

Policy Brief

May 2021

EU Commission consultation - Digital Services Act (DSA)

Towards a new understanding of “social” media that can protect EU citizens and serve European democracies

About CEP

The Counter Extremism Project (CEP) is an international, nonprofit policy organization that has been engaged in efforts to effectively regulate social media and video sharing companies since 2015. Our focus lies on extremist ideologies and on illegal and terrorist content online. CEP advisors have been working with EU institutions and EU Member States for the past several years on some of the key issues the DSA aims to regulate.

The complete CEP policy paper on the EU DSA draft can be accessed here:

<https://bit.ly/2SuoTsH>

- The **business model** of most very large social media and video sharing platforms (gatekeepers), which is based on extracting and monetizing as much data from their users by manipulating them to spend as much time as possible on their platforms, might currently be creating societies that are **outraged, polarized and misinformed**. Those **harmful effects are systemic and by design** and cannot be characterized as unintended consequences of an otherwise healthy and well-functioning business model. Margrethe Vestager, Executive Vice President of the European Commission for A Europe Fit for the Digital Age, has called very large tech companies **threats to democracy** and anticompetitive.
- The draft **Digital Services Act (DSA)** is a welcomed and ambitious piece of legislation that aims “to create a safer digital space in which the fundamental rights of all users of digital services are protected”. Unfortunately, despite introducing some promising new elements like increased transparency requirements and external audits, in its current form the draft will most likely **fall short of its main objective**.
- The draft DSA is based on a set of **misleading narratives** about the role, function and business models of so-called gatekeeper platforms that do not seem to adequately reflect their actual functionality and commercial purpose. The CEP paper therefore addresses those **systemic misunderstandings** and provide an **alternative narrative** that might help to build the internet and intermediary services the EU is actually aiming for.
- The **proposed limited liability regime** of the DSA of 2020, which is the foundation of the current dominance of gatekeepers, is based on a 62-year-old US court decision which stated that a newsstand owner, who was arrested in 1956 for selling a book with “indecent” content, cannot be held liable for the content of books he was selling, unless he knew (or should have known) about their illegal content. This **special privilege serves multi-billion-dollar big tech companies until today** and is currently being **challenged in the United States**, but not in the DSA draft.
- It is particularly relevant to highlight that **the limited liability regime** of the existing EU e-Commerce directive and the current draft of the DSA actually **allows for a proactive**

moderation of user-generated content by the companies. This is sometimes called the Good Samaritan clause. It maintains the limits of their liability for the remaining illegal content on their platform if they proactively moderate content on a voluntary basis. However, the **limited liability regimes in the EU regulations did not, and still do not, provide any positive or negative incentives** for the companies to invest in effective proactive content moderation.

- From a purely **business perspective**, it is reasonable for a for-profit company to ask **why they should allocate elite and expensive data engineers to build effective content moderation systems**, if the same engineers instead could grow the revenue side of the business model. Also, it appears to be much less expensive for the companies to hire more **public policy managers who “handle” upset and concerned policy makers** and civil society organizations criticizing the individual and societal harm created by the constant and massive availability of illegal and harmful content on their services.
- The argument that limited liability created a fertile ground for innovation might or might not have been correct in the past, considering all the benefits and harms that have been created by the gatekeepers. It is obvious, however, that for the past several years, **innovation for gatekeepers mostly means buying innovative smaller companies** and thereby consolidating or growing their market dominance. The fact that a limited liability regime for tech startups from 1996 is still supposed to be applied to **market dominating gatekeeper companies in 2021** and beyond should be seen as a **policy failure of the European Union and its Member States**.
- If EU policymakers and EU citizens want **very large for-profit private companies** to host and facilitate **safe public spaces for freedom of opinion and democracy**, then draft legislation needs to mandate or incentivize companies to do so and potentially also pay them for this **new service**, which is most likely **not compatible with their existing business model**.
- How could a **less toxic business model** for social media and video sharing platforms look like? The current limited liability regime most likely would need to be terminated or significantly narrowed in scope, **moving away from the “exceptionalism” approach** currently employed towards the (big) tech industry. Furthermore, an obligation for gatekeepers to **proactively monitor their platforms for illegal content** should be introduced. It remains unclear why today systemic proactive monitoring measures and upload filters can be applied in an untransparent manner for for-profit purposes of the companies but not in a transparent manner for the public interest of user protection from illegal and/or harmful content.
- Since the **new audit and compliance regime** that the DSA envisions for gatekeepers is **a positive development** and mirrors in significant aspects regimes already deployed in other industries, we urgently advise to include **key learnings** which were introduced **after major failings and crisis particularly as it relates to failures of audit systems in the financial industry**. These includes a) provisions that require platforms to allow auditors access to all relevant information during annual and additional audits b) ensuring commercial independence of auditors by creating an industry wide auditing fund from which auditors are going to be compensated, c) strengthening the independence of auditors by requiring the rotation of auditing mandates, and d) requiring separation of auditing and consulting mandates.