

# Digital Services Act – Key Liability & Due Diligence Rules

DENTONS

**Territorial scope:** Offer/target intermediary services to EU consumer/business recipients

## All intermediary services

Liability exemptions

- As before, incl. no general monitoring required & caching/hosting liable on actual knowledge; + extra conditions for hosting
- New: exemption not lost if proper voluntary investigation or legal compliance

Comply with judicial/administrative orders

- On illegal content takedown
- Info on specific service "recipients"

Due diligence & transparency

- Public electronic **contact point** info (authorities, recipients); in main establishment/rep + broadest EU language
- Notify DSC EU legal representative: liability!
- User content restrictions: required terms **content & format**, incl. intelligible (esp. to any minors), machine-readable, moderation policies & processes e.g. algorithmic & human review, complaint procedures, moderation application/ enforcement incl. other rights & freedoms; notify recipients of significant changes
- Public, machine-readable, easily-accessible report ≥ 1x/yr (unless small/micro): info on moderation, orders, complaints, automated moderation; Commission templates (draft)
- Voluntary standards for notices, recipient comms, ads info, etc. to be supported; also voluntary codes of conduct e.g. for ads transparency, accessibility

### Key

DSC=designated national Digital Services Coordinator

Board=European Board for Digital Services (DSCs)

MS=Member States

"Recipients"=service users, incl. organisations

VLOP="very large online platforms"

"Online interface"=software incl. website, mobile apps

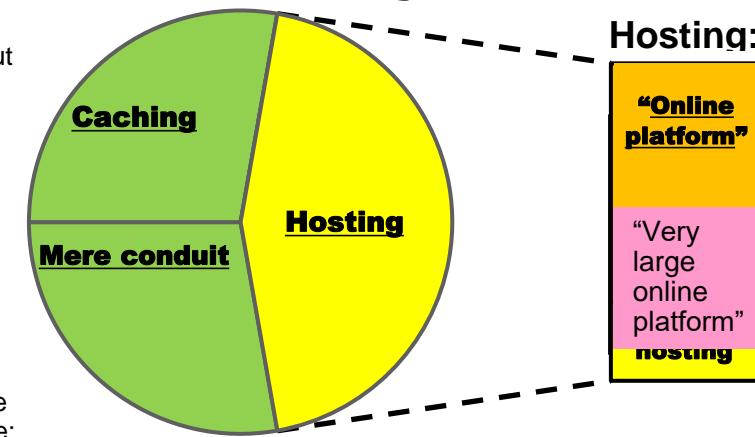
"In quotes"=defined or qualified term

Colour coding: green similar to before, yellow and amber more & more rules, pink = the most onerous

**Timing:** The DSA applies from 17 Feb 2024 or (for designated VLOPs) 4mths after Commission designation, some in Apr 2023; but online platforms had to publish number of average monthly active EU recipients by 17 Feb 2023.

Online search engines are **not** covered here, **or supervision, enforcement or investigations**: but note that DSCs can require measures then ask courts to **restrict service access**; max 6% annual worldwide turnover fine generally, 1% for certain only failings; daily fines of 5% average daily worldwide turnover or income; and recipients etc. can complain, claim compensation

## "Intermediary services"



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### VLOPs (≥45m active recipients/mth + Commission designation; OJ publication)

- 45m Commission-adjustable; designated after consulting MS/DSC, annual supervisory fee to Commission, fee per designated service (factors: no. of recipients, previous year's costs, > 0.05% worldwide annual net income); Commission methodology, report on costs; dedesignation process
- Clear, unambiguous, concise, easily accessible machine-readable summary of terms for recipients, incl. remedies & redress; in official languages of all MS where offered
- ≥1x/yr systemic risk assessment: illegal content; actual/foreseeable negative effects on certain human rights, civic discourse/public security, gender-based violence, public health, minors, serious negative consequences for physical or mental health; factors e.g. any intentional manipulation, regional/linguistic aspects; supporting documents ≥3yrs, Commission/DSC can request
- Reasonable, proportionate, effective tailored systemic risk mitigation measures; see examples
- 1x/yr reports by Board of key systemic risks & best practice mitigations, per MS & for EU
- Crisis response: Commission can issue/amend Board-recommended public decision requiring actions on serious threats to public security/public health; Commission monitoring/reporting; encourage voluntary crisis protocols, testing, etc
- ≥1x/yr independent audit (own cost); requirements, reports, remediation; Commission rules, methodology etc.; certain info to DSC/Commission & publish >3mths after report (redactable)
- Recommender systems: ≥1 option not based on profiling
- Searchable public repo + API of certain ads info, 1yr after, reasonable efforts on accuracy etc
- Data access on request: to DSC / Commission + explanations (compliance); vetted researchers if DSC requests (systemic risks); requirements/process; sharing with researchers
- Independent compliance function incl. head; requirements, tasks; notify to DSC, Commission; management body governance, accountability, reviews, involvement
- Reports ≥6-mthly, + even more info; reports on systemic risks assessment / mitigation, audit & remediation (redactable)

### Hosting services

- >1x/yr report: + info on notices alleging illegal content
- Illegal content: notice & action mechanisms (=actual knowledge if illegality identifiable); statement of reasons for restrictions (exceptions)
- Notify suspected offences (threat to life/safety) if aware

### "Online platforms" (hosting info for recipient for "public" dissemination)

- Decisions/statements of reasons (no personal data) to Commission, for public machine-readable database
- Average monthly active EU recipients: publish >= 6-monthly (any Commission methodology) & on DSC/Commission request;
- ≥6mth access to free electronic complaints handling system on restrictions/notices, for recipients incl. notice-givers; inform decision without undue delay; not solely automated
- Dispute settlement: provide easily-accessible etc. info; right (exception) & requirements; NB. fees/costs; DSC-certified bodies, requirements, process, reports to & by DSC; Commission public list of certified bodies
- Prioritise "trusted flaggers": DSC-awarded; criteria; public machine-readable database of TFs; TF reports >1x/yr to DSC & published; online platforms to police/report inaccurate TFs, process to investigate/terminate; Commission guidance
- Anti-misuse: suspend recipients & notice-givers if manifestly illegal/unfounded; requirements; misuse policy in terms
- >1x/yr report: + info on disputes, suspensions
- Dark patterns/users' free, informed decisions: no deception, manipulation etc in web/app design/organisation/operation; Commission guidance
- Advertising: transparency regarding ads, advertisers, main parameters for presenting (& how to change them); ability for recipients to declare commercial comms, making nature clear; no ads based on profiling using special category data
- Recommender systems transparency: main parameters/ options in terms; enable recipient-preferences if several
- Protection of minors: measures incl. no advertising based on profiling of minors; Commission guidance
- Traders: obtain certain info, checks (12mths legacy); correction; suspension; secure storage >6mth post-termination; limited disclosure; clear info display for recipients; compliance by design for traders' required info (product safety, pre-contractual info, compliance), best efforts + random checks; if aware notify consumers (6mths) re illegal products/services or publish
- Small/micro exempt (reports, online platforms) except request for active recipients info, trader provisions if VLOP; or unless VLOP