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The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?¹

João Pedro Quintais² and Sebastian Felix Schwemer³

Abstract

On 15 December 2020, the European Commission published its proposal for a Regulation on a Single Market for Digital Services (Digital Services Act). It carries out a regulatory overhaul of the 21-year-old horizontal rules on intermediary liability in the Directive and introduces new due diligence obligations for intermediary services.

Our analysis illuminates an important point that has so far received little attention: how would the Digital Services Act’s rules interact with existing sector-specific *lex specialis* rules? In this paper, we look specifically at the intersection of the Digital Services Act with the regime for online content sharing service providers (OCSSPs) set forth in art. 17 of Directive (EU) 2019/790 on copyright in the Digital Single Market (CDSM Directive). At first glance, these regimes do not appear to overlap as the rules on copyright are *lex specialis* to the Digital Services Act. A closer look shows a more complex and nuanced picture. Our analysis concludes that the DSA will apply to OCSSPs insofar as it contains rules that regulate matters not covered by art. 17 CDSM Directive, as well as specific rules on matters where art. 17 leaves margin of discretion to Member States. This includes, to varying degrees, rules in the DSA relating to the liability of intermediary providers and to due diligence obligations for online platforms of different sizes. Importantly, we consider that such rules apply even where art. 17 CDSM Directive contains specific (but less precise) regulation on the matter.

From a normative perspective, this might be a desirable outcome, to the extent that the DSA aims to establish “uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected”. Based on our analysis, we suggest a number of clarifications that might be help achieve that goal.

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1. Introduction

On 15 December 2020, the European Commission published its proposal for a Regulation on a Single Market for Digital Services (Digital Services Act, DSA)⁴, which amends the e-Commerce Directive⁵ for certain internet intermediaries. The DSA carries out a regulatory overhaul of the 21-year-old horizontal rules on intermediary liability in the Directive. In this paper, we look at how the DSA’s rules would interplay with sector-specific, *lex specialis* rules. This question is relevant both for specific EU legislation, such as on copyright⁶ and terrorist content⁷, as well as national sector regulation. The focus of our analysis here is on online platforms and copyright-protected material.⁸

With regard to copyright-protected material, art. 17 of the Directive on copyright in the Digital Single Market (CDSM Directive) establishes a new liability regime for online content-sharing service providers (OCSSPs). These rules are due to be implemented by EU Member States on 7 June 2021. Both art. 17 CDSM Directive and multiple provisions of the DSA impose obligations on how online platforms deal with illegal information. Whereas art. 17 targets copyright infringing content, the DSA targets illegal content in general (including that which infringes copyright).

This raises the question of how the two frameworks will interact once both enter into force. This question is of high relevance, first and foremost, where the frameworks differ. At first sight, these regimes will not overlap since art. 17 is *lex specialis* to the DSA. A closer look, however, reveals a much more complex picture. The DSA is complementary to art. 17, and imposes a number of additional obligations on online platforms that qualify as OCSSPs. But the extent to which these obligations apply – and in some case whether they do apply – is unclear. This paper examines and maps this underexplored intersection between the CDSM Directive and the DSA. The analysis illuminates a point that has so far receives little attention: the extent to which the DSA provides a new regulatory approach to online platforms through horizontal rules that extend to most corners of EU law, even where that reach appeared precluded or limited by specific legislation.

⁴ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825 final. For ease of reference, we refer to this legislative proposal as “DSA” in the main body of the text and “DSA proposal” in the footnotes.

⁵ 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 [2000] OJ L178/1 (e-Commerce Directive).

⁶ 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 (CDSM Directive).

⁷ See European Parliament, Press Room, New rules adopted for quick and smooth removal of terrorist content online (28.04.2021), <https://www.europarl.europa.eu/news/en/press-room/20210422IPR02621/new-rules-adopted-for-quick-and-smooth-removal-of-terrorist-content-online> (noting the approval in the European Parliament of the post-trilogue version of the new Regulation).

⁸ For the purposes of simplicity, we use the term copyright-protected “material” to cover both works protected by copyright and other subject matter protected by related rights.

The paper proceeds as follows. After this introduction (1), we provide a snapshot of the complex regime set out in art. 17 CDSM Directive, providing a baseline understanding for the subsequent analysis (2). We then move to the heart of our analysis, explaining why and how the DSA liability regime and especially its asymmetric due diligence obligations apply to online platforms that host and provide access to copyright protected content, despite – and in addition to – the specific rules in art. 17 CDSM Directive (3). We conclude with key findings of our analysis and suggestions for clarifications in the further legislative process (4).

2. OCSSPs and art. 17 CDSM Directive

2.1. Overview

OCSSPs are a novel concept defined in art. 2(6) CDSM Directive, with further guidance in recitals 62 and 63. They are providers of an information society service whose main purpose is to store and give the public access to a large amount of protected content by its users, provided it organises and promotes that content for profit-making purposes. The definition also contains a number of exclusions aimed at services that are either not aimed primarily at giving access to copyright-protected content and/or are primarily not for-profit (e.g., service providers like Skype, Dropbox, eBay, Wikipedia, ArXiv.org and GitHub).⁹

While this concept is new to the copyright *acquis*, OCSSPs do not appear to constitute a wholly new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities or functions were previously currently regulated in different legal instruments, such as the e-Commerce Directive¹⁰, the InfoSoc Directive¹¹ and the Enforcement Directive.¹² Figure 1 below represents this relationship.

⁹ See art. 2(6) para.2 CDSM Directive. See also art. 17(6) DSM Directive on startup OCCSPs.

¹⁰ See art. 14 e-Commerce Directive.

¹¹ See especially art. 3 (right of communication to the public) and art. 8(3) (injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right) InfoSoc Directive.

¹² See especially arts. 5 and 11 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004) (Enforcement Directive).

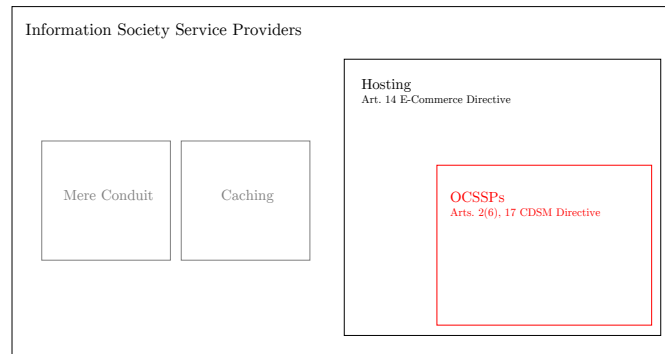


Figure 1. OCSSPs in the context of the e-Commerce Directive

Art. 17 is an extremely complex legal provision. As Dusollier notes, it is the “monster provision” of the Directive, “both by its size and hazardousness”.¹³ There is perhaps no better testament to this than the wealth of legal scholarship that already exists on art. 17, even before its national implementation deadline.¹⁴

¹³ Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’ (2020) 57 Common Market Law Review 979.

¹⁴ There is already significant scholarship art 17. See e.g. Matthias Leistner, ‘European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?’ [2020] Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ) <<https://papers.ssrn.com/abstract=3572040>> accessed 17 April 2020; Axel Metzger and others, ‘Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law – Comment of the European Copyright Society’ (European Copyright Society 2020) European Copyright Society Opinion ID 3589323 <<https://papers.ssrn.com/abstract=3589323>> accessed 4 July 2020; Sebastian Felix Schwemer, ‘Article 17 at the Intersection of EU Copyright Law and Platform Regulation’ (2020) 3/2020 Nordic Intellectual Property Law Review <<https://papers.ssrn.com/abstract=3627446>> accessed 4 July 2020; Thomas Spoerri, ‘On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market’ (2019) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-2-2019/4914>>; Giancarlo Frosio, ‘Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity’ [2020] IIC - International Review of Intellectual Property and Competition Law <<https://doi.org/10.1007/s40319-020-00931-0>> accessed 4 July 2020; Maxime Lambrecht, ‘Free Speech by Design – Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive’ (2020) 11 JIPITEC <<http://www.jipitec.eu/issues/jipitec-11-1-2020/5080>>; Gerald Spindler, ‘The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?’ 10 JIPITEC 334; Krzysztof Garstka, ‘Guiding the Blind Bloodhounds: How to Mitigate the Risks Art. 17 of Directive 2019/790 Poses to the Freedom of Expression’, *Intellectual Property and Human Rights* (4th edn, Kluwer Law International 2019) <<https://papers.ssrn.com/abstract=3471791>> accessed 8 April 2020; Dusollier (n 15); Jan Bernd Nordemann and Julian Wiblinger, ‘Art. 17 DSM-RL – Spannungsverhältnis Zum Bisherigen Recht?’ [2020] GRUR 569; Martin Husovec and João Pedro Quintais, ‘How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive’ [2021] GRUR

In simple terms, art. 17 states that OCSSPs carry out acts of communication to the public when they give access to works/subject matter uploaded by their users. As a result, these providers become directly liable for their users' uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for copyright relevant acts, previously available to many of them under art. 14(1) e-Commerce Directive. Arguably, this makes art. 17 *lex specialis* to the e-Commerce Directive.¹⁵

The provision then introduces a complex set of rules to regulate OCSSPs, including a liability exemption mechanism in paragraph (4), and a number of what can be referred to as mitigations measures and safeguards.

The liability exemption mechanism is comprised of best efforts-obligations for preventive measures, including those aimed at filtering content *ex ante*, at notice and stay-down, and at notice and takedown.¹⁶ In particular, art. 17(4) establishes three cumulative conditions for this liability exemption mechanism. The first condition is that OCSSPs must demonstrate to have made best efforts to obtain an authorisation.¹⁷ If this obligation is met, then OCSSPs are subject to two further cumulative conditions in paragraphs (b) and (c). Namely, they must demonstrate that they have made: (i) best efforts to ensure the unavailability of specific works for which the right holders have provided them with the relevant and necessary information; and (ii) acted expeditiously, subsequent to notice from right holders, to take down infringing content and made best efforts to prevent its future upload. Condition (i) appears to impose what critics label an upload filtering obligation, whereas condition (ii) introduces both a notice-and-takedown mechanism (similar to that of art. 14 e-Commerce Directive) and a notice-and-stay-down (or re-upload filtering) obligation.¹⁸

Among the mitigations measures and safeguards that art. 17 includes we find the following. First, the requirements of a proportionality assessment and the identification of relevant factors for preventive measures.¹⁹ Second, a special regime for small and new OCSSPs.²⁰ Third, a set of mandatory exceptions akin to user rights or freedoms that are designed as obligations

International <<https://doi.org/10.1093/grurint/ikaa200>> accessed 3 May 2021; Martin Husovec and João Quintais, 'Too Small to Matter? On the Copyright Directive's Bias in Favour of Big Right-Holders' in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights*. (OUP 2021) <<https://papers.ssrn.com/abstract=3835930>> accessed 3 May 2021.

¹⁵ See e.g. Miquel Peguera, 'The New Copyright Directive: Online Content-Sharing Service Providers Lose ECommerce Directive Immunity and Are Forced to Monitor Content Uploaded by Users (Article 17),' (*Kluwer Copyright Blog*, 26 September 2019) <<http://copyrightblog.kluweriplaw.com/2019/09/26/the-new-copyright-directive-online-content-sharing-service-providers-lose-e-commerce-directive-immunity-and-are-forced-to-monitor-content-uploaded-by-users-article-17/>> accessed 13 April 2020.

¹⁶ Art. 17(4) (b) and (c) CDSM Directive.

¹⁷ On the interpretation of this condition, see e.g. Metzger and others (n 16).

¹⁸ For an analysis of these preventive obligations see Martin Husovec, "How Europe Wants to Redefine Global Online Copyright Enforcement" (2019). In: Tatiana Eleni Synodinou (ed.), *Pluralism or Universalism in International Copyright Law (Kluwer law, Forthcoming)*, <http://dx.doi.org/10.2139/ssrn.3372230>.

¹⁹ Art. 17 (5) CDSM Directive.

²⁰ Art. 17 (6) CDSM Directive.

of result expressly based on fundamental rights.²¹ Fourth, a clarification that art. 17 does not entail general monitoring – a similar prohibition to that set out in art. 15 e-Commerce Directive.²² Fifth, a set of procedural safeguards, including an in-platform complaint and redress mechanism and rules on out of court redress mechanisms.²³

Finally, art. 17(10) tasks the European Commission (EC) with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSSPs and rights holders and to establish best practices regarding the appropriate industry standards of professional diligence. At time of writing, the dialogues have taken place and the Commission has published a preliminary targeted consultation document, but not yet the final guidelines.²⁴

2.2. Normative hierarchy of obligations and safeguards

In addition to the overview above, it is important for the purposes of our analysis to further explain the normative hierarchy embedded in art. 17, as well as provide additional detail on its complaint and redress rules.

Art.17(7) includes a general and a specific clause on E&Ls. The general clause is contained in the first sub-paragraph, which states that the preventive obligations in 4(b) and (c) should not prevent that content uploaded by users is available on OCSSPs if such an upload does not infringe copyright, including if it is covered by an exception.²⁵ The second paragraph of art. 17(7) CDSM Directive includes a special regime for certain E&Ls: (i) quotation, criticism, review; (ii) use for the purpose of caricature, parody or pastiche.²⁶ Additionally, art. 17(9)

²¹ Art. 17 (7). CDSM Directive.

²² Art. 17(8). See, on this topic, Martin Senftleben and Christina Angelopoulos, ‘The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market’ (IViR; CIPIL 2020) <<https://papers.ssrn.com/abstract=3717022>> accessed 29 October 2020.

²³ Art. 17(9).

²⁴ European Commission, ‘Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market’ <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68591> accessed 12.12.2020. For an discussion on the stakeholder dialogues, see Paul Keller, ‘Article 17 Stakeholder Dialogue: What We Have Learned so Far – Part 1’ (*Kluwer Copyright Blog*, 13 January 2020) <<http://copyrightblog.kluweriplaw.com/2020/01/13/article-17-stakeholder-dialogue-what-we-have-learned-so-far-part-1/>> accessed 7 May 2021; Paul Keller, ‘Article 17 Stakeholder Dialogue: What We Have Learned so Far – Part 2’ (*Kluwer Copyright Blog*, 14 January 2020) <<http://copyrightblog.kluweriplaw.com/2020/01/14/article-17-stakeholder-dialogue-what-we-have-learned-so-far-part-2/>> accessed 7 May 2021.

²⁵ This should be read in combination with the statement in Article 17(9) to the effect that the DSM Directive “shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law”. In this respect, Recital 70 emphasizes the need for the preventive obligations to be implemented without prejudice to the application of E&Ls, “in particular those that guarantee the freedom of expression of users”. See João Pedro Quintais and others, ‘Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics’ (2020) 10 JIPITEC <<https://www.jipitec.eu/issues/jipitec-10-3-2019/5042>>.

²⁶ These were optional E&L in arts. 5(3)(d) and (k) of the InfoSoc Directive, which have not been implemented in all Member States; where they have, the implementations differ.

requires that OCSSPs inform users in their terms and conditions of the user’s right to use works under exceptions.²⁷

One key feature of the legal design of art. 17 is that paragraph (7) translates into an obligation of result. That is to say, Member States must ensure that these exceptions are respected despite the preventive measures in art. 17(4). This point matters because paragraph (4) merely imposes “best efforts” obligations. The different nature of the obligations, underscored by the fundamental rights-basis of paragraph (7)²⁸, indicates a normative hierarchy between the higher-level obligation in paragraph (7) and the lower-level obligation in paragraph (4). This matters not only for legal interpretation of art. 17 in general but also for the assessment of content moderation obligations in this legal regime. For instance, this legal understanding justifies the view that to comply with art. 17 it is insufficient to rely on *ex post* complaint and redress mechanisms in art. 17(9). It is also required to have *ex ante* safeguards that avoid the overlocking of uploaded content by filtering content technologies used by OCSSPs that are incapable to carry out the type of contextual assessment required under art. 17(7).²⁹ It is on this basis that the Poland filed an action for annulment against art. 17 for failure to sufficiently safeguard the right to freedom of expression of users.³⁰

On top of these potentially conflicting obligations, art. 17(9) further includes certain *ex post* or procedural safeguards at: (i) the platform level, and (ii) the out-of-court level.³¹

At the platform level, Member States are mandated to provide that OCSSPs “put in place an *effective and expeditious complaint mechanism* that is available to users of their services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them”.³² These mechanisms are further circumscribed insofar as complaints “shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review”.³³ The latter human review-criterion implies that

²⁷ Art. 17(9) para. 4 CDSM Directive.

²⁸ See e.g. recital 70 CDSM Directive.

²⁹ See Quintais and others (n 28); Martin Husovec, ‘Over-Blocking: When Is the EU Legislator Responsible?’ (LSE 2021) Working Paper ID 3784149 <<https://papers.ssrn.com/abstract=3784149>> accessed 4 May 2021; Christophe Geiger and Bernd Justin Jütte, ‘Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match’ [2021] GRUR International <<https://academic.oup.com/grurint/advance-article-abstract/doi/10.1093/grurint/ikab037/6169057?redirectedFrom=fulltext>> accessed 4 May 2021.

³⁰ Case C- 401/19, Poland v Parliament and Council. Arguing that the Court should invalidate art. 17 on these ground, see Geiger and Jütte (n 32); Husovec (n 32).

³¹ In this paper, we do not examine the third level of safeguards in art. 17(9) CDSM Directive, relating to judicial authority or court level.

³² Emphasis added. Note that the requirement is on Member States, compared to the ensuring of unavailability which is on the platforms. This first aspect resembles the Commission’s original proposal from September 2016, where it suggested in art. 13(2) that ‘Member States shall ensure that the service providers ... put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures’, see Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593.

³³ Art. 17(9)(2), second sub-paragraph CDSM Directive (emphasis added). On a critique of the ‘elastic timeframe’ see Martin Senftleben, “Bermuda Triangle – Licensing, Filtering and Privileging User-Generated Content Under

everything leading up to a dispute can be processed by the platform in an automated fashion by algorithms.³⁴ It is further specified that these mechanisms should allow “users to complain about the steps taken with regard to their uploads, *in particular* where they could benefit from an *exception or limitation* to copyright in relation to an upload to which access has been disabled or that has been removed”.³⁵

Furthermore, the provision stipulates a justification-duty on rights holders. The reasons for a rights holder’s request to make content unavailable needs to be “duly justified”.³⁶ The decision at this level remains with the platform, but as Senftleben notes, “[t]he underlying legal assessment, however, is likely to be cautious and defensive (...) [and] a generous interpretation of copyright limitations serving freedom of expression seems unlikely, even though a broad application of the right of quotation and the parody exemption would be in line with CJEU jurisprudence”.³⁷ In other words, there is a risk of overenforcement.³⁸

In addition to the platform-based procedural safeguards, also out-of-court redress mechanisms for the impartial settlement of disputes are to be put in place by Member States.³⁹ This mechanism is “without prejudice to the rights of users to have recourse to efficient judicial remedies (...)”.⁴⁰ Specifically in relation to exceptions, “Member States shall ensure that users

the New Directive on Copyright in the Digital Single Market” (2019) 41 European Intellectual Property Review 480. In its Council vote, Germany suggests the timeframe to be understood “as rapidly as possible”, see Draft Directive of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (first reading), Statements, (Council of the European Union, 15 April 2019) <<https://data.consilium.europa.eu/doc/document/ST-7986-2019-ADD-1-REV-2/en/pdf>> [Statement by Germany, point 7].

^{34.} See similarly Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, 6.3.2018, [2018] L 63/50, points 20 and 27 in relation to proactive measures on human oversight and in the context of data protection *see, e.g.*, Article 22(3) 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). See also Schwemer (n 16); Sebastian Schwemer and Jens Schovsbo, ‘What Is Left of User Rights? –Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime’ 17.

^{35.} Recital 70 (emphasis added).

^{36.} Article 17(9) sub-para. 2 CDSM Directive.

^{37.} See Senftleben (n 36).

^{38.} For empirical work on overenforcement, *see, e.g.*, Kris Erickson & Martin Kretschmer, *Empirical Approaches to Intermediary Liability*, CREATE Working Paper 2019/6, (2019), pp. 10 ff.; Jennifer Urban, Joe Karaganis, & Brianna Schofield, *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 Journal of the Copyright Society (2017); Sharon Bar-Ziv & Niva Elkin-Koren, *Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown*, 50 Connecticut Law Review (2017); specifically in the context of YouTube and parodies, *see* Kris Erickson & Martin Kretschmer, *This Video Is Unavailable: Analyzing Copyright Takedown of User-Generated Content on YouTube*, Journal of Intellectual Property, Information Technology and Electronic Commerce Law (2018) 9, 75 and Sabine Jacques et al., *An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity*, SCRIPTed (2018) 15(2), 277-312. For a recent overview of existing studies in this areas, *see also* Daphne Keller and Paddy Leerssen, ‘Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation’, *ocial Media and Democracy: The State of the Field and Prospects for Reform* (Social Science Research Network 2019) <<https://papers.ssrn.com/abstract=3504930>> accessed 4 May 2021.

^{39.} Art. 17(9) sub-para. 2 CDSM Directive.

^{40.} Art. 17(9) sub-para. 2 CDSM Directive.

have access to a court or another relevant judicial authority to assert the use of” the same.⁴¹ Member States enjoy a considerable amount of discretion when implementing the procedural safeguards and such mechanisms might also be informed by the stakeholder dialogues and the Commission’s guidance on the application of art. 17.⁴²

3. The interplay between the DSA and the CDSM Directive

Against this background, the DSA proposal was published in 15 December 2021. The DSA is a regulation that is meant inter alia as “REFIT”⁴³ of certain parts of the e-Commerce Directive. Other than the different legal nature of the proposed instrument – Regulation vs Directive – the DSA has a broader scope than the e-Commerce Directive⁴⁴ and sets up a much more detailed procedural framework, which is further explored below.⁴⁵

The DSA is divided into five chapters: general provisions (I), liability of providers of intermediary services (II), Due diligence obligations for a transparent and safe online environment (III), Implementation, Cooperation, Sanctions and Enforcement (IV), and final provisions. For the purposes of this paper, we are mostly concerned with Chapters I to III.

The liability exemptions in Chapter II largely resemble the system set forth 21 years ago in the e-Commerce Directive⁴⁶, with notable adjustments such as a Good Samaritan clause⁴⁷ and provisions on orders. Separate from this, the proposal suggests the introduction of asymmetric due diligence obligations in Chapter III, which are a novelty compared to the e-Commerce Directive.

3.1. Are rules on copyright excluded from the DSA?

In this paper, we are interested in the potential overlap between the proposed DSA and art. 17 CDSM Directive. This is visualized in the Venn-diagram below (Figure 2).

⁴¹ Art. 17(9) sub-para. 2 CDSM Directive.

⁴² Art. 17(10) CDSM Directive.

⁴³ European Commission, REFIT – making EU law simpler, less costly and future proof, https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en.

⁴⁴ See art. 1 DSA proposal.

⁴⁵ See infra at 3.2.2.a).

⁴⁶ I.e., the specific liability exemptions for ‘mere conduit’, ‘caching’ and hosting remain largely unchanged.

⁴⁷ See, e.g., Aleksandra Kuczerawy, ‘The Good Samaritan That Wasn’t: Voluntary Monitoring under the (Draft) Digital Services Act’ (*Verfassungsblog*, 12 January 2021) <<https://verfassungsblog.de/good-samaritan-dsa/>> accessed 5 May 2021.

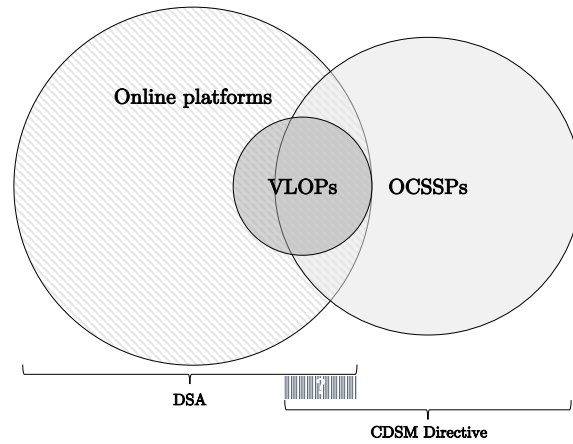


Figure 2. Overlap between DSA and CDSM Directive

A preliminary question for our purposes is whether the DSA applies to OCSSPs in the first place. Importantly, the special “copyright”-regime for OCSSPs *only* relates to the *copyright*-relevant portion of an online platform that qualifies as an OCSSP. Art. 17(3) subpara. 2 CDSM Directive states clearly that the hosting safe harbour of art. 14 e-Commerce Directive – and correspondingly that in art. 5 DSA – still applies to OCSSPs “for purposes falling outside the scope of this Directive.” Consider the example of YouTube, which qualifies as OCSSP. If the relevant information or content it hosts relates to copyright, art. 17 CDSM Directive applies. If the relevant information, however, relates to hate speech or child sexual abuse material or any other illegal information or content⁴⁸, the e-Commerce Directive’s – and correspondingly DSA’s – hosting liability exemption is the place to look. In other words, YouTube would be considered an OCSSP (in the context of copyright) and also a VLOP (in the context of other information).

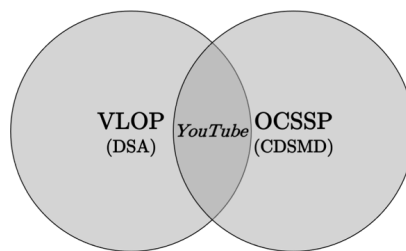


Figure 3. Example of overlap between regulatory regimes in the case of OCSSPs

⁴⁸ Art. 2(g) DSA proposal defines “illegal content” as “any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law”.

In the following, we focus on the copyright aspects. Art. 1(5)(c) DSA states that the Regulation is “without prejudice to the rules laid down by (...) Union law on copyright and related rights.” Supporting Recital 11 adds that the “Regulation is without prejudice to the rules of Union law on copyright and related rights, which establish specific rules and procedures that should remain unaffected.” Read alone, this Recital could be understood as the Commission’s view that art. 17 CDSM Directive, in our example, indeed contains the answers to all questions regarding obligations of OCSSPs. In our view, however, “unaffected”⁴⁹ can only relate to aspects which indeed are specifically covered by those rules.

Recital 11 (similar to Recital 10), however, is only a further example of areas of application of the general principle contained in Recital 9, aimed at providing further clarity on the interplay between the horizontal rules of the DSA and sector-specific rules. Recital 9 states that the DSA

*“should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services (...). Therefore, this Regulation leaves those other acts, which are to be considered *lex specialis* in relation to the generally applicable framework set out in this Regulation, unaffected. However, the rules of this Regulation apply in respect of issues that are not or not fully addressed by those other acts as well as issues on which those other acts leave Member States the possibility of adopting certain measures at national level.”*⁵⁰

The Explanatory Memorandum repeats this text and provides as one example the obligations set out in the AVMS Directive⁵¹ on video-sharing platform providers as regards audiovisual content and audiovisual commercial communications. It continues that such rules “will continue to apply” but that the DSA “applies to those providers to the extent that the AVSMD or other Union legal acts, such as the proposal for a Regulation on addressing the dissemination on terrorist content online, do not contain more specific provisions applicable to them.”⁵²

Applying this logic to the CDSM Directive, this means that the specific rules and procedures contained in art. 17 for OCSSPs are likely considered *lex specialis* to the DSA. Conversely, the DSA will apply to OCSSPs insofar as it contains: (i) rules that regulate matters not covered by art. 17 CDSM Directive; and (ii) specific rules on matters where art. 17 leaves margin of discretion to Member States. As we demonstrate below, whereas category (i) is more or less straightforward, category (ii) is more challenging.

⁴⁹ Confusingly, the Explanatory Memorandum in one instance notes that “the proposal does not amend sector-specific legislation or the enforcement and governance mechanisms set thereunder, but provides for a horizontal framework to rely on, for aspects beyond specific content or subcategories of services regulated in sector-specific acts” (explanatory memorandum p. 6). The wording “amend” could suggest a broader exclusion than “unaffected”. Since Recitals and articles of the proposal, however, do not take this up, we refrain from further analysis. At the same time,

⁵⁰ Recital 9 DSA Proposal (our emphasis).

⁵¹ Directive 2010/13/EC, as amended by Directive (EU) 2018/1808,

⁵² Unfortunately, the Explanatory Memorandum refrains from specifically addressing its relation to the CDSM Directive. Since the AVMS Directive explicitly only serves as one example, however, there is no indication that this general principle would not apply to other specific rules.

3.2. Potentially applicable rules

At this stage, it is important to note that the DSA contains a bifurcated approach to regulation. On the one hand, Chapter II sets out a regime for the liability of providers of intermediary services.⁵³ This regime distinguishes between *functions*, namely ‘mere conduit’, ‘caching’ and hosting. It is in essence a revamped version of the existing rules on liability exemption (also known as safe harbours) and ban on general monitoring in arts. 12 to 15 e-Commerce Directive.⁵⁴ The main differences are the addition of a quasi-“Good Samaritan” rule in art. 6⁵⁵, and provisions on orders to act against illegal content (art. 8) and to provide information (art. 9). On the other hand, Chapter III sets out “horizontal”⁵⁶ due diligence obligations for a transparent and safe online environment.⁵⁷ This regime distinguishes between categories of providers, by setting out asymmetric obligations that apply in a tiered way to different categories of providers of information society services. As a starting point, the liability exemption regime, on the one hand, and the due diligence obligations, on the other hand, are separate from each other. In other words: the availability of a liability exemption is not dependent on compliance with due diligence obligations and vice-versa.⁵⁸

In this respect, the DSA retains in art. 2(a) the definition of “information society services” of the e-Commerce Directive that underpins the notion of information society service provider (ISSP). For the purposes of due diligence obligations, it then proposes a distinction between four categories of *services*, from general to increasingly more specific: (1) intermediary services, (2) hosting services, (3) online platforms, and (4) very large online platforms (VLOPs).⁵⁹ These are visualised in Figure 4 below.

Intermediary services, the broadest category, comprises ‘mere conduit’, ‘caching’, or ‘hosting’ services.⁶⁰ ‘Hosting’ services consist “of the storage of information provided by, and at the request of, a recipient of the service”.⁶¹ Online platforms are defined as providers of “a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.”⁶² In simple terms, VLOPs are those online platforms provide their services to a number of average monthly active recipients of the service in the EU equal

⁵³ See arts. 3 to 9 DSA proposal.

⁵⁴ See also art. 71 DSA proposal.

⁵⁵ On which, see Kuczerawy (n 50).

⁵⁶ Cf. Recital 73 DSA proposal.

⁵⁷ arts. 10 to 37 DSA proposal.

⁵⁸ Note, however, e.g. Art.14(3) DSA proposal (“Notices that include the elements referred to in paragraph 2 shall be considered to give rise to actual knowledge or awareness for the purposes of Article 5 in respect of the specific item of information concerned.”)

⁵⁹ Art. 1(f) and 25 DSA proposal.

⁶⁰ art. 2(f) DSA Proposal.

⁶¹ Similar to the current wording of the e-Commerce Directive’s art. 14.

⁶² art. 2(h) DSA Proposal.

to or higher than 45 million.⁶³ Under the asymmetric obligations approach of Chapter III DSA, VLOPs are subject to the highest number of cumulative obligations.⁶⁴

In our view, when contrasting the definitions in the DSA and CDSM Directive, it is clear that the notion of OCSSP covers at least (certain) online platforms and VLOPs, as represented in Figure 4.

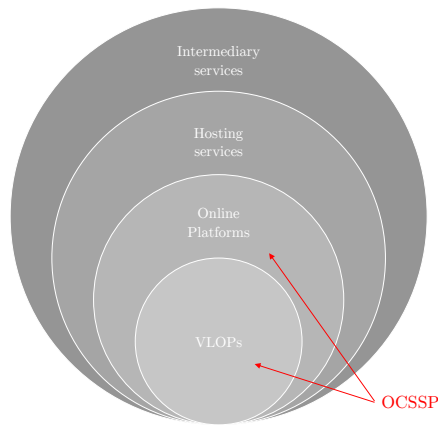


Figure 4. DSA typology of ISSP and placement of OCSSP⁶⁵

In light of this overlap, the question that arises is to what extent the DSA's liability rules (in Chapter II) and the asymmetric obligations (in Chapter III) apply to OCSSPs as online platforms or VLOPs.

3.2.1. DSA Liability Regime and OCSSPs

In our view, the liability regime in the DSA is partly excluded for OCSSPs. First, the hosting safe harbour (in art. 5 DSA) is meant to replace art 14 e-Commerce Directive.⁶⁶ As such, its application is set aside by the express reference in art. 17(3) CDSM Directive.⁶⁷

⁶³ Art. 25 DSA proposal.

⁶⁴ Arts. 25–33 DSA proposal.

⁶⁵ Figure 4 is an adjustment by the authors of a similar visual representation available at European Commission, The Digital Services Act: ensuring a safe and accountable online environment, Which providers are covered, https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

⁶⁶ See art. 71 DSA proposal.

⁶⁷ See supra at 2.

The general monitoring ban in art. 7 DSA, which aims to replace the similar prohibition⁶⁸ in art. 15 e-Commerce Directive, on the other hand, appears to not be touched by the CDSM Directive. Art. 17(8) CDSM Directive merely states that “[t]he application of this Article shall not lead to any general monitoring obligation.” It does not set aside the application of art. 15 e-Commerce Directive, meaning that it can be understood as being of a merely declaratory nature.

Things are, however, less clear for the “good Samaritan” rule in art. 6 DSA on “[v]oluntary own-initiative investigations and legal compliance”. In our view, this provision probably does not apply to OCSSPs. Given the direct reference⁶⁹ to the liability exemptions in the DSA, its application appears to be directly connected (for our purposes) to the specific hosting safe harbour, which does not apply to OCSSPs as per art. 17(3) CDSM Directive. In addition, art. 6 DSA is meant to enable “activities aimed at detecting, identifying and removing, or disabling of access to, illegal content, or take the necessary measures to comply with the requirements of Union law, including those set out in this Regulation.” But art. 17(4)(b) and (c) CDSM Directive already set forth a liability exemption mechanism requiring OCSSPs make best efforts to apply preventive measures to ensure the unavailability or removal of copyright infringing content. These specific rules for OCSSPs would appear to leave little space for voluntary own-initiative investigations by online platforms, and consequently the application of art. 6 DSA. As a result, there may be no need to look for interpretations that would include voluntary activities by OCSSPs.⁷⁰

Finally, the rules on orders against illegal content and orders to provide information in arts. 8 and 9 DSA may apply to OCSSPs. Art. 8 DSA, in particular, sets out a detailed regime not available elsewhere to OCSSPs. To be sure, one could argue that art. 8(3) InfoSoc Directive, as interpreted by the CJEU, already provides specific rules on injunctions. But the latter provision applies only to “intermediaries whose services are used by a third party to infringe a copyright or related right”, a rule consistent with art. 14(3) e-Commerce Directive.⁷¹ In other words, art. 8(3) InfoSoc Directive applies to intermediaries that are not directly liable for the content they host. This is not the case of OCSSPs, who by virtue of the legal regime in art. 17(1) CDSM Directive are directly liable for the content they host and is publicly available. If that is the case, then it would seem that art. 8 DSA applies to OCSSPs.

3.2.2. What due diligence obligations for OCSSPs?

⁶⁸ A further analysis of the differences between art. 7 DSA proposal and art. 15 e-Commerce Directive is outside the scope of this paper.

⁶⁹ We will get back to this point further below at 3.2.2 a).

⁷⁰ This may be different in other sector-specific legislation, which is outside the scope of this paper.

⁷¹ Art. 14(3) e-Commerce Directive states the hosting safe harbour “shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.”

It is outside the scope of this paper to discuss in depth all potential obligations that apply to online platforms and VLOPs. Instead, we will focus on selected key obligations that apply to both categories and might be relevant for OCSSPs. This includes certain due diligence obligations for all providers of intermediary services (arts. 10-13), online platforms (arts. 14-24) and VLOPs (arts. 25-33).

As a preliminary remark, we see no obstacle to the application to OCSSPs of general obligations⁷² that extend all intermediary services on points of contact, legal representatives, terms and conditions⁷³, and transparency reporting. This includes the obligations set out in arts. 10 to 13 (with aggravation in arts. 23, and 33 DSA).

*a) Notice-and-action and statement of reasons*⁷⁴

A far trickier question is whether or not the detailed regimes on notice-and-action (art. 14) and statement of reasons (art. 15) are suggested to apply to OCSSPs.

As explained above, art. 17(4)(b) and (c) CDSM Directive set out a specific notice-and-action regime, which includes in paragraph (c) obligations regarding notice-and-takedown as well as notice-and-stay-down.⁷⁵ This could point in the direction of the DSA being excluded here, since the copyright sector-regulation contains rules on the matter. At the same time, however, art. 17 CDSM Directive remains vague around the concrete notice-and-action setup: it merely mentions “a sufficiently substantiated notice”.⁷⁶ In a vacuum, this would for instance allow Member States margin of discretion in regulating the details of such notice.⁷⁷

Thus, it is also arguable that some components of the notice-and-action regime, such as the minimum elements that should be contained in a notice to a platform⁷⁸, add a level of specificity not found in the *lex specialis* rules of the CDSM Directive. Then again, already today the European landscape for notices is varying, since some Member States chose to amend the implementation of art. 14 e-Commerce Directive with procedural rules, whereas others did not. On this point, it is important to remember that the very choice of instrument for the DSA – a Regulation vis-à-vis Directive – was considered necessary to provide legal certainty, transparency and consistent monitoring.⁷⁹ Furthermore, the accompanying Explanatory

⁷² Chapter III, Section 1 DSA proposal, with certain further adjustments of the obligations for specific intermediary services.

⁷³ Art. 12 DSA obliges intermediary service *inter alia* to provide information on content moderation including algorithmic decision making and human review. Art. 19(9) subpara. 4 CDSM Directive, too, stipulates a duty on OCSSPs to inform in users in their terms and conditions, however, only with respect to the possibility to use copyright-protected works under copyright limitations and exceptions provided for in the copyright acquis.

⁷⁴ Chapter III, Section 2 DSA proposal.

⁷⁵ See *supra* at 2.

⁷⁶ See art. 17(4)(c) CDSM Directive.

⁷⁷ It is still unclear whether this margin of discretion would be subject to consistency with: (i) the “high industry standards of professional diligence” mentioned in art. 17(4)(b) applicable *ex vi* the last sentence of paragraph (c); and (ii) any potential the guidance from the Commission pursuant to art. 17(10).

⁷⁸ Art. 14(2) DSA proposal.

⁷⁹ Explanatory memorandum, DSA proposal p. 7.

Memorandum points out that sector-specific instruments do not cover all regulatory gaps, especially with regards to “fully-fledged rules on the procedural obligations related to illegal content and they only include basic rules on transparency and accountability of service providers and limited oversight mechanisms”.⁸⁰ Similarly, art. 1(2)(b) DSA notes that the aim of the Regulation is to set out uniform rules. All these considerations suggest the application of DSA rules to OCSSPs. Against this application, the strongest argument we find is the consideration that the rationale for the vaguer regime of art. 17 CDSM Directive in this regard was precisely to allow some margin of discretion to platforms and rights holders on how to define the content of notices for the specific subject matter of copyright.

The answer to the question in any case also depends on the nature of art. 14 DSA: is it to be understood as supplement to the *specific* hosting liability exemption in art. 5 DSA or as due diligence obligation applicable to hosting services more broadly? On the one hand, it is clear that due diligence obligations are to be seen as separate from liability exemptions. The (non-)compliance with due diligence obligations does not affect the hosting safe harbour, and vice-versa. On the other hand, this distinction between safe harbours and due diligence obligations is blurred by the – we think problematic and probably unintended – effect a notice is suggested to have on the actual knowledge of a hosting service.⁸¹ Since art. 14(3) DSA makes direct reference to the hosting liability exemption in art. 5 DSA, at least art. 14(3) DSA cannot directly apply to OCSSPs.

A similar logic applies to the rules on statement of reasons (art. 15 DSA), which apply to the justification provided by platforms to users regarding decisions to remove or disable access to specific items of information. In the scheme of art. 17 CDSM Directive, users *appear* to be informed about these reasons *only* through a complaint and redress mechanism. Under art. 17(9), rights holders “shall duly justify the reasons for their [removal] requests” *to OCSSPs*, who will then take a decision on removal or disabling. There are no explicit rules on whether, when, and how these decisions are communicated to users, which suggests that there is ample margin for application of the specific rules set out in art. 15 DSA.

b) Internal complaint mechanism and out-of-court dispute settlement

In the context of online platforms, arts. 17 and 18 DSA set forth a detailed internal complaint mechanism as well as out-of-court dispute settlement. Art. 17 CDSM Directive also mandates such mechanisms in paragraph (9) for the specific genus of OCSPs, but in a much less detailed fashion. In various forms, both the DSA and art. 17 CDSM Directive stipulate that such internal complaint mechanisms need to be effective, processed within a reasonable timeframe (undue delay/timely manner), and involve some form of human review. The DSA, however, is more detailed and includes, for instance, a requirement of user-friendliness and a minimum period for filing such complaint of six months following the takedown decision.

⁸⁰ Explanatory memorandum, DSA proposal p. 4.

⁸¹ See art. 14(3) DSA proposal.

The question is, thus, again whether the DSA is able or intended to “fill” the holes that the *lex specialis*-regulation in the CDSM Directive left open. First, however, even if answered in the negative, it could be argued that arts. 17 and 18 DSA – in the view of the EU-lawmaker – represent the archetypes of “effective and expeditious” mechanisms. Complaint and redress mechanisms *should* therefore be modelled after the horizontal DSA example where the CDSM Directive falls short. In our view, this is desirable outcome.

Second, we should not forget that OCSSPs are not relevant from a copyright-perspective *only*. If a video on *YouTube* contains illegal hate speech, the notice-and-action mechanism (and following redress mechanisms) would not fall under the regime of art. 17 CDSM Directive but rather that of the e-Commerce Directive and future DSA.⁸² Having various similar but different redress mechanisms for the *very same* platform depending only on the legal regime governing the content at issue (copyright, personal data, hate speech, etc.) can hardly be in the interest of the lawmaker⁸³, OCSSPs, internet users or other stakeholders.

A counter argument would be that such differentiated approach is justified in light of the specific character of the rights concerned. The question then is: What part of *substantive* copyright law would prescribe a different treatment for the *complaint handling* of copyright-related content takedowns? The immediate starting point for such special place for copyright in the heart of the EU *acquis* would be its protection in art. 17(2) Charter of Fundamental Rights of the European Union⁸⁴ and the high-level of protection as set out in the recitals of the InfoSoc Directive and emphasized time and again by the CJEU.⁸⁵ In our view, however, that high-level protection can hardly be undermined by safeguarding complaint mechanisms. The latter only become relevant once content has been taken down and a potential infringement of the protected rights is prevented. Instead, redress mechanisms relate inter alia to users’ fundamental rights (vis-à-vis a platform’s right to conduct a business). Consequently, we argue that arts. 17 and 18 DSA should apply to OCSSPs to fill the gaps left open by the vaguer rules on the complaint and redress in art. 17(9) CDSM Directive.

c) Trusted flaggers/notifiers and measures against misuse

Another noteworthy novelty relates to the obligation for online platforms to collaborate with *certain* trusted flaggers/notifiers in art. 19 DSA. Trusted notifiers are “an individual or entity which is considered by a hosting service provider to have particular expertise and

⁸² Another related question is what framework would apply if one and the same video is relevant from a copyright-perspective and a non-copyright perspective; e.g., a parody of a copyright-protected work that also contains hate speech.

⁸³ See, e.g., recitals 4 and 7 DSA proposal.

⁸⁴ Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.

⁸⁵ For a scholarly analysis of the use of the “high level of protection” justificatory argument by the CJEU in this context, see e.g. Marcella Favale, Martin Kretschmer and Paul C Torremans, ‘Is There an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice’ (2016) 79 *The Modern Law Review* 31.

responsibilities for the purposes of tackling illegal content online”.⁸⁶ Despite the regime in art. 17 CDSM Directive, we expect trusted flaggers to play an important role on OCCSPs also for the flagging of copyright-protected material in the foreseeable future.

Recital 46 DSA, for example, notes that for “intellectual property rights, organisations of industry and of right-holders could be awarded trusted flagger status, where they have demonstrated that they meet the applicable conditions”. Once again, however, art. 19(1) DSA puts itself in direct connection to the notice-and-action mechanism in art. 14 DSA, meaning that this regime could be related to only those online platforms that are not OCSSPs. Thus, the applicability of art. 19 in the context of OCSSPs depends at least to some extent on the question whether the notice-and-action mechanism applies to OCSSPs, as discussed above.⁸⁷

In the field of copyright and OCSSPs, rights holders may also have an interest that online platforms are *obliged* to collaborate with certain trusted notifiers. Already today, however, trusted flagger arrangements are a common occurrence, at least on larger scale online platforms.⁸⁸ The notable twist of the DSA is that the trusted flagger status is awarded by the relevant Digital Services Coordinator of the Member States if certain requirements are met.⁸⁹ Furthermore, the platform is obliged to inform the Coordinator if a trusted flagger submits “a significant number of insufficiently precise or inadequately substantiated notices”.⁹⁰ Ultimately, then, the trusted flagger status can be revoked.⁹¹ In light of uncertainty around the data quality of copyright notices, such oversight could be also in particular importance in the context of OCSSPs.⁹²

But even if art. 19 DSA indeed were not applicable to OCSSPs, it is important to note that already the non-binding Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online encouraged platforms to *voluntarily* collaborate with trusted flaggers.⁹³ Similarly, nothing in the DSA prevents “voluntary” trusted notifier arrangements. These would however be outside the scope of art. 19 and therefore outside the supervision of the Digital Services Coordinator.⁹⁴ This apparent gap is, however, at least partly tackled by art. 20 DSA.

Art. 20 DSA on measures and protection against misuse contains two main angles. First, the obligation to suspend the accounts of *users* who “frequently provide manifestly illegal

⁸⁶ Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, *OJ L 63, 6.3.2018, p. 50–61*, point 4(g).

⁸⁷ See supra at 3.2.2 a).

⁸⁸ See, e.g., Google Support, YouTube Help, YouTube Trusted Flagger program, <https://support.google.com/youtube/answer/7554338?hl=en>

⁸⁹ Art. 19(2) DSA proposal.

⁹⁰ Art. 19(5) DSA proposal.

⁹¹ Art. 19(6) DSA proposal.

⁹² See e.g. Keller and Leerssen (n 41).

⁹³ See for an in-depth analysis, Sebastian Felix Schwemer, ‘Trusted Notifiers and the Privatization of Online Enforcement’ (2019) 35 Computer Law & Security Review 105339.

⁹⁴ See, e.g., recital 46, that states: “the rules of this Regulation on trusted flaggers should not be understood to prevent online platforms from giving similar treatment to notices submitted by entities or individuals that have not been awarded trusted flagger status (...)”.

content”.⁹⁵ Secondly, the obligation to suspend the *processing of notices and complaints* by individuals or entities or by complainants who “frequently submit notices or complaints that are manifestly unfounded”.⁹⁶ In our view, art. 20 proposal is central to mitigating misuse both by users and by any type of flaggers, probably excluding at least partly “trusted flaggers”, regulated by art. 19 but including flaggers covered by “voluntary” trusted notifier arrangements with platforms.

Again, art. 20(2) DSA proposal, however, directly references arts. 14 and 17 DSA. For the application of art. 20 on OCSSPs, thus, once, the central question is whether art. 14 and (at least part of) art. 17 DSA apply the *lex specialis* of art. 17 CDSM Directive.

The issue of users repeatedly uploading illegal content is as relevant for OCSSPs as for other online platforms. Likewise, the misuse of notices and complaints is a concern on OCSSPs. Art. 17(7) and (9) subpara. 3 CDSM Directive require that the copyright-regime must not lead to the unavailability of non-infringing works, without however explicitly putting in place a misuse protection. In this absence of specific regulation, we argue that art. 20 DSA should be fully applicable to copyright misuse. Art. 20 DSA is central also for voluntary arrangements (e.g., trusted notifiers falling outside the regime set forth in art. 19 DSA), for which we equally argue it is fully applicable. For reasons of legal certainty, it is desirable that the wording of art. 20 DSA is clarified during the legislative process to state this unequivocally.⁹⁷

d) Additional obligations on VLOPs

Finally, VLOPs are subject to certain specific due diligence obligations, *inter alia*, risk assessment (art. 26) and risk mitigation (art. 27). The functioning and use made of the services of very-large OCSSPs (e.g., YouTube or Pornhub) might come with systemic risks, e.g., “dissemination of illegal content” or “negative effects for the exercise” of fundamental rights including freedom of expression. Since the CDSM Directive does in no way address these issues, we do not see any argument that precludes the application of arts. 26 and 27 (as well as other relevant provision such as data access) to VLOPs that are also OCSSPs. The same reasoning holds for other relevant obligations, such as data access and transparency.

4. Conclusions

In this paper we have looked at the potential relationship between the horizontal DSA rules and sector-specific rules for OCSSPs in art. 17 CDSM Directive. The rules on copyright – vis-

⁹⁵ Art. 20(1) DSA proposal.

⁹⁶ Art. 20(2) DSA proposal.

⁹⁷ Outside the scope of this paper, it, is also surprising that the misuse mechanism is only foreseen for online platforms, but not other intermediary services (e.g., hosting or even non-hosting intermediary services). Arguably, in light of the DSA’s goals, it would be desirable that such misuse mechanism is applicable to all voluntary notice-and-action mechanisms for all intermediary services.

à-vis other forms of information (or content) – appear to have a special place in the EU legal order. Meanwhile, the European Commission has provided (internally) some insights on their interpretation in a presentation to Council Working Party on Intellectual Property (Copyright).⁹⁸ In that presentation, the Commission reminds that the “DSA is not an IPR enforcement tool” given its general and horizontal nature but that it “includes a full toolbox which can be very useful for the enforcement of IPR”, which would apply “without prejudice to existing IPR rules”. Notably, however, the Commission considers that art. 17 CDSM Directive remains “unaffected; i.e. DSA rules on limited liability, notice and action, redress and out of court mechanism [are] not applicable for [OCSSPs]”. Our analysis in this paper concludes otherwise, presenting a more complex and differentiated picture. First and foremost, “unaffected” does not mean that the horizontal DSA rules would not supplement those in art. 17 CDSM Directive, especially as it regards notice-and-action or redress mechanisms.⁹⁹

Our conclusion is that the DSA will apply to OCSSPs insofar as it contains: (i) rules that regulate matters not covered by art. 17 CDSM Directive; and (ii) specific rules on matters where art. 17 leaves margin of discretion to Member States.

Category (i) applies to some provisions in the liability framework rules¹⁰⁰ of the DSA, most clearly to procedural obligations. This makes sense since, in our view, the special role of copyright, as noted above, may only be related to substantive copyright law. But the DSA’s due diligence obligations assessed in this paper relate to information requirements, quality assurances regarding notices, and procedural safeguards for the *ex post* control with a view to, for instance, reinstate non-infringing content. In this light, we find no strong argument for why EU copyright law would require a full exemption from procedural obligations set out for online platforms in the DSA. In fact, the very character of the proposed DSA (and e-Commerce Directive) is to provide broad and horizontal rules for a level playing field. Where no more specific regulation of art. 17 CDSM Directive applies, the asymmetric due diligence obligations of the DSA should apply.

The situation is trickier for category (ii), which relates to areas where art. 17 CDSM Directive does fact provide for some degree of regulation, and it is uncertain to what extent it preempts more detailed rules in the DSA. In our view, the logical approach is to see the CDSM Directive’s regulation as *lex specialis*. Where this *lex specialis*, however, does not contain specific or more detailed regulation (or an explicit exemption from the general rules), the horizontal rules of the DSA would apply.¹⁰¹

⁹⁸ Council of the European Union, Working Paper, N° Cion doc.: 14124/20, Digital Services Act and EU copyright legislation - Information from the Commission, Brussels, 01 March 2021 WK 2824/2021 INIT (on file with the authors).

⁹⁹ The Commission’s presentation itself continues to lay out possible “complimentarity” of the DSA rules with regard to art. 17 CDSM Directive, namely for “e.g. transparency obligations with regard to action taken by the online platform; trusted flaggers”. See *id.*

¹⁰⁰ See *supra* at 3.2.1.

¹⁰¹ This understanding is also supported by recital 11 DSA proposal, which clearly only relates to “*specific rules and procedures*” (our emphasis)

From a normative standpoint, we understand the DSA’s due diligence obligations as “first principles” of how internet intermediaries, and most notably platforms, must “behave”, and how fundamental rights of users can be balanced. In other words, the DSA’s due diligence obligations are the horizontal fallback regime that would only be altered by more specific *lex specialis* rules. That is to say, as a horizontal framework, the DSA sets out the *minimum* standard for the intertwined relations of platforms, users and rightsholders.¹⁰² As such, even in the presence of specific non-exhaustive sector regulation, the DSA rules should remain applicable unless they are clearly set aside by the *lex specialis*.

Our analysis identifies several rules in the DSA that should apply to OCSSPs despite the regime in art. 17: on notice and action, internal complaint and out of court dispute settlement, trusted flaggers/notifiers, and measures against misuse.¹⁰³ But we have also identified a number of gray areas in these overlaps between the DSA and art. 17 CDSM Directive. To avoid legal uncertainty, it would be important to clarify these during the legislative process, for instance by stating that Chapter III DSA (arts. 10 to 37) applies as horizontal framework *mutatis mutandis* also to those intermediary services covered by other secondary legislation, to the extent no more specific rules are laid out. Further precise clarifications could be introduced in the specific gray areas identified in this paper, in order to ensure the applicability of the DSA’s safeguards to OCSSPs, where justified. After all, although we can all agree that copyright is special, it should not be a barrier to setting “uniform rules for a safe, predictable and trusted online environment, where fundamental rights enshrined in the Charter are effectively protected”.¹⁰⁴

¹⁰² Which, in our example, relates to copyright right holders, but could also be the holder of another protected right.

¹⁰³ See *supra* at 3.2.2.

¹⁰⁴ Art. 1(2)(b) DSA Proposal (setting out the aims of the Regulation).