

The new rules of the game on the Internet: the Digital Services Act and IP

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PROGRAMME

50'
Presentation

1. WHAT IS THE DSA
2. WHAT DOES THE DSA BRING
3. IMPACT ON IP
4. THE DSA AND BIG TECH
5. ENTRY INTO APPLICATION

10'
Questions and answers

1

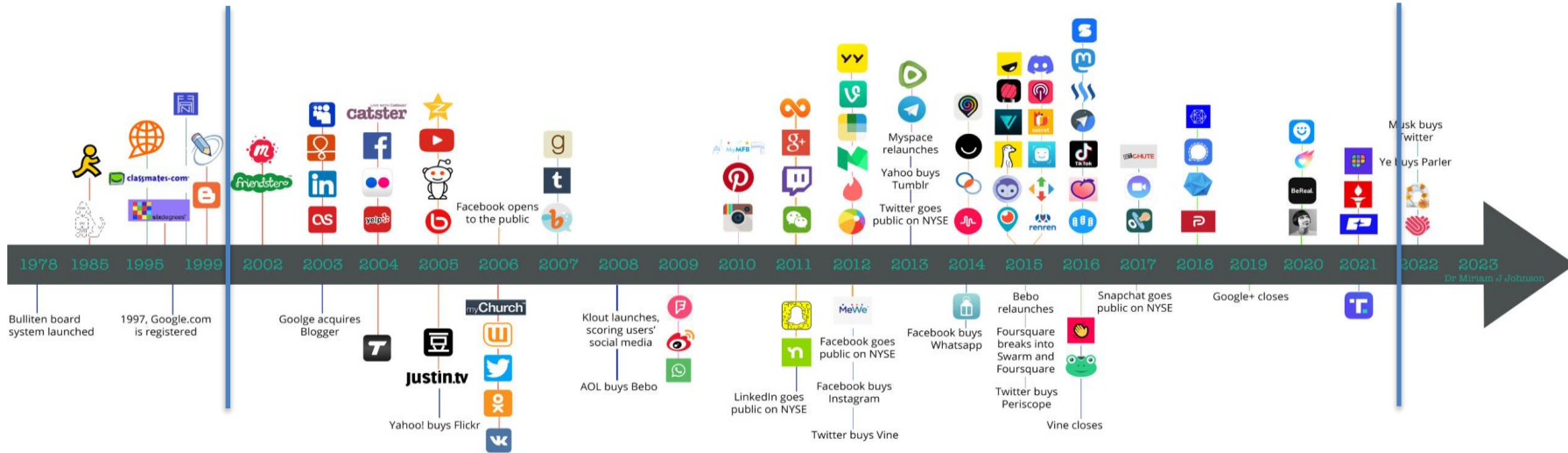
WHAT IS THE DIGITAL SERVICES ACT?

MAIN PRINCIPLES OF THE DIGITAL SERVICES ACT

- A full harmonisation Regulation
- A reinforcement of the exemption of liability
- A balance between the protection of fundamental rights online and protect users from illegal and harmful content.
- A set of rules on content moderation, transparency, fair design and advertising.
- A horizontal tool – it applies to all types of content, and all types of business models.

E-Commerce Directive adopted in the EU

DSA adopted in the EU



Credits : Dr Miriam J Johnson

Main differences with the Commission proposal

New issues: protection of minors, dark patterns, crisis response mechanism, (partial) ban of targeted advertising



Primary enforcement of VLOP/VLOSE related obligations by Commission – need for a supervisory fee

VLOPs (very large online platforms)
VLOSEs (very large online search engines)



2

WHAT DOES THE DSA BRING?



E-commerce Directive 2000/31

Rules for information society services providers



DECATHLON

SPIEGEL
ONLINE



Liability exemption - intermediary services

Mere
conduits

Caching
services

Hosting
services

+ no general monitoring obligations



2000

SECTOR
SPECIFIC
LEGISLATION

Digital Services Act Rules for intermediary services

Clarifies rules on liability and creates
incentives for proactive measures

Due diligence obligations

Common framework for enforcement:
Digital Services Coordinators +
Commission

2022

HORIZONTAL VERSUS SPECIFIC?

The **DSA** is without prejudice to other sector specific rules



in particular (not exhaustive list!): Copyright acquis, including IPRED; Consumer protection acquis; AVMSD; Data protection rules; International private law...



Those rules will prevail if they are more specific.

DSA prevails over minimum harmonisation effect of some directives

TYPES OF INTERMEDIARY SERVICES

Article 4 (mere conduits)



- merely technical and automatic processing
- ISP (Scarlet/Sabam)
- Wifi hotspot (C-484/14, McFadden),
- domain name registrar (C-521/17, SNB-REACT)

Article 5 (caching)

- temporary storage (Akamai, cloudflare...)
- No case-law

Article 6 (hosting)

- Referencing service (Google)
- online marketplaces (eBay)
- social network (Netlog, Facebook)
- video-sharing platforms (YouTube)
- cloud services (Uploaded)

LIABILITY EXEMPTION FOR MARKETPLACES (ARTICLE 6(3))



No liability exemption for consumer law where the online marketplace

- presents the specific item of information
- or otherwise enables the specific transaction at issue

in a way that would lead an **average consumer** to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.

Online marketplace and use of a sign

C-148/21 and C-184/21 (Louboutin)



- if a **well-informed and reasonably observant user** of that site **establishes a link** between the services of that operator and the sign at issue
- It happens when such a **user may have the impression that that operator itself is marketing, in its own name and on its own account, the goods bearing that sign.**
 - Uniform methods of presenting for own goods and those offered by third party sellers, own logo as renowned distributor, etc.

Voluntary own-initiative investigations (Article 7)

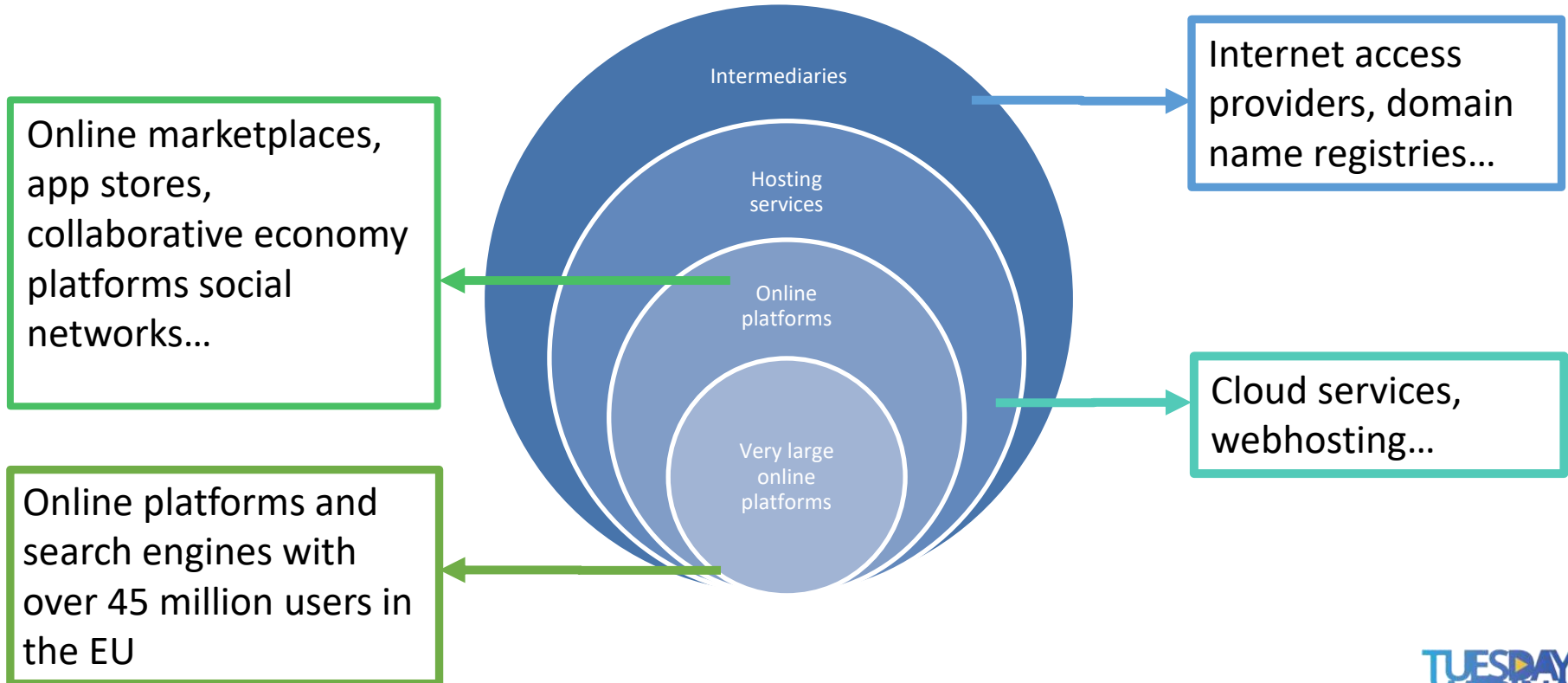
Providers of intermediary services conducting voluntary own-initiative investigations to detect, identify, remove, disable access to illegal content

They can still benefit from liability exemptions (Art.4, 5, 6)

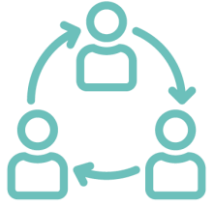
C-682/18
(YouTube)

The Court arrived to the same conclusion before the DSA was adopted! (p. 109)

DIGITAL SERVICES PROVIDERS IN SCOPE OF THE DSA



ENFORCEMENT OF THE DSA



Digital Services Coordinator (National level)

- Independent authorities
- Direct supervision and enforcement
- Coordination and exchanges with other national competent authorities



European Board for Digital Services

- Ad-hoc independent advisory group
- Composed by national Digital Services Coordinators
- Chaired by the Commission
- Advises DSCs and COM, issues recommendations



European Commission

- Direct/primary enforcement powers vis-à-vis VLOPs/VLOSEs
- Advises on cross border disputes
- Intervenes following DSC requests

3

WHAT IMPACT WILL THE DSA HAVE ON IP?

N&A procedures

**Trusted flagger
status**

**Redress
mechanisms** for
notice providers

**Repeat infringer
policy**

**Legal
representative**

**General rules on
transparency**

**KYBC
obligations**

Search engines

NOTICE AND ACTION PROCEDURES



For **all hosting services** (big and small, technical or platforms)

- **Standardised content of a notice**, by electronic means
- If sufficiently precise and adequately substantiated, they trigger **“actual knowledge”**
- **Acknowledgement of receipt and information on the decision taken**, including redress mechanisms
- Promotion of **standard mechanisms**

TRUSTED FLAGGERS



- Only for **medium, large or very large online platforms**
- **Certified entities or individuals** with particular expertise and competence
 - Notices by trusted flaggers dealt with priority and without delay
 - Possibility to develop standards for APIs

REDRESS MECHANISMS FOR NOTICE PROVIDERS



- **Users, but also notice providers,** are entitled to challenge the (non) removal decisions, or decisions on demonetisation, taken by the platform
 - equally entitled to engage on an out-of-court dispute against the platform
 - If the decision is in the favour of the user or the notice provider, the platform has to cover the costs.

LEGAL REPRESENTATIVE



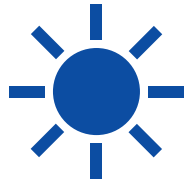
- Providers that are not established in the EU will need to appoint a legal representative
- This will allow effective enforcement within the Union against intermediaries from third countries.

REPEAT INFRINGERS' POLICY



- Platforms need to take measures to protect against misuse
- Suspension of accounts of recipients who frequently provide manifestly illegal content.
- Need to be transparent about their repeat infringers' policy

INCREASED TRANSPARENCY



There are several layers of **transparency obligations**: rightsholders will get more **information** on how content is removed, ranked or recommended and advertised

- Transparency reports on number of notices, removals based on T&C, time taken, complaints received...
- Possibility to standardise transparency reports, to get comparable data
- For VLOPs, transparency on recommender mechanisms and advertising

KNOW YOUR BUSINESS CUSTOMER

**Marketplaces need to identify the third party seller
“at the gate”**



Deterring measure for rogue sellers, in particular from third countries
Includes random checks on products and services

SEARCH ENGINES



Search engines as such are not regulated
exempted from liability if they are considered “hosting”
or “caching” services



Very Large Online Search Engines will be subject to specific obligations (risk assessment and risk mitigation measures)



WHAT ABOUT BIG TECH?

DESIGNATION PROCESS FOR VLOPS / VLOSE



Platforms have **until 17th February** to publish the average number of “recipients of the service”

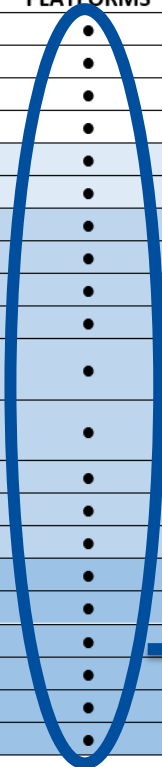


If they go beyond **45 million recipients** of the service, the **European Commission will *designate* them.**



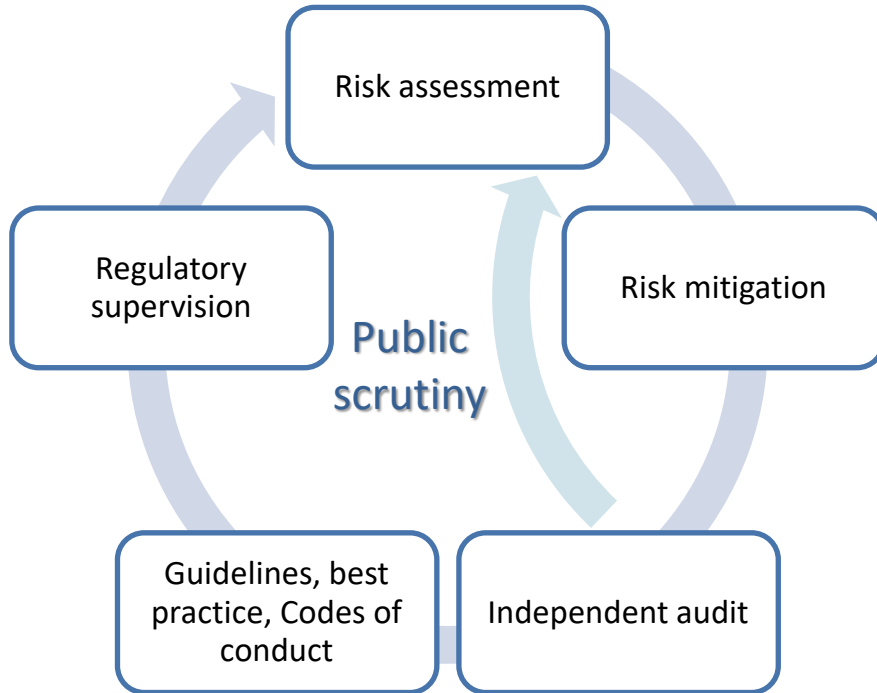
4 months after designation, the Regulation will be applicable to the designated entities

	VERY LARGE PLATFORMS	ONLINE PLATFORMS	HOSTING SERVICES	ALL INTERMEDIARIES
Transparency reporting	•	•	•	•
T&Cs	•	•	•	•
Cooperation with national authorities	•	•	•	•
Points of contact & legal representatives	•	•	•	•
N&A	•	•	•	
Reporting criminal offences	•	•	•	
Complaint & redress mechanisms, OOC dispute settlement	•	•		
Trusted flaggers	•	•		
Prohibition of Dark Patterns	•	•		
Measures against abusive notices	•	•		
Special obligations for marketplaces (e.g. KYBC, random checks)	•	•		
Bans on targeted ads to children and based on special categories of personal data	•	•		
Accessibility	•	•		
Transparency of recommender systems	•	•		
Advertising transparency	•	•		
Risk management	•			
Independent audits	•			
User can opt out of profiling	•			
Data sharing with authorities & researchers	•			
Codes of conduct	•			
Crisis response cooperation	•			



Cumulative obligations

SUPERVISED RISK MANAGEMENT

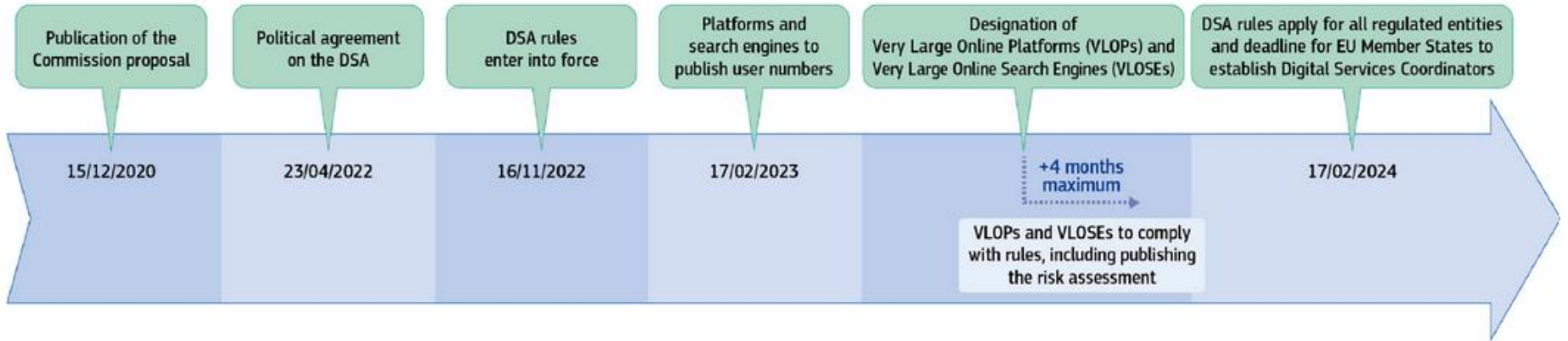


- Places societal risks and interests **at the top of the priorities** in the design of a platforms' systems
- A **dynamic** approach to identify and address **societal risks as they emerge**
- Covers the **core design of a service**, from its T&C, to its algorithmic systems and optimisation choices
- Robust **oversight** with feedback loops:
 - Independent audits
 - Regulatory supervision
- **Under public scrutiny:** e.g. transparency reports, data access for researchers, consultation on guidelines, involvement in risk assessment & mitigation design

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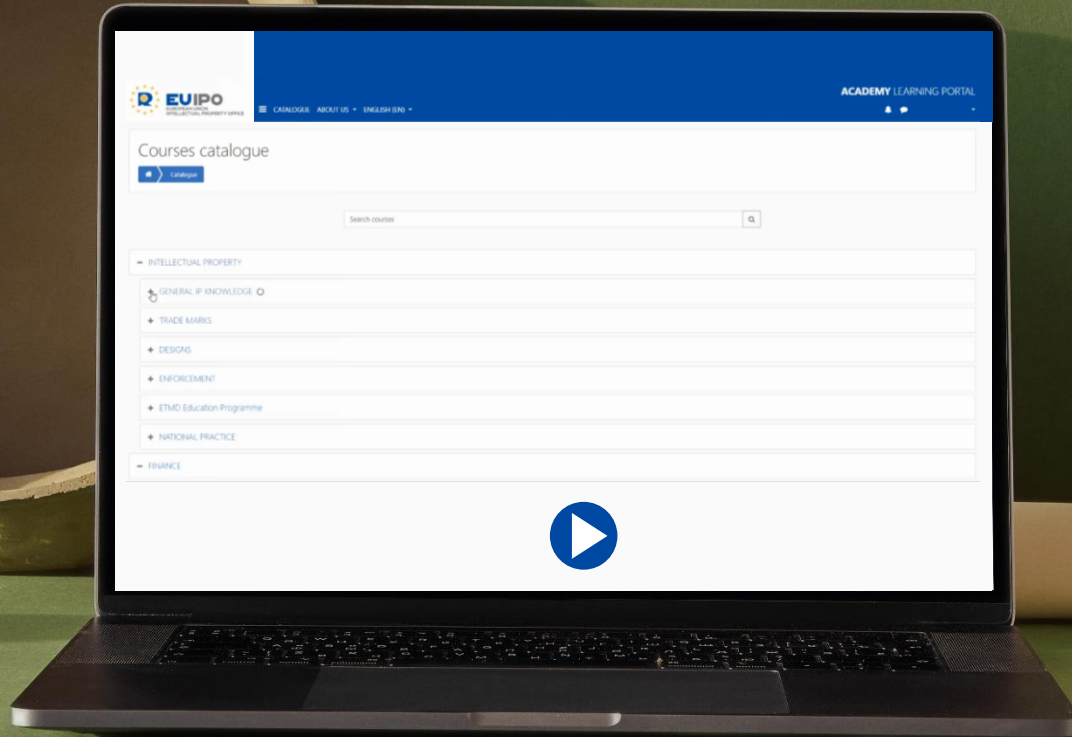
WHEN WILL THE DSA BRING RESULTS?

TIMELINE FOR THE DIGITAL SERVICES ACT





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