

# JEDI

TECH & POLICY BRIEFINGS



## **THE DIGITAL SERVICES ACT (DSA)**

**FIT FOR THE 21<sup>ST</sup> CENTURY?**

JANUARY 2022

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## **JEDI'S 8 RECOMMENDATIONS FOR THE DSA**

1. Produce a European definition of "illegal content"
2. Strengthen the prohibition on "generalized monitoring" requirements
3. Extend to all Member States the competence to investigate and sanction
4. Leave to the judiciary the prerogative to authorize or not the deletion of a content or an account
5. Limit the certification of ADR bodies to public, independent, non-profit organizations
6. Upon initiation of an investigation, order access to platforms databases & algorithms and lift business secrecy
7. Reduce length & complexity of procedures and strengthen the deterrent power of sanctions
8. Quarterly impact evaluation of the DSA – and not every 5 years

## THE JOINT EUROPEAN DISRUPTIVE INITIATIVE

The Joint European Disruptive Initiative (JEDI) is the European advanced research projects agency (ARPA) with a mission to bring Europe in a leadership position in emerging and breakthrough technologies.

To achieve this goal, JEDI is launching [GrandChallenges](#) to push the frontiers of science & innovation, with a radical new method based on purpose-driven research, maximum speed, full focus on excellence, deep interdisciplinarity, and bold ‘moonshot’ risk-taking.

JEDI aims to provide Europeans and free societies with the means of technological and scientific power, for prosperity and societal resilience. Driven by humanistic values, JEDI is focused on solving major societal challenges of our time (environment, healthcare, digital, education, oceans, space) through innovation.

To be always ahead of the curve, JEDI has developed cutting-edge [technology foresight](#) and is actively engaged in high-level tech & policy recommendations.

JEDI is working for the common good, powered by more than 4.600 technology and scientific leaders from academia, industry and deeptech startups in 29 countries in Europe and globally. It is fully independent and financed by engaged foundations, companies, individuals and public institutions.

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## JEDI TECH & POLICY BRIEFINGS

Technological innovation cannot be reduced to the inventiveness, let alone the genius, of solitary minds. It is part of a political and geopolitical framework. This is why this series of briefing notes aims to shed light on the role of national and European public action on technological and innovation topics in the light of the fundamental values and interests of Europeans. These Briefings are both an analysis of current projects and regulations, and a place for concrete recommendations.

The aim is to support positive impact on our societies and on the greatest number of our citizens of emerging and disruptive technologies, and to allow Member States and Europe to remain sovereign in our technological century.

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# THE DIGITAL SERVICES ACT (DSA): FIT FOR THE 21<sup>ST</sup> CENTURY?

## CONTEXT

Released on December 15, 2020, the Digital Services Act (DSA) is a draft regulation whose aim is to replace the 2000 e-commerce directive, in order to adapt to the new challenges of regulating online content. These new issues include the centralization of communication services and digital media by a small group of actors, mainly of American origin and the explosion of the phenomenon of disinformation through the dissemination of fake news, subversion operations carried out by states and criminal organizations, and the spreading of conspiracy theories.

## GOAL OF THE DSA PROPOSAL

The project sets three general objectives: consumer protection, transparency, and accountability of platforms, and the establishment of a framework conducive to innovation, growth and competitiveness. In short ensuring a safe and accountable digital environment.

Moreover, it is based on two approaches: protection of access to reliable information and censorship of illegal content.

All of this happens within a harmonized framework, which is made possible by a directly applicable regulation, as opposed to a directive. Those practices, aimed at circumventing European regulations, such as "forum shopping", should be greatly discouraged.

## JEDI ASSESSMENT

This text is a step forward.

Firstly, it offers a protective framework for fundamental freedoms, ensuring strict control of content while avoiding widespread censorship and surveillance, whether by the platforms themselves or by states.

Secondly, "intermediary service providers", and especially "very large online platforms", have a responsibility to be transparent towards their users and the authorities, whether it be their moderation, recommendation or advertising systems. Users get new rights, such as the possibility to refuse profiling more easily. Finally, the authorities have a more dissuasive power of control and sanction, which can go up to a fine of 6% of the annual worldwide turnover and the restriction of access to the offending service.

In concrete terms, this should reduce the possibility for platforms to allow the spread of content deemed harmful to users, such as hate speech or fake news. The level of transparency that would be imposed on them would imply revealing the functioning of their algorithms and the way they treat their users' data.

However, several obstacles remain to be overcome in order to improve the text effectiveness.

Firstly, the objective of harmonization is not fully met. Indeed, states define individually what is "illegal content" and can consequently shift the scope of the DSA. They also have some discretion in imposing monitoring obligations on platforms, so that some platforms might be

left relatively alone, while others will be turned into zealous auxiliaries of state censorship. Moreover the "one-stop-shop" mechanism, already present in several regulations such as the GDPR, tends to concentrate supervisory power in the hands of the states hosting the European establishments of the major digital players, primarily Ireland. Yet, as seen in the case of the GDPR, the Irish regulator is making great efforts to make the regulation "little effective" against US platforms.

Secondly, the DSA is designed in such a way that it will undoubtedly encourage the transfer of judicial functions to private and non-European actors ("Alternative Dispute Resolution" or AdR bodies), whose task, like a judge, will be to interpret legal texts and apply sanctions (removal of content, blocking of accounts, etc.). The authorities' control capacity will be limited: the technical effectiveness of the independent audits will be restricted and their impartiality questionable; and the direct controls of the authorities especially on platforms' databases and algorithms will come up against business secrecy. Moreover, the length of the procedures that may ultimately lead to the application of sanctions is such that their dissuasive effect is highly questionable.

Finally, all the dysfunctional implementations of the text - if the wording remains as it is - will only be corrected in a period of five years at best, which is the time allowed for the Commission to evaluate the effectiveness of the regulation, which is extremely long in the digital world.

## JEDI'S DETAILED RECOMMENDATIONS FOR THE DSA

1. Produce a European definition of "illegal content"
  - ➔ to avoid regulatory re-fragmentation at the Community level, and, thus, to avoid the spread of "forum shopping" and "legal dumping" between the Member States.
2. Strengthen the prohibition on "generalized monitoring"
  - ➔ to meet the intent of the regulation, and to respect the fundamental rights of European citizens, as mentioned in the European Convention on Human Rights, and thus avoid making Europe a model of social control. Moreover, as platforms are required to remove content once it is flagged, EU policymakers should actively support technologies that are better at spotting illegal and unacceptable content (detecting deepfakes in real time, more accurate AI) — and the decision to remove a content should still be explainable for a human.
3. Extend the competence to investigate and sanction to all Member States
  - ➔ in order to solve the many problems raised by the "one-stop-shop" mechanism and the feeling of impunity that can result from it. The financial and political dependencies of certain Member States on non-European technology companies should not lead to non-application of European regulations.
4. Leave to the judiciary the prerogative to authorize or not the deletion of a content or an account
  - ➔ in order to guarantee the respect of the rights and liberties, critical function of the judiciary authority. Censorship should not be enforced by an administrative authority dependent on the executive power, and even less by private companies.

***"Stop forum shopping and the regulatory Monopoly game"***

***"The judge must judge. Censorship is neither an administrative nor a business matter".***

5. Limit the certification of ADR bodies to public, independent, non-profit organizations

→ to address the issues of bias and geographic asymmetry raised by these bodies. The outcome of an arbitration should not depend on the financial means of a particular actor and arbitration should not become a business matter.

6. Upon initiation of an investigation, order access to platforms' databases and algorithms and lift business secrecy

→ to ensure full transparency and compliance of intermediary service providers. For control operations to be effective, business secrecy must be lifted, and investigators must obtain the full cooperation of companies.

***“No transparency exception for algorithms”***

7. Reduce length & complexity of procedures and strengthen the deterrent power of sanctions

→ by introducing a minimum amount for fines imposed on very large platforms, facilitating access restriction measures, and adding "permanent blocking" as an additional sanction. The effectiveness of a sanction is measured by its accuracy, its deterrent effect, and its ability to prevent breaches from happening again.

8. Quarterly evaluation of the DSA – and not every 5 years

→ It is critical to start right now to correct unintended consequences of the regulation, and set up an evaluation and correction mechanism with a agile but thorough review every three months. For reasons of impartiality, the evaluation must be conducted by an authority, body or agency independent from the European Commission, national executive bodies and obviously from the private sector targeted by the regulation.

***“Technology does not wait for regulation to keep pace”***

## CALENDAR

15 December 2020: The Digital Services Act legislative proposal is submitted to the European Parliament and the Council of the European Union by the European Commission.

18 November 2021: The European Data Protection Board adopted a statement on the Digital Services Package which makes several recommendations to the co-legislators.

25 November 2021: The Council of the European Union reached a common position on the DSA proposal.

14 December 2021: The European Parliament's Internal Market and Consumer Protection Committee adopted the DSA proposal by 36 votes to 7 and 2 abstentions.

20 January 2022: Vote by the Parliament in plenary session. The approved text will become Parliament's mandate for negotiations with EU governments within the Council.

## KEY PLAYERS

### European Parliament

Internal Market and Consumer Protection Committee (IMCO) Rapporteur: Christel SCHALDEMOSE (S&D), Main shadow Rapporteurs: Arba KOKALARI (EPP), Dita CHARANZOVA (Renew), Alexandra GEESE (Greens),

Civil Liberties, Justice and Home Affairs Committee (LIBE) Rapporteur: Patrick BREYER (Greens)

Legal Affairs Committee (JURI) Rapporteur: Geoffroy DIDIER (EPP)

Industry, Research and Energy Committee (ITRE) Rapporteur: Henna VIRKKUNEN (EPP)

### Telecommunication Council

Digital/Telecommunication ministers of the 27 Member States.

### European Commission

Executive Vice President of the European Commission for *A Europe Fit for the Digital Age*: Margrethe Vestager

European Commissioner for Internal Market: Thierry Breton



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