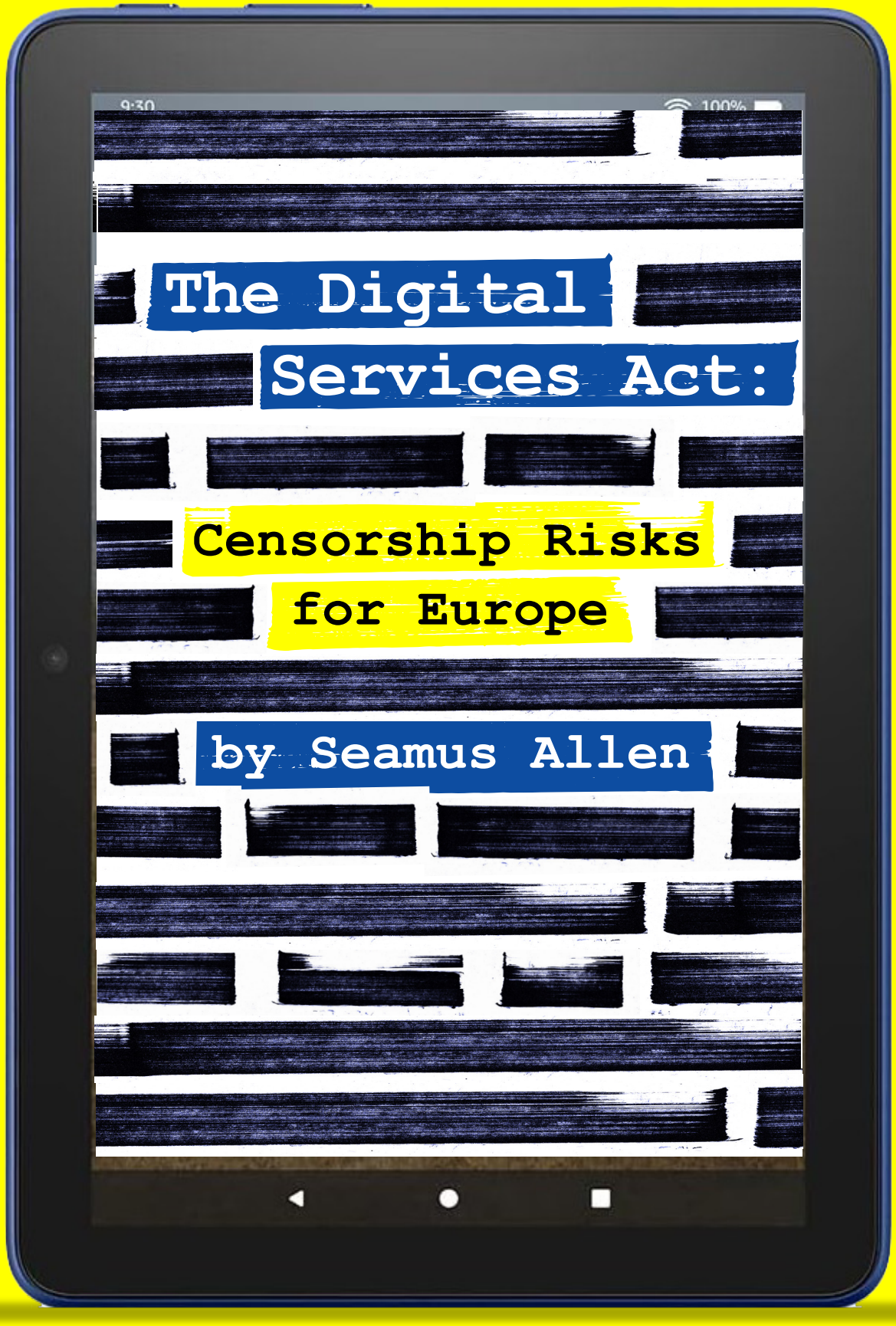

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Executive Summary

The Digital Services Act (DSA) began to fully apply in the European Union (EU) in February 2024. The much-heralded legislation seeks to help counter the spread of illegal and harmful online content, including disinformation. However, this paper argues that the DSA may incentivise the excessive removal of online content, including for content that is truthful, legal and non-harmful, and give rise to harmful censorship that was not intended by its creators. The DSA may also expand the role of powerful private companies and political authorities in shaping public discourse and determining what information citizens should and should not see. Content moderation under the DSA may also benefit groups that are powerful, persistent and representative of majority viewpoints more than less powerful groups or minority viewpoints. Ireland and its regulators, the Coimisiún na Meán, will have a disproportionate role in terms of DSA enforcement in Europe, as many of the largest online platform companies have their European headquarters in Ireland. Ireland may thus find itself at the heart of European controversies about DSA enforcement and freedom of speech across the EU.

This paper examines the following factors which may cause the DSA to lead to censorship and the excessive blocking of online content.

1. **Broad Speech Laws across Europe**. Many laws about permissible speech are broad, complex and lead to far-reaching consequences that were unintended by their creators. Right across Europe "broad speech laws" are being used to suppress legitimate debate and to stifle criticism. Certain features of the DSA may incentivise online platforms to take an even broader approach when applying such laws to online content, leading to excessive content removal.

2. **Content-removal focused mechanisms**. Some of the DSA's main mechanisms are primarily focused on the removal or blocking of online content, rather than the restoration of wrongly blocked content, thus putting more pressure on platforms to remove content than to restore it.

3. **Time pressures imposed by the DSA.** The DSA imposes time pressures which may incentivise platforms to over-remove content to avoid breaching DSA requirements, especially when dealing with broad speech laws such as those referred to above.

4. **The lack of protection for information access rights.** Although the DSA provides some protections for freedom of expression, there are no explicit protections for access to information in the DSA. This means that platforms may face more contestation under the DSA if they choose to keep contested content "up", which could incentive them to block or remove contested content.

5. **Insufficient protection against terms and conditions moderation.** The DSA provides insufficient protections against online platforms designing terms and conditions that may lead to censorship, and the DSA may inadvertently incentivise online platforms to expand such terms and conditions further.

6. **Far-reaching systemic risk mitigation provisions**. The DSA may also expand the role of powerful private companies and the European Commission in shaping public discourse by tasking them with deciding whether online information meets vague criteria – such as whether it may have "negative effects on civic discourse" – and mandating them to act to reduce the visibility and spread of such information. The DSA may provide insufficient accountability or constraints to prevent them from doing so in a manner that may align with their own political preferences or biases.

7. **The lack of safeguards against extreme laws.** There are few protections within the DSA to prevent it from applying to extreme laws, such as those that may threaten democracy or the fundamental rights of minority groups. The DSA may potentially benefit authoritarian governments in Europe, by legally forcing regulators and platform companies based in other EU Member States to help such a government to censor its own citizens.

This paper finally proposes some recommendations that can help to mitigate the above risks posed by the DSA, by ensuring that greater emphasis is placed on protecting content from wrongful removal and by ensuring that online platforms are more accountable. This paper ultimately argues that while the DSA poses major risks of causing online censorship and the excessive blocking of online content, it is possible to amend the DSA in ways that would significantly mitigate these risks while maintaining the DSA's benefits.

1. Introduction

The Digital Services Act (DSA) began to fully apply in the European Union (EU) in February 2024. This much-heralded legislation seeks to help counter the spread of illegal and harmful content online, including disinformation. The DSA could lead to major fines of up to 6% of global turnover for companies that fail to comply.[1] However, this paper argues that the DSA poses risks of incentivising the excessive removal of online content and may give rise to harmful censorship that was not intended by its creators. The DSA may also expand the role of powerful companies and political authorities in shaping online public discourse and determining what information citizens should and should not see.

This paper begins by illustrating the far-reaching scope of laws to which the DSA applies, including what this paper calls *broad speech* laws, for which the DSA's mechanisms may be poorly designed. This paper then examines features of the DSA that may incentivise online platforms to engage in the over-blocking or harmful censorship of online content. These features include:

(a) Content-removal focused mechanisms;

(b) the time pressures for content removal;

(c) the lack of explicit protection for information access rights;

(d) insufficient protection against terms and conditions moderation;

(e) far-reaching systemic risk mitigation obligations; and

(f) the lack of safeguards against extreme laws.

These features may incentivise platforms to remove content that may be legal, truthful and non-harmful. These features may also benefit groups that are powerful, persistent or reflective of popular opinion, more than less powerful groups or minority viewpoints. The DSA additionally risks bolstering would-be authoritarian governments in Europe, by legally forcing platform companies and regulators based in other EU Member States to assist such governments in censoring their own citizens. In these cases, the DSA may represent a threat to democracy and to fundamental rights.

Ireland will have a disproportionate role in terms of DSA enforcement, as it has with GDPR enforcement, because many of the largest online platform companies are headquartered in Ireland.[2] Ireland's regulator – Coimisiún na Meán – is tasked with regulating many of the largest online platform companies for their conduct under the DSA across Europe, although it shares this responsibility with the European Commission.[3] Ireland may thus find itself at the heart of pan-European controversies about the enforcement of the DSA and could find itself in the firing line of freedom of speech debates across Europe. This paper will finally propose some policy recommendations that could help to mitigate the risks outlined above while preserving the DSA's benefits.

2. The DSA and Broad Speech Laws

Many laws regarding illegal speech are explicit, clear and specific. These are often the types of laws that are envisaged in discussions about the DSA. However, the DSA applies to almost all laws in the Member States of the EU, in addition to European law.[4] Thus, the DSA applies to what may be called *broad speech laws* - laws which are broad in scope, complex, and potentially ambiguous. Such laws can often have unintended consequences and be interpreted widely enough to be invoked against an extremely wide range of public commentary. This can lead to prolonged legal cases, even if courts may eventually determine that such commentary was perfectly legal. The DSA generally makes little explicit distinction between cases where content is clearly and explicitly illegal, and cases where determining the legality of content may be complex, ambiguous and contentious. The frameworks imposed by the DSA are more appropriate for the first type of case than the second, as will be later shown throughout this paper. This paper will now provide some examples of broad speech laws with which the DSA may problematically interact.

2.1 SLAPPs and Defamation

In recent years, media freedom and human rights organisations have warned of a major upsurge in the use of SLAPPs (strategic lawsuits against public participation) by powerful actors - such as politicians, business figures and companies - against journalists and civil society throughout Europe "to stifle scrutiny and public debate."[5] Defamation law is most commonly used to initiate SLAPPs, but other laws, such as privacy law, may also be used.[6] In Ireland, a Dublin City University study found that more than one third of Irish journalists have been sued for defamation.[7] Several Irish politicians have sued reputable Irish media outlets, including *The Irish Times* and *RTÉ*, amongst others.[8] A coalition of media freedom groups, including Reporters Without Borders and the European Federation of Journalists, expressed "alarm" about what they deemed to be a "coordinated campaign against the media in Ireland" which was using the law to "intimidate and silence" journalists.[9] In the UK, Russian oligarchs and Russian linked-groups have used defamation law against the media, journalist and other stakeholders.[10] On other occasions, powerful companies in the UK used court orders to block reporting or force the removal of online information on subjects including a tax avoidance scandal[11] and toxic waste dumping.[12] In France, a woman was charged for insulting French President Emmanuel Macron on social media.[13] There have also been multiple defamation cases in Italy involving social media posts about prominent politicians, including Italian Prime Minister Giorgia Meloni.[14]

2.2 Hate Speech Law and Policies

Another category of law that can have a broader scope of application than initially intended is hate speech law, which is prominently mentioned in the DSA.[15] In the UK, hate speech law was invoked against black British citizens criticising white dominance[16]; a protestor who described scientology as a "dangerous cult"[17]; and against a social media poster commenting about alleged war crimes committed by the British Armed Forces in Afghanistan.[18] In France, hate speech law has been invoked against a Jewish academic for comments on antisemitism in the Middle East;[19] against an individual who referenced the Ustasha genocide;[20] and against a gay rights activist who accused an anti-gay marriage organisation of homophobia.[21] In Spain and Bulgaria, peaceful advocacy of independence amongst ethnic minorities has been suppressed on the grounds that such advocacy constitutes an incitement to hatred.[22] In Ireland, a women was arrested by appointment for social media posts which were deemed an incitement to hatred against the Society of Saint Pius X Resistance, [23] a religious organisation whose sermons have blamed Jews for COVID-19.[24]

In France on several occasions those advocating for economic boycotts against Israel because of its occupation of Palestine have been accused of inciting hatred.[25] On one such occasion in 2015, activists were convicted by French courts of criminal incitement to hatred, but the European Court of Human Rights ruled against French courts in 2020.[26] In Germany, criticism of Israel is frequently treated as incitement to hatred, including critical comments that are relatively mainstream and deemed non-hateful in other countries, such as Ireland.[27]

Major online platform companies often adopt hate speech policies that go far beyond what is legally required, which has led to the removal of content that is critical of countries for human rights abuses. Examples including the removal of posts criticising China (for its policies towards minorities in Xinjiang)[28]; Israel (for its occupation and policies in Palestine)[29]; Russia (because of the invasion of Ukraine)[30]; and Azerbaijan (for aggression towards Armenians)[31].

2.3 Removal of Legal Material

There is a wide variety of other broad speech laws. Many European countries continue to enforce blasphemy laws.[32] There has also been a recent trend in Europe towards criminalising the denial of genocide and war crimes.[33] This may lead to online platforms attempting to decide which war crimes are real and censoring those who disagree. The examples provided above are not necessarily cases of illegal speech; however, in the cases above, the law is broad enough that an extraordinarily wide range of speech could *potentially* be challenged on the grounds that it plausibly could breach such laws. The DSA obliges online platform companies to moderate such cases, even though the DSA's framework may be poorly suited to these cases. Furthermore, online platforms often rely heavily on automated algorithms, rather than human beings, to decide whether to remove online content.[34] This can lead to mistakes that humans would be unlikely to make.[35] The DSA framework may incentivise online platforms to broadly interpret such laws and to incline towards blocking content that is contested under these laws, even if this leads to the frequent blocking of legal material. This framework will now be examined in the following sections.

3. Content-Removal Focused Mechanisms

First, some of the main mechanisms in the DSA are more focused on content removal than on restoring content that has been wrongly removed. For example, the "notice and action" mechanism and the "trusted flaggers" system are exclusively about removing content. The "notice and action" mechanism enables platform users to report content that they believe is illegal, or potentially, a breach of a platform's terms and conditions.[36] Ensuring robust processes for a "notice and action" mechanism that leads to the expeditious removal of illegal content is a significant focus of the DSA.

"Trusted flagger" is a status that can be awarded by regulators to a wide range of entities, which could include state bodies, NGOs, private bodies, organisations opposing racism, trade unions, and industry associations amongst others.[37] Notices submitted by trusted flaggers about content that should be removed must be treated with "priority"[38] and should generally be treated "faster"[39] than other notices. The DSA thus enables a diverse range of actors to play a privileged role in seeking the removal of online content.[40]

Given the privileged status of trusted flaggers under the DSA, platforms may be more likely to remove content when it is reported by trusted flaggers than by other users. Trusted flaggers are likely to include entities with particular political leanings, and some may more frequently flag content that contradicts their political stance than content that does not. However, there is no counterpart to trusted flaggers in the DSA, to examine content that has been removed or blocked, and assess whether this content really was illegal or a breach of a platform's terms and conditions. This is a significant imbalance in the DSA which means that there is more emphasis on ensuring the removal of content than on restoring content that has been wrongly removed.

4. Time Pressures for Content Removal

The DSA imposes a certain amount of time pressure on online platforms to remove illegal material. Throughout the DSA it is stated that platforms should act "expeditiously", in a "timely manner", and "without undue delay" in dealing with notices about illegal material.[41] Transparency reports published by online platforms must record the "median time needed" by platforms before taking action.[42] Reports from trusted flaggers must be "given priority" and treated "faster".[43] Very large online platforms (VLOPs) in particular have to pay attention to the "speed" of their decisions.[44] The DSA also states that VLOPs should "consider" the "benchmark" of removing illegal hate speech within 24 hours, as is set by the Code of conduct on countering illegal hate speech.[45] While this code is voluntary, the DSA also states that failure to ensure the "application" of these voluntary codes "without proper explanations" could be taken into account when considering whether the DSA has been infringed.[46] These codes are thus not fully voluntary. Yet, although the DSA imposes time pressure on platforms to act, many cases involving speech laws, such as those outlined earlier, require extremely complex analysis and can last for years in courts.[47] The DSA arguably does not provide enough explicit differentiation between cases of explicitly, clearly illegal content and cases where determining legality is complex. The DSA also does not explicitly penalise platforms for refusing to allocate sufficient time to consider cases where adequately determining the legality of material may be a complex and time-consuming process. In contrast, platforms may fear to appear as if they are slow at dealing with illegal content, and thus act with undue speed even when dealing with highly complex cases. Although platforms can be penalised under the DSA if they consistently wrongly remove material, acting with excessive speed to remove content is not *itself* explicitly penalised by the DSA; acting with insufficient speed to remove content is. Platforms thus have an incentive to err on the side of removing material in the first instance in complex cases. This is exacerbated by the fact that platforms are likely to face greater contestation under the DSA if they fail to remove content than if they wrongly remove content - as is explained next.

5. Lack of Protection for Information Access Rights

The DSA lacks explicit protection for the right to access information. The DSA generally only enables those who have posted content to contest platform decisions to remove it, as a means to protect "freedom of expression." The DSA generally does not enable other users to contest the removal or blocking of content that they themselves did not post (although an individual whose post has been removed can ask a representative body to act on their behalf).[48] This may give rise to a contestation asymmetry, meaning that the time and resources that platforms spend engaging with user challenges will be greater when platforms leave "up" disputed content instead of blocking it. This is because, first, if platforms receive notices against specific content and do not act against it, there is no limit on the number of users and organisations who can subsequently submit notices against the same content. In contrast, when platforms act against

content, it is generally only the user who posted the content that can contest the platform's decision under the DSA.[49] If the user does not choose to take any action, it is unlikely that the platform will be deemed to be breaching the DSA, even for the wrongful removal of content.

Secondly, if a platform decides *not* to act against content that it has received notices against, the users who submitted these notices can subsequently contest against the platform's decision using the internal complaints-handling system or an out-of-court dispute settlement body.[50] The platforms' internal complaints-handling system could have to repeatedly engage in contestation processes over the same piece of content. Coordinated actions could be taken against political, contentious or unpopular content by powerful or persistent actors.

Individuals may not always have the willingness, time and knowledge to effectively contest the removal of their posts, and only a certain percentage of individuals may be likely to do so.[51] In contrast, for high-visibility, contentious content, more users can continue to report the content and to subsequently contest the platform's decision if the platform does not remove it. Thus, platforms are generally likely to face more contestation under the DSA if they keep up contested content, incentivising them to err on the side of removing this content instead.

This situation could also give rise to geo-blocking. In many cases, platform companies based in one country (e.g. Ireland or Spain) might not know whether content posted in their country could be illegal in other EU Member States, whose languages and laws their staff do not know (e.g. such as Slovenia or Latvia). Given the diverse range of complex speech laws across Europe outlined earlier, partisan platform users or campaign groups could cite contentiously broad interpretations of their national laws to contest content under the DSA that was posted in other EU Member States. Platform companies may be incentivised to block access to content for countries where the content is contested, even if they do not know whether the content is actually illegal in that country. The user who posted the geo-blocked content could contest this, but in many cases a user in one country may have little inclination to contest the visibility of their post for a foreign country and they would be unable to do so effectively if they do not know that country's languages or laws. Under the DSA, citizens living in the geo-blocked country would not be able to contest the blocking of access to content for their country. Thus, although the DSA was partly intended to prevent the fragmentation of the single market, in some cases it could increase the geographic fragmentation of online platforms. Similarly, the DSA may empower Europeans who wish to block access to content that is posted outside of the EU of which they disapprove, without providing mechanisms by which other EU citizens could contest the blocking of such content.

6. Insufficient Protections Against Terms and Conditions Moderation

Although the DSA purportedly protects freedom of expression, in reality the DSA mainly protects users from platforms mistakenly interpreting a law or mistakenly applying their own terms and conditions. The DSA seems to provide relatively little protection to users against platforms that deliberately write terms and conditions that enable them to engage in censorship. There also seems to be a certain level of ambiguity regarding the extent to which platforms should be obliged to consider freedom of expression in designing their terms and conditions in the first place. This is of great importance, as 99.8% of actions taken against content by the largest platforms are officially taken on the basis of the platform's terms and conditions.[52]

Article 14 is the article of the DSA that relates to the terms and conditions of platforms. It states that: "Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing" terms and conditions, with due regard to fundamental rights including "the freedom of expression."[53] It is not clear, however, if the reference to applying and enforcing terms and conditions includes *designing* terms and conditions. In contrast, recital 47 of the DSA states that "When designing, applying and enforcing" their terms and conditions "providers of intermediary services" should take into account "fundamental rights as enshrined in the Charter."[54] The subsequent sentence states that: "For example, providers of very large online platforms should in particular pay due regard to freedom of expression and of information."[55]

It is left unclear to what extent non-very large online platforms (non-VLOPs) must respect freedom of expression when *designing* their terms and conditions. (VLOPs are platforms with at least 45 million users.) Arguably, there are good reasons for which many small platforms should *not* have to respect freedom of expression – such as specialist online platforms dedicated to specific interests (e.g. hobbies such as hiking, sports, knitting) and which may explicitly ban discussion of other topics (e.g. such as politics.) However, if the DSA *never* obliges non-VLOP platforms to respect

freedom of expression in designing their terms and conditions, then the DSA, on most platforms, does not actually provide protection for freedom of expression. It would merely provide protection against platforms making mistakes in interpreting their own terms and conditions – and not against platforms designing their terms and conditions to enable biased content removal or censorship. It should be noted that non-VLOP platforms can include large platforms with millions of users.

Even for VLOPs, the DSA does not indicate what constitutes a breach of a VLOP's obligations to respect freedom of expression in their terms and conditions. Even if it did, the DSA does not provide platform users with protections against terms and conditions that may violate such rules. The DSA enables platform users to contest a platform's decision to remove their post if the user's post did not actually breach the terms and conditions of the platform. However, the DSA does not enable users to contest the platform's terms and conditions themselves, in cases where the user's post *does* breach a platform's terms and conditions, but the user believes that the platform's terms and conditions themselves severely infringe freedom of expression or information. This may also give rise to a loophole: even if users successfully argue that their posts do not breach the platform's terms and conditions, the DSA does not seem to prevent a platform from simply rewriting its terms and conditions to subsequently remove the same posts.

This could enable platforms to set terms and conditions that may reflect their political biases. Crucially, platforms could also seek to avoid dealing with the complex speech law cases and prolonged contestation processes outlined earlier in this paper, by expanding their terms and conditions to enable the blocking of the relevant content.

In some cases, platforms could opt for what this paper will call *terms and conditions maximalism* and *adjacent censorship* – the creation of terms and conditions sufficiently broad so that platforms may frequently remove online material across the entire EU even when the material is only illegal in a minority of EU Member States. This would help companies to avoid the geographic fragmentation of their online platforms and the need to hire specialist staff in each jurisdiction.

Thus, the DSA could thus lead to the expansion of private companies' roles in shaping online public discourse by incentivising the broadening of their terms and conditions without providing sufficiently improved accountability. Other features of the DSA that may further contribute to this are considered next.

7. Far-reaching Systemic Risk Mitigation Provisions

The DSA's special obligations placed on very large online platforms (VLOPs) and very large online search engines (VLOSEs) (those which have more than 45 million users) to address systemic risks[56] may also increase the role of powerful, private companies and political actors in shaping public discourse. These systemic risk provisions oblige companies to address: i. the dissemination of illegal content; ii. threats to fundamental rights (listed as including the right to human dignity, privacy, freedom of expression and non-discrimination among others); iii. social risks such as those in relation to public health and physical or psychological well-being; and most broadly: iv. "any actual or foreseeable negative effects on civic discourse and electoral processes, and public security."[57] In practice, iv. has been interpreted to mean "negative effects on civic discourse" regardless of whether it relates to electoral processes.[58] The DSA also specifically states that VLOPs and VLOSEs "should also focus on the information which is not illegal but contributes to the systemic risks" including "misleading or deceptive content, including disinformation."[59]

The DSA requires VLOPs and VLOSEs to implement mitigation measures to address these systemic risks, and states that these "may include" measures such as adapting the functioning of their services, "adapting their terms and conditions", adapting their content moderation processes, and "adapting their algorithmic systems, including their recommender systems."[60]

Determining what information meets the above criteria, such as what constitutes "negative effects on civic discourse" is potentially highly subjective. Under the DSA, powerful private companies will be legally permitted – indeed, legally mandated – to decide what information might have "negative effects on civic discourse" and to supress the spread and visibility of such information. The DSA specifically prompts companies to consider expanding their terms and conditions to remove or block such information, further accentuating the lack of restrictions on terms and conditions outlined in the previous section. The DSA also prompts VLOPs and VLOSEs to consider adjusting their algorithmic and recommender systems to reduce the visibility and the spread of such information. Transparency on how VLOPs and VLOSEs alter their recommender and algorithmic systems to affect the visibility of content may be more difficult to achieve than in cases where content is actually removed.[61]

This is concerning, as many of these companies already have great influence over public discourse which they have been accused of misusing. For example, many of these companies have already been accused of politically-biased content moderation systems;[62] of deliberately amplifying certain political viewpoints while disfavouring others;[63] of suspending or banning their critics from their platforms;[64] of deliberately disseminating false or misleading information about corporate rivals[65] or in relation to public policy issues;[66] or of using their own platforms to campaign against specific regulations they oppose.[67] Even when platforms seem to act in good faith to remove disinformation, there are many examples of them making mistakes in doing so.[68]

These powerful companies are now mandated by the DSA to interfere with public discourse – presenting risks that they may do so under the influence of their own political preferences or biases. Although the European Commission will enforce the above DSA provisions, the Commission is also an increasingly politicised body. To avoid DSA fines, VLOPs and VLOSEs may demote information that the European Commission deems to have "negative effects on civic discourse" or deems to constitute disinformation, even in cases where the Commission's viewpoint may be highly controversial. Indeed, it has already become clear that the Commission can use the DSA to pressure VLOPs and VLOSEs to apply risk mitigation measures in relation to subjects upon which the Commission's own political views are highly controversial[69], and upon which the Commission itself may have a poor track record of discerning false information.[70] The Commission has already been criticised by human rights and freedom of expression organisations for doing the above, in specific cases where fears have arisen that legitimate content could be censored,[71] or for doing so in a politicised and arbitrary manner that can seem unrelated to evidence of risk.[72]

Powerful private companies and political actors are thus empowered by the DSA to take measures to reduce the visibility and spread of information which they deem to have "negative effects on civic discourse". Yet there are no mechanisms in the DSA to allow citizens and other stakeholders to contest such measures if they wrongly reduce the visibility or spread of information that others may consider a truthful and positive contribution to public discourse. The DSA may thus lead to the expansion of the role of powerful companies and political actors in shaping online public discourse without providing accompanying constraints on their power.

8. Lack of Safeguards Against Extreme Laws: Threats to Democracy and Fundamental Rights

The DSA uses an extremely broad definition of illegal content that effectively applies to all the laws of EU Member States in addition to EU law. Hypothetically an exemption to this could arise due to wording in the DSA that states it applies for all national law "which is in compliance with Union law."[73] However, there is no framework, procedures or steps outlined in the DSA about what platforms or regulators can do if they believe a national law may not be in compliance with Union law, or how they can even assess this to be the case.

The DSA could thus apply to what might be considered "extreme laws", such as laws that threaten democracy or fundamental rights. Arguably such laws already exist in Europe. In Hungary, government critics have allegedly been prosecuted for their opinions by the government, for "insulting the dignity of the Hungarian nation" and under Hungary's "fake news" law, including for online social media posts.[74] Hungary's law against LGBT propaganda has gained particular notoriety.[75] In Poland, critics of the President have faced criminal charges for insulting the President in social media posts.[76] Human rights groups and historians accuse Poland's Holocaust speech law of criminalising truthful statements about Polish antisemitism and Polish collaborationism during the Holocaust.[77] Greece's fake news law prompted alarm from media and human rights groups, especially amidst extreme deterioration in media freedom in that country.[78] "In Greece, you now risk jail for speaking out on important issues of public interest, if the government claims it's false," said Eva Cossé, Greece researcher at Human Rights Watch.[79] The DSA can also apply to information relating to illegal activities, which could include peaceful protests. This could apply to scenarios akin to the Spanish government's decision to block over 140 websites for disseminating information about the Catalan independence referendum.[80]

While laws such as those above already existed, the DSA will now legally oblige online platform companies and regulators in other EU Member States to assist would-be-authoritarian governments in censoring their own citizens. This is particularly significant given that in several European countries experiencing democratic backsliding, media freedom has been undermined, meaning online platforms are often one of the last spaces where citizens can effectively challenge their governments. This has been emphasised by dissidents and opposition figures in Hungary who are now warning that Hungary's DSA regulators may bolster state propaganda.[81]

This aspect of the DSA may pose especially severe dilemmas for regulators in Ireland. If some online platforms refrain from censoring based on extreme laws, the DSA seems to oblige regulators in Ireland to take action against them – indeed, if regulators fail to do so, they themselves could be breaching the DSA. Even if regulators are known to have reservations about a particularly controversial law, platform companies are unlikely to take risks of breaching the DSA in the hopes that regulators might arbitrarily turn a blind eye. The DSA could thus strengthen the hand of authoritarian governments seeking to dismantle democracy or suppress minority rights in Europe, by legally obliging regulators and platform companies in other EU Member States to assist them in censoring their citizens.

9. Recommendations

Based on the examination above, this paper proposes some recommendations which could help to mitigate the censorship risks posed by the DSA. Some of these recommendations would require legislative amendment of the DSA itself; but others could be partially adopted on a voluntary basis by platforms and other stakeholders. These recommendations could include the introduction of:

1. **Trusted Reviewers to Assess Content Moderation:** *These entities would assess whether the content that has been removed or blocked by online platforms was correctly removed or blocked.* These trusted reviewers should serve as counterparts to the trusted flaggers, with the same status, and be subjected to a similar vetting process, but with the role of assessing whether content was wrongly removed or blocked by online platforms.

2. **Due Diligence Protections and Obligations for Complex Moderation Cases***: The DSA should provide explicit protections and obligations for online platforms for complex content moderation cases.* As was shown earlier, determining the legality of content may often be complex and result in years-long court cases.[82] An amended DSA could specify that:

   - Expeditious action against content is not necessarily expected in complex cases;
   - When platforms are evaluated for their speed under the DSA, complex cases should be counted separately from others;
   - Platforms will not be penalised for making the "wrong" decision, and will be judged for the adequacy of a good-faith decision-making process;
   - Platforms should expect penalisation if they allocate insufficient time or resources to the consideration of complex cases.

   These changes should neither make the DSA stricter nor more lenient and should balance the increased possibility of fines in some cases with the greater protection against platforms being fined for making good-faith mistakes in others.

3. **Protections for Information Access Rights:** *Platform users should be able to contest the wrongful blocking or removal of content, even if they did not post this content.*

   At a minimum, this should apply to (i) users who have previously interacted with the content in question and (ii) users who attempt to access the content via a link. These users should be able to view a "statement of reason" similar to that provided to the poster of the content, about the reason for the post's removal. An amended DSA could enable the viewing of an archived version of the removed material for those who are contesting the blocking or removal of that content. This would ensure that these users can subsequently contest effectively (e.g. by citing the post's exact language if needed.)

4. **Contestation Rights against Terms and Conditions**. *Users of VLOPs and VLOSEs should have the ability to contest terms and conditions which severely undermine freedom of expression or information.* An amended version of the DSA could make such a contestation right mandatory while introducing safeguards to limit excessive or frivolous contestation alongside clearer obligations for VLOPs and VLOSEs regarding their obligations to protect freedom of expression and information. VLOPs and VLOSEs should be obliged to report about contestation against their terms and conditions in their transparency reports.

5. **Reforms to the Systemic Risk Provisions**. *Systemic risk provisions should target clearly defined risks and should make VLOPs, VLOSEs and the European Commission more accountable.* Targeting specific and precisely defined risks rather than open-ended vaguely defined risks would prevent private companies or political actors from gaining broad discretionary powers to demote content of which they disapprove. The DSA should also ensure that the alteration of services, including algorithmic and recommender systems, should be transparent and contestable by citizens if such alterations may be politically motivated or may have politically biased consequences.

6. **Emergency Break Procedure:** *The DSA should provide an "emergency break procedure" that can be used by regulators in exceptional cases to prevent the DSA from applying to specific laws that are anti-democratic or a severe threat to fundamental rights.* This would exempt platforms from applying the DSA to the specified law, so that platform companies and regulators in other EU Member States would not be forced to assist a European government that is undermining democracy and censoring its own citizens. Platform companies, platform users or other stakeholders should be able to appeal to regulators in cases where they believe a law falls into this category. Regulators should only be able to activate this procedure under strict conditions. For example, this could include conditions that this procedure is only applicable to laws which prohibit content that is legal in a majority of EU Member States, and that the regulator provides evidence that the law represents a severe risk to democracy or fundamental rights. National regulators could be empowered to provisionally issue such emergency breaks pending a decision from the Board of European Digital Services Coordinators (which consists of all the regulators who enforce the DSA across the EU.)

10. Conclusion

This paper demonstrates how the DSA may lead to the excessive removal of online content and censorship. The DSA may also expand the role of powerful private companies and political authorities in shaping online public discourse and determining what information citizens should and should not see. The paper began by considering the far-reaching broad speech laws to which the DSA can apply and with which it may problematically interact. A number of features of the DSA may incentivise platforms to err on the side of removing or blocking content. These features include the content-removal focused mechanisms of the DSA; the time pressures for content removal; the lack of protection for information access rights; and the lack of restraints on platform terms and conditions. The DSA obligations in relation to systemic risk may also empower major companies and political actors to shape and influence public discourse without providing sufficient constraints on their power. Furthermore, the DSA may incentivise platforms to moderate in ways that are more beneficial for groups that are powerful, persistent or representative of popular opinion, rather than less powerful groups or minority viewpoints. The lack of safeguards in the DSA against extreme laws also means that there is a risk that the DSA will strengthen the hand of authoritarian governments in Europe seeking to dismantle democracy or threaten fundamental rights, by obliging platform companies and regulators in other EU Member States to assist such a government in censoring its own citizens. The implications of all the above may be especially significant for Ireland, given Ireland's disproportionate role in enforcing the DSA. Ireland's regulator, Coimisiún na Meán, may face dilemmas when it comes to regulating platform companies for compliance with laws elsewhere in Europe that may be at odds with values or prevailing viewpoints in Ireland. This paper sets out several policy recommendations that could significantly reduce the above risks, by providing more measures to protect content from wrongful removal and to ensure that online platforms are more accountable. The DSA poses significant risks of online censorship, but there are several ways that these risks can be mitigated while maintaining the DSA's benefits.

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