

Getting the Digital Services Act right: 3 recommendations for a thriving EU digital ecosystem

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REGULATING THE INTERNET IN THE AFTERMATH OF COVID-19

The Digital Services Act (DSA) – a landmark legislation that will establish limits and obligations in the activities of digital services and online platforms – has raised expectations in the EU. If it gets it right, the EU could set an example for future global internet governance.

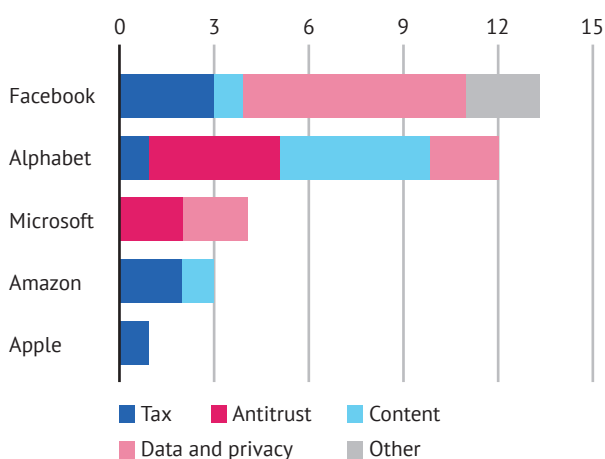
With the COVID-19 crisis still ongoing, policymakers now have a real worst-case-scenario to consider when spelling out new obligations for digital services and platforms. Illegal and offensive content, misleading advertising, disinformation, targeted propaganda and market distortions are only some of the shortcomings of the internet during this crisis.

Previous major events, such as the 2016 Brexit referendum and US Presidential election, and the 2019 European Parliament election, also highlighted how vulnerable public opinion is to manipulation, polarisation and disinformation.

The dimensions of the problem are obvious, but agreeing on anything more than voluntary commitments will be a battle (see Figure).¹ So far, the most divisive questions in the debate are, firstly, about defining the threshold of minimum obligations that all digital services and platforms must follow. Secondly, the Commission also needs to consider the scope of additional or *ex ante* legislation, that addresses market distortions by giant platforms that act as gatekeepers of the market.

Figure: Big Tech's troubles in Brussels

Number of EU-related material risks, tax and legal matters



Source: *The Economist*, "The power of privacy", 23 March 2019.

BACKGROUND – THE E-COMMERCE DIRECTIVE AND ITS OUTDATED LIABILITY REGIME

Commission President Ursula von der Leyen promised to “upgrade [the Union’s] liability and safety rules for digital platforms, services and products”.² The current legal framework for digital services has hardly changed since the adoption of the e-Commerce Directive (ECD, 2000/31/EC) in 2000.

The ECD aimed to harmonise minimum standards of content liability for online intermediaries such as online platforms and digital services across the EU.³ It introduced a range of ‘safe harbour’ regimes, which exempt online intermediaries from a wide range of user-generated liabilities. The liabilities include copyright infringements, defamation, misleading advertising, unfair competition and illegal content (e.g. terrorism content, hate speech).

The safe harbour regimes were established under Articles 3, 12, 13 and 14 of the ECD. Article 14 is of particular interest, as it provides liability exemption for “hosting” intermediaries, which generally provide services in “storage and distribution”, “networking” and “search and referencing”.⁴ In other words, Article 14 concerns online platforms and services such as YouTube, Amazon, Facebook, Airbnb and Google.

Article 14 states that an online intermediary is “not liable for the information stored at the request of a recipient of the service”. This exemption applies insofar as the intermediary “does not have actual knowledge of illegal activity” and “is not aware of facts or circumstances from which the illegal activity or information is apparent”.⁵ This applies to the condition that the intermediary removes or disables access to illegal content as soon as they become aware of its existence. Additionally, intermediaries are subject to ‘duties of care’ and other obligations for removing illegal online content, at the request of a public authority.

This means that intermediaries do not have an obligation to protect users’ fundamental rights, such as freedom of expression or privacy. As unprincipled as this may sound, there are good reasons as to why such protections were omitted at the time.

First, monitoring user content to protect users’ fundamental rights would have placed an immense administrative burden on the platforms and digital services. It would have stifled innovation and competition in a still nascent market. Second, determining the (il) legality of user content to protect users’ fundamental rights should not be the responsibility of intermediaries. Issuing a judgment on the legality of user-generated content is ultimately the job of a court. The ECD’s liability rules intended to remove obstacles from entering the market, and to prevent platforms from handling user-generated content illegally.

However, this self-regulatory approach presented citizens and regulators with a catch-22. The ECD exempts intermediaries from liability insofar as they are unaware of the illegal content they host. Thus, if they monitor the legality of the content they host proactively, they could lose the benefit of liability exemption. As a result, intermediaries are disincentivised from taking adequate voluntary measures to ensure that the content they host is legal. Legal circles refer to this as the ‘Good Samaritan paradox’.⁶

STATE OF PLAY – WHERE DO EU AND NATIONAL AUTHORITIES STAND?

Despite the legal instruments that have complemented the ECD since 2000,⁷ the EU now needs something more ambitious that can align innovation with fair competition and the protection of fundamental rights. In this regard, the DSA is tremendously critical, as it could define how central aspects of the internet will look for generations to come.

Crucially, discussions about the DSA, its drafting and consultations are all taking place during the COVID-19 pandemic.

Politically, the crisis has been a catalyst for realising the DSA’s significance. On 9 June, the European Council called for “swift action” “to enhance citizens’ safety and to protect their rights in the digital sphere across the Single Market.”⁸ It also recognised that although “certain very large online platform companies provide visibility [...] to smaller companies” through advertising services, “they also draw extensive assets, including vast amounts of data, which may turn them into gatekeepers in the digital economy. This may risk restricting the ability of new innovators to successfully enter the market, and limiting the choice for consumers.”⁹

The Commission’s plans to present a draft of the DSA toward the end of 2020 might have to be postponed to the first quarter of 2021. In the meantime, it has commissioned a study that will examine the network effects and gatekeeping power of digital platforms, as well as options for redressing competitive disparities between dominant players and new market entrants.¹⁰

The DSA consultations, which will remain open until 8 September, cover two debates. The first concerns enabling intermediaries to provide their services across the EU. The second addresses market distortions in and the level playing field of the EU’s Digital Single Market.

The European Parliament has shown a strong interest in the DSA legislation. Over the past months, the Parliament’s committees on Civil Liberties, Internal Market and Legal Affairs published their draft reports on the legislation. These have given the Commission strong indications about where the wind blows in the Parliament, which could help avoid delays in its enactment.

The Parliament has suggested that the DSA would offer opportunities for coregulation, increase media quality and highlight social platforms’ highly systemic function for EU democracies. However, despite these signs of political will, as always, the devil is in the detail: the main conflict lines will likely broaden during the tabling of the DSA.

Meanwhile, developments at the national level are sending the Commission early signals about how ambitious its drafting of the DSA can be. Until now, top digital officials in Germany, France, Italy, Spain and Portugal have made clear that regulatory dependency on dominant platforms should end. An interesting example is a judgment from Germany’s highest court in June, ordering Facebook to stop merging and sharing user data across its platforms immediately.¹¹

So far, dominant platforms’ representatives in Brussels have argued that they are already doing a lot more than what is expected of them under the ECD and that they require more clarity about their obligations. At the same time, representatives have strongly argued that the ECD’s liability regime framework should remain unchanged.

PROSPECTS – GETTING THE DSA RIGHT

These are the main conflict lines in the DSA debate: defining minimum obligations for all platforms which apply regardless of their size – the *de minimis* rule; and defining additional rules for gatekeeping platforms – *ex ante* legislation – that will apply to giant platforms, whose access to data enables them to profile users and to influence opinion information online.

Firstly, there are **concerns about the risks citizens face in their online engagements and the protection of their rights**. Tackling these risks will require measures that increase transparency about how platforms moderate content. Content moderation is a standard practice among platforms and is usually achieved via automated decision-making (ADM) tools because the sheer abundance of information is impossible for human agents alone to process. Using ADM, platforms can identify, filter or remove illegal content that may fall under a certain category (e.g. terrorist, child sexual abuse, racist and xenophobic hate speech).

No matter how beneficial this practice may sound, it poses serious threats to fundamental rights, such as freedom of expression and opinion. ADM tools are unable to understand the highly contextual and delicate nuances of speech. While ADM can potentially identify illegal content, it can also silence groups and individuals whose messages are not illegal and as a result can reinforce social biases against minorities and vulnerable social groups.¹² This is why ADM tools must be made sufficiently transparent, so that independent observers can monitor and assess the different platforms' ADM tools and decision-making criteria for content moderation.

Additionally, while limited liability for platforms should, in principle, be preserved, it must be reinforced with a clause that addresses the Good Samaritan paradox, and introduce additional responsibilities for the dominant players.

Secondly, there are **competition concerns** concerning newcomers to the market and the level playing field. These measures will likely be the focus of the *ex ante* rules that the Commission has mentioned in its DSA plans. They will be activated retrospectively when certain conditions are fulfilled, to curb the market power of giant platforms which act as gatekeepers for aspiring entrants.

An impact assessment of dominant players in the market will be needed to avoid measures that undermine consumer interests and innovation. Almost a million EU businesses sell their goods and services via major online platforms nowadays, and more than 50% of small and medium-sized enterprises sell their products through online marketplaces. With 4.7 million EU jobs currently linked to businesses active on online platforms, the stakes are high and ineffective measures could exacerbate existing market distortions.¹³

In this spirit, there are three recommendations the Commission should consider when drafting the DSA.

Recommendation 1 – Introduce a double-incentive mechanism

To differentiate between major players and smaller online intermediaries **the minimum transparency and market obligations of online platforms must be defined according to indexes of annual turnaround, market share, user base and gatekeeping impact**.

Market and algorithmic transparency obligations may be easier to process by market giants like Google, Amazon, Facebook and Apple (GAFA). However, they would require smaller ones to compromise on their capacity for innovation. Smaller platforms should not have to offer exhaustive descriptions of their ADM and other processes, unless they are required on a spot-check basis. This measure could enable smaller players to enjoy considerable incentives for entering the market.

Conversely, **ex-ante rules should disincentivise especially strong players from abusing their dominance in the market and make it impossible for other players to compete**. Disincentives should involve merging and sharing user data across multiple services that are owned by the same platform (e.g. Facebook and its Instagram and WhatsApp).

Data-merging practices offer dominant platforms crucial insights about purchasing behaviour and content consumption. In turn, these insights translate into 'data power' that gives unfair advantages to dominant players because it allows them to behave as gatekeepers.¹⁴ That is why *ex ante* rules for especially strong players should be introduced, forbidding data-merging practices for players with excessive data power.

An effective sanctioning regime will be necessary in cases of negligence. It should enforce fines proportional to the damage the dominant player has inflicted to the market. The fines should be backdated to account for the entire period of market abuse, and orders to stop abusive market behaviour should be enforced as soon as the threshold for adequate evidence is met – even prior to concluding the examination, which could take years.

Recommendation 2 – Establish a central EU agency

A central EU agency that monitors and enforces the DSA is necessary. The agency would have a clear legal mandate to enforce transparency obligations and *ex ante* rules for especially strong players acting as gatekeepers across the EU27.

Equal enforcement of the DSA across the Union will be a daunting task. National enforcement agencies should not engage alone in enforcing the DSA for giant platforms. Besides lacking the necessary resources, this approach would cause fragmentation in the EU Single Market, through inconsistent interpretation of rules and enforcement. A central EU agency would harmonise governance between national and EU-level regulatory authorities by enforcing consistent regulation across the Union.

The agency would increase EU leverage over giant platforms since it would represent the Union as a whole. Additionally, it would be in a unique position to address potential clashes of interest in enforcement between the national and EU-levels of governance. For example, it could monitor the implementation of DSA transparency obligations by national enforcement bodies in member states where rule of law has been an issue.

The agency should also enforce a data access regime in order to increase transparency over giant platforms in the EU27. This approach would enable independent ADM monitoring by stakeholders (e.g. civil society, journalists, regulators, academics) and foster freedom of scientific research in platform governance.

The issues of democratic values and human rights are hugely important. This agency's mandate should, therefore, be designed with a view to monitoring issues of content governance, algorithmic transparency, and discrimination related to ADM on giant platforms. To minimise the risk of overlaps, tiered regulation should explicitly outline different levels of oversight and how they interact with regulatory authorities in competition, data protection, cybersecurity, etc.

Recommendation 3 – Enhance the role of national data protection authorities (DPAs)

The role of national DPAs should be enhanced in order to enable them to effectively enforce the implementation of the General Data Protection Regulation (GDPR, 2016/679) at the national level. A recent report shows that dominant platforms and services can leverage DPAs' lack of resources in individual member states. For example, Ireland and Luxembourg have seen resource increases of 169% and 126% between 2016 and 2019, respectively. However, there are significant disparities elsewhere: Greece and Bulgaria have seen a 15% and 14% decrease in staff, respectively.¹⁵

Enhancing the capacities of DPAs is crucial if research institutions, civil society and other stakeholders are to safely engage in independent monitoring of ADM practices. Any data access regime that facilitates independent monitoring should come with strong safeguards for personal data, in line with the GDPR. This is especially important when it comes to data access regimes operating at the national level – DPAs should have adequate resources to monitor how personal data is processed in these regimes.

This approach would drastically alleviate the EU agency's administrative burden. It would also foster harmony between national and supranational levels of governance, as it would maintain a meaningful role for national agencies. Additionally, enhancing the role of DPAs would distribute responsibility across different levels of governance, which would reduce concerns about power grabs at the EU level.

CONCLUSION

The DSA signals a crucial moment for EU policymaking. It should address some of the most significant threats citizens face online: illegal and offensive content, targeted political advertising, disinformation, propaganda, unfair competition and market distortions. It could bring more competition to the digital economy by curbing the gatekeepers' abusive practices, free up space for new entrants with business models that favour transparency, and offer users a meaningful variety of choices. Ultimately, it would bring benefits for all businesses by clarifying obligations, the Good Samaritan paradox, and imposing a consistent *de minimis* rule across the EU. If the EU gets it right, the DSA could set a golden standard – much like GDPR did for data protection – by pairing platform governance with democratic values and fair competition. It would be another guiding example of internet governance which citizens, civil society and businesses across the world can refer to when holding their governments to account.

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- 3 Online intermediaries perform or provide services such as online searches, e-commerce, social networks and cloud computing. Their main feature (in contrast to other online services) is that they bring different types of users together, thus enabling economic or social interaction.
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