

Future is Calling¹: The Digital Services Act (DSA)² within the Context of Consumer Protection³

¹ Cf. in the following *Parashu, Dimitrios*, Elements of EU Consumer Protection Law. With Analyses of other EU Market Law Matters, Berlin 2024, pp. 31 et seqq.

² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (OJ L 277 of 27 October 2022, p. 1).

³ See in the following European Commission (ed.), The Digital Services Act Package, accessed through <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> (last accessed on 10 February 2025). For the practical importance of the topic involved, cf. *Obly, Ansgar*, Die Haftung von Internet-Dienstleistern für die Verletzung lauterkeitsrechtlicher Verkehrspflichten, in: GRUR 2017, pp. 441 et seqq.

A Regulation 2022/2065 (DSA)

A.1 General Introduction⁴

The importance of digital services in our lives is understandable in many different ways: Such services are used to communicate, to shop, to find information etc., all of it through constantly evolving, newer digital services. They have also made trade across borders and the access of new markets much easier:

But there are also issues to address, issues which deal with the trade and exchange of illegal goods and services. Online services might also be misused by manipulative algorithmic systems and disinform especially the weaker link on the market, the consumer.

A main issue is still that some larger online platforms control important ecosystems within the digital economy, acting as gatekeepers on the digital markets – leading sometimes to unfair conditions, not only for businesses using these platforms, but also for consumers. To address such matters, the DSA was introduced.

The path to the DSA observed and followed technological progress, of course. Put more generally, since the 1970s the European Communities were trying to articulate certain consumer protection law programs (with reference to President *Kennedy's* 1962 “Con-

⁴ Cf. in the following *Parashu* (Fn. 1), pp. 1 et seqq.

sumer Bill of Rights”)⁵. A lack of compromise between the Member States led the European legislator to concrete first results in that area, only significantly later,⁶ for instance in the 1980s⁷ and 1990s⁸. In that way, several types of contract which proved to become more influential over the years were mirrored, for the consumers’ benefit.

The EU followed this path and issued, among other activities, a special European Consumer Agenda in 2012⁹ which, due to further technological develop-

⁵ Cf. *Mayer, Robert N.*, The US Consumer Movement: A New Era Amid Old Challenges, in: *The Journal of Consumer Affairs*, Vol. 46, No. 2, Special Issue on Product Literacy (Summer 2012), pp. 171 et seqq. (171 et seq.). More generally, cf. *Schwartz, Victor E. / Behrens, Mark A. / Silverman, Cary / Tedesco, Rochelle M.*, Consumer Protection in the Legal Marketplace: A Legal Consumer’s Bill of Rights is Needed, in: 15 *Loyola Consumer Law Review* 1 (2002), pp. 1 et seqq.

⁶ To understand the struggle better, cf. generally *Schricker, Gerhard*, Die Angleichung des Rechts des unlauteren Wettbewerbs im Gemeinsamen Markt, in: *WRP* 1977, pp. 1 et seqq.; *Möstl, Markus*, Grenzen der Rechtsangleichung im europäischen Binnenmarkt, in: *EuR* 2002, pp. 318 et seqq.; *Bock, Yves*, Rechtsangleichung und Regulierung im Binnenmarkt. Zum Umfang der allgemeinen Binnenmarktkompetenz, Baden-Baden 2005, especially pp. 1 et seqq.

⁷ Cf. Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372 of 31 December 1985, p. 31).

⁸ Cf. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144 of 4 June 1997, p. 19).

⁹ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A European Consumer Agenda – Boosting confidence and growth (COM/2012/0225 fin.).

ment and its needs to be addressed,¹⁰ aimed at further consumer protection policies by the Union¹¹ in order to also enhance competition matters¹². In 2020, the European Commission adopted a successor, the New Consumer Agenda,¹³ which effectively updated the overall strategic framework of the EU consumer policy, aiming to respond the post-pandemic and digitalisation challenges to consumer rights.

A.2 Regulation 2022/2065 and Consumer Protection¹⁴

Due to the constantly growing significance of information society services also for consumers,¹⁵ and in order to enhance the most responsible behaviour possible by providers of such services,¹⁶ to EU legislator issued Regulation 2022/2065, which is due to apply from 17 February 2024 onwards,¹⁷ and amends¹⁸ important

¹⁰ Cf. Point 3 of said Communication.

¹¹ Cf. Point 1 of said Communication.

¹² Cf. *ibid.*

¹³ Communication from the Commission to the European Parliament and the Council, New Consumer Agenda Strengthening consumer resilience for sustainable recovery (COM/2020/696 fin.).

¹⁴ Cf. *Parashu* (Fn. 1), p. 31 et seqq.

¹⁵ Cf. Recital 1 to Regulation 2022/2065.

¹⁶ Cf. Recital 3 to Regulation 2022/2065.

¹⁷ Cf. Article 93 Para 2 Regulation 2022/2065.

¹⁸ Cf. Article 89 Regulation 2022/2065.

parts of the Electronic Commerce Directive 2000/31¹⁹.
It aims at

*(...) setting out harmonised rules for a safe, predictable and trusted online environment that facilitates innovation and in which fundamental rights enshrined in the Charter, including the principle of consumer protection, are effectively protected. (...)*²⁰

It does so especially through Article 29 et seqq., which include provisions regarding providers of online platforms, whenever allowing consumers to conclude distance contracts with traders through said platforms. Especially the quite excessive right to information would have to be emphasised here,²¹ as well as matters of data access and respective checks and balances,²² and last, not least, certain conduct rules for online advertising.²³ Non-compliance from the providers' side might very well lead to legal sanctions, also for the consumers' benefit.²⁴ Taking place under the auspices of the freshly foreseen "European Board for Digital Services",²⁵ one cannot still determine the ultimate impact of said secondary legal act on the Market and especially on matters of consumer protection.

¹⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178 of 17 July 2000, p. 1).

²⁰ See Article 1 Para 1 Regulation 2022/2065.

²¹ Cf. Article 32 Regulation 2022/2065.

²² Cf. Article 40 Regulation 2022/2065.

²³ Cf. Article 46 Regulation 2022/2065.

²⁴ Cf. Article 52 et seqq. Regulation 2022/2065.

²⁵ See Article 61 et seqq. Regulation 2022/2065.

a) Recital Analysis

As Recital 1 to Regulation 2022/2065 points out, the specificity of information intermediary services (for instance online social networks or several online platforms which among other allow consumers to conclude distance contracts with traders, forming new ways of business transactions) have advanced²⁶ to be an important part both of the Union's economy and the Union citizens' daily life, calling for a normative update, twenty years after the Directive 2000/31/EC²⁷.

In terms of legal certainty,²⁸ the EU legislator decided to advance to the present regulation, in order to avoid possible diverging national laws²⁹ that could (through societal risks³⁰) negatively affect the internal market³¹, to ensure the necessary market efficiency³² and to serve – for the sake of Fundamental Rights of the EU Charter – the necessary goal of a both predictable and trustworthy (meaning both transparent and accountable)³³ online environment.³⁴ This mainly

²⁶ Cf. Recitals 28–29 to Regulation 2022/2065.

²⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L 178 of 17 July 2000, p. 1).

²⁸ See Recitals 16, 26 to Regulation 2022/2065.

²⁹ Cf. Recital 31–35, 38, 52–53 to Regulation 2022/2065.

³⁰ See Recitals 76/80–86/90–91/100 to Regulation 2022/2065.

³¹ Cf. Recitals 2, 4 to Regulation 2022/2065.

³² Cf. Recital 7 to Regulation 2022/2065.

³³ See especially recitals 48–49, 65–66 to Regulation 2022/2065.

³⁴ Cf. Recitals 3, 9, 47, 51, 72, 153/155 to Regulation 2022/2065; regarding harmonised "due diligence obligations" for providers see especially recitals 40–41 to Regulation 2022/2065.

by reflecting already existing rules against relevant illegality in the offline environment,³⁵ for instance also in the area of advertisement matters.³⁶ The Regulation 2022/2065 is addressed mainly to platform providers as defined by Directive (EU) 2015/1535³⁷ who provide their services (via a ‘dissemination to the public’³⁸) being “substantially connected to the Union”³⁹ for remuneration.⁴⁰ Matters of communication with recipients are also of importance within the Regulation 2065/2022⁴¹.

Moreover, its liability⁴² rules establish especially whenever the provider cannot be held liable relating specifically to illegal content provided by service recipients,⁴³ with further beneficial (for providers) provisions wherever applicable⁴⁴ – Injunction possibilities aside,⁴⁵ as well as redress issues,⁴⁶ out-of-court dispute

³⁵ Cf. Recital 12 to Regulation 2022/2065.

³⁶ Cf. Recitals 68–69, 95, 107 to Regulation 2022/2065.

³⁷ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241 of 17 September 2015, p. 1).

³⁸ See Recital 14/75 to Regulation 2022/2065.

³⁹ See Recitals 7, 8, 36 to Regulation 2022/2065.

⁴⁰ Cf. Recitals 5, 6, 13 to Regulation 2022/2065.

⁴¹ See regarding “single points of contact for recipients of services” especially the recitals 42–43 to Regulation 2022/2065.

⁴² Cf. Recitals 121–122 to Regulation 2022/2065.

⁴³ Cf. Recital 17 to Regulation 2022/2065.

⁴⁴ Cf. Recitals 19–22, 27, 30 to Regulation 2022/2065.

⁴⁵ Cf. Recital 25 to Regulation 2022/2065.

⁴⁶ Cf. Recital 39 to Regulation 2022/2065.

settlement,⁴⁷ audits⁴⁸ and access to data;⁴⁹ the Commission (and relevant national authorities⁵⁰ through necessary cooperation⁵¹) of course always being in the position to sanction⁵² and monitor,⁵³ also in regard to (soft law) codes of conduct.⁵⁴ A special Board for Digital Services, acting as advisor especially to the Commission, is also foreseen.⁵⁵

Expressis verbis the present Regulation 2022/2065 shall not seen as colliding to further relevant secondary legal acts of the EU.⁵⁶

b) Regulation Analysis

ba) First Things First

The main goals of Reg. 2022/2065, which exists parallelly to the core elements of Directive 2000/31⁵⁷ and avoids also other collisions with preexisting secondary EU law,⁵⁸ are threefold, attempting to harmonise⁵⁹ (for the benefit of the internal market)⁶⁰ intermediary ser-

⁴⁷ Cf. Recitals 59–60 to Regulation 2022/2065.

⁴⁸ Cf. Recitals 92–93 to Regulation 2022/2065.

⁴⁹ Cf. especially Recitals 96–98 to Regulation 2022/2065.

⁵⁰ Cf. Recitals 109–116/123–125 to Regulation 2022/2065.

⁵¹ Cf. Recital 127/130 to Regulation 2022/2065.

⁵² Cf. Recitals 117–120/125/139/144 to Regulation 2022/2065.

⁵³ Cf. Recital 101/138/141–143/147–148 to Regulation 2022/2065.

⁵⁴ Cf. Recitals 103–106 to Regulation 2022/2065.

⁵⁵ Cf. especially Recitals 131–137 to Regulation 2022/2065.

⁵⁶ Cf. Recitals 10–11, 56, 74, 149 to Regulation 2022/2065.

⁵⁷ Cf. Article 2 Para 3 Regulation 2022/2065.

⁵⁸ Cf. Article 2 Para 4 Regulation 2022/2065.

⁵⁹ Cf. Article 1 Paras 1, 2 Regulation 2022/2065.

⁶⁰ Cf. *ibid.*

vice providers' potential liability exemptions,⁶¹ further their possible due diligence obligations⁶² and last – not least – necessary cooperational matters between Commission and relevant national enforcement authorities⁶³. All this in reference to only intermediary⁶⁴ services offered to recipients established or located in the EU, regardless the respective service providers' place of establishment.⁶⁵ A plethora of necessary definitions for the Regulation application follows in Article 3 of said Reg., as usual for comparable secondary EU legal acts.

bb) Liability and Orders

Of the utmost importance is the subject of providers' potential liability: First of all, the EU lawmakers did not include a general information monitoring obligation⁶⁶ (regardless a supervisory fee charged by the Commission in terms of *checks and balances* when dealing with distance contracts)⁶⁷ but opened the door to any voluntary own-initiative investigations if necessary.⁶⁸

In regard to matters of “mere conduit”⁶⁹, no liability of a provider is foreseen with respect to transmission in a communication network of information (in-

⁶¹ Cf. Article 1 Para 2 lit. a Regulation 2022/2065.

⁶² Cf. Article 1 Para 2 lit. b Regulation 2022/2065.

⁶³ Cf. Article 1 Para 2 lit. c Regulation 2022/2065.

⁶⁴ Cf. Article 2 Para 2 Regulation 2022/2065.

⁶⁵ Cf. Article 2 Para 1 Regulation 2022/2065.

⁶⁶ Cf. Article 8 Regulation 2022/2065.

⁶⁷ Cf. Article 43 Regulation 2022/2065.

⁶⁸ Cf. Article 7 Regulation 2022/2065.

⁶⁹ Article 4 Regulation 2022/2065.

cluding storage)⁷⁰ provided by a service recipient, or the mere access to a communication network – as long as the transmission is not initiated by the provider, as well as the receiver and the transmission information are not selected by the provider.⁷¹ Infringement provision obligations for providers can be foreseen by national legislation, though.⁷²

In regard to matters of “caching”⁷³, no liability of a provider is foreseen with respect to transmission in a communication network of information provided by a service recipient, as long as the information storage is being done only for reasons of transmission efficiency or security – given that all necessary obligations about *e.g.* accessing and updating these elements of information are met by providers.⁷⁴ Again, infringement provision obligations for providers can be foreseen by national legislation here.⁷⁵

In regard to matters of “hosting”⁷⁶, no liability of a provider is foreseen with respect to storage of information provided by a (non-acting under provider control)⁷⁷ recipient of the service, as long as providers’ lack knowledge of relevant illegal activity or illegal content or – if informed properly – act accordingly in order to remove such content.⁷⁸ Once more, infringement pro-

⁷⁰ Cf. Article 4 Para 2 Regulation 2022/2065.

⁷¹ Cf. Article 4 Para 1 litt. a-c Regulation 2022/2065.

⁷² Cf. Article 4 Para 3 Regulation 2022/2065.

⁷³ Article 5 Regulation 2022/2065.

⁷⁴ Cf. Article 5 Para 1 litt. a-e Regulation 2022/2065.

⁷⁵ Cf. Article 5 Para 2 Regulation 2022/2065.

⁷⁶ Article 6 Regulation 2022/2065.

⁷⁷ Cf. Article 6 Para 2 Regulation 2022/2065.

⁷⁸ Cf. Article 6 Para 1 litt. a-b Regulation 2022/2065.