



The European Digital Services Act: The Future Towards a Safer Digital Space and Single Market?

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Summary

It has been twenty years since the European Union introduced its cornerstone legislative framework on the bloc's digital single market and space by the name of the e-Commerce directive. Nevertheless, it is undeniable that over the last twenty years the internet and digital space have changed and evolved enormously, which has resulted as well in the emergence of new challenges such as the dominant market position of tech giants and disinformation. It is in face of these developments and challenges that the European Commission (EC) under Ursula von der Leyen has committed itself as part of its wider Digital Strategy to introduce a new legislative framework by the name of the Digital Services Act (DSA) which alongside the Digital Markets Act (DMA) will replace the bloc's e-Commerce directive. The DSA's draft has just recently been released in the December of last year shortly after having completed its public consultation.

Already long before to the draft's release the prospect of the DSA has stirred considerable discussion and controversy, especially surrounding three key issues of contention. The first issue concerns the question of how the current limited liability regime in respect to the management and countering of harmful as well as illegal content should be transformed or not. This is in particular contentious as this does not just require the cautious balancing of societal interests and not overburdening the industry, but also guaranteeing that any changes to the limited liability regime do not by default lead to an infringement of the freedom of expression and right to privacy. The second issue revolves around the debate on how much should internet giants be managed through legal means versus how much responsibility should be bestowed upon them through the incentivisation of taking proactive action. Nonetheless, this poses once more a dilemma as too little regulatory oversight and too much responsibility on the side of tech giants could result in over-censorship with little recourse and transparency for the end users. Finally, there remains the point of contention surrounding the issue of how and if harmful and illegal content should be defined in the DSA's final form, which beyond the concern over the preservation of the rights of the bloc's citizens is also a problem given the reality that each member state not only struggles with a different magnitude of a problem in this realm, but also has a different philosophy when it comes to approaching these policy issues. Fundamentally though, despite their complexity, these issues will have to be addressed sooner or later in order to avoid legal fragmentation in the bloc, which could both pose a threat to the growth potential of the digital single market and the management of illegal and harmful content, which has already begun to occur as the example of Germany and the NetzDG law shows.

Consequently, based on these points of contention, there are a couple of brief yet important takeaways when it comes to the DSA initiative and its possible success. One of these takeaways is that it will be a difficult and precarious policy balancing act on the EC's part in order to make the DSA possible and have a meaningful impact. This balancing act will have to weigh not only the interests of member states, industry giants, and civil society against one another, but as well ensure at the same time that the compromise found will in fact have a net benefit. Another important takeaway is whether or not the DSA, at least from the perspective of the challenges that are posed by disinformation and undesirable content, is in fact the right approach to the problem from a practical and philosophical perspective in the first place, especially on a European wide level as penalisation may do more harm than good in the long term.

Introduction

The implications of disinformation, fake news, and hate speech have long been a subject of great discussion amongst policy makers, academics, and the wider public. It has been especially the overall societal ramifications of disinformation that have taken the spotlight in many arenas. Nonetheless, ever since the Covid-19 pandemic last year, once again this concern has risen to the forefront with the ignition of mass protests across the globe sparked by conspiracy theories and disinformation. Yet again, in these tumultuous times, it is none other than the European Union (EU) which seeks to introduce a brand-new legal framework on the way that the digital economy and sphere is managed in the bloc. The name for this new legislative package is the Digital Services Act (DSA), which was just very recently presented by the European Commission (EC) alongside with the Digital Markets Act (DMA) with the purpose of replacing and overhauling the EU's current legal regime for digital services, which was introduced in the year 2000, by the name of the e-Commerce directive.¹ Consequently, this report, with a focus on the dimension of disinformation and harmful as well as illegal content, will firstly seek to chart the current state of affairs in relation to the bloc's efforts to avert and manage content deemed harmful, and secondly, present the key points of contention and concern voiced by stakeholders such as member states, industry, and civil society leading up to the recent release of the DSA's draft by the EC. This will be insightful because it is these very points contentions that will almost undoubtedly not only continue to shape and steer the discussion around the DSA in the months ahead, but also grow in intensity as the vote on the DSA by the European Parliament approaches.

The e-Commerce Directive

When the e-Commerce directive was introduced in the year 2000, the digital world, as we know it today, did not exist.² So, the primary purpose with which it was established was with the aim of 'fostering the development of electronic commerce' in the bloc and providing a legal framework which ensures the free movement of 'information society services' between member states.³ Furthermore, the directive sought to encourage uniformity and the approximation of the national laws of member states in this realm.⁴ This directive was a considerable step forward for the EU's digital single market at the time as it settled many issues that were beforehand either unclear or were handled differently within the bloc by different member states.⁵ One example of how the directive settled legal ambiguities in respect to economic considerations was for instance the internal market clause, which

¹ European Commission, 'The Digital Services Act Package', Shaping Europe's Digital Future - European Commission, 2 June 2020, <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

² Tambiama Madiega, 'Reform of the EU Liability Regime for Online Intermediaries: Background on the Forthcoming Digital Services Act', In-Depth Analysis (European Parliamentary Research Service (EPRS), May 2020), <https://data.europa.eu/doi/10.2861/08522>.

³ Madiega, I&1.

⁴ Madiega, I&1.

⁵ European Commission, 'E-Commerce Directive', Shaping Europe's Digital Future - European Commission, 24 September 2015, <https://ec.europa.eu/digital-single-market/en/e-commerce-directive>.

Stipulated that online service providers are subject to the law of the member states in which they have been established rather than where their services are utilised.⁶ This evidently made it easier for digital businesses to operate within the bloc and simplified operating in general.

However, even in a world where New York City's World Trade Center still stood tall, the EU was already considering the problem of harmful content and the possibility of liability issues that could arise through many digital platforms unintentionally hosting such content.⁷ Therefore, in an effort to push back against illegal and harmful content on the internet, whilst at the same time not penalising or imposing unfair burdens on digital service providers, the directive did not impose penalties on such providers for hosting illegal or harmful content as long as they fulfilled the following criteria:

- service providers hosting illegal content need to remove it or disable access to it as fast as possible once they are aware of the illegal nature of it;
- only services who play a neutral, merely technical and passive role towards the hosted content are covered by the liability exemption.⁸

These legal exemptions for digital service providers were clearly needed to encourage the growth and operation of such platforms in the bloc as it would have not been feasible to impose such legal sanctions on digital platforms, if they had hosted such content inadvertently.⁹

However, despite all of the above seemingly being quite reasonable, there have been many issues with the current limited liability regime or 'safe harbour' conditions, which go beyond mere legalistic battling.¹⁰ One example of such a significant problem is the fact that neither the illegal activities that are meant to be prohibited have been defined nor the issue of what in fact qualifies as actual knowledge over the illegal content has been resolved.¹¹ For example, is it simply enough for one user on YouTube to report a video in order for YouTube to become liable for hosting an ISIS beheading video, not to mention how much time should YouTube have to remove such content before it should face penalties?¹² On the same point as well, what if in fact the video was not an ISIS video, but a parody video by a user, then what recourse does the uploader have to ensure the video is restored and his freedom of expression respected?¹³ Moreover, since member states are not permitted, as per the current legal regime, to impose general user monitoring obligations upon digital platforms, there is the serious issue and question over what in fact do current automated content monitoring algorithms constitute.¹⁴ Are these algorithms an infringement on privacy or free speech laws, let alone if such

⁶ European Commission.

⁷ European Commission.

⁸ European Commission.

⁹ European Commission; Madiega, 'Background On the Forthcoming Digital Services Act'.

¹⁰ Madiega, 'Background On the Forthcoming Digital Services Act'. Please see executive summary for the first mention of the term 'safe harbour.'

¹¹ Madiega.

¹² Madiega.

¹³ Madiega.

¹⁴ Madiega.

mechanism can be classified as general monitoring?¹⁵ Last but not least, it is not even entirely clear what constitutes an ‘information society service’ provider nowadays, which is a very important question as one may wonder, if Facebook qualifies as one, since its users do not in fact provide it with ‘remuneration’ for its services since it is advertisers that do, but then are advertisers the users?¹⁶ In order to underscore the importance of this last point more concretely, the Court of Justice of the European Union did not qualify Uber as an ‘information society service’ provider while it did so for Airbnb.¹⁷

Nonetheless, it should be remarked that even though the e-Commerce directive, being the legal framework, has been undeniably the cornerstone of all subsequent efforts by the EU to tackle disinformation and harmful as well as illegal content in this realm on the continent, there have been a few of other efforts by the EC to tackle these challenges. One of these efforts has been a code of practice that was initiated in collaboration between the EC and several tech giants in 2018, which provided a voluntary framework for digital platforms to tackle disinformation proactively.¹⁸ Another initiative was the establishment of the East StratCom Task Force in 2015 whose primary objective was to address Russia’s disinformation campaigns through strategic communication and outreach in Eastern Europe.¹⁹ The manner in which this has facilitated itself in practice is the EUvsDisinfo project that seeks to raise public awareness and understanding of the ‘Kremlin’s disinformation operations’ in Europe as well as beyond through providing insights, analysis, and media monitoring services.²⁰ However, irrespective of the impact of these initiatives, it is clear that given that one of the DSA’s aims is to provide a better legal framework to tackle disinformation and undesirable content, it is clear that these initiatives have not been enough in the eyes of the EC. This became apparent particularly through the criticism that the earlier mentioned code of practice has faced by member states.²¹

¹⁵ Madiega.

¹⁶ Madiega, 1, 5 & 8.

¹⁷ Madiega, 13 & 14.

¹⁸ European Commission, ‘Code of Practice on Disinformation’, Shaping Europe’s Digital Future - European Commission, 26 September 2018, <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

¹⁹ European External Action Service, ‘Questions and Answers about the East StratCom Task Force’, EEAS - European External Action Service - European Commission, accessed 20 October 2020, https://eeas.europa.eu/headquarters/headquarters-homepage/2116/questions-and-answers-about-east-stratcom-task-force_en.

²⁰ EUvsDisinfo, ‘About’, EUvsDisinfo, accessed 20 October 2020, <https://euvsdisinfo.eu/about/>.

²¹ Samuel Stolton, ‘EU Code of Practice on Disinformation “Insufficient and Unsuitable,” Member States Say’, *Euractiv*, 5 June 2020, <https://www.euractiv.com/section/digital/news/eu-code-of-practice-on-disinformation-insufficient-and-unsuitable-member-states-say/>.

The Digital Services Act

The DSA is thereby not just a fundamental part of the European Union's wider Digital Strategy which strives as per the Commission's Work Programme 2020 to create a Europe 'fit for the digital age,' but also a clear attempt to address the deficiencies and shortcomings of the e-Commerce directive.²² Therefore, the DSA is meant to be a legal package that will serve the purpose of providing a new and modern legal framework to Europe with the aim of improving upon the bloc's previous e-Commerce directive as well as accounting for an array of new challenges such as the serious impact of disinformation and hate speech, not to mention the debacle associated with the mass gathering of user data.²³ Currently, the draft of the DSA was just recently been released in December of last year after the EC completed its public consultation on the 8th of September 2020.²⁴

Although the content of DSA is the not primary focus of this report, it can be said that broadly speaking that the DSA alongside with the DMA seeks to improve and overhaul the current legislative framework of the bloc in order to correct existing deficits in that very framework as well as address many of the new challenges such as the strong market position of big tech giants.²⁵ However, there are certain problems and policy questions, as described during the previous discussion of the e-Commerce directive, that will continue to dominate the discussion surrounding the DSA as it moves from being a draft piece of legislation to being put up for a vote in the European Parliament. One of them being the question concerning what categorises 'harmful content,' even though 'illegal content' within itself has not even been specifically defined by the previous directive, the issue of 'harmful content' is even more vague and arguably crucial.²⁶ For instance, what does actually constitute harmful disinformation or simply just harassment?²⁷ Furthermore, should the EC determine what is classified as harmful content or should it be left to the member states? This will probably be a highly contested issue in the finalisation of the DSA, since a balance will have to be drawn between the policing of harmful content and freedom of speech.²⁸ Another similar aspect relates to the question of what to do over fake news and disinformation as, similar to the 'harmful content' dilemmas, one deals with the issue of how to adequately address this problem without once again either imposing an unfair burden on platforms or the fundamental rights of the bloc's citizens.²⁹ Nevertheless, given that France and Germany have

²² European Commission, 'European Commission 2020 Work Programme: An Ambitious Roadmap for a Union That Strives for More', European Commission 2020 Work Programme, accessed 18 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_20_124.

²³ European Commission, 'The Digital Services Act Package'; European Digital SME Alliance, 'The Digital Services Act and the Role of (Social Media) Platforms', European Digital SME Alliance, 21 August 2020, <https://www.digitalsme.eu/the-digital-services-act-and-the-role-of-social-media-platforms/>.

²⁴ European Commission, 'The Digital Services Act Package'; European Parliament, 'Legislative Train Schedule', European Parliament, accessed 20 September 2020, <https://www.europarl.europa.eu/legislative-train/theme-a-europe-fit-for-the-digital-age/file-digital-services-act>.

²⁵ European Digital SME Alliance, 'The Digital Services Act and the Role of (Social Media) Platforms'.

²⁶ Madiega, 10–11.

²⁷ Madiega, 'Background On the Forthcoming Digital Services Act'.

²⁸ Madiega.

²⁹ Madiega, 10 & 11.

already adopted national legislation with the end in sight to tackle the issue of fake news and disinformation, without something being done, there is indeed a very viable risk of legal fragmentation in the single market, which in turn could pose a threat the digital market as a whole in the EU, unless the EC steps in with the DSA and sets the boundaries.³⁰

The Reception

Given the contention surrounding the DSA and its ultimate final form, the reception already preceding the draft's release amongst stakeholders has been diverse, to say the least, and much of it has been driven by the interests of the given stakeholder group in question. Consequently, this part of the report will focus on the reception by governments, industry, and civil society respectively leading up to the draft's release by paying particular attention not only to voiced opinions and concerns, but also to the possible future positions of these key actors based on their previously voiced opinions on the very key issues surrounding the DSA.

Governments

One loose affiliation of likeminded states in regards to the DSA and European Digital Policy at large that collectively call themselves the Digital 9+ (D9+) states consist of Denmark, Finland, Sweden, Netherlands, Luxembourg, Belgium, UK, Ireland, Estonia, Poland and the Czech Republic.³¹ This affiliation of states insists that the 'core principles' of the e-Commerce directive 'not only be maintained, but modernized, yet in a targeted manner.'³² Therefore, these states believe that the 'time has come to consider the introduction of a framework for notice and action mechanisms across the EU, with measures that are proportionate to the nature and impact of the harm committed.'³³ This new framework should, amongst many other things, ensure the quick and efficient removal of illegal content, while at the same time not creating an unfair burden on companies as well as allowing content creators the opportunity to redress and allowing for a mechanism that permits the submission of a 'counter-notice' by those whose content has been removed.³⁴ Furthermore, this new framework should guarantee user's fundamental rights of expression and information.³⁵ This is a very firm position by such a broad array of states, given the early stage of the DSA's development at the time, one may even speak of the setting of a redline, especially when one considers the economic stakes for countries such as Ireland and Estonia, which rely, as is generally known, on a healthy digital single market in the EU.³⁶ In contrast, it was and still is to a lesser degree, quite hard to gauge the position of some other states. For example, Germany virtually up to the release of the draft by the EC took no public formal opinion with the exception of a working paper drafted by the Ministry of J

³⁰ Madiega, 7–8 & 11.

³¹ D9+ Group, 'D9+ Non-Paper on the Creation of a Modern Regulatory Framework for the Provision of Online Services in the EU', 9 December 2019, <https://www.gov.pl/web/digitalization/one-voice-of-d9-group-on-new-regulations-concerning-provision-of-digital-services-in-the-eu>.

³² D9+ Group, 2.

³³ D9+ Group, 2.

³⁴ D9+ Group, 2.

³⁵ D9+ Group, 2.

³⁶ D9+ Group, 2.

Justice in regards to the legalities surrounding the question of monitoring the digital market from the perspective of consumer rights.³⁷ Nonetheless, through Germany's past actions, especially when taking into account that the country is one of the states that has considerably contributed to the emergence of the issue of legal fragmentation, it is not very hard to imagine Berlin's possible position on the DSA.³⁸ It was through the infamous NetzDG law, which was enacted by the country to combat agitation and fake news on social media networks, that Germany teleported itself to the forefront of taking active measures against such challenges.³⁹ The NetzDG law required platforms to remove or block prohibited content within a short period of time, store it for potential legal action for up to ten weeks, and face fines leading up to 5 million Euros, if these organisations did not report on the content that has been removed or blocked.⁴⁰ This in turn sparked considerable controversy within civil society for several reasons such as on the basis of the arbitrary distinction between 'manifestly unlawful content' and 'not manifest unlawful content' which is very blurry and undefined, thereby creating the very real risk of over censorship and compliance by digital platforms as to avoid fines.⁴¹ All of this, in addition to the fact that subsequent updates of the NetzDG law may include the mandatory submission of all data to the Federal Criminal Police Office (BKA), indicate that Germany, in contrast to the D9+ states, is without a doubt more determined to acquire a solid legal framework with which it will be possible to remove and prosecute harmful content and its publishers.⁴² Therefore, the country's position towards the DSA is probably one that would like to see the EC be ultimately more stringent in its formulation of the act and its provisions in line with the NetzDG.

Nonetheless, it was not only member states which probably seek a more stringent regulatory regime for the DSA that did not formally voice their position until much later. It was especially surprising to see that even amongst the Visegrad Group (V4) there appears to be varying positions towards the EC's DSA initiative. This can be seen by the fact that Slovakia and Hungary did not join the Czech Republic and Poland in their membership of the D9+ affiliation.⁴³ In the case of Slovakia, one can witness a member state, which has taken the influence of disinformation campaigns very seriously, especially from a national security perspective, which has meant a lot of engagement from the relevant ministries of defence and foreign affairs.⁴⁴ However, besides some efforts in strategic communication and participating in NATO linked initiatives, the country has until recently not provided any of its ministries or regulatory bodies

³⁷ Alexander Fanta, 'EU Plant Großen Wurf - Das Plattformgrundgesetz', Netzpolitik.org, 13 July 2020, <https://netzpolitik.org/2020/eu-plattformgrundgesetz-digital-services-act/>; Bundesministerium der Justiz und für Verbraucherschutz, 'Sachverständigenrat für Verbraucherfragen legt Studie zur verbrauchergerechten Regulierung digitaler Plattformen vor', Bundesministerium der Justiz und für Verbraucherschutz, 17 June 2020, https://www.BMJV.de/SharedDocs/Pressemitteilungen/DE/2020/061720_SVR.html.

³⁸ Fanta, 'EU Plant Großen Wurf - Das Plattformgrundgesetz'; Ingrid Lambrecht, 'An Act Waiting to Happen: National Responses to Online Hate Speech Ahead of the EU's Digital Services Act', *KU Leuven - CiTiP* (blog), 7 July 2020, <https://www.law.kuleuven.be/citip/blog/an-act-waiting-to-happen/>.

³⁹ Lambrecht, 'An Act Waiting to Happen'; Aleksandra Kuczerawy, 'Phantom Safeguards? Analysis of the German Law on Hate Speech NetzDG', *KU Leuven - CiTiP* (blog), 30 November 2017, <https://www.law.kuleuven.be/citip/blog/phantom-safeguards-analysis-of-the-german-law-on-hate-speech-netzdg/>.

⁴⁰ Lambrecht, 'An Act Waiting to Happen'; Kuczerawy, 'Phantom Safeguards?'

⁴¹ Lambrecht, 'An Act Waiting to Happen'; Kuczerawy, 'Phantom Safeguards?'

⁴² Lambrecht, 'An Act Waiting to Happen'; Kuczerawy, 'Phantom Safeguards?'; D9+ Group, 'D9+ Non-Paper'.

⁴³ D9+ Group, 'D9+ Non-Paper'.

⁴⁴ Stanislav Matějka, An we, 8 October 2020.

with either the competencies or tools needed to address disinformation and undesirable content directly.⁴⁵ In fact it has been only recently with the effort to transpose the Audiovisual Media Services Directive (AVMSD) that some changes are possibly going to occur over the next few months.⁴⁶ Moreover, the country has recently committed itself to a considerable restructuring exercise in the realm of digital governance as well as preparing the country to leap forward with its digitalisation effort over the next decade.⁴⁷ Nevertheless, based on Slovakia's past position, it is very unlikely that the country will on the front of tackling disinformation strive to drastically overhaul the current limited liability regime or bestow greater individual responsibility upon bigger tech firms.⁴⁸ Furthermore, it is clear that Slovakia will most probably be adamant throughout the process about the clarification of not only the rules that are imposed upon digital platforms, but also the responsibilities and transparency that these platforms owe to their users.⁴⁹ All of this seems even more likely when one considers that it was Slovakia alongside several Baltic states had criticised the earlier mentioned collaborative code of practice by the EC for being 'insufficient and unsuitable,' and called for an 'urgent' need to introduce regulation to tackle disinformation on social media platforms.⁵⁰ Therefore, one may find that after all Slovakia is closer in its position to the D9+ affiliation than one might initially think.⁵¹ Accordingly, the lack of concrete signalling early on towards the EC's DSA initiative by Slovakia and some other member states should not be seen by default as either disinterest or the inability to come up with a position.⁵² In consequence, the DSA presents beyond doubt a very unique opportunity for Slovakia, and other member states in a similar position, to play a considerable constructive role in simultaneously not just shaping its own digital transformation, but as well ensuring that the DSA complements that very digital transformation and that its interests are safeguarded.⁵³

Industry

The European Digital SME Alliance published its first position on the 8th September 2020 via a formal position paper.⁵⁴ According to the alliance, which strives to represent the interests of digital SME's in the bloc, the DSA presents as much an opportunity to overcome the present challenges in the digital space that have evolved over the last few years as it potentially presents a threat to the very health of that space.⁵⁵ The alliance fears that not only there might be a risk of imposing unfair burdens on smaller digital businesses, but also that there may be an issue

⁴⁵ Matějka.

⁴⁶ Matějka.

⁴⁷ Office of the Deputy Prime Minister of the Slovak Republic for Investments and Information, 'Strategy of the Digital Transformation of Slovakia 2030', 2019, <https://www.mirri.gov.sk/wp-content/uploads/2019/11/Brochure-SMALL.pdf>; European Commission, 'Digital Government Factsheet 2019 - Slovakia', 2019, https://joinup.ec.europa.eu/sites/default/files/inline-files/Digital_Government_Factsheets_Slovakia_2019.pdf.

⁴⁸ Matějka, An Interview with Stanislav Matějka.

⁴⁹ Matějka.

⁵⁰ Stolton, 'EU Code of Practice on Disinformation "Insufficient and Unsuitable," Member States Say'.

⁵¹ D9+ Group, 'D9+ Non-Paper'.

⁵² Matějka, An Interview with Stanislav Matějka.

⁵³ Matějka.

⁵⁴ European Digital SME Alliance, 'Position Paper on the Digital Services Act (DSA)' (European Digital SME Alliance, 8 September 2020), <https://www.digitalsme.eu/digital/uploads/Position-paper-on-Digital-Services-Act-FINAL.pdf>.

⁵⁵ European Digital SME Alliance.

with the possible imposition of general monitoring requirements, which the alliance strongly opposes.⁵⁶ Therefore, the group demands the maintenance of the current limited liability regime as well as the basic principles of the current e-Commerce directive, whilst at the same time encouraging the EC to find an approach that is not in line with an ‘one-size-fits-all approach.’⁵⁷

In quite similar fashion, EDiMA, the association which represents tech giants such as Facebook, Amazon, and Apple in Europe, has already very early on taken a position on the DSA initiative.⁵⁸ The organisation advocates for something called a ‘Online Responsibility Framework,’ that enables and encourages online providers to do ‘more to protect online consumers from illegal content,’ without placing additional burdens on such organisations.⁵⁹ Therefore, also EDiMA finds that the principle of limited liability ‘must be reaffirmed as part of any new framework.’⁶⁰ Furthermore, there appears to be a desire to have ‘harmful content’ more concretely defined, which as even mentioned earlier, has been a weakness of the e-Commerce directive.⁶¹ Moreover, there seems to be a strong agreement with the Digital SME Alliance on the point of not having one simple framework for the entire sector, but rather apply the new framework ‘proportionately to a variety of different online services rather than a specific list.’⁶² Differently, the organisation takes the risk of legal fragmentation rather serious as it potentially could lead to harsher regimes in some member states, but at the same time it ‘accepts’ that there may be a need for an oversight body.⁶³ Nonetheless, what really stands out in EDiMA’s position is the fact that the organisation strives to draw a difference between ‘responsibility and liability.’⁶⁴ This distinguishing between responsibility and liability stems from a fear by the online giants that a new legal regime would probably penalise platforms for acting ‘proactively’ as EDiMA states its desire for a new legal regime that encourages proactive and ‘additional effective action against illegal content and activity’ on the platforms.⁶⁵ It is also probably for this very reason that EDiMA’s subsequent paper on the topic emphasised the importance of defining the legal basis on which its members within its proposed framework should act upon illegal content.⁶⁶ Although the organisation reaffirms its position in favour of safeguarding fundamental rights of users and disfavours the imposition of general monitoring, it should be looked at with caution when EDiMA advocates for the means to proactively engage with illegal and harmful content as it may lead to a deprivation of plurality on platforms and the censorship of users with them having little legal recourse.⁶⁷

⁵⁶ European Digital SME Alliance.

⁵⁷ European Digital SME Alliance, 5.

⁵⁸ EDiMA, ‘Responsibility Online’ (EDiMA, January 2020), <https://edima-eu.org/wp-content/uploads/2020/01/Responsibility-Online-1.pdf>.

⁵⁹ EDiMA.

⁶⁰ EDiMA, 1.

⁶¹ EDiMA, ‘Responsibility Online’.

⁶² EDiMA, 3.

⁶³ EDiMA, 4.

⁶⁴ EDiMA, 2.

⁶⁵ EDiMA, 2 & 3.

⁶⁶ EDiMA, ‘Fundamentals of the Online Responsibility Framework Series: A Legal Basis to Act’ (EDiMA, 12 October 2020), https://www.euractiv.com/wp-content/uploads/sites/2/2020/10/ORF-Series_-Basis-to-Act_EDiMA.pdf.

⁶⁷ EDiMA, ‘Responsibility Online’.

Nonetheless, despite the fact that EDiMA represents most of the tech giants in Brussels, it is beneficial to take a moment to reflect upon some of the individual positions taken by up such companies towards the DSA initiative in order to see whether or to what degree they may deviate from EDiMA's position. One of these tech giants is none other than Facebook, which has just recently been subject to considerable controversy alongside Twitter for unilaterally censoring a story by the New York Post containing allegations against one of Joe Biden's sons in the midst of the presidential election in the United States.⁶⁸ It was in February 2020 that the social networking giant released its own white paper on the way it would like to see online content regulation move forward.⁶⁹ In the document, Facebook emphasised the need for a regulatory framework that holds internet companies accountable for having 'certain systems and procedures in place' to address disinformation and undesirable content.⁷⁰ According to the company, this approach would be the best at ensuring a balance between the safety of users, freedom of expression, and other interests instead of requiring the firm to restrict specific forms of speech or setting stringent performance targets for such actors in the digital space.⁷¹ Of course, Facebook admits that the final solution will probably require a mixture of all approaches since they are not mutually exclusive, but it is clear that the company desires a regulatory framework set on guidelines rather than specific rules, which echoes EDiMA's responsibility based vision for the future regulatory framework in the bloc.⁷² In contrast, Google, which also owns YouTube, has advocated in its response to the DSA's public consultation for a framework that keeps with some updates true to the nature of the current limited liability regime of the e-Commerce directive.⁷³ However, despite appreciating the limited liability regime as a core foundation on which the DSA should base itself, Google just like Facebook is also not too far off from EDiMA's position in the realm of disinformation and undesirable content. This can be seen especially when Google paradoxically called for a framework that does not prioritise speed and high penalties in order to guarantee fair and transparent content removal processes, but also at the same time would like that policy makers 'encourage intermediaries to engage in the responsible use of voluntary actions for content moderation, above and beyond what is required by the liability regime.'⁷⁴ This once again echoes the position of EDiMA which advocates for a framework that is more reliant on responsibility than on liability.⁷⁵

⁶⁸ Jon Levine, 'Facebook, Twitter Bosses Agree to Testify in Senate — after the Election', *New York Post* (blog), 24 October 2020, <https://nypost.com/2020/10/24/facebook-twitter-ceos-will-testify-in-senate-after-election/>.

⁶⁹ Facebook, 'Charting a Way Forward: Online Content Regulation' (Facebook, February 2020), https://about.fb.com/wp-content/uploads/2020/02/Charting-A-Way-Forward_Online-Content-Regulation-White-Paper-1.pdf.

⁷⁰ Facebook, 9.

⁷¹ Facebook, 'Charting a Way Forward'.

⁷² Facebook; EDiMA, 'Responsibility Online'.

⁷³ Kent Walker, 'A More Responsible, Innovative and Helpful Internet in Europe', *Google*, 3 September 2020, <https://blog.google/around-the-globe/google-europe/more-responsible-innovative-and-helpful-internet-europe/>; Google, 'Google's Submission: Keeping Users Safe Online, Deepening the Internal Market, and Clarifying Responsibilities for Digital Services' (Google, n.d.), https://blog.google/documents/89/Googles_submission_on_the_Digital_Services_Act_package_1.pdf.

⁷⁴ Google, 'Google's Submission: Keeping Users Safe Online, Deepening the Internal Market, and Clarifying Responsibilities for Digital Services', 7.

⁷⁵ Google, 'Google's Submission: Keeping Users Safe Online, Deepening the Internal Market, and Clarifying Responsibilities for Digital Services'; EDiMA, 'Responsibility Online'.

Civil Society

Besides the digital industry itself, there are also several groups within civil society that have a key stake in the ultimate product that will be the DSA. One of these groups are journalists, which as per the Committee to Protect Journalists is especially concerned on the impact of the DSA on the ability of journalists to pursue and publish stories on harmful content as well as the general impact on the freedom of expression.⁷⁶ Although the DSA presents an opportunity to rebalance the digital landscape and strengthen independent journalism, especially when considering the massive role that giant tech companies play nowadays, it also poses a considerable risk as it may result in a new set of regulations that will remain with us for several decades to come.⁷⁷ This concern is not entirely without precedent as the German NetzDG law already stirred a lot of controversy as the entire content removal process in Germany lacks transparency and oversight with little recourse for those whose content has been removed.⁷⁸ Therefore, any new legal framework should, from an apparent journalistic standpoint, contain several safeguards against further strengthening the position of tech giants and allowing for accountability as well as transparency as to prevent infringements on journalism and the freedom of expression.⁷⁹

Quite similarly, EDRi which is a collective network of civil society actors that advocate in the defence of digital rights across the continent, sees several opportunities and risks posed by the DSA.⁸⁰ The organisation also sees many risks with the further monopolisation of the market and the censorship of free speech, if the DSA is not drafted and adopted with caution.⁸¹ Therefore, EDRi makes several proposals on how to tackle some of the challenges faced today by policy makers when it comes to the digital space, while at the same time also safeguarding the very principles that made the 'internet great.'⁸² One of these is the fact that the organisation appeals to the EC to maintain the limited liability regime that was set in stone by the e-Commerce directive and not to use limited liability as a tool to push digital platforms to 'take more responsibility,' in order to prevent the over-removal of content.⁸³ This is further emphasised by the authors of the position paper by simply stating that 'privatising the legality assessment for online expression cannot be the solution.'⁸⁴ This is quite in opposition to the position of EDiMA, which advocated for precisely an environment that encourages and incentivises online platforms to take on more responsibility.⁸⁵ Instead, EDRi advocates for the establishment of a system that is transparent and informs users of the reasons behind decisions taken by platforms

⁷⁶ Tom Gibson, 'How Will the EU's Digital Services Act Impact Journalism?', *Committee to Protect Journalists*, 29 July 2020, <https://cpj.org/?p=49018>.

⁷⁷ Gibson.

⁷⁸ Gibson.

⁷⁹ Gibson.

⁸⁰ EDRi, 'Who We Are', European Digital Rights (EDRi), accessed 27 September 2020, <https://edri.org/about-us/who-we-are/>; Chloé Berthélémy and Jan Penfrat, 'Platform Regulation Done Right: EDRi Position Paper on the EU Digital Service Act' (EDRi, 9 April 2020), https://edri.org/wp-content/uploads/2020/04/DSA_EDRiPositionPaper.pdf.

⁸¹ Berthélémy and Penfrat, 'Platform Regulation Done Right'.

⁸² Berthélémy and Penfrat, 5.

⁸³ Berthélémy and Penfrat, 5.

⁸⁴ Berthélémy and Penfrat, 5.

⁸⁵ EDiMA, 'Responsibility Online'.

to remove or keep their content as well as the potential establishment of an effective mechanism of legal redress through perhaps the creation of special and independent tribunals established solely for that purpose from funds appropriated from large digital platforms by a European wide authority.⁸⁶ Consequently, it becomes clear that whilst the industry itself seeks to minimise potential penalties and obtain free hand at monitoring and policing content, civil society sees that as a very threatening potential for the future of the digital space, and thus on the basis of the fundamental right to the freedom of expression, it may be best not to hand the keys to the castle to tech giants and instead find a pragmatic middle ground that strives to reduce the problem of the dissemination of toxic material through realistic proposals.⁸⁷

Last but not least, even though fact checkers have not joined, at least not yet, the discussions surrounding the DSA initiative, it should be noteworthy to briefly mention the way in which the fact checker community has evolved over the last couple of years, especially as they could play a bigger and arguably more constructive role in tackling disinformation. Generally, there is no wider association of fact checkers to be found, however, one does find an array of public non-profit initiatives operated by citizens and for-profit companies offering their fact checking services that have emerged over the last few years.⁸⁸ One noteworthy example of such an initiative, which happens to be a non-profit initiative run by citizens, is a volunteer-based project called Keyboard Warriors in Poland, which is being operated under the umbrella of the *Front Europejski* that tries to combat false information about European policies and values.⁸⁹ Although there is seemingly no larger collective or association in existence today of such non-profit and for-profit fact checking entities, they do deserve to be heeded, because it is undeniable that these entities could provide considerable insight to policy makers when it comes devising their position towards the DSA and finding alternative as well as sustainable solutions to the issue of disinformation. This is especially true when it comes to grass roots collaborative efforts such as the Keyboard Warriors from Poland. After all, realistically speaking penalisation and content removal can at best only be one aspect of a successful strategy that seeks to counter disinformation and illegal as well as harmful content.

⁸⁶ Berthélémy and Penfrat, 'Platform Regulation Done Right'.

⁸⁷ Berthélémy and Penfrat.

⁸⁸ Logically, 'About Us', Logically, accessed 20 October 2020, <https://www.logically.ai/about>; Truly Media, 'About Us | Truly Media', Truly Media, 14 November 2014, <https://www.truly.media/about-us/>; Front Europejski, 'Wojownicy', Front Europejski, accessed 20 October 2020, <https://fronteuropejski.pl/wojownicy/co-to/>. Please see for some examples.

⁸⁹ Front Europejski, 'Wojownicy'.

Conclusion

In its effort to update the legal framework that governs the European digital single market and space, the EC has set itself quite the ambitious objective. Irrespective of whether the DSA will ultimately take on a more or less draconian approach, the question whether the EC will be successful in its quest will in the end largely depend on its ability to weigh its desired policy goals against the interests of the various stakeholders on the scene. This has become particularly evident when one examines the reactions and concerns voiced by stakeholders prior to the draft's release from across the bloc's political union, industry, and civil society as interests and opinions are diverse and tend to diverge a lot on some of the core issues that the DSA seeks to address and reconcile. Therefore, the prospect that the DSA might be an overly ambitious project that might be stopped in its very early tracks is not entirely unfeasible based on the surveyed opinions in this report. Yet again, these surveyed opinions do not even take into account the reaction by the wider European public, which may even exceed the outcry that was witnessed during the introduction of Article 13, in particular if the DSA takes on a more draconian and problematic approach to the management of online content in its final form.⁹⁰ However, if the DSA does go up for debate in the European Parliament and eventually ends up being adopted, it will probably feature either the preservation of the current limited liability regime or an expansion of it, and will not feature the shifting of responsibility solely to the already problematic monopolising tech giants. Accordingly, at the heart of the contention surrounding the DSA initiative lies not only the question of who, if anyone, should be held liable for harmful and illegal content, but also more basically, if intervention by the EC on a European wide level on disinformation and undesirable content is in fact desirable or even appropriate, because based on the principle of subsidiarity, it might be better for individual member states to take action or define the boundaries on what is acceptable content. Of course, legal fragmentation in this area could undeniably pose a serious challenge to the prosperity of the digital single market and its growth, particularly when it comes to smaller and medium sized digital enterprises. Nevertheless, perhaps the reason why the e-Commerce directive and the current legislative regime of the bloc has not provided an end all solution to the issue of disinformation and undesirable content might be because the approach of penalisation in this realm might actually not have been the right approach to the issue from the beginning.

Although the DSA's draft has already been released, thereby making it difficult to call for altogether completely different approach to the issues that the DSA strives to address, it is still possible on the basis of the core issues and the concerns that have been voiced so far to argue for an approach that is ultimately led by prudence and caution when it comes to the refurbishing of the bloc's current legal framework. On the one hand, philosophically speaking, the cure must not be worse than the alignment. It is undeniable that disinformation and harmful as well as illegal content pose a serious challenge and threat to social cohesion in many member states. However, the European project ever since its inception has prided itself

⁹⁰ Matt Reynolds, 'What Is Article 13? The EU's Divisive New Copyright Plan Explained', *Wired UK*, 24 May 2019, <https://www.wired.co.uk/article/what-is-article-13-article-11-european-directive-on-copyright-explained-meme-ban>.

through its role as a bulwark in favour of promoting, protecting, and expanding the governance model of liberal democracy. Consequently, a case might be made in favour of an approach that focuses less on penalisation and potential censorship, and instead emphasises public education and the strengthening of communal solidarity. Such an alternative or complementary approach to the problem would not just make Europe as a whole more resilient to such challenges, but also not threaten the plurality and vibrance that come with liberal democracy. After all, disinformation and undesirable content can only harm a society that is neither informed nor in accord with its own values in the first place. On the other hand, pragmatically, there is a real question of, if at all, it will ever be possible to achieve a transparent and sustainable way of monitoring the spread of information and content online, which does not either amount to general monitoring through algorithms by platforms or severely restricts the ability of users and organisations to share and spread information. The truth of the matter is that everyday data on digital platforms and across the internet grows exponentially, which makes it virtually impossible not to rely on automated systems, which in turn poses serious questions on transparency, biases, and accountability. Notwithstanding, that once something has been uploaded, it is virtually impossible to remove it from the internet in the first place since content replicates and can be sought by those individuals of the given target group in any case on various platforms. For example, albeit having been banned from virtually all mainstream digital platforms, the American conspiracy theorist by the name of Alex Jones and his content can still be widely accessed on the internet with relatively little effort.⁹¹ This is especially important to consider, because too often those demographics which are targeted by disinformation or undesirable content often seek out such materials themselves on online platforms anyways, even if it is on niche platforms.⁹² Therefore, it is really questionable whether or not Facebook's recent unilateral decision to ban all content related to the QAnon conspiracy theory will have any positive effects and will not be in actuality counterproductive.⁹³ Ultimately, the road not taken will never be known, but it might be worth contemplating taking the road less travelled in this case, especially at this critical juncture that may define the digital space in Europe and possibly beyond for the next few decades. This may entail the contemplation of a digital future for Europe that avoids unsustainable and possibly counterproductive policy instruments, and instead seeks out measures that boost social cohesion and protect the very core values that we strive to protect in the first place against disinformation and undesirable content.

⁹¹ Bitchute, 'Bitchute Is a Peer-to-Peer Social Video Platform', BitChute, accessed 9 October 2020, <https://www.bitchute.com/>. One example of a platform on which Jones's content can be publicly accessed.

⁹² Bitchute; 'LiveLeak.Com - Redefining the Media', LifeLeak.com, accessed 9 October 2020, <https://www.liveleak.com/>. Two examples of widely known platforms on which arguably controversial content can be found.

⁹³ BBC, 'Facebook Bans Qanon Accounts Across All Platforms', *BBC News*, 6 October 2020, <https://www.bbc.com/news/world-us-canada-54443878>.

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