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Taming the Titans? – Digital Constitutionalism and the Digital Services Act

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Gergely Ferenc LENDVAI
PhD Candidate, Ludovika University of Public Service, HUNGARY
e-mail: lendvai.gergely.ferenc@stud.uni-nke.hu

Abstract: The study examines the Digital Services Act (DSA), a landmark regulation in EU platform regulation with a focus on its impact on user safety, transparency, and accountability for Very Large Online Platforms and Search Engines (VLOPSE). Using a legal-theoretical approach grounded in digital constitutionalism, we evaluate the provisions concerning risk and crisis mechanisms as well as accountability issues. Our findings reveal that the DSA introduces significant advancements in platform regulation and governance but also faces limitations in practical implementation and consistency, particularly in preserving digital liberties and addressing systemic risks.

Keywords: digital constitutionalism, Digital Services Act, platform governance, platform regulation, online communication

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Dompter les Titans ? Le constitutionnalisme numérique et la loi sur les services numériques

Résumé : L'étude examine la loi sur les services numériques (DSA), une réglementation historique dans le domaine des plateformes de l'UE, en mettant l'accent sur son impact sur la sécurité des utilisateurs, la transparence et la responsabilité des très grandes plateformes en ligne et moteurs de recherche (VLOPSE). En utilisant une approche juridico-théorique fondée sur le constitutionnalisme numérique, nous évaluons les dispositions concernant les mécanismes de risque et de crise ainsi que les questions de responsabilité. Nos conclusions révèlent que la DSA introduit des avancées significatives dans la réglementation et la gouvernance des plateformes, mais qu'elle est également confrontée à des limites dans sa mise en œuvre pratique et sa cohérence, notamment en ce qui concerne la préservation des libertés numériques et la prise en compte des risques systémiques.

Mots-clés : constitutionnalisme numérique, loi sur les services numériques, gouvernance des plateformes, réglementation des plateformes, communication en ligne

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Introduction

From a *"tinderesque"* website called FaceMash (Bernhard & Clarida, 2014), created by then-19-year-old Mark Zuckerberg at Harvard, to Facebook, the largest social media platform (Brügger, 2015) or from an innovative way of microblogging (Sumikawa et al., 2018) to one of the largest online information networks, online platforms such as Facebook or Twitter (now "X") have evolved from mere convenient tools of interaction with peers into potent influencers, shaping our lives, the public and democratic discourse, and societies at global (Hunsinger & Senft 2014; Lendvai & Gosztonyi, 2024). These digital behemoths have amassed unprecedented economic, political and societal power, raising concerns about their impact on everything from individual liberties to the very fabric of democracy itself (Mutsvairo & Rønning, 2020; Price, 2013). The question rightly arises: What has the law done to mitigate the risks and potential harms emerging from online platform use? In response to these growing concerns, via the initiative of the European Commission, the DSA emerged as a new and unprecedented legislative framework poised to uphold liberties and reshape the digital landscape, signifying a collective effort in the European Union to rein in the unchecked dominance of very large online platforms and very large online search engines (together "VLOPSE") (Cendic & Gosztonyi, 2022).

To examine the impacts and the understanding of the DSA, the study is divided into three critical parts. In Section 1, the concept of digital constitutionalism is introduced as a conceptual basis for the study of the DSA in liaison with user rights on VLOPSE. Section 2 examines the core of the DSA, its provisions, and its profound implications. In this segment, the provisions regarding the heightened scrutiny of

VLOPSE will be presented with special attention to risk assessment and crisis protocols, as the newfound roles of VLOPSE in risk mitigation and crisis response mechanisms raise critical questions about accountability, effectiveness, and the preservation of digital liberties. Section 3 serves as the crux of the above investigation, addressing the pivotal questions posed by the research objectives: Can the DSA effectively respond to the evolving environment of online platforms? By demonstrating both the theoretical and regulatory background, the present study aims to raise questions on the efficacy and applicability of the DSA and underlines critical polemics with regard to the new European platform regulation regulation.

1. Digital Constitutionalism and the Digital Services Act

To contextualise the DSA within the framework of fundamental rights, the understanding of the concept of digital constitutionalism is proposed. Digital constitutionalism, as per the pertaining literature (Celeste, 2019; De Gregorio, 2022; De Gregorio & Radu, 2022), represents a legal-theoretical, interdisciplinary construct centralised at the intersection of law and technology, addressing the pressing need to translate well-established fundamental and constitutional principles into the rapidly evolving digital realm. Despite its utmost importance and practical significance in the discipline of information, constitutional and media law, digital constitutionalism is a relatively new subdiscipline and has no uniform definition thus far (Celeste, 2019; Bocharova, 2022). At its core, however, digital constitutionalism embodies an enduring commitment to preserving and extending fundamental democratic values and individual rights within the digital ecosystem, especially within the power structures present on the Internet (De Gregorio, 2022). According to Celeste (2019), digital constitutionalism is not a distinct legal school but rather an ideology which stems from the structuralisation of the original concept of constitutionalism. This reconstructed conceptual framework of constitutionalism presupposes that the Internet and digital technologies are not merely conduits of information and communication but public spaces where constitutional rights are continually tested, shaped, and, at times, imperilled or restricted. Consequently, the digital realm is characterised by its unique attributes, including ubiquity, borderlessness, and the rapid pace of technological innovation, necessitating an expansive understanding of constitutional rights outside the existing scholarly and regulatory framework.

It is vital to accentuate the basis of the reasoning behind applying digital constitutionalist standards to platform regulation. According to Statista (2023), 4.89 billion individuals use social media platforms worldwide, and this staggering number will rise to 5.85 billion users prospectively in 2027. The question rightly arises – how adequate is it to call the digital revolution a "revolution" anymore with the majority of the global population being active on these platforms, and in relation to this, are traditional pieces of legal instruments applicable to the digital sphere? Digital constitutionalism posits that the principles enshrined in classical constitutional frameworks, such as freedom of speech, the right to privacy, the right to information,

and non-discrimination, are no longer sufficient in the digital world, and they must be adapted to the exigencies of the changes emerged form digitalisation (cf. De Gregorio, 2022; Suzor, 2018). It contends that the Internet is no longer a "lawless" space (Suzor, 2019); therefore, the law cannot longer be immune to establishing a new domain where fundamental principles are to be interpreted and operationalised innovatively. These innovative legislative novums may be exemplified by the emergence of information law and data protection, resulting in new rights such as the right to be forgotten introduced in the GDPR (Mantelero, 2013) or the legal mechanisms to fight against online disinformation (Mazur & Chochia, 2022).

A critical aspect of the practical understanding of digital constitutionalism is platform regulation. In this regard, the DSA enacted in October 2022 in the European Union epitomises the convergence of theoretical tenets of digital constitutionalism with regulatory imperatives. Referred to as a milestone in platform governance (Keller, 2022), the DSA manifests the core principles of digital constitutionalism by striving to harmonise the ascendancy of online platforms, and in particular VLOPSE, with the preservation of democratic values and individual liberties. The emphasis on VLOPSE is crucial, as the DSA is the first international legislation to recognise that platforms must not be regulated equally but instead depending on their popularity, size, economic power and effects on users (Micova, 2021). Understanding the nuances of digital constitutionalism and its resonance within the DSA's provisions is essential, as the specific regulatory measures of this landmark legislation will be examined in the following section.

2. The Digital Services Act

2.1. *Brief Overview of the Legislation*

As per the European Commission's official informational publication regarding the DSA, the new regulation aims at ensuring three aspects of online platform usage and operation: (1) heightened user protection, including the protection of users' fundamental rights online, (2) the establishment of straightforward and concise transparency and accountability stipulations concerning online platforms and their operators and (3) the fostering innovation, growth and competitiveness within the European market (EC, 2022). The regulation's primary objective is to address platform-related issues in an algorithmic-powered environment as a first international attempt to redefine and deconstruct how legislators regulate the Internet (Savin, 2021). In the present subsection, the principal goals and the scope of the DSA will be discussed as an introduction to VLOPSE regulations.

At the heart of the DSA lies a commitment to safeguarding user rights and preserving digital liberties within the online environment (Turillazzi et al., 2023). It endeavours to enhance user safety, data protection, and transparency within digital platforms (Turillazzi et al., 2023; Cendic & Gosztonyi, 2022). The DSA pursues this aim by setting obligations for platforms to establish practical and accessible reporting

possibilities, issue transparency reports on their content moderation and mechanisms, and create or reshape service terms in a manner that conforms with the protection of human rights. The DSA also introduces extensive communicational and technical rules regarding interactions between official entities, authorities, and online platforms, as well as communication between users and platforms. One of the DSA's crucial points is that Meta, TikTok or Twitter ("X") can no longer argue that they fall out of the scope of the regulation because they are not established in any of the members of the European Union; the DSA is applicable to all and every platform and intermediary service that provides services within the EU (Buiten, 2021). The DSA also accentuates that transparency is to be ensured by platforms on all fronts; in content moderation, in algorithmic recommendation and in personalised advertisements as well. Paraphrasing Husovec (2023a), the DSA is discriminative when it comes to equal regulation; as mentioned above, the DSA differentiates obligations based on the size of the platform, prescribing mid-sized platform a more rigorous protocol on content moderation and the most meticulous risk assessment and risk mitigation procedures on VLOPSE. The DSA also differentiates concerning the applicability of the regulation – while most platforms are to ensure that they are in conformity with the new European rules by February 2024, VLOPSE are to ensure that they conform to the DSA from August 2023, approximately half a year earlier than other platforms.

2.2. *Focus on the Giants – What are the Most Important Provisions to which Platforms like Facebook or TikTok must oblige?*

VLOPSE are defined by Article 33(1) as "online platforms and online search engines which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million". Online platforms, per the DSA, are "hosting services that, at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of the DSA". To stray away from the legal jargon of the DSA, VLOPSE are the most prominent platforms on the Internet with the highest number of monthly active users and usually with the most potent economic background. The European Commission has designated a total of 19 VLOPSE in April 2023, renowned sites such as Facebook, Instagram, Google services (Maps, Play, Shopping and Search), Bing, Snapchat, TikTok, and Twitter (EC, 2023). The specific obligations deriving from the DSA on VLOPSE can be categorised into four categories: (1) risk and crisis-related mechanisms, (2) provisions concerning transparency and data security, (3) data access for research purposes and (4) due diligence provisions.

The theoretical background for the risk and crisis mechanisms can be identified in the paramount role of VLOPSE in disseminating information and communications regarding risks (Recital 76 of the DSA). Though the DSA does not provide an explicit definition for "risk", as per the recitals of the DSA, risk means a systemic harm or

detriment that undermines societal, health or economic structures. A systemic risk may be identified as a worldwide disinformation campaign concerning a pandemic or an interface or design that lets users disseminate hate speech or other illegal content. Recital 80 of the DSA categorises systemic into four categories. The first category of systemic risks concerns the dissemination of illegal content such as hate speech, discriminative speech, materials related to child sexual abuse or services regarding illegal activities, products or substances. The second category understands systemic risks in the context of the impact of the service provided by VLOPSE; this means risks resulting in damage to media freedom and pluralism, data and consumer protection and fundamental rights such as freedom of expression. These risks are mainly associated with the algorithmic activities of platforms, such as algorithmic bias against a group of people or the creation of a user interface that allows for the dissemination of content that may impair the development of children. The third category concerns systemic risks that significantly harm democratic processes and the public discourse. Such may be exemplified by fake news propaganda on platforms before elections, a prevalent example of which was the disinformation campaign financed by then-president Brazilian right-wing populist politician Jair Bolsonaro (Tomaz, 2023). The fourth and last category of systemic risks consists of disinformation regarding public health and the physical and mental well-being of users of the given platform. This last category is of extreme importance, especially in the context of popular social media platforms that have notably facilitated fake news dissemination during the COVID-19 pandemic (Yang et al., 2021). It can be concluded, therefore, that the systematic identification, analysis, and assessment of such risks by VLOPSEs are not merely regulatory requirements but serve as a crucial mechanism for safeguarding the broader digital environment, preserving democratic values, and protecting the rights and well-being of users and society at large.

The first critical provision regarding risks and crises stems from Article 34 of the DSA. Titled “Risk assessment”, said article envisages that providers of VLOPSE are obligated to identify, analyse, and assess systemic risks arising from their services’ design, functioning, or usage. This includes considerations related to illegal content, impacts on fundamental rights (such as privacy and freedom of expression), civic discourse, public security, gender-based violence, public health, and minors’ well-being. The assessments must account for various factors, including recommender systems, content moderation processes, terms and conditions, advertising systems, and data practices. The assessment of such risks consists of a holistic, detailed analysis of whether intentional manipulation caused the systemic risk or the exploitation of the services of the VLOPSE. When assessing systemic risks, providers of VLOPSE are also obligated to consider regional and linguistic aspects, accounting for a more specified and profound understanding of the systemic risk in question. The preservation of risk assessment documents for three years is mandatory. Assessing systemic risks, however, is only the first part of risk management; providers of VLOPSE are also obligated to mitigate such risks. Risk mitigation entails that providers of VLOPSE must implement reasonable, proportionate (cf. Czarnoczki, 2021), and effective mitigation measures tailored to the identified systemic risks.

These measures can encompass adaptations to service design, terms and conditions, content moderation processes, algorithmic systems, advertising systems, and cooperation with external entities. Also, the impact on fundamental rights must be carefully considered when implementing these measures. The efficacy of risk mitigation is examined and evaluated by the European Board for Digital Services (an independent advisory group of Digital Services Coordinators whose main task is the supervision of providers of intermediary services (Art. 61 of the DSA) in cooperation with the European Commission. The European Board for Digital Services and the Commission jointly publish comprehensive reports on an annual basis, identifying systemic risks and best practices for mitigation. The two entities may also issue guidelines regarding practices and recommendations on risk mitigation.

In regard to crises, the DSA adopts a different regulatory approach – while risk management is an obligation independent of whether there is a supervisory decision of the Commission or the aforementioned Board, crisis response obligations and the adoption of mechanisms mitigating crises are dependent on the decision of the Commission acting upon the recommendation of the Board. The text of the DSA – similarly to risks – does not define explicitly what a "crisis" per se is. According to Recital 91, a crisis is understood as an extraordinary circumstance that can lead to severe threats to public security or public health within the territorial boundaries of the European Union. In the framework of this extremely vague description, said Recital section takes armed conflicts, acts of terrorism, natural disasters and cross-border pandemics as crises. If such a crisis occurs, VLOPSE may be required to assess their services' contribution to the threat and take specific measures to prevent, eliminate, or limit this contribution. The Commission's decision on implementing crisis mechanisms by VLOPSE is not absolute; however, it must consider the necessity, proportionality, and duration of the actions to be enacted. If the Commission issues the abovementioned decision, VLOPSE are to take one or more actions of the following three measures: (1) the evaluation of whether the services provided by VLOPSE significantly contribute to the crisis, (2) the identification of adequate measures against the crisis and the elimination of the threats emerging from it and (3) reporting to the Commission on the actions and their efficacy to mitigate the crisis. It is essential to mention that the provider of VLOPSE retains autonomy in choosing the specific measures, but they must be effective and proportionate with respect to fundamental rights. The Commission monitors the measures' application and may amend its decisions based on the evolution of the crisis.

Concerning increased transparency measures, providers of VLOPSE must implement a plethora of measures, from independent auditing to the ensuring of online advertising transparency. Under Article 37, VLOPSE are to undergo independent audits at their own expense at least once a year. The independent audits must assess the compliance of the given VLOPSE with the DSA stipulations, and VLOPSE providers are to cooperate with the independent auditors fully. The latter entails granting access to data for the auditor and allowing the auditor to enter the premises without interference. VLOPSE are also to be conformed with compliance measures;

providers of VLOPSE shall establish independent compliance functions with adequate authority and resources. From the user's standpoint, the DSA requires additional transparency measures regarding recommender systems, requiring VLOPSE to enact an "opt-out" possibility for users concerning personalised recommendations. The opt-out option, in practice, allows users to choose a recommendation service, for instance, on Facebook or Instagram, which is not based on the platform's profiling. Such an opt-out option was first introduced by Meta on 22 August 2023, enabling users of Facebook and Instagram to be informed on profiling via twenty-two "system cards" detailing the process of personalised profile creation and to opt out of algorithmic content recommendation that is powered by artificial intelligence (Meta, 2023). As for online advertising, Article 39 of the DSA mandates that VLOPSE must maintain a publicly accessible repository containing comprehensive information about the advertisements displayed on their platforms. This repository ensures transparency by providing details about advertised products, entities behind the ads, targeting methods, and reach, all while safeguarding user privacy by excluding personal data.

Additionally, the article allows for the exclusion of information related to removed or disabled advertisements due to legality or non-compliance issues. The Commission has the authority to issue guidelines to standardise these transparency repositories. On a more general note, Article 42 also requires VLOPSE to regularly publish reports that provide transparency into their content moderation efforts, workforce, and compliance with the DSA. These reports must be published within two months of the DSA's application date (in practice, the first reports are expected in October 2023) and subsequently every six months. VLOPE are additionally obliged to disclose details about their content moderation workforce, qualifications, linguistic expertise, and training, all categorised by Member State languages. They should also report on the accuracy of content moderation indicators and provide information on average monthly recipients of their services in each EU Member State. Furthermore, these platforms are expected to share risk assessment results, mitigation measures, and audit reports while considering the privacy and security of users and their services. It is relevant to underline, however, that sensitive data may not be included in the above transparency reports.

From an academic viewpoint, Article 40 stipulating data access for researchers is of utmost importance (Husovec, 2023b). This provision sets forth a comprehensive framework concerning granting access to data stored and managed by VLOPSE for monitoring and assessing how platforms operate. The DSA introduces a science-based monitoring on platforms as well via Article 40, the goal being to ensure that platform giants are operating in conformity with European regulations and that they are guaranteeing the enforcement of necessary measures related to the digital security of users and their data. Upon request by so-called "vetted researchers" granted by the Digital Services Coordinator of a member state or the Commission, researchers may access data to conduct research regarding the detection, identification and understanding of systemic risks (Dergacheva et al., 2023). This provision, therefore,

introduces a new perspective for researchers to analyse and examine algorithms and data policies by VLOPSE to discover how and in what ways platforms may contribute to systemic risks – a perspective that has long been overshadowed by the fact that platforms often do not share information about the design, the functioning, the testing and the operation of their algorithms and recommendation systems (cf. Hitlin & Rainie, 2019). Granting access to critically important data is only one part of the obligation – platforms are also to explain in detail the operation of their algorithms, which can most certainly facilitate the work conducted by researchers. The scope of the status of being a vetted researcher is, however, relatively narrow (Husovec, 2023b). Vetted researchers must meet a particular set of criteria. For instance, they must be affiliated with a research organisation and maintain an independent position from commercial interests. They are also to ensure that they have the competent capability to handle and analyse data securely, to demonstrate that the research solely concerns systemic risks related to platforms and that they are committed to publishing the research results publicly and free of charge. If all criteria are met, researchers are to apply for a vetted researcher status, which is awarded by the Digital Services Coordinator of establishment (meaning the Digital Services Coordinator of the member state) where the main establishment of a provider of an intermediary service is located or its legal representative resides or is established Art. 3n of the DSA). If the applying researcher is granted the vetted researcher status, the Digital Services Coordinator is to monitor (via reporting) the activities of the vetted researcher. In terms of data access and data sharing, for the purpose of harmonisation, the Commission has the authority to issue delegated acts concerning conditions of data sharing, taking into account the rights and interests of providers of platforms and the provisions of the General Data Protection Regulation (GDPR).

Lastly, VLOPSE may also be subjected to specific due diligence measures. In this regard, due diligence measures are mainly manifested in the creation of a voluntary code of conduct regarding the proper application of the DSA or specifically themed issues such as the code of conduct for online advertising and accessibility (Griffin & Maelen, 2023), as well as crisis protocols. Codes of conduct as per the DSA serve the purpose of enhancing compliance and addressing challenges concerning content moderation and systemic risks, however, it is to be stressed again that the enactment of the code of conduct is purely voluntary, therefore, it is up to VLOPSE's discretion to create such codes. If VLOPSE, however, do decide to create a code of conduct, the European Commission is authorised to review and evaluate the effectiveness of the measures implemented and mentioned in the code of conduct in line with the transparency and accountability objectives of the DSA. As mentioned, two specific code of conduct, namely code of conducts on online advertising and accessibility, are regulated in particular detail by the DSA. Code of conduct on online advertisements shall prioritise the free, fair and transparent flow of information between online advertising intermediaries and recipients of online advertisements.

In contrast, codes of conduct for accessibility shall aim to assess how platforms ensure that access to platform services for recipients with disabilities is in conformity

with the pertaining European and national laws. Crisis protocols are different from a regulatory aspect; initiated by the Commission upon the recommendation of the Board, VLOPSE may choose to create voluntary crisis protocols to address extraordinary circumstances and the adequate actions related thereto to be performed by platforms. Crisis protocols may include measures such as prominently displaying crisis information provided by authorities, designating specific crisis management points of contact, and adapting resources dedicated to compliance with DSA obligations during a crisis. The DSA uses a more holistic approach regarding crisis protocols; to ensure that sufficient measures are proposed, the Commission may invite competent authorities of member states and civil society organisations in the development of crisis protocols. The Commission may also ask VLOPSE to revise and review their crisis protocol if it deems that the measures entailed in the protocols are detrimental to fundamental rights or public safety.

3. New Era of User-centricity or Wishful Thinking? – Understanding Digital Constitutionalism and the Digital Services Act from a Critical Perspective

Though the DSA is undoubtedly a condemnable regulatory philosophy in regards to user-centricity and the handling of challenges emerging from online interactions on online platforms, specifically social media platforms, questions may arise as to how digital constitutionalist values prevail under the Regulation. Within this context, one central concern revolves around the potential for unintended consequences of the application of the DSA (Buri & Hoboken, 2021). As the DSA compels VLOPSE to monitor proactively and moderate systemic risks and the platform's contribution, the substantial risk of overzealous content removal arises as a mitigating measure to avoid regulatory repercussions. This risk poses a fundamental question regarding digital constitutionalism: Can the legislation safeguard not only the technical compliance with rules but also the broader principles of democratic discourse, including the protection of diverse viewpoints and the preservation of the robust exchange of ideas? This polemic may be approached from the examination of how effective and applicable risk assessment provisions are per the DSA.

Firstly, the interpretation of the DSA leaves room for questions, as divergent implementations of the Regulation within the European Union may lead to an inconsistent experience for users, potentially infringing upon their digital rights. Citing Mantelero (2023), the DSA sets forth an *ex-ante* strategy concerning risk assessment, which is principally based on the harmful contribution of design, functioning and use of services of the platform to systemic risks. However, it is not clear from the text of the DSA how platforms should assess harms and risks that are independent of the design and the functioning of the platform. For instance, can political disinformation propaganda or hate speech campaigns powered by external tools powered by artificial intelligence be considered systemic risks? The central polemic is, therefore, that new forms of disinformation or communicational techniques (Aczél, 2017) may stem from sources independent from the exploitation

of the design of the platform in question, and the DSA's adaptability to new forms of risks seems somewhat questionable.

It is also crucial to emphasise that despite a rigorous attempt to tackle challenges emerging from the use of VLOPSE, the DSA opts for a mitigating approach regarding systemic risks instead of a preventive regulatory philosophy (Mantelero, 2023). Following Mantelero's approach (2023), the DSA fundamentally accepts that systemic risks are inevitable and inherent to platform usage and chooses to put regulatory efforts into the mitigation of potentially existing and emerging risks instead of making a tentative to create a more rigid preventive legal framework. This approach, however, may be interpreted as contradictory to the objectives outlined in the aforementioned provisions, namely transparency and user-centricity (Carneiro & Palumbo, 2023). Subsequently, reducing the accountability of VLOPSE to mitigation and assessment does not affect the already existing internal policies of these platforms and does not make a step forward to the prevention of harms.

Another aspect to consider is how the DSA narrows down the scope of risk management. Given the provisions above, systemic risks to be handled by VLOPSE are solely reduced to the territorial borders of the EU. This stipulation, however, completely disregards the global aspect of systemic risks, as well as users of VLOPSE outside of the EU. For instance, VLOPSE may opt for mitigating risks following a Russian political disinformation campaign in the EU, however, it may choose not to do so in the US, where Russian interference during the elections has been noted numerous times (Murphy, 2023; Landon-Murray et al., 2019; Zhang et al., 2021) or in countries heavily affected by political interference of Russia such as Belarus (Manaev et al., 2021), Georgia or Ukraine (Baranovsky-Dewey, 2019). Creating a regulatory enclave in the context of systemic risks is, therefore, highly polemic, especially if the DSA's aim was to create a new regulatory landscape for platform governance.

With regard to the above two aspects, two additional issues are to be raised in the context of the safeguarding of digital liberties. Firstly, the DSA's regulation regarding vetted researchers is exceedingly problematic not only from a scholarly but a regulatory approach as well. Researchers play a pivotal role in identifying and examining risks related to online platform usage, however, as per Article 40, the scope of researchers that may conduct such research is highly narrowed down (Husovec, 2023b). Questions may arise about the effectiveness of the procedure regarding awarding the vetted researcher status. Secondly, the process of awarding a vetted researcher status is not harmonised; a researcher may be awarded a vetted researcher status in Germany; however they may not be awarded the status in Ireland. This polemic stems from the fact that it is not the Commission but the Digital Services Coordinators of member states that consider applications for the vetted researcher status, essentially leading to the dependence on the decision of national authorities instead of a harmonised, uniform procedure coordinated by the Commission.

Furthermore, implementing a soft law approach regarding a voluntary code of conduct undermines the involvement of platforms in the fight against systemic risks. VLOPSE may very well choose not to enact a code of conduct or create a code of conduct without much substance to comply with the DSA, however, both options disregard the perspective of users who are essentially involved in systemic risks as subjects (cf. Griffin & Maelen, 2023). Though the practice may shape how codes of conduct will be implemented, doubts may emerge in the case of certain platforms, especially in the case of Twitter ("X"). Under Elon Musk, Twitter has actively acted against joint European efforts to fight systemic risks. This trend may be best exemplified by Twitter pulling out of the European Union's voluntary code to fight disinformation ("2022 Code of Practice on Disinformation"), a code to which all other platform giants (Meta, Google, Twitch, TikTok, Microsoft) signed up to (BBC, 2023).

The DSA is arguably a breakthrough in platform regulation, especially regarding the governance of VLOPSE. It can also be noted that heightened obligations regarding compliance and transparency will most likely result in a more user-central usage of online platforms. However, the efficacy of the application of the DSA is still overdependent on platforms, leading to critical questions as to how digital liberties will prevail under the new regime of the DSA.

Conclusion

In this study, the DSA has been examined in the context of digital constitutionalism from a critical perspective. The study presented the theoretical background of the discipline of digital constitutionalism, highlighting the fundamental aspects and goals of the movement such as the need for a practical interpretation of fundamental rights online, the creation of a regulatory framework where fundamental rights are safeguarded and set forth when regulating digital technologies. The study explored a more profound understanding of digital liberties and why safeguarding digital liberties must be essential in platform governance. In this regard, a progressive view on platform governance has been argued which welcomes the digital constitutionalist idea of creating an Internet-regulatory framework which is no longer "lawless", and which is hallmarked with European regulations such as the GDPR or the DSA. As for the latter, the study presented and analysed in detail the provisions of the DSA with regard to VLOPSE, accentuating the most significant stipulations that will affect users and platforms alike. Such provisions include the new risk assessment and risk mitigation rules which – for the first time in international regulation – sets forth rigorous obligations for VLOPSE to proactively monitor, act against and address societal risks on their platforms which include a wide range of potential issues from gender-based online violence to online disinformation. Lastly, the study aimed to propose questions and polemics regarding the relation of the effective applicability of the regulation, the provisioned practice by users and the experience of users on social media platforms. Though the DSA may be cornerstone for digital constitutionalism a

myriad of potential problems can arise from the regulation, including problems related to the regulation's practical efficacy, the extremely narrow scope of researchers' right to be informed and conduct research on risks on platforms, and the non-binding soft law code of conduct stipulations. The present study aims to contribute to the rich scholarly discourse on platform regulation, highlighting key issues and questions about regulating platform giants, namely the challenges of implementing international, global regulations to global phenomena and technologies.

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