Moving Forward: Charting the Much-Needed Evolution of the Digital Services Act

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Abstract

The Digital Services Act (DSA) represents a pivotal step in the evolution of internet governance, aiming to address several critical issues that have emerged in the digital era. This article delves into the potential pathways through which the DSA could evolve to tackle three significant challenges currently facing the online world: contractual content moderation and fundamental rights, algorithmic transparency and the opt-out system, and the complexities of disinformation and the codes of conduct. (i) Firstly, the article explores the nuanced approach of the DSA towards contractual content moderation, emphasizing its minimal intervention in the substantive content of user-platform contracts. This section discusses how the DSA's focus on procedural regulation rather than substantive contract terms could impact fundamental rights and the autonomy of platform operators in defining their terms of service. (ii) Secondly, the discussion shifts to the issue of algorithmic transparency and user autonomy in an increasingly automated digital environment. It criticizes the DSA's current measures and suggests how enhanced transparency and a more robust opt-out system could empower users while addressing the challenges posed by the opacity of algorithmic decision-making. Lastly, the article addresses the handling of disinformation within the DSA framework, analyzing its current approach and proposing more stringent measures to combat the spread of false information effectively. This section evaluates the potential of codes of conduct as flexible, adaptive tools to improve content moderation practices and mitigate systemic risks posed by disinformation.

Keywords: Digital Services Act, algorithms, disinformation, content moderation, codes of conduct

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1. Introduction

The Digital Services Act (DSA) represents a cornerstone in the evolving legislative landscape of the EU, aimed at regulating online platforms and modernizing the long-standing E-Commerce Directive. The imperative for such legislative updates had become increasingly evident, necessitated by

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the rapid advancements in digital technology and the growing influence of digital platforms on societal norms and individual behaviors.

Despite its strategic intentions, the DSA exhibits several notable deficiencies that detract from its effectiveness in addressing the rising challenges of the digital age. The regulation is characterized by conceptual ambiguities and the application of excessively broad rules, which collectively fail to effectively target specific problematic areas within the digital domain. One of the primary oversights of the DSA pertains to the regulation of contract-based private content moderation. This term refers to the enforcement of platform-specific terms of service or community guidelines, which are often ambiguously defined and subject to discretionary enforcement by the platform operators. This lack of specificity and oversight leads to a heterogeneous application of moderation practices, which can undermine the consistency and fairness essential to maintaining user trust and legal compliance. Furthermore, the DSA inadequately addresses the complexities associated with algorithmic recommender systems. These systems, integral to the operational frameworks of many online platforms, shape user engagement and information consumption through personalized content delivery. The absence of specific regulatory guidelines under the DSA concerning the operation and oversight of these algorithms leaves a significant gap in the governance of practices that have substantial implications for transparency, fairness, and the propagation of biases. Additionally, the regulation falls short of tackling the pervasive issue of disinformation. In the current digital ecosystem, where information can be disseminated rapidly and across geographical boundaries, the DSA's provisions do not sufficiently confront the multifaceted challenges posed by the spread of false information. This regulatory gap is particularly concerning given the profound effects that disinformation can have on democratic integrity, public health, and social cohesion.

Nevertheless, it is crucial to acknowledge that the DSA has its merits. The Regulation establishes a foundational framework that, while not explicitly addressing all pertinent issues, provides avenues for future amendments and policy adaptations. There is inherent potential in the DSA's framework for the progressive refinement of regulations, aimed at better addressing the highlighted issues through targeted policy interventions. The subsequent sections will explore these specific limitations of the DSA, identifying shortcomings of the DSA and discussing potential improvements to better address these challenges. The objective is to provide a clear and thorough critique that highlights deficiencies within the DSA and proposes improve-

ments. This involves a review of the existing rules and an exploration of how modifications could enhance the Regulation.

2. Contractual Content Moderation and Fundamental Rights

Several authors have extensively discussed the terms of use for social networking sites and their legal enforceability.[1] Therefore, it is not necessary here to reiterate the fundamental importance of this contractual relationship in regulating online platforms. Despite the comprehensive regulatory framework provided by the DSA, it surprisingly intervenes minimally in the substantive content of these contracts. Instead, the DSA focuses largely on regulating the processes by which these contracts' compliance is ensured. This hands-off approach to the contractual content itself retains the general *status quo*, with some important implications.

By allowing the fundamental terms of user-platform contracts to remain largely unaltered, the DSA implicitly permits platforms to continue setting their own terms of service in ways that can significantly affect user rights and responsibilities. While this offers platforms the flexibility to innovate and tailor their services to specific needs and markets, it also leaves ample room for these companies to dictate terms that may disproportionately favor their interests over those of users, especially in areas not specifically covered by the DSA. This approach also underscores a reliance on platforms to self-regulate within the broad legal boundaries set by the DSA. The regulation mandates certain standards and obligations related to transparency,[2] content moderation[3] and data protection of minors,[4] but the enforcement and interpretation of many user rights are left to the platforms' discretion through their terms of service. This can lead to inconsistencies in how user rights are protected across different platforms, potentially leading to a fragmented digital environment where user experiences and rights

1 *See* Michael Karanicolas, 'Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements', *University of Toledo Law Review,* Vol. 52, Issue 1, 2021, pp. 1–25; Mark A. Lemley, 'Terms of Use', *Minnesota Law Review,* Vol. 91, Issue 2, 2006, pp. 459–483; Aaron T. Chiu, 'Irrationally Bound: Terms of Use Licenses and the Breakdown of Consumer Rationality in the Market for Social Network Sites', *Southern California Interdisciplinary Law Journal,* Vol. 21, Issue 1, 2011, pp. 165–197.

2 DSA, Articles 15 and 42.

3 Id. Article 24.

4 Id. Article 28.

vary significantly from one service to another. The DSA's focus on process rather than substantive contract content can be seen as a strategic choice to promote compliance without stifling innovation.[5] It establishes essential guardrails but it does not delve deeply into dictating the exact nature of the terms that govern the user-platform relationship. This allows platforms some room to maneuver in competitive digital markets but raises questions about whether this approach sufficiently protects users, particularly in an environment characterized by rapid changes and significant power imbalances between large tech companies and individual users. This approach to the contractual relationship between users and platforms, focusing on compliance processes rather than the contracts' content, reflects a delicate balance between regulation and freedom.[6] However, it also leaves open questions about the adequacy of user protection and the effectiveness of self-regulation by platforms.

This means that platform operators have the discretion to define their own contractual terms, deciding autonomously on their content moderation policies. Although the DSA somewhat achieves the goal that "what is illegal offline should also be illegal online,"[7] it does not sufficiently ensure the converse: that "what is not illegal offline should not be illegal online." The intermediaries, essentially, are put in a judge-like role without defined standards or safeguards, leading to self-implemented moderation mechanisms and procedures that lack transparency. This situation allows intermediaries to significantly influence digital law-making and fundamental rights protection, which they manage without any regulatory safeguards.[8]

Content moderation on social media platforms presents a significant challenge due to the continuous generation of vast amounts of content. For instance, Facebook employs nearly 15,000 content moderators,[9] while the entire judiciary of Hungary consists of about 2,900 judges handling

5 *See* at https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en.

6 Frances Burwell, *Regulating Platforms the EU Way? The DSA and DMA in Transatlantic Context,* at www.wilsoncenter.org/article/regulating-platforms-eu-way-dsa-and-dma-transatlantic-context.

7 *See* at www.consilium.europa.eu/en/press/press-releases/2021/11/25/what-is-illegal-offline-should-be-illegal-online-council-agrees-on-position-on-the-digital-services-act/.

8 Berrak Genc-Gelgec, 'Regulating Digital Platforms: Will the DSA Correct Its Predecessor's Deficiencies?', *Croatian Yearbook of European Law and Policy*, Vol. 18, 2022, pp. 58–59.

9 *See* at www.forbes.com/sites/robertzafft/2022/10/09/twitter-facebook-et-al-the-case-for-freelance-content-moderation/.

everything from commercial to criminal cases.[10] This disparity highlights a potential issue: without platforms acting as initial filters for content moderation, courts could become overwhelmed with cases needing swift resolution regarding what constitutes illegal or harmful content. To manage this demand, governments would need to significantly enhance judicial or administrative capacities. Scholars suggest two main solutions: strengthening platform moderation through judiciary-like mechanisms, such as social media councils like that of Facebook,[11] or developing e-courts equipped for the digital age.[12] The DSA appears to lean towards the first option – privatizing content moderation. This approach alleviates the pressure on states to expand judicial infrastructure to cope with the demands of moderating digital content. The collaboration between states and large tech companies, as seen with Facebook, indicates a reliance on private entities to manage the complexities of digital content, reflecting a strategic but perhaps necessary 'invisible handshake' given the prevailing institutional limitations.[13]

By designating online intermediaries as 'watchdogs' governments effectively outsource the enforcement of online regulations to algorithmic tools. Due to the impractical transaction costs associated with manually reviewing illegal content, online intermediaries find themselves compelled to use algorithmic methods for monitoring and filtering to manage their liability. In practice, the moderation of various types of online content (including intellectual property violations, defamatory statements, dangerous and hate speech, child sexual abuse and child abuse, as well as online disinformation) and the resolution of disputes among users, are increasingly handled through automated filtering and other algorithmic approaches. The push for the broad use of algorithmic enforcement tools exacerbates the inherent tension between private ordering and traditional due process norms.[14]

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10 *See* at www.parlament.hu/documents/10181/39233533/Infotablo_2021_8_igazsagszolgaltatas_2021.pdf/163e2772-6634-7348-2587-662059586ab8?t=1616150875967.

11 Gilad Abiri & Sebastián Guidi, 'From a Network to a Dilemma: The Legitimacy of Social Media', *Stanford Technology Law Review*, Vol. 26, 2023, pp. 92–142.

12 Anupam Sharma & Akhil Kumar, 'Transforming Access To Justice In The Digital Age: The Role Of E-Courts', *NUJS Journal of Regulatory Studies*, Vol. 8, Issue 2, 2023, pp. 43–57.

13 *See* at http://eulawanalysis.blogspot.com/2022/01/a-democratic-alternative-to-digital.html.

14 Giancarlo Frosio & Christophe Geiger, 'Taking fundamental rights seriously in the Digital Services Act's platform liability regime', *European Law Journal*, Vol. 29, Issue 1–2, 2023, p. 34.

Given the vast scale, speed, and technological complexity of content moderation, it is beyond the capacity of state actors to take over this task from platforms, who currently serve as the primary agents of content moderation. This reality shapes regulatory approaches, rightly shifting the focus towards procedural rather than substantive regulation. However, Douek argues that the existing regulatory emphasis on procedural fairness in individual cases is flawed because much of content moderation operates on a broader scale, outside the scope of individual instances. Legislative mandates focused on procedural due process for individuals may have limited effectiveness in improving the overall system and could potentially hinder its ability to meet broader objectives. Douek underlines that the emphasis on providing a sense of fair treatment to individuals, while important, must be balanced against other goals such as efficiency, accuracy, and consistency in content moderation, highlighting significant trade-offs between these aims.[15] "The scale and speed of online speech means content moderation cannot be understood as simply the aggregation of many (many!) individual adjudications."[16]

The most critical issues in content moderation extend beyond the scrutiny of individual posts to encompass the overall functionality of moderation systems. Given that errors in content moderation are unavoidable, it is essential to consider which types of errors are more acceptable within these systems. Although users have the right to understand and contest specific moderation decisions, these rights do not empower them to question the broader systemic choices that dictate these decisions. These systemic frameworks are often the root of many of the biases and issues highlighted earlier. Therefore, understanding and addressing the structure and principles of content moderation systems is crucial in identifying and mitigating systemic biases that can influence broader outcomes in digital environments. Beyond the realm of content moderation, platforms engage in a variety of governance decisions that have systemic effects on user behavior and the flow of information. These decisions include the functionalities allowed by interfaces such as the ease of commenting on strangers' posts, which can influence the rate of abuse and harassment. These design choices and algorithmic recommendations significantly shape user interactions and content visibility, having an impact far beyond isolated moderation decisions. How-

15 Evelyn Douek, 'Content Moderation as Systems Thinking', *Harvard Law Review*, Vol. 136, Issue 2, 2022, p. 532.

16 Id. pp. 530–531.

ever, these broader impacts are not readily addressable through individual rights alone. This highlights a limitation within the existing framework focused primarily on content moderation, which tends to emphasize harms to identifiable individuals rather than addressing the more extensive ways in which platforms govern and shape the digital media environment. Such a narrow focus may overlook the crucial role that platform design and systemic decisions play in influencing online media and communication dynamics.[17]

Article 14 of the DSA serves as a cornerstone for the act's broader ambitions to safeguard public discourse on online platforms. Section 14 specifically targets the preservation of freedom of expression by establishing stringent requirements for transparency and fairness in content moderation. It mandates that online platforms provide clear, comprehensible information in their terms and conditions about the rules, procedures, measures, and tools used in content moderation. This includes both algorithmic decision-making and human review processes, aimed at ensuring that legal content is not unjustly removed, and that illegal content is dealt with efficiently. The first part of Article 14 of the DSA introduces a transparency rule whereby providers of intermediary services should include appropriate information (in a clear, simple, intelligible, unambiguous and user-friendly manner) of restrictions on their services in their terms and conditions. This information

> "shall include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review, as well as the rules of procedure of their internal complaint handling system."[18]

In relation to the first paragraph, paragraphs 2, 3, 5 and 6 typically complement these requirements: Any significant changes must be notified to users,[19] the terms of services targeting minors must be drafted in language intelligible to children,[20] large platforms must draw up a summary of their terms and conditions[21] and the terms and conditions under which they are

17 Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality', *European Law Open,* Vol. 2, Issue 1, 2023, pp. 42–43.
18 DSA, Article 14(1).
19 Id. Article 14(2).
20 Id. Article 14(3).
21 Id. Article 14(5).

provided must be made available in the official languages of all Member States.[22]

However, Article 14(4) is of particular interest:

> "Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions referred to in paragraph 1, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter."[23]

This paragraph applies to any restrictions on the use of the services, not just decisions made regarding individual content. Instead, individual decisions are referred to in Article 20, where decisions are taken on the basis that "the information provided by the recipients constitutes illegal content or is incompatible with its terms and conditions".[24] These specific decisions may include decisions to remove information, limit its visibility, suspend the user, or stop monetization.[25] However, Article 14(4) talks about the restrictions set out in the terms of use, *i.e.* pre-established rules that limit users in any way.

The enforcement of fundamental rights in interactions between individuals, particularly on social media platforms, presents complex interpretative challenges. Unlike state actors, social media operators are not inherently bound by constitutional guarantees of freedom of expression, since these cannot typically be directly applied against them. This distinction necessitates a clear differentiation between the vertical application of fundamental rights (between individuals and the state) and their horizontal application (between individuals). In cases involving the state, the pathway for addressing rights' infringements is straightforward, as the state is the primary guarantor of fundamental rights. Conversely, when fundamental rights issues arise horizontally, any inaction may indirectly implicate the state if the legislative framework is inadequate or enforcement is lacking, thus extending the state's responsibility to third parties. In this context, it is pertinent to explore whether the state's protective obligations should extend to

22 Id. Article 14(6).
23 Id. Article 14(4).
24 Id. Article 20(1).
25 Id.

regulating social networks to ensure freedom of speech is upheld. The DSA, referencing international standards and UN guiding principles on human rights,[26] implies that Article 14(4) elevates the relevance of fundamental rights in the relationships between online platforms and their users to an EU regulatory level. This suggests an evolving recognition of the state's role in safeguarding such rights in digital arenas, potentially mandating the adoption of specific legal provisions to effectively enforce these rights on social media platforms.[27]

Wolters and Gellert observe that the safeguards for users' fundamental rights have been strengthened under the DSA regime. This enhancement stems not only from the establishment of new redress mechanisms but also from the obligations imposed on hosting provider services to deliver decisions that are objective, non-arbitrary, diligent, and timely, and to support these decisions with a statement of reasons. However, they note that the scope of these safeguards remains somewhat limited. Despite this limitation, Wolters and Gellert argue that these new requirements represent a significant improvement compared to the previous framework, where binding legal provisions for protecting these rights were largely absent.[28]

In conclusion, while Section 14 of the DSA lays a foundational framework for protecting fundamental rights online, particularly freedom of expression, it also highlights the complexities and limitations of regulating global online platforms. It undoubtedly strengthens the enforcement of fundamental rights online, but the exact content and scope of application of the provisions are still questionable.[29]

3. Algorithmic Transparency and the Opt-Out System

While the DSA makes significant strides in setting regulatory standards, its actual impact on preventing overreach by platform operators and ensur-

26 Id. Recital (47).

27 João Pedro Quintais *et al.*, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation', *German Law Journal,* Vol. 24, Issue 5, 2023, p. 24.

28 Pieter Wolters & Raphael Gellert, 'Towards a Better Notice and Action Mechanism in the DSA', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 14, Issue 3, 2023, p. 418.

29 Sebastian Felix Schwemer, 'Digital Services Act: A reform of the e-Commerce Directive and much more' *in* Andrej Savin & Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law,* Edward Elgar, Cheltenham, 2023, pp. 232–252.

ing diverse and pluralistic content is not guaranteed. The act's reliance on platforms' self-regulation and the general nature of some of its provisions may not suffice to address the evolving challenges posed by digital communication environments.[30] Algorithms are increasingly entrusted with decision-making tasks that can influence our perceptions and interactions. This influence extends beyond mere economic implications as private actors harness these tools, which are more sensitive to business needs than public interests. The autonomous nature of these algorithms introduces unpredictability and complicates accountability, potentially leading to issues such as discrimination in profiling and scoring practices. Moreover, the digital transformation over the past two decades has reshaped how we express ourselves online, significantly impacting the public sphere. While the internet has been a pivotal medium for promoting democratic values such as freedom of expression, the rise of automated decision-making systems poses new threats to these freedoms. Concerns about these systems and their implications for freedom of expression have been acknowledged by European courts, including the ECtHR, highlighting the challenges these technological advancements bring to protecting fundamental rights.[31]

The preamble states that a fundamental aspect of how online platforms operate involves the strategic prioritization and presentation of information on their interfaces, enhancing and streamlining user access to content. This is achieved through algorithms that suggest, rank, and highlight information, using text, visual cues, or other methods to organize content provided by users. Recommender systems are pivotal in shaping how users find and engage with online content, improving search functionality and overall user experience. These systems are crucial not only in elevating certain content but also in driving the widespread sharing of information and influencing online behavior. Therefore, it is essential for online platforms to maintain transparency about the functioning of these recommender systems. They must inform users clearly about how these systems affect content presentation and influence user interactions. Platforms should disclose the key parameters of these systems in a manner that is easy to understand, ensuring users are aware of how content is tailored to them, particularly

30 Caroline Cauffman & Catalina Goanta, 'A new order: the Digital Services Act and consumer protection', *European Journal of Risk Regulation,* Vol. 12, Issue 4, 2021, pp. 758–774.

31 Oreste Pollicino & Giovanni De Gregorio, 'Constitutional Democracy, Platform Powers and Digital Populism', *Constitutional Studies,* Vol. 8, 2022, p. 15.

by explaining the main factors that influence content suggestions and the significance of these factors, including any reliance on profiling and user behavior.[32]

Transparency is of course an important step in regulation, but it is not enough in itself. Users should have increased access to information about content curation and moderation practices, including the ability to opt-out of unwanted content curation.[33] As Duek argues, the prevailing simplicity in transparency regulations can mislead regulators into implementing basic mandates that offer limited insights. Effective transparency must be purposefully targeted; the common approach of requiring platforms to disclose total enforcement numbers is simplistic and uninformative. These numbers alone fail to explain underlying trends or causes, such as increases in overall content or changes in enforcement criteria, which might affect the interpretation of data concerning *e.g.* takedown rates. Additionally, these figures don't reveal disparities across languages, regions, or demographics. Overemphasis on simplistic metrics can also lead to harmful incentives, prompting platforms to inflate their reported enforcement numbers to meet regulatory expectations and boast about their compliance. This narrow focus on simple metrics like takedown decisions overlooks the broader complexities and consequences of content moderation, such as the potential for perverse incentives and the exclusion of key stakeholders and factors from the conversation. A generic, one-size-fits-all transparency mandate not only falls short of providing meaningful information but also fails to adapt to the evolving landscape of content moderation. A more nuanced approach to transparency would inform various stakeholders – from governments to civil society – enabling them to address misinformation effectively and participate in shaping content moderation practices. Ultimately, while transparency is beneficial, not all mandates effectively serve the intended goals of informed regulation, market responsiveness, or platform accountability. Effective mandates require careful design to be truly insightful and adaptive.[34]

The DSA's strategy for enhancing algorithmic transparency and accountability has room for improvement. To tackle the problems associated with the opacity of algorithms and the 'black box society', more precise require-

32 DSA, Recital (70).

33 Frosio & Geiger 2023, p. 77.

34 Evelyn Douek, 'Content Moderation as Systems Thinking', *Harvard Law Review,* Vol. 136, Issue 2, 2022, pp. 559–562.

ments could be implemented. These could target issues like algorithmic bias, which can create 'echo chambers' where users only encounter content that reinforces their beliefs. Further improvements could include providing more detailed explanations of the logic behind automated decisions, increased transparency regarding the data sets used for training algorithms, and stronger mechanisms for redress to address harms caused by algorithmic decisions. Such measures would significantly bolster algorithmic accountability.[35]

The traditional distinction between passive and active roles in determining the liability of online service providers is becoming increasingly tenuous. The extensive moderation activities – filtering, sorting, and optimizing content for profit – undertaken by platforms are still classified as purely technical and passive. However, the adequacy of this classification in the age of AI-driven moderation is debatable. Originally, service providers were viewed as mere intermediaries that reduced transaction costs by connecting different user groups. Nowadays, platforms in two-sided markets not only provide free services or content to attract users but also generate revenue through advertising and charging other market side users. These ad-supported platforms are designed to capture users' attention, displaying more ads and prompting users to reveal more personal data for targeted, lucrative advertising. This is part of what is known as the attention economy, where digital services are optimized to support advertising-driven business models. While some providers may still assume a passive, neutral stance, many online platforms have become active participants in shaping the digital environment. They not only control user access and transaction modalities but also influence what content users see, aiming to increase user engagement and data sharing. This involvement challenges the notion that their services are neutral and purely technical.[36]

Radical measures such as an absolute ban on the use of personalized algorithms should be ruled out, as this would violate not only freedom of speech and information, but also the freedom to conduct a business and freedom of contract of the platforms.[37] Beyond the stipulations in Article

35 Frosio & Geiger 2023, p. 77.

36 Miriam C. Buiten, 'The Digital Services Act from Intermediary Liability to Platform Regulation', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law,* Vol. 12, Issue 5, 2021, p. 372.

37 Joao Tornada, 'How (Not) to Deal with the 'Bubble Effect' in Cyberspace: The Case of the EU Digital Services Act', *Brooklyn Journal of International Law*, Vol. 49, Issue 1, 2023, p. 121.

27, providers of very large online platforms and very large online search engines that employ recommender systems are required to offer at least one alternative for each of their recommender systems that does not rely on profiling. Opt-out options on social media platforms are often positioned as giving users more freedom and control over their online experiences. However, the reality is that the opt-out model has inherent flaws that make it less than effective in guaranteeing true freedom. The very nature of an opt-out system starts from the premise that users are automatically enrolled in a certain feature or service. This means that the default setting might involve the collection of data or exposure to certain content unless a user actively takes steps to change it. Given that many users may not be technologically savvy or might overlook the importance of certain settings, the default option can lead to inadvertent consent. Additionally, the opt-out model assumes that users are informed about all the implications of the settings they are enrolled in. But with the rapid evolution of technology and the intricate ways in which data is used, even well-intentioned users might not fully grasp what they are opting out of. Social media platforms, with their extensive terms of service and privacy policies, often contain language that is dense and difficult for the average user to understand. Furthermore, even if a user successfully opts out of one feature, the interconnected nature of social media means that their data or preferences might still be influenced by other aspects of the platform. For instance, opting out of targeted ads doesn't necessarily mean a user's activities aren't still being tracked and used in other ways. Article 27 only provides an exemption from profiling in accordance with the GDPR,[38] however, it is important to recognize that even with this provision, these recommendation systems may still operate in ways that are not entirely transparent or clear to the user. This lack of transparency can occur despite the absence of profiling, as the algorithms driving these systems might still process and prioritize content in a manner that is opaque, making it difficult for users to understand why certain content is recommended to them. The DSA's measures aim to mitigate this by requiring clearer explanations of the algorithms' functioning, but achieving full transparency in the complex mechanics of these systems remains a challenging task. Also, we have to consider whether

38 Article 4(4) of 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, GDRP).

the user really wants to use the given platform without certain functions. The personalized timeline is fundamentally useful to the user, it relieves them from a lot of unnecessary information that he would not be interested in anyway, and in return, it may be worth it for them that some of their data is used for this purpose. We can also draw the conclusion from the regulation on Cookies that the user experience has become much worse than it was before, many people allow access to much more data due to intrusive pop-up windows.

According to Tornada, the effectiveness of the DSA in disrupting the 'bubble effect'[39] largely depends on the number of users who choose non-personalized feeds on social networks, search engines, and marketplaces. Tornada points out that since these platforms thrive on the personalized recommendation of content, the impact of this measure may be inherently limited from the start (suitability aspect). He also notes that without widespread awareness of the issues surrounding information bubbles and digital polarization, it is unlikely that there will be a significant uptake of the option to 'opt out' of personalized content. Drawing on sociological insights, Tornada argues that due to homophilic tendencies, people are inclined to engage with information and individuals that reflect their interests and opinions. Consequently, given the choice between personalized content and more diverse political and informative content on social networks, which are ecosystems driven by immediacy, entertainment, and commercial advertising, most users will prefer the former.[40]

In conclusion, while opt-out options may seem like a step towards greater freedom for internet users, they often fall short of providing genuine control, or the control that is often offered (even if it is perhaps more legal) is less desired by the users. But most importantly freedom isn't just about the ability to opt out; it is also about the ability to have meaningful choices. An opt-out system presents a binary choice, often without giving users a spectrum of options that might better suit their individual needs and preferences.

39 *See* János Tamás Papp, 'Recontextualizing the Role of Social Media in the Formation of Filter Bubbles', *Hungarian Yearbook of International Law and European Law*, Vol. 11, 2023, pp. 136–150.

40 Tornada 2023, pp. 128–129.

4. Disinformation and Codes of Conduct

There is a growing consensus among scholars that while the DSA represents a significant step forward in regulating online platforms, it may not adequately address the complexities of disinformation and is somewhat vague on how platforms should tackle disinformation.[41] Researchers argue that the DSA's provisions, including those related to transparency and the Code of Practice on disinformation,[42] lack the robustness needed to effectively combat the evolving nature of online false information.[43] According to scholars like De Gregorio, the DSA's emphasis on transparency and accountability, although essential, does not directly tackle the root causes or the dynamic mechanisms through which disinformation spreads.[44] Additionally, other experts express concerns that the DSA might fall short in terms of enforcement capabilities and the practical challenges in monitoring compliance across diverse digital platforms.[45] These perspectives highlight the need for a more comprehensive approach that includes stronger regulatory measures and more active involvement of various stakeholders to effectively mitigate the impact of disinformation.

Other scholars also highlight that the DSA alone may not be sufficient to address the disinformation problem within the EU.[46] Currently, the protection against disinformation largely relies on the willingness of information society service providers to fulfil their duties of care regarding the content they distribute. This includes their ability to self-assess the 'systemic risks' inherent in their activities and implement preventive actions, particularly through content moderation procedures. However, the DSA does not specifically define harmful content, including disinformation, nor does

41 *See* at https://sirenassociates.com/policy-papers/the-eu-digital-services-act-overview-and-opportunities/.

42 Strengthened Code of Practice on Disinformation, at https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation.

43 Luca Nannini *et al.*, 'Beyond phase-in: assessing impacts on disinformation of the EU Digital Services Act', *AI and Ethics,* 2024, pp. 1–29.

44 Giovanni De Gregorio, *How Does the DSA Contribute to Platform Governance and Tackle Disinformation?*, at www.ippi.org.il/how-does-the-dsa-contribute-to-platform-governance-and-tackle-disinformation/.

45 Aleksandra Kuczerawy, 'The Good Samaritan that wasn't: voluntary monitoring under the (draft) Digital Services Act', *VerfassungsBlog,* 12 January 2021.

46 Alexander Peukert, 'Who Decides What Counts as Disinformation in the EU?', *VerfassungsBlog,* 24 October 2023.

it mandate its removal.[47] Additionally, the effectiveness of these measures also depends on the capacity of relevant public authorities to monitor and enforce compliance with these obligations. Whether this approach will provide a robust enough response to the challenges disinformation poses to democratic societies is still an open question.[48]

Strowel and De Meyere present a complex proposal to fight disinformation with the tools of the DSA. The proposal advocates for instituting a comprehensive transparency principle for online platforms, aligning with standards similar to those in public administration and elements of the GDPR. This principle mandates that platforms openly disclose their operational and decision-making processes regarding the prioritization and dissemination of information. The proposal suggests that enhanced transparency concerning the design of platforms and their moderation policies would bolster accountability and enable external evaluations of the effectiveness of moderation tools. Additionally, the transparency principle would be paired with a shift in compliance responsibilities, specifically placing the onus on Very Large Online Platforms (VLOPs) to prove their compliance, acknowledging their critical role as gatekeepers in the digital space. The document calls for an expanded role for users and third parties in combating disinformation. This is where the concept of 'middleware' gains importance. Middleware, in this context, is described as software and services that introduce an editorial layer between major internet platforms and their users. This technology would empower users by providing more refined control over the content they encounter, by altering or filtering the information presented based on personal or predefined criteria. The proposal also supports extending access rights beyond traditionally vetted researchers to include non-governmental organizations and other relevant stakeholders. This would be supported by a stringent certification process to ensure the protection of online privacy and the proprietary interests of platforms. Concerns are highlighted regarding the adequacy of current enforcement mechanisms under the DSA, leading to the recommendation for the establishment of an independent EU authority dedicated to the

47 Mark Leiser, 'Reimagining Digital Governance: The EU's Digital Service Act and the Fight Against Disinformation', *SSRN,* 2023, at https://ssrn.com/abstract=4427493, p. 7.

48 Dario Moura Vicente, 'Protection against Disinformation on the Internet: A Portuguese Perspective', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 14, Issue 3, 2023, p. 461.

regulation of online platforms. This authority would be responsible for enforcing transparency and accountability, managing the complex dynamics between platforms, users, and regulators. It would need to be independent, transparent in its operations, and adequately resourced with expertise in data and algorithms to effectively oversee platform activities.[49]

In this regard, the DSA introduces a co-regulatory framework. This framework allows service providers to voluntarily adopt codes of conduct to mitigate the negative impacts of the spread of illegal content, as well as manipulative and abusive behaviors. Article 45(1) empowers both the Commission and the Board to support and facilitate the creation of diverse codes of conduct, aimed at enhancing the application of the DSA. These codes address two main categories of concern: illegal content, as specified in Article 3(h), and various systemic risks outlined in Article 34. The primary function of these codes of conduct is to provide detailed interpretations and enhancements of the existing legal framework. They encourage the adoption of voluntary standards that extend beyond statutory obligations or, where necessary, to develop broader guidelines that function as soft law. The DSA emphasizes the voluntary nature of adherence to these codes. However, the preamble indicates that a service provider's refusal to adopt a code, without a satisfactory explanation, may be considered when assessing compliance with DSA obligations. In cases where specific systemic risks are identified under Article 34, the Commission may invite service providers, relevant authorities, civil society organizations, and other stakeholders to collaborate in developing these codes.

Codes of conduct represent a potentially transformative aspect of the DSA. These instruments provide a strategic avenue through which the Commission can catalyze significant changes in online platform behaviors—changes that might be challenging to enforce under the rigid frameworks of legally binding EU regulations. Unlike direct legislative mandates, codes of conduct offer a flexible mechanism that allows for the implementation of substantive, adaptive measures tailored to the unique challenges posed by digital services. The real power of codes of conduct lies in their ability to extend beyond the binary classification of content as illegal or not. A significant portion of content on online platforms, while not necessarily

49 Alain Strowel & Jean De Meyere, 'The Digital Services Act: Transparency as an Efficient Tool to Curb the Spread of Disinformation on Online Platforms?', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, Vol. 14, Issue 1, 2023, pp. 80–83.

violating laws, can still be detrimental to public discourse and individual well-being. This includes issues like misinformation, cyberbullying, and other forms of content that contribute to a toxic online environment. Traditional legal approaches often fall short of addressing these grey areas due to their complex and evolving nature.

The Commission already noted that the Code of Practice on Disinformation is set to evolve into a formal Code of Conduct.[50] This transformation signifies a structured commitment to combating disinformation across online platforms operating within the European Union. By adopting this as a Code of Conduct, the DSA ensures that signatories, including major social media platforms and search engines, are legally bound to adhere to its guidelines. These guidelines emphasize transparency, the integrity of services, and the robustness of information systems against the pervasive issue of fake news and online disinformation. The integration of this code into the DSA framework will facilitate a more accountable and systematic approach to mitigating the spread of false information, offering clearer mechanisms for enforcement and compliance, and setting a precedent for how platforms manage the dissemination of content.

It is logical to require very large online platforms to conduct their own risk assessments, as they alone have complete access to the data they gather on users and are most familiar with the challenges posed by their services, as well as the most efficient remedies. Similarly, it is reasonable for the Commission to expect these platforms to cover the costs of ensuring compliance with the DSA regulations. A significant concern, however, is ensuring the independence of private audit firms that are competing for profit and may have conflicts of interest with the platforms they audit. Thus, a robust framework for overseeing these auditors is necessary. The DSA stipulates that audit organizations must be independent from the platforms they evaluate, possess demonstrated risk management expertise, technical competence, and maintain objectivity and professional ethics, notably through adherence to established codes of practice or standards.[51] However, there appears to be a lack of a specific supervisory framework for these auditors. Nonetheless, platforms are obligated to provide the Digital Services Coordinator of their jurisdiction or the Commission, upon reasoned request and within a specified timeframe, access to data

50 *See* at https://digital-strategy.ec.europa.eu/en/news/third-meeting-european-board-digital-services.

51 DSA, Article 28(2).

necessary for monitoring and evaluating compliance with the Regulation.[52] They are also required to grant access to researchers who meet certain criteria, for the purpose of conducting research that helps identify and understand systemic risks.[53] Benjamin Farrand points out that while the DSA prescribes more detailed obligations regarding what outcomes should be achieved, it largely leaves the methods of achieving these outcomes to the discretion of the market operators, hence perpetuating 'regulated self-regulation'. Although independent audits are mandated annually under Article 37, the platforms can select their own auditors, leading to potential 'audit capture', mirroring governance failures seen in past financial crises. Farrand critiques this model by highlighting that it relies on a system where large online operators assess themselves, continuing the ordoliberal tradition of market structuring where regulation is minimal and market driven.[54] Rozgonyi also emphasizes the importance of careful regulation in the development and modification of codes of conduct at both national and EU levels. She advocates for a process that is inclusive, open, and transparent, ensuring proper representation and thorough stakeholder consultations. Rozgonyi also calls for a clear definition of the relationship between EU and national codes of conduct and stresses the need for a distinct approach to illegal content, which should be managed through co-regulatory mechanisms, versus harmful content, which may be handled privately.[55]

Incorporating the Disinformation Code of Conduct as an official Code of Conduct within the framework of the Digital Services Act (DSA) could significantly amplify global efforts to combat disinformation through the mechanism known as the 'Brussels Effect'.[56] Given the EU's substantial market influence, platforms are often compelled to align their operational policies with EU regulations to ensure market access. Therefore, by setting robust disinformation protocols under the DSA, the EU would indirect-

52 Id. Article 31(1).

53 Cauffman & Goanta 2021, p. 771.

54 Benjamin Farrand, 'The Ordoliberal Internet? Continuity and Change in the EU's Approach to the Governance of Cyberspace', *European Law Open,* Vol. 2, Issue 1, 2023, p. 125.

55 Krisztina Rozgonyi, 'Negotiating New Audiovisual Rules for Video Sharing Platforms: Proposals for a Responsive Governance Model of Speech Online', *Revista Catalana de Dret Public (Catalan Journal of Public Law)*, Vol. 61, 2020, p. 94.

56 Dawn Carla Nunziato, 'The Digital Services Act and the Brussels Effect on Platform Content Moderation', *Chicago Journal of International Law*, Vol. 24, Issue 1, 2023, pp. 121–122.

ly pressure global platforms to adopt these higher standards universally. This alignment facilitates the adoption of enhanced content moderation practices worldwide, bolstering the detection and mitigation of disinformation across digital platforms.

5. Conclusion

This article has critically analyzed the DSA's approach to contractual content moderation, algorithmic transparency, and disinformation, highlighting both its strengths and the areas in need of enhancement. The DSA's minimal intervention in the substantive content of user-platform contracts reflects a strategic choice that preserves platform autonomy but raises questions about the protection of user rights in the dynamic and powerful domain of online platforms. Furthermore, while the DSA promotes algorithmic transparency and offers opt-out options, these measures may still fall short of providing users with meaningful control over the automated systems that profoundly influence online environments. Lastly, the approach to disinformation and the implementation of codes of conduct, although innovative, requires robust enforcement mechanisms and a more explicit commitment to tackling the complexities of online false information effectively.

The DSA establishes a foundational legal framework that is adaptable and potentially transformative. However, its effectiveness hinges on the future development of more specific regulations and the proactive involvement of all stakeholders to refine these measures. As the regulation of the online space continues to evolve, the DSA should also progress, embracing a more granular and nuanced approach to regulation that not only addresses current deficiencies but also anticipates future challenges. It is crucial that ongoing revisions and the implementation of the DSA are informed by a balanced consideration of freedom, transparency, and the protective measures necessary to maintain a fair and safe online environment for all users. By continually adapting to technological advancements and the shifting paradigms of online interaction, the DSA can fulfil its promise as a cornerstone of digital regulation in the EU, safeguarding fundamental rights and fostering a resilient online presence for everybody.