Governing Online Platforms After the Digital Services Act: an Analysis of the Commission Decision on Initiating Proceedings Against X*

Matteo Fabbri[1]

1 *IMT School for Advanced Studies, Lucca, Italy*

Abstract

As of 17th February 2024, the Digital Services Act (DSA) applies to all online intermediaries in the EU: this means that every online platform is now liable for missing to comply with its requirements on, among other things, content moderation and recommendation, advertising transparency and systemic risk assessment. For what concerns very large online platforms (VLOPs) and search engines (VLOSEs), defined as those reaching more than 10% of the EU population or 45 million users, the deadline for full compliance with the DSA was set in August 2023. The Commission has the exclusive supervisory and enforcement power for the obligations concerning VLOPs and VLOSEs. Consequently, to verify any failure to comply with the new rules, the Commission sent requests for information (RFIs) to various VLOPs including X, Facebook, Instagram, AliExpress, TikTok and YouTube, starting from October 2023. The RFI is the first stage of an investigation under the DSA, which can be followed by the access to the data and algorithms used by the platform, the conduction of interviews to informed subjects and inspections at the platform's premises. The information gathered through RFIs has already motivated the opening of two proceedings against X and TikTok in December 2023 and February 2024, respectively.

In the perspective of clarifying the structure and implications of the DSA enforcement process, this contribution aims to analyse the progression from a RFI to the initiation of proceedings against a platform: in particular, I aim to understand which type of evidence collected by the Commission through investigations can justify the decision to open a procedure of infringement under the DSA. Given that the text of already submitted RFIs is not publicly available, nor it is possible to access official documents about further investigative steps (as they have not taken place yet), I will compare the press release about a specific RFI with its first legal consequence, i.e. the Commission decision on initiating proceedings against X, published on December 18th 2023. This comparison will set the ground for understanding how the evidence collected by the Commission can justify the initiation of proceedings. The analysis relies on documents available through the European Commission website, including press releases, executive summaries, call for applications and the Commission decision itself, which is the only legal document publicly disclosed until now. Moreover, I consider the definition of the respective roles of the institutional bodies responsible for the enforcement of DSA, i.e. the European Centre for Algorithmic Transparency (ECAT) and the DSA enforcement team, whose work is closely intertwined.

The public availability of integral legal documents about the DSA enforcement procedures is essential for fostering scrutiny by researchers and platform users. Sharing information on who does what and how, i.e. which entity of the Commission is responsible for selecting specific evidence about the illegal activities of platforms and how such evidence can justify the opening of proceedings, is a necessary requisite for transparent and accountable governance. Given the unavailability of these documents and information, I argue that the DSA enforcement process is not sufficiently transparent nor accountable to the public at the current stage and may possibly lead to unfair governance.

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1. Introduction

As of 17th February 2024, the Digital Services Act (DSA) [1] applies "to all online intermediaries in the EU" [2]: this means that every online platform is now liable for missing to comply with its requirements on, among other things, content moderation and recommendation, advertising transparency and systemic risk assessment. For what concerns very large online platforms (VLOPs)

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matteo.fabbri@sns.it (M. Fabbri)

and search engines (VLOSEs), defined as those reaching more than 10% of the EU population or 45 million users, the deadline for full compliance with the DSA was set in August 2023. The Commission has the exclusive supervisory and enforcement power for the obligations concerning VLOPs and VLOSEs. Consequently, to verify any failure to comply with the new rules, the Commission sent requests for information (RFIs) to various VLOPs including X, Facebook, Instagram, AliExpress, TikTok and YouTube, starting from October 2023 [3]. The RFI is the first stage of an investigation under the DSA, which can be followed by the access to the data and algorithms used by the platform, the conduction of interviews to informed subjects and inspections at the platform's premises. The information gathered through RFIs has already motivated the opening of various proceedings of infringement, including against X, TikTok, AliExpress, Facebook and Instagram, between December 2023 and May 2024.

In the perspective of clarifying the structure and implications of the DSA enforcement process, my research focuses on analysing the progression from a RFI to the initiation of proceedings against a platform: in particular, I aim to understand which type of evidence collected by the Commission through investigations can justify the decision to open a procedure of infringement under the DSA. Given that the text of already submitted RFIs is not publicly available, nor it is possible to access official documents about further investigative steps (as they may not have taken place yet), I will compare the press release about a specific RFI with its first legal consequence, i.e. the Commission decision on initiating proceedings against X (hereafter Commission decision), published on December 18th 2023 [4]. This comparison will set the ground for understanding how the evidence collected by the Commission can justify the initiation of proceedings. The analysis relies on documents available through the European Commission website, including press releases, executive summaries, call for applications and the Commission decision itself, which is the first legal document publicly disclosed regarding the DSA enforcement process. In fact, it is worth noting that the official text of the Commission decision on initiating proceedings against TikTok, which follows the one against X and dates to February 19th 2024, has not been shared yet: its content can be inferred just from the related press release [5] and a one-page summary note [6]. The only other Commission decision on initiating proceedings whose text has been publicly disclosed is the one against AliExpress, which dates to March 14th 2024.

The public availability of integral legal documents about the DSA enforcement procedures is essential for fostering scrutiny by researchers and platform users. Moreover, sharing information on who does what and how, i.e. which entity of the Commission is responsible for selecting specific evidence about the illegal activities of platforms and how such evidence can justify the opening of proceedings, is a necessary requisite for transparent and accountable governance. Given the unavailability of these documents and information, I argue that the DSA enforcement process is not sufficiently transparent nor accountable to civil society and researchers at the current stage.

2. The content and consequences of a request for information

According to the related press release, the RFI sent to X [7] on October 12th 2023 concerned "the assessment and mitigation of risks related to the dissemination of illegal content, disinformation, gender-based violence, and any negative effects on the exercise of fundamental rights, rights of the child, public security and mental well-being". The Commission aimed at scrutinizing X's "policies and actions regarding notices on illegal content, complaint handling, risk assessment and measures to mitigate the risks identified". Following the submission of the RFI, the Commission decision identified five areas of concerns in which the platform is suspected to have infringed the DSA provisions. A closer look at the document of the decision can help highlight the content and consequences of a RFI to a VLOP.

Firstly, Twitter International Unlimited Company (TIUC), "the main establishment of the provider of X in the European Union", failed to "diligently assess certain systemic risks in the European Union stemming from the design and functioning of X and its related systems, including algorithmic

systems, or from the use made of their services" [4]. In particular, the company did not "put in place reasonable, proportionate and effective mitigation measures" for "the actual and foreseeable negative effects on civic discourse and electoral process stemming from the design and functioning of X in the European Union": in fact, the current solutions "appear inadequate […] notably in the absence of well-defined and objectively verifiable performance metrics" (ibidem). This failure is particularly evident in the moderation of contents featuring languages different from English or pertaining to specific local and regional contexts. Suspicions that "insufficient resources [are] dedicated to mitigation measures" (ibidem) focus on the role of Community Notes, the collaborative feature that allows users to "leave notes on any post and, if enough contributors from different points of view rate that note as helpful, the note will be publicly shown on a post" [8].

Secondly, the company would systematically fail to process efficiently, "take decisions in a diligent, non-arbitrary, and objective manner" and answer "without undue delay" to the "notices […] of allegedly illegal content hosted on X" [4]: therefore, X's content moderation would be insufficient also when the input comes from users. Thirdly, the recent possibility of purchasing the blue checkmark that once marked an account as verified is considered deceptive and manipulative for users of X, who "are led to interpret […] checkmarks as an indication that they are interacting with an account whose identity has been verified or is otherwise more trustworthy, when in fact no such verification or confirmation of trustworthiness appear to have taken place" (ibidem). Fourthly, the company did not abide by the transparency requirements for online advertising, "by not providing searchable and reliable tools that allow multicriteria queries and application programming interfaces to obtain all the information on such advertisements as required by Article 39(2)" of the DSA (ibidem). Lastly, the VLOP seems "to have denied access to data that are publicly accessible on X's online interface to qualified researchers" (ibidem) by imposing costs for using the API and prohibiting the scraping of publicly accessible data, in violation of Article 40(12) of the DSA.

As the excerpts from the Commission decision highlight, the proceedings against X were initiated as a follow-up to the platform's response to the RFI submitted on October 12th 2023: in particular, the problematic issues regarding the handling of notices of illegal content, the measures to mitigate systemic risks and the moderation policy, indicated in the press release about the RFI, correspond to the main areas of concern addressed by the decision. The consequentiality between the RFI and the decision is underlined also by points 4 and 5 of the latter: in fact, while point 4 refers to the submission of the RFI and the response provided by X, point 5 states that, according to Article 66(1) of the DSA, "the Commission may initiate proceedings in view of the possible adoption of decisions […] in respect of the relevant conduct by the provider of the very large online platform or of the very large online search engine that the Commission suspects of having infringed any of the provisions" (ibidem).

3. What to expect from the next steps

The areas of concern addressed by the Commission decision include issues that emerge both from the bottom-up interaction with the platform and the top-down governance of its socio-technical ecosystem: data access by researchers and users' notices of illegal content pertain to the former, while the identification of systemic risks and the measures adopted to mitigate them pertain to the latter. The co-existence of top-down and bottom-up perspectives is not only motivated by the necessity to address issues coming from different sources (e.g. complaints filed by recipients of the service versus a letter from the Commission to the platform requesting clarifications); it is also functional to investigate different aspects of the same area of concern (e.g. the use of Community Notes to support content moderation, whose effectiveness is questioned both by users and by the Commission as reliance on this functionality may cover the lack of specialized personnel). The structure and content of the decision indicate that, after the enforcement of the DSA, the VLOPs and VLOSEs may not be able to consider anymore prima facie compliance as separated from the

obligations to provide reasonably prompt and reliable answers to the issues raised by individual users and researchers, the traditionally disadvantaged side in the interactions with platforms.
The investigation initiated by the Commission decision aims to establish whether the failures outlined above "would constitute infringements of Articles 34(1), 34(2) and 35(1)" of the DSA as regards the first area of concern (inadequate assessment and mitigation of systemic risks), Article 16(5) and 16(6) for what concerns the second one (handling of notices of illegal content), Article 25(1) with respect to the third one (deceptive design of checkmarks), Article 39 with reference to the fourth one (lack of tools to ensure transparency in ads) and Article 40 apropos the fifth one (denied data access to researchers) [4]. According to [9], the next steps of the investigation will include gathering further "evidence, for example by sending additional requests for information, conducting interviews or inspections". Following the opening of formal infringement proceedings, the Commission will be empowered "to take further enforcement steps, such as interim measures, and non-compliance decisions" and "to accept any commitment made by X to remedy on the matters subject to the proceeding" (ibidem).
Interestingly, the "DSA does not set any legal deadline" for the end of the proceedings, whose duration will depend on several "factors, including the complexity of the case, the extent to which the company concerned cooperate with the Commission and the exercise of the rights of defence" [9]. The responsibility of carrying the investigation pertains just to the Commission, whose decision "relieves Digital Services Coordinators, or any other competent authority of EU Member States, of their powers to supervise and enforce the DSA in relation to the suspected infringements of Articles 16(5), 16(6) and 25(1)" (ibidem). In this context, it is difficult to make hypotheses about a timeline for the conclusion of the proceedings against X, as this investigation will be accompanied by similar ones originating from the RFIs submitted to other VLOPs or VLOSEs.

4. The intertwined role of ECAT and DG Connect

Given the amount of investigative work which the Commission will embark on in the next months, it is useful to focus on the entities involved in this process: on the one side, the European Centre for Algorithmic Transparency (ECAT), within the Joint Research Centre (JRC), and, on the other side, the DSA enforcement team, within Directorate F (Platforms Policy and Enforcement) [10] of the DG Connect. While the DSA enforcement team should have the responsibility of enforcing the regulation, some crucial investigative procedures, like the on-site inspections at the platforms' premises, would be carried by ECAT: therefore, it is unclear how the collaboration and the division of duties between the two institutional bodies will be managed.
On the one hand, the mission of ECAT is to "provide technical assistance and practical guidance for the enforcement of the DSA" and "research the long-running impact of algorithmic systems to inform policy-making and contribute to the public discussion" [11]: its activity will include inspecting and testing the algorithmic systems used by VLOPs to understand their functioning, studying their "short, mid and long-term societal impact" and develop "practical methodologies towards fair, transparent and accountable algorithmic approaches, with a focus on recommender systems". On the other hand, the DSA enforcement team will be composed by "multi-disciplinary teams […] co-operating with regulatory authorities in the Member States", which "will engage with stakeholders and gather knowledge and evidence to support the application of the DSA and to detect, investigate and analyse potential infringements of the DSA" [10].
As can be seen, the information provided by the Commission is currently not sufficient to understand how the work of ECAT and the DSA enforcement team intertwines specifically. Indeed, both these entities focus on gathering knowledge and evidence about VLOPs and VLOSEs to support the enforcement of the DSA, to the point that that ECAT features an "Algorithm inspections & DSA enforcement" [12] team, whose work overlaps even nominally with that carried at DG Connect. In particular, the profile of a technology specialist in the enforcement team at DG Connect is, if not similar, at least complementary to that of an inspector at ECAT: [13] specifies that technology

specialists “will work in seamless cooperation with the European Centre for Algorithmic Transparency (ECAT) and facilitate interactions with technical teams at very large online platforms and search engines”.

5. Conclusion

The application of the DSA is proceeding at fast pace: on December 20th 2023, the Commission designated three pornographic platforms as VLOPs while introducing more stringent requirements for them; on January 18th 2024, it sent RFIs to seventeen VLOPs and VLOSEs focusing on the measures they have taken to ensure data access to eligible researchers; on February 19th 2024, TikTok was notified the initiation of proceedings, which have been opened also against AliExpress on March 14th and against Facebook and Instagram on May 16th. While the DSA has come into force for every online platform since February 17th 2024, the main questions about the modalities and timeline of its application and the actions that platforms will need to take to ensure compliance are still open. In particular, it still needs to be clarified which regulatory mechanisms and investigative evidence undergird the progression from a RFI to the initiation of proceedings against a platform. Considering that there is no legal deadline for the end of the proceedings, neither platforms nor users can have an estimate of their duration. Users are the main beneficiaries of the protection granted by the DSA, but if they are not involved in shaping its enforcement, the new provisions may not have tangible beneficial outcomes. This contribution shows the direction of the first enforcement procedure under the DSA, thereby highlighting the type of evidence that European regulators see as symptomatic of non-compliance. The outcome of the ongoing proceedings against VLOPs will set a milestone for the future DSA enforcement strategies and their implications for users’ online experience. The DSA has the potential to change the interaction between digital companies and European citizens by enhancing public accountability and users’ empowerment. However, for this potential to be realized, regulatory principles need to be translated into clear and transparent enforcement practices, which should be publicly disclosed to European researchers and citizens.

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