

Liability of News Platforms under the Digital Services Act

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Abstract

This article analyzes the conditions under which news platforms can be held liable under European Regulation (EU) 2022/2065 of the Parliament and of the Council (Digital Services Act). The first part concerns the object of the DSA regulation, by reference to news platforms, and the second part regards the notion of illegal content and its specific nature in the case of news platforms. The third and fourth parts concern the liability of the online platform both for posted articles and for advertising, in which the author has identified a distinct regime depending on the type of uploaded material. The conclusion of the paper concerns the importance of the European Regulation (EU) 2022/2065 of the Parliament and of the Council for the activity of journalists and news platforms.

Keywords: news platforms, Digital Services Act, public communication law, journalist's responsibility, press freedom.

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1. Introduction

Freedom of the press implies carrying out the activities of collecting and transmitting information to the public through media channels, without the intervention of authorities on the content of the communicated message.

Since the French Revolution of 1789, freedom of speech has been consistently recognized as a fundamental right², celebrated both nationally and internationally, especially in the second part of the 20th century.

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² Art. 11 of the Declaration of the Rights of Man and Citizen adopted in 1789 provided: "The free communication of thoughts and opinions is one of the most precious human rights; every citizen can therefore speak, write and print freely, except in the cases provided by law, in which he will have to answer for the abusive use of this freedom."

In most international regulations, freedom of expression includes both the right to send and the right to receive information transmitted by others to the public. The enforcement of these rights was achieved both by art. 19 of the Universal Declaration of Human Rights³, as well as by art. 10 of the European Convention on Human Rights⁴. The latter regulation was imported, in a similar manner, by art. 11, paragraph 1 of the Charter of Fundamental Rights of the European Union.

Undeniably, freedom of expression is a fundamental right, recognized, at least formally, in any modern society. Freedom of the press is a component of this right, having a complex content, which includes both the freedom of speech and the freedom to organize the journalist's activity.

With the development of information technology, public communication has entered a new stage of development, and traditional means such as newspapers, radio channels and television have been overtaken by online media, both in written and audio-video formats.

The Internet is an important part of life in contemporary society, and for the younger generations it represents a natural element known since birth.

Unlike the traditional press, which has benefited from a heterogeneous regulatory framework for the last decades in European states, the online press has, with few exceptions, been exempted from any attempt of regulation.

In reality, the accelerated development of a new, innovative communication system could not be achieved without almost total freedom of action. Under these conditions, at the level of the European Union, in the first decade of the 2000s, there were no mechanisms to restrict the content of information posted online, only messages of an obviously illegal nature, such as those with terrorist content, or inciting hatred and discrimination, were prohibited. Otherwise, the authorities had a passive role⁵ and allowed the existence of some self-regulatory mechanisms, most of them dependent on the editorial policy of each individual online publication.

The doctrine of the passive role of the authorities, both at national and European level, limited the possibility of applying the principle of responsibility, as a general principle of communication law⁶, since beyond the responsibility of the author of a material posted online, there is no form of liability for the provider

³ Adopted in 1948, by the General Assembly of the United Nations Organization - according to art. 19: " Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

⁴ Adopted at the level of the Council of Europe in 1950 - according to art. 10, paragraph 1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

⁵ E. Lazăr, N. D. Costescu, *Dreptul european al internetului*, Hamangiu Publishing House, Bucharest, 2021, p. 46.

⁶ S.-Al. Vernea, *Dreptul Comunicării*, Hamangiu Publishing House, Bucharest, 2021, p. 12.

of the hosting service of that material.

This regulatory omission has been corrected by the European legislator through multiple measures taken in recent years⁷.

On October 19, 2022, Regulation (EU) 2022/2065 of the European Parliament and of the Council on a single market for digital services and amending Directive 2000/31/EC (Digital Services Regulation), was adopted; hereinafter referred to as "DSA".

We are of the opinion that taking concrete measures, homogeneous at European level in this matter, constitutes the foundation for regulating liability of online platforms, which by their nature are not dependent on borders or national specifics.

Precisely for these reasons, the European legislator opted for the enforcement of a Regulation, an act with direct applicability in the internal law of member states⁸, which, unlike directives, does not require implementation⁹. Some authors have rightly pointed out that the standard imposed by the regulation is a minimal one¹⁰, each member state being free to improve by national legislation.

2. The object of the DSA Regulation regarding news platforms

Beyond the purpose of the act, expressly revealed by art. 1, paragraph 1, the object of regulation is provided in the following paragraph. According to it: "This Regulation lays down harmonised rules on the provision of intermediary services in the internal market. In particular, it establishes: (a) a framework for the conditional exemption from liability of providers of intermediary services; (b) rules on specific due diligence obligations tailored to certain specific categories of providers of intermediary services; (c) rules on the implementation and enforcement of this Regulation, including as regards the cooperation and coordination between the competent authorities."

From the content of the rendered text, we note that the regulation aims to establish uniform conditions for providing services on the internal market. The most important regulated areas are aimed at establishing a common framework for holding intermediate service providers liable and implicitly determining the cases of exonerating them from liability for the existence of illegal content. From

⁷ J. P. Quintais, S. F. Schwemer, *The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?*, European Journal of Risk Regulation, vol. 13, No. 2/2022, p. 192.

⁸ P. Church, C. N. Pehlivan, *The Digital Services Act (DSA): A New Era for Online Harms and Intermediary Liability*, Global Privacy Law Review, vol. 4, No. 1/2023, p. 53.

⁹ M. A. Dumitrașcu, *Dreptul Uniunii Europene I*, Universul Juridic Publishing House, Bucharest, 2021, p. 318.

¹⁰ A. Savin, *The EU Digital Services Act: Towards a More Responsible Internet*, Copenhagen Business School Law Research Paper Series No. 21-04, 2021, p. 5, available online at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786792, accessed on 16.03.2024.

the wording of art.1, par.2, letter an of the Regulation, we note that the rule consists in holding intermediate service providers liable for illegal content, and, exceptionally, they can be exempted from liability under certain restrictive conditions.

Equally, the Regulation establishes preventive obligations of certain categories of suppliers, these being limited to due diligence obligations. In order to effectively apply the regulation at the level of the European Union, given the fact that the transmission of information does not depend on the existence of borders, common rules of cooperation between the authorities of the member states have been established.

In the matter of online media, the regulation is particularly relevant for determining the conditions of liability for news platforms, respectively of their exoneration from liability. We note that the DSA Regulation does not regulate an editorial policy, this being essentially left to the discretion of each publication, respectively platform, however, in the event of posting material with illegal content, the responsibility does not fall solely on the author¹¹, but also on the platform that provided the hosting services and implicitly, made the information public.

By art. 2, par. 1 and 2 of the DSA Regulation, the fields in which it produces effects are expressly stipulated, respectively: "1. This Regulation shall apply to intermediary services offered to recipients of the service that have their place of the establishment or are located in the Union, irrespective of where the providers of those intermediary services have their place of the establishment. 2. This Regulation shall not apply to any service that is not an intermediary service or to any requirements imposed in respect of such a service, irrespective of whether the service is provided through the use of an intermediary service."

The sequence of the two previously reproduced paragraphs clearly shows that the regulation is not intended to be applied directly to the authors of online materials or the producer of an audio-video material, but only to the intermediary that provides the public communication service, called "intermediate service". This notion is defined by art. 3, letter g of the Regulation: "one of the following information society services: (i) a 'mere conduit' service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network; (ii) a 'caching' service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request; (iii) a 'hosting' service, consisting of the storage of information provided by, and at the request of, a recipient of the service".

The activity of simple transmission (mere conduit) is carried out by the

¹¹Who will be liable for his own deed under the conditions of tortious or contractual civil liability, depending on the content of the message and the obligations violated by making it available to the intermediary service provider?

provider of the internet service. This does not involve an analysis, of any kind, of the information communicated, thus not being relevant for the responsibility of the news platforms.

Equally, the caching service involves the automatic, temporary storage of some information to make it much more quickly accessible to end users, without any control of the storage service provider over the content of the stored data. Thus, this category of intermediate services is also not relevant for the liability of news platforms.

In terms of the hosting service, it involves storing information provided by one person, followed by communicating that information upon access by another person. In general, this service is provided through online platforms, defined by art. 3, letter I of the Regulation as "a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation".

Regarding news platforms, this term is an equivalent to specialized sites, online publications, blogs, sites that provide audio-video files, including news feed on social networks or social media applications, etc. Any form of organization through which an electronic platform makes available to the public information produced by other persons, performs, in concrete terms, a hosting activity within the meaning of the Regulation. For the purpose of this article, by news platforms we will designate the specialized sites that have an editorial policy and collaborate with professional journalists. The rest of the platforms will be designated by indicating their typology.

3. Illegal content in news platforms – concept and importance

The role of the DSA Regulation is to establish the conditions under which an intermediary service provider, in this case a news platform, is responsible for the material found within it. As a rule, platforms will be liable for posting "illegal content". The definition of the notion is made by art. 3, letter h of the Regulation, as "any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law".

Under these conditions, by illegal content we do not mean only messages expressly prohibited by the legal provisions of the European Union, but also information that does not comply with the law of the Union or of any member state, regardless of the object or nature of that law. In our opinion, everything that exceeds the limits of freedom of expression, regulated by art. 10 of the European

Convention on Human Rights or by art. 11 of the Charter of Fundamental Rights of the European Union, will be qualified as illegal content.

For this purpose, we note that freedom of expression can be limited, according to art. 10, paragraph 2 of the European Convention on Human Rights, through measures provided by law, necessary in a democratic society and proportionally used to protect the following values: (i) national security (ii) territorial integrity or public safety (iii) defense of public order and crime prevention (iv) protection of health or morals, (v) protection of reputation or rights of others (vi) to prevent disclosure of confidential information or (vii) to guarantee the authority and impartiality of the judiciary.

Although art. 11 of the Charter of Fundamental Rights of the European Union does not contain an equivalent of art. 10, paragraph 2 of the ECHR Convention, we note that the scope and meaning of the freedom of expression, as a fundamental right, are the same, as expressly stipulated by art. 52, paragraph 3, sentence I of the Charter¹².

Under these conditions, the violation of any limit of freedom of expression, as provided for by the ECHR Convention, automatically implies a violation of freedom of expression under the terms of the Charter, which leads to the classification of the content as illegal.

In addition, depending on the national law of each member state, what exceeds the limits of freedom of expression recognized in domestic law, to the extent that it does not contradict Union law, constitutes illegal content.

In our opinion, the platform is responsible for an act of its own, that of not having limited the spread of illegal content, although it had the opportunity to know the nature of this material, either by setting up an automatic content filtering system or by analyzing notifications sent by users.

Determining the illegal content is essential for triggering the liability mechanism according to the Regulation or for identifying the conditions for exemption from liability.

4. Particular rules regarding the liability of news platforms

Since news platforms are a species of online platforms, the provisions of the Common Regulation for online platforms will be applied to them, customized according to the defining elements of a news platform: (i) gathering materials on a multitude of subjects (ii) the existence of an editorial policy (iii) the elaboration of materials by persons either in a relationship of subordination to the platform, or in a contractual relationship of collaboration (professionals).

As a rule, to the extent that there is illegal, publicly accessible content on

¹² According to art. 52, paragraph 3, sentence I of the Charter of Fundamental Rights of the European Union: "to the extent that this charter contains rights that correspond to rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, their meaning and extent are the same as those provided by the mentioned convention".

the platform, its civil liability will be incurred. The Regulation introduced, in art. 6, paragraph 1 an exemption clause, according to which: "Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider: (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content."

Legal literature¹³ referred to this provision as a "liability shield", which we think is an appropriate terminology.

The text imposes two alternative conditions for exonerating the platform from liability: (a) not to know the illegal content or data or facts from which the illegal content results or (b) to promptly remove the illegal content. The removal can be done both *ex officio*, through a preventive measure, and at the express request of at least one user, who sent a notification for this purpose.

Although the previously exposed rules can be used in blog posts or in the news feed on social media platforms, they do not apply in the case of news platforms with editorial control. We bear in mind that news platforms have the nature of specialized sites, with their own editorial policy, a fact that attracts the incidence of art. 6, paragraph 2 of the Regulation, according to which: "paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider". Subjecting the posted materials (press articles, audio-video reports) to an editorial policy, which is equivalent to exercising a form of control over the content posted on the platform. It is extremely important to make a distinction between the exercise of an editorial control prior to publication, which aims at both the form and substance of the respective material, according to the editorial policy of the platform, and the exercise of a technical, automated control to identify any illegal content (nudity, words specific to licentious language or messages of a terrorist nature or that incite hatred, etc.).

In this regard, art.7 of the Regulation uses this distinction, even if the legislator did not expressly regulate it, stipulating: "Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 4, 5 and 6 solely because they, in good faith and in a diligent manner, carry out voluntary own-initiative investigations into, or take other measures aimed at detecting, identifying and removing, or disabling access to, illegal content, or take the necessary measures to comply with the requirements of Union law and national law in compliance with Union law, including the requirements set out in this Regulation." This article was inspired by section 230 of the US

¹³A. Turillazzi, M. Taddeo, L. Floridi, F. Casolari, *The digital services act: an analysis of its ethical, legal, and social implications*, Law, Innovation and Technology, vol. 15, No. 1/2023, p. 95.

Communications Decency Act, as amended by the Telecommunications Act of 1996¹⁴ and acts as a reward for the efforts of the platform operator, who in good faith tried to remove the illegal content.

By applying this rule to news platforms, we observe that intermediate service providers can benefit from the protection conferred by art.6 even if they carry out in good faith, investigations and checks capable of leading to the identification, removal or blocking of illegal content. In reality, the legislator notes that conducting investigations on its own initiative and in good faith does not equate to editorial control, which is why the platform can be exonerated from liability.

Under these conditions, we appreciate that regarding the news platforms, for the posted materials (press articles, audio-video reports, images) the exemption from liability cannot occur either according to art. 6 or according to art. 7 of the Regulation, since, in both situations, the editorial control disqualifies the platform from liability exemption, as expressly stipulated in art.6, paragraph 2 of the Regulation.

The situation is different with regard to comments posted by users, to the extent that they are allowed by the platform. We appreciate that it is not possible to apply the editorial policy for comments, as they result from the freedom of expression of the readers. Regarding them, there is no control from the intermediary service provider, and the simple application of content-based filters (licensed words, nudity, words specific to terrorist messages, etc.), does not disqualify the news platform from the exemption from liability provided of art. 6, par. One and art. 7 of the Regulation, strictly in what concerns the content of the comments.

Therefore, the DSA Regulation does not exempt news platforms from liability regarding the content subject to editorial control, but allows the removal of liability, under the restrictive conditions stipulated in arts. 6 and 7 regarding the content of comments or other information posted by users and not subjected to editorial control.

To the extent that we will refer to a news blog, or a page on a social network or a channel on an audio-video content-sharing sites, we will not be in the presence of a publication, with its own editorial policy, but of a personal page, a fact that will allow the intermediary service provider to be exempted from liability under the conditions of fulfilling one of the assumptions provided by art.6, paragraph 1 letter "a" or "b" of the Regulation. Equally, if the service provider has its own policy of automatic verification or investigation of the content, followed by its deactivation for preventive purposes, we consider that the provisions of art. 7 of the Regulation may apply, and thus the provider will benefit from the exemption from liability in the basis of the Good Samaritan clause.

¹⁴ Available online at <https://www.fcc.gov/general/telecommunications-act-1996>, accessed on 16.03.2024.

As noted in literature, the DSA Regulation not only encourages the detection of illegal content, but also the removal or disabling of access to it, without the prior permission of a judicial or administrative authority¹⁵. In the field of online platforms, another, much more subtle, way of reducing the visibility of a material consists of "shadow banning", a procedure that makes it no longer accessible in the main flow of the platform for users¹⁶. Either way, concretely, the task of protecting the public against illegal content is outsourced to private individuals, respectively to intermediate service providers, who have the opportunity to act by limiting, at least temporarily, the freedom of expression of the authors of censored materials.

In our opinion, we are not in the presence of an impermissible limitation of the exercise of a fundamental right, since, on the one hand, such measures can be taken to prevent the dissemination of illegal content, and after taking such a measure, the author will be notified, having the possibility to appeal the decision of the intermediate service provider in a summary and fast solving procedures.

Another provision of the Regulation, applicable in a particular way in for news platforms, is found in art. 8 of the DSA: 'No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.'

The provision indicates that the news platform does not have a general obligation to monitor information communicated to the public. This regulation is only relevant for posted content for which there was no previous editorial control, which would be equivalent to information monitoring, but it is also relevant for comments and any information posted without having been subjected to control. For news blogs, pages on a social network or channels for sharing audio-video content, the provisions of art. 8 of the DSA have the nature of a guarantee that prohibits unjustified censorship, for preventive reasons.

Legal literature¹⁷ considered that the role of this article is to balance the risk that the service provider, by exercising a control obligation, could plausibly know the illegal nature of the content and thus be held liable.

5. Rules regarding advertising on a news platform

The relationship between the press and advertising implies an obvious interdependence, as long as advertising constitutes an essential source of income

¹⁵ C. Cauffman, C. Goanta, *A New Order: The Digital Services Act and Consumer Protection*, European Journal of Risk Regulation, vol. 12, No. 4/2021, p. 769.

¹⁶ P. Leerssen, *An end to shadow banning? Transparency rights in the Digital Services Act between content moderation and curation*, Computer Law & Security Review, vol. 48, 2023, p. 3.

¹⁷ I. Buri, J. van Hoboken, *The Digital Services Act (DSA) proposal: a critical overview*, in Digital Services Act (DSA) Observatory Institute for Information Law (IViR), University of Amsterdam, 2021, p. 16, available online at: https://dsa-observatory.eu/wp-content/uploads/2021/11/Buri-Van-Hoboken-DSA-discussion-paper-Version-28_10_21.pdf, last accessed on 16.03.2024.

for any publication. Under these conditions, any news platform benefits from a space allocated to advertising.

In advance, we note that the provisions relating to it are not applicable to the services of online platform providers that qualify as micro-enterprises or small enterprises, within the meaning of the definition in Recommendation 2003/361/EC, as stipulated in art. 19, paragraph 1 of Regulations. Exceptions are made by platform providers that qualify as VLOP, i.e. very large online platforms in accordance with art. 33 of the Regulation, i.e. have an average monthly number of active service recipients in the Union greater than or equal to 45 million and that are designated as very large online platforms.

The substantial regulation regarding advertising on online platforms can be found in art. 26, paragraph 1 of the DSA Regulation, according to which: ‘Providers of online platforms that present advertisements on their online interfaces shall ensure that, for each specific advertisement presented to each individual recipient, the recipients of the service are able to identify, in a clear, concise and unambiguous manner and in real time, the following: (a) that the information is an advertisement, including through prominent markings, which might follow standards pursuant to Article 44; (b) the natural or legal person on whose behalf the advertisement is presented; (c) the natural or legal person who paid for the advertisement if that person is different from the natural or legal person referred to in points (b); (d) meaningful information directly and easily accessible from the advertisement about the main parameters used to determine the recipient to whom the advertisement is presented and, where applicable, about how to change those parameters.’

As it follows from the previous text, the European legislator imposed four transparency conditions: (i) identification of the material as advertising (ii) identification of the beneficiary of the advertising activity (iii) identification of the entity that paid for the advertising activity, if it is distinct from the beneficiary and (iv) easy identification of the recipient of the advertising activity.

The purpose of the regulation aims, on the one hand, to make a clear distinction between informative materials posted on the platform and materials intended to promote products or services. In this way, the degree of fidelity of the assessments made by the author of the advertising materials are subjected to a specific level of tolerance, intended for commercial promotion. This rule constitutes an application of the principle of objectivity, as a specific principle of public communication law.

As for the beneficiary of the activity, we note that it is presumed to be the entity that paid for the advertising activity, and if the latter is different, the public is entitled to know, precisely because negative, deceptive or comparative advertising can easily go unnoticed.

In our view, the rules on advertising are elementary and specific to the purpose of the regulation, which is to increase transparency in the use of online platforms.

6. Conclusions

The adoption of the DSA Regulation represents an important landmark in the European Union's activity of unitary regulating digital platforms. With the emergence of online media and communication technology, new means of rapid and exceptionally efficient communication have appeared, such as vlogs, live broadcasts through social networks and a multitude of channels for sharing audio-video content.

These changes led to a reconfiguration of modern journalism, by simplifying both the information transmitted and the way of receiving it.

Currently, a considerable part of the press predominantly operates in the sphere of online publications, either by using a news platform, with a constant audience, loyal through the publications' editorial policy, or by freelancing.

With the entry into force of the DSA Regulation, rules were established to moderate communications, by preventing the dissemination to the public of any information that, according to European law and the national law of the member states, can be classified as illegal content.

Although, at first glance, such a regulation appears as a form of censorship, we note that it pursues a legitimate goal, and constitutes a beginning for the establishment of a legal framework for online platforms, including those in the media.

In agreement with some recent literature,¹⁸ we appreciate that the Regulation incorporates the values of the Charter of Fundamental Rights of the European Union, which gives it a long perspective in the regulated field.

As we have observed, its application involves many particularities when the provider of intermediate services is a news platform, its responsibility being difficult to remove, as long as there is an editorial control over the published materials. In these conditions, the regulation has, however, an encouraging nature for journalists, on the one hand, because it reduces the risk of exposing the public to misinformation, and, on the other hand, because it transfers the burden of responsibility to the publisher, thus preventing a risk of retaliation through judicial action of the person mentioned in the press material, against the journalist.

In essence, we can say that the Regulation contributes to increasing the degree of safety of public communications carried out online, both through its regulatory object and its effects.

¹⁸ A. P. Heldt, *EU Digital Services Act: The White Hope of Intermediary Regulation*, in T. Flew, F. R. Martin, *Digital platform regulation, Global Perspectives on Internet Governance*, Palgrave Macmillan, Cham, 2022, p. 76.

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