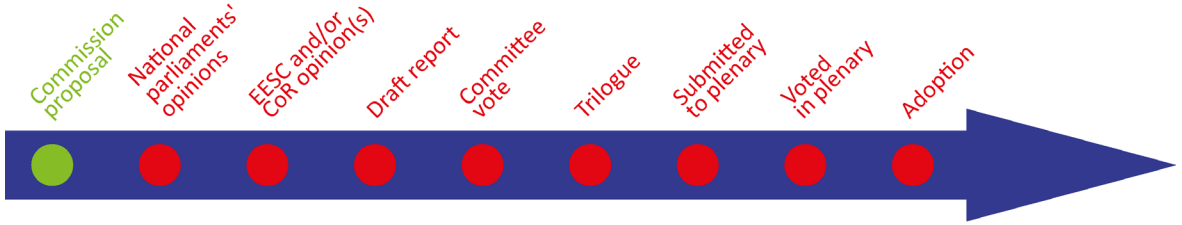
European Parliament

Digital services act

OVERVIEW

The rules governing the provision of digital services in the EU have remained largely unchanged since the adoption of the e-Commerce Directive in 2000, while digital technologies and business models continue to evolve rapidly and new societal challenges are emerging, such as the spread of counterfeit goods, hate speech and disinformation online. Against this backdrop, in December 2020, the European Commission tabled a new legislative proposal on a digital services act to amend the e-Commerce Directive and set higher standards of transparency and accountability to govern the way platform service providers moderate content, on advertising and on algorithmic processes. Parliament has already voiced strong support for revision of the EU rules applicable to online actors. EU lawmakers will now assess whether the Commission's proposal is an appropriate response to the challenges identified and will work towards defining Parliament's own position on the proposal, which is the first step in the EU's interinstitutional legislative process.

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		
Committee responsible:	Committee on the Internal Market and Consumer Protection (IMCO)	COM(2020) 825 15.12.2020
Rapporteur:	Christel Schaldemose (S&D, Denmark)	2020/0361(COD)
Shadow rapporteurs:	Arba Kokalari (EPP, Sweden) Dita Charanzová (Renew, Czechia) Alessandra Basso (ID, Italy) Adam Bielan (ECR, Poland) Alexandra Geese (Greens/EFA, Germany) Martin Schirdewan (The Left, Germany)	Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')
Next steps expected:	Publication of draft report	



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Introduction

Whereas online platforms – such as search engines, social media and e-commerce platforms – are playing an increasingly important role in our social and economic life, the current EU rules on digital services date back two decades and have remained largely unchanged since the adoption of the e-Commerce Directive in 2000 (Directive 2000/31/EC). On 15 December 2020, the European Commission presented a digital services act package with two draft pieces of legislation, a digital services act (DSA) and a digital markets act (DMA), designed to create a fairer playing field and make online platforms more responsible for the content posted on them.[1] The specific aim of the DSA is to promote a transparent and safe online environment, defining responsibilities and accountability for a range of digital service providers. The new rules, once adopted, will re-shape the rights and obligations of digital service providers, online users, customers and business users in the EU.

Existing situation

e-Commerce Directive

The e-Commerce Directive's overarching goal was to foster the development of electronic commerce in EU. To that end, the Union set up a common legal framework facilitating the free movement of information society services between Member States, legal certainty and consumer confidence in online commerce. The directive was designed to approximate national laws in various fields, including with regard to the establishment of service providers in the EU, rules applicable to commercial communications and electronic contracts (e.g. online advertising and unsolicited commercial communications) as well as the liability of online intermediaries.

The EU rules applicable to online actors currently rest on three key principles. First, the **country of origin principle** requires information society services to comply with the laws of the Member State in which they are legally established when operating across the EU; facilitating those companies' access to the entire EU single market. Second, the **limited liability regime** exempts 'online intermediaries' from liability for the content they convey and host (i.e. safe harbour principle) if they fulfil certain conditions. Hosting companies must remove illegal content or activity when they have been informed of its presence on their services and cannot be held liable for illegal content or activity on their services unless they have 'actual knowledge' of the illegal content or activity (i.e. 'notice and action' mechanisms). Finally, the e-Commerce Directive prohibits Member States from imposing on online intermediaries a **general obligation to monitor** information that they transmit or store in order to protect their users' fundamental rights.

Calls to revise the e-Commerce Directive

The Commission has conducted various assessments of the e-Commerce Directive since 2010, investigating the need for it to be revised. A number of studies and consultations[2] have demonstrated large variances in the way the directive is implemented throughout the EU and highlighted that **national case law on liability remains highly fragmented**. Academics point to persisting legal uncertainty regarding the application of national norms and to conflicting court rulings and have called for clarification of the current rules on these grounds.[3]

Furthermore, the current EU rules on digital services have remained largely unchanged since the adoption of the e-Commerce Directive in 2000, while digital technologies and business models continue to evolve rapidly and **new societal challenges have emerged**. The question of how to tackle the increasing spread of illegal and harmful products (e.g. counterfeit goods) and content (e.g. hate speech, disinformation and misinformation) online has become central to the debate on online platform regulation in the EU. In this area, with the adoption of the Recommendation on measures to effectively tackle illegal content online, a memorandum of understanding on the sale of counterfeit goods on the internet (MoU) and the development of the EU code of practice on disinformation in 2018, the Commission initially encouraged platforms to self-regulate. However,

the effectiveness of this approach has been questioned. The 2020 evaluation of the MoU showed that the sale of counterfeit and pirated goods remains problematic. The creation of a harmonised framework for content management and curation in order to tackle the phenomenon of online disinformation and hate speech more effectively at EU level has also been recommended.

Parliament's starting position

The European Parliament has long advocated revision of the EU digital rules applicable to digital platforms and adopted three seminal resolutions on the DSA in October 2020. EU lawmakers approved an Internal Market and Consumer Protection (IMCO) Committee legislative initiative report calling on the Commission to carry out a comprehensive revision of the e-Commerce Directive. It includes various recommendations to **improve consumer protection** in the digital economy with respect to, for instance, targeted advertising practices. EU lawmakers also approved a Legal Affairs (JURI) Committee legislative-initiative report recommending that the Commission impose **content management and transparency obligations** on platforms (e.g. with respect to algorithms) and **give users more control over content curation**, i.e. the selection, organisation, and presentation of online material. Finally, Members approved a Civil Liberties, Justice and Home Affairs (LIBE) Committee own-initiative report calling on the Commission to address the challenges posed by new technologies and ensure **legal clarity and respect for fundamental rights**. The three resolutions, however, coincided in that they recommended maintaining the e-Commerce Directive's general principles (i.e. the country of origin principle, the limited liability regime and a ban on general monitoring obligations).

Parliament's legislative initiative resolutions adopted pursuant to Article 225 of the Treaty on the Functioning of the European Union (TFEU) include detailed provisions that Parliament would like to see enshrined in EU legislation. This 'indirect' right of initiative does not create an obligation on the Commission to propose the legislation requested. However, the Commission President, Ursula von der Leyen, has pledged to take Parliament's views into account.

Furthermore, a range of Parliament studies have emphasised the need to revise the e-Commerce Directive[4] and suggest that taking common EU action to enhance consumer protection and common e-commerce rules as well as to create a EU framework for content management and curation would be beneficial for the internal market.[5]

Council and European Council

In its June 2020 conclusions on shaping Europe's digital future, Council welcomed the forthcoming digital services act proposal and emphasised the need for clear and harmonised evidence-based rules on responsibilities and accountability for digital services that would guarantee internet intermediaries an appropriate level of legal certainty. Furthermore, in its conclusions of November 2020, Council called on the European Commission to refine the responsibilities of online platforms in the DSA taking into account the possible impacts on the level playing field and the need to safeguard media pluralism.

At Member State level, meanwhile, a broad consensus has emerged in recent years on the need to update and harmonise the EU rules applicable to online platforms.[6] In December 2019, a number of Members States (Belgium, Czechia, Denmark, Ireland, Estonia, Luxembourg, the Netherlands, Poland, Finland and Sweden) called for the core principles of the e-Commerce Directive to be retained while modernising the EU framework in a targeted way to address the emergence of new types of online intermediaries.

Preparation of the proposal

The Commission ran a public consultation from June to September 2020 to assess how to best deepen the internal market and clarify responsibilities in respect of digital services; it garnered more than 200 replies. Together with a number of legal and economic studies, these replies fed into the

European Commission's impact assessment.[7] The impact assessment concluded that the core principles of the e-Commerce Directive remain very much valid today and have enabled the growth and accessibility of digital services across borders. However, the Commission also points out three main problems relating to the governance of digital services in the EU, outlined below.

Increasing exposure to illegal and harmful activities online

Investigations found[8] that the misuse of online services for illegal activities has expanded significantly. This concerns, inter alia, the sale of **illegal goods**, such as dangerous goods, unsafe toys, illegal medicines, counterfeit products (imports of counterfeit goods in Europe totalled €121 billion in 2016). This also concerns the dissemination of **illegal content**, such as content infringing intellectual property rights, child sexual abuse material (which doubled between 2017 and 2019), terrorist content, illegal hate speech and illegal ads targeting individuals. The Commission also notes the growing spread of **harmful content** online, such as harassment on social media, disinformation content and fake news (e.g. spread of false information on the Covid-19 pandemic or vaccination). The provision of illegal services such as non-compliant accommodation services on short-term rental platforms and illegal marketing services are also reported to be widespread.

Platforms have become important players in **the 'attention economy'** that is at the core of their business model – as they match users with the most relevant information for them and often attempt to monetise the process by means of advertising or transactions – and are coming under increasing scrutiny given the **systemic societal risks** they pose. Illegal and harmful content is amplified when shared through platforms and, in the absence of effective EU regulation and enforcement, those platforms set the rules of the game. The Commission stresses that there is an important balance to be struck between measures taken to remove illegal content and the **protection of fundamental rights**, especially freedom of expression and freedom to conduct a business. In this regard, the impact assessment found[9] that platforms are not currently protecting the fundamental rights of their users appropriately. Platforms have broad discretionary powers under their terms of service and often their decisions are not based on an assessment of the legality of the content or accompanied by appropriate safeguards, including justifications for removal or access to complaint mechanisms. As a result, erroneous removals can have a chilling effect on users' freedom of expression and have a substantial adverse impact on individual businesses and traders dependent on online marketplaces.

Lack of cooperation between national authorities and limits of supervision mechanisms

The second issue highlighted by the impact assessment is that the supervision of digital services in the EU is ineffective because there is very little cooperation between the competent Member States' regulating authorities. While the e-Commerce Directive sets out general principles for organisation of the supervision of digital services in the EU (e.g. the country of establishment must take corrective measures), there are **no detailed mechanisms for cooperation or information sharing across Member States**. While cross-cutting digital issues arise at national level but also increasingly at regional and local level, authorities lack information and the technical capability to supervise digital services provided in the EU (especially when the providers are established outside of Union).[10]

Risk of legal fragmentation and legal barriers for digital services

Online content moderation and liability regimes applicable to online platforms are a growing point of focus for lawmakers around the world and particularly in Europe. Member States have started regulating online platforms and online intermediaries at national level. Some have recently passed legislation while others have launched legislative procedures.[11] In **Germany,** a law on improving law enforcement in social networks that was passed in 2017 and modified in 2020 (NetzDG)[12] is in

the process of being amended again. This law prescribes that social networks must implement measures to address and, if necessary, block unlawful content including hate crime or false messages posted on their platforms. In **France**, draft legislation on political separatism would enshrine in French law wide-ranging content moderation obligations for online platforms. **Poland** is reportedly preparing social media laws that would prohibit platforms from removing content that did not specifically break the Polish rules. Legislative work on content moderation is also under way in other Member States including in **Hungary**. Against this background, the Commission highlights the risks of legal fragmentation resulting from national initiatives that create new barriers in the internal market especially for SMEs, including innovative start-ups.[13]

The changes the proposal would bring

Legal basis

The Commission put forward a proposal for a regulation on a single market for digital services (digital services act – DSA) on the basis of Article 114 TFEU to prevent divergences from hampering the free provision of cross-border digital services and to guarantee the uniform protection of rights and uniform obligations for business and consumers across the internal market.

Scope

The DSA proposal sets out a horizontal framework for transparency, accountability and regulatory oversight of the EU online space. The new legislation will not replace but complement the e-Commerce Directive and other pieces of legislation including the Platform-to-Business Regulation (which imposes already stringent transparency and fairness obligations on platforms) and the sector-specific rules on content moderation already in force in the EU to tackle, for instance, dissemination of terrorist content online, hate speech or copyright infringement.[14]

The material scope of the DSA is broader than the existing e-Commerce Directive. The draft rules apply to **online intermediary services** and impose different sets of obligations for distinct **categories of online intermediaries** according to their role, size and impact in the online ecosystem (Article 2). Accordingly, the draft DSA differentiates rules on:

- **intermediary services** provided by network infrastructure providers, including 'mere conduit services' (e.g. internet access) and 'catching services' (e.g. automatic, intermediate and temporary storage of information);
- **hosting services** provided by providers storing and disseminating information to the public, such as cloud and webhosting services;
- **online platform services** by providers bringing together sellers and consumers, such as online marketplaces, app stores, collaborative economy platforms and social media platforms; and
- **very large online platforms (or VLOP) services** provided by platforms that have a particular impact on the economy and society and pose particular risks in the dissemination of illegal content and societal harms. Specific rules are set out for platforms that reach more than 45 million active recipients in the EU on a monthly basis. The methodology to designate VLOPs will be set out in a delegated act by the Commission and a list of VLOPs will be drawn up and revised regularly (Article 25).

Regarding territorial scope, all online intermediaries offering their services in the EU would have to comply with the new rules including those established outside the EU (Article 1).

Asymmetric obligations

The DSA proposal is a horizontal instrument putting in place a framework of layered responsibilities targeted at different types of intermediary services. The draft legislation therefore introduces a

range of **harmonised EU-wide asymmetric obligations** crafted according to the size and impact of the digital services provided.[15]

Obligations for all providers of intermediary services

The draft DSA stipulates basic obligations applicable to all providers of intermediary services falling within the scope of the DSA to ensure transparency and fundamental rights protection. This includes the obligation to set out all restrictions they may impose on the use of their services. In addition, they would be obliged to act responsibly in applying and enforcing those restrictions, including when using tools used for the purpose of content moderation, such as **algorithmic decision-making review** (Article 12). All providers will also have to report on the removal and disabling of information considered illegal content or contrary to the providers' terms and conditions (Article 13). Finally, all intermediaries will have to establish a **single point of contact** to facilitate direct communication with Member States' authorities and other competent authorities (Article 10) and those established outside the EU will have to designate a **legal representative in the EU** (Article 11).

Obligations for online platforms and hosting service providers

For online platforms and hosting services, the Commission proposes detailed notice and action mechanisms and more adequate appeal mechanisms. This combination would facilitate the fight against illegal online content, while safeguarding user rights.

Both online platforms and hosting providers would be required to put in place **notice and action mechanisms** enabling third parties to notify the presence of alleged illegal content (Article 14) and to provide a **statement of reasoning** when they decide to remove or disable access to specific information (Article 15).

In addition, online platforms will have to comply with a new set of requirements to ensure trust in and safety of the products and services they provide. They will have to establish an easily accessible and user-friendly **internal complaint-handling procedure** for their users (Article 17) and will be obliged to engage with **out-of-court dispute settlement** bodies to resolve disputes with their users (Article 18). The proposal also introduces the concept of **trusted flaggers** – entities appointed by Member State authorities with particular expertise and competence in tackling illegal content.

Digital services act (DSA) draft asymmetric obligations

	Intermediary services *(cumulative obligations)*	Hosting services *(cumulative obligations)*	Online platforms *(cumulative obligations)*	Very large platforms *(cumulative obligations)*
Transparency reporting	•	•	•	•
Requirements on terms of service due account of fundamental rights	•	•	•	•
Cooperation with national authorities following orders	•	•	•	•
Points of contact and, where necessary, legal representative	•	•	•	•
Notice and action and obligation to provide information to users		•	•	•
Complaint and redress mechanism and out of court dispute settlement			•	•
Trusted flaggers			•	•
Measures against abusive notices and counter-notices			•	•
Vetting credentials of third party suppliers ("KYBC")			•	•
User-facing transparency of online advertising			•	•
Reporting criminal offences			•	•
Risk management obligations and compliance officer				•
External risk auditing and public accountability				•
Transparency of recommender systems and user choice for access to information				•
Data sharing with authorities and researchers				•
Codes of conduct				•
Crisis response cooperation				•

Source: European Commission.

Online platforms would be under the obligation to process notices from those trusted flaggers as a priority (Article 19) and would have to inform competent enforcement authorities in the event that they became aware of any information giving rise to a **suspicion of serious criminal offences** involving a threat to people's life or safety (Article 21). Furthermore, the proposal introduces a **'know your business customer' principle**, under which platforms would be required to obtain and verify identification information from traders prior to allowing them to use their services (Article 22).

Finally, in the field of **online advertising** the DSA proposes new rules to give users of online platforms meaningful information on the ads they see online, including information on why an individual has been targeted with a specific advertisement. To that end, online platforms displaying advertisements online would be subject to transparency obligations to ensure that individuals using their services knew the sources of the ads, why they had been targeted and could identify the ad 'in a clear and unambiguous manner and in real time' (Article 24). Those rules would be complementary to the initiatives envisaged by the European democracy action plan, in particular the strengthening of the code of practice on disinformation and legislation to ensure greater transparency in the area of sponsored content in a political context.[16]

Obligations for very large online platforms (VLOPs)

VLOPs will be subject to the full scope of the proposed regulation given the particular impact they have on the economy and society and their potential responsibility as regards the dissemination of illegal content and societal harms. In addition to all the obligations mentioned above, the draft DSA sets a higher standard of transparency and accountability for how the providers of such platforms moderate content, on advertising and on algorithmic processes (Articles 26-33).

VLOPs will be required to **assess the systemic risks** stemming from the functioning and use of their services at least once a year (Article 26). VLOPs will have to assess three categories of risk: (i) potential misuse by users of their services (e.g. dissemination of illegal content such as child sexual abuse material and the conduct of illegal activities such as counterfeit products); (ii) the impact of their services on fundamental rights (e.g. rights to privacy, freedom of expression) due, for instance, to the design of their algorithmic systems, and (iii) the intentional manipulation of their services, for instance through the creation of fake accounts, leading to widespread dissemination of information having a negative effect (e.g. on the protection of public health, electoral processes and public security). Following such analyses, VLOPs will be required to take appropriate **mitigating measures** (Article 27), such as adapting the design and functioning of their content moderation, algorithmic recommender systems and online interfaces so that they discourage and limit the dissemination of illegal content. They will also have to submit themselves to **external and independent audits** (Article 28). Furthermore, VLOPs will have to compile and make publicly available **detailed information on the advertising they display** by means of a repository (including those on whose behalf the advertisement is displayed and the total number of recipients), provide the digital services coordinator, the Commission and vetted researchers with **access to data necessary to monitor and assess compliance** (Article 31) and appoint **compliance officers** (Article 32). Against this backdrop, the DSA constitutes a step away from the self-regulation approach towards more **cooperative, co-regulatory and regulatory mechanisms**.

In the **US**, Section 230 of the Communications Decency Act shields online platforms from liability for user content and gives them leeway to moderate that content. So far, content moderation of large platforms remains in the remit of **self-regulation**. For instance, Facebook set up an Oversight Board in 2019 to hear appeals of content-moderation decisions and should review by April 2021 the decision to freeze temporarily former president Trump's Facebook account. The Board has the power to task panels of independent experts with reviewing the blocking decisions taken by the company and can overrule content decisions taken by Facebook executives, although its independence has been questioned. However, the debate about making platforms more accountable is also raging in the US and a number of separate revision bills have recently been introduced to that end. While there is a lot of resistance to the imposition of more stringent rules, some academics are calling on US lawmakers to make the US approach to platform regulation more akin to the European approach.

Implementation, enforcement and oversight

Member States will have to designate independent **digital services coordinators** (Article 38) who will be granted specific oversight powers (Article 41), will be entitled to receive complaints against providers of intermediary services (Article 43), will have to cooperate with digital services coordinators of other Member States (Article 45) and will be able to take part in joint investigations (Article 46). Furthermore, a European board for digital services (EDPB) will be set up to ensure effective coordination and consistent application of the new legislation (Article 47).

However, very large online platforms (VLOPs) will be subject to **enhanced supervision by the European Commission**. The Commission will be able to intervene if the infringements persist (Article 51). It will be able to carry out investigations, including through requests for information (Article 52), interviews (Article 53) and on-site inspections (Article 54). It will be able to adopt interim measures (Article 55) and make binding commitments by very large online platforms (Article 56), and it will be able to monitor compliance (Article 57).[17] In cases of non-compliance, the Commission will be able to adopt non-compliance decisions (Article 58), as well as fines (Article 59) and periodic penalty payments (Article 60) for breaches of the regulation and for the supply of incorrect, incomplete or misleading information in the context of the investigation.

Advisory committees

The Committee of the Regions (CoR) recently adopted an opinion on platform regulation in the context of the collaborative economy. The opinions of the European Economic and Social Committee (EESC) and of the CoR on the DSA are expected shortly.

National parliaments

The deadline for the submission of reasoned opinions on the grounds of subsidiarity is 7 April 2021. At the time of writing, Finland has already indicated its support for the DSA proposal and is in favour of imposing a number of obligations on platforms to combat disinformation and other information influencing activities and measures to improve the transparency of online marketplaces (while respecting companies' right to legitimate business secrets). On 17 February 2021, the Czech Chamber of Deputies delivered its opinion, stating that the illegality of online content removal should be left to independent courts and warning about the risks associated with applying cross-border content removal orders without the consent of the court.

Stakeholder views[18]

Associations and organisations defending users and consumers

BEUC, the European Consumer Organisation, calls on lawmakers to define consumer protection as an explicit objective of the DSA, arguing that the text should clearly provide for liability of online marketplaces so that consumers can seek damages in certain cases. It also argues that the rules on enforcement and redress should be fine-tuned (e.g. the text should state clearly that complaints should be dealt in the country where consumers are affected, not where the platform is established).

European Digital Rights (**EDRi**), an association that supports civil rights, regrets the absence of more systemic reform, warns about a system of privatised content control and calls for legislation that does more to tackle the abusive and intrusive business model of behavioural advertising and ensures that content moderation rules allow for freedom of expression, without private companies deciding on the illegality of that content. Similarly, **Access Now**, a digital rights organisation, welcomes the proposal but calls for additional safeguards to be enshrined. More specifically, the legislative act should ban targeted behavioural tracking and individual cross-party tracking, include a notification mechanism to content providers before any action is taken, and include more independent oversight for the proposed systemic risk assessment which, as drafted now, seems to

rely mainly on self-assessment conducted by platforms themselves. Human rights organisation **Article 19** points at the vagueness of the proposal, which endangers freedom of expression. There is no guidance on how to run the impact assessment of Article 26 and this leaves an enormous amount of discretion to both companies and ultimately the Commission to decide how risks should be mitigated. Furthermore, Article 19 stresses that the DSA should look beyond content regulation to require ex ante unbundling of content moderation and hosting by large platforms, in order to increase competition, user choice and rights protections. Users would then be able to make choices about which type of content moderation and which content rules they would like to be subject to, and which company hosts and accesses their data.

Platforms

The Computer and Communications Industry Association **CCIA** calls for the imposition on platforms of obligations that are achievable and proportionate to the known risks and warns that creating a specific regime focused on very large online platforms may push illegal content and products towards small digital service providers. While **DOT Europe**, the association representing the leading internet companies in Europe, welcomes the proposal, they ask for clarifications. DOT Europe argues that the definition of illegal content should be narrowed down to avoid overbroad removals and that the legislation must ensure coherence and avoid duplication between the obligations stemming from the DSA and from other texts such as the Platform-to-Business Regulation and the Copyright Directive.

SMEs and starts-ups

Associations representing small and medium-sized enterprises and start-ups generally support the DSA, but would like the text to be modified to take into account their specific size and scale. **Allied for Startups**, welcomes the proposals but warns that regulating online platforms on the basis of a threshold may disincentivise the growth of start-ups in the EU. **European Technology Alliance**, asks in particular for obligations proportionate to risks and platforms' capacities and for clarification of the definition of what constitutes a very large online platform, and especially of the notions of 'users' or 'service recipients'. **The App Association** raises some concerns regarding compliance costs incurred by small players owing to the obligations to implement automated notice-and-action mechanisms and to establish a legal representative in the EU. The association calls on EU lawmakers to develop more flexible responses and reporting requirements as well as a flexible threshold for very large online platforms. They also warn that obligations that target platforms on the basis of their size alone (as opposed to their risk-profile) could act as a disincentive to growth resulting in investor hesitation, and hinder innovative companies from challenging existing gatekeepers.

Academic views

Algorithmic transparency and online advertising

The European Data Protection Supervisor (EDPS) welcomes the DSA proposal but recommends additional measures to protect individuals better when it comes to content moderation and online targeted advertising. The EDPS stresses that profiling for the purpose of content moderation should be prohibited unless the online service provider can demonstrate that such measures are strictly necessary to address the systemic risks explicitly identified in the DSA. He also calls on EU legislators to consider a **ban on online targeted advertising** based on pervasive tracking and to restrict categories of data that can be processed to enable or facilitate targeted advertising.

Furthermore, a recent study found that social media, such as Instagram and WhatsApp, are becoming increasingly relevant political advertising platforms and that in the absence of ad repositories, harmful content can go undetected and unscrutinised. In the same way, the argument has been made that setting up a **public repository of advertising information,** accessible not only

to vetted researchers but also to advocates and regulators, would be valuable to improve understanding of the workings of the online ad industry.[19]

Very large platforms: Risk assessment and general monitoring

Under the draft DSA, risk assessment (Article 26) is left largely to the companies and no oversight mechanism has been introduced to check the accuracy of very large platforms' assessment. In this regard, the establishment of a mechanism to coordinate between competent authorities has been proposed to ensure a coherent oversight of the risk assessment.[20] This approach is especially necessary when it comes to finding a suitable methodology to enable very large platforms to assess the dissemination of illegal content while respecting the prohibition on general monitoring of their users' online content (enshrined in the e-Commerce Directive and confirmed by the case law of the Court of Justice of the European Union – CJEU). Common guidance would be useful in particular with regard to the **use of automatic detection and filtering technologies** to detect illegal and harmful content.[21]

Filtering techniques and general monitoring under EU law. In a series of cases (e.g. *Scarlet v SABAM* (2011), *SABAM v Netlog* (2012), *Eva Glawischnig-Piesczek v Facebook Ireland* (2019)), the CJEU has consistently ruled that Members states cannot oblige online platforms to implement a general monitoring obligation in order to protect their users' fundamental rights. However, Article 17 of the 2019 Copyright Directive imposes on online providers an obligation to be proactive in ensuring that illegal content is not made available on their platforms if they want to avoid liability. The Republic of Poland introduced an action for annulment against Article 17, arguing that such an obligation would lead platforms to filter content uploaded by their users by automated means (i.e. filtering technologies), which would infringe the right to freedom of expression of their users. Against this background, some academics warn that the Court may annul Article 17 altogether,[22] and argue that the European legislators should take the opportunity to **frame a revised and unified liability regime for platforms** with appropriate independent EU institutional control in the context of the DSA.[23]

Obligations on online market places

Some commentators are critical of the draft DSA provisions on online market places and argue that the economic evidence does not support the **magnitude of the counterfeit products problem** as presented by the Commission and that the proposed measures would not therefore be proportionate to the existing problem.

Disinformation

The DSA will require large social media platforms to share with the research community data that relates to risks such as the dissemination of 'illegal content' and 'intentional manipulation' of online services. However, there is no provision specifying how this should be implemented in practice. In this respect, academics would like to see the DSA set up a **permanent mechanism to facilitate collaborative research between industry and academia**, as researchers need regular (not just one-off) access to data to collect and update quantitative data to facilitate hypothesis testing and the design of intervention strategies to fight disinformation.[24]

Oversight and compliance

The oversight mechanisms and institutional organisation enshrined in the draft DSA have been questioned. There are question marks regarding: the composition and role of the proposed European board for digital services (EBDS), who should be designated digital services coordinator at national level and how they should function in relation to other national regulators, and how to ensure independent oversight and law enforcement on VLOPs. [25] Lawmakers could also consider enabling regulators to conduct an **ex-ante review/screening of the terms and conditions** of very large platforms given their crucial role in shaping what is and is not allowed on the platform.[26]

Legislative process

In Parliament, the DSA has been provisionally assigned to the IMCO committee, which has appointed Christel Schaldemose (S&D, Denmark) as rapporteur. EU lawmakers will now assess if the Commission's proposal is an appropriate response to the challenges identified and will work towards defining the Parliament's own position on the proposal, the first step in the EU's interinstitutional legislative process.

EP SUPPORTING ANALYSIS

Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Collection of studies for the IMCO Committee – Digital Services Act, May 2020.

EPRS, Liability of online platforms, EPRS study, February 2021.

EPRS, Digital services act, European added value assessment, October 2020.

EPRS, Digital Services Act Pre-legislative synthesis of national, regional and local positions on the European Commission's initiative, November 2020.

EPRS, Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act, May 2020.

EPRS, Initial appraisal of the Commission impact assessment, *forthcoming*, March 2021.

OTHER SOURCES

Single market for digital services (digital services act), European Parliament, Legislative Observatory (OEIL).

ENDNOTES

1 The focus of this briefing is the digital services act. Please also see the EPRS briefing on the digital markets act.

2 See European Commission, E-commerce Directive, 2020.

3 See C. Angelopoulos, 'Beyond the safe harbours: harmonising substantive intermediary liability for copyright infringement in Europe', *Intellectual Property Quarterly*, Vol. 3, 2013, pp. 253-274. See also I. Garrote Fernandez-Diez, Comparative analysis on national approaches to the liability of internet intermediaries for infringement of copyright and related rights, 2014.

4 See European Parliament, Collection of studies for the IMCO Committee – Digital Services Act, May 2020. See also T. Madiega, Reform of the EU liability regime for online intermediaries: Background on the forthcoming digital services act, EPRS, European Parliament, May 2020; and Liability of online platforms, Panel for the Future of Science and Technology, European Parliament, February 2021.

5 See N. Lomba and T. Evas, Digital services act, EPRS, European Parliament, October 2020.

6 See C. Collovà and T. Madiega with C. Morichon and A. Väisänen, Digital Services Act Pre-legislative synthesis of national, regional and local positions on the European Commission's initiative, EPRS, European Parliament, November 2020.

7 In addition, the Commission consulted on adopting ex ante regulatory instruments for gatekeepers and a possible new competition tool to address structural competition problems in digital as well as non-digital markets.

8 See European Commission, impact assessment at p.10 – point 34.

9 See European Commission, impact assessment ibid.

10 See European Commission, impact assessment ibid.

11 For an overview, see European Commission, impact assessment Annex 6.

12 See Bundesministerium der Justiz und für Verbraucherschutz, *Netzwerkdurchsetzungsgesetz*, April 2020.

13 See European Commission, impact assessment at p. 10-34.

14 For an overview, see the repository of rules for online content moderation in the EU provided by DOT Europe.

[15] Micro- and small companies will have obligations proportionate to their ability and size while ensuring they remain accountable. As a result, if they are subject to the general obligations in terms of transparency and fundamental rights protection transparency, they will be exempt from the more stringent obligations on online platforms (Article 16).

[16] See European Commission, Questions and Answers: European Democracy Action Plan – making EU democracies stronger, 2020.

[17] Before initiating proceedings, the Commission must only consult the European Board for Digital Services (EBDS, Article 51).

[18] This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.

[19] See M. MacCarthy, How online platform transparency can improve content moderation and algorithmic performance, 2021.

[20] See B. Martins dos Santos and D. Morar, Four lessons for U.S. legislators from the EU Digital Services Act, 2021.

[21] For an overview of the issues at stake see G. Frosio and C. Geiger, Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime, 2020.

[22] See P. Keller, CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work, 2021.

[23] See B. Justin Jütte and C. Geiger, Regulating freedom of expression on online platforms? Poland's action to annul Article 17 of the Directive on Copyright in the Digital Single Market Directive, European Law Blog, 2020.

[24] See A. Wanless, How Europe Can Tackle Influence Operations and Disinformation, Carnegie Europe, 2021.

[25] See B. Wagner and H. Janssen, A first impression of regulatory powers in the Digital Services Act, *VerfBlog, 2021.*

[26] See A. De Streel and M. Ledgere, New ways of oversight for the digital economy, CERRE, 2021.

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