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Mitigating Systemic Risks and Freedom of Expression According to the Digital Services Act Model

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Abstract

The present paper aims to investigate the co-regulatory model of Regulation 2022/2065 for mitigating systemic risks arising from disinformation. The ultimate goal, according to the European legislator, is to respect the freedom of expression of users of online platform services and search engines in the context of VLOPs and VLOPEs. We are interested in the compatibility of the regulatory model and the principle of legality enshrined in the Charter of the Fundamental Rights of the European Union (CFREU), as well as the related risks and limitations of the regulation itself to mitigate systemic risks that do not conform to the principle of proportionality. Doubts, problems and criticisms remain numerous and certainly warrant thorough consideration of the suitability of co-regulation and the discipline and activity that entails the full moderation of content originating from online users.

Keywords: Digital Service Act, disinformation, freedom of expression, CFREU, European Union Law, systemic risks, VLOPs, VLOPEs, proportionality principle, online platforms, regulatory functions

1. Introduction

Regulation (EU) 2022/2065 on the Digital Services Act (DSA) (Mantelero, 2022)[1] sought to regulate the related risks associated with providers and intermediary services concerning the transport, temporary storage of information and information concentration (hosting). The DSA has highlighted specific regulations for online platform providers, Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs), as well as their intermediaries, according to Article 33 of the DSA. Intermediary platforms assign self-regulatory functions that comply with the adoption of measures to address their systemic risks posed by their services and the related dissemination of harmful and illegal content online. Thus, intermediaries are granted discretion in implementing the DSA.

This system most likely entails a limitation on the exercise of freedom of expression for the recipients of VLOPs and VLOSEs, according to Article 3 of the DSA (entitled: Definitions). In certain situations, intermediaries can remove malicious users and implement a specific system, compliant with Union law, that limits the exercise of fundamental rights. Our investigation focuses on criticisms regarding users' freedom of expression and the regulatory powers of the DSA, which seek to mitigate systemic risks in VLOPs and VLOSEs. The regulatory

[1] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) (Text with EEA relevance), PE/30/2022/REV/1, OJ L 277, 27.10.2022, pp. 1-102. see also: POLICY AND LEGISLATION, 17 November 2025, Report on application of Article 33 of Regulation (EU) 2022/2065 (DSA) and the interaction of that Regulation with other legal acts. https://digital-strategy.ec.europa.eu/en/library/report-application-article-33-regulation-eu-20222065-dsa-and-interaction-regulation-other-legal

approach takes as an example the mitigation of systemic risks caused by the dissemination of qualified content, including disinformation. Disinformation practically requires the adoption of a code of conduct by VLOPs and VLOSEs in order to fulfill obligations that mitigate DSA risks. The DSA's risk mitigation obligations are general considerations on issues arising from the delegation of regulatory functions, a precise analysis of the functioning of DSA provisions towards the fight against disinformation and the use of a code of good practices in this sector from 2022[1].

2. Regulation, Co-Regulation of DSA and Freedom of Expression

The DSA regulation was an important milestone in the evolution of European Union law in the fields of anti-discrimination and new technologies in order to prevent and reduce the spread of illegal and harmful content online. This EU regulation seeks to defend fundamental rights in the digital world globally by regulating digital content, also influencing non-European legislation. This phenomenon is characterized by the Brussels effect, which has led to various non-EU legislation based on the General Data Protection Regulation (GDPR)[2] as well as on the protection of personal data (Benedik & Stuerzer, 2023). Subsequently, the Artificial Intelligence Act (AIA) (Schott, 2024)[3] is an important milestone in the field of new technologies, becoming one of the main global standards bases for the regulation of AI (Floridi, 2021).

Cultural differences and different European national systems cause conflicts and difficulties even in countries outside the Union, such as the USA. The legislative benchmark is an innovative model (Zingales, 2022). The content of the DSA text takes into account the principles of the e-commerce directive[4] and the regulations regarding the liability of intermediaries and content disseminated online by third parties pursuant to Articles 3, 4, 5, and 6 of the DSA. The DSA regulation is a regulatory paradigm relating to liability and content disseminated through online intermediary services, moving from an approach that includes the ex-post liability of intermediaries to an ex-ante regulation of their activities (Buiten, 2022). The articles from the e-commerce directive and the exemption regime for liability apply to a category of intermediaries. This category concerns VLOPs and VLOSEs, as the DSA applies additional obligations regarding the risks posed to society by the circulation of harmful information online.

The DSA regulation includes a series of obligations that definitively and precisely regulate intermediaries through a self-assessment that complies with the regulations and external control systems of supervision by competent authorities. This approach offers discretion to those implementing the DSA, thus establishing continuous monitoring of their operations. It is part of section five of the DSA, dedicated to VLOPs and VLOSEs, thus assigning intermediaries the task of acting as self-regulators of their own systemic risks inherent in the use of their services (Zingales, 2022). Supervision and control by the European Commission are carried out by independent experts.

[1] European Commission the Strengthened Code of Practice on Disinformation 2022, 16 June 2022. https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation

[2] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, pp. 1–88.

[3] Proposal for a regulation of the European Parliament and of the Council of 21 April 2021 establishing harmonised rules on artificial intelligence (AI Act) and amending certain Union legislative acts. COM/2021/206 final.

[4] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1–16.

Article 34 of DSA[1] requires VLOPs and VLOSEs to assess systemic risks to the Union arising from the general design and operation of their service and related systems, including algorithmic systems for the use of their services. This assessment is conducted annually by introducing a critical impact of the identified systemic risks. Article 34 of DSA does not provide a complete list of systemic risks, but rather assesses certain categories of systemic risks related to the dissemination of illegal content, such as potential negative effects on the protection of fundamental rights despite the related civic debate, electoral processes of public safety, the negative effects of violence in general and the negative consequences for the physical and mental well-being of one's person. Article 34, therefore, regulates: "(...) risk assessments by the date of application referred to in the second subparagraph of Article 33, paragraph 6, and at least annually thereafter, and in any case before the introduction of functionalities that may have a critical impact on the risks identified pursuant to this Article. The risk assessment must be specific to their services and proportionate to the systemic risks, taking into account their severity and likelihood, and must include the following systemic risks: - the dissemination of illegal content through their services; - any current or foreseeable adverse effects on the exercise of fundamental rights, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including freedom and pluralism of the media, enshrined in Article 11 of the Charter, and to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child, enshrined in Article 24 of the Charter, as well as the high level of consumer protection enshrined in Article 38 of the Charter; - any current or foreseeable negative effects on civic debate and electoral processes, as well as on public safety; - any current or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences for the physical and mental well-being of the person (…)".

The risks identified in the VLOPs and VLOSEs are based on Article 35 DSA, which adopts measures that mitigate the risks in a reasonable, proportionate and effective manner. Article 35, paragraph 1 highlights: "(…) the providers of very large online platforms and of very large online search engines shall adopt reasonable, proportionate and effective mitigation measures, adapted to the specific systemic risks identified pursuant to Article 34, paying particular attention to the effects of such measures on fundamental rights (…)".

We must highlight the co-regulatory system whereby supervisory authorities work with intermediaries and define implementing measures pursuant to Article 35 of the DSA. In this spirit, Article 45, paragraph 2, states: "(...) a significant systemic risk within the meaning of Article 34, paragraph 1, arises affecting several very large online platforms or several very large online search engines (...) invite the relevant providers of very large online platforms or the relevant providers of very large online search engines and other providers of very large online

[1] "Article 34, Risk assessment - the Digital Services Act (DSA). (1) Providers of very large online platforms and of very large online search engines shall diligently identify, analyse and assess any systemic risks in the Union stemming from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services (…) Article 33(6), second subparagraph, and at least once every year thereafter, and in any event prior to deploying functionalities that are likely to have a critical impact on the risks identified pursuant to this Article. This risk assessment shall be specific to their services and proportionate to the systemic risks, taking into consideration their severity and probability, and shall include the following systemic risks: (a) the dissemination of illegal content through their services; (b) any actual or foreseeable negative effects for the exercise of fundamental rights, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including the freedom and pluralism of the media, enshrined in Article 11 of the Charter, to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child enshrined in Article 24 of the Charter and to a high-level of consumer protection enshrined in Article 38 of the Charter; (c) any actual or foreseeable negative effects on civic discourse and electoral processes, and public security; (d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being. (2) When conducting risk assessments, providers of very large online platforms and of very large online search engines shall take into account, in particular, whether and how the following factors influence any of the systemic risks referred to in paragraph 1: (a) the design of their recommender systems and any other relevant algorithmic system; (b) their content moderation systems; (c) the applicable terms and conditions and their enforcement; (d) systems for selecting and presenting advertisements; (e) data related practices of the provider. The assessments shall also analyse whether and how the risks pursuant to paragraph 1 are influenced by intentional manipulation of their service, including by inauthentic use or automated exploitation of the service, as well as the amplification and potentially rapid and wide dissemination of illegal content and of information that is incompatible with their terms and conditions. The assessment shall take into account specific regional or linguistic aspects, including when specific to a Member State. (3) Providers of very large online platforms and of very large online search engines shall preserve the supporting documents of the risk assessments for at least three years after the performance of risk assessments, and shall, upon request, communicate them to the Commission and to the Digital Services Coordinator of establishment (…)".

platforms, very large online search engines, online platforms and other intermediary services, where appropriate, as well as the relevant competent authorities, civil society organisations and other interested parties, to participate in the development of codes of conduct, including by establishing commitments to adopt specific risk mitigation measures as well as a framework for regular reporting on the measures taken and their results (...)".

A collaboration between intermediaries and the European Commission defines codes of conduct for systemic risk mitigation measures identified by Article 34. In this regard, Article 35 DSA is linked to the reduction of systemic risks arising from illegal content that is harmful and systematically disseminated in certain ways, especially in the case of disinformation. Article 35 is implemented through moderate measures of users' online content that interferes with their fundamental rights. It is noted that Article 35 DSA allows for the precise and regular functioning of VLOPs and VLOSEs, which are linked to the supervision of the European Commission and implement measures capable of limiting the exercise of fundamental rights for users and their freedom of expression. This regulatory approach criticizes compliance with and conditions that restrict the rights protected by the Charter of the Fundamental Rights of the European Union (CFREU) according to the form and substance of the resulting applications.

Criticisms in this regard refer to systemic risks caused by disinformation and are adopted by the code of conduct implemented by Article 35 and provided for by Article 45 of the DSA. Considerations regarding the functioning of the DSA, which regulates the mitigation of systemic risks of disinformation, are not precise and are only briefly outlined in the preambles of the DSA, namely Articles 83, 84, and 88. These articles effectively address the systemic risks of evaluation, the negative effects on civic debate, public safety, public health for minors and the physical and mental well-being of individuals. Obviously, criticisms regarding the protection of freedom of expression and of users arise from the implementation of Article 35 of the DSA.

3. Limitations on Freedom of Expression Resulting from the Implementation of Article 35 DSA and the Code

Article 35 DSA mitigates the risks posed by disinformation. Its interference with users' freedom of expression and with their protection is enshrined in Article 11 CFREU, which provides for the right to freedom of expression and the interference of public authorities without border restrictions. Article 35 DSA interferes with users' freedom of expression in many ways. This article applies to the variety of situations and purposes that fall within the scope of freedom of expression, as implemented by the entities required to do so. The reference to the measures adopted mitigates the risks posed by disinformation considering also the Code, which includes measures that address restrictions on users' freedom of expression, as well as measures concerning the signatories that comply with Article 35 DSA.

The relevant commitments set forth in Articles 18 and 21 of the Code, highlight the signatories and the limits concerning the harmful dissemination of information. These commitments adopt consistent measures according to the prohibition of the restriction of the visibility of content and of the parameters of recommendation systems. This is how the measures constituting the relevant restrictions on freedom of expression are assessed under Article 11 CFREU.

The CFREU's position aims to prioritize the obligations of the Union and of its member states, while avoiding violations of freedom of expression. The provisions also apply to the institutions, bodies of the Union and to member states, according to Article 51 of the CFREU. There are no obligations for private individuals, but only respect for the fundamental rights of the CFREU and of their relationships with other private individuals. The VLOPs and VLOSEs impose limits on the enjoyment of freedom of expression, according to Article 35 of the DSA. The CFREU applies to restrictions that arise directly from fulfilling an obligation under European law. The commitments of the Code implement the means for its signatories to fulfil obligations under Article 25 of the DSA. The application of Article 35 establishes the restriction of a fundamental right as its source. The quality of restriction is based on a European legislative act, which is precisely necessary for the restriction to comply with the CFREU. This assumption is consistent with the CFREU's restriction within the scope of vertical effects imposed by the Charter itself and the institutions of the Union. The effects on private individuals, according to the Court of Justice of the European Union (CJEU), recognize the horizontal effectiveness of freedom of expression, which does not exclude what is provided for in Article 51, paragraph 1, CFREU (Brkan, 2019; Kellerbauer, Klamert & Tomkin, 2024; Silveira, Araùjo Coehlo, Costa & Cabral, 2024).

The interpretation of this provision takes into account the case law of the CJEU[1], the General Court[2] and the European Court of Human Rights (ECtHR) with the application of Article 10 of the European Convention on Human Rights (ECHR), which includes freedom of expression. The relevant connection is explained in Article 52, paragraph 3 CFREU. The connection with the ECHR is made explicit in Article 52, paragraph 3 CFREU, which provides that the charter includes rights that correspond to those guaranteed by the ECHR, i.e., rights that are equal and conferred by the convention, without including Union law, which provides for extended protection. The protection of fundamental rights is established by the ECHR and guarantees, as a minimum standard, the application of the CFREU, except for the possibility that the charter confers greater protection. This connection between the ECHR and the CFREU is important for the interpretation of freedom of expression in Union law in connection with the fact that the ECHR's case law on freedom of expression develops and finds application in the case law of the CJEU.

Freedom of expression is protected from disinformation under Article 11 (Bayer, Katsirea, Batura, Hoplznagel, Hartmann & Lubianiec, 2021)[3]. The ECHR protects freedom of information, especially from information that is considered false (Villiger, 2023)[4], as well as from information and ideas that are disturbing and offensive[5]. The corresponding disinformation articles content protects freedom of expression of online users according to the principle that false content is disseminated without interference from public authorities. Case law can highlight the interference with freedom of expression and users in the case of VLOPs and VLOSEs and in the prohibition of their content from the code. This position is based on Article 18 of the code, which restricts the visibility of content and the measures envisaged that set recommendation systems in a specific way that exclude users' content from search engine results. The interference with freedom of expression is evident and complies with the ECHR and CJEU's content removal requirements. The violation of Articles 10 and 11 requires compliance with a specific legal obligation. The restriction takes into account the general principles of freedom of expression, despite the content not being removed in itself but limiting its circulation through the media.

[1] CJEU, 20 December 2017, C-434/15, Elite ECLI:EU:C:2017:981, published in the electronic Reports of the cases. 19 December 2019, C-390/18, Airbnb Ireland, ECLI:EU:C:2019:1112, published in the electronic Reports of the cases. 3 December 2020, C-62/19, Star Taxi, ECLI:EU:C:2019:980, published in the electronic Reports of the cases.

[2] General Court, 19 November 2025, T-367/23, Amazon EU Sàrl, ECLI:EU:T:2025:1038, published in the electronic Reports of the cases. 3 October 2025, Zalando, T-348/23, ECLI:EU:C:2025:821, published in the electronic Reports of the cases. 10 September 2025, T-58/24, TikTok, ECLI:EU:T:2025:843, published in the electronic Reports of the cases. 10 September 2025, T-55/24, Meta Platform Ireland Ltd, ECLI:EU:T:2025:842, published in the electronic Reports of the cases. 1st March 2024, T-139/24, WebGroup Czech Republic v. Commission in progress. order 1st March 2024, T-138/24, Aylo Freesites v. Commission, published in the electronic Reports of the cases. 6 February 2025, T-92/25, Google Ireland v. Commission, in progress. 20 September 2024, T- 486/24, NKL Associates v. Commission in progress. In this regard, the General Court can be said to have deemed the relevant quantitative mechanism. It is based on a designation that ultimately seeks to reject the theory used in the Amazon case for related online platforms and marketplaces, which also involve lower risks and respect social networks. The difference lies in the objectives of its designation. Thus, the cases also raise, as was obvious, some criticisms regarding the DSA, especially regarding the designation of VLOPs and VLOSEs as a quantitative mechanism that appears to be important for calculating the Average Monthly Number of Active Recipients, which are applied uniformly whenever necessary. The General Court held that the criteria indicated and based on Article 33 of the DSA do not violate the relevant principle in general terms, nor do they violate legal certainty in connection with the TikTok and Meta cases. This is also suggested by the relevant criteria, which are sufficient and require further precise integration within the framework of the European Commission, given that it exercises the relevant delegation power proposed by the regulation itself. Intermediary service providers have also implemented moderation practices for their content adopted by DSA for legitimate content that violates the terms and conditions of disinformation. Thus, we can say that the DSA is fully applied to the moderation of legitimate content and has assumed a fundamental role, important for the supervisory authority, which also guides the practices and supervised entities towards the direction of respect for the fundamental rights of their users. The conduct affirmed through the management of VLOPs and VLOSEs, as appropriately adapted by DSA, is consistent with the principle of proportionality and in accordance with the concerns and doubts expressed by the Kirchenberg judges.

[3] According to the authors, freedom of expression has found a relative limit through disinformation aimed at manipulating public debate. This behavior lays the foundation for the protection of freedom of expression. Thus, debate develops, which is not immediately apparent, according to the legitimate use associated with freedom of expression and its abuse.

[4] ECtHR, Salov v. Ucraine, num. 65518/01, (2005), par. 113. Dareskizb v. Armenia, num. 61737/08, (2021), par. 71ss.

[5] ECtHR, Handyside v. United Kingdom, num. 5493/72 (1976), par. 49; Observer and Guardian v. United Kingdon, num. 13585/88, (1991), par. 59.

Article 10 of the ECHR applies not only to its own content but also to the means of dissemination.[1] The ECHR affirms freedom of expression when accessing its content.[2] It is noted that recommendation systems also become means of dissemination and shape the online experience for users through the expression of online expressions. According to recommendation systems, intermediaries are free to regulate their own operations, which facilitate the dissemination of content that complies with the CFREU and the ECHR. Disseminating content creates a legal obligation that imposes on the Union and its Member States not to restrict the exercise of freedom of expression.

The relevant interference describes and legitimizes the legal order of the Union only if the requirements of Article 52, paragraph 1, CFREU, namely the principles of legality, legitimacy and proportionality, are respected. These restrictions do not affect the essential content of freedom of expression. The assessment of compliance with these requirements is brought to the attention of the jurisprudence of the ECHR, as are the restrictions on freedom of expression and the restrictions permitted by the CFREU, which do not exceed the relevant applications of the ECHR. The requirement and the level of protection offered by the CFREU are not lower than that guaranteed by the ECHR itself.

The formulation of obligations under Article 35 raises doubts regarding their compatibility with the principle of legality. The related attribution of responsibilities, governing the obligated parties within the framework of the co-regulatory system, paves the way for the principle of proportionality. The conditions set forth in Article 52, paragraph 1, CFREU, which relates to the legitimacy of restrictions and compliance with the relevant essential content of fundamental rights, are not evident. The objectives of this contribution are exposed to criticisms presented by its co-regulatory position and with reference to the fight against disinformation and the protection of the principles of legality and proportionality. These problems begin with criticisms relating to the principle of legality under Article 52, paragraph 1, CFREU.

4. Regulatory Officials, Delegation and Affinity with the Principle of Legality: Co-Regulation of DSA and Evidence

Limitations arising from Article 52, paragraph 1, CFREU (Kellerbauer, Klamert & Tomkin, 2024; Silveira, Araùjo Coehlo, Costa & Cabral, 2024) regarding the exercise of the rights and freedoms guaranteed by the Charter are provided for by the law itself. Interpreting this requirement is essential to the case law, especially from the ECHR and less from the CJEU. It is the same legislation that imposes restrictions on the fundamental rights guaranteed by the Charter. However, it respects the principle of legality. It provides precise rules (Kuner, 2018)[3] and defines the relative scope of limitations on the right being impinged upon[4]. The ECtHR has similarly conditioned respect for the principle of legality in the CJEU by affirming a similar principle that respects its restriction according to a legal basis of national law, to be accessible and also foreseeable (Villiger, 2023)[5]. The relevant jurisprudence of the ECtHR as a law that characterizes the material and not its formal meaning includes various categories of written law but not legislative measures and positive norms at a secondary rank as well as measures adopted by bodies that regulate the professionalism of standard-setting powers independently of their delegates from the European Parliament[6].

The ECtHR includes the notion of "law" as an unwritten right, given that norms derive from case law. "Law" is used when the applicable norm is interpreted by judges who determine the application of the principle of legality within the scope of Article 52, paragraph 1, CFREU. The CJEU has not explicitly invoked the notion derived from the ECHR, thus providing guidance that reflects the notion of its incorporation into European law. The

[1] ECtHR, Autronic AG v. Swiss, num. 12726/87, (1990), par. 47. Murphy v. Ireland, num. 44179/98, (2003), par. 61; Ahmet Yildirim v. Turkey, num. 3111/10, (2012), par. 50; Pirate Bay: Neij and Sunde Kolisoppi v. Sweden, num. 40397/12 (2013); Pendov v. Bulgaria App, num. 44229/11, (2020), par. 53.

[2] ECtHR, Pendov v. Bulgary, num. 44229/11, (2020), par. 53. The ECtHR considered the restriction of freedom of expression and functionality on the website to be a compromise as the website remains technically accessible.

[3] CJEU, 17 December 2015, C-419/14, WebMindLicenses Kft. v. Nemzeti Adóés Vámhivatal Kiemelt Adóés Vám Főigazgatóság, ECLI:EU:C:2015:832, published in the electronic Reports of the cases, par. 81. 21 December 2016, C-203/15 and C-698/15, TELE2Sverige, ECLI:EU:C:2016:970, published in the electronic Reports of the cases, par. 109.

[4] CJEU, 26 July 2017, opinion 1/15, Accord PNR EU-Canada, ECLI:EU:C:2017:656, published in the electronic Reports of the cases, par. 139. 16 July 2020, C-311/18, Facebook Ireland v. Schrems, ECLI:EU:C:2020:559, published in the electronic Reports of the cases, par. 175. 22 April 2022, C-401/19, Republic of Poland v. European Parliament and Council of the European Union, ECLI:EU:C:2022:297, not published, par. 64.

[5] ECtHR, Sunday Times v. United Kingdom, num. 6538/74, (1979), par. 49; Ahmet Yildirim v. Turkey, num. 3111/10, (2012), par. 59.

[6] ECtHR, Sanoma Uitgevers B.V. v. The Netherlands, num. 38224/03, (2010), par. 83.

ECHR principles, as a minimum threshold of protection for human rights and the ECtHR have interpreted the term "law" to ensure a higher level of protection. The lack of precise guidance from the CJEU is based on the precision of the norm, which allows for a restriction that describes its scope and foreseeability for those affected. The quality of norms constitutes a restrictive legal basis and less formal qualification.

5. Adequacy of Harmony Between the Principle of Legality and Article 35 of the DSA

Ascertaining compliance with the principle of legality in an absolute manner, aiming for legal certainty and predictability, means applying the rule that entails the restriction of a fundamental right in a manner necessary for the law to formulate the terms sufficiently, thus allowing for the adaptation of the various types of terms that arise. The moderation obligations for online content and the nature of the specific case regulate and require the provision that formulates the varied terms. In this spirit, the CJEU[1] also recalls the legitimacy of Article 17 of Directive 2019/790, i.e., the DSM directive[2]. In fact, the Kirchenberg judges affirmed the relevant provisions and cases of Article 17, which required broad time limits that leave entities obligated to decide on the precise measures to adopt to fulfill the obligations that conclude the provisions that are part of Article 17 and respect the principle of legality pursuant to Article 52, paragraph 1, CFREU.

The CJEU has confirmed the regulatory legitimacy of delegating important regulatory tasks to private entities, which moderate content and allow for a wide range of discretionary powers to implement actions that significantly impact the exercise and freedom of expression. The criticisms and conclusions of the CJEU under Article 17 concern the assessment and compliance with the principle of legality, highlighting the shortcomings of Article 35 of the DSA with regard to the specification determining the conditions and imposition of restrictions on freedom of expression and the definition of the scope of these restrictions. The relevant CJEU ruling, in conjunction with Article 17 of the DSM Directive, highlights that Article 35 fully complies with the principle of legality, and the different wording, in its application, falls under Article 17 of the DSM Directive. The main criticisms arising from Article 35 respect the principle of legality and define the systemic risks and the conditions under which risk measures and the scope of the resulting restrictions are adopted. The aspects affect the predictability and interference of freedom of expression.

Systemic risks justify the adoption of adaptation measures that are not sufficient and definable within the DSA but identify the VLOPs and VLOSEs. Article 34, paragraph 1, highlights non-exhaustive examples, systemic risks that are formulated for the most part in a varied and broad manner. This approach does not seem sensible and takes into account the European legislator, who does not foresee the systemic risks that arise with the evolution of technology and society. In this context, the VLOPs and VLOSEs are better positioned. The definition of systemic risks as an essential step determines the conditions that, according to Article 35 of the DSA, highlight the adoption of mitigation measures. This is a specific legislation that defines systemic risk, according to Article 34, as a method of identifying risks and criteria for qualitative and quantitative parameters, including cases of risk that have become systemic. The list of public interests is thus at risk. Paragraph 1 is not exhaustive and leaves a question mark regarding the public interests justifying the application of Article 35 and the question of public interests. It is thus justified a risk that arbitrarily applies that article. The list provides broad, definitive public interests given the negative effects of civic debate involving electoral processes, public safety, public health (especially that of minors) and the physical and mental well-being of one's own person. Combating misinformation by defining the public interest as the protection of civic debate and electoral processes delicately strengthens the subject of divergent interpretations.

Online users are unlikely to have any idea about the adaptation measures and the risks they pose civic debates and electoral processes. The accepted criteria generally harm civic debate and electoral processes. Disinformation and measures conflict with public interests according to the provisions of the DSA. The preambles, as social phenomena, are linked to Article 34. Systemic risks are sufficient and define the dissemination of illegal content as having a negative impact on fundamental rights. Illegality includes and verifies the basis of laws within the scope of the Union, which includes the legislation in force and the case law of a fundamental right that appears to be violated.

The legislative text does not provide guidance regarding the severity of systemic risk. It justifies the adaptation of measures leaving their assessment to the discretion of the obliged entities. The legislative text and the preambles, especially Articles 79 to 91, provide detailed examples that apply to Article 35, which specifies

[1] CJEU, 22 April 2022, C-401/19, Republic of Poland v. European Parliament and Council of the European Union, op. cit., parr. 73, 74 and 75.

[2] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.), PE/51/2019/REV/1, OJ L 130, 17.5.2019, pp. 92-125.

non-exhaustive examples without providing other general guidance and conditions for its applicability. The conditions relating to the applicability of the article are social phenomena that are not easily measurable given the lack of general guidance and significant uncertainties of an application nature. Assessing and controlling risks by the application date pursuant to Article 33, paragraph 6, letter b) has a critical impact on the risks identified under that article. The risk assessment specifies its services in a manner proportionate to systemic risks, taking into account the severity and probability, which includes systemic risks such as the dissemination of illegal content through its services; foreseeable negative effects on the exercise of fundamental rights relating to human dignity, taking into account Article 1 of the CFREU and private and family life pursuant to Articles 7, 8, 11, 21, 24 and 38 of the CFREU; foreseeable negative effects on civic debate, electoral processes, and public safety; and any foreseeable, current negative effects on the violation in general and on the protection of public health for minors, as well as the negative consequences for the physical and mental well-being of one's person.

Regulating systemic risks is not an entirely new development in European legislation. It finds precedent in the discipline relating to the supervision of financial institutions[1]. The difference between European legislation and prudential supervision of financial institutions and systemic risks highlights the relative conditions for applicability and the provisions that can be calculated for the indications on calculation methods present in the legislation. Within this sphere, social phenomena are included, from DSA and the general definitions, indications on calculation methods. Disinformation, measurement with an impact on civic debate and electoral processes take into account measures that conflict with activities that are different, with heterogeneous approaches and methods (Green, Gully, Roth, Roy, Tucker & Wanless, 2023) that appear difficult, if not impossible (Nimmo, 2020; Altay, Berriche & Acerbi, 2023). Such reasoning makes the law necessary and the criticisms relating to the definition of systemic risk. Article 35 does not define its own mitigation measures and freedom of expression. Article 1 already requires VLOPs and VLOSEs to pay attention to their effects, the fundamental rights measures that provide a list and examples of mitigating measures. Intermediaries thus have the power to adopt moderation measures relating to their content, which necessarily make it necessary to restrict the visibility of content from blocking it to content from a user account that evaluates and ensures respect for freedom of expression. This makes it difficult for users to predict restrictions that are imposed in the near future.

Article 17 of the DSM Directive as well as the CFREU, have already deemed compatible, according to the principle of legality, to use open-ended concepts to regulate the moderation of online content. Article 17, which indicates restrictions on users' freedom of expression defines the practical modalities for mitigating them. Article 17, paragraph 4, benefits from the exemption and liability regime for communication to the public as well as for content that is shared online, which protects copyright. Service providers and the content that can be shared online, depend on the circumstances. Although they do not determine the practical measures and obligations, users who foresee the type of restrictions that arise from the application of Article 17 within Article 35 do not indicate restrictions that can be imposed by the legislative text.

The gap that highlights legal uncertainty does not appear to be reconcilable with the principle of the CJEU and the legislation imposing a restriction on fundamental rights that define the scope of the restriction itself. Article 35, through its wording, does not clarify the implications that preclude potential limitations on the freedom of expression of the online users. The discretion of intermediaries defines the scope of application of Article 35 and the European Commission monitors and controls its application, i.e., the administrative practice. It is questionable whether the gaps in the legislative text are filled and provided for by the codes of conduct and by guidelines that allow the European Commission to adopt standards pursuant to Article 35, paragraph 3. The codes of conduct, guidelines of the European Commission, and voluntary initiatives will be adopted in the near future in a non-mandatory and non-guaranteed manner. They are not binding sources and do not produce legal effects. Consequently, it will be difficult to classify them as "laws" pursuant to Article 52, and paragraph 1 CFREU. This term derives from ECHR jurisprudence[2]. The regulation of DSA and the mitigation of systemic risks appear to be inconsistent with the conditions that require the restriction of fundamental rights according to the CFREU and the principle of legality.

From the previous paragraphs, we understand that we are faced with a situation that ensures legal certainty through transactions that conflict with the self-regulation of the platforms themselves. The legislator's democratic legitimacy guides its regulatory intervention with a top-down rule based on Article 114 TFEU. By attempting to regulate the lack of legitimacy, negative externalities and platforms, which define the related powers of control over providers and their users, are left under the subsidiarity and proportionality principles.

[1] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 Text with EEA relevance, OJ L 176, 27.6.2013, pp. 1-337.

[2] ECtHR, Sanoma Uitgevers B.V. v. the Netherlands, num. 38224/03 (2010), par. 8.

These principles demonstrate and contribute to the removal of obstacles within a single digital market, which is useful for harmonizing a horizontal solution that guarantees a certain flexibility for Member States. The protection of providers and rights holders precludes the prohibition of discrimination. The inapplicability of the law stems from a justice system that fulfills a nomophylactic function, verifying referrals that lead to a consequence of applicability for the solutions offered. This is due to factual data that do not exclude the quality, the power of the platforms and the actions that imply a conflict with the single digital market, paving the way for a response that will be provided through the rulings of the Kirchenberg judges.

6. Proportionality and Application of Article 35 DSA: Protection of Freedom of Expression and Content Moderation

The delegation of regulatory responsibility to DSA intermediaries, as a consequence of delegation within the framework of the proportionality principle of Article 52, paragraph 1 CFREU, proposes and demonstrates the general structure of DSA, which appears to highlight the protection afforded by restrictions that arise within the framework of compliance with the proportionality principle and the rationale underlying the case within the substance of an application practice.

The DSA provides procedural safeguards to protect freedom of expression to intermediary service providers that are proportionate and non-arbitrary. The procedural choices set out in the DSA regulation include the review of decisions restricting freedom of expression adopted by intermediaries against erroneous or arbitrary decisions, ensuring that no interference is limited. Article 20, paragraph 1 of the DSA, highlights the obligation for online platform providers to provide users with an effective national complaints system that allows for and submits complaints that challenge restrictions and decisions on freedom of expression[1]. Article 20 requires decisions and complaints to justify the supervision of personnel, which does not occur through automated tools. Article 21, paragraph 1 of the DSA provides that affected users have the right to choose their own certified out-of-court dispute resolution body for disputes related to their decisions. Users have the right to appeal to the competent courts of a Member State complaining of a violation of fundamental rights. The signatories to the Code submit their users' complaints to a transparent system pursuant to Article 24 of the same Code. The procedural system facilitates proportionate enforcement pursuant to Article 35 DSA, in accordance with the case law of the CJEU.[2]

Regulation DSA calls for compliance with the principle of proportionality according to Article 14, par. 4.0,[3] which requires its intermediaries to highlight restrictions related to the service used, including content, acting

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[1] "Internal complaint-handling system: (1) Providers of online platforms shall provide recipients of the service, including individuals or entities that have submitted a notice, for a period of at least six months following the decision referred to in this paragraph (...) provider of the online platform upon the receipt of a notice or against the following decisions taken by the provider of the online platform on the grounds that the information provided by the recipients constitutes illegal content (...): (a) decisions whether or not to remove or disable access to or restrict visibility of the information; (b) decisions whether or not to suspend or terminate the provision of the service, in whole or in part, to the recipients; (c) decisions whether or not to suspend or terminate the recipients' account; (d) decisions whether or not to suspend, terminate or otherwise restrict the ability to monetise information provided by the recipients. (2) The period of at least six months referred to in paragraph 1 of this Article shall start on the day on which the recipient of the service is informed about the decision in accordance with Article 16(5) or Article 17. (3) Providers of online platforms shall ensure that their internal complaint-handling systems are easy to access, user-friendly and enable and facilitate the submission of sufficiently precise and adequately substantiated complaints. (4) Providers of online platforms shall handle complaints submitted through their internal complaint-handling system in a timely, non-discriminatory (…) sufficient grounds for the provider of the online platform to consider that its decision not to act upon the notice is unfounded or that the information to (...) it shall reverse its decision referred to in paragraph 1 without undue delay. (5) Providers of online platforms shall inform complainants without undue delay of their reasoned decision in respect of the information to which the complaint relates and of the possibility of out-of-court dispute settlement provided for in Article 21 and other available possibilities for redress. 6.Providers of online platforms shall ensure that the decisions, referred to in paragraph 5 (…)."

According to art. 21, par. 1: "Recipients of the service, including individuals or entities that have submitted notices, addressed by the decisions referred to in Article 20(1) shall be entitled to select any out-of-court dispute settlement body that has been certified (...) Providers of online platforms shall ensure that information about the possibility for recipients of the service to have access to an out-of-court dispute settlement, as referred to in the first subparagraph, is easily accessible on their online interface, clear and user-friendly (…) right of the recipient of the service concerned to initiate, at any stage, proceedings to contest those decisions by the providers of online platforms before a court in accordance with the applicable law."

[2] CJEU, 22 April 2022, C-401/19, Republic of Poland v. European Parliament and Council of the European Union, op. cit., par. 94.

[3] According to art. 14, par. 4: "Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service (…)."

diligently, objectively and proportionately towards the recipients of the service and freedom of expression. The obligation of Article 14, par. 4 limits the application and conditions of the services offered by its users, introducing standards of conduct for intermediaries that respect the relationship with users, including the implementation of moderation practices and their own content. The relevant provision is interpreted as a type of obligation relating to its intermediaries that protects the fundamental rights of users, introducing the indirect horizontal effectiveness of the rights realized through the terms of conditions and services offered by intermediaries (Quintais, Appelman & Fathaigh, 2023). Article 35, par. Article 1 includes adaptation measures for systemic risks that are reasonable, proportionate, effective and that pay particular attention to the effects and measures of fundamental rights. These articles highlight the legislative approach that assigns the regulatory responsibility of intermediaries that become independent co-regulatory regulators to dialogue with the executive (Mylly, 2021). It is clear that the delegation approach of Article 14, paragraph 4, and Article 35, paragraph 1, in conjunction with Article 45, encourages the adoption of codes of conduct in operations with all parties that adequately define the systemic risks identified under Article 34.

This position establishes obligations that respect fundamental rights (Senftleben & Quintais, 2023) and presupposes that intermediaries are responsible for moderation measures and content that complies with the principles of the CFREU and the principle of proportionality. Moderating their own content is a voluntary initiative for intermediaries who fulfill the obligations of Article 35. The definition of fundamental aspects establishes freedom of expression for certain contexts between private entities. Article 14, paragraph 1 highlights intermediary service providers who provide general conditions and information regarding content restrictions and the recipients of their service with reference to the procedures, policies, measures and tools used for content moderation, which include algorithmic decision-making and human review, as well as the procedural rules of a national complaint management system. The user of the services is made aware of possible limitations as a subject through a contractual document and as a guarantee to be able to distinguish the restrictions of his own law in a voluntary manner made available to his intermediaries.

7. Respect for the Principle of Proportionality and Practice of DSA

The willingness and ability of intermediaries ensure a restriction that, in a proportionate manner, seeks to specify the modalities that occur and are problematic for various reasons. A logical intermediary moderates the content that complies with the legislative obligation that drives and decides the measures that, in practice, implement commercial reasoning that respects fundamental rights. The tendency is to adopt an approach that minimizes the risk of non-compliance with the law by strengthening content moderation for risky situations. This risk imposes restrictions on content (overblocking). This risk also highlights and refers to content moderation pursuant to Article 17 of the DSM Directive (Zumbansen, 2007; Hartzog, Melber & Salinger, 2013; Perel & Elkin Koren, 2016; De Gregorio, 2022; Senftleben & Quintais, 2023), which seeks to address the delegation of intermediaries and the related respect for fundamental rights. Disinformation and intermediaries act with users and/or fact-checkers according to the commitments made through the code that prepares sophisticated web manipulation techniques using generative artificial intelligence applications (Goldstein, Sastry, Musser, Di Resta, Gentzel & Sedova, 2023; Akhtar, 2023; Patel & Sattler, 2023).

We cannot ignore the use of automated tools that are becoming increasingly appropriate and combat certain techniques for disseminating disinformation. The use of automated tools poses a risk of overblocking for intermediaries. Article 17 of the DSM Directive and Article 14, paragraph 4 of the DSA (Senftleben, Quintais & Meiring, 2023) transfer to intermediaries the responsibility to define and respect the fundamental rights of their users, which in specific cases can serve as a model in practice. Criticisms arise and concern intermediaries' adoption and interpretation of open concepts as a path to due diligence and proportionality and as a precise application that aligns with their commercial interests and the need to protect the fundamental rights of their users. Consequently, the circumstances concerning the conflict of interests of intermediaries with their users become an aspect of attention for the independent regulators. The principle of proportionality does not respect, refer to, or define the legislative text, i.e., it does not create a distinction between the category of political or commercial content and the category for the creators of their own content, the watchdogs and/or simple users.

Applying proportionality and respecting the fundamental rights imposed by DSA requires intermediaries to consider their own costs and efficiency when structuring the internal processes that govern their content. VLOPs and VLOSEs have a certain degree of discretion implemented between open concepts that constitute a logical, aligned choice that predominantly has commercial interests. VLOPs and VLOSEs effectively encourage the principle of proportionality and risk-based obligations that depend on an obligated entity's resources and characteristics. The connection with cost and efficiency considerations regarding DSA obligations and due

diligence is evident in Article 41 of the preamble to DSA.[1] DSA obligations and their characteristics expose each intermediary to the risk of considerations and costs that take on significant weight in the implementation of Article 35 of the DSA.

There are doubts regarding the principle of proportionality as well as with the moderation of the content of compliance with Article 35 of the DSA, and especially whether VLOPs and VLOSEs act in favor of the public interest and that of users. The DSA highlights disproportionate restrictions on freedom of expression and on control systems. Users use a system of remedies at certain levels. The DSA highlights a system of supervision and regular monitoring of the operations of VLOPs and VLOSEs, which is based at the European level on the European Commission's supervisory authority. Thus, the judicial and extrajudicial control systems redress mechanisms and the European Commission's oversight offer a remedy for the risks of outsourcing and regulatory functions on the part of intermediaries.

8. DSA Extrajudicial Procedures and Complaint Mechanisms

The complaint and redress mechanism proposed by DSA protects restrictions on users' freedom of expression. The provision of this type of mechanism requires, according to Article 20 of DSA, a series of decisions that seek to limit users' freedom of expression. Article 54 of the DSA requires users to seek compensation from providers and intermediary services for damages and losses incurred as a result of violating the obligations established by DSA. The relevant mechanisms seek to mitigate the risk to intermediaries and the erroneous and arbitrary decisions related to moderating content deemed incompatible or illegal with the general conditions. The mechanisms thus effectively fulfill their function. Also, the users are able to fulfill their role in identifying violations and the relevant legislation that affects the means to take action. This guarantees effective and precise redress. An effective remedy that has ensured respect for users' fundamental rights, in accordance with the general principle of effectiveness, which seeks to justify and enforce erroneous and arbitrary decisions by intermediaries. The argument that a complaint mechanism is managed by intermediaries does not guarantee effective protection for their users' freedom of expression. Another argument concerns the risk that the intermediaries do not adequately implement the complaint and appeal mechanisms. Article 20 of the DSA does not provide precise guidance on the structural mechanism. The general terms and tense used reflect the process of designing online interfaces to ensure the exercise of users' complaints and appeal rights.

Article 20, together with Articles 14 and 35, formulates the standard of conduct that requires user-friendly and accessible systems that allow the submission of complaints that are precise, sufficiently reasoned and comprehensive. Online platform providers must handle complaints in a timely, non-discriminatory, non-arbitrary and diligent manner. Compliance with the principle of proportionality pursuant to Articles 144 and 34 helps online platform providers enjoy a certain discretion in deciding and implementing the relevant standards. Doubts and problems arise regarding the timeframes for handling complaints. Article 20, paragraph 4, of the DSA does not fail to provide precise instructions and require providers to rescind the decision without delay. Perhaps the fact that it includes content published on online platforms that lose relevance within a short period of time seems insufficient. In certain cases, they promptly remove the restriction imposed on the content until the remedy is effective for their user. Article 20 does not expressly include a supplier who takes into account the nature and content of the contract as the object of restriction. It differs from the response time requirement due to the late reversal of its decision. We can say that the obligation to differentiate is based on circumstances that aim to interpret the obligations in this regard.

Article 20 does not guarantee online platform providers, but effectively considers any circumstances indicating the need to proceed urgently with the decision review process. A logical provider tends to establish appeal and complaint procedures that involve the least costs, as long as they are granted. Misinformation, shortcomings of Article 20 and the practical implementation of appeal and complaint mechanisms are not remedied by the Code,

[1] According to preamble 14 DSA: "(…) The concept of "dissemination to the public", as used in this Regulation, should entail the making available of information to a potentially unlimited number of persons, meaning making the information easily accessible to recipients of the service in general without further action by the recipient of the service providing the information being required, irrespective of whether those persons actually access the information in question (…) 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 (...) defined in Directive (EU) 2018/1972 of the European Parliament and of the Council, such as emails or private messaging services, fall outside the scope of the definition of online platforms as they are used for interpersonal communication between a finite number of persons determined by the sender of the communication (...) Regulation for providers of online platforms may apply to services that allow the making available of information to a potentially unlimited number of recipients (...) the meaning of this Regulation only where that dissemination occurs upon the direct request by the recipient of the service that provided the information (…)".

but are miscellaneous matters under Article 24. The combination of the legislative text of the DSA and the Code supports online platform providers, who enjoy discretion in structuring complaint mechanisms. Appeals based on risk-related considerations and needs are the basis for inefficient and ineffective mechanisms that do not adequately protect users' freedom of expression. Users who are not motivated to take action and who do not have effective and efficient access to the remaining protections against the illegal conduct of providers and online platforms.

In this way, users create problems for notification and complaint systems as intermediaries (West, 2018; HateAid Report, 2022; Senftleben, Quintais & Meiring, 2023). A certain proactivity is relied upon users seeking redress against decisions restricting freedom of expression, that is, an approach based on a false assumption. It has been shown that users are largely unmotivated. The users file complaints against decisions that seek to limit freedom of expression (Urban & Quilter, 2006). They seek to act and proceed without waiting for an intermediary response (West, 2018). We must expect that in the case of disinformation, the application of the restriction and its own content generates a certain chilling effect that is capable of producing deterrent effects on users. A restriction is thus applied to false content that prevents the user from acting with full awareness. The spread of fake news is affected by the stigma attached to the content's classification and the perceived misinformation resulting from participation in a seemingly inappropriate public debate. This reasoning is discouraging for a user, namely, filing a complaint against a decision made by an intermediary. This does not ensure the proper functioning of complaint mechanisms and related appeals, which are mitigated for the protection and freedom of expression of its users.

9. Finding Out-Of-Court Dispute Resolutions

Article 21 of the DSA[1] provides users with the right to submit complaints. According to Article 20, access to out-of-court dispute resolution through intermediaries is through a valid, specific and certified body in accordance with Article 20, paragraph 3 of the DSA. Out-of-court dispute resolution bodies are certified by the Digital Services Coordinators, which meet the requirements of impartiality and independence. These bodies are independent, external and respectful of the parties involved in the dispute. The bodies are competent to resolve disputes that proceed quickly, effectively and efficiently. In the case of Meta Oversight Board, the court introduced some safeguards that guarantee the independence and reliability of a reorganization that meets the requirements for the dispute resolution (Kuczerawy, 2023).

The certification requirements for out-of-court dispute resolution bodies address the criticisms raised about complaints and appeal mechanisms, which are based on the fact that these bodies are external, independent and respectful of intermediaries by acting expeditiously and motivating users to appeal. The bodies' structured certifications, in the future and the possibility of significant divergences among Member States, have the power to impose dispute resolution procedures that are binding on the parties, all that is provided for in Article 21, paragraph 2 of the DSA. Intermediaries decide to comply with the decisions of out-of-court bodies. Users thus turn to these bodies. Effective protection of freedom of expression is not guaranteed for intermediaries who decide not to comply with the decision-making party's requests. The conclusion reached for complaints and appeal mechanisms does not guarantee effective protection of freedom of expression for users in the event of erroneous decisions that are abusive to intermediaries.

10. Courts and Related Appeals

Appeals filed with the intermediary that has turned to alternative dispute resolution bodies retain the right to appeal to a court. For users, the ability to access a judgment from an independent body means obtaining binding decisions that remedy the shortcomings of other remedial options.

There are no criticisms regarding judicial recourse based on the independence and competence of its own body, which is competent given the doubts regarding users' motivation to act, as well as effective protection for the time required for judicial resolution of disputes within the Union.[2] Judicial procedures are very time-consuming and costly for EU member states. The restrictions applied to online content depend on the possibility of

[1] Article 21, par. 1: "Recipients of the service, including individuals or entities that have submitted notices, addressed by the decisions referred to in Article 20(1) shall be entitled to select any out-of-court dispute settlement body that has been certified in accordance with paragraph 3 of this Article (...) Providers of online platforms shall ensure that information about the possibility for recipients of the service to have access to an out-of-court dispute settlement, as referred to in the first subparagraph, is easily accessible on their online interface, clear and user-friendly (…) prejudice to the right of the recipient of the service concerned to initiate, at any stage, proceedings to contest those decisions by the providers of online platforms before a court in accordance with the applicable law (…)".

[2] European Commission 2025: COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN CENTRAL BANK, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, 2025 EU Justice Scoreboard, 01.07.2025 COM (2025) 375 final.

obtaining precautionary measures, which are not always possible. The news published online take into account the time constraints and the possibility of obtaining precautionary measures.

11. The Role of the European Commission and the Oversight Mechanisms for VLOPs and VLOSEs Through the DSA Regulation

The discretion of VLOPs and VLOSEs is linked to oversight systems, with investigative powers of a sanctioning nature and oversight for the correct implementation of the DSA. These screening and oversight systems, through the European Commission, seek to verify the contribution of the principle of proportionality, which respects the effective protection of users' freedom of expression.

The DSA regulation and the control mechanisms provided for in Articles 35, paragraphs 2 and 3, 37, 40, 45, paragraphs 3 and 4, and 65 and the following indicate ex ante that VLOPs and VLOSEs are suitable and that they comply with the DSA obligations and the ex post control mechanisms on their operation.

Article 35, paragraphs 2 and 3 establish a committee that collaborates with the European Commission and publishes the reports and practices of VLOPs and VLOSEs that monitor identified systemic risks. This allows the ability to guide its providers towards applying DSA obligations that best respect the fundamental rights of its users, limiting the discretion offered by the DSA text.

It is immediately apparent that, pursuant to Article 40, paragraph 1 of the DSA,[1] the European Commission may request access to VLOP and VLOSE data for the purpose of monitoring and evaluating its compliance with the DSA's operations and provisions. Another ex-post control concerns the independent review required by Article 37, paragraph 1, for VLOPs and VLOSEs. This has to do with the evaluation of the systemic risk mitigation obligations, which are related to the codes of conduct, protocols and the signatories' crisis management.[2] The relevant reviews conducted by the organizations meet the requirements of independence and professional ethics. Thus, each type of review complies with the relevant obligations and commitments of VLOPs and VLOSEs, whether positive, negative, and/or positive with observations. A negative review opinion is accompanied by a report that provides operational recommendations for remedial and implementation measures. The VLOPs and VLOSEs receive negative reviews, which take into account their recommendations and address any shortcomings that arise in order to adopt a report suitable for review, describing the measures adopted. In this way, operational recommendations, reasoning for selection and alternative measures are implemented. The review system takes into account that the European Commission has access to the reports of the independent organizations of the VLOPs and VLOSEs pursuant to Article 40 of the DSA. And this pursuant to the European Commission's supervisory and investigative powers exercise provided for in Articles 67, 68, 69, and 72 of the DSA.

Information gathering is necessary for carrying out inspections and monitoring actions. This is a supervisory and control system independent of the European Commission. It is logical that the European Commission, through independent auditors, carries out these actions on behalf of the VLOPs and VLOSEs.[3] This remedy prevents any audit judgments that are negative and require financial sanctions pursuant to Articles 70, 71, 73, and 74 of the DSA.

Another ex ante control mechanism is linked to the European Commission's direct investigative powers, which are based on Articles 66 et seq. of the DSA. The European Commission thus initiates an investigative procedure that adopts its own decision, which is not compliant with the imposition of financial sanctions as established in Articles 73 and 74 of the DSA. Within this framework, provisional measures exist through a procedure established in Article 70 of the DSA. However, according to Article 71 of the DSA, the European Commission makes the commitments undertaken by a VLOP or a VLOSE binding. The European Commission has exercised its powers of control and oversight over information through control systems established by the DSA

[1] Art. 40, par. 1: "(…) Providers of very large online platforms or of very large online search engines shall provide the Digital Services Coordinator of establishment or the Commission, at their reasoned request and within a reasonable period specified in that request, access to data that are necessary to monitor and assess compliance with this Regulation (…)".

[2] Art. 37, par. 1: "(…) Providers of very large online platforms and of very large online search engines shall be subject, at their own expense and at least once a year, to independent audits to assess compliance with the following: (a) the obligations set out in Chapter III; (b) any commitments undertaken pursuant to the codes of conduct referred to in Articles 45 and 46 and the crisis protocols referred to in Article 48 (…)".

[3] According to art. 37, par. 6: "(…) Providers of very large online platforms or of very large online search engines receiving an audit report that is not 'positive' shall take due account of the operational recommendations addressed to them with a view to take the necessary measures to implement them (…) adopt an audit implementation report setting out those measures (…) shall justify in the audit implementation report the reasons for not doing so and set out any alternative measures that they have taken to address any instances of non-compliance identified (…)".

autonomously as appropriate. Article 45 includes the relevant intervention by the European Commission and the Committee regarding the development and implementation of codes of conduct. Thus, the European Commission and the Committee influence the content of codes of conduct. Recipients who, according to the DSA rules, indirectly influence the content, which facilitates and encourages their own development according to Article 45, par. 11, do not participate in the drafting of their own codes.[1]

In this spirit, the European Commission and the Committee monitor the adaptation of the codes of conduct through their own mechanism and through the measures that adopt the results envisaged by the code itself, according to Article 45, par. 3 DSA.[2] Section X of the code already provides that the signatories are committed to submitting their periodic reports to the European Commission. The signatories must also adapt to the code and to the resulting results envisaged in Articles 38 and 44. The European Commission and the Committee seek to assess whether the codes of conduct can meet the purposes that take into account any key indicators for providing services through their conclusions and publications. Article 45, par. 4 systematically provides for the codes of conduct. The European Commission and the Committee invite the signatories to also adopt the relevant measures that are necessary in this regard.

12. European Commission Supervision: Problems and Solutions

From the previous paragraphs, we have learned that mechanisms and tools exist to protect the fundamental rights of platform users as well as online search engines. This ensures a level of scrutiny and broad discretionary control, which is attributed to VLOPs and VLOSEs through fulfillment of the obligations of Article 35 of the DSA. The European Commission thus acts ex ante by adopting practices, guidelines and recommendations on mitigation measures that influence the content of codes of conduct developed pursuant to Article 45. It also ensures, pursuant to Article 35, that it does not excessively interfere with its users' right to freedom of expression. The European Commission thus has numerous tools for ex post monitoring of codes of conduct, particularly through independent reviews. The European Commission thus benefits from a continuous flow of information relating to the obliged entities, which is effective under its investigative powers.

The reasoning is based on the European Commission's control through mechanisms that do not allow for the protection of users' freedom of expression. The DSA, as an authority with administrative powers, together with the European Commission, continuously monitors VLOPs and VLOSEs. According to Article 66 of the DSA, the European Commission initiates administrative proceedings if it suspects VLOPs or VLOSEs of attempting to violate the provisions of the DSA. The European Commission's conferral of powers is quite problematic since the European Commission is not an independent authority but an executive body that, through ties to political power, lays the foundations of the Union's institutional system, pursuant to Article 17, paragraph 7, TEU (Kellerbauer, Klamert & Tomkin, 2024). Political pressure plays a primary role in defining applicable rules to the infrastructures managed by the so-called gatekeepers. This arrangement thus presents obvious risks to users' freedom of expression, considering the oversight of countermeasures. Close cooperation and ongoing dialogue with the entities overseen by the European Commission are linked to the political authorities, which participate in defining mechanisms that decide whether or not content and restrictions are acceptable.

The resulting risks of attribution to the European Commission's supervisory powers result in the participation of the European Digital Services Committee in the decision-making processes for the supervision and activities of VLOPs and VLOSEs, in accordance with Section 5 of the DSA, as well as Section 6, which refers to codes of conduct and related crisis protocols. The Committee participates in the relative supervision of VLOPs and VLOSEs, which is mitigated according to the political considerations influencing the European Commission's decisions. The Committee includes and represents the Digital Services Coordinator (DSC) in accordance with Article 62, paragraph 1 of the DSA.

Article 50 of the DSA requires member states to ensure that the DSC operates with full independence and autonomy to manage the budgets and adequate resources required for its functions. The impartiality and independence guarantee the Committee's work. The Committee's independence includes to the states the factors

[1] Art. 45, par. 1: "(…) The Commission and the Board shall encourage and facilitate the drawing up of voluntary codes of conduct at Union level to contribute to the proper application of this Regulation (…) challenges of tackling different types of illegal content and systemic risks, in accordance with Union law in particular on competition and the protection of personal data (…)".

[2] Art. 45, par. 3: "(…) When giving effect to paragraph1 and 2, the Commission and the Board, and where relevant other bodies, shall aim to ensure that the codes of conduct clearly set out their specific objectives, contain key performance indicators to measure the achievement of those objectives and take due account of the needs and interests of all interested parties, and in particular citizens, at Union level. The Commission and the Board shall also aim to ensure that participants report regularly to the Commission and their respective Digital Services Coordinators of establishment on any measures taken and their outcomes, as measured against the key performance indicators that they contain (…)".

that foresee the participation of other national authorities. The DSA does not require compliance with independence requirements. The European Commission chairs the Committee and provides approval for the adoption of internal regulations, although it does not have a veto right under Article 62 of the DSA. The Committee has an advisory role as well as the task of supporting the European Commission within the scope of the DSA. As an independent body, it has its own effects and does not have supervisory powers of a sanctioning or corrective nature. The Committee's presence is not sufficient to address the risks arising from the attribution of supervisory functions to the European Commission as a mitigating measure for these types of risks and as a structure that acts in a specific manner.

In practice, the oversight system highlights the content of DSA as part of the intermediaries with weaknesses. The risks to users' freedom of expression attribute the supervisory functions to an independent institution that participates in the same committee, without balancing its connection with the political power of the European Commission.

13. Conclusions

The work of DSA is based on co-regulation that seeks to regulate VLOPs and VLOSEs with the aim of bringing future benefits. In this context, the rules adapt flexibly to the specific situations and systemic risks that arise. These benefits are accompanied by risks that affect the freedom of expression of users within the DSA framework. Mitigating systemic risks occurs through Article 52 CFREU. The shortcomings of the DSA regulation, which respects the principle of legality, are evident. DSA appears to respect the principle of proportionality. Its application is highlighted due to the risk of disproportionate restrictions, as well as the risk posed by the control and actions of intermediaries that do not guarantee effective protection of their users' freedom of expression.

Intermediary services prioritize their content before adopting DSAs, which operate legitimately and precisely in terms that influence disinformation.

The DSA regulation has broad application within the moderation of legitimate content, occurring at a level of direct obligation under its own law. The European Commission thus assumes an important role as a supervisory authority, guiding practices for supervised entities in a direction that respects the fundamental rights of users. The right direction is possible from VLOPs and VLOSEs, which adapt DSAs in a manner that respects the principle of proportionality and the problems that have arisen. However, the problem remains that the European Commission, as an executive branch and as an institution, has political influence and decides on sensitive aspects concerning the exercise of freedom of expression online. Its interference with freedom of expression results in the implementation of Article 35, which does not respect the principle of legality. The practical implications of DSA and the level at which the European Commission is able to guide towards a greater, more precise adaptation and implementation of the content of the regulation under investigation remain debatable.

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