

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Sander Sagar

**FROM THE E-COMMERCE DIRECTIVE TO THE EUROPEAN  
DIGITAL SERVICES ACT: THE LIABILITY REGIME OF  
INTERNET INTERMEDIARIES**

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Supervisor: Thomas Hoffmann, PhD

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I hereby declare that I have compiled the thesis independently and all works, important standpoints, and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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Sander Sagar (13.05.2021)

(signature, date)

Student Code: 185037HAJB

Student e-mail address: [sagarsander@gmail.com](mailto:sagarsander@gmail.com)

Supervisor: Thomas Hoffmann, PhD:

The paper conforms to requirements in force

.....

(signature, date)

Chairman of the Defense Committee:

Permitted to the defense

.....

(signature, date)

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## **ABSTRACT**

Following the rapid transformation of the digital architecture and the emergence of new major digital platform economies which have fundamentally reshaped the provision of goods and services in the European Union, the importance of the functioning of a harmonized European digital economy has become increasingly more prevalent as digital technologies have become a major part of all aspects of modern life. Since the adoption of the E-Commerce Directive by the EU, numerous limitations surrounding the intermediary liability regime and the legal framework for the provision of online services established by the E-Commerce Directive have emerged. In response to the challenges presented in the E-Commerce Directive, the European Commission has drafted a preliminary legislative proposal referred to as the Digital Services Act which seeks to bring about important regulatory changes for the legal framework concerning the provision of online digital services and attempts to reform the liability regime of online intermediaries in the EU. This thesis first examines the reasons why the E-Commerce Directive did not succeed in the creation of a harmonized digital services market in the EU and thereafter summarizes and discusses the proposed changes by the Digital Services Act and analyses their potential impact on the liability regime of online intermediaries. This thesis seeks to address the following research question “To what extent does the newly proposed Digital Services Act reform the EU’s online intermediary regime to create a harmonized digital legal framework to protect the rights and interests of Union citizens and online intermediaries?”.

# 1. INTRODUCTION

The E-Commerce Directive (ECD) adopted by the EU on 8 June 2000<sup>1</sup>, attempted to establish the core principles and legal framework surrounding the current digital service economy in the European Union. Since the introduction of the E-Commerce Directive, the architecture of the digital economy and the rapid evolution of new business models for digital services and the emergence of new digital platform economies have profoundly changed the structure and functioning of the digital market. Consequently, this radical transformation of the digital services market has also brought about new legal challenges and distinct barriers for the provision of digital services under the current legislative framework of the E-Commerce Directive. The current liability regime for online intermediaries adopted by the E-Commerce Directive has been unable to adequately respond to the rapid development of the digital services market and critics have called for the thorough reconsideration of the legal framework established by the E-Commerce Directive.

Although the European Union has attempted to implement further regulatory measures alongside the E-Commerce Directive including the Audiovisual Media Services Directive (AVMSD)<sup>2</sup> and the Digital Single Market Directive (DSM)<sup>3</sup>, these additional frameworks have, however, raised further legal complications with their compatibility with the E-Commerce Directive. Additionally, EU Member States have adopted their own national legislation to regulate the digital services market which has further exacerbated the legal fragmentation and uncertainty within the digital services market in Europe. In response to these developments in the digital services economy, the European Commission has announced the adoption of the newly proposed Digital Services Act which would attempt to harmonize and revise the current EU legislative framework surrounding the liability of digital service providers. It is important to note, that the information concerning the

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<sup>1</sup> Directive (EU) No 2000/31 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, p. 1–16

<sup>2</sup> Directive (EU) No 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24

<sup>3</sup> Directive (EU) No 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, OJ L 130, 17.5.2019, p. 92–125

Digital Services Act is based on a preliminary proposal drafted by the European Commission and that the final version of the Digital Services Act shall likely be modified.

The research question of this thesis is whether the newly proposed Digital Services Act sufficiently reforms the EU's online intermediary regime to create a harmonized digital legal framework to protect the rights and interests of Union citizens and online intermediaries.

The sub-questions of this thesis are the following:

- 1) To what extent does the Digital Services Act reform the limitations and shortcomings highlighted in the E-Commerce Directive?
- 2) How effectively does the digital legal framework created by the Digital Services Act respond to the challenges of the modern digital world?
- 3) What difficulties does the Digital Services Act have to address to preserve the European Union's position in the global digital market economy?

The hypothesis of this of this research is that the proposed Digital Services Act effectively addresses the limitations arising from the E-Commerce Directive and adequately considers the challenges posed by modern digital economies and adopts a balanced approach which significantly strengthens the position of the European digital economy while managing to safeguard the rights and interests of online intermediaries and the recipients of intermediary services. Nonetheless, there are certain limitations which have surfaced concerning the exclusion of micro- and small enterprises which could pose a significant threat to the dissemination of illegal goods and content in the digital online environment and undermine the protection of consumers.

This paper will first examine the E-Commerce Directive and the reasons why the E-Commerce Directive had been unable to adequately respond to the modern challenges of rapidly transforming digital platform economies. The second chapter of the thesis shall discuss and shortly summarize the key proposals of the Digital Services Act and attempts to analyze their potential influence and impact on the liability regime of online intermediaries and their effectiveness to protect the legitimate rights and interests of online intermediaries and the recipients of intermediary services. Lastly, the thesis will present two important proposals which should be addressed and revised in the Digital Services Act.

## 2. E-COMMERCE DIRECTIVE

Implemented on 8 June 2000 by the European Union, the E-Commerce Directive is one of the fundamental legislative frameworks for digital services which facilitated the establishment and the development of the EU's electronic Single Market for digital service providers. The primary objective of the E-Commerce Directive was to ensure that the legal obstacles surrounding the development of electronic commerce and the digital market were abolished to facilitate the free movement of goods and services and enable freedom of establishment for digital platforms across Europe. Through the adoption of the E-Commerce Directive, the European Union intended to achieve a high level of Community harmonization, promote the digital economy for small- and medium-sized enterprises and ensure higher consumer confidence and legal certainty within the digital market.<sup>4</sup> The scope of the Directive is comprehensive and wide-reaching as the liability regime extends not only to the traditional internet service provider sector but also encompasses the online intermediaries that are involved with the provision of goods and services on online platforms.<sup>5</sup> Therefore, the Directive covers a wide-spectrum of activities online, including the selling of goods online on e-commerce platforms such as Amazon and AliExpress, the provision of online commercial information for revenue purposes, the offering of online search engine tools (Google, Bing), the transmission of information or the hosting of information through internet intermediaries, cable and mobile communication companies offering their services to end-users and many other services that involve electronic communications through a provider to a recipient in an online environment.<sup>6</sup> As a result, the E-Commerce Directive establishes a comprehensive legal framework which accounts for the majority of digital service platforms and online intermediaries in the European digital market.

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<sup>4</sup> Directive (EU) No 2000/31 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, p. 1.

<sup>5</sup> Edwards, Lilian. 2005. "The Problem of Intermediary Service Provider Liability." In *The New Legal Framework for E-Commerce in Europe*, by Lilian Edwards, 93-100. Oregon: Hart Publishing.

<sup>6</sup> Pearce, Graham, and Nicholas Platten. 2000. "Promoting the Information Society: The EU Directive on Electronic Commerce." *European Law Journal* 6 (4): 363-378.

## 2.1. Liability Exemption Regime of the E-Commerce Directive

The liability exemption regime of the E-Commerce Directive is one of the central cornerstones of the legislative framework which provides internet intermediaries with the safety net to provide digital services without exposing themselves to excessive liability from damages. The Directive outlines the commonly known “Safe Harbor” mechanisms in Articles 12-15 of the ECD which attempt to outline and define the conditions under which internet intermediaries would be exempt from liability.<sup>7</sup> First, Article 12 states that a service provider is not liable for the information transmitted if the provider (a) does not initiate the transmission; (b) does not select the receiver of the transmission; and (c) does not select or modify the information contained in the transmission. As long as the providers remain passive in their activities, the liability exemption in this Article would apply without any significant responsibilities. Secondly, Article 13 deals with the exemption of internet intermediaries who are involved with the caching of information for the sole purpose for making the transmission of information more efficient on the conditions that (a) the provider does not modify the information, (b) complies with the widely recognized rules regarding the updating of information and lawful use of technology within the industry and (c) the provider acts expeditiously to remove or disable content upon obtaining knowledge that there have been changes to the initial source or an administrative authority has ordered the removal or disabling of the information. Lastly, Article 14 states that service providers are not liable for the information stored at the request of a recipient of the service, provided that (a) the provider does not have actual knowledge of the illegal nature of the activity or information and, as regards to claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent and (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information. Article 15 of the ECD holds that Member States cannot impose a general obligation on internet intermediaries to monitor the information which they transmit or store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.<sup>8</sup>

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<sup>7</sup> Montagnani, Maria Lilla. 2019. "New Obligations for Internet Intermediaries in the Digital Single Market — Safe Harbors in Turmoil?" *Journal of Internet Law* 22 (7): 3-11.

<sup>8</sup> Council Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] Official Journal of the European Union L178/13.



## 2.2. Shortcomings of the E-Commerce Directive

Although the E-Commerce Directive had successfully managed to establish a wide-reaching and important regulatory framework for the development of digital commerce for both businesses and consumers within the European Union, it nonetheless, eventually revealed multiple limitations and shortcomings relating to the divergences of national implementation of the Directive, numerous differences resulting from European and national case law adopted by the courts, a non-harmonized notice-and takedown system, and the uncertainty of the extent and definition of the liability exemption system had caused significant legal uncertainty and difficulties for online intermediaries and digital service providers to reliably determine whether the ECD's liability exemption framework indeed applied to them or whether they were outside the scope of the liability framework.<sup>9</sup>

## 2.3. Non-Harmonized Implementation of the Directive

One of the primary reasons as to why the E-Commerce Directive had failed to fully harmonize the digital services economy within the European Union was due to the non-harmonized implementation of the Directive into the national legislative systems by the Member States. Arguably, the inconsistencies resulting from national divergences to implement the Directive had been caused by the complex diversity of interests at stake, involving both the legitimate interests of businesses and the fundamental rights and freedoms of the consumers, resulting in the need for the regulators to often make difficult compromises for the adoption of the Directive.<sup>10</sup> On the other hand, the important interpretative role of the CJEU to provide clear guidance to the national courts and harmonize the implementation of the ECD into national legislative systems had also to a certain extent been unclear since the CJEU did not always manage to provide precise interpretations of the Directive's liability system to harmonize the application of the Directive.<sup>11</sup> Therefore, many issues concerning the implementation of the Directive had mainly been left to the

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<sup>9</sup> Madiaga, Tambiama. 2020. Reform of the EU liability regime for online intermediaries. Report, Brussels: European Parliamentary Research Service.

<sup>10</sup> Bourdillon, Sophie Stalla. 2012. "Sometimes one is not enough! Securing freedom of expression, encouraging private regulation, or subsidizing Internet intermediaries or all three at the same time: the dilemma of Internet intermediaries' liability." *Journal of International Commercial Law and Technology* 7 (2): 154-175.

<sup>11</sup> Bourdillon, Sophie Stalla. 2017. "Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well." In *The Responsibilities of Online Service Providers*, by Mariarosaria Taddeo and Luciano Floridi, 275-293. New York: Springer Publishing.

national courts and regulatory authorities to decide, regarding how to apply the Directive during the emergence of new online business platforms in the digital economy, which effectively lead to significant differences between national regulatory and court approaches concerning the liability of internet intermediaries. As a result, due to the prevalence of ambiguities with the implementation of the E-Commerce Directive, businesses and internet intermediaries were more likely to preserve their own rights and interests over the balanced approach of considering the legitimate rights and interests for both businesses and consumers proposed by the Directive.<sup>12</sup>

## **2.4. Non-Harmonized Notice- and Takedown System**

One of the other key reasons as to why the E-Commerce Directive has only been partially successful in achieving its objectives is due to the fact that the Directive did not impose a harmonized notice-and takedown system and merely suggested that Member States take the measures and initiative to adopt the notice-and takedown systems within their own national legislative frameworks themselves. The Directive's approach to let Member States implement the notice- and takedown systems by themselves, however, lead to the further legal fragmentation of the E-Commerce Directive, as the Directive did not explicitly outline specific guidelines for the implementation of notice- and takedown systems. Therefore, Member States eventually developed differing practices across Europe which involved varying statutory forms and notice systems for users and platforms alike.<sup>13</sup> Moreover, some Member States also implemented special regulatory bodies dealing with notice- and takedown forms and the filtering of such notices, resulting in further variety in the procedure and therefore adversely affecting the digital harmonization goal of the Directive.<sup>14</sup> More importantly, the absence of a harmonized notice- and takedown system significantly undermined the freedom of expression and legal certainty of users on online platforms who send out notice-and takedown requests to internet service providers since there is a lack of procedure and accountability as service providers are more inclined to take down their online services in order to avoid injunctions or liability which has the potential effect to hinder public

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<sup>12</sup> Eecke, Patrick Van, and B. Ooms. 2007. "ISP liability and the e-commerce directive: a growing trend toward greater responsibility for ISPs." *Journal of Internet Law* 3-9.

<sup>13</sup> Eecke, Patrick Van. 2011. "Online service providers and liability: A plea for a balanced approach." *Common Market Law Review* 48 (5): 1455 – 1502.

<sup>14</sup> Barceló, Rosa Julià, and Kamiel J. Koelman. 2000. "Intermediary Liability: Intermediary Liability in the E-Commerce Directive: So Far So Good, But It's Not Enough." *Computer Law & Security Review* 16 (4): 231-239.

discussion and criticism.<sup>15</sup> Furthermore, the lack of a harmonized notice-and takedown system also has the potential to promote the activity of unfair commercial practices, wherein competitors could effortlessly send out unfounded claims towards their competitors without facing significant penalties by supervisory authorities .<sup>16</sup> Even though there had been no harmonized notice-and takedown system implemented by the Directive, Barceló and Koelman rightly justify in their analysis that online intermediaries often do not possess the knowledge and personnel to evaluate whether certain information is illegal and, even if they receive a notice-and takedown request, should not be in the position and have the obligation to objectively assess and evaluate whether potentially illegal or defamatory material should be available or not on the online platforms to safeguard the freedom of expression and the fundamental interests of the users of the platform.<sup>17</sup>

## **2.5. Legal Uncertainty from Divergent European and National Case Law**

Due to the abovementioned fragmented implementation of the Directive and the broad scope of the liability exemption regime, internet intermediaries have faced considerable legal uncertainty regarding the applicability of the liability exemption regime of the E-Commerce Directive. This legal uncertainty regarding the applicability of the liability regime to internet intermediaries has further been compounded by the varying case law provided by the Court of Justice of the European Union (CJEU) and differences in Member States' national court decisions. For instance, according to the CJEU's *L'Oréal v eBay* ruling which addressed the illegal content posted by users on eBay, the CJEU ruled that eBay cannot "rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realized that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31."<sup>18</sup> Therefore as a result, the operators of online marketplaces have had to either increase their costs to prevent the circulation of illegal content and IP infringements, or on the contrary, become inactive enough in order to avoid liability and stay within the scope of the exemption

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<sup>15</sup> Baistrocchi, Pablo Asbo. 2003. "Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce." *Santa Clara High Technology Law Journal* 19 (1): 111-130.

<sup>16</sup> *Ibid.*, 130.

<sup>17</sup> Barceló and Koelman (2000), *supra nota* 11, 130.

<sup>18</sup> Court of Justice, *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, Case C-324/09, 12 July 2011, para. 124.

provided by Article 14 of the E-Commerce Directive.<sup>19</sup> Additionally, the ruling also refers to a new term “diligent economic operator” which would strongly imply that active online economic operators would have to employ additional due diligence measures in order to safeguard their business platforms over the content which is submitted by the users of their platform. Even though Article 15 of the ECD explicitly exempts internet intermediaries from “general monitoring obligations”, the L’Oreal v eBay ruling highlights the direction of active online operators for more active involvement and monitoring of user content on their platforms. Controversially, the problem with online platforms proactively monitoring and implementing additional controls over the content submitted by the users to not expose themselves to extensive liability would mean that platforms would have to employ even broader obligations to filter and control the content of their platforms which would likely lead to excessive intervention and the creation of disproportionate restrictions that would adversely affect freedom of expression on online platforms.<sup>20</sup> Similarly in the Google Spain<sup>21</sup> case, the approach taken by the ECtHR shows a growing trend towards the widening of the scope of liability for internet service providers and their obligations towards the users of the platform, however as a consequence, the exact definition as to what liability the internet service providers are subject to are becoming increasingly more ambiguous and unclear to what is provided for in Articles 12-15 of the E-Commerce Directive.<sup>22</sup> In some Member States such as France, the national courts have maintained that internet service providers should implement a more active and preventative approach to online content moderation against copyright infringements, resulting in further legal uncertainty and fragmentation for internet service providers who offer their services across Europe who would have to additionally to consider whether these obligations also apply in the jurisdictions of other Member States as well.<sup>23</sup> As a result of these divergences in the digital legal framework provided by the E-Commerce Directive, internet service providers would rather actively protect their own rights through private agreements, out of court settlements and self-censorship by removing the flagged content on request, rather than protecting the right to freedom of expression and the circulation of online

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<sup>19</sup> Clark, Birgit, and Maximilian Schubert. 2011. "Odysseus between Scylla and Charybdis? The ECJ rules in L'Oréal v eBay." *Journal of Intellectual Property Law & Practice* 6 (12): 880-888.

<sup>20</sup> Sloot, Bart van der. 2015. "Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe." *Journal of Intellectual Property, Information Technology and E-Commerce Law* 6 (3): 211-228.

<sup>21</sup> Court of Justice, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González., Case C-131/12, 13 May 2014, para. 99.

<sup>22</sup> Marušić, Branka. 2016. "Gate Keeper or Trespasser? EU ISP Liability Regime and its Privacy Implications." *NIR* 1: 4-17.

<sup>23</sup> Mlynar, Vojtech. 2014. "A Storm in ISP Safe Harbor Provisions: The Shift From Requiring Passive-Reactive to Active-Preventative Behavior and Back." *Intellectual Property Law Bulletin* 19 (1): 1-28.

content submitted by their recipients of their services as it is a significantly more costly alternative to maintain.<sup>24</sup>

## 2.6. The Declining Role of Article 15 of the E-Commerce Directive

As a result of the growing trend of the European and national courts' divergences in case law which was strongly illustrated in the L'Oreal v eBay and Google Spain rulings and with regard to internet service providers having to respond to the constant changes in the European digital legal framework, internet intermediaries have taken further recourse to implement more proactive measures to monitor content of the recipients of their online platforms instead of having a more passive-reactionary role. Therefore, it could be argued that Article 15 of the ECD which prevents general monitoring obligations for online service providers, has to a significant extent lost its role and function in the legal framework established by the E-Commerce Directive.<sup>25</sup> The subsiding role and consistency of Article 15 shows that the liability framework created by the E-Commerce Directive is no longer subject to conditional liability that is dependent on the actions of online service providers, but rather, it could be argued that intermediary liability is being increasingly shaped by organizational and structural liability, depending on the content the online intermediary provides to the recipients of its platform.<sup>26</sup> Consequently due to the transforming intermediary liability system, the innovation and provision of economic services for online platforms is becoming increasingly more difficult due to the newly imposed monitoring duties which require modern content recognition technology and automated filtering measures, compounded by the compliance duties of due diligence and the reporting and the flagging of content, it could be claimed that online intermediaries are in a position of acute legal uncertainty as they are required to both comply with measures that safeguard them outlined in Articles 12-15 of the E-Commerce Directive, but are also obliged to implement more proactive content moderation mechanisms on their platforms.<sup>27</sup>

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<sup>24</sup> Marušić (2016), *supra nota* 18, 16.

<sup>25</sup> Bourdillon, Sophie Stalla. 2013. "Online monitoring, filtering, blocking ....What is the difference? Where to draw the line?" *Computer Law & Security Review* 29 (6): 702-712.

<sup>26</sup> Montagnani, Maria Lillà. 2019. "New Obligations for Internet Intermediaries in the Digital Single Market — Safe Harbors in Turmoil?" *Journal of Internet Law* 22 (7): 3-11.

<sup>27</sup> Montagnani, Maria Lillà, and Alina Yordanova Trapova. 2018. "Safe harbours in deep waters: a new emerging liability regime for Internet intermediaries in the Digital Single Market." *International Journal of Law and Information Technology* 26 (4): 294-310.

## 2.7. Online Intermediaries and the Use of Automated Filtering Measures

With regard to the rapid development and the changing environment of the modern digital platform economies and in light of the increasingly more prevalent duties imposed on active online intermediaries that have the additional obligation to proactively monitor the content of the users on their platforms and protect themselves from liability, large online platforms and service providers have started to use and employ automated filtering measures to remove illegal or infringing content from their platforms for efficiency, risk management and commercial purposes. Considering the massive influx of information and data transmitted and stored on online platforms, traditional governance mechanisms have proven to be unable to govern and enforce the illegal or harmful practices shared by users on online platforms, thus shifting the burden of law enforcement in the hands of online intermediaries, particularly to large-scale online intermediaries such as Google and Amazon.<sup>28</sup>

Algorithmic content enforcement measures which are the emerging trend for mega platforms with millions of users, however, entail certain risks and concerns towards rights holders and end-consumers that concern issues such as the transparency and accountability of such mechanisms and the proper standards of due process which would significantly affect the legitimate interests of online users' rights to privacy and freedom of expression and the protection of fair commercial practices if the automated filtering measures are not properly implemented by the online intermediaries.<sup>29</sup> Frosio and Mendis convincingly argue in their essay, that the proactive monitoring duty placed on online service providers is rapidly leading to the shifting trend towards the use of automated filtering and algorithmic enforcement measures to monitor the content of users on online platforms which could significantly limit and undermine the users' freedom of expression and legitimate rights to procedural justice and the usage of public domain content.<sup>30</sup> According to Riis, the shift towards algorithmic content moderation is a significant departure from the traditional liability regime under the E-Commerce Directive and algorithmic content regulation, as it currently stands, is highly controlled and developed by private industry

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<sup>28</sup> Koren, Niva Elkin, and Maayan Perel. 2018. "Algorithmic Governance by Online Intermediaries." In *The Oxford Handbook of Institutions of International Economic Governance and Market Regulation*, by Eric Brousseau, Jean Michel Glachant and Jérôme Sgard. Oxford: Oxford University Press.

<sup>29</sup> Frosio, Giancarlo F. 2017. "Reforming Intermediary Liability In The Platform Economy: A European Digital Single Market Strategy." *Northwestern University Law Review Online* 112: 18-46.

<sup>30</sup> Frosio, Giancarlo, and Sunimal Mendis. 2019. "Monitoring and Filtering: European Reform or Global Trend?" In *The Oxford Handbook of Online Intermediary Liability*, by Giancarlo F. Frosio, 544-565. England: Oxford University Press.

stakeholders and employed by major online intermediaries without the oversight and legislative intervention through secondary law or regulatory harmonization on a Community level.<sup>31</sup> Algorithmic content moderation measures employed by internet intermediaries spark particular concerns regarding the problem of over-enforcement as online service providers and major internet intermediaries, being profit-oriented businesses that seek to mitigate costs, would be more inclined to employ algorithms which would, through the excessive removal of content submitted by the users, prevent dispute and litigation risks and as a result undermine the legitimate rights and interests of the involved end-users of online platforms.<sup>32</sup> Another potential concern lies within the accountability and transparency surrounding the algorithmic filtering tools due to their complexity and scalability as they are likely to function as unforeseeable “black boxes”, which automatically regulate the behavior and content of users on online platforms without the opportunity of procedural oversight.<sup>33</sup> Numerous studies have shown that automated filtering tools and technologies are currently only mostly capable of identifying the contents within particular files, and often lack the capacity to make complex and subjective judgement decisions on whether a particular case constitutes as infringing or unlawful material which would likely still require the traditional intervention and oversight by courts and legal practitioners.<sup>34</sup> While algorithms are certainly capable of making content- and information based decisions concerning the filtering and removal of certain online content, they are still argued to be imperfect tools which cannot maintain a one hundred per cent accuracy rate, meaning that some inconsistencies and false positives would eventually undermine the platform users’ fundamental rights to information and expression in the online environment.<sup>35</sup>

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<sup>31</sup> Riis, Thomas. 2018. "Leaving the European Safe Harbor, Sailing Towards Algorithmic Content Regulation." *Journal of Internet Law* 22 (7): 1-21.

<sup>32</sup> Riis, Thomas, and Clement Salung Petersen. 2016. "Private enforcement of IP law by internet service providers: notice and action procedures." In *User Generated Law: Re-Constructing Intellectual Property Law in a Knowledge Society*, by Thomas Riis, 228–251. Cheltenham: Edward Elgar Publishing.

<sup>33</sup> Koren, Niva Elkin, and Maayan Perel. 2016. "Accountability In Algorithmic Copyright Enforcement." *Stanford Technology Law Review* 19 (3): 473-532.

<sup>34</sup> Spoerri, Thomas. 2019. "On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market." *Journal of Intellectual Property, Information Technology and E-Commerce Law* 10 (2): 173-186.

<sup>35</sup> Riis (2018), *supra nota* 28, 1.

### **3. THE DIGITAL SERVICES ACT**

In response to the rapid development of the changing landscape of the modern digital world and the emergence of new digital platform economies, the European Commission has drafted a preliminary legislative proposal for review in the European Parliament according to the ordinary legislative procedure referred to as the Digital Services Act, amending the E-Commerce Directive implemented on 8 June 2000.<sup>36</sup> Developing and building on the fundamental principles outlined in the E-Commerce Directive, the Digital Services Act seeks to create a durable and harmonized legal framework and governance structure that would enable the provision of innovative digital services within the Community while safeguarding the fundamental rights of users on online platforms through establishing additional measures for fairness, transparency and accountability for the moderation of content on online digital platforms. The proposal outlines clear responsibilities and accountability mechanisms for the providers of intermediary services, particularly for large social media platforms and online marketplaces, through establishing clear due-diligence obligations and notice-and takedown procedures for the removal of illegal and harmful content online in order to improve the users' safety on online platforms and safeguard their fundamental rights. The proposal, considering the impact of very large online platforms within the European economy and society, sets even higher standards of accountability and transparency for the usage of risk management tools, with particular regard to automated and algorithmic content filtering measures which have become important tools for online content moderation in the modern digital age. The Digital Services Act creates increased obligations for the risk assessment of automated filtering tools and imposes the creation of appropriate risk management and auditing systems to protect the integrity and transparency of the services of very large online platforms against the use of manipulative techniques which would undermine the functioning of the digital economy. The proposal outlines that the scope of additional obligations and measures which would apply to very large online intermediaries in the Union, would be applicable if the platform has approximately more than 45 million monthly average recipients of the service. The specific changes and the impact of the provisions outlined in the Digital Services Act will be examined in the following sub-chapters.

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<sup>36</sup> Commission Proposal COM/2020/825 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.



### **3.1. Terms and Definitions**

With regard to the important terms and definitions outlined in the Digital Services Act, the proposal seeks to maintain the main principles and definitions established in the E-Commerce Directive without major significant changes. According to Article 2(f) of the Digital Services Act, the definition of intermediary services refers to (a) “a ‘mere conduit’ service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network (b) “a ‘caching’ service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request” and (c) “ a ‘hosting’ service that consists of the storage of information provided by, and at the request of, a recipient of the service”. Nonetheless there are certain newly introduced definitions in the Regulation which provide and attempt to create uniform definitions for “recommender systems” under Article 2 (o), “advertisement” under Article 2 (n) and also importantly for “content moderation” according to Article 2 (p) of the Regulation, wherein content moderation includes “the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account”. Although the changes made in the terms and definitions of the Digital Services Act do not entail significant changes compared to the E-Commerce Directive, the additional abovementioned definitions which clarify certain terms and actions, increase the consistency and clarity of the proposals within the Regulation.

### 3.2. Liability Regime under the Digital Services Act

The liability regime of the proposed Regulation is outlined in Chapter II, Articles 3-9 of the Digital Services Act which lay down the legal framework of the liability exemption regime available for the internet intermediaries. Importantly, the liability exemption regime does not significantly differ from the fundamental principles outlined in the E-Commerce Directive as Articles 3,4,5 and 7 of the Digital Services Act which concern “mere conduit”, “caching”, “hosting” and “no general obligation to monitor” respectively, effectively mirror the exact same content that is covered by Articles 12-15 of the E-Commerce Directive. Nonetheless, the Digital Services Act introduces a novel article to govern the liability regime of internet intermediaries which is outlined in Article 6 of the Digital Services Act and concerns the internet intermediaries’ “Voluntary own-initiative investigations and legal compliance” which states that: “Providers of intermediary services shall not be deemed ineligible for the exemptions from liability referred to in Articles 3, 4 and 5 solely because they carry out voluntary own-initiative investigations or other 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”. This additional article acts as an important safety mechanism for online internet intermediaries to remain within the liability exemption regime as previously under the E-Commerce Directive, the voluntary actions taken by intermediaries would place them outside the scope and protection of the liability exemption regime, thus exposing them to civil liability and potential damages claims.<sup>37</sup> Additional procedural measures are also introduced in Articles 8 and 9 of the Regulation which concern the intermediaries’ obligation to inform national judicial or administrative authorities about the specific action taken upon receipt of allegedly unlawful content. In summary, Chapter II of the Regulation does not introduce significant changes to the intermediary liability regime which was already in place by the legislative framework established by the E-Commerce Directive, therefore having relatively minimal reforming impact regarding the general liability regime of the Digital Services Act and its effectiveness shall primarily depend on the substantive regulation implemented by Member States.<sup>38</sup>

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<sup>37</sup> Savin, Andrej. 2021. "The EU Digital Services Act: Towards a More Responsible Internet." *Journal of Internet Law* 24 (7): 15-25.

<sup>38</sup> *Ibid.*, 6.

### **3.3. New Due Diligence Obligations Applicable for Internet Intermediaries**

Chapter III constitutes the significant majority of the changes proposed within the Digital Services Act which outline new due diligence and transparency obligations applicable for internet intermediaries. Chapter III is additionally divided into four subsections, wherein Section 1 concerns general rules applicable to all intermediary service providers, Section 2 deals with rules applicable to hosting services and online platforms, Section 3 establishes the applicable rules for online platforms only and Section 4 outlines the due diligence obligations for very large online platforms to manage systemic risks. Concerning the obligations applicable to all intermediaries outlined in Section 1, online intermediaries must: establish a single point of contact to allow for direct communication with Member States' authorities (Article 10), comply with the requirement for intermediaries which are not established within the Union to designate legal representatives that represent the online intermediary (Article 11), disclose the information about any restrictions in relation to the use of their services in their terms and conditions (Article 12), are obliged to publish detailed yearly reports based on any content moderation the online platforms have been involved in (Article 13). Articles 14 and 15 in Section 2 of the Digital Services Act respectively involve the implementation of specific harmonized notice-and takedown mechanisms and a statement of reasons if a provider removes or disables access to specific content. More specifically, Article 14 outlines the obligation for intermediaries to create easily accessible and user-friendly electronic notices which involve particular criteria and elements that must be available in the notice submission: (a) "an explanation of the reasons why the individual or entity considers the information in question to be illegal content", (b) "a clear indication of the electronic location of that information, in particular the exact URL or URLs, and, where necessary, additional information enabling the identification of the illegal content" (c) "the name and an electronic mail address of the individual or entity submitting the notice, except in the case of information considered to involve one of the offences referred to in Articles 3 to 7 of Directive 2011/93/EU" and (d) "a statement confirming the good faith belief of the individual or entity submitting the notice that the information and allegations contained therein are accurate and complete". The removal of the good faith presumption in Article 14 (d) of the Regulation has significant importance as to the protection of online intermediaries against unfounded complaints which could adversely affect the provision of digital services and creates a stronger framework for the protection of the legitimate rights of online intermediaries.<sup>39</sup> On the other hand, Article 15 of the

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<sup>39</sup> *Ibid.*, 8.

Regulation creates the obligation for internet intermediaries in the cases where they remove or disable specific content from the recipients of the service the requirement to also file a statement of reasons for the removal or disabling of the content and inform the recipient of the the removal of the content, creating a more reliable legal framework for notice-and takedown requests which takes into account the legitimate rights and interests of both the intermediaries and also the end-users on online platforms.

Section 3 of Chapter III outlines additional provisions applicable to online platforms, wherein Article 16 provides for an exclusion for online platforms which qualify as micro or small enterprises according to the Annex to Recommendation 2003/361/EC. Article 17 of the Regulation outlines an internal electronic complaint handling mechanism which enables users to lodge complaints against the decisions taken by online intermediaries regarding (a) “decisions to remove or disable access to the information”, (b) “decisions to suspend or terminate the provision of the service, in whole or in part, to the recipients” and (c) “decisions to suspend or terminate the recipients’ account”. This Article effectively creates the requirement for human oversight and the creation of further accountability and transparency measures as online intermediaries are unable to completely base their decisions for the abovementioned removal of information or data solely on automated filtering tools which would safeguard the users’ right to an additional appeal process, however, could significantly increase the costs of operation for intermediaries.<sup>40</sup> Article 18 of the Regulation supports the procedural measures outlined in Article 17 and establishes further opportunities for the parties involved to choose out-of-court dispute settlement measures for the resolvement of their dispute. Article 19 of the Regulation proposes the concept of “trusted flaggers”, wherein entities which specialize in dealing with the tackling of illegal and unlawful content are given priority status to handle the complaints submitted to the online intermediaries which have to forward these complaints to the trusted flaggers. Important safeguards for online intermediaries are provided for in Article 20 of the Digital Services Act which outlines the measures and protections against misuse by users who frequently provide manifestly illegal content and the submission of notices or complaints which are manifestly unfounded while taking into account the circumstances behind the intention of the recipient or the complainant and the gravity of the misuse, requiring the online intermediary to justify their decision behind the suspension of notices or the suspension of users on their online platforms. If there are any suspicions of criminal offences involving the threat to life and safety of persons or the likelihood

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<sup>40</sup> *Ibid.*, 9.

that such an event would take place, Article 21 obliges online intermediaries to inform the law enforcement or judicial authorities of Member States with the relevant information available to the intermediary. Further consumer protection mechanisms are outlined in Article 22 of the Regulation which places on the online intermediaries the obligation to ensure that traders who are offering products or services on the platforms of the online intermediary the accurate information of their name, address and electronic mail address and other verifications related to the trader and in the absence or inaccuracy of the abovementioned information, the online platforms are obliged to suspend the provision of their services to the trader until the request is complied with. The measures outlined in Article 22 shall significantly increase the administrative costs imposed on online intermediaries which, however, could be reasonably argued to be an important tradeoff for the protection of consumers and fair business practices from malicious traders involved in unfair commercial practices who are actively abusing fair business practices on online platforms and are compromising the quality of the provision of goods and services within the European digital market economy.

### **3.4. Obligations for Very Large Platforms**

Taking into consideration the impact and role of very large online platforms on the European economy and society, the Digital Services Act sets increasingly higher standards of transparency and accountability for the monitoring of the content of such platforms in Articles 25-37 of the Regulation through further due diligence and oversight obligations to develop appropriate risk management tools in order to protect the integrity of their services against the use of manipulative techniques. According to Article 25 of the Digital Services Act, online platforms are considered to be very large platforms which provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, calculated in accordance with the methodology set out in further paragraphs of Article 25. Additional risk assessment obligations are created for very large platforms in Article 26 of the Regulation which require platforms to address issues related to any systemic risks stemming from the functioning of their services within the Union which concern (a) the dissemination of illegal content, (b) the risks of negative effects with regard to private and family life and, freedom of expression and information and the prohibition of the discrimination of children, and (c) the risks resulting from the intentional manipulation of the platforms' services with an adverse effect on on the protection of "public health, minors, civic discourse, or actual or foreseeable effects related to electoral processes and

public security”. Article 27 of the Regulation briefly outlines the obligation for very large platforms to introduce “reasonable, proportionate and effective” mitigation measures for the risks covered by Article 26. The carrying out of independent audits to assess compliance with the Regulation is required under Article 28 of the Regulation which compels very large platforms to carry out yearly independent audits lead by independent organizations with expertise, and if the following audit displays a negative result, very large platforms must take organizational measures within 30 days to implement the changes proposed by the auditing organization. Further transparency obligations are outlined in Article 30 relating to the display of online advertisements and the information regarding advertisers, Article 31 which allows for the access to monitoring data upon the request of a Digital Services Coordinator or the Commission to ensure compliance with the Regulation and Article 32 which obliges very large platforms to appoint a compliance officer whose duties are (a) “cooperating with the Digital Services Coordinator of establishment and the Commission”, (b) “organising and supervising the very large online platform’s activities relating to the independent audit pursuant to Article 28”, (c) “informing and advising the management and employees of the very large online platform about relevant obligations under this Regulation”, and (d) “monitoring the very large online platform’s compliance with its obligations under this Regulation”. Lastly, Article 33 of the Regulation requires very large online platforms to publish the reports referred to in Article 13 every six months from the date of application referred to in Article 25(4).

### 3.5. Analysis and Evaluation

Considering the proposed changes outlined in the Digital Services Act, it could be stated that the direction taken by the Regulation and the Commission is headed in the correct direction to harmonize the legal framework surrounding digital intermediaries within Europe and safeguarding the legitimate rights of businesses and consumers concerning their rights to freedom to conduct business and ensuring fair business practices while also protecting the users' rights to freedom of expression and information. The Regulation rightfully seeks to harmonize the gaps and challenges which have emerged since the adoption of the E-Commerce Directive through implementing harmonized notice-and takedown mechanisms, creating additional measures for online intermediaries to provide detailed reports to ensure that transparency and accountability measures are followed with respect to online content moderation, ensuring compliance through steep fines and injunctions in case of non-compliance and sets even higher standards for very large online platforms to manage systemic risks resulting from the crucial role these major platforms play in the modern digital age of the European Union's economy and society.

With regard to the abovementioned considerations outlined in the proposed Digital Services Act, the European Union faces two primary challenges for the creation of a uniform and harmonized digital services market in Europe. The first issue concerns the necessity for high levels of harmonization on the EU level, as the limitations from the fragmented legal framework created by the E-Commerce Directive should certainly be avoided as any further divergences in European and national laws would result in additional legal uncertainty for online intermediaries and the inability to protect the fundamental rights of users on online platforms. Nonetheless, the EU must navigate a careful balancing act and manage the impact of the newly proposed Digital Services Act as it could have major implications for the engagement of large platform economies which play a significant role in the modern economy and society which could risk isolating the EU from global digital platform economies and raising barriers to entry could deter digital businesses from innovating their services and entering the market if the enforcement of such rules and measures outlined in the Digital Services Act are burdensome or too excessive for online intermediaries to comply with.<sup>41</sup> Despite the considerable changes proposed in the Regulation itself, the success of the Digital Services Act shall nonetheless highly depend on the subsequent legislation adopted by

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<sup>41</sup> Rodríguez, Teresa. 2021. "The background of the Digital Services Act: looking towards a platform economy." *Journal of the Academy of European Law* 22: 75-86.

European and national legislative and regulatory bodies, and the substantive decisions taken by judicial authorities which shall decide and provide the solutions as to what constitutes and is considered illegal content online and the extent as to how to balance the competing fundamental rights in order to create a stable and functioning digital economy within the Union for both online intermediaries and users alike.<sup>42</sup> Furthermore, some concerns could arise with the overall complexity of due diligence and transparency reporting requirements prescribed for online intermediaries within the Digital Services Act which, as a result, could to a certain extent disincentivize the recipients of intermediary services to acquaint themselves with the reports on the activities of online intermediaries. Although there are significant uncertainties regarding the use of automated filtering measures, the Digital Services Act must ensure that the Regulation is adequately balanced and implements the highest possible standards to safeguard the recipients of online services and, on the other hand, makes sure that the provisions are not too excessive and do not prevent technological progress and innovation within the sphere of digital services.

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<sup>42</sup> Savin (2021), *supra nota* 34, 16.



## 4. PROPOSALS FOR REFORM

In order to fulfill the objectives established in the Digital Services Act and establish harmonized standards for European digital markets which ensure high levels of legal certainty and consumer protection for both online intermediaries and the recipients of intermediary services, the author outlines two main proposals which the Digital Services Act should revise and address.

Firstly, in order to maintain high levels of consumer protection within the digital services economy, an extension of Article 22 which concerns the traceability of traders to include micro- and small enterprises is required.<sup>43</sup> Currently according to Article 16 of the Digital Services Act, the Regulation excludes additional provisions applicable to online platforms if the online platform qualifies as a micro- or small enterprise within the meaning of the Annex to Recommendation 2003/361/EC.<sup>44</sup> The criteria to be qualified as a micro- or small enterprise according to the number of workers or annual turnover could potentially become a weak link within the Regulation which businesses could easily circumvent. Moreover, in the context of the digital economy, online businesses that provide goods and services within digital marketplaces are relatively feasible to model while still staying within the criteria and qualifications of being a micro- or small enterprise. This is particularly important, as online marketplaces could still have a significant amount of traffic and recipients using such services, and the exclusion for micro- and small enterprises would exclude them from significant parts of the proposed regulation which include internal complaint-handling systems, the protective measures against abusive behaviour, reporting to trusted flaggers, reporting criminal offences, advertising and reporting transparency and the carrying out of independent audits. As a result, there is a high potential for the dissemination of either illegal or harmful goods and online content in the online environment even while being qualified as a micro- or small enterprise which would significantly undermine the legitimate rights and interests for the protection of consumers in the digital environment. To avoid unfair competition based on sheer size and economic power and allow for smaller businesses to innovate their services, micro- and small enterprises should not be subject to all of the additional provisions applicable to online platforms in Section 3 of the Regulation, however certain revisions based on, for instance, a risk-

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<sup>43</sup> Opinion of the European Economic and Social Committee of 29 April 2021 on the 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

<sup>44</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36–41

assessment approach instead of the size and annual turnover should be implemented to safeguard the rights of consumers.

Secondly, the Digital Services Act must introduce additional measures which would ensure that short-term traders who abuse the system and create new accounts to sell goods and services in the online marketplace provided by the online intermediary are effectively dealt with. As it stands according to Article 22 (4) of the Digital Services Act concerning the traceability of traders, “The online platform shall store the information obtained pursuant to paragraph 1 and 2 in a secure manner for the duration of their contractual relationship with the trader concerned. They shall subsequently delete the information.” As a result, this provision effectively prevents online intermediaries from permanently suspending the activities of traders who systematically abuse the cancellation of the contractual relationship between the intermediary and the creation of new accounts on their platform to keep selling counterfeit or illegal goods on their website without the online intermediary having the ability for any effective measures to prevent this from occurring. Therefore, as a proposal, the Digital Services act should implement a national regulatory authority which could store the information of the traders and verify their credibility and in case of systematic abuse reported by the online intermediary, the national authority could issue an order to permanently suspend the activities of the trader. This additional measure would significantly prevent misuse by traders and increase the credibility of online trading platforms while effectively reducing the amount of counterfeit or non-compliant goods in online marketplaces.

## 5. CONCLUSION

Taking into consideration the emergence of new major digital platform economies which have fundamentally transformed the digital architecture and the provision of goods and services within the modern European digital economy, the importance of having a properly functioning and harmonized European digital market has become without a doubt one of the key points of discussion for the successful functioning of the European Union. Since the adoption of the E-Commerce Directive on 8 June 2000, significant limitations and shortcomings concerning the digital legal framework and intermediary liability regime have surfaced regarding their capacity to effectively safeguard the objectives and the protection of fundamental freedoms outlined in the E-Commerce Directive.

In response to the challenges presented in the E-Commerce Directive, the European Commission has put forward a preliminary legislative proposal called the Digital Services Act which would reform the legal framework surrounding the provision of digital services and the liability regime of online intermediaries. The newly proposed Digital Services Act seeks to bring about important changes for the legal framework of digital platform economies within Europe. Although the original intermediary liability protection mechanisms have been relatively unchanged, a harmonized notice- and takedown system is implemented, including the creation of new internal complaint handling systems and alternative dispute resolution systems to safeguard the principles of due process and transparency for the users of online platforms which would guarantee the users' rights to exercise their rights to freedom of expression and information. Additionally, a more specialized set of rules has been carved out for very large online platforms which would be subject to increased procedural and regulatory oversight, with the introduction of extra layers of transparency, accountability, and reporting requirements for the moderation of content on such platforms, wherein additional enforcement measures which include steep fines for violations of the proposed measures would ensure the compliance with the Regulation. Nonetheless in order to successfully implement the proposals outlined in the Digital Services Act, the European Union must strike a careful balance between the impact of increased regulations and organizational measures on online intermediaries to prevent the European Union from isolating itself from the global digital platform economy and the risk of excessively increasing entry barriers for new online intermediaries as that would have considerable effects on the development of the digital economy, innovation and the ability to conduct business within the Union.

Additionally, this thesis has addressed two important proposals which should be revised in the Digital Services Act. The first proposal deals with the inclusion of micro- and small enterprises within the legal framework concerning the additional provisions applicable to online platforms in Section 3 of the Regulation, as there is a high chance for the circulation of illegal or counterfeit goods and unlawful content in the online environment through micro- and small enterprises, and proposes that the criteria to include micro- and small enterprises in the provisions of Section 3 of the Regulation should be based on a risk-assessment approach of their services instead of their size and annual turnover. The second proposal concerns itself with short-term traders who could potentially abuse the platforms of internet intermediaries and continue selling illegal or counterfeit goods using their services, as online intermediaries must according to Article 22 (4), after the duration of their contractual relationship with the trader, delete all the information concerning the trader. To provide countermeasures and safeguards for online intermediaries and prevent the circulation of illegal or counterfeit goods on their platforms, the author proposes that the data concerning the trader should be stored in a national regulatory body or register which could, on the request of a reasonable request by the intermediary, prohibit the trader from carrying on its activities.

In conclusion, although the current proposal of the Regulation could still be considered imperfect, the newly proposed Digital Services Act represents the ambitious development to reform the European digital services economy and is one of the most important legislative proposals that will significantly affect the protection of fundamental rights and interests for both online intermediaries and the recipients of intermediary services.

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