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WHAT ARE THE CHALLENGES PRESENTED BY THE DIGITAL SERVICES ACT'S PROVISIONS ON CONTENT MODERATION AND HOW DOES THIS REGULATION ALIGN WITH THE ITALIAN CONSTITUTIONAL FRAMEWORK'S APPROACH TO SAFEGUARDING FREEDOM OF EXPRESSION?

Prof. Giovanni Piccirilli

Relatore

Prof. Raffaele Bifulco

Correlatore

Maresa Mathew 159263

Candidata

Anno Accademico

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What are the challenges presented by the Digital Services Act's provisions on content moderation and how does this Regulation align with the Italian constitutional framework's approach to safeguarding freedom of expression?

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1. Introduction

1.1. Context and Relevance

The Digital Services Act (DSA) is a central part of the European Union's new digital policy, with the aim to govern online platforms and ensuring a safer, more transparent digital space. With 5.4 billion people worldwide online in 2023 and over 91% of Europeans connected, the internet has become a central element of daily life.[1] It functions not only as a marketplace but also as a space for public discourse, media sharing, and political communication.[2] However, the increasingly important role of digital platforms in society has led to challenges such as hate speech, disinformation, and cyberbullying—issues that demand effective regulatory frameworks. The DSA will intervene in content moderation to possibly handle some of these issues.

The DSA is designed to provide a unified framework for platform governance, addressing the responsibilities of intermediary services and regulating the dissemination of illegal content. Its provisions modernise the discipline for online platforms, enforcing accountability and transparency in their operations. The DSA regulates content moderation, which is the process that platforms use to manage user-generated content, either manually or through automated systems. In a digital landscape that was once seen as a "marketplace of ideas", the rise of fake news, hate speech, and harmful content creates a need for pervasive content moderation, that will need to be balanced with freedom of expression to protect fundamental rights.

At its core, the DSA defines illegal content, lays down different obligations for platforms, with various levels of protection according to the platforms' size and

[1] "Facts and Figures 2023 - Internet Use" (October 10, 2023) https://www.itu.int/itu-d/reports/statistics/2023/10/10/ff23-internet-use/ last accessed 28.09.2024

[2] De Gregorio, G., Pollicino, O., "The European Constitutional Road to Address Platform Power" in in *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* Max Planck Institute for Innovation & Competition Research Paper No. 21-25 19

influence and sets up a notice-and-take-down system. The DSA places responsibility on platforms to ensure that online environments remain safe and inclusive. At the same time, it emphasizes user protection, ensuring that individuals are aware of the way platforms operate, including how algorithms prioritize or demote content. This level of transparency is vital to maintain trust in online spaces, particularly as more of our personal and professional lives take place within these platforms. In addition, they empower users to know their rights and use them. Moreover, the DSA's content moderation provisions seek to address the imbalance of power between major tech companies and users. Platforms like Meta and X (formerly Twitter) hold significant control over the information that circulates online, yet often escape meaningful regulation. The DSA attempts to rectify this by regulating Very Large Online Platforms and Very Large Online Search Engines, who have a greater impact on the market and on online spaces.

In sum, the DSA is an indispensable tool for shaping the future of digital governance, as it creates a regulatory framework that both protects free speech and curbs harmful content, ensuring that online spaces remain a source of trustworthy information and healthy public discourse. By addressing the challenges of gatekeepers and their power, the DSA represents a significant step toward achieving greater accountability and transparency in the digital age.

1.2. Research Question and Objectives

The DSA creates an innovative regulatory framework designed to address the complex issues of content moderation, transparency, and accountability on online platforms. However, its introduction also raises crucial questions about how its provisions impact fundamental rights, particularly the freedom of expression. My research seeks to explore the challenges presented by the DSA's content moderation provisions, especially regarding their compatibility with Italian constitutional law, specifically Article 21 of the Italian Constitution, which enshrines the right to freely express one's thoughts and prohibits censorship.

My research question is “what are the challenges presented by the Digital Services Act's provisions on content moderation, and how does this Regulation align with the Italian constitutional framework's approach to safeguarding freedom of expression?” By focusing on this question, the thesis aims to provide a comprehensive analysis of the DSA’s approach to content moderation, critically assessing whether its mechanisms – such as automated moderation, designation of trusted flaggers, and the uniform treatment of users – adequately protect or undermine the constitutional safeguards for freedom of speech in Italy. This thesis will look into the definition of illegal content given by the DSA and the consequences that derive from it. Furthermore, it will focus on the DSA’s uniform treatment of all users.

By focusing on these critical challenges, the thesis seeks to assess whether the DSA, in its current form, effectively balances the need for content regulation with the protection of constitutional rights in Italy, and how these potential shortcomings might be addressed to ensure a free and open digital environment for all.

1.3. Thesis Structure

In Chapter 2, I will introduce the concept of content moderation and its significance in today’s digital landscape. I will discuss the different approaches platforms use for moderation and explain how these systems shape the dynamics of users interactions. This chapter will also cover the increasing concerns surrounding disinformation and its impact on public discourse, highlighting how content moderation addresses the dissemination of harmful and false information. Finally, I will introduce the E-Commerce Directive and the DSA, focusing on their role in regulating content moderation and the progress of the discipline in matters of transparency, accountability, and the regulation of liability for intermediary services.

In Chapter 3 I will examine the interplay between the DSA and other key regulations such as the AI Act, the European Media Freedom Act (EMFA), and the Regulation on

the Transparency and Targeting of Political Advertising (TTPA). The AI Act is critical for understanding the role of automated systems in content moderation and the potential for algorithmic censorship. The EMFA and TTPA will be discussed in terms of how they address disinformation, political content regulation, and foreign interference in the EU media market, emphasizing their alignment with or divergence from the DSA. Finally, I will assess how the provisions of the DSA on transparency, accountability, and user protection mechanisms (such as complaint-handling systems and dispute resolution procedures) aim to empower users, allowing them to challenge decisions affecting their content or online presence. This chapter will also highlight the role of AI and automated systems in content moderation, discussing the challenges and risks posed by their use, particularly regarding the over-removal of content and discriminatory censorship.

In Chapter 4, I will examine how the DSA's broad definition of illegal content poses challenges to Italian constitutional safeguards by potentially encompassing everything from criminal infractions to minor civil or administrative violations under the same framework. Such a broad interpretation raises significant proportionality concerns under Article 21 of the Italian Constitution, which emphasizes the protection of free speech, even for controversial or politically sensitive content. The DSA's lack of distinction between users, particularly in how it applies the same rules to journalists and ordinary users, further complicates the matter, risking censorship of protected journalistic activities that play a crucial role in public discourse. Furthermore, I will highlight how the DSA's automated content moderation systems could disproportionately affect minority groups, further conflicting with Italy's constitutional principles that safeguard equal protection and freedom of expression for all citizens. These systems, which often lack the contextual understanding needed to differentiate hate speech from legitimate speech, may lead to the overblocking and the silencing of marginalized voices.

2. Content Moderation in the European Union

2.1. Content Moderation and Freedom of Expression

2.1.1. Introduction to Content Moderation

In 2023 5.4 billion people worldwide were online, with peaks of 91% of the population in Europe.[3] Ever since the Covid pandemic our lives shifted completely towards digitalisation, which helped us get through the crisis and gave us new tools for our everyday lives.[4] Internet now acts as a flourishing marketplace, a social gathering space, a media outlet, as well as a channel for public and official communications. The growing presence of our society online and the amount of time we spend on social media (1 hour and 48 minutes per day in Europe[5]) call for greater attention from legislators. What started as a "free marketplace of ideas" and was thought of as the new *agorà* for public discourse where direct democracy practices could thrive, is now a place highly vulnerable to hate speech, cyberbullying, fake news and violent content.[6] To manage these issues, some control is needed, usually in the form of content moderation. Content moderation can be defined as the organized practice of screening user-generated content uploaded on websites, social media and other online outlets, in order to determine the appropriateness of the content for a given site, locality, or jurisdiction.[7] Online platforms draft and publish their own terms of service (or terms and conditions) to clarify which practices and which types of content are allowed on

[3] "Facts and Figures 2023 - Internet Use" (October 10, 2023) https://www.itu.int/itu-d/reports/statistics/2023/10/10/ff23-internet-use/ last accessed 28.09.2024
[4] Allegri M.R., "Il Diritto Di Accesso a Internet: Profili Costituzionali - MediaLaws" (*MediaLaws*, April 11, 2021) https://www.medialaws.eu/rivista/il-diritto-di-accesso-a-internet-profili-costituzionali-2/ 58
[5] Kemp S., "The Time We Spend on Social Media — DataReportal – Global Digital Insights" (*DataReportal – Global Digital Insights*, January 31, 2024) https://datareportal.com/reports/digital-2024-deep-dive-the-time-we-spend-on-social-media?utm_source=Global_Digital_Reports&utm_medium=Analysis_Article&utm_campaign=Digital_2024&utm_content=Digital_2024_Analysis_And_Review last accessed 29.02.2024
[6] Bucalo, M.E., "La libertà di espressione: nuovi limiti e nuovi controlli - Treccani" (*Treccani*) https://www.treccani.it/magazine/lingua_italiana/speciali/fake_news/2_Bucalo.html
[7] Roberts, S.T., "Content Moderation," *Springer eBooks* (2017) https://doi.org/10.1007/978-3-319-32001-4_44-1

their platforms and which are not, so when any piece of content is not considered appropriate the platform will 'moderate' it.[8] This could take the form of removing the content, demonetising it, deplatforming the user who uploaded it, flagging the content and more.[9] Therefore, while social media platforms may seem like public forums for debate, they actually operate on elaborate content moderation systems that shape the nature and conditions of user interactions.[10] Moreover, information manipulation, particularly in the digital domain, increasingly impacts public discourse. A 2023 survey indicates that 85% of individuals globally are concerned about the effects of disinformation on their fellow nationals, while 87% believe that disinformation has already influenced political affairs in their country.[11] The consequences of disinformation and mistrust in the news have far-reaching implications in the political context and often negative repercussions, which is one of the main reasons why the dissemination of fake news needs to be addressed and, possibly, strictly regulated.

Possible approaches to content moderation used by platforms include: community moderation, where a platform relies on its community members to moderate user-generated content; paid individual contractors, professionals who are hired by the company and trained for the role; automated systems, likely databases that are combined with machine learning algorithms; digital juries, which are made up of a group of ad hoc users; expert panels, where expert means a professional in content moderation, in journalism, in law, in human rights and more.[12]

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[8] Papaevangelou, C. and Votta, F., "Content Moderation and Platform Observability in the Digital Services Act" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/content-moderation-and-platform-observability-in-the-digital-services-act/

[9] Guidance Note on Content Moderation Best Practices adopted by the Steering Committee for Media and Information Society (CDMSI) at its 19th plenary meeting, 19-21 May 2021 11

[10] Papaevangelou, C. and Votta, F., "Content Moderation and Platform Observability in the Digital Services Act" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/content-moderation-and-platform-observability-in-the-digital-services-act/

[11] Ipsos and UNESCO, "Survey on the Impact of Online Disinformation and Hate Speech" (Mathieu Gallard ed, 2023) https://www.unesco.org/sites/default/files/medias/fichiers/2023/11/unesco_ipsos_survey.pdf

[12] Molina, M.D. and Sundar, S.S., "When AI Moderates Online Content: Effects of Human Collaboration and Interactive Transparency on User Trust" (2022) 27 Journal of Computer-Mediated Communication 2-3

The EU thus introduced a new Regulation to deal with platform governance and content moderation, the Digital Services Act (DSA). The Digital Services Act is a central tassel of the EU's new strategy to regulate the actions of these online platforms, where content moderation plays a starring role. Content moderation is defined it in Article 3 (t) of the DSA as "the activities, whether automated or not, undertaken by providers of intermediary services, that are aimed, in particular, at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility, and accessibility of that illegal content or that information, such as demotion, demonetisation, disabling of access to, or removal thereof, or that affect the ability of the recipients of the service to provide that information, such as the termination or suspension of a recipient's account".[13] This is surely a broad definition, which gives a good overview of the different aspects of online interactions touched by content moderation and that highlights the central role that automated tools play in content moderation.[14]

The DSA introduced some new provisions to increase the level of transparency and accountability of online platforms. Furthermore, it addresses the dissemination of illegal content and disinformation, and the societal risks deriving from it.[15] More specifically, it centres on the regulation of intermediary services, which integrates and enhances the consumer protection legislation, and the data protection rules already in force under EU law.[16] It was a much needed piece of legislation, which finally harmonised and modernised the discipline of intermediary services and liability in the internal market, aiming to foster a safe, predictable and trustworthy online environment.[17] The Commission seeks to protect users from unwarranted

[13] DSA Article 3 (t)
[14] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 2
[15] Recital 9 DSA
[16] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 4.
[17] Recital 9 DSA

interferences that may harm their constitutional rights to freedom of expression and protection from discrimination by addressing transparency gaps and establishing new redress systems.[18] The aim seems to be to safeguard the 'passive' dimension of freedom of information, specifically the right to access diverse and unaltered information, by improving individuals' awareness of the functioning of and the risks deriving from recommender systems, as well as the active dimension, which enables users to share information and influence the public discourse in a healthy, well-functioning and safe social media environment.[19]

The Digital Services Act has been in force for months now, but companies have been slow to comply with the regulations. However, the European Commission is now cracking down on these companies to ensure they adhere to the DSA guidelines. The Commission opened proceedings against several major tech companies for suspected violations of the DSA. Particularly interesting in terms of content moderation are the proceedings towards Meta and X.[20] The Commission is closely monitoring their content moderation practices and has noticed multiple aspects that need further investigation, such as the effectiveness of measures to counteract the dissemination of illegal content, the demoted visibility of political content embedded in the algorithms, as well as the compliance with the provisions concerning deceptive advertisements and disinformation campaigns.[21] These alleged violations raise questions about the balance between freedom of expression and the need to regulate online content. One task that is particularly delicate is the management of disinformation and hate speech by the major platforms. The Commission's investigation into Meta and X could shed light on whether these companies are effectively combating harmful content while still

[18] De Gregorio, G. and Pollicino, O. "The European Constitutional Road to Address Platform Power" in *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* Max Planck Institute for Innovation & Competition Research Paper No. 21-25 19

[19] De Gregorio, G. and Pollicino, O. "The European Constitutional Road to Address Platform Power" in *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* Max Planck Institute for Innovation & Competition Research Paper No. 21-25 19

[20] European Commission, "Commission Opens Formal Proceedings against Facebook and Instagram under the Digital Services Act" (30.04.2024) Press Release; European Commission, "Commission Opens Formal Proceedings against X under the Digital Services Act" (18.12.2023) Press Release

[21] Ibid.

upholding users' right to express themselves freely. The proceedings against Big Tech also highlight the challenges of enforcing digital regulations across borders. With many tech giants operating globally, it can be difficult for individual countries or regions to hold them accountable for their actions. The EU's efforts to crack down on violations of the DSA serve as a test case for how effective international regulation can be in regulating these platforms

What may seem like a common matter of contractual nature can have deeper reaches depending on the relevance of the private actor on the market. Already in 2015 the Commission pointed out that "some online platforms have evolved to become players competing in many sectors of the economy and the way they use their market power raises a number of issues that warrant further analysis beyond the application of competition law in specific cases".[22] A position of dominance in the market can provide the platform with disproportionate power towards users and other platforms.[23] Platform corporations such as Facebook have attained unparalleled power and wealth, emerging as a novel category of what Stern labels "company-states": companies endowed with the authority to manage not only commerce but also law, land, and liberty, similarly to governments.[24] Governments these days need to engage in head-to-head negotiations with platforms over topics that were formerly strictly within the purview of democratic decision-making, as platforms employ their digital powers as a political force.[25] The attitude of these platforms to use their influence and their size to

[22] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A Digital Single Market Strategy for Europe' COM (2015) 192 final, 12

[23] Buri, I. and van Hoboken, J. "The DSA Proposal's Impact on Digital Dominance" in *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* Max Planck Institute for Innovation & Competition Research Paper No. 21-25 10

[24] Stern, P. J., The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India (2011) Oxford University Press

[25] Törnberg, P., "How Platforms Govern: Social Regulation in Digital Capitalism" (2023) 10 Big Data & Society January–June 1–13

exercise public-like powers, such as law-making and censoring information, endangers users' fundamental rights, in particular freedom of expression.[26]

There are many aspects of content moderation that pose a threat to freedom of expression, I will use three examples to show the complexity and the extensive repercussions of even simple content moderation decisions.

Firstly, platforms lay down their rules on their terms and conditions (or terms of service), which are standardized contracts, defined unilaterally and offered indiscriminately on equal terms to any user.[27] These are not susceptible to constitutional safeguards and public law, seeing as they are an expression of private contractual powers.[28] Nevertheless, these terms and conditions will apply globally and influence the behaviour of thousands of users, who do not get a say in the matter. In fact, they are adhesion agreements, which create a "take it or leave it" relationship, preventing any bargaining of the clauses among the contracting parties.[29] There is an imbalance of power between a platform corporation and a single user, whose only option to opt out of conditions they do not like is to avoid using the service altogether.[30] Not only that, but when these platforms become particularly dominant on the market, they are most likely one of the few options if not the only one, meaning that their terms and conditions become an unspoken law. To use the service of such a tech giant – gatekeeper under the Digital Markets Act – one has to surrender to their rules. Therefore, when the terms and conditions of a gatekeeper prohibit political affiliations of some kind, restrict speech over certain topics, limit the ability of a user to share their opinions, it is not just about a private actor setting their own rules, it is a matter of a private actor using public-like powers, reducing users' freedom of

[26] De Gregorio, G. and Pollicino, O. "The European Constitutional Road to Address Platform Power" in *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* Max Planck Institute for Innovation & Competition Research Paper No. 21-25 16

[27] Guidance Note on Content Moderation Best Practices adopted by the Steering Committee for Media and Information Society (CDMSI) at its 19th plenary meeting, 19-21 May 2021 22

[28] Quintais J.P., Appelman N. and Fahy R., "Using Terms and Conditions to Apply Fundamental Rights to Content Moderation" [2022] *German Law Journal* available at SSRN Electronic Journal 2

[29] Guidance Note on Content Moderation Best Practices adopted by the Steering Committee for Media and Information Society (CDMSI) at its 19th plenary meeting, 19-21 May 2021 22

[30] Quintais J.P., Appelman N. and Fahy R., "Using Terms and Conditions to Apply Fundamental Rights to Content Moderation" [2022] *German Law Journal* available at SSRN Electronic Journal 3

expression. This type of platforms reaches an extensive audience and mimics the power dynamics of a public entity, without being exposed to the same strict regulations.

Secondly, who decides how to moderate content? Moderation is not neutral, that is the reason why strong guidelines and rules are needed to avoid discrimination and abuse. This is the case with the overblocking and shadowing on Palestinian content (on Meta?) during the Sheikh Jarrah attack in 2021, which showed a significant compression of freedom of expression on the topic, highlighting the bias in the moderation process.[31] Another controversial content moderation decision was the closing and banning of President Trump's social media accounts on Facebook and Twitter, after his accusations towards the Congress and alleged electoral fraud encouraged a brutal attack towards the building of Congress and the politicians who were inside. It might be a fair decision based on the contractual provisions regulating the rapport between the platform and the user, but Trump was not merely a user, he was the President of the country.[32] It is a peculiar and multi-faceted issue that outlines the fine line between content moderation and censorship.[33] On the one hand, Facebook and Twitter are private companies, whose platforms are not even media outlet, but rather social media, and Donald Trump is a user like any other under private law. On the other hand, they are among the most used and influential website worldwide, not only for the social media role, but also for the praxis – established my numerous politicians globally – to use them as a channel for political campaigns, public information and even announcements of official actions undertaken by Governments and other major State authorities (war declarations are a significant example).[34] The users on Facebook and Twitter currently rely on them for this type of information, millions of users signed to a platform to interact with each other, share their thoughts

[31] Abokhodair, N., Skop, Y., Rüller, S., Aal, K. and Elmimouni, H., "Opaque algorithms, transparent biases: Automated content moderation during the Sheikh Jarrah Crisis" First Monday, volume 29, number 4 April 2024

[32] Bassini M., "Libertà Di Espressione e Social Network, Tra Nuovi 'Spazi Pubblici' e 'Poteri Privati'. Spunti Di Comparazione" Rivista Italiana Di Informatica E Diritto – RIID 3 (2021) 2

[33] Colapietro C., "Libera Manifestazione Del Pensiero, Fake News e Privacy, Oggi" Dirittifondamentali.it 2 2022 13

[34] Manetti, M., "Facebook, Trump e la fedeltà alla Costituzione" in Quad. cost., n. 2/2021, 427-430

and read about the latest news from their favourite influencers, singers and politicians. In these terms, Twitter and Facebook act as part of the media and Donald Trump cannot be equated to a common user, hence this "deplatforming" causes serious concerns on freedom of expression and the related right to be informed.[35]

Another challenging aspect of online content moderation consists of the vast and diverse forms of advertising content, which are disseminated in infinite amounts and often exploit the online behavioural patterns of consumers. Digital advertising now exists in multiple forms, including influencer marketing, personalized ads, and hybrid ads (a combination of both).[36] Each of these forms presents unique risks to consumer protection, especially in terms of transparency and manipulation.[37] Influencer marketing, a form that relies on influencers promoting products through personalized recommendations to their followers, creates specific challenges because of the trust influencers build with their audience. This form of marketing can blur the lines between authentic opinion and commercial endorsement, making it difficult for consumers to discern when they are being marketed to. Personalized ads target individuals based on personal data such as browsing habits, social media activity, and purchase history, and can even use sensitive data such as age to increase their influence on the targeted subject.[38] Additionally, the rise of hybrid ads, which combines the data-driven targeting of personalized ads with the relational trust of influencer marketing, makes them even more effective and potentially more manipulative. This convergence of strategies is particularly problematic, as it further obscures the commercial intent behind advertising content. It is fundamental to

[35] Bassini M., "Libertà Di Espressione e Social Network, Tra Nuovi 'Spazi Pubblici' e 'Poteri Privati'. Spunti Di Comparazione" Rivista Italiana Di Informatica E Diritto – RIID 3 (2021) 2
[36] Duivenvoorde, B., Goanta, C.,"The regulation of digital advertising under the DSA: A critical assessment" Computer Law & Security Review, Volume 51, 2023
[37] Duivenvoorde, B., Goanta, C.,"The regulation of digital advertising under the DSA: A critical assessment" Computer Law & Security Review, Volume 51, 2023
[38] Goanta, C., "Human Ads Beyond Targeted Advertising" in *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* Max Planck Institute for Innovation & Competition Research Paper No. 21-25 42-44

seriously regulate this matter, in a manner that protects fundamental rights and is possibly future-proof.[39]

Furthermore, the DSA might produce challenges and direct conflicts with the United States' speech framework for social media platforms. These regulation, akin to other recent EU regulations on social media platforms, is likely amplify the Brussels Effect, whereby European regulators find themselves in the position to increasingly shape global content moderation practices and compel platforms to address a greater volume of (allegedly) harmful content than before.[40] This comprehensive regulatory framework might motivate platforms to align their global content moderation practices more closely with those of the EU rather than in accordance with the United States's balance of speech harms and benefits. The EU and its member states typically prioritise the protection against dignitary, reputational, and societal harms over absolute freedom of expression, holding platforms accountable for facilitating harmful content, whereas the U.S. adopts an opposing stance.[41] The DSA is expected to drive platforms to align their content moderation procedures with the EU's framework, as it imposes substantial financial penalties for noncompliance, including maximum fines of six percent of a platform's annual global revenue.

2.1.2. Freedom of Expression in the EU

Article 10 – ECHR

[39] Duivenvoorde, B., Goanta, C.,"The regulation of digital advertising under the DSA: A critical assessment" Computer Law & Security Review, Volume 51, 2023
[40] Bradford, Anu, "The Brussels Effect: How the European Union Rules the World" *Faculty Books* 232 (2020)
[41] Nunziato, D. C., "The Digital Services Act and the Brussels Effect on Platform Content Moderation" (2023). GWU Legal Studies Research Paper No. 2023-28, GWU Law School Public Law Research Paper No. 2023-28 2

The right to freedom of expression and information is contained in Article 10 of the ECHR, according to which "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".[42] It constitutes a fundamental pillar of democracy and guarantees the protection of other rights from the Convention as well.[43] The second paragraph of Article 10 clarifies that the exercise of freedom of expression may be subject to formalities, conditions, restrictions or penalties according to the law. This is the case for matters of national security, territorial integrity or public safety, for preventing crime, for protecting health and morals, as well as for protecting the reputation or rights of individuals, for preserving privacy and confidential information, for maintaining the authority and impartiality of the judiciary, and in general for the needs of a democratic society.[44]

The European Court of Human Rights (ECtHR) in 1976 ruled that "Freedom of expression […] is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[45] The court emphasised the importance of the thin line between unlawful content and purely unfavourable information. A norm can only interfere with freedom of expression on the condition that it prohibits solely criminal content, while continuing to uphold the thin line in all circumstances.[46] Concerning the exceptions to this right, the Court stressed that they must be construed strictly and that the need for any restrictions must be proven convincingly.[47] It will eventually be up to the Court to determine

[42] Article 10(1), ECHR
[43] Jochen Abr. Frowein, "Freedom of expression under the European Convention on Human Rights", in Monitor/Inf (97) 3, Council of Europe
[44] Article 10(2) ECHR
[45] ECtHR, Handyside v United Kingdom, app. 5493/72 (1976), para 49
[46] ECtHR, Handyside v United Kingdom, app. 5493/72 (1976), para 49; Claussen V., "Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the Context of European Legislation - MediaLaws" (MediaLaws, May 30, 2019) https://www.medialaws.eu/rivista/fighting-hate-speech-and-fake-news-the-network-enforcement-act-netzdg-in-germany-in-the-context-of-european-legislation/ last accessed 28.07.2024 111
[47] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 10; Stoll v. Switzerland ([GC], § 101, reiterated in Morice v. France ([GC], § 124) and Pentikäinen v. Finland ([GC], § 87

whether the reasons provided by the national authorities as a justification for the restriction are "relevant and sufficient".[48]

The right to freedom of expression is also fully applicable to the internet and internet users should be free to express themselves online, whether they are personal or even political or religious, in perfect accordance with Article 9 of the Convention "right to freedom of thought, conscience and religion".[49] Regarding the material scope of the Article, it covers communications on the internet, regardless of the type of message and even if the intention behind it was of profit-making nature.[50] Internet users have the right to receive and share information on the Internet, as well as to create, reuse, and distribute content via the Internet.[51] The Court, investigating the relation between intellectual property protection and freedom of expression in cases of criminal convictions for copyright infringements, finding that such convictions represent interferences with the right to freedom of expression and as such must be justified by law and balanced with the legitimate aim of protecting the rights of others.[52]

The right of freedom of expression that protects internet users must be balanced with Article 8 of the Convention "the right to respect for private and family life" concerning the protection of reputation.[53] According to the Court, the criteria for balancing the right to freedom of expression with the right to respect for private life include: the contribution to a debate of general interest, the level of public recognition of the person involved, the subject matter of the report, the past behaviour of the person involved, the method used to obtain the information and its accuracy, the content,

[48] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 487; Barthold v. Germany, § 55; Lingens v. Austria, para 40
[49] Committee of Ministers, "Steering Committee on Media and Information Society (CDMSI) - b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum" para 40
[50] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 579; Ashby Donald and Others v. France, para 34
[51] Committee of Ministers, "Steering Committee on Media and Information Society (CDMSI) - b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum" para 43
[52] Neij and Sunde Kolmisoppi v. Sweden no.40397/12. See also Ashby Donald and others v. France, no, 36769/08 para 34.
[53] Chauvy and Others, no. 64915/01 § 70; Pfeifer v. Austria, no. 12556/03, § 35; and Polanco Torres and Movilla Polanco v. Spain, no. 34147/06, § 40

format, and impact of the publication, and the severity of any punishment given.[54] Hence, Internet user should consider the reputation of others, including their entitlement to privacy, when it comes to sharing information online.

The Court noted more than once how user-generated expressive activity creates an unprecedented platform and environment for the exercise of freedom of expression, with internet playing a central role in enhancing the public's access to news and also facilitating the circulation of information in general.[55] Furthermore, the Court pointed out how more and more services and information are available only online and that political content, that is ignored by traditional media, finds its place on the internet (YouTube in the case at hand, but also Twitter, Instagram and TikTok can be examples of this phenomenon), creating an insurgence of citizen journalism.[56]

At the same time, the internet does not only carry benefits. The Court observed that many dangers come from the widespread use of the internet, namely unlawful speech, hate speech and speech inciting violence can be more frequent and their dissemination higher than ever.[57] Moreover, they can spread instantly and often remain persistently available online.[58] It is recognised by the Court that the internet as an information and communication tool is completely different from the printed media, and as such will never be subjected to similar regulations and control, differing policies and approaches are to be expected.[59]

For the purpose of content moderation, it is particularly relevant to take note of the criteria elaborated by the Court to strike a balance between freedom of expression

[54] Delfi As v. Estonia, no. 64569/09, para 78-81; Axel Springer AG v. Germany no. 39954/08 para 89-95, and Von Hannover v. Germany (no. 2), nos. 40660/08 and 60641/08 para 108-113
[55] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 576; Delfi AS v. Estonia [GC], para 110; Cengiz and Others v. Turkey, para 52
[56] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 578; Jankovskis v. Lithuania, para 49; Kalda v. Estonia, para 52; Cengiz and Others v. Turkey, para 52
[57] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 582; Delfi AS v. Estonia [GC], para 110; Annen v. Germany, para 67
[58] Ibid.
[59] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 583; Editorial Board of Pravoye Delo and Shtekel v. Ukraine, para 63

and content moderation, when it comes to managing and deleting comments online.[60] To establish whether an internet provided is required to take down comments posted by a third party, one should look at the context and contents of the comments, the liability of the authors of the comments, the measures taken by the applicants and the conduct of the aggrieved party and finally the consequences for the aggrieved party and for the applicants.[61] Consequently, when these criteria are applied, the Court recognized the legitimation to order the internet news portal to pay damages, when they did not remove comments that qualified as hate speech or incitement to violence.[62]

Another key aspect in the content moderation discourse is the admissibility of blocking and filtering practices to comply with takedown obligations. Blocking and filtering, if unjustified, could amount to unfair restrictions to the right to freedom of expression.[63] In order to be justified, blocking and filtering measures taken by the State authorities have to be targeted to specific and clearly identifiable content, recognized by a competent national authority with a decision, that can in turn be reviewed by a tribunal or a regulatory body, in accordance with the requirements of Article 6 of the ECHR.[64] In order to prevent the unjustifiable censoring of content, state authorities should ensure that all filters are evaluated both before and during their implementation to ensure that their effects are proportionate to the purpose and therefore necessary in a democratic society.[65] Blocking and filtering norms should not be used arbitrarily to generally block any type of online content, they should not have

[60] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 596; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, para 60 et seq.; Delfi AS v. Estonia [GC], para 142 et seq.
[61] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 596; Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, para 60 et seq.; Delfi AS v. Estonia [GC], para 142 et seq.
[62] "Guide on Article 10 of the European Convention on Human Rights" Council of Europe (2020) para 597; Delfi AS v. Estonia [GC]
[63] Committee of Ministers, "Steering Committee on Media and Information Society (CDMSI) - b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum" para 48
[64] Recommendation CM/Rec(2008)6 of the Committee of Ministers to member States on measures to promote the respect for freedom of expression and information with regard to Internet filters, see Appendix, part III, ii-iv
[65] Ibid.

collateral effects in rendering significant quantities of information accessible, they should be prescribed by law in a way that prevents any abuse of power and be subject to judicial review.[66] The rules and principles indicated above do not exclude the installation of filters to safeguard minors in specific locations where minors access the Internet, such as schools or libraries.[67]

Furthermore, internet users are entitled to guarantees when these restrictions apply, mostly concerning their right to be informed and the possibility to challenge the decisions.[68] Internet users should be informed about when filtering is activated, why a specific type of content is filtered, and how and under what criteria the filtering operates. They should be given brief information and instructions on how to manually override an active filter, such as who to contact if content appears to have been unjustifiably restricted and how to bypass a filter for a specific type of content or website. Users should be given efficient and easily available mechanisms of recourse and remedy, including the suspension of filters, if they claim that content has been prohibited unjustifiably.[69]

Furthermore, another unjustified restriction to the right enshrined in Article 10 is represented by the common practice of online services providers, such as social networks, to remove user-generated content, deactivate users' accounts, etc.[70] To avoid unlawful behaviours, they will need to comply to the conditions in Article 10(2) as interpreted by the Court.[71] Moreover, According to the United Nations Guiding

[66] Recommendation CM/Rec(2008)6 of the Committee of Ministers to member States on measures to promote the respect for freedom of expression and information with regard to Internet filters, see Appendix; Association Ekin v. France, n 39288/98
[67] Declaration on Freedom of Communication on the Internet, principle 3
[68] Committee of Ministers, "Steering Committee on Media and Information Society (CDMSI) - b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum" para 52
[69] CM/Rec(2008)6, see Appendix, part I; CM/Rec(2012)3, Appendix, part III.
[70] Committee of Ministers, "Steering Committee on Media and Information Society (CDMSI) - b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum" para 53
[71] Recommendation CM/Rec (2011)7 of the Committee of Ministers to member States on a new notion of media, para 7, Appendix, para 15; 44-47; 68 -69 ; Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, para 3

Principles on Business and Human Rights Business, Member States have a responsibility to respect human rights, which translates into regulating big tech companies to avoid causing or contributing to occurrences with a negative impact on human rights.[72] In terms of respect of the freedom of expression, online service providers have a responsibility to contrast hate speech and other content that incites violence or discrimination.[73] They need to monitor the use of expressions motivated by racist, xenophobic, anti-Semitic, misogynist, sexist or other biases and moderate such comments.[74]

Article 11 – European Charter of Fundamental Rights

Article 11 of the EU Charter of Fundamental Rights determines the definition of the right to freedom of expression and information that applies in EU law. According to it "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interferences by public authority and regardless of frontiers.".[75] In paragraph 2 there is an addition concerning the media "The freedom and pluralism of the media shall be respected".

According to Article 52(3) of the Charter, the right's meaning and extent are identical to those ensured by the ECHR. The restrictions on it cannot surpass those outlined in Article 10(2) of the Convention. However, this does not affect any limitations that Community competition law may impose on Member States' ability to implement the licensing arrangements mentioned in the third sentence of Article 10(1) of the ECHR.[76]

[72] Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services; Committee of Ministers, "Steering Committee on Media and Information Society (CDMSI) - b. Recommendation CM/Rec(2014)6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum" para 54

[73] Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, para 3; CM/Rec (2011)7, para 91

[74] Recommendation CM/Rec(2012)4 of the Committee of Ministers to member States on the protection of human rights with regard to social networking services, para 3; CM/Rec(2012)4, II/10

[75] EU Charter of Fundamental Rights Article 11

[76] Official Journal of the European Union C 303/17 - 14.12.2007

The second paragraph of this Article explicitly outlines the repercussions of the first paragraph with regards to the freedom of the media. The basis for this is primarily the case law of the Court of Justice, specifically case C-288/89, as well as the Protocol on the system of public broadcasting in the Member States attached to the EC Treaty, and Council Directive 89/552/EC (specifically its seventeenth recital).[77]

According to Article 6(1) TFEU, the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union which hold the same legal value as the Treaties.[78] Nevertheless, Article 11 has a limited relevance in the European human rights landscape, since freedom of expression is already covered by the ECHR in Article 10. This is because, when the Charter contains rights that correspond to rights ensured by the ECHR, the meaning and scope of those corresponding rights are equivalent to those laid down by the ECHR.[79] Furthermore, the ECHR is set to establish the minimum threshold of protection, while EU law can only expand the level of protection.[80]

2.2. The EU Legislative Framework on Content Moderation

2.2.1. E-Commerce Directive (ECD)

The DSA is not a standalone regulation in the field of digital content moderation. It stands on the shoulder of the E-Commerce Directive, which was the first of its kind and laid down the basis for the liability of providers, with principles that still apply. It constitutes one of the cornerstones of the Digital Single Market which, with the increasing digitisation of the economy and the society, acts as the foundation of the

[77] Official Journal of the European Union C 303/17 - 14.12.2007; judgment of 25 July 1991, Stichting Collectieve Antennevoorziening Gouda and others [1991] ECR I-4007
[78] Article 6(1) TFEU
[79] EU (2012), Charter of Fundamental Rights of the European Union, OJ C 326, 26 October 2012, Art. 52(3).
[80] Charter of Fundamental Rights, Article 52(3)

whole Internal Market project.[81] The E-Commerce Directive harmonised rules on issues such as transparency and information requirements for online service providers; commercial communications; electronic contracts and limitations of liability of intermediary service providers while also enhancing administrative cooperation between Member States and strengthening the role of self-regulation.[82]

The Directive is applicable to individuals or entities, whether natural or legal, that offer an information society service and are based inside the European Economic Area ("EEA").[83] The definition of an "information society service" under the Directive is broad. The concept encompasses any remunerative service offered remotely by electronic means using electronic equipment for data processing and storage, and upon the specific request of the service recipient.[84] Information society services refer to a variety of online economic activities, such as selling goods and services like online newspapers, databases, financial services, professional services (e.g., lawyers, estate agents), and entertainment services.

Provisions relevant to content moderation

Article 3 (1) establishes the responsibility and duty of the Member States to ensure that service providers active on their national territory comply with the domestic provisions applicable within the coordinated field. This is the so-called “principle of origin”, first introduced by this directive, according to which service providers fall under the jurisdiction of the state whose territory they are based on.[85]

[81] de Streel, A. and Husovec, M., “The E-Commerce Directive as the Cornerstone of the Internal Market” [2020] SSRN Electronic Journal 11.
[82] E-Commerce Directive” (Shaping Europe’s digital future, December 12, 2023) https://digital-strategy.ec.europa.eu/en/policies/e-commerce-directive last accessed 05.03.2024
[83] 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 ('Directive on electronic commerce') OJ L178.
[84] “The E-Commerce Directive” (CMS Law-Now) https://cms-lawnow.com/en/ealerts/2002/04/the-e-commerce-directive last accessed 28/02/2024.
[85] Claussen V., “Fighting Hate Speech and Fake News. The Network Enforcement Act (NetzDG) in Germany in the Context of European Legislation - MediaLaws” (MediaLaws, May 30, 2019)

Articles 12-14 address the responsibility of Internet Service Providers (ISPs) towards the content uploaded on their platforms, which has been almost exactly re-adopted in the DSA.[86] Section 4 of Chapter II is titled *Liability of intermediary service providers* and it differentiates between "mere conduit", "caching" and "hosting" activities. It is particularly important to explain this regime, considering that the DSA maintained this structure and these liability exemptions.[87]

Article 12 is the one dedicated to "mere conduit", which is defined as the act of 'transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network' given that the provider does not initiate the transmission, does not pick the receiver of the transmission and does not select or modify the information contained in the transmission.[88] For these activities, Member States have to ensure that the provider is not liable for the information transmitted.[89] The second paragraph underlines that this definition includes the 'automatic, intermediate and transient storage of the information transmitted' as long as they are stored for the sole purpose of carrying out the transmission in the communication network and only for the time deemed reasonably necessary for such transmission.[90] Paragraph 3, on the other hand, explains how the exclusion of liability in these circumstances does not prevent a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.[91]

Likewise, Article 13 describes "caching", which is the act of transmission in a communication network of information by an information society service.[92] To qualify for the liability exemption in case of caching – meaning that the service provider is not

https://www.medialaws.eu/rivista/fighting-hate-speech-and-fake-news-the-network-enforcement-act-netzdg-in-germany-in-the-context-of-european-legislation/ last accessed 28.07.2024 128

[86] Lodder, A.R. and Murray, A.D., *EU Regulation of E-Commerce* (Edward Elgar Publishing 2022) 29.

[87] Nunziato DC, "The Digital Services Act and the Brussels Effect on Platform Content Moderation" (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425793 2

[88] Article 12(1) E-commerce Directive

[89] Article 12(1) E-commerce Directive

[90] Article 12(2) E-commerce Directive

[91] Article 12(3) E-commerce Directive

[92] Article 13(1) E-commerce Directive

liable for the automatic, intermediate and temporary storage of such information – the storing of information must happen for the sole purpose of the efficiency of the transmission.[93] There are also further requirements, namely: that the provider does not modify the information stored, but does comply with the conditions on access to the information, as well as with the rules concerning the updating of the information that are recognised and used by the industry; the provider must also refrain from interfering with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of such information; finally the provider must act expeditiously to remove or to disable access to the information it has stored, when obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.[94] Paragraph 2, in alignment with the norm present in Article 12(3), excludes that this liability exemption will affect courts or administrative authorities in Member States, meaning they will still be able to require the service provider to terminate or to prevent an infringement.[95]

Finally, Article 14 defines the limits of the phenomenon of "hosting", which indicates the storage of information coming from a recipient of the service by an information service provider.[96] In this case the conditions that apply for the provider to be exempt from liability in case of the illegality of such content, are that the provider does not have 'actual knowledge of illegal activity or information' but that – once aware of this violation – acts expeditiously to remove the information or disable access to it.[97] Furthermore, concerning damages claims, Article 14(1)a specifies that the provider must not be aware of 'facts or circumstances from which the illegal activity or information is apparent', in order to escape liability.[98] No liability exemption is enacted when the recipient of the service is acting under the authority or control of the

[93] Article 13(1) E-commerce Directive
[94] Article 13(1) E-commerce Directive
[95] Article 13(2) E-commerce Directive
[96] Article 14(1) E-commerce Directive
[97] Article 14(1) E-commerce Directive
[98] Article 14(1) E-commerce Directive

provider, meaning that the provider would have or should have known about possible law infringements.[99] Finally, paragraph 3 repeats what has already been said for mere conduit and caching activities, namely that this liability regime does not hinder courts or administrative authorities in Member States to order the termination or prevention of infringements on the part of providers, as well as creating procedures to govern the removal or the disabling of access to such information.[100]

Another fundamental provision is found in Article 15, which sets a very clear prohibition against general and constant monitoring at the providers' hands. It states that Member States cannot introduce a general obligation to monitor, meaning actively seeking facts or circumstances indicating illegal activity, on internet service providers, when they are providing mere conduit, caching or hosting services.[101] Furthermore, paragraph 2 explains that obligations to notify the competent authorities of possible illegal activity or obligations to cooperate with competent authorities at their request in identifying of recipients of their service with whom they have storage agreements are indeed allowed.[102] The aim to stop internet service providers to become "cyber patrols", or better, to prevent Member States from turning them into patrols, although, that does not imply that a provider cannot have monitoring obligations in a specific case.[103] Moreover, it does not affect orders by national authorities in line with national law.[104] In the L'Oréal/eBay decision, the CJEU determined that requiring websites to monitor information in order to prevent illegal behaviour goes against Article 15 of the E-Commerce Directive.[105] The court also found a breach of Article 3 of the E-Commerce Directive, as the measures outlined in the Directive must be fair, proportionate, and not excessively expensive. This ruling was also applied to social networks in the Netlog case, where the CJEU stated that filtering

[99] Article 14(2) E-commerce Directive
[100] Article 14(3) E-commerce Directive
[101] Article 15(1) E-commerce Directive
[102] Article 15(2) E-commerce Directive
[103] Lodder, A.R. and Murray, A.D., *EU Regulation of E-Commerce* (Edward Elgar Publishing 2022) 34.
[104] Recital 47 E-Commerce Directive
[105] CJEU, C-324/09, L'Oréal SA and Others v eBay (2011), para 139

systems are not allowed, even if their purpose is to prevent copyright infringement through the uploading of protected music.[106]

2.2.2. Digital Services Act (DSA)

The Digital Services Act, together with the Digital Markets Act, is part of the Digital Services Package, which aims to be the first comprehensive EU rulebook addressed to the most used platforms that we all rely on in our daily lives.[107] These two regulations were crafted to work in synergy in order to achieve two main goals, namely the creation of a safer digital space that ensures the protection and respect of fundamental rights, as well as the establishment of a level playing field in order to promote innovation, growth and healthy competition in the European Single Market and further.[108] They set out uniform rules and standard for the parties involved to abide by throughout the Union, in order to guarantee legal certainty and improve the functioning of the internal market.[109] In the words of Margrethe Vestager, while the focus of the Digital Services Act is placed on users' rights enforcement, the Digital Markets Act is more market-oriented.[110] Thierry Breton, the Commissioner for the Internal Market, described this package as the end of the era of "too big to care platforms", by implementing a common legal regime for 450 million European citizens, thus crafting a single European digital market.[111]

The goal of the Digital Services Act's innovative regulatory framework for online services is to stimulate companies to tackle illegal content while protecting users'

[106] CJEU, C-360/10, Sabam v. Netlog (2012)
[107] "Press Corner" (*European Commission - European Commission*) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4313
[108] "The Digital Services Act Package" (*Shaping Europe's digital future*, March 18, 2024) https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package
[109] Recital 4 DSA
[110] "Press Corner" (*European Commission - European Commission*) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4313
[111] "Press Corner" (*European Commission - European Commission*) https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4313

fundamental rights.[112] It was presented by the European Commission in December 2020, adopted by the European Parliament in June 2022 and finally entered into force on November 16th 2022.[113] The primary regulatory contribution of the DSA is the separation of due diligence obligations from the liability for underlying content.[114] The majority of laws attempted to influence the behaviour of providers by threatening them with joint liability for the actions of their users prior to the advent of DSA. The new Regulation formulates new due diligence obligations that will make internet service providers accountable, even when their liability does not cover user-generated content, for their own failings to be diligent.[115]

The Digital Services Act entered into force on November 16th, 2022.[116] After that, online platforms were demanded to provide to the Commission the number of active users using their services by February 17th, 2023, in order to allow their classification into the different categories established by the DSA. [117] If designated as 'very large online platform', they would have four months to comply with the obligations imposed by the DSA, including filing their first annual risk assessment report and delivering it to the Commission. [118] For the other online platforms, those that do not fall under the 'very large online platform' category, the DSA will enter into force on 17th February 2024, date by which they need to be complying with the regulation. [119]

[112] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 2.
[113] "The Digital Services Act Package" (*Shaping Europe's digital future*, March 18, 2024) https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package
[114] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 1
[115] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 1
[116] "The Digital Services Act Package" (*Shaping Europe's digital future*, March 18, 2024) https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package
[117] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 2.
[118] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 2.

The DSA was given the form of a regulation, which means that it is directly applicable and it does not need to be transposed into national law to be incorporated in the domestic legal system.[120] Furthermore, it acts as a horizontal instrument, meaning it will apply evenly across different sectors and actors; therefore, it will be coexisting with and supporting sector-specific legislation.[121] Accordingly, Article 2 explicitly states that the DSA should be without prejudice to the rules laid down by other EU legal acts, specifically mentioning some, including copyright protection laws, consumer protection legislation, criminal and terrorist online content discipline, data protection and judicial cooperation for criminal matters.[122] However, it does interfere with and even amend some provisions of the E-commerce Directive on certain legal aspects of information society services, as the Directive did not adequately fulfil the needs of today's digital internal market, made up of platforms operating globally, managed by algorithmic systems and hosting possibly harmful content.[123]

The DSA takes on the risks to society caused by the spread of disinformation and unlawful content.[124] With a focus on intermediary service regulation, it strengthens and combines consumer protection laws and data protection standards already in place under EU law.[125] Article 2 defines the scope of the Regulation, which applies to 'intermediary services offered to recipients of the service that have their place of establishment or are located in the Union', while their own place of establishment is irrelevant.[126] If the service provider does not have an establishment in the EU, the applicability of the Regulation depends on meeting the "substantial connection"

[120] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 2
[121] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 2
[122] DSA Article 2.
[123] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 3
[124] Recital 9 DSA
[125] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 4.
[126] DSA Article 2.

requirement with the EU, as specified in Article 3(d).[127] This approach resembles the one used by the General Data Protection Regulation in determining its scope; put simply, providers which do not target their digital services to Europeans citizens do not fall under the scope of the DSA, if they do, then they are subject to it.[128]

A long-overdue piece of legislation, the DSA intends to modernise and harmonise the internal market's discipline of intermediary services and liability in order to promote a trustworthy, safe, and predictable online environment.[129] Its most innovative contribution consists of differentiating between due diligence obligations and platform liability for the underlying content.[130] Prior to the DSA, it was common for legislators to threaten internet service providers with joint liability with their users, relating to their online behaviour and the content they uploaded.[131] Thus, when such cases would end up in court – except for some specific law sectors[132] – judges would be faced with only two options: either impose a duty of care or deny it by applying the liability exemption.[133] The DSA put an end to this binary by establishing new due diligence obligations, redefining platform accountability.[134] Failure to comply with these obligations not only subjects providers to penalties imposed by regulatory authorities but also gives affected consumers the right to seek compensation for any damage they have experienced, as stipulated in Article 54.[135]

Concerning the enforcement of this regulation, there are different aspects and actors involved in it. Firstly, Member States have to designate an ad hoc authority for the

[127] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 4
[128] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023) 2
[129] Recital 9 DSA
[130] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 1
[131] Ibid.
[132] Martin Husovec, Injunction Against Intermediaries in the European Union (CUP, 2017)
[133] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 1
[134] Ibid.
[135] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 8

purpose of enforcing these provisions, assigned with multiple tasks listed in the DSA, called the national Digital Services Coordinator (DSC).[136] Chapter IV Section I deals with the designation and requirements of such agencies, who are responsible for all matters relating to supervision and enforcement of this regulation, together with the Commission and any other body that the Member State has designated with specific roles.[137] They can request access to VLOPs/VLOSEs data (we will see later what these categories mean), order inspections and sanction infringements, as well as certify "trusted flaggers" and bodies in charge of out-of-court dispute settlements.[138] Moreover, the Commission plays a central role in the enforcement of the DSA, having both investigative and sanctioning powers.[139] The Commission can order access to the VLOPs data and algorithms, send a request for information to verify compliance, conduct interviews and inspections.[140] In terms of sanctioning powers, the Commission can impose fines and even request temporary sanctions with a specific procedure.[141] Finally, the obligations deriving from the DSA are enforceable also through private action.[142] This means that individuals, firms and organisations that were at the receiving end of breaches of the due diligence obligations are able to seek injunctions and compensation claims before national courts.[143]

Structure and Due Diligence Obligations

[136] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 2
[137] Article 49 DSA
[138] "Digital Services Act: Questions and Answers | Shaping Europe's Digital Future" https://digital-strategy.ec.europa.eu/en/faqs/digital-services-act-questions-and-answers
[139] "The Enforcement Framework under the Digital Services Act" (*Shaping Europe's Digital Future*) https://digital-strategy.ec.europa.eu/en/policies/dsa-enforcement
[140] "The Enforcement Framework under the Digital Services Act" (*Shaping Europe's Digital Future*) https://digital-strategy.ec.europa.eu/en/policies/dsa-enforcement
[141] "The Enforcement Framework under the Digital Services Act" (*Shaping Europe's Digital Future*) https://digital-strategy.ec.europa.eu/en/policies/dsa-enforcement
[142] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023) 2
[143] Ibid.

The DSA is made up of five chapters: general provisions; liability of providers of intermediary services; due diligence obligations for a transparent and safe online environment; implementation, cooperation, penalties and enforcement; final provisions.

The first chapter, consisting of only three articles, lays down the definitions of terms used in the DSA and explains the subject matter and the scope of this Regulation. Chapter II concerns the liability of providers of intermediary services, it updates the regime of the E-Commerce Directive without changing the model based on "hosting", "caching" and "mere conduit". Chapter III constitutes the core of the Regulation and it is where the new due diligence system is contained. It outlines the due diligence obligations and describes the layered system through which they are applied. Finally, Chapter IV focuses on the enforcement of the DSA, designating the governing bodies, describing the implementation of the new rules, as well as establishing penalties for the different infringements. The last chapter concludes clarifying the interactions between the DSA and other legislation, fixes a deadline for the review of the Regulation and lastly, sets the date for its entry into force.

Platform liability

In Chapter II the platform liability regime is laid down, maintaining the regime first established through the E-Commerce Directive twenty years ago.[144] This part outlines the specific requirements that providers of mere conduit (article 3), catching (article 4), and hosting services (article 5) must adhere to in order to be exempt from liability for the information they transmit and keep on behalf of third parties.[145] In general, it provides that platforms are not liable for the third-party content they host, provided they act expeditiously upon notice of such allegedly illegal content.[146] Upon receiving a

[144] Nunziato DC, "The Digital Services Act and the Brussels Effect on Platform Content Moderation" (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425793 2
[145] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 78-79
[146] Nunziato DC, "The Digital Services Act and the Brussels Effect on Platform Content Moderation" (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425793 2

reliable notice that it is hosting illicit material on its website, a platform is obligated to "expeditiously" remove such material or face legal responsibility. Such notification can be issued by several distinct entities. It is important to underline that these liability exemption are out of question if the intermediary service provider plays an active role that gives them knowledge or control over the content, rather than "confining itself to providing the services neutrally by a merely technical and automatic processing of the information", which is not a new development of the DSA as much as a codification of previous case law.[147] To counterbalance this norms – and drawing inspiration from section 230 of the US Communications Act – Article 7 introduces the Good Samaritan Clause.[148] This provision allows providers to carry out voluntary investigations or take other measures to detect, identify, and remove illegal content without the risk of being considered and active player and thus excluded from the liability exemptions, providing that they act in good faith and with due diligence in their effort to remove illegal content.[149] The DSA proposes a system where individuals, "trusted flaggers" (commercial, non-governmental organisations, or public bodies with specialised knowledge) and/or country-level authorities can detect content that they consider to be unlawful under the rules of EU member states.[150] Finally, it establishes two final obligations to comply with requests from national judicial or administrative authorities to combat illegal content and provide information (articles 8 and 9).[151]

Due Diligence Obligations

[147] Recital 18 DSA; Case C-324/09, L'Oréal v eBay CJEU 12 July 2011; joined cases C-682/18 (Cyando) and C-683/18, (YouTube) CJEU 22. June 2021
[148] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 5
[149] G'sell F., "The Digital Services Act (DSA): A General Assessment" in Antje von Ungern-Sternberg (ed.), Content Regulation in the European Union – The Digital Services Act, TRIER STUDIES ON DIGITAL LAW, Volume 1, Verein für Recht und Digitalisierung eV, Institute for Digital Law (IRDT), Trier April 2023 7
[150] Nunziato DC, "The Digital Services Act and the Brussels Effect on Platform Content Moderation" (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425793 2
[151] Nunziato DC, "The Digital Services Act and the Brussels Effect on Platform Content Moderation" (2023) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4425793 2

After this overview of the structure and the contents of the DSA, it is time to look at the due diligence obligations more in detail. The DSA creates a layered system, where bigger services that are catering to more people and with more influence are assumed to have a more significant impact and, thus, a bigger responsibility, towards users but also in terms of legality and fundamental rights. These due diligence obligations are not intended as a precondition for the liability exemptions, rather they are meant to strike a balance between the favourable liability assurances and the societal responsibilities entrusted to providers, in terms of safety, fairness and trust.[152] The DSA transitions the responsibility of intermediaries from the area of liability to the realm of regulation, therefore embodying the shift in EU law from intermediary liability to platform regulation.[153]

The obligations are set out in four tiers, using the nomenclature of Husovec and Roche Laguna they can be differentiated into universal obligations, basic obligations, advanced obligations and special obligations. It is important to underline that they apply cumulatively, according to the activity and size of the providers, the more layers of obligations will apply, in a pyramid-like structure.[154]

Universal obligations apply to all services that benefit from the liability exemptions (hence mere conduit, caching and hosting)[155] and consist of: the need to establish a single point of contact to facilitate direct contact with state authorities (article 10); the need to designate a legal representative in the Union, for the providers that are not established in any Member States, but who provide their services inside the territory of the European Union (article 11); the obligation of setting out on their terms and conditions any restrictions they may impose on the use of their services as well as to

[152] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 4
[153] Miriam C. Buiten, The Digital Services Act: From Intermediary Liability to Platform Regulation, 12 JIPITEC (2022), http://www.jipitec.eu/issues/jipitec-12-5-2021/5491
[154] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 5 and Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586
[155] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 5

act responsibly when applying them (article 12); and lastly reporting obligations when it comes to the removal and the disabling of information considered to be illegal or contrary to the provider's terms and conditions (article 13).[156]

Basic obligations apply to all services that technically perform hosting, regardless of their size.[157] This next layer of duties consists of an obligation to create mechanisms allowing third parties to notify the presence of potentially illegal content (article 14) and an obligation to state the reasons for the removal or disabling of access provided by a recipient of the service (article 15).[158]

Advanced obligations are addressed to online platforms that are medium-sized or bigger, which can be assessed by looking at their employees number (more than 50 employees) or the size of their business (at least 10 million EUR turnover or balance sheet).[159] Other than their size, the recipients of these obligations are determined through their business model, namely a subset of hosting services that this Regulation defines as "online platforms".[160] While online platform is a commonly used term, the DSA codified a specific legal definition that indicates "providers of hosting services that not only store information provided by the recipients of the service at their request, but that also disseminate that information" to the public as their core feature.[161] Advanced obligations cover many topics and can be divided into five main categories: content moderation, fair design of services, advertising, amplification and transparency.[162]

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[156] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 79

[157] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 5

[158] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 79

[159] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, Article 2; DSA Recital 49

[160] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 7

[161] DSA Recital 13

[162] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 7

Finally, the highest tier of obligations is represented by the special obligations, which are aimed at Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSE), new categories of services introduced by the DSA, referring to those services with more than 45 million average active monthly users, regardless of the firm's size or turnover.[163] One aspect that stands out concerning these last level of obligations is that the European Commission is the only authority responsible for their supervision and enforcement.[164] These obligations comprise mainly two additional aspects: security and control (articles 26 to 28 and article 32) and further responsibilities of information and access (articles 29 to 31 and article 33).[165] In order for these dispositions to apply, VLOPs and VLOSEs have to be designated as such by the Commission.[166] For the purpose of the designation, the subjects that are considered "active users" are both the register and the unregistered ones, meaning on online marketplaces, both sellers and buyers, on social networks, both registered and non-registered users and on short-term rental services, both providers of rental and potential tenants.[167]

[163] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 5
[164] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 9
[165] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 80
[166] DSA Article 33
[167] Husovec, M. and Roche Laguna, I., "Digital Services Act: A Short Primer" in *Principles of the Digital Services Act* (Oxford University Press, 2023 9; DSA Recital 77

3. Challenges Presented by the Digital Services Act

In recent years, the European Union has significantly updated its regulatory framework to address the growing influence of online platforms on public discourse and fundamental rights. Building on the foundations laid by the E-Commerce Directive, which first established the liability regime for online intermediaries, the DSA represents an important new step. While the E-Commerce Directive primarily focused on enabling the digital economy, the DSA aims to provide a more comprehensive approach to content moderation, particularly in safeguarding users' fundamental rights such as freedom of expression.

The aim of this regulation is to ensure that online platforms are held accountable for the way they moderate content. This is crucial in an era where platforms have become gatekeepers of information, shaping public discourse and influencing both political and social outcomes.[168] As such, the DSA introduces clear provisions for transparency, risk assessments, and oversight mechanisms that aim to mitigate the risks of over-removal or censorship, while still enabling swift action against illegal or harmful content.[169]

This chapter will explore how the DSA's content moderation provisions, while seeking to ensure greater platform accountability, may also present new challenges, particularly in the context of freedom of expression. Furthermore, the interaction between the DSA and other legislative initiatives will be observed to assess how these frameworks work together—or potentially conflict—when regulating content that affects public discourse and media freedom.

[168] Griffin, R., "EU Platform Regulation in the Age of Neo-Illiberalism" (March 29, 2024) 9
[169] Recitals 2-4, DSA

3.1. Content Moderation under the DSA: A Double-Edged Sword

3.1.1. European Media Freedom Act

The European Union is proposing a regulation for media services in the internal market, known as the 'European Media Freedom Act'. This initiative is part of the EU's 2022 work programme and aims to address issues affecting the functioning of the internal market for media services and the operation of service providers; it has been in force since May 2024 but will fully apply from August 2025.

Media services – and their pluralism – are essential for a healthy civic sphere, cultural and linguistic diversity, fundamental rights, and equality.[170] With digital technologies, media services can be accessed across borders and through various means, while competition in the digital media space is increasingly international.[171]
The EMFA creates a legally binding framework for national authorities to tackle providers that systematically engage in disinformation and information manipulation and interference, and that abuse internal market freedoms, for example media service providers financed by certain third countries.[172] The regulation addresses several problems affecting the functioning of the internal market for media services and the operation of service providers. Media companies face obstacles hindering their operation and impacting investment conditions in the internal market, such as different national rules and procedures related to media freedom and pluralism. The Commission asserts that a unified EU strategy, fostering convergence, transparency, legal certainty, and a level playing field for relevant media players, is the most effective means to help improve the internal media market.[173] This will hopefully ease the burden on media service providers previously required to conform to several national legal regimes when operating across multiple Member States. It will increase legal

[170] Recital 2, European Media Freedom Act
[171] Recital 1, European Media Freedom Act
[172] Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 10
[173] European Commission, "Proposal for a Regulation of the European Parliament and the Council Establishing a Common Framework for Media Services in the Internal Market (European Media Freedom Act) and Amending Directive 2010/13/EU" (2022) 9

certainty for media market participants, consequently fostering fair competition and cross-border investment. This will also allow media regulators to implement coordinated actions about issues impacting the EU's information landscape, particularly with the safeguarding of EU consumers' interests.[174] The explanatory memorandum in the proposal for this Regulation explicitly states the intention of upholding the right to freedom of expression, especially with respect to the role of the Board, which operates fully independently from governments and any other entities.[175]

The European Media Freedom Act aims to protect editorial independence, journalistic sources, public service media, and media ownership transparency.[176] It also ensures independent functioning of public service media, protects media against unjustified online content removal, introduces the right of customisation of media offers and guarantees transparency in state advertising.[177] A new independent European Board for Media Services, composed of representatives from the national media authorities or bodies and assisted by a Commission secretariat, will be set up and will start operating in February 2025.[178] The Board will, among other functions, promote the effective and consistent application of the EU media law framework.[179] It will replace the European Regulators Group for Audiovisual Media Services (ERGA) that was established under the Audiovisual Media Services Directive.[180]

[174] Ibid.
[175] European Commission, "Proposal for a Regulation of the European Parliament and the Council Establishing a Common Framework for Media Services in the Internal Market (European Media Freedom Act) and Amending Directive 2010/13/EU" (2022) 13
[176] "European Media Freedom Act" (*European Commission*) https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy/european-media-freedom-act_en last accessed 8.10.2024
[177] "European Media Freedom Act" (*European Commission*) https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy/european-media-freedom-act_en last accessed 8.10.2024
[178] Article 29, European Media Freedom Act
[179] Article 13, European Media Freedom Act
[180] Article 8, European Media Freedom Act

3.1.2. Overblocking and Private Censorship

Content moderation consists of a delicate balance between what content to remove and what to preserve. With all the factors that come into play, it is difficult to finely calibrate the system to establish a definite boundary dividing harmful content from expressions of free speech, especially with the use of algorithms and automated systems. It is a complex and ongoing challenge that requires constant monitoring and adjustment. Under the DSA's notice-and-action regime, outlined in Article 16, platforms are required to act promptly upon receiving notices about illegal content, which includes both the removal and restriction of access to such content. While this mechanism is intended to address the spread of harmful material online, it also creates a situation where platforms may act preemptively to avoid penalties, leading to the removal of lawful content.[181]

More precisely, Article 16 establishes a system that hosting services have to implement, allowing any individual to notify them when they encounter information that they identify to be illegal content. These mechanisms, called action and notice, enables users, including those with specific interests such as copyright holders or individuals claiming defamation, to report the presence of potentially illegal content to the relevant service provider.[182] The availability of the liability exemption for hosting services depends upon providers taking prompt action against illegal content upon gaining knowledge of it, hence these providers are often motivated to remove the contested information following the receipt of such a notice.[183] Anyway, removal is not mandatory, unless the notice is sufficiently precise, adequately substantiated, and the illegality is evident, such that it can be established without extensive legal analysis.[184] Moreover, providers of hosting services have to process such notices in a timely,

[181] Barral Martínez, M., "Platform regulation, content moderation, and AI-based filtering tools: Some reflections from the European Union" 14 (2023) JIPITEC 211 https://www.jipitec.eu/archive/issues/jipitec-14-1-2023/5716/#ftn.N10475 217 last accessed 12.10.2024

[182] Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586 8

[183] Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586 8; Article 6 DSA

[184] Article 16(2) and (3) DSA

diligent, non-arbitrary and objective manner, showing how these mechanisms aim to address illegal content and empower notifiers to assert their rights, while also safeguarding users against unwarranted removals.[185] It is innovative that the DSA defines "illegal content" as any information not in compliance with either EU law or the law of the Member States, irrespective of the precise subject matter or nature of that law.[186] It is an improvement, given the fact that online platforms are prone to disregarding national laws in matters of content moderation.[187] Yet, this definition might be a little too broad, leading to overblocking, as there are various conducts that might be described as unlawful in different Member States. Furthermore, in terms of freedom of expression, many Member States have dubious policies which often limit free speech, so by respecting domestic law rather than possibly higher European standards freedom of expression could be unduly limited.[188]

Article 16 is part of the "basic obligations" and as such applies to all hosting services. It is important to underline that the DSA obliges providers of hosting services to attach a clear and specific statement of reasons to any affected user of the service in case of restrictions of the visibility of specific items of information uploaded by them; any restriction of monetary payments; suspension or termination of the provision of the service in whole or in part; suspension or termination of the user's account.[189] This is an incredible advancement especially for social media users, who have suffered great losses for the suspension of their accounts or of the monetization, even for long periods of time, without ever receiving a reason for it, also meaning they had no grounds to fight the decision. That is why it represents an important step forward for user rights online. The same Article also lays down the basic and minimum content of

[185] Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586 8; Article 16(6) DSA
[186] Article 3(h), DSA
[187] See the example of Meta Oversight Board cfr Cerrina Feroni, G., "L'Oversight Board di Facebook: il controllo dei contenuti tra procedure private e norme pubbliche https://www.garanteprivacy.it/home/docweb/-/docweb-display/docweb/9542545
[188] Griffin, R., "EU Platform Regulation in the Age of Neo-Illiberalism" (March 29, 2024) 12; Harvey, D., *A Brief History of Neoliberalism* Oxford University Press (2005) 15
[189] Article 17(1), DSA

such a statement of reasons, thus establishing a new industry standard.[190] Furthermore, Article 20 makes mandatory – in this case for online platforms, rather than hosting services – the establishment of an internal complaint-handling system, which constitutes yet another safeguard against the unjust removal of content.[191] This system will enable users to lodge complaints online and free of charge against the decisions concerning the restrictions listed in Article 17 (1); it should be available for a period of at least six months after the decision. It should allow users to complain about decisions not to follow-up on a received notice of allegedly illegal content, to remove information due to alleged illegality or incompatibility with the terms and conditions, or to suspend the service provision or an account, among other things.[192] Moreover, another tool to strengthen the position of users towards the online platform, in order to combat possible abuse and overblocking enacted by the platform is the power to submit a dispute that they may have with a provider of online platforms about content moderation decisions to an out-of-court dispute settlement body.[193] It is a weak option anyway, seeing as cannot ultimately result in a binding decision, limiting its effectiveness and, consequently, also its use; hence it does not seem to be a useful tool against possible abuses from platforms.[194]

Another pillar of the content moderation policy of the DSA is the designation of "trusted flaggers". Trusted flaggers are legal persons, private or public, recognised by Member States and European agencies, who have specialised knowledge and expertise in recognising illegal content and are tasked with notifying the providers when they encounter it.[195] Providers of online platforms are required to handle notifications submitted by trusted flaggers with priority, supposedly creating an even more efficient

[190] Article 17(3), DSA
[191] Article 20, DSA
[192] Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586 11
[193] Article 21 DSA
[194] Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586 11
[195] Morais Carvalho, Jorge and Arga e Lima, Francisco and Farinha, Martim, Introduction to the Digital Services Act, Content Moderation and Consumer Protection (May 24, 2021). Revista de Direito e Tecnologia, Vol. 3 (2021), No. 1, 71-104 95

and reliable system of notification. [196] Yet, there is the problem of the designation per se, who can become a trusted flagger? On the one hand, one could argue that the trusted flagger mechanism allows for more diversity in the decision-making process, allowing marginalised groups to participate in the moderation.[197] Indeed, there are multiple safeguards in place for trusted flaggers: their status is awarded by a national Digital Services Coordinator (DSC) upon demonstrating their expertise; they are required to remain independent from platforms; they pledge to submit notices diligently, accurately, and impartially; and they are obligated to release an annual activity report. On the other hand, trusted flaggers could be easily influenced by corporate interests and political powers, creating a leeway for powerful players to distort the fair representation in the moderation process.[198] Moreover, the funding of such organisations can be quite burdensome, especially considering the costs of transparency and independence. The DSA, however, does not account for it and does not establish a public fund or other funding options, trusted flaggers will have to diversify their income sources by themselves.[199] Consequently, there is no guarantee that there are enough incentives for organisations to even apply to be trusted flaggers, since it may be risky politically and financially to apply to the status.[200] And even if enough moderators step up to the role, NGOs and academics are in no way representative of the whole society, much less of marginalised groups; on the contrary they tend to be rather elitist, even when they claim to be progressive.[201] It is also disappointing to see no mention of the harsh working conditions of content moderators – which are well-documented – and no intention of putting an end to the

[196] Wilman, 'The DSA, an overview', Nederlands tijdschrift voor Europees recht, No. 9/10, 2022, p. 220, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4304586 8
[197] Lenoir, T., "The Difficult Life of Trusted Flaggers" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/the-difficult-life-of-trusted-flaggers/
[198] Lenoir, T., "The Difficult Life of Trusted Flaggers" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/the-difficult-life-of-trusted-flaggers/
[199] Lenoir, T., "The Difficult Life of Trusted Flaggers" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/the-difficult-life-of-trusted-flaggers/
[200] Lenoir, T., "The Difficult Life of Trusted Flaggers" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/the-difficult-life-of-trusted-flaggers/
[201] Griffin, R., "EU Platform Regulation in the Age of Neo-Illiberalism" (March 29, 2024) 12; Harvey, D., *A Brief History of Neoliberalism* Oxford University Press (2005) 17

industrial-scale moderation system running at minimal cost for the platform companies.[202]

In addition to the DSA, the European Media Freedom Act is of little help in these matters. It does contain some content moderation provisions, namely an extra protection for media services against the unjustified removal of their content by VLOPs and some correlated norms.[203] But these provisions are of little reach since they only apply to media services, thus they are helpful but not for the average users of online platforms – and also they are subjected to multiple conditions.[204]

3.2. The Role of AI in Content Moderation

3.2.1. AI Act

The Artificial Intelligence Act (AI Act) and the Digital Services Act (DSA) are two major regulatory frameworks introduced by the European Union that interact in significant ways, especially when it comes to ensuring the safe and responsible use of technology in online spaces. Both pieces of legislation address how online platforms operate and moderate content, and they are particularly concerned with the impacts of advanced technologies, like AI, on fundamental rights, transparency, and consumer protection. Nevertheless, they fundamentally address different fields of technology regulation. The AI Act mainly regulates AI technology, while the DSA oversees intermediary services, including online platforms. The primary discussions regarding the DSA occurred during a period when AI was still emerging and had not yet provoked significant societal and political discourse, whereas the AI Act became a focal point of the EU's legislative agenda with the recent rise of popular and controversial

[202] Terzis, P. & Van Hoboken, J.) "What have we done? A Brussels affect" Conference presentation, The Promise and Perils of Human Rights for Governing Digital Platforms, Leiden, Netherlands (2024)
[203] Article 18, European Media Freedom Act
[204] See also European Commission, "Questions & Answers: European Media Freedom Act" (2023) https://ec.europa.eu/commission/presscorner/api/files/document/print/en/qanda_22_5505/QANDA_22_5505_EN.pdf

applications like ChatGPT. That is why the DSA is deeply lacking in terms of control over automated systems, AI and especially generative AI. However, both the AI Act and the DSA emphasize transparency and accountability, especially regarding how platforms use AI to moderate content or serve targeted ads. Under the DSA, platforms are required to provide explanations about how their content moderation systems work, including any use of AI to filter, rank, or recommend content.[205] Similarly, the AI Act requires that high-risk AI systems, such as those used for automated content moderation, must be transparent in their functioning and allow for human oversight.[206]

Social media has become a crucial arena for the modern politics of censorship.[207] Cultural production, media consumption and interpersonal communication are more and more intermediated by a few dominant online platforms, which now represent key points of control over media and communications[208]. Content moderation is widely recognised as central to create usable and safe online spaces yet many scholars and activists are concerned about the role of dominant platforms, such as social media, search engines, and app stores, whose power can control media and communications based on their commercial interests.[209] The complexities of these concerns are exacerbated by the growing capabilities of platforms to automate content moderation, as opposed to depending on human workers for manual review. Automated monitoring facilitates corporate control of online discourse, enabling the scanning of all user-generated content and communications prior to upload, thereby resulting in the pre-emption of undesirable behaviour before it takes place.[210] It also

[205] Article 27, DSA
[206] Recital 27, AI Act; Article 1, Article 50, AI Act
[207] Griffin, R., "The Politics of Algorithmic Censorship: Automated Moderation and its Regulation" in *Music and the Politics of Censorship: From the Fascist Era to the Digital Age*, edited by James Garratt, Turnhout, Belgium, Brepols, 2025 3
[208] Srnicek, N., *Platform Capitalism*, Cambridge, Polity, 2016; Gorwa, R., "What is platform governance?", in *Information, Communication & Society*, 22/6 (2019), pp. 854-871
[209] Roberts, S. T., *Behind the Screen: Content Moderation in the Shadows of Social Media*, New Haven, Yale University Press, 2018
[210] Griffin, R., "The Politics of Algorithmic Censorship: Automated Moderation and its Regulation" in *Music and the Politics of Censorship: From the Fascist Era to the Digital Age*, edited by James Garratt, Turnhout, Belgium, Brepols, 2025 4

creates new opportunities for discriminatory censorship, as algorithmic decision-making software is known to replicate, exacerbate, and amplify existing patterns of social inequality, due to its biases.[211]

The AI Act is a comprehensive legal framework designed to address the risks of AI and position Europe as a leading global player. It provides AI developers and deployers with clear requirements and obligations regarding specific uses of AI, while also reducing administrative and financial burdens for businesses, particularly small and medium-sized enterprises (SMEs). The Act is part of a wider package of policy measures to support the development of trustworthy AI, including the AI Innovation Package and the Coordinated Plan on AI.[212]

The AI Act ensures that Europeans can trust what AI has to offer, as AI systems may create risks and cause harm to public interests and fundamental rights protected under EU law. [213] Such risks must be addressed to avoid undesirable outcomes. Existing legislation provides some protection, but it is insufficient to address the specific challenges AI systems may bring. The new rules address risks specifically created by AI applications, prohibit AI practices that pose unacceptable risks, determine a list of high-risk applications, set clear requirements for AI systems for high-risk applications, define specific obligations for deployers and providers of high-risk AI applications, require a conformity assessment before a given AI system is put into service or placed on the market, put enforcement in place after a given AI system is placed into the market, and establish a governance structure at European and national levels.[214]

The regulatory framework of the AI Act defines four levels of risk for AI systems: unacceptable risk, high-risk, limited risk, minimal risk.[215] All AI systems considered a

[211] Griffin, R., "The Politics of Algorithmic Censorship: Automated Moderation and its Regulation" in *Music and the Politics of Censorship: From the Fascist Era to the Digital Age*, edited by James Garratt, Turnhout, Belgium, Brepols, 2025 4

[212] "AI Act" *Shaping Europe's Digital Future*, September 25, 2024 https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai

[213] Recital 5, AI Act

[214] "AI Act" *Shaping Europe's Digital Future*, September 25, 2024 https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai

[215] "AI Act" *Shaping Europe's Digital Future*, September 25, 2024 https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai

clear threat to the safety, livelihoods, and rights of people are banned, while high-risk AI systems are subject to strict obligations before they can be put on the market.[216] The vast majority of AI systems currently used in the EU fall into the category of limited risk, which is associated with lack of transparency in AI usage and for which the AI Act introduced specific transparency obligations.[217]

3.2.2. Automated Systems

What is generative AI? Artificial Intelligence can be described as the ability of a digital computer or computer-controlled robot to perform tasks commonly associated with intelligent beings.[218] More specifically, it constitutes "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments".[219] A particular and very relevant subtype of AI, is generative AI, which consists of an AI that emulates the structure and the characteristics of input data – such as text, images or audio – to generate derived synthetic content.[220] The next generation of artificial intelligence has the potential to unleash previously unseen levels of free speech by accelerating the internet's already exponential expansion in the dissemination and consumption of knowledge.[221] It is now possible to create algorithmically what looks and sounds like human-generated content, which is a first. Gen AI harms – actual, potential, and imagined – have led to

[216] Article 5, AI Act
[217] "AI Act" *Shaping Europe's Digital Future*, September 25, 2024 https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai
[218] B. J. Copeland, "Artificial Intelligence (AI)," in Britannica 2023, https://www.britannica.com/technology/artificial-intelligence
[219] The White House, "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," October 30, 2023 https://www.whitehouse.gov/briefing room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use of-artificial-intelligence/
[220] The White House, "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," October 30, 2023
[221] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" *The Future of Free Speech* 2024 https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 6

regulatory efforts across the globe.[222] Generative AI exhibits a higher degree of autonomy compared to standard AI, it follows its initial programming plus the parameters established by humans.[223] By September 2023, it is unsurprising that 45 percent of the US population was utilising Generative AI. Approximately one-third of users employed Generative AI to explore themes of interest, while 38 percent engaged with it for recreational purposes.[224] As of October 2023, a majority of students (56 percent) used AI tools for exams or coursework.[225]

AI systems can pose a grave danger to freedom of expression, even more so in the case of Gen AI. A study showed that the policies of the mostly used GenAI chatbots online right now have policies that completely disregard international human rights standards, in particular for what concerns disinformation, misinformation and hate speech.[226] Their policies tend to be too vague when talking about the different categories of users protected from hatred, as well as the reasons behind the prohibition, using broad or open-ended restrictive clauses..[227] Moreover, Gen AI chatbots tend to engage in overblocking, going significantly beyond the legitimate interests that justify speech restrictions.[228] Not only are these GenAI systems

[222] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" (*The Future of Free Speech*, June 6, 2024) https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 8

[223] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" (*The Future of Free Speech*, June 6, 2024) https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 6

[224] "Top Generative AI Statistics for 2023," Salesforce, September 1, 2023 https://www.salesforce.com/news/stories/generative-ai-statistics/

[225] Jane Nam, "56% of College Students Have Used AI on Assignments or Exams" BestColleges, November 22, 2023, https://www.bestcolleges.com/research/most-college-students-have-used-ai-survey/

[226] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" (*The Future of Free Speech*, June 6, 2024) https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 4

[227] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" (*The Future of Free Speech*, June 6, 2024) https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 4

[228] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" (*The Future of Free Speech*, June 6, 2024)

significantly restricting free speech, they also clearly expose their biases: the researchers used prompts that requested chatbots to generate "soft" hate speech and it showed that chatbots were generally willing to generate content supporting one side of the argument but not the other.[229] Moreover, from an ethical and societal, as well as from a legal point of view, the potential risks are numerous relating to the auto-generation of illegal or harmful content.[230]

But AI systems are not only subject to content moderation, they can also be the tool through which content is moderated. They are frequently used by bigger platforms to help detect unlawful and inappropriate content. The use of AI in the context of content generation and moderation is both part of the challenge and of the solution.[231] Online services increasingly rely on AI systems to moderate the massive amounts of third-party content they host: automated content filters and review algorithms can be used to identify unsuitable material quickly and efficiently.[232] An example is the "hash matching" technology, the best tool currently to proactively detect and remove child sexual abuse material.[233]

AI systems are rich in deployment possibilities, such as autonomous vehicles, healthcare diagnostics, and customer service chatbots. At the same time, they also

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https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 4

[229] Calvet-Bademunt, J.M. and Mchangama, J., "Report: Freedom of Expression in Generative AI – A Snapshot of Content Policies" (*The Future of Free Speech*, June 6, 2024) https://futurefreespeech.org/report-freedom-of-expression-in-generative-ai-a-snapshot-of-content-policies/ 4

[230] Ghalamkarizadeh, A., Arshad, T., Siems, J., "The Sorcerer's Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act" January 2024 https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act

[231] Ghalamkarizadeh, A., Arshad, T., Siems, J., "The Sorcerer's Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act" January 2024 https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act

[232] Ghalamkarizadeh, A., Arshad, T., Siems, J., "The Sorcerer's Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act" January 2024 https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act

[233] Explained well here: MSAB, "How To Use Rapid Hash Matching In The Battle Against CSAM" *Forensic Focus* https://www.forensicfocus.com/articles/how-to-use-rapid-hash-matching-in-the-battle-against-csam/ July 30, 2023

present ethical concerns and challenges, and pose significant risks to users.[234] It is crucial to carefully consider and address these ethical implications to ensure the safe and responsible use of AI technology. In this sense, it is relevant to see if the DSA accounted for these risks and included measures to mitigate them effectively. Looking simply at the wording of the DSA, one could hardly say that it looks well-equipped to deal with AI. The phrase “automated system” occurs one, while there are some mentions of “automated tools” or “automated means” but without adopting a specific definition for them. Not “artificial intelligence”, nor “AI” ever come up in the whole regulation.

Additionally, in terms of Gen AI, it is hard to imagine how the DSA provisions could be tailored to apply to these systems. Stand-alone AI finds no coverage in this regulation, since the services addressed by the DSA are limited to conduit, caching and hosting, whereas Gen AI models do not follow these standard structures.[235] They produce new content from users’ contributions and the DSA fails in addressing this type of content dissemination.[236] It is worth noting, however, that in some circumstances, the distinction between standalone large language models extensively searching the Internet and "regular" search engines is becoming more difficult to determine.[237] For example, Google's AI Overviews, which launched recently, will revolutionise the company's "traditional" services by presenting users with AI-generated answers retrieved from online sources. The goal is to directly lay out the information that the user is looking for rather than a collection of links.[238] A common place where Gen AI generated content and in general illegal content can often be found is on messenger

[234] Recital 48, AI Act
[235] Article 3(g), DSA
[236] Ghalamkarizadeh, A., Arshad, T., Siems, J., “The Sorcerer’s Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act” January 2024 https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act
[237] Calvet-Bademunt J and Barata J, “The Digital Services Act Meets the AI Act: Bridging Platform and AI Governance” (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/the-digital-services-act-meets-the-ai-act-bridging-platform-and-ai-governance/
[238] More about it here: Rogers R, “How Google’s AI Overviews Work, and How to Turn Them Off (You Can’t)” *WIRED* (May 16, 2024) https://www.wired.com/story/google-ai-overviews-how-to-use-how-to-turn-off/

services. Interpersonal communication services, like emails or private messaging services, fall outside the scope of the DSA provisions regarding hosting services and may be subject to specific requirements only when they operate through public groups or open channels; thus closed groups communication services are disregarded in the DSA yet central to fight the dissemination of harmful and unlawful content.[239] Finally, what happens under the DSA when platforms that are under the scope of the regulation contain integrated Gen AI models? Does the liability exemption discipline still apply? The answer is unclear, as the DSA fails to include provisions on such hybrid forms of use, so hopefully more guidance will come from the jurisprudence and from national Digital Services Coordinators.[240] On a positive note, Article 16 with its notice and action procedure applies undoubtedly also to AI-generated content, when it qualifies as illegal under the DSA.[241] All in all the DSA is not an instrument that was drafted with AI in mind and it results poorly equipped to regulate such systems, which is a pity seeing how relevant they are for content moderation.

The AI Act extensively regulates AI systems with a risk-based approach, but unfortunately ignores content moderation. In fact, it never even mentions it. Freedom of expression as well is – regrettably – not on the top priorities of this piece of legislation. Only in Recital 48 the legislator expresses their concerns regarding the upholding of fundamental rights, but even then just towards high risk AI system, which seems reductive. Because of scalability, speed, and cost-efficiency, online service providers will continue to rely on AI-based filtering solutions to combat illegal or

[239] Calvet-Bademunt J and Barata J, "The Digital Services Act Meets the AI Act: Bridging Platform and AI Governance" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/the-digital-services-act-meets-the-ai-act-bridging-platform-and-ai-governance/

[240] Ghalamkarizadeh, A., Arshad, T., Siems, J., "The Sorcerer's Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act" January 2024 https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act

[241] Ghalamkarizadeh, A., Arshad, T., Siems, J., "The Sorcerer's Apprentice Conundrum: Generative AI Content under the EU DSA and UK Online Safety Act" January 2024 https://www.engage.hoganlovells.com/knowledgeservices/news/the-sorcerers-apprentice-conundrum-generative-ai-content-under-the-eu-dsa-and-uk-online-safety-act

harmful content on a voluntary basis.[242] Thus, the key question is no longer whether to rely on AI-based systems to screen content, but whether automated content screening is becoming a requirement in disguise for online platforms, and if so, how can it be reconciled with online intermediaries' liability exemption and fundamental rights, namely their freedom to conduct business.[243]

3.3. Political and Electoral Influencing via Social Media

3.3.1. Regulation on the transparency and targeting of political advertising

The European Parliament and Council presidency have reached a provisional agreement on a new regulation on the transparency and targeting of political advertising. The regulation aims to make it easier for citizens to recognize political advertisements, understand who is behind them, and know whether they have received a targeted advertisement, so they are better placed to make informed choices.[244] It will support an open and fair political debate in member states, based on objective, transparent, and pluralistic information, and ensure that political advertising takes place in full respect of fundamental rights, including the right to privacy.[245] Moreover, in order to prevent foreign interference, there will be a ban on the provision of advertising services to third country sponsors three months before an election or referendum.[246]

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[242] For example: Meta transparency statement on how Meta prioritises content for review at: https://transparency.fb.com/en-gb/policies/improving/prioritizing-content-review/ last accessed 11.10.2024

[243] Barral Martínez, M., "Platform regulation, content moderation, and AI-based filtering tools: Some reflections from the European Union" 14 (2023) JIPITEC 211 https://www.jipitec.eu/archive/issues/jipitec-14-1-2023/5716/#ftn.N10475 last accessed 12.10.2024

[244] Council of the EU, "Transparency and Targeting of Political Advertising: EU Co-Legislators Strike Deal on New Regulation" Press Release November 7, 2023 https://www.consilium.europa.eu/en/press/press-releases/2023/11/07/transparency-and-targeting-of-political-advertising-eu-co-legislators-strike-deal-on-new-regulation/

[245] Council of the EU, "Transparency and Targeting of Political Advertising: EU Co-Legislators Strike Deal on New Regulation" Press Release November 7, 2023 https://www.consilium.europa.eu/en/press/press-releases/2023/11/07/transparency-and-targeting-of-political-advertising-eu-co-legislators-strike-deal-on-new-regulation/

[246] Council of the EU, "EU Introduces New Rules on Transparency and Targeting of Political Advertising" Press Release March 11, 2024 https://www.consilium.europa.eu/press

The new regulation defines political advertising as the preparation, placement, promotion, publication, delivery, or dissemination of messages by, for or on behalf of political actors, unless they are of a purely private or purely commercial nature.[247] It covers political advertising that is normally provided for remuneration, as well as political advertising through in-house activities.[248] The rules also place strict limits on the use of targeting and ad delivery techniques, including the use of personal data for targeting political advertising online only if the data subject has given explicit consent.[249] It aims to boost trust in election campaigns by combating information manipulation and interference in the political discussion, including providing consumers with more information about who is behind political ads and how they are targeted.[250] The TTPA It also includes a public archive of all internet political ads.[251] The new rules will apply 18 months after their entry into force.[252]

This is not only a law against disinformation, as various authors define it, but it is first and foremost a law against undue influences in political, electoral and democratic processes. In 2021, the European External Action Service (EEAS) introduced the phrase "foreign information manipulation and interference" (FIMI).[253] It defines it as 'behaviour that threatens or has the potential to negatively impact values, procedures, and political processes', 'manipulative in character', 'conducted in an intentional and coordinated manner', and involving 'state or non-state actors, including their proxies inside and outside of their own territory'.[254] The effects of the role of online platforms

[247] Article 3(2), Regulation 2024/900 on the transparency and targeting of political advertising
[248] Article 3(2), Regulation 2024/900 on the transparency and targeting of political advertising
[249] Article 18, Regulation 2024/900 on the transparency and targeting of political advertising
[250] Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 9
[251] Article 13, Regulation 2024/900 on the transparency and targeting of political advertising
[252] Council of the EU, "EU Introduces New Rules on Transparency and Targeting of Political Advertising" Press Release March 11, 2024 https://www.consilium.europa.eu/press
[253] "2021 StratCom Activity Report - Strategic Communication Task Forces and Information Analysis Division" (*EEAS*) https://www.eeas.europa.eu/eeas/2021-stratcom-activity-report-strategic-communication-task-forces-and-information-analysis-division_en 2
[254] Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 3

and search engines in global information ecosystems, including the growing use of digital media, is a current topic of heated debate. Social media may boost democratic engagement, but after it was discovered in 2018 that Cambridge Analytica had microtargeted voters in the US elections of 2016 via Facebook data breaches, worries about how the attention economy is affecting democracy have grown.[255] This, together with the EU's response, brought attention to the systemic threats that digital platforms pose to the information domain on a worldwide scale. However, systems that monetise viral content, such as recommendation, filtering, and ranking algorithms, can be abused to promote the dissemination of misleading, damaging, or polarising information.[256] Public opinion as well as individual and group decision-making may be impacted by this. In addition, these businesses target youth and take in advertising revenue that was formerly used to support established media outlets that adhere to journalistic ethics and standards. Despite their enormous profits, these corporations frequently pay little or no taxes.[257]

3.3.2. Disinformation and Manipulation

The DSA takes the impact of online platforms information manipulation and political meddling into account, less in terms of content moderation and more in terms of systemic patterns. In Recital 82 it explicitly recognises "the actual or foreseeable negative effects on democratic processes, civic discourse and electoral processes, as well as public security" as a specific category of risk, in particular for the practice of risk assessment.[258] With more than 45 million users, VLOPs and VLOSEs bear a greater burden of preventing disinformation and other socially damaging content in the EU,

[255] "The Cambridge Analytica Files" (*The Guardian*) https://www.theguardian.com/news/series/cambridge-analytica-files
[256] Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 4
[257] Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 4
[258] Recital 82, DSA; Article 34(1)c

that is why they are required to carry out risk assessments, evaluate their mitigation strategies and outcomes against systemic risks (including misinformation) and, in extreme cases, put crisis protocols into place.[259] Moreover, one of the main reasons the Commission adduced for the opening of the investigation and the proceedings against Meta is "The non-availability of an effective third-party real-time civic discourse and election monitoring tool ahead of the upcoming elections to the European Parliament and other elections in various Member States", stating that in times of electoral processes (just like the past 2024 in the EU) access to such tools shall be expanded and not reduced – as Meta did.[260] The Commission is in charge of the DSA enforcement and ahead of June 2024 issued guidelines for VLOPs and VLOSEs with recommendations for risk mitigation aimed at electoral integrity, with particular attention to generative AI labelling for deepfakes and similar content.[261]

Furthermore, the regulation on transparency and targeting of political advertising (TTPA) has an extensive discipline on the topic of moderation of political content. At the centre of this regime there is Article 11 that lays down the rules for the publication of political advertising, both online and offline. They should be explicitly labelled as such – political advertisement – with a clear reference to the corresponding election or referendum where applicable. The identity of the sponsor and of the entity controlling the sponsor must be evident as well. The labels should be made available in a way that fits the medium used.[262] It is critical to underline that political opinions that are expressed in a personal capacity do not fall under the scope of this regulation, as they are not considered political advertising.[263] This is definitely an important safeguard for

[259] Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 7; Articles 34-35, DSA
[260] European Commission, "Commission Opens Formal Proceedings against Facebook and Instagram under the Digital Services Act" (30.04.2024) Press Release
[261] "Guidelines for Providers of VLOPs and VLOSEs on the Mitigation of Systemic Risks for Electoral Processes" (*Shaping Europe's Digital Future*, April 26, 2024) https://digital-strategy.ec.europa.eu/en/library/guidelines-providers-vlops-and-vloses-mitigation-systemic-risks-electoral-processes ; Bentzen, N.,"Online Information Manipulation and Information Integrity: An Overview of Key Challenges, Actors and the EU's Evolving Response" Briefing EPRS https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2024)762416 7
[262] Article 11, TTPA
[263] Article 3(3), TTPA

freedom of expression, allowing people to keep on sharing their political opinions and affiliations, especially online. It is essential to protect individuals' right to express their opinions without unnecessary limitations or restrictions. Sponsors and providers of advertising services have an obligation to declare whether the advertising service that they have requested the provider of advertising services to perform constitutes a political advertising service within the meaning of this regulation and are responsible for the truthfulness of their statements.[264] In case of supposed non-compliance, political advertising publishers must have in place working mechanisms to allow people to notify them of possible infringements.[265] VLOPs and VLOSEs have additional obligations, requiring them to address the notifications in a diligent, non-arbitrary and objective manner; as well as to notify the person who sent it of the follow-up decision.[266] The timing changes in heated political times, hence why in the month prior to an election or a referendum, any notification about a political advertisement linked to that election or referendum must be processed within 48 hours (provided that the notification can be processed completely on the basis of the information included in the notification).[267] Options of redress for the final decision must be available and be communicated in an easy and user-friendly manner.[268] Furthermore, the regulation sets specific requirements in case of online political advertising that uses targeting techniques: they will be permitted only if the controller collected the personal data from the data subject, who gave explicit consent to their processing for political advertising purposes, given that they do not involve profiling.[269]

[264] Article 7(1), TTPA
[265] Article 15, TTPA
[266] Article 15(5), TTPA
[267] Article 15(7), TTPA
[268] Article 15(8), TTPA
[269] Article 18, TTPA

4. The Digital Services Act and Freedom of Expression under Italian Constitutional Law

4.1. Introduction

The Digital Services Act (DSA), as a cornerstone of the European Union's digital regulatory framework, introduces significant measures aimed at enhancing transparency, accountability, and safety on online platforms. However, these regulatory advancements come with substantial implications for fundamental rights, particularly the right to freedom of expression. In the Italian context, Article 21 of the Italian Constitution stands as a critical safeguard for freedom of speech, creating a delicate interplay between the DSA's content moderation policies and Italy's constitutional protections. In this Chapter I will focus on some critical profiles of the DSA to see if the high standards of freedom of expression upheld by Italian Courts are respected.

4.2. Overview of Article 21 of the Italian Constitution

4.2.1. The Scope of Freedom of Expression under Italian Law

Article 21 of the Italian Constitution institutes the right to freely manifest one's thoughts.[270] I will firstly introduce an English translation of the Article and then discuss its implications.

"Every person has the right to freely express his or her thought in speech, in writing and through any other means of circulation.

The press may not be subjected to any authorisation or censorship.

Seizure shall be permitted only on the basis of a reasoned measure issued by a judicial authority in the case of offences for which such seizure is explicitly authorised by the

[270] Article 21, Italian Constitution

law governing the press, or in the case of violation of its provisions concerning the indication of the identities of those holding responsibility for the publication.

In such cases, when there is a situation of absolute urgency and when prompt intervention of a judicial authority is not possible, periodical publications may be seized by judicial police officers, who must immediately, or within twenty-four hours at the latest, report the matter to the judicial authority. If the judicial authority does not confirm the seizure order within the following twenty-four hours, the latter shall be revoked and deemed null and void.

The law may introduce general rules requiring the disclosure of the sources of funding of the periodical press.

Printed publications, public performances and any other events infringing accepted principles of morality are prohibited. The law shall provide for appropriate measures to prevent and suppress all violations."[271]

Article 21 consists of a subjective right, that is, a right of subjects, of people: a claim that each person – by virtue of a legal rule (for example, a rule contained within the Constitution) – can assert against the State.[272] Moreover, according to Italian constitutional law doctrine, it falls under the category of "freedom rights" (*diritti di libertà*). As opposed to "social rights" (*diritti sociali*) – which are those that, in order to be guaranteed, require active intervention by the State – "freedom rights" only require the State's passive intervention, meaning it must refrain from intervening or better yet impeding the fulfilment of the right.[273]

This formula is particularly broad and – on the subjective level – grants the right to "everyone", meaning all citizens, but also foreigners, professionals such as writers and

[271] "Chamber of Deputies – Italian Constitution – English translation" https://en.camera.it/4?scheda_informazioni=23

[272] Serges, G., "I diritti di libertà di manifestazione del pensiero" in Ruotolo, M. and Caredda, M., (eds), "La Costituzione...Aperta a Tutti" Università degli Studi Roma Tre Dipartimento di Giurisprudenza, Terza edizione, Roma TrE-Press 2021 155-179

[273] Serges, G., "I diritti di libertà di manifestazione del pensiero" in Ruotolo, M. and Caredda, M., (eds), "La Costituzione...Aperta a Tutti" Università degli Studi Roma Tre Dipartimento di Giurisprudenza, Terza edizione, Roma TrE-Press 2021 155-179

journalists, as well as private people occasionally sharing their thoughts, legal persons, groups and political movements.[274] Although, certain categories can be bound by different regimes for specific reasons. This is the case, for example, of Members of Parliament – and other comparable public servants – who enjoy a more favourable treatment, in light of their roles: indeed, they cannot be held liable for votes and opinions expressed as a part of their jobs, while exercising their functions, according to Article 68 of the Constitution.[275] There are as well individuals who are subjected to a more restrictive discipline in terms of free speech, due to particular circumstances. One particular case is the one of those professional who are bound to the "professional secret" according to Italian law, like doctors, lawyers and so on, similarly to the attorney-client privilege in the US doctrine.[276] Moreover, Italian inmates suffer different restrictions to their freedom of expression, especially those who are serving their sentences with strict surveillance regimes (think of Article 41-bis ord. pen.).[277] It is also notable to observe that the Constitution does not confer an autonomous relevance to the figure of the professional journalist, showing that it does not distinguish between the right to freedom of expression and the right to inform in this instance.[278] The implication here is that journalists are not acting as professionals in the interest of the community to be informed, rather they exercise their freedom to express their opinions, which covers the freedom to select which news to publish when and where.[279]

The journalist qualification becomes relevant for the right to report, or the right to inform, which constitutes one of the articulations of the right to freedom of

[274] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell'informazione e Dei Media* 2nd edn, Giappichelli 2022 15
[275] Article 68(1), Italian Constitution; among many others judgments 10-11/2000 Constitutional Court
[276] "Segreto professionale dell'avvocato" Attorney-client privilege: Article 28, Italian forensic deontological code; Article 622, Italian criminal code; Article 200, Italian criminal procedure code
[277] Mannella F, "Le Restrizioni alla Libertà di Corrispondenza, di Informazione e di Studio dei Detenuti in Regime Di c.d. Carcere Duro: La Corte Costituzionale, in accordo con la Cassazione, salva l'Art. 41-Bis Ord. Pen. e la Discrezionalità dell'Amministrazione Penitenziaria in Materia" [2017] Fascicolo N. 1/ 2017 https://www.costituzionalismo.it/download/Costituzionalismo_201701_620.pdf
[278] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell'informazione e Dei Media* 2nd edn, Giappichelli 2022 16
[279] Ibid.

expression, resulting in the right to expose and disseminate information relating to facts considered to be of public interest.[280] Thereby, the right to report also finds its foundation in Article 21 of the Constitution. Indeed, every journalistic activity of describing daily events contains a manifestation of thought: even the most banal account of a sports competition or a fashion show requires intellectual elaboration.[281] "Opinions are formed on facts and there could be no circulation of ideas if there were no equal circulation of news" stated Crisafulli, about the connection between the right to report and the right to freedom of expression.[282] The Constitutional Court itself has repeatedly recognized that art. 21 of the Constitution includes the "freedom to give and disseminate news, opinions and comments".[283]

On an objective level, the reference to "in speech, in writing and through any other means of circulation" leads to believe that the constitutional guarantee extends to every form of free speech (thus also images, artistic works and even practical behaviours that have a symbolic value) intended for an indeterminate number of people, whatever their content; for example, in judgment 120/1968, the Constitutional Court included in the scope of Article 21 also the advertisement of a lonely heart in a newspaper. The wording “any means” makes for a very futureproof provision, adapting easily through courts interpretation to any new technological development, like it did for smartphones and computers.[284] In the Constitutional court jurisprudence, freedom of expression has been described as “the cornerstone of the democratic order”[285] The Constitution upholds the right to one’s own opinion in its different nuances. It protects it in its static nature, meaning that every person can freely create their own ideas and they cannot be discriminated against on the basis of their

[280] Donofrio, V. M., “Diritto di cronaca, oblio e riservatezza: un trittico senza tempo” *Altalex* (May 28, 2021) https://www.altalex.com/documents/news/2021/05/28/diritto-di-cronaca-oblio-e-riservatezza-trittico-senza-tempo
[281] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell’informazione e Dei Media* 2nd edn, Giappichelli 2022 27
[282] Crisafull,i V., “Problematica della «libertà d’informazione»”, in Il Politico, 1964, 285 ss. 287
[283] Judgement no. 105/1972, Constitutional Court
[284] Bucalo, M. E., *I Volti Della Libertà Di Manifestazione Del Pensiero Nell’era Digitale* Giappichelli 2023 12
[285] Judgement no. 84/1969

opinions; it protects it in its dynamic nature, allowing each individual to freely express (except for the limits of this right) their own ideas in any place, with any means (words, writings, etc.) and in any field (political, religious, etc.); finally, the right gives rise to a negative side that must be respected as well, so that each individual is free to keep their opinions secret and cannot be forced to divulge them, aside from the exceptions provided for by law (for example, the obligation to testify in court).[286] The protection afforded by the Constitution covers both the dissemination of thoughts and opinions, as well as facts-telling.[287]

Article 21 of the Constitution, while broadly encompassing constitutional protections, contains an exception regarding advertising information. In fact, the Constitutional Court has held that it should not be brought back within the scope of art. 21 of the Constitution but can enjoy the less intense protection offered by Article 41 of the Constitution to freedom of private economic enterprise.[288] The Court delineates a distinct separation between expressions of idea and commercial advertising, which is regarded as an element of business operations and a funding source for information bodies, however not an expression of a personal thought. Advertising does not seek to disseminate ideas or convey the author's personality; rather, it aims to influence the specific behaviours of others through suggestions and emotional appeals.[289] This interpretation seems to underestimate the informative aspect and the expressive nature of the thought of many advertising messages and conflicts with the case law of the European Court of Human Rights, which has included advertising communication within the scope of freedom of expression established by art. 10 of the Convention,

[286] Del Giudice, F., *Costituzione esplicata*, Napoli, Gruppo Editoriale Esselibri Simone 2011 73
[287] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell'informazione e Dei Media* 2nd edn, Giappichelli 2022 17
[288] Article 41, Italian Constitution; Constitutional Court, judgment 68/1965 on the legitimacy of the preventive authorization for hotel advertising on prices and rates and Constitutional Court, judgment 231/1985, on the prohibition of advertising messages originating from a foreign television station
[289] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell'informazione e Dei Media* 2nd edn, Giappichelli 2022 17

recognising however that States have a broader regulatory power than that established for political, cultural or artistic opinions.[290]

4.2.2. Limits to Freedom of Expression in the Italian Constitution

Article 21 of the Constitution explicitly contemplates only one limit to freedom of expression, prohibiting demonstrations contrary to morality and allowing the legislator to take adequate measures not only to repress but also to prevent violations.[291] However, morality does not constitute the only limit to the right to express one's thoughts. Freedom of expression is, in fact, a "dangerous" freedom.[292] By expressing opinions or recounting facts one can offend, violate privacy, reveal secrets, vilify institutions and religions, foment hatred and much more. It follows that there are multiple restrictions to this freedom, to protect other individual rights and collective interests or those of the State. Consequently, its effective scope has to be measured by the number and extent of the limits and, above all, by the criteria adopted by the legislator and the judges to reconcile the right to freely express one's opinion with the other legal positions protected by the system.[293] One can identify four major limits to the right to free speech from the constitutional text[294]: substantial limitations must be established by law and law only (so-called "riserva di legge assoluta" in the Italian doctrine);[295] any restriction must be based on the protection of other rights, good, interests or values that are the object of constitutional protection, whether explicitly or implicitly; such protection, even when it involves opposing interests, can never result in a total sacrifice of freedom of information or in the impossibility of its exercise in practice, because it is a fundamental right; and finally, when balancing freedom of

[290] European Court of Human Rights, 24 February 1994, Casado Coca v. Spain, A-285; 30 January 2018, Sekmadienis Ltd. v. Lithuania, app. 69317/14
[291] Article 21, Italian Constitution
[292] Malavenda C., Melzi d'Eril C., Vigevani G.E., *Le regole dei giornalisti. Istruzioni per un mestiere pericoloso* Bologna 2012
[293] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell'informazione e Dei Media* 2nd edn, Giappichelli 2022 25
[294] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell'informazione e Dei Media* 2nd edn, Giappichelli 2022 25-26
[295] Judgement no. 9/1965, Constitutional Court

expression with other conflicting rights, the interpreter must remember that they are not faced with a choice between two antinomic principles, but rather they are dealing with one principle – freedom of expression – and with its exceptions, to which a restrictive interpretation must be applied, freedom of expression is the rule and its restrictions are the exception.[296]

However, the operation to identify the "implicit limits" to freedom of expression is extremely complex, conditioned by the evolution of social sensitivity and technologies.[297] The catalogue undoubtedly includes the rights of personality, honour and reputation. The latter is defined by the Constitutional Court as the "right to be oneself, understood as respect for the image of a participant in associated life, with the acquisition of ideas and experiences, with ideological, religious, moral and social convictions that differentiate, and at the same time qualify, the individual".[298] Reputation can be defined, on the other hand, as the consideration that an individual enjoys within a community.[299] These concepts are both constitutionally protected (it is discussed whether their foundation is to be found in Article 2 of the Constitution, through the reference to the inviolable rights of the person, or rather in Article 3, which affirms the equal social dignity of individuals.[300] They are protected through “defamation”, a criminal offense committed by those who damage the reputation of an absent person, but only when talking to two or more other subjects.[301] The law identifies some aggravated hypotheses: if the offense is committed through the press or any other means of advertising (Internet, for example), or in a public document, the penalty increases.[302]

[296] In accordance with the ECHR jurisprudence, see European Court of Human Rights, 25 April 1979
[297] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell’informazione e Dei Media* 2nd edn, Giappichelli 2022 26
[298] Judgement no. 13/1994, Constitutional Court
[299] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell’informazione e Dei Media* 2nd edn, Giappichelli 2022 27
[300] Judgement no. 84/1974, Constitutional Court
[301] Article 595, Criminal Code
[302] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell’informazione e Dei Media* 2nd edn, Giappichelli 2022 28

A specific limit of the Italian constitution is the prohibition to reconstruct the dissolved fascist party: "The reorganization, in any form, of the dissolved fascist party is prohibited".[303] This constitutional prohibition also entails significant limitations on the freedom of expression of thought, the most important of which is the one connected to the crime of “apology of fascism”, provided for by the law 645/1952.[304] Behaviours related to fascism and the reconstruction of the fascist party are prohibited during electoral campaign’s as well, as confirmed by a recent judgment of an Italian administrative Court.[305]

Many other "new rights" are knocking on the doors of Parliaments and domestic and supranational courts, often as a defence against technologies that are increasingly capable of compromising the private sphere of individuals.[306] This is the case of the protection of copyright and of data protection, which constitute a limit to freedom of expression.[307] The protection of rights must always be “systemic and not divided into a series of uncoordinated and potentially conflicting norms”, otherwise there could be an unlimited expansion of one of the rights that would make it into a “tyrant” towards other constitutionally protected interests constituting, in their entirety, an expression of the dignity of the individual.[308]

A further limit to freedom of expression has been established through law no. 71/2017 “Provisions protecting minors for the prevention and contrast of the phenomenon of cyberbullying”.[309] This law – after having identified in very broad and, in some ways, poorly defined terms, the specific offence of “cyberbullying”, in Article 2 it requires the

[303] XII Final and Transitional Provision, Italian Constitution
[304] Luciani, M., *La Libertà Di Espressione, Una Prospettiva Di Diritto Comparato Italia* (Prof. Dr. Ignacio Díez Parra ed, EPRS Servizio Ricerca del Parlamento europeo 2019) http://www.europarl.europa.eu/thinktank 21; law 645/1952
[305] T.A.R. Piemonte, Turin, Section II, 18 April 2019, no. 447; Luciani, M., *La Libertà Di Espressione, Una Prospettiva Di Diritto Comparato Italia* (Prof. Dr. Ignacio Díez Parra ed, EPRS Servizio Ricerca del Parlamento europeo 2019) http://www.europarl.europa.eu/thinktank 21
[306] Bassini, M., Cuniberti, M., Melzi D'eril, C., Pollicino, O., Vigevani, G. E., *Diritto Dell’informazione e Dei Media* 2nd edn, Giappichelli 2022 26
[307] Bucalo, M. E., *I Volti Della Libertà Di Manifestazione Del Pensiero Nell’era Digitale* Giappichelli 2023 12
[308] Judgement no. 83/2013, Constitutional Court; no. 264/2012, Constitutional Court
[309] Law no. 71/2017

manager of the website or social media that has received a request for the blackout, removal or blocking of any other personal data of a minor, disseminated on the internet, to proceed no later than forty-eight hours with the blackout, removal or blocking requested.[310] The claim has to come from the minor who has been suffering an act of cyberbullying or from the parent or the guardian on their behalf. The manager is therefore tasked with the "identification of the behaviours falling within the definition of cyberbullying and their distinction from those that can be classified as non-illicit expression of thought", hence content moderation.[311]

Furthermore, by looking at the jurisprudence of the Constitutional court, one can identify a long list of limitations, including: public safety, justice, religious sentiment and minors' protection.[312] The length of this list could make one think that freedom of expression in Italy is a void right, constantly under attack, but the reality is that as any right, freedom of expression needs to be balanced with other constitutionally protected values for a real democratic application of the norms, compatible with pluralism.[313] Finally, implicit limits to freedom of expression can only be found in those that are directly inferred from the Constitution and are functional to the protection of other constitutional interests, while the legislator is precluded from introducing further limits identified at his discretion.[314]

[310] Article 2, law no. 71/2017
[311] Niro, R., "Piattaforme Digitali e Libertà Di Espressione fra Autoregolamentazione e Coregolamentazione: Note Ricostruttive" in Di Cosimo, G. *Processi democratici e tecnologie digitali* Giappichelli 2022 264
[312] Respectively: judgement no. 1/1956 and no 65/1970; judgement no. 25/1965 and no. 196/1987; judgement no. 188/1975; judgement no. 9/1965 and no. 25/1965 and no. 16/1981
[313] Luciani, M., *La Libertà Di Espressione, Una Prospettiva Di Diritto Comparato Italia* (Prof. Dr. Ignacio Díez Parra ed, EPRS Servizio Ricerca del Parlamento europeo 2019) http://www.europarl.europa.eu/thinktank 36
[314] Luciani, M., *La Libertà Di Espressione, Una Prospettiva Di Diritto Comparato Italia* (Prof. Dr. Ignacio Díez Parra ed, EPRS Servizio Ricerca del Parlamento europeo 2019) http://www.europarl.europa.eu/thinktank 36

4.3. The Broad Definition of Illegal Content under the DSA

4.3.1. The complicated interpretation of “illegal content”

The definition of illegal content under the Digital Services Act describes it as "any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law". This is a valuable provision, as it introduces national law into content moderation practices, which were priorly completely based on internal policies set by platforms themselves, indifferent to domestic regulations. This will help ensure that platforms are held accountable and consistent with legal standards across different countries. However, the definition might be too broad for its own good. This could potentially lead to excessive censorship and hinder freedom of speech but let us make one step at a time.

Illegality is a vast concept, with many nuances and interpretations. By definition, according to the dictionary, it means "not allowed by law".[315] Once again we are dwelling with a big word, "law", which can have multiple meanings depending on the context it is used in, on the language it is translated to, as well as on the legal system of each different country or community and their values and traditions. Since Kelsen's hierarchy of laws is the foundation of the Italian juridical system, among many others around the world, we can use it to take a look at the meaning of law. In its most literal meaning a law is the third element of Kelsen's pyramid from the top down, below Constitutional norms and treaties and international norms. In this sense a law is a piece of parliamentary legislation, produced according to a specific procedure; in the Italian legal system this means that it has to be approved by the two Chambers of Parliament and promulgated by the President of the Republic.[316] Laws are also referred to as primary sources and in Italy under this category we find parliament laws, acts with the same value as laws (decrees by the Government under specific conditions, in

[315] “Illegal” Definition, Cambridge Dictionary https://dictionary.cambridge.org/dictionary/english/illegal last accessed 16.10.2024
[316] Zatti, P., “Introduzione al Linguaggio Giuridico”

Italian "decreto legge" and "decreto legislativo"), plus regional laws.[317] In a very strict sense not even the Constitution is included in this category, but naturally as the highest source of law in the Italian system a more extensive interpretation needs to be applied.

So does any law infringement — because clearly any law violation falls under the category of "illegal activity" — produce illegal content under the DSA as an outcome? I shall think it dies not, but the formulation of this definition makes its interpretation somewhat vague and open to debate. I wonder if all infringements or offences are truly the same; I wonder if committing a criminal offence should be considered equal to violating a civil law or an administrative one, in terms of the DSA. I believe the severity of the consequences should somehow be taken into account, to create a fair but also free online environment. In our society these conducts are judged and handled differently, to ensure safety and retribution as well as proportionality. I think it is relevant to consider the intent behind the actions and the potential harm caused by the law breaches, rather than just categorising all infractions under the same umbrella. The nuances of each situation should be carefully evaluated to determine the appropriate response and consequences. By taking a more nuanced approach to enforcing the DSA, we could foster a digital space that balances freedom of expression with accountability.

Another doubt comes from the phrasing "any information that, in itself or in relation to an activity (…)" which leads me to question what content could classify as illegal because it is in relation to an illegal activity. What kind of relation does it have to be? Is there a threshold for the offensivity of the content or the harm it can cause? Is uploading a picture of a law infringement considered "illegal content" under the scope of the DSA? According to Recital 12 "In order to achieve the objective of ensuring a safe, predictable and trustworthy online environment, for the purpose of this Regulation the concept of ‘illegal content’ should broadly reflect the existing rules in the offline environment. In particular, the concept of ‘illegal content’ should be

[317] Zatti, P., “Introduzione al Linguaggio Giuridico”

defined broadly to cover information relating to illegal content, products, services and activities. In particular, that concept should be understood to refer to information, irrespective of its form, that under the applicable law is either itself illegal, such as illegal hate speech or terrorist content and unlawful discriminatory content, or that the applicable rules render illegal in view of the fact that it relates to illegal activities. Illustrative examples include the sharing of images depicting child sexual abuse, the unlawful non-consensual sharing of private images, online stalking, the sale of non-compliant or counterfeit products, the sale of products or the provision of services in infringement of consumer protection law, the non- authorised use of copyright protected material, the illegal offer of accommodation services or the illegal sale of live animals. In contrast, an eyewitness video of a potential crime should not be considered to constitute illegal content, merely because it depicts an illegal act, where recording or disseminating such a video to the public is not illegal under national or Union law. In this regard, it is immaterial whether the illegality of the information or activity results from Union law or from national law that is in compliance with Union law and what the precise nature or subject matter is of the law in question."[318]

Why did the legislator choose to point that that an image depicting CSAM is illegal whereas an eyewitness video of a potential crime is not, when the recording or the dissemination of the video is not deemed illegal under national or EU law. On the one hand, this interpretation key avoids scenarios such as parking your car in a parking space reserved for disabled people, uploading a picture of it online and having it removed, thus it is helpful in these instances. On the other hand, I cannot see how this law could be effectively enforced without a deep study of the substantial criminal law of all the Member States. How can online platforms be burdened with understanding the legal systems and traditions of 27 States with different criminal codes, content moderation policies and free speech regimes. Without guidance, there is no doubt that there will be confusion and inconsistency in the enforcement of this law across

[318] Recital 12, DSA

different countries, potentially leading to legal challenges and disputes, especially regarding freedom of expression.

On this note, continuing to analyse the phrasing of the definition of illegal content, this criticality catches my attention: " any information (…) not in compliance with Union law or the law of any Member State which is in compliance with Union law". How can anyone identify for sure that a piece of information corresponds to a violation of a domestic law, that is in compliance with EU law. This is not an easy ask to implement, as it requires a deep understanding of both national and EU legislation, as well as potentially complex legal interpretations. Keep in mind, most of content moderation is handled by various automated systems and AI. How can such vague instructions be successfully translated into a functioning code? In order for these demands to be met, humans need to do the heavy-lifting first and untangle the many layers of legal interpretation hidden in these seemingly simple sentences. In my opinion the Commission, in order to make this regulation actually enforceable, needs to invest in legal research for all the interested Member States. The aim should be the establishing of guidelines, fit for human use, as well as machine-readable. The DSA or the Commission should clarify what constitutes "illegal content" to prevent overreach and ensure that freedom of expression is protected. It is important for legislation to strike a balance between regulating harmful content and safeguarding individuals' rights to express themselves online.

4.3.2. Risk of Overblocking and Italian jurisprudence

The interpretation of these legal definitions raises major concerns about potential censorship and the need for clear guidelines to prevent abuse of power in determining what constitutes illegal content. This issue could have serious implications for freedom of speech and expression online, as well as for the ability of users to access diverse viewpoints and information.

As previously mentioned, freedom of expression is not a limitlessly expandable right.[319] It needs to be balanced with other fundamental rights, both online and offline. That is exactly the legal basis of content moderation, a form of counterbalancing free speech with other rights and safeguards to keep online platforms safe and inclusive for all users. The DSA lays down a common content moderation framework for the EU, establishing a liability regime for platforms concerning the removal of illicit content. Some of the measures aim now to hold platforms accountable for content policing and create more transparency on how the latter is achieved.[320]

Seeing the consequences in case of slow reactions or negligence in content moderation, online platforms are incentivized to invest in robust systems and processes to ensure compliance with the DSA. Under Article 16, platforms are required to act promptly upon receiving notices about illegal content, which includes both the removal and restriction of access to such content. Although the goal of this method is to stop unlawful content from spreading online, it also puts platforms in a position where they may take proactive steps to avoid fines, which could result in the removal of legal content.[321] However. the removal of such content is not mandatory unless the notice is sufficiently precise, adequately substantiated; moreover the illegality must be evident, meaning that it can be recognised without extensive legal analysis.[322]

Given the difficulties I highlighted in the definition of illegal content under the DSA, it seems reasonable to worry about overblocking. It seems hard to establish that a piece of information is illegal in these conditions. Firstly, there are the difficulties I underlined and the grey areas of the definition of illegal content. Secondly, the obligation to remove content is only mandatory if the piece of information is evidently illegal. Excluding some very blatant cases, for the small tasks of everyday content

[319] Judgement no. 83/2013, Constitutional Court; no. 264/2012, Constitutional Court
[320] Bassini, M. (Accepted/In press) Bassini, M. (Accepted/In press) "Online content moderation and democracy: The impact of case law and a long-awaited legislative response in Europe" In C. Girard, & P. Auriel (Eds.), *Freedom of expression and democracy in Europe* Cambridge University Press 11
[321] Barral Martínez, M., "Platform regulation, content moderation, and AI-based filtering tools: Some reflections from the European Union" 14 (2023) JIPITEC 211 https://www.jipitec.eu/archive/issues/jipitec-14-1-2023/5716/#ftn.N10475 217 last accessed 12.10.2024
[322] Article 16(2) and (3) DSA

moderation (copyrighted materials, hate speech, fake news, spam, sales of unlawful products) it is rarely evident – without extensive legal analysis – which behaviours are permitted and which are not. Thus the platforms are faced with two choices: sticking to the letter of the law, through a restrictive interpretation of what illegal content is and when it is evidently so, and diminishing the amount of content they remove or taking considerably more time in doing so; or taking a more zealous approach, removing content at a fast pace, paying less attention to the safeguards laid down by the DSA to uphold freedom of expression. In the first case, platforms risk high fines and numerous conflicts with the Commission and national authorities, in the second case they do not, and they might even end up in the good graces of the Commission. It is likely that platforms would rather go for the less pricey option, sacrificing free speech for easier moderation.[323] This liability system is based on the action of platforms and it is unreasonable to expect of platforms to risk their business in the name of legal precision, especially if that is not focus of the Commission. It should be in the Commission's best interest to clarify these provisions to ensure their correct application.

Overblocking poses a serious threat to freedom of expression. Online platforms have the power to shape public discourse, and the users are in a weaker position, with no bargaining power against these Tech giants. But pluralism is necessary to freedom of expression. To quote the ECHR freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.[324] According to paragraph 2 of Article 10, "it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population"[325]. Furthermore, the Court underlines that every "formality", "condition", "restriction" or "penalty" imposed in

[323] Pollicino, O., "La Prospettiva Costituzionale sulla Libertà di Espressione nell'era di Internet" in G. Pitruzzella - O. Pollicino - S. Quintarelli, *Parole e potere. Libertà d'espressione, hate speech e fake news*, Milano, 2017
[324] Handyside v UK (1976) Series A no 5493
[325] Ibid.

this sphere must be proportionate to the legitimate aim pursued.[326] An indiscriminate removal of potentially illicit content with the only aim of avoiding pecuniary sanctions can in no way be considered proportional. This ruling, greatly expands the boundaries of freedom of expression, stating that even those contents that would struggle to gain approval among the generality of members of society because they are shocking or offensive cannot be deprived, for this reason alone, of the guarantees that accompany freedom of expression.[327] This type of content is gravely at risk on online platforms, together with political speech. Political censorship online was already mentioned for the case of Trump's deplatforming. Italy has its own landmark cases, Facebook v. CasaPound and Facebook v. Forza Nuova, which – even with their different outcomes – outline a coherent jurisprudence relating to the high safeguards that Italy upholds for content moderation and freedom of expression. To sum up, these three judgements deal with the same issue: Facebook deplatforming CasaPound and Forza Nuova, two Italian far-right parties, due to their hateful and racist behaviours, both online and offline.[328]

One Court affirmed that the exclusion of CasaPound would conflict with "the right to political pluralism (…) eliminating or strongly restricting the possibility for the applicant association, active in Italy since 2009, to express its political messages"[329]
Furthermore, it makes an interesting point distinguishing between the conduct of private citizens and the responsibility of an association they belong to. Namely, the responsibility for events and behaviours (even criminally relevant ones) concerning individual members of an association cannot "automatically fall on the association

[326] Handyside v UK (1976) Series A no 5493
[327] Pollicino, O., "La Prospettiva Costituzionale sulla Libertà di Espressione nell'era di Internet" in G. Pitruzzella - O. Pollicino - S. Quintarelli, *Parole e potere. Libertà d'espressione, hate speech e fake news*, Milano, 2017
[328] Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 176
[329] Trib. Roma, sez. impresa, ord. 12 dicembre 2009; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 177

itself", which gives Facebook no basis to deplatform it.[330] Italian Courts also established very high standards for what classifies as apology to fascism, arguing that the publication of content depicting the so-called Celtic cross or other symbols relating to fascism are not significant enough, since these were "episodes that individually do not appear to infringe the limit" and which indeed were not the reason for the disabling of the entire page, they were simply individually removed.[331] The page was not deemed to "promote a party that pursued purposes contrary to the Constitution (...)".[332]

The Court also does not recognise Facebook – a private entity operating for profit – the power to restrict freedom of expression, in a situation of clear power imbalance between the platform and the user, and to an extension that goes even further than what the legislator had provided for in criminal law.[333] Moreover, the Court states that the criminal repression of discriminatory conduct should represent the extrema ratio, the very last resort.[334] In another instance, the Court listed all the relevant articles from the Charter of Fundamental Rights of the EU and the Treaties of the Union, highlighting the importance of human dignity, freedom of expression and information and the prohibition of any type of discrimination.[335] The fact that all these constitutionally guaranteed rights are brought into play demonstrates the seriousness that the Italian courts reserve to freedom of expression and with which they judge the limitations to it from content moderation practices. The Court also acknowledged the

[330] Trib. Roma, sez. impresa, ord. 12 dicembre 2009; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 177
[331] Trib. Roma, sez. impresa, ord. 12 dicembre 2009; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 177
[332] Trib. Roma, sez. impresa, ord. 12 dicembre 2009; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 177
[333] Trib. Roma, sez. II, ord. 29 aprile 2020; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 182
[334] Trib. Roma, sez. II, ord. 29 aprile 2020; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 180
[335] Article 2, TEU; Article 11, Article 21, CFREU; Article 9, Article 10, Article 19, TFEU

central and primary role played by the Facebook service in the context of social networks» and the «preeminent importance assumed by the Facebook service (and by other social networks connected to it) in upholding the pluralism of political parties (protected under Article 49 of the Constitution), to the point that the subject who is not present on Facebook is in fact excluded (or severely limited) from the Italian political debate (...)», inferring from this that Facebook would hold a «special position».[336]

It is hard to match these very high standards established by Italian Courts, on the basis of Italian and European law, with the vague definition offered by Article 3(h) DSA of illegal content. Italian jurisprudence has developed a high threshold for content moderation that centres on safeguarding freedom of expression, particularly in politically sensitive contexts. This is clearly exemplified in cases like Facebook v. CasaPound and Facebook v. Forza Nuova, where Italian courts upheld the right to political pluralism and stressed that even provocative or controversial speech is protected under the Italian constitutional law. The courts' insistence on pluralism and removal of content just as extrema ratio underscores a fundamental clash with the Digital Services Act's (DSA) overly broad definition of "illegal content."

The DSA defines illegal content in a way that encompasses a wide range of infractions, from serious criminal offenses to minor civil or administrative violations. The DSA also requests platforms to ensure that domestic law that defines a piece of information as illegal content, is as well compliant with EU law, because otherwise that content cannot be defined illegal and thus removed. Quite complicated, isn't it? This definition introduces significant interpretative challenges, and its broad scope can lead to disproportionate restrictions on speech, as platforms may over-censor content to avoid liability. Without clear distinctions guidelines coaching platforms and their content moderators, the risk of overblocking increases, and platforms may err on the side of caution, removing lawful content that should otherwise be protected under Italy's constitutional framework.

[336] Trib. Roma, sez. impresa, ord. 12 dicembre 2009; Grandinetti, O., "Facebook vs. CasaPound e Forza Nuova, ovvero la disattivazione di pagine social e le insidie della disciplina multilivello dei diritti fondamentali", in MediaLaws, n. 11/2021, 177

Not only that but platforms' reliance on automated systems for content moderation amplifies these risks. These systems, often designed to flag any form of non-compliant content, may struggle to interpret the complexities of Italian or EU law, resulting in the removal of content that could have been protected under Italian jurisprudence. Without proper human oversight and a nuanced understanding of the legal frameworks across Member States, the potential for misinterpretation is substantial and the threat to freedom of expression is evident.

Italian courts have made it clear that freedom of expression must be upheld unless there is a proportionate and legally sound reason to restrict it. This cautious approach contrasts sharply with the DSA's broad and vague provisions, which could, in their current form, lead to excessive censorship and the curbing of political discourse. Thus, the broad definition of illegal content within the DSA directly conflicts with the established constitutional and jurisprudential safeguards that are fundamental to Italy's democratic and legal traditions.

However, this is incompatibility is not insurmountable. This problem could be addressed with the establishment of common guidelines to make the regulation truly enforceable. The goal should be to create rules that are both human-friendly and machine-readable, based on the legal traditions of all Member States. The Commission should possibly fund a study to investigate what type of content classifies as illegal content for each Member State and whether their norms on these matters are compliant with EU law as the DSA requires, as this would be impossible to know without in-depth cross-border research.

4.4. Uniform Treatment of All Users under the DSA

All are equal before the law and before the DSA. The regulation lays down a framework that distinguishes between different platforms, with obligations tailored to their size and impact; yet, it does not distinguish between users. Article 3(b) defines recipients of the service (hence the users) as "any natural or legal person who uses an intermediary service, in particular for the purposes of seeking information or making it

accessible". Moreover, Recital 2 specifies that "business users, consumers and other users are considered to be 'recipients of the service' for the purpose of this Regulation." This surely simplifies the regulation on the users' side, since the focus is on regulating platform governance and their content moderation practices. It ensures that all users, whether they are individuals or businesses, are protected and have clear guidelines to follow when using intermediary services. However, content moderation does not only involve platforms, it concerns users too. I want to outline how the uniform treatment of all users under the DSA creates difficulties in upholding freedom of expression, especially towards two categories of users: journalists and minorities.

4.4.1. Lack of Distinction Between Journalists and Ordinary Users

Journalists play a crucial role in democratic societies, often acting as watchdogs and ensuring government transparency. This role is recognized in various national constitutions and legal systems, which provide special protections for press freedom. For instance, Article 21 of the Italian Constitution grants elevated protection to journalistic activity, safeguarding the free dissemination of information and ideas, which is considered essential to democracy.[337] However, the DSA's failure to distinguish between journalists and other users' risks undermining these safeguards. The regulation places no additional protections or allowances for the media, treating their content moderation issues as it would any other user, whether a private citizen or a business.

The absence of a specific regime for journalists under the DSA could lead to undue censorship or restrictions on journalistic activities. For example, content produced by journalists that may be controversial, critical, or even politically sensitive could be subject to the same moderation rules that apply to non-journalists. Investigative journalism, which often involves exposing wrongdoing or corruption, may be especially vulnerable under such a regime. Without a legal framework that protects the press against overzealous removal of content, platforms may take preemptive steps to

[337] Article 21, Italian Constitution

moderate content that should be protected under press freedoms, simply to avoid liability.

This issue raises serious concerns about how the DSA balances the need to regulate content while upholding fundamental rights to freedom of expression and freedom of the press. By failing to carve out specific provisions for journalists and media organizations, the DSA inadvertently disregards the heightened constitutional safeguards afforded to these groups. The regulation needs to consider the unique role journalists play in society and provide tailored provisions to ensure that their freedom to report is not unduly compromised by automated or hasty content moderation processes.

Journalists are professionals, who in Italy belong to a specific register, the "Albo dei Giornalisti", the registration to which is mandatory in order to practice this job. Their profession and the exercise of their functions are regulated by multiple sources: the Constitution, various laws, ethical codes and best practices. They are held to very high standards when it comes to how they produce and disseminate their work, which is why their output – the story they cover, their articles, their reportage – is more protected than just a random comment on the internet. This level of accountability and responsibility is crucial in maintaining the integrity and credibility of journalism as a profession. Journalists are expected to adhere to strict guidelines in terms of accuracy, fairness, and impartiality in their reporting. This is in stark contrast to the often unregulated and unchecked nature of content on the internet, where misinformation and fake news can easily spread without consequence. The role of journalists in society is to provide the public with reliable and trustworthy information, and their commitment to upholding these principles is essential in a democratic society. So then why does the DSA treat all of the information online the same way, even though journalism is very present on online platforms?

One could argue that the DSA is not the right piece of legislation to deal with journalistic content. There is the European Media Freedom Act that complements the framework from the DSA, but I do not agree with this statement. Firstly, because I do

not believe that one can deal with content moderation without even mentioning the special role of journalists and the duty of the press to report, to inform and to share truthful news. Secondly, because even the European Media Freedom Act does not do an exhaustive job in protecting the content that journalists publish and share online. Basically, under Article 18, media service providers (yet again an incredible broad category of non-better identified media workers) have the duty to register themselves as such by providing detailed information about them and their work, to have in return the possibility to reply to the statement of reason that is sent to them when their content is flagged in 24 hours (or less if there is urgency), to potentially justify their content.[338] There is no obligation for the VLOP to somehow meaningfully incorporate this reply into their decision, nor does this reply create a dialogue between the platform and the media service provider. The outcome is simply that the VLOP can remove the content anyway, and if it does, it will inform the media service provider promptly.[339] I will not go into further details, because my focus is on the DSA but from my point of view this framework is far from the protection of the press that the EU law standards mandate.

In the Italian legal system, the freedom of the press and the right to report are an integral part to the right to freely manifest one's opinion in Article 21. Article 21(2) underlines that "the press may not be subjected to any authorisation or censorship".[340] The right to report basically consists in the right to expose and disseminate information relating to facts considered to be of public interest.[341]

Article 19 of the Universal Declaration of Human Rights and Article 10 of the European Convention on Human Rights contain the right to impart information and Article 11 from the Charter of Fundamental Rights of the European Union goes a step further and

[338] Article 18(4), EMFA
[339] Article 18(4), EMFA
[340] Article 21(2), Italian Constitution
[341] Donofrio, V. M., "Diritto di cronaca, oblio e riservatezza: un trittico senza tempo" *Altalex* (May 28, 2021) https://www.altalex.com/documents/news/2021/05/28/diritto-di-cronaca-oblio-e-riservatezza-trittico-senza-tempo

declares that "the freedom and pluralism of the media shall be respected".[342] Thus, I would suggest that the importance of journalism and the public relevance of their findings is not only part of the Italian Constitutional tradition, it is a shared European value.

In Italy, there are multiple sources of regulation of the press and of the work of journalists as I mentioned earlier. Article 2 (Rights and duties) of professional law 69/1963 states: "The freedom of information and criticism is an inalienable right of journalists, limited by compliance with the laws established to protect the personality of others, and it is their inalienable obligation to respect the substantial truth of the facts, always observing the duties imposed by loyalty and good faith. Any news that is inaccurate must be corrected and any errors must be repaired. Journalists and publishers are required to respect professional secrecy regarding the source of the news, when this is required by the fiduciary nature of the news, and to promote a spirit of collaboration between colleagues, cooperation between journalists and publishers, and trust between the press and readers".[343] Consequently, journalists are bound to truthfulness, must act in good faith and musts always correct any errors and repair every mistake. They also have an inalienable right to freedom of information and criticism.

The DSA does not guarantee these values by treating the content coming from all users alike. Most users are not legally obligated to say the truth and to rectify their claims if they prove to be unfounded, but journalists do. Moreover, it is not hard to identify journalists, they are registered as such on public records in order to exercise their profession, thus a verification of their accounts online would not be such a hassle. In addition, how many average users face consequences offline if what they publish is not up to the standard of truthfulness and right to report and inform? Journalists do, the protection of the human person and respect for the substantial truth of the facts are

[342] Article 19 of the Universal Declaration of Human Rights; Article 10 of the European Convention on Human Rights; Article 11 of the Charter of Fundamental Rights of the European Union
[343] Article 2, law no. 69/1963; "Etica: le regole - Ordine Dei Giornalisti" (*Ordine Dei Giornalisti*, April 26, 2019) https://www.odg.it/etica-le-regole

principles to be understood as limits to the freedom of information and criticism.[344] Among many others, they also have the duty to the maintenance of professional decorum and dignity, as well as the respect for one's own reputation. There are also prohibitions and journalists can be sanctioned by the Oder of Journalists or by Court for their violations. To mention an example there is Article 15 of Law 47/1948 which prohibits the publication of images with shocking or horrifying content": "The provisions of art. 528 of the Criminal Code (obscene publications and shows) also apply to printed matter which describes or illustrates, with shocking or horrifying details, events which have actually occurred or even only imaginary, in such a way as to be able to disturb the common sense of morality and family order or to be able to cause the spread of suicides or crimes".[345]

The failure to differentiate journalists from ordinary users not only undermines freedom of the press but also compromises public interest. The role of the media in a democratic society goes far beyond the casual exchange of ideas found on social platforms. Journalists are central to holding powerful actors—governments, corporations, and institutions—accountable. This unique social function deserves distinct consideration in a regulatory framework aimed at content moderation.

Without special protections, the current DSA framework could incentivize platforms to remove journalistic content preemptively to avoid potential liability. Platforms could either implement overly cautious moderation policies that sweep up journalistic work in their algorithms, or they may face legal and financial risks if they fail to take swift action against content that is flagged by users or automated systems. The problem is exacerbated by the reliance on algorithmic content moderation. Automated systems, as they exist today, are notoriously ill-equipped to understand nuance, context, or intent, particularly in fields like journalism, where critical reporting may include strong language or footage that could easily be misinterpreted as harmful or inappropriate.

[344] "Etica: le regole - Ordine Dei Giornalisti" (*Ordine Dei Giornalisti*, April 26, 2019) https://www.odg.it/etica-le-regole

[345] Article 15, law no. 47/1948; "Etica: le regole - Ordine Dei Giornalisti" (*Ordine Dei Giornalisti*, April 26, 2019) https://www.odg.it/etica-le-regole

For example, investigative reports on human rights abuses might display graphic images that are essential to the story but could be flagged as violent content under generic moderation guidelines. Considering the way algorithmic content moderation works, the fear is not only that some content might be removed or sanction, but rather that content deemed objectionable will be technically impossible to post, thanks to the filters that the major online platforms have in place (ex ante content moderation).[346] Algorithmic content moderation, as efficient as it can be in removing harmful content and helping platforms to avoid liability, often sweeps tons of lawful and significant content with it. Content that has a public interest in being shown (the beating of an activist in their cell), content with artistic (The Descent from the Cross by Rubens) or historical relevance (the famous photo showing a Vietnamese girl running away from Napalm bombing).[347] In all these instances (and surely many more), content moderation has been documented removing these contents from the platform.

I am not a policymaker and to implement efficient policy there are various steps, significant amounts of research and of trials. However, concerning the risk of journalistic censorship through platforms content moderation, I think the identification of journalists – also under the DSA – and a different treatment of their content, could go a long way. Let us imagine, for example, an obligation that mandates human review when the content published by a journalist is flagged, even better if it is human review operated by a body of content moderators specifically educated in freedom of expression, freedom of the press and their limits in the EU. It would be a costly option, no doubt, but it could help safeguarding freedom of expression on online platforms in the EU.

[346] Griffin, R., "The Politics of Algorithmic Censorship: Automated Moderation and its Regulation" in *Music and the Politics of Censorship: From the Fascist Era to the Digital Age*, edited by James Garratt, Turnhout, Belgium, Brepols, 2025

[347] Niro, R., "Piattaforme Digitali e Libertà Di Espressione fra Autoregolamentazione e Coregolamentazione: Note Ricostruttive" in Di Cosimo, G. *Processi democratici e tecnologie digitali* Giappichelli 2022 255

4.4.2. Disproportionate Impact on Marginalized and Minority Groups

Another category of users particularly vulnerable under the DSA's uniform treatment approach consists of minorities and marginalised groups. In its current form, the regulation does not account for the unique challenges faced by these groups, whose voices may be disproportionately targeted by content moderation mechanisms. For marginalized communities, platforms are often both a haven for self-expression and a battleground where they face harassment, disinformation, and hate speech.

Minorities, including ethnic, racial, religious, and LGBTQ+ communities, often use digital platforms as essential tools to share their perspectives, organize for advocacy, and challenge dominant narratives. However, these groups are also frequent targets of online abuse. Content moderation policies that apply uniformly to all users may not be adequately equipped to protect minority voices. Automated moderation systems, in particular, are prone to bias, and may mistakenly flag or remove content that is vital for these groups' expression of identity or political advocacy. A uniform approach fails to recognize the need for more nuanced and contextual handling of content created by vulnerable or marginalized users, potentially leading to the silencing of their voices.

Moreover, the DSA's equal treatment of users disregards the existing structural inequalities that these groups face. For instance, the lack of differentiation between hate speech directed at minorities and regular user content may lead to underreporting or under-removal of harmful content targeting these groups. Without adequate protection mechanisms or recognition of the specific needs of minority users, the DSA risks perpetuating existing societal inequalities within the online space.

Social media platforms and other major tech players rely on sophisticated content moderation systems to filter out content deemed illegal or undesirable, primarily to sustain advertising revenue. Tech companies like TikTok and YouTube heavily rely on artificial intelligence (AI) and automated decision-making processes to sustain their industrial-scale content moderation processes. Algorithmic moderation has become necessary to manage growing public expectations for increased platform responsibility,

safety, and security on a global scale.[348] However, these systems remain opaque, unaccountable, and poorly understood. Even well-optimized moderation systems could exacerbate existing problems of platforms and their content policy due to three main reasons: automated moderation threatens to increase opacity, complicate understanding of fairness and justice in large-scale sociotechnical systems and obscure the fundamentally political nature of speech decisions being executed at scale.[349]

Discrimination online can take many forms, including but not limited to racial profiling, gender-based harassment, and censorship of marginalised voices. It has political and social implications, as well as negative consequences on free speech. Examples of how online discrimination works can be found in the censorship of hashtags like #SaveSheikhJarrah to document and denounce violence and injustice during the attacks to the Jerusalem neighbourhood in 2021: posts with this hashtag and similar ones faced various forms of restrictions in the name of content moderation, including shadow banning, sensitivity filters, and even account restrictions.[350] Another form of discrimination could be banning and censoring women's nipples whereas men's do not represent a problem.[351] For minority groups that are often exposed to hate speech, such as member of the LGBTQ+ community, discrimination can be not setting up a higher level of protection for their category and not paying more attention to the violence they are constantly exposed to.

At the EU level, both the Charter of Fundamental Rights of the EU and the European Convention on Human Rights guarantee protection against discrimination, respectively through Article 21 "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any

[348] Papaevangelou, C. and Votta, F., "Content Moderation and Platform Observability in the Digital Services Act" (*Tech Policy Press*, May 29, 2024) https://www.techpolicy.press/content-moderation-and-platform-observability-in-the-digital-services-act/

[349] Gorwa, R., Binns, R. and Katzenbach, C., "Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance" (2020) 7 Big Data & Society

[350] Opaque algorithms, transparent biases: Automated content moderation during the Sheikh Jarrah Crisis by Norah Abokhodair, Yarden Skop, Sarah Rüller, Konstantin Aal, and Houda Elmimouni. First Monday, volume 29, number 4 (April 2024)

[351] Andolini, A., "Free the Nipple: How Social Media Holds Back Women's Self-Determination" *EL PAÍS English* (April 13, 2023) https://english.elpais.com/society/2023-04-13/free-the-nipple-how-social-media-holds-back-womens-self-determination.html

other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited[352]" and Article 14 "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status[353]". The Convention does not provide an express definition of "incitement to hatred", but the Recommendation No. (97)20, adopted by the Committee of Ministers of the Council of Europe adopted on 3rd October 1997defines hate speech as "including all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance".[354]

Italy finds the foundation of the non-discrimination principle in Article 3 of the Constitution, which states "All citizens have equal social dignity and are equal before the law, regardless of sex, race, language, religion, political opinion or personal and social condition".[355] Moreover, paragraph 2 of the same Article indicates that "it is the duty of the Republic to remove the economic and social obstacles which, by restricting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country.[356] This second paragraph poses a duty on the State to not only guarantee protection from this discriminations, but rather to build a framework that does not allow discrimination and to remove the obstacles that are hindering the full development of the human person and their effective participation in the life of the country. I reckon, this could be the foundation for an obligation, addressed to the State and its organs, to fight online discrimination of minorities and remove the obstacles – the overreaching and inaccurate algorithmic content moderation, the oppression and suppression of marginalised voices by the hands of

[352] Article 21, CFREU
[353] Article 14, ECHR
[354] Gori, P., "Libertà Di Manifestazione Del Pensiero, Negazionismo, Hate Speech" in Buffa, F. and Civinini, M. G., La Corte di Strasburgo – Gli Speciali di Questione Giustizia Aprile 2019 https://www.questionegiustizia.it/speciale/articolo/liberta-di-manifestazione-del-pensiero-negazionismo-hate-speech_90.php
[355] Article 3(1), Italian Constitution
[356] Article 3(2), Italian Constitution

the dominant group, the difficulties to report and obtain the removal of hate speech addressed at them – that prevent their thriving in online spaces.

In these terms, I cannot seem to find a similar approach in the DSA. I do not see the intentionality in preventing this type of content moderation dysfunctionality, nor the care or the attention towards minorities that a regulation that stands for pluralism should show. The DSA seems too focused on platforms and not enough on the users who inhabit them.

Non-discrimination is one of those rights that is often held against freedom of expression as its limit. The balancing between the two rights is sometimes a delicate and difficult matter, yet it is fundamental as a basis to a democratic society. Therefore, the request to pay more attention to content moderation practices that disproportionately involve and attack minorities and marginalised groups, is completely in line with the Italian framework on freedom of expression online. The Italian Court of Cassation states that the legal interest protected by the law is the violation of the peaceful coexistence of various ethnic groups, dignity and freedom of expression. Therefore, the offense to equal dignity must be sanctioned in any case, regardless of whether the incitement or provocation is perceived by people.[357] This establishes a very high standard of protection for the victim of hate speech and hate crimes, both online and offline. I cannot see a similar standard being upheld through the obligations of the DSA, which fall short of their duty to protect users against discrimination.

I also cannot help but wonder what happens to minorities in the EU countries that are less democratic and tolerant than we might think and that have either implemented discriminatory policies, or that are not investing enough energy in protecting said minorities and their rights. Hungary comes to mind, together with Poland and Italy for example, with their more and more right-leaning politics and the dismantling of rights happening step by step. Could the DSA in such instances even attempt to protect said

[357] Judgement no. 41819/2009, Corte di Cassazione

minorities online, when domestic laws and their enforcement are not even on their side? It seems like a critical situation.

In light of Italian law and constitutional protections, the Digital Services Act (DSA) proves inadequate in addressing the disproportionate impact of content moderation on marginalized and minority groups. Article 3 of the Italian Constitution emphasizes both the formal and substantive equality of all citizens, mandating the removal of social and economic obstacles that hinder full participation in society.[358] This includes protecting minorities from discrimination, which the DSA fails to accomplish due to its uniform, platform-focused approach.

The DSA overlooks the unique vulnerabilities of minority groups who face structural inequalities and are frequently targeted by hate speech and harassment. Automated moderation systems, often biased and error-prone, can exacerbate these challenges by disproportionately flagging or removing their content. As such, the DSA not only neglects the duties enshrined in Italian law but also undermines broader European legal frameworks like the EU Charter of Fundamental Rights, which prohibits discrimination and supports freedom of expression for all citizens, including marginalized groups.

The Italian legal framework, which places a duty on the state to ensure equality and freedom of expression, points to the need for more nuanced and intentional content moderation mechanisms. The current system is ill-equipped to combat online discrimination effectively and protect minority voices. Furthermore, in countries with governments that are not committed to protecting minority rights—such as Hungary, Poland, and Italy's current political climate—the DSA's limited protections are insufficient. Without robust safeguards, the regulation risks perpetuating the suppression of marginalized voices in both democratic and less tolerant environments.

In conclusion, the DSA's failure to recognize the specific needs of minorities undermines the foundational democratic values of equality and freedom of

[358] Article 3, Italian Constitution

expression, as articulated in both Italian and EU law. It highlights the need for a more tailored approach that actively works to prevent the perpetuation of discrimination and ensure that the voices of vulnerable groups are protected and amplified, rather than silenced.

The position that any and all state censorship is bad and should be avoided is rightly regarded as extremist, especially by feminist and antiracist scholars who emphasise the dangers that unrestricted speech (on- and offline) has historically posed for minority groups.[359] Content moderation, including algorithmic moderation, is essential to create safe and inclusive spaces for online media and communication. Yet the current content moderation practices and their regulation pose very real dangers: suppression of political dissent, systemic discrimination, and the channelling of all online media and communication in line with the priorities of corporate advertisers, for example. Current trends suggest that the role of algorithmic censorship in online media and civic life will only continue to expand. Difficult questions lie ahead about when and how it can be used legitimately, and what safeguards might prevent the worst abuses of power.[360]

4.5. Rachel Griffin Neo-illiberalism[361]

This research, as many others, focuses on the role that democratic and constitutional values play in the law-making of the EU and if certain rights are enforced, safeguarded, etc. But what happens when the biggest threats do not come from outside the State, rather from within? Rachel Griffin analyses this less talked about point of view, in a more and more right-leaning Europe she asks the question: are our regulations far-right proof? If authoritarian figures came to power, would our current EU framework be enough to keep us safe and to safeguard our rights? And the answer is probably no,

[359] Franks, M. A., 'Beyond the Public Square: Imagining Digital Democracy', in: Yale Law Journal Forum, 131 (2021), pp. 427-53
[360] Griffin, R., "The Politics of Algorithmic Censorship: Automated Moderation and its Regulation" in *Music and the Politics of Censorship: From the Fascist Era to the Digital Age*, edited by James Garratt, Turnhout, Belgium, Brepols, 2025 11
[361] Griffin, R., "EU Platform Regulation in the Age of Neo-Illiberalism" (March 29, 2024)

because we are not drafting these pieces of legislation with these risks in mind. This is why I want to leave here some ideas and critics that Griffin highlights in her research, to help shift the focus of European legal research in this direction, seeing how crucial it is in these times to protect democracy.

According to Griffin, EU platform regulation can be better understood as manifesting an ongoing shift away from progressive neoliberalism and towards neo-illiberalism, as fundamental rights and liberal-democratic norms are increasingly sacrificed in favour of unrestrained state surveillance and private-sector-led innovation. Research should not only assess how these laws are currently being implemented but also look further ahead to the abuses of power they could enable in an increasingly-plausible 'far-right Europe'. The 2022 Digital Services Act (DSA) represents a prime example of this shift, as its overall regulatory approach is characteristically neo-illiberal. The DSA embraces marketized media governance and entrenches corporate power, while politically, it creates extensive possibilities for state censorship. By creating the appearance of accountability while acquiescing to the organization of online media around surveillance advertising, the DSA legitimizes upward-redistributive 'platform capitalism'.

The predominant framing of the DSA as a possibly-inadequate but fundamentally well-intentioned attempt to uphold liberal constitutionalism in the digital age is misleading. Neo-illiberalism and platformisation have played a significant role in mediating political-economic shifts. Information technologies were central to neoliberal globalisation, financialization, and the expansion of market rationalities into new social spheres. Digital platforms have become the core organizational form of informational capitalism, with 'big tech' companies owning them among the most powerful sections of the global capitalist class. These companies' rise was enabled by neoliberal policies in areas such as competition law, international trade, and financial regulation. EU and national policymakers seem increasingly concerned to minimise regulatory constraints on business, while normalizing illiberal surveillance and censorship practices and weakening fundamental rights safeguards.

Overall, the DSA's content reporting, trusted flagging, risk assessment, and crisis management provisions will make it significantly easier for governments to suppress this and other online content that they deem politically undesirable. Political scientists are seriously discussing the medium-term possibility of a 'far-right Europe', as national governments pursuing illiberal agendas on surveillance and censorship have strongly influenced recent platform regulation initiatives, particularly via the Council during trilogue negotiations. If these racist and reactionary agendas will be exercising greater influence over member states and EU institutions, including the Commission and the national regulatory agencies responsible for DSA enforcement, it is beyond time for scholars to start systematically considering how their DSA powers could be abused.

The analysis of the Digital Security Act (DSA) suggests that the EU has primarily focused on regulating harmful or illegal content rather than structural power, leaving extractive corporate monopolies in place and creating mechanisms for state authorities to influence content moderation. Applying the theoretical framework of neo-illiberalism helps to highlight the complementarities between liberal, business-friendly economic regulation and illiberal political repression. The DSA's focus on censorship could also contribute to critical analysis of surveillance practices enabled by other EU platform regulation initiatives, such as the AI Act, which has weaker restrictions on biometric surveillance and social scoring. Environmental groups can be subject to the DSA notice and takedown framework and the 2021 Terrorist Content Regulation, which requires platforms to respond to removal orders within an hour and implement specific measures like automated content filtering.

Future research should incorporate further analysis of the EU's new focus on industrial policy, protectionism, and digital sovereignty. The "return of industrial policy" has been hailed as a move away from neoliberalism, but it appears broadly compatible with the neo-illiberal framing. Looking ahead, we must reckon with a future of 'polycrisis', economic stagnation, and escalating geopolitical and environmental instability. Political economists predict a 'doom loop' where centrist parties double down on austerity, nationalism, and political repression. Platform governance will

become a key site of political conflict, contestation, and repression due to the growing centrality of digital platforms in economic, cultural, and social life. Scholarship in this field urgently needs to take more account of how these laws have been shaped by Europe's ongoing neo-illiberalisation.

5. Conclusion

The DSA represents a milestone in the EU's digital governance framework, aiming to bring transparency, accountability, and protection to the complex world of content moderation. However, despite its progressive objectives, this thesis has highlighted significant shortcomings of the DSA, particularly when assessed against Italy's constitutional principles and the safeguards for freedom of expression under Article 21. The two key areas of concern – the overly broad definition of illegal content and the uniform treatment of all users – demonstrate how the DSA could potentially threaten fundamental rights if not carefully calibrated.

First, the broad and vague definition of "illegal content" under the DSA raises critical issues of proportionality and judicial oversight. By grouping together everything from criminal offenses to minor civil violations, the DSA risks encouraging overblocking of content, stifling freedom of expression, and undermining democratic values. Italy's jurisprudence, with its high threshold for restricting speech, particularly in political contexts, serves as a stark contrast to the DSA's loose approach. The absence of clear guidelines for platforms and the reliance on automated content moderation systems further exacerbate these risks, as these systems are often ill-equipped to interpret the nuances of national legal frameworks or protect controversial but lawful speech.

Second, the DSA's failure to differentiate between users creates a significant risk to freedom of expression, especially for journalists and marginalized communities. Journalists, who enjoy heightened constitutional protections due to their role in democratic society, are treated as ordinary users under the DSA, exposing them to undue censorship. As seen in Italian legal frameworks, the press is essential for holding

governments and powerful actors accountable, and its work cannot be subjected to the same content moderation practices as non-journalistic content. The DSA's uniformity risks restricting critical journalistic activities, especially in politically sensitive reporting, where automated moderation might misinterpret unpopular yet crucial news coverage as harmful content. Similarly, the DSA’s approach overlooks the specific vulnerabilities of minority and marginalized groups, whose voices are often disproportionately targeted by content moderation systems. Automated moderation, prone to bias, may suppress the speech of these communities, reinforcing existing inequalities. Italian constitutional law, with its robust framework to protect against discrimination, underscores the need for more nuanced content moderation mechanisms that account for the distinct needs of vulnerable groups.

In conclusion, while the DSA marks a critical step towards modernizing content moderation in the digital age, it also brings to light essential challenges in safeguarding fundamental rights. Its broad definition of illegal content and failure to account for the diverse nature of users, especially journalists and marginalized communities, poses significant threats to freedom of expression. Italian constitutional protections, which emphasize proportionality, press freedom, and non-discrimination, highlight the need for more careful regulatory design. Moving forward, the DSA would benefit from clearer guidelines, tailored provisions for vulnerable users, and stronger judicial oversight to ensure that the regulation does not inadvertently undermine the very rights it seeks to protect.

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