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The digital services act: an analysis of its ethical, legal, and social implications

Aina Turillazzi[a], Mariarosaria Taddeo[a,b,c], Luciano Floridi [a,b] and Federico Casolari[a]

[a]Department of Legal Studies, University of Bologna, Bologna, Italy; [b]Oxford Internet Institute, University of Oxford, Oxford, UK; [c]The Alan Turing Institute, London, UK

ABSTRACT

In December 2020, the European Commission issued the Digital Services Act (DSA), a legislative proposal for a single market of digital services, focusing on fundamental rights, data privacy, and the protection of stakeholders. The DSA seeks to promote European digital sovereignty, among other goals. This article reviews the literature and related documents on the DSA to map and evaluate its ethical, legal, and social implications. It examines four macro-areas of interest regarding the digital services offered by online platforms. The analysis concludes that, so far, the DSA has led to contrasting interpretations, ranging from stakeholders expecting it to be more challenging for gatekeepers, to others objecting that the proposed obligations are unjustified. The article contributes to this debate by arguing that a more robust framework for the benefit of all stakeholders should be defined.

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KEYWORDS Competition law; Digital Services Act; Ethics; European Commission; Fundamental rights; Online platforms

1. Introduction

For many years, the European Union (EU) has been pursuing a digital strategy by developing a modern legal framework to protect online users' fundamental rights (FR) while facilitating business expansion and access to new markets. Among the fundamental components of this strategy, there is a recently proposed regulation, the Digital Services Act (DSA).[1] This article

CONTACT Luciano Floridi luciano.floridi@oii.ox.ac.uk; luciano.floridi@yale.edu

[1]Proposal for a Regulation of the European Parliament and of the Council on the Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, doc. COM (2020) 825 final, 15 December 2020.

analyses the DSA by reviewing the scholarly literature discussing it, working documents, and comments by relevant actors. The goal is to map and evaluate the ethical, legal, and social implications of the DSA. To do so, the article is structured into three more sections. Section 2 introduces the DSA by providing a general overview of its terminology (Section 2.1), the benefits it may deliver for EU stakeholders (Section 2.2), and the new obligations that it introduces and will need to be implemented (Section 2.3). It analyses the most critical issues identified by the literature, and focuses, initially, on three points: (i) the main problems and challenges posed by digital services; (ii) the EU bodies responsible for each of them; and (iii) how the DSA should address the fostering of innovation and competition while protecting fundamental European values. Section 3 identifies four macro-areas of interest regarding online platforms, and analyses the related ethical and policy issues. Section 4 concludes the paper, summarising its main findings. The Appendix outlines the methodology of the systematic search and review.

Before moving to section 2, some remarks are necessary to contextualise the research developed in this article.

Following the EU €1.8 trillion Recovery Plan, the European Commission (EC) intends to make this decade Europe's 'Digital Decade'. The goal is to focus on data, technology, and infrastructure (henceforth also the digital), to strengthen the EU's digital sovereignty, and set competition standards. In 2018, the EC established an Observatory of the Online Platform Economy to supervise the evolution of online platforms, whilst continuing to develop the EC's work on them. Furthermore, together with the European Green Deal, EC President von der Leyen stated in her Political Guidelines the need for a European Digital Agenda. Still in 2019, the Platform-to-Business (P2B) Regulation was introduced to promote a better trading environment, constrain unfair practices, and support transparency for online platforms' business users.[2] In December 2020, the EC proposed a 'regulatory package' comprising the Digital Markets Act (DMA)[3] and the Digital Services Act (DSA). In this article, we focus on the latter, leaving the analysis of the former to a second, complementary article.

The E-Commerce Directive (henceforth, ECD) laid down the initial EU legal framework for digital services in 2000.[4] The ECD has remained

[2]Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57, 11 July 2019.

[3]Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), doc. COM (2020) 842 final, 15 December 2020.

[4]Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178/1, 17 July 2000.

unmodified since its adoption, becoming increasingly outdated. Thus, in the Explanatory Memorandum to the DSA, the EC states that the DSA should elaborate a more effective and coherent legal framework for the digital ecosystem while building on the ECD. It should consider both the new developments not reflected in the pre-existing legislation – especially by dealing with the emergence of online platforms and the increasing impact of digital transformation – and the contribution given by the case law of the EU Court of Justice in shedding light on ECD's provisions and related acts. To update the ECD effectively, the evolution of fundamental rights (henceforth, FR) should also be studied, in relation to digital services,[5] while adopting a post-compliance, soft-ethics approach.[6] Undoubtedly, there is a trade-off between the protection of users' FR and the ability to innovate and compete on online platforms. Squeezed between the imperative of the principle of conferral and that of the respect of the EU fundamental values, the DSA wants to create a truly sophisticated, advanced, and complete picture of online markets and digital services.

2. Understanding the DSA: a European, unified context of online platforms

When one considers the EU digital ecosystem, high levels of fragmentation emerge. Digital economies are still developing in Bulgaria, Greece, and Romania (see the 2020 version of the Digital Economy and Society Index (DESI)),[7] but they are already mature in Finland, Sweden, and Denmark, which reach the highest scores in the index.[8] This fragmentation is costly in itself, especially in terms of lower productivity. It is further exacerbated by increasing compliance costs, given the lack of harmonisation among the relevant legal systems of Member States (MSs). All this calls for EU action.[9]

Based on Article 114 of the Treaty on the Functioning of the European Union (TFEU), which is the cornerstone of measures aiming at improving the proper functioning of the Internal Market,[10] the DSA should take the

[5]Teresa Rodriguez de Las Heras Ballell, 'The background of the Digital Services Act: looking towards a platform economy', [2021] 22 *ERA Forum* 75 accessed 14 April 2021.
[6]Luciano Floridi, 'Soft ethics, the governance of the digital and the General Data Protection Regulation' [2018] 376(2133) *Phil. Trans. R. Soc. A*. accessed 11 January 2022.
[7]The Digital Economy and Society Index (DESI), as the name suggests, monitors Europe's digital economy. The latter can be defined in terms of digital performance and competitiveness of economic activities.
[8]European Commission, 'The Digital Economy and Society Index' (European Commission, 2020) <https://digital-strategy.ec.europa.eu/en/policies/desi> accessed 26 October 2021.
[9]Teresa Rodriguez de Las Heras Ballell (n 5).
[10]Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights: a commentary* (Oxford University Press 2019).

form of an EU Regulation, i.e. the most centralising of EU binding legal acts. This is to provide a uniform level of protection throughout the Union, while preventing divergences and differentiation among MSs. Also importantly, as in the case of the General Data Protection Regulation (GDPR), companies will have to comply with these rules regardless of whether they are established in the EU.[11] This may favor European companies but risk making the European digital market less attractive.

2.1. New terminology: the four categories of intermediary services providers

The DSA targets online intermediary services – reaching more than 10 per cent of the EU's population – and aims to protect users' online FR. It is important to note that the EC defines 'intermediary services providers' as those offering network infrastructure (i.e. Internet access providers) which, in turn, include four other categories assessed by the DSA: intermediary services, hosting services (i.e. cloud), online platforms (i.e. social media platforms), and very large online platforms (VLOPs).[12] The introduction of four categories for intermediary services providers is a significant step forward in regulating digital platforms within EU law. Companies fall into different categories according to some size-related criteria, enabling supervising authorities to target the business model of the gatekeeper directly.[13]

The DSA imposes new obligations (see Table 1) on service providers proportionate to their role, size, and impact in the market.[14] In the Table, the obligations are described on the left and the service providers are organised accourding to the four categories described above. Any of those offering its services in the Internal Market will have to comply with these rules, irrespective of its location. The main goals are to obtain an EU-wide uniform framework applicable to (a) reduce illegal – or potentially harmful – content online; (b) allocate liabilities to online intermediaries for third-party

[11] 'In order to ensure the effectiveness of the rules laid down in this Regulation and a level playing field within the internal market, those rules should apply to providers of intermediary services irrespective of their place of establishment or residence, in so far as they provide services in the Union, as evidenced by a substantial connection to the Union.' Recital 7, DSA.

[12] Online platforms are a subcategory of hosting services, which are themselves a subcategory of intermediary services providers. In general, online intermediary platforms benefit from the liability exemption contained in Article 5(1) of the DSA, which corresponds to the 'hosting exemption' of the ECD.

[13] In the Digital Services Act package, a *gatekeeper* is defined as a company that meets the following criteria: (i) has a strong economic position, significant impact on the internal market and is active in multiple EU countries; (ii) has a strong intermediation position, meaning that it links a large user base to a large number of businesses; and, (iii) has (or is about to have) an entrenched and durable position in the market, meaning that it is stable over time.

[14] European Commission, 'The Digital Services Act: ensuring a safe and accountable online environment' (European Commission, 2020) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en> accessed 6 April 2021.

Table 1. New obligations for gatekeepers in the DSA.

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

Source: authors' elaboration adapted from the literature.

Table 2. Benefits for EU stakeholders.

Stakeholders	Benefits
Citizens	More choice, lower prices Protection from illegal content Better protection of fundamental rights
Digital services providers	Legal certainty for the harmonization of rules Easier to start-up and scale-up in Europe More choice, lower prices
Digital services business users	Access to EU-wide markets through platforms Level-playing field against providers of illegal content
Society	Greater democratic control and oversight over systemic platforms Mitigation of systemic risks, such as manipulation or disinformation

Source: authors' elaboration adapted from the literature.

content; (c) protect users' FR online, and (d) bridge the information asymmetries between the online intermediaries and their users.[15]

The EC claims that the norms place citizens at the center of the legislation, in accordance with fundamental European values listed in Article 2 Treaty on European Union (TEU).[16] The EC also argues that the DSA provides a concrete set of benefits to citizens (Table 2), regarding innovation, growth, and competitiveness for small and medium enterprises (SMEs) and start-ups operating within the single market.

2.2. Advancements in the digital market

At the international level, the first seven ranked online platforms account for 69per cent of the total €6 trillion platform economy marketplace. Also, all Big Tech companies are digital platforms. The turnover in business-to-customers (B2C) e-commerce has increased by 13per cent from 2014 to 2019, and the forecasted turnover for 2019 was €621 billion. These players, therefore, may present a threat to competition, not only in the EU.[17]

The Impact Assessment (henceforth, IA) published for the DSA, which builds on the evaluation of the ECD,[18] recognises three core themes related to the governance of digital services in the European single market: the potential for online intermediaries to harm stakeholders; the supervisory bodies of such platforms – and how they work; and the legal barriers established by such platform. This approach was also

[15]Teresa Rodriguez de Las Heras Ballell (n 5).
[16]European Commission (n 14).
[17]In June 2021, G7 finance ministers reached a historic agreement on taxing multinationals. The deal establishes that companies would have to pay taxes wherever they operate, instead of where they are headquartered. For instance, Ireland has a low tax jurisdiction since it imposes the global minimum effective level. This translated in the presence of large multinationals in the country for tax related purposes. The G7 agreement aims to disincentivise the latter since firms face a competitive disadvantage with multinationals that have income from low-tax countries.
[18]Commission, 'Impact assessment of the Digital Services Act (Impact Assessment)' COM (2020) 348 final.

Table 3. Digital services and associated EU policies.

Main problem	Specific issue
Limited protection and supervision of digital services users	Protection of users' fundamental rights Supervision of online platforms
Risks raised from the use of digital services that threaten citizens' rights and freedoms	Dissemination of illegal content online Unfair consumer commercial practices
Abuse market power by online platforms	Barriers to entry and weak single market Preventing smaller companies from scaling up
Cross-cutting issues: lack of transparency of algorithms, lack of common and clear definitions of digital services, weak enforcement	Tax avoidance Misuse of online platforms by malicious actors to spread disinformation

Source: authors' elaboration based on, and adapted from, EPRS (2020), Gawer and Srnicek (2021) and European Commission (2020b).

illustrated in a 2019 EC brochure titled '*How Do Online Platforms Shape Our Lives and Businesses*'.[19] The goal was to determine the specific matters associated with digital platforms and their services, while signaling the current EU norm that tackles them.[20] A paper from the in-house research department and think tank of the European Parliament (EP), the European Parliamentary Research Service (EPRS), identifies specific issues and assesses policy packages of the final version of the DSA.[21,22] Table 3 summarises the results, providing an overview of the three previous reports.[23]

2.3. The role of gatekeepers in the digital market and beyond

When talking about limited – and sometimes uneven – protection and supervision of users of digital services, we are referring to businesses, particularly SMEs, citizens, and national authorities. Hence, strict protection of FR is needed, especially for EU citizens' personal data.[24] Indeed, the policy package proposed by the Directorate-General (DG) for Parliamentary Research Services – and co-authored by Annabelle Gawer and Nick Srnicek – focuses on enhancing consumer protection and common

[19]European Commission. (2018). *How do online platforms shape our lives and businesses?*. Retrieved October 26, 2021, from https://digital-strategy.ec.europa.eu/en/node/242/printable/pdf.

[20]Annabelle Gawer and Nick Srnicek, 'Online platforms: Economic and societal effects' (European Parliamentary Research Service Scientific Foresight Unit) <http://www.europarl.europa.eu/RegData/etudes/STUD/2021/656336/EPRS_STU(2021)656336_EN.pdf> accessed 3 May 2021.

[21]Niombo Lomba and Tatjana Evas, 'Digital Services Act: European added value assessment' (European Parliamentary Research Service, 2020) <https://data.europa.eu/doi/10.2861/7952> accessed 6 April 2021

[22]This study has been written by Professor Annabelle Gawer, Surrey Business School, University of Surrey (main author), Dr Nick Srnicek, King's College London, at the request of the Panel for the Future of Science and Technology (STOA) and managed by the Scientific Foresight Unit, within the Directorate-General for Parliamentary Research Services (EPRS) of the Secretariat of the European Parliament. In this paper, we will be referring to it by its authors.

[23]Note that the documents overlap in the table since those issues are common to all three of them.

[24]Annabelle Gawer and Nick Srnicek (n 20).

e-commerce rules.[25] Note that this also implies developing a set of digital enforcement tools, particularly in the field of EU competition law, which should be made available to the entire population.[26]

Concerning the possible role played by EU competition law, the abuse of the dominant position by online platforms is another issue to consider for authorities due to the market power of such platforms, in conjunction with their ability to generate asymmetries and distort competition.[27] A weak single market may pose entry barriers. In particular, VLOPs impose legal barriers that may prevent smaller companies from scaling-up, because the former can bear the cost, whereas the latter most likely cannot.[28] Conversely, the affected companies are businesses dependent on online intermediaries. The EPRS report states that, in the online platform ecosystem, specific regulation is necessary to guarantee fair competition in the digital age.[29] The straightforward conclusion for cross-cutting issues (i.e. lack of transparency, weak enforcement) is to establish cross-cutting policies to ensure enforcement and guarantee clarity.[30,31] Another point is the inefficient supervision of online platform services and inadequate administrative cooperation, which is particularly challenging when those platforms have a significant presence in the EU Internal Market.[32]

Table 3 also lists the new and increasing risks for citizens using digital services, which may threaten their rights and freedoms. The EC stresses that this primarily affects citizens and consumers, businesses undermined by illegal activities, and law enforcement.[33] The diffusion of illegal content online is strictly related to the previous point, since it translates into insufficient protection of FR and other emerging risks.[34] This involves all types of online intermediaries, with particular impact where online platforms are affected.[35,36]

[25]Caroline Cauffman and Catalina Goanta, 'A New Order: The Digital Services Act and Consumer Protection', [2021] 12(4) *European Journal of Risk Regulation* 758 accessed 21 June 2021.
[26]Margrethe Vestager, 'Defending competition in a digital age' (European Commission, 2021) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defending-competition-digital-age_en> accessed 15 November 2021.
[27]Niombo Lomba and Tatjana Evas (n 21).
[28]Commission (n 18).
[29]Niombo Lomba and Tatjana Evas (n 21).
[30]Niombo Lomba and Tatjana Evas (n 21).
[31]Tax avoidance practices may fall under this category. Therefore, proposals for a fair taxation of the EU digital economy have been made. Also, another action that would have a large impact on democratic participation consists in the spreading of misinformation in online platforms. The literature reviewed for this article proposed the support of independent fact checking bodies, as well as a Self-regulatory Code of Practice.
[32]Niombo Lomba and Tatjana Evas (n 21).
[33]Commission (n 28).
[34]Illegal content refers to the kind on material that leads to the incitement to terrorism, hate speech, child sexual abuse content, infringement of IP rights, and so on.
[35]Commission (n 28).
[36]Considerable work has been done in recent years to prevent making the same mistakes. Some examples are the GDPR, the New Deal for Consumers, and the above-mentioned Regulation on promoting fairness and transparency for businesses users of online platforms.

Structured dialogues on such themes are essential, with several possible solutions for creating a framework for content management to protect (and balance) rights and freedoms.[37] For example, an analytical tool to assess whether the protection of FR is addressed correctly in the DSA.[38,39] To achieve a correct balancing of FR in the DSA, one should address content moderation, freedom of expression, freedom of information, and the right to privacy and data protection,[40] to ensure proper implementation of the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (EU Charter). Intellectual property (IP) rights are another critical element to consider, and it is a complex one to tackle, as the presence of strict obligations for providers of digital services could hinder their ability to conduct business.[41] The authors suggest that property rights should cover IP rights. Lastly, due process and fair trial guarantees are other requirements for an unbiased DSA.

According to a recent opinion by the European Data Protection Supervisor (EDPS), the EU's independent data protection authority, the proper enforcement of the DSA is crucial. The EDPS states that the proposed Regulation could overhaul some of the main drawbacks of the current highly centralised platform economy.[42] If implemented correctly, the legislation could bring back the online network's original promise: to be a decentralised, open network that enables everybody to communicate and create freely. The digital economy is becoming a platform economy, and the current legislation is no longer adequate to deal with a complex digitalised ecosystem.

3. A post-compliance assessment of the DSA: harmonisation, illegal content, intermediary liability, and consumer trust

So far, we have seen an overview of the context and the main challenges and features of the DSA. In this section, we discuss what the proposed legislation should look like when formally constructed. We shall do so

[37] Some examples are the New Copyright Directive, the Revised Audio Visual Media Services Directive for video-sharing platforms, and the Proposal for a Regulation of Terrorist content online. Conversely, Gawer and Srnicek (n 20) point out that the ECD failed to address unfair consumer commercial practices by online platforms towards their business users.

[38] Giancarlo Frosio and Christophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Services Act's Platform Liability Regime' (forthcoming) [2022] *European Law Journal* accessed 15 April 2021

[39] This tool is based on the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR, and the EU Charter of Fundamental Rights, as interpreted by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), respectively.

[40] Other examples are freedom of thought, conscience and religion, freedom of assembly and association, equality and the right to non-discrimination, the right to privacy and data protection, freedom of the arts and sciences, and the right to an effective remedy.

[41] Giancarlo Frosio and Christophe Geiger (n 38).

[42] Europea Data Protection Supervisor (EDPS), 'Opinions on the Digital Services Act and the Digital Markets Act' (EDPS, 2021) <https://edps.europa.eu/press-publications/press-news/press-releases/2021/edps-opinions-digital-services-act-and-digital_en> accessed 10 February 2021.

by addressing four macro-areas of concern: harmonisation, illegal content, intermediary liability, and consumer trust.

3.1. Harmonisation

The DSA should establish a robust and common framework for the benefit of all stakeholders. The latter's interests are difficult to align, and the complexity of the digital economy results in a plethora of contrasting opinions. Some stakeholders expected the Regulation to be more challenging for gatekeepers. In contrast, others believe that the new obligations are unjustified.[43] Contrasting opinions reflect contrasting interests, and indicate the need for a trade-off between the protection of users' FR and the ability to innovate and compete by online platforms.[44] The IA of the DSA points out that there is a tendency to be industry-specific in the reform.[45,46]

Conflicting opinions can be problematic as they can hinder the harmonisation of regulation in the EU context, which is the first macro area we identify in the DSA. In this respect, we agree with the literature when it states that the shortcomings of the ECD should be avoided, and an internal regulatory competition race among MSs must be prevented.[47] However, even though the recourse to regulation should ensure a stricter harmonisation among the MSs' legal systems, the DSA is not entirely immune from criticisms and contradictions when implementing a common regulatory framework. In contrast to the ECD, the DSA (Article 7) does not require intermediary service providers to monitor illegal activities on their platforms and denies MSs the possibility of imposing this requirement on online platforms.[48,49] At the same time, Article 5(4) of the DSA does not prevent the possibility for MSs to require the providers to terminate or prevent an infringement.[50] This could lead to inconsistencies and uncoordinated procedures amongst

[43]Caroline Cauffman and Catalina Goanta (n 25).
[44]Caroline Cauffman and Catalina Goanta (n 25).
[45]Commission (n 18).
[46]Cauffman and Goanta (n 25) state that the instruments of the DSA are limited procedurally since they do not sufficiently incorporate procedures for dealing with illegal content. They are also limited substantively since they are either focused on narrow issues (i.e.., child abuse material), or on specific platforms (i.e., audio-video sharing platforms).
[47]Teresa Rodriguez de Las Heras Ballell (n 5).
[48]Caroline Cauffman and Catalina Goanta (n 25).
[49]Note that the DSA substitutes Articles 12 and 15 of the ECD regarding the liability of intermediary services providers, but the rules it introduces instead (Articles 3 and 9) do not vary greatly. The reform mainly categorizes the interpretation the Court of Justice has given of these rules.
[50]This has not changed from the ECD. The only difference is that the DSA further elaborates and harmonises the conditions to be met by such orders: they need to have a statement of reasons explaining why the information contains illegal material, while referring to the specific legal provision infringed. They also must provide one – or more – exact uniform resource locators and, if necessary, additional information enabling the identification of the illegal content concerned. Lastly, information about the possibility to redress should be made available.

MSs, resulting in a contradictory application of the DSA and a fragmented outcome that the DSA is meant to avoid.[51]

Furthermore, Article 67 of the proposed Regulation provides for the creation of a 'reliable and secure' information sharing system between Digital Services Coordinators (DSC).[52] The DSC are independent authorities designated by MSs. Due to the global nature of the digital market, the DSA also establishes an advisory group of DSCs from each MS, referred to as the 'European Board for Digital Services' (or just the Board). The Board will be charged with assisting in coordinating enforcement activity (including joint investigations) where necessary and will supervise the activity of the DSCs. When VLOPs are involved, the EC may also be called upon by the relevant DSC to take the necessary investigatory and enforcement measures. Nevertheless, it is important to stress that, unlike the DMA, the primary responsibility for enforcement of the DSA still stays with MSs, rather than with the EC, a situation that does not allow for excluding both inconsistencies and fragmentation completely, at a national level.

3.2. Illegal content

According to the DSA, the EU should consider platforms established outside its borders: there is the risk that while imposing barriers to entry to non-EU platforms, the EU platform economy may increase the distance from the market.[53] This is mainly due to the global nature of such an economic model. The DSA aims to make the Internet safe for all by addressing illegal content and overseeing content moderation practices.[54] While it maintains the ECD rule that platforms are not liable for others' digital content, the DSA introduces an exception to that norm: anybody on the Internet can signal any content as potentially illegal. This would hold the platform liable, and they will have to remove or disable access to the content expeditiously.

The DSA moves away from relying on self-regulation of hate speech.[55,56] According to EDRi, a European advocacy group, the DSA follows the principle 'delete first, think later', which would create a system of privatised content control with arbitrary rules beyond judicial and democratic

[51]Caroline Cauffman and Catalina Goanta (n 25).
[52]The certification scheme proposed by the DSA, lead by the DSC, can ensure that only trustworthy organisations can provide out-of-court settlement to users and online platforms.
[53]Teresa Rodriguez de Las Heras Ballell (n 5).
[54]European Digital Rights (EDRi), 'The EU's attempt to regulate Big Tech: What it brings and what is missing' (EDRi, 2020) <https://edri.org/our-work/eu-attempt-to-regulate-big-tech/> accessed 6 April 2021.
[55]Annabelle Gawer and Nick Srnicek (n 20).
[56]Luciano Floridi, 'The End of an Era: from Self-Regulation to Hard Law for the Digital Industry' [2021] 34 (4) *Philosophy & Technology* 619, accessed 11 January 2022.

scrutiny.[57] Freedom of expression becomes problematic when discussing the content removal clauses introduced in the DSA, which suggest the 'over-removal' of user-generated content. The latter, in turn, undermines freedom of expression. The advocacy group suggested working with independent, certified dispute settlement bodies for the wrongful elimination of online content. They also believe that the DSA should guarantee affordable access to those services to prevent this from falling into the hands of consulting and law firms. These seem reasonable suggestions.

Different regulatory approaches should be implemented to illegal and harmful content.[58] Dot Europe – the association of Internet companies in Europe – claims that the focus must be on illegal, and not harmful, content, and warns that, if this terminology is not adopted, freedom of speech and expression may be undermined.[59] Indeed, the DSA is unclear whether the focus must be on illegal – and/or harmful – content. There is no clear definition of what is harmful and what is illegal. This is problematic and should be resolved. The issue is especially concerning in the EU context, given that some contents or behaviors may be illegal in some MSs, and 'not-illegal-but-harmful' in others (i.e. defamation of religion is a criminal offence in Germany, Italy, Poland, and Spain, but not in Denmark and France).[60] Another concern regarding illegal content involves offline actions directly incited online.[61] The EDRi clarifies that effective moderation of harmful online content is related to how content is spread.[62] Writers, journalists, politicians, and, more generally, influencers should pay increased attention to the content they share online. They are the new 'shareholders' of the Internet and, most importantly, of digital platforms. One may argue that contractual obligations (i.e. brand ambassadors) may alter the assessment of the content they share and foster the circulation of illegal or harmful material.

3.3. Intermediary liability

The condition of intermediary liability in the DSA is a third macro area of concern. The DSA provides service providers with exemptions from liability, as interpreted by the EU Court of Justice, but it fails to address the conditions under which liability is incurred. The latter is determined by other rules of

[57] European Digital Rights (EDRi) (n 54).
[58] Giancarlo Frosio and Christophe Geiger (n 38).
[59] Samuel Stolton, 'Digital Services Act should avoid rules on "harmful" content, Big Tech tells EU' (Euractiv, 2020) <https://www.euractiv.com/section/digital/news/digital-services-act-should-avoid-rules-on-harmful-content-big-tech-tells-eu/> accessed 4 May 2021.
[60] European Digital Media Association, 'Digital Services Act package: open public consultation' (European Digital Media Association, 8 September 2020 [survey]) <https://doteurope.eu/wp-content/uploads/2020/09/EDiMA-response-to-Digital-Services-Act-public-consultation.pdf> accessed 17 June 2021.
[61] Gerard Pogorel, 'The Digital Services Act and beyond' (Research Gate, 2021) <http://rgdoi.net/10.13140/RG.2.2.33457.92003> accessed 15 November 2021.
[62] European Digital Rights (EDRi) (n 54).

the EU or national law, which will limit the capacity of the EU Regulation to create a single level playing field throughout the EU.[63] This would lead to potential fragmentation and uncertainty, given that EU rules should prevail over national rules and MSs cannot interfere in the liability exemption of the DSA.[64]

At the EU level, exemptions from liability are determined for intermediary service providers.[65] Article 5(1)(a) of the DSA maintains the ECD's negligence-based model: providers of intermediary services cannot be held liable if they lack knowledge of user-generated content. Article 7 explicitly levies the burden on intermediary services for monitoring the presence of illegal activities on their platforms – it also denies MSs the possibility of imposing this kind of behavior on gatekeepers. Article 5(1)(b) requires that providers take expeditious action to remove such content once they are aware of it. On the negative side – especially regarding freedom of expression – this practice may encourage gatekeepers to be 'better safe than sorry' and take disproportionate action on legitimate content on their platforms.[66] Article 6 aims to protect 'Good Samaritans' (like Section 230 of the US Communications Decency Act): it serves as a liability shield for good-faith efforts to remove illegal content proactively. This would prevent gatekeepers from entering a never-ending spiral of legal action, while they could attribute those resources to innovation, for example. However, it could also become an excuse for firms to monitor their online content passively. The DSA also introduces general rules on mechanisms allowing anybody on the Internet to signal any content as potentially illegal; these are the so-called 'notice-and-action mechanisms' (Article 14). They contribute to increasing the level of transparency of the role played by providers. Conversely, they do not set out different procedures depending on the type of content, which may lead to disproportionate action by competition authorities and confusion for gatekeepers.

The new norms may encourage harmonisation among MSs (see section 3.1) also because of the due diligence and disclosure obligations. The DSA sets those obligations according to the four categories of online services, shown in Table 1. The EC aims to establish a single point of contact between themselves (and MSs) and providers of online services, especially regarding content moderation practices. The DSA stands by the fact that providers of intermediary services must disclose, in their Terms of Service (ToS), any policies, procedures, measures, and tools used for content moderation (i.e. algorithmic decision-making). At least once a year, they

[63]Caroline Cauffman and Catalina Goanta (n 25).
[64]Caroline Cauffman and Catalina Goanta (n 25).
[65]Commission (n 18).
[66]For example, when Twitter banned Trump from its platform in early January 2021, it was operating according to this principle. To which extent those actions are democratically correct, should be established by the DSA.

should publish a clear and detailed report stating their content moderation practices for the period.

Disclosing information about the gatekeeper's system (i.e. recommendation algorithms) would widely expose them: giving access to these kinds of data may put the platform's confidential information in a vulnerable position. Even though the platforms may demand to amend their request to authorities, they should propose alternative disclosure procedures. In terms of FR, the DSA is vague and lacks legal certainty. Article 26(1)(b), instead of directly targeting the violation of FR, only requires firms to assess related negative effects. The mitigation measures of the DSA (Article 27) refer only to *reasonable* rather than *necessary* measures to protect human rights and address those risks. Once codes of conduct are adopted and mitigation measures implemented,[67] the DSA makes it hard for human rights groups to raise concerns to the DSC or the Board. On the bright side, and from the standpoint of consumers (trust), when platforms offer goods (and services) to consumers, the latter can rely on the disclosure obligations (the already mentioned Articles 26 and 27 of the DSA).

3.4. Consumer trust

The fourth and last macro area to address is consumer trust. In order to improve it, the DSA should take into account the platforms' verification processes.[68] This is especially relevant when comparing ECD's mandatory disclosures and DSA's transparency obligations.[69] It seems reasonable to ask that companies will have to provide information to platforms (non-publicly available) and consumers (publicly available).[70] Consumers will receive updates on the marketplaces, websites – and sometimes social media – in which the companies operate. Disclosure obligations from platforms to consumers are present in the DSA when the former offers goods or services directly (or indirectly) to the latter. They also must investigate, verify, and share this information with public authorities. The EDRi argues that, while the DSA contains an adequate portfolio of provisions on transparency issues on online advertising, it fails to address targeted online manipulation through advertising technology.[71,72] If this is not constrained, the authors

[67]This is in line with Professor Gerard Pogorel's reasoning, which suggested setting standard codes of conduct and legal criteria.
[68]Caroline Cauffman and Catalina Goanta (n 25).
[69]The DSA tackles transparency in a different manner, and this may pose consistency problems with respect to the ECD.
[70]Caroline Cauffman and Catalina Goanta (n 25).
[71]European Digital Rights (EDRi) (n 54).
[72]Some areas in which the DSA fails to address online manipulation are, for example, data collection and monitoring of users, which may lead to surveillance.

claim,[73] pervasive data collection will continue being the pattern – and lead to surveillance by online platforms.[74]

Current debates regarding digital services replicate the ones of the liberal founding thinkers, according to Gerard Pogorel, Professor of Economics Emeritus, Institut Polytechnique de Paris.[75] He refers to Benjamin Constant's 1819 conference '*De la liberté des anciens comparée à celle des Modernes*', where he introduced the concepts of individual and political liberties. Pogorel updates Constant's terminology into the twenty-first-century social influence that corporate organisations can exert on individuals. On the one hand, online platforms may optimize our freedoms and contribute to expanding our knowledge. On the other hand, they could disseminate disinformation, illegal content, and hate speech. Pogorel also refers to John Stuart Mill's '*The struggle between Liberty and Authority*' to emphasise that the fight to preserve our liberties has long existed. Within this context, EDRi's position paper shows how the new barriers arising from the centralisation and commercialisation of the Internet undermine users' rights and freedoms.[76,77] This results in lower quality public debate and weak democracies. Thus, in the context of data accumulation by companies, the literature stresses their relevance in the business model of online platforms.[78] They criticise the ubiquitous and surreptitious collection of information from users, encouraging the discussion on privacy and competition.

From the perspective of consumer protection, the literature also touches upon two main themes regarding the DSA's digital enforcement approach:[79] the nature of investigations and enforcement on the digital single market; and the readiness of MSs to comply with enforcement obligations stemming from the DSA. In online marketplaces, consumers sometimes have trouble understanding who the contracting party is. Therefore, the DSA proposed Article 5(3) for the 'average and reasonably well-informed consumer'. The provision has a clear link to the responsibilities of online platforms. Here, a key question is how consumers may receive better protection. Indeed, even if the Article seems to suggest that it should be determined objectively, based on all relevant circumstances, whether an average and a reasonably well-informed consumer may believe that 'the information, or the product

[73]In the article, the authors mention the delay in the ePrivacy Regulation, whose negotiations are still ongoing. The Regulation was supposed to be in force from May 2018 together with the GDPR.
[74]They call on the EP to be consistent on their demand to gradually dispose of "*hyper-invasive surveillance advertising*" in Europe.
[75]Gerard Pogorel (n 61).
[76]European Digital Rights (EDRi), 'DSA: Platform Regulation Done Right' (EDRi, 2020) <https://test.edri.org/our-work/dsa-platform-regulation-done-right/> accessed 5 May 2021.
[77]The authors refer to Articles 11, 47, 51, 52 of the Charter of Fundamental Rights of the European Union; Article 10 of the European Convention for the Protection of Human Rights; Article 19 of the International Covenant on Civil and Political Rights.
[78]Annabelle Gawer and Nick Srnicek (n 20).
[79]Caroline Cauffman and Catalina Goanta (n 25).

or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control', it remains unclear how such an assessment should be carried out. Moreover, in case of legal action, a platform could bear the costs of highly-qualified lawyers more easily than many customers probably could.[80]

It has become commonplace that consumers' trust is also intertwined with fair competition among relevant businesses and companies. The EC's seven-year decision on Google's price comparison service reveals the inappropriateness of existing EU competition law in the domain at stake.[81,82] In contrast, other parts of the literature highlight how Articles 14 and 15 of the ECD – which support an *ex-post* approach to fundamental rights – reinforce the policy goal of encouraging freedom of speech and association rights.[83] Therefore, they object to moving to an *ex-ante* approach in the DSA. This topic is consequential, and it is further expanded in the DSA. Here suffice it to remark that the mission of antitrust authorities – both at the EU and national level – may somehow change from policing the platforms' market behaviors *ex-post* to defining and enforcing constraints on their behavior *ex-ante*. The transition from antitrust enforcement to monitoring and applying *ex-ante* rules was mainly encouraged by the supposed inadequacy of Articles 101 and 102 of the TFEU. They were deemed unable to limit the risks of harmful conduct by digital platforms, mainly for timing reasons. So, the EC found appropriate to modify the scheme of legal action.[84] However, one should not ignore that the lack of adaptability and flexibility in adopting *ex-ante* regulations may be inappropriate for digital market dynamics. Meredith Broadbent from the Center for Strategic and International Studies (CSIS) indicated that *'The ex-ante regulations are unusual, require a labour-intensive application, and are poorly adapted to rapidly changing sectors'*.

It is also worth stressing that the network effect generated by some online platforms transforms users/consumers into products, who have no power to influence the 'community rules' of the firm.[85] At the same time, government authorities are worried about the negative effect that Big Tech companies,

[80] Article 5(3) of the DSA mentions the 'recipient' of the service (which most likely refers to the party), who uses the services of the platform to commercialise its products. The authors suggest that using the word 'trader' instead of 'recipient' would already clarify this provision.

[81] Annabelle Gawer and Nick Srnicek (n 20).

[82] Legislative bodies efforts have been insufficient in the decision regarding self-preferencing of Google's own price comparison service in search results. As a result, several suppliers of price comparison websites were severely damaged by the lack of readiness of antitrust laws.

[83] Giancarlo Frosio and Christophe Geiger (n 38).

[84] Louisa Freemont and Sabina Ciofu, 'European Commission publishes Digital Services Act and Digital Markets Act' (TechUK, 2020) <https://www.techuk.org/resource/european-commission-publishes-digital-services-act-and-digital-markets-act.html> accessed 20 December 2021.

[85] User's privacy and data security is continuously limited due to personalized advertising – or targeted advertising-based business models – and is incredibly difficult for them to contest that situation.

particularly social media, may have on democracy. This concern is grounded both on the lack of understating of the business models and internal dynamics of these companies, and on the role, those tech providers have played in reported cases of users' manipulation, circulation of fake news, and lack of transparency (i.e. Cambridge Analytica case). On this point, the EDRi suggests that the DSA should distinguish between content intermediaries (i.e. social media networks) and online marketplaces (i.e. selling physical goods or services).[86] While the distinction may bring some conceptual clarity, it will not be helpful in practice, insofar as nudging mechanisms, low levels of transparency, and business models may be quite similar. Furthermore, intermediaries may couple content intermediation and online markets on the same platform. This further supports our thesis that discrimination should be made by the type of service provided, and not by platform.[87] For this reason, we believe that further discussions on the enforcement of the DSA should be made at the EU level, as well as overseas. More resources will have to be invested in fostering relevant research and a debate open to all stakeholders for this to happen.

4. Key points for discussion

The world has greatly changed in the last two decades, and so have digital services. The DSA package enables the EU to keep pace with the digital revolution. While it acknowledges the relevance of the topics covered in the former regulation – the ECD – it builds over it and accounts for the importance of considering the new developments in the digital landscape, e.g. online platforms. As mentioned in section 2, the main issues that the DSA expands on when compared to the ECD are the potential for online intermediaries to harm stakeholders, supervisory bodies, and their operations, as well as the legal barriers established by such platforms.[88] In the previous sections, we categorised the improvements of DSA over the ECD in four macro areas indicated in section 3. The ECD poses a problem to the harmonisation of EU regulation, which increases the tension amongst the internal legislation of MSs.[89,90] Regarding intermediary liability, the novel regulation maintains the ECD's rule for illegal content, in which platforms will not be held liable for user-generated content. This is the so-called negligence-

[86]European Digital Rights (EDRi) (n 76).
[87]European Digital Rights (EDRi) (n 76).
[88]Commission (n 18).
[89]Teresa Rodriguez de Las Heras Ballell (n 5).
[90]In contrast to the ECD, the DSA does not require intermediary services providers to monitor illegal activities on their platforms and denies MSs the possibility of imposing this requirement on online platforms. Moreover, the DSA adapts to the interpretation that the Court of Justice has given to the rules regarding the liability of intermediary services providers. Something that has not changed from the ECD is the possibility for MSs to require the providers to terminate or prevent an infringement, although the DSA further elaborates and harmonises the conditions to be met by such orders.

based model. Nevertheless, it introduces the possibility of signaling any content as potentially illegal (see section 3.2) and demands platforms to remove the content expeditiously or disable access to it.[91] In the consumer trust sphere, the EU moves from ECD's mandatory disclosures to DSA's transparency obligations.[92] The transition induces legislation to consider transparency differently, which may be inconsistent with the ECD's rationale.[93] Finally, the DSA opts for an *ex-ante* approach to FR, shifting from the *ex-post* approach of the ECD. While some argue that the latter already encouraged freedom of speech and association rights,[94] others highlight the necessity to adopt an *ex-ante* approach due to the inadequacy of Articles 101 and 102 of the TFEU.[95]

In contrast to the ECD, the DSA seeks to create a legislative infrastructure that facilitates the co-existence of FR and digital services.[96] Online platforms tend to be characterised by innovation and competitiveness, which presents new threats to the protection of users' FR. As the ECD has shown, it is challenging for legislation to cope with this evolving field. Therefore, we argue that it is within the interest of the EU and private companies to foster a *soft ethics* approach. Contrary to *hard ethics*, which identifies what is morally right and wrong independently and perhaps even in contrast with legislation, soft ethics is post-compliance, that is, it works on what is morally right or wrong

> '*over and above* the existing regulation, not against it, or despite its scope, or to change it, or to by-pass it (e.g. in terms of self-regulation)' [97]

Both types of ethical approaches have in common the issue of feasibility: an agent will perform a specific action only if it is possible to do so. This is the well-known requirement that 'ought implies can'.[98] Soft ethics adds to it that 'ought implies may', that is, the ethically recommendable is within the legally compliant. Hence, soft ethics suppose a post-feasibility and post-compliant approach. For example, in the case of the DSA, MSs would accept its implementation as a starting point for developing digital services. Soft ethics would then add further recommendations for doing more (and sometimes even less) that is morally preferable within what is legally permissible. While we recognise the importance of hard ethics as a crucial element to help

[91] European Digital Rights (EDRi) (n 54).
[92] Caroline Cauffman and Catalina Goanta (n 25).
[93] The DSA proposes a different approach to transparency. Companies will have to provide information to platforms and consumers. The latter will receive updates on the marketplaces, websites in which the former operate. Disclosure obligations from platforms to consumers are also present in the novel regulation – whose information will be investigated, verified, and shared with public authorities.
[94] Giancarlo Frosio and Christophe Geiger (n 38).
[95] Louisa Freemont and Sabina Ciofu (n 84).
[96] Teresa Rodriguez de Las Heras Ballell (n 5).
[97] Luciano Floridi (n 6).
[98] Luciano Floridi (n 6).

shape legislation, we contend that soft ethics is a more effective approach once sound legislation is in place, to build on regulations and/or operate whenever legislation is still absent, only in progress, or in need of interpretation. This *modus operandi* may encourage platforms to exercise 'good corporate citizenship' and prompt a proactive attitude to address the ever-emerging ethical challenges encouraged by digital innovation.[99,100] A crucial point to be raised in the context of digital ethics is EU's favorable regulatory landscape to exercise such an approach. It entails an opportunity for the Union as not many places in the world have both a strong position on FRissues and are advanced in terms of digital regulation. In order to assert its digital sovereignty, the EU must benefit morally from digital innovation by implementing a soft digital ethics approach.

Our recommendations follow the four macro-areas we identified in section 2. Starting with harmonisation, to meet the heterogenous challenges posed by the digital economy, the DSA ought to create a sound and shared regulatory framework for the benefit of all stakeholders. To this end, as indicated by the literature, internal legislative tensions among MSs must be prevented, and conflicting opinions should be put aside while favoring a common EU interest.[101] Thus, our first recommendation focuses on harmonisation. Inconsistencies in some articles of the DSA (between Articles 5 and 7, for example) may result in a contradictory application of the novel regulation and further fragmentation amongst MSs. We also call attention to the need to clarify the EC's role concerning the DSC when VLOPs are involved. The primary responsibility for enforcement of the DSA remains with MSs, rather than with the EC. This makes it difficult to avoid inconsistencies and fragmentation at a national level.

When considering illegal content, we argue that content removal practices introduced in the DSA may result in arbitrary enforcement of rules that could undermine freedom of expression.[102] Joining forces with an independent, certified dispute settlement body may help prevent the wrongful elimination of online content. If the DSA guarantees this service, the involvement of consulting and law firms could be avoided. In the context of illegal and harmful content, the DSA does not present a clear position, which is problematic and should be resolved. At the same time, it is true that different regulatory approaches should be implemented to deal with illegal and harmful content,[103] if this terminology is not adopted, freedom of speech and expression may be undermined.[104]

While the DSA may exempt digital service providers from intermediary liability, it does not address the conditions under which liability is

[99]Luciano Floridi (n 6).
[100]Luciano Floridi and Mariarosaria Taddeo, 'What is data ethics?' [2016] 374 (2083) *Phil. Trans. R. Soc. A.* accessed 15 November 2021.
[101]Teresa Rodriguez de Las Heras Ballell (n 5).
[102]European Digital Rights (EDRi) (n 54).
[103]Giancarlo Frosio and Christophe Geiger (n 38).
[104]Samuel Stolton (n 59).

incurred.[105] According to the DSA, these conditions are supposed to be determined by other rules of the EU or MSs' national law, which will limit the capacity of the new regulation to create a single-level playing field throughout the EU.[106] This would lead to potential fragmentation and uncertainty, given that EU rules should prevail over national rules and MSs cannot interfere in the liability exemption of the DSA.[107]

Regarding DSA's disclosure obligations, we encourage identifying alternative procedures, as the current proposal could expose platforms' confidential information. Also, the EU Regulation, instead of directly targeting the violation of FR, only requires companies to assess its negative effects. Thus, we recommend adopting a more explicit and straightforward approach, which will provide legal certainty to firms in the market.

Finally, we offer recommendations to improve consumer trust. Here, the DSA should take into account the platforms' verification processes.[108] In any case, one of the main changes of the DSA from the ECD is the transition from an *ex-post* to an *ex-ante* approach to legal action.[109] We saw that this change was motivated by the supposed inadequacy of Articles 101 and 102 of the TFEU. Nevertheless, the novel approach may lack the adaptability and flexibility features of an *ex-post* scheme, which is considered more appropriate for digital market dynamics. When considering customer trust, we also encourage a clearer specification of the DSA's provisions (i.e. Article 5(3) on the 'average and reasonably well-informed consumer'), because, in the current draft, it remains questionable how the regulation would assess whether the user has complied with the information obligation.

Finally, we argue that the DSA must but does not yet address targeted online manipulation through advertising technology.[110] This may favor pervasive data collection and surveillance by online platforms. Hence, in line with the literature reviewed in this article, we stress the importance of discussion on privacy and competition, while pursuing EU democratic values.[111] This is especially important considering the absence of a general understating of the business models and internal dynamics of tech companies (e.g. social media companies), and the role that those tech providers have

[105]However, some practices may encourage gatekeepers to take disproportionate action on legitimate content on their platforms. Take, for example, Article 5(1)(b), which requires providers to take expeditious action to remove such content once they are aware of it. In addition, while Article 6 of the DSA wants to protect 'Good Samaritans' for their good-faith efforts to remove illegal content in a proactive manner, this may also become an excuse for firms to monitor their online content passively. Lastly, although Article 14 contributes to increasing the level of transparency of the role played by providers, the DSA fails to set out different procedures depending on the type of content, which may lead to disproportionate action by competition authorities and confusion for gatekeepers.
[106]Caroline Cauffman and Catalina Goanta (n 25).
[107]Caroline Cauffman and Catalina Goanta (n 25).
[108]Caroline Cauffman and Catalina Goanta (n 25).
[109]Louisa Freemont and Sabina Ciofu (n 84).
[110]European Digital Rights (EDRi) (n 54).
[111]European Digital Rights (EDRi) (n 76).

played in reported cases of users' manipulation, circulation of fake news, and lack of transparency.

5. Conclusion

The debate on the digital economy is a central topic in the political scene today. The EU is determined to introduce digital solutions as one of its policy strategies' main components while focusing on data, technology, and infrastructure. In this regard, the EC issued the DSA proposal in December 2020. The approval and enforcement of the DSA are crucial for the future of digital European sovereignty.[112] In this article, we offered some clarifications to contribute to the ongoing debate that aims at refining and finalising the DSA. This study conducted a systematic search and review of the academic literature and policy papers.[113] This preliminary analysis enabled us to identify the relevant literature on the DSA, and, thus, some ongoing trends in the discussion. We also determined four macro-areas of concern: the harmonisation of EU practices, illegal/harmful content, (intermediary) liability, and consumer protection linked to antitrust law. We address each of these themes, offering an updated analysis of the common arguments on EU competition law, to contribute to the debate on digital services. We conclude that the DSA has led to contrasting interpretations: some stakeholders expected it to be more challenging for gatekeepers, and others stated that the proposed obligations are unjustified.[114]

A significant aspect that frequently occurred in our review, and is becoming a vital and cross-cutting issue in the current debate, is the focus on FR. According to the EC, the new obligations imposed on online platforms provide a concrete set of benefits to citizens' FR, as shown in Table 2. However, there is also a growing debate on protecting users' data and managing illegal content. We agree with the literature that strict protection of FR is needed, especially concerning EU citizens' personal data.[115] The diffusion of illegal content online results in insufficient protection of FR and other emerging risks. With respect to market competition, there is a trade-off between the protection of users' rights, and the ability to innovate and compete by online platforms.[116] In the context of FR, the increasing use of algorithms should be proportionate to the platforms' content moderation practices.[117]

[112]Europea Data Protection Supervisor (EDPS), 'Opinions on the Digital Services Act and the Digital Markets Act' (EDPS, 2021) <https://edps.europa.eu/press-publications/press-news/press-releases/2021/edps-opinions-digital-services-act-and-digital_en> accessed 10 February 2021.
[113]Maria J. Grant and Andrew Booth, 'A typology of reviews: an analysis of 14 review types and associated methodologies', [2009] 26(2) *Health Information & Libraries Journal* 91, accessed 11 January 2022.
[114]Caroline Cauffman and Catalina Goanta (n 25).
[115]Annabelle Gawer and Nick Srnicek (n 20).
[116]Caroline Cauffman and Catalina Goanta (n 25).
[117]Giancarlo Frosio and Christophe Geiger (n 38).

The goal for governments and competition authorities should be to produce sound, actionable guidance for the governance of the design and use of digital services.

The DSA intends to correct and update the shortcomings of the ECD, by building *on* it, not *over* it. Although some basic principles can be maintained, a sound revision of the current rules on digital services is required. Twenty years after the first steps were taken in the direction of digital regulations, the question is no longer *whether* but *how* human and environmental circumstances change because of the digital revolution, and hence how the good governance of the digital needs to be a priority. The ECD did not anticipate the evolution of society's FR in relation to digital services. The DSA seeks to fill this gap with a post-compliance soft-ethics approach.

As time passes, more work will focus on the DSA and its implications, adding more voices and nuances to the debate. However, we hope that the four macro-areas identified in this article will provide a helpful framework to analyse further the ethical, legal, and social implications of the DSA in the context of competition law. This hope gains yet more saliency if one considers that, like the GDPR, the DSA can also serve as an example for other countries to regulate digital services. Thus, it seems likely that, as in the case of the GDPR, the DSA shall have a Brussels effect, contributing to shaping the governance of digital services outside the EU. Therefore, further discussions on the enforcement of the DSA are crucial, both in the EU and abroad.

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Notes on contributors

Aina Turillazzi is a Research Fellow of the Centre for Digital Ethics in the Department of Legal Studies, University of Bologna.

Mariarosaria Taddeo is Associate Professor and Senior Research Fellow at the Oxford Internet Institute, University of Oxford, and Dstl Ethics Fellow of the Alan Turing Institute, London.

Luciano Floridi is Professor of Philosophy and Ethics of Information at the Oxford Internet Institute, University of Oxford, and Professor of Sociology of Culture and Communication in the Department of Legal Studies, University of Bologna.

Federico Casolari is Professor of EU Law, in the Department of Legal Studies, University of Bologna.

ORCID

Luciano Floridi http://orcid.org/0000-0002-5444-2280

Appendix: Methodology

For this study, a systematic search and review were performed via keyword queries on three widely used repositories of academic literature and policy papers (Table A1).[118] The study relied on two academic databases (Google Scholar and SSRN), and reports from several EU agencies (EC, EP, Euroactiv, Article 19, EDRi, Dot Europe, EPRS, and EDPS). Three keywords were used to describe the DSA: 'ethics', 'digital economy', and 'competition law'. They were combined using AND, where appropriate. The search was limited to publications made available between December 2016 and April 2021 and identified 80 unique papers for review. After an initial review of titles and abstracts, 13 papers were selected for a full review (as referenced in the article footnotes). The selection process was determined by the relevance of the selected papers to the ethical, legal, and social implications of the DSA. The classification included nine papers from European Union,[119] three papers from Google Scholar, and one from SSRN.

Table A1. Systemic and search review results.

Database	Keywords	Returned
European Union†	DSA* AND ethics	13
	AND digital economy	9
	AND competition law	19
Google Scholar	DSA* AND ethics	14
	AND digital economy	6
	AND competition law	12
SSRN	DSA* AND ethics	3
	AND digital economy	–
	AND competition law	4

† includes the European Commission, European Parliament, Euractiv, Article 19, EDRi, Dot Europe, EPRS and EDPS.

In this article, we decided to maintain an analytical approach and focus on the ethical, legal, and social issues posed by platforms offering digital services. We adopted the distinction proposed by the EC between intermediary services providers, hosting services, online platforms, and VLOPs. The new obligations imposed on online players for each category were addressed (see Table 1), following the considerations of the EC.[120] In our analysis, we considered: (i) transparency measures for online platforms; (ii) oversight structure to address the complexity of the online space; (iii) measures to counter illegal goods, services, or content online; and (iv) access for researchers to crucial data. The EC's report presents a revision of the potential benefits (Table 2) of the DSA from the perspective of (i) citizens, (ii) digital services providers, (iii) digital services business users, and (iv) society.

Based on this approach, we used Table 3 to document a set of critical issues in the literature on the Regulation to the current day. It mainly concerns the problems and challenges posed by digital services, and the EU and national bodies in charge. The correct balance of these requirements was assessed under the following categories: (i) limited protection and supervision of digital services users; (ii) risks raised from the

[118]Maria J. Grant and Andrew Booth (n 113).
[119]It includes the European Commission, the European Parliament, Euroactiv, Article 19, EDRi, Dot Europe, the EPRS and the EDPS.
[120]Commission (n 18).

use of digital services that threaten citizens' rights and freedoms; (iii) abuse of market power by online platforms; and (iv) cross-cutting issues: lack of transparency of algorithms, lack of clear and standard definitions of digital services, weak enforcement. This preliminary analysis helped us identify the ongoing trends in the discussion – which, in turn, allowed us to establish Table A1, and determine four macro-areas of concern present in the current literature on the DSA. We address each of these themes, offering an updated analysis of the common arguments on EU competition law, to contribute to the debate on digital services.