AT A GLANCE

Requested by the IMCO committee

Study in Focus

European Parliament

Enforcement and cooperation between Member States

E-Commerce and the future Digital Services Act

The original full study[1] presents an overview of possible options for an effective model of enforcement for a future Digital Services Act (DSA). Four key areas of regulatory design are emphasised: the failure of self-regulation in relation to platforms; the importance of correct regulatory framing; the necessity of focusing on the internal operations of platforms; and that the scope of a DSA should be limited but include robust transparency and enforcement measures. A range of enforcement strategies are then evaluated across a suite of Digital Single Market (DSM) legislation, alongside barriers to Member States cooperation and effective enforcement.

Check out the original full study by scanning this QR code!

Background

The E-Commerce Directive (ECD) is 20 years old and is no longer fit for purpose given the rapid transformation and expansion of E-Commerce in all it its forms. We have a multitude of different platform services that have differential social and business affects across the EU with innovative business models that defy the categorisation set down in the existing regulatory framework. This loose regulation of platforms has moved from enabling innovation to creating a few platforms with global domination almost entirely exempt from legal liability in how they conduct business. Not only does this radically distort the organising principles of competition and consumer law, it has essentially left the task of defining public values such as free speech, dignity and non-discrimination to unaccountable private entrepreneurs rather than public institutions and legislators. The reform of the ECD is now urgent, requiring a fundamental rethink about the basic organising principles of platform regulation.

The method of regulation in the ECD (self-regulation alongside a liability shield) has proved unfit for purpose. It is clear from the myriad case law that whilst the CJEU has attempted to mitigate some of these regulatory failings, ultimately the CJEU cannot fill this liability gap. The future DSA must not replicate the ECD in two particular respects: the liability shield and the principle of no general monitoring. These two core principles of the ECD prevent the development of a model of effective enforcement and cooperation between Member States regardless of the rules that are eventually put in place. Put simply, without liability, the last 20 years have shown that there is no incentive to comply. If a new DSA is to have any purpose, then enforceability of rules should be a priority for legislators.

The DSA cannot solve all the problems associated with the digital services sector. Legislation should therefore concentrate on a few key horizontal rules that apply to the internal operations of platforms. The original conceptualisation of platforms was of private enterprises that ought to be regulated by competition law (price and market) and by consumer protection measures based on the power of contract. This regulatory framing must change to a new model, conceptualising platforms as occupying a pivotal position in the public space that have the power to fundamentally reshape society both commercially and politically. Clear EU goals and values to frame the regulation of platforms is critical to design legislation that works for the EU context.

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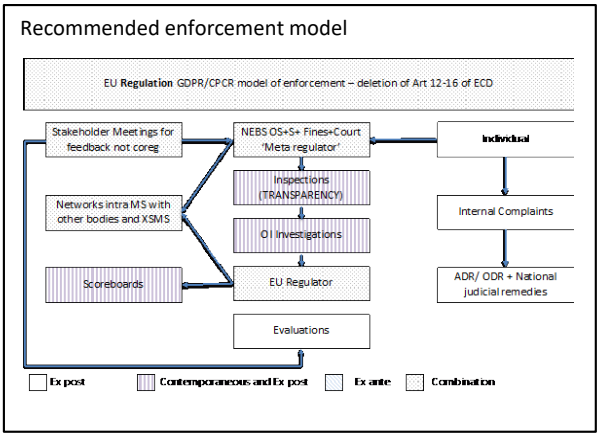
The EU has multiple tools and techniques that it could use to enhance enforcement and cooperation between Member States. A survey of seven instruments in the DSM illustrates that a patchwork of approaches have been adopted depending on the relative importance (for the internal market and for an EU values perspective) of the measures. The design of different enforcement models range from soft self-regulation (ECD, geoblocking, parcel) to strengthened self-regulation through layering enforcement (AVMS and copyright), to prioritising cooperation between Member States and reinforcing centralised Commission enforcement (consumer rights), to a comprehensive public values enforcement model (GDPR). Careful attention needs to be paid to the particular barriers to enforcement that a DSA might encounter: externalities; unequal distribution of tech HQs; expertise; complexity; lack of transparency from platforms. Full transparency with regulators ought to be the baseline requirement of a DSA so that external monitoring and verification of platform activities can take place.

Key findings and recommendation

The new DSA should seek to address the power imbalance that has emerged between user and platform, platform and regulator, and platform and Member State. Platforms occupy a pivotal position in the public space and have the power to fundamentally reshape society both commercially and politically. As such they ought to be regulated according to public, not private, law values. Free speech and public values are not synonymous and should not be treated as such.



The model of enforcement recommended in the study seeks to combat the failures of the regulatory design of the ECD, whilst being mindful of the specific barriers to enforcement that platform regulation could encounter. This model seeks to combine the best attributes of the Consumer Protection Cooperation Regulation (CPCR) and the GDPR approach to enforcement. In this model, regulation by National Enforcement Bodies (NEBs) would be a key feature. These NEBs would operate in a network across Member States, with overall coordination by a central EU regulator. NEBs should have sanctioning powers (as per the GDPR) with specific penalties prescribed that should be proportionate to platform size to encourage SME development whilst also controlling larger companies. Internal rules of platforms should be set by EU legislation, structured by public values defined by the legislator and not left to the internal (unsupervised) moderation of platforms. Increased transparency from platforms on data sharing is critical to any future model of enforcement: regulators cannot regulate without it. Externalities and other negative effects can be dealt with by other legal instruments (e.g. competition law, local legislation). Stakeholder buy-in through feedback via network and regulator interactions for learning and dynamic adaptation of rules is also recommended.

NEBs should be able to launch own initiative investigations into systemic issues, and would be under a duty to report an EU central regulator the actions it has taken and the systemic issues it faces. NEBs would under a duty to work in a network across Member States and with a central EU regulator, with jurisdictions and mutual assistance mechanisms clearly defined. The EU regulator should be charged with co-ordinating the network, keeping the platform ecosystem under review, and have supplementary powers to tackle systemic issues that are too big for individual states to pursue due to lack of resources or expertise. It would be the responsibility of other EU institutions such as the European Parliament to provide reports on compliance on a yearly basis and to provide the information needed to maintain a 'Platform Scoreboard'. Information dissemination to citizens about platform behaviour should be a key task of the EU regulator.

[1] https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648780/IPOL_STU(2020)648780_EN.pdf

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