



Digital Services Act: a mixed bag

Assessment

April 2021

On the 15th of December 2020, the European Commission published an initial proposal for a Regulation entitled the “Digital Services Act”. COFACE-Families Europe has been following the development of this piece of legislation from the start, and responded to the initial consultation launched by the Commission.

As it stands, the current Digital Services Act proposal includes some notable progress, especially in the areas of advertising and online safety, but it also fails at addressing many issues such as pushing for easier data portability or empowering users of digital services platforms.

This short assessment first assessed to what extent COFACE proposals are reflected in the DSA, and secondly highlights articles which are important from a civil society perspective.

Let us break down the analysis of the proposal in two parts: first, examine COFACE-Families Europe's proposals and explore whether they are reflected in the Commission's proposal, and second, go through certain key articles which are of interest from the perspective of civil society.

I. COFACE proposals reflected in the DSA

COFACE-Families Europe's proposals:

Incentivize a diversification of business models (subscription based, micro-payments,...) besides those based on advertising in order to address the perverse effects linked with relying solely on advertising (the incentive of making the content addictive, minimal moderation, scams linked to fraudulent ads...).

>>As it stands, the proposal only looks at advertising transparency: making sure users understand how it works, why they are shown a certain ad, but nothing about diversifying away from ad-based business models.

Implement community based moderation and more user participation on top of professional moderation. One of the reasons for trauma online is the feeling of powerlessness, and having to wait for a "professional" to review any reporting. Community based moderation could allow users to voluntarily opt for reviewing reports, thus serving as a "first layer" safety net which could be much more responsive than professional moderation, which would only handle very serious reporting cases (child abuse material, gory violence) and review cases where community based moderation fails to solve the problem.

>>The proposal includes the concept of "trusted flaggers" and create a new authority: "Digital Services Coordinators". This remains a very "top down" approach, with very little power given to users. It goes

against the right to participation which is essential for a democratic digital citizenship.

A more balanced approach towards copyright and protecting content creators

The proposal doesn't change any rules with regards to the use of copyrighted material on digital services platforms. This is very disappointing since copyright has disproportionately affected content creators. For example, YouTube content creators who use only a few seconds of copyrighted music in a 30-minute original video see their entire revenue confiscated. The proliferation of Memes on the Internet also calls into question the limits of copyright vs. content creators.

Crack down on online scams such as certain advertisements on social media.

For instance, "flash" ads, or companies that create a fake website and advertising account, only to disappear within a few weeks.

>>The Directive proposal includes measures such as traceability of traders, but it is not certain that this will be able to stop the advertisement of scams and fake trader websites. One alternative would have been to force any new trader to sell its first 100 orders via payments systems which allow for an escrow service, and only release the funds if all customers have successfully received their merchandise. This would also unlock other features for increased publicity or advertisement on social media platforms.

Open source algorithms and allow users to choose third party algorithms to sort content.

>>The proposal only includes a right to more transparency and information about the algorithms and sorting mechanisms used on a digital service platform. There is also the possibility for users to slightly tweak the algorithm (for instance, remove certain assumptions that the algorithm has about a users' preferences) but not a possibility of switching to different third-party sorting algorithms.

Take a lot of precaution in raising the clause of “crisis and systemic threats to society”, which can only be invoked by governments.

This clause could give governments special powers such as censorship of online content or the possibility to violate certain online rights in the name of a very loosely defined “crisis and systemic threat to society”.

>>The proposal kept the clause as is, so it leaves the door open for abuse by governments. There is no agreed upon definition of what constitutes a “crisis and systemic threat to society”. For instance, in the case of a terrorist attack, how significant should the attack be? Would a knife attack suffice? Or does it have to be a bomb? In any case, the possibility for any government to use this clause should be greatly restricted and limited, as some democratic governments have abused their powers in violation of privacy, democracy and human rights:

>>Not only should the use of such powerful clauses be subject to a proper democratic vote by national parliaments, but the use of national referendums should also be considered. For instance, in the case of the current coronavirus pandemic, not a **single** European country has bothered asking citizens whether they approved the very drastic measures imposed by the governments.

Provide indicators for users to be informed about the platforms they use such as statistics about the number of complaints relative to the number of active users, the proportion of advertising to regular content, the “real” price they pay or the evolution of user complaints and flagging of content.

>>The proposal only includes provisions for sharing data about complaints and other relevant data for auditing purposes (making sure that the digital service providers are compliant with the DSA) to governments and chosen academics, and include the need for publishing independent audits and risk assessments, but not communicate directly this information to users.

Focus on supporting transparent and independent media rather than focus on censorship of “fake news” and establishing a “Ministry of Truth” which decides what is “true” and what is “false”.

>>The proposal clearly goes in the direction of censorship, even if it underlines the need for balancing the freedom of expression with its other policy objectives such as tackling “fake news”. The unfortunate reality is that most media are less and less “independent”, which doesn’t bode well for their neutrality. If they don’t pro-actively peddle “fake news”, they can simply ignore certain events or present information in a misleading way.

Include stronger measures for data portability and interoperability between services to allow users to easily switch between platforms.

>>The proposal doesn’t address this at all.

Consider the impact of the developments of decentralized digital service providers and platforms.

>>The proposal doesn’t address this at all.

II. Articles of interest from civil society perspective

Noteworthy articles and provisions in the proposal:

Article 2, Definitions (f)

>>The way intermediary services are defined is bound to evolve, especially in light of blockchain technology, decentralized hosting services and possibly the increased use of mesh networks and multi-cast broadcasting technology.

*Article 10, Points of contact, Article 32
Compliance officers and Article 41 Powers
of Digital Services Coordinators*

>>COFACE-Families Europe welcomes this provision as it will make it easier to engage with digital service providers. However, all of these measures are very much “top down”, putting governments and public authorities at the center of the enforcement of regulation, leaving users powerless. COFACE-Families Europe would have preferred that the legislator considers requiring online platforms to set up online governance bodies where the users of the platform would have a direct power to vote and influence how the platform is managed, what rules they should abide by, and other co-decision processes relevant to keeping users safe. Users should have some way of organizing and collectively raising issues, problems and grievances with the platform, voting on potential solutions, and monitor how the platform responded to their collective requests. If the European Union is serious about enhancing Digital Citizenship, then this is the only way to go about it. Otherwise, users will remain digital **subjects** (as in a Kingdom) rather than digital **citizens**. The right to participation and especially, participate in deciding the rules which one will abide by, is a cornerstone of democracy.

*Article 13 Transparency reporting
obligations for providers of intermediary
services and Article 23 Transparency
reporting obligations for providers of online
platforms*

>>COFACE-Families Europe welcomes this provision as information about content moderation, number of orders received from Member States and other such data is invaluable to monitor, across several years, whether a digital service provider has improved its handling of illegal content, and may be an important factor for users when they choose their digital service provider.

*Article 14 Notice and action mechanisms
and Article 15 Statement of reasons*

>>COFACE-Families Europe supports these two articles, as a way to harmonize the reporting of illegal content and also, properly inform a user about a decision to remove a certain content including the possible redress mechanisms in case the user wants to oppose the decision.

*Article 17 Internal complaint-handling
system and Article 18 Out-of-court dispute
settlement*

>>COFACE-Families Europe welcomes these provisions as it is essential for users to have access to meaningful recourse mechanisms in case of censorship or in case their account has been terminated by an online platform.

Article 19 Trusted flaggers

>>While this provision is a step in the right direction, it does not go far enough. Trusted flaggers are an indirect way to give more power to users via select civil society organizations which can flag content on their behalf. Shifting towards some form of community based moderation would be the next logical step. Also, it is worth noting that flagging content is a resource and time intensive undertaking. Without proper (financial) support, most organizations will not be able to harness the full potential of this status.

Article 22 Traceability of traders

>>This is a step in the right direction, in preventing scams and fraud on online platforms. However, this issue will be much harder to tackle than just this requirement. Anyone can advertise or sponsor any type of post on online platforms. Which means that anyone can easily advertise a “general” non sales related post which redirects to a fraudulent website where they pretend to sell goods/services with no need to abide by the requirements of this article. Even if

online platforms check where links of advertisements lead to, it's also rather easy to do a "bait and switch": once the advertisement is approved, change the website's content. One additional requirement would be for consumers to know when an advertiser has opened his/her account. Typically, scams and frauds frequently open/close accounts. A business which has been operating from the same account for a certain period of time (more than a year) can be deemed more trustworthy than one created in the last weeks. As stated above, there needs to be some form of warning for consumers of recently created accounts promoting goods/services, and the set-up of an escrow service for the first sales made for new businesses.

Article 24 Online advertising transparency

>>COFACE-Families Europe fully supports this provision. Transparency about advertisement is key. However, consumers should also have access to additional information such as the proportion of advertisement to content and how that has evolved across time, to be able to assess just how much advertisements there are.

Article 26 Risk assessment, Article 27 Mitigation of risks and Article 28 Independent audit

>>While there might be some advantages to these measures, it could be interpreted as a way for the European Union to tax, indirectly, large online platforms, as these three articles will force online platforms to hire experts in the DSA regulation and spend millions for independent audits by firms specialized in the DSA. Rather than more paper pushing, it might have been wiser, as stated above, to grant more power to the users, and devise novel governance rules where users have a direct voice.

Article 29 Recommender systems

>>COFACE-Families Europe fully supports more transparency as regards the functioning of the algorithms responsible for sorting user generated content. However, the DSA should have gone further and allowed users to tweak more profoundly the recommender system. For instance, the DSA should require all online platforms to provide a "neutral" recommender system which sorts content based on the date (more recent to oldest), or other simple parameters. The DSA should also require all online platforms to open up their recommender system to third-party algorithms, to allow users to truly benefit from a customization of the information presented to them.

Article 34 Standards

>>COFACE-Families Europe would have rather seen a requirement for standardizing data portability data structures in order to facilitate moving data between online service providers.

Article 35 Codes of conduct and Article 36 Codes of conduct for online advertising

>>COFACE-Families Europe wishes to stress that codes of conduct should be followed up with legal backstops and clear consequences for online platforms violating their codes of conduct. If a code of conduct is successfully implemented and enforced, and has positive effects, it should be converted into a law which legally binds online platforms, preventing them from backpedalling on their promises.

Article 37 Crisis protocols

>>As stated above, COFACE-Families Europe find that this article could be abused.

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