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**THE DIGITAL SERVICES ACT AND THE CONCEPT OF
LEGAL REPRESENTATIVE**

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- ☐ **Nota**

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I. Introduction.

A new era marked by innovative digital services has emerged, fundamentally reshaping our daily routines, interpersonal connections, consumption patterns, and business landscapes. This shift, often likened to the industrial revolution in its significance, has not only revolutionized how we interact with technology but has also introduced novel challenges and risks for both individuals and society at large.

The recent global health crisis has accelerated this digital transformation, leading to a significant surge in online activities such as commerce and communication. Recognizing the pivotal role of digitalization in the post-pandemic recovery, the European Union has prioritized it as a key pillar of transformation. Consequently, European institutions are keen to establish tailored Regulations to enhance consumer access to online goods and services, combat the dissemination of illicit content and products, and foster a conducive environment for innovation, competition, and growth within the European digital realm.¹

At the forefront of this endeavor is the European Union's ambition to construct a unified digital market and effectively govern the ongoing digital evolution. To this end, the European Commission has recently unveiled the Digital Services Act Package, comprising the Digital Services Act (henceforth “DSA”) and the Digital Market Act (henceforth “DMA”), as part of its broader strategy for the digital single market.²

The aim of this study is to analyze the debate surrounding the concept of legal representative introduced by the DSA, providing readers with a comprehensive overview of the issue. The choice of this topic is motivated by the interest in understanding how the concept of legal representative introduced by the DSA might impact international private law and how it relates with the so-called

¹ In its communication dated January 29, 2020, following the European elections of May 2019, the newly constituted European Commission under the leadership of Ursula von der Leyen unveiled its work program. The Commission emphasized the unique opportunity for the European Union to lead the transition towards a fair, climate-neutral, and digitally advanced Europe over the coming years and decade. As part of this strategic vision, Margrethe Vestager was appointed as the new commissioner responsible for the initiative “A Europe Fit for the Digital Age”. This strategic policy has been built around three fundamental pillars: technology that works for the people, a fair and competitive digital economy, and an open, democratic, and sustainable society. The primary objectives have been to transform Europe into a global leader in the digital economy, support developing economies in their digital transformation, and develop and promote international digital standards. By focusing on these pillars, the European Union aimed to fully leverage the potential of digital transformation while ensuring that its approach remains human-centric, ethical, and rooted in core European values. More info at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/shaping-europes-digital-future_en.

² CHIARELLA, M. L., (2023). Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment. *Athens Journal of Law*, no9, 33.

“Brussels effect”. This may seem bewildering even to legal experts, as it is difficult to conceive that the EU legislator is not fully aware of the impact that legislation might have on the internal market.

The methodology employed for this Master's thesis is based on legal research, involving the analysis of legislation, doctrine, and case law. It's worth noting that while this work falls within the discipline of Law and Technology, aspects of other legal branches, especially international private law, have not been neglected.

Firstly, we will address the concept of legal representative to delve into its nature and obligations.

Next, we will examine the concept of establishment under EU law and the problematic around it in connection with the legal representative. We will examine how, although the DSA consistently states that a legal representative cannot be equated with having an establishment, it still imposes numerous obligations that blur the distinction between both concepts. We will explain why it is impractical for EU businesses that only certain intermediary service providers that do not have an establishment in the Union but offer services here, must meet these requirements, potentially hindering the single market

Finally, we will conduct an analysis of how the DSA, through the introduction of the legal representative, has actively contributed to deepen the so-called “Brussels effect”, and how it might set a benchmark for more progressive digital regulatory standards worldwide.

In conclusion, this study provides a comprehensive analysis of the legal representative concept introduced by the DSA, its implications for international private law, and its contribution to the Brussels effect. The DSA not only represents a significant advancement in the EU's digital regulatory landscape but also has the potential to influence global digital policy, setting new standards for accountability and compliance in the digital age. Understanding these developments is essential for stakeholders across the digital economy as they navigate the complex and rapidly changing regulatory environment.

II. The concept of legal representative under the Digital Services Act.

The DSA represents a substantial effort by liberal democratic nations to comprehensively regulate content moderation on internet platforms. It mandates that internet intermediaries, including social media platforms, hosting services, online marketplaces, app stores, and search engines, adopt a wide range of measures to ensure transparency and reduce harmful material. Given that these companies have significant influence over user actions, such as providing or denying service and controlling the amplification or suppression of speech, the DSA aims to regulate the processes through which they engage in this private decision-making.³

Approved in November 2022 and entering into force on February 17, 2024, the DSA addresses its contentious scope of application in Article 2.1. This new piece of legislation applies to intermediary services provided to recipients of the service located in the Union or having their place of establishment therein, regardless of the location of the providers of those intermediary services. Due to this broad scope of application, under the heading of "Due diligence obligations for a transparent and safe online environment," Chapter III, Article 13 introduces the concept of a legal representative. However, articles 11 and 12 envisage both point of contacts, those for Member States' authorities, the Commission and the Board, and those for recipients of the service.

The main difference between point of contacts and the legal representative is that the latter only comes into play, as outlined in Recital 7 of the DSA, when the intermediary services providers without establishment in the Union offer services in the Union "*as evidenced by a substantial connection to the Union*".

Recital 44 of the DSA further states that intermediary service providers based in a third country and offering services in the Union are required to appoint an adequately authorized legal representative within the Union.⁴

The figure of the legal representative emerges as a solution for the need to ensure "*the effectiveness of the rules laid down in the*" DSA and "*a level playing field within the internal market*"⁵. This need

³ CHANDER, A., "When the Digital Services Act Goes Global" (October 18, 2023), Berkeley Technology Law Journal, vol. 38, issue 3, pp. 1067-1088, DOI No. 10.15779/Z38RX93F48, (2023), Georgetown University Law Center Research Paper No. Forthcoming, Georgetown Law Faculty Publications and Other Works, 2548., Available at SSRN: <https://ssrn.com/abstract=4606282>

⁴ 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)

⁵ *Ibidem*.

for enforceability is due to the fact that the platforms serve as providers of specific intermediary services, but they neither own nor control the content. This situation, compounded by the high volume of content and the frequent use of pseudonymous or inaccurate customer data, leads to the publication or sharing of illicit content that is challenging for the service provider to regulate. In fact, by amending the scope of application outlined in the previous liability regime of Directive 2000/31/EC, it is now detached from the place of establishment of the service providers, with the only relevant criterion being the provision of services within the European Union. This represents a significant advancement, as it facilitates and broadens the scope of obligations and responsibilities for service providers, thereby eliminating the disparity of national Regulations. Such disparities previously encouraged various Member States to formulate the most advantageous Regulations for these providers in an attempt to attract them to establish their headquarters within their territories. Now, under the new Regulation, service providers will be subject to the same liability regime irrespective of their country of establishment, provided that they offer their services within the European Union.⁶

The evolution of intermediary service provider liability can be traced back to the case of *Delfi AS v. Estonia* (64569/09) dated October 10, 2013, which was accepted for appeal by the Grand Chamber of the European Court of Human Rights (“ECHR”, henceforth) and upheld in its judgment on June 16, 2015. This case involved Delfi, an Estonian digital media outlet that allowed users to comment on published news articles. One such comment was found to be defamatory towards a prominent individual.⁷ It should be noted that this was the first time the ECHR examined whether administrators of online discussion platforms could be held accountable for content posted by third parties. Following this landmark case, subsequent ECtHR judgments have not followed a similar approach.⁸

The ECHR, likely aiming to avoid a potential conflict with European Union law, held that the ultimate decision regarding the attribution of responsibility for online content falls primarily within the national domain. This underscored the importance of the internal legal frameworks of each member state and the interpretation by national courts, which are granted considerable discretion in this matter.

⁶ DE NOVA LABIÁN, A. J., "La Diligencia Debida De Las Plataformas En línea Dentro Del Reglamento Europeo De Servicios Digitales", *Cuadernos Europeos De Deusto*, n.º 70 (abril), 99-131. <https://doi.org/10.18543/ced.2991>.

⁷ 7 ECHR of June 16, 2015, Case *Delfi AS v. Estonia* (ECLI:CE:ECHR:2015:0616JUD006456909).

⁸ KORPISAARI, P., "From Delfi to Sanchez – when can an online communication platform be responsible for third-party comments? An analysis of the practice of the ECtHR and some reflections on the Digital Services Act", *Journal of Media Law*, 14(2), 352–377. <https://doi-org.tilburguniversity.idm.oclc.org/10.1080/17577632.2022.2148335>

Consequently, the ECHR accepted, based on the Estonian legal system, that the digital media outlet could be held liable for user comments. However, this ruling was not extended to encompass the entire internet or other countries.

The ECHR also noted that the implementation of measures to prevent illicit content does not, in itself, suffice to exempt from liability. The presence of a filter to detect offensive language, a system allowing users to report inappropriate content for review and possible removal with a single click, the fact that the complainant did not use this system, the digital media's practice of proactively removing certain content, and the removal of comments as soon as notified by the affected person, were all deemed insufficient to avoid liability.

Furthermore, the ECHR considered that the digital media outlet could have implemented a more robust system for the proper identification of users or an immediate control mechanism for each comment, whether prior to or immediately after publication. Thus, the responsibility for the harm fell upon the digital media outlet.

Finally, the ECHR determined that holding internet intermediaries liable for illicit content they transmit constitutes a restriction on the freedom of expression under Article 10 of the European Convention on Human Rights. However, it recognized that such a restriction could be permissible if it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society.⁹

The case has attracted significant criticism. Judges Sajó and Tsotsoria, dissenting from the majority of the ECHR, argued that the majority's position would require constant monitoring of third-party comments from the moment they are posted. This could lead to the removal of comment features or overly quick deletion of comments. Despite Delfi's efforts to prevent or remove illegal content, the minority's concern was understandable. However, the threats remained online for six weeks without being detected by moderators or the automated system, even though the ECHR deemed the content to be clearly unlawful hate speech, leaving no ambiguity about its illegality. Furthermore, this was a civil case involving 320 euros in compensation, not a criminal matter. The state also has a certain margin of discretion in these cases.¹⁰

⁹ DE NOVA LABIÁN, A. J., "La Diligencia Debida De Las Plataformas En línea Dentro Del Reglamento Europeo De Servicios Digitales", Cuadernos Europeos De Deusto, n.º 70 (abril), 99-131. <https://doi.org/10.18543/ced.2991>.

¹⁰ Korpisaari, P., "From Delfi to Sanchez – when can an online communication platform be responsible for third-party comments? An analysis of the practice of the ECtHR and some reflections on the Digital Services Act", *Journal of Media Law*, 14(2), 352–377. <https://doi-org.tilburguniversity.idm.oclc.org/10.1080/17577632.2022.2148335>

Although the ECHR, in its Delfi judgment, held that the ultimate decision regarding the attribution of responsibility for online content falls primarily within the national domain, it introduced for the first time the notion that a digital media outlet could be held liable for user comments. In my view, this notion has migrated to the DSA, with the caveat that the responsibility of intermediary service providers will not depend on applicable national law, but on the DSA, thereby eliminating disparities among the legal systems of Member States and establishing a single liability regime.

In fact, the new liability regime introduced by the DSA has materialized through the role of the legal representative. In fact, as already mentioned, the legal representative is the sole means to ensure a proper enforceability of the Regulation in alignment with the scope of application envisaged in Article 2.1, i.e., the DSA goes further, and not only brings forward the aforementioned responsibility regime but also ensures its enforceability.

Consequently, intermediary service providers are required to furnish information about their legal representatives to relevant authorities and make it accessible to the public.

- Natural or legal person designated in writing.
- Sufficiently “mandated” by the providers of intermediary services.
- Possibility for the legal representative to be “*held liable for non-compliance with obligations under the DSA*”.

All these elements should allow us to identify which are the requirements that a future appointee should meet in order to comply with the definition envisaged in Article 13. However, some questions may arise around them. In particular, “designated in writing and sufficiently mandated” are not further developed in the DSA. There is no detailed and complete reference in the DSA, neither to what kind of writing nor to its content that would be considered enough to meet the 'sufficient' criteria. In this context, aforementioned recital 44 provides that: “*it should be possible for a legal representative to be mandated, in accordance with national law, by more than one provider of intermediary services*”. Therefore, we conclude that the sufficient and form criteria will be subject to the law of the Member States. Nevertheless, there is still uncertainty regarding what the Regulation implies when it mentions the potential (“*it shall be possible*” – Article 13 (3)) accountability of the designated legal representative for failure to comply with obligations outlined in the DSA. However, as outlined in the point 2 of the aforementioned provision, “*providers of intermediary services shall provide their legal representative with necessary powers and sufficient resources to guarantee their efficient and timely cooperation with the Member States’ competent authorities, the Commission and the Board, and to comply with such decisions*”. Hence, necessary powers and sufficient resources emerge as the main

elements for compliance and, consequently, for accountability, although there is no specific definition for each concept.

It follows from the foregoing that if both the sufficient and form criteria depend on national law, the necessary powers and sufficient resources will also depend on it since those elements are a direct result of the national legal regimen applicable to the mandate.

This connection between national law and the criteria for sufficiency, form, necessary powers, and sufficient resources highlights the complex and interdependent nature of adherence within the DSA. As such, a future appointee must navigate not only the stipulations outlined in the DSA but also the specific legal requirements of the Member State(s) in which they operate.

Furthermore, the absence of explicit guidance in the DSA regarding the accountability of designated legal representatives for failure to comply with obligations adds another layer of complexity. While Article 13(3) suggests the possibility of such accountability, the precise mechanisms and consequences remain unclear. However, the emphasis on providing necessary powers and sufficient resources to legal representatives, as delineated in Article 13(2), implies that accountability is linked to the capacity of these representatives to effectively fulfill their duties.

Fundamentally, the legal context surrounding legal representation within the DSA is complex and susceptible to varying interpretations, contingent upon the specific laws and rules of individual Member States. Consequently, prospective appointees are obligated not only to satisfy the overarching prerequisites delineated in Article 13 but also to navigate and adhere to the diverse legal frameworks prevailing within the Member State(s) wherein they operate..

Once clarified what “legal representative means” under the DSA, we will proceed with the analysis of legal representative's obligations.

The analysis of the obligations imposed on the legal representative will lead us to a broader understanding of the concept. In fact, in line with the recital 76 of the proposal put forward by the European Commission “*the Member State where those providers appointed their legal representative should have jurisdiction, considering the function of legal representatives under this Regulation*”¹¹. The reference to “*considering the function of legal representatives under this Regulation*” showcases that an accurate definition of the concept is not only given by the set of elements analyzed in the

¹¹ Proposal for a Regulation OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM/2020/825 final).

present chapter, but also by the duties assigned. Therefore, this will facilitate the comparison, in the upcoming chapters, with the concept of establishment.

III. The obligations of the legal representative.

The obligations of the legal representative can be inferred through an analysis of the obligations imposed on the intermediary services providers. These are the following:

1. Outlining any restrictions on the service in their terms and conditions, providing details such as content moderation measures and algorithmic decision-making (Article 14).
2. The issuance of an annual transparency report covering aspects such as content moderation measures and the number of takedown and disclosure orders received (Article 15).
3. Intermediary services providers receiving takedown or information disclosure orders from judicial or administrative authorities in the EU must promptly notify the authority of any actions taken. (Article 9).¹²

It follows from the foregoing that the legal representative will be held accountable for non-compliance with any of these obligations.

Delving into each obligation, Article 14 foresees that intermediary services providers should provide the information stated therein in language that is clear, plain, intelligible, user-friendly, and unambiguous. Additionally, this information must be made publicly available in a format that is easily accessible and machine-readable.

It also envisages that in cases where an intermediary service is specifically tailored for or predominantly utilized by minors, providers must articulate the usage conditions and any associated restrictions in a manner that is comprehensible to minors.

Moreover, when enforcing restrictions outlined in the terms and conditions, providers are expected to exercise diligence, objectivity, and proportionality. This enforcement should be carried out with due consideration for the rights and legitimate interests of all parties involved, including the

¹² CHURCH, P., PEHLIVAN, C. N., "The Digital Services Act (DSA): A New Era for Online Harms and Intermediary Liability", (2023), 4, Global Privacy Law Review, Issue 1, pp. 53-59, <https://kluwerlawonline-com.tilburguniversity.idm.oclc.org/JournalArticle/Global+Privacy+Law+Review/4.1/GPLR2023005>

fundamental rights of service recipients, such as freedom of expression, media freedom, pluralism, and other rights enshrined in the Charter.

Also, in accordance with Article 33, very large online platforms and search engines are further required to publish their terms and conditions in the official languages of all Member States in which they offer their services.

Article 15 encompasses the requirement for reports to include specific information. This includes the volume of orders received from authorities of Member States, with categorization based on the type of illegal content, issuing Member State, and the median time required for compliance. Furthermore, details related to content moderation initiatives undertaken by the provider should be incorporated, covering aspects such as the utilization of automated tools, the provision of training and support to moderation personnel, measures influencing information availability and accessibility, and any associated service restrictions.

Additionally, the reports should encompass information regarding the number of complaints received through internal complaint-handling system.

However, the responsibility system introduced by the “DSA”, is a comprehensive one. Therefore, along with the obligations already outlined, it has introduced several grounds for excluding liability depending on the type of service in question—mere conduit services, caching services, and hosting services—the following provisions apply:

Regarding mere conduit services, Article 4.1 sets forth the conditions for exemption from liability: the service provider must not initiate the transmission, select the recipient of the transmission, or select or modify the transmitted information.

For caching services, as stipulated in Article 5.1, the requirements are that the provider does not modify the information, complies with conditions on access to the information, adheres to rules regarding the updating of information specified in a manner widely recognized and used by the industry, does not interfere with the lawful use of technology widely recognized and used by the industry to obtain data on the use of the information, and acts promptly to remove or disable access to the information upon becoming aware that the information at the source of the transmission has been removed from the network or that access to it has been disabled by a court or administrative authority.

Lastly, for hosting services as outlined in Article 6.1, the requirements are that the provider does not have actual knowledge of illegal activity or illegal content and, in the case of claims for damages, does not have knowledge of facts or circumstances indicating the illicit nature of the activity or content. Furthermore, upon obtaining such knowledge, the service provider must act promptly to remove the illegal content or disable access to it.¹³

It should be noted that Article 5(1)(a) of the DSA maintains the E-Commerce Directive negligence-based model: providers of intermediary services cannot be held liable if they lack knowledge of user-generated content. Article 7 explicitly places the burden on intermediary services for monitoring the presence of illegal activities on their platforms – it also denies Member States the possibility of imposing this kind of behavior on gatekeepers. Article 5(1)(b) requires that providers take prompt action to remove such content once they become aware of it. However, this approach may have negative implications, particularly concerning freedom of expression, as it might incentivize gatekeepers to adopt a cautious approach, potentially leading to overreactions against legitimate content on their platforms.¹⁴

Article 6 is designed to safeguard 'Good Samaritans' (similar to Section 230 of the US Communications Decency Act), offering a liability shield for sincere efforts to proactively remove illegal content. This provision aims to spare gatekeepers from being ensnared in perpetual legal battles, allowing them to allocate resources towards innovation instead. However, it also runs the risk of enabling firms to passively monitor their online content. Additionally, the DSA introduces overarching Regulations on mechanisms enabling anyone on the Internet to flag potentially illegal content; these are termed 'notice-and-action mechanisms' (Article 14). These mechanisms enhance transparency regarding the role of providers. Nevertheless, they lack differentiation in procedures based on the nature of content, potentially leading to disproportionate actions by competition authorities and causing confusion for gatekeepers.¹⁵

¹³ CHIARELLA, M. L., (2023). Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment. *Athens Journal of Law*, no9, 33.

¹⁴ TURILLAZI, A., TADDEO, M., FLORIDI, L., & CASOLARI, F. (2023). "The Digital Services Act: An Analysis of Its Ethical, Legal, and Social Implications." *Law, Innovation and Technology*, 15(1), 83-106. DOI:10.1080/17579961.2023.2184136

¹⁵ *Idem*.

IV. The concept of establishment in EU Law – An international private law perspective.

Now that both the concept and the relevant duties of the legal representative have been clarified, we can delve into whether this “innovative” definition equates to an establishment under the Law of the Union. It should be noted that article 13 (5) DSA provides that the “*designation of a legal representative within the Union pursuant to paragraph 1 shall not constitute an establishment in the Union*” however, it remains unclear if that clause is actually effective.

The concept of establishment can find its roots in the freedom of establishment. The freedom of establishment as outlined in Article 49 of the Treaty on the Functioning of the European Union (TFEU) ensures the unrestricted movement of self-employed individuals. This right extends to both natural persons who are citizens of EU member states and legal entities such as companies formed under civil or commercial law. Notably, Article 54 of the TFEU complements Article 49 and is thus the most important element in the regulation of the freedom of establishment for companies. This provision defines in its second paragraph what is to be understood by “company” for the purposes of European freedoms, and in its first paragraph states that these companies (those defined in the second paragraph) will benefit from the freedom of establishment as they are “*treated in the same way (...) as natural persons who are nationals of Member States.*” For this equivalence to occur, certain conditions must still be met. On the one hand, the company must be incorporated in accordance with the laws of a Member State; on the other hand, its registered office, central administration, or principal place of business must be within the European Union.¹⁶ The nationality or domicile of its shareholders, associates, or founders is inconsequential.¹⁷ It follows from the foregoing that in order to have an establishment in the Union having an appointee (which is required in line with Article 13 of the DSA) is not enough. In this regard, we could come to the conclusion that the DSA is coherent with the legal framework applicable to the concept of establishment. However, if we have a closer look at Article 17 (2) of Regulation (EU) No 1215/2012 some doubts may arise. This article provides that “*Where a consumer enters into a contract with a party who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out*

¹⁶ GARCÍA, R. A. (2017). “Libertad de establecimiento de personas físicas y jurídicas en la UE: razones para una diferencia”, en C. Górriz López y R. Arenas García (coords.), *Libertad de establecimiento y Derecho europeo de sociedades*, Barcelona, Atelier, 15-43.

¹⁷ ANDENAS, M. y WOOLDRIDGE, F., *The Substantive Law of the EU—The Four Freedoms* (2nd edn, 2007).

of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.”

Hence, it appears that the initial delineation of establishment in line with Article 54 TFEU necessitates that a company adhere to the legal framework of an EU member state and maintain its registered office, central administration, or primary operational locus within the Union. Consequently, non- EU companies cannot benefit from the freedom of establishment, however they still can be incorporated in the EU through the so-called “secondary establishment” which seems to be the category referred to in 17 (2) of Regulation (EU) No 1215/2012. A secondary establishment *“takes place, when the legal entity retains its home office in one country and establishes a form 'of financial activity dependent from the main office' in another”*¹⁸.

Therefore, if an intermediary service provider without a secondary establishment in the Union has to appoint a legal representative, will this legal representative fall within the category referred to in Article 17 (2), and therefore qualify as a “concealed” establishment? Also, can the legal representative be equated to a secondary establishment in line with EU Law?

In order to bring clarity to this “apparent” confusion, we need to delve into how the concept of establishment is actually regulated in different provisions of EU law.

It should be noted that under EU Law, an office or agency is considered a secondary establishment without separate legal personality. Run by an agent or representative, it handles sales, communication with third parties interested in business with the parent company, and relevant administrative tasks. A branch, which is also a secondary establishment without legal personality but owned by the parent company, has more independence from the main office and can create agencies.

While there are no official definitions of these terms, the Court of Justice of the European Union (CJEU) defines these type of establishments as operational centers with the authority, power, and resources to conduct business with third parties. These third parties, recognizing the link between these establishments and the parent company and being unable to negotiate or contract with the foreign company itself, typically prefer to deal with its extensions, such as an agency, branch, office, or subsidiary.¹⁹

¹⁸ XANTHAKI, H., "The Secondary Establishment of Companies within the EU: challenge or missed opportunity?", *European Business Law Review*, vol. 10, issue 3, pp. 120-139, (1999). [Available at: <https://kluwerlawonline-com.tilburguniversity.idm.oclc.org/journalarticle/European+Business+Law+Review/10.3/EULR1999014>]

¹⁹ The Court determined that a branch, agency, or similar establishment must be a business location with a permanent appearance, operating as an extension of the parent company. This location needs to have its own management and the

Also, the most interesting legal norm that can apply (by analogy) to the present situation is the General Data Protection Regulation (GDPR, henceforth). Article 3(1) of the GDPR provides that the *“Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not”*.

Although Article 4(16) of the GDPR outlines the concept of a "main establishment," the Regulation itself doesn't offer a specific definition of "establishment" concerning Article 34. However, Recital 225 sheds light on this, stating that an establishment involves the actual and consistent engagement in activities through stable arrangements. The legal structure of these arrangements, whether a branch or subsidiary with legal status, isn't the decisive factor. This language mirrors Recital 19 of Directive 95/46/EC, which has been referenced in various CJEU judgments broadening the interpretation of "establishment." These interpretations move away from a purely formalistic approach, where companies are considered established only where they are formally registered.²⁰

The CJEU has ruled that the concept of establishment encompasses any genuine and effective activity, even if minimal, conducted through stable arrangements. To ascertain whether an entity located outside the EU has an establishment within a Member State, both the stability of the arrangements and the actual engagement in activities within that Member State must be assessed, taking into account the specific nature of the economic activities and services provided. This is particularly pertinent for businesses offering services exclusively online²¹.

In the present case, it looks like the legal representative can fit in the effective activity conducted through stable arrangements, in particular, in light of the several obligations that highlighted in the second chapter.

This conclusion might have two main practical implications: an impact on the liability regime envisaged by Regulation (EU) No 1215/2012 and a closer proximity to the so-called "hostage-taking" laws.

necessary resources to conduct business with third parties. These third parties, aware of the legal connection to the parent company's head office abroad, can transact business at this branch without directly dealing with the parent company. This interpretation was outlined in the cases 33/78 Somafuv Saar-Ferngas [1978] ECR 935 and 14/76 De Bloos v Boyer [1976] ECR 1510, in the context of Article 5 of the Convention of 5 September 1968. This definition also serves to clarify Article 58 EC within the framework of EC law.

²⁰ Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) Version 2. 1. European Data Protection Board. 2 November 2019.

²¹ Google Spain SL, Google Inc. v AEPD, Mario Costeja González (C-131/12), Weltimmo v NAIH (C230/14), Verein für Konsumenteninformation v Amazon EU (C-191/15) and Wirtschaftsakademie Schleswig-Holstein (C-210/16)..

Regarding the first point, according to Article 18 of Regulation (EU) No 1215/2012, if a consumer enters into a contract with a party not domiciled in the Member State but has a branch, agency, or other establishment in one of the Member States, that party shall be considered domiciled in that State for disputes arising from the activities of the said branch, agency, or establishment.²² Therefore, if, in line with the previous interpretation, the legal representative can be assimilated to an establishment, intermediary service providers can be considered domiciled in the Member State in question, and therefore, “a consumer (user) may bring proceedings against the other party to a contract either in the courts of Member State in which that party is domiciled (...)”²³.

Regarding the second point, the aforementioned conclusion might be worrying, in particular, if the appointee is a natural person. Laws that necessitate a human representative can be compared to laws that effectively hold individuals or entities as hostages, the well-known “*hostage-taking*” laws.²⁴

In 2021, Russia enacted what's commonly referred to as the "Landing Law," which mandates the physical presence of certain internet platforms within Russia, either through a branch, representative office, or other entity established in the country. There's ambiguity surrounding whether having a legal representative is sufficient to meet this requirement, or if actual employees are necessary for compliance with the physical presence mandate. According to a Russian news source, among major foreign internet service providers, only Apple and Spotify have fully established their presence in Russia.²⁵

However, human rights organization Article 19 expresses concerns regarding this Landing Law, fearing it could potentially be exploited to curtail freedom of expression and hinder access to information. They worry that by subjecting internet companies to requests for online content removal or demands for users' personal data from authorities, the law may undermine these fundamental rights. Notably, Apple and Google only removed an app supportive of Alexei Navalny after Russian authorities threatened to arrest their local employees.²⁶

²² Magnus, U. & Mankowski, P. (2016). Volume 1 Brussels Ibis Regulation - Commentary. Köln: Verlag Dr. Otto Schmidt. <https://doi-org.tilburguniversity.idm.oclc.org/10.9785/9783504384807>

²³ *Idem*.

²⁴ Chander, A., When the Digital Services Act Goes Global (October 18, 2023). Georgetown University Law Center Research Paper No. Forthcoming, *Berkeley Technology Law Journal*, Vol. 38, Issue 3, Pp. 1067-1088, DOI No. 10.15779/Z38RX93F48, (2023). Georgetown Law Faculty Publications and Other Works. 2548., Available at SSRN: <https://ssrn.com/abstract=4606282>

²⁵ Troianovski, A., Satariano A, Google and Apple, Under Pressure from Russia, Remove Voting App, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/17/world/europe/russia-navalny-app-election.html>.

²⁶ Russia: Internet companies must challenge ‘landing law’ censorship, ARTICLE 19 (Jan. 21, 2022), <https://www.article19.org/resources/russia-internet-companies-must-challenge-censorship-under-new-law/>.

It should be noted that the DSA does not envisage criminal liability, explicitly recognizes the possibility to have a legal person as a legal representative, but the parallelism cannot be denied.

Finally, it is worth to mention that significant fragmentation is evident in the EU digital landscape. Digital economies in Bulgaria, Greece, and Romania are still evolving, as indicated by the 2020 Digital Economy and Society Index (DESI), whereas Finland, Sweden, and Denmark have highly developed digital economies with top DESI scores.²⁷ This fragmentation incurs substantial costs, particularly through reduced productivity. Additionally, the absence of harmonization among Member States' legal systems increases compliance costs. These challenges highlight the need for EU intervention. In light of Article 114 of the Treaty on the Functioning of the European Union (TFEU), which underpins measures to enhance the proper functioning of the Internal Market, the DSA aims to provide a consistent level of protection across the Union and prevent discrepancies and variations among Member States²⁸. However, since compliance with the DSA is required regardless of where companies are based (as already noted in comparison with the GDPR), this could benefit European companies but may also make the European digital market less attractive²⁹. Therefore, we are going to analyze the potential effects of the legal representative on non-EU competitors in the following chapter.

V. The Brussels effect: The legal representative as an equalizer in the EU Single Market against non-EU competitors.

A central dilemma we confront is this: Asserting jurisdiction beyond national borders appears justifiable because without such measures, states may fail to adequately safeguard their citizens' rights, as stipulated in the DSA provisions. However, expansive jurisdictional claims beyond territorial boundaries could be deemed impractical, given the impossibility for individuals and entities operating online to comply with the diverse legal frameworks of every jurisdiction they encounter.

²⁷ The Digital Economy and Society Index (DESI), as the name suggests, monitors Europe's digital economy. The latter can be defined in terms of digital performance and competitiveness of economic activities.

²⁸ Teresa Rodríguez de Las Heras Ballell, 'The background of the Digital Services Act: looking towards a platform economy', [2021] 22 ERA Forum 75.

²⁹ TURILLAZI, A., TADDEO, M., FLORIDI, L., & CASOLARI, F. (2023). "The Digital Services Act: An Analysis of Its Ethical, Legal, and Social Implications." *Law, Innovation and Technology*, 15(1), 83-106. DOI:10.1080/17579961.2023.2184136

Consequently, an extensive application of state laws across borders might significantly hinder businesses' ability to partake in international trade.³⁰

The clear-cut division between territorial and extraterritorial realms is among the most fundamental concepts facing challenges in the online sphere.³¹

While EU-based intermediary services providers are compelled by the DSA to appoint a “point of contact” in line with Article 11, non-EU based intermediary services providers shall appoint the legal representative.

The necessity to appoint a legal representative ensures an effective enforcement of the measures imposed on non- EU based intermediary services providers as well as fosters the Single Market integration by virtue of providing a level playing field with the EU-based competitors. This situation will lead towards a greater harmonization in terms of worldwide standards, in particular, because “*the DSA levies huge financial penalties for violating its provisions, including maximum fines of six percent of a platform’s annual worldwide turnover*”³².

Platforms will likely align their community guidelines with European hate speech standards to avoid potential fines, especially in EU member states. This could lead to the globalization of content policies tailored for the EU, making it easier for moderators worldwide to adhere to a consistent set of rules, with some exceptions like nudity Regulations. However, hate speech definitions vary within the EU itself.

Certain obligations outlined in the DSA could have global reach. For instance, requirements for platforms to explain user actions or offer dispute resolution systems might be implemented by some Very Large Online Platforms (VLOPs) on a global scale. As already mentioned, all covered platforms must issue annual reports on their content moderation practices, which may focus on European operations but could shed light on global practices. Also the transparency reports mandated by the DSA could benefit users worldwide, as some firms adopt unified practices globally.

Several avenues could facilitate the global adoption of the Digital Services Act (DSA). Firstly, companies might implement DSA-compliant measures worldwide, thereby global standards align with rules set by Brussels for efficiency reasons. Secondly, governments may be drawn to aspects of

³⁰ Azzi, A. The Challenges Faced by the Extraterritorial Scope of the General Data Protection Regulation, 9 (2018) JIPITEC 126.

³¹ *Idem*.

³² C.N., Dawn The Digital Services Act and the Brussels Effect on Platform Content Moderation, 24 CHI. J. INT’L L. 115, 117 (2023).

the DSA that empower them to regulate the internet, offering tools for swift removal of illegal content, procedural rules to limit platform authority over content, risk assessment capabilities, and crisis management mechanisms, backed by significant fines for non-compliance.

Another potential mechanism involves the EU actively promoting the DSA as a global standard, possibly integrating its principles into free trade agreements. While lacking a direct equivalent to the GDPR's adequacy determination, which incentivizes alignment with European standards for easier trade access, the EU's reputation for good governance and adherence to human rights norms could make its legal framework appealing to other countries.

There are compelling reasons for such widespread adoption. Issues like disinformation, hate speech, communal violence, and election interference are significant challenges in many Global South countries, mirroring the concerns that drove the creation of the DSA in Europe.

However, these countries often face constraints such as limited institutional capacity, resources, and a less robust civil society and independent press. Moreover, many of these nations are susceptible to democratic erosion or already exhibit authoritarian tendencies, raising serious concerns about freedom of expression. Implementing similar Regulations in such contexts could potentially lead to abuse.

While the DSA doesn't explicitly aim for a "Brussels Effect," whereby EU Regulations shape global standards, some European regulators do express hopes that it might set a benchmark for more progressive digital regulatory standards worldwide.³³

However, there is an overlooked fact that may call into question the good intentions of the DSA in ensuring a level playing field between non-EU and EU competitors. This is essentially about the potential undermining of the competitiveness of European service providers in light of recitals 7 and 8 of the DSA. According to recital 7, the territorial scope of the DSA is determined by whether the intermediary services are provided within the Union, emphasizing the need for a substantial connection to the Union. Recital 8 further clarifies that such a connection exists if the service provider has an establishment in the Union, has a significant number of users within the Union, or directs its activities towards one or more Member States. This broad and inclusive definition could potentially disadvantage European service providers on the global stage. If merely having an establishment in

³³Chander, A., When the Digital Services Act Goes Global (October 18, 2023). Georgetown University Law Center Research Paper No. Forthcoming, Berkeley Technology Law Journal, Vol. 38, Issue 3, Pp. 1067-1088, DOI No. 10.15779/Z38RX93F48, (2023). Georgetown Law Faculty Publications and Other Works. 2548., Available at SSRN: <https://ssrn.com/abstract=4606282>

the Union is enough to establish this substantial connection, European providers may face more stringent regulatory scrutiny compared to their non-European counterparts, who might not have such a defined presence in the Union. This could result in increased compliance costs and operational constraints, thereby diminishing their competitive edge internationally.³⁴

VI. Concluding remarks.

The DSA introduces the concept of the legal representative as a pivotal mechanism to ensure compliance and enforceability of the regulation, particularly for intermediary service providers that are not established within the EU. This legal representative acts as a point of contact between non-EU based service providers and the EU regulatory bodies, ensuring that these entities adhere to the DSA's provisions. The obligations imposed on the legal representative are substantial. They include ensuring that service providers comply with content moderation policies, transparency in operations, and cooperation with EU authorities. Articles 14 and 15 of the DSA specify the requirements for clear terms and conditions, annual transparency reports, and prompt notification to authorities regarding takedown or information disclosure orders. However, one of the crucial aspects examined was whether the appointment of a legal representative under the DSA equates to an establishment under EU law. Article 13(5) of the DSA explicitly states that appointing a legal representative does not constitute an establishment. However, the study explored the implications of this designation in light of existing EU law. The analysis indicated that while the DSA aims to avoid conflating the legal representative with an establishment, the practical duties and responsibilities assigned to the legal representative might lead to it being perceived as a secondary establishment. This interpretation aligns with the Court of Justice of the European Union (CJEU) rulings, which consider any genuine and effective activity conducted through stable arrangements as constituting an establishment. Therefore, the legal representative, by fulfilling these roles, could be seen as engaging in stable and effective activities within the EU.

Nonetheless, the introduction of the legal representative has also profound implications for the liability regime within the EU. The DSA's liability framework departs from the previous negligence-based model by imposing stricter accountability measures on service providers. This shift is intended to

³⁴De Miguel Asensio, P. A. (2021). Servicios y mercados digitales: modernización del régimen de responsabilidad y nuevas obligaciones de los intermediarios.

enhance the protection of fundamental rights, such as freedom of expression, while ensuring a safer online environment. The DSA's provisions on liability, particularly Articles 4 to 6, outline the conditions under which service providers can be exempt from liability. These include not initiating the transmission, not selecting the recipient of the transmission, and acting promptly to remove or disable access to illegal content once aware of its existence. These measures place a significant burden on service providers and their legal representatives to maintain robust content moderation practices and transparency.

The study also explored the broader impact of the DSA, particularly through the lens of the “Brussels Effect.” This phenomenon refers to the EU's ability to set global regulatory standards due to the stringent nature of its regulations. The DSA, with its rigorous requirements and substantial penalties for non-compliance, has the potential to influence digital regulatory frameworks worldwide. The legal representative plays a crucial role in this context. By ensuring that non-EU service providers comply with the DSA's standards, the legal representative helps extend the reach of EU regulations beyond its borders. This creates a level playing field within the EU Single Market and encourages global platforms to align their policies with EU standards to avoid penalties. Consequently, the DSA could drive the global adoption of more progressive digital regulatory standards, particularly in areas such as content moderation, transparency, and consumer protection. However, the DSA may inadvertently challenge the competitiveness of European service providers. Recitals 7 and 8 define the territorial scope of the DSA by establishing a substantial connection to the Union. This connection exists if the service provider has an establishment in the Union, a significant number of users within the Union, or directs its activities towards one or more Member States. Such a broad and inclusive definition means that European providers might face more stringent regulatory scrutiny and higher compliance costs than their non-European counterparts who lack a defined presence in the Union. These increased operational constraints could diminish the competitive edge of European service providers on the global stage.

While the DSA represents a significant step forward, the study identified several practical challenges and areas of uncertainty. The ambiguity surrounding the specific duties and liabilities of the legal representative, particularly regarding the “sufficiently mandated” criterion, underscores the need for clearer guidelines. Additionally, the potential classification of the legal representative as an establishment raises concerns about the broader implications for service providers and their operational structures.

To address these challenges, it is recommended that the European Commission provides more detailed guidance on the designation and duties of legal representatives. This includes specifying the types of documentation and mandates required to meet the “sufficient” criteria and clarifying the extent of the legal representative’s liability. Furthermore, ongoing dialogue with stakeholders, including service providers and legal experts, is essential to ensure that the DSA’s implementation is practical and effective.

In conclusion, the DSA and the introduction of the legal representative represent significant advancements in the EU’s digital regulatory landscape. By imposing stringent regulations and ensuring their enforceability, the DSA aims to enhance consumer protection, foster innovation, and create a unified digital market. The legal representative serves as a crucial mechanism to achieve these goals, particularly by ensuring compliance among non-EU service providers.

The potential global impact of the DSA, through the Brussels Effect, underscores its importance in shaping digital regulatory standards worldwide. However, practical challenges and ambiguities remain, necessitating further clarification and guidance from the European Commission. Understanding these developments is essential for stakeholders across the digital economy as they navigate the complex and rapidly evolving regulatory environment. The DSA not only represents a significant advancement in the EU’s digital policy but also sets a benchmark for global digital regulation, promoting accountability, transparency, and consumer protection in the digital age.

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