

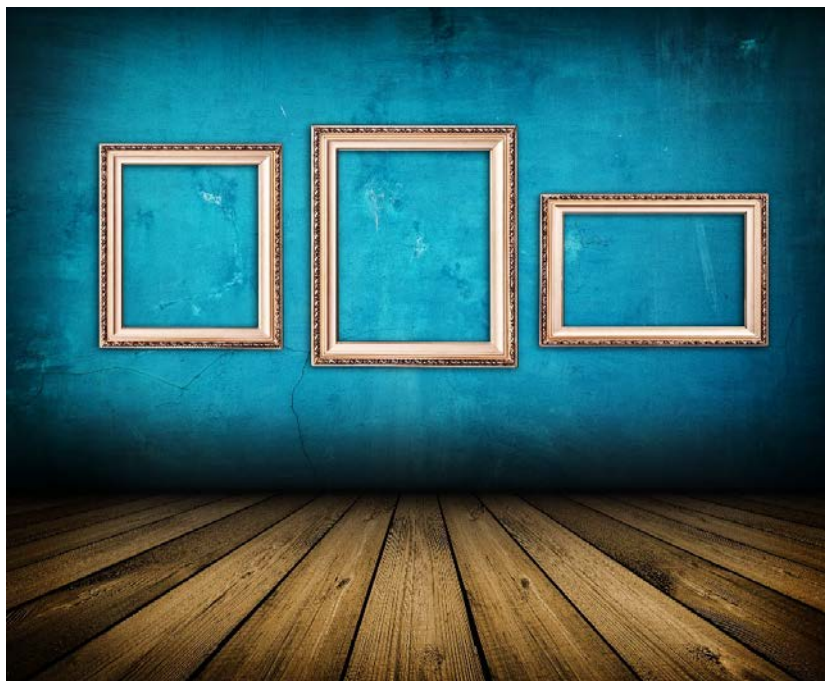
STUDY

Requested by the IMCO committee



Enforcement and cooperation between Member States

E-Commerce and the future Digital
Services Act



Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
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Enforcement and cooperation between Member States

Abstract

This study presents an overview of possible options for an effective model of enforcement for a future Digital Services Act. 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 DSM legislation, alongside barriers to Member States cooperation and effective enforcement. The paper sets out several options for enforcement and concludes with a recommendation of a specific enforcement model for a new DSA.

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CONTENTS

LIST OF ABBREVIATIONS	4
LIST OF FIGURES	5
LIST OF TABLES	5
EXECUTIVE SUMMARY	6
1. INTRODUCTION	9
2. E-COMMERCE DIRECTIVE: LIMITATIONS AND REFORM	10
2.1. Limitations of the E-Commerce Directive	11
2.2. Enforcement and cooperation in E-Commerce Directive	12
2.3. The Court cannot plug the regulatory gap	13
3. REGULATORY FRAMES, GOALS, AND ENFORCEMENT	15
3.1. Why framing matters	15
3.2. Regulatory goals and values	17
4. EU ENFORCEMENT TOOLBOX	19
4.1. Barriers to enforcement	21
4.1.1. Externalities	21
4.1.2. Unequal distribution	22
4.1.3. Expertise	22
4.1.4. Complexity	22
4.1.5. Lack of transparency	23
5. ENFORCEMENT CHOICES IN DIGITAL SINGLE MARKET LEGISLATION	24
5.1. Regulatory frames employed in Digital Single Market suite	26
5.1.1. Soft self-regulation: E-Commerce Directive, geoblocking, parcel distribution	26
5.1.2. Enhanced self-regulation and layering: Audio Visual Media Services and copyright	27
5.1.3. Enforcement and cooperation prioritised: consumer rights	28
5.1.4. Rights frame with European values: General Data Protection Regulation	28
6. OPTIONS AND RECOMMENDATIONS FOR DIGITAL SERVICES ACT	30
6.1. Options	30
6.2. Recommendations	31
REFERENCES	34

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AVMS	Audio visual Media Services
CAA	Civil Aviation Authority
CFR	European Union Charter of Fundamental Rights
CJEU	Court of Justice of European Union
CPCR	Consumer Protection Cooperation Regulation
DSA	Digital Services Act
DSM	Digital Single Market
ECD	E-Commerce Directive
ECHR	European Convention on Human Rights and Fundamental Freedoms
EPP	European People's Party
ERGA	European Regulators Group for Audio Visual Media Services
EU	European Union
GDPR	General Data Protection Regulation
IMI	Internal Market Information System
NEBs	National Enforcement Bodies
NEBs OS	National Enforcement Bodies with oversight function only
NEBs+	National Enforcement Bodies with cooperation/ network duties
ODR	On-line Dispute Resolution
REFIT	Regulatory Fitness
ToS	Terms of Service

LIST OF FIGURES

Figure 1: Clashing regulatory frames	16
Figure 2: Bespoke enforcement post REFIT and evaluation	20
Figure 3: Model of enforcement for platforms	31

LIST OF TABLES

Table 1: Toolbox of EU enforcement	19
Table 2: Types of enforcement regimes across the 7 instruments	25

EXECUTIVE SUMMARY

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 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 existing the 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. With this in mind, reform of the ECD is now urgent. It requires a fundamental rethink about basic organising principles of platform regulation that were first proposed 20 years ago.

This study shows that 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. It is imperative that any future Digital Services Act (DSA) does 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.

Aim

The aim of this study is to provide policy makers with expert advice on the possible reform of the ECD into a future Digital Services Act (DSA) with a particular focus on enforcement and cooperation between Member States. The study proceeds on the following assumptions:

- that the DSA will be concerned with regulating ‘platforms’;
- that some amendment to the ECD is probable and desirable; and
- that the EU legislator aims to maximise the ability to enforce the rules elaborated in a new DSA by having a robust system of enforcement as part of the legislative design.

Key Findings

The original regulatory conceptualisation of platforms was that of private enterprises that ought to be regulated by competition law (price and market) and by loose consumer protections measures based on the power of contract. The new DSA should instead seek to address the power imbalance that has emerged between user and platform, platform and regulator and platform and Member States. 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 weaponization of the American approach to free speech (all conquering) which subverts the European idea of free speech (one right to be balanced amongst others) should be avoided. When this occurs, free speech is being deployed not to genuinely protect public values but to insulate platforms

from liability. Being clear on the EU goals and values that are to frame the regulation of platforms is a critical first step in designing legislation that works for the EU context.

The EU has multiple tools and techniques that it could use to enhance enforcement and cooperation between Member States. In the Digital Single Market (DSM) however there is a consistent pattern of adopting self-regulation with limited powers of oversight for national enforcement bodies and soft self-regulatory codes of conduct. Careful attention needs to be paid to the way in which platforms have conducted themselves under the licence of self-regulation. Furthermore, particular barriers to enforcement that a DSA might encounter makes more self-regulation unworkable: externalities; unequal distribution of tech headquarters; expertise; complexity; and a complete lack of transparency from platforms. A binding requirement of transparency between platform and regulator should be the baseline requirement in any future DSA so that external monitoring and verification of platform activities can take place.

A survey of seven instruments in the DSM illustrates that a patchwork of approaches has been adopted depending on the relative importance – for the internal market and an EU values perspective – of the measures themselves, alongside the existing regulatory framework. The design of different enforcement models range from soft self-regulation (ECD, geoblocking, parcel) to strengthened self-regulation through layering enforcement in response to the regulatory failures of the ECD (AVMS and copyright), to prioritising cooperation between Member States and reinforcing centralised Commission enforcement (consumer rights), to a comprehensive public values enforcement model (GDPR).

Recommendations

The model of enforcement recommended in this 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.
- Regulation by National Enforcement Bodies 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 controlling larger companies.
- 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 should have 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 would function best as a specialised agency (like ERGA). It would, alternatively, be possible to bring this within Commission's remit directly (like for example Competition law enforcement). However, it would need to be situated **outside** DG Competition and DG Internal Market due to their single competences and internal missions being incompatible with the wider problems platforms pose.
- EU legislation should regulate how platforms operate internally. These rules should be 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: without this regulators cannot regulate. Externalities and other negative effects can be dealt with by other legal instruments (e.g. competition law, local legislation etc).
- Stakeholder buy-in through feedback via network and regulator interactions for learning and dynamic adaptation of rules is also recommended.
- 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.
- The EU regulator would be responsible to other EU institutions such as the European Parliament for providing reports on compliance on a yearly basis and 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. INTRODUCTION

This study is concerned with enforcement and cooperation between Member States with regard to the possible reform of the E-Commerce Directive¹ (ECD) and the future Digital Services Act (DSA). The system of enforcement should be a starting point when considering the content of new regulatory rules on e-commerce: new rules will be ineffective if the system of enforcement has not been properly calibrated to respond to the regulatory goals and specific rules being adopted. At the same time, the rules must be proportionate to type of digital service entity being regulated, whilst enabling dynamic adaptation to changing market conditions. It is thus quite a difficult task to propose a system of enforcement for rules that are as yet unknown at the time of writing. In order to bring clarity and meaningful recommendations, a number of assumptions must be made about what the DSA might include.

This study starts from the proposition that the DSA will focus on the regulation of on-line platforms that provide digital services. The type of platform, business model, or the type of rules that will attach to the conduct of digital services are not within the remit of this report, except insofar as such matters affect the choice of enforcement method.² This paper elaborates the factors that should guide the design of the enforcement model of a DSA; one that enables a coherent approach to enforcement within the digital internal market, and therefore on rules that can apply **horizontally across the internal operation of platforms**.³ This study will provide a framework for understanding the different regulatory choices to be made by EU legislators, and the consequences of those choices, and will survey and evaluate the current enforcement mechanisms across a suite of digital service instruments. The study will conclude with a range of options and a key recommendation that foster cooperation between Member States and optimise the prospect of effective enforcement in the digital services sector.

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'). OJ L 178, 17.7.2000, p. 1–16 hereinafter 'ECD'.

² 'Platforms' are being defined differently in different Member States and regulatory contexts, and the EU institutions need to be clear on the how they differentiate between B2B activities from B2C, data clouds and storage, collaborative economy versus search engines, audio visual media providers and social networks including their networked and competition effects of the business models. Whether defined as intermediaries or digital gatekeepers, platform power is also contested as yardstick for intervention see Lynksey, Orla 'Regulating Platform Power' LSE Law, Society and Economy Working Papers 1/2017 available at http://eprints.lse.ac.uk/73404/1/WPS2017-01_Lynksey.pdf.

³ This report concentrates on creating a coherent set of rules for enforcement within the internal market, and therefore focuses on the internal operation of platforms.

2. E-COMMERCE DIRECTIVE: LIMITATIONS AND REFORM

KEY FINDINGS

The EU legislator selected self-regulation alongside a liability shield as the main components of regulating platforms in the ECD. This has now proved unfit for purpose given the development of the platforms. It is clear that the CJEU cannot fill this gap. It is imperative that any future DSA does not replicate this model, especially if enforcement and cooperation between Member States is a genuine priority. The regulatory framing of what the EU seeks to regulate and why will dictate the possible enforcement choices. 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.

In light of the vast transformation of the digital services sector over the last two decades, the ECD is now no longer fit for purpose. Today we know more about how platforms have exploited their enormous data harvesting powers for revenue production, but also opinion formation and sculpting (or eroding) the basic tenets of democratic societies through manipulation of political opinion. Recent scandals regarding data harvesting and selling, Cambridge Analytica, fake news, political advertising and manipulation and a host of other on-line harms (from hate speech to the broadcast of terrorism) have shown the need to revisit the regulation of these entities.

Delineating the power of platforms is not the only motivation for new regulation. In addition, the EU can ensure regulatory conditions facilitate exploitation of the digital environment and be a global standard setter in regulating future technologies. The EU legislature has already adopted several pieces of sectoral legislation in the Digital Single Market (DSM) on the subject of copyright protection⁴, consumer rights protection⁵, GDPR⁶, geoblocking⁷, audiovisual media services (AVMS)⁸, and parcel distribution⁹ to name a few. Revisiting the ECD is particularly critical since this new sectoral legislation cross references the four key provisions of the ECD that currently provide a shield for platforms from liability. Moreover, because the EU has been slow to respond to the explosion of platform activity and some of its negative consequences, other regulators on the global stage have begun to produce divergent rules¹⁰ that could ultimately lead to incoherence in the internal market and a diminution of

⁴ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130, 17.5.2019, p. 92–125.

⁵ Regulation (EU) 2017/2394 of the European Parliament and of the Council of 12 December 2017 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 (Text with EEA relevance) OJ L 345, 27.12.2017, p. 1–26.

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, p. 1–88.

⁷ Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC OJ L 60I 2.3.2018 p. 1–15.

⁸ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities OJ L 303, 28.11.2018, p. 69–92 (hereinafter AVMS Directive).

⁹ Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services OJ L 112 2.5.2018 p. 19–28.

¹⁰ See for example from the US Stigler Committee on Digital Platforms, Final Report, September 2019, available at: <https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report>.

European standards and values. Whatever substantive rules are chosen, the new rules should balance the threats and opportunities that digital services create. To properly realise these aspirations it is important to confront the power imbalance between user and platform, platform and regulator and platform and Member State.

This study emphasises four key lessons that should inform the re-design of the ECD into a DSA:

- Self-regulation has proved inadequate, and co-regulation without transparency does not offer effective oversight;
- The correct regulatory framing is critical to understanding the problem and solutions;
- There should be a focus on regulating the internal operation of platforms (across the different business models and platform types) particularly in respect of consumer-facing platforms. We need to carefully define **what behaviours we seek to regulate and why in the DSA** to construct coherent regulatory goals and values; and
- The DSA cannot, in a single coherent instrument, solve all the issues with all platform types. Other mechanisms are already available to solve particular problems.

2.1. Limitations of the E-Commerce Directive

The EU's approach to regulating digital services has naturally evolved from a liberal approach that focuses on growth in the single market, to one that should now focus on creating a level playing field and so enabling smaller entities to gain a market share. At the same time regulators must now focus on protecting fundamental rights and the rule of law from those who dominate the market.¹¹ The shift from liability shields to a more proactive approach supports the desire of the EU to be a market leader in digital regulation whilst at the same time setting global standards in the protection of citizens' rights. This new approach of 'digital constitutionalism'¹² must step outside the traditional legal silos of competition law, consumer law and internal market concerns to embrace public values beyond the economic sphere.

The ECD currently **protects platforms from most legal liability** in a number of different ways. First the ECD generally insulates platforms from liability for third party content. Thus Articles 12-14 of the ECD remove liability for those platforms operating as 'mere conduits', 'caching', and 'hosting' entities. It also ensures that platforms have no general obligation to monitor (Article 15) what is posted on their sites, although operators are required to remove 'illegal content' (undefined) once aware of it. We now know that the categories of 'mere conduits', 'caching' and 'hosting' are incredibly contested and that very few digital operators truly fit these categories.¹³ A regulatory gap has flourished that has the dual effect of stifling innovation and is inadequate for providing suitable safeguards.

Australian Competition & Consumer Commission: Digital Platforms Inquiry – Final Report June 2019, <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>, UK HM Gov White Paper 'Online Harms' CP 57 (April 2019). https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf, The German Network Enforcement Law Netzdurchsetzungsgesetz, Law of 30 June 2017 are just some examples of the different approaches.

¹¹ See von der Leyen political guidelines 'A Europe that strives for more' under European Fit for a Digital Age https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf.

¹² Suzor, Nicolas 'A constitutional moment: How we might reimagine platform governance' Computer Law & Security Review: The International Journal of Technology Law and Practice, <https://doi.org/10.1016/j.clsr.2019.10538>, De Gregorio, Giovanni 'The Rise of Digital Constitutionalism in the European Union' (2020) International Journal of Constitutional Law (forthcoming).

¹³ Lynskey 'Regulating 'Platform Power' n 2.

2.2. Enforcement and cooperation in E-Commerce Directive

It is not just the content of the rules and scope of exemptions that has made the ECD unfit for purpose; the system of enforcement for this directive was always premised on non-regulation. Under 'Implementation' Article 16 of the directive suggested that the Commission and Member State merely *encourage* trade, professional or consumer associations to draw up *voluntary codes of conduct* i.e. the system was predicted on voluntary (individual) self-regulation by the platforms without any external supervision.¹⁴ Article 17 instructs that Member States cannot obstruct any laws that enable out of court settlement schemes (but does not have to provide any). The emphasis was on using already burdened consumer rights associations to broker solutions within national contexts without any uniformity or indeed any real power. Court actions were not mandated (Article 18) but where they were already in existence should have interim measures available. Sanctions were to be determined by the Member State (Article 20) as long as they were effective, proportionate and dissuasive. Cooperation provisions for Member States are weak; designating a contact point and exchanging information with each other and the Commission the only requirement.

The self-regulatory approach championed in the ECD has failed. We have experienced a vast catalogue of platform misconduct with very little in the way of remedies available, and certainly none that act as significantly dissuasive for wealthy private entities to cease undesirable practices or even practices that violate fundamental rights. Proponents of self-regulation argue that regulatees alone possess the advantage of expertise to regulate effectively in a complex, dynamic environment where information asymmetry is embedded in the system. First, this premise seems to accept that information asymmetry is an immutable fact that cannot be changed or ameliorated: this is a false proposition. Secondly, the idea that private, profiteering entities are the appropriate actors to define public values and create 'safe spaces' that respect data privacy, open up markets from their own position of dominance¹⁵, and respect fundamental rights has proven illusory.¹⁶ Commercial enterprises should not be in the business of deciding public values.¹⁷ In relation to 'meta regulation' such as a future DSA where global values are being defined, public values ought to be defined by public actors.¹⁸

Effective self-regulation relies on factors such as reputational damage and market forces – and equates them as equivalent to public regulation – to ensure compliance, setting appropriate standards, or as a spur for better behaviour. However, the possibility of reputational damage can equally act as a spur for secrecy and cover-up rather than transparency and strict self-regulation. The so-called trust economy is subject to gaming and manipulation.¹⁹

¹⁴ On the different typologies of regulation see Jeron van der Heijden 'The long, but promising, road from deterrence to networked enforcement' in Drake, Sara and Smith, Melanie (eds) *New Directions in the Effective Enforcement of EU Law and Policy* 77-104 (2016: Edward Elgar), and also Finck, Michele 'Digital co-regulation: designing a supranational legal framework for the platform economy' (2018) 43 *European Law Review* 47-68 on the failure of self-regulating platforms.

¹⁵ The DSA should not be concerned with addressing dominance, as there are already existing mechanisms for this, see for example T-612/17 *Alphabet v Commission* nyr. The point is that the consequences and networked effects of huge market shares exacerbate the issues the DSA should tackle.

¹⁶ It is well documented in the literature that self-regulating firms have a poor record in choosing the public interest over their self interest Bartle, Ian and Vass, Peter 'Self-regulation within the Regulatory State' (2007) 85 *Public Administration* 885-905.

¹⁷ Some authors can see a role for public value co-regulating at the local level for particular types of platforms or AI technology, for example Ranchordás, Sofia and Goanta, Catalina, 'The new city regulators: Platform and public values in smart and sharing cities', *Computer Law & Security Review: The International Journal of Technology Law and Practice* (in press) <https://doi.org/10.1016/j.clsr.2019.105375> prioritises 'deep coregulation' for collaborative economy in particular.

¹⁸ See Busch, Christoph 'Self-Regulation and Regulatory Intermediation in the Platform Economy' in Cantero Gamito, Marta & Micklitz, Hans-Wolfgang (eds.) *The Role of the EU in Transnational Legal Ordering: Standards, Contracts and Codes* 115-134 (2019: Edward Elgar) that advances an argument that regulation of platforms is framed as a type of meta-regulation.

¹⁹ Stemler, Abbey 'Feedback loop failure: Implications for the self-regulation of the sharing economy' (2017) 18 *Minnesota Journal of Law, Science and Technology* 673-712. See James Temperton's investigation into Airbnb and the failure of the internal guidelines and ratings system in 'I stumbled across a huge Airbnb scam that's taking over London' in *Wired* available here: <https://apple.news/AzNExIU3hQum5c0a8P0Vovw>.

Ultimately there is no way for independent regulators to know what platforms are policing²⁰ and how; ‘transparency’ reports published by some platforms merely reflect the subjective assessment of that private entity and are in turn themselves subject to reputational manipulation, when it may be more expedient to report content as a breach of community guidelines rather than an admission of hosting illegal content.²¹ In the case of global platforms wielding massive power and immune to market forces through dominance, self-regulation is fraught with difficulty; effective enforcement requires an accountability regime that citizens can buy into.

Even the most ardent supporters of self-regulation for platforms align recommendations to *particular platforms* and business models (usually collaborative economy), and stress the necessity for proper enforcement mechanisms.²² Such enforcement mechanisms in turn rely on the goodwill of platforms handing over commercially sensitive data that they, so far, are unwilling to do.²³ This is where the theory of self-regulation meets the reality of actual practice and falls short. This is not a proper basis for regulatory design of the DSA. Nonetheless, regulators should expect tech companies to lobby **not only to keep this approach but to extend liability insulation** through a so-called “Good Samaritan” principle. In making this request, platforms admit that under the present regime they actively break the law (on-line hate speech removal etc). Only a further extension of liability insulation (when it turns out they have broken the law by not removing content) will ensure platforms *choose* to cooperate and apply the law in future. This is completely untenable and should be wholly rejected. The only way to make platforms obey the law is to apply it to them without exception: regulate online as offline. Platforms are the guardians and gatekeepers of the platform ecosystem, and the main players make billions of dollars in profit every year. It is completely disingenuous to argue that extension of a liability shield will somehow encourage better cooperation from platforms.

2.3. The Court cannot plug the regulatory gap

The CJEU cannot plug the regulatory gap left by the ECD. The Court has attempted to narrow down some of the exemptions in the ECD to capture platforms such as *Uber*,²⁴ and reclassify them in a way in that existing legal frameworks can readily grasp and regulate in the national context. So, an ostensible ‘mere conduit’ was effectively reclassified as a transport service, and therefore subject to all the duties and liabilities that competing offline transport services are subjected to in each Member State. However, the most recent case of *Airbnb Ireland* (December 2019)²⁵ shows the limit to hoping that the CJEU can plug the regulatory gap and thus enable EU legislators make few changes to the existing regime. An attempt by the French tourist industry to capture *Airbnb* as a provider of accommodation (and thus attach it to existing French Hogue Law) failed. *Airbnb* was classified as being an information society service – essentially a passive platform.

²⁰ This is also why ‘enforced self-regulation’ fails with platforms since whilst regulators are in charge of enforcing and monitoring externally set standards, in order for external regulators to know if the regime is operating, the regulatees must have full transparency.

²¹ Keller, Daphne & Leerssen, Paddy ‘Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation’ in N. Persily & J. Tucker, *Social Media and Democracy: The State of the Field and Prospects for Reform* (CUP: 2020) is a fascinating study on platforms self regulatory activities.

²² Black, Julia *Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a ‘Post-Regulatory’ World*, (2001) 54 *Current L Probs* 103-147.

²³ Sundararajan, Arun, *The Collaborative Economy: Socioeconomic, Regulatory and Policy Issues*. Policy Department A: Economic and Scientific Policy,

European Parliament [https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/595360/IPOL_IDA\(2017\)595360_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2017/595360/IPOL_IDA(2017)595360_EN.pdf).

²⁴ Case C-434/15 *Asociación Profesional Elite Taxi v Uber Systems Spain, SL*. ECLI:EU:C:2017:981.

²⁵ Case C-390/18 *Airbnb Ireland* ECLI: EU:C:2019:1112.

Since not all platforms provide the same kinds of services, not all generate revenue in the same way, the ECD cannot adequately capture the complexity of today's digital services; interpretation by the CJEU merely reinforces the choices of the EU legislator of 20 years ago. Furthermore, recent legislative developments now actively undermine the coherence of the ECD system.²⁶ This jurisprudential approach by the CJEU is not the inevitable or only way of regulating platforms, but the CJEU is powerless to adopt a different regulatory frame without legislative intervention. When it comes to data protection, the CJEU has taken a markedly different approach; whilst it is dealing with the same platforms, it is doing so within the framework of fundamental rights and privacy most recently encapsulated by the GDPR.²⁷

The EU legislator selected self-regulation alongside a liability shield as the main components of regulating platforms in the ECD. It is clear that the CJEU cannot fill this gap. Given the apparent failure of this approach, it is imperative that any future DSA does not replicate this model, especially if enforcement and cooperation between Member States is a genuine priority. The following section identifies the next key lesson in designing a future DSA: the importance of regulatory framing.

²⁶ 'the emphasis on the adoption of automatic filtering systems and a clear encouragement to invest in such technologies results in a dangerous clash with Articles 14 and 15 of the ECD. More precisely, using filtering systems blurs the line between active and passive hosting providers, a distinction subject to detailed analysis by the CJEU in a number of cases' in Montagnani, Maria Lillà, and Trapova, Alina 'New obligations for Internet intermediaries in the Digital Single Market – safe harbours in turmoil?' (2019) 22 (7) Journal of Internet Law 3-11.

²⁷ Cases C-293/12 e C-594/12, Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others ECLI:EU:C:2014:238, Case C-362/14, Maximilian Schrems v Data Protection Commissioner, ECLI:EU:C:2015:650, Case C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González ECLI:EU:C:2014:317.

3. REGULATORY FRAMES, GOALS, AND ENFORCEMENT

KEY FINDINGS

The original conceptualisation of platforms was of private enterprises that ought to be regulated by competition law (price and market) and by consumer protections 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. The weaponization of the US approach to free speech (all conquering) which subverts the European approach to free speech (one right to be balanced amongst others) should be avoided when sculpting public values. Being clear on the EU goals and values that are to frame the regulation of platforms is a critical first step in designing legislation that works for the EU context.

Regulatory framing matters. Law is ill-prepared for platforms because fundamentally law is constructed upon either a public or private basis, informed by the concepts of public or private 'spaces'. For example, traditional media companies are regulated on the basis of public law principles given their wide-reaching ability to influence political opinion and affect democratic politics although most are entirely private entities. Yet private tech companies like Facebook and other social networking sites have the capacity to reach and influence a much larger audience's buying practices or political identities have escaped similar regulation and are instead left to private law modalities.

This public-private cleavage means that the DSA has to be carefully framed. It cannot simultaneously tackle all the issues at stake in platform regulation. Private law is dominated by the logic of economics, markets, user choice, contract law and price (competition). Unfortunately platforms often do not engage any of these organising concepts in business design.²⁸ On many aspects of platforms' business models, competition law fails, yet many regulatory authorities around the globe continue to frame platform regulation in economic and competition law terms alone.²⁹ That is not to say competition is not a significant concern but it is not the remedy to protect the public values also engaged. Similarly, because the target of regulation is private, the type of regulators involved are not minded to think first about fundamental rights of citizens or public values in the same way as if they are regulating a public entity or Member State. Public law on the other hand is concerned with regulation of powerful actors that control how society functions – from constitutional foundations (politics, democracy, rule of law) to law enforcement, to the protection of fundamental rights – and how society frames its values and respects the dignity of its citizens. Some platforms can easily be framed as equivalent to public actors yet escape the same regulatory framing.

3.1. Why framing matters

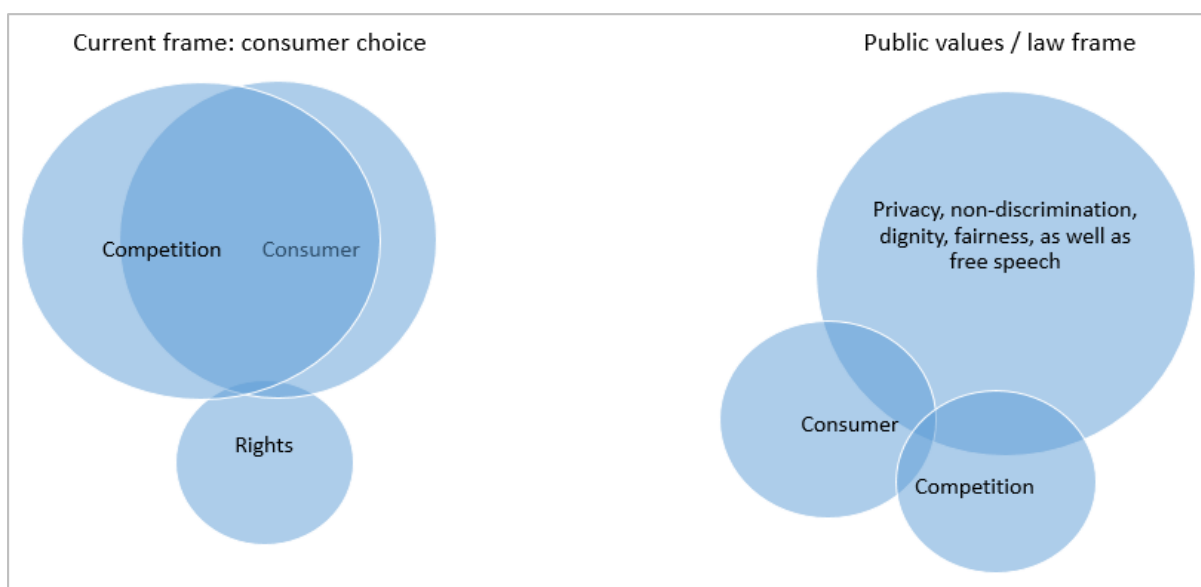
This clash of regulatory values and systems of law have left platforms in a regulatory void. This regulatory void is not just bad for citizens' rights, but also for new and emerging tech companies to provide innovation and growth in the absence of legal certainty. How priorities are ordered in a DSA **fundamentally affects the system of enforcement you choose.**

²⁸ Though see the limited decision from the Bundeskartellamt on Facebook discussed by Lorenzo-Rego, Irene, 'The Perspective of the Bundeskartellamt in the Evaluation of Facebook's Behaviour: Prior Considerations and Possible Impact' (2019) 3 (2) CoRe 100-109.

²⁹ Furman Report 'Unlocking Digital Competition and European Commission Competition Policy for the Digital Era' Some jurisdictions remain pessimistic about the possibility of competition law alone to properly regulate platforms, see e.g. Stigler Committee n 10.

Broad fundamental rights protection and the protection of the rule of law is *not* consistent with self-regulation. If the framing is commercial and competition law, then the focus remains on self or co-regulatory measures that amount to altering Terms of Service (ToS) of digital platforms. This is based on market logic; if consumers do not like it, they can go elsewhere and exercise their power of contract, even though everywhere else is also the same, or there is nowhere else to go due to market dominance. The current regulatory framing of the ECD is based on competition law and the consumer. The dignity of the citizen is nowhere to be seen and a public values framework is absent.

Figure 1: Clashing regulatory frames



Source : Author's own elaboration

Choosing the right regulatory framing depends upon what the EU decide to regulate. When talking about the possible future of AI regulation, Black and Murray³⁰ describe the path of internet regulation as:

‘Firstly, there is...Libertarianism: (1) the market will regulate; (2) there is no one government or regulator who has authority, or even the legitimacy to regulate; (3) the [digital] community is the source of legitimate authority to regulate. Then in time there will be...realism: (1) the market cannot control this; (2) key players will set the agenda and should be the focus of regulation; (3) regulation should focus on discrete risks and harms rather than *processes or structures*.

Much later may come the realisation that as governments stood by a few large corporations have stolen a march and have become self-governing within the sphere through contractualisation.³¹

We have now passed the realisation that the market and key players are the appropriate regulators, and yet the legislature is still in the process of focusing on ‘discrete harms’ such as copyright or on-line hate /protection of minors etc. The **DSA needs to focus on horizontal internal processes and structures**, rather than discrete risks and harms, when it comes to platform regulation. It is the internal

³⁰ My emphasis. This is a lament about the future of AI regulation possibly repeating the same path as the internet, even though, as they argue, the risks and harms appear to be more intuitively understood than was the case with platforms. Black, Julia and Murray, Andrew ‘Regulating AI and Machine Learning: Setting the Regulatory Agenda’ (2019) 10 (3) EJLT <http://ejlt.org/article/view/722/978>.

³¹ Black and Murry n 30.

operations of the platforms, rather than ‘problem driven’ approach the Commission has so far adopted, that is required.

Black and Murray offer the following (circular) framework for regulatory design: goals and values → knowledge and understanding → tools and techniques → behaviour of individuals → behaviour of organisations → trust and legitimacy → goals and values.³² This circular design puts the regulatory framing, (goals and values) at the start and end of the regulatory conversation: they are simultaneously input and output measurements.

3.2. Regulatory goals and values

The regulatory goals of a DSA need to be consistent if a functioning set of rules are to be enforced. This means that creating growth ought to be balanced against protection of **all fundamental rights** including non-discrimination, privacy, free speech, rule of law, and the basic tenets of democracy. In the ECD protecting fundamental rights is essentially framed as a singular concern – protecting free speech – that means insulating platforms from liability for third party content alongside no general monitoring. Ironically, there appears on this logic to be an appreciation that platforms are not the appropriate actors to delineate public values, but this misunderstands the consequence of non-enforcement: a lack of enforcement means platforms are *de facto* deciding public values. Defining public values as the protection of free speech in this context conforms with an essentially American approach to regulating tech and free speech (that trumps other rights) rather than a European approach where free speech is balanced against other competing rights or values requiring intervention.³³ If a distinctly European approach is taken to regulating platforms, free speech must not become weaponised to insulate platforms from liability, but rather is balanced amongst protection of privacy, the rule of law and other fundamental rights.

As yet the regulatory goals of the DSA are still being elaborated. According to the Commission:

‘The goals of this revision would be to provide clear, updated, and binding rules to tackle problems such as illegal hate speech online, or opaque political advertising. A revised rulebook for digital services would provide *greater safety, trust, and empowerment* ... while giving innovative EU businesses regulatory clarity to scale, grow, and compete globally and *safeguarding the overarching right of freedom of expression as well as European and democratic values*... and set global standards which could be promoted at international level. Such EU-wide rules should be backed by a European regulatory oversight structure to help effectively enforce and protect the interest of all European citizens across the Single Market (my emphasis).³⁴

The choice of words here is already alarming; a false note appears championing the American approach to free speech (‘overarching right’) appearing to dominate European and democratic values. If (user?) safety, trust and empowerment are regulatory goals, then the frames of citizen-consumer whose rights

³² This framework was developed in relation to AI but serves as a useful template for platforms too. This is not the only regulatory framework to be suggested when regulating platforms, for example see Nooren, Pieter, Van Gorp, Nicolai, Van Eijk, Nico, Fathaigh, Ronan Ó ‘Should we Regulate Digital Platforms? A New Framework for Evaluating Policy Options’ (2018) 10 (3) Policy & Internet 264-301, that focuses on regulation by platform design. However this model undervalues the public interest and values concerns.

³³ Hoofnagle, Chris Jay, van der Sloot, Bart and Zuiderveen Borgesius, Frederik ‘The European Union general data protection regulation: what it is and what it means’ (2019) 28 Information & Communications Technology Law 65-98. See also Heinze, Eric ‘Wild-West Cowboys Versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech’ in Weinstein, James & Hare, Ivan, (eds) *Extreme Speech and Democracy* 182-203, (2019: OUP) available at SSRN: <https://ssrn.com/abstract=1482687>.

³⁴ Text from a leaked DG work package document A future Digital Services Act p 24 found https://www.politico.eu/wp-content/uploads/2019/08/clean_definite2.pdf. Already there are amendments in place in the AVMS because the approach of self-regulation based on codes of conduct failed to solve the hate speech problem.

are voluntarily given up via ToS need to be rethought. These mixed messages on goals and values needs to be resolved before moving on to the other aspects of the regulatory design.

However the regulatory goals are ordered, the DSA should create internal coherence with the wider EU regime including the Charter of Fundamental Rights³⁵ and ECHR, the GDPR and indeed begin to make cohesive the distinct approaches taken in the Copyright Directive and the AVMS.³⁶

The following section provides an overview of the EU regulatory toolbox when it comes to enforcement of EU law, the selection of tools being made in the DSM, and then identifies the barriers to enforcement of EU law and policy, in particular those that are relevant for regulating platforms.

³⁵ On the bringing together in a new standard of review for single market concerns and the CFR see the latest Opinion of AG Sanchez-Bordona in Case C-78/18 Commission v Hungary nyr.

³⁶ Montagnani and Trapova n 26.

4. EU ENFORCEMENT TOOLBOX

KEY FINDINGS

The EU has multiple tools and techniques that it could use to enhance enforcement and cooperation between Member States. In the DSM there is a consistent pattern of self-regulation with limited powers of oversight for national enforcement bodies and soft self-regulatory codes of conduct. Careful attention needs to be paid to the particular barriers to enforcement that a DSA might encounter: externalities; unequal distribution of tech headquarters; 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.

The EU has a multiplicity of tools at its disposal to ensure the effective enforcement of EU law and policy and almost all of them can be found in some form or another across the single market.³⁷ In general terms these tools can be aggregated into the following categories.

Table 1: Toolbox of EU enforcement

	Centralised infringement and other legal mechanisms*			Individual
First wave	Dialogue	Databases	Inspections	Direct Effect/ Preliminary rulings
Second wave	Package meetings	Naming and shaming	Investigations	Solvit
	Stakeholder meetings	Conformity check	Guidance/soft law	Damages
Third wave	Networks	Pilot	Implementation plans	ADR/ODR
	Agencies	Scoreboards /IMI		
	Hybrid/Intgov	Semesterisation	Evaluations	
Bespoke enforcement solutions				
	NEB/EU Reg/ Penalties specified	Central Database(s)	Codes of conduct	

*Other legal centralised instruments include competition, state aid and interim measures as well as the financial penalty

Source : Author's own elaboration

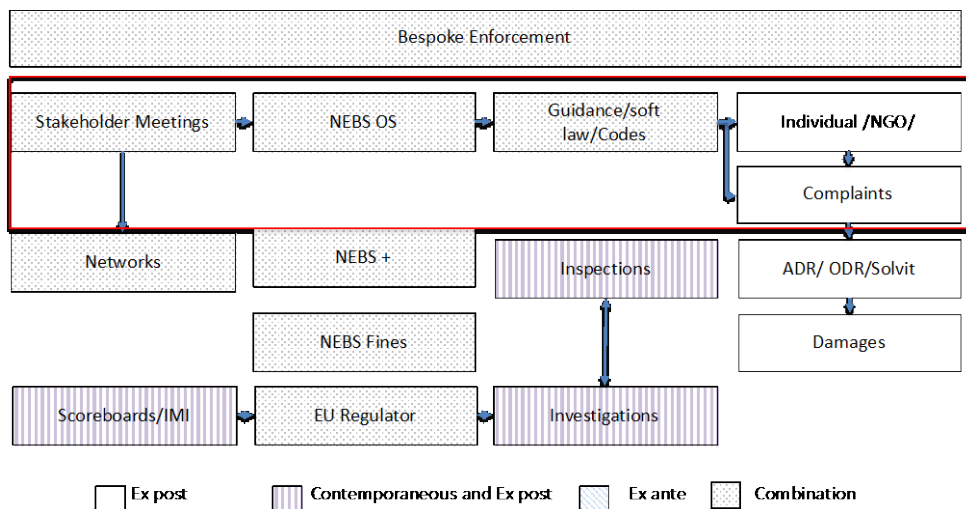
³⁷ You can see an early report on the various tools and techniques European Parliament Study (2013): Ballesteros, Marta et al 'Tools for ensuring Implementation and Application of EU Law and Evaluation of their Effectiveness' Directorate General for Internal Policies, Policy Department C: Citizens Rights and Constitutional Affairs PE 493.014.108.

Many instruments in the single market have adopted a combination of some of these tools and techniques with more or less success.

Enforcement design has been iterative and experimental, especially as a result of the REFIT38 and the Better Regulation Agenda³⁹ where ex post evaluation of legislative instruments typically focused on (the lack of) enforcement, and new proposals set out to remedy gaps in a bespoke fashion.⁴⁰ However, this approach to regulatory design can also lead to repetition, redundancy and indeed gaps in the system that are exploited by regulatees requiring yet more regulation to ‘mind the gap’. Increased complexity and gap-plugging through cross-over measures further obscure enforcement goals and citizens feel confused as to how best to enforce their rights.

The suite of DSM instruments surveyed in this report in Section 5 select a variety of approaches. Empowering national enforcement bodies in an oversight, co-regulation or sanctioning role seems to be preferred, alongside ODR/ADR consumer systems for the settlement of individual complaints. Particularly in relation to platform regulation, there has been a mix of self (voluntary) regulation in the form of platforms designing their own codes of conduct with in house complaint handling mechanisms alongside co-regulation where national enforcement bodies (and stakeholders) co-design codes of conducts that are overseen and validated by appropriate national bodies. Figure 2 outlines the model(s) of enforcement seen across the single market, with the red square indicating the limited option of self-regulation in the ECD.

Figure 2: Bespoke enforcement design post REFIT and evaluation



Source : Author’s own elaboration

³⁸ Communication from the Commission EU Regulatory Fitness COM(2012) 746 final.

³⁹ Communication from the Commission, Completing the Better Regulation Agenda: Better solutions for better results COM(2017) 651 final, Communication from the Commission - Better regulation for better results - An EU agenda COM/2015/0215 final, Communication from the Commission Better Regulation: Delivering better results for a stronger Union COM/2016/0615 final.

⁴⁰ Smith, Melanie ‘Evaluation and the salience of infringement data’ (2015) 6 European Journal of Risk Regulation 90-100.

4.1. Barriers to enforcement

There is a rich literature on why Member States fail to implement and /or enforce EU Law.⁴¹ Typically research identifies 10 factors that have an effect on whether Member States implement EU law correctly. These factors are: goodness of fit; preference fit; institutional decision-making capacity; administrative efficiency; low complexity of EU law; favourable culture (toward rule of law and conflict management); few inter-ministerial coordination problems; national enforcement and monitoring; EU monitoring and enforcement; learning.⁴² Only three of these remain in the control of EU legislators and these are:

- Low complexity (design);
- National enforcement and monitoring (design); and
- EU monitoring and enforcement (enforcement model)

Research on the problems of co-operation *between* Member States outside the field of law enforcement is less developed or situated specifically in the study of formal and informal networks as mechanism to encourage cooperation between Member States in the form of information sharing, learning, and capacity building which in turn aids administrative implementation of EU law.⁴³ Börzel and Heidbreder classify these types of cooperative networks as informational, procedural and organisational cooperation but like other types of network activity failure by a single state can have negative consequences for the utility of such networked enforcement.⁴⁴ In order to design a future DSA that incorporates a model of effective enforcement and cooperation between Member States, these points should be borne in mind. Multiple goals, conflicting values and attempting to solve all the problems various business models and platform types is a recipe for confusion, conflict and unequal or failed enforcement. Platforms present their own specific regulatory problems and the following sections select five barriers to enforcement that should be mitigated in the design of the enforcement system in a future DSA.

4.1.1. Externalities

Externalities – that is the external affects off-line as a consequence of platforms’ on-line activities – will be different depending on platform type and may effect Member States in different ways. It is imperative therefore that in order for good cooperation and enforcement to be a possibility, how those rules are drawn must carefully consider these potential externalities. Although platforms’ internal operations (data, privacy, prevention of crime, respect for fundamental rights) **can be horizontally regulated at the EU level**, clearly the immediate effects on the housing market (for example) are not appropriate for regulation in the DSA. Sometimes the term externalities can be applied in a different way. When research literature suggest that platforms can play a valuable role in enforcement (as co-creators or co-regulators) this is presented as a positive externality. However, these arguments refer to the ability of platforms to act in place of Member States as enforcers (eg recoup tax from citizens).⁴⁵

⁴¹ See for example Zhelyazkova, Asya, Kayab, Cansarp and Schrama, Reini ‘Notified and substantive compliance with EU law in enlarged Europe: evidence from four policy areas’ (2015) 22 *Journal of European Public Policy* 1127–1147. For a summary of this research on barriers to enforcement and cooperation see Smith, Melanie ‘Challenges in the implementation of EU Law at national level’ Briefing for JURI Committee of the European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs Directorate-General for Internal Policies PE 608.841 – November 2018.

⁴² Angelova, Mariyana, Dannwolf, Tanja, König, Thomas ‘How robust are compliance findings: a research synthesis’ (2012) 19 *Journal of European Public Policy* 1269–1291.

⁴³ Börzel, Tanja A and Heidbreder, Eva G ‘Enforcement and Compliance’ in (eds) Harlow, Carlow, Leino, Päivi, della Cananea Giacinto *Research Handbook on EU Administrative Law* 241-262.

⁴⁴ Börzel n 43 p 260.

⁴⁵ Finck n 14.

This enforcement externality is not the same as a platform enforcing EU rules on itself (self-regulation). This conflation is damaging and misleading from the perspective of effective enforcement of EU law.

4.1.2. Unequal distribution

Any report on how to achieve effective enforcement and cooperation between Member States would be remiss not to mention the concentration of European headquarters in Ireland. Currently, Ireland is home to Apple, Twitter, Google, Facebook, LinkedIn, Amazon, Etsy, Groupon, PayPal, Airbnb, Uber, Stripe, Siemens, Intel, Dell, Microsoft, Symantec, EA, Adobe, Dropbox, Salesforce, SAP and eBay's global customer experience headquarters to name just a few.

Whilst of course there are other big tech companies in other Member States, the sheer concentration in Ireland by the leading market players cannot be overlooked, nor the importance of these operators for jobs or the significant part they play in the overall economy of that state. This enormous concentration places a practical and political burden on a small Member State. Appropriate resourcing, in particular of Ireland's NEB,⁴⁶ is critical to the success or failure of any new rules. This unequal burden is why a network of national bodies co-ordinated by an EU regulator is vital to supporting enforcement, especially if the Commission is committed to the country of origin principle in its rule and enforcement design.

4.1.3. Expertise

Resourcing the NEBs and/ or EU regulator is also important when considering the large information, technical and other asymmetries that exist in regulating platforms. This is not just financial resources, but requires a multi-disciplinary staffing (competition and human rights lawyers, data scientists, software engineers, AI experts) to mitigate those asymmetries. Too often enforcement becomes siloed, within the EU and domestically, either seen as an internal market issue or a fundamental rights issue, or a competition issue, when in fact all of these (singular) approaches are insufficient. Effective networking across internal regulators and other cross border networks (e.g. the European Competition Network) and defined roles where overlapping jurisdictions occur should be considered.

4.1.4. Complexity

Enforcement fails when rules are too complex, not appropriately designed and the system of enforcement is not given sufficient attention at the policy design stage.⁴⁷ In the case of platform regulation, more is not necessarily better.⁴⁸ Clearly defined roles, powers and competencies alongside the type of NEB chosen has a significant impact on success especially for cooperation across borders. Take for example the case of air passenger rights. Enforcement, as it so often is, was left to Member State discretion, particularly in relation to the design, capacity and choice of NEB. Since the NEB was left to Member State discretion, all Member States chose different and not necessarily complementary solutions. The UK nominated the Civil Aviation Authority whose mission is air safety, not consumer rights: the CAA is not resourced to fulfil the mission of a consumer body. As a consequence an uncontrolled proliferation of for-profit firms have stepped in to fill the regulatory gap leading to incomplete and patchy enforcement.⁴⁹ The UK is about to make the same mistake again in relation to

⁴⁶ The continuous under-funding of the Irish Data Protection Commission is a real problem for the effective enforcement of the GDPR across Europe <https://www.irishtimes.com/business/technology/data-protection-commission-disappointed-at-budget-allocation-1.4045248>

⁴⁷ Angelova, Mariyana et al n 42.

⁴⁸ See the concern of Hodges, Christopher 'Collective Redress: The Need for New Technologies' (2019) 42 Journal of Consumer Policy 42-59 on the Commission's proposal for collective redress in consumer rights, also Kelly, Cliona, Cooke, Isabel 'The "New Deal for Consumers" and consumer collective redress' (2018) 25 (8) C.L. Pract.171-178.

⁴⁹ Drake, Sara 'Delays, cancellations and compensation: why are air passengers still finding it difficult to enforce their EU rights under Regulation 261/2004' (2020) Maastricht Journal of European and Comparative Law (forthcoming).

on-line harms and OFCOM.⁵⁰ It is a mistake to add on platform regulation to an existing regulator with a different mission, especially one that is dedicated to competition or consumer rights alone. It will have neither the funding, nor expertise or mission.

4.1.5. Lack of transparency

Self-regulation in the ECD failed for many reasons, but a lack of transparency from regulatees will hinder **any** enforcement design. In designing a new DSA, legislators should make transparency between platform and NEBs a priority.

Platforms self-reporting without the ability to audit (or understand what is being reported) will not create an appropriate accountability regime. This is where the scope of the DSA should be considered. Fewer rules, but with binding transparency, will be more effective than complex, layered, platform/or business model specific rules without transparency.

The following section narrows down the discussion of possible enforcement models for the DSA by providing an overview of the enforcement models in six DSM instruments in addition to the ECD to offer insight into the alternatives and consequences of choosing an enforcement model in a future DSA.

⁵⁰ Online Harms White Paper n 10.

5. ENFORCEMENT CHOICES IN DIGITAL SINGLE MARKET LEGISLATION

KEY FINDINGS

A survey of seven instruments in the EU DSM illustrates that there is no one preferred model, but rather a patchwork of approaches have been adopted depending on the relative importance – for the internal market and EU values perspective – of the measures themselves, alongside the existing regulatory framework. The design of different enforcement models range from soft self-regulation (ECD, geoblocking, parcel) to enhancing self-regulation with layered enforcement in response to regulatory failure of the ECD (AVMS and copyright) to enhancing cooperation between Member States and reinforcing centralised Commission enforcement (consumer rights) to a comprehensive public values enforcement model (GDPR).

In line with the creation and promotion of the DSM⁵¹, the EU has introduced a panoply of regulation to create legal certainty, open up markets and regulate how companies process and store personal data. The following sections of the study will examine six of these instruments, and in particular the associated enforcement regimes, to provide an overview of some of the regulatory choices that have recently been made in this sector. Such choices in regulatory design may inform the type of enforcement regime recommended for a proposed DSA. At this stage, no in-depth academic studies are available to assess to the relative success or failure of the enforcement regimes of the selected instruments as they are all relatively new.⁵²

Important recent legislation in the area of the DSM includes, but is not limited to, the GDPR, the geoblocking regulation, the parcel services regulation, the audiovisual media service directive, the copyright directive, and the consumer protection regulation.⁵³ This suite of regulations and directives have different strategies for enforcement, and to some degree, the type of enforcement design is informed by the choice of regulating instrument (directive or regulation) and the rules being imposed. Most are, in rule terms, limited by the ECD Articles 12-15. Potential conflicts between the ECD and newer instruments can be found in the copyright directive that, on the one hand does not require general monitoring (as per the ECD), yet on the other requires platforms to be proactive in ensuring that copyrighted material is not uploaded onto their platforms without a licensing agreement.⁵⁴ To do this effectively, some kind of ex ante filtering system would be required through the use of algorithms, though this in turn seems to be prohibited as 'general monitoring' and would also have the effect of moving platforms from passive to active in CJEU case law.⁵⁵ Within this suite of regulations, online hate speech, terrorism and protection of minors are also singled out as areas where platforms need to exercise a duty of care, possibly through the use of algorithms, whilst simultaneously being prevented

⁵¹ Communication from The Commission 'Online Platforms and the Digital Single Market Opportunities and Challenges for Europe' COM/2016/0288 final.

⁵² There is a lot of commentary on the workability, desirability and potential unforeseen effects of the GDPR and CPR regulations, but nothing that specifically conducts studies on the effectiveness of the enforcement systems therein.

⁵³ See n 4 - 9.

⁵⁴ See below in 5.1.2.

⁵⁵ Although the court has recently engaged in some fudging here to square the circle by stating filtering for specific content (eg in AVMS and Copyright) isn't general monitoring, this is not reality as you have to scan all content to detect particular types of material. This is just another example of the ECD not being fit for purpose Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* ECLI:EU:C:2019:821.

from general monitoring. Any reform to the ECD must confront this lack of coherence between the instruments.

These recent additions to the DSM confirm the failure of the system of self-regulation in the ECD to prevent broadcast of terrorism, on-line hate speech and so on, despite non-binding codes of conduct already in existence.⁵⁶ This is a salutary lesson regarding the appropriateness of codes of conduct as a form of regulation.

Where the rules are limited, the system of enforcement chosen is also usually limited since there is little point in having an aggressive system of enforcement for limited rights and duties. In practical terms, the choice of directive immediately places the method of enforcement at the discretion of the Member State, leading inexorably to unequal application of the rules across borders. This is well established in the research literature, and inevitably results in further layering of legislation to tighten up enforcement.⁵⁷ These ever decreasing circles of regulation inevitably end up being designed in a way in which the Commission and /or central regulator play a greater part in enforcement. It would be sensible to start here, rather than end up here in five years.

Table 2 below provides a brief overview of the enforcement mechanisms within each of these instruments as well as the ECD. Roughly speaking the Table moves from the softest enforcement choices to the hardest (both horizontally and vertically).

Table 2: Types of enforcement regimes across the 7 instruments

	ECD	GEO	Parcel	AVMS	Copyright	CPC R	GDPR
None		Relies on CPCR					
Report	✓		✓	✓		✓	
Self	✓			✓			
Co-Reg				✓			
Complaint					✓		✓
NEB OS		✓	✓	✓			✓
ADR/ODR Option							
ADR/ODR Req				✓	✓	✓	
NEBs Enforce						✓	✓
NEB spec powers req						✓	✓

⁵⁶ These interventions are not without criticism Quintel, Teresa and Ullrich, Carsten 'Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, related initiatives and beyond' in Petkova, Bilyana & Ojanen, Tuomas (eds) *Fundamental Rights Protection Online: The Future Regulation Of Intermediaries* (2019: Edward Elgar Publishing) and Joint Press Statement 'The Sounding Board of the Forum on Disinformation issues Their unanimous final Opinion on the so-called Code of Practice, <https://www.euractiv.com/wp-content/uploads/sites/2/2018/09/Joint-Press-Statement-Sounding-Board-Issues-Opinion-on-Code-of-Practice-EMBARGO.pdf>.

⁵⁷ Smith, Melanie and Drake, Sara 'Conclusions: assembling the jigsaw of effective enforcement – multiple strategies, multiple gaps?' in Drake Sara and Smith, Melanie (eds) *New Directions in Effective Enforcement of EU Law and Policy* (2016: Edward Elgar) 320-327.

	ECD	GEO	Parcel	AVMS	Copyright	CPC R	GDPR
NEB & Stakeholder						✓	✓
NEB+				✓		✓	✓
NEB+ EU Reg						✓	✓
MS judicial remedies				✓	✓(copyright law)	✓	✓(including representative actions)
Penalties specified							✓

*NEB: National Enforcement Body, NEB+: NEBs with network/ cooperation responsibilities

Source : Author's own elaboration

5.1. Regulatory frames employed in Digital Single Market suite

Overall this mapping exercise shows us that whilst there is a fairly established spectrum of enforcement solutions chosen in the field of digital services, there is no particular trend over time, i.e. we have not moved from soft solutions to hard in terms of the timing of these legislative instruments.⁵⁸

5.1.1. Soft self-regulation: E-Commerce Directive, geoblocking, parcel distribution

The ECD has a soft system of enforcement; platforms and entities draw up their own (voluntary) codes of conduct and have (unspecified) complaints handling and quality verification systems in place. Appeal rights (if any) are determined by the platform. The reasons for this choice of enforcement system is (a) insulation from liability (b) the concept of users agreeing through contractual terms to be treated in a certain way by the platforms (c) the predominance of private law frames (customer choice) through which many DSM legislation has been developed. This approach can be seen in the American approach to regulating tech, but was specifically rejected by the EU when it came to the GDPR.⁵⁹ In other words whilst this is a familiar pattern in the DSM, it is not the **only** choice and the EU is free to set its own standards in regulating the future interaction between citizen and platforms.

The parcel distribution legislation is similarly lacklustre in terms of enforcement. In essence, the Commission has taken enforcement into its own hands. Whilst there must be a nominated NEB in Member States, in fact these do little in the way of enforcement. Rather they are tasked with gathering information from parcel distribution services about price and this information is reported to the Commission who maintains a list for comparison purposes. It is uncertain what the consequences of non-compliance are besides centralised enforcement against the Member State in question.

The geoblocking regulation is peculiar in that it has no real enforcement system of its own, although it does require Member States to nominate a NEB to oversee the application of the regulation without any further detail. Rather, the geoblocking regulation is reliant on 'piggybacking' onto other

⁵⁸ The geoblocking, parcel and GDPR instruments were all 2018 and sit at the opposite ends of the enforcement spectrum, the CPR 2017 is at the harder end of the spectrum and the AVMS (in force 2020) is somewhere in the middle.

⁵⁹ Hoofnagle et al n 33.

mechanisms of enforcement, such as the CPR, the Injunctions Directive⁶⁰ and a proposed further directive on class actions for consumers.⁶¹ Again, whilst this tactic is not untypical – prioritising rule drafting without enforcement mechanisms – it is not the recommended approach for the DSA. It creates unnecessary confusion for Member States, stakeholders and consumers. This way of legislating may be seen as pragmatic for the Commission as it is easier to pass in Council without meaningful enforcement provisions. When enforcement inevitably fails the Commission returns with a new mandate for yet more legislation to fill the enforcement gap, yet excessive complexity and layering are common reasons for enforcement failure. This cannot be allowed to happen in the DSA.

5.1.2. Enhanced self-regulation and layering: Audio Visual Media Services and copyright

The AVMS similarly adopts a self / co-regulation approach but with added bite. Article 4 encourages the use of self or co-regulation in drawing up codes of conduct that are broadly accepted by all stakeholders in the Member State, and leaves room for the Union to draw up similar codes of conduct. National enforcement bodies are not required to be created specifically for this task, and existing national bodies can merely bolt on supervision of the codes to their current duties. The NEB has no sanctioning powers, but will oversee voluntary codes of conduct, and the NEB has network and information exchange duties with a newly established EU technical group (ERGA)⁶². Again, whilst the directive suggests illegal content needs to be monitored and removed, and special provisions are made for the protection of minors, incitement to hate, terrorism and other crimes, no general monitoring or ex ante filtering can be applied to content, reciting the ECD Articles 12-15.⁶³ Member States are required to ensure appropriate ADR schemes are available to mediate a dispute between users and the platform where necessary, but no detail is prescribed vis a vis powers and remedies. The notice and take down approach is difficult to monitor externally and compliance is impossible to monitor due to the lack of transparency inherent in these schemes. Compliance and monitoring both remain in the purview of the platforms except where cases progress to court.

The copyright directive is stricter in rule design which requires pre-authorisation from rightsholders via licencing agreements with platforms and the ‘best efforts’ of the platform to remove infringing material as soon as possible. Here the platforms are more or less being required to execute ex ante protections of copyright whilst at the same time being prevented from general monitoring obligations. Self-regulatory codes (albeit with more specific obligations and structure provided by the directive) are complemented by a system of ADR be in place to resolve disputes, backed up by judicial remedies for breach of copyright. One imagines that due to extensive copyright law being in place already, there was no appetite for bringing forward additional methods of enforcement. Yet this reform has been criticised as incoherent and unenforceable⁶⁴, placing an enormous burden on copyright holders rather than placing liability onto the platforms which would be a more effective way to stop copyright infringement.

⁶⁰ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests OJ L 110, 1.5.2009 30–36.

⁶¹ Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC COM/2018/0184 final.

⁶² European Regulators Group for Audiovisual Media Services (ERGA) will oversee the implementation of the Directive and be comprised of representatives of NEBs and the Commission. It will provide on-going technical advice to the Commission Articles 30a, 30b AVMS Directive.

⁶³ AVMS Directive article 28b.

⁶⁴ Montagnani and Trapova n 26.

5.1.3. Enforcement and cooperation prioritised: consumer rights

The Consumer Protection Cooperation Regulation (CPCR) is distinct in so far as this is a specific enforcement regulation, designed to deliver enforcement across a panoply of existing legislation that set out consumer rights in a variety of fields. Its focus is cross border consumer infringements and is therefore heavily skewed towards Member State cooperation. As such the regulation is very detailed about the character, powers, duties and remedies of the NEB or stakeholder bodies charged with overseeing the implementation of the regulation (Articles 5-10) and of associated consumer rights already in force.

This specificity is required to reinforce co-operation across borders, with the Mutual Assistance Mechanism also spelled out in detail (Articles 11-14). National authorities must have a designated single contact point, the same basic powers, duties, remedies and character to facilitate cooperation with each other and, additionally, cooperate with the Commission (reporting mechanisms) that oversees this network of consumer bodies. Articles 15-25 set out how widespread and cross border infringements should be co-ordinated between Member States and the Commission, and finally in respect of Union wide infringements (Article 26-29) an additional layer of enforcement is put into place in the form of the 'alert system', as well as a power for the Commission to perform Union wide 'sweeps'⁶⁵. This approach provides a reasonable template for a system of enforcement that prioritizes the cooperation between Member States. Without these detailed instructions in place, and a coordinating authority to oversee it at the EU level with additional backstop investigation and inspection powers, it would be a much less effective tool of enforcement. This system ensures that serial infringers cannot hide by changing states (exploiting the country of origin principle), and repeated violations can be centrally tackled.

The CPCR was required because enforcement of the rules set out in previous legislation was inadequately enforced, and entire areas of consumer-rights legislation, like passenger rights, have failed from an enforcement perspective.⁶⁶ Unable to fix enforcement through sectoral legislation, the CPCR aims to fill the gap by additional prioritising and reinforcing enforcement and cooperation mechanisms.

5.1.4. Rights frame with European values: General Data Protection Regulation

Finally, the GDPR represents the most comprehensive instrument in terms of enforcement. The regulatory frame here is different to all the other instruments. It is not premised on the citizen as consumer, or competition law imperatives. It is premised on a European idea of protection of fundamental rights, in particular the right to privacy as found in the Charter and the ECHR. Many argue even this framing does not go far enough, and that human dignity and fairness are more appropriate regulatory frames.⁶⁷ Nonetheless the GDPR does not champion the American framing of privacy that is weaker. Regardless of the efficacy of the rules on protection of an individual's personal data,⁶⁸ the design of the system of enforcement is the most robust, multifaceted, and proportionate of all the DSM legislation in its approach to the digital environment.

⁶⁵ Cross border consumer infringements can also be pursued via Solvit and IMI. There are myriad ways to enforce consumer rights, yet more legislation is being proposed on collective redress. More is not necessarily more in terms of achieving effective enforcement.

⁶⁶ Drake, Sara 'Empowering Parliaments and enforcing citizens' rights in the implementation and application of Union law. Case analysis the transposition and implementation of Regulation 261/2004 on air passenger rights' PETI Committee Briefing Note Policy Department for Citizens' Rights and Constitutional Affairs Directorate-General for Internal Policies PE 608.843 – November 2018.

⁶⁷ Floridi, Luciano 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 Philosophy & Technology 307–312, de Hingh, Anne 'Some Reflections on Dignity as an Alternative Legal Concept in Data Protection Regulation' (2018) 19 German Law Journal 1270-1290 Clifford, Damian and Ausloos, Jef, 'Data Protection and the Role of Fairness' (2018) 37 Yearbook of European Law 130–187.

⁶⁸ The critique of these rules is vigorous and multifaceted, from how we define personal data and how we conceptualise what this means, to how we protect users from data harvesting and selling, de Hingh 'Some Reflections on Dignity' n 67.

The GDPR regime moves away from self and co-regulation precisely because it takes a public law frame that prioritises the protection of public values. It takes control of the character of any internal complaints systems that private entities might put in place, specifying how they should work. It is not left to the discretion of the private entities to see if they will, or will not, find it in their economic interests to respect fundamental rights. There is a direct intervention in the operators Terms of Service (ToS).⁶⁹ The GDPR requires specific NEBs who have to comply with certain standards of independence, resources and tasks;⁷⁰ who have specific, detailed and extensive enforcement powers;⁷¹ and are enmeshed in a network of similar bodies across Member States and with an overall EU regulator at the head of the network to co-ordinate activities.⁷² Importantly, in addition to national penalties and sanctions that may already exist, the regulation sets specific financial penalties to be imposed on platforms to ensure effectiveness and proportionality.⁷³ Extensive duties to cooperate horizontally across the Member States and vertically with the EU regulator are set out in great detail,⁷⁴ to be overseen by the European Data Protection Board.⁷⁵ This horizontal and vertical enforcement ensures that forum shopping is not an option if operators wish to access EU markets and data, and is crucial if there is to be meaningful cooperation across borders by Member States. It also creates a network effect that is vital for spreading best practice, learning and cultural change.⁷⁶

The Commission is yet to report its assessment on the success and ways to improve the operation of the GDPR (due mid 2020) but in an interim note the Commission concluded that the GDPR had been successful *in creating a compliance culture* amongst business and the promotion of global standards, yet there was still more work to be done on strengthening the role of regulators. This lesson should be taken forward in the design of the DSA. The Commission notes the allocation of sufficient resources to regulators is still a concern, and stepping up cooperation between different Member States is a priority, as well as uniform adoption of the Codes of Conduct under the GDPR.⁷⁷

⁶⁹ GDPR article 47.

⁷⁰ GDPR articles 51-57.

⁷¹ GDPR article 58.

⁷² GDPR articles 60-76.

⁷³ GDPR article 83-84.

⁷⁴ GDPR articles 60-67.

⁷⁵ GDPR articles 68-76.

⁷⁶ Polak, Josine and Versluis, Esther 'The virtues of interdependence and informality: an analysis of the role of transnational networks in the implementation of EU directives' in S. Drake and M. Smith (eds) *New Directions in the Effective Enforcement of EU Law and Policy* (2016: Edward Elgar) 105-129.

⁷⁷ Commission Communication 'Data protection rules as a trust-enabler in the EU and beyond – taking stock' COM(2019) 374 final 24.7.2019.

6. OPTIONS AND RECOMMENDATIONS FOR DIGITAL SERVICES ACT

6.1. Options

KEY FINDINGS

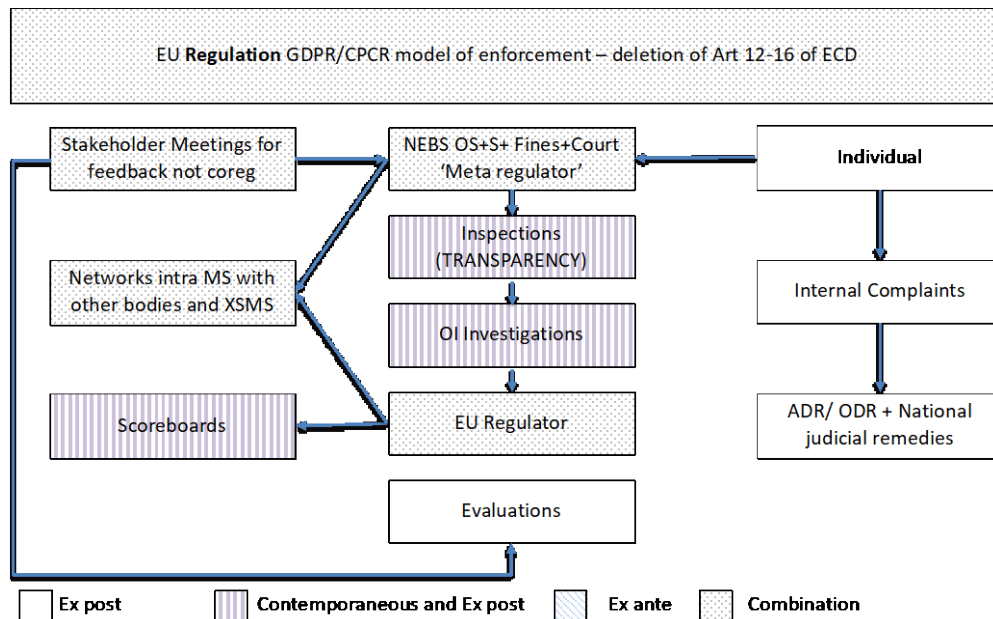
The recommended model approximates the most effective elements of the enforcement regimes of the CPCr and the GDPR. The preferred model is one that prioritises cooperation through (horizontal) networking across borders and (vertical) networking with a specialised EU regulator that not only has the ability to co-ordinate the network but has ancillary enforcement powers of its own. NEBs should have sanctioning powers with specific penalties prescribed that should be proportionate to platform, and enforceable transparency obligations should be in place so that the regulators can access and interpret all available data. The internal rules of platforms to be set by DSA, and public values defined by legislator. Stakeholder buy-in is achieved through feedback via network and regulator interactions for learning and dynamic adaptation of rules, not by self-regulation.

The following options for designing an enforcement model are an amalgamation of choices already in play in the DSM with some important alterations. They range from the least effective option (a) to the most effective option (d). The recommended model approximates the most effective elements of the enforcement regimes of the CPCr and the GDPR that prioritises cooperation between Member States to combat complex cross border issues, but also have **a centralised co-ordinating regulator** within the EU that not only has the ability to co-ordinate the network but has ancillary enforcement powers of its own.

- (a) Continuation of the self-regulation approach: **not recommended**. Lacks accountability and meaningful oversight, has already proven inadequate to task. Definitely no extension of the liability shield via a 'Good Samaritan' principle.
- (b) Regulation by NEBs with unspecified sanctioning powers: **not recommended**. Lack of coherence, forum shopping problems, and undermines cooperation across borders.
- (b) Co-regulation with industry but on the condition of complete access to data/algorithms/processing activities by regulator: **not recommended**. Oversight with specified sanctions outside of existing national measures. Unlikely that platforms will comply, regulators lack expertise to interpret and challenge any shared data.
- (d) Regulation by NEBs in a network with overall coordination by a central EU Regulator: **recommended**. NEBs have sanctioning powers with specific penalties prescribed that should be proportionate to platform to encourage SME development whilst controlling larger companies. **Internal rules of platforms set by EU legislation**, public values defined by legislator. Increased transparency from platforms on data sharing to enable regulator to regulate. Externalities and other negative effects can be regulated by other legal instruments. If ECD definitions changed (passive/active and so on) to catch platform ecosystem instead of shielding them, Member States will be able to regulate differential externalities through national law (eg Uber). Stakeholder buy-in is achieved through feedback via network and regulator interactions for learning and dynamic adaptation of rules and not through self-regulation.

6.2. Recommendations

Figure 3: Model of enforcement for platforms



Source : Author's own elaboration

In drafting this model, the following assumptions have been made. The new DSA will be a Regulation rather than a Directive (a directive being insufficient and cannot set up cross border cooperation effectively). It is also assumed that the DSA removes key elements of the ECD: the liability shield, the way platforms are described (hosting, caching, mere conduit) and the system of self-regulation entirely removed from Article 16 ECD. It is also posited that the DSA should be a limited instrument in terms of scope: it should focus on remedying a few key issues rather than trying to regulate the platform ecosystem by anticipating future business models and practices and issues with competition law (competition law needs to be reformed separately to deal with new business models, not via the DSA).

When we visualise people as citizens rather than consumers in the interaction with platforms we can introduce wider norms and values into the regulatory process and enforcement model. The model above acknowledges the challenges inherent in a complex and dynamic regulatory environment. Effective enforcement requires NEBs comprised of multi-disciplinary teams that are responsible for oversight of the internal horizontal EU devised rules for platforms (not soft codes of conduct drawn up by platforms for themselves). NEBs should have the power to sanction and fine platforms in a number of ways according to the rules in the DSA, and should be able to have standing to pursue cases against platforms in their national courts for non-compliance with the rules. NEBs should have powers to compel data / algorithms / transparency to ensure access to data and would require the staff and resources to properly interpret that data. 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 be 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 (as per the CPCR).

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 responsible to other EU institutions such as the European Parliament for providing reports on compliance on a yearly basis and 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.

The EU regulator could be a part of the Commission (but not within DG Internal Market or Competition) but ideally it would be a specialized agency in order to have the requisite mission and expertise to carry out its functions appropriately.

Individuals should be at first instance directed to the platforms own complaints handling service to resolve grievances. The internal complaints handling systems of platforms should therefore be regulated as part of the DSA, and comprise standards that respect fundamental rights. Timescales, onward appeal rights and direct information provision to citizens should all be designed externally by the DSA or central EU regulator, not left to individual platform discretion. These complaints handling systems should be audited by the NEB. If citizens are not satisfied they can either pursue through consumer ODR mechanisms already established or complain to the NEB whose judgment will be definitive.

Regulating the internal operations of platforms should be a key focus. Setting out substantive law to compel platforms to share data and algorithms with the regulator for audit should be a key guiding principle of the enforcement model, abandoning the self reporting or 'transparency' reports that have proved entirely insufficient and misleading. Real world businesses are subject to audit and data is money in the platform economy. There can be no more reliance on the so called 'trust economy'. Platforms' verification processes about what they host, sell, advertise, rank and promote needs to be externally verifiable by regulators and these horizontal rules should be set by legislation. The only way to incentivise platforms to prioritize reliability and transparency is to make them liable for what appears in their respective ecosystems particularly in respect of citizen focused platforms.

Platforms will lobby hard to retain (a) the liability shield in Arts 12-14 ECD (c) extend that liability shield via a Good Samaritan principle and, (c) platforms and others may argue forcefully against the removal of Article 15 ECD that prohibits general monitoring. Dealing first with the liability shield, reality tells us this has not worked for citizens and platforms have not demonstrated requisite responsibility that is concomitant of a liability shield. They have abused their position of trust. They have not responsibly operated the platform ecosystem. There is no longer any valid arguments that platforms can manage these spaces alone using their moral compass without regulatory intervention. The question for regulators is not whetherto make platforms liable, but for what, and how? Regardless of what rules are adopted, self-regulation and self-monitoring must be abandoned and **transparency between platforms and regulator must be the cornerstone of the new regime**. No system of regulation will work unless regulators are in a position to perform independent checks on the activities of the platforms.

Since it is clear that a blanket liability shield has failed as a regulatory strategy, it should be unnecessary to make the argument that a further extension of this shield is undesirable. However, it is clear this is being considered in a number of important legislative quarters.⁷⁸ In arguing for a Good Samaritan principle, platforms are seeking to shield themselves from whatever rules the new DSA is set to introduce. There is no point to a DSA if you introduce a Good Samaritan principle. Moreover, it is an entirely false premise, since the Good Samaritan principle is, in legal terms, largely employed in criminal law or food/health safety areas.

⁷⁸ See for example Voss, Axel JURI Committee (EPP) 'A manifesto for Europe's Digital Sovereignty and geo-political competitiveness' available here <https://www.linkedin.com/feed/update/urn:li:activity:6638081362257555457/>.

The premise of the Good Samaritan is that there is a liability shield for an *innocent bystander* who acts in good faith to aid compliance with the law. Platforms are not innocent bystanders in the on-line world, they are the active facilitators of whatever occurs there.

Lastly the fundamental underpinning of the ECD is the prohibition of general monitoring. No doubt, at the time the ECD was written, this seemed like an essential protection of free speech, and of course, this argument is now weaponised time and again by those who wish to insulate platforms from liability. However, this is a fundamental misunderstanding of the nature of free speech in the European Union, and the nature of consequences of Article 15. I have already argued above, this approach prioritises the fundamental right of free speech over all other fundamental rights which is not the correct understanding of free speech in the CFR and the ECHR. Free speech is not an overarching right in the EU. The consequences of no general monitoring has been to essentially allow the platforms to decide what constitutes the legal definition of free speech because without legislative intervention they are left to their own devices to police the 'free speech space' left by a regulatory vacuum. A no general monitoring duty does not protect our European ideal of free speech: it protects the platforms' individual ideas of what constitutes free speech.

Regulating platforms in the DSA requires legislators to confront what may be perceived by some as competing goals: innovation versus protection of values, free speech versus regulation or liability. It does not have to be a dichotomous choice. Whatever substantive rules are chosen, approaching the DSA with a framework of public values and a robust system of enforcement ought to be the starting point in regulatory design.

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This study presents an overview of possible options for an effective model of enforcement for a future Digital Services Act. 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 the DSA should remain a single (but limited) regulatory instrument which includes robust enforcement measures. A range of enforcement strategies are then evaluated across a suite of DSM legislation, alongside barriers to Member State cooperation and effective enforcement. The paper sets out several options for enforcement and concludes with a recommendation of a specific enforcement model for a new DSA.

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