Certification of Out-of-court Dispute Settlement Bodies under the Digital Services Act

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The Digital Services Act tries to split *rulemaking* and *interpretation* in content moderation. It mostly leaves providers' rulemaking discretion intact but constrains the way providers can subsequently use their own policies against individuals. Providers must disclose a broad set of rules upfront and explain their individual decisions. Platforms, such as social media and marketplaces, must also allow internal free-of-charge appeals. One of the innovations is that unhappy users and notifiers, instead of resorting to the judiciary, can now also file "external appeals" that can be heard in front of certified out-of-court dispute settlement bodies of their choice. If they win, the platforms will pay some of their costs. This brief practical note[1] explains the rationale of the system and considers the issues that the national Digital Services Coordinators (DSCs) will have to deal with in the certification process. Since the first certifications of the ODS bodies will not take place before February 2024, the goal is to start the conversation about the best practices before the first certifications are made.

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[1] Parts of this note are based on Chapter 12 of the forthcoming book, Martin Husovec, *Principles of the Digital Services Act* (OUP, [May] 2024, forthcoming).

What is the point of ODS?

The Digital Services Act considers private rulemaking that affects third-party content or behaviour is a potential source of significant private power over the society and market. Because providers of digital services come in different shapes and sizes, the DSA only constrains such power gradually. All providers must disclose their rules (Article 14(1)), and those who store content (hosting providers) must explain their individual content moderation decisions (Article 17). Mid-sized companies that distribute the content publicly as their main functionality (online platforms) must also allow internal appeals and engage in external dispute resolution. These tiered procedural rules constrain the private power of firms when exercising their discretion.

Any firm with a superior bargaining position that unilaterally sets rules for its business partners and consumers, cannot remain impartial when interpreting such rules, especially if it remains affected by the outcomes of related disputes. The temptation to bend the rules to the desired outcomes is too high. Any hidden changes affect the legal certainty. And without legal certainty, business partners and consumers build their livelihoods and lives on top of unstable fundaments. The carpet can be pulled from under them at any point without advance notice. The DSA does not cement the rules — it would be foolish to do so — but it tries to bring some *predictability* to the inevitable changes.

Since internal appeals of content disputes are handled by the firms and are thus not entirely independent, the DSA supplements the system by an external review of the decision by means of out-of-court dispute settlement (Article 21), or ODS for short. ODS systems were known in the digital ecosystem for years. Domain name disputes, for instance, are decided by swift and efficient alternative dispute resolution (ADR) systems since 1999.[2] They help domain name authorities to tackle the problem of abusive registration on a global scale. Similarly, there are ADR systems in consumer law, such as in the aviation industry in which airlines submit their disputes to impartial decision-making concerning the compensation for delayed or cancelled flights.[3]

ODS bodies are not courts, not even "de facto" courts. The DSA's system is probably better described as a system of second opinions that providers cannot easily ignore and must pay for if they lose.

The goal of Article 21 DSA is twofold. On the one hand, it provides a *credible remedy* to the affected individuals who can complain to an independent party and have their cases quickly reviewed by an expert who issues a second opinion. On the other hand, because successful applicants are reimbursed by providers, the existence of ODS creates a *financial incentive for providers to make fewer mistakes* in their own internal review.

This dual goal was proposed and empirically tested in the academic literature by Fiala and Husovec before it became part of Article 21 DSA.[4] The idea is that the rational bias toward over-blocking

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[2] All ICANN-accredited domain name registrars must follow the Uniform Domain-Name Dispute-Resolution Policy (UDRP) which was adopted by Internet Corporation for Assigned Names and Numbers (ICANN) in 1999. See Internet Corporation for Assigned Names and Numbers, 'Uniform Domain-Name Dispute-Resolution Policy' (*ICANN*, 24 October 199) <https://www.icann.org/resources/pages/help/dndr/udrp-en>.

[3] See e.g., CEDR Aviation Adjudication Scheme Scheme Rules, https://www.cedr.com/wp-content/uploads/2021/10/Aviation-Adjudication-Rules-Nov-2020-v2.pdf and for further background in EU law in general, see Ortolani, Pietro, The Digital Services Act, Content Moderation and Dispute Resolution (February 1, 2023). Available at SSRN: https://ssrn.com/abstract=4356598. Some examples of similar ADR bodies are FEVAD France, Signal Conso France, Spanish mediatom, Portugal Consumer online complaint book, Luxembourg, Servicen national du Mediatuer de la consummation; EU ODR platform, European Consumer Centre Lithuania, French-speaking Test Achat, German Reklamation24, Spanish OCU, Dutch Test Aankoop, Italian Altroconsumo, UK Pissed consumers UK, French Reclameici, Austrian Ombudsstelle, etc.

[4] Lenka Fiala and Martin Husovec, 'Using Experimental Evidence to Design Optimal Notice and Takedown Process' (2022) 71 International Review of Law and Economics.

documented during the past two decades can be mitigated by giving the affected parties the ability to correct the mistakes by an outsider, and thereby inflict small costs onto providers for their initial mistakes. If many individuals use their newly gained rights and try to improve their situation, the cost for the provider becomes significant. Thus, in turn, they will work to change the flawed internal processes that give rise to ODS disputes in the first place.

The ultimate goal of the ODS is thus better internal content moderation with fewer mistakes.

Who and when can file an ODS appeal?

Every "recipient" of the platform service addressed by the relevant content restrictions (visibility, account, monetisation, and service) can file an ODS appeal. This includes content creators, notifiers of the content, and potentially affected readers. They are entitled to file an ODS complaint even if they failed to initiate an internal appeal or did initiate it, but it is still pending (Article 21(1)). Naturally, they can equally file an ODS appeal if the internal appeal process was finalised. The DSA does not place any time limit to initiate such an ODS procedure.

Unless states decide to subsidise some ODS bodies, the majority will be run as fee-charging projects. Thus, the existence of fees will impose an informal structure: free internal appeals are relied upon first, and fee-based external appeals are relied upon next.

Platforms have an obligation to inform their users about ODS in their statement of reasons and internal appeal decisions. According to Article 21(1), they should even facilitate access to such bodies on their own interface. Ideally, the providers would provide a simple link through which affected parties can refer their file to one of the ODS bodies whose systems are interconnected with those of providers. This is particularly important given that the DSA also requires providers to be forthcoming with various kinds of specialist independent non-profit organisations of users (Article 86(1)).

The choice of an ODS provider is with the complainant. However, ODS providers must be an expert in a particular area of dispute resolution for which they have received certification. Thus, while the choice is with the complainant, it is constrained by the availability of expert bodies in the area of the dispute. The certification in one EU state is valid across the EU.

In terms of geography, the DSA does not limit the relief to European citizens or inhabitants (see Article 3(b), Article 21(1)). Thus, a successful Nigerian Youtuber who has a following in the EU can use the ODS system vis-à-vis decisions of online platforms that are regulated in the EU (see Article 3(e)). The DSA does not provide a hard limit on which EU non-residents cannot use the ODS system, and benefit from its compensation scheme. The CJEU will need to clarify to what extent "an EU connection" is even a relevant criterion for individuals invoking the DSA rights in some cases. It is likely that the providers might push against the unrestrained use of ODS bodies for non-EU individuals because it increases their costs. The DSCs and ODS bodies should therefore think about how they inform the non-EU complainants about the compensations of the fees and costs.

What decisions are subject to ODS appeals?

ODS shall be available for all *relevant* decisions by *online platforms*.

All online platforms are obliged to submit to out-of-court dispute settlement (Article 21 DSA). Online platforms are services that store and distribute content to the public and are operated by at least mid-sized companies (that is, 50 employees, or 10 million EUR turnover).[5]

[5] For the detailed explanation of the types of providers, see Husovec, Martin, The DSA's Scope Briefly Explained (July 4, 2023). Available at SSRN: https://ssrn.com/abstract=4365029

In practice, most disputes will concern very large online platforms (VLOPs):

	Company	Digital Service
Social media	Alphabet	YouTube
	Meta	Facebook
	Meta	Instagram
	Bytedance	TikTok
	Microsoft	LinkedIn
	Snap	Snapchat
	Pinterest	Pinterest
	Twitter	Twitter
App stores	Alphabet	Google App Store
	Apple	Apple App Store
Wiki	Wikimedia	Wikipedia
Marketplaces	Amazon	Amazon Marketplace
	Alphabet	Google Shopping
	Alibaba	AliExpress
	Booking.com	Booking.com
	Zalando	Zalando
Maps	Alphabet	Google Maps

Other non-VLOP platforms that are subject to ODS if they meet the mid-size company criterion are for instance: BeReal, Reddit, Telegram (groups), Viber (groups), Airbnb, Apple Books, Vinted, Allegro, Cdiscount, Leboncoin, Roblox, eBay, Tripadvisor, Trustpilot, Gutefrage, Heureka, Skyscanner, PornHub, OnlyFans, Spotify Podcasts, DailyMotion, Github, Discord, Tumblr.

Very large search engines are not explicitly subject to ODS; however, their situation can be complicated by the fact that various features of search engines can constitute platforms. Thus, disputes revolving around the right to be forgotten or copyright infringements could be in theory subject to Article 21 DSA, but the interpretation is far from being settled.

The disputes can concern businesses or consumers. The relevant decisions are defined very broadly as "decisions taken by the provider of the online platform on the grounds that the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions:

(a) decisions whether or not to remove or disable access to or restrict the visibility of the information;
(b) decisions whether or not to suspend or terminate the provision of the service, in whole or in part, to the recipients;
(c) decisions whether or not to suspend or terminate the recipients' account;
(d) decisions whether or not to suspend, terminate or otherwise restrict the ability to monetise information provided by the recipients".

Although the relevant decisions are widely construed, some decisions are nevertheless not subject to Article 21 DSA. For instance, typical disputes between consumers and marketplaces about the quality of performance, such as services, goods, or their delivery, are not subject to DSA ODS. The typical disputes between traders and marketplaces, in contrast, are more likely to be subject to ODS. Removal of their offerings, deduction of penalties, hiding of offers, or suspension of accounts all can qualify.

On services like Wikimedia that rely on substantial community content moderation, only moderation that is taken by the provider itself is relevant. Unless the community is specifically instructed by the provider, its decisions are unlikely to be attributable to it.

Who counts as an ODS expert?

In the ODS certification process, national DSCs must assess the expertise of the candidate bodies. According to Article 21(3)(b): "it has the necessary expertise in relation to the issues arising in one or more particular areas of illegal content, or in relation to the application and enforcement of terms and conditions of one or more types of online platform, allowing the body to contribute effectively to the settlement of a dispute". In addition, Article 21(3)(e): "it is capable of settling disputes in a swift, efficient and cost-effective manner and in at least one of the official languages of the institutions of the Union". Thus, the expertise concerns three main areas: language, illegal content, and terms and conditions.

It is inevitable that ODS bodies will delimit their expertise into sub-areas because no single body can engage experts with track records covering all the areas of law or platforms.

Two main types of ODS bodies are likely: (1) *area-specific ODS bodies* that focus on specific types of illegal content, such as hate speech, child abuse material, or copyright infringements; (2) *platform-specific ODS bodies*, such as Facebook-related, Twitter-related, etc. In addition, the ODS bodies might further narrow down their expertise through the language of the disputes (e.g., Slovak, Finish, etc.). In theory, ODS bodies could limit their expertise further, however, they risk having the fee compensations being challenged by the platforms whenever their expertise would be overstepped only a little.

In the certification process, the national DSCs will be mostly looking into the composition of the experts who are engaged by the ODS candidate bodies. An ODS body that claims to specialise in hate speech must be able to demonstrate that its experts have a track record of assessing such subject matter. The DSA does not require legal expertise. However, given that the key activity will consist in resolving interpretation disputes, some subject matter expertise might be required, even though legal education might not be necessary. Thus, experts working at NGOs that were previously notifying hate speech on specific platforms could probably submit their work experience as relevant. National DSCs should, however, be careful whom they assess to be "experts".

Part of the expertise assessment could be how ODS bodies train and screen their own experts, including how they onboard new experts who join their ranks to keep the quality stable. Because it would not be practical for DSCs to approve certification every time the expert composition at ODS bodies significantly changes, one of the ways how to assess expertise would be to ask ODS bodies to come up with their *own criteria* that describe their present and future experts. This will force ODS bodies to think hard about how they define their expertise and provide DSC bodies with a simple checklist of criteria on which they potentially can re-assess or withdraw the certification.

What content rules apply in the ODS procedure?

The ODS body cannot have its own substantive rules for disputes. With every dispute, it must defer to the policies of a particular online platform. Therefore, the ODS bodies do not take away the rulemaking power of the platforms. Thus, in a dispute concerning hate speech, the contractual policy of a particular platform, along with state rules on hate speech, is determinative. The same applies to remedies. If an account suspension dispute concerns copyright infringement, the first source of law is the contractual arrangement between the platform and its users. Thus, if the policy contractually constrains some legal practices, that is the starting point. If policy only reiterates some legal concepts from the legal system, such as parody, copyright norms can be applied to determine the meaning.

The applicable content rules are one of the difficult issues that the industry will need to resolve in the years to come. Without a doubt, the dynamics under the ODS might change the drafting strategies of the firms. So far, the firms preferred to draft their own special policies. Post-DSA, they might decide to create industry-wide templates on specific issues to cut down on costs. In the absence of such templates, the idiosyncrasy of each of the platforms must be followed by ODS bodies.

One of the open questions of the ODS procedure is how much power it gives to the experts to declare some of the contractual arrangements to be *inapplicable* due to their conflict with the underlying legal rules. For instance, if EU consumer law considers some arrangements illegal, should an expert ignore it, or consider it relevant and refuse to apply them? The legitimacy of such a review might be stronger due to consumer rules' mandatory nature. But how about if the argument is not that contractual arrangement is illegal, but that the national norm stipulating illegality is unconstitutional? These are very complicated issues, and it is not obvious if the ODS procedure is the right forum for them at all. The experts can always signal their views as obiter dictum, but their legitimacy is rather weak to be the arbiters of the constitutionality of national law - even if their rules are not legally binding.

Is the ODS procedure binding?

ODS decisions are not contractually or otherwise legally binding for its parties (Article 21(2)). Instead of an arbitration model, the DSA opted for a non-binding mediation structure.[6] Providers must "engage, in good faith, with the selected certified out-of-court" ODS provides with a view to resolve the dispute (Article 21(2)). Only if the identical dispute as the one at stake "has already been resolved", can they refuse to "engage" with an ODS body. An identical dispute is a dispute concerning the same information and the same grounds of illegality or incompatibility of content (Article 21(2)). ODS procedures do not affect judicial or other legal remedies that the eligible parties might have at their disposal (Article 21(1)).

What is the consequence of this? In my view, the effect is best described as "binding-in-principle" or "systemically but not individually binding". This means that parties can always disregard the individual outcomes, but they cannot systematically ignore the mechanism. Systematic non-compliance with ODS decisions, which cannot be justified, can lead to a violation of Article 21 DSA. Such providers cannot be said to "engage in good faith". The DSA does not specify in which cases non-compliance is justified; however, potential examples could be in my view jurisdiction overreach, abuse of the procedure, pending objections to the certification, etc. These are objective reasons. Even if platforms disregard the decisions, they must pay for the procedure.

While it is true that nothing stops platforms to ignore ODS decisions in individual cases, if such instances pile up, they can violate the DSA. For VLOPs, such refusals would be scrutinised very closely in their annual risk assessments. Not to mention that any refusals can have their PR and political dimension. A refusal to implement an ODS decision can be an important check on the overreach by ODS bodies, or the failure of DSCs to properly certify ODS bodies. However, if platforms have no justification, and still refuse to engage, they risk violating Article 21(2) of the DSA.

But even such "binding-in-principle" effects should not be overstated. Unlike in other areas (e.g., aviation), the substantive rules are not fully imposed by the legislature. Under the DSA, providers still formulate the terms and conditions of their service. Thus, they largely set the rules of the game, within what is made possible by the otherwise applicable legal system. Even if the decisions were binding, providers could have simply changed the underlying rules at their will. Subject to the applicable legal

[6] While the Commission proposal established that online platforms "shall be bound by the decision taken by the body", several Member States (in particular Finland) raised concerns as regards the constitutionality, under their respective legal systems, of a binding system, as it would be interpreted as impeding access to a judge; see 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, art 18(1).

system, the platforms retain the monopoly on their formulation of the underlying rules for their services; however, they share the power to interpret their own rules with ODS experts (and courts).

Providers still hold a pen on their terms and conditions but going forward more frequently lose to have a final word on the meaning of their words.

Judicial or administrative authorities can always arrive at their own interpretation. But the costs, formality, and speed of such state procedures in many EU countries are unlikely to attract the same amount and type of disputes. This is very similar to how domain name disputes are handled in many countries. Domain name ADR decisions are then rarely challenged in courts.[7] Very often, complex cases go to courts, but simpler cases are resolved by ADRs. Often, ADR bodies even have a special clause in their own procedural rules, which foresee an application to the court within some time limit, in which case they suspend self-execution of ODS decision by a domain name authority.[8]

Who qualifies as an ODS provider?

ODS bodies utilised for the purposes of the DSA must be certified by national Digital Service Coordinators (DSCs). Each ODS body that fulfils the criteria is issued with a certification for a maximum period of five years. The certification decision is an administrative decision which should be subject to judicial review on the national level.[9] In the certification process, the ODS body must demonstrate the following:

a) its impartiality and independence, including from providers, their users, and notifiers,
b) necessary expertise in the subject matter area, such as area of illegal content, terms and conditions of specific services or platforms,
c) its members' pay is not linked to the outcome of procedures,
d) it operates an electronic platform which can handle the disputes,
e) it is capable of settling disputes in a "swift, efficient and cost-effective manner" and in at least one of the official languages of the institutions of the EU, and
f) it adopted "clear and fair rules of procedure that are easily and publicly accessible".

Each certification decision specifies the expertise and language(s) of the ODS body. On an annual basis, ODS bodies report to their DSCs. They must report on their functioning; in particular, the report should at least cover the number of cases, their outcomes, length, and any encountered difficulties. National DSCs can request additional information. DSCs then use this information to compile bi-annual reports about the functioning of the ODS ecosystem, identifying best practices and making recommendations as to how to improve the system further (Article 21(4)). The list of eligible ODS bodies will be aggregated and published by the European Commission (Article 21(8)).

Since ODS bodies must be "independent" from providers, their users, and notifiers, existing ODS forums, such as Meta's Oversight Board, are unlikely to qualify unless they restructure their operations.[10] This is because the organisation behind it receives funding from the provider, and some of its members are appointed by it.[11] In contrast, the dispute settlement systems operated by World

[7] See study by Annette Kur, https://www.zar.kit.edu/DATA/projekte/udrp_705937a.pdf

[8] Even in such a system, the period thus stipulated is obviously not binding upon the court. However, it gives a chance to the unsuccessful party to prevent the implementation of an ODS decision.

[9] See ECtHR's case law on the issue of the right to a fair trial under Article 6 ECHR; *Ramos Nunes de Carvalho e Sá v. Portugal* App nos 55391/13, 57728/13, and 74041/13 (ECtHR, 6 November 2018), paras 177-181.

[10] Same view, Aleksandra Kuczerawy, Social Media Councils under the DSA: a path to individual error correction at scale? 214, in Matthias C. Kettemann and Wolfgang Schulz (eds.) Platform://Democracy Perspectives on Platform Power, Public Values and the Potential of Social Media Councils https://graphite.page/platform-democracy-report/assets/documents/Plat-Democracy-Report.pdf

[11] Oversight Board, 'Trustees' <https://www.oversightboard.com/governance/#governance> accessed 2023.

Intellectual Property Organisation, or even many other national bodies designated to operate domain name dispute systems, are unlikely to have the same problem. These systems are not funded by the domain name authorities but by complainants. The funding thus does not come from any providers. At the time of writing, WIPO Arbitration and Mediation Centre is preparing its copyright-focused system that it plans to certify in one of the Member States.

Who pays for ODS?

The innovative component of Article 21 is its payment structure. The payment structure of each ODS depends on who sets it up. Only two payment structures are possible: a) nominal fee, or b) no fee (Article 21(5)).[12] The fee structure must be known upfront. For-profit ODS bodies will likely require a nominal fee. State-funded ODS bodies might require very low nominal fees or offer ODS at no cost to the complainants.

The fees charged shall be reasonable and cannot exceed "the costs incurred by the body". This reference arguably means nothing else other than that the fee must reflect the costs of running the ODS. The original Commission's proposal was clearer in this respect when it elaborated that "[t]he fees charged by the body for the dispute settlement shall be reasonable and shall in any event not exceed the costs thereof". Typically, each ODS has two main costs: (1) operational costs of running the digital tools and educating the pool of its experts; and (2) costs of experts who decide its individual cases. In domain name ADR bodies, operational costs usually account for 1/3 and the expert costs for 2/3 of the costs.

The fee structure determines the financial independence of the body and the potential bias of its experts. It should form part of the certification process.

The fees charged have an important function.[13] Since the fee paid to ODS must be reimbursed in case of the complainant's success ("in favour of"), this is a small punishment for the provider for its original mistake. At the same time, the risk of losing the fee paid when the complainant is not successful also discourages and filters abusive or meritless appeals, since only success is rewarded by the reimbursement. The compensation structure partly de-risks the dispute resolution for complainants by making sure that even if the provider prevails, the complainant will not be obliged to reimburse it for its costs; the only exception being an instance of the abusive complainant who "manifestly acted in bad faith" – such bad actor might be obliged to pay fees and other related reasonable expenses of *providers*.

Any ODS body preparing its fee structure must consider: a) its costs, and b) the demand for its ODS services at distinct price points. The main cost for any ODS body is the labour of experts who prepare their decisions. To save money on them, the ODS body can assist them with technology, and flexible rules that do not require elaborate explanations. However, both points, if stretched too far, can cost the ODS body its certification. At the same time, the higher the fees, the fewer disputes the ODS body is likely to attract because they must convince the future complainant that their services are worth it. As a result, the ODS bodies will need to navigate the trade-offs by tailoring the offering. One way to do so would be to employ a tiered fee structure that adjusts depending on the type of complainant and effectively cross-subsidises more lucrative disputes (e.g., trader account terminations).

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[12] In my view, there is clearly no room for interpretation that DSA allows two fees to be charged for the same procedure from two different parties (complainants and platforms). The DSA only foresees one fee that is either paid by complainants, or a situation where no fee is charged at all. There is no legal mandate in Article 21 of DSA that would allow ODS bodies to charge providers automatically for simply receiving a complaint against them (this does not prevent the escrow system). In fact, such an interpretation would directly undermine rules concerning fee-shifting in cases of success or failure, as it would be irrelevant if the provider wins or loses.

[13] See for background, Lenka Fiala and Martin Husovec, 'Using Experimental Evidence to Design Optimal Notice and Takedown Process' (2022) 71 International Review of Law and Economics.

The state-run free-of-charge ODS system runs a risk of being overwhelmed by complaints that have little prospect of winning, as their complainants do not face the risk of losing the fee. At the same time, such a system can be an important way to incentivise complaints by individuals who have no means, or whose complaints have low value to the complainants but have high social significance. But the DSA provides also other ways how to support the same goal. The state can support similar ODS cases through specialist non-profit independent organisations (Article 86) or trusted flaggers (Article 22), by bearing their fees. In my view, this approach is preferable because it allows better targeting of support.

Apart from the fee itself, Article 21 also foresees reimbursement of "any other reasonable expenses that [the complainants] have paid" in case of the complainant's success. Some have interpreted this to mean that providers will be obliged to pay the full cost of legal representation.[14] In my view, such a reading is not very convincing.

Firstly, unlike in the pre-litigation phase, ODS does not require legal assistance. The point of ODS is to get an *expert view*. The fact that the complainant obtained expensive legal assistance cannot mean that such expense is necessary or reasonable given the merit of the case. Second, given that the DSA places clear limits on fees that can be charged by an ODS provider, it would be inconsistent to allow costs that exceed the fees by several multiples to be reimbursed along with the fee. Any reasonable costs incurred by complainants must be reasonable given the forum (ODS), its costs and legal weight, and the complexity of the case. If the fee costs several hundred Euros, the reasonable costs can hardly cost thousands. Thirdly, the "reasonable costs" are not meant to provide a back door to damages caused by the original content moderation decision. Damages must be sought through judicial routes or negotiated settlements. This is again consistent with how similar systems operate in areas such as domain names.

ODS bodies have no foreseen role in estimating "reasonable costs". This leaves the system with several options: (1) ODS bodies take over the entire task of cost clearance (fees, and reasonable costs), (2) ODS bodies entirely leave it to the parties to collect compensation from each other, or (3) ODS bodies only clear the fees but not reasonable compensation. Unless DSCs express a strong preference, it will be up to ODS bodies to decide in which configuration they want to operate.

ODS bodies that charge a nominal fee will typically charge the complainant (a content creator or a notifier). However, the ODS body that does not get any assurances or deposits from the platform, risks not being able to collect reimbursements of fees and costs. If an ODS body leaves it to its complainants to collect such monies, this can undermine the attractiveness of ODS as a service. Successful complainants who were not reimbursed could complain to DSCs, for sure, but their position remains weaker than that of ODS bodies that aggregate many disputes.

It is therefore preferable that ODS bodies assume the role of complex reimbursement clearance. In the absence of specific agreements with platforms, they could request the platforms to put money corresponding to a nominal fee and capped reimbursement of reasonable costs into an escrow. Thus, as the procedure starts, ODS bodies would have complainants' and platforms' contributions secured, and only release the funds to the party depending on the success of the dispute. If the platform would refuse to put the money into escrow, the ODS body would still hear the disputes but warn the complainant about the situation.

In my view, the best outcome would be if the ODS assumes the full role of fee reimbursement but caps the reasonable costs at the percentage of the original fee (e.g., 50%). This allows the ODS bodies to better adjust the expectations of the complainants because they know how much they can get

[14] See Daniel Holznagel, A Self-Regulatory Race to the Bottom through Out-of-Court Dispute Settlement in the Digital Services Act, available https://verfassungsblog.de/a-self-regulatory-race-to-the-bottom-through-art-18-digital-services-act/

reimbursed in the event of success. If the winning party think it is owed more, it can always try to seek such an amount bilaterally. ODS bodies could specify in their rules under which conditions they recognise such reasonable costs (e.g., engagement of an expert, evidence, or other expenses).

The question remains how to resolve cases where the providers would be unwilling to put the money into an escrow. The dilemma is as follows. If platforms lose the cases, they ought to pay to complainants. If ODS bodies leave it to the platform-complainant relationship, they can undermine the confidence in the system. If ODS bodies absorb the loss and try to collect money from the platforms, they assume additional risks and potentially can undermine their independence.

The DSA does not specify how the fee reimbursement rules apply when success is only partial. Since Article 21 employs the phrase "in favour of", the fee reimbursement should take place regardless of the amount of success. But "reasonable expenses" could be arguably adjusted for the scope of success.

The national DSCs should also consider the above ODS configurations when they are certifying the proposed ODS fee structures.

What is a fair ODS procedure?

While the exact fashioning of the procedure is in the hand of ODS bodies, it must comply with the DSA and other applicable laws. Article 21(3)(f) states that: "the out-of-court dispute settlement that it offers takes place in accordance with clear and fair rules of procedure that are easily and publicly accessible, and that comply with applicable law, including this Article". Thus, the overarching criterion for procedural rules is that of fairness. There are very few explicit rules that ODS bodies must follow.

Their decisions must be made available to the parties within a reasonable period not exceeding 90 days after the receipt of the complaint. Only exceptionally, in very difficult cases, can the period be extended to 180 days (Article 21(4)). The process takes place entirely online. Other questions can be flexibly designed by the ODS providers. DSCs thus will need to assess the fairness of the proposed procedural rules holistically. Such rules clearly need to be part of the application for certification.

The DSA does not even specify who shall be invited to participate in such disputes. It is clear that the platform and the complainant must be part of the procedure. However, how about content creators whose account the notifier is contesting or a notifier whose notification content creator is contesting? The DSA does not require their presence. One can argue that it is in the platform's best interest to engage such individuals because they can lose the case and pay. Including such parties can also be logistically very difficult for ODS bodies. The simplest way how to approach this would be for the ODS bodies to generally proceed without further parties, but incentivise the platforms to collect such views, and/or open up the process to commenting on the submitted disputes.

However, ODS bodies are likely to view any additional procedural turns as a costly exercise. The DSA does not even ban secrecy, and thus the ODS bodies can easily opt for secret, or semi-secret decision-making that is cheaper to operate. This, per se, is not a problem, as long as ODS bodies retain some level of accountability for how they decide the disputes (e.g., through high-level summaries, and collection of detailed statistics that the DSCs will need). Some level of secrecy can be an enhancing feature for certain disputes, but it can also be counterproductive for other complainants, especially if they lose and are bound by strong non-disclosure rules. Preferably, the complainants should always have a choice if they want to have their procedure subject to secrecy or not.

What can an ODS body decide?

The ODS body can only decide to *undo* the platform's decision. It cannot award damages or order some other specific performance. Nothing stops ODS bodies from making recommendations. But they have little legal consequences for the providers. However, such recommendations can have some legal value

for regulators (e.g., to assess their compliance with Article 14). The findings of ODS bodies thus can also feed into the annual risk assessment. They can also file complaints before DSCs if they observe some problematic behaviour.

If ODS bodies take over the task of *cost clearance*, they can also decide about the fee and reasonable cost compensation. They could be also deciding about bad-faith actors. If the money is put into escrow by all the parties, cost clearance is made much more efficient. Thus, the clearance model of ODS could be beneficial even to online platforms because they can easily enforce cost reimbursement against bad actors who try to abuse the ODS process.

What if an ODS provider becomes a rogue?

The certification process should ensure that ODS bodies have sufficient expertise and independence. However, the DSCs should be aware that ODS bodies could try to abuse the system. For instance, one can imagine the possible emergence of ODS bodies that are ideologically biased and only hire experts who decide in a particular direction and then market themselves as such (e.g., right-wing, or left-wing friendly ODS bodies), or ODS bodies who encourage their experts to decide against providers, attract complainants, and collect their reimbursements.

The DSA places several safeguards in place to prevent this.

First, DSCs continuously review the independence of ODS bodies, and their internal fee and payment structure. They can revoke the certification at any point, following their own investigation or complaints of third parties (Article 21(7)). Second, DSCs receive a steady stream of reports, including about how the cases are handled, so any bias can be detected rather early, especially when DSC benchmarks results against those of other ODS bodies. Third, the providers who are obliged to "engage in good faith" with ODS bodies might refuse to implement their decisions with the argument that the decisions are not impartial until a DSC decides about the pending investigation of an ODS provider.

The system of checks of balances relies upon ODS bodies, platforms and DSCs constantly looking over each other's shoulders to work.

While the DSA leaves providers with no room for withholding the reimbursement of fees, if an ODS provider loses its certification, it might arguably equally lose its due fees. The DSA does not deal with this situation. The reimbursement due in case of loss of certification might depend on the date from which the certification is lost. DSCs could, in theory, back-date their decisions to the point when the evidence of abuse exists to prevent rogue ODS bodies from reaping any benefit. Alternatively, it could fine the rogue ODS body and distribute the fines as compensation to the affected parties.

The DSA does not address the question of liability for damages under national law. However, if an ODS body runs a system in accordance with its rules and certification, it clearly cannot be liable for its functioning to the providers or other actors. However, if an ODS loses such certification due to abuses of the process, the potential liability is probably not pre-empted by the DSA.

Further useful resources

- Article 19, Social Media Councils, https://www.article19.org/wp-content/uploads/2021/10/A19-SMC.pdf
- Lenka Fiala and Martin Husovec, 'Using Experimental Evidence to Design Optimal Notice and Takedown Process' (2022) 71 International Review of Law and Economics https://ssrn.com/abstract=3218286
- Articles in the collection: Matthias C. Kettemann and Wolfgang Schulz (eds.) Platform://Democracy Perspectives on Platform Power, Public Values and the Potential of Social Media Councils https://graphite.page/platform-democracy-report/assets/documents/Plat-Democracy-Report.pdf
- Lorraine Conway, Consumer disputes: Alternative Dispute Resolution (ADR), House of Commons, https://commonslibrary.parliament.uk/research-briefings/cbp-7336/
- Ortolani, Pietro, The Digital Services Act, Content Moderation and Dispute Resolution (February 1, 2023) https://ssrn.com/abstract=4356598