

# The Digital Services Act: Practical Implications for Online Services and Platforms

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## Introduction

The [Digital Services Act](#) (DSA) is a key part of the European Union's (EU) digital regulation strategy, which seeks to modernise legal frameworks and create a safer and more open digital environment.

The DSA entered into force in the EU on 16 November 2022. Whilst a number of provisions took effect on this date (including the provisions empowering the European Commission (**Commission**) to designate certain entities as “very large online platforms” (**VLOPs**) and “very large online search engines” (**VLOSEs**), as well as the obligation on online platforms to publish transparency reports), the majority of the operative provisions will not come into force until 17 February 2024.

Designated online platforms and online search engines were required to publish their first transparency reports by 17 February 2023, and will be obliged to continue to do so once every six months thereafter.

The DSA has a broad scope and regulates many aspects of digital services, including liability for online content and services, targeted advertising, know your business customer (KYBC) requirements, transparency for users, and managing systemic platform risks. The various requirements and restrictions of the DSA apply differently depending on the nature of the digital service being provided, with VLOPs and VLOSEs subject to the most comprehensive controls.

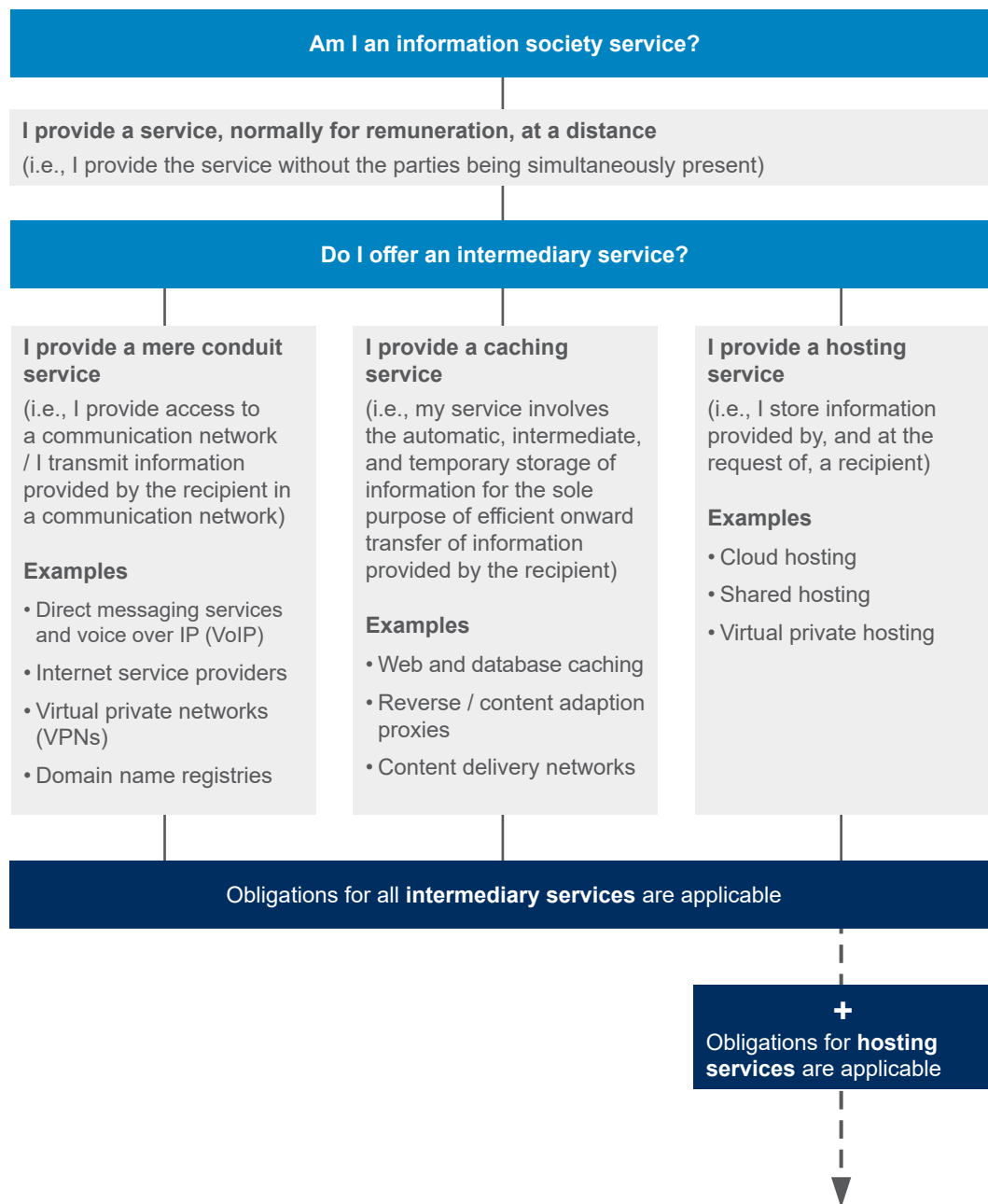


# Applicability

The DSA imposes obligations on all **information society services** that offer an **intermediary service** to recipients who are located or established in the EU, regardless of whether that **intermediary service provider** is incorporated or located within the EU.

Additionally, the DSA imposes cumulative obligations on **intermediary services** that fall within the definition of: (i) hosting services; (ii) online platforms and marketplaces; and (iii) VLOPs and VLOSEs.

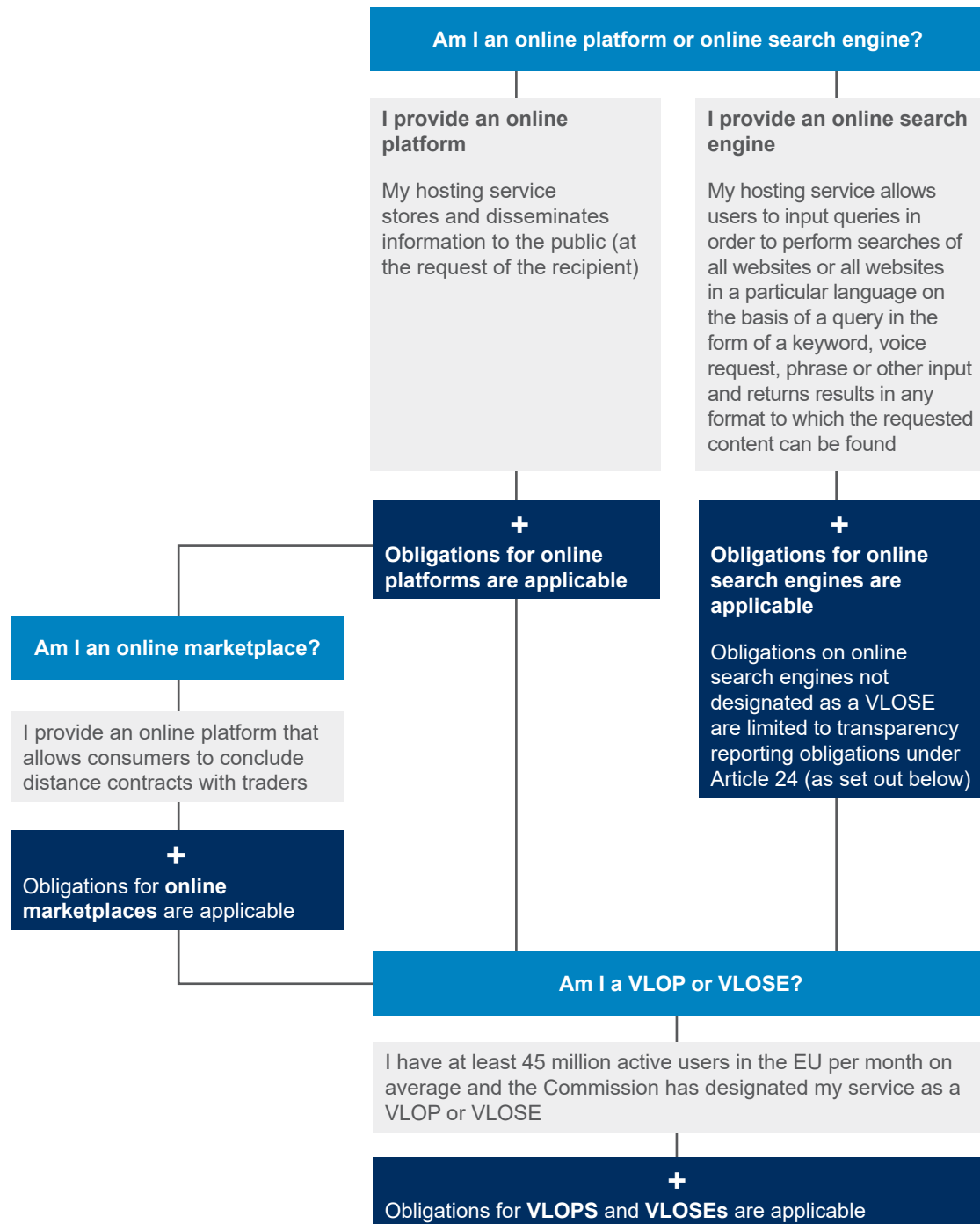
The chart below aims to help entities navigate the DSA by identifying the cumulative obligations applicable to each type of in-scope intermediary service.



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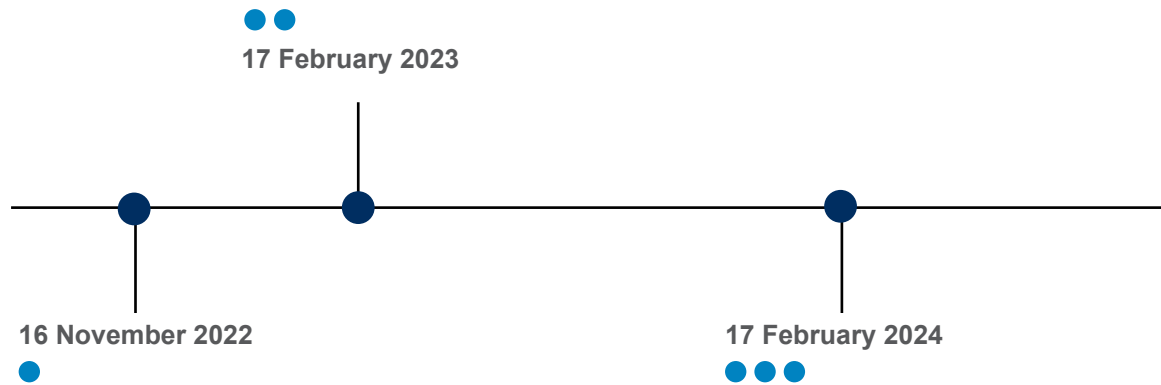


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# Timeline



● The following provisions came into force on **16 November 2022**:

- **Designation of VLOPs and VLOSEs:** The Commission may designate providers meeting the relevant thresholds as VLOPs or VLOSEs, following the completion of the initial transparency reporting under Article 24 by 17 February 2023 (though failure to meet the transparency reporting deadline will not prevent such a provider from being designated as such). VLOPs and VLOSEs will then have 10 working days to submit views on their designation, which the Commission will take into account in its decision (Article 33(3) to (6)). Once designated as a VLOP or VLOSE, the provider must comply with applicable obligations within four (4) months of designation, or by 17 February 2023 (whichever is earlier).
- **Supervisory fee:** The Commission may set and adopt an annual supervisory fee to be charged to VLOPs and VLOSEs for the costs associated with the Commission's performance of certain obligations and powers under the DSA.
- **Enforcement (VLOPs and VLOSEs):** The Commission may (i) take steps related to the initial and continued supervision, investigation, enforcement and monitoring of VLOPs and VLOSEs; and (ii) impose penalty fines of up to 6% of annual worldwide turnover against VLOPs and VLOSEs for failure to comply with the DSA (Articles 73-74).
- **Delegated acts:** The Commission may adopt delegated acts relating to (i) the procedural steps, auditing methodologies and reporting templates for audits performed under the DSA (Article 37(7)); and (ii) technical conditions under which VLOPs or VLOSEs are to share data and the purposes for which the data may be used (Article 40(13)).

● ● **Transparency reporting:** The obligations for transparency reporting are set out in Article 24(2), (3) and (6). Online platforms and online search engines must have published their first transparency report by **17 February 2023**. Once every six months thereafter, providers must publish information on average monthly active users.

● ● ● **VLOPs and VLOSEs:** The applicable, substantive provisions of the DSA will apply from the **earlier of four months after a provider's designation as a VLOP or VLOSE, or 17 February 2024**.

● **All other intermediary service providers:** The applicable, substantive provisions of the DSA will apply to these entities from **17 February 2024**.



# Obligations and Liability

## 1. Obligations and liability rules applying to all intermediary services

Mere Conduits, Caching Services	Hosting Services	Online Platforms	Online Marketplaces	VLOPs / VLOSEs
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An intermediary service refers to any of the following services:

- 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;
- 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; or
- a **hosting service** that consists of the storage of information provided by, and at the request of, a recipient of the service

In relation to the liability of intermediary service providers for content transmitted or hosted on their services, the DSA maintains the existing exemptions from liability or “safe harbours” under the e-Commerce Directive. Under the DSA, providers are not liable for content hosted on their service so long as they either do not know the content is illegal or infringing, or they promptly remove or block access to that content once aware that it is illegal or infringing. The DSA clarifies that intermediary service providers will not lose the benefit of the liability exemptions by virtue of any own-initiative monitoring they carry out on their platforms. However, if a provider does identify illegal or infringing content via its own-initiative monitoring, it must promptly remove such content in order to remain within the liability safe harbour. The DSA maintains the e-Commerce Directive position that providers are not under any general obligation to conduct own-initiative monitoring for illegal or infringing content or activity.

The DSA makes one substantive change to the historic e-Commerce Directive position on liability safe harbours, which is to disapply the liability exemptions in relation to an online marketplace platform provider’s liability under consumer protection law if that provider presents the relevant services, products, or information in a way that would lead consumers to believe that the platform provider itself is providing those services or products.

The DSA imposes certain key obligations applicable to all intermediary services. The key areas for consideration are:



### **A. Transparency reporting: Publication of annual reports on content moderation**

Under Article 15, all providers are required to make publicly available annual reports on content moderation that they are engaged in. These reports must include information about the moderation initiative, including information relating to illegal content, use of automated tools, training measures, and complaints received under complaints-handling systems.

For VLOPs and VLOSEs only, such reports must be published every six months under Article 42 and the report must specify the human resources dedicated to content moderation, the qualifications and linguistic experience of such persons and the indicators of accuracy and related information.

#### **Guidance**

To prepare for the DSA coming into force, providers should assess whether their content moderation dashboards allow them effectively and efficiently to extract and report the relevant information.

### **B. Appointment of points of contact and legal representatives**

All providers are required to establish two points of contact: (i) under Article 11 for communication with the EU Member State Authorities, the Commission, and the European Board for Digital Services (the Board); and (ii) under Article 12 for rapid and direct communication with the recipients of their services.

Under Article 13, providers not established in the EU but which provide services into the EU must designate a legal representative in an EU Member State in which it offers its services for the receipt of, compliance with, and enforcement of decisions issued under the DSA. Notably, such legal representatives can be held liable for non-compliance with the DSA, without prejudice to the liability that could be initiated against the provider.

### **C. Updates to terms and conditions (T&Cs)**

Article 14 requires all providers to ensure their terms of service use clear, plain, intelligible, user-friendly, and unambiguous language. Further, these T&Cs must be available in an easily accessible and machine-readable format. Providers are also obligated to inform the recipients of their services of any significant changes to such T&Cs and to explain the conditions for, and any restrictions on, the use of their services that are intended for use by minors in such a way that is understandable to minors.

#### **Guidance**

To facilitate compliance with the DSA as a whole, providers should consider whether their T&Cs need to be updated to reflect or to facilitate other applicable obligations arising under the DSA (e.g., their transparency or content moderation obligations).

### **D. Content moderation policies and takedown orders**

The majority of obligations relating to content moderation apply only to hosting services, online platforms, and VLOPs/VLOSEs. However, under Article 14(4), all intermediary services providers are required to ensure that any restrictions imposed on content moderation should have due regard to the rights and legitimate interests of all parties. In addition, under Articles 9 and 10, all intermediary services are required to comply with information orders and takedown orders from regulators and judicial authorities.





## 2. Additional cumulative obligations for providers of hosting services

Mere Conduits, Caching Services	Hosting Services	Online Platforms	Online Marketplaces	VLOPs / VLOSEs
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A **hosting service** refers to a service that consists of the storage of information provided by, and at the request of, a recipient of the service.

For the purposes of the DSA, hosting services include **online platforms, online marketplaces, and VLOPs**.

In addition to the obligations above, the DSA imposes further cumulative obligations on providers of hosting services. The key areas for consideration are:

### A. Notice and takedown procedures

Under Article 16, providers of hosting services are required to – in relation to the Article 15 transparency reporting obligations discussed above -- implement mechanisms to allow recipients of their services to notify them of the presence of allegedly illegal content. These mechanisms must allow for sufficiently precise and detailed notices to be submitted. Under Article 17, providers of hosting services then have an obligation to provide a statement of reasons to the affected user, which must include the decision taken, the facts and circumstances relied on in taking such a decision, information on the use of automated means, reference to the legal or contractual ground relied on (where the decision concerns allegedly illegal content or a violation of T&Cs), and information on the redress available.

#### Guidance

To prepare for the DSA coming into force, providers should appraise their notice and action mechanisms to ensure they meet the standards set under the DSA, and allow for sufficiently detailed and complex notices to be submitted, reviewed, judged, and transparently decided upon.

### B. Reporting criminal offences

Under Article 18, providers of hosting services are obligated to inform the national law enforcement or judicial authorities of the relevant EU Member State of any information that gives rise to suspicions of criminal offences involving a threat to the life or safety of persons.



### 3. Additional cumulative obligations for providers of online platforms

Mere Conduits, Caching Services	Hosting Services	Online Platforms	Online Marketplaces	VLOPs / VLOSEs
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An online platform is a hosting service that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of the DSA.

VLOPs and online marketplaces are types of online platform, for the purposes of the DSA.

In addition to the obligations listed above, providers of online platforms are subject to a number of additional cumulative obligations set out in A to F below. These obligations do not, however, apply to online platforms that qualify as micro or small enterprises (as defined in [Recommendation 2003/361/EC](#)).

#### A. Redress mechanism for users

Article 20 requires providers of online platforms to maintain an internal complaints-system that enables the recipients of their services to lodge complaints against a decision to remove, disable, suspend, or terminate a user's access to information, services, or their account. Under Article 21, providers of online platforms are obligated to inform complainants of their reasoned decision and the options available to them, including out of court settlement or other redress options.

#### B. Prioritising trusted flaggers

Article 22 requires providers of online platforms to prioritise trusted flagger notices. Trusted flaggers are appointed by the new DSA regulator (known as the Digital Services Coordinator) of the EU Member State where the trusted flagger applicant is established and the Commission will maintain a publicly available database of trusted flaggers.

#### C. Taking measures against abusive notices and counter-notices

Under Article 23, providers of online platforms must suspend, for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service who frequently provide manifestly illegal content. In addition, online platforms must suspend the processing of abusive notices of complainants who submit unfounded notices. This process must be clearly set out in the providers' T&Cs, alongside examples of matters taken into account when assessing what constitutes misuse of notices.



#### **D. Safety by design: Non-deceitful online interface and protection of minors**

Under the DSA, providers of online platforms are obligated to ensure that their interfaces meet certain design and accessibility standards. In particular, Article 25 stipulates that providers must not design online platforms in a deceitful manner that would impair recipients' ability to make free and informed decisions. This prohibition seeks to prevent: platform interfaces from promoting certain user choices over others; repeated requests to the recipient to make a choice which has already been made; and termination of the service being made more difficult than initial subscription or sign-up. Under Article 28, if an online platform is accessible to minors, providers must implement appropriate and proportionate measures to ensure a high level of security, privacy, and safety of minors.

##### **Guidance**

To prepare for the DSA coming into force, providers should audit their online interfaces to ensure that they are sufficiently clear, plain, intelligible, user-friendly, and unambiguous when describing compliance with various DSA standards, distance contracts with traders, and, as discussed below, advertising and user profiling.

#### **E. Transparency obligations: Advertising, user profiling, and recommender systems**

Under Article 26, providers of online platforms must supply users with information relating to any online advertisements on its platform so that the recipients of the services can clearly identify that such information constitutes an advertisement. Providers of online platforms are prohibited from presenting targeted advertisements based on profiling using either the personal data of minors or special category data (as defined in the GDPR).

Article 27 requires providers of online platforms that use recommendation systems to set out in their T&Cs the main parameters they use for such systems, including any available options for recipients to modify or influence them. Under Article 38, VLOPs and VLOSEs must provide at least one option (not based on profiling) for users to modify the parameters used.

#### **F. Additional transparency reporting: Disputes, suspensions, and monthly active users**

Article 24 imposes additional transparency reporting obligations on providers of online platforms, in particular submitting reports to the Commission on the number of disputes submitted and the number of suspensions imposed. Additionally, such providers must publish information on average monthly active recipients of the service in a section on the online interface.



## 4. Additional cumulative obligations for providers of online marketplaces

Mere Conduits, Caching Services	Hosting Services	Online Platforms	Online Marketplaces	VLOPs / VLOSEs
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An **online marketplace** is an online platform that allows consumers to conclude distance contracts with traders.

In addition to the obligations listed above, providers of online marketplaces are subject to a number of additional cumulative obligations.

### A. KYBC checks and other obligations

Under Article 30, providers of online marketplaces are required to conduct KYBC checks on new traders offering products or services to consumers in the EU, including vetting information provided through reliable services. For any existing traders, providers of online marketplaces are required to make best efforts to do the same.

In addition, providers of online marketplaces must also, under Article 31, ensure that their interfaces enable compliance with contractual and product safety information applicable under EU law.



## 5. Additional cumulative obligations for VLOPs and VLOSEs

Mere Conduits, Caching Services	Hosting Services	Online Platforms	Online Marketplaces	VLOPs / VLOSEs
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A **VLOP** or **VLOSE** is an online platform or online search engine that has a number of average monthly active recipients of the service in the EU equal to or higher than 45 million and that is designated as a VLOP or VLOSE by the Commission under the DSA.

VLOPs and VLOSEs are subject to the most robust obligations in the DSA, in addition to the cumulative obligations applicable to all online platforms as set out above. The key areas for consideration are:

### A. Conducting risk assessments and establishing a compliance function

Under Article 34, VLOPs and VLOSEs are required to conduct an annual assessment on any systemic risks stemming from the functioning and use of their services and mitigate risks identified in such risk assessment by implementing tailored, reasonable, proportionate, and effective mitigation measures. Such assessments will cover:

- dissemination of illegal content;
- any negative effects for the exercise of the fundamental rights for private and family life, freedom of expression and information, the prohibition of discrimination, and the rights of the child as set out in the EU’s Charter of Fundamental Rights; and
- intentional manipulation of their service with actual or foreseeable negative effects on the protection of public health, minors, civic discourse, or related to electoral processes and public security.

Under Article 41, VLOPs and VLOSEs must also establish a compliance function that is independent from operational functions and comprises one or more compliance officers including the head of the compliance function.

### B. Pay the supervisory fee

Upon designation as a VLOP or VLOSE, such a provider is required to pay an annual supervisory fee. The amount will be specified in an implementing act to be published by the Commission.

### C. Risk management and crisis response

Under Article 36, the Commission may require VLOPs and VLOSEs to take one or more of the following actions in case of a crisis:

- assess whether the functioning and use of their service contribute to a serious threat;
- identify specific, effective, and proportionate measures to eliminate such contribution; and
- report to the Commission on these assessments.



#### **D. External and independent auditing**

Under Article 37, VLOPs and VLOSEs must submit annual independent audits to confirm their compliance with various obligations under the DSA. If the opinion of the auditor is not positive, the report must also provide operational recommendations on specific measures to achieve compliance. Within one month of receiving such recommendations, the platform must adopt an audit implementation report setting out the remedial measures to be implemented. If those measures were not implemented, it should provide justifications for not doing so and any alternative measures taken to address the non-compliance.

#### **E. Data sharing with authorities**

Under Article 40, VLOPs and VLOSEs must provide access to data necessary to monitor their compliance with the DSA where requested by the relevant Digital Services Coordinator. Within 15 days of receipt of this request, the providers can ask for an amendment to the request if they are unable to give access to the data requested.

#### **F. Compile a publicly available database on advertisements**

Under Article 39, VLOPs and VLOSEs that present advertisements on their online interfaces have an additional obligation to make publicly available a repository of information relating to these practices, including information concerning:

- the period and content of the advertisement, including the name of the product, service, or brand and the subject matter;
- the person on whose behalf the advertisement is presented and who paid for it (if different);
- whether the advertisement was intended to be presented to a particular group;
- commercial communications published; and
- the number of recipients reached.

No personal data should be included in the repository, and for each advertisement, information about such advertisement should be displayed for the entire period during which the provider presents the advertisement and for one year after the last time the advertisement was displayed.

#### **G. Content moderation**

Article 42 requires VLOPs and VLOSEs to include in their Article 15 transparency reports the human resources dedicated to content moderation, the qualifications and linguistic expertise of the persons carrying out the activities, and the indicators of accuracy and related information referred to in such reports.

##### **Guidance**

To prepare for the DSA coming into force, VLOPs and VLOSEs should assess whether their content moderation practices are sufficiently transparent and well documented so as to ensure they can meet the reporting standards set under Article 42.



## Sanctions

Under Article 52, each EU Member State is permitted to determine the penalties applicable to infringements of the DSA by providers of intermediary services under their competence, with the maximum penalty for failure to comply with the DSA to not exceed 6% of that intermediary service provider's total annual worldwide turnover.

The Commission is empowered to issue binding orders and fines directly against VLOPs and VLOSEs, with fines to not exceed 6% of the provider's total annual worldwide turnover, or, in the case of periodic penalty payments, 5% of the average daily income or annual worldwide turnover per day.

Furthermore, Article 54 affords recipients of services the right to seek compensation from providers in respect of damage or loss suffered due to an infringement by the providers to comply with the DSA.



## Practical Considerations

- Providers of intermediary services to recipients who are located or established in the EU should consider how the DSA could apply to their specific service(s), and should orientate their future strategy in order to ensure compliance.
- The deadline for initial transparency reporting was on 17 February 2023. Online platforms should ensure that they are in a position to publish accurate information detailing the number of average monthly active users by 17 August 2023, and every six months thereafter.
- As the majority of the DSA operative provisions will come into force on 17 February 2024, intermediary service providers should consider prioritising their compliance actions in the intervening period, based on compliance risk for their business and their practical implementation timescales.
- In the short term, intermediary service providers should review existing notices and processes that may require uplift, or prepare to implement new notices and processes, to cover the following DSA requirements: notice and take down, user T&Cs, KYBC for online marketplaces, and transparency reporting.





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