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When the Digital Services Act Goes Global

Anupam Chander

Georgetown University Law Center, ac1931@georgetown.edu

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WHEN THE DIGITAL SERVICES ACT GOES GLOBAL

Anupam Chander[†]

ABSTRACT

The European Union’s Digital Services Act (“DSA”) establishes a “meta law”—public regulation of the private regulation conducted by internet platforms. The DSA offers an attempt to balance private technological power with democratic oversight. The DSA will likely prove an attractive model for other governments to assert control over massive global internet platforms. What happens when other countries borrow its approach, in an instantiation of the vaunted Brussels Effect? This Article evaluates the DSA using the “Putin Test”—asking what if an authoritarian leader were given the powers granted by the DSA? The Article argues that authoritarians might well exploit various mechanisms in the DSA to enlarge their control over the dissemination of information, and, in particular, to target the speech of critics.

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† Scott K. Ginsburg Professor of Law and Technology, Georgetown University; Visiting Fellow, Berkman Klein Center’s Institute for Rebooting Social Media, Harvard University. I’m grateful to Pam Samuelson and Martin Senftleben for inviting me to participate in the stellar Berkeley symposium on the Digital Services Act, and to Eric Goldman, Florence G’sell, Martin Husovec, Daphne Keller, and my student Chris Haines for insightful comments, Christine Vlastic for helpful research assistance, and Marley Macarewich for excellent editing. All views expressed herein, and all errors, are my own.

I. INTRODUCTION

The European Union’s Digital Services Act (DSA)¹ represents the most comprehensive effort by liberal democratic states to regulate content moderation by internet platforms. The DSA requires internet intermediaries—such as social media, hosting services, online marketplaces, app stores, and search engines—to adopt a wide array of measures designed to ensure transparency and reduce harmful material. Because these companies regulate the actions of their users, providing or denying service, amplifying or dampening speech, the DSA seeks to regulate how these companies engage in this private decision-making. It is thus a meta-content moderation law—public regulation of the private regulation conducted by internet platforms. This means it is a literal Meta law, the law of Meta Platforms, Inc. In April 2023, the European Commissioner for Internal Market Thierry Breton adapted a line from Spiderman to describe the DSA’s regulatory philosophy: “With great scale comes great responsibility.”² With this caution, Commissioner Breton announced the initial list of services subject to the law’s strictest rules—namely, certain services provided by Alibaba, Amazon, Apple, Booking.com, Facebook, Google, Microsoft, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, and Zalando.³ To make the announcement, he chose Twitter (now “X”), one of the companies designated a “Very Large Online Platform” (VLOP) under the Act.⁴

The DSA is part of the European Union’s efforts to bring private power under democratic control. As European scholar Florence G’sell notes, the DSA responds to the “trend towards the privatization and automation of

1. Regulation 2022/2065 of the European Parliament and of the Council of 19 Oct. 2022, on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), O.J. (L 277) 1 (EU). The Act could perhaps more precisely be described the “Digital Intermediary Services Act,” as it does not govern all digital services, but rather only internet platforms that serve as intermediaries for other goods and services. Recital 6 of the Act provides, “This Regulation should apply only to intermediary services and not affect requirements set out in Union or national law relating to products or services intermediated through intermediary services.”

2. @ThierryBreton, TWITTER (Apr. 25, 2023, 6:30 AM), <https://twitter.com/ThierryBreton/status/1650854765126107136>.

3. See European Commission Press Release, Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines (Apr. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413. Zalando, the only designated platform that hails from an E.U. member state, has sued to void the designation. Molly Killeen, *Zalando Files Suit Against Commission Over Very Large Platform Designation*, EURACTIV (June 27, 2023), <https://www.euractiv.com/section/platforms/news/zalando-files-suit-against-commission-over-very-large-platform-designation>.

4. *Id.*

online speech control.”⁵ Margrethe Vestager, European Commissioner for Competition and Executive Vice President of the European Commission for A Europe Fit for the Digital Age, summarizes its goals: “It aims to protect online consumers from unsafe and illegal products, and it protects our right to speak freely online.”⁶ One prominent example of online speech control was the decision by many of the largest internet platforms to ban then-President Donald Trump in the wake of the January 6, 2021 attack on the Capitol by his supporters. European leaders, including then-German Chancellor Angela Merkel, criticized the ban.⁷ French Finance Minister Bruno Le Maire declared: “What shocks me is that Twitter is the one to close his account. The regulation of the digital world cannot be done by the digital oligarchy.”⁸

The Digital Services Act will likely follow its groundbreaking European predecessor, the Data Protection Directive, in achieving a global impact—what the scholar Anu Bradford has famously labeled a “Brussels Effect.”⁹ Americans, Bradford points out, may be surprised to find that “EU regulations determine . . . the privacy settings they adjust on their Facebook page.”¹⁰ Legal scholar Dawn Nunziato has written persuasively that the DSA, too, will likely carry a Brussels Effect, “influenc[ing] how social media platforms globally moderate content.”¹¹ Large platforms are likely to apply various aspects of the DSA, such as transparency rules and perhaps dispute resolution systems, across their worldwide operations. I want to consider here another mechanism associated with the Brussels Effect—the explicit adoption of laws modeled on European rules by countries elsewhere.¹² That is, rather than relying on corporations to globalize European legal norms, governments can choose to do so themselves.

5. Florence G’sell, *The Digital Services Act: a General Assessment*, 1 CONTENT REGUL. IN THE EUROPEAN UNION: THE DIGITAL SERVICES ACT 85–86 (Antje von Ungern-Sternberg ed., 2023).

6. Margrethe Vestager, *Shared Objectives for Framing the Tech Economy*, 41 BERKELEY J. INT’L L. 137, 141 (2023).

7. Pierre-Raul Bermingham, *Merkel Among EU Leaders Questioning Twitter’s Trump Ban*, POLITICO (Jan. 11, 2021), <https://www.politico.eu/article/angela-merkel-european-leaders-question-twitter-donald-trump-ban>.

8. *Id.*

9. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 22–26 (2012).

10. *Id.* at 3.

11. Dawn Carla Nunziato, *The Digital Services Act and the Brussels Effect on Platform Content Moderation*, 24 CHI. J. INT’L L. 115, 117 (2023).

12. Anu Bradford, who named the “Brussels Effect,” observes that the de facto Brussels Effect can be “reinforced with a de jure Brussels Effect . . . when other countries’ legislators affirmatively adopt the EU’s strict standards.” *The Brussels Effect*, *supra* note 9, at 8.

Introducing the Digital Services Act at the Berkeley symposium, Irene Roche Laguna, one of the European Commission architects of the Act, asked: “What would Putin do with this instrument?”¹³ She answered, “I want to think that the DSA passes the Putin Test.”¹⁴ I think the “Putin Test” would go something like this: If Russia cut and pasted the European Union’s Digital Services Act into Russian law, would that raise human rights concerns? Why single out Russia? Vladimir Putin has served continuously as either the President or Prime Minister of Russia since 1999. Putin’s government uses legal tools to stifle dissent and target political opponents with politically-motivated charges.¹⁵ In this Article, I propose to put the DSA through the Putin Test. We can also imagine versions of that test for other imperfect democracies such as Brazil, India, or Nigeria. These hypotheticals allow us to imagine a future Brussels Effect of the DSA.

Imagining a Russian Digital Services Act allows us to see how ruthless actors might deploy its provisions to target political enemies by utilizing its regulatory infrastructure—from digital services coordinators to trusted flaggers to local representatives—to ensure a favorable information environment in the country.

Some will consider this endeavor unfair or unreasonable. After all, the DSA was written by and for the European Union. It exists within a constitutional framework, the Charter of Fundamental Rights of the European Union, and national constitutional constraints.¹⁶ The DSA also exists within the human rights framework covering the members of the Council of Europe through the European Convention on Human Rights—though, by that measure, so did Russia, which was a member of the Council of Europe until it was expelled in the wake of its invasion of Ukraine in 2022.¹⁷

There is much to praise in the DSA, as it increases transparency and risk assessment and mitigation. My argument is not that the DSA grants national or regional authorities clearly excessive power. The DSA is nowhere close to a

13. Irene Roche Laguna, Keynote Address at the University of California, Berkeley School of Law 27th Annual BTLJ-BCLT Symposium: From the DMCA to the DSA—A Transatlantic Dialogue on Online Platform Liability and Copyright Law (Apr. 6-7, 2023). Irene Roche Laguna is the Deputy Head of Unit dealing with the Implementation of the Telecom Regulatory Framework in the European Commission, at the Directorate-General for Communications Networks, Content and Technology (DG CONNECT).

14. *Id.*

15. U.S. DEP’T OF STATE, 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: RUSSIA (2022).

16. *See* Digital Services Act recital 3, 2022 O.J. (L 277).

17. *Russia Ceases to be a Party to the European Convention on Human Rights*, COUNCIL OF EUR. (Mar. 23, 2022), <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022>.

grant of plenary control over the internet. Rather, it generally cabins itself within the rules of existing national laws that determine legality and illegality. Furthermore, the DSA does not provide government authorities the direct power to order the removal of material (though some provisions might be deployed in ways that approximate such power, as we shall see); rather it leaves questions of such removal powers to the national laws of the member states. The goal of this Article is not to criticize the DSA, but to begin to anticipate the ways that it, or laws modeled after it, can be abused by determined actors.

This Article proceeds as follows. Part II argues that the Digital Services Act will likely carry a Brussels Effect. Part III then applies the Putin Test to the DSA—what would happen were such a law adopted in Putin’s Russia—and finds that there is cause for concern about the globalization of the DSA.

II. THE DIGITAL SERVICE ACT’S LIKELY BRUSSELS EFFECT

Before we evaluate the Digital Services Act as a part of law outside Europe, it is useful to understand that such a result is both likely and, to some extent, intended. This Part argues that the Digital Services Act will likely carry a Brussels Effect, both *de facto* through changes in the practices of multinational corporations, and *de jure* through changes in foreign law. This is not to suggest that the DSA will be adopted in whole either by corporations or governments worldwide, but rather to suggest that it will be substantially influential on digital content regulation well beyond Europe. Other states are likely to cite it to support their own efforts to regulate the content moderation practices of internet platforms.

As Dawn Nunziato argues, the DSA will likely have global impact.¹⁸ The DSA will, she explains, “likely incentivize platforms to skew their content moderation policies toward the [European Union]’s approach. This is because the DSA levies huge financial penalties for violating its provisions, including maximum fines of six percent of a platform’s annual worldwide turnover.”¹⁹ Given these potential fines, platforms will ensure that European hate speech norms are reflected in their community guidelines, at minimum for E.U. states. Many internet platforms may find it convenient to globalize their content policies written for E.U. member states, which would allow moderators around the world to be trained on a uniform set of policies to be applied globally with exceptions for specific categories of speech that have different

18. Nunziato, *supra* note 11, at 120.

19. *Id.*

rules, such as nudity.²⁰ Of course, even within the European Union, the definition of hate speech has varied among the member states.²¹

Furthermore, some of the DSA's obligations carry global implications. Parts of the DSA—such as those requiring platforms to provide explanations of why adverse actions were taken against users or requiring platforms to offer dispute settlement systems²²—might be rolled out by at least some VLOPs globally. All covered platforms must publish annual reports on their content moderation practices, including their use of automated tools, training measures, and complaints received.²³ While these reports may limit their information to their European operations, they are likely to provide some insight into their global operations as well. Because some firms may adopt largely unified practices across the world, these transparency reports may prove useful to users across the world, not just in the European Union. Internet intermediaries must also publish their “terms and conditions,” which include their community guidelines.²⁴ VLOPs and VLOSEs (very large online search engines) must provide a summary of their terms and conditions in machine-readable form.²⁵

A number of mechanisms might globalize the DSA.²⁶ First, companies could adopt DSA-compliant practices worldwide. This is a common form of

20. See Daphne Keller, *Who Do You Sue? State and Platform Hybrid Power over Online Speech*, HOOVER WORKING GROUP ON NATIONAL SECURITY, TECHNOLOGY, AND LAW, AEGIS SERIES PAPER 1902 (Jan. 29, 2019), <https://s3.documentcloud.org/documents/5699593/Who-Do-You-Sue-State-and-Platform-Hybrid-Power.pdf> (“[P]latforms’ operational preference [is] for a single set of rules. Teams that review massive volumes of user content struggle with logistics and enforcement consistency in the best of circumstances. Enforcing dozens of different rules around the world would, as Facebook’s Monika Bickert has pointed out, be ‘incalculably more difficult’ than applying a single, consistent set of Community Guidelines. For social networks and other communications platforms, inconsistent rules also create bad user experiences, interfering with communication between people in different countries. Maintaining a single set of standards—and perhaps expanding them to accommodate national legal pressure as needed—is much easier.”); cf. ANU BRADFORD, *THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD* 161 (2020) (arguing that U.S. internet platforms “made a strategic choice to switch to a more restrictive European style of hate speech regulation”).

21. Natalie Alkiviadou, *Regulating Hate Speech in the EU*, in *ONLINE HATE SPEECH IN THE EUROPEAN UNION: A DISCOURSE-ANALYTIC PERSPECTIVE* 6–7 (2017) (observing that “there is little coherence amongst EU member states on the definition of hate speech”).

22. Digital Services Act art. 20, 2022 O.J. (L 277) (internal complaint-handling system); *id.* at art. 21 (out-of-court dispute settlement).

23. *Id.* art. 15.

24. *Id.* art. 14.

25. *Id.* art. 14(1).

26. Charlotte Siegmann and Markus Anderljung offer a set of possible mechanisms to globalize the EU’s Artificial Intelligence Act, which is currently being finalized:

the Brussels Effect in Anu Bradford’s account—when companies align their global practices with Brussels’ rules largely out of possible efficiency of adopting those same standards worldwide.²⁷ This is also the main mechanism in Nunziato’s account of the global effects of the DSA.²⁸

Second, governments might find much to envy in the Digital Services Act—which validates burgeoning efforts to bring the internet under government control, provides special tools for speeding up the removal of illegal content under local law, includes procedural rules that might limit the power of platforms to label or suppress other content, conveys power to evaluate risk mitigation measures, and sets out “break glass” crisis control mechanisms—complete with the possibility of getting six percent of the company’s global revenue for violations.

A third mechanism is possible as well. The European Union could itself promote the DSA as a global model, perhaps incorporating parts of it into its model free trade agreements. Here, the DSA does not offer a mechanism like the adequacy determination used in the European Union’s General Data Protection Regime (GDPR), where foreign governments might seek to align their laws to the European standard in order to win easier access to digital trade with the European Union.²⁹ Because European countries are generally seen as well-governed, democratic, and compliant with human rights norms,

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- Foreign jurisdictions may expect EU-like regulation to be high quality and consistent with their own regulatory goals.
 - The EU may promote its blueprint through participation in international institutions and negotiations.
 - A de facto Brussels Effect with regard to a jurisdiction increases its incentive to adopt EU-like regulations, for instance by reducing the additional burden that would be placed on companies that serve both markets.
 - The EU may actively incentivise the adoption of EU-like regulations, for instance through trade rules.

Charlotte Siegmann & Markus Anderljung, *The Brussels Effect and Artificial Intelligence: How EU Regulation Will Impact the Global AI Market*, CTR. FOR GOVERNANCE of AI 5 (Aug. 2022), <https://arxiv.org/pdf/2208.12645.pdf>.

27. Cf. Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, OXFORD UNIV. PRESS 232 (2000) (describing the de facto Brussels Effect as “common”).

28. Nunziato, *supra* note 11, at 115 (arguing that the DSA “will incentivize platforms to skew their global content moderation policies toward the EU’s instead of the U.S.’s balance of speech harms versus benefits”).

29. See Regulation 2016/679 of the European Parliament and 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), 2016 O.J. (L 119/1) 1 (EU), art. 45.

they may be especially attractive generators of legal norms. This last possibility is the focus of this Article—governments across the world borrowing the European approach for their own laws.

There would be good reason for this adoption. The problems of disinformation, hate speech, communal violence, and election interference are particularly acute in many countries in the Global South.³⁰ The concerns motivating the DSA in Europe are shared across the world.³¹

At the same time, institutional capacity and resources can be more limited, and civil society institutions and an independent press more fragile. Furthermore, states are often at grave risk of democratic backsliding, or already have authoritarian tendencies, with serious concerns about freedom of expression. This makes the adoption of similar rules in those states more likely to lead to abuse.

A Brussels Effect is likely to occur as a byproduct of the European Union's efforts to regulate the internet enterprises that serve its own population. A Brussels Effect, however, is not an official ambition of the DSA. At times, however, one can see some European regulators express the hope that the DSA might offer the world what they believe are more enlightened digital regulatory standards.

One E.U. leader has hinted at a hope that the DSA might create a Brussels Effect. European Union President Charles Michel has embraced the Brussels Effect and included the DSA in the list of E.U. rules "that might have such an effect. At the Munich Security Conference on February 20, 2022, he stated:

There is something else that is very important: our regulatory power, often called the 'Brussels effect.' Our standards, inspired by our European values, tend to become global standards. And this is true in many sectors . . . In the digital field, the General Data Protection Regulation (GDPR) had a similar effect, and we are working on our Digital Services Act and our Digital Markets Act.³²

30. Vittoria Elliott, Nilesh Christopher, Andrew Deck & Leo Schwartz, *The Facebook Papers Reveal Staggering Failures in the Global South*, REST OF WORLD (Oct. 26, 2021), <https://restofworld.org/2021/facebook-papers-reveal-staggering-failures-in-global-south> (providing examples of disinformation in the Global South and arguing that Facebook underinvests in content moderation there).

31. António Guterres, *Guardrails Urgently Needed to Contain "Clear and Present Global Threat" of Online Mis- and Disinformation and Hate Speech*, SAYS UN Secretary-General, AFRICA RENEWAL (June 11, 2023), <https://www.un.org/africarenewal/magazine/june-2023/guardrails-urgently-needed-contain-%E2%80%9Cclear-and-present-global-threat%E2%80%9D-online-mis>.

32. European Council Press Release 130/22, Remarks by President Charles Michel at the Munich Security Conference (Feb. 20, 2022).

Despite President Michel’s warning elsewhere in this speech of “massive sanctions” upon Russian aggression in the Ukraine, Putin ordered Russian troops to invade a few days later.³³ President Michel had linked the DSA to the Brussels Effect earlier as well as part of the European Union’s “regulatory power.”³⁴ As President Michel explained in 2021, the Brussels Effect stems from the European Union’s position as one of the world’s largest markets:

We have unique and undeniable strengths. Our market of 450 million people. And with it, comes our regulatory power. The famous “Brussels effect”—that enables us to set the highest standards for our citizens, while projecting these standards across the world. This is especially true in the digital domain. Take our General Data Protection Regulation (GDPR) in 2016. And today’s Digital Services Act and Digital Markets Act, proposed by the Commission.³⁵

Here, President Michel mentions the possibility that the DSA might be one of the standards that the European Union “project[s] . . . across the world.”³⁶

It is important to recognize that the hope to bring Europe’s local rules to a global stage is not merely the assertion of power for its own sake. As President Michel explained in 2021:

And as our Union has taken shape, it has also become a project of influence. Our large single market has made us the biggest trader in the world and, in turn, the largest exporter of standards—known as the ‘Brussels effect.’ Yet, the standard we propagate most successfully in our neighbourhood is democracy, fundamental values, and the rule of law.³⁷

President Michel’s hope, shared with many European regulators, is that Brussels can lead the way towards a democratic and liberal world order founded on fundamental rights.

At the initial level, the Brussels Effect can be understood simply as a descriptive account of regulatory globalization with Brussels driving global regulatory standards across a variety of domains. But it can sometimes also

33. Austin Ramzy, *The Invasion of Ukraine: How Russia Attacked and What Happens Next*, N.Y. TIMES (Feb. 24, 2022), <https://www.nytimes.com/2022/02/24/world/europe/why-russia-attacked-ukraine.html>.

34. European Council Press Release, *supra* note 32.

35. European Council Press Release 63/21, Digital sovereignty is central to European strategic autonomy - Speech by President Charles Michel at “Masters of digital 2021” online event (Feb. 3, 2021).

36. *Id.*

37. European Council Press Release 666/21, Speech by President Charles Michel at the opening session of the Bled Strategic Forum (Sept. 1, 2021).

become a normative goal—that the rest of the world should move towards E.U. rules, perhaps especially for global digital technologies. The Brussels Effect consists not just in a descriptive account of the globalization of a legal norm, but rather an occasional hope that the legal rules and standards of the European Union will become global rules and standards.

Anu Bradford has noted that the civil law style of continental Europe might have special appeal for developing countries:

[T]he civil law tradition of the [European Union] typically leads to precise and detailed rules, drafted in multiple languages, which are easier to emulate in developing countries that may have less-skilled administrative agencies and judiciaries. The Brussels Effect presents these countries with an opportunity to outsource their regulatory pursuits to a more resourceful and experienced agency.³⁸

III. PUTIN'S DSA

We now turn to the Putin Test for the DSA. In order to imagine the Russian Digital Services Act—or the Nigerian Digital Services Act or the Indian Digital Services Act—we need to understand both the institutions and the norms embedded within the DSA.

The normative focus of the DSA is to promote more vigorous takedown of illegal speech by internet platforms and, at the same time, provide due process-style rights for speakers who are disciplined by internet platforms.³⁹ As Florence G'sell observes, the DSA's "goal is to encourage [online platforms] to fight objectionable content while respecting users' fundamental rights."⁴⁰ Both of these are, of course, noble goals and are likely shared by many governments across the world. Like the governments in the European Union, many governments are concerned about disinformation or hate speech circulating online. At the same time, they are rightly concerned that internet platforms exercise extraordinary power over global speech—deciding who speaks, who doesn't, who can monetize their speech via advertising, and whose speech is promoted or demoted on their platforms.

38. Anu Bradford, *The European Union in a Globalized World: The "Brussels Effect,"* 2 REVUE EUROPÉENNE DU DROIT 75, 75 (Mar. 2021).

39. *Questions and Answers: Digital Services Act*, EUROPEAN COMM'N (Apr. 25, 2023), https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348 (stating that the Digital Services Act provides "[e]ffective safeguards for users, including the possibility to challenge platforms' content moderation decisions based on a new obligatory information to users when their content gets removed or restricted").

40. G'sell, *supra* note 5, at 86 ("[The Digital Service Act's] goal is to encourage [online platforms] to fight objectionable content while respecting users' fundamental rights").

But there are also more self-interested reasons for many governments to embrace these goals. After all, many governments complain about what they believe to be disinformation on internet platforms, especially disinformation about their own activities. And governments are annoyed when their own speech is labeled as misleading or false, disabled from amplification, or removed altogether without appropriate process from the governments' perspective. This makes the various mechanisms that the DSA offers to achieve its twin goals attractive for governments with authoritarian tendencies. We turn to those mechanisms now.

A. DSA: THE DIGITAL SERVICES COORDINATOR

The Digital Services Act relies on a variety of enforcers, some newly created and some currently existing. Some of these enforcers operate at the national level, and some at the E.U. level.⁴¹ E.U.-level enforcement is a response to concerns of insufficiently strict enforcement by the national or sub-national data protection authority charged with regulating any particular data gathering or processing enterprise.⁴² Separate national regulators increase the variation in enforcement priorities, and even quality among the regulators, but also increase the local knowledge they have.

The DSA establishes a new regulator—the Digital Services Coordinator.⁴³ This is a position at the national level, not at the Europe-wide level, and thus requires the creation of at least twenty-seven such Coordinators across the Union.⁴⁴ A single supranational regulator would, in theory, increase uniformity in the application of the law (potentially at the price of some local knowledge), but it would not make sense here because criminal laws related to speech have not been harmonized across the European Union. The national Digital Services Coordinators will themselves coordinate through a newly created European Board for Digital Services, with each member state having one representative on that Board.⁴⁵

41. Supervision and enforcement powers are divided between the Member State in which the main establishment of the intermediary service is located and the Commission itself, which shall work “in close cooperation.” Digital Services Act art. 56, 2022 O.J. (L 277).

42. G’sell, *supra* note 5, at 22 (“The DSA framework grants the EU Commission significant supervisory and enforcement powers, a departure from the usual jurisdiction of Member States. This may be attributed to criticisms of the country-of-origin principle, which gives exclusive jurisdiction to Irish regulators since many large technology companies are based in Ireland”).

43. Digital Services Act art. 49, 2022 O.J. (L 277).

44. Member States are required to designate one or more Digital Services Coordinators.

Id.

45. *Id.* arts. 61–62.

The title suggests a relatively ministerial, administrative role, but the powers vested in the Coordinator are substantial.⁴⁶ The Coordinator has a significant role in the enforcement of the DSA. Like the Act itself, the title of the role, Digital Services Coordinator, is somewhat of a misnomer because the role does not give jurisdiction over all digital services. Rather, it gives jurisdiction only over internet platforms that serve as intermediaries for other goods and services.⁴⁷

The Coordinator can request data from VLOPs or VLOSEs.⁴⁸ Importantly, there is a civil liberty constraint: these requests must

take due account of the rights and interests of the providers of very large online platforms or of very large online search engines and the recipients of the service concerned, including the protection of personal data, the protection of confidential information, in particular trade secrets, and maintaining the security of their service.⁴⁹

The Coordinator receives user complaints and assesses them.⁵⁰ The Coordinator also has the power to investigate the complaints.⁵¹ The Coordinator can demand information from platforms related to a suspected infringement of the DSA.⁵² This includes the powers to conduct on-site investigations and to seize information, regardless of storage medium.⁵³

46. The European Union did not make the mistake of the U.S. State Department when it stood up a new body it called “The Disinformation Governance Board.” Amanda Seitz, *Disinformation Board to Tackle Russia, Migrant Smugglers*, ASSOCIATED PRESS (Apr. 28, 2022), <https://apnews.com/article/russia-ukraine-immigration-media-europe-misinformation-4e873389889bb1d9e2ad8659d9975e9d>. Senator Josh Hawley denounced the board, arguing that “Homeland Security has decided to make policing Americans’ speech its top priority.” @HawleyMO, TWITTER (Apr. 27, 2022, 4:01 PM), <https://twitter.com/HawleyMO/status/1519406288756785152?s=20>. While such a role was not the intention of the State Department, the name invited this confusion about its purpose.

47. Digital Services Act recital 6, 2022 O.J. (L 277) (“This Regulation should apply only to intermediary services and not affect requirements set out in Union or national law relating to products or services intermediated through intermediary services”).

48. *Id.* art. 40(1).

49. *Id.* art. 40(2).

50. *Id.* art. 53.

51. *Id.* art. 51(1).

52. *Id.* art. 51(1)(b) (granting the Digital Services Coordinator “the power to carry out, or to request a judicial authority in their Member State to order, inspections of any premises that those providers or those persons use for purposes related to their trade, business, craft or profession, or to request other public authorities to do so, in order to examine, seize, take or obtain copies of information relating to a suspected infringement in any form, irrespective of the storage medium”).

53. The Coordinator can enforce its orders by seeking a competent judicial authority to order the platform to temporarily cease services. *Id.* art. 51(2)(b).

The Coordinator chooses those who will be the “trusted flaggers” for platforms, whose requests for takedowns are to be prioritized.⁵⁴ The Coordinator can grant trusted flagger status only to those entities meeting the following conditions:

- (a) it has particular expertise and competence for the purposes of detecting, identifying and notifying illegal content;
- (b) it is independent from any provider of online platforms;
- (c) it carries out its activities for the purposes of submitting notices diligently, accurately and objectively.⁵⁵

Once designated, trusted flaggers are supposed to notify platforms of illegal material on their services, and the platforms are to act upon those notices “without undue delay.”⁵⁶ Because of the special power of trusted flaggers to cause rapid suppression of speech online, the selection of which entities are entrusted with that power is of great significance. What if the approved “trusted flaggers” are not in fact to be trusted?

The Coordinator also has a critical role in the access that researchers will have under the DSA to information held by internet platforms: the Coordinator determines who is a “vetted researcher.”⁵⁷

The Coordinator also has broad enforcement powers, which include “the power to order the cessation of infringements and, where appropriate, to impose remedies proportionate to the infringement and necessary to bring the infringement effectively to an end, or to request a judicial authority in their Member State to do so”⁵⁸ In significant part, the Digital Services Coordinator exercises power over digital services companies that have their main establishment (or their legal representative) in the jurisdiction of that Coordinator.⁵⁹

The Coordinator can issue extraordinary fines that could reach amounts that are historic for all penalties: up to “6% of the annual worldwide turnover of the provider of intermediary services concerned in the preceding financial year.”⁶⁰ This is a fifty percent higher fine than available under the GDPR.⁶¹ The Coordinator can also seek a judicial order to temporarily suspend a

54. *Id.* art. 22.

55. *Id.* art. 22(2).

56. *Id.* art. 22(1).

57. *Id.* art. 40(8).

58. *Id.* art. 51(2)(b).

59. *Id.* art. 3(n) (providing definition).

60. *Id.* art. 52(3).

61. General Data Protection Regulation art. 83(4), 2016 O.J. (L 119/1).

platform under appropriate circumstances.⁶² The Coordinator also certifies dispute settlement bodies.⁶³

Each of these roles permits a personally, politically, or ideologically-motivated Coordinator to exercise those powers not on behalf of all of the people of the country, but rather a particular interest. Political or personal preferences might favor flaggers aligned with those preferences. Accredited dispute settlement bodies might favor a particular viewpoint. Researchers who may have better relations with the Coordinator may be more likely to be approved, which may help produce studies that favor the government's viewpoint. Indeed, a provision designed to allow the public to scrutinize platform actions through outside research could be weaponized to strengthen government control.⁶⁴

So, what might Vladimir Putin do with a Russian Digital Services Coordinator? Such a Coordinator might exercise his or her statutory powers in the interests of Putin himself. For example: the Russian Digital Services Coordinator might compel information from wayward platforms about critics of the Ukraine invasion, select trusted flaggers that mark opposition speech as illegal, approve researchers that were sympathetic to the Russian strongman, select dispute settlement bodies favorable to the government, and seek a judicial order to temporarily suspend a recalcitrant platform. A Russian Digital Services Coordinator might well become a Digital Czar.

B. DSA: CRISIS PROTOCOLS AND EMERGENCY POWERS

Finalized after the Russian invasion of Ukraine, the Digital Services Act includes special emergency-type powers.⁶⁵ First, it empowers the European Commission to establish crisis protocols for VLOPs and VLOSEs.⁶⁶ Second, the DSA also grants the Commission the power to issue guidelines for the risk mitigation measures that the platforms undertake.⁶⁷ Specifically, the Commission has the power to order “interim measures” against VLOPs and VLOSEs “where there is an urgency due to the risk of serious damage for the recipients of the service.”⁶⁸

It makes sense to prepare for inevitable crises with protocols in place to respond. And certain crises will demand immediate response. But emergency powers raise risks of abuse. Governments could use them to target what the

62. Digital Services Act art. 51(3)(b), 2022 O.J. (L 277).

63. *Id.* art. 21(3).

64. I thank Daphne Keller for this important insight.

65. G'sell, *supra* note 5, at 103.

66. Digital Services Act art. 36(1), 2022 O.J. (L 277).

67. *Id.* art. 35.

68. *Id.* art. 70.

governments believe to be election disinformation produced by the opposition, or communal discontent that might undermine those in power.

Russia again provides a warning. Prior to elections in 2021, Russian authorities ordered Apple and Google to remove an app created by supporters of opposition leader Alexei Navalny. Russian authorities claimed that the app supported a political movement that had been outlawed as extremist.⁶⁹ Russia's Roskomnadzor—the Federal Service for Supervision of Communications, Information Technology, and Mass Media—banned Facebook in the wake of the Ukraine invasion, arguing ironically that Facebook was restricting “the free flow of information” because of its constraints on Russian state media.⁷⁰ Washington Post technology writer Will Oremus aptly described this Russian claim as “Orwellian.”⁷¹

A Russian DSA would offer Putin or his designated Digital Services Coordinator powers that would allow such repressive measures. A Russian DSA would allow the Roskomnadzor to designate trusted flaggers that would label any criticism of Putin as defamatory and thus illegal. A Russian DSA would permit Putin to order the removal of the Navalny supporters' political app on the grounds that it was carrying illegal content—in this case, election-related information provided by an opposition candidate. And it would permit Putin to ban Facebook itself on the ground that it was violating Russian law by interfering with Russian state propaganda.

C. DSA: RISK MITIGATION

One of the DSA's principal regulatory mechanisms is a requirement that VLOPs and VLOSEs undertake risk assessments and then put in place risk mitigation measures.⁷² The companies must perform an initial risk assessment and then perform annual assessments and additional risk assessments when introducing new functionalities that might raise risks. The bulk of the risk assessment and mitigation work is thus assigned to the companies themselves.

However, there remains a role for the government regulators. The risk assessments must be provided, upon request, to the relevant Digital Services Coordinator, as well as to the European Commission itself.⁷³ The Board, in

69. Anton Troianovski & Adam Satariano, *Google and Apple, Under Pressure from Russia, Remove Voting App*, N.Y. TIMES (Sept. 23, 2021), <https://www.nytimes.com/2021/09/17/world/europe/russia-navalny-app-election.html>.

70. Will Oremus, *The Real Reason Russia is Blocking Facebook*, WASH. POST (Mar. 5, 2022), <https://www.washingtonpost.com/technology/2022/03/05/russia-facebook-block-putin-ban-roskomnadzor/>.

71. *Id.*

72. Digital Services Act arts. 34–35, 2022 O.J. (L 277).

73. *Id.* art. 34(3).

cooperation with the Commission, shall publish best practices for risk mitigation. The Commission, in cooperation with the Digital Services Coordinators (which presumably would occur through the Board), may issue guidelines that present best practices and recommend possible measures.⁷⁴

These mechanisms seem reasonably measured. However, an authoritarian state could use the recommendation and guidelines powers to pressure platforms to implement rules to control speech.

D. DSA: LOCAL REPRESENTATIVE

The Digital Services Act requires foreign-based digital intermediaries that serve the European Union to designate a local legal representative.⁷⁵ This representative could be held liable for non-compliance. Jason Pielemeier of the Open Network Initiative has worried that similar laws that require a human representative can amount to “hostage-taking” laws.⁷⁶ The European Union’s version explicitly permits a corporate entity to play the role of legal representative.⁷⁷ Thus, the European Union’s version of this requirement does not offer the opportunity for a government to threaten local employees with jail if they do not comply—only the financial consequences of having their legal representative fined (extensively, as the case may be). Yet, other governments might implement the local representative requirement to require physical employees. As we will see, Twitter apparently agreed to establish a local office in Nigeria in order to be permitted to return to Nigeria after it censored tweets by the Nigerian President for promoting violence.⁷⁸

Russia passed a so-called “Landing Law” in 2021 to require physical presence in Russia of certain internet platforms, including through a branch,

74. *Id.* art. 35(2).

75. *Id.* art. 13.

76. Vittoria Elliott, *New Laws Requiring Social Media Platforms to Hire Local Staff Could Endanger Employees*, REST OF WORLD (May 14, 2021), <https://restofworld.org/2021/social-media-laws-twitter-facebook>; Jason Pielemeier, *Mind the Gap: The UK is About to Set Problematic Precedents on Content Regulation*, JUST SEC. (Mar. 6, 2023), <https://www.justsecurity.org/85358/mind-the-gap-the-uk-is-about-to-set-problematic-precedents-on-content-regulation>; Asha Allen & Ophélie Stockhem, *A Series on the EU Digital Services Act: Tackling Illegal Content Online*, CTR. FOR DEMOCRACY & TECH. (Aug. 22, 2022), <https://perma.cc/HG99-U28Q> (“The threat of prosecution or imprisonment of employees or representatives if platforms do not comply with government demands even if unjustified, as seen during the recent Russian Federal elections and cases in Brazil, poses a significant risk to human rights and freedom of access to information.”).

77. Digital Services Act art. 13(1), 2022 O.J. (L 277) (specifying that “a legal or natural person” can serve as a legal representative for purposes of the Act).

78. *See infra* notes 89–90 and accompanying text.

representative office, or other entity within the country.⁷⁹ It is unclear whether a legal representative is enough, or whether actual employees are necessary to comply with the physical presence requirement.⁸⁰ A Russian news website claims that of the large foreign internet service providers, “only Apple and Spotify” have fully ‘landed’ in Russia.⁸¹ The human rights group Article 19 worries that this Landing Law “could be used to suppress freedom of expression and access to information by making internet companies vulnerable to online content removal requests or demands to disclose users’ personal data from the authorities.”⁸² Apple and Google removed the app by supporters of Alexei Navalny only after Russian authorities threatened to arrest their local employees.⁸³

E. THE DSA ELSEWHERE

It is not only Putin that may relish the powers of a Digital Services Act. Many governments across the world may embrace the ability to rapidly take down content they believe to be illegal and to punish platforms severely for lack of compliance with government views of what content is permissible or harmful.

Indeed, we see similar moves in laws across the world. Brazil’s new “fake news” law also adopts crisis protocols and state-supervised risk mitigation, all in the service of slowing the spread of misinformation online.⁸⁴ However, “critics decry it as draconian, rushed and open to abuse by special interests.”⁸⁵

79. [Federal Law of the Russian Federation on Activities of Foreign Persons on the Information and Telecom Network “Internet” in the Territory of the Russian Federation], *Sobranie Zakonodatel’sstva Rossiiskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 236.

80. *Physical Presence Requirements for Foreign Tech Companies in Russia: How to Respond*, BAKER MCKENZIE, <https://www.bakermckenzie.com/-/media/files/insight/publications/resources/webinar-re-landing-law--faq.pdf>.

81. *Law On Landing in Russia (Digital Residency)*, TADVISER (July 15, 2022), [https://tadviser.com/index.php/Article:Law_on_Landing_in_Russia_\(Digital_Residency\)#Authorities_will_tighten_the_law_.22on_landing](https://tadviser.com/index.php/Article:Law_on_Landing_in_Russia_(Digital_Residency)#Authorities_will_tighten_the_law_.22on_landing).

82. *Russia: Internet Companies Must Challenge ‘Landing Law’ Censorship*, ARTICLE 19 (Jan. 21, 2022), <https://www.article19.org/resources/russia-internet-companies-must-challenge-censorship-under-new-law>.

83. Troianovski & Satariano, *supra* note 69.

84. Joan Barata, *Regulating Online Platforms Beyond the Marco Civil in Brazil: The Controversial ‘Fake News Bill,’* TECH POL’Y PRESS (May 23, 2023), <https://techpolicy.press/regulating-online-platforms-beyond-the-marco-civil-in-brazil-the-controversial-fake-news-bill>.

85. Brian Harris & Hannah Murphy, *Brazil’s Lawmakers to Vote On ‘Fake News’ Bill Opposed by Tech Groups*, FIN. TIMES (Apr. 30, 2023), <https://www.ft.com/content/827326e9-7433-4fb4-9fb5-36a76658d106>; *Brazil: Reject ‘Fake News’ Bill*, HUMAN RIGHTS WATCH (June 24, 2020), <https://www.hrw.org/news/2020/06/24/brazil-reject-fake-news-bill>.

Many have also criticized similar moves in Indian intermediary liability rules.⁸⁶ A proposed Digital India Act will “regulate Big Tech,” but might raise similar concerns.⁸⁷ The Indian government labeled a BBC documentary about the Prime Minister defamation, and the Indian information technology ministry ordered Twitter to take down tweets promoting that documentary.⁸⁸

In 2021, after Twitter deleted tweets by the Nigerian President because it found that they might promote violence, the government banned Twitter from the country. Twitter negotiated a return half-a-year later, with the government proclaiming that Twitter agreed to its terms.⁸⁹ Twitter reportedly agreed to open a local office, pay taxes, and be sensitive to national security.⁹⁰ Would a Nigerian DSA give the government power over all of the speech platforms, committing them to not censor government speech, for example?

Even in the European Union, uses of the authorities provided by the DSA might raise questions. In July 2023, French Prime Minister Emmanuel Macron floated the possibility of a shutdown of TikTok, Snapchat, and Telegram after accusing them of contributing to the riots that followed the police shooting of

86. Tejasi Panjiar & Prateek Waghre, *Many Mysteries of ‘Digital India Bill,’* INTERNET FREEDOM FOUND. (Feb. 20, 2023), <https://internetfreedom.in/many-mysteries-of-the-digital-india-bill>; Aarathi Ganesan, *Why does the Delhi HC Think Search Engines are Responsible For Taking Down Non-Consensual Intimate Images?*, MEDIANAMA (May 11, 2023), <https://www.medianama.com/2023/05/223-search-engines-non-consensual-intimate-images-delhi-hc>.

87. Umang Poddar, *Digital India Bill May Change the Internet as We Know It*, SCROLL.IN (Mar. 24, 2023) <https://scroll.in/article/1045731/the-proposed-digital-india-bill-may-change-the-internet-as-we-know-it#:~:text=In%20the%20recent%20past%2C%20too,power%20to%20take%20down%20content>.

88. Prasanna S, *Why Did Twitter Agree to Take Down Tweets Linking to BBC Documentary?*, WIRE (Feb. 18, 2023), <https://thewire.in/law/why-did-twitter-agree-to-take-down-tweets-linking-to-bbc-documentary>.

89. James Vincent, *Nigeria Lifts Twitter Ban, Says the Company Has Agreed to Government Demands*, VERGE (Jan. 13, 2022), <https://www.theverge.com/2022/1/13/22881580/nigeria-twitter-ban-agreed-government-demands-local-office-tax>.

90. Abubakar Idris & Peter Guest, *How Twitter Rolled Over to Get Unblocked in Nigeria*, REST OF WORLD (Jan. 13, 2022), <https://restofworld.org/2022/how-twitter-rolled-over-to-get-unblocked-in-nigeria>. Almost a year after the Twitter ban was lifted in Nigeria, however, Twitter told a news service that it had not yet opened an office in that country; Francis Onyemachi, *8 Months After Lifting Ban, Twitter Office Not in Nigeria*, BUS. DAY (Sept. 17, 2022), <https://businessday.ng/technology/article/8-months-after-lifting-ban-twitter-office-not-in-nigeria/>. In 2022, the Court for the Economic Community of West African States (ECOWAS) ruled that the Nigerian Twitter ban was an unlawful infringement on freedom of expression and access to media. Jason Kelley, *Nigerian Twitter Ban Declared Unlawful by Court*, ELEC. FRONTIER FOUND. (July 20, 2022), <https://www.eff.org/deeplinks/2022/07/nigerian-twitter-ban-declared-unlawful-court-victory-eff-and-partners>.

Nahel M.⁹¹ Thierry Breton, the European Union’s Commissioner for Internal Market, explained that the DSA would provide this power in the future. “When there is hateful content, content that calls—for example—for revolt, that also calls for killing and burning of cars, they will be required to delete [the content] immediately,” Breton stated, citing the Digital Services Act obligations which were not yet enforceable in July 2023.⁹² “If they don’t act immediately, then yes, at that point we’ll be able not only to impose a fine but also to ban the operation [of the platforms] on our territory.”⁹³ Any such ban would only be temporary, however, as Florence G’sell points out: “Under Article 82 of the DSA, the European Commission can request a regulator to ask a judicial authority to temporarily restrict user access if there is a serious and persistent breach causing significant harm and involving a criminal offense threatening people’s safety or lives.”⁹⁴

IV. CONCLUSION: AVOIDING DIGITAL CZARS

All of the powers that the Digital Services Act grants are worthy and well-intentioned, designed to respond to the critical role of internet platforms in our daily lives, from politics to business to culture. But by pointing out the risks entailed in the globalization of the Digital Services Act, this Article hopes to ensure we anticipate the ways that the powers granted by the law can be abused.

Many of these rules can be weaponized by activist politicians, who have an incentive to promote speech favorable to them, and to punish speech that criticizes them or regales an opponent. As we have seen, there are a variety of mechanisms in the Digital Services Act that are open to such exploitation. That may be true of all laws: they depend on the prosecutor, the regulator, the policeman, and the judge to administer them impartially. But when it comes to

91. Lyric Li, *Macron Says Social Media Could Be Blocked During Riots, Sparking Furor*, WASH. POST (July 6, 2023), <https://www.washingtonpost.com/world/2023/07/06/france-macron-social-media-block-riots/>; Théophane Hartmann, *Macron Mulls Social Media Shutdowns to Contain Civil Disorder*, EURACTIV (July 5, 2023), <https://www.euractiv.com/section/digital/news/macron-mulls-social-media-shutdowns-to-contain-civil-disorder/>; Laura Kayali & Elisa Bertholomey, *Macron Floats Social Media Cuts During Riots*, POLITICO (July 5, 2023), <https://www.politico.eu/article/macron-mulls-cutting-access-social-media-during-riots/#:~:text=PARIS%20%E2%80%94%20French%20President%20Emmanuel%20Macron,his%20speech%20seen%20by%20POLITICO.>

92. Clothilde Goujard & Nicolas Camut, *Social Media Riot Shutdowns Possible Under EU Content Law, Top Official Says*, POLITICO (July 10, 2023), <https://www.politico.eu/article/social-media-riot-shutdowns-possible-under-eu-content-law-breton-says.>

93. *Id.*

94. G’sell, *supra* note 5, at 20–21.

speech regulations, we should be especially concerned—because here the motivations to bend the law in one’s favor are at their apex.

The DSA exists within a European legal framework that is interpreted by an independent judiciary. Evaluating its rules on its own does not recognize the constraints that may arise from other sources of law within the European Union. Any adoption of the DSA in foreign jurisdictions may not find a similar protective framework of laws and institutions. Legal transplants do not necessarily carry the old soil of institutions, practices, and people.

Governments across the world seeking to bring the internet under control have often turned to the European Union as a model. For example, one of the sponsors of the Brazilian “fake news” law, Federal Deputy Orlando Silva, explained that the German NetzDG law had served as an inspiration for the debates of the working group that created the Brazilian fake news law.⁹⁵ It is likely that the Digital Services Act will prove an attractive model as well for countries across the world.

At the same time, it is important to recognize that it is not only the countries of the former Soviet Union or the Global South that pose the risk of abuse. Even a President of the United States might install partisans in key spots to deploy agencies for political ends.⁹⁶ Even within the European Union, there are potential areas of risk. Many of the twenty-seven member states of the Union share a recent history of authoritarian leaders. And every leader, regardless of political party, has an incentive to control information flow—to designate the opposition’s critique as defamation and lies.

This reflects what I have elsewhere described (with Haochen Sun) as the double-edged nature of digital sovereignty—digital sovereignty is both necessary and dangerous.⁹⁷ Legal regimes must anticipate the exploitation of

95. Tales Tomaz, *Brazilian Fake News Bill: Strong Content Moderation Accountability but Limited Hold on Platform Market Power*, 30 JAVNOST - THE PUBLIC, J. EUR. INST. FOR COMM’N & CULTURE 253, 259 (2023).

96. Adam Goldman, *Justice Dept. Investigated Clinton Foundation Until Trump’s Final Days*, N.Y. TIMES (May 22, 2023), <https://www.nytimes.com/2023/05/22/us/politics/fbi-clinton-foundation.html>; Maggie Jo Buchanan, *Trump’s Politicization of the Justice System*, CTR. FOR AM. PROGRESS (Feb. 20, 2020), <https://www.americanprogress.org/article/trumps-politicization-justice-system>; Priscilla Alvarez & Geneva Sands, *Trump Uses Homeland Security Agency To Fight His Political Battle Against Democratic Cities*, CNN (July 20, 2020), <https://www.cnn.com/2020/07/20/politics/trump-homeland-security-portland-chicago/index.html>; Lisa Rein & Juliet Eilperin, *The White House Installs Political Aides At Cabinet Agencies To Be Trump’s Eyes and Ears*, WASH. POST (Mar. 19, 2017), https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1_story.html.

97. Anupam Chander & Haochen Sun, *Sovereignty 2.0*, 55 VAND. J. TRANSNAT’L L. 283 (2022).

powers over our digital activities not only by corporations but also by governments. We need law to protect us not only from profit-maximizing industrialists but also self-interested politicians.

Indeed, the DSA does seek to build in what Americans might call checks and balances in certain cases. The DSA includes, at various points, limits to the powers it grants as well as procedural protections. For example, the Digital Services Coordinator is supposed to be an independent body. Its investigatory power is to be exercised in conformity with the E.U. Charter of Rights and subject to safeguards in national law.⁹⁸ In this way, the DSA relies on national legislation to provide critical safeguards. The crisis protocol, too, must include safeguards to protect Charter rights.⁹⁹ Trusted flaggers are to meet various conditions.¹⁰⁰ The guidelines issued by the Commission for risk mitigation measures occur only after public consultations and must take “due regard to the possible consequences of the measures on fundamental rights enshrined in the Charter of all parties involved.”¹⁰¹ This is hardly an Act that is indifferent to the possibility that government officials might deploy those powers in abusive ways.

Even domestic checks and balances may prove inadequate. Many have advocated the use of international human rights law to guide and constrain the actions of private internet platforms.¹⁰² But at present there is no international law mechanism to enforce speech and political rights within offending states.

98. Digital Services Act art. 51(6), 2022 O.J. (L 277) (“Member States shall lay down specific rules and procedures for the exercise of the powers pursuant to paragraphs 1, 2 and 3 and shall ensure that any exercise of those powers is subject to adequate safeguards laid down in the applicable national law in conformity with the Charter and with the general principles of Union law. In particular, those measures shall only be taken in accordance with the right to respect for private life and the rights of defense, including the rights to be heard and of access to the file, and subject to the right to an effective judicial remedy of all affected parties.”).

99. *Id.* art. 48(4) (“The Commission shall aim to ensure that crisis protocols set out . . . safeguards to address any negative effects on the exercise of the fundamental rights enshrined in the Charter, in particular the freedom of expression and information and the right to non-discrimination.”).

100. *Id.* art. 22. The recitals to the DSA recognize the possibility that trusted flaggers might themselves engage in abuse: “In order to avoid abuses of the trusted flagger status, it should be possible to suspend such status when a Digital Services Coordinator of establishment opened an investigation based on legitimate reasons.” *Id.* recital 62. The solution to this concern seems to be to rely on the Digital Services Coordinator to investigate that abuse, but this solution only works if the Coordinator and flagger are not politically aligned.

101. *Id.* art. 35(3).

102. See, e.g., David, U.N. Doc. A/HCR/38/35: *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Apr. 6, 2018). *But cf.* Evelyn Douek, *The Limits of International Law in Content Moderation*, 6 U.C. IRVINE J. INT’L, TRANSNAT’L & COMPAR. L. 37

When we think about fundamental rights, we must always keep in mind that we should protect fundamental rights both against private corporations and the state. Opportunities for abuse lie in both sources—indeed, the state may pose a special threat in some cases—targeting dissidents or political minorities. Alongside our understandable desire to bring internet companies under democratic control, we should remain mindful of the dangers of excessive government control as well.