



Online content rules. Zalando sues the Commission

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📌 EU AND COMPETITION LAW, IT&TMT, PERSPECTIVES

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On 27 June 2023, Zalando, a German based apparel and accessories marketplace, filed an action with the General Court of the European Union to challenge its designation by the Commission as a “very large online platform” (VLOP) under the so-called “Digital Services Act” (DSA)¹.

The DSA applies to all digital services that connect consumers to goods, services or content, and introduces a comprehensive new set of tight rules for online intermediaries on how to design their services and procedures as well as new responsibilities to limit the spreading of online illegal content and products,

enhancing the protection of minors and giving users more choice and higher quality information. More particularly, given their role in facilitating public debate and economic transactions, as well as the dissemination of information, opinions and ideas, the DSA introduces a special regime for VLOPs, that is, platforms which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million². These platforms are designated by the Commission after consulting with the Member State of establishment or after taking into account the information provided by the Digital Services Coordinator of establishment³. Within four months following the

¹ 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, OJ L 277 27.10.2022.

² Article 33 of the DSA, named “Very large online platforms and very large online search engines”, at paragraph 1 states “... *This Section shall apply to online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million, and which are designated as very large online platforms or very large online search engines pursuant to paragraph 4...*”.

³ The Digital Services Coordinator is the competent authority of a Member States which is responsible for all matters relating to application and enforcement of DSA in that Member State.



designation, VLOPs are expected to comply with the full set of obligations and duties foreseen by the DSA such as, amongst others, i) to identify, analyse and assess systemic risks in the Union stemming from the design or functioning of their service and its related systems⁴, ii) to put in place reasonable, proportionate and effective mitigation measures, tailored to the specific systemic risks identified⁵, and iii) to submit, at their own expense and at least once a year, to independent audits⁶.

The Commission designated Zalando and other 16 companies⁷ as VLOPs on 25 April 2023 based on the user data they had been obliged to publish by 17 February 2023. According to Zalando, however, the Commission failed to take into account the hybrid nature of its business model, inasmuch as users of its retail business, accounting for 64% of its gross merchandise volume in 2022, should not have been counted, as the DSA doesn't apply to retail services⁸.

Further, by putting strict processes and vetting procedures in place with regard to products offered and content posted on its site, the company claims to have taken effective care of systemic risks of dissemination of harmful or illegal third-party contents. Zalando CEO *Robert Gentz* said in a statement that "*The European Commission misinterpreted our user numbers and failed to acknowledge our mainly retail business model. The number of European visitors who connect with our Partners is far below the DSA's threshold to be considered as a VLOP*".

The ball is now in the hands of the General Court, called upon to take a stance on a matter which, besides a *première*, is bound to become a landmark case on DSA enforcement and the proportionality of Commission's policies aimed at making the Internet a safe and trustworthy eco-system for users and consumers.

⁴ See article 34 of the DSA, named "Risk assessment".

⁵ See article 35 of the DSA, named "Mitigation of risks".

⁶ See article 37 of the DSA, named "Independent audit".

⁷ Such as, amongst the others, Amazon, Google, Twitter, Wikipedia, YouTube, Instagram and TikTok.

⁸ Article 2 of the DSA, named "Scope", at paragraph 2 states "... *This Regulation shall not apply to any service that is not an intermediary service or to any requirements imposed in respect of such a service, irrespective of whether the service is provided through the use of an intermediary service...*".



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