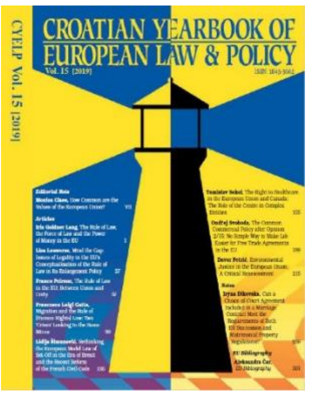
Department of European Public Law
University of Zagreb Faculty of Law



Croatian Yearbook of European Law and Policy

ISSN 1848-9958 (Online) | ISSN 1845-5662 (Print)

Journal webpage: https://www.cyelp.com

From GMOs to Online Platforms: Gatekeeping Powers and Executive Authority in EU Internal Market Risk Regulation

Felix Blommaert

Suggested citation: F Blommaert, 'From GMOs to Online Platforms: Gatekeeping Powers and Executive Authority in EU Internal Market Risk Regulation' (2026) 22 CYELP ('Online First').

Link: https://www.cyelp.com/index.php/cyelp/article/view/616

Published by University of Zagreb

Submit your work to CYELP

Published online: 16 July 2026

FROM GMOs TO ONLINE PLATFORMS: GATEKEEPING POWERS AND EXECUTIVE AUTHORITY IN EU INTERNAL MARKET RISK REGULATION

Felix Blommaert*

Abstract: The European Commission has long been the institution that converts indeterminate risk into binding administrative decisions, deciding, for instance, over the market access of GMOs, plant protection products, and chemicals whenever national opinions on their safety diverge. The Digital Services Act (DSA) now assigns it a similar role: determining whether platform features should be disallowed because of the risks they pose to the Union. Unlike these traditional frameworks, however, the Commission decides unilaterally, unconstrained by comitology votes, national safeguards, or mandatory expert opinion. Juxtaposing the DSA against this older regulatory tradition, I show that its systemic risk framework marks a departure toward unchecked executive discretion. I argue that this departure is not the product of a Commission power grab but of compensatory centralisation: an institutional design compensating for the loss of regulatory control by Member States of destination, rather than a deliberate expansion of executive reach. In that sense, it exemplifies what Chiti and Mendes describe as the 'age of functionalism', where institutional design is driven by temporary workability rather than normative ambition. The result is a framework in which systemic risk, an inherently contested and politically saturated concept, is adjudicated through an unconstrained dialogue between the Commission and the world's most powerful platform firms. This compensatory centralisation raises pressing questions about its long-term tenability in light of political resistance and its democratic legitimacy more broadly.

Keywords: risk regulation, platform regulation, executive power, GMOs, Digital Services Act, functionalism, indeterminacy, European Commission.

1 Introduction

Risk regulation and executive authority are two of the most consequential trends in contemporary EU governance. Goods and services, traded freely on the internal market, are seen as bearers of potential risks to health, the environment, and fundamental rights. Such risks have been the source of many legislative frameworks where the legislator delegates risk identification and mitigation powers to others, prominently administrative authorities and

* Felix Blommaert is a PhD student at the Transnational Legal Studies Department, Vrije Universiteit Amsterdam, the Netherlands. Email: f.b.n.blommaert@vu.nl; ORCID: 0009-0002-7764-9783.

regulated firms.[1] At the same time, the European Union has been characterised by increasing executive decision-making. Faced by several crises, the Union has created decision-making institutions outside the scope of the Treaties and seen a Commission willing to leverage the Treaties to create an unprecedented fund and negotiate vaccines for Member States.[2] This fits within a trajectory of an EU regulatory state focused on deriving political legitimacy from its output, rather than its input or throughput. The then ECB President Mario Draghi's 'whatever it takes' looms over the European project, clearly illustrated by the impact of his 2024 report on ongoing deregulatory efforts of the EU.[3] These two developments do not merely coincide. When an executive authority is delegated with the power to determine what counts as a risk and what constitutes an adequate response to it, something inherently political occurs. Risk becomes a terrain on which the scope and pace of integration are set, voices are included or excluded, and the boundaries of institutional authority are drawn. Understanding how risk and executive power come together in the EU is therefore both a question of legal doctrine and of democratic legitimacy.

This paper investigates that dynamic through the EU's flagship law on intermediary services, the Digital Services Act (DSA).[4] The DSA requires the largest online platforms and search engines to identify and mitigate 'systemic risks'.[5] This duty is exclusively supervised by the European Commission, which enjoys considerable discretion in determining what regulated providers ought to do and in imposing substantial fines.[6] The framework has been heavily politicised: it has attracted persistent censorship critiques,[7] been

---

[1] On the emergence of risk as an object in regulatory society, see Karen Yeung and Sofia Ranchordás, *An Introduction to Law and Regulation: Text and Materials* (2nd edn, CUP 2024) pt 1, ch 2.
[2] See Jonathan White, *Politics of Last Resort: Governing by Emergency in the European Union* (OUP 2020); Bruno De Witte, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635 <https://doi.org/10.54648/COLA2021046>; Matthias Ruffert and Päivi Leino-Sandberg, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433 <https://doi.org/10.54648/COLA2022031>; Jane Arroyo and others, 'The EU Vaccines Strategy: A Mixed Bag of Achievements and Discontent' (2025) 16 European Journal of Risk Regulation 653 <https://doi.org/10.1017/err.2024.92>; Päivi Leino-Sandberg, 'The Secret Life of the EU Treaties: NGEU and the Politics of the EU's "Living Constitution"' [2026] European Law Open 1 <https://doi.org/10.1017/elo.2025.10055>.
[3] Nikita Divissenko, 'From Draghi Report to the European Commission's Regulatory Agenda: Regulatory Transformation or Deregulation?' [2025] European Law Blog <https://doi.org/10.21428/9885764c.bab0816b> accessed 8 June 2025.
[4] Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC [2022] OJ L277/1 (Digital Services Act or DSA).
[5] Arts 34 and 35 DSA.
[6] Art 56(2) DSA.
[7] Daphne Keller, 'Regulating Platform Risk and Design: ChatGPT Says the Quiet Part out Loud' (*Center for Internet and Society at Stanford Law School*, 2024) <https://cyberlaw.stanford.edu/blog/2024/08/regulating-platform-risk-and-design-chatgpt-says-the-quiet-part-out-loud/> accessed 8 June 2025; House Judiciary Committee Republicans, *The Foreign Censorship Threat: How the European Union's Digital Services Act Compels Global Censorship and Infringes on American Free Speech* (July 2025).

framed as a tool for election interference,[8] and allegedly became a bargaining chip in transatlantic trade negotiations with the US administration.[9] It thus offers a privileged vantage point from which we can examine the relationship between risk and executive authority in the EU.

This paper pursues three interconnected questions. First, what powers does the DSA vest in the European Commission with respect to systemic risk regulation, and how are Member States positioned relative to those powers? Second, how do the Commission's risk-based powers under the DSA compare to those in pre-existing internal market risk frameworks? Third, why did the Union legislator choose to centralise these powers as it did, and what does that choice reveal about the trajectory of EU executive governance?

To answer these questions, the paper proceeds by combining close doctrinal analysis with a purposive comparative method. The doctrinal analysis in Part 2 maps the Commission's supervisory mandate under the DSA. Part 3 then develops a controlled comparison across four pre-existing internal market risk frameworks: the regulation of genetically modified organisms, plant protection products, general food and feed, and chemicals. These frameworks are selected because they share a specific functional and constitutional profile with the DSA while offering analytical variation along a key dimension: the institutional constraints surrounding that power. Part 4 draws on literature to explain the DSA's departure from those institutional constraints, advancing the concept of compensatory centralisation to describe how the Commission's exclusive risk mandate emerged not from institutional overreach but as a political corrective to the asymmetries produced by the country-of-origin principle.

While others have described the executive centralism of the DSA,[10] this paper contextualises it within the trajectory of internal market risk regulation. As the 'heartland' of EU risk regulation, internal market law tells a distinctive story about how the EU has historically managed legitimacy problems that

---

[8] Statement by V Joron during the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) of 3 December 2024. Joron questioned whether discussing the application of the systemic risk framework while Romanian elections were still ongoing did not constitute, in and of itself, an interference.
[9] Jan-Ole Harfst, Tobias Mast and Wolfgang Schulz, 'Independence as a Desideratum' (*Verfassungsblog*, 16 July 2025) <https://doi.org/10.59704/50020240f8894397> accessed 28 July 2025.
[10] Martin Husovec, *Principles of the Digital Services Act* (OUP 2024); Giovanni De Gregorio and Pietro Dunn, 'The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age' (2022) 59 Common Market Law Review 473 <https://doi.org/10.54648/COLA2022032>; Rachel Griffin, 'Governing Platforms through Corporate Risk Management: The Politics of Systemic Risk in the Digital Services Act' [2025] European Law Open 1 <https://doi.org/10.1017/elo.2025.17>; Andrea Palumbo, 'Systemic Risk Management and the Constitutional Limits of Delegating Political Discretion: An Analysis of the DSA and the AI Act' [2025] European Journal of Risk Regulation 1 <https://doi.org/10.1017/err.2025.10069>; M Verónica Vargas and Giovanni De Gregorio, 'The Transformation of European Risk Regulation: Managing Uncertainty and Powers in the Digital Age' [2026] European Journal of Risk Regulation 1 <https://doi.org/10.1017/err.2025.10079>.

arise whenever it substitutes mutual recognition with harmonised risk regulation.[11] This substitution always involves a transfer of trust: from inter-state trust in each other's regulatory decisions to trust in a central executive authority. The EU has historically surrounded that transfer with institutional constraints on that central executive. Comitology, mandatory agency opinions, and national safeguards construct a specific relationship of trust between the Commission and Member States. Tracing the DSA within internal market risk regulation offers a concrete observation: this legal instrument lacks such architectures of trust. Instead, I demonstrate how the Commission's centralised risk-based powers over online platform and search engine providers structurally exclude the regulatory powers of Member States. While this situation emerged as a stable compromise between different Member States and the Commission, I argue that it nevertheless produces a potential for ensuing trust deficits among them.

2 The Commission as risk regulator of VLOPs and VLOSEs

2.1 Introduction

In this part, I show how the Union legislator centralised a risk-based executive mandate for the European Commission in the Digital Services Act. I begin by outlining the structure of the DSA and the indeterminate, risk-based duties in Articles 34, 35, and 36. I then explain how platforms mainly self-define risks within a broad, largely non-binding collaborative governance environment. Next, I demonstrate that the Commission alone holds the supervisory powers needed to determine whether platforms have adequately identified and mitigated systemic risks. Finally, I show how this framework structurally excludes Member States from shaping or enforcing these obligations, meaning that the Commission ultimately sets the authoritative meaning of 'systemic risks' and required mitigation measures under the DSA.

2.2 Context of the DSA

The DSA is the general EU law on digital intermediary services. Intermediary services encompass everything from servers to the most-used social media services. As its predecessor, the e-Commerce Directive,[12] predates the creation of Facebook, this update came as a relatively expected development. The legal impetus for this law is the emergence of national laws attempting to regulate social media services, which arguably constitute an obstacle to the

---

[11] Veerle Heyvaert, 'Governing Climate Change: Towards a New Paradigm for Risk Regulation' (2011) 74 Modern Law Review 817, 822 <https://doi.org/10.1111/j.1468-2230.2011.00874.x>.

[12] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (e-Commerce Directive).

internal market.[13] The DSA thus aims to harmonise most matters related to platform regulation.[14]

A core component of the DSA is the liability regime for these services, which was already in place under the e-Commerce Directive.[15] New, however, are the due diligence obligations. The DSA identifies several general obligations that apply to all intermediary services, with some more specific ones for hosting services. Hosting services store information at the request of users.[16] The most stringent due diligence obligations apply to an even narrower subcategory of hosting services, namely 'very large online platforms' (VLOPs) and 'very large online search engines' (VLOSEs). These entities are defined both by the nature of their services and the size of their user base. The DSA defines online platforms as hosting services that mainly store and disseminate information to the public.[17] This includes popular social media services and online marketplaces, but also Wikipedia and pornographic websites.[18] Online search engines are defined as services that allow users to find information related to requested content on all websites or websites in a particular language based on specific queries.[19] For a service to qualify as 'very large', it must have at least 45 million[20] active recipients in the Union on average monthly and be designated as such by the Commission.[21]

Among those VLOP- and VLOSE-specific due diligence obligations are risk-based obligations. There are two distinct risk frameworks at play: a general one[22] and a crisis response mechanism.[23] Collectively, these frameworks aim to mitigate the societal risks that these platforms may pose to the Union.[24] The regulation of these risks at the EU level is premised on the idea that the size and prevalence of these services require a centralised and uniform approach.[25] In both instances, the Commission plays an important role.

---

13 Recital 2 DSA. For a wonderful account of how EU politics shaped Germany's first platform law, see Robert Gorwa, *The Politics of Platform Regulation: How Governments Shape Online Content Moderation* (OUP 2024) ch 5.
14 See Husovec (n 10) ch 17.
15 Arts 12-15 e-Commerce Directive.
16 Art 3(g)(iii) DSA.
17 Art 3(i) DSA.
18 European Commission, 'Supervision of the designated very large online platforms and search engines under DSA' (Digital Strategy) <https://digital-strategy.ec.europa.eu/en/policies/list-designated-vlops-and-vloses> accessed 6 March 2026.
19 Art 3(j) DSA.
20 The Commission does have the power to change this threshold through a delegated act. Art 33(2) DSA.
21 Art 33(1) DSA. Such designations have already been the subject of legal proceedings as the Commission has latitude regarding the source of information and because there is discussion on the extent to which certain user numbers should be excluded given that they might be part of non-regulated elements of a service. For a discussion, see Husovec (n 10) 174. So far, the EC has designated several VLOPS and VLOSEs, including Facebook, TikTok and Google Search. For a list, see Commission (n 18).
22 Arts 34 and 35 DSA.
23 Art 36 DSA.
24 And thus, arguably, not outside of it.
25 Recital 124 DSA.

The centre of the general risk-based framework is located in Articles 34 and 35 DSA.

Article 34 obliges VLOP and VLOSE providers to identify 'systemic risks' arising from the design or functioning of their service and its related systems, including algorithmic systems, or from the use made of their services. This identification must occur at specific instances.[26] Systemic risks are not exhaustively defined in the DSA. Instead, this legal instrument provides a non-exhaustive list of systemic risks, namely:[27]

a) the dissemination of illegal content […]*;*
(b) any actual or foreseeable negative effects for the exercise of fundamental rights […]*;*
(c) any actual or foreseeable negative effects on civic discourse and electoral processes, and public security;
(d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being.

Given the non-exhaustiveness of the systemic risk definition, this list should be read as the most pressing 'public policy objectives' according to the EU legislator.[28]

Consequently, Article 35 requires firms to manage systemic risks through 'appropriate, proportionate, and effective' measures. The DSA then establishes a non-exhaustive list of potentially appropriate measures, including:[29]

(a) adapting the design, features or functioning of their services, including their online interfaces;
(d) testing and adapting their algorithmic systems, including their recommender systems;
(h) initiating or adjusting cooperation with other providers of online platforms or of online search engines through the codes of conduct and the crisis protocols referred to in Articles 45 and 48 respectively.

When the Commission deems that 'extraordinary circumstances lead to a serious threat to public security or public health' in parts or the entirety of the Union, it can impose three exhaustively listed duties on VLOP and VLOSE providers.[30] The Commission can demand that they assess whether and how

[26] VLOP and VLOSE providers must conduct the risk assessments yearly and before launching 'functionalities that are likely to have a critical impact' on the systemic risks. The risk assessment must be 'specific to [the] services' and 'proportionate to the systemic risks, taking into consideration their severity and probability'. Art 34(1) and (2) DSA.
[27] Art 34(1) DSA.
[28] Recitals 40, 41, 71, 75, 145 DSA.
[29] Art 35(1) DSA. I chose these examples given that they were most salient to this paper.
[30] Art 36(1) and (2) DSA.

their services[31] contribute to the crisis, that they provide relevant information, and finally that they identify and apply measures to prevent, eliminate, or limit their contribution to the crisis.[32] Principally, the services retain the discretion to determine the measures as long as they are specific, effective, and proportionate.[33] Moreover, they must

> *take due account of the gravity of the serious threat […], of the urgency of the measures and of the actual or potential implications for the rights and legitimate interests of all parties concerned, including the possible failure of the measures to respect the fundamental rights enshrined in the Charter.*[34]

The same requirements apply to the decisions taken by the Commission.[35] Moreover, the actions demanded in a decision may not exceed a period of three months.[36]

2.3 The empowerment of the European Commission

The risk-based provisions of the DSA are indeterminate; there is no exhaustive definition of systemic risks, nor of the required mitigation measures. These two frameworks are generally described as meta-regulatory, meaning that they allow the platforms to self-regulate so long as they can demonstrate to the Commission that their systems comply with the general standards of the law.[37] The regulated firms are thus largely responsible for identifying the risks their services create and determining the appropriate mitigation measures.[38] The DSA aims to enhance scrutiny over how firms do this in several ways. It would be beyond the scope of this paper to exhaustively describe these avenues, especially since the DSA does not fully formalise them itself.[39] For example, Mateus Correia de Carvalho describes how the DSA provides several formal and informal avenues for auditors, civil society

---

[31] Specifically, the functioning and the use of their services. This could be important, as it recognises that not only the services, but also their users can be responsible for societal effects. Kevin Munger, for example, illustrates why it is important to recognise the dynamics between content users and creators in understanding polarisation. See Kevin Munger, *The YouTube Apparatus* (1st edn, CUP 2024).
[32] Art 36(1) DSA.
[33] Art 36(5) DSA.
[34] Art 36(1) DSA.
[35] Art 36(3)(a) and (b) DSA.
[36] Art 36(3)(c) DSA.
[37] Nicolo Zingales, 'The DSA as a Paradigm Shift for Online Intermediaries' Due Diligence' (*Verfassungsblog*, 2 November 2022) <https://doi.org/10.17176/20221102-215609-0> accessed 28 July 2025.
[38] In that sense, this framework maps well onto Marco Almada's procedural account of technology neutrality. How rules should apply to the specific technology is not determined by the legislator or even the Commission, but rather by the platform companies themselves. Marco Almada, *Delegating the Law of Artificial Intelligence: A Procedural Account of Technology-Neutral Regulation* (European University Institute 2024) <https://data.europa.eu/doi/10.2870/94276> accessed 30 May 2025.
[39] Mateus Correia de Carvalho, 'It Will Be What We Want It to Be: Sociotechnical and Contested Systemic Risk at the Core of the EU's Regulation of Platforms' AI Systems' (2025) 16 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 35 <https://www.jipitec.eu/jipitec/article/view/420> accessed 6 March 2026.

organisations, affected individuals, and other experts to scrutinise how platforms identify and mitigate risks.[40] Mandatory yearly independent audits of the regulated firms,[41] enhanced data access for researchers and regulators,[42] and the ability of several institutions to issue soft law instruments like codes of conduct[43] and guidelines[44] all contribute to this collaborative governance project. In that sense, this process provides important signals to the regulated firms of which risks they could consider, and what measures they could take against them. The opinions behind these signals, however, are not legally binding: codes of conduct are voluntary, and guidelines do not create binding rules.[45]

That is not to say that the regulated firms are entirely free to identify and mitigate systemic risks. On the other side of this self-regulation under enhanced scrutiny sit the exclusive supervisory powers of the European Commission.[46] This exclusivity means the Commission sits in the 'driving seat' when it comes to systemic risks; it retains the prerogative to 'initiate, target, shape, and terminate' decisions.[47] Functionally, the Commission's role is to translate indeterminate risk duties into negative compliance determinations and binding remedial obligations. In practice, the Commission can oppose how a VLOP or VLOSE provider identifies and mitigates risks. To do so, the DSA effectively constructs a graduated enforcement ladder. First, the Commission can designate an intermediary service as a VLOP or VLOSE. This decision entails that the service is subjected not only to the risk-regulation obligations, but also to other obligations set out in section 5 of the DSA. After this designation, the Commission can rely on the DSA to demand that the regulated firms (and other relevant actors) share information related to a suspected infringement.[48] When concerns persist, the Commission opens proceedings against the provider for suspected non-compliance with systemic-risk duties, crisis-response duties, audit obligations, or data-access obligations.[49] The opening frames the scope of the case and preserves the Commission's exclusive supervisory role over VLOPs/VLOSEs. Where there is urgency due to the risk of serious and irreparable harm to recipients or public interests, the Commission may impose interim measures to prevent the aggravation of harm while the investigation proceeds.[50] At any point after proceedings open, the provider may offer commitments to remedy the

[40] ibid 58–67.
[41] Art 37 DSA.
[42] Art 40 DSA.
[43] Art 45(1) and (2) DSA.
[44] Art 35(3) DSA. For example, Commission, 'Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Art 35(3) of Regulation (EU) 2022/2065' Communication C/2024/2537 [2024] OJ C/2024/3014, paras 8–22 <https://eur-lex.europa.eu/eli/C/2024/3014/oj/eng> accessed 6 March 2026.
[45] Art 35(3) and Art 45(1) DSA.
[46] Art 56(2) DSA.
[47] Folkert Wilman, Saulius Lukas Kaleda and Paul-John Loewenthal, *The EU Digital Services Act* (1st edn, OUP 2024) 379.
[48] Art 67 DSA.
[49] Art 66 DSA.
[50] Art 70 DSA.

identified concerns.[51] The Commission can make them binding on the provider by accepting them and closing the case without a fine.[52] If the Commission concludes that the provider failed to identify relevant systemic risks and/or failed to apply appropriate, proportionate, and effective mitigations, it issues a decision of non-compliance.[53] The Commission has at its disposal the power to issue periodic penalty fines in cases of persistent non-compliance.[54] In cases of repeated, serious non-compliance causing ongoing serious harm, the DSA provides a last-resort pathway to temporary service access restrictions in coordination with national authorities and subject to judicial safeguards.[55]

In the emergency framework, finally and additionally, the Commission may issue[56] and amend[57] crisis measures upon the recommendation of the Board. In this regard, it 'shall take utmost account of the recommendation of the Board'.[58] However, there are doubts in the literature about whether this formality effectively prevents the Commission from contesting conduct by the regulated firms in the absence of recommendations. This would mean that the Commission has a duty only to 'consult the Board and give it a reasonable opportunity to adopt a recommendation, without the absence thereof however necessarily preventing the Commission from acting'.[59]

In practice, this means that platforms can identify and mitigate systemic risks to their liking, potentially in accord with demands voiced under the collaborative governance project. However, only the Commission can determine that a firm is not doing enough in this regard. In that sense, the power to determine which risks are relevant and what measures are required shifts from the regulated firms to the European Commission. The latter can rely on the soft law or findings that emerge from the collaborative governance project.[60] Empirical literature also underlines how such soft law documents

---

[51] Art 71(1) DSA
[52] ibid.
[53] Art 73 DSA.
[54] Arts 76–77 DSA.
[55] Art 82 DSA.
[56] Art 36(1) DSA.
[57] Art 36(8) DSA.
[58] Art 36(10) DSA.
[59] Wilman, Kaleda and Loewenthal (n 47) 279.
[60] In fact, that is how the recitals and operative text and implementing regulation of the DSA frame it. Recital 137 DSA states that the Commission must 'cooperat[e] with the Digital Services Coordinators and the Board […] be able to coordinate and rely on the expertise and resources of such authorities […] draw on the expertise and capabilities of the Observatory on the Online Platform Economy […] relevant expert bodies, as well as centres of excellence [and] may invite experts with specific expertise, including in particular vetted researchers, representatives of Union agencies and bodies, industry representatives, associations representing users or civil society, international organisations, experts from the private sector, as well as other stakeholders' for the purposes of enforcement. Art 35(1)(h) DSA states that compliance with codes of conduct could be sufficient mitigation measures. De Corvalho also argues that 'conducting a risk adversarial audit could conceivably be one of "the necessary actions to monitor the effective implementation and compliance" with the DSA that the Commission may take in art 72 DSA'; de Carvalho (n 39). The Commission can appoint

have become influential in EU governance, indicating that they could also come to play an instrumental role for the Commission under DSA risk regulation.[61] Nevertheless, the Commission is not bound by these soft law documents. It can conceptualise risks and determine which measures are (in)adequate in response thereto individually.

2.4 The disempowerment of Member States

So far, I have described the actors empowered by the risk regulation framework. For a comprehensive understanding of the nature of the framework, we also need to understand whom it disempowers. In what follows, I first explain how the DSA significantly limits the ability of Member States to enact similar rules for platforms and search engines. Then, I highlight the constraints on national regulators.

This disempowerment begins at the legislative level. The DSA establishes harmonised rules for intermediary services in the internal market. Full harmonisation entails that there remains little room for Member States to maintain or introduce divergent rules in the harmonised field. Member States may only maintain national rules in a fully harmonised field if they are necessary 'to maintain national provisions on grounds of major needs referred to in Article 36 [TFEU], or relating to the protection of the environment or the working environment'.[62] A Member State may only introduce new rules in this harmonised field based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.[63] The maintenance or adoption of new rules in this field is subject to authorisation by the European Commission, which can only permit measures that do not constitute an obstacle to the functioning of the internal market and do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[64] Given that national deviations from fully harmonised rules in principle constitute an obstacle to the internal market, these requirements constitute a considerable obstacle to such measures.[65] Additionally, Member States carry the burden of proof in

---

external experts and auditors to support its supervisory tasks (Art 72(2) DSA, Art 3(5)-(7) Commission Implementing Regulation (EU) 2023/1201 of 21 June 2023 on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/2065 of the European Parliament and of the Council (2023) OJ L159 51.

[61] Carl Vander Maelen and Rachel Griffin, 'Twitter's Retreat from the Code of Practice on Disinformation Raises a Crucial Question: Are DSA Codes of Conduct Really Voluntary?' (*DSA Observatory*, 12 June 2023); Rachel Griffin, 'Codes of Conduct in the Digital Services Act': (2024) 2024 Technology and Regulation 167 <https://doi.org/10.71265/a54szq76>; Tahireh Panahi and Andressa De Bittencourt Siqueira, 'Soft Law, Hardcore? The Legal Enforcement of Codes of Conduct under the Digital Services Act' (*Verfassungsblog*, 3 June 2024) <https://doi.org/10.59704/73aaa5ac9d80b65b> accessed 6 March 2026.

[62] Art 114(4) TFEU.

[63] Art 114(5) TFEU.

[64] Art 114(6) TFEU.

[65] Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edn, OUP 2024) 1754–1763.

justifying their measures, whereas the Commission enjoys a broad discretion in its assessment.[66] Finally, harmonisation measures may also include safeguard clauses allowing Member States to adopt provisional derogations to protect non-economic interests listed in Article 36 TFEU.[67]

The DSA full harmonisation pertains to a broad field: the provision of intermediary services. The fully harmonised rules on risk regulation principally mean the following: Member States cannot impose more or less stringent risk-related rules on intermediary services. Accordingly, they principally cannot regulate non-VLOP and non-VLOSE providers, nor can they adopt additional rules on risk regulation by VLOP and VLOSE providers. As Husovec puts it: '[f]or very large online platforms (VLOPs) and VLOSEs, the DSA establishes fully harmonised and 360-degree rules that will likely catch everything that touches these services'.[68] Given the aforementioned limited abilities of Member States to retain or introduce new rules, it seems unlikely that national exemptions would be allowed by the Commission. Finally, the DSA does not provide safeguard clauses for Member States to diverge from the provisions. The DSA thus prevents national governments from articulating alternative risk conceptions or imposing divergent mitigation expectations.

Even in the theoretical example where such pre-emption would not apply here, the maintenance or adoption of national rules for intermediary services would still need to abide by the country-of-origin principle.[69] When the 26 Member States where the service is not established wish to further regulate it, such a measure would need to be justified under the limited derogation grounds of Article 3(4) of the e-Commerce Directive. This measure would have to relate to a given service,[70] be necessary and proportionate, and follow the procedural notification requirements. While such exemptions have been granted, research also demonstrates how the Commission has played an active role here to obstruct and shape national rules prior to the DSA.[71] As the DSA constitutes the flagship law on intermediary services, it is likely that such practices would persist. In practice, this makes unilateral experimentation with alternative conceptions of systemic risk highly unlikely.

The country-of-origin principle also applies at the level of enforcement. For the purposes of DSA enforcement, the law requires Member States to create national authorities, called Digital Services Coordinators (DSCs).[72] DSCs cannot, however, enforce the DSA against any service provider. Instead, they can only apply this law in regard to providers established in their jurisdiction.[73] This also applies to providers of VLOPs and VLOSEs. Those

---

[66] ibid 1757.
[67] Art 114(10) TFEU.
[68] Husovec (n 10) 385.
[69] Art 3 e-Commerce Directive.
[70] This means that general rules are excluded. See Case C-376/22 *Google Ireland and Others* EU:C:2023:835.
[71] Gorwa (n 13) ch 5; Dion Kramer, 'Airbnb, the City, and the Drive for European Integration' (2024) 3 European Law Open 500 <https://doi.org/10.1017/elo.2024.30>.
[72] Art 49 DSA.
[73] Art 56(1) DSA.

providers are only established in a couple of Member States, usually those offering favourable regulatory and fiscal conditions.[74] To that extent, the powers of other Member States in terms of the DSA are already significantly constrained. Furthermore, the enforcement powers of those DSCs against VLOP and VLOSE providers are limited in two ways. When it comes to the enforcement of all DSA obligations other than the risk framework, DSCs can only initiate proceedings to the extent the European Commission has not yet initiated proceedings itself for the same infringement.[75] When the Commission initiates proceedings itself, the DSC is relieved of its supervisory powers.[76] Regarding the risk framework, the DSCs enjoy no formal supervisory and enforcement powers. As explained above, the enforcement and supervision of this framework is exclusively reserved for the European Commission.[77] The DSA thus constructs a situation where only a handful of DSCs can enforce obligations against VLOP and VLOSE providers. That enforcement, however, is limited by the formal scope of the risk-based framework and the absence of Commission intervention. The power to contest the practices of regulated firms thus gravitates decisively towards the Commission.

It is important to note that DSCs could influence the Commission's exercise of its risk mandate indirectly through the European Board for Digital Services (the Board). This is an independent advisory group at the Union level, consisting of DSC representatives.[78] The Commission must 'take utmost account' of the opinion of the Board when initiating infringement proceedings against VLOP or VLOSE providers.[79] Additionally, the Commission must also receive a recommendation from the Board before it can issue[80] or amend[81] crisis measures relative to VLOP or VLOSE providers. These opinions are not legally binding on the Commission. However, 'the decision to deviate therefrom should be properly explained'.[82]

The combined effect is a regulatory landscape in which many Member States are both legislatively and administratively sidelined. They cannot define systemic risks through national law, nor can they easily operationalise or enforce risk-related duties through their own authorities. Instead, the power to give legal effect to concepts of 'systemic risk' and 'appropriate mitigation' is concentrated with the regulated firms and the European Commission.

2.5 Conclusion

The DSA sets up a collaborative governance framework, with actors like DSCs, civil society, and researchers playing an important role in scrutinising

[74] See Commission (n 18).
[75] Art 56(4) DSA.
[76] Art 66(2) DSA.
[77] Art 56(2) DSA.
[78] Art 62(1) DSA.
[79] Art 66(4) DSA.
[80] Art 36(1) DSA.
[81] Art 36(8) DSA.
[82] Recital 133 DSA.

regulated platform firms. In that capacity, these actors enjoy specific duties and enhanced powers to illustrate and contest how these firms identify and mitigate risks. Nevertheless, a doctrinal reading of the DSA reveals its most important relationship: that between the regulated firms and the European Commission. Both can listen to the voices that emerge within this collaborative framework. They remain equally free not to. Within this bilateral regulatory dialogue, the European Commission enjoys highly concentrated powers. The DSA thus represents a legislative choice to vest supervisory power over systemic risks exclusively in the Commission, without subjecting that power to relational legal constraints.

3 Gatekeeping powers by the European Commission

3.1 Introduction

In the following two sections, I demonstrate how the legislator's centralisation of risk-based powers in the DSA constitutes a substantial departure from recurrent past practices. To that end, I first explain how several pre-existing legal frameworks are similar to the DSA in that they feature the Commission which is responsible for addressing risks on the internal market. I thus first trace the DSA within a longer trajectory of internal market risk regulation. After having identified important similarities among the DSA and these other frameworks, I identify important differences between them. Those differences specifically relate to the constraints on the Commission's discretionary risk-based powers.

3.2 Selection and justification

The purpose of this specific part is to trace how the DSA departs from past internal market risk regulation. An important obstacle to this goal is the expansiveness of risk regulation in the internal market. Already in 2011, Heyvaert argued that the internal market constitutes the heartland of EU risk regulation.[83] A proliferation of secondary laws and governance strategies focused on risk regulation has emerged since the 1990s.[84] These legal frameworks also cover different sectors and pursue a variety of goals, making it difficult to comprehensively systematise them for the purposes of a comparison with the DSA.

---

[83] Heyvaert (n 11).

[84] Evidenced, for example, by the numerous and varied contributions to the European Journal of Risk Regulation, established in 2010. See also Alberto Alemanno, 'Regulating the European Risk Society' in Alberto Alemanno and others (eds), *Better Business Regulation in a Risk Society* (Springer 2013); Elizabeth Fisher, 'Framing Risk Regulation: A Critical Reflection' (2013) 4 European Journal of Risk Regulation 125 <https://doi.org/10.1017/S1867299X00003299>; Hans-W Micklitz and Takis Tridimas, *Risk and EU Law* (Edward Elgar Publishing 2015); Ellen Vos, 'Three Decades of EU Risk Regulation Research' (2017) 8 European Journal of Risk Regulation 47 <https://doi.org/10.1017/err.2016.7>; Mark L Flear, *Regulating New Technologies: EU Internal Market Law, Risk, and Socio-Technical Order*, vol 1 (OUP 2017).

Consequently, I pursue a purposive comparison of the DSA and a set of legal frameworks that represent certain recurrent features of internal market risk regulation. The purpose is to find frameworks that predate the DSA, but grant similar power to the European Commission as a risk regulator. To that end, I define a potential population through four cumulative criteria. First, the framework must be based on Article 114 TFEU, meaning it constitutes a harmonising measure aimed at the functioning of the internal market. Second, risk must serve as the operative administrative trigger: the Commission's power to act is conditioned on, and defined by, an indeterminate legislative risk standard. Third, the European Commission must function as the decision-making endpoint, holding the power to convert that indeterminate standard into binding determinations. Fourth, the Commission's determination must function as a constitutive condition for the exercise of a market freedom: its decision constitutes the legal basis on which access to, or exclusion from, the internal market depends. Whether a product may circulate, on what terms, and subject to what restrictions, turns on the Commission's exercise of this power. These four criteria equally characterise the DSA.[85] Out of this population, I select four frameworks for comparison: the regulation of genetically modified organisms,[86] plant protection products,[87] general food and feed,[88] and chemicals.[89] I do not claim these are the only frameworks that satisfy the criteria. The population may be larger, and this paper does not undertake to map it comprehensively. The four selected frameworks are sufficient for the analytical purpose at hand: together, they establish that the regulatory logic underlying the DSA has clear precedents in internal market law, and that those precedents were

[85] These four criteria and the additional selection mean that I exclude other frameworks that might equally provide interesting insights. Competition law, for example, features an enforcement power by the European Commission. However, this power is not based on Art 114 TFEU, does not feature the open-ended concept of risk mitigation as a goal, nor does it strictly regulate market access. I also do not discuss the Digital Markets Act and the Artificial Intelligence Act as they do not postdate the DSA. While those frameworks share important commonalities with the DSA, the main goal of this part is to compare the DSA specifically to other, pre-existing, internal market frameworks.

[86] Regulation (EC) 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L268/1 (GMO Regulation); Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L106/1 (GMO Directive), where the former relates to GMO food use, food product containing or consisting of GMOs or food products produced from GMOs and the latter to Commercial use of GM Seed.

[87] Regulation (EC) 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L309/1 (PPP Regulation).

[88] Chapter IV, Section 2 Regulation (EC) 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1 (GFL Regulation or GFLR).

[89] Regulation (EC) 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC [2006] OJ L396/1 (REACH Regulation).

consistently accompanied by relational constraints on Commission power that the DSA conspicuously omits. Additionally, they all offer analytical variation along the dimension that matters most for this paper: the nature and extent of those institutional constraints. It is that combination of functional similarity and institutional divergence that makes these four frameworks useful as a controlled comparison, and that justifies treating them as a sufficient rather than exhaustive basis for the argument.

3.3 Similarity: from mutual recognition to Commission gatekeeping

These risk frameworks encompass both the Commission's power to grant (conditional) authorisations for market access (GMOs,[90] active substances in plant protection products,[91] and the use of chemical substances that are in Annex XIV[92]) and the power to ban certain products (interim restrictions on food and feed under the General Food Law Regulation[93] and the addition of chemicals to Annex XIV (greylist)[94] or Annex XVII (blocklist).[95] In all instances, it is the European Commission that is called upon to authorise the placing on the market or specific use of a product or restrict its market access.[96]

The legal instruments that I have just listed all constitute fully harmonising measures, based on Article 114 TFEU.[97] Specifically, they harmonise an authorisation or banning process. Consequently, they come with certain disempowerment for national lawmakers and regulators. That level of disempowerment varies across the frameworks, which is why I will describe them separately. The Plant Protection Product Regulation (PPP Regulation) fully harmonises the procedure for the approval of active substances.[98] The producer of active substances submits an application for approval to the rapporteur Member State, which then passes it on to the European Commission for it to issue a decision on the matter.[99] In essence, the approval of active substances is a decision that is reserved for the Commission, which subsequently limits the authorisations Member States may grant for plant protection products.[100] The REACH Regulation features

---

90 Art 4(2) GMO Regulation; Art 6 GMO Directive.

91 Chapter II, Section 1 PPP Regulation.

92 Arts 60–64 REACH Regulation.

93 Chapter IV, Section 2 GFLR.

94 Meaning that their use is not prohibited outright but would require an authorisation. This refers to Annex XIV to the REACH Regulation, in accordance with Art 58 REACH Regulation.

95 Leading to an outright prohibition. This refers to Annex XVII of the REACH Regulation, in accordance with Arts 69–72 REACH Regulation.

96 While the GMO Directive also lays that power with national authorities, this *de facto* happens at the EU level by the Commission. Maria Weimer, *Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology* (1st edn, OUP Oxford 2019) ch 3.

97 These legal instruments are not, however, exclusively based on Art 114 TFEU.

98 Art 1(3) and (4), recitals 9 and 27 PPP Regulation.

99 Arts 7–13 PPP Regulation.

100 The PPP also harmonises an authorisation procedure, decided upon by national administrations. Member States do enjoy the power to authorise the specific plant protection products, provided that the active substances contained therein have been approved at the EU level and that the products comply with the uniform principles and the conditions laid down in the Regulation. Arts 28–29(1)(a) PPP Regulation.

both authorisations and bans. When it comes to authorisations, it is the specific industrial user applying for permission to continue a particular use of a restricted substance listed in Annex XIV.[101] The Commission's decision relates specifically to that applicant.[102] Unlike the authorisation procedure, restriction procedures are initiated by different actors. When it comes to additions to Annex XIV and Annex XVII, the procedure is initiated by the European Chemicals Agency (ECHA), a Member State, or the European Commission.[103] These decisions apply to all manufacturers, importers, and users of the restricted substance collectively.[104] Again, only the Commission can authorise or ban these specific products. Under the GMO frameworks, the relevant actor is the applicant and subsequent authorisation holder who seeks a Commission decision, typically the developer or producer of the GMO.[105] This authorisation principally applies to the entire European Union, with a geographical opt-out having been added by later developments.[106] Once a GMO is authorised at the EU level, Member States are legally barred from restricting cultivation except through the extremely narrow derogation route

[101] Art 62(2) REACH Regulation.

[102] Art 62(2) REACH Regulation establishes that applications for authorisation may be made by the manufacturer(s), importer(s) and/or downstream user(s) of the substance, confirming that the authorisation procedure is applicant-driven rather than general. The applicant-specific nature of the decision is confirmed by Art 60(9)(a) REACH, which requires the authorisation to specify the person(s) to whom it is granted. The Commission's decision thus binds only that specific applicant for that specific use, as further confirmed by Art 60(9)(c) REACH, which requires the authorisation to specify the use(s) for which it is granted.

[103] For Annex XIV, Art 58(3) REACH establishes that ECHA recommends priority substances for inclusion, taking into account the opinion of the Member State Committee. The substances eligible for recommendation must first be identified as meeting the criteria of Art 57 REACH through the procedure established in Art 59 REACH. Under Art 59(2) and (3) REACH, both the Commission and Member States may trigger this prior identification process by requesting or preparing an Annex XV dossier respectively, feeding into ECHA's eventual recommendation. For Annex XVII, Art 69(1) REACH establishes that the Commission may request ECHA to prepare a restriction dossier, while Art 69(4) REACH establishes that Member States may notify ECHA of their intention to prepare such a dossier independently. Art 69(2) REACH establishes a more limited third pathway: where a substance is already listed in Annex XIV, ECHA may on its own initiative assess whether its use in articles additionally warrants restriction under Annex XVII after the relevant sunset date.

[104] The collective effect of Annex XIV additions follows from Art 56(1) REACH, which establishes that no manufacturer, importer or downstream user may place a listed substance on the market or use it without prior authorisation. The collective effect of Annex XVII additions follows from Art 67(1) REACH, which establishes that a substance for which Annex XVII contains a restriction shall not be manufactured, placed on the market or used by anyone unless it complies with the conditions of that restriction, again operating against all market actors collectively rather than a named applicant.

[105] Art 4(2) GMO Regulation and Art 6 Deliberate Release Directive.

[106] GMO authorisations granted under the GMO Regulation and Deliberate Release Directive have EU-wide effect. Art 7(1) GMO Regulation establishes that the Commission decision granting authorisation applies throughout the Union. A geographical opt-out was introduced by Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory [2015] OJ L68/1, which inserted Art 26b into the Deliberate Release Directive. This provision allows Member States to request adjustments to the geographical scope of a GMO authorisation or to adopt measures restricting or prohibiting cultivation in all or part of their territory on grounds other than those related to the scientific risk assessment, including environmental policy objectives, land use, socioeconomic impacts or public policy.

under Article 114(5) TFEU, which requires new scientific evidence, a problem specific to the Member State, and a strict proportionality assessment. These centralised authorisation procedures are often subject to heavy political contestation, something we will return to later. Under the General Food Regulation, the Commission retains the exclusive rights to adopt certain measures when food or feed constitutes a risk to human health, animal health, or the environment.[107] The relevant actors here are food and feed business operators generally.[108]

Through harmonising measures, the Union legislator has thus decided to withdraw the power of Member States to authorise or ban such products. At the same time, it made an initial decision on whether that product can circulate on the internal market. For GMOs, active substances in plant protection products, and certain chemical substances, the legislator determined that these products ought not to be placed on the internal market outright. General food and other chemicals are *ab initio* allowed on the internal market. Market actors are therefore principally either allowed or prohibited from placing certain products on the market. Then, the legislator delegated power to the European Commission to determine whether these products can enter or remain on the internal market in light of evolving risks. This power, conversely, affects market actors. Either they have the privilege to introduce and use their products in accordance with the decision by the European Commission, or they are subject to the Commission's veto. The Commission here converts an indeterminate legislative concept of risk into a binding determination of whether, and on what conditions, a product may circulate.

Returning to the DSA, a parallel emerges. The goal of the DSA risk framework is to address risks that stem from the design, functioning, or use of the services, including algorithmic systems. The regulated firms can initially determine how they design and operate their services. However, through the enforcement ladder described above, the Commission can limit market access of specific designs and operations of the service.[109] It can accept binding commitments, issue decisions of non-compliance and emergency measures, and, finally, temporary suspensions.[110] In that sense, the framework disallows specific providers from maintaining design features or other technical choices. This can include certain addictive features, but equally, content moderation practices.[111]

Under both frameworks, the Union legislator has thus delegated what I call a gatekeeping power to the European Commission. It issues administrative decisions, determining either whether an initially prohibited product (good or

[107] Art 53 GFLR.
[108] Art 17 GFLR. Chapter IV Section 2 GFLR and Art 53 GFLR, describes the Commission's emergency powers rather than identifying food business operators as the relevant market actors. However, Art 17 GFLR establishes the general obligations of food business operators.
[109] See 2.3.
[110] ibid.
[111] ibid.

service) can be authorised or whether a product can be banned. This transformation from a ban to an authorisation, or from an authorisation to a ban, occurs through the concept of 'risk'. This concept might be best understood in relation to the EU's autonomous principle of mutual recognition. The harmonisation of these procedures represents a certain distrust among Member States in addressing each other's risks. Correspondingly, power is granted to the European Commission to manage risks for the entire internal market that come with certain products.

3.4 Divergence: restrictions on Commission gatekeeping

Despite these strong similarities, the DSA differs significantly in the extent to which the Commission's powers are unconstrained. In what follows, I will demonstrate how these four frameworks significantly limit the Commission's risk-based discretion compared to the DSA.

In these frameworks, the Commission's exercise of discretionary risk-based powers operates within a system of institutional constraints provided most importantly by two key actors: specialised scientific agencies that deliver mandatory risk assessments, and comitology committees representing Member States that vote on implementing measures. In what follows, I provide an overview of these procedures. Then, I highlight additional constraints on the Commission that vary per framework.

The frameworks require the European Commission to seek the opinion of a designated EU agency before engaging in risk regulation. Most importantly, these agencies are tasked with assessing the risks that the products may pose to the Union.[112] Generally, those assessments pertain exclusively to the impacts the products might have on human health, animal health, and the environment. However, that opinion does not always exclusively relate to the parameters of exact sciences. When the Commission is called upon to generally restrict a chemical substance or authorise uses of other substances, it also receives a separate opinion from the same agency on the socio-economic impacts of its proposal.[113] The legislative instruments, as discussed here, only appoint a single agency per risk framework. When it comes to food safety, including GMOs and pesticide products, the European Food Safety Agency (EFSA) is the relevant authority.[114] For chemicals, this is the European Chemicals Agency (ECHA).[115] The role EU law attributes to these agency opinions is debatable. On the one hand, the Court in *Pfizer*[116] generally states that the Commission's regulatory decision may go beyond scientific opinions as the latter do not have democratic legitimacy. These instruments

[112] Art 6 and 7(1) GMO Regulation, Art 28 (1) Deliberate Release Directive, Art 58(4) REACH regulation when it comes to the addition to Annex XIV, Art 64 REACH Regulation concerning authorisations, Arts 70–72 REACH Regulation concerning restrictions, and Art 12 PPP Regulation. This is however not the case for emergency interim measures. See Art 53 GFLR.
[113] Art 64(4)(b) REACH Regulation concerning authorisations, Arts 70–72 REACH Regulation concerning restrictions.
[114] As established under the GFLR. See Chapter III.
[115] Title X REACH Regulation.
[116] Case T-13/99 *Pfizer Animal Health SA v Council* EU:T:2002:209 (*Pfizer*) para 201.

contain legal expressions that substantiate this view. The REACH Regulation allows the use of otherwise prohibited chemical substances when 'socio-economic benefits outweigh' the health and environmental harms. GMO authorisations must also be based on 'other legitimate factors',[117] which include 'societal, economic, traditional [and] ethical […] factors'.[118] These frameworks are also premised on the precautionary principle, which could theoretically substantiate a departure from agency opinions.[119] Maria Weimer, in the context of GMOs, also traces this discretion in jurisprudence by the General Court.[120] On the other hand, *Pfizer* can also be read as making it substantially difficult for the Commission to diverge from agency opinions. The Court here adjudged that the Commission may only depart from this opinion where it can provide 'specific reasons […] of a scientific level at least commensurate with that of the opinion in question'.[121] This is also stated in both the GMO and REACH regulations.[122] Accordingly, Weimer has also argued that this judgment 'significantly limit[s] the policy space of risk managers, in particular in situations of scientific uncertainty, where robust scientific findings might be lacking'.[123] While these frameworks thus express a level of discretion for the European Commission in decision-making, mandated agency opinions guide or arguably even restrict this discretion. The duty for the Commission to substantiate departure from that advice entails that any decision it issues must be justified relative to this opinion.

While the European Commission plays an important role in these frameworks, it is crucial to note that it does not make binding decisions unilaterally. Instead, the Commission submits a proposal to a committee comprised of Member State representatives, which then provides an opinion on it. This procedure is called 'comitology'[124] and is legally required when the Commission wants to adopt what are called 'implementing acts'.[125] As the

---

[117] Art 7(1) GMO Regulation.
[118] Recital 19 GFLR, as the GFLR constitutes the *lex generalis* of the GMO Regulation, this definition arguably applies to this specific regulation. Weimer (n 96) ch 3.
[119] For example, the first Commission proposal relating to the GMO Herculex actually relied on this principle to deviate from the EFSA opinion. Weimer (n 96) ch 4. Such an approach has also been advocated in the context of glyphosate. Marta Morvillo, Alessandra Arcuri and Daniela García Caro, 'Green Light to Glyphosate, Pesticides and NGTs: Backpedaling on the Green Deal?' [2024] European Law Blog <https://doi.org/10.21428/9885764c.05484336> accessed 22 June 2025.
[120] Weimer (n 96) ch 4.
[121] *Pfizer* (n 116) para 199.
[122] Art 7(1) GMO Regulation, Art 73(1) REACH Regulation. See also Art 4(3) Deliberate Release Directive, Art 13(1) PPP Regulation. When it comes to Annex XIV REACH, ECHA has a guiding role in proposing substances to a candidate list. A literal reading of the Regulation indicates a limited discretionary role for the European Commission.
[123] Weimer (n 96) ch 2.
[124] The current procedure of comitology is established by Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers [2011] OJ L55/13 (The Comitology Regulation). The establishment of the relevant committee and the sectoral particularities are established by the parent law, with the law serving as the foundation of the implementing act.
[125] Art 291 TFEU.

definition of implementing acts is ambiguous,[126] this means that comitology is necessary when the EU legislator has determined that a Commission decision constitutes an implementing act. Even urgent decisions can be subjected to comitology. For example, where the Commission must take emergency measures to combat the risks of unsafe food on the internal market, the comitology procedure is applicable.[127] While implementing acts are usually general and thus relate to a product in general, this is not always the case. For example, the authorisation of glyphosate as an active substance for plant products is general for the EU,[128], whereas the authorisation for marketing or use of otherwise prohibited chemicals relates to a particular applicant.[129] There are three procedures, varying in the level of scrutiny the Commission undergoes to adopt a proposal. The strictest procedure not only requires an opinion but also grants the European Parliament and the Council an explicit veto right. While this procedure was phased out in the 2011 Comitology Regulation, the REACH Regulation retains this procedure through a grandfathering mechanism.[130] Intermediately, the Examination Procedure requires that the Commission submit the proposal to the committee for the purpose of a vote. The committee can approve a draft through a positive opinion or vote against it through a negative opinion. This opinion is voted on and requires a qualified majority by the Member States.[131] When there are insufficient votes to support a positive or negative opinion, no opinion is delivered. While the Commission may still decide that case principally, this is not the case for implementing acts relating to the protection of, among other things, 'the health and safety of humans, animals or plants'.[132] In practice, thus, implementing acts that require an examination procedure and concern the health of humans, animals, and plants *de facto* require a positive opinion supported by a qualified majority of Member States. Most of the risk-based regulatory frameworks previously discussed fall within this category.[133]

[126] The Treaties do not define such implementing acts. In textbooks, implementing acts are usually contrasted to 'delegated acts', where the Commission is granted power to amend non-essential elements of secondary legislation. The Commission defines implementing acts as non-legislative in nature that specify in greater detail legislation. These acts aim to provide greater uniformity in the Union and may be of individual or general application. Commission, 'Non-binding criteria for the determination of what constitutes a nanomaterial for the purposes of food legislation' [2019] OJ C223/1 para 2.
[127] Art 53(1) and (2) GFLR.
[128] Despite the possibility of such applications being made by only one single producer. Art 7 PPP Regulation.
[129] Art 56(1), Art 60(9), and Art 62(2) REACH Regulation.
[130] This is the case for the addition of chemical substances to Annex XIV and Annex XVII of the REACH Regulation. Art 58(1) and Art 133(4) REACH Regulation, which refers to Art 5a(1) to (4) of Decision 1999/468/EC. See Art 12 Comitology Regulation. Art 73(2), Art 133(4) which refers to Art 5a(1) to (4) of 1999/468. See Art 12 Comitology Regulation.
[131] Art 5(1) Comitology Regulation.
[132] Art 5(4)a ibid. While the Commission might nevertheless have the *de jure* option to demand deliberation in the case of no opinion or to appeal a negative one, these avenues have rarely proven effective. Arts 5(3) and (4) Comitology Regulation. Damian Chalmers and others, *European Union Law: Text and Materials* (5th edn, CUP 2024) 136.
[133] Art 53(1) and Art 58(2) GFLR, Art 7(3) and Art 35(2) GMO Regulation, Art 18(1) and Art 30(2) Deliberate Release Directive, Art 13(2) and Art 79(3) PPP Regulation. These legal instruments refer to Art 5 and Art 7 Decision 1999/468/EC, which previously established

Finally, the Advisory procedure only allows the committee to issue a non-binding opinion on the draft. This opinion, while not necessitating a vote, can be taken by a simple majority.[134] While non-binding in nature, practice shows considerable deference by the Commission to these opinions.[135] Comitology thus allows for the politicisation of these risk decisions. That these traditional risk frameworks mostly rely on the examination procedure, *de facto* requiring a positive vote, highlights the institutionally recognised need for this political input.

These older risk frameworks thus share an institutional commonality: mandatory agency opinions and comitology. Additionally, the frameworks feature further restrictions on the Commission's gatekeeping powers. The Plant Protection Product Regulation fully harmonises the procedure for the approval of active substances.[136] Member States, however, do retain the power to limit specific plant protection products.[137] Even when the Commission thus authorises an active substance, Member States can principally decide not to authorise the products that use it. Under the GMO framework, Member State derogations were initially made almost impossible. The system was designed as an exhaustive market-access harmonisation measure: once a GMO is authorised at the EU level, Member States are legally barred from restricting cultivation except through the extremely narrow derogation route under Article 114(5) TFEU, which requires new scientific evidence, a problem specific to the Member State, and a strict proportionality assessment. This system became unworkable, however, with the CJEU narrowly interpreting permitted exemptions, several national cultivation bans without a legal basis under the framework, comitology stalemates, and persistent political resistance from some Member States.[138] This finally led to a provision unique in internal market law: a specific right for Member States to opt out of the authorisation framework.[139] This evolution emphasised the disempowerment that comes with harmonised authorisation schemes. It also highlighted how, in certain cases, harmonisation can lead to severe opposition, prompting the Union legislator to reopen space for diversity. Under the General Food Regulation, finally, the Commission retains the exclusive rights to adopt certain measures when food or feed constitutes a risk to human health, animal health, or the environment.[140] However, Member States are less excluded from addressing these risks than in the aforementioned frameworks. First, the Commission

---

the examination procedure. Since the introduction of the Comitology Regulation, this is now governed by Art 5 Comitology Regulation. References in past laws have not been changed but must rather be read as referring to this article, as determined by Art 13(1)(c) Comitology Regulation.

134 Art 4(1) Comitology Regulation.

135 Chalmers and others (n 132) 134–139.

136 Art 1(3) and 4, recitals 9 and 27 PPP Regulation.

137 Arts 28 and 29(1)(a) PPP Regulation.

138 Maria Weimer, 'Risk Regulation and Deliberation in EU Administrative Governance: GMO Regulation and Its Reform' (2015) 21 European Law Journal 622 <https://doi.org/10.1111/eulj.12140>; Maria Lee, 'GMOs in the Internal Market: New Legislation on National Flexibility' (2016) 79 Modern Law Review 317 <https://doi.org/10.1111/1468-2230.12182>; Weimer (n 96).

139 Art 26b GMO Directive; ibid for discussion.

140 Art 53 GFLR.

may only adopt these measures where 'such risk[s] cannot be contained satisfactorily by means of measures taken by the Member State(s)'.[141] Additionally, the measures of the Commission are limited in time and can be taken in close cooperation with the Member States.[142]

Returning to the Digital Services Act, it is clear that the Commission's gatekeeping powers here are far less relationally constrained. First, its supervisory mandate is not subject to comitology. It issues its administrative decisions unilaterally, not through Member States. This follows from the legal qualification of its powers under the DSA. Unlike the traditional frameworks, its gatekeeping power is not exercised through implementing acts. Such a construction is unique in internal market law: the field is one with shared competences for the EU and Member States, where the latter are usually called upon for the enforcement of harmonised provisions.[143] The DSA also does not create an agency, nor does it require the Commission to receive an opinion from one prior to enforcing its gatekeeping powers. Instead, it only requires the Commission to 'take utmost account' of the opinion of an institution that comprises the national regulatory authorities, the Board, when initiating infringement proceedings against VLOP or VLOSE providers[144] and when issuing[145] or amending[146] crisis measures. The Commission is not legally bound by these opinions. However, the recitals of the DSA do state that deviation from them requires justification. In that sense, it is similar, if not identical, to the Commission's relational duties toward EFSA and ECHA under the four risk frameworks. Finally, this framework structurally excludes Member States from contesting the Commission's gatekeeping powers. The risks are framed as pan-European, meaning that there are no explicit subsidiarity clauses, opt-outs, or differentiated procedures. Instead, only the competent DSCs can investigate and fine VLOP and VLOSE providers for other violations of the DSA to address systemic risks indirectly. Even then, however, those investigations can always be taken over by the Commission.[147]

3.5 Conclusion

The gatekeeping comparison reveals something that a sectoral reading of the distinct frameworks would miss: the DSA is not a departure from the tradition of EU internal market risk regulation. It constitutes an intensification of one of its core features. The Commission has long been the institution that converts indeterminate risk into binding administrative decisions. These are instances where mutual recognition among Member States is seen as inadequate to address evolving risks on the internal market. What is new in the DSA is therefore not the function itself, but a legislative choice to instantiate it without the relational constraints that earlier legislators built

[141] Art 53(2) GFLR.
[142] Art 53(2) GFLR.
[143] Wilman, Kaleda and Loewenthal (n 47) 384.
[144] Art 66(4) DSA.
[145] Art 36(1) DSA.
[146] Art 36(8) DSA.
[147] Art 66(2) DSA.

around it. Comitology voting rights, mandatory agency opinions, differentiated regulation, opt-outs, and explicit subsidiarity requirements were not accidental features of traditional frameworks. They reflect an institutionally embedded recognition that delegating an open-ended power to convert risk into market conditions requires countervailing checks. This begs the question of why the legislator chose to intensify these centralised executive powers in the case of the DSA.

4 Reflections

4.1 Introduction

In this final part, I draw on literature to explain why the Union legislator came to centralise such risk-based powers with the European Commission. This reveals a more complex narrative than simply the Commission seeking to expand executive control through risk regulation. What we see, rather, is the Commission willing to do what it deems necessary to pursue its vision of the internal market for intermediary services. This vision sees only Member States where these services are established (usually countries known for their hospitable tax regimes) with supervisory powers over the DSA. To appease the Member States that lose effective regulatory controls, namely the Member States of destination, the Commission thus offers itself as the final gatekeeper. The overlap of executive power and risk regulation in the DSA is thus the result of the Commission appeasing Member States, rather than seeking to expand its influence over them.

4.2 The DSA as compensatory centralisation

To understand how this uniquely centralised power emerged, I will briefly discuss the general origins of the DSA. Across many liberal democracies, social media services were not heavily regulated at the start of the 2010s. Government interference in the operation of those services was disfavoured because of its perceived threats to free speech and economic growth.[148] However, several key 'shock events' transformed platform governance into a politically salient issue in several jurisdictions, where several stakeholders demanded increased regulation.[149] The proliferation of content, such as the livestream videos of the Christchurch mass-shooting or Trump's deplatforming in the wake of the 2021 Capitol insurrection, provided strong impulses for increased government intervention.[150] This was also true for the EU, where several Member States increasingly felt the need to regulate such services. In Germany, for example, key decision-makers grew increasingly dissatisfied with Facebook and Twitter for their inaction against hate speech directed toward migrants. They sought to enhance the duties of social media

[148] Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (OUP 2019) ch 4; Elettra Bietti, 'A Genealogy of Digital Platform Regulation' (2023) 7 Georgetown Law Technology Review 1 <https://doi.org/10.2139/ssrn.3859487>.
[149] Gorwa (n 13).
[150] ibid chs 6–7.

services through enhanced take-down responsibilities.[151] This development was the backdrop for the European Union to intervene. Increased national laws, driven by this increased political salience, would construct a fragmentation of laws, which the Commission saw as a threat to the internal market for intermediary services.[152] This is evidenced by its active role in contesting the German law[153] and its subsequent legislative proposal to further harmonise this market through the DSA.

However, the Commission did not aim to centralise platform regulation at the Union level. Instead, it primarily sought to anchor the enforcement of the DSA with Member States of origin. In its proposal, public enforcement of the DSA was reserved for Member States where the services were established (Member States of origin); the Commission proposed only a subsidiary role for itself.[154] It could only initiate proceedings after the DSC of the Member State of origin of the VLOP had found the provider in breach of the risk-based obligations, where the DSC had requested an intervention by the Commission or where the DSC failed to take investigatory or enforcement initiatives at the request of the European Commission.[155] In that sense, the Commission thus sought to advance the country-of-origin principle in terms of enforcement.[156]

This approach, however, met strong political resistance. The French, holding the presidency of the Council at the time of the negotiations, had instead wanted an enhanced ability of Member States of destination to enforce the DSA.[157] This demand was driven by frustration with how the General Data Protection Regulation (GDPR)[158] had been enforced.[159] Under the GDPR's decentralised system, enforcement had also been delegated to Member States of origin. This meant that principally only a few Member States were responsible for enforcement, where some of those either could or would not

[151] ibid ch 5.
[152] ibid.
[153] With new federal elections coming up, the German government sought to vote on the NetzDG with the incumbent legislative branch. It was unsure whether the elections would lead to a legislative authority as welcoming to the law. Consequently, the Commission invoked a procedural objection to the law shortly before the elections, which halted the vote on the law until after those elections. The Commission has been described as only lifting this objection until after the German executive agreed to significantly lower regulatory standards; ibid.
[154] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC COM/2020/825' (15 December 2020), Arts 51(1) and 40(1).
[155] ibid.
[156] Art 3(2) e-Commerce Directive.
[157] Husovec (n 10) 421.
[158] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[159] Ilaria Buri and Joris Van Hoboken, 'The DSA Supervision and Enforcement Architecture' (*DSA Observatory*, 22 June 2022); Ilaria Buri, 'A Regulator Caught Between Conflicting Policy Objectives' (Verfassungsblog, 31 October 2022) <https://doi.org/10.17176/20221031-220451-0> accessed 6 March 2026; Husovec (n 10) ch 17.

effectively enforce the rules.[160] The concern was that the DSA, if built on the same logic, would reproduce that structural under-enforcement. In this view, the proposal essentially stimulated regulatory arbitrage on the internal market: among the world's most economically and politically powerful firms, companies could avoid regulation and supervision by establishing themselves in Member States that provide favourable regulatory conditions, often times in conjunction with tax advantages.

The final text of the DSA represents a compromise between the two positions. On the one hand, the DSA firmly places enforcement privileges with Member States of origin. However, when it comes to VLOP and VLOSE providers, the DSA features what I have described as a primarily centralised enforcement gatekeeping position for the Commission. Both the Commission and DSC of the Member State of origin have concurrent enforcement powers in respect to the general DSA obligations, where the Commission can always take precedence over the DSC of origin.[161] Regarding risk regulation, the Commission takes exclusive control.[162] As the Commission thus set out to further enhance the regulatory and supervisory powers of Member States of origin, a political backlash forced it to take up an additional centralised role. The centralisation of risk-based powers is thus not the result of the Commission seeking to build its own executive powers, but quite the reverse. Simply put, the centralisation of risk-based powers functions here as a political corrective to the asymmetrical decentralisation of DSA enforcement.

While it appears that Member States thus agreed with the Commission on the urgency of platform risks, distrust between them prompted a conferral of power to the Commission. This combination of urgency and mutual distrust seems to explain why the framework does not rely on an agency like the aforementioned four traditional frameworks. While it was considered by the Commission and received academic and political support, the creation of an agency was seen as too time-consuming for the purposes of the law.[163] These same considerations might explain why comitology was not opted for.[164]

The discussion on the origins of the DSA reveals that the Commission initially saw itself as a subsidiary DSA enforcement authority relative to Member States of origin. There are three interconnected points I want to make here. First, it should be noted that the final Commission powers under the DSA in no way represent its initial intentions. Its proposal simply does not represent a power grab toward enhanced control and influence. When discussing the DSA in the context of the developing regulatory state, it is

---

[160] ibid.
[161] Art 56(1)–(4) DSA.
[162] Art 56(2) DSA.
[163] Husovec (n 10) 425.
[164] Nothing in the Treaties would have prevented the lawmaker from qualifying the Commission's powers as implementing acts. This follows simply from the fact that EU law does not legally define such acts. For a recent discussion on defining implementing acts, see Guido Bellenghi and Ellen Vos, 'Rethinking the Constitutional Architecture of EU Executive Rulemaking: Treaty Change and Enhanced Democracy' (2024) 15 European Journal of Risk Regulation 793 <https://doi.org/10.1017/err.2024.35>.

important to be wary of narratives that say otherwise. While there are other examples of the Commission actively increasing powers through developing risk-based frameworks, the DSA constitutes a more nuanced one. Second, this development raises questions about the role of the country-of-origin principle in the internal market. My description provides evidence of the ripple effects this principle creates. In 2000, well before the emergence of social media services, the Union legislator determined that the internal market requires minimal intervention against information society services by Member States of destination.[165] This decision set up clear incentives for regulatory arbitrage and sent out a message to many public authorities that regulation of such services would be subject to heavy legal scrutiny. Indeed, Kramer shows how the qualification of Airbnb as an intermediary service effectively created a regulatory chill for the city of Amsterdam to address a pressing local issue; the rise of illegal short-term rentals.[166] He further argued that the maintenance of this principle meant that additional regulation of short-term rental services necessarily had to occur through Union harmonisation, instead of favouring decentralised approaches by cities.[167] In the same vein, I demonstrate how the expansion of centralised executive powers through risk regulation is a path dependency of internal market law predicated on mutual recognition, rather than on regulatory diversity. Further research into the Commission's use of these powers should therefore always be juxtaposed with the question of how the regulatory set-up disempowers Member States that could have taken different, perhaps more locally contextualised, approaches to the same regulatory issue. Finally, this description allows me to frame the Commission's central powers as compensatory centralisation. The Union legislator aims to compensate for issues of regulatory arbitrage by vesting far-reaching executive powers in the Commission. However, this compensation is only partial in scope: it exclusively relates to platforms and search engines that have reached a specific user count. Consequently, services like Airbnb or Reddit are still exclusively regulated by DSCs of origin.[168]

4.3 The DSA in the age of functionalism and trust issues

So far, this paper has been doctrinal and descriptive. This has allowed me to compare the respective frameworks and identify their trajectory: the delegation of administrative risk-based powers to the European Commission. Now, I shift focus to why the past older internal market risk frameworks constrained the Commission's powers. This will allow me to highlight how the absence of these constraints may influence the Commission's strategy under the DSA and how this affects the framework's political legitimacy.

The four traditional frameworks represent instances where Member States trust the European Commission to address general risks on the internal market. At the same time, the laws also represent a limited amount of trust in the Commission. This is unsurprising, especially in light of the BSE crisis.

165 Art. 3(2)e-Commerce Directive.
166 Kramer (n 71).
167 ibid.
168 Art 56(1) DSA.

When the Commission sought to prevent Member States from restricting access to UK beef products in the face of evolving research on health risks, a subsequent European Parliament inquiry found the Commission to have engaged in a policy of disinformation.[169] That crisis did not merely damage the Commission's credibility in food safety; it exposed the absence of institutional conditions capable of making its exercise of centralised risk authority legitimate. The response was structural. Food law and other risk-based instruments underwent reforms that introduced both Union and Member State voices, as well as independent scientific expertise, into Commission decision-making.[170] Mandatory agency opinions, comitology, and differentiated national safeguards were forged, in part, through that crisis. They represent the EU's institutionally embedded recognition that trust is earned through institutional deliberation. Correspondingly, several scholars have theorised these mechanisms in complementary ways. Christian Joerges and Jürgen Neyer demonstrated how comitology evolved into a deliberative body where consensual rather than conflictual decision-making reigned.[171] They argued this reflected a political process in which the quality of reasoning, the authority of experts, and commitment to legal principles matter in ways that rational utilitarianism cannot capture.[172] Where the Commission imposes norms across the entire EU, Joerges argues elsewhere, it derives legitimacy by grounding those norms in a validity criterion that is intrinsically universal: scientific expertise.[173] In that manner, the Commission escapes what he calls the 'built-in parochialism' of law.[174] Later scholarship described these governance processes as experimentalist: networked agencies, councils of regulators, and comitology functioning as adaptive fora for the iterative construction of shared regulatory standards.[175] More generally, Vivien Schmidt argued that networked agencies and comitology constituted crucial sources of throughput legitimacy: a procedural criterion concerned with the quality of governance processes, as judged by the accountability of policymakers and the transparency, inclusiveness, and the openness of those processes.[176] Others have argued that these governance processes are a way

---

[169] Ellen Vos, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' (2000) 23 Journal of Consumer Policy 227 <https://doi.org/10.1023/A:1007123502914>.
[170] ibid; Weimer (n 96) ch 2.
[171] Christian Joerges and Jürgen Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 European Law Journal 273 <https://doi.org/10.1111/1468-0386.00031>.
[172] ibid.
[173] Christian Joerges, 'Law, Science and the Management of Risks to Health at the National, European and International Level: Stories on Baby Dummies, Mad Cows and Hormones in Beef' (2000) 7 Columbia Journal of European Law 1.
[174] ibid.
[175] Charles F Sabel and Jonathan Zeitlin, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010).
[176] Vivien Ann Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output *and* "Throughput"' (2013) 61 Political Studies 2 <https://doi.org/10.1111/j.1467-9248.2012.00962.x>; Vivien Ann Schmidt, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (OUP 2020).

for the Commission to produce epistemic legitimacy.[177] Here, it grounds its contested risk decisions in forms of knowledge that heterogeneous actors can recognise as authoritative even when they disagree on outcomes. What unites these accounts is a common insight: when the EU centralises risk authority, it can only sustain the trust of those subject to that authority by building procedural conditions that make the exercise of that authority transparent, contestable, and responsive. Comitology and mandatory agency represent areas of deliberation between Member States, the Commission, and other stakeholders necessary to support the political legitimacy of administrative decision-making. The other discussed limits on Commission risk regulation, differentiated decision-making, national safeguards, and opt-outs represent additional limits to the reach of this deliberation.

As my doctrinal analysis has demonstrated, there are no legally binding deliberation fora that limit the Commission in its enforcement of the DSA. The regulatory dialogue remains between the Commission and the service providers. Section 4.2 demonstrates that this happened as a result of distrust from Member States of destination toward Member States of origin. The former saw the latter as inadequate supervisors of VLOP and VLOSE providers, where the only available compromise was the Commission filling this potential enforcement vacuum. The situation, in other words, is one where intense distrust among Member States and powerful firms comes together, pushing toward unseen Union centralisation. That intense level of distrust arguably contributed to the absence of further deliberative constraints on Commission risk regulation. The departure from these institutional constraints on the Commission, driven by compensatory intentions, maps precisely onto what Edoardo Chiti and Joana Mendes describe as the 'age of functionalism' of EU administrative law,[178] where integration, 'stripped of political ambitions of constitutional futures', operates through complex administrative procedures.[179] Here, the goal is 'no longer to refine institutional solutions to strengthen their normative (and, where feasible, democratic) foundations, but to secure workable solutions despite the remaining legal constraints and the increasingly salient political resistance'.[180] This has been the reason for much criticism of the DSA. Rachel Griffin draws on critical theory to argue that this framework offers the Commission the opportunity to coalesce with firms in policing certain speech, while also deregulating them.[181] Additionally, the delegation of such essential powers to the Commission and regulated firms has also been described as constitutionally invalid.[182] Yet, on the other end of the spectrum sit more

[177] Maria Weimer and Anniek de Ruijter, *Regulating Risks in the European Union: The Co-Production of Expert and Executive Power* (Hart Publishing 2017); Weimer (n 96); Marta Morvillo, 'Glyphosate Effect: Has the Glyphosate Controversy Affected the EU's Regulatory Epistemology?' (2020) 11 European Journal of Risk Regulation 422 <https://doi.org/10.1017/err.2020.11>.
[178] Eduardo Chiti and Joana Mendes, 'The Evolution of EU Administrative Law' in Paul Craig and Gráinne De Búrca, *The Evolution of EU law* (3rd edn, OUP 2021) 369–372.
[179] ibid 370.
[180] ibid.
[181] Griffin (n 10).
[182] Palumbo (n 10).

aspirational accounts, seeing an empowered Commission surrounded by civil society as an actor of good.[183]

Taking a step back from these normative opinions about centralised Commission powers, the strategy of the Commission under the DSA will require further scrutiny. Robert Gorwa's extensive political science work on the dynamics of platform regulation highlights how key shock events drive nation-states to regulate platforms.[184] Furthermore, he demonstrates how institutional constraints and the normative landscape, alongside capacity constraints, shape regulatory strategies.[185] Ever since the introduction of the DSA, the EU has been faced with several potential shock events like alleged Russian interference in Romanian elections through TikTok, the sale of child-like sex dolls on Shein in France, and AI-generated child sexual abuse materials on X, heavily contested in several Member States.[186] These events drive national calls for enhanced regulation. Even when we assume that the DSA provides adequate obligations to outlaw such events, regulatory enforcement remains with DSCs of origin and the European Commission, with the latter enjoying an enforcement privilege over the former. The aforementioned events, for example, prompted Commission investigations under the risk-based framework and general DSA obligations.[187] The Commission here is delegated not just with the task to enforce the DSA against VLOP and VLOSE providers, but arguably also to manage the demands of 27 Member States and other stakeholders in reaction to these shock events. This unique mixture of institutional arrangements and a diverse normative landscape may fundamentally constrain the Commission in pursuing the goals of the DSA. One potent research agenda here is to investigate how the European Commission bargains with Member States in this context. This would most likely happen not only through cooperation and dialogue with other DSCs, but also through informal communications and infringement procedures against Member States.

---

[183] Niklas Eder, 'Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation' (2024) 25 German Law Journal 1197 <https://doi.org/10.1017/glj.2024.24>.

[184] Gorwa (n 13) ch 9.

[185] ibid ch 4.

[186] Eliza Gkritsi, 'EU Opens Investigation into TikTok and the Romanian Election' (*Politico*, 17 December 2024); Justin Hendrix and Ramsha Jahangir, 'Tracking Regulator Responses to the Grok "Undressing" Controversy' (*TechPolicy.Press*, 1 June 2026); 'EU Opens Investigation into Shein over Sale of Childlike Sex Dolls' (*Le Monde*, 17 February 2026).

[187] Commission, 'Commission opens formal proceedings against TikTok on election risks under the Digital Services Act' (17 December 2024) <https://digital-strategy.ec.europa.eu/en/news/commission-opens-formal-proceedings-against-tiktok-election-risks-under-digital-services-act> accessed 6 March 2026; Commission, 'Commission investigates Grok and X's recommender systems under the Digital Services Act' (26 January 2026) <https://digital-strategy.ec.europa.eu/en/news/commission-investigates-grok-and-xs-recommender-systems-under-digital-services-act> accessed 6 March 2026; Commission, 'Commission launches investigation into Shein under the Digital Services Act' (17 February 2026) <https://digital-strategy.ec.europa.eu/en/news/commission-launches-investigation-shein-under-digital-services-act> accessed 6 March 2026.

4.4 Conclusion

This part sets out to explain an anomaly: why the DSA vests the Commission with exclusive, institutionally unchecked risk-based powers, departing from the deliberative architecture that has governed comparable Union risk regulation for decades. The answer is not a story of institutional ambition but of institutional improvisation under political constraint. The Commission did not seek this role. It inherited it from a structural condition embedded in internal market law: a country-of-origin principle that, once applied to platform regulation, generated predictable incentives for regulatory arbitrage and predictable resentment among those Member States that bore its consequences without wielding any supervisory powers. Compensatory centralisation was the political price of maintaining the principle.

I attempted to make the procedural costs of this compensatory centralisation visible. The deliberative mechanisms that legitimise Commission risk authority in comparable frameworks are not merely technical refinements. They are institutional responses to a constitutive tension: centralised risk authority over heterogeneous political communities requires ongoing justification to those communities. The absence of these deliberative mechanisms in the DSA does not dissolve that tension. It defers it. Whether workable governance can substitute for legitimate governance, and for how long, is the question the Commission's enforcement practice under the DSA will ultimately have to answer.

5 Conclusion

This paper has aimed to investigate how risk regulation and executive power come together in the EU, using the DSA's systemic risk framework as its entry point. The goal was to find out how centralised the Commission's discretionary risk-based powers are in the framework, how they relate to earlier internal market risk-based frameworks, and why this difference matters. Three findings emerge from this investigation.

First, the DSA vests the power to give authoritative meaning to 'systemic risk' exclusively in the European Commission. Within a collaborative governance architecture that incorporates civil society, researchers, and DSCs, the Commission retains the sole prerogative to convert indeterminate risk duties into binding determinations. Member States are structurally excluded from contesting that power, both legislatively and administratively. The framework's most important relationship is bilateral: between the regulated firms, who self-define risks, and the Commission, which can oppose those definitions and applications.

Second, this bilateral structure is not without precedent, but it is without the constraints that accompanied its precedents. The Commission has long served as a gatekeeping institution in EU internal market risk regulation. In that role, it converts indeterminate legislative risk standards into binding conditions for market access. What distinguishes the DSA is the legislative choice to instantiate this function without the comitology procedures, mandatory agency opinions, and differentiated national safeguards that earlier legislators built around it. Those constraints were not incidental. They reflected an institutionally embedded recognition, forged in part through crises, that delegating open-ended risk powers to the Commission requires countervailing procedural sources of legitimacy.

Third, this departure was not the product of Commission overreach. The centralisation of risk-based powers in the DSA was compensatory toward Member States who lost regulatory and supervisory powers over service providers. The Commission did not seek this role; it accepted it as the price of maintaining its vision of an internal market based on mutual recognition through the country-of-origin principle. The functionalist logic of EU administrative law that Chiti and Mendes diagnose elsewhere is clearly visible here: institutional design driven by workability rather than normative ambition, producing an arrangement that is effective as a political compromise but democratically underspecified as a governance structure.

The combined effect is a framework in which risk, an inherently contested and politically saturated concept, is adjudicated through a dialogue between an unconstrained executive authority and some of the most economically powerful firms in the world. At the same time, the Commission is tasked with building and maintaining trust with Member States in an area that is heavily politicised and complex. This raises profound questions about the framework's tenability and, most importantly, its legitimacy.

Bibliography

Almada M, *Delegating the Law of Artificial Intelligence: A Procedural Account of Technology-Neutral Regulation* (European University Institute 2024) https://data.europa.eu/doi/10.2870/94276

Alemanno A, 'Regulating the European Risk Society' in Alberto Alemanno and others (eds), *Better Business Regulation in a Risk Society* (Springer 2013)

Arroyo J and others, 'The EU Vaccines Strategy: A Mixed Bag of Achievements and Discontent' (2025) 16 European Journal of Risk Regulation 653 https://doi.org/10.1017/err.2024.92

Bellenghi G and Vos E, 'Rethinking the Constitutional Architecture of EU Executive Rulemaking: Treaty Change and Enhanced Democracy' (2024) 15 European Journal of Risk Regulation 793 https://doi.org/10.1017/err.2024.35

Bietti E, 'A Genealogy of Digital Platform Regulation' (2023) 7 Georgetown Law Technology Review 1 https://doi.org/10.2139/ssrn.3859487

Buri I, 'A Regulator Caught Between Conflicting Policy Objectives' (*Verfassungsblog*, 31 October 2022) https://doi.org/10.17176/20221031-220451-0

Buri I and Van Hoboken J, 'The DSA Supervision and Enforcement Architecture' (DSA Observatory, 22 June 2022)

Carvalho MC de, 'It Will Be What We Want It to Be: Sociotechnical and Contested Systemic Risk at the Core of the EU's Regulation of Platforms' AI Systems' (2025) 16 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 35 https://www.jipitec.eu/jipitec/article/view/420

Chiti E and Mendes J, 'The Evolution of EU Administrative Law' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021)

Cohen JE, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (OUP 2019)

De Gregorio G and Dunn P, 'The European Risk-Based Approaches: Connecting Constitutional Dots in the Digital Age' (2022) 59 Common Market Law Review 473 https://doi.org/10.54648/COLA2022032

De Witte B, 'The European Union's COVID-19 Recovery Plan: The Legal Engineering of an Economic Policy Shift' (2021) 58 Common Market Law Review 635 https://doi.org/10.54648/COLA2021046

Divissenko N, 'From Draghi Report to the European Commission's Regulatory Agenda: Regulatory Transformation or Deregulation?' (*European Law Blog*, 2025) https://doi.org/10.21428/9885764c.bab0816b

Eder N, 'Making Systemic Risk Assessments Work: How the DSA Creates a Virtuous Loop to Address the Societal Harms of Content Moderation' (2024) 25 German Law Journal 1197 https://doi.org/10.1017/glj.2024.24

Fisher E, 'Framing Risk Regulation: A Critical Reflection' (2013) 4 European Journal of Risk Regulation 125 https://doi.org/10.1017/S1867299X00003299

Flear ML, *Regulating New Technologies: EU Internal Market Law, Risk, and Socio-Technical Order* (OUP 2017)

Gorwa R, *The Politics of Platform Regulation: How Governments Shape Online Content Moderation* (OUP 2024)

Griffin R, 'Codes of Conduct in the Digital Services Act' (2024) Technology and Regulation 167 https://doi.org/10.71265/a54szq76

Griffin R, 'Governing Platforms through Corporate Risk Management: The Politics of Systemic Risk in the Digital Services Act' [2025] European Law Open 1 https://doi.org/10.1017/elo.2025.17

Harfst J-O, Mast T and Schulz W, 'Independence as a Desideratum' (*Verfassungsblog*, 16 July 2025) https://doi.org/10.59704/50020240f8894397

Heyvaert V, 'Governing Climate Change: Towards a New Paradigm for Risk Regulation' (2011) 74 Modern Law Review 817 https://doi.org/10.1111/j.1468-2230.2011.00874.x

Husovec M, *Principles of the Digital Services Act* (OUP 2024)

Joerges C, 'Law, Science and the Management of Risks to Health at the National, European and International Level: Stories on Baby Dummies, Mad Cows and Hormones in Beef' (2000) 7 Columbia Journal of European Law 1

Joerges C and Neyer J, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology' (1997) 3 European Law Journal 273 https://doi.org/10.1111/1468-0386.00031

Keller D, 'Regulating Platform Risk and Design: ChatGPT Says the Quiet Part out Loud' (Center for Internet and Society at Stanford Law School, 2024) https://cyberlaw.stanford.edu/blog/2024/08/regulating-platform-risk-and-design-chatgpt-says-the-quiet-part-out-loud/

Kellerbauer M, Klamert M and Tomkin J, *The EU Treaties and Charter of Fundamental Rights: A Commentary* (2nd edn, OUP 2024)

Kramer D, 'Airbnb, the City, and the Drive for European Integration' (2024) 3 European Law Open 500 https://doi.org/10.1017/elo.2024.30

Lee M, 'GMOs in the Internal Market: New Legislation on National Flexibility' (2016) 79 Modern Law Review 317 https://doi.org/10.1111/1468-2230.12182

Leino-Sandberg P, 'The Secret Life of the EU Treaties: NGEU and the Politics of the EU's "Living Constitution"' [2026] European Law Open 1 https://doi.org/10.1017/elo.2025.10055

Maelen CV and Griffin R, 'Twitter's Retreat from the Code of Practice on Disinformation Raises a Crucial Question: Are DSA Codes of Conduct Really Voluntary?' (DSA Observatory, 12 June 2023)

Micklitz H-W and Tridimas T, *Risk and EU Law* (Edward Elgar Publishing 2015)

Morvillo M, 'Glyphosate Effect: Has the Glyphosate Controversy Affected the EU's Regulatory Epistemology?' (2020) 11 European Journal of Risk Regulation 422 https://doi.org/10.1017/err.2020.11

Morvillo M, Arcuri A and García Caro D, 'Green Light to Glyphosate, Pesticides and NGTs: Backpedaling on the Green Deal?' (*European Law Blog*, 2024) https://doi.org/10.21428/9885764c.05484336

Palumbo A, 'Systemic Risk Management and the Constitutional Limits of Delegating Political Discretion: An Analysis of the DSA and the AI Act' [2025] European Journal of Risk Regulation 1 https://doi.org/10.1017/err.2025.10069

Panahi T and De Bittencourt Siqueira A, 'Soft Law, Hardcore? The Legal Enforcement of Codes of Conduct under the Digital Services Act' (*Verfassungsblog*, 3 June 2024) https://doi.org/10.59704/73aaa5ac9d80b65b

Ruffert M and Leino-Sandberg P, 'Next Generation EU and Its Constitutional Ramifications: A Critical Assessment' (2022) 59 Common Market Law Review 433 https://doi.org/10.54648/COLA2022031

Sabel CF and Zeitlin J, *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP 2010)

Schmidt VA, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 Political Studies 2 https://doi.org/10.1111/j.1467-9248.2012.00962.x

Schmidt VA, *Europe's Crisis of Legitimacy: Governing by Rules and Ruling by Numbers in the Eurozone* (OUP 2020)

Vargas MV and De Gregorio G, 'The Transformation of European Risk Regulation: Managing Uncertainty and Powers in the Digital Age' [2026] European Journal of Risk Regulation 1 https://doi.org/10.1017/err.2025.10079

Vos E, 'EU Food Safety Regulation in the Aftermath of the BSE Crisis' (2000) 23 Journal of Consumer Policy 227 https://doi.org/10.1023/A:1007123502914

Vos E, 'Three Decades of EU Risk Regulation Research' (2017) 8 European Journal of Risk Regulation 47 https://doi.org/10.1017/err.2016.7

Weimer M, *Risk Regulation in the Internal Market: Lessons from Agricultural Biotechnology* (1st edn, OUP 2019)

Weimer M, 'Risk Regulation and Deliberation in EU Administrative Governance: GMO Regulation and Its Reform' (2015) 21 European Law Journal 622 https://doi.org/10.1111/eulj.12140

Weimer M and de Ruijter A, *Regulating Risks in the European Union: The Co-Production of Expert and Executive Power* (Hart Publishing 2017)

White J, *Politics of Last Resort: Governing by Emergency in the European Union* (OUP 2020)

Wilman F, Kaleda SL and Loewenthal P-J, *The EU Digital Services Act* (1st edn, OUP 2024)

Yeung K and Ranchordás S, *An Introduction to Law and Regulation: Text and Materials* (2nd edn, CUP 2024)

Zingales N, 'The DSA as a Paradigm Shift for Online Intermediaries' Due Diligence' (*Verfassungsblog*, 2 November 2022) https://doi.org/10.17176/20221102-215609-0