Chapter V

Content Blocking in Light of the Polish Broadcasting Act and the Digital Services Act (DSA) – Comments on the Mutual Relationship of the Acts

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Abstract The article analyzes the legal regulations: Regulation (EU) 2022/2065 of the European Parliament and Council (Digital Services Act) of October 19, 2022, and the Polish Broadcasting Act in its version amended on August 11, 2021, which introduced changes implementing the provisions of Directive 2010/13/EU on audiovisual media services. This comparison was made because reading of these legal acts may lead to the conclusion that the provisions of these different legal instruments overlap and regulate the same matter, namely the activities of online platforms and video platforms providing intermediary internet services. Therefore, it is necessary to distinguish between these legal regulations and establish their mutual relationship. The main conclusion from the analysis is that, despite the fact that the Directive on audiovisual media services, along with the Polish Broadcasting Act constitutes lex specialis in relation to the Digital Services Act, in practice, the latter will largely shape the functioning of modern internet media and will do so on the same terms for all EU countries.

Keywords: • Digital Services Act • Polish Broadcasting Act • Directive 2010/13/EU on audiovisual media services • intermediary internet services • online platforms

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1 General comments

The issue of the provision of audiovisual digital services within the EU is regulated by 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) (OJ EU L 95, 15.04.2010, p. 1 et seq., hereinafter: "Directive 2010/13/EU"). However, due to the significant technological changes that have taken place in the media services market, the original version of this Directive was modified by Directive (EU) 2018/1808 of the European Parliament and of the Council 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 (OJ EU L 303, 15.04.2010, p. 69 et seq., hereinafter: "Directive 2018/1808"). The content of the aforementioned legal acts was implemented into the Polish legal order into the content of the Broadcasting Act of 29 December 1992 (Journal of Laws of 2022, item 1722, hereinafter: "the BA").

The change in the existing legal arrangements made by Directive 2018/1808 was prompted, as indicated in its first recital, by the increased importance of new types of content, such as video clips and various types of user-generated programmes. It was noted that video-sharing platforms and social media services deliver a substantial part of audiovisual content. This can be referred, for instance, to the channels offered on the YouTube platform. The same applies to platforms and services permitting the sharing of audiovisual content (such as Facebook/Meta or TikTok). According to the fourth recital of Directive 2018/1808, these new forms of communication, which have already developed after the adoption of Directive 2010/13/EU, should be covered by Directive 2010/13/EU as long as they can compete for the same audiences and revenues as audiovisual media services. Furthermore, they also have a considerable impact in that they "facilitate the possibility for users to shape and influence the opinions of other users", and they have as their main, and not merely incidental, purpose the provision of audiovisual content of an informative, educational, entertaining nature (Recitals 4 and 5 of the preamble to Directive 2018/1808) (van Drunen, 2020:165). In general, the principal purpose of Directive 2010/13/EU is not to regulate the operation of social media services as these, in principle, serve as a tool for communication between users. In certain situations, they can perform similar functions to traditional media services if adapted appropriately. Within such services, problems may arise with the presence of violence, hate speech and content that is inappropriate for children. Hence, their inclusion in the services regulated by Directive 2010/13/EU should be assessed as justified (Kuklis, 2020: 95).

At the same time, 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, i.e., the so-called Digital Services Act, was passed on 19 October

2022 (OJ EU.L.2022.277.1, 2022.10.27, hereinafter: "the DSA"), which will take effect on 17 February 2024, except that providers of very large online platforms and very large search engines will have to comply with their obligations under the Act before then. The DSA aims directly to create a safe, predictable and trusted online environment that facilitates innovation and where the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union are effectively protected. The DSA is thus the EU's next major step in regulating the internal market for digital services, following the adoption of the E-Commerce Directive, which has so far been the vital legal regulation here (Buri, Hoboken, 2021: 361).

When analysing the legal regulations of the Polish Broadcasting Act in the version after its amendment of 11 August 2021, caused by the implementation of Directive 2018/1808, and the legal regulations of the DSA, one may have the impression that the legal regulations of these two legal acts refer to the same sphere of the digital services market, which is the activity of online video platforms providing intermediation services. Given the above, there is a need to delineate the scope of these two legal acts and determine their mutual relationship to each other. Thus, the research purpose of this article is to delineate the material scope and to determine the mutual relationship between the BA and the DSA, insofar as they relate to the activities of online video platforms providing intermediation services. This is because, in practice, it is unclear to what extent the activities of video platforms providing intermediation will be governed by the BA and to what extent by the DSA. Will the DSA apply in practice to the activities of traditional media providing their media services on the Internet?

2 The Broadcasting Act as *lex specialis* in relation to the provisions of the Digital Services Act

Referring to the research question outlined above, it should be pointed out that the EU legislator, in creating the DSA regulations, assumed that the legal regulations contained in this legal act would apply only if the Audiovisual Media Services Directive does not regulate an issue. Article 2(4) of the DSA provides that "This Regulation is without prejudice to the rules laid down by other Union legal acts regulating other aspects of the provision of intermediary services in the internal market or specifying and complementing this Regulation, in particular, the following: Directive 2010/13/EU, i.e., the Audiovisual Media Services Directive". When interpreting the aforementioned provision of the BA, it should be stated that the Audiovisual Media Services Directive, and thus the BA, which implements its provisions into the Polish legal order, is to constitute lex specialis to the BA. Such conclusions are also confirmed by one of the recitals of the DSA, where it is stated as follows: "The Regulation is complementary to existing sectoral legislation and does not affect the application of the applicable Union law governing specific aspects of the provision of information society services, which apply as lex specialis. For example, the obligations regarding audiovisual content and audiovisual commercial communications set out in Directive 2010/13/EC, as amended by

Directive (EU) 2018/1808, concerning providers of video-sharing platforms ("the Audiovisual Media Services Directive") will continue to apply. However, this regulation applies to such providers only to the extent that more specific rules set out in the Audiovisual Media Services Directive or other EU legislation do not apply to them".

This clear outline of the relationship between the two legal acts under consideration implies that, in addition to the Broadcasting Act, providers of audiovisual media services on the Internet will also be obliged to comply with the regulations of the DSA, which is in force throughout the EU, in matters not regulated by it. The justification for this conclusion can be found in the subsequent recitals of the regulation, which stipulate that: "This Regulation should complement, yet not affect the application of rules resulting from other acts of Union law regulating certain aspects of the provision of intermediary services, in particular the Audiovisual Media Services Directive". It is, therefore, noteworthy that the provisions of the DSA will apply to matters which are not covered at all, or are only partly covered, by those other legislative acts, as well as to matters where those other acts leave it to the Member States to adopt certain measures at the national level.

As previously indicated in the introduction, both legal acts in question (the DSA and the BA) partly cover the same sphere, i.e., the operation of online platforms that provide intermediary online services. In the BA, this group of entities is referred to as "video-sharing platforms" and in the DSA simply as "online platforms". The material scope of the DSA is defined by Article 1(1), which provides that the Regulation sets out harmonised rules for the provision of intermediary services on the internal market, and it applies to intermediary services provided to service recipients who are established or resident in the Union, irrespective of the place of establishment of the providers of those services. Article 3(G) of the said Act contains a definition of "intermediary services", whereby such services are defined as one of the following information society services:

i) a 'mere conduit' service, consisting of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
ii) a 'caching' service, consisting of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;
iii) a 'hosting' service, consisting of the storage of information provided by, and at the request of, a recipient of the service.

The above-indicated material scope of the regulation in question can be compared with the material scope of the BA. According to the current wording of Article 1a, the tasks of radio and television broadcasting, as referred to in the Act, shall be carried out by:

a) providing media services,

b) distributing television programmes, and
c) providing video-sharing platforms.

The tasks of the Polish Regulatory Body for Electronic Media, the National Broadcasting Council, were correlated with this article, where it is indicated that this body safeguards the freedom of speech in radio and television broadcasting, protects the independence of media service providers **and video-sharing platforms providers**, as well as the interests of viewers, listeners and users, and ensures an open and pluralistic radio and television.

From the perspective of the relationship of the legal acts analysed in the body of this article, it is important to note that, in line with the definition contained in Article 4(22a) of the BA, a video-sharing platform is understood as a service that is provided electronically as part of the business activity conducted for this purpose. Hence, the definition formulated in this way implies that if a specific entity operates an online video-sharing platform but does so outside the scope of its business activity, the BA will not apply to this type of activity (Duda-Staworko, 2022: 36). In this case, to the extent not covered by the BA, only the provisions of the DSA will apply.

In addition, it should be noted that the BA has expressly included its application to social media services. This is reflected in the wording of Article 2(2)(6a) of the BA, which provides that the Act does not apply to electronically supplied services allowing content to be shared by their users (social media services), provided that their principal function is not the provision of audiovisual programmes or user-generated videos. This scope of activity of online platforms relating to social media services is, therefore, not regulated by the BA. However, it is covered, in its entirety, by the DSA, even if it is performed by traditional electronic media (e.g., social media of public television).

3 Blocking unlawful content under the Broadcasting Act

The entry into force of the Act of 11 August 2021, amending the Broadcasting Act and the Cinematography Act, resulted in introducing legislation implementing Directive 2018/1808 into the national legal order. This amendment introduced a new chapter 6b entitled "Video-sharing platforms" into the content of the BA. The new provisions in Article 47m contain several information obligations incumbent on video-sharing platforms providers while Article 47n provides for an obligation to apply for registration in the list of video-sharing platforms maintained by the Chairman of the National Broadcasting Council. Subsequent provisions are devoted to prohibitions of posting certain content on video-sharing platforms.

Under Article 47o(1)(1) of the BA, it is prohibited to post on video-sharing platforms any programmes, user-generated videos or other communications that are prejudicial to healthy physical, mental or moral development of minors, in particular, those containing pornographic content or exhibiting gratuitous violence without applying effectual

technical safeguards, as referred to in Article 47p(1). This provision requires video-sharing platform providers to develop and operate effective technical safeguards, including parental control systems or other appropriate measures, to protect minors from access to programmes, user-created videos or other communications that are prejudicial to physical, mental or moral development of minors. The provision also stipulates that video-sharing platforms shall put in place arrangements to enable users to classify their uploaded programmes, user-generated videos or other communications and to apply technical safeguards. The obligation on video-sharing platform providers arising from Article 47p(1), i.e., to apply effective technical safeguards, is aimed at eliminating prohibited content as part of *ex-post* control. The obligations imposed on video-sharing platform providers to use technical safeguards to eliminate unlawful content (so-called content filtering) may not take the form of *ex-ante* control over the content posted by users. This principle arises from Article 28b(3) of Directive 2018/1808.

Article 47o(1), in items (2) and (3), introduces an absolute prohibition on the sharing of video programmes, user-generated videos or other communications:

- that are prejudicial to the healthy physical, mental or moral development of minors;
- that contain incitement to violence or hatred towards a group of people;
- that contain content that may facilitate the commission of a terrorist offence;
- pornographic content with the participation of a minor;
- content inciting to insults to a group of people or an individual;
- content containing prohibited commercial communications, including but not limited to communications containing so-called hidden commercial communications.

Paragraph 2 of the said provision imposed an obligation on platform providers, as entities responsible for how content uploaded to the platform is collated, to apply countermeasures against the publication of unlawful content.

In the context of the obligations of video-sharing platform providers relating to the identification of unlawful or harmful content referred to in Article 47 of the BA, it is worth pointing out the content of Article 47s (1), which states the following: "The provider of a video-sharing platform shall provide transparent and user-friendly mechanisms for the users of that platform to report content published on the video-sharing platform which violates the prohibition laid down in Article 47o". The video-sharing platform provider was obliged to respond to user enquiries immediately, in any case not later than 48 hours after reporting.

An issue worth analysing in the context of the mutual relation of the discussed legal acts is their applicability to blocking the unlawful activity of platform users. A new solution introduced into the Polish legal order by the Act implementing Directive 2018/1808 are rules allowing video-sharing platform providers to block access to content by other users. Under Article 47t of the BA, after requesting the user to remedy the unlawful state within

a set period, the video-sharing platform provider shall prevent access to the programmes posted on the video-sharing platform by its user. Once this is done, the content in the user's account will not be available to the general public. Initially, the content will not be completely removed from the platform but the general public's access to it will be limited only to the user who posted it on the platform. Only through subsequent infringements by the same platform user, the video-sharing platform provider, after requesting the user to remedy the unlawful state within a set period, will be able to block that user's account on the platform for a specified period. The provision of the Act states that the account may be blocked for a period of up to three months in the case of posting, at least twice, programmes, user-generated videos or other communications, despite requesting the user to stop infringing the law, when the content of these materials concerned:

- content that is prejudicial to the healthy physical, mental or moral development of minors, if the video-sharing platform user has not classified it in accordance with the applicable law,
- content in breach of Article 47o (1) (2) and (3),
- content containing prohibited commercial communications (which are in breach of Article 16(1), Article 16b(1) to (3), Article 16c(1), Article 17 and Article 17a or the regulations issued on the basis of Article 47q(2) or, in the absence thereof, which are not marked under the terms and conditions referred to in Article 47r).

In the cases expressly indicated in the wording of Article 47t (3), relating to gross violations of a legal order, the video-sharing platform provider may decide to terminate the user's account permanently. Gross violations of the legal order by the user include the situations described in Article 47o(1)(3), namely:

- publication of content that may facilitate the commission of a terrorist offence;
- pornographic content with the participation of a minor;
- content inciting to insults to a group of people or an individual based on their nationality, ethnic, racial or religious affiliation or lack of religious denomination.

The BA guaranteed every platform user (viewer) the right to report perceived violations (cf. Article 47o.) and imposed an obligation on the platform provider to respond to the person reporting the perceived irregularities. (cf. Article 47s(1).

Similar to the providers of traditional media services, video-sharing platform providers were obliged to store copies of programmes, user-generated videos, commercial communications and other communications made available to the public, for a period of not less than 28 days from the date of their removal from the platform or termination of their availability, and to present them to the President of the National Council upon request.

As for platform users, Directive 2018/1808 does not introduce any specific measures regarding their liability for unlawful content posted on the platforms, except for the sanctions of temporary blocking of the content or termination of the account on the

platform, as described below. Users will, therefore, be held legally liable for the content they publish under the general rules (e.g., for infringement of the Act on Copyright and Related Rights or under the provisions of the Criminal Code for committing the offence of insult or defamation).

4 Blocking unlawful content under the DSA

The DSA does not contain provisions defining what is meant by unlawful content. In this regard, the DSA explicitly states that to determine what content is unlawful, it is necessary to apply the regulations of individual EU Member States and EU law. Recital 12 of the DSA indicates that unlawful content should be understood as any information, irrespective of its form, that under the applicable law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or relates to illegal activities, such as the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services in infringement of consumer protection law, the non-authorised use of copyright-protected material or activities involving the violation of consumer protection law.

As far as the DSA is concerned, the literature notes that the content of this legal act has a layered structure consisting of four layers, each regulating a different type of service. The lowest, broadest layer applies to all intermediary services. The next layer consists of obligations applicable only to hosting services, followed by a layer of obligations concerning "online platforms", i.e., entities that, in addition to providing hosting services, store material provided by users and distribute it to the public. The highest layer contains obligations for "very large online platforms" and "very large online search engines". In the lowest and broadest layer, which applies to all intermediary services, the DSA contains provisions on the liability of providers of electronic services. In this regard, the DSA repeats the principles of conditional exclusion of liability for service providers, which were previously found only in the e-commerce directive.

As regards the legal liability of video-sharing platforms for unlawful content posted by their users, nowadays, as before the entry into force of the DSA (based on Articles 12 and 13 of the Act of 18 July 2002 on the Provision of Services by Electronic Means (Journal of Laws 2020, item 344, hereinafter: "the Electronic Services Act"), in the event of unlawful content on the platform, the platform provider is, in principle, not liable for it as long as it has no knowledge of the unlawful nature of the content published by the user (C-236/08 Google France, C-682/18 and C-683/18 YouTube). It should be further pointed out that video-sharing platform providers do not bear editorial responsibility for the content posted on the platforms by users. Providers only put together the content on the platform, and it is somewhat of a rule that they have no knowledge of the unlawful nature of the content published by users (Głowacka, 2016: 185; Klafkowska-Waśniowska, 2014: 130; Klafkowska-Waśniowska, 2016: 45). However, if the video-sharing platform

provider has received information from any source about the unlawful nature of the content distributed on its platform, it is obliged to take action to remove this content. Failure to take the steps prescribed by law will result in the provider's liability for that content (Wilman, 2021: 2190; Wilman, 2022).

Although the DSA does not contain provisions defining the meaning of unlawful content, it does contain specific solutions to help EU Member States better deal with illegal online content. These include rules regarding what the decisions of national judicial or administrative authorities should contain or the obligation for intermediary service providers to take action against certain specific illegal content. Service providers were obliged to implement mechanisms alerting persons suspected of infringing the law. They must deal with them timely, diligently, non-arbitrarily and objectively. Service providers were also obliged to block users who allowed frequent provision of illegal content. Article 20(1) of the DSA states the following: "Online platforms shall suspend, for a reasonable period and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content". Similarly, Paragraph 2 of this Article states that the accounts of persons who frequently submit manifestly unfounded notices or complaints will also be suspended.

When an online platform becomes aware of any information giving rise to a suspicion that a serious criminal offence, which may pose a threat to the life or safety of persons, has been or is likely to be committed, it shall immediately inform law enforcement or judicial authorities of the Member States concerned of its suspicions and provide all available information in this regard (cf. Article 21(1)).

The envisaged system of monitoring content by platforms is linked to the obligation of an internal complaint-handling system. The user will have the right to lodge a complaint against decisions of the platform, including:

a) decisions to remove information or disable access to it;
b) decisions to suspend or terminate the provision of the service, in full or in part, towards recipients;
c) decisions to suspend or terminate the account of recipients. (cf. Article 17(1)).

The possibilities for complaints and out-of-court dispute resolution are without prejudice to the users' right to bring an action before the national courts. Judicial redress is not explicitly regulated in the DSA. This means that, in principle, it is an issue that should be regulated in national law.

5 Specific obligations of very large online platforms and very large search engines provided for in the DSA

One of the key obligations under the DSA is to require providers of very large online platforms and very large search engines to assess, and then to address, all systemic risks resulting from the design, operation and use of their services. This has to be done annually. It is a sort of a risk management system – a new solution focusing on problems occurring at the system level, not just on problems pertaining to the individual level. This aims to eliminate not only the effects but mainly the root causes. In drafting the DSA, special attention was also given to dealing with various crises. This Act grants the Commission significant powers regarding providers of very large online platforms and very large search engines, and these providers may be required to do three things:

- to assess whether – and, if so, to what extent and in what way – the operation and use of their services contributes significantly to a severe threat to public safety or public health in the EU,
- to identify and apply measures to prevent, eliminate or reduce such impact; and
- to submit an evaluation report to the Commission on the measures taken.

6 Summary

The comparison shows that although the Audiovisual Media Services Directive and, with it, the BA constitute *lex specialis* to the DSA, this legal act will largely shape how modern online media functions and will do so on the same basis for all EU countries. It can be seen, from the comparison, that the DSA, unlike the BA, will apply to the operation of social media and, in addition, it will also cover the activities of platforms, regardless of whether their providers have the status of business entities. It should be assumed that, even though, formally, the DSA constitutes *lex generalis* to the BA, its provisions will be applied alongside or in parallel with the procedures envisaged in the BA. This is because it is difficult to argue that the applied procedures provided for in the BA would preclude the actions provided for in the DSA.

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