

# **Designing Rules for Content Moderation: The Shift from Liability to Accountability in Europe**

- Dr. Martin Husovec



# **Designing Rules for Content Moderation: The Shift from Liability to Accountability in Europe: Lesson for the Transatlantic Dialogue**

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## 25 years

- The last 25 years have **validated** the approach taken in the 90s
- Liability-safe harbours created **breathing space** for people's expression without editors and gave rise to new services
- DMCA, ECD (or CDA) are **no models** for how to actually solve *complex* problems = **they enable basic coordination**
- **Self-regulation** did not exactly meet expectations

## A new generation of rules

	 United States	 European Union
I. generation: 1996-2000	Sec 230 CDA; Sec 512 DMCA	Articles 12-15 ECD
II. generation: 2020-?	? [PACT]	Digital Services Act

- **I. generation:** breathing space for speech & industries
  - Emphasis on self-regulation
- **II. generation:** regulation of risks posed by services
  - Subset of tech becomes closely a regulated industry

# DSA's Regulatory Design Principles

**Horizontal rules** (= avoiding sectorial rules)

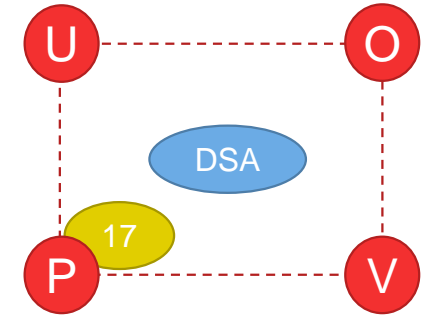
**Shared burden** (= resisting temptation to blame one actor)

**Ecosystem solutions** (= everybody is part of the solution)

**Accountability not liability** (= separate reg. expectations)

# 1: Horizontal rules

- DSA's horizontality & broad application is part key to its **political adoption** (= changes the politics; same ECD)
- Horizontality allows for more **consistent protection** of various interests, such as of FoE (e.g., DSA vs Article 17's ills)
- Broad application **limits regulatory arbitrage & loopholes**
- 360-rules allow for **better consideration of trade-offs** (e.g. over-blocking and under-detection risks – think of upload filters)



## 2: Shared burden

- DSA **renews democratic support** (Roche Laguna) for the **model of shared burden for societal risks** on the digital services
  - everyone is expected to do something
- This is an important signal:
  - constant questioning in the last 20 years
  - also extends to risk mitigation measures!
- But the SB approach demands that **those who share the burden should be also given tools and encouragement to do better** (e.g. NGOs, notifiers, or users)

## 3: Ecosystem solutions

- DMCA, CDA, and ECD all put most of the focus on providers
- But enforcement issues are determined by an **ecosystem of actors** whose actions co-contribute to the overall outcomes
  - e.g. over-blocking is caused by notifiers, providers and users;
- DSA looks at the ecosystem for solutions:
  - e.g. providers + trusted flaggers & ADR for solutions to over-blocking
  - e.g. providers + researchers & auditors for assessment of risks



## DSA creates legal incentives

- For **notifiers** to be prioritised if they demonstrate quality
  - Give or take the status; instead of focusing on damages, suspensions!
- For **providers** to improve their internal appeal systems
  - To pay for mistakes through follow-up ADR disputes by externals
- For **both** to standardise the submission interfaces
  - To facilitate sensible use of automated tools (see Husovec (2018))
- For **specialist organisations** to assist in individual disputes
  - By giving notifiers and users ability to be represented

## 4: Accountability not liability

- The due diligence obligations are **NOT** embedded into a liability question [c.f. repeat infringers (Art 23 DSA vs § 512(i) DMCA)]
- Regulatees must act but usually not to compensate
- **Separate enforcement system** (public & private)
  - E.g. lack of “timely” removal is subject to public / private enforcement tools; but to prevail in private litigation, systemic failure must be shown, and damage specifically attributable to lack of timeliness (+ only compensatory + litigation cost sharing in most EU states)

## Outlook: cross-fertilisation with the US?

- DMCA heavily influenced the EU's legislation (ECD); the US case law certainly in the early 2010s was key;
- DMCA notifications were a de facto compliance standard in absence of EU-wide notice and takedown rules
- Many of the DSA's tools probably **cannot** be transplanted in the US environment due to 1AM and are too EU-specific (e.g. different damages / litigation costs): **BUT principles!**

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**Want to know more?**

[husovec.eu/DSA](https://husovec.eu/DSA)  
(DSA Newsletter)

[LSE Short Course on the EU Digital Services Act](#)