ireland	332+	364
	Microsoft	Bing	VLOSE	Ireland	107	119
Social media	Alphabet	YouTube	VLOP	Ireland	401+	416+
	Meta	Facebook	VLOP	Ireland	255	258
	Meta	Instagram	VLOP	Ireland	250	257
	Bytedance	TikTok	VLOP	Ireland	125	134
	Microsoft	LinkedIn	VLOP	Ireland	122+	132+
	Snap	Snapchat	VLOP	Netherlands	96+	102
	Pinterest	Pinterest	VLOP	Ireland	n/a	124
	X (formerly Twitter)	X	VLOP	Ireland	100+	112+
App stores	Alphabet	Google App Store	VLOP	Ireland	274+	284+
	Apple	Apple App Store	VLOP	Ireland	n/a	123
Online Marketplaces	Amazon	Amazon Marketplace	VLOP	Luxembourg	n/a	181+
	Alibaba	AliExpress	VLOP	Netherlands	n/a	135+
	Booking.com	Booking.com	VLOP	Netherlands	n/a	n/a
	Infinite Styles Services	Shein	VLOP	Ireland	n/a	108
	Whaleco Technology	Temu	VLOP	Ireland	n/a	75
	Zalando[c]	Zalando	VLOP	Germany	30+	27+
Wiki	Wikimedia	Wikipedia	VLOP	none	151+	151+
Price comparison	Alphabet	Google Shopping	VLOP	Ireland	74+	70+
Maps	Alphabet	Google Maps	VLOP	Ireland	278+	275
Porn sites	Aylo Freesites	PornHub	VLOP	Cyprus	n/a	n/a
	Technius	Stripchat	VLOP	Cyprus	n/a	n/a
	Webgroup	Xvideos	VLOP	Czechia	n/a	160

[a] For an archive of the first wave of disclosures made in February 2023, see <https://husovec.eu/wp-content/uploads/2023/09/DSA-MAU-First-Disclosure-Feb2023.pdf>.

[b] For an archive of the second wave of disclosures made in August 2023, see <https://husovec.eu/wp-content/uploads/2023/09/DSA-MAU-Second-Disclosure-Aug2023.pdf>. For the December 2023 round of designations, see < https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses>.

[c] Zalando has sought to invalidate its VLOP status; section 9.2.1.

Table 9.2 Runners-up online platform services.

Online platforms	Digital Service	Users (mil): 1st disclosure (Feb 2023)	Users (mil): 2nd disclosure (Aug 2023)
Social media	BeReal	18	18
	Reddit	10+	11+
Messaging services	Telegram	38+	n/a
	Viber	30+	n/a
	Discord	n/a	n/a
Marketplace	Airbnb	30+	38+
	Apple Books	n/a	< 1
	Vinted	n/a	27+
	Allegro	23+	23+
	Cdiscount	19+	17
	Leboncoin	26+	27+
	Roblox	25+	27+
	eBay	n/a	n/a
Comparison & review sites	Tripadvisor	n/a	n/a
	Trustpilot	23+	n/a
	Gutefrage	30+	28+
	Heureka	23	23
	Skyscanner	34+	41+
Content-sharing services	OnlyFans	n/a	n/a
	Spotify Podcasts	n/a	n/a
	DailyMotion	n/a	n/a
	GitHub	10+	11+
Maps	Waze	40+	40+

9.1.2 Runners-up and other platforms

In addition to the above companies, the major services listed in Table 9.2 likely constitute mid-size or bigger online platforms, and thus, some of them are likely runners-up to become VLOPs in the coming years.

Among these services, the European Commission is rumoured to explore whether Spotify and eBay truly do not meet the threshold as declared.[2] It is not entirely unlikely that some of them end up designated as new VLOPs in late 2023. On the whole, the exact number of online platforms that are active in the EU for the purposes of the DSA is currently not known and may be difficult to determine, especially since they

[2] Clothilde Goujard, 'European Retailer Protests against Big Tech Platform Label' *POLITICO* (13 June 2023) <https://www.politico.eu/article/zalando-big-tech-label-protest-european-retailer/> accessed 1 September 2023.

need to meet the company size threshold to be relevant. Some DSCs, such as Germany, have recently carried out empirical mapping to determine the number of European and non-EU-based providers that might fall under the regime.[3] The study found a total of 4,501 potential regulated providers relevant for Germany alone, of which almost a third are online platforms. Existing registers for video-sharing platforms, one of the most common types of platforms, list less than 100 such services for the entire EU.[4]

9.1.3 Online platforms vs mere hosting services

Not all services that store other people's information are online platforms. They must also publicly distribute other people's information and store it at their request. Providers that do *not* distribute information publicly remain regulated as hosting services only—something that I prefer to call 'mere hosting services'. Unlike other hosting services (Chapter 7), online platforms' main functionality is also the public distribution of stored information. If public distribution of information is 'a minor and purely ancillary feature of another service' or 'a minor functionality of the principal service' it is not the main functionality (Article 3(i)). The ancillary or minor nature arguably refers to technical *and* economic aspects of integration. Recital 13 mentions newspaper comment sections as a typical example that should be distinguished from social media platforms. However, even newspapers could become more valued for their user comment sections than editorial content. Finally, if the company providing an online platform is only small or micro, such services remain regulated as mere hosting services until they grow in the size due to the carve-out in Article 19.

Public distribution can be described as *creation of new audiences* for user-generated content. Mere hosting services, in contrast to online platforms, do not themselves 'distribute' information to the public. If the information goes out to the public, it is distributed by their users (Article 3(i) DSA), such as owners of the websites hosted on webservers. This is emphasised by Recital 13:

> 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 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.[5]

The typical examples of such services are *consumer cloud solutions*, such as Dropbox, Google Drive, and Apple's iCloud, or *business cloud solutions*, such as AWS, Stripe, and

[3] See Bundesnetzagentur, Umsetzung des Digital Services Act in Deutschland Bestandsaufnahme der relevanten Akteure, available at <https://www.bundesnetzagentur.de/DE/Fachthemen/Digitalisierung/DSA/studie_dsa_akteure.pdf?__blob=publicationFile&v=3>.

[4] 'Search Results for "Video Sharing Platforms"' (*European Audiovisual Observatory*, 30 June 2023) <http://mavise.obs.coe.int/f/ondemand/advanced?typeofservice=4> accessed 1 September 2023.

[5] Emphasis mine.

Shopify; classical *web hosting services* like GoDaddy, Ghandi, and Websupport, or even *webmail*, such as Gmail or Hotmail.[6]

Two main considerations keep such providers from tighter regulatory scrutiny. They are less public-facing, which means they create fewer direct risks. In enforcement, mere hosting services often play only a supplementary role after their clients—individual online shops or websites—fail to play their part. All 'mere hosting' services run by companies that employ more than 50 employees or have a turnover of more than €10 million must also issue annual reports about their content moderation practices and algorithmic moderation tools (Article 15 DSA).

The borders between 'online platforms' and non-platform 'mere hosting services' are fluid and complex. Recital 13 DSA mentions that even consumer cloud solutions could become online platforms if the distribution of information becomes more than a minor feature. An open-source content management system, such as WordPress, is arguably only a mere hosting service if the hosted content is distributed independently by websites using its technology (eg independent websites using WordPress's system, including its hosting). However, if a WordPress-like system also starts *creating an audience* for the websites it helps to host, such as by offering aggregating features, it can easily become an online platform. Moreover, a news website hosting and distributing blogs of other bloggers can be an online platform for blogs, and its bloggers hosting providers (possibly even platforms) vis-à-vis user comments. Thus, some providers can look like a matryoshka that contains other providers within.

For some commerce, advertising, and content management systems, a further problem arises from their relative proximity to the public, particularly where one must register to use a service. For instance, on a content management system, all kinds of plug-ins are offered to registered users via a marketplace. Recital 14 DSA explains its notion of public as follows:

> 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.*[7]

Thus, the mere existence of a registration process does not make such services *private*. Only a manual registration process overseen on an ad hoc basis by humans who select whom to admit can turn the service, or its parts, private. This is key for messaging

[6] Rec 14 of the DSA says that email falls outside the scope of the definition of an online platform because the criterion of the public is not met, as 'they are used for interpersonal communication between a finite number of persons determined by the sender of the communication'.

[7] Emphasis mine.

services hosting various groups and channels that either require the permission of administrators to enter or can be joined by anyone automatically, depending on the settings. It is also why the distribution of plug-ins to registered users by content management systems or marketplaces organised by advertisers can constitute online platforms.

9.1.4 Infrastructure services

Infrastructure services provide the hidden services that allow the internet to function. The mere conduit provisions, after clarification in the DSA's language, arguably cover most of them. The caching provision covers content delivery networks whose importance for the security of the internet is increasing. All these services are subject to only light touch *universal* due diligence obligations, such as points of contact and terms and conditions. The biggest impact is on the non-EU-based services, which will have to appoint a legal representative (Article 13 DSA) if they offer their services in the EU in exchange for becoming regulated in only one of the Member States.

Only when providers employ more than 50 people or have over €10 million turnover do they publish annual transparency reports about how they conduct content moderation (Article 15 DSA). This means, for instance, that big emailing or storageless messaging services, content delivery networks, domain name services, VPN services, and internet access providers should have started issuing reports about their practices as of February 2024. This also includes transparency about tools used for such content moderation, such as how they operate website blocking measures, deregister domain names, block customers, or filter spam and malicious messages.

Table 9.3 provides examples of infrastructure services under the DSA.

Table 9.3 Infrastructure services.

Internet 'access' providers	**Domain name services**	**Storageless messaging**	**Other potential services**	**CDNs[a]**
Telecommunication companies (O2, Vodafone, Orange)	Domain registries (.de by DENIC, .nl by SIDN, .sk by SK-NIC, etc)	Signal	Certification authorities	CloudFlare
Providers of open WiFi (cafes, hotels)	Domain name registrars (GoDaddy, Gandi)	WhatsApp	Transit services (Level(3), NTT)	Akamai
VPN providers	Recursive DNS (Google, Open DNS)	Email services (as regards emailing, not storage)	Browsers (Mozilla, Chrome)	CacheFly
Tor node operators	Authoritative DNS (Dyn, CloudFlare)		Voice over IP services	Azure Front Door

[a] See 'Global Map of CDNS and Cloud Services' (26 July 2023) <https://opentelecomdata.org/cdns/?trk=feed_main-feed-card_feed-article-content> accessed 28 August 2023.

9.1.5 Non-regulated services

The DSA only applies if a digital service incorporates a user-generated content (UGC) component into the service, and extends to its other parts that are inseparable from the perspective of the user experience. This might be missing from purely editorial services, like Netflix, Disney +, and Amazon Prime. However, when these services introduce user reviews viewed by others, they might start falling into the DSA's scope. For instance, Google Maps is an online platform despite the fact that mapping service is largely editorial. In the user experience, user-generated parts (eg shop reviews, profiles of shops, etc.) are defining for navigation as much as the editorial maps. Another example is Spotify whose playlists or podcasts could pull also more editorial parts of the service, such as curated music libraries, into the category of online platforms. At the same time, the DSA does not apply to some important services, such as some ride-hailing apps, due to their EU classification as transport services.[8] Some uncertainty remains about digital services, which have purely non-profit character due to the criterion of the economic activity (Chapter 6.2.6). However, in most cases, such services should arguably remain regulated if their assets can be commercialised due to their potential economic value.

9.2 Determining Regulatory Layers

The DSA has several tiers of obligations. Midsized companies that operate online platforms have more obligations in content moderation than small and micro companies. Digital services with the biggest foothold in Europe—45 million monthly active users—are subject to the most extensive risk management regime. The DSA's design takes into account three important criteria:

a) technical functionality embedded in a digital service;
b) size of a company offering a digital service; and
c) average monthly users of a digital service in the EU.

Very few due diligence obligations apply to *infrastructure services* (mere conduit and caching), such as internet access providers. Some of the DSA's content moderation obligations apply to all digital services that simply store other people's information as an economic activity (*mere hosting*). However, transparency and other more resource-intensive content moderation provisions (eg dispute resolution) apply only to those mid-sized companies that store and distribute it to the public as a main functionality (*online platforms*). These same companies are also subject to specific obligations concerning their recommender systems, advertising, and user interfaces. If they serve

[8] Case C-320/16 *Uber France* ECLI:EU:C:2018:221.

users who are children, they owe a specific due diligence obligation to children. Finally, online platforms with 45 million average monthly users in the EU must comply with all the previous rules and their special obligations as *very large online platforms*. The most far-reaching among them is a general risk management obligation.

9.2.1 Determining 'Big Tech' by counting users

According to Article 24(2) DSA, all online platforms and search engines must publish their numbers concerning average monthly active users at least in two annual windows. The goal is to keep who is or might soon become 'Big Tech' visible (ie VLOPs/VLOSEs). Providers can publish their numbers on their websites, but their competent DSC and the European Commission can also approach them at any time to request specific information about user numbers (Article 24(3)). The Commission may issue a delegated act concerning methodology for counting *active monthly recipients of services* (Article 33(3)). At the time of writing, this has not yet happened. The Commission has only published an FAQ, which does not address the methodology.[9]

Article 3 DSA defines the concept of active recipient as follows (emphasis mine):

> (p) 'active recipient of an online platform' means a recipient of the service that *has engaged* with an online platform by either requesting the online platform to host information or being *exposed to* information hosted by the online platform and disseminated through its online interface;

Thus, the crucial term is 'engagement', which can be a 'request to host information', such as by sellers or content creators, or an 'expos[ure]' to such information. An active user is either a content creator or a consumer of content. As noted by Recital 77, 'engagement is not limited to interacting with information by clicking on, commenting, linking, sharing, purchasing or carrying out transactions on an online platform' and is most certainly not limited to registered users. For public social media, active recipients include both content creators who actively post or share content and those who only read it, even though they do not have a registered account. That said, for social media services that allow only registered users to share and see the content, this suggests only registered users count.

A specific complication is whether the readership of content from the service embedded in other services, such as online news articles, also increases the user count. Article 3(p) speaks of 'being exposed to information … disseminated through its online interface'. Arguably, embedded content that relies on its own interface created for this purpose by the provider should also count these additional readers. However, if the

[9] EU Commission, 'DSA: Guidance on the Requirement to Publish User Numbers' (*Shaping Europe's digital future*, 1 February 2023) <https://digital-strategy.ec.europa.eu/en/library/dsa-guidance-requirement-publish-user-numbers> accessed 28 August 2023.

embedding technique does not use the providers' own interface, such users arguably do not need to be counted.

Recital 77 states that the count should 'reflect all the recipients *actually engaging* with the service at least once in a given period, by being exposed to information disseminated on the online interface of the online platform, such as viewing it or listening to it, or by providing information, such as traders on an online platform allowing consumers to conclude distance contracts with traders'.[10] The concept depends on 'market and technical developments' (Recital 77). Providers are, however, allowed to deduce 'incidental users' who visit the websites.

All five pending designation cases, concern methodology. For instance, Zalando is contesting its designation, arguing that its hybrid marketplace does not reach the threshold because the traffic for goods sold by Zalando and third-party goods can be separated.[11] Given what I said above, this is unlikely to succeed. The buyers of both products are exposed to them on the same interface; thus, there is no clear separation. A consumer who buys goods sold by Zalando is likely exposed to goods from third-party sellers during the search stage, even though she did not buy them. Zalando thus seems to be an easier case.[12] If a provider is separating its online retail business from its marketplace platform by actually using different interfaces (eg separate apps), it can be argued that the numbers concerning online retail should not be counted.

Article 3 DSA defines the concept differently for search engines:

> (q) 'active recipient of an online search engine' means a recipient of the service that has submitted a query to an online search engine and been exposed to information indexed and presented on its online interface;

For search engines, only the searching side is crucial. Thus, website owners, who benefit from the search results and can be considered recipients of the service in that broader sense, are irrelevant for defining active recipients (Recital 77). Otherwise, any search engine aspiring to be comprehensive would be immediately classified as a VLOSE due to the large number of resources it can index. The presumption is that they do not 'actively engage' with the search engine, although this might not be true for all website owners, particularly those who use dedicated interfaces to communicate with the search engine about their websites. However, in those cases, they can become VLOPs because the content is submitted to them (eg Google Shopping). Going forward, a question might arise as to whether search engines that also fulfil the definition for online platforms should follow the counting rules established for VLOSEs or VLOPs.[13] In

[10] Emphasis mine.

[11] Molly Killeen, 'Zalando Files Suit against Commission over Very Large Platform Designation' (*Euractiv*, 27 June 2023) <https://www.euractiv.com/section/platforms/news/zalando-files-suit-against-commission-over-very-large-platform-designation/> accessed 4 September 2023.

[12] Disclosure: The author is representing a consumer organisation, EISi, intervening on the side of the Commission in this case.

[13] See the discussion in ch 7.

my view, in such a case, VLOSE counting constitutes lex specialis and should prevail for the reasons stated above.

When counting the users, *bots and scrapers* can be excluded in the first step.[14] Nothing prohibits companies from overclaiming and thus from counting even users they do not have to. Recital 77 clarifies that multi-device use by the same person should not count as multiple users. The companies can further exclude 'incidental' users (Recital 77) who land on services through linking or search tools. Such users do not 'actually engage' with the services. Thus, the concept tries to approximate the real number of unique human beings using the service. This can be tricky to calculate. Using proxies (eg the average number of devices per person) to calculate the final number of unique users is unavoidable. Whatever the final number, it is inevitably only a better or worse approximation of the real user base. That being said, Article 24(2) demands a number. The provision affords discretion to companies to establish their estimates of the user base relying on the methods that are compatible with the goals of the DSA. Thus, while adopting different thresholds for incidental use might be acceptable, relying on irrelevant criteria, such as attributable revenue, should not.

Furthermore, the counting must be on a per-service level (Recital 77). This can be difficult for hybrid services that incorporate several aspects, of which only some constitute platforms, such as marketplaces that sell their own goods, video-sharing services that promote their own content, or messaging services whose chats are not always public. The features that drive user engagement also do not necessarily have to be user-generated. For instance, online maps with user-generated content, such as Google Maps, expose to usually inextricably to both editorial and user-generated content when offering its navigation services. In these cases, the question is when can we separate *non-platform activities* for the purposes of counting of users.

To some extent, an imprecise but justifiable methodology should be an acceptable methodology. Privacy considerations demand that companies not engage in additional tracking just to calculate a number for the DSA. Therefore, it should be possible to use proxies when calculating the average monthly users. For instance, DuckDuckGo used survey data to estimate a device-per-person estimate,[15] and Wikipedia used some of the existing device-per-person estimates to approximate the number of unique users.[16] Google, on the other hand, published its data separately for signed in and non-signed in users.[17]

Judging by the first disclosures, some companies have apparently inferred that because Article 24(2) requires the publication of 'information on the average monthly

[14] According to Rec 77, the DSA does not require providers of online platforms or online search engines to perform specific tracking of individuals online. Where such providers can discount automated users such as bots or scrapers without further processing of personal data and tracking, they may do so.

[15] DuckDuckGo, 'Regulatory Reporting' (*DuckDuckGo Help Pages*) <https://help.duckduckgo.com/duckduckgo-help-pages/r-legal/regulatory-reporting/> accessed 28 August 2023.

[16] Wikimedia, 'EU DSA Userbase Statistics' (*Wikimedia Foundation Governance Wiki*) <https://foundation.wikimedia.org/wiki/Legal:EU_DSA_Userbase_Statistics> accessed 27 August 2023.

[17] Google, 'Information about Monthly Active Recipients under the Digital Services Act (EU) (1 Jul 2022–31 Dec 2022)' (2023) <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-24_2022-7-1_2022-12-31_en_v1.pdf> accessed 27 August 2023.

active recipients of the service in the Union', companies do not need to publish any numbers or methodology. As demonstrated in the tables above, some companies did not publish their numbers, but merely a descriptive statement and most did not publish their methodologies. These companies usually argue that Article 24(2) does not use the word 'number', and thus a simple disclosure of whether a company is above or below the threshold will suffice. Upon a closer look, it is clear that this is not very convincing.

The DSA uses the phrase in many places to indicate simply that something must be published. For instance, Article 31(1) states that providers are obliged 'to provide information on the name, address, telephone number and email address of the economic operator'. The argument above conveniently gives the phrase 'information on' a very broad meaning to allow companies to comply in ways they find convenient, particularly to avoid potentially publishing information useful for competitors. The question is whether such discretion is really granted by Article 24(2). In my view, it undermines the effectiveness of the DSA because disclosures cannot be examined by the public on their plausibility. The DSA, by asking for public disclosures instead of in private, wanted to relieve companies of the extra work of notification but also to enable public scrutiny.

The failure to disclose a number is particularly perplexing for those providers who end up being VLOPs or VLOSEs. They have the following obligations according to Article 42(3): 'shall include in the reports referred to in paragraph 1 of this Article the information on the average monthly recipients of the service for each Member State'. Now, while one might argue that a precise number is not necessarily the only intended meaning of the term 'information on' in Article 24(2), it is fairly impossible to argue that a document that must report such 'information on … for each Member State' need not contain an actual number. If the Court or the Delegated Act ever interprets the notion, 'information on' is likely to mean a specific number, possibly accompanied by methodology.

9.2.2 Digital services vs relevant technical activity

The DSA does not rely on the term digital service. In fact, the entire regulation is entirely agnostic to the actual service that incorporates the regulated technical activity. What triggers the DSA's application is the integration of technical activity into a broader digital service. If the regulated technical activity—storage and public distribution of other people's information—can be separated from their other activities, particularly the public distribution of their information, these two distinct activities do not have to be regulated together. However, if these activities are not severable, they can be regulated as non-UGC design features of the same overall service.[18] Figure 9.1 illustrates this in the context of an online marketplace.

[18] For similar problem, see Case C-347/14 *New Media Online GmbH v Bundeskommunikationssenat* ECLI:EU:C:2015:709 (on dissociability of principal and complementary activity for AVMS Directive).

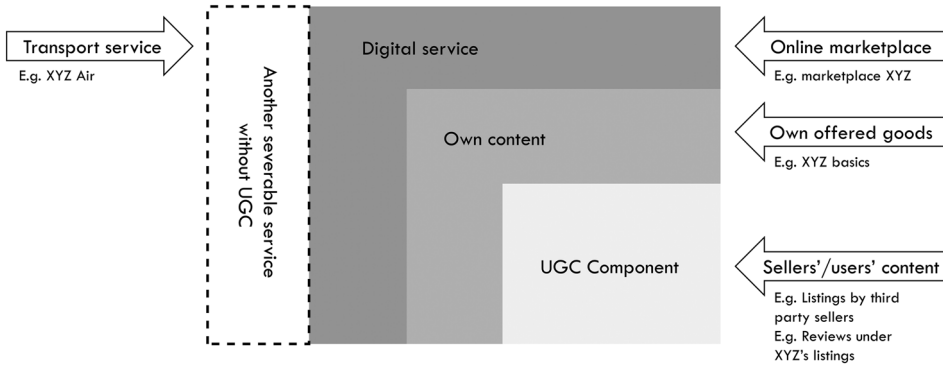

Figure 9.1 Scope of digital services: online marketplace

This is why Google Maps is regulated in its entirety, even if a lot of content on the service is not user-generated. Its UGC content that overlays editorial content can be viewed separately but is ultimately inextricably mixed in the user-experience. This logic explains why marketplaces often must report the number for the entire service because the digital service cannot be easily demarcated for its platform and non-platform side. Such hybrid platforms thus end up being more likely to be regulated, which can be justified by the fact that the user experience, and thus the impact on users, is inseparably mixed. The providers can always seek decoupling of two types of content, but often the UGC content will be 'too useful' for popularity of the service. Streaming services can be sometimes an example of a service whose user experience (eg podcasts as UGC component and music as editorial content) are separable. The same can be said about messaging services, such as Telegram, for their public and private communication channels. However, it ultimately depends on the usage of the service whether there are spill-overs between two types of content, and hence impact on the user experience. Moreover, for some streaming services, music could be consider UGC content too. If the licensed music would be uploaded without editorial control, such as by artists themselves, such uploaded music could constitute 'information provided by a recipient of service'. The copyright licensing regime is not determinative from the perspective of qualifying as a hosting service or an online platform. (Chapters 6–7). Figure 9.2 depicts such a situation.

At the time of writing, porn websites are very likely trying to use such separation technicalities to deflate the actual size of their services. This is clear from the fact that services like YouPorn, PornHub or Xvideos, which are in the top 20 websites around the world,[19] initially either did not report any or report very low numbers[20]—perhaps to

[19] 'Top Websites Ranking - Most Visited Websites in July 2023' (*Similarweb*) <https://www.similarweb.com/top-websites/> accessed 1 September 2023.

[20] Youporn, 'EU Digital Services Act' <https://www.youporn.com/information/#eudsa> accessed 1 September 2023 ('7.3 million average monthly recipients').

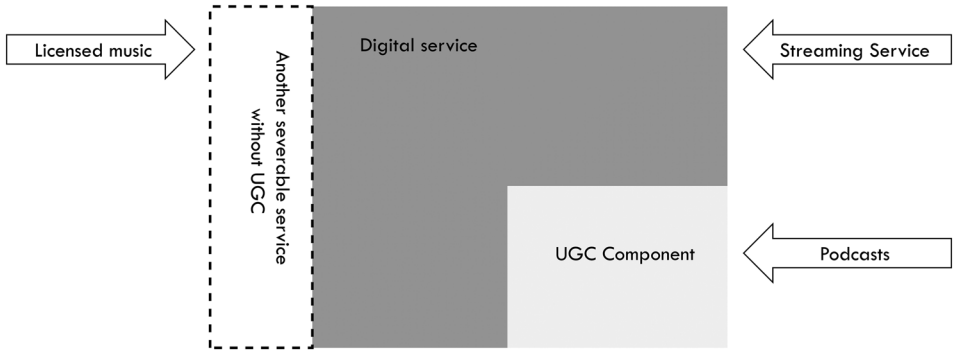

Figure 9.2 Scope of digital services: streaming service

avoid regulation and more scrutiny. Xvideos eventually conceded to be big enough to become a VLOP.[21]

Another set of issues concerns search engines specifically. Since search engines and online platforms have the same threshold, the problem only arises if two types of services are combined. Bing's search qualifies as a VLOSE. Even its integration of a ChatBot could count as a regulated non-UGC design feature. However, it is less clear whether its advertising intermediation arm constitutes only part of the service or an entirely separate VLOP. The storage of advertising and keywords qualifies as hosting, and the publication of the former should arguably constitute an online platform. If this is the case, the question is whether Bing's search size also elevates its advertising arm into a VLOP. Arguably, the answer should be yes since the advertising appears in the same search results. This can have consequences for the content moderation side of advertising and its relationship with advertisers, such as their disputes.

Finally, messaging services are regulated differently depending on how they operate. Cloud-based messaging such as Telegram or Messenger constitutes hosting (Chapter 7), while storageless messaging such as Signal qualifies as a mere conduit service. If the groups or channels on cloud-based messaging services are public, they can constitute online platforms. In Messenger's case, it is a feature integrated into a social network that remains regulated along with the main product. However, in Telegram's or Viber's case, this again begs the question of how to count the users. Arguably, if the user base for two functionalities is severable, the provider can deduce the numbers for non-platform activities, such as private messaging. But, as noted above, if the spillovers between two functionalities are strong, it might be hard to count users separately.

Finally, providers are not prohibited from using methodology that inflates their numbers. While Article 24(2) asks for specific information, if more methodologies are

[21] Xvideos initially did not disclose the numbers. But after a while, they disclosed having 160 million users which puts them among VLOPs (see Chris Köver, 'XVideos wird erste Pornoplattform in der Liga der Riesen' (*Netzpolitik.org*, 28 September 2023), <https://netzpolitik.org/2023/digitale-dienste-gesetz-xvideos-wird-erste-pornoplattform-in-der-liga-der-riesen/> accessed 28 September 2023.

acceptable, it is unlikely that the providers will be punished for higher than actual disclosures. In the absence of a common methodology, the numbers thus are not entirely comparable between providers. This is why the European Commission uses its own methodology to calculate the supervision fee.

One of the difficulties in practice is determining the borders of a particular service. This will be soon addressed by the General Court in *Zalando v European Commission*.[22] As mentioned, Zalando argues that it can separate the average number of monthly users of its marketplace platform from those for its own online retail business. Such hybrid marketplaces pose several problems. If separation does not exist in the user experience, can it be created to count users? If the same users can browse the provider's own products and third-party products in the same interface and move seamlessly between them, can we split the user base?

My view is that unless such providers can show some strong evidence of separation in the user experience, providers need to count all user numbers together. While this might over-include some providers which pose fewer systemic risks, the DSA (unlike the Digital Markets Act) does not need interrogation of the actual impact on the markets or society, even if it does impose additional special obligations on the providers.[23] The 'reach threshold' of 45 million monthly active users is an arbitrary yardstick agreed upon in the legislative process. Thus, all that matters is the presence of users on the user interface. This is why Amazon's lawsuit[24] against the designation is so baffling. It seems clear that the company meets the threshold, and it is irrelevant whether the impact of its marketplace is incomparable with that of social media. The legislature's will is fairly clear.

As can be seen here, the definition of the recipient of the services in the DSA is very broadly worded in Recital 77:

> Accordingly, the number of average monthly active recipients of an online platform should reflect all the recipients actually engaging with the service at least once in a given period of time, by *being exposed to information disseminated on the online interface of the online platform*, such as viewing it or listening to it, or by providing information …[25]

Thus, as long as the interface exposes its own offers to the same users as those of third-party traders, I am sceptical that an artificial separation, such as by considering attributable turnover, can be made to determine the reach of the service.

9.2.3 A notion of the service

The above examples show that the DSA sometimes needs to separate the UGC and non-UGC components (eg hybrid marketplaces or streaming services) to decide

[22] Case T-348/23 *Zalando v Commission* (case in progress, lodged 27 June 2023).
[23] However, see section 9.3.1 on the broader implications of being designated as a VLOP/VLOSE.
[24] Case T-367/23 *Amazon Services Europe v Commission* (Case in progress, lodged 5 July 2023).
[25] DSA, Rec 77 (emphasis mine).

which surface it applies to under the concept of a 'service'. In other cases, the DSA must separate the platform from the non-platform side (eg messaging services) for the same purpose. In both cases, the separation revolves around the notion of an 'online platform' and the scope of the concept of 'service'. One possible approach to test the separation is as follows.

Article 3(i) defines an online platform as a 'service' that '*also* disseminates information to the public'. The definition provides a carve-out for a service which disseminates information to the public as 'purely ancillary features' or 'minor functionalities' of another principal service. However, such features or functionality must be inseparable to be excludable. *Inseparability* is defined as a situation when a functionality or feature '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 this Regulation' (Article 3(i)).

Thus, the DSA potentially includes the following test for *separability* between a service and its parts that should fall under a different regime: *If a feature or functionality can be used without the principle service and is not split only to circumvent the application of the DSA, it is severable* .

Now, this would suggest several criteria. First, the words 'can be used' suggest that the user experience, rather than technological design, business side, or corporate organisation, determines the outcome. Second, the separability in the user experience must be somewhat 'natural' and cannot be forced, having been motivated by a desire to circumvent the DSA. Thirdly, the definition says nothing about the companies providing the 'service', which suggests that they are irrelevant for legal classification.

Equipped with such a derived test, one can try to resolve some of the thorny DSA questions ranging from which parts of the service should count users (Article 24) and who becomes a VLOP (Article 33), to the question whether the service is provided by a mid-sized company or not (Article 19), and what is the place of (main) establishment of the company behind the service for the purposes of allocating the public supervision (Article 56).

The DSA does not define which company or companies are responsible for the service. Problems arise if one company provides two or more services used by users or when one or more companies provide one service, whether jointly, or independently, used by users.

First, consider a somewhat simpler situation when a provider has several interfaces through which it provides a service (eg '.de', '.fr', apps, user-accounts, etc.) and different companies operate such versions of the service. The key legal question can arise, for instance, regarding whether two language versions of one product are still the same service for VLOP counting, or whether their have common or separate places of establishment. Based on the DSA's goal to capture 'online platforms' whose number of users 'reaches a significant share of the Union population',[26] it would seem logical to ignore minor version differences within the European market if the users

[26] DSA, Rec 76.

experience essentially the same product operated from one center. The argument would be that users who switch between country versions are still exposed to the same product, only on different addresses and different language versions. Arguably, the outcome should not be any different, even if the same provider uses a different company for each language version. Accepting such strategy when counting users would create a simple way for companies to keep the number of monthly active users almost *always* below the VLOP threshold and to undermine the idea that there should be only one main place of establishment if the service has several establishments in the EU.

Now, imagine another strategy. A provider splitting an online platform into two services operated by two companies. One which operates the UGC component and has less than 50 employees, or €10 million turnover, and the other which sells advertising and exceeds the threshold. The company thus potentially does not become regulated as an online platform. Again, the DSA does not have explicit provisions against such tactics. However, the relevant Recommendation foresees the notions of partner and linked enterprises whose employee headcount and turnover must also be considered (e.g., in case one company controls the other).[27] Thus, as long as two companies would be linked or viewed as jointly responsible for the service, the strategy to separate into several small economic entities would not work.

As argued above, a possible unifying argument in all these cases is that the regulation's goal is to capture a service organised around a specific user experience. Thus, even if the functionality is not operated by the same company, as long it is not *experienced as distinct by users*, it should count as unitary service. During review of the DSA, the legislature should consider adopting definition of 'service' and 'responsible companies' that can capture several entities, such as the term 'undertaking' in competition law. For instance, the Delegated Act on Supervisory Fees, which foresees a situation where a fee decision is 'addressed to more than one legal person' who are then 'jointly and severally liable for the payment' (Article 6(4)).[28] This clearly indicates that two or more companies could be understood as providing one service.

Intuitively, we understand the above situations as attempts to circumvent the DSA. However, drawing the boundary might be even harder in some cases. For instance, if a conglomerate starts buying different local marketplaces around the EU with the idea to keep their local brands but starts giving them the same systems, back-end, and support, at which point does it become a single service for the purposes of online platform definition, but also for counting its users? Again, intuitively, we understand that if a company starts harnessing the economies of scale and increases the integration of various products, thus creating an equivalent user experience, it will constitute one service at some point. However, at which exact point? The DSA has no answer to this question.

[27] Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36, Art 3.

[28] Commission Delegated Regulation (EU) 2023/1127, Art 8.

Consider franchising in the digital space. If a Finish franchisor offering a platform with job adverts has ten independent franchises across the EU, how do we determine the user numbers and the place of establishment? If we examine the question from the user's perspective, the argument, depending on the circumstances, could be: that even franchising leads to one product with the same design that is being offered across the EU. However, one could have also a situation where the franchising only concerns technology and know-how but all key operations regarding the digital service, such as pricing, and similar key business decisions, are independently controlled locally. On the other hand, for services with local deliveries (eg food), it is often the case that the users remain in the local siloes and never interact with across the different versions. Accepting this argument tries to inject too much social media logic into the user counting. The DSA never states that users must be exposed to each other on the same interface so that we can conclude that they are part of the same service. Arguably, at least for VLOP counting, the better approach is to focus on the number of users exposed to the same service rather than their ability to interact with each other. These considerations will also be key to determine the place of main establishment of the service that allocates the competence to different public authorities (Article 56).

Finally, a related problem is when one provider gives space to another provider within its service to do its own business with a heavy UGC component. An end-user sees layers of providers and does not always know who determines what. For instance, a social network creates a space for others to create their pages, allowing their owners to moderate content and users. In this case, the social network is clearly an online platform, maybe even a VLOP. However, how about the page owner, who also moderates content? Such an owner could qualify for the status of a hosting provider (see Chapter 6.2.1). Being a hosting provider brings advantages, such as the availability of a liability exemption, but also obligations (eg having a contact point and giving a statement of reasons). Would the DSCs in such matryoshka-style situations insist on their enforcement even though such hosting providers are themselves part of a broader online platform ?

In the DSA review, it will be worth revisiting how digital services are delimited to avoid these qualification problems, which are likely to result in a lot of litigation. While some of the issues can be solved by interpretation, other problems require explicit changes to the DSA.

9.2.4 On mini platforms

The DSA consciously excludes micro and small enterprises that operate online platforms from its most prescriptive regulations. Article 19 carves out such 'mini platforms' from the most onerous platform-specific (advanced) obligations, such as internal and external dispute settlement. The only exceptions to this rule are providers whose digital services reach a threshold of a VLOP or VLOSE. For them, the small company size is overshadowed by their large user base (Article 19(2)).

Small enterprises are defined by a Council Recommendation[29] as 'an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.' Micro enterprises are those which employ 'fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million'.[30] As a result, online platforms that do not exceed either 50 employees or €10 million annual turnover/balance sheet remain only subject to basic obligations for hosting services, and intermediary services. This notion, however, depends also on the linked and partner enteprises (Article 3 of the Recommendation), which means that a big parent holding company can easily disqualify smaller daughter companies from the status. Article 4 of the Council Recommendation and Article 19(1) moreover have transitory periods which means that reclassification is not immediate. It can take one or two years.

The DSA says nothing about whether companies operating DSA-regulated digital services must be exclusively or partly devoted to the DSA-regulated portion of a business. Thus, a media house earning 80% of its revenue from newspapers and 20% from a social network under the same company will have to be considered as a whole, despite the fact that most revenue is attributable to the DSA-irrelevant parts of the business. The company can legitimately restructure and spin out its less successful social network to a separate company that does not exceed the small enterprise threshold.

9.3 Judicial Review of VLOP/VLOSE Designation Decisions

Amazon, Pornhub, Stripchat, Xvideos, and Zalando, are currently litigating their designation as a VLOP before the General Court.[31] The obvious reason why companies might seek invalidation is to avoid being regulated by the DSA. An ancillary motivation can be to avoid being regulated by other acts of EU law that are increasingly relying on the status of VLOPs as the regulatory thresholds. At the time of writing, five other legislative proposals are already relying on the concept: the Commission's Proposal for the European Media Freedom Act,[32] the European Parliament's proposed addition to the Artificial Intelligence Act,[33] the Commission's Proposal for the Political Advertising

[29] As defined in Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36, art 2(2). Other EU laws do not necessarily use the same concepts, see Article 3 of Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (2013) OJ L 182 (anticipating higher tresholds).

[30] ibid art 2(3).

[31] *Zalando v Commission* (n 22); *Amazon Services Europe v Commission* (n 27); *WebGroup Czech Republic v Commission* T-139/24; *Aylo Freesites v Commission* T-138/24; *Technius v Commission* T-134/24.

[32] Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU' COM(2022) 457 final, art 17.

[33] European Parliament, 'Amendments adopted by the European Parliament on 14 June 2023 on the proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts (COM(2021) 020—C9-0146/2021—2021/0106(COD))' Document P9_TA(2023)0236, amendment 740 ('AI systems intended to be used by

Regulation,[34] and the Commission's Proposal for the European Digital Identity Regulation.[35] Thus, in the years to come, the designation disputes can gain importance beyond the obligations imposed by the DSA.

The validity of the Commission's designation decisions pursuant to Article 33(4) of the DSA can be reviewed according to Article 263 Treaty on the Functioning of the European Union (TFEU), which provides that:

> Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

The designation decisions are undoubtedly 'challengeable acts' because they are legally binding on the designated companies,[36] are based on a proper legal basis (Article 33(4))[37] and produce additional specific legal effects.[38] The direct annulment action can be undoubtedly initiated by affected companies who are on the receiving end of the designation because such designations are 'capable of affecting the interests of the applicant by bringing about a distinct change in his legal position'.[39] The companies can also seek preliminary injunctions to suspend the application of some of the special obligations of the DSA before the Court examines the status. For instance, Amazon succeeded in temporarily suspending the application of Article 39 about the advertising archives in its pending case with the argument that it 'enable third parties to access significant trade secrets concerning the advertising strategies of the applicant's advertising customers'.[40] The President of the General Court, however, declined to grant the same order regarding Article 38, the mandatory opt-out mechanism for the recommender systems. On appeal, the European Court of Justice lifted the interim measures with reference to the balance of interests.[41]

While such designations also produce legal effects on third parties, such as consumers or researchers who gain new rights, their standing to challenge designations is less likely. Firstly, since they need to challenge an act of the Commission, they would be

social media platforms that have been designated as very large online platforms within the meaning of Article 33 of Regulation EU 2022/2065, in their recommender systems to recommend to the recipient of the service user-generated content available on the platform.')

[34] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising' COM(2021) 731 final, art 7(6).

[35] Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 910/2014 as regards establishing a framework for a European Digital Identity' COM(2021) 281 final, art 12b.

[36] Case C-911/19 *Fédération bancaire française (FBF)* ECLI:EU:C:2021:599, para 36.

[37] Case T-113/89 *Nefarma* ECLI:EU:T:1990:82, para 68.

[38] Case T-258/06 *Germany v Commission* ECLI:EU:T:2010:214, para 27.

[39] C-322/09 P *NDSHT v European Commission* ECLI:EU:C:2010:701, para 45.

[40] Case T-367/23 R *Amazon Services v Commission* ECLI:EU:T:2023:589, para 64.

[41] See C-639/23 P(R)), *Amazon v European Commission*, ECLI:EU:C:2024:277: 'it must be held that the interests defended by the EU legislature prevail, in the present case, over Amazon's material interests, with the result that the balancing of interests weighs in favour of dismissing the application for interim measures' (para 164).

effectively arguing against the designation and, thus, against the additional rights they might derive from it. It is quite clear that third parties are more likely to support, rather than contest, the Commission's designation that gives them rights. Second, even if it would make sense to challenge designations for third parties, they would need to demonstrate 'direct' and 'individual concern' (Article 263).[42]

Consumers, researchers, and civil society are more likely to either *intervene* to support the Commission in designation disputes initiated by providers according to Article 40 of the Protocol on the Statute of the Court[43] or seek a declaration that the Commission is unlawfully failing to designate some providers which costs them extra rights according to Article 265 of the TFEU. As regards interventions, the threshold for standing differs. Article 265 TFEU speaks of 'establish[ing] an interest', which the case law interprets to mean a 'direct [and] existing interest' in the result of a case pending before the Court.[44]

This route is used by NGOs less frequently in Luxembourg than in Strasbourg, and the Court of Justice of the European Union tends to be somewhat strict with the applications, usually favouring associations rather than individuals.[45] For representative associations composed of a broad membership, the Court tends to waive the requirement if the case is 'raising questions of principle liable to affect those members'.[46] For instance, the European Consumer Organisation (BEUC) has been repeatedly accepted as an intervener in this way.[47] Under the DSA, the same should be possible for associations of researchers, consumers, and possibly even of users in general. For NGOs, the Court cautiously accepts some that have shown to be directly involved with the issues.[48] Thus, the NGOs involved in the Codes of Conduct and give input for risk management by VLOP/VLOSEs could argue their standing. In *Zalando*, the General Court recently issued a pioneering decision that allowed a consumer organisation to intervene invoking the rights derived from Article 86.[49] This is an encouraging signal that interventions by NGOs in the DSA-related direct cases in Luxembourg might become more commonplace. In my view, this is necessary given that industry usually asks

[42] Case C-25/62 *Plaumann v Commission* ECLI:EU:C:1963:17 (direct concern); C-486/01 *Front national v European Parliament* ECLI:EU:C:2004:394 (individual concern).

[43] Protocol (No 3) On the Statute of the Court of Justice of The European Union [2004] OJ C-310/210, art 40.

[44] Case T-138/98 Order of the President of the First Chamber of the Court of First Instance of 3 June 1999 in *ACAV and others v Council* ECLI:EU:T:1999:121, para 14; Viktor Luszcz, *European Court Procedure: A Practical Guide* (Hart Publishing 2020) 629ff.

[45] Jasper Krommendijk and Kris van der Pas, 'To Intervene or Not to Intervene: Intervention before the Court of Justice of the European Union in Environmental and Migration Law' (2022) 26(8) International Journal of Human Rights 1394, 1403.

[46] C-151/97 P(I) Order of the President of the Court of 17 June 1997 in *National Power and PowerGen v British Coal and Commission* ECLI:EU:C:1997:307, para 66.

[47] Case T-612/17 Order of the President of the Ninth Chamber of the General Court of 17 December 2018 in *Google and Alphabet v Commission* (Google Shopping) ECLI:EU:T:2018:1007.

[48] Case T-37/04 R Order of the President of the Court of First Instance of 7 July 2004 in *Região autónoma dos Açores v Council* ECLI:EU:T:2004:215, para 57ff; see the debate in Luszcz (n 48) 634ff.

[49] Following initial rejection by the President of the General Court in 2023, the General Court permitted the European Information Society Institute (EISi), a consumer organisation, to intervene on behalf of the consumers on the side of the European Commission (Order of the Seventh Chamber of the General Court, T-348/23, 20th of March 2024) after successful appeal (C-647/23 P(I) - EISi v Zalando and Commission). The author acted as a lawyer for the NGO.

its own associations to support their positions. Involvement of NGOs is thus a question of equality of arms.

As regards actions against *failures to act*, the standing of individuals and organisations requires their 'direct' and 'individual concern' as is the case for actions for annulment.[50] Contrary to the wording of Article 265 of the TFEU, the applicant does not need to be potentially 'addressed' by such a decision, which means that even consumers, researchers, and civil society could qualify. According to the case law, if such an applicant could seek direct annulment of an act according to Article 263, it can also pursue an action against a failure to issue an act.[51] A designation decision is clearly not discretionary.[52] The Commission has a duty to designate if the conditions of the DSA are met.[53] The obligation according to Article 33(4) of the DSA is sufficiently well-defined and unconditional to be reviewed by Article 265 TFEU.[54]

9.4 Separation of Liability and Accountability

The DSA's significant regulatory contribution is splitting due diligence obligations from the liability for underlying content. Prior to the DSA, most laws tried to influence providers' behaviour by threatening joint liability for their users' actions. Save for some areas of law, the courts often faced a binary decision: impose a duty of care or deny it and confirm a liability exemption.[55] The DSA ends this binary. It comes up with its own expectations formulated as due diligence obligations. Providers violating them can be held to account. These legal obligations are separate from those of their users. The violations of the DSA have no bearing on the provider's preservation of the liability exemptions. Even providers who are not liable for users remain accountable for their failings to be diligent. They are *accountable but not liable*.

The E-Commerce Directive (ECD also acknowledged this separation between *liability* and *due diligence* obligations. Recital 48 ECD clarified that 'this Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply *duties of care*, which can reasonably be expected from them, and which are specified by national law, in order to detect and prevent certain types of illegal activities'. Such duties of care referred to autonomous obligations, distinct and unrelated to the (tortious) liability issues. Hence, under the ECD, the Member States could legislate to impose such distinct measures, such as establishing complaint mechanisms or hotlines, to the extent that they did not violate liability exemptions. Given the divergences and fragmentation arising across

[50] Luszcz (n 48) 260ff.
[51] C-68/95 *T Port v Bundesanstalt für Landwirtschaft und Ernährung* ECLI:EU:C:1996:452, para 59.
[52] cf Case T-521/14 *Sweden v Commission* ECLI:EU:T:2015:976 (conditionality to issue delegated acts).
[53] Case T-164/10 *Pioneer Hi-Bred International v Commission* ECLI:EU:T:2013:503.
[54] Luszcz (n 48) 246ff.
[55] Martin Husovec, 'Remedies First, Liability Second: Or Why We Fail to Agree on Optimal Design of Intermediary Liability' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020).

Europe, the DSA removes that margin of manoeuvre from the Member States and introduces its own catalogue of 'duties of care' through harmonisation.

The DSA's accountability-but-not-liability design was not an automatic choice. In the legislative process, the European Parliament strongly pushed to make the liability exemptions *dependent* on compliance with due diligence obligations. Thus, any violation of Chapter III of the DSA would make liability exemptions unavailable. The argument was that such conditionality would create a strong incentive for compliance. The liability exemptions would become a truly hard-earned 'prize' or a 'privilege' given only to those who respected the law in its entirety. A similar approach exists under section 79 of the Indian Information Technology Act 2000,[56] which makes the liability exemptions conditional upon 'the intermediary observ[ing] due diligence while discharging his duties under this Act and also observ[ing] such other guidelines as the Central Government may prescribe in this behalf'. Related governmental acts, such as one applicable to social media, then further specify what such 'due diligence' duties mean.[57]

The European Commission justified this design as follows:

> Structuring due diligence obligations as a condition of the liability exemption would imply that compliance would be ultimately voluntary: the intermediary service would only be 'incentivised', but not 'required' to comply with the rules. It could make a calculation of risks, and consider that, based on national or Union laws, it would still not be held liable by a court, or that the costs of complying could be lower than the costs incurred through potential sanctions. In certain cases, the incentive for intermediaries to comply with the conditions to qualify for the liability exemption may well be limited, for example, when damage claims are not a realistic threat. However, intermediaries should not be left the choice whether or not to comply with the relevant requirements and self-standing obligation are required to achieve this objective.[58]

In other words, the Commission argued that *conditionality* would not immediately improve compliance. It would also mean that those who stop qualifying for liability exemptions do not have to comply with due diligence obligations anymore, although they are performing the relevant technical function (eg non-neutral hosts). For platforms, the

[56] S 79, Indian Information Technology Act, No 21 of 2000 <https://www.indiacode.nic.in/bitstream/123456789/13116/1/it_act_2000_updated.pdf> accessed 29 August 2023.

[57] Part II(4)(4), Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, Notification of 25 February 2021, GSR 139(E) <https://mib.gov.in/sites/default/files/IT%28Intermediary%20Guidelines%20and%20Digital%20Media%20Ethics%20Code%29%20Rules%2C%202021%20English.pdf> accessed 29 August 2023 ('A significant social media intermediary shall endeavour to deploy technology-based measures, including automated tools or other mechanisms to proactively identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary under clause (d) of sub-rule (1) of rule 3, and shall display a notice to any user attempting to access such information stating that such information has been identified by the intermediary under the categories referred to in this sub-rule').

[58] Commission, '"Impact Assessment" (Commission Staff Working Document) Accompanying the Document "Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (DSA) and Amending Directive 2000/31/EC"' SWD(2020) 348 final, annex 9.

application of liability privileges would become a nightmare because they are subject to many open-ended obligations. In my view, such conditionality would tilt the incentives even more in the direction of over-removal because any misstep would have grave consequences. It would put the DSA's balanced and tailored rules under a one-sided incentive structure. Moreover, given the vagueness of some of the due diligence obligations, the liability exemption would be useless as a legal defence. Already under section 512 DMCA, some providers preferred to confront liability norms directly rather than liability exemptions because of the long laundry list of the conditions that the provider must meet.[59]

A regulatory design that makes liability exemptions conditional upon observance of all the due diligence obligations has two potential outcomes: in a better case, it pronounces them redundant, or in a worse case, it suggests to the courts that to be free of liability for others, a long list of conditions must first be met. To make liability exemptions conditional upon satisfying due diligence obligations would be to force providers to balance on the edge of a cliff, knowing that one small slip would send them tumbling into national liability chaos.

In my view, the most important debate gets lost when we bundle due diligence obligations and the liability for third-party content. Any non-compliance can potentially mean dramatic consequences. The key calibration of the system should be in deciding what tailored incentives for compliance are proportionate, proper, and effective. If everything is lumped together in one lot, the enforcement system is under strain to target its responses. The DSA's design allows for a better escalation of enforcement and tailoring of its demands. Plus, the DSA's mixture of private and public enforcement of two separate systems—liability for content and accountability for due diligence obligations—is arguably superior to a 'one-size-fits-all system'. In fact, this design feature is part of what sets the DSA apart as a better regulatory model (see Chapter 21).

That being said, due diligence obligations continue to have some meeting points with liability exemptions. If a provider is obliged to conduct a check of some information and, while doing so, acquires actual knowledge, the two obligations can run a very similar course. However, the opposite is also easily true. A provider that fails to act upon knowledge but provides properly presented but legally incorrect explanations acts correctly in terms of procedure but can still become liable along with its users for failing to take down illegal content. Similarly, a provider that fails to issue a content creator with the statement of reasons and thus violates its procedural due diligence obligation might still correctly assess the case on substance.

[59] In the decisions of the United States Court of Appeals, Ninth Circuit in *Perfect 10 Inc v Visa International Service Association* 494 F 3d 788 (9th Cir 2007), the Court notes at fn 4 that: 'Because Defendants are not "service providers" within the scope of the DMCA, they are not eligible for these safe harbors. The result, under Perfect 10's theories, would therefore be that a service provider with actual knowledge of infringement and the actual ability to remove the infringing material, but which has not received a statutorily compliant notice, is entitled to a safe harbor from liability, while credit card companies with actual knowledge but without the actual ability to remove infringing material, would benefit from no safe harbor. We recognize that the DMCA was not intended to displace the development of secondary liability in the courts; rather, we simply take note of the anomalous result Perfect 10 seeks'. For a broader debate of s 512 from the European perspective, Martin Husovec, 'Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules' (2023) 38 Berkeley Technology Law Journal 883, https://btlj.org/wp-content/uploads/2024/01/0002_38-3_Husovec.pdf).

In the following chapters, the book takes the reader through three basic areas of obligations: content moderation, risk management, and transparency. Although demarcated as such, these three areas are not water-tight compartments; the separation allows me to better explain their different features. Content moderation rules are mostly about the process of how decisions are made. Transparency/oversight rules are about what gets published, controlled, and notified by whom. Finally, risk management rules are about how companies must redesign their services and further test, monitor, and improve the working of their systems to better manage risks posed by the functioning and use of their services. Table 9.4 provides a quick overview of Part III of the DSA.

Table 9.4 Overview of due diligence obligations.

Obligations	**Universal** *All providers of mere conduit, caching, hosting services*	**Basic** *all hosting services*	**Advanced** *medium-to-large online platforms*	**Special** *VLOPs & VLOSEs*
Content Moderation	**Art 14** (fair rules)	**Art 16** (notice submission) **Art 17** (statement of reasons) **Art 18** (notification of suspected relevant crimes)	**Art 20** (internal redress) **Art 21** (out-of-court mechanism) **Art 22** (trusted flaggers) **Art 23** (anti-abuse provisions) **Art 30–32** (specific rules on B2C marketplaces)	**Art 38** (recommender systems) **Art 34–35** (general risk management) **Art 45-48** (Codes of Conduct)
Risk-based Approach (design, functioning, use of a service)	N/A		**Art 25** (fair design of user experience); **Art 26(3)** (profiling in advertising); **Art 27** (recommender systems); **Art 28** (protection of minors); **Art 30** (traceability of traders); **Art 31** (facilitating design for traders)	
Transparency and Oversight	**Art 11** (regulator's contact point); **Art 12** (recipient's contact point); **Art 13** (legal representative); **Art 15** (content moderation reporting);	N/A	**Art 22** (reports by trusted flaggers); **Art 24** (content moderation reports plus); **Art 24(5)** (database of all the statements of reasons); **24(2)** (monthly users reporting); **Art 26** (advertising disclosure)	**Art 39** (advertising archives); **Art 37** (auditing); **Art 40** (data access); **Art 41** (compliance function); **Art 42** (content moderation transparency)