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Settling DSA-related Disputes Outside the Courtroom: The Opportunities and Challenges Presented by Article 21 of the Digital Services Act

by
Ruairí Harrison (The Internet Commission)
Jonny Shipp (The Internet Commission)
Aebha Curtis (The Internet Commission)

Abstract

Despite the inherently contentious and opaque nature of content moderation and the variety of disputes which users may find themselves in, particularly when engaging with political, provocative, or satirical content, a user's ability to externally appeal a moderation decision has up until this point been limited. While a user may still challenge the platform's decision in a court of law and Meta have established an Oversight Board to independently review 'significant' content decisions, the ability for the everyday user to access redress solutions is otherwise limited. To address this, the EU's Digital Services Act (DSA) introduced an out-of-court dispute settlement (ODS) procedure to provide an external, independent redress solution. This is a novel form of non-judicial redress in that it has not been legislated for previously in the realm of content moderation.

Innumerable topics may emerge from Article 21 DSA alone, but for the purposes of this paper, we will focus on two conditions which the ODS bodies must satisfy in order to become certified under this Article. These conditions for certification are the 'independence' and 'expertise' of ODS bodies. Within these sections and flowing from them, several practical matters which remain open-ended at present will be teased out from the perspective of not only the ODS body, but also national regulators, online platforms, and users. By doing this, the paper attempts to follow on from previous contributions on this topic to move Article 21 DSA from theory into practice in these initial months following the DSA coming fully into force.

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1. Introduction

The Digital Services Act (DSA)[1], recently dubbed the 'Constitution of the Internet', is akin to a typically 'constitutional' document in that it offers redress pathways to citizens.[2] The regulation proposes three possible routes to redress for alleged wrongs committed by online platforms while moderating its service. Of the three forms available, the out-of-court dispute settlement (ODS) mechanism is perhaps the most innovative and far-reaching despite its non-binding nature. Whereas the 'internal complaint handling mechanism' has become commonplace at the leading platforms, and content moderation-related jurisprudence has aided the ECtHR and the CJEU in shaping European thinking regarding freedom of expression online, the DSA's ODS procedure provides users with an alternative means to settle content- and account-related disputes**.** Despite eCommerce-related ODS being regulated at EU level since 2013, a formalised external means of appeal for content- and account-related issues is novel and brings about unique challenges that do not apply to merely commercial disputes.[3] These challenges are brought about by the frequency of content shared by users, the fundamental rights at stake, the contentious nature of innumerable topics discussed online, the varying social and political cultures within which said topics are debated, and the opaque nature of moderation processes.

In addition to the inherent issues involved in moderating content online, the suitability of an ODS mechanism to address related disputes remains uncertain. As is standard in EU law-making, the Commission has offered a comprehensive provision (Article 21) which answers many of the basic questions: who can appeal; when they can appeal; what can be appealed; who pays. However, certain crucial concepts in Article 21 DSA are stated without being defined, notably the 'independence' and 'expertise' of the ODS bodies, two 'conditions' which ODS bodies must meet before being certified by national-level Digital Service Coordinators (DSCs).[4]

Note on authors and commissioning organisations–
Ruairí Harrison is a Digital Policy Analyst at The Internet Commission. After completing a traineeship at the European Commission's Digital Services Act Unit and later contributing to The Internet Commission's Accountability Report 2.0, Ruairí joined The Internet Commission full-time in August 2022. He has an extensive background in European digital rights and has more recently been focusing on the DSA's redress provisions.
Jonny Shipp is an Independent Consultant and Visiting Fellow at the London School of Economics. He founded The Internet Commission in 2017 and served as its Executive Chair from 2020 until securing its acquisition by the Trust Alliance Group (TAG) in 2022. He is retained by TAG as a specialist in European affairs, digital policy, and out-of-court dispute resolution.
Aebha Curtis is a Strategic Insight Analyst at Trust Alliance Group (TAG), having previously led the quantitative and qualitative analysis for the Internet Commission's Accountability Reports. Aebha has a depth of expertise in tech policy and a proven track record of delivering impactful analyses across a wide range of organisations and projects, including the UK Government's Verification of Children Online project. She recently completed a Graduate Diploma in Law to deepen her understanding of digital regulations and legislation.
Trust Alliance Group (TAG) comprises several businesses that were previously part of Ombudsman Services. The Energy Ombudsman, Communications Ombudsman, Internet Commission and POPLA are now separate business units within the Group. TAG exists to build, maintain, and restore trust and confidence between consumers and businesses.
The Internet Commission is a non-profit organisation that works to advance trust in digital services and contribute to a safer and fairer internet for citizens across the globe. In 2022, The Internet Commission became part of the Trust Alliance Group
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[1] Council Regulation 2022/2065 of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (from herein Digital Services Act) OJ L 277
[2] Alexandra Geese MEP, Speech at the European Parliament (Greens-EFA Website, Press Release 20.01.2022) https://www.greens-efa.eu/en/article/press/european-parliament-votes-on-constitution-for-the-internet
[3] Council Directive 2013/11/EU of 21 May 2013 on ADR for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC OJ L 165 63 (*from herein Consumer ADR Directive)*
[4] *Note:* Article 21(3) DSA groups the conditions of 'independence and impartiality', but for the purposes of brevity, this paper will often mention 'independence' when discussing these two related *but separate* terms.

Paper Structure

Before delving into the conditions of 'independence' and 'expertise' and their potential implications, for the purposes of clarity and context, this paper will firstly offer a brief overview of why redress matters more broadly for consumers and users. Following this, the new regulatory pathway for content moderation redress established by the DSA will be set out. This section will discuss the provisions on notice-and-action (Article 16), the statement of reasons (Article 17), the internal complaint handling mechanism (Article 20) and finally the external forms of redress: the highlighted ODS provision and the right of the user to challenge a platform's content decision before a court of law.

After this overview, the two aforementioned conditions within Article 21 DSA will be analysed, beginning with how DSCs may seek to ensure that certified ODS bodies are 'independent' (and 'impartial'). This section will focus on what these interconnected terms might mean in the context of DSA ODS bodies. This will be achieved by analysing European Commission statements relating to EU ADR (ADR) concerning how best to ensure independence and impartiality of ADR bodies. This section will also hypothesise on issues which make content moderation unique when compared with other ADR markets. As a form of case analysis, Meta's Oversight Board will be analysed in the context of Article 21(3) of the DSA, after which the ongoing protections within Article 21 DSA against biased ODS bodies will be discussed.

The penultimate section will focus on the 'expertise' condition which ODS bodies must satisfy in order to be certified. Article 21 DSA appears to divide expertise in three core areas: illegal content, platforms' terms of service and linguistic expertise. We discuss the other means by which expertise should be further defined, for instance, specific types of illegal or harmful content, on the basis of individual platforms or different platform types, as well as on the basis of member state to member state. Yet, in the same way as for independence, a definition of the minimum threshold of 'expertise' necessary for certification is yet to be established. This section puts forth some examples to illustrate the challenges in establishing this minimum threshold given the selection of ways in which the market may be segmented.

Following from the discussion of Article 21 DSA 'expertise', the final section presents and discusses the output of a series of workshops at Trust Alliance Group in autumn 2023, which brought together internal experts in trust and safety and dispute resolution in energy and communications, to explore ideas for an Article 21 DSA ODS body.[5] Scenarios were developed to explore and analyse the types of complaint that might appear in front of such an ODS body. The resulting analysis offers a variety of insights, particularly regarding the complexities in store for these bodies and the associated significance of ensuring a minimum threshold of expertise can be established to guarantee trust in ODS bodies from both the user's and the platform's perspective.

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[5] *Trust Alliance Group (TAG) is the non-profit group which has operated the UK Energy Ombudsman and the UK Communications Ombudsman for more than 20 years. It was formerly known as The Ombudsman Services Ltd. In 2022, The Internet Commission was acquired by TAG. The Internet Commission was established in 2018 and its growing team of experts engaged closely with the development of the UK Online Safety Act and the DSA. In its first iteration, The Internet Commission created an evaluation framework and approach to corporate accountability that resulted in the publication of two accountability reports. The second report, "An independent evaluation of online trust and safety practice" was published in March 2022.*
These reports offered independent evaluation and facilitated rich exchanges of best practice between broadcasters, dating apps, social media, gaming, and live-streaming platforms. In the post-DSA landscape, The Internet Commission has turned its focus to redress in the DSA: the organisation's trust & safety expertise combined with TAG's extensive experience in dispute resolution provide a strong platform for the creation of an 'Digital Services Ombudsman', or an ODS body within the framework of the DSA.

The working paper will conclude by gathering the key insights on 'independence', 'expertise' and, more generally, the challenges and opportunities which remain regarding Article 21 DSA to push the conversation forward from theory into practice. It will be argued that, in order to meet these challenges, greater industry agreement on the aforementioned processes and definitions will maximise the potential of this under-explored provision. Thus, after concluding, we will include in the appendix some key ODS policy development topics that we suggest could be delivered via close collaboration with key industrial, civil society, consumer, and regulatory stakeholders, as an essential part of any broad ODS proposition development.

2. Why Redress Matters

In the context of a private transaction between an online platform and an individual user or consumer, redress is an essential tool in offsetting, to a certain degree, the power imbalance between the two parties. Complaint handling mechanisms function to provide users with access to justice and empower them to hold the digital service accountable. Effective redress systems furnish users with the tools to protect their own interests and participate in the administration of justice. In doing so, redress can thereby enhance users' sense of agency which in turn builds trust between the user and the service.

Building, maintaining, and restoring trust is vital to the functioning of the digital economy. For services, increasing trust is integral to reducing customer churn and maintaining services' reputations. By simply offering internal complaint handling mechanisms and dispute resolution services, digital services can build trust as users can feel that they have a means of resolving a dispute, should one arise. This trust is often a prime factor when users choose to recommend others to avail of the service. Dispute resolution can also be a powerful tool for the identification and diagnosis of problems within a system. It can act as a kind of externalised quality assurance check, informing the business as to where its systems are not working and where to invest or allocate resource to resolve the issue. This kind of information, leveraged effectively, is invaluable: it can enable swift corrective action and direct insight into user experiences on the service.

Indeed, although not explicitly provided for in the DSA, the potential of the information gathered by ODS bodies to filter back to online platforms in order for said platforms to enhance their service should not be overlooked: just as the DSA's transparency reporting obligations hold platforms accountable to regulators by requiring platforms to make available vast swathes of pertinent data, an effective ODS process can also hold platforms accountable via fresh insights from users regarding their online experiences.[6] Further EU platforms with more than 45 million monthly active users (Very Large Online Platforms) have additional reasons to engage with ODS bodies: Article 34 and 35 DSA cover the assessment and mitigation of risks at said platforms respectively, with Article 35 DSA explicitly referring to the 'implementation of ODS bodies' decisions' as a measure which the Commission will view as mitigating risks at the platform.[7] In short, for reasons of risk mitigation via regulation and/or the potential associated negative media coverage from a failure to implement decisions, the opportunities for improvement to online platforms via user redress should not be underestimated.[8]

[6] *Note*: the DSA does however require ODS bodies to report on their functioning to DCSs via Article 21(4) DSA which states that every year these bodies must compile reports for DSCs including information on the number of disputes they received, the information about the outcomes of those disputes, the average time taken to resolve them and any shortcomings or difficulties encountered. It is argued that this data, and more granular data on ODS disputes, could also be insightful for the platforms themselves.
[7] *See fn 1* (DSA), Articles 34, 35(1)(g) DSA
[8] *See fn 1* (DSA), Articles 34, 35(1)(g) DSA

Although the value of redress is commonly cited across innumerable industries, it has not always been availed of. Outside of e-Commerce, companies offering digital services have historically had very uneven approaches to digital redress to the extent that we are now faced with a patchwork of redress provisions in relation to digital services, with service pathways often fragmented and experiences across services totally disjointed. One early mover when it came to the offering of ODS solutions for aggrieved parties came about in the context of domain name disputes: these bodies help domain name authorities to tackle the problem of abusive registration of domain names on a global scale.[9] Similarly, there are ODS systems more generally running across EU eCommerce as well as more specific areas of the market. For example, in the aviation industry, airlines submit their disputes to an impartial decision-making body concerning the compensation for delayed or cancelled flights.[10] It should be noted that two EU laws addressing online dispute resolution predate the Digital Services Act, those being the 2013 ODR Regulation (to be repealed) and the 2013 ADR Directive (to be updated).[11] The interaction between the DSA and consumer-focused EU ADR rules will be returned to later in this paper.

Irrespective of this regulatory patchwork and the inconsistent consumer uptake across the EU for said ADR schemes, they are nonetheless available and legislated for in several key markets.[12] However, as has been discussed elsewhere, content and account-related moderation disputes need to be treated in a unique way given the distinct challenge they pose when compared with the above consumer-focused disputes. Aside from the scale and frequency of content uploaded in a variety of forms (audio; visual; audio-visual; text-based; AI-generated content), the fact that major platforms, particularly social media platforms, have profiled themselves as digital marketplaces of ideas, where billions of users may share content, receive content and engage in different communicative practices, is problematic from an access to justice point of view given issues of scale. Further, indispensable human rights from a democratic standpoint are often the focus of content disputes (unlike in the context of marketplace disputes), those being freedom of speech, privacy and the right of access to information.

A digital town square is bound to host innumerable conflicts given how a platform (via its terms of service) assesses a piece of content and how this assessment has innumerable other lenses of assessment depending on the user and how they may be impacted by the content. This is represented in the 2022 findings of Meta's Oversight Board that Meta had incorrectly applied their terms of service 40% of the time out of a sample size of 130 contested removal decisions.[13] This sample size pales into insignificance when compared to the sheer quantity of moderation decisions at Meta: a recent

[9] The Uniform Domain-Name Dispute-Resolution Policy (UDRP) is a process established by the Internet Corporation for Assigned Names and Numbers (ICANN) for the resolution of disputes regarding the registration of internet domain names. It was established in October 1999 after ICANN adopted a set of Rules for Uniform Domain Name Dispute Resolution Policy (the UDRP Rules) https://www.icann.org/resources/pages/help/dndr/udrp-en

[10] The Centre for Effective Dispute Resolution (CEDR) offers 'independent ADR for consumers when they experience problems with aviation companies' (website: https://www.cedr.com/consumer/aviation/make-a-complaint/)

[11] Council Regulation (EU) No 524/2013 of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) [2013] OJ L 165,Council Directive (EU) 2013/11/EU of 21 May 2013 on ADR for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (ADR Directive) [2013] L 165 63

[12] M Knigge, C Pavillon, '*The legality requirement of the ADR Directive: just another paper tiger*?' 4 Journal of European Consumer and Market Law (2016) 155-163

See also: The Commission's explanatory memorandum for discontinuing the 2013 Online Dispute Resolution (ODR) Regulation refers to the fact that 'the ODR platform is only enabling on average 200 cases EU wide to be treated by and ADR entity per year' 2023/0375(COD) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023PC0647

[13] R Waters, 'Lessons for Elon Musk from Meta's Content Moderation' Financial Times (London, 23rd June 2022) https://www.ft.com/content/e637212b-2722-4294-a1cd-45a11fb5491c

DSA transparency report highlights that Meta made 46,697,806 content measures in the third quarter of 2023 alone.[14]

Given the impact that incorrect moderation decisions can have on commercial relationships, let alone public health, public security, and a user's reputation and career opportunities, it is no surprise that the movement towards user empowerment and greater user voice has looked to alternative forms of redress such as ODS to address users' access to justice challenges. This upcoming section will thus present the pathways to redress for content- and account-related moderation decisions in the context of the EU's Digital Services Act.

3. The DSA's Approach to User Redress for Content Moderation Disputes

Article 21 DSA's ODS mechanism is best viewed as the non-judicial external redress option at the tail end of a formalised process of user redress in the context of a content moderation dispute. Whereas ODS in this context can be viewed as a novel (yet non-binding) solution, the other checkpoints along this path are commonplace at most leading social media platforms and the DSA simply formalises these into a regulation binding on all online platforms operating in the European Union. Given that this provision should not be viewed in isolation, this paper will run through each provision on this '*intra platform'* redress pathway and discuss how each connects with *external redress,* that being the ODS provision Article 21 DSA and judicial redress.

3.1 Notice-and-action Mechanism (Article 16 DSA)

The notice-and-action mechanism is a means through which individuals (and entities) can 'report' or flag' content which they consider to be illegal.[15] This reporting essentially amounts to a user providing a 'notice' to the platform that they should review that piece of content following which the platform can decide to 'act' by moderating the content or to refuse to 'act' by reinstating the content. Although this feature is commonplace on leading platforms, Ortolani has noted that the lack of regulation here had allowed platforms to exclude certain types of content from the list from which users must select the kind of illegal content. This creates a situation where notices which may serve to negatively impact the platforms' economic model can be excluded, such as unfair commercial practices.[16]

As this gives too much agency to platforms regarding what illegal content is (and is not) moderated, Article 16 DSA seeks to formalise this initial step of the redress process. Thus, Article 16 DSA states that notice-and-action mechanisms must be easily accessible, fully digitised and user-friendly, and to allow for sufficiently precise and adequately substantiated notices.[17] This includes, but is not limited to, the reasons why the notifying party considers it to be illegal and an exact URL of content of the content in question.[18] In this way, the user will not be limited by the list previously provided by some platform and can instead refer to the alleged law which the content allegedly contravenes.

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[14] Facebook DSA Transparency Report (27th October 2023) https://transparency.fb.com/sr/dsa-transparency-report-oct2023-facebook/
[15] This reference to *entities* in Article 16 DSA opens the door for non-users to notify the platform of illegal content.
[16] C Goanta, P Ortolani, 'Unpacking Content Moderation: The Rise of Social Media Platforms as Online Civil Courts', in Kramer, X.; Hoevenaars, J.; Kas, B. (ed.), *Frontiers in Civil Justice. Privatisation, Monetisation and Digitisation*, (Cheltenham Edgar, 2022) pp. 192-216
[17] *See fn* 1 (DSA) Article 16(2)
[18] *See fn* 1 (DSA) Article 16(2)

In the context of the DSA's redress pathway for content disputes, Article 44 DSA's explicit reference to the standardisation of notices under Article 16 is noteworthy.[19] Given the frequent use of terms such as 'user-friendly', 'easily accessible', and 'easy-to-use' in the text, it is argued that as Article 44(1) leaves open the possibility of voluntary standards in other areas of the DSA, said standards could help improve the ease of DSA redress more generally from the user's perspective. This opens the door to industry standards regarding not only the notice and action but also the statements of reasons (Article 17 DSA), internal complaint handling (Article 20 DSA) and the ODS mechanism (Article 21 DSA).

3.2 Statement of Reasons (Article 17 DSA)

The requirement on platforms to provide a statement of reasons to users arises from transparency issues regarding content moderation at leading platforms. The opacity in decision-making can affect not only the basis on which a platform makes a certain decision, but also the basic question of whether a measure has been taken at all. This is most evident in the case of 'shadow bans' on social media. These bans involve limiting the visibility of certain accounts and/or posts without disclosing the measure to the affected party. Article 17 DSA directly tackles this by broadening the scope of moderation-related action to any moderation decision taken by a platform, which includes: content restrictions (such as content removal, disabling of access to content, and demoting content) as well restricting monetary payments to a user, restricting the provision of the service to a user and restricting a user's account. However, it should be noted that a statement of reasons is not required where a platform refuses to take moderation measures after receiving a notice from a user.

In brief, companies must provide 'affected users' with reasons why their content (or account) was 'moderated'. This 'statement of reasons' must include:

- The way in which the content was moderated (for instance, by demotion),
- The facts and circumstances relied on in taking the moderation decision,
- The role of automation in how the decision was made,
- The alleged legal provision breached or the alleged T&C provision breached, and
- Clear and user-friendly information on the possibilities for further redress available.[20]

Finally, in the context of Article 21 DSA's ODS procedure, the above factors within the 'statement' are crucial for an informed decision to be handed down by an ODS body. It contains indispensable information for these bodies in assessing the validity of the violation when viewed in the context of either its legality or its breaching of the terms of service. In the DSA text itself, it is noted that platforms need to provide information with the statement of reasons regarding how ODS can be used to challenge the Article 17 DSA statement of reasons.[21] Thomas Hughes has gone even further elsewhere regarding this link arguing that 'as part of their obligation to "engage, in good faith" with ODS, platforms should provide this statement of reasons to ODS in connection with a user's appeal'.[22]

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[19] *See fn* 1 (DSA) Article 44(1)(a)
[20] *See fn* 1 (DSA) Article 17(3)
[21] *See fn* 1 (DSA) Article 17(3)(f); this requirement to notify users of alternative forms of redress is also found in Article 20(5) DSA after the internal complaint handling decision: *'Providers of online platforms shall inform complainants without undue delay of their reasoned decision in respect of the information to which the complaint relates and of the possibility of out-of-court dispute settlement provided for in Article 21 and other available possibilities for redress.'*
[22] T Hughes, 'Practical Considerations for Out-of-Court Dispute Settlement (ODS) under Article 21 of the EU Digital Services Act' (DSA Observatory Blog, 8th February 2024) https://dsa-observatory.eu/2024/02/08/practical-considerations-for-out-of-court-dispute-settlement-ods-under-article-21-of-the-eu-digital-services-act-dsa/

This will certainly enhance the effectiveness of decision-making under Article 21 DSA and functions as a useful starting point in starting to develop core features of an effective ODS process.

3.3 Internal Complaint Handling Mechanism (Article 20 DSA)

Article 20 DSA is the final stage of the internal redress process. Whereas the previous two provisions apply to all hosting service providers, the internal complaint handling mechanism only applies to online platforms. Given the scale and frequency at which online content moderation decisions are made, and the potential for said disputes to be brought before a court, it is pragmatic that Article 20 DSA lessens the burden on courts. Users can make use of this appeal system and then have the option to further escalate the matter to either an ODS body or a court of law.

Looking to the substance of the provision, it may be summarised as follows: Article 20 DSA states that platforms must provide 'affected users' with a system to lodge complaints against the platform's decision to remove (including regarding visibility, suspension, termination) a user or their content. This runs for 6 months after the affected user is informed of decision.

The key elements to the internal complaint handling mechanism include user-friendliness of the mechanism and facilitation of the submission of precise, well-substantiated complaints. Further, complaints must be dealt with in a timely, non-discriminatory, diligent and non-arbitrary manner, and should result in immediate reversal if the platform's decision was found to be incorrect. It is also of note that this internal decision must be overseen by human review and thus cannot be fully automated.

The formalising of the internal complaint handling mechanism via Article 20 DSA is to be commended in that it offers users the ability to force platforms to have a 'second look' at how the moderation decision was made. However, this internal review still exists within the confines of a private commercial entity such that having this as the last resort of appeal would prevent adequate user redress in that bias is harder to address due to the opacity and complexity of moderation practices. As discussed in section 2 (*why redress matters)*, aggrieved parties are likely to feel greater trust in the service and in its decision-making if the service's decision can be externally and independently reviewed. It is to this external review that we now turn.

3.4 Judicial Redress

Before progressing with our analysis of Article 21 DSA's ODS process, it is important to note that the (more traditional) form of redress, judicial redress, is still available to users wishing to challenge the outcome of a content dispute.[23] This may be asking the platform to reinstate content that the affected party believes was incorrectly restricted or to remove content that they believe should have been restricted by the platform.

Yet given both the financial and practical barriers to these kinds of content disputes reaching court, it is pragmatic that the EU legislators have opted for a low-cost, swifter, easier-to-access approach for

[23] *See fn* 1 (DSA), Article 21(1): '… *[T]he first subparagraph is without prejudice to the right of the recipient of the service concerned to initiate, at any stage, proceedings to contest those decisions by the providers of online platforms before a court in accordance with the applicable law.*'

aggrieved parties that remain unhappy with the outcome of the platform's internal content processes, namely the ODS process in Article 21 DSA.

3.5 Out-of-court Dispute Settlement Bodies (Article 21 DSA)

Finally, users are entitled to avail of a system of external review to resolve their content moderation dispute. As with Article 20 DSA, this provision only applies to online platforms. As two of the conditions which an ODS body must satisfy will be critically analysed in the upcoming section, for now a simple overview of other relevant facets of the provision will be put forth. Article 21 DSA provides a novel form of redress in the content moderation space in that users are empowered to appeal a platform's internal decision via certified independent experts. Users can technically access this process without exhausting a platform's internal complaint-handling mechanism, although it seems pragmatic to encourage users to avail of this internal review first.[24]

Article 21 DSA states that platforms must make the ODS service easily accessible on their online interface in that it is 'clear and user-friendly'.[25] It seems that a pragmatic way to ensure ease of access for users would be to include a hyperlink on their interface through which concerned users can view a drop-down menu from which they can select one of the ODS bodies. This body's decision, however, will not be binding on either party. Despite this, Article 21 DSA not only has potential benefits for users if it can indeed be low-cost, easy to use and timely. Further, it also may create a financial incentive for platforms to make fewer moderation mistakes. As Husovec argued, due to the fact that successful ODS applicants will be reimbursed by the platforms for their costs, Article 21 DSA could ensure that platforms will be appropriately incentivised to minimise their costs by making fewer errors in moderating content.[26]

Others have argued that the asymmetrical nature of the cost scheme (which will rest on platforms irrespective of the outcome of the decision [*and so long as the user has engaged in good faith*]) may 'disincentivise platforms to take-down illegal content when they predict a likelihood of users turning to ODS'.[27] The only potential cost falling on the user is the nominal (participation) fee which ODS bodies may charge for using their service, and as above, the costs falling on those users who are found to have lacked 'good faith' in engaging with the process. It should be noted that although this cost scheme is an important facet of Article 21 DSA, it will not be the focal point of this paper and is dealt with in greater detail in Husovec's forthcoming text, *Principles of the Digital Services Act.*[28] Finally, returning to the substance of Article 21 DSA, ODS bodies must apply to national level Digital Service Coordinators (DSCs) in order to be certified. This application process and the challenges and opportunities which exist within it will be discussed below.

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[24] *See fn* 22 (Hughes); Hughes expands upon how this could be done, for instance by ensuring ODS bodies implement this condition (of first exhausting the internal appeal) as part of their "clear and fair rules of procedure", as is standard in other ADR markets in the EU.
[25] *See fn* 1 (DSA) Article 21(1)
[26] M Husovec, *Principles of the Digital Services Act* (Forthcoming Oxford University Press, 2024) section 11.5 Step 4: External appeals
[27] D Holznagel, 'Art. 21 DSA – What to expect?' (CR Online blog, 21st September 2023) https://www.cr-online.de/blog/2023/09/21/art-21-dsa-what-to-expect/
[28] *See fn 26* (Husovec)

4 Assessing two core conditions within Article 21 DSA – Independence & Expertise

In order to be certified as an Article 21 DSA ODS body, submitting bodies must satisfy six conditions and specify their area(s) of expertise. The six conditions can be summarised as follows:

- ODS bodies must be 'independent and impartial',
- ODS bodies must have the 'necessary expertise' to settle a dispute,
- Members of the ODS bodies are not remunerated in a way that is linked to the outcome of the decision,
- The service offered by ODS bodies must be easily accessible and fully digitised,
- The ODS bodies must be able to settle disputes in a swift, efficient and cost-effective manner in at least one language of the European Union, and
- The ODS body must have clear and fair rules of procedure in place and these rules must be easily and publicly accessible.[29]

Further, ODS bodies applying for certification under Article 21 DSA must specify:

- The area(s) of expertise which the ODS body has proven; this can be concerning (different types of) illegal content or content contravening a platform (or several platforms') terms of service agreements, and
- The official language or languages in which the ODS body is capable of settling disputes.[30]

For the purposes of this paper, the conditions of '**independence'** and '**expertise'** will be the two conditions analysed. It should be highlighted that these two conditions are challenging in the more general context of ADR (ADR) as evidenced by the recent European Commission Recommendation on ADR in October 2023.[31] In short, alongside repealing the ODR Regulation and proposing an update to the 2013 ADR Rules, the European Commission put forth this brief Guidance which aims to 'promote high quality criteria of the dispute resolution procedures offered by online marketplaces and Union trade associations by ensuring effectiveness and fairness of those procedures and the **expertise, independence and impartiality** of the natural persons in charge of those procedures'.[32] This Guidance will be discussed further below.

With this said, DSA and ADR dispute resolution should be viewed as having distinct subject matter while still being useful points of comparison. The Recommendation at present, however, draws a necessary distinction between the DSA and ADR Directive given that the former is still 'without prejudice' to the latter due to the fact that the former focuses on content disputes whereas the latter focuses on commercial disputes with a third-party trader.[33] Further, perhaps the points of comparison will be narrowed into the future after one recommendation from the European Commission's ADR Directive revision public consultation was to align the ADR Directive revision with the Digital Services

[29] *See fn* 1 (DSA) Article 21(3)(1)(a-e)
[30] *See fn* 1(DSA) Article 21(3)(2(a-b)
[31] Commission Recommendation (EU) 2023/2211 of 17 October 2023 on 'quality requirements for dispute resolution procedures offered by online marketplaces and Union trade associations' OJ L series (19.10.23)
[32] *See fn* 31 (Commission Recommendation) p 1
[33] Commission Explanatory Memorandum to COM(2023)649 - Amendment of Directive 2013/11/EU on ADR for consumer disputes, as well as Directives (EU) 2015/2302, (EU) 2019/2161 and (EU) 2020/1828, (2023/0376(COD) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52023PC0649

Act (DSA) regarding online platforms' dispute resolution obligations.[34] With this said, it is nonetheless too early to operate under the assumption that these two separate approaches will end up meshing together.

4.1 Independence

Looking to the first of the two aforementioned 'conditions' that bodies must fulfil in order to be certified, Article 21(3)(a) DSA states that ODS bodies must be:

> 'impartial and independent, including financially independent, of providers of online platforms and of recipients of the service provided by providers of online platforms, including of individuals or entities that have submitted notices'.

In formulating this provision, the European Commission grouped the interconnected notions of independence and impartiality under one condition alongside explicitly mentioning the importance of financial independence. In the more general (legal) context, 'independence' can be briefly defined as the decision-maker not being subject to external influence or control in coming to their finding. Relatedly, 'impartiality' concerns fairness in decision-making: decisions must be made based on objective criteria and thus should not be subject to bias or prejudice.

As mentioned in the previous section, the European Commission is looking to update its 2013 Directive on Alternative Dispute Resolution (from herein ADR) and recently offered some – admittedly brief – recommendations regarding quality requirements for dispute resolution procedures for online marketplaces.[35] Again, the context of content disputes vis-à-vis consumer-trader disputes should limit the impact which this European Commission guidance has on our understanding of Article 21 DSA conditions, yet it should not be entirely dismissed. The recommendation states in Section 4 that independence may be guaranteed by requiring that the 'natural persons in charge of these procedures are not subject to any instructions from either party or their representatives' and that 'impartiality' may be guaranteed by requiring that natural persons 'are remunerated in a way that is not linked to the outcome of the procedure'.[36]

Linking this back to a user's experience on online platforms, the 'independence' and 'impartiality' of the ODS body guarantees neutrality in decision-making: it is the 'condition' which helps assure users and regulators alike that the platform will not end up (indirectly or directly) marking its own homework. This is the very feature which should make Article 21 DSA's ODS solution an attractive alternative to users that believe a platform's content decision could be unfair or biased.

For this reason, it is essential that ODS bodies are not only independent in the eyes of the DSCs making this evaluation, but also that bodies are *seen to be independent* from the user's perspective. This necessity is explicitly mentioned in in the 2013 ADR Directive but does not make its way into the DSA. Article 6(1)(e) of the ADR Directive (concerning the expertise, independence, and impartiality of ADR bodies) states that those persons working at the ADR entity must disclose 'any circumstances that may*, or may be seen to*, affect their independence and impartiality or give rise to a conflict of

[34] Commission Staff Working Document, Impact Assessment Report SWD 335 final of 17th October 2023 for the Proposal for a Council Directive amending Directive 2013/11/EU on ADR; point (D)(I)
https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52023SC0335
[35] *See fn* 31 (ADR Commission Recommendation)
[36] *See fn* 31 (ADR Commission Recommendation) p 2

interest' with either party that is a party to a dispute.[37] Further, its recitals state that 'the independence and integrity of ADR entities is crucial in order to gain Union citizens' trust that ADR mechanisms will offer them a fair and independent outcome' and note that impartiality only exists where those in charge of ADR 'cannot be subject to pressure that potentially influences their attitude towards the dispute'.[38]

As will be discussed in the expertise section, the requirement 'to be seen to be independent' may be more of a challenge if the market segments on the basis of ODS bodies focused on addressing complaints from individual companies only. This issue is most visible in the closest example we have to a non-judicial means of resolving a content moderation dispute resolution at present: Meta's Oversight Board.

4.1.1 *Case Study: Article 21 DSA and the Oversight Board*

In recent years, relevant scholars have been voicing their concern that existing redress systems at leading, influential platforms have ultimately mutated into 'private adjudication'; inconsistent transparency as to how decisions are made, the standards in place, and why certain kinds of appeals are side-lined (such as disregarding unfair commercial practices) are among the reasons behind this.[39] The Oversight Board (OB) created by Meta (at that time Facebook) was an attempt to get out ahead of these problems and demonstrate Meta's commitment to addressing incorrect moderation decisions on Facebook and Instagram via external experts. The OB predates the initial 2020 Digital Services Act proposal and, for several reasons regarding its structure, objectives and 'independence', does not directly fit the mould for an Article 21 DSA ODS body.

Looking to the core function of the OB, the Board reviews selected content decisions made by Meta's platforms to see if the company acted in line with its policies, values, and human rights commitments.[40] The Board can choose to overturn or uphold those decisions. Meta can also ask the Board for guidance on its wider policies through 'policy advisory opinions'.[41] Since its formation, OB has handed down 76 decisions on issues ranging from holocaust denial, to a fictional assault on a gay couple, to a depiction of Zwarte Piet, a controversial traditional holiday figure in the Netherlands (which the Board found to have violated Meta's hate speech community standards).[42]

A key contrast between an Article 21 DSA ODS body and the OB is the comparatively limited number of decisions handed down by it. Whereas the DSA envisages Article 21 DSA to provide a 'catch-all' form of redress for recipients of the platform to resolve their dispute with the platform, the OB is instead concerned with reviewing selected individual decisions to determine if they were made correctly. Its function is to independently review some of the most difficult and significant content decisions they

[37] *See fn* 11 (ADR Directive 2013) Article 6(1)(e)
[38] *See fn* 11 (ADR Directive 2013) recital 32
[39] P Ortolani 'The resolution of content moderation disputes under the Digital Services Act' (2023) Giustizia Consensuale 2022 2 pgs 533-573
[40] Oversight Board, 'Case Decisions and Policy Advisory Opinions' (2024) https://www.oversightboard.com/decision/
[41] *ibid*
[42] *See fn* 40 (Oversight Board)

make '*as opposed to all cases'*.[43] Further, the OB's decisions are binding on Meta whereas the ODS body's decision will (technically) not be binding on either party.[44]

Finally, an online platform seeking to establish an ODS body that is specific to their entity may struggle to establish sufficient 'independence' of the ODS body under the Article 21(3) DSA certification process.[45] Much of this is likely to come down to how the body is financially resourced.[46] Article 21 DSA explicitly mentions financial independence as prerequisite for certification, and thus any DSA-ODS applicant body would need to carefully consider how it is funded. This issue regarding the funding of ODS bodies and the associated issues of fee structures is dealt with below (and in greater depth by both Husovec and Holznagel respectively).[47]

In its most recent Transparency report (as of May 2024), Meta appears to view ODS and OB as separate solutions: they state that a user that is unhappy with a decision may appeal to the OB or, as ODS bodies become certified, Meta will take steps to engage in this process.[48] Another leading platform, 'X', seems to have adopted a similar approach; the platform has simply stated that as part of their 'DSA Help Centre' update, they will 'engage with the selected certified out-of-court dispute settlement body with a view to resolving the dispute'.[49]

It is possible that the major platforms may enter this space at some point in future but as discussed by Holznagel elsewhere, informal conversations imply that leading platforms are more likely to establish or work with a separate (and independently resourced) entity in order to be certified under Article 21 DSA.[50] In this way, the fact that the DSA leaves the door open to member states to use public funds to establish their own national ODS body (or bodies) under Article 21 DSA certainly lessens these funding (and related independence) concerns once it can be presented as a public good, which seems, *prima facie*, achievable.

4.1.2 *Defining 'Independence' in Complex Cases*

Regarding the independence of other non-state bodies, Holznagel has argued that lawyers with a background in DSA-related topics such as digital rights, copyright law and media law would be well-

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[43] Nick Clegg, 'Welcoming the Oversight Board' (Facebook Newsroom, 6th May 2020) https://about.fb.com/news/2020/05/welcoming-the-oversight-board/

[44] *Note:* although the content decision itself will be binding on the platform, the policy recommendations are not binding. With this said, it has been noted elsewhere that consistent non-adherence to the Oversight Board's policy will be tracked by the Board and will reflect poorly on the platform.
See further: N Shiffman, C Miller et al, 'Burden of Proof: Lessons Learned for Regulators from the Oversight Board's Implementation Work' (Journal of Online Trust & Safety, Stanford Internet Observatory, February 2024) https://doi.org/10.54501/jots.v2i2.168

[45] D Wong, L Floridi, 'Meta's Oversight Board: A Review and Critical Assessment' (2023) 33 Minds and Machines 261-284 https://link.springer.com/article/10.1007/s11023-022-09613-x#Sec9

[46] In the specific example of OB, their official site states that 'the Board's independent judgement is critical to its function. Both the board and its administration are funded by an independent trust and supported by an independent company that is separate from Meta'. It remains unclear if this will be sufficient for the DSA as the Board is still funded or backed by Meta, a company that operates and controls the online platforms, and which was involved in the appointment of several of the Board's members.
See Meta's Oversight Board, Website Home Page https://www.oversightboard.com/

[47] *See fn* 26 (Husovec) section 11.5; *See fn* 27 (Holznagel Blog)

[48] *See fn* 14 (Facebook Transparency Report, October 2023) p 12

[49] Information about European Union Digital Services Act Out-of-Court Dispute Resolution Option and Judicial Redress (X Platform Help Centre, Digital Services Act) https://help.twitter.com/en/rules-and-policies/digital-services-act

[50] *See fn* 27 (Holznagel blog)

placed to apply for certification, particularly from the perspective of the 'expertise' condition.[51] Yet returning to the importance of establishing minimum standards for what is meant by 'independence', certifying DSCs should also prepare themselves for applications from persons with sufficient expertise but questionable independence and impartiality through concurrent, recent and/or previous experiences. This is perhaps best illustrated via the following three hypothetical examples of potential conflicts of interest:

- An ex-Instagram trust and safety senior-level manager setting up an entity and applying for Article 21 DSA certification despite having left the company on bad terms after she alleges wrongdoing on the part of Instagram while that platform alleges her own incompetence.

- An ex-social media VLOP trust and safety senior-level manager setting up an entity and applying for Article 21 DSA certification who has left the VLOP on positive terms but insists on only offering the ODS service to his previous platform.

- A lawyer (primarily focusing on content moderation litigation) who sets up an ODS entity and applies for Article 21 DSA certification, yet has a long history of taking vexatious, frivolous and/ or and conspiracy-theory-related claims on behalf of claimants, which are quickly disposed of by the judiciary.

Again, as mentioned above, in each of these cases the utility of also *being seen to be independent* should be underlined. These borderline cases will most likely require further clarity via coordinated DSC guidance to ensure complainants can trust the impartiality of the decisions handed down by ODS bodies. For instance, if an ODS body is affiliated with one platform alone (or a group of platforms controlled by the same entity), it will no doubt create heightened difficulties in proving their 'independence'. Yet further clarification would be needed such that ODS bodies can ascertain whether this would be a considerable obstacle to certification as opposed to preventing certification outright.

Up until this point, our analysis of this condition has been viewed through the lens of the independence and impartiality of decision-makers within these bodies. However, a core point of contention is how the fee structures at ODS bodies may also infringe the impartiality of these bodies: whereas individual decision-makers may be swayed by biases, the economic infrastructure of the ODS body may also create systemic issues. The manner in which an ODS body charges its fees will be central to the commercial viability of the ODS body itself, particularly for non-state bodies who can't make use of state funding to sustain themselves.

Recent arguments from both Holznagel and Hughes share considerable scepticism regarding how the asymmetrical fee structures may impact both the impartiality of the body and the kinds of complaints it receives.[52] This asymmetrical structure is designed to minimise users' barriers to redress, and means that platforms will bear the cost of the process conducted by the ODS body, even where the user 'loses' their dispute (unless the user 'manifestly acted in bad faith').[53] The above authors argue that although bodies may not be influenced by a user or a platform *per se*, the very fact that their commercial viability relies on the initiation of an ODS complaint by users alone may result in a scenario

[51] *See fn* 27 (Holznagel blog); further, the German *NetzDG* version of a similar ODS provision in national law in fact required a legal qualification in order to qualify as an arbitrator. It is thus possible that the German DSC's approach may even require a legal qualification, although these are merely rumours as of March 2024.
[52] *See fn* 27 (Holznagel); *see fn* 22 (Hughes)
[53] *See fn* 1 (DSA) Article 21(3)(a)

whereby ODS bodies adopt pro-user biases when issuing decisions. In doing so, they would be incentivising:

(a) The use of their own ODS body over another by users (who are able to select between multiple ODS bodies) as users consider that specific body's dispute outcomes to be more 'pro-user'.
(b) Repeat use by those complainants who have previously been successful through the pro-user ODS body.

Holznagel, in particular, voices concerns that this potential bias, with its aim of maintaining or increasing complaint volumes, would thus compromise the impartiality of ODS bodies and threaten to overwhelm platforms with both procedural costs and decisions to implement or reject. Indeed, while it is true that ODS bodies' decisions are non-binding, online platforms will have additional costs associated with the decision to administer the decisions or otherwise. In statements from his forthcoming text, *Principles of the Digital Services Act,* Husovec addresses the complexities and costs brought about by ODS.[54] Husovec underlines the importance of platforms 'successfully juggling real costs and legally acceptable fee structures *but also* the acceptance of decisions by providers and regulators who certify them'.[55] In brief, for-profit ODS bodies must ensure the fees keep coming in and not get the reputation of always finding in favour of platforms whilst simultaneously not contravening the trust of providers and regulators alike by offering inherently pro-user outcomes.[56]

4.1.3 *Concluding Thoughts on Independence*

The above concerns are certainly ones to keep fresh in our minds, yet it should also be noted that elements of these concerns can be effectively countered by further guidance. Moreover, several related protections against bias are built into Article 21 DSA:

Firstly, these concerns of malicious actors and inherently pro-claimant bias may be addressed by effectively defining independence and impartiality via coordinated guidance at DSC level. For instance, the importance of transparent and impartial fee structures needs to be underlined: such structures must be understood and approved of by DSCs prior to certification being awarded to ODS bodies.

Secondly, in relation to built-in protections, Article 21(2) DSA permits platforms to ignore repetitive claims where the dispute has already been resolved on the same grounds.[57]

Thirdly, the text permits ODS bodies to charge users of its service a nominal fee and this will be a crucial means through which the number of vexatious claims landing on the doorsteps of ODS bodies can be limited.[58]

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[54] *See fn 26* (Husovec) section 11.5.7: Who pays for ODS?
[55] *ibid*
[56] *Note:* With this said, the above authors' statements are merely their concerns looking forward; the statements should simply be viewed as guiding considerations for both DSCs and ODS bodies as the bodies begin to establish their economic models.
[57] *See fn* 1 (DSA) Article 21(2)
[58] *See fn* 1 (DSA) Article 21(5)
Note: whether state-run bodies will require a nominal fee seems less likely given that they will not be for-profit services. This runs the risk that state-run bodies will be open to complainants with no (financial) limitation on lodging a complaint, yet this is merely an issue to keep a close eye on as user engagement with Article 21 DSA develops.

Fourthly, the DSA requires a wide range of data-gathering and report-making on the part of several stakeholders in the DSA. ODS bodies will be no different: under Article 21(4) DSA, these bodies must share reports with DSCs regarding the number of disputes received and the outcome of those disputes.[59] This can serve as a useful protection to weed out biased habits creeping into ODS bodies' decision-making. Further, this continuous review allows DSCs to assess an ODS body's ongoing practices regarding their independence and their internal fee structure: if the DSC believes an ODS body's independence (or impartiality) has been compromised, the DSC can revoke their certification.[60]

Finally, and perhaps most relevant from the perspective of malicious actors, is the requirement for both parties to act in *good faith* in engaging with ODS providers[61]. In the above example of malicious actors flooding the system with vexatious claims this *good faith* requirement should address such actors. Further, although this *good faith* requirement is directed solely to the two parties to the procedure, it is submitted as a requirement which should be applicable to the ODS bodies themselves. It should be open to platforms – or users – to allege that biased decision-making has taken place and that the ODS body itself has as such not engaged with the process *in good faith*. There should be a means through which either party can submit their dissatisfaction with the body to the DSC such that the allegation will be investigated by the DSC. This would allow the DSC to reach an outcome of either rejecting the allegation or revoking the body's certification under Article 21 DSA.[62] This could be added to the pragmatic list of tools put forth by Thomas Hughes to minimise abuse.[63]

To conclude by looking forward regarding what 'independence' may mean in practice, it is clear that much remains unknown given that this is a nascent redress solution. In the above discussion regarding the heightened difficulties in establishing independence whilst being associated with one platform (or parent company) alone, it is submitted that further guidance is needed as to whether the 'independence' condition prevents such a body from entering the market or is merely a significant obstacle to certification. This issue may turn predominantly on funding and other forms of (indirect) influence, yet one might argue that an ODS body qualified to handle complaints in one type of platform, for instance, livestreaming, should not be allowed to limit their expertise to a single platform alone when it could be used across several similar platforms.

Much of this discussion centres around how the ODS market may be segmented, for instance on the basis of individual platform, platform type, content type, language, and finally (as has become most likely) via state-backed bodies. It seems few are willing to publicly dip their toe in the ODS market and it may be that Meta and others are content to bide their time and assess how the ODS market emerges, how many users are choosing to avail of this solution and, most importantly, how effectively the state-backed ODS bodies handle the complaints. Thus, whereas it may be relatively straightforward for a state-backed body to prove their independence (once more detailed procedures can be outlined about potential conflicts of interest and similar issues), the condition of expertise may be more troublesome

[59] *See fn* 1 (DSA) Article 21(4)
[60] *See fn* 1 (DSA) Article 21(7)
[61] *See fn* 1 (DSA) Article 21(3)(a)
[62] *ibid*; further, it should be noted that prior to certification being revoked, the 'Digital Services Coordinator shall afford that body an opportunity to react to the findings of its investigation and its intention to revoke the out-of-court dispute settlement body's certification' as per Article 21(7).
[63] *See fn* 22 (Hughes)

should state bodies not specifically delineate their area(s) of expertise. It is to this expertise 'condition' more generally that we will next turn.

4.2 Expertise

In order to be certified, Article 21(3)(b) DSA states that ODS bodies must have:

> 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.[64]

In this context, ODS bodies applying for certification must prove that they have sufficient knowledge in the subject matter of the dispute such that the complainant, the platform and the regulator can have confidence that the ODS body will be effectively equipped to resolve the dispute. Each condition for certification is of equal importance, yet the demonstration of expertise is not only challenging (as will be discussed below) but also indispensable for Article 21 DSA to be an effective and workable redress solution. This should be seen from three perspectives:

Firstly, for users; as this is a novel solution plagued with practical unknowns, the decision-making capabilities of the ODS bodies should not be the subject of doubt. One objective of the DSA is to enhance user empowerment and Article 21 DSA certainly has the potential to do so. Yet users should have faith in outsourcing their complaint to a non-judicial body, and so this body must be educated, informed, up-to-date and capable of addressing local nuances or slang which a borderline dispute may turn on.

Secondly, platforms have a lot to gain from ODS bodies becoming a workable solution. If platforms engage well with ODS bodies and take note of ODS bodies' (non-binding) decisions, this will improve the internal workings of the service itself but also may improve their public image and perhaps set them aside from rival platforms. Platforms can use ODS bodies' findings to become aware of repeat issues and/or repeat offenders and adjust their service accordingly to minimise risks. And, as above, this positive working relationship has the potential to makes users feel heard and thus feel safer online. With this said, if platforms do not feel that an ODS body is equipped with the relevant knowledge to resolve complaints, then it is difficult for the relationship to function for platforms (and, as above, for users).

Thirdly, from the perspective of DSCs and the European Commission, 'expertise' is a similarly indispensable condition. Article 21 DSA is a non-judicial solution which has the potential to redesign the redress process away from platforms being the *final arbiter* in content disputes whilst not further backlogging national courts (with cases which the judiciary may not be best equipped for nor have the time to deal with).[65] Therefore, it is in the interests of regulators for this to be a workable solution, such that if it were to be brought to the media or the industry's attention that disputes were erroneously handled by ODS bodies, this supposed lack of expertise would actively discourage trust in the online redress processes.

4.2.1 *The Relevance of Legal Knowledge as a Facet of Expertise*

As a point of reference, it is useful to note how the recent European Commission recommendation and the 2013 ADR Directive approach the issue of expertise in consumer-trader disputes. Those natural

[64] *See fn* 1 (DSA) article 21(3)(b)
[65] The issues of scale for content moderation disputes are discussed above (*see fn*s 11, 12)

persons in charge of dispute resolution procedures must 'possess the necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes, as well as a general understanding of the applicable law'.[66] The recitals of the 2013 ADR Directive also provide a useful insight into the interconnectedness of legal knowledge and 'expertise':

> 'the natural persons in charge of ADR [should] possess the necessary expertise, including a general understanding of law. In particular, those persons should have sufficient general knowledge of legal matters in order to understand the legal implications of the dispute, without being obliged to be a qualified legal professional'.[67]

It is argued that the complexity of demonstrating your 'expertise' in the context of content moderation disputes is likely to be greater and more multi-faceted than in consumer-trader online disputes. Further, the outcome of a moderation dispute is also of unique consequence when compared to other industries in which ADR bodies play a pivotal role, such as energy and telecoms disputes. One core question should be how DSA ODS bodies will prove their more general understanding of competing fundamental rights, for instance rights with consequences for democracy and society more broadly such as freedom of expression, freedom of information and the right to privacy.

Despite the *prima facie* importance of legal knowledge for experts in resolving content-related disputes, Article 21 DSA does not transfer the 2013 ADR Directive's reference to experts requiring a 'general understanding of law'.[68] As mentioned above, the rationale behind this – if any – is confusing given that the ODS bodies established under Article 21 DSA will often be dealing with complex cases which not only encompass cultural and linguistic issues but also may often turn upon human rights nuances or issues regarding contractual interpretation of a platform's terms of service.

It has been written elsewhere that subject matter expertise does not necessarily mean that a legal education is required. Husovec submits that 'experts working at NGOs that were previously notifying hate speech on specific platforms could probably submit their work experience as relevant'; he also points to the importance of DSCs understanding the training, screening and onboarding processes such that they can ensure the quality of expertise on an ongoing yet reviewable basis.[69] Further, it is clear that getting the definition of 'expertise' right is also important given the potential variance in backgrounds and interests of parties which may enter this market. Advancing on Husovec's NGO example above, one may consider the condition of 'expertise' in the following examples:

- An ODS body applying for Article 21 DSA certification despite previously only focusing on billing disputes between a consumers and telecoms service providers,
- A National Press Council attempting to set up a new entity in order to apply for Article 21 DSA certification, or
- A state-backed entity applying for Article 21 DSA certification and claiming it will deal with all complaints by hiring an expert per 'type' of harmful content and illegal content.

[66] *See fn 11* (ADR Directive) Article 6(1)(a)
[67] *See fn* 11 (ADR Directive) recital 36
[68] *See fn* 11 (ADR Directive 2013) Article 6(1)(a)
[69] *See fn* 26 (Forthcoming Husovec Text) Section 11.5.3 'Who counts as an ODS expert?'

Indeed, legal education or even a 'general understanding of the law' may not be a requirement, but judging from early movers in Germany (for instance, *Laboraid*)[70] and statements from Holznagel's aforementioned stakeholder engagement, lawyers are likely (and evidently well-placed) to apply for certification; this will particularly be the case regarding 'illegal content' disputes.[71] It is also rumoured that the German approach to Article 21 DSA may indeed make the attainment of a legal qualification a necessary facet of expertise.[72] The only explicit guidance document for Article 21 DSA in this area, namely the Irish DSC's Article 21 DSA Guidance and Application Form does implicitly refer to the importance of qualifications in establishing expertise. The Irish DSC asks bodies: 'what is the *general background, expertise, qualifications, or certifications*, that you will require of senior managers and director-equivalent roles responsible for overseeing the proposed ODS dispute settlement service?'[73]

Interestingly, in relation to the first sample scenario above regarding the telecoms-focused ODS body, the Irish DSC also asks applicant bodies: 'what relevant prior experience does your ODS body have providing, or facilitating access to dispute settlement services?'[74] This acknowledges that the experience which effective 'expertise' requires is not only in relation to harmful or illegal content, but also experience in dispute resolution.

4.2.2 *Expertise in What? Further Delineating an ODS Body's Field of Expertise*

Returning to the provision itself, the European Commission divides up Article 21 DSA 'expertise' in initially broad strokes:

(i) expertise might concern 'illegal content',

(ii) a platform (or several platforms') terms of service agreement(s), and/or

(iii) resolving disputes in one or more EU languages.[75]

This leaves plenty of room for ODS bodies to narrow or broaden their expertise and thus it leaves it quite open-ended as to what kind of 'market' ODS will create. With this said, it is submitted that the ODS market may be divided in one (or several parallel-running) market segmentations – on the basis of:

- ***Language***,
- ***Content type*** (for instance, 'disinformation' expertise),
- ***Type of platform*** (for instance, 'online dating' expertise),

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[70] Laboraid, Knowledge Tools (DE) this German body is not yet established in the market and is still preparing for certification via the German DSC (as of March 2024)
[71] *See fn* 27 (Holznagel Blog)
Note: perhaps beyond the scope of this paper is the role which legal tech may play in resolving disputes at scale the field. This is discussed concisely in Holznagel's blog but questions of liability regarding the ODS body and the outsourced legal tech are quite interesting: might it be the case that legal experts must form the right questions and pathways to redress in a given dispute and then it is up to legal tech to operationalise this? Although liability is not directly concerned given the ODS mechanism's non-binding nature, it still poses questions as to where blame may lie in a system's failure if the two facets of the ODS solution are distinctly legal entities.
[72] *ibid* (Holznagel blog)
[73] Coimisiún na Meán, 'Article 21 Out-of-Court Dispute Settlement Guidance and Application Form' https://www.cnam.ie/wp-content/uploads/2024/02/20240216_Article21_GuidanceForm_Branded_vF_KW.pdf
[74] *ibid*
[75] *See fn* 1 (DSA) Article 21(3)

- ***Individual platforms***[76] (for instance, 'Tiktok' content moderation expertise),
- ***EU member states establishing their own ODS bodies*** (with some remaining questions as to how this expertise may be further sub-divided, such as separate state ODS bodies to address different types of content such as 'hate speech' expertise), and/ or
- ***Illegal content*** dispute expertise, whereas others may focus on ***terms of service/ harmful content*** dispute expertise (with questions remaining as to whether this is sufficiently narrow alone or whether further subdivision within each is needed).

Each of these above potential market segmentations provide different issues in how 'expertise' may be interpreted as well as practical issues around compatibility between different ODS bodies.

It is argued that 'language' expertise logically links with 'state-backed ODS bodies'. For example, if the Lithuanian state decided they wished to establish an ODS body and apply for Article 21 DSA certification, they may cite their area of expertise as national online criminal offences ('illegal content') but are also likely to be able to cite expertise regarding Lithuanian language disputes. Although this does not preclude non-state actors from also entering the space, it is one pragmatic solution to the cultural and linguistic nuances which are specific to smaller member states. However, as alluded to in section 4.1, whereas the 'independence' of such state bodies may be relatively straightforward to establish, these bodies may struggle to prove their 'expertise': this is because of the numerous separate and specific types of content disputes and the difficulties in resourcing expertise across these numerous areas.[77] For instance, in the above Lithuanian hypothetical example, will it be sufficient for the state-backed body to cite its expertise across *all* Lithuanian criminal offences?

The expertise of state-backed ODS bodies is of the utmost significance given that those bodies who have come forward so far hoping to apply for certification are arising from the state.[78] The two countries that have publicly announced their intentions to establish novel ODS bodies are Austria[79] and Hungary.[80] Other larger member states appear to be moving towards amending existing ODS mechanisms from other sectors to carry out the work of a state-established DSA ODS body but this remains behind closed doors at the time of writing. Indeed, Article 21(6) explicitly states that member states may establish ODS bodies so some level of nationalisation of ODS bodies is not surprising.[81] However, this brings forth two questions:

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[76] As discussed in section 4.1 (independence), it is argued that single platform-focused ODS bodies are not recommended given the difficulties in ensuring they could remain impartial; as discussed, if expertise can apply to one platform, its remit should be extended to apply to similar platforms as well.

[77] *Note:* a state body can opt to specify the expertise in such a way that narrows their scope such that these concerns of resourcing expertise may not be as pronounced.

[78] Interestingly, Ireland has not indicated its intention to establish a state-backed body. However, they have already opened a 'user contact centre' which provides users with information about the DSA and how to make a complaint https://www.techcentral.ie/coimisiun-na-mean-opens-contact-centre-providing-information-on-digital-services-act-enforcement/

[79] Austria is establishing an 'Arbitration Board' within the media department of its regulator, *Rundfunk und Telekom Regels-GmbH (RTR Medien*) which is expected to function as an ODS body (RTR Medien, "EU Digital Services Act: KommAustria will be national "Digital Services Coordinator" from February 17", 18th January 2024) https://www.rtr.at/medien/presse/pressemitteilungen/Presseinformationen_2024/PI01162024KOA_DSA_KDD.html

[80] The Hungarian national 'DSA Executive Act' designates the Online Platform Vitarendező Tanács as a newly established ODS body under Article 21 of the DSA; *see further:* Dóra Petrányi 'Hungary adopts national legislation to complement the DSA (CMS Law-Now, 20th Nov 2023) *https://cms-lawnow.com/en/ealerts/2023/11/hungary-adopts-national-legislation-to-complement-the-digital-services-act*

Note: in the case of certain EU member states with lacking media freedom and freedom of expression, it is advised that the independence of state-backed ODS bodies is also viewed in the context of independence from the state itself.

[81] *See fn* 1 (DSA) Article 21(6)

- How will these bodies delineate their expertise? Will they subdivide one parent ODS body into one that is addressing illegal content and within this the many forms of illegal content, and another that addresses harmful content and its various categories? Where will these experts come from?

- How can we ensure that state-backed ODS bodies are not favoured over non-state ODS bodies? Although there will be no 'market' competition at certification level such that both a state- and non-state ODS body should be certified on their respective merits, how may the non-state ODS body compete with the resourcing and scale capabilities of the ODS body with state funding?

Following from this, if we imagine an online dating scenario encompassing both online, offline and cross-platform harms, and a state ODS body that simply delineates its expertise more generally into 'serious' and 'minor' harmful content, versus an ODS body focusing solely on online dating disputes (in all their forms and related scenarios), how can it be ensured – or should it be ensured – that the latter ODS body is adequately equipped with the resources and funding to match its expertise? This is just one of the several practical challenges which run alongside the innumerable opportunities which Article 21 DSA's ODS process provides, as will be discussed in the following section.

4.2.3 *Concluding thoughts on Expertise*

Similar to 'independence', it is evident that the brevity of detail in Article 21(3)(b) DSA regarding expertise may create a headache for relevant stakeholders. As has been argued elsewhere, the dangers of forum shopping (whereby certain DSCs are seen to set a lower threshold of expertise and bodies therefore favour that DSC for certification) are possible.[82] This may also allow greater bias in decision-making, whereby a less rigorous assessment of expertise may fail to notice that an ODS body's 'expertise' ultimately ends up favouring one party over the other and that favoured party (for instance, a user) only utilises a body certified in that member state.[83] Of course, the short answer to minimising this threat is defined coordination: stricter certification requirements should be set out and it is sensible for these to come from the community of DSCs. These requirements could be enhanced by civil society involvement from not only affected interest groups but also those groups with a background in resolving other kinds of complaints. Section 4.1 on independence noted the potential of the 'good faith' requirement on both parties also being extended to the ODS bodies themselves. In the context of expertise, this could also provide a means for users or platforms unhappy with the quality of decision-making or the supposed 'expertise' at the ODS to challenge the validity of its certification.[84] This ties back to the importance of coordinated, ongoing assessment by DSCs as to how ODS bodies are meeting the certification conditions.

Yet the significance of coordination is not only relevant to ensure that DSCs certification practices do not diverge too greatly; whereas DSCs will come together to address these issues, it recommended that a hub for ODS bodies would also go some way in kick-starting Article 21 DSA into becoming a workable solution. Expertise can be enhanced at an industry-wide level by establishing mechanisms for the exchange of knowledge about the market, innovation and best practices. This could bring together existing and new organisations that have developed or are in the process of developing

[82] *See fn* 27 (Holznagel Blog)
[83] *See fn* 22 (Hughes Blog)
[84] *See fn* 1 (DSA) Article 21(2), Article 21(7)

expertise, ensuring efficient referrals of cases to bodies that have the right expertise, as well as helping to consolidate insights about emerging risks and harms in order to communicate with the industry and support improvements.

Before moving away from theory and deeper into practice, it is also crucial to highlight that recent statements from Martin Husovec regarding DSA implementation also apply to the questions regarding how to best guarantee the independence and expertise of ODS bodies.[85] Husovec noted that it is 'not yet entirely clear what the DSA actually is, and we shouldn't be quick to judge; he went on to argue that the "DSA is about incremental change, and effective implementation will take a long time"'.[86] Similarly, it is argued that although the vagueness of the above-discussed conditions is problematic from a variety of perspectives, regulators may be learning lessons from other industries that rubber-stamping standards and definitions which have not yet been tried and tested in the market – in this case, in the sphere of content disputes – may actually end up harming more than helping the DSA in achieving its objectives.

It appears that this 'incremental change' approach is being used in the aforementioned Irish DSC's Guidance and Application Form on Article 21 DSA: the Guidance poses the issues of independence and expertise more as open questions as opposed to minimum requirements. For example, the form asks potential ODS bodies what their 'process is for the appointment or procurement of case decision-makers', as opposed to requiring certain minimum standards as features of this process.[87] One may argue that this document is merely an initial step from a single national regulator. Yet although this Guidance does not clear up many questions and concerns which those active on this topic may have, it should be noted that it should not be viewed as isolated to Ireland: it is clear that if DSCs wish to achieve a coordinated approach to ODS, their guiding statements will be largely the outcome of the discussions of all DSCs, or in the very least with their knowledge of the contents of the Guidance.[88] It is most likely that the DSCs will be assessing what is coming their way evidence-wise and how the market begins to take shape. From this, they must further update their guidance or move towards other soft law solutions such as standards or codes to make Article 21 DSA work and establish minimum standards on this basis. In short, we must ensure that healthy scepticism of an uncertain solution does not lead to the prejudicing one of the DSA's most innovative user-focused provisions.

5. Opportunities and Challenges – *from Theory to Practice*

The DSA seeks to create a market via Article 21 DSA so that users will be able to find an ODS body that matches their needs. When in the market for an ODS body, a user may want to choose a body that has expertise in dispute resolution and knows how to deliver to justice and redress, but also in the type(s) of service concerned, its language, demographics, norms, values and terms of service, and the specific kind of harm or issue they face.

In autumn 2023, The Internet Commission brought together trust and safety experts with dispute resolution practitioners from the UK energy and communications sectors to explore the types of complaints that a DSA ODS body is likely to handle. Through a series of workshops, The Internet

[85] Martin Husovec, Key Note Speech at the DSA Observatory Conference, IViR at University of Amsterdam (*see further coverage via:* Gabby Miller, 'The Digital Services Act Is Fully In Effect, But Many Questions Remain' (Tech Policy Press, 20th February 2024) https://techpolicy.press/the-digital-services-act-in-full-effect-questions-remain)
[86] *ibid*
[87] *See fn* 73 (Irish DSC, Article 21 Guidance Form) p 9
[88] *See fn* 85 (speaking as part of a panel at the DSA Observatory Conference, the DSCs of Ireland, France and the Netherlands all spoke of the importance of a coordinated approach to their competences.)

Commission developed and analysed five scenarios to explore the kinds of complaints that such a body may need to handle and reflected on what it might take to deliver an effective ODS body in this context. The following scenarios primarily relate to Article 21(3)'s 'expertise' condition in that they explore the complexities in resolving a complaint thus underlining the importance of expertise in both content moderation and dispute resolution. However, the scenarios do not exclusively encompass subject matter within the scope of Article 21 DSA; they are instead designed to test the limits of how these rules may be applied.

In this section, we use fictional individual and company names to present the scenarios and our analysis of the opportunities and challenges that may be faced by platforms and proposed ODS bodies as they seek to drive positive change at both an individual level and a system level.

5.1 Achieving the right balance of punishment and rehabilitation

Users may be suspended to prevent ongoing harmful behaviour, but also as a punishment or motivation to behave better. The challenging task for ODS bodies will be finding a flexible, sustainable balance between safeguarding users, sometimes vulnerable users, deterring repeat offenders, and motivating good behaviour online.

> *Brighton-based Shockzz99 has been a verified streamer on a streaming service, GameTube (GT) for four years, having had some success. They have 30,000 followers of a signature format which uses music clips and AI generated images based on well-known celebrities. The images break platform obscenity guidelines, and a complaint has been received that they glorify sexual violence. Anne, a 24-year-old gamer from Dublin, complained to GT and, following an internal review, Shockzz99's account has been suspended because it was found to be breaching guidelines on copyrighted music and depiction of violence against women. Until their account was suspended, Shockzz99 has been earning an average of €1,000 / month from streaming. They have now updated the images and promise to remain compliant with guidelines. They therefore want their account to be reinstated. GT has reviewed the case and decided to maintain the suspension for a full 12 months.*

This user scenario concerns the reinstatement of a creator that has breached a platform's guidelines. The creator is losing income following the suspension and the platform has removed the offending material. The length of the suspension is designed to lead to a permanent loss of the creator's audience. This was advocated by the original complainant, and the platform is concerned that reinstating the account may set a negative precedent. They may also be concerned that the complainant might be able to stir up damaging media coverage of the case. It is better for them to be strict, but on the other hand, both the livelihood and freedom of expression of the creator are at stake. The ODS provider must balance these concerns, but also consider that the creator remains free to move to a competing platform.

Connecting the above to the Article 21(3) DSA 'expertise' condition, it is submitted that the negotiation and conciliation experience of ODS bodies will play an indispensable role in striking a fair balance between penalising offenders and helping them to recognise their harmful behaviour and move on accordingly. The outcome of the dispute here being circulated to the platform and the DSCs may also help develop norms and standards as to appropriate terminations or suspensions in particular areas of the market, in the above instance, gaming and live streaming.

5.2 Capacity to assess the admissibility and reliability of evidence

A dispute may involve evidence from multiple online sources, raising questions about which sources should be considered reliable and admissible as evidence in an investigation.

> *Sam posted an advert on the social network LookBook for an online/remote job. Agatha saw the post and identified it as a scam. She reported it to the platform. In her report she included details about how the scam works together with anecdotal evidence from a friend, who has suffered this type of scam. She also included information she found online that appears to show that the listed address of Sam's company is fake. LookBook has determined that they are not able to ascertain whether it is a scam. The advertisement was posted from Sam's account, which is verified as a person (not a bot account), and LookBook say that it would be inappropriate to accept evidence from third-party online services about the existence or otherwise of a business posting on their service, since this could lead to malicious abuse of their reporting system through fabricated 'evidence'. The platform is also hesitant to act against commercial entities on its platform, since it does not want to disincentivise those entities engaging with it. As the job listing is a post and not an advertisement, there is also some grey area in LookBook's terms of advertising and standards to be applied. Further, LookBook has not received any complaints from anyone who has followed up with the advertisement, although a handful of other users have reported it as a scam. Agatha has appealed to the ODS body.*

This is a scenario about a public posting on a social media platform which includes text and images and is visible to all users. Agatha has identified it as a scam, but the platform has neither accepted her evidence nor fully investigated themselves. This may be because they haven't received any complaint of actual harm, so they consider a full investigation to be disproportionate at this stage. On the other hand, both Agatha and the ODS body have evidence of this kind of scam, which involves extortion. The experience of harm to her friend motivates Agatha to seek removal of the post and closure of Sam's account. Sam may not know anything about the complaint and the platform considers other issues to be higher priority.

This illustrates the role of independent research and expertise in informing the work of the ODS body: their own knowledge that this type of scam is a growing problem allows them to recognise and effectively escalate the problem for resolution by the platform, despite the platform's initial decision not to investigate fully. It also highlights complexities around the classification, by users or platforms, of content as either a user post or advertising, and the proper identification and authentication of businesses that place advertising.

5.3 Navigating off-platform and local rules

Disputes may have a physical component such as a device, and a user's rights and expectations may relate to an in-store purchase as much as to an online platform experience. ODS providers will need to define the scope of their investigations such that platform issues can be dealt separately from disputes involving local consumer protection rules.

> *Michael bought his son Danny a games Console and Console Network (CN) subscription, for Christmas. Within a few weeks, Danny's account had been blocked. Michael complained to CN, who explained that Danny's account was blocked because of offensive, racist comments.*

CN showed Michael the comments, and how they breached the inclusivity rules in its terms of service. Michael was told that the account would remain blocked. He argued that his son was young, badly influenced by friends at school, and said that Danny now understood that his past behaviour was unacceptable. Michael said that if CN would not reverse the ban, the new Console he had bought would become an expensive ornament and he would have to return it to the store for a refund. CN said that adult users are responsible for explaining expected behaviour on their service to families or children prior to use. It also said that the retail purchase was separate from the network agreement and that any return and refund of the Console would be a matter for the store from which it was bought.

Michael has brought his complaint to an ODS body. CN wants to demonstrate that they operate an environment that is appropriate for young people. This includes keeping racism out of their service and being seen to do so. Michael thinks the sanction is disproportionate and feels as though he has been accused of bad parenting. He now wants his money back, or to see Danny's account reinstated so that he can play with his Christmas present and his friends. CN ultimately want Danny back on their network as a paying customer, but also want to be seen to apply their rules fairly and consistently, to protect the overall population of users on their service. They don't have the power to offer refunds for hardware, which is a completely different business area: Michael's claim for a refund for the Console would have to be taken up with the store from which he bought it.

The rules applicable for the online environment may be at odds with those in an offline environment, with online platforms seeking to apply terms and conditions at regional or global level, and offline retailers being subject to a local consumer protection regime. Evidently, the above factual scenario is not purely limited to the DSA rules, yet ODS providers may need to stay within the scope of the DSA when determining settlements, perhaps signposting separate, local consumer redress processes when needed. However, whilst the ODS provider can claim a clear remit, they cannot ignore the way a user's overall experience will shape their views, feelings, and argument. Thus, to settle disputes efficiently, ODS providers may need to take account of relevant legal arguments outside of the DSA, for example, relating to consumer protection or discrimination.

In the context of ODS 'expertise', the above example may be an instance in which state-backed national bodies may be well suited to address the concerned issues of local consumer protection rules. However, as consumer protection rules are a shared EU competence, the recent package from the European Commission focusing on the revision of the ADR Directive is significant.[89] As discussed in section 4, the public consultation recommends the alignment of the rules on consumer protection disputes and content moderation disputes more closely.[90] This is certainly a case in which an ODS body would need to be privy to both the DSA and the upcoming amended ADR Directive as it appears to tie in elements of both ODS solutions.

5.4 Taking responsibility for third party providers

Third party providers are often involved in delivering platform services. Where a third-party provider is involved, ODS bodies will need to rely on platforms to ensure that their providers and business partners are delivering on their responsibilities.

[89] Article 168 TFEU
[90] *See fn* 34 (Updating of the EU ADR Directive – Public Consultation 2023)

CSP, a children's charity is concerned about the rise in numbers of children vaping, so when they received a complaint from a parent that their child had access to 18 classification content including vaping product placement on the gaming network, VN, they helped the parents to gather evidence and present it to the platform. The platform rejected the complaint, saying that its age assurance process is working as it should. CSP therefore brought the complaint to the ODS body, which establishes that the issue relates to specific, sponsored scenes within the latest release of a popular game published by Exter Games found on VN.

In this scenario, a trusted flagger brings a complaint about ineffective age verification by the third-party publisher of a leading game title. The trusted flagger wants scenes involving vaping to be removed for players that are under 18 using the specific complaint as a means to drive the change they are seeking. They argue that the visibility of vaping to children of scenes involving vaping demonstrates ineffective age verification. They want the platform to amend its terms of business with the publisher, Exter Games, to require more effective protection for children. The gaming network, VN, is concerned about brand and reputation, and possibly damaging revelations about its age assurance capabilities. At the same time, its relationship with Exter Games is one of its most important and lucrative business partnerships and does already include strict terms about age-appropriate content. The ODS body is not engaged directly with Exter Games, so settlement of the complaint relies on the capacity of VN, the platform, to enforce a remedy which may not align easily with the business relationship involved. The UK Communications Ombudsman has faced situations in which complaint resolution is delayed by third parties. When looking at these complaints they consider it the responsibility of the consumer's supplier to overcome any problems they have with third parties such as wholesale broadband providers.

Looking to the impact of Article 21 DSA's ODS procedure on this scenario, two key points stand out. Firstly, Article 22 DSA's 'trusted flaggers' – a related topic which has been purposely left out of the scope of this paper.[91] It remains to be seen if the prioritisation of notices by trusted flaggers may impact the prioritisation of disputes by ODS bodies, yet we must await further European Commission guidance on this topic. Secondly, in relation to enforcement or 'the solution' of the dispute, if the complaint to the ODS body is upheld, there might be a recommendation that the platform changes something. However, in this case the change would have to be made by the games publisher and they have little incentive to do this except as a means of sustaining a positive commercial relationship with the platform. It remains to be seen how said recommendations can end up addressing these issues given the platform not being able to implement the changes directly.

5.5 Cooperating well in cross-platform cases

Some disputes will involve multiple platforms, each having its own terms of service. For each case, an ODS body will therefore need to determine which platforms are in scope and ensure that it has the necessary expertise to investigate. In other sectors, consumers find themselves submitting separate complaints in relation to each organisation involved, adding complexity and effort for consumers, and resulting in fragmented and overlapping investigations. There is an opportunity to design better integrated user experiences.

Both David and Judith are registered with the dating app, Bantr. They connected and exchanged messages amicably at first, and they also connected on the social media platform

[91] *See fn* 1 (DSA); Article 22

Y. Soon after this, David started sending abusive and upsetting messages, and sharing them with his friends on Y. Judith blocked David on Bantr, and complained to them about the abuse she was receiving, including the non-consensual sharing of pictures of her on Y. Bantr has investigated and has suspended David's Bantr account. They say that they cannot do anything about the ongoing abuse Judith is experiencing on Y: she has been able to block David, but the abuse continues from other users connected with him. Judith complained to Y, who say that the issue is related to Bantr so they cannot help.

Judith has now complained to the ODS body. She wants Y to stop the abuse she is receiving and is worried that it may spread across other social platforms. She also wants there to be consequences for David, for him to be punished for his bad behaviour. David denies involvement, saying that Judith is making it all up. He doesn't want to hear any more about it and wants his Bantr account restored.

In this last case a user, Judith, has reported abusive behaviour to a platform, Y, which find no breach of its terms and conditions: it upholds its decision not to act on complaint of harassment because it occurred on another platform, Bantr. Judith is challenging this interpretation of Y's terms and conditions. Bantr upholds its decision to ban David following Judith's complaint, and David may wish to start his own complaint against Bantr. Effective resolution may require the ODS to navigate and investigate multiple platforms, each with their own rules, and engage with, and mediate between, multiple individual users. When bringing a case to an ODS body, users will want to choose a body that is competent to investigate across the range of platforms involved. They may also want to raise a complaint involving several users. Good signposting is therefore crucial for users to know which organisation is best equipped to resolve their dispute.

The challenge of handling complaints that involve multiple suppliers is not new or unique to online platforms: the UK Energy Ombudsman receives a lot of complaints that cover two energy suppliers, such as when companies use incorrect final or opening meter readings. In relation to digital platforms, ODS bodies will need to be clear about their limits, but at the same time, the ever-changing landscape of digital services may necessitate greater agility and greater breadth of knowledge than exists in other sectors.

In relation to the DSA's ODS solution, two points should be highlighted. Firstly, from the perspective of Article 21(3) DSA 'expertise', this scenario outlines that ODS bodies must be capable of addressing one set of facts which encompass more than one platform and potentially multiple harms. This may require a comprehensive understanding of several different types of platforms' terms of service. Secondly, regarding 'efficiency' (Article 21(3) DSA), Article 21(2) DSA states that providers may refuse to engage with ODS bodies if this dispute has already been resolved regarding the same information and the same grounds of alleged harmful or illegal content. However, this provision should be taken as prohibiting repeat vexatious claims as opposed to preventing claims for the same content reappearing on a different service. It is argued that this specific content moderation dispute scenario is certainly plagued with uncertainties and unknowns, but perhaps additional guidance and closer engagement between national DSCs will help alleviate these uncertainties.

5.6 Additional opportunities to explore

We developed the above scenarios as a starting point for working on the practical implementation of Article 21 DSA, and the design of effective ODS solutions: they helped us to identify some key considerations and challenges. In addition to the above, we identified three additional areas to explore further with stakeholders as we develop our thinking about the role and shape of a potential ODS body:

(a) Iterating and scaling policies and operational processes. Issues with social media have led to "techlash": a loss of trust in wider tech sector. As part of an international effort to restore trust between consumers and platform business, ODS bodies will need to effectively manage high volumes of complaints and help to provide evidence of systemic improvements to a wide range of critical and rightly sceptical stakeholders. Digital platforms are under scrutiny and face high reputational risk if they do not have appropriate and effective content governance and safety processes in place.

(b) Shaping an effective user experience across national borders. Digital services cross borders but regulators find this more challenging, thus causing inconsistency for customers and the challenge of complying with disparate regulations. Given its dominance inside the management and operations of digital platforms, and considerable consumer reach, the English language may offer an advantage in delivering consistency. When it comes to scaling up, such a linguistic choice must clearly be tempered with a strong awareness of cultural differences and a strategic ambition to collaborate across and serve other language groups.

(c) Co-creating data / system-level insights specification. The high volume of users makes identification of issues and effective complaint handling challenging, but also very important. The systematic publication of ODS outcomes may be a key component of accountability and instrument for increasing both consumer trust and stakeholder confidence.

The above opportunities and challenges are summarised in the following table. This is offered as an agenda for collaborative development between all stakeholders, but the primary responsibility for delivery of an effective system will fall on potential ODS providers and online platforms. The opportunities and challenges are therefore categorised according to these two key actors:

	POTENTIAL ODS BODIES	*PLATFORMS*
OPPORTUNITIES	• Achieving the right balance of punishment and rehabilitation (5.1) • Iterating and scaling policies and operational processes (5.6 (a))	• Shaping an effective user experience across national borders (5.6.(b)) • Co-creating data / system-level insights specification (5.6 (c))
CHALLENGES	• Capacity to assess the admissibility and reliability of evidence (5.2) • Navigating off-platform and local rules (5.3)	• Taking responsibility for third party providers (5.4) • Cooperating well in cross-platform cases (5.5)

6. Conclusion

The DSA's ODS provision is a novel solution and has the potential to empower users in a way that internal appeals systems and judicial remedies have not up until this point. In the same way that the novel nature of the solution is exciting and promising, it also brings about major questions as to its workability in practice regarding how to maximise user engagement with this feature, but also regarding both how and who to certify as appropriate ODS bodies to enter this space. This paper has sought to focus on the conditions of 'independence' and 'expertise' of ODS bodies, two conditions which ODS bodies must satisfy in order to be certified. In doing so, it has put forth a litany of remaining issues in ensuring the independence and expertise of ODS bodies, for instance looking to the balancing act of individual platforms establishing external ODS bodies which may have the necessary expertise but struggle to prove their independence, just as state-backed bodies should be able to establish their 'independence' but must offer further clarity on how they will establish and categorise their 'expertise'. It was also noted that the requirement for both the user and the platform to engage with the ODS process *in good faith* should be extended to the ODS body itself.[92] This requirement may appear vague and open-ended *prima facie,* but if taken up in a strict and consistent manner, it might have the potential to be an effective tool in addressing biases.

An overarching theme of the DSA in the past year has been striking the balance between merely building systems and hoping users will engage with them versus adding further flesh to the original regulation such that the effectiveness of the text more broadly can be guaranteed. In the context of Article 21 DSA, it is submitted that the cautious steps thus far from DSCs, the European Commission and candidate ODS bodies themselves demonstrate the uncertainties brought about by this unprecedented solution to content disputes. It is hoped that any academic criticism of the somewhat open-ended nature of the ODS provision will serve to simply pose questions (which others may have been neglected up until this time) – and serve to collegially answer these questions – as opposed to damning the solution to the scrap-heaps of being just another legislative 'paper tiger' from the European Commission.[93] Before such a conclusion can be reached, it is imperative to give it the requisite time to breathe and reach those users for whom it was created in the first place.

Finally, returning to how to continue this conversation around the challenges (and opportunities) of Article 21 DSA, our final section sought to provide some hypothetical examples of the variety of complaints and the associated complexities that may arise in resolving disputes. By doing this, we hope to contribute to the growing debate around Article 21 DSA and moving this novel redress solution from theory to practice in these initial months of the DSA's full implementation.

[92] *See fn* 1 (DSA) Article 21(2)
[93] P Ortolani 'If You Build it, They Will Come The DSA "Procedure Before Substance" Approach' (Verfassungsbooks 2023) p 159: "*The experience of the European ODR Portal demonstrates that ADR risks becoming a paper tiger, if the traders (or, in the case of content moderation, the platforms) have no incentive to participate in the dispute resolution procedure and comply with its outcome.*"

7. Appendix

As a means of moving forward, we propose the following agenda for co-creation workshops with stakeholders including companies, NGOs, consumers, and regulators:

ODS body policy development agenda

- Approach to cross-platform cases
- Navigating off-platform and local rules
- Platform responsibility for third party providers
- Admissibility and reliability of evidence
- Penalising and reinstating offenders
- Consumer experience across national borders

ODS body product development agenda

- Develop and test customer journeys
- Create data / system-level insights specification
- Build, demonstrate and iterate / cocreate capability
- Plan and deliver market pilot
- Develop scaling strategy