TO HOST OR NOT TO HOST: NARROWING INTERMEDIARY LIABILITY EXEMPTION IN THE DSA

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Intermediary liability exemption in the Digital Services Act (Regulation 2022/2065, 'DSA') is generally interpreted as being unchanged compared to the e-Commerce Directive (Directive 2000/31). Conditional liability exemption strikes a balance between the interests of hosting providers, people affected by illegal content, and the freedom of expression of the general public. However, hosting providers and their role in society have evolved significantly since the adoption of the e-Commerce Directive. Despite their position as key infrastructure in the public debate and their sophisticated content moderation processes, they enjoy a seemingly widening exemption from liability in CJEU case law. This article argues for a narrower scope of application for intermediary liability exemption for hosting services guided by due diligence obligations and duties of care created in the DSA and sectoral regulation. This can benefit aggrieved parties in holding platforms liable and inspire better moderation of illegal content. A narrower interpretation of the liability exemption can be justified by compliance with requirements on notice-and-takedown mechanisms, a fairer economic burden of moderation, improved moderation capacity, and the geopolitical tensions which strain effective content moderation. The DSA provides clear due diligence obligations in Articles 16 and 23, and sectoral regulation requires diligence regarding specific types of content. These obligations can be used to exclude undiligent or bad faith actors from the liability exemption. This better reflects hosting providers' positions as powerful actors and ensures a liability exemption that does not reward negligent or laissez-faire approaches to content moderation by actors that stand to gain monetarily from structurally hosting illegal content.

1 INTRODUCTION

In February 2025, Instagram users were surprised by a large amount of violent and sexual imagery crowding their 'Reels' page. Meta apologised profusely for displaying illegal content to a large number of users; their automated moderation process had malfunctioned.[1] Platforms frequently boast the success of their content moderation systems, increasingly relying on novel techniques such as large-language models to moderate content.[2] The fallibility of such means, together with a changing political landscape in which platforms align

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[1] Dylan Butts, 'Meta says it fixed "error" after Instagram users report a flood of graphic and violent content', (CBNC, 26 February 2025) <https://www.cnbc.com/2025/02/27/meta-apologizes-after-instagram-users-see-graphic-and-violent-content.html> accessed 1 September 2025.

[2] For TikTok: Rozanna Latiff, 'ByteDance's TikTok Cuts Hundreds of Jobs in Shift towards AI Content Moderation' (*Reuters*, 11 October 2024) <https://www.reuters.com/technology/bytedance-cuts-over-700-jobs-malaysia-shift-towards-ai-moderation-sources-say-2024-10-11/> accessed 1 September 2025. For Meta: 'Content Moderation in a New Era for AI and Automation | Oversight Board' (*Oversight Board*, 17 September 2024) <https://www.oversightboard.com/news/content-moderation-in-a-new-era-for-ai-and-automation/> accessed 1 September 2025.

with a political trend that promotes less moderation rather than more,[3] underline the importance of an effective liability framework surrounding the hosting of illegal content. A balanced intermediary liability framework strikes an appropriate balance between the interests of aggrieved parties, internet intermediaries, and the general public.

The primary liability exemptions for hosting illegal content in the European Union are laid down in Articles 4-6 Digital Services Act ('DSA')[4] and were previously found in Articles 12-14 of the e-Commerce Directive ('ECD').[5] Intermediary liability for hosting illegal content constitutes a precarious balance between providing a remedy for parties affected by illegal content, protecting the users' freedom of expression from potential over-enforcement as a result of liability, chilling third-party speech, and stumping online platforms in their economic growth. The ECD's doctrine has been developed in case law over the last 25 years.[6] Academic consensus is that, despite the transition from the ECD to the DSA, intermediary liability exemptions have not changed.[7] The DSA has merely adopted some of the Court of Justice of the European Union's (CJEU) reasoning in its recitals to provide context to the liability exemption.[8] However, the landscape around content moderation and the dissemination of illegal content on the internet has developed significantly since 2000. Online platforms have become places where users can socialise, network, participate in the democratic process, and shop, all at the same time.[9] The legal landscape has similarly evolved: the DSA creates a layer of accountability on top of the existing liability rules laid down in the ECD, encompassing a wide range of due diligence obligations, such as transparency obligations, risk assessments, and engagement with civil

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[3] Jacob van de Kerkhof, 'Musk, Techbrocracy and Free Speech' in Alberto Alemanno and Jacquelyn Veraldi (eds), *Musk, Power, and the EU: Can EU Law Tackle the Challenges of Unchecked Plutocracy?* (Verfassungsbooks 2025) 91 et seq.

[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) [2022] OJ L277/1.

[5] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1; see also Raphaël Gellert and Pieter Wolters, 'The Revision of the European Framework for the Liability and Responsibilities of Hosting Service Providers' (Ministry of Economic Affairs and Climate Policy 2021) 99.

[6] E.g. Joined Cases C-236/08 to C-238/08 *Google France v Louis Vuitton* EU:C:2010:159; Case C-324/09 *L'Oreal v eBay* EU:C:2011:474; Joined Cases C-682/18 and C-683/18 *YouTube/Cyando* EU:C:2021:503; but also in the sphere of the Council of Europe: *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015); *Sanchez v France* App no 45581/15 (ECtHR, 15 May 2023); *Patrascu v Romania* App no 1847/21 (ECtHR, 7 January 2025).

[7] E.g. Folkert Wilman, 'The Digital Services Act (DSA): An Overview' (*SSRN*, 27 December 2022), 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586> accessed 1 September 2025: 'Moreover, as will be seen below, the DSA includes the rules on liability which were previously contained in that directive'; Aleksandra Kuczerawy, 'The Power of Positive Thinking Special Issues: Intermediary Liability as a Human Rights Issue' (2017) 8(3) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 226, 228: 'After consultation, the Commission concluded that it would maintain the existing intermediary liability regime while implementing a sectorial, problem-driven approach'; Martin Husovec, *Principles of the Digital Services Act* (Oxford University Press 2024) 65: 'To avoid [a death sentence for decentralised speech], the second generation of rules, such as the DSA, does not intend to change the underlying liability for someone else's content'.

[8] Ronan Riordan, 'A Case Study of Judicial-Legislative Interactions via the Lens of the DSA's Host Liability Rules' (2025) 10(1) European Papers – A Journal on Law and Integration 259.

[9] Catalina Goanta, 'The New Social Media: Contracts, Consumers, and Chaos' (2023) 108 Iowa Law Review 118; generally Jose van Dijck, *The Culture of Connectivity: A Critical History of Social Media* (Oxford University Press 2013).

society actors.[10] These obligations follow a layered approach, increasing as the size of the platform increases.[11] Very Large Online Platforms and Very Large Online Search Engines ('VLOPSEs', platforms with a number of monthly active users exceeding 45 million)[12] need to abide by the most intense regime,[13] whereas micro- and small enterprises are excluded from the scope of a number of DSA provisions.[14]

The starting point of this contribution is the observation that the DSA maintains – at least in phrasing – the liability exemptions of the ECD in spite of the evolution that hosting providers underwent in the past 25 years. This raises the question whether changes in content moderation and the expectations raised in the DSA should be better reflected in how the doctrine of intermediary liability exemption is applied. This contribution argues that, although the legal phrasing of liability exemptions has not significantly changed since the ECD, it requires nuancing to (a) reflect platforms' poor compliance with mandatory notice-and-action mechanisms, frustrating a pre-condition for liability exemption; (b) reflect the economic reality in which hosting providers benefit economically from hosting illegal content; (c) reflect platforms' improved technological moderation capacity compared to the early 2000s; (d) provide a clearer incentive for platforms to moderate illegal content in a geopolitical landscape that stimulates less moderation; and (e) the observation that the case law of the European Court of Human Rights regarding freedom of expression on the internet does not stand in the way of this argument. Not only can a narrower scope of liability exemption ensure a fairer distribution of responsibility for hosting illegal content, it also provides more remedies for parties aggrieved by illegal content by excluding bad faith actors, and it may stimulate moderation against illegal content,[15] preventing associated harms. The DSA provides clear guidelines that can guide this interpretation of the hosting liability exemption, predominantly through requirements that can exclude non-diligent hosting providers and through expectations around the level of diligence that could lead to awareness of illegal content.

This argument is laid out along the following structure: Section 2 introduces the current framework for liability exemption for hosting illegal content and explains why the consensus is that the DSA has not changed the doctrine for liability exemption since the ECD; Section 3 provides reasons why the intermediary liability exemption should be interpreted more narrowly than 25 years ago; Section 4 explains instances in the DSA and sectoral regulation that can change how intermediary liability exemption is applied in light of requirements for platform due diligence. The purpose of this article is not to dismiss intermediary liability exemption; it argues for a nuanced narrowing of scope of the liability

[10] Martin Husovec, 'Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules' (2023) 38 Berkeley Technology Law Journal 883. See also Rachel Griffin, 'Public and Private Power in Social Media Governance: Multistakeholderism, the Rule of Law and Democratic Accountability' (2023) 14(1) Transnational Legal Theory 46.
[11] Digital Services Act (n 4) recital 76; see also Folkert Wilman, 'De Digital Services Act (DSA): een belangrijke stap naar betere regulering van onlinedienstverlening' (2022) 28 Nederlands tijdschrift voor Europees Recht 220, 222.
[12] Digital Services Act (n 4) Article 33(1).
[13] ibid Section 5 Articles 33-43.
[14] As defined in Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36; Digital Services Act (n 4) Articles 15(2), 19(1), 29(1).
[15] E.g. Yassine Lefouili and Leonardo Madio, 'The Economics of Platform Liability' (2022) 53 European Journal of Law and Economics 319.

exemption in cases where hosting providers act negligently in their due diligence obligations in content moderation.

2 INTERMEDIARY LIABILITY EXEMPTION IN THE DSA

Before expanding on arguments for narrowing the scope of intermediary liability exemption in Section 3, this section explains the framework for intermediary liability exemption for hosting illegal content in the DSA and why it resembles that of the ECD. Important to note at the outset is that the DSA only harmonises the exemption of liability for hosting illegal content; generally, liability is established through national law or European law and can be derived from criminal law, civil law, or any other field of law.[16] The DSA harmonises a general horizontal liability exemption for mere conduit services, caching services, and hosting providers.[17] This article focuses exclusively on the exemption for hosting providers because of their relevance in recent case law and increased due diligence obligations in the DSA. This framework is explored in Section 2.1. Section 2.2 explains why the current consensus is that the liability exemption has not changed since the ECD, and it provides an overview of provisions that may stand in the way of interpreting the liability exemption differently. Section 2.3 provides a brief, interim conclusion.

2.1 AN OVERVIEW OF CONDITIONAL INTERMEDIARY LIABILITY EXEMPTION

The DSA's explanatory memorandum states that article 6 DSA maintains – at least textually – the liability exemption regime of article 14 ECD.[18] Article 14 ECD required Member States to ensure that hosting providers were not liable for hosting illegal content if they did not have knowledge of the illegal information they host.[19] The conditional liability exemption of Article 14 ECD was heavily inspired by paragraph 512 of the U.S. Digital Millennium Copyright Act ('DMCA'),[20] a 'sectorial, conditional immunity system'.[21] The DMCA departed from the earlier US Section 230 Communications Decency Act,[22] which immunised hosting providers from liability for hosting most types of content.[23] Immunity in paragraph 512 of the DMCA is conditional on the knowledge of the service provider of the copyright infringing content: if the service provider is unaware of copyright infringing content, they

[16] Digital Services Act (n 4) Article 3(h); Case C-291/13 *Papasavvas* EU:C:2014:2209 para 53; see also Folkert Wilman, 'The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content – Between the e-Commerce Directive and the Digital Services Act' (2021) 12(3) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 317, 321.
[17] Digital Services Act (n 4) Articles 4-6.
[18] European Commission, '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, 3. See also Franz Hofmann and Benjamin Raue (eds), *Digital Services Act: Article-by-Article Commentary* (Nomos 2025) 162.
[19] Directive on electronic commerce (n 5) Article 14(1)(a).
[20] 17 U.S.C. para 512.
[21] Husovec, 'Rising Above Liability' (n 10) 884.
[22] 47 U.S.C. para 230.
[23] See generally Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press 2019).

are not liable; once made aware of such content, the service provider has to act expeditiously to remove that content. Article 14 ECD copied this model for hosting providers.[24]

The popularity of this liability exemption in the late 90s was based on the notion that less regulation would benefit economic interests and freedom of expression.[25] A framework for conditional liability exemption was seen as an agreeable middle-ground between non-liability and strict liability. Non-liability would create an undesirable situation where parties affected by illegal content are left without remedies. Conversely, strict liability would create an undesirable scenario requiring hosting providers to assume full control over all content online, which would cause unpredictable monetary loss and diminish the benefits of a decentralised communication network..[26] If hosting providers were strictly liable for illegal content, they would need to exercise immense amounts of editorial control to avoid liability. This would limit the degree to which the internet can be used for accumulating free expression, especially since various courts have recognised the internet's ability to provide a crucial vehicle for freedom of expression.[27] The downside of the liability exemption is that it leaves parties affected by illegal content with fewer remedies compared to a strict liability model, as hosting providers may hide behind being unaware of the illegal content. This is part of the balancing act that maintains the possibility of liability only if a hosting provider becomes aware of illegal content and precludes strict liability.[28] This is confirmed by the European Court of Human Rights ('ECtHR'), which held that the notice-and-action mechanism sufficiently safeguards affected parties' rights[29] – a finding that is further discussed below.[30]

The 'knowledge-based' liability exemption in Article 6 DSA – and previously Article 14 ECD – consists of three components:[31] (a) qualifying as a hosting provider; (b) not having actual knowledge of illegal content or, as regards claims for damages, not being aware of facts or circumstances from which the illegal content is apparent; or (c) acting expeditiously to remove or disable access to the illegal content.

2.1[a] Hosting providers

Hosting providers are defined in Article 3(g)(iii) DSA: 'a service consisting of the storage of information provided by, and at the request of, a recipient of the service'.[32] They must take

[24] Directive on electronic commerce (n 5) Article 14(1).
[25] See also European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on A Digital Single Market Strategy for Europe' COM(2015) 192 final, 3-4.
[26] Husovec, 'Rising Above Liability' (n 10) 893.
[27] Case C-401/19 *Commission v Poland* EU:C:2022:297 para 46; *Delfi v Estonia* (n 6) para 110; United States Supreme Court, 19 June 2017, *Packingham v North Carolina,* 137 S. Ct. 1730.
[28] E.g. Directive on electronic commerce (n 5) recitals 41 and 46; also *YouTube/Cyando* (n 6) para 113.
[29] *MTE and Index.hu v Hungary,* App no 22947/13 (ECtHR, 2 February 2016) para 91. Cf. *Delfi v Estonia* (n 6) para 159, in which the ECtHR found that in some instances action is required even without notices.
[30] See below subsection 4.1[a].
[31] Wilman, 'The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content – Between the e-Commerce Directive and the Digital Services Act' (n 16).
[32] Digital Services Act (n 4) Article 3(g)(iii); most obligations in the DSA are aimed at hosting services as opposed to mere conduit or caching services of Articles 3(g)(i) and (ii) respectively. Hosting providers have obligations under Chapter 3 Section 2; subspecies online platforms (Article 3(o)) have obligations under Section 3; online platforms allowing consumers to conclude distance contracts with traders under Section 4; and then VLOPs under Section 5; all are considered hosting providers).

a neutral role, meaning that they provide merely technical and automated processing services and do not have control over user-generated content.[33] This criterion – in the context of article 14 ECD – has been interpreted extensively in the case law of the CJEU, which has clarified how a hosting provider may interact with information while maintaining a neutral role. For example, the CJEU established in *Google France* that remuneration for hosting services does not preclude a passive role.[34] Hosting providers may also engage in indexing, searching, and recommending user-generated content.[35] However, the CJEU decided in *L'Oreal v eBay* that optimising the presentation of sales listings interfered with that neutral or passive role and excluded a hosting provider from its neutral position.[36] Neutrality of a hosting provider can therefore be seen as a spectrum, encompassing a range of activities between full passivity and full control, that has developed over time along with platform affordances that must be assessed on a case-by-case basis.[37]

2.1[b] Actual knowledge of illegal content or awareness of facts or circumstances from which illegal content is apparent

Hosting providers may not have 'actual knowledge' of illegal content or be aware of any facts or circumstances from which illegal content is apparent.[38] These are seemingly two different standards, in which actual knowledge constitutes specific knowledge of the presence of illegal content and the nature of its illegality,[39] whereas awareness of facts or circumstances from which illegal content is apparent is a broader criterion that can be derived from a broader set of circumstances.[40] The difference is that, in the case of 'awareness', liability can only lead to damages, whereas 'actual knowledge' could also lead to criminal liability.[41]

Actual knowledge or awareness of illegal content can be gained through own-initiative investigations or through notices submitted through notice-and-action mechanisms. In order to lead to awareness, notices must be sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess,

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[33] Digital Services Act (n 4) Article 6(2), also recital 18; *L'Oreal v eBay* (n 6) para 113. For a discussion whether neutrality also involves passiveness, see Folkert Wilman, 'Between Preservation and Clarification' (*Verfassungsblog*, 2 November 2022) <https://verfassungsblog.de/dsa-preservation-clarification/> accessed 1 September 2025.

[34] *Google France v Louis Vuitton* (n 6) para 116.

[35] Digital Services Act (n 4) recital 22; *YouTube/Cyando* (n 6) para 114.

[36] *L'Oreal v eBay* (n 6) para 116

[37] Joris van Hoboken et al, 'Hosting Intermediary Services and Illegal Content Online: An Analysis of the Scope of Article 14 ECD in Light of Developments in the Online Service Landscape' (European Commission 2018), 31–33 <https://data.europa.eu/doi/10.2759/284542> accessed 1 September 2025.

[38] It is important to note that recital 18 seemingly conflates 'being a neutral hosting provider' with 'having knowledge or control over content', stating that 'the provider of intermediary services plays an active role of such a kind as to give it knowledge of, or control over, that information'. Although there is certainly overlap between 'having actual knowledge over' and 'being aware of', it is entirely conceivable that a passive or neutral hosting provider has knowledge over illegal content.

[39] E.g. in the context of notices: Opinion of AG Saugmandsgaard Øe in Joined Cases C-682/18 and C-683/18 *YouTube/Cyando* EU:C:2020:586 para 187: 'A notification is also intended to give [the hosting provider] sufficient evidence to verify the illegal nature of the information'.

[40] Husovec, *Principles of the Digital Services Act* (n 7) 130.

[41] ibid; Miquel Peguera, 'The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems' (2008) 32(4) Columbia Journal of Law and the Arts 481, 488–489.

and where appropriate, act against illegal content.[42] The hosting provider must diligently assess the facts and circumstances brought forward in such notices.[43]

After a hosting provider has actual knowledge or awareness of allegedly illegal content, it must establish the illegal nature of the content.[44] The illegal nature must be 'a matter of actual knowledge or be apparent', meaning that the illegality must be specifically established, readily identifiable or manifest.[45] The findings of the CJEU on this are reflected in article 16(3) DSA. What is considered 'apparently' illegal can be contentious. AG Saugmandsgaard Øe comments that in some cases illegality can be immediately obvious, mentioning child abuse material as an example, whereas in others it may not be, e.g. copyright.[46] To avoid over-removal and hosting providers becoming judges of online legality, AG Saugmandsgaard Øe argues that hosting providers can only be held liable for not removing content if the illegal character of the content can be ascertained without difficulty and without conducting a detailed legal or factual examination, i.e when the illegal character is apparent.[47]

The standard for whether facts and circumstances have led to awareness of illegal content established in *L'Oreal/eBay* and in *YouTube/Cyando* is what a 'diligent economic operator' would have identified. This is a strict requirement that is not met easily: in *L'Oreal,* AG Jääskinen excludes 'construed' knowledge on the basis of the diligence expected from an economic operator, meaning that a service provider cannot be liable on the basis of that they 'should have known', or whether they 'have good reasons to suspect illegal activity'.[48] Expecting otherwise could violate the prohibition on general monitoring obligations under article 15 ECD and 8 DSA. However, Jääskinen nuances this finding for 'same or similar' trademark infringing goods, arguing that 'same or similar' infringements are part of the same illegal activity and, as such, constitute 'ongoing' illegal content, in which case the provider 'should have known' of the trademark infringement.[49]

The Court finds in *L'Oreal* that an imprecise or inadequately substantiated notice must be taken into account by national courts in establishing whether there are facts and circumstances from which a diligent economic operator should have identified the illegal content.[50] Nordemann interprets this as a duty of care, requiring some effort of the economic operator to identify illegal content based on facts presented to them.[51] *YouTube* nuances this finding. AG Saugmandsgaard Øe seemingly dismisses the argument that awareness can be construed on the basis of the expected diligence or duty of care of an operator, stating: 'attention should be paid not to the fact that the provider would have known had it been

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[42] Digital Services Act (n 4) recital 22; Article 16(3).
[43] ibid Article 16(6)
[44] *Google France v Louis Vuitton* (n 6) para 109. See also Hofmann and Raue (n 18) 170.
[45] *YouTube/Cyando* (n 6) para 113.
[46] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) paras 187-190. Saugmandsgaard Øe argues that copyright cases can be difficult to assess due to the variety of rightholders that can be involved and the various national regimes that may need to be accounted for, referring explicitly Case C-360/10 *SABAM v Netlog* EU:C:2012:85 para 50. However, copyright cases have also been dubbed some of the more obvious cases of illegal content; in cases of piracy, illegality is often clear-cut.
[47] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) para 190.
[48] Opinion of AG Jääskinen in Case C-324/09 *L'Oreal v eBay* EU:C:2010:757 para 163.
[49] ibid para 167.
[50] *L'Oreal v eBay* (n 6) para 122.
[51] Jan Bernd Nordemann, 'Haftung von Providern im Urheberrecht Der aktuelle Stand nach dem EuGH-Urteil v. 12. 7. 2011 – C-324/09 – L'Oréal/eBay' [2011] GRUR 977.

diligent, but to what it really knew'.[52] The final decision in *YouTube* confirms this line of reasoning, finding that the notification must contain sufficient information to enable the operator to satisfy itself without a detailed legal examination that the content is illegal and that removing it is compatible with freedom of expression.[53] Thus, there is limited room in case law for a duty of care, and only in certain circumstances.

The level of diligence required from the 'diligent economic operator' is left relatively undefined unclear throughout this development. Adding to this complexity, Saugmandsgaard Øe links the liability exemption of article 14 ECD to the concept of good faith. Citing the input by the French Government, he finds that the liability exemption 'seeks to protect service providers that generally act in good faith, not providers whose very intention is to facilitate copyright infringements'.[54] Good faith can be demonstrated through generally complying with obligations to remove content, or by putting in place tools that combat illegal content.[55] However, judging by the tone of the CJEU[56] and the AG[57], it is interpreted primarily as a criterion of *neither* deliberately facilitating illegal content nor remaining inactive despite having general awareness of the hosting service being used to disseminate illegal content.

2.1[c] Acts expeditiously to remove access to the illegal content

Upon having gained actual knowledge or awareness of illegal content, a hosting provider must act expeditiously to remove or disable access to the illegal content. This involves both a temporal requirement – content must be removed expeditiously – and the question of whether the platform could be required to remove content that is identical or similar to the illegal content.

The requirement of 'expedience' is undefined and needs to be assessed on a case-by-case basis.[58] It can be dependent on the nature of the content: for example, the expected expedience for removing CAM ('Child Abuse Material') may be greater than that of unwarranted financial advice. The requirement for member states is that temporal requirements may not be so rigid as to inspire over-blocking.[59] Previously, the *Conseil Constitutionnel* found that removal times under 24 hours in *Loi Avia* were unconstitutional as they may lead platforms to remove content even in cases of doubt.[60] In contrast, the 2025 Code of Conduct on Countering Illegal Hate Speech Online+ requires signatories

[52] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) para 179; referring to Opinion of AG Jääskinen in *L'Oreal v eBay* (n 48) para 163.
[53] *YouTube/Cyando,* (n 6) para 116, also Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) para 190.
[54] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) fn. 187.
[55] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) paras 124 and 128.
[56] *YouTube/Cyando* (n 6) para 94 on YouTube having various measures to prevent copyright infringement, and para 98, on Cyando not facilitating illegal sharing.
[57] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) para 191.
[58] Digital Services Act (n 4) recital 52; see also Hofmann and Raue (n 18) 178-179.
[59] Benjamin Raue and Hendrik Heesen, 'Raue/Heesen: Der Digital Services Act' [2022] Neue Juristische Wochenschrift 3537, 3540.
[60] *Conseil Constitutionnel,* 18 June 2020, 2020-801 DC, para 16; see Ruth Janal, 'Haftung Und Verantwortung Im Entwurf Des Digital Services Acts' [2021] Zeitschrift für Europäisches Privatrecht 227, 248.

to review 50% of notices of illegal hate speech online within 24 hours.[61] The absolute time requirements posed by Article 6(1)(b) DSA for takedown therefore remain somewhat vague, but in its Code of Conduct the Commission shows tolerance for stricter removal times.

Article 6(1)(b) DSA also raises the question of whether awareness of specific illegal content could lead to an obligation to remove identical or similar content: can hosting providers be required to ensure *staydown* instead of *takedown*?[62] Staydown implies that future infringements must also be removed, which may require the hosting provider to moderate content *ex ante*. The notice-and-staydown model is popular in cases of copyright infringement: for example, under the German doctrine of *Störerhaftung*, injunctions could be ordered for future infringing materials.[63] However, monitoring for similar infringements creates a tension with the general monitoring prohibition of Article 8 DSA, as it would require hosting providers to proactively monitor content.

This tension is resolved somewhat inconsistently in CJEU case law over the past decade. In *Scarlet v SABAM* and *SABAM v Netlog*, the CJEU found that requiring preventive monitoring of all data by an internet service provider for intellectual property infringing content would contravene the general monitoring obligation of Article 15(1) ECD.[64] In *McFadden* this reasoning was confirmed.[65] Conversely, in *L'Oréal,* the CJEU finds that injunctions to suspend violators of intellectual property rights may be ordered if operators of online marketplaces fail to take preventive measures, which encourages some forms of proactive content moderation.[66] The CJEU nuances this line in *Glawischnig-Piesczek v Facebook*: it is not considered a general monitoring obligation when a hosting providers are required to remove identical – as already established in *L'Oreal* – and similar content.[67] The qualification 'similar' is novel. In *Glawischnig-Piesczek,* it is required by the nature of defamatory content, which may take different forms, but be similar at its core.[68] Similarity can only be established when it does not require an independent assessment by the hosting provider.[69] Janal argues that removing 'similar' content inevitably requires the use of filtering techniques, yet filtering may not lend themselves to effectively judging the context in which the defamatory speech is uttered. This may then contravene article 8 DSA.[70] To add a layer of proportionality to this requirement of filtering for similar content, A-G Saugmandsgaard Øe argues in his conclusion in *YouTube* that, if monitoring obligations for identical or similar content are ordered, those obligations must be proportionate to the complexity of the obligation (i.e.

[61] European Commission, 'Code of conduct on Countering Illegal Hate Speech Online +' (20 January 2025), 2.3 <https://digital-strategy.ec.europa.eu/en/library/code-conduct-countering-illegal-hate-speech-online> accessed 1 September2025.
[62] Martin Husovec, 'The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?' (2018) 42(1) Columbia Journal of Law & the Arts 53. Also Aleksandra Kuczerawy, 'From "Notice and Takedown" to "Notice and Stay Down": Risks and Safeguards for Freedom of Expression' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020).
[63] E.g. *Bundesgerichtshof,* 12 March 2004, *Internetversteigerung I,* I ZR 304/01; see for example Christina Angelopoulos and Stijn Smet, 'Notice-and-Fair-Balance: How to Reach a Compromise between Fundamental Rights in European Intermediary Liability' (2016) 8(2) Journal of Media Law 266, 285; Kuczerawy, 'From "Notice and Takedown" to "Notice and Stay Down"' (n 62) 540.
[64] Case C-70/10 *Scarlet Extended v SABAM* EU:C:2011:771 paras 39-40; *SABAM v Netlog* (n 46).
[65] Case C-484/14 *Tobias McFadden v Sony Music Entertainment* EU:C:2016:689 para 87.
[66] *L'Oreal v eBay* (n 6) para 141.
[67] Case C-18/18 *Eva Glawischnig-Piesczek v Facebook* EU:C:2019:821 para 37.
[68] ibid para 40.
[69] ibid para 46.
[70] Janal (n 60) 249-250.

similar content is more difficult to monitor than identical content) and, therefore, take into account the availability of monitoring systems to the hosting provider.[71] In sum, the CJEU does not fully dismiss the possibility of near-general monitoring obligations, but these need to be necessitated by the nature of the illegal content and proportional to the situation of the hosting provider.

2.1[d] Limitations to the scope of applicability of the liability exemption under article 6(1) DSA.

The DSA limits liability exemption compared to Article 14 ECD in two instances: in Article 6(3) and by leaving sectoral regulation on illegal content that creates different standards for liability exemption (e.g. the Copyright in the Digital Single Market Directive ('CDSM'))[72] intact.

Article 6(3) DSA stipulates that liability under consumer protection cannot be exempted for online platforms that allow the conclusion of distance contracts with traders where the average consumer could believe that the product was sold by the online platform itself.[73] This answers a critique that hosting providers are not liable for consumer harms even though consumers rely on the hosting provider's brand image to buy goods and services.[74] Sectoral regulation fragments the landscape of intermediary liability exemption for illegal content outside of the DSA's scope. The Copyright Directive,[75] Enforcement Directive[76] and CDSM Directive all act as *leges speciales* under the DSA.[77] Under the CDSM Directive online content-sharing service providers[78] perform an act of communicating to the public when hosting third-party content.[79] If they host copyright infringing content, they must obtain prior authorisation from right-holders to do so or face liability for copyright infringement.[80] Providers may be exempt from liability if they (a) made best efforts to obtain authorisation; (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works; and (c) acted expeditiously to remove content upon receiving a notification and made best efforts to remove future uploads.[81] This is a higher standard of liability exemption than Article 6 DSA, which is justified by addressing right-holders from a value-gap created by negligent enforcement on behalf of online service

[71] Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) para 222.
[72] Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market [2019] OJ L130/92.
[73] Digital Services Act (n 4) Article 6(3).
[74] E.g. Caroline Cauffman and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12(4) European Journal of Risk Regulation 758, 766–767. Caufman and Goanta criticise the provision (then Article 5(3) of the DSA proposal) for creating legal uncertainty on the interpretation of average consumer – although that is a common standard in consumer law, it is still unclear what factors lead an average consumer to assume that the hosting provider is party to the contract.
[75] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10.
[76] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L157/45.
[77] Digital Services Act (n 4) recital 11.
[78] Directive 2019/790 (n 72) Article 2(6); this can bes een as a subset of online platforms in the sense of Article 3(i) DSA.
[79] Directive 2001/29 (n 75) Article 3.
[80] Directive 2019/790 (n 72) Article 17(1); Directive 2001/29 (n 75) Article 3.
[81] Directive 2019/790 (n 72) Article 17(4).

providers.[82] To be exempt from liability in the case of copyright, online platforms may be required to employ automated filtering techniques,[83] creating a tension with Article 8 DSA and generally the right to freedom of expression.[84] The CJEU resolved this tension in *Poland v Commission,* finding that platforms are not obliged to generally monitor and that Article 17(7)-(9) provides sufficient safeguards to balance copyright and the right to freedom of expression.[85]

2.2 WHY IS THE CONSENSUS THAT THE HOSTING LIABILITY EXEMPTION HAS NOT CHANGED?

As iterated above, the academic consensus is that the framework for liability exemption has not changed since the ECD. The fundamental reasoning behind the liability exemption – balancing the promotion of economic development in internet services, maintaining freedom of expression by not mandating general monitoring for all illegal content and offering users a remedy via notice-and-action and potential liability – remains intact.[86] Most reports evaluating the intermediary liability exemption generally find that, although the ECD required clarification, there was no real support for fundamentally altering the liability exemption.[87] The liability exemption regime was considered 'fit-for-purpose' by most individual users, content uploaders, and intermediaries.[88] Only IP-rightholders indicate flaws in both the system and its interpretation in case law, stating it does not allow them sufficient redress from intermediaries and infringing parties. Their

[82] Directive 2019/790 (n 72) recital 66. Cf. on whether this justifies stricter liability than in other fields, Janal (n 60) 235-236.
[83] Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70(6) GRUR International 517, 550–552.
[84] This provision has been popular topic of academic debate, see for example: Geiger and Jütte (n 83); João Pedro Quintais et al, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive Statements' (2019) 10(3) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 277; Martin Husovec, 'Mandatory Filtering Does Not Always Violate Freedom of Expression: Important Lessons from *Poland v. Council and European Parliament*' (2023) 60(1) Common Market Law Review 173; Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the e-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' (*SSRN*, 4 January 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717022> accessed 1 September 2025.
[85] *Commission v Poland,* (n 27) paras 72-97.
[86] Generally, Wilman, 'The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content – Between the e-Commerce Directive and the Digital Services Act' (n 16) 322-323.
[87] E.g. van Hoboken et al (n 37); Gellert and Wolters (n 5); Tambiama Madiega, 'Reform of the EU Liability Regime for Online Intermediaries: Background on the Forthcoming Digital Services Act : In Depth Analysis.' (European Parliament 2019, PE 649.404) <https://data.europa.eu/doi/10.2861/08522> accessed 1 September 2025; Anja Hoffmann and Alessandro Gasparotti, 'Liability for Illegal Content Online' (Centre for European Policy, March 2020) <https://www.cep.eu/fileadmin/user_upload/hayek-stiftung.de/cepStudy_Liability_for_illegal_content_online.pdf> accessed 1 September 2025.
[88] European Commission, 'Synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and het collaborative economy' (2015) <https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15877> accessed 1 September 2025; see also Maria Lillà Montagnani, 'A New Liability Regime for Illegal Content in the Digital Single Market Strategy' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020).

concerns have been addressed in Directive 2019/790.[89]

Instead, the DSA adds a layer of accountability norms in the form of due diligence and transparency, which are not linked to liability. Husovec calls this 'accountability-but-not-liability'.[90] These provisions require additional efforts from platforms but do not translate to intermediary liability. This separation may stand in the way of a more narrow interpretation of the liability exemption in the DSA compared to the ECD. This subsection describes some provisions that would stand in the way of a more narrow interpretation of the liability exemption.

The first provision anchoring liability exemption amidst other norms is Article 54. It explicitly separates liability for hosting illegal content from liability for individual harms suffered by infringement of the DSA.[91] The reasoning behind this distinction is that liability for illegal content is aimed at restoring a lawful state by making victims whole, whereas liability under Article 54 is only about holding platforms accountable for complying with their obligations under the DSA.[92] Accountability provisions in the DSA on transparency and due diligence are therefore not intended create liability for the communication of others.[93] Recital 41 underscores this sentiment: 'the due diligence obligations are independent from the question of liability of providers of intermediary services, which therefore need to be assessed separately'.[94] To clarify this separation with an example, it is impossible to hold a platform for hosting CAM because it was late in submitting transparency reporting.[95] Since a separate avenue for liability for the novel obligations stemming from the DSA's due diligence system is available, it is not necessary to link the doctrine for intermediary liability exemption to the due diligence system.

A second provision preventing a narrow reading of liability exemption is the Good Samaritan provision of Article 7.[96] Article 7 confirms that intermediary service providers are not excluded from relying on liability exemptions of Articles 4-6 DSA if they carry out voluntary good faith investigations into illegal content or take necessary measures to comply with national or EU law, and if this also leads to an active or non-neutral role that would normally exclude them from qualifying as a hosting provider. This provision prevents a catch-22 in which an online platform would be excluded from the liability exemption because they moderate content in good faith.[97] Exclusion from liability exemption for good faith

[89] Directive 2019/790 (n 72). See Section 2.3; also more extensively João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) 13(2) European Journal of Risk Regulation 191.
[90] Husovec, 'Rising Above Liability' (n 10) 910. See also Giancarlo Frosio and Martin Husovec, 'Accountability and Responsibility of Online Intermediaries' in Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020).
[91] Digital Services Act (n 4) Article 54.
[92] Husovec, 'Rising Above Liability' (n 10) 911.
[93] Husovec, *Principles of the Digital Services Act* (n 7) 66.
[94] Digital Services Act (n 4) recital 41.
[95] Hofmann and Raue (n 18) 958-960.
[96] Digital Services Act (n 4) Article 7.
[97] van Hoboken et al (n 37) 39. This fear was not justified even without the Good Samaritan provision, see e.g. Directive on electronic commerce (n 5) recital 40; European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Tackling Illegal Content Online' COM(2017)555 final, 12-13; see also Gellert and Wolters (n 5) 68-69.

content moderation could lead to less moderation to avoid liability.[98] Good faith implies that platforms operate in an objective, non-discriminatory and proportionate manner and take into account the rights and legitimate interests of all the parties involved.[99] The application of the Good Samaritan provision may be limited by the requirement of diligence, critics argue. Berbec, referring to Kuczerawy, questions whether the liability exemption is available, for example, if a hosting provider only succeeds in removing some illegal content on the basis of a notice, but misses some identical or similar content of which the illegal nature is apparent.[100] An undiligent hosting provider may therefore be excluded from the provision, leading to the conclusion that 'taking voluntary actions in good faith neither guarantees no[r] precludes neutrality'.[101] In spite of this, the article is commonly seen as an assurance that platforms should moderate content without fearing lability, and therefore ensures that the liability exemption also extends to hosting providers that actively moderate content.[102]

A final limitation is laid down in Article 8 DSA, which prohibits general monitoring obligations.[103] The ECD allowed for member states to create explicit duties of care regarding certain types of illegal content.[104] The DSA does not copy this, making the general monitoring prohibition stricter.[105] General monitoring obligations are prohibited due to operational costs for hosting providers and risks to the freedom of expression. The use of automated filtering is associated with risks to freedom of expression because of the potential for catching proverbial 'dolphins in the net', where legal content is inadvertently removed.[106] Article 8 must be interpreted as precluding any level of diligence being expected of an operator that may lead to a *de facto* or *de jure* general monitoring obligation or pro-active measures relating

[98] By analogy: 'where ignorance is bliss, "tis wise to be folly"', California Court of Appeals, June 23 1958, *People v Smith*, Civ. A. No. 3792.
[99] Digital Services Act (n 4) recital 26, see also Jacob van de Kerkhof, 'Good Faith in Article 6 Digital Services Act (Good Samaritan Exemption)' (*The Digital Constitutionalist*, 15 February 2023) <https://digi-con.org/good-faith-in-article-6-digital-services-act-good-samaritan-exemption/> accessed 1 September 2025.
[100] Adriana Berbec, 'To What Extent Can Online Service Providers Adopt Voluntary Content Moderation Measures without Losing Their Immunity Shields? A Comparative Analysis of Online Service Providers' Liabilities in the European Union and the United States' (2024) 15(1) Journal of Intellectual Property, Information Technology and E-Commerce Law 13; Aleksandra Kuczerawy, 'The Good Samaritan That Wasn't: Voluntary Monitoring under the (Draft) Digital Services Act' (*Verfassungsblog*, 12 January 2021) <https://verfassungsblog.de/good-samaritan-dsa/> accessed 1 September 2025; the requirement to moderate against content of which the illegal nature is apparent arises from Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) para 197.
[101] Kuczerawy, 'The Good Samaritan That Wasn't' (n 100).
[102] Wilman, 'The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content – Between the e-Commerce Directive and the Digital Services Act' (n 16) 335. Unclear: *YouTube/Cyando* (n 6) para 109.
[103] Digital Services Act (n 4) Article 8; previously included as Article 15 in Directive on electronic commerce (n 5).
[104] Directive on electronic commerce (n 5) recital 48.
[105] Arguably, the explicit duties of care are included in sectoral regulation, see e.g. Gerald Spindler, 'The Liability System of Art. 17 DSMD and National Implementation: Contravening Prohibition of General Monitoring Duties' (2019) 10(3) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 344; Senftleben and Angelopoulos (n 84).
[106] E.g. Daphne Keller, 'Dolphins in the Net: Internet Content Filters and the Advocate General's Glawischnig-Piesczek v. Facebook Ireland Opinion' (Stanford Center for Internet and Society, 4 September 2019) <https://cyberlaw.stanford.edu/content/files/2024/05/Dolphins-in-the-Net-AG-Analysis.pdf> accessed 1 September 2025; more generally: Robert Gorwa, Reuben Binns and Christian Katzenbach, 'Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance' (2020) 7(1) Big Data & Society 1.

to identifying or monitoring illegal content.[107] Specific monitoring obligations are allowed for similar or identical content, however, following *Glawischnig-Piesczek*.[108] *De facto* general monitoring obligations are created by assuming a duty of care that is too expansive. Article 8 DSA can therefore stand in the way of limiting the liability exemption: by making hosting providers more liable, providers are *de facto* expected to assume a more active role in content moderation, which is precluded by Article 8.

2.3 INTERMEDIARY FINDINGS

This Section has presented an overview of the intermediary liability exemption in Article 6 DSA. Neutral intermediary service providers are not liable for hosting illegal content if they have no specific knowledge of that content or its illegality, and if they act expeditiously to remove it after gaining knowledge. The liability exemption for hosting providers is justified by facilitating economic growth of digital service providers and ensuring that freedom of expression is not interfered with through over-removing content by hosting providers fearing liability. Despite the added responsibility for hosting providers codified in the DSA and sector-specific regulation, the liability exemption has not significantly changed since the e-Commerce Directive of 2000. Its scope is somewhat limited by Article 6(3) DSA and sectoral regulation, but its key characteristics remain. In fact, altering the scope of the liability exemption in the DSA is prevented by the Good Samaritan provision of Article 7 DSA, the separate ground for liability of Article 54 DSA, and the general monitoring prohibition of Article 8 DSA. However, this article argues that there is room for a nuanced rethinking of the intermediary liability exemption guided by provisions in the DSA. Section 3 outlines arguments that justify narrowing of the scope of intermediary liability exemption within the framework of the DSA. This rethinking does not dismiss the key characteristics of the liability exemption, but ensures that it applies to good faith actors whilst excluding bad faith hosting providers.

3 WHY SHOULD WE RETHINK THE INTERMEDIARY LIABILITY EXEMPTION OF ARTICLE 6 DSA?

This article contests that the DSA allows for the liability exemption to be interpreted more narrowly than it was under the ECD, at least on a case-by-case basis. In some instances, this could aid individual aggrieved parties and rightholders with an additional remedy vis-à-vis the platform, which is currently precluded by a broad liability exemption. Aside from the general observation that laws applying to the internet drafted in the year 2000 may not be entirely fit for a fast-developing digital economy, this contestation rests on five points: (i) insufficient access to functioning notice-and-action mechanisms warrants a narrower application of the liability exemption; (ii) a narrower exemption would reflect a fairer division of the economic burden of moderation; (iii) a narrower liability exemption reflects developments in moderation capacity over the past two decades; (iv) a narrower exemption could contravene a geopolitical interest in less moderation and create enforcement mechanisms against mis-moderation; and (v) the case law of the European Court of Human

[107] Digital Services Act (n 4) recital 22.
[108] *Eva Glawischnig-Piesczek v Facebook* (n 67).

Rights indicates that the freedom of expression does not necessarily preclude a stricter liability exemption.

3.1 INSUFFICIENT ACCESS TO FUNCTIONING NOTICE-AND-ACTION MECHANISMS

Notice-and-action mechanisms of online platform providers constitutes a cornerstone in the intermediary liability exemption structure outlined in Section 2.1. Liability exemption can – at least under the ECD and DSA – only be justified if parties aggrieved by illegal content have a remedy available. That remedy is provided by an avenue for the affected party to request takedown of the illegal content. This is usually achieved through a notice-and-action mechanism. The importance of such mechanisms is acknowledged by the EU regulator,[109] the ECtHR in *MTE v Hungary* (finding that a functioning notice-and-action mechanism acts as a balancing instrument between various interests, and would thus not justify liability for hosting comments),[110] and the CJEU (in acknowledging the importance of notice-and-action mechanisms in combatting copyright infringements in *Youtube/Cyando*).[111] National case law also emphasises the importance of such mechanisms in facilitating users to act against illegal content.[112]

Previously, the requirements for notice-and-action were fragmented on a member state level.[113] The DSA progresses this thorny issue in harmonising those requirements, explicitly acknowledging that (a) hosting providers must provide their users with an easily accessible and user-friendly means of reporting content;[114] and (b) that a notice through such as mechanism creates knowledge or awareness of illegal content with the hosting provider, thus excluding them from liability exemption if they do not act expeditiously.[115]

The design of such mechanisms greatly affects how users are able to submit notices. Several studies have indicated that hosting providers do not adhere to requirements of ease-of-access or user-friendliness. In works on Germany's *Netzwerkdurchsetzungsgesetz,* which also included a notice-and-takedown requirement, Heldt[116] and Wagner et al[117] show that Facebook's design of their notice-and-action mechanism affects how users report content. The reporting affordance for illegal content was considerably less accessible than that for incompliance with terms and conditions, resulting in users submitting less notices on illegal

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[109] Commission, 'Communication on Tackling Illegal Content Online' (n 97) 16.
[110] *MTE and Index.hu v Hungary* (n 29) para 91.
[111] *YouTube/Cyando* (n 6) para 94.
[112] E.g. Hoge Raad, 27 January 2023, *Brein v NSE,* ECLI:NL:HR:2023:94 para 1.4 et seq.
[113] Aleksandra Kuczerawy, 'Intermediary Liability & Freedom of Expression: Recent Developments in the EU Notice & Action Initiative' (2015) 31(1) Computer Law & Security Review 46, 51.
[114] Digital Services Act (n 4) Article 16(1).
[115] ibid Article 16(3).
[116] Amélie Heldt, 'Reading between the Lines and the Numbers: An Analysis of the First NetzDG Reports' (2019) 8(2) Internet Policy Review <https://policyreview.info/articles/analysis/reading-between-lines-and-numbers-analysis-first-netzdg-reports> accessed 1 September 2025.
[117] Ben Wagner et al, 'Regulating Transparency?: Facebook, Twitter and the German Network Enforcement Act' (Proceedings of the 2020 ACM Conference on Fairness, Accountability, and Transparency, Association for Computing Machinery 2020) <https://dl.acm.org/doi/10.1145/3351095.3372856> accessed 1 September 2025.

content. Sekwenz et al[118] and Holznagel[119] observe a similar trend regarding Article 16 DSA notice-and-action mechanisms for TikTok and Facebook: notice-and-action mechanisms are poorly implemented, leading to users being dissuaded from reporting illegal content, or not being able to report it as illegal. Article 16 has led to various complaints against VLOPs.[120] If the avenue for generating knowledge or awareness of illegal content with the hosting provider is dysfunctional, hosting providers remain within the scope of the liability exemption, since it is more difficult to create awareness of illegal content. Non-compliance with Article 16 can therefore, to some extent, be rewarding; the user is less able to alert the platform and therefore trigger liability. The only remedy currently for individuals against this is Article 54 DSA. However, if functioning notice-and-action mechanisms are a precondition for liability exemption, it seems plausible that not providing such mechanisms could lead to exclusion from the liability exemption, as is argued in subsection 4.1[a].

3.2 FAIRER ECONOMIC BURDEN FOR HOSTING ILLEGAL CONTENT

Narrowing liability exemption can be justified because it requires internet intermediaries, who generally benefit economically from hosting illegal content, to be accountable to parties seeking a remedy when affected by illegal content. Buiten et al have conducted a law and economics analysis of liability rules for hosting services.[121] Their analysis starts with the observation that hosting providers are stuck in a paradox where they may want to act against illegal content online but simultaneously profit from the presence of that content on their services. Since they benefit economically from hosting content, it is fair to place responsibility for the costs of content moderation with those hosting providers. Their economic benefit can also be used as an argument for holding them liable: '[i]f hosting platforms reap the benefits from exchange in the space they govern, it stands to reason that they also face responsibility if their business model causes harm'.[122] Their analysis is supported by the so-called 'value-gap'. The 'value gap' is a term coined by copyright holders to describe the situation in which the hosting provider generates income over infringing content but the original rightsholder does not.[123] The CDSM Directive addresses the value gap for copyright

[118] Marie-Therese Sekwenz, Ben Wagner, and Simon Parkin, "'It Is Unfair, and It Would Be Unwise to Expect the User to Know the Law!" – Evaluating Reporting Mechanisms under the Digital Services Act' (Proceedings of the 2025 ACM Conference on Fairness, Accountability, and Transparency, Association for Computing Machinery 2025) <https://dl.acm.org/doi/10.1145/3715275.3732036> accessed 1 September 2025.
[119] Daniel Holznagel, 'Follow Me to Unregulated Waters!' (*Verfassungsblog*. 30 May 2024) <https://verfassungsblog.de/follow-me-to-unregulated-waters/> accessed 1 September 2025.
[120] E.g. TikTok: HateAid, 'HateAid Files a Complaint against TikTok' (*HateAid*, 14 February 2025) <https://hateaid.org/en/systemic-failure-hateaid-files-complaint-against-tiktok/> accessed 1 September. Also Meta: European Commission, 'Commission Opens Formal Proceedings under DSA' (*European Commission*, 30 April 2024) < https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2373 > accessed 1 September 2025.
[121] Miriam C Buiten, Alexandre de Streel, and Martin Peitz, 'Rethinking Liability Rules for Online Hosting Platforms' (2020) 28(2) International Journal of Law and Information Technology 139.
[122] ibid 149.
[123] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' (2020) 22(2) Vanderbilt Journal of Entertainment & Technology Law 323.

holders through a stricter liability regime.[124] However, the internet economy has developed beyond generating income through copyright infringing content, but other content remains under a 'loose' liability exemption regime. Users – and therefore hosting providers – also generate income by defaming people, or spreading hatred.[125] The negative effects – material and immaterial – of such speech are not carried by the platform, however; they are carried by citizens. It could be considered a fairer distribution of the burden for hosting illegal content if bad faith actors profiting monetarily from hosting illegal content would be excluded from liability exemption, allowing aggrieved parties to hold them liable.

3.3 IMPROVED MODERATION CAPACITY

Content moderation processes have improved significantly since the early 2000s due to advances in automation. Automation is necessitated by the enormous scale on which content is moderated.[126] Hosting providers have since developed sophisticated tools to automate content moderation.[127] To illustrate, every 6 months roughly 10 billion content moderation decisions are uploaded into the DSA Transparency Database, the vast majority of which are automated.[128] Academic discourse has focused primarily on weaknesses in automated procedures regarding freedom of expression[129] and transparency;[130] however, it is undeniable that content moderation has advanced significantly, especially since human moderation is also not an absolute guarantee of accuracy. It is expected that advancements in the use of large language models in content moderation will add to content moderation accuracy in the future.[131]

The increased accuracy of content moderation since the early 2000s leads to higher detection and higher removal rates of illegal content: a development that is boasted by the largest social media platforms, who increasingly rely on automated moderation at the expense

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[124] Martin Senftleben, João Pedro Quintais, and Arlette Meiring, 'How the EU Outsources the Task of Human Rights Protection to Platforms and Users: The Case of UGC Monetization' (2023) 38(3) Berkeley Technology Law Journal 101, 105.

[125] Thales Bertaglia, Catalina Goanta, and Adriana Iamnitchi, 'The Monetisation of Toxicity: Analysing YouTube Content Creators and Controversy-Driven Engagement' (4th International Workshop on Open Challenges in Online Social Networks, Association for Computing Machinery 2024) <https://dl.acm.org/doi/10.1145/3677117.3685005> accessed 1 September 2025.

[126] Tarleton Gillespie, 'Content Moderation, AI, and the Question of Scale' (2020) 7(2) Big Data & Society 1.

[127] For example: European Commission, 'Working Document Impact Assessment on the Modernisation of the EU Copyright Rules' SWD(2016) 301 final.

[128] Amaury Trujillo, Tiziano Fagni, and Stefano Cresci, 'The DSA Transparency Database: Auditing Self-Reported Moderation Actions by Social Media' (2025) 9(2) Proceedings of the ACM on Human-Computer Interaction 1; Rishabh Kaushal et al, 'Automated Transparency: A Legal and Empirical Analysis of the Digital Services Act Transparency Database' (The 2024 ACM Conference on Fairness, Accountability, and Transparency) <https://dl.acm.org/doi/10.1145/3630106.3658960> accessed 1 September 2025.

[129] E.g. Federica Casarosa, 'When the Algorithm Is Not Fully Reliable: The Collaboration between Technology and Humans in the Fight against Hate Speech' in Hans-W Micklitz et al (eds), *Constitutional Challenges in the Algorithmic Society* (Cambridge University Press 2021); Céline Castets-Renardt, 'Algorithmic Content Moderation on Social Media in EU Law: Illusion of Perfect Enforcement' (2020) 2020(2) University of Illinois Journal of Law Technology & Policy 283.

[130] E.g. Mike Ananny and Kate Crawford, 'Seeing without Knowing: Limitations of the Transparency Ideal and Its Application to Algorithmic Accountability' (2018) 20(3) New Media & Society 973; Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a Right to an Explanation Is Probably Not the Remedy You Are Looking For' (2017) 16(1) Duke Law & Technology Review 18.

[131] E.g. Emmanuel Vargas Penagos, 'ChatGPT, Can You Solve the Content Moderation Dilemma?' (2024) 32 International Journal of Law and Information Technology eaae028.

of human moderation.[132] Their boasting of successful moderation processes also raises expectations. The expectation of accuracy is underlined in several (co-)regulatory documents, for example the Code of Conduct+[133] against illegal hate speech and the Regulation on terrorist content online.[134] Although Article 7 DSA precludes such good faith investigations leading to liability (see Section 2.2), the expected accuracy created by social media networks' own PR, as well as the evolvement of content moderation into a sophisticated process, should factor in assessing liability exemption under Article 6. Not only will the advancement of content moderation lead to awareness of illegal content on a factual basis more frequently, it also raises the question whether platforms choosing not to apply such measures should be held liable for negligence.[135] Of course, it is a conscious choice of the EU regulator not to mimic the liability exemption of the CDSM Directive. However, the DSA's liability exemption stems from a period in time when it was impossible for hosting providers to control all content. Even though this is even more true nowadays due to the exponential growth of hosting services, automation and sophistication do allow hosting providers to better control content. This requires rethinking whether hosting providers should be exempt from liability even if they have advanced methods available – especially in cases where they choose not to use such methods.

3.4 PROVIDING A COUNTERMOVEMENT TO A TREND OF MODERATION WITHDRAWAL

As illustrated by the anecdote in the introduction, it is not uncommon for intermediary service providers to make mistakes in content moderation. This is not problematic per se, most platform regulations acknowledge that perfect moderation is impossible.[136] However, the current political climate in the United States supports reducing content moderation efforts. Protected by the geopolitical influence of the Trump administration, which is publicly threatening the EU if it applies the DSA too stringently,[137] CEO's of online platforms increasingly move towards less moderation.[138] This means that the dissemination of illegal content online increases. As an example, the prevalence of hate speech on X has increased significantly since Musk became its CEO.[139]

Intermediary liability can be an effective incentive for hosting providers to remove illegal content more actively. Liability needs to be weighed against the risks to freedom of

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[132] Latiff (n 2); 'Meta's New AI System to Help Tackle Harmful Content' (*Meta Newsroom*, 8 December 2021) <https://about.fb.com/news/2021/12/metas-new-ai-system-tackles-harmful-content/> accessed 1 September 2025.

[133] Code of conduct on Countering Illegal Hate Speech Online + (n 61) Article 4.2.4.

[134] Regulation 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L 172/79 recital 16.

[135] See by analogy Directive 2019/790 (n 72) Article 17(4).

[136] See e.g. Castets-Renardt (n 129).

[137] The White House, 'Fact Sheet: President Donald J. Trump Issues Directive to Prevent the Unfair Exploitation of American Innovation' (*The White House*, 21 February 2025) <https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-issues-directive-to-prevent-the-unfair-exploitation-of-american-innovation/> accessed 1 September 2025.

[138] Dean Jackson and Berin Szóka, 'The Far Right's War on Content Moderation Comes to Europe | TechPolicy.Press' (*Tech Policy Press*, 11 February 2025) <https://techpolicy.press/the-far-rights-war-on-content-moderation-comes-to-europe> accessed 1 September 2025.

[139] Daniel Hickey et al, 'X under Musk's Leadership: Substantial Hate and No Reduction in Inauthentic Activity' (2025) 20(2) PLOS ONE e0313293.

expression posed by over-moderation. The Commission and the CJEU, through case law and subsequent codification in the DSA have arguably opted for a broad scope for intermediary liability exemption. Nevertheless, narrowing the interpretation of the intermediary liability exemption in some cases can be justified to inspire better moderation efforts by intermediary service providers to provide counterweight to the 'moderation withdrawal'.

3.5 FREEDOM OF EXPRESSION IS NO PRIMA FACIE OBSTACLE TO A MORE NARROW INTERPRETATION

A main point of critique against restricting intermediary liability exemption is that it would interfere with freedom of expression, since strict liability may lead to over-removal. However, the ECtHR leaves considerable room for intermediary liability in its case law, suggesting that freedom of expression does not stand in the way of a more narrow interpretation of the liability exemption.

In its case law, the ECtHR balances rights of individuals affected by defamation or hate speech against the right to freedom of expression of hosting providers. In that balancing act it does not consider the liability exemption of Articles 14 ECD or 6 DSA[140] – nor does it have to.[141] For example, in *Delfi v Estonia,* the ECtHR found that holding a newspaper liable for hate speech posted by anonymous users was not in violation of the right to freedom of expression of Article 10 ECHR, without considering that such a newspaper would enjoy liability exemption.[142] In *MTE v Hungary,* the ECtHR considered holding a Hungarian association liable for hosting 'false and offensive' comments to interfere with the freedom of expression, since the notion of liability applied by the national courts did not allow for a balancing of interests between competing rights.[143] It explicitly did not consider the liability exemption.[144] In its latest seminal judgment on the matter, *Sanchez v France,* the ECtHR confirms the line of *Delfi,* and even extends it to apply to a politician who was held criminally liable for not removing hateful comments by third parties on his Facebook page.[145] In this case too, the Court did not rely on the liability exemption following the national court's assessment on that matter,[146] but also emphasises that 'to exempt

[140] *Delfi v Estonia* (n 6) para 127; Oreste Pollicino, 'European Judicial Dialogue and the Protection of Fundamental Rights in the New Digital Environment: An Attempt at Emancipation and Reconciliation' in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Bloomsbury Publishing 2015) 108; Marta Maroni, 'The Liability of Internet Intermediaries and the European Court of Human Rights' in Bilyana Petkova and Tuomas Ojanen (eds), *Fundamental Rights Protection Online* (Edward Elgar Publishing 2020) 268.

[141] Martin Husovec et al, 'Grand confusion after *Sanchez v. France*: Seven reasons for concern about Strasbourg jurisprudence on intermediaries' (2024) 31(3) Maastricht Journal of European and Comparative Law 385. Cf. Michael FitzGerald, 'Not hollowed by a Delphic frenzy: European intermediary liability from the perspective of a bad man: A response to Martin Husovec et al.' (2025) 32(1) Maastricht Journal of European and Comparative Law 47.

[142] *Delfi v Estonia* (n 6) paras 160-161. Lisl Brunner, 'The Liability of an Online Intermediary for Third Party Content: The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v Estonia*' (2016) 16(1) Human Rights Law Review 163.

[143] *MTE and Index.hu v Hungary* (n 29) para 89.

[144] ibid para 51; it accepted the national court's reasoning that MTE did not qualify as a hosting provider because it did not provide e-commerce services.

[145] *Sanchez v France* (n 6) para 209.

[146] ibid paras 137-139.

producers (as a specific subclass under French civil law) from all liability might facilitate or encourage abuse and misuse, including hate speech and calls to violence, but also manipulation, lies and disinformation'.[147]

The argument here is that freedom of expression does not need to stand in the way of a more narrow interpretation of the liability exemption. When interpreting the DSA in light of the Charter[148] – which forms a guiding document following recital 153[149] – the case law of the ECtHR leaves room for a narrower interpretation of liability exemption without interfering with freedom of expression. This narrow interpretation would emphasise the need for due diligence by hosting providers. Of course, the potential risks to freedom of expression of stricter liability need to be weighed against the benefits of that liability, and much depends on the factual assessment by national courts of whether the internet intermediary qualifies as a hosting provider. The ECtHR has developed a line of case law that explicitly acknowledges the possibility for establishing liability for internet intermediaries, and the freedom of expression does not necessarily need to stand in the way of stricter liability exemption.

This section has provided arguments for a narrower interpretation of intermediary liability exemption. These are rooted in the conviction that, since the role of hosting providers in society has increased significantly since the year 2000 and their capacities have evolved correspondingly, it is fair to come to a narrower interpretation of the liability exemption. Of course, this narrow interpretation needs to be grounded in law. The next section explores avenues in the DSA that allow for a narrower interpretation of the intermediary liability exemption.

4 HOW DOES THE DSA ALLOW FOR RETHINKING THE INTERMEDIARY LIABILITY EXEMPTION?

Section 3 has provided arguments for why a narrow interpretation of the hosting liability exemption may be desirable and possible from a fundamental rights perspective. This Section explores which provisions in the DSA can be used to that argumentation. The DSA can allow applying the liability exemption more narrowly. The purpose of the narrow interpretation is to exclude bad faith actors from the liability exemption. An actor can be considered in bad faith when it is generally incompliant with the DSA's due diligence norms, or undiligent in its handling of notices to avoid awareness of illegal content. Although Section 2.2 has explained why due diligence obligations are separated from liability questions, the threshold for intermediary liability exemption still introduces a level of diligence expected from intermediaries to determine whether they are a hosting provider that was not aware of illegal content.

This raises a question: what happens when an undiligent economic operator is presented with facts or circumstances that would have created awareness of illegal content within the framework of the DSA had they been diligent? This Section argues that an undiligent economic operator may be excluded from the liability exemption for two

[147] *Sanchez v France* (n 6) para 185.
[148] Which must be interpreted in light of the European Court of Human Rights case law following Article 52(3) of the Charter of Fundamental Rights of the European Union.
[149] Digital Services Act (n 4) recital 153.

reasons: (i) intermediary services that structurally infringe on Articles 16(1) and 23(1) DSA do not qualify as a neutral hosting provider in the sense of Article 6(1) DSA, and/or (ii) the undiligent hosting provider has failed to remove content of which the diligent provider ought to have been aware in light of Article 16(6) DSA and sectoral due diligence norms.

4.1 AN UNDILIGENT INTERMEDIARY CAN BE EXCLUDED FROM QUALIFYING AS A NEUTRAL HOSTING PROVIDER UNDER ARTICLE 6(1)

A first line of argumentation is that an undiligent intermediary service provider should not qualify as a passive, neutral hosting provider. The requirements for a hosting provider are that internet intermediary services provide their services neutrally, by mere technical and automatic processing of information.[150] To be excluded from this category, a hosting provider either has active knowledge over content, or has control over the content shared. This threshold is not met easily: as mentioned in subsection 2.1[a], platforms may structure, recommend, and index content without being excluded from being a hosting provider. However, as demonstrated in subsection 2.1[b], the hosting provider may not deliberately facilitate dissemination of illegal content: hosting providers are excluded from liability exemption when they have openly expressed the intention to facilitate illegal content.[151] This is also reflected in recital 20 of the DSA: in instances where the intermediary service 'deliberately collaborates' with a user they are not neutral and therefore should not benefit from the liability exemption. In line with the case law cited above, this is the case when intermediary service providers make explicit that their purpose is to facilitate illegal activities.

However, the threshold of open expression of intention to facilitate illegal content is not insignificant, and is therefore unlikely to exclude many 'bad faith' hosting providers, even though that could be desirable from the perspective of combatting illegal content and providing remedies to aggrieved parties. Holznagel notes that the requirements of neutrality and passivity, the 'knowledge-or-control' test, does not necessarily exclude providers that are structurally prone to hosting illegal content ('*strukturell gefahrgeneigter Provider*') from liability exemption.[152] He mentions Darknet platforms and platforms with limited protection for revenge porn as examples.[153] These types of hosting providers may be passive, neutral and not control the illegal content hosted on their platform, and thus qualify as a hosting provider under Article 6 DSA, exempting them from liability if they remove content expeditiously after a notice.[154] At the same time, they are prone to hosting illegal content. This protection may therefore be overly broad: although platforms cannot be held liable based on general

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[150] Digital Services Act (n 4) recital 18, see subsection 2.1[a].
[151] See to that effect: Case C-527/15 *Stichting Brein v Filmspeler* EU:C:2017:300; Case C-610/15 *Stichting Brein v Ziggo & XS4All,* EU:C:2017:456; Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) paras 120, 129 and 191.
[152] Again, with the exception of those that openly facilitate illegal content, in this case *Filmspeler* and *ThePirateBay*; Daniel Holznagel, 'Nach dem EuGH-Urteil in Sachen YouTube/Cyando: Fast alles geklärt zur Host-Provider-Haftung?' (2021) 37(9) Computer und Recht 603, 605.
[153] Daniel Holznagel, 'Chapter II Des Vorschlags Der EU-Kommission Für Einen Digital Services Act — Versteckte Weichenstellungen Und Ausstehende Reparaturen Bei Den Regelungen Zu Privilegierung, Haftung & Herkunftslandprinzip Für Provider Und Online-Plattformen' (2021) 37(2) Computer und Recht 123, 124.
[154] Digital Services Act (n 4) Article 6(1)(b).

knowledge that they host illegal content under CJEU case law, it seems overly protective to offer liability exemption to platforms who have such general knowledge and act non-diligently in the design of their services with respect to illegal content. An exemption from liability may not encourage any moderation efforts, as Buiten et al have stipulated, and may even be conducive to sinister business-models that seek to monetise illegal content.[155]

A-G Saugmandsgaard Øe concluded – albeit in a footnote – in 2020 that the liability exemption is only intended for hosting providers acting in good faith.[156] This consideration has not been adopted explicitly in decisions by the CJEU, or in the DSA.[157] Holznagel wrote in 2021 that excluding bad faith hosting providers as 'non-neutral' would require a formal alteration of the standards for being a hosting provider.[158] However, the distinction between passive and active has diminished somewhat in the DSA; the DSA explicitly allows platforms to take an active stance toward content without losing their liability exemption, for example by indexing or filtering content.[159] An answer to the impossibility regarding the exclusion of bad faith actors would be to exclude structurally prone-to-illegal-content platforms from qualifying as a neutral[160] hosting provider, and therefore excluding them from the liability exemption.

What does it mean to be a non-neutral hosting provider? Under the ECD, being neutral – aside from the practical implications of providing the service without taking any editorial responsibility or control over the content – was generally interpreted as abiding by takedown requests and taking some content moderation measures, but left room for interpretation on where the borders of neutrality are.[161] It can be argued that under the DSA, some aspects are formally required from neutral hosting providers in order to maintain their liability exemption: Article 9 DSA provides a clear avenue establishing clear takedown requests by administrative entities, which, by repeated refusal or non-compliance, could lead to the conclusion that the hosting provider is not neutral. Similarly, Article 16(6) requires hosting providers to engage in good faith with notices submitted through notice-and-action mechanisms. Equally, Article 23, on abusive users, requires that hosting providers act in good faith in maintaining their user-base, and exclude abusive recipients from their service. If a significant part of the user base of a platform is abusive, this could exclude the hosting provider from neutrality. Non-compliance could preclude hosting provides from acting in a 'neutral' capacity, and therefore exclude them from the liability exemption of Article 6. The subsections 4.1[a] and 4.1[b] explain why Articles 16 and 23 provide legal instruments that enable the exclusion of intermediary service providers that are structurally prone to hosting illegal content or generally act in bad faith from the liability exemption.

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155 Buiten, de Streel, and Peitz (n 121) 150–151.
156 Opinion of AG Saugmandsgaard Øe in *YouTube/Cyando* (n 39) fn 187.
157 Although Article 7 DSA on the Good Samaritan provision could be read as rewarding good faith economic operators with liability exemption, even if they are aware of illegal content.
158 Holznagel, 'Nach dem EuGH-Urteil in Sachen YouTube/Cyando' (n 152) 606.
159 Digital Services Act (n 4) recital 22.
160 Focussing on neutrality rather than passivity is in line with CJEU case law, e.g. Opinion of AG Jääskinen in *L'Oreal v eBay* (n 48) paras 138-146; see also van Hoboken et al (n 37) 31-32.
161 Wilman, 'The EU's System of Knowledge-Based Liability for Hosting Services Providers in Respect of Illegal User Content – Between the e-Commerce Directive and the Digital Services Act' (n 16) 321.

4.1[a] Dysfunctional or no notice-and-action mechanisms under Article 16

As noted in Section 3.1, notice-and-action mechanisms are an important aspect of the intermediary liability exemption framework. However, before the DSA, there was no general legal requirement for intermediary services to provide such a mechanism.[162] Varying national implementations, and some sectoral (co)-regulations recommended,[163] or indeed required,[164] intermediary services providers to provide such mechanisms. Article 16 adds to this paradigm with a horizontal requirement for hosting providers to provide user-friendly and easily-accessible mechanisms that allows anyone to notify them of illegal content.[165] Remedies for users for non-compliance with this article would, in line with the framework outlined in Section 2.4, fall under Article 54 DSA on damages.

However, conceptualising the hosting provider as a neutral, good faith intermediary, it can be argued that failing to provide users with a notice-and-action mechanism under Article 16(1) DSA excludes intermediary service providers from qualifying as a hosting provider, and thus from liability exemption. Holznagel underscores this argumentation, noting that missing notice-and-action mechanisms could be an indicator for an 'active role' due to creating a structural risk for illegal content.[166] The reasoning for this is that notice-and-action is the only available remedy for users in the liability exemption framework, with the exception of overly burdensome and time-consuming procedures to acquire injunctions in national courts, which still may be an ineffective remedy due to the speed at which illegal content spreads on the internet.[167] If intermediary service providers do not present users with the possibility of 'creating' awareness of illegal content – after all, a notice under Article 16 is seen as creating such awareness[168] – they might not be able to be held liable. Lacking a notice-and-action mechanism should be seen as bad-faith design of the hosting service; by being negligent in respect of Article 16, the hosting provider ensures that liability exemption of Article 6(1)(a) would always be available. This cannot be the intention of the EU regulator. Not facilitating a notice-and-action mechanism must therefore lead to a potential exclusion from the intermediary liability exemption.

Following this argumentation, the question arises whether the degree of non-compliance with Article 16 should factor into the assessment whether the hosting provider takes an active approach. Notice-and-action mechanisms, after all, can take different

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[162] Pieter Wolters and Raphaël Gellert, 'Towards a Better Notice and Action Mechanism in the DSA' (2023) 14(3) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 403; MZ van Drunen, 'The Post-Editorial Control Era: How EU Media Law Matches Platforms' Organisational Control with Cooperative Responsibility' (2020) 12(2) Journal of Media Law 166, 177. Although some argue that the ECD indirectly requires platforms to adopt notice and action mechanisms, see Aleksandra Kuczerawy, Kuczerawy, 'From "Notice and Takedown" to "Notice and Stay Down"' (n 62).

[163] E.g. European Commission, 'Code of Conduct on Countering Illegal Hate Speech Online' <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en> accessed 1 September 2025; now updated to the Code of conduct on Countering Illegal Hate Speech Online + (n 61), adopted under Article 45 DSA.

[164] Regulation 2021/784 (n 134) Article 10; Directive 2019/790 (n 72) Article 17(9).

[165] Digital Services Act (n 4) Article 16(1); Article 3(h).

[166] Holznagel, 'Chapter II Des Vorschlags Der EU-Kommission Für Einen Digital Services Act' (n 153) 126.

[167] That is not to say that users cannot attempt to request takedown outside of the mechanisms of Article 16; see recently Kammergericht Berlin, 25 August 2025, 10 W 70/25.

[168] Digital Services Act (n 4) Article 16(3).

forms,[169] and compliance with the requirements of Article 16 is varying across hosting providers.[170] This has to be assessed on a case-by-case basis, in line with the spectrum of neutral activities mentioned in subsection 2.1[a]. It is disproportional to the ratio of Article 6 to exclude intermediary service providers from liability exemption for being slightly difficult to use; however, if the notice-and-action mechanism is absent, or is designed in such a way that users are unable to meet the criteria of submitting an adequately substantiated notice by using these mechanisms, it could be fair to exclude them from being labelled as a neutral hosting provider. For example, if a platform does not facilitate an explanation of the illegality of a notice, it is possible that this precludes an adequately substantiated notice, which requires an explanation of the legal ground under which the content is illegal and an explanation of why the content is illegal.[171] Being unable to explain the illegality in sufficient detail would leave the user unable to create awareness under CJEU case law.

A functioning-notice-and-action system is a *conditio sine qua non* for the liability exemption framework in the DSA. Rewarding intermediary service providers that fail to contribute to that system with liability exemption is unfair, especially in light of the many (co-)regulatory instruments requiring such a mechanism. The proportionality of excluding hosting providers from the liability exemption is ensured by the fact that Article 16(1) poses form-free requirements, and hosting providers have the freedom to comply in a way that suits their service best.[172] The requirements therefore do not significantly impede on the freedom of enterprise of hosting providers, nor do they pose excessive burdens.[173] It is therefore not unfair that non-compliance with Article 16 could lead to the hosting provider being excluded from the liability exemption of Article 6 DSA, by excluding such providers from qualifying as a neutral hosting provider, especially in light of the strict requirements posed on notices to create specific knowledge or awareness of illegal content.[174]

4.1[b] Misuse of services under Article 23(1)

Article 23(1) is a due diligence obligation that requires online platforms to suspend users that frequently provide manifestly illegal content.[175] It requires online platforms (as a subcategory of hosting providers)[176] to be aware of users that misuse their services and exclude them. This prevents online platforms from being populated with illegal content by 'repeat offenders'. The argument in this subsection is that structurally disregarding abusive users that frequently post illegal content online may exclude an intermediary service provider from qualifying as a neutral hosting provider. The CJEU acknowledged that repeat infringers could

[169] Kate Crawford and Tarleton Gillespie, 'What Is a Flag for? Social Media Reporting Tools and the Vocabulary of Complaint' (2016) 18(3) New Media & Society 410.
[170] Sekwenz, Wagner, and Parkin (n 118).
[171] See further examples: Sekwenz, Wagner, and Parkin (n 118).
[172] Hofmann and Raue (n 18) 328.
[173] Cf. Wolters and Gellert (n 162) 408; Christophe Geiger, Giancarlo Frosio, and Elena Izyumenko, 'Intermediary Liability and Fundamental Rights' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020).
[174] Digital Services Act (n 4) recital 22: '[…] through notices submitted to it by individuals or entities in accordance with this Regulation in so far as such notices are sufficiently precise and adequately substantiated to allow a diligent economic operator to reasonably identify, assess, and where appropriate, act against the allegedly illegal content'. Also: *YouTube/Cyando* (n 6) para 116.
[175] Digital Services Act (n 4) Article 23(1).
[176] ibid Article 3(i).

require an additional level of diligence by the hosting provider. In *L'Oreal,* the Court decided that hosting providers may be required to suspend users who repeatedly post copyright infringing content to prevent future infringements.[177] Hofmann underscores this argument, noting that infringing on the duty of care laid down in Article 23 can lead to the assumption of an active role for the platform provider.[178]

The *ratio* behind the exclusion from the liability exemption is that structural non-compliance with Article 23 is an indication of a bad faith approach to content moderation. The indication that non-compliance represents bad faith is informed the fact that Article 23 in itself represents high thresholds regarding the frequency and the manifest illegality of the content disseminated, meaning that only a negligent hosting provider could have missed an abusive user. The frequency necessary to trigger Article 23(1) is dependent on the requirements laid down in Article 23(3): the absolute volume of illegal content provided, and the proportion of the illegal content compared to legal content.[179] The manifest illegality of the content is dependent on whether a layperson would see the content as evidently illegal.[180] It could be argued that the nature of the manifestly illegal content should be a factor in determining compliance with Article 23: while a layperson may be able to detect fake Birkenstocks as trademark infringement, a platforms failure to block accounts spreading CAM may be more damning under Article 23(1) if the requirement refers to 'manifestly illegal content'. Similarly, one could argue that frequency and manifest illegality can be corresponding factors, meaning that a high frequency of less evidently illegal content could still trigger Article 23(1), as well as a comparatively lower frequency of very evidently illegal content, such as CAM. Since excluding online providers from the liability exemption is a significant step, the proportionality of the exclusion needs to be weighed against the degree of non-compliance with article; it would be disproportional to exclude a platform with over a billion users due to failing to suspend services for one abusive user. Non-compliance with Article 23 therefore needs to be structural. This needs to be assessed on a case-by-case basis and can depend *inter alia* on the nature of the illegality prevalent on the platform, the proportion of users that can be labelled as abusive under Article 23, and the measures taken to combat such abuse.

Aside from not qualifying as a neutral hosting provider, it could be argued that, even if the online platform was unaware of illegal content posted by such a 'repeat offender', it should have been due to the requirements of Article 23(1). This relates to the point made in the next subsection in which provisions in the DSA can be used to lower the threshold for when a hosting provider is deemed aware of illegal content. In the case of abusive users, knowledge of that illegal content is then construed by the explicit expectations of the due diligence provision in Article 23(1). Again, this provision needs to be applied proportionally to the impact that excluding hosting providers from the liability exemption would have. The bar for being an abusive user in Article 23(1) is therefore not met easily, Raue argues, and

[177] *L'Oreal v eBay* (n 6) para 141.
[178] Hofmann and Raue (n 18) 163.
[179] Digital Services Act (n 4) Article 23(3).
[180] ibid recital 63. This seemingly constitutes a stricter barrier than the illegality that needs to be indicated by users in a notice under article 16, as found in: *YouTube/Cyando* (n 6) para 116: 'sufficient information to enable the operator of that platform to satisfy itself, without a detailed legal examination, that that communication is illegal and that removing that content is compatible with freedom of expression'.

only with respect to the interests of all parties involved.[181] This may limit the instances where non-compliance with Article 23(1) leads to exclusion from intermediary liability exemption in practice. However, the high threshold of applying Article 23(1) underscores the severity of the non-compliance by the hosting provider, and it supports the notion that it is proportional that, when a platform provider is taking a bad-faith approach to content moderation and fails to take action in Article 23(1) situations, they no longer qualify as a neutral hosting provider.

4.2 THE THRESHOLD FOR AWARENESS IN DILIGENT ECONOMIC OPERATORS IS LOWER

The previous section has argued that non-compliance with Articles 16 and 23 DSA may lead to exclusion from qualifying as a neutral hosting provider; those actors can therefore not rely on the liability exemption by default. This section moves one step further: if an intermediary service provider qualifies as a hosting provider, provisions in the DSA and sectoral regulation can lower the threshold of awareness of illegal content with diligent economic operator under Article 6(1)(a)DSA in factual assessments. If the hosting provider does not act expeditiously after becoming aware of illegal content, they are excluded from the liability exemption following article 6(1)(b).[182]

The expectation of diligence in relation to awareness of illegal content is introduced in subsection 2.1[b]: a hosting provider may not rely on the liability exemption if they are aware of facts or circumstances that would have led a diligent economic operator to identify the illegality. This criterion, to some extent, creates an expectation of diligence from hosting providers. This diligence can be interpreted as a duty of care. The CJEU created some room for this interpretation in *L'Oréal,* which was not completely resolved in *YouTube,* especially in light of the tension that a duty of care would bring with the prohibition on general monitoring obligations. In *L'Oréal,* the CJEU found that an imprecise notice must still be taken into account by a diligent operator.[183] *YouTube* clarifies that in those instances the notice must still contain sufficient information to remove the content without a detailed legal examination.[184] The degree to which this requires a duty of care was never fully resolved in case law, but *Youtube* indicates that the duty of care is not broad. However, the DSA introduces a number of provisions that can be used to define the threshold for when a hosting provider is deemed aware of illegal content in line with that duty of care.

This section proposes that developments in the DSA and sectoral regulation arguably lower the factual threshold for establishing awareness of illegal content on a factual level compared to the ECD, for example in cases where a notice is insufficiently precise, or even absent. This is supported by two arguments: (a) Article 16(6) explicitly requires better diligence on notices on ongoing infringement; (b) duties of care established in sectoral regulation reduce the amount of information required to raise knowledge or awareness. These two arguments are supported by the general notion that, since content moderation mechanisms have become incrementally more sophisticated than they were under the ECD

[181] Hofmann and Raue (n 18) 472.
[182] Digital Services Act (n 4) Article 6(1)(b).
[183] *L'Oreal v eBay* (n 6) para 122.
[184] *YouTube/Cyando* (n 6) para 116.

(see Section 3.3), it is not unreasonable to expect that hosting providers have awareness of illegal content sooner than they would have 25 years ago.

4.2[a] Article 16(6) DSA requires more diligence in assessing notices

As part of the newly formalised notice-and-action framework, Article 16(6) DSA stipulates that decisions on the information in any notices received through the mechanisms of Article 16(1) must be taken in a timely, diligent, non-arbitrary and objective manner.[185] This is predominantly a codification of jurisprudence, and outlines requirements that can be used to fill in a 'duty of care' for hosting providers on notices. It is important to note that these principles are a matter of procedure, not outcome. Article 16(6) does not entitle a user to a correct decision, just to a timely, non-arbitrary, objective, and diligent decision.[186] Such decisions may also be rendered using automatic means.[187] Aside from the timeliness requirement, which is fluid and needs to be established on a case-by-case basis, notices need to be examined in a diligent, non-arbitrary, and objective manner. While non-arbitrariness and objectivity are requirements that are part of the proceduralisation of content moderation,[188] the argument of this subsection is that the requirement of diligence of Article 16(6) may lower the threshold for awareness of illegal content, as a diligent economic operator can be deemed aware of illegal content sooner.

The next question is: how diligent does a notice need to be examined? Generally, the level of diligence required is relatively low, Holznagel argues, in light of the finding in *Youtube* that illegality needs to be established without a detailed examination of the notice.[189] However, providers could be assumed to have gained knowledge if the provider 'negligently ignores evidence for a violation'.[190] On a practical level this includes information included in a notice by users, but also existing and easily accessible knowledge, such as the context of the alleged violation, the history of the reporter, and the history of the uploader.

In line with the argumentation in Section 3.3: it is not inconceivable that existing and easily accessible knowledge is more present than it was 20 years ago; it could therefore be argued that factually, negligently ignoring evidence of a violation is likely to happen more frequently. The DSA also creates a number of examples that facilitate access to knowledge outside of the information contained in the notice. For example, trusted flagger status, as part of the history of the reporter, under Article 22 can be a relevant factor.[191] On the history of the uploader: if a user frequently uploads manifestly illegal content, the online platform is expected to be aware of that content under Article 23. As argued in the previous Section,

[185] Digital Services Act (n 4) Article 16(6).
[186] Wolters and Gellert (n 162) 415.
[187] Explicitly: Article 16(6): '[…] *Where they use automated means for that processing or decision-making*, they shall include information on such use in the notification referred to in paragraph 5' (emphasis added).
[188] Interestingly they assume that the hosting provider is a neutral actor that has no opinions or preferences of its own. However, the European Court of Human Rights acknowledged to some extent in *Google v Russia* that hosting providers can have their own freedom of expression: see *Google LLC and others v Russia,* App no 37027/22 (EctHR, 8 July 2025) para 91.
[189] Daniel Holznagel, 'How to Apply the Notice and Action Requirements under Art. 16(6) Sentence 1 DSA – Which Action Actually?' (2024) 25(6) Computer Law Review International 172, 177.
[190] ibid.
[191] Digital Services Act (n 4) Article 22(1). Arguably, the opposite is true for users that frequently abuse the notice-and-action mechanism. The online platform is expected to suspend their flagging mechanisms under Article 23(2).

knowledge on illegal content can be construed in such situations based on the explicit due diligence obligation for the online platform. Previous knowledge on the nature of the infringing content could be established through earlier notices under Article 16, appeals under Article 20,[192] or potentially earlier decisions regarding identical or similar content in the out-of-court dispute settlement framework of Article 21.[193] It is possible that the same content is reported multiple times by the same reporter: the DSA does not prevent *ne bis in idem* with regards to notices on illegal content. This causes a hosting provider to have some prior knowledge on a specific infringement.

An additional question is whether Article 16(6) requires diligence only with regards to the specific information contained in the notice, or also requires reflection on similar or identical illegal content, thus creating a potential takedown obligation for more than the content exactly indicated in the notice. This tension was touched upon under subsection 2.1[c] as notice-and-staydown.[194] Holznagel argues that this is not the intention of the notice-and-action framework of Article 16(6): the relating recitals and legislative process do not support it.[195] However, if identical or similar content is understood as an ongoing infringement, as opposed to separate information that was not included in the original notice, then a diligent hosting provider might be expected to address such content.

The understanding of ongoing infringement is in line with A-G Jääskinen's conclusion in *L'Oreal*, in which he illustrates that:

> if A has been discovered infringing trade mark X by listing an offer on the electronic marketplace in September, I would not exclude that the marketplace operator could be considered having actual knowledge of information, activity, facts or circumstance if A uploads a new offer of the same or similar goods under trade mark X in October. In such circumstances it would be more natural to speak about the same continuous infringement than two separate infringements. I recall that Article 14(1)(a) mentions 'activity' as one object of actual knowledge. An ongoing activity covers past, present and future.[196]

Jääskinen's argumentation includes a strong temporal dimension (i.e. the time from September to October). Whether this applies to a wider timeframe (e.g. from September to January) needs to be assessed on a case-by-case basis. It is difficult to speak of ongoing infringement if this timeline was 5 years instead of a mere month; such would be overly burdensome to the hosting provider, and create a tension with the prohibition on general monitoring obligations. However, qualifying similar and identical content as ongoing infringement may require a hosting provider to remove such illegal content as well as part of the diligence required under Article 16(6). This expected diligence can create circumstances in which a platform is deemed to be aware of illegal content, even though a notice referring the content may not have been specific enough to raise knowledge on illegal content. This interpretation of Article 16(6) would be in line with the CJEU's decision in *Glawischnig-Piesczek*, in which an effective remedy could only be achieved through granting an injunction

[192] ibid Article 20.
[193] ibid Article 21.
[194] *Eva Glawischnig-Piesczek v Facebook* (n 67) para 41.
[195] Holznagel, 'How to Apply the Notice and Action Requirements' (n 189) 178.
[196] Opinion of AG Jääskinen in *L'Oreal v eBay* (n 48) para 167.

for 'similar' content. If a hosting provider fails to address content that *should* have been identified through diligent assessment of the notice, it could be excluded from Article 6(1). Of course, the level of diligence in this case needs to be balanced against the general monitoring prohibition, but *Glawischnig-Piesczek* opens the door to a more expansive reading of diligence.

4.2[b] Duties of care established in sectoral regulation and the DSA raise the bar for the diligent economic operator

The DSA is the horizontal cornerstone of the digital *acquis,* but succeeds a number of sectoral (co-)regulations that establish duties of care for hosting providers (or a sector-specific subset thereof). Some sectoral regulation exists outside of the scope of DSA liability exemption, such as the CDSM.[197] However, other regulatory and co-regulatory instruments, such as the amendments to the Audiovisual Media Services Directive (AVMSD),[198] the Regulation preventing the dissemination of terrorist content online (TERREG)[199] and several codes of conduct,[200] introduce explicit due diligence obligations for hosting providers or their corresponding sector-specific subset. This subsection argues that the level of diligence of economic operators required by Article 6(1) DSA needs to be interpreted in line with duties of care that are imposed on hosting providers in the varying sectoral regulations. In cases where information is not clearly available through the notice submitted because it is incomplete, duties of care required in sectoral (co-)regulation may lower the threshold of information contained in the notice for the platform to still make an assessment on the legality of the content.

One example of sectoral regulation requiring additional due diligence from hosting providers is the amended AVMSD. The DSA applies without prejudice to this Directive.[201] The AVMSD applies to media service providers – a categorisation distinct from the categorisations made in the DSA. Particularly relevant are 'video-sharing platform services', a subset of media service providers, are essentially platforms that allow the dissemination of user-generated videos to the general public.[202] This affordance is common for online platforms under the DSA; most VLOPs and online platforms are therefore required to comply with the AVMSD parallel to the DSA.[203] Under Article 28b(1) AVMSD,

[197] Digital Services Act (n 4) recital 11; Directive 2019/790 (n 72).
[198] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69.
[199] Regulation 2021/784 (n 134).
[200] European Commission, 'Code of Conduct on Disinformation' (13 February 2025) <https://digital-strategy.ec.europa.eu/en/library/code-conduct-disinformation> accessed 1 September 2025; Code of conduct on Countering Illegal Hate Speech Online + (n 61).
[201] Digital Services Act (n 4) recital 10. Interestingly Article 28b applies without prejudice to Articles 12 to 15 of the ECD, which leaves the relation between the DSA and the AMVSD unclear.
[202] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1 Article 1(aa).
[203] Sally Broughton Micova and Ľuboš Kukliš, 'Responsibilities of Video-Sharing Platforms and Their Users' in Heritiana Ranaivoson, Sally Broughton Micova, and Tim Raats (eds), *European Audiovisual Policy in Transition* (Routledge 2023) 88.

video-sharing platforms are expected to adopt appropriate measures to protect minors from commercial content that impairs their development, and the general public from commercial content containing violence, hate speech, terrorist content, or CAM.[204] The appropriateness of such measures is determined in light of the nature of the content, the harm it may cause, and the interests of the group protected and the public at large.[205] This generally means that larger platforms will need to take more appropriate measures against such content than smaller platforms.[206] Platforms must include and apply such measures in their terms and conditions – underlining that some level of diligence is required.[207] This is safeguarded by establishing a notice-and-action mechanism and dispute resolution procedures.[208] Appropriate measures are bound by the prohibition of general monitoring obligations of Article 8, and can therefore not involve preventive filtering of content.[209] Nevertheless, Ullrich underlines that some 'morally and technically founded duties of care' would be appropriate in the context of the AVMSD.[210] This gap is, since his writing, partially filled by the due diligence framework of the DSA, but the notion that the requirements of the AVMSD create an extra duty of care for platforms still stands after the DSA's adoption. A more diligent investigation into notices regarding CAM, hate speech, or terrorist content is therefore required from video-sharing platform services by reading the AVMSD in conjunction with the DSA.

Another example of sectoral regulation introducing additional requirements for hosting providers is TERREG. TERREG applies parallel to the DSA and the AVMSD.[211] It applies to hosting service providers, a definition found in the Information Society Services Directive that largely mirrors the definition of hosting provider in the DSA.[212] The Regulation tackles the dissemination of terrorist content online by laying down duties of care for hosting providers.[213] When a hosting provider is confronted with terrorist content in the last 12 months – which is virtually all large online platforms – they are required to take extra measures.[214] These measures include addressing removal orders within one(!) hour, flagging channels for EUROPOL and other competent authorities, notice and action mechanisms, and taking proactive measures to combat illegal content.[215] Several researchers have criticised this Regulation for introducing a pro-active duty of care that would contravene

[204] Directive 2010/13/EU (n 202) Article 28(b).
[205] ibid Article 28b(3).
[206] Pietro Dunn, 'Online Hate Speech and Intermediary Liability in the Age of Algorithmic Content Moderation' (PhD thesis, University of Bologna 2024) 90–91.
[207] Directive 2010/13/EU (n 202) Article 28b(3)(a)-(b); also Giovanni De Gregorio, 'Expressions on Platforms' (2018) 2(3) European Competition and Regulatory Law Review 203, 212–213.
[208] Directive 2010/13/EU (n 202) Article 28b(3)(d)-(i).
[209] ibid; *mutatis mutandis*: 'Those measures shall not lead to any ex-ante control measures or upload-filtering of content which do not comply with Article 15 of Directive 2000/31/EC'.
[210] Carsten Ullrich, 'Standards for Duty of Care: Debating Intermediary Liability from a Sectoral Perspective' (2017) 8(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 111, 118–119.
[211] Regulation 2021/784 (n 134) Article 1(5); Digital Services Act (n 4) recital 10.
[212] Regulation 2021/784 (n 134) Article 2(1); Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) [2015] , art. 1(b).
[213] Regulation 2021/784 (n 134) Article 1(1)(a).
[214] Regulation 2021/784 (n 134) Article 4(4).
[215] ibid Article 4(1).

Article 8 DSA.[216] Platforms would be expected to use automated means to filter illegal content, which arguably presents risks for freedom of expression, certainly in light of the broad definition of terrorist content in the Regulation.[217] This critique is generally well-founded; however, with regards to liability exemption – which van Hoboken argues is partly undermined by the Regulation – it could be argued that platforms are expected to be more diligent when users submit notices on terrorist content, both regarding the required expedience in taking action and the degree to which platforms are expected to take down identical and similar content. Because the platform is required in sectoral regulation to be more diligent, the threshold for when a platform is aware of that illegal content is lower when a user reports terrorist content, even when that notice is not precise, or if it did not remove content identical to a previous notice.

Sectoral codes of conduct can also add requirements to content moderation practices, in particular with regards to illegal hate speech and disinformation.[218] The DSA explicitly formalises Codes of Conduct as part of the DSA framework.[219] Codes of Conduct are traditionally voluntary, multistakeholder efforts that shape policy and facilitate participation in content moderation.[220] Although the DSA emphasises their voluntary nature,[221] it has been theorised that there is significant pressure to adhere to the standards of such codes.[222] This is underscored by recital 104 stressing that

> […] the refusal without proper explanations by a provider of an online platform or of an online search engine of the Commission's invitation to participate in the application of such a code of conduct could be taken into account, where relevant, when determining whether the online platform or the online search engine has infringed the obligations laid down by this Regulation.[223]

Generally, complying with codes of conduct will make hosting providers more aware of illegal content on a practical level, for example by engaging with trusted flaggers and fact-

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[216] Inter alia Alexandre De Streel, 'Online Platforms' Moderation of Illegal Content Online' (European Parliament 2020, PE 652.718), 25–26 <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652718/IPOL_STU(2020)652718_EN.pdf> accessed 1 September 2025; Joris van Hoboken, 'The Proposed EU Terrorism Content Regulation: Analysis and Recommendations with Respect to Freedom of Expression Implications' (Transatlantic Working Group on Content Moderation Online and Freedom of Expression 2019), 7 <https://pure.uva.nl/ws/files/46500757/46218669.pdf> accessed 1 September 2025.

[217] Regulation 2021/784 (n 134) Article 2(7).

[218] European Commission, 'Codes of conduct under the Digital Services Act' <https://digital-strategy.ec.europa.eu/en/policies/dsa-codes-conduct> accessed 1 September 2025.

[219] Digital Services Act (n 4) Articles 45-47; this contribution addresses only Article 45.

[220] Rachel Griffin, 'Codes of Conduct in the Digital Services Act: Functions, Benefits & Concerns' (2024) 2024 Technology and Regulation 167, 179.

[221] Digital Services Act (n 4) Article 45(1), see also recital 103: '[…] While the implementation of codes of conduct should be measurable and subject to public oversight, this should not impair the voluntary nature of such codes and the freedom of interested parties to decide whether to participate'.

[222] Griffin, 'Codes of Conduct in the Digital Services Act' (n 220) 175; Jacob van de Kerkhof, 'Jawboning Content Moderation from a European Perspective' in Charlotte van Oirsouw et al (eds), *European Yearbook of Constitutional Law: Constitutional law in the Digital Era, vol 5* (TMC Asser Press 2024).

[223] Digital Services Act (n 4) recitals 103-104. It continues by stating that the mere fact of participation in a code of conduct does not create a presumption of compliance with this Regulation.

checkers.[224] These interactions should generally not lead to exclusion of the liability exemption in light of Article 7 DSA.

However, codes of conduct can also create expectations on the turnaround times of notices, for example explicitly in the Code of Conduct on Countering Illegal Hate Speech+.[225] The question is whether voluntary codes of conduct are capable of affecting the level of diligence required in light of the liability exemption of Article 6(1)(b) – is it possible for hosting providers to become liable after not abiding by a voluntary standard? Based on its monitoring reports, hosting providers have moved to responding to notices within 24 hours, as required by the Code of Conduct, but compliance varies. If expeditiousness by which hosting providers need to address content is interpreted as abiding by industry standards, then not abiding by those industry standards codified in the Code of Conduct may lead to liability for hosting illegal content, as it alters the duty of care for hosting providers on notices for illegal content. It is unclear whether these systemic obligations – 24 hours is a requirement generally, but not for notices specifically – can be extrapolated to individual liability cases. This remains to be seen in practice, but it is not impossible that courts will use codes of conduct to interpret what duty of care is expected from hosting providers, and use the norms set out therein to evaluate content moderation practices of hosting providers.

4.3 SYNTHESIS

Section 2.1 has given an overview of the current practice regarding intermediary liability exemption, and explained the ratio behind the exemption. The scope of intermediary liability exemption is explained broadly in CJEU case law. However, in *L'Oreal* and *YouTube,* the CJEU has been ambiguous in creating a duty of care for hosting providers. The DSA acknowledges that duty of care somewhat, but separates it from liability exemption. Intermediary liability exemption facilitates economic growth and prevents situations in which strict liability of hosting providers would cause harms to freedom of expression. However, Section 3 has illustrated that there are factors that require, and allow, a rethinking of *how* the standard of liability exemption is applied; although the phrasing of the liability exemption has remained relatively unchanged since the ECD, the landscape around that exemption has. Section 4 has explored provisions in the framework of the DSA and sectoral regulation that guide the interpretation of the intermediary liability exemption, and argues that negligent platforms can be excluded from the definition of hosting provider, and that duties of care created in the DSA and sectoral regulation can factually lower the threshold of awareness of illegal content thus triggering Article 6(1)(b).

How does this argument reconcile with concerns for freedom of expression, prohibitions on general monitoring, and the Good Samaritan as outlined in Section 2.2? The suggestions above do not seek to exclude good faith hosting providers from liability exemption; it seeks to exclude bad faith hosting providers. The interpretation of the provisions addressed in this section and their effect on the liability exemption should not be inconsistent with the prohibition on general monitoring obligations. They may lead hosting

[224] European Commission, '2022 Strengthened Code of Practice on Disinformation' (16 June 2022), Commitment 21 <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation> accessed 1 September 2025.
[225] Code of conduct on Countering Illegal Hate Speech Online + (n 61) 2.3.

providers to monitor for identical or similar content as opposed to the exact illegality when the nature of illegality described in the notice requires such an intervention. They may also require hosting providers to monitor users that frequently upload manifestly illegal content. Neither option contravenes the prohibition on general monitoring obligations of Article 8 as it is interpreted in CJEU case law. The Good Samaritan of Article 7 protects hosting providers from being excluded from liability exemption for acquiring knowledge or awareness in good faith investigations on illegal content. Such may occur for example when investigating users under Article 23, or fulfilling due diligence obligations under Codes of Conduct. However, Article 7 does not protect against liability for not being expeditious in removing such illegal content.[226] It merely ascertains that hosting providers remain neutral after undertaking measures to comply with requirements set by Union law or national law.

The most contingent point in this argumentation is the protection of freedom of expression: many fear that strict(er) liability can chill freedom of expression, as platforms will likely over-remove content to avoid liability.[227] Empirical data on this phenomenon can be divisive in the context of other regulations, for example in the case of *NetzDG*.[228] However, freedom of expression is not an absolute right, and needs to be balanced against other interests.[229] In its case law, the ECtHR has balanced the right to freedom of expression against people's right to private life,[230] but also included considerations whether someone's expressions, if they are considered hate speech, may undermine a cohesive society or suppress minorities.[231] This balancing act may be used to argue for better moderation practices by hosting providers, but it needs to be made carefully to prevent over-removal. The suggestions made above for more diligence by the hosting provider arguably stay within the limit set by the ECtHR for respecting the freedom of expression: the suggestions address gross negligence by the hosting provider, not small issues of non-compliance by *bona fide* hosting providers.

Finally, a note on proportionality. A narrow interpretation of liability exemption in line with additional requirements for diligence may be overly burdensome for smaller hosting providers. Although the requirements of Article 16 DSA also apply to micro-enterprises and smaller enterprises, many of the suggestions made above are also dependent on the position of the hosting provider. In case-by-case analyses, the capacity of smaller enterprises to meet the requirements laid out above can be weighed against the interests of aggrieved parties. This can be done in line with article 19 DSA, for example.

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[226] Kuczerawy, 'The Good Samaritan That Wasn't' (n 100).
[227] E.g. Kuczerawy, 'The Power of Positive Thinking Special Issues' (n 7); Buiten, De Streel, and Peitz (n 121) 161.
[228] E.g. 'Preventing "Torrents of Hate" or Stifling Free Expression Online?' (The Future of Free Speech 2024) <https://futurefreespeech.org/wp-content/uploads/2024/05/Preventing-Torrents-of-Hate-or-Stifling-Free-Expression-Online-The-Future-of-Free-Speech.pdf> accessed 1 September 2025; Martin Eifert (ed), *Netzwerkdurchsetzungsgesetz in Der Bewährung: Juristische Evaluation Und Optimierungspotenzial* (1. Auflage, Nomos 2020); William Echikson and Olivia Knodt, 'Germany's NetzDG: A Key Test for Combatting Online Hate' (Centre for European Policy Studies 2018, 2018/09) <https://aei.pitt.edu/95110/1/RR_No2018-09_Germany's_NetzDG.pdf> accessed 1 September 2025.
[229] *Handyside v the United Kingdom,* App no 5493/72 (EctHR, 7 December 1976) para 49.
[230] E.g. Case C-131/12 *Google Spain v Mario Gonzalez,* EU:C:2014:317; *Delfi v Estonia* (n 6) para 139; *Biancardi v Italy,* App no 77419/16 (ECtHR, 25 February 2022) para 69.
[231] E.g. *Vejdeland et al v Sweden,* App no 1813/07 (ECtHR, 9 May 2012) paras 56-57.

5 CONCLUSION

The liability exemption for hosting providers in the ECD was adopted almost *verbatim* in Articles 4-6 DSA. Conditional liability exemption provides an adequate but delicate balancing act between the interests of parties affected by illegal content, platform providers requiring legal certainty from being liable for illegal content and the general public, who have an interest in not being subjected to editorial control on the internet potentially constraining their freedom of expression. However, the standards developed around the application of the liability exemption stem from the early 2000s. In the meantime, platforms have developed into sophisticated networks where people can socialise, shop, and take part in the democratic debate, all at the same time. Hosting providers have gained economically from hosting illegal content and have developed sophisticated content moderation mechanisms. The current geopolitical climate puts effective content moderation under pressure. This article argues that, in light of these developments, we must rethink whether our interpretation of the liability exemption regime should evolve within the framework of the DSA.

The DSA introduces a range of due diligence obligations that encourage hosting providers to take more responsibility regarding their content moderation. Several provisions create implicit and explicit duties of care, both in the DSA or by sectoral regulation, and can factor into whether a service qualifies as a hosting provider or whether it has met the threshold of awareness of illegal content. It is important to balance this interpretation on a case-by-case basis. The EU regulator had solid arguments for maintaining the conditional intermediary liability exemption; narrowing the application of the liability exemption requires balancing it with the prohibition on general monitoring *ex* Article 8 DSA and the freedom of expression of internet users. However, in order to ensure a functioning right to freedom of expression, we need a functioning public sphere, which can be achieved through better combatting illegal content online and providing adequate remedies to aggrieved parties. Narrowing the scope of the intermediary liability exemption may be a tool to achieve that, by incentivising platforms to take better care of their due diligence obligations and to better facilitate notice-and-takedown by users. Hosting providers have evolved significantly since the early 2000s; content moderation has evolved synchronously. Perhaps the intermediary liability exemption can evolve too.

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