

Recommendations for the Digital Services Act (DSA) and Digital Markets Act (DMA)

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INTRODUCTION

The proposed Digital Services Act (DSA) and Digital Market Act (DMA) offer a unique opportunity to establish democratic safeguards for the public information and communication domain. As currently drafted, they show a great deal of progress but fail to rise sufficiently to the challenge.

The European Commission's message has the merit of being simple and catchy – “everything allowed offline must be allowed online, and everything banned offline must be banned online.” But the online world functions differently from the offline world. Offline, democratic parliaments determine the public domain's standards and architecture, and impose obligations on its various actors, Online, tech companies have assumed this role and, in practice, their algorithms have completely modified the public domain system, eliminating the distinctions on which regulation was previously based.

It is envisaged that the DSA and DMA will be handled differently, with different rapporteurs. But the issues they address are interdependent and should therefore be discussed as a whole, in order to be as consistent as possible.

The International Partnership for Information and Democracy¹ – promoted by Reporters Without Borders (RSF), launched at the 74th UN General Assembly in September 2019 and endorsed by 42 countries, including 21 EU members – aims to promote and apply democratic principles in the global information and communication domain. It is intended to provide a framework for regulating digital actors and the digital market. The Forum on Information and Democracy, the entity that implements the Partnership, has published many recommendations² for use in regulating digital service providers.

¹ <https://informationdemocracy.org/principles/>

² https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-infodemics_101120.pdf

MAIN RECOMMENDATIONS

Crucial elements must be reinforced or added to the DSA and DMA in order to be able to combat infodemics while preserving reliable news and information and the freedom of opinion and expression:

1. Expand the definition of systemic risk to include the system itself, the way algorithms function p.5
2. Require platforms to be transparent and their algorithms to be auditable p.5
3. Ensure that platforms observe political, ideological and religious neutrality p.6
4. Require platforms to give “due prominence” to reliability of news and information p.6
 - Introduce a co-regulation approach based on standards defined by civil society p.7
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- Expand the definition of trusted flaggers so that they can oppose the arbitrary removal of content and unjustified notices p.11
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DSA AND DMA PROGRESS

The draft DSA already contains progressive elements that must be welcomed. They include:

- Recognition of the systemic risks posed by “Very Large Platforms” (VLPs), especially risks to the democratic debate and to freedom of expression and information in the EU;
- Reinforcement of the obligations imposed on platforms as regards the provision of information to their users, transparency, annual audits and identifying and remedying the dangers their activities may pose;
- Creation of mechanisms protecting users’ freedom of expression: increased possibilities of appealing against moderation decisions, the obligation to create independent external complaint mechanisms, and the rights of users to appeal to the regulator;
- Creation of mechanisms for combatting the misuse of tools provided by platforms, including arbitrary notices; VLP obligations to identify and remedy risks resulting from the deliberate manipulation of their services that have an impact on civic discourse, electoral processes and public security;
- Provision for “enhanced supervision” by the European Commission over VLPs failing to respect their commitments and obligations, which can result in the Commission intervening, imposing heavy sanctions and forcing the VLPs to provide access to algorithms.

The draft DMA also contains progressive elements, in particular:

- Identification of the leading platforms as “gatekeepers,” and the attachment of a number of obligations to this status;
- The obligation for gatekeepers to submit to an independent audit of all the consumer profiling techniques they apply to their services;
- Consideration of the danger of gatekeeper conflicts of interest with regard to ranking and prioritising search results.

1/ Expand the definition of systemic risk to include the system itself, i.e. the way algorithms function

The main systemic risk posed by the platforms stems from the way their algorithms, which is influenced, above all, by their business models. This business model tends to favour the visibility of sensational information in order to maximise the time that users spend on the platform. The algorithmic curation promotes content that is intended to trigger user “involvement” (meaning clicks, comments and shares). The business model ends up favouring content that arouses emotion, usually simplistic and even hate-filled, violent and misleading content, rather than reliable information. The systemic risk posed by the platforms therefore stems from their business model, their internal logic and the rules that determine how they function.

⇒ The DSA’s concept of systemic risk should **specifically include the risk posed by the system itself (the way that its algorithms function, as influenced by the business model) and the DSA should address this risk in two ways:**

- **by an obligation to evaluate, identify and remedy the risks posed by the algorithms and the platforms’ business models**
- **by direct obligations (see following recommendations).**

2/ Require platforms to be transparent and their algorithms to be auditable

The draft DSA provides for a number of detailed transparency obligations and an obligation for VLPs to submit, at their expense, to an annual audit of their due diligence and risk evaluation obligations and their adherence to the undertakings given in their codes of conduct. The draft DMA also provides for an obligation for gatekeepers to submit to an independent audit of the consumer profiling techniques they apply to their services.

Nonetheless, it is the platform algorithms themselves, the algorithms used for content ranking, personalisation and moderation, that should be subjected to a regular audit. These algorithms enable the platforms to influence the behaviour of users and citizens in the public domain (DSA) and reinforce their dominant market position (DMA).

⇒ **The DSA should subject algorithms to regular audits**, conducted by auditors who, if necessary, are subject to a confidentiality requirement and who are technically equipped to carry out the appropriate research and regular tests.

Both the draft DSA and DMA say nothing about the entities that will conduct these regular audits and impose no specific requirement as to their – necessary – independence.

⇒ The DSA and DMA must provide safeguards regarding the independence of auditors.

The draft DSA requires platforms to be transparent about the parameters used for their system of recommending content and ranking search results (article 29). But the platforms are free to modify these parameters and any modification, even a marginal one, can have a big impact on the content and information available to users and can have very serious consequences for some content producers, especially media outlets.

⇒ Platforms should be subject to a **requirement of immediate and transparent information about changes to their rules of search result ranking and recommendations**, even those carried out experimentally, so that regulators, users and content producers are notified of these changes and their impact is foreseeable to those affected by them.

⇒ Users must be able to ask the regulator to take a position on the impact of platform changes to their rules of search result ranking and recommendations, and demand that the platform remedy any negative impacts.

3/ Ensure that platforms observe political, ideological and religious neutrality

Platforms must be subject to a requirement of political, ideological and religious neutrality. They must not be able to give preference to any political opinions, ideas or parties.

⇒ Platforms must be explicitly obliged to adhere to political, ideological and religious neutrality.

4/ Impose on platforms an obligation to ensure “due prominence” to reliable news and information

In contrast to other kinds of content (such as advertising, political campaigns, propaganda and corporate communications), content that respects media ethics and professional standards with regard to the production of reliable news and information is of vital importance to democracy and must enjoy special safeguards.

“Reliable news and information” should be understood to mean information that is freely gathered, processed and disseminated according to the principles of a commitment to truth, plurality of viewpoints and the use of rational methods to establish and verify facts.

- **Introduce a co-regulation approach based on standards defined by civil society**

The draft DSA provides for mechanisms to combat disinformation. They include a requirement for leading platforms to evaluate the systemic risks that coordinated disinformation campaigns can pose and to remedy these risks; a requirement for them to be transparent about targeted advertising and their rules for prioritising content; and encouragement for platforms to adopt codes of conduct, especially with regard to combatting disinformation, and in so doing to give undertakings which regulators could decide to make binding. These mechanisms are nonetheless insufficient.

The DSA also provides for the drafting of “crisis protocols” that in “extraordinary circumstances” defined by these protocols could require platforms to display “prominent information on the crisis situation provided by Member States’ authorities or at Union level.” These protocols therefore envisage a mechanism for ensuring the visibility of official information online. But, as well as reinforcing the visibility of official information, whose reliability is not guaranteed and which is increasingly the subject of mistrust and suspicion, **it is the visibility of public interest journalism that needs to be enhanced, and at all times.**

In order to respond to the goal of combatting the systemic dangers posed by disinformation and to the need defined in the European Democracy Action Plan (EDAP) to “support adequate visibility of reliable information of public interest and maintain a plurality of views,” **the DSA should make platforms adhere to a “due prominence” obligation with regard to reliable news and information.**

To this end, the DSA should adopted a **co-regulation approach**, in the form of a **legal obligation referring to a self-regulatory standard**. Using “must-carry” and quota rules as a model, the DSA should **make platforms adopt mechanisms designed to give prominence to information sources that respect standardised self-regulatory norms on professional and ethical practices**, and give them preferential treatment in terms of prioritisation of content, especially promotion and visibility in news feeds and search results.

New co-regulation legislation must require platforms to use these self-regulatory tools, under the control of the national regulatory authorities, applying tools and clear criteria identified in the legislation. These legal requirements should include an obligation to “do no harm” and not discriminate on the basis of content or viewpoint. Intermediaries should not regard failure to respect or use these technical standards as grounds for excluding, downgrading or negatively impacting content visibility or monetisation.

⇒ The DSA should make platforms adhere to a **“due prominence” obligation with regard to reliable news and information**, based on a co-regulation approach. Referring to a self-regulatory standard, platforms would be required to adopt mechanisms designed to give prominence to information sources that respect standardised self-regulatory norms on professional and ethical practices, and give them preferential treatment in terms of prioritisation of content.

- **The Journalism Trust Initiative (JTI)**

In a collaborative process initiated by RSF, the Journalism Trust initiative (JTI) has produced a machine-readable set of standards designed to encourage respect for journalistic ethics and methods and reinforce use of the right

to information and freedom of opinion by promoting online content produced in accordance with these principles.

The process was launched by RSF under the aegis of the European Committee for Standardisation (CEN), with help from French CEN member AFNOR and German CEN member DIN, and in partnership with Agence France-Presse (AFP) and the European Broadcasting Union (EBU). More than 120 entities collaborated in drafting the standards, including news agencies (such as the Associated Press, DPA and EFE), broadcast media (such as the BBC, RTL and France TV), media unions (journalists' federations in Taiwan and South Korea), consumer groups (the European Consumer Organisation) and tech groups (such as the World Wide Web Consortium). Google and Facebook participated, as did many regulatory bodies from various European countries. The JTI European "Standard" was officially issued on 19 December 2019 in the form of a "CEN workshop agreement."³

In the JTI implementation phase, **media outlets registered or certified as compliant with the JTI Standard will gain a comparative advantage** when it is incorporated into the algorithms used by social media platforms and search engines. The possible benefits include a better position in search results and social media news feeds, more advertising income, favourable decisions by independent authorities and public funding.

The JTI Standard's adoption will thereby promote and improve the visibility of sources of news and information that can be regarded as reliable because they comply with a set of journalistic standards that were developed in a self-regulatory process under the CEN's aegis and in cooperation with journalists and media from all over the world, and are implemented in a transparent and verifiable manner.

⇒ To implement the due prominence obligation, **the co-regulation approach could refer to a self-regulatory standard such as the Journalism Trust Initiative.**

5/ Ensure that content moderation respects international standards on freedom of expression

- **Make platforms bring their terms of service into line with international free speech standards**

The draft DSA requires platforms to clearly define in their terms of service what restrictions they could impose on the use of their services and to ensure that their content moderation respects users' fundamental rights, including the freedom of expression.

This means that platforms will be able to continue regulating the freedom of expression according to their own rules, which may not conform to international standards with regard to the freedom of expression. But platforms should not be able to restrict the freedom of expression in a manner regarded under international law as

³ <https://www.cen.eu/news/workshops/Pages/WS-2019-018.aspx>

arbitrary, or be more restrictive than Member States in the limits they impose on the freedom of expression of their users.

⇒ To safeguard respect for the right to freedom of expression and information, **the DSA must require platforms to bring their terms of service into line with international standards on freedom of expression** as defined in article 19 of the International Covenant on Civil and Political Rights and as interpreted by the UN Human Rights Committee's General Comment No. 34.

- **Require platforms to refuse to comply with an order that is not in accordance with free speech standards**

The draft DSA does not define “illegal” content but says that “orders to act against illegal content” issued by Member States must explain why the content is illegal, by reference to the specific legal provision that has been infringed (article 8).

⇒ The DSA should specify that **platforms must refuse to act on a Member State's request for content suppression if the request does not conform to international standards** on freedom of expression or if the legal provision to which it refers does not conform to these standards.

⇒ In such a situation, the order should be **evaluated by the out-of-court dispute settlement under the control of a judge**.

- **Explicitly provide for sanctions for the arbitrary removal of lawful content**

The draft DSA requires platforms to respect users' fundamental rights (including the freedom of expression) and says users can complain to regulators in case of infringement of the DSA (article 43).

⇒ To more effectively ensure respect by platforms for the fundamental rights of their users, especially given the sanctions envisaged in a great deal of Member State legislation for failure to remove illegal content, the DSA should explicitly allow national regulators to impose sanctions in the event of the arbitrary removal of lawful content.

- **Reinforce the rights of appeal of users**

The draft DSA says users can submit complaints against platform moderation decisions to an “internal complaint-handling system” and then, if not satisfied with the platform's decision, to a certified and independent “out-of-

court dispute settlement” body, and this “without prejudice to the right of the recipient concerned to redress against the decision before a court in accordance with the applicable law.”

But this mechanism means that, in the absence of a decision by a platform, if the platform leaves a complaint unanswered, recourse to a dispute settlement body and then to a judge is not possible.

⇒ The DSA must allow users to have recourse to the mechanisms for redress even in the absence of a decision by the platform.

- **Reinforce the power of judges to ensure respect for the right to freedom of expression**

Content shared on platforms is governed by the right to freedom of expression, for which a judge acting as the guardian of freedoms must be competent.

The draft DSA’s recourse mechanisms do not allow for a summary judgment. Recourse to a judge is possible only as a last resort, after decisions resulting from the internal complaint-handling system and an out-of-court dispute settlement body. It must always be possible to urgently seek an injunction in response to a platform’s action, to ask a judge to order the immediate withdrawal of content constituting a serious abuse of freedom of expression (hate speech or incitement to violence, for example), or the immediate restoration of journalistic content of a public interest nature that has been arbitrarily removed.

⇒ The DSA must allow urgent recourse to a judge immediately after any action by a platform that constitutes a serious violation of the right to freedom of expression or a serious arbitrary restriction of this right, or at any other moment in accordance with the right to effective recourse to an independent court.

6/ Require platforms to appoint a legal representative in every EU Member State

The draft DSA requires platforms to appoint a legal representative in the European Union. This would not suffice for users to be able exercise their rights easily and effectively.

To ensure that platforms are fully required to respect their legal obligations, and under judicial oversight, they must be obliged to appoint a legal representative in each Member State, one able to receive summonses from individuals and public authorities.

⇒ Platforms must be required to appoint a legal representative in all the Member States where they operate.

7/ Give civil society an appropriate role

The DSA defines “trusted flaggers” as entities whose notices (reporting allegedly illegal content) are treated with priority (article 19). This restricted role given to certain civil society organisations, that of reporting supposedly illegal content, needs to be counterbalanced by giving other organisations the ability to oppose the removal of lawful content by platforms and oppose arbitrary notices by users calling for lawful content to be taken down.

Reporters Without Borders (RSF), for example, has on several occasions in the past submitted requests to platforms to restore lawful journalistic content that they had removed arbitrarily. Only the support by RSF to such requests, by the journalist who was the content’s author, resulted in the content being restored.

Limiting the role of civil society organisations to reporting allegedly illegal content could result in reinforcing the tendencies in our societies to systematically denounce content that disturbs, offends or shocks certain sensibilities at the expense of the right to freedom of opinion and expression and the freedom to inform.

- **Define the selection criteria of trusted flaggers**

The criteria specified by the DSA for selecting trusted flaggers are insufficient and must be fleshed out, especially with regard to their necessary independence vis-à-vis governments and public authorities.

⇒ Define the selection criteria of trusted flaggers, especially with regard to their necessary independence vis-à-vis governments and public authorities.

- **Expand the definition of trusted flaggers so that they can oppose the arbitrary removal of content and unjustified notices**

The definition of trusted flaggers must be expanded to enable entities to help preserve the freedom of expression and the freedom to inform from arbitrary notices and the arbitrary removal of content, especially journalistic content, information and media cartoons.

⇒ Civil society organisations should be recognised as trusted flaggers able to submit or support a complaint about a notice concerning journalistic content or a moderation operation – a complaint that should be treated with priority. These organisations should be able to address platforms’ internal complaint-handling systems and out-of-court dispute settlement bodies and refer disputes with platforms to a judge.

- **Allow trusted flaggers to contribute to the definition of codes of conduct**

The DSA says the European Commission and the proposed European Board for Digital Services will encourage the drawing up of codes of conduct in order to respond to a significant systemic risk (article 35), including a risk

to civic discourse such as that posed by disinformation. It also says that undertakings given by platforms in these codes of conduct can be made binding by the regulators (article 58).

⇒ Trusted flaggers should, as a priority, be invited to participate in drawing up the codes of conduct envisaged by the DSA, in order to contribute to preserving freedom of expression, pluralism, media sustainability and so on.

⇒ Trusted flaggers should be able to submit requests to national regulators or to the European Commission for certain undertakings given by platforms in the codes of conduct to be made binding.

- **Allow trusted flaggers to respond to violations of the DSA or actions by platforms that create a systemic risk**

The DSA allows platform users to lodge complaints about alleged violations of the DSA by platforms (article 43). Civil society organisations, including those that defend the freedom to inform and journalistic freedoms, should also be able submit complaints to regulators when platforms violate the DSA, fail to respect the undertakings they have given, misapply codes of conduct or take an initiative that poses a systemic risk, especially one affecting media freedom or pluralism.

⇒ Trusted flaggers should be able to submit complaints to regulators about violations of the DSA by platforms or about actions by platforms that create a systemic risk.

8/ Ensure “gatekeeper” competition, which will foster a more pluralist, open and decentralised digital environment

The dominant position of a limited number of online actors and the control they are able to wield over the online information and communication domain’s architecture has a direct impact on the ability of users and citizens in general to exercise and protect their rights, as well as on the global public domain and democracy.

Nonetheless, the draft DMA does not try to foster an online environment that is more open to competition by new entrants and less acquiescent to domination by a very small number of corporate giants. The DMA proposes measures designed to create conditions of competition among the companies that use the platforms and to defend the interests of these companies vis-à-vis the platforms, without trying to improve competition among the platforms themselves in order to encourage the emergence of new actors and pluralism in the digital domain. Some measures proposed by the DMA could even reinforce the dominant position of the leading platforms and users’ dependence on them.

Furthermore, the DMA almost exclusively adopts the perspective of the leading platforms and companies that use their services to carry out their activities, without taking the end user's position. The dominant position of the leading platforms and their ability to dictate the rules of the market can nonetheless have a direct impact on the fundamental rights of end users, individuals and citizens. In particular, the market research mechanism envisaged by the DMA provides for no end-user role.

⇒ The DMA must above all try to create a more pluralistic digital domain, one less acquiescent to the power of a limited number of platforms, to encourage competition among platforms, and to facilitate the emergence of new actors.

⇒ The DMA must also aim to create market conditions and a regulatory framework that enables end users to defend and take advantage of their rights.

9/ Require “mixed” services (private messaging services using public domain logics) to respect basic principles

Messaging services such as WhatsApp, Signal, Telegram or WeChat are not used solely to send private messages. In some countries they have become instruments for the mass dissemination of hate speech and false information. For this reason, they require regulation and the DSA is the most appropriate legislative tool for regulating the providers of these digital services.

Such service providers should be subject to new specific requirements including a limit on the number of participants in a discussion group, an obligation to create mechanisms whereby users can report hate speech and other kinds of illegal content so that the provider can take appropriate measures, and an obligation to create effective mechanisms for appealing against moderation decisions.

The Forum on Information and Democracy's working group on infodemics (see below) has published a report⁴ with many recommendations that can serve as the basis for new regulations for private messaging services.

⇒ The DSA should regulate private messaging services when they are used for public domain purposes, using the Forum on Information and Democracy's recommendations as its basis.

⁴https://informationdemocracy.org/wp-content/uploads/2020/11/ForumID_Report-on-infodemics_101120.pdf

10/ A governance proposal

- **Safeguard the independence of national regulators**

According to the draft DSA, the proposed national regulators, called “the Digital Services Coordinators,” must “act with complete independence,” must “remain free from any external influence, whether direct or indirect,” and must “neither seek nor take instructions from any other public authority or any private party” (article 39).

However, the DSA does not provide for any European mechanism to ensure, monitor or enforce respect for this requirement. To ensure that that this legislation is not exploited by any Member States for political ends, the DSA should establish mechanisms to safeguard the independence of national regulators.

⇒ The opinions that the European Board for Digital Services can issue to national regulators (article 49) should be able to refer to their respect for the requirement of independence. The Board should also be able to advise the European Commission to intervene in a situation in which a regulator is failing to respect the requirement of independence.

⇒ It should be possible for service providers, users or the European Board for Digital Services to refer matters concerning a national regulator’s independence to the European Commission, and for the Commission to launch an infringement procedure to ensure compliance with this obligation.

⇒ If the European Commission is not given this power in the DSA, a specific directive to this effect should be adopted, as the revised Audiovisual Media Services directive did with national broadcast regulators.

- **Safeguard future regulatory relevance**

So that the principles and obligations set out in the DSA can continue to be relevant regardless of future technological evolution, new regulatory themes and methods should be the subject of constant discussion in which civil society should be a participant.

According to the draft DSA, the European Commission, the national Digital Services Coordinators and other competent authorities will develop “guidance and analysis (...) on emerging issues across the internal market with regard to matters covered by this Regulation” and the European Board for Digital Services will coordinate and contribute to this process (article 47). The Board will “support and promote (...) the identification of emerging issues” (article 49).

An independent body should be inserted into this process, one tasked with issuing recommendations for updating the DSA’s provisions when this is necessary and with proposing new regulatory subjects and modalities.

The Forum on Information and Democracy⁵, the body that implements the International Partnership for Information and Democracy, is ideally suited for this role. An international entity founded by 11 independent organisations from different backgrounds and regions, the Forum takes its mandate from the principles outlined in both the International Declaration and the Partnership for Information and Democracy.

Its mandate includes making recommendations to all the different stakeholders that shape the global information and communication space on how its norms should evolve, and facilitating the emergence of regulatory and self-regulatory responses by and for the various stakeholders.

⇒ So that new principles and obligations can be regularly defined by an independent stakeholder, we propose inserting the Forum on Information and Democracy into European digital governance so that it can work on emerging issues and other relevant matters.

- The Forum could be given the role of a permanent group of experts similar, for example, to the group of experts that the European Commission created in January 2018 to help coordinate and implement environmental policy.
- The Forum could be assigned a permanent think-tank role regarding implementation of the DSA, DMA and EDAP in order to improve the resilience of democracies and adapt their response to the new challenges associated with disinformation and the threats to media sustainability.
- As the Forum's tasks include evaluating the digital information domain, it could also be the entity that is responsible for platform and algorithmic transparency. It would be tasked with organising access to data for researchers and all qualified persons, while avoiding publicity when appropriate.

⁵ <https://informationdemocracy.org/forum/>