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The DSA has been published – now the difficult bit begins

Joris van Hoboken

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The Digital Services (DSA) has [finally been published](#) in the Official Journal of the European Union on 27 October 2022. This publication marks the end of a years-long drafting and negotiation process, and opens a new chapter: that of its enforcement, practicable access to justice, and potential to set global precedents.

As many authors will analyze in more detail throughout this symposium, the DSA is intended as the EU's new landmark piece of legislation for addressing illegal and harmful content and activity online. It has been portrayed as Europe's new "Digital Constitution", which affirms the primacy of democratic rulemaking over the private transnational ordering mechanisms of Big Tech. While it extends the e-Commerce Directive's core principles for the regulation of online services that handle third-party content, and codifies existing self-regulatory practices initiated by online platforms, it also introduces several significant legal innovations: a tiered system of due diligence obligations for (very large) intermediary services, the regulation of content moderation through terms of service enforcement, systemic risk assessment obligations for the most widely used platforms, and access to data for researchers. In sum, with the DSA, the EU aims once again to set a global standard in the regulation of the digital environment. But will the DSA be able to live up to its expectations, and under what conditions?

It is this and related questions that this online symposium will address. We have invited a group of leading experts to comment on the DSA, focusing on the overall outcome of the DSA and on three main themes moving forward: (i) the implementation and enforcement of the DSA; (ii) access to justice in relation to content moderation processes; and (iii) international impact and what standards the DSA may be furthering globally.

Implementation and Enforcement of the DSA

A crucial aspect for the success of the DSA relates to the proper implementation of its enforcement framework and the application of its due diligence requirements in practice. The enforcement framework includes a combination of new regulatory authorities at the national (Digital Services Coordinators) and EU level (as part of the European Commission). As underlined by many (particularly civil society and academics), these elements will be decisive as to whether the DSA will deliver on its goals, and whether its rules will be capable of meaningfully protecting fundamental rights. In the long run, the question of legitimacy will be particularly important. Will the independent authorities for overseeing the regulation of content moderation processes, an area perhaps even more contested than online privacy, be broadly accepted by market players and the general public?

As shown by the GDPR, ambitious substantive rules are nothing but a “paper tiger” without effective enforcement. Serious failures in the GDPR’s enforcement have clearly influenced the DSA’s enforcement chapter and surrounding negotiations. In effect, the DSA opts for more centralized enforcement against the most powerful platforms by the European Commission, and includes strict deadlines for Digital Services Coordinators and the Commission to act.

At the national level, the EU member states must decide how to position and equip their national regulators. Dealing with this hot potato of regulatory competence will not be easy, as the DSA cuts across media law, telecommunications regulations, consumer protection, data protection, intellectual property and criminal law. Some countries may decide to create new regulatory agencies in the process, while others may allocate the relevant oversight tasks to (a possible combination of) existing agencies. Pragmatism, path dependency and national particularities may open a plethora of institutional approaches to platform governance.

Given the profound fundamental rights implications of the DSA, the choice of further developing the European Commission into the most important regulatory authority for online content governance deserves continued debate and scrutiny. The Commission is already set to further increase its enforcement powers in other pieces of legislation under discussion or recently adopted. This raises constitutional issues relating to independence and the separation of powers. In the area of platform regulation, the Commission is not an independent regulatory authority, but the executive branch of the EU, which put forward the DSA proposal and played an active role in its finalization.

Other stakeholders (users, researchers, civil society organizations) are also given a significant role to play in the DSA enforcement architecture. Vetted researchers, for instance, will be able to gain access to platform data to investigate relevant harms and dynamics in platform governance. One of the most relevant questions concerns whether the DSA provides these actors with adequate tools to contribute meaningfully and effectively to the enforcement of its rules, particularly from a fundamental rights perspective.

Finally, the DSA also regulates content moderation practices based on terms of service and requires that services moderate transparently, proportionately, and with due regard to the fundamental rights and interests of users and other stakeholders. The precise interpretation of this new provision, which builds on the horizontal effect of fundamental rights between users and online services, will involve complex balancing requirements and an interplay between national constitutional safeguards and EU .

Access to Justice and Content Moderation

One of the main policy goals of the DSA is to create a safer online environment. It is one thing for the DSA to provide for new mechanisms to address online harms, it is another for those to deliver on their promise in practice. Whether this goal is met will depend on whether the DSA succeeds in offering adequate access to justice to

people confronted with online harms. In this regard, codification of the notice and takedown and complaint mechanism can be seen as a step forward. However, it is an open question to what extent this offers sufficient remedies, given the breadth of online harms the DSA addresses. For example, whether the DSA can provide individual or collective opportunities to contest terms and conditions remains to be seen. The matter is further complicated by the fact that substantial barriers to justice often prevent meaningful access to complaint and redress mechanisms or remedies against these harms. Ultimately, effective remedies against online harm and abuse will remain dependent on the platforms' implementation of the DSA requirements, and on national particularities of procedural law more generally.

Even though it is clear that the impact of online harms is spread unevenly, it is still insufficiently understood what online harms are faced by different (including marginalized) groups, how these harms differ and intersect, and where access to justice and opportunities for contestation of platform practices are needed. In particular, various types of unlawful content (such as harassment or racism), as well as over-removals or bans, disproportionately harm marginalised communities. For the DSA to succeed in contributing to a healthy digital environment for all, it will be essential to understand these different needs, and involve civil society organisations representing these interests in the implementation and enforcement debate.

International Implications of the DSA

Finally, EU regulation has an undeniable impact beyond European borders. The so-called “Brussels effect” – the ability of the EU to shape global standards by exercising its regulatory power – has been a distinctive feature of earlier EU law, in particular the GDPR. Since its announcement, discussions about the DSA proposal have been accompanied by the awareness that the DSA may have a profound regulatory resonance on a global level. US-based platform regulation experts and policymakers have thus followed the DSA debate closely, perhaps not least because the largest platforms more heavily regulated under the DSA are mostly US firms.

The same issues and societal risks which the DSA seeks to address are affecting – perhaps even more significantly, and with additional complexities – countries in the so-called Global South. The possible adoption of DSA standards outside the EU raises the question of whether these rules, if implemented, could help advance the platform regulation efforts elsewhere, and promote fundamental rights and other democratic values. At the same time, the DSA's approach could pose risks in less democratic countries, particularly in light of the civil society critiques of some aspects of the DSA, including the centralization of certain enforcement powers.

The line between the safeguarding of fundamental freedoms and democratic values online versus regulatory competition with other regions is thin. A question which thus accompanies deliberations on the DSA's extraterritorial effects is, fundamentally, why the EU is attempting to set international standards, and whether it does so mindful of possible collateral effects.

A Preview

In the few days that the DSA has been officially published, its necessity has already been made abundantly clear. Against this backdrop, more than a dozen expert authors spanning policy, academia and civil society across five continents will come together in the coming days and debate some of the questions sketched out above, as well as raise many more. We have learnt a lot from the texts in this symposium and hope they will move the debate forward.

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