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Chapter 4 - Focus

The Potential of the Digital Services Act

: The EU's Challenge as a Coalition of Leviathans

Tomoaki Kurishima*

In 2022, the European Union introduced the Digital Services Act (DSA) and the Digital Markets Act (DMA) as a new set of landmark regulations for digital platforms. These acts were officially presented as efforts to create a safer digital environment in which the fundamental rights of all users are protected, while also fostering innovation, growth, and competition both within and beyond the EU single market.

This column focuses on the DSA. It examines the background and legislative framework of its adoption, with particular attention to its "pyramid" regulatory approach and the obligations imposed on very large online platforms (VLOPs). Finally, it explores the EU's potential to shape the governance of the digital space.

1 Background and Overview of the DSA's Enactment

Internet commerce in the EU was initially regulated by the Electronic Commerce Directive (2000/31/EC). This directive aimed to promote online commerce among EU member states and, among other provisions, included exemptions from liability for intermediary service providers (Articles 12 et seq.). At the time of its adoption, the digital economy was still in its infancy, with the proportion of Internet users in the EU population having just surpassed 10% in 1999. In other words, it was a period when the vast majority of people were not yet using the Internet.

Who could have imagined that, just two decades later, people would come to rely on digital platforms for everything from everyday shopping and hotel reservations to news consumption, job searches, and entertainment? Few, if any, would have seriously anticipated that the spread of misinformation through digital platforms could pose a genuine threat to democratic governance.

However, as the Internet has matured – bringing considerable convenience and enriching daily life – its

* **Tomoaki KURISHIMA**: Associate Professor of Constitutional Law, the Graduate School of Humanities and Social Sciences, Saitama University.

adverse effects have become increasingly evident. Enabled by digital platforms, the dissemination of hate speech and terrorist propaganda has become alarmingly facile, and illegal content, including child sexual abuse material, continues to circulate online.

The liability exemptions introduced by the Electronic Commerce Directive were originally designed to prevent the stifling of innovation and to encourage the growth of online services. However, in light of evolving circumstances, there is a growing consensus that digital platforms must also bear responsibility for mitigating the harms associated with digital communication.

Against this backdrop, the Digital Services Act (DSA) (Regulation (EU) 2022/2065) was introduced as a comprehensive reform of the earlier directive. Although referred to as an "Act," the DSA is formally a *regulation* under the EU legal framework – meaning it is directly applicable in all member states without the need for national implementing legislation.

As this suggests, the DSA represents a new regulatory initiative by the European Union aimed at imposing more robust obligations on digital platform operators that wield significant power in the online environment. While it does not entirely displace the liability exemptions introduced by the Electronic Commerce Directive, the DSA significantly enhances the responsibilities of major platforms. In particular, very large online platforms are now required not only to promptly remove illegal content, but also to ensure that users have effective means to file complaints, to uphold transparency in content moderation practices, and to disclose the logic behind recommendation systems and targeted advertising.

Unlike the Electronic Commerce Directive, the DSA introduces a comprehensive framework for administrative oversight and enforcement, involving both EU institutions and national authorities. The DSA's principal objective is to reinforce the protection of users' rights and freedoms in the digital sphere while also addressing broader societal risks — most notably, threats to democratic governance — that may arise from the unchecked influence of digital platforms.

The DSA was formally adopted in October 2022, with partial implementation beginning in August 2023 and full implementation taking effect in February 2024.

A comprehensive presentation and discussion of the numerous regulatory provisions contained in the DSA would far exceed the scope of this column. Instead, the focus here will be on the significance of its "pyramid" regulatory model, which is particularly noteworthy in terms of the relationship between public authorities and digital platforms.

2 The "Pyramid" Regulatory Model: Implications for Very Large Online Platforms

A distinctive feature of the DSA is its imposition of graduated obligations, determined by the role, size, and influence of the online service provider. As illustrated in the figure, regulatory subjects are classified into four tiers. The lowest tier —"intermediary services"— bears the fewest obligations, while progressively higher tiers are subject to increasingly stringent requirements. This structure is commonly referred to as the

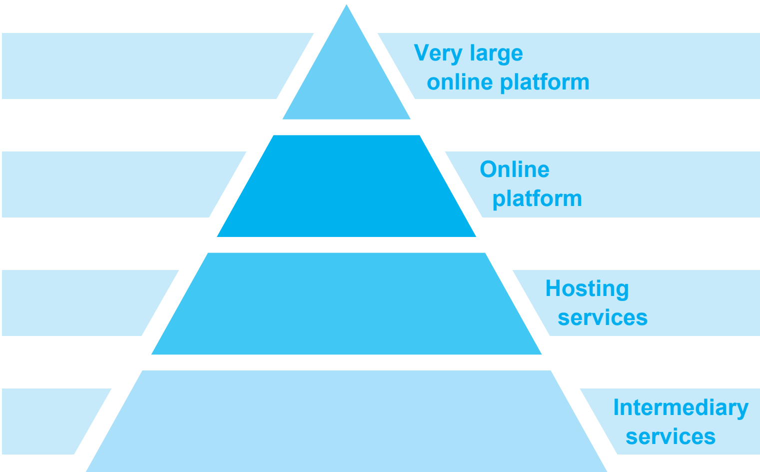

Figure: Classification of Service Providers under the DSA
(source: official website of the European Commission) [1]

DSA's "pyramid model" of regulation.

The model rests on the principle that each platform operator should assume obligations commensurate with the scale of its societal impact within the Internet ecosystem — an application of the principle of proportionality.

The DSA places its greatest regulatory emphasis on (i) Very Large Online Platforms (VLOPs) and (ii) Very Large Online Search Engines (VLOSEs), both of which occupy the top tier of the regulatory pyramid. These are defined as services with an average of more than 45 million active users per month in the EU (Article 33(1)), a threshold corresponding to approximately 10% of the EU's total population. The category of VLOPs currently includes 20 services, such as Facebook, YouTube, X (formerly Twitter), and Amazon, while VLOSEs include Google Search and Bing[2].

In the European Commission's impact assessment, VLOPs and VLOSEs are described as "de facto public spaces" and are recognized as posing a risk of significant adverse spillover effects on society and democracy at large — so-called systemic risks. Many of these service providers also wield substantial economic power and are often designated as "gatekeepers" within the meaning of the Digital Markets Act (DMA), a legislative counterpart to the DSA referenced earlier.

What emerges here is the application, in the digital sphere, of the EU's established risk-based regulatory approach — an approach previously employed in sectors such as finance, food safety, and environmental

1 European Commission, "The Digital Services Act", https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en (Last viewed February 18, 2024 (same hereinafter))

2 The 20 entities designated as VLOPs as of February 2024 are as follows: Alibaba AliExpress, Amazon Store, Apple AppStore,Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, PornHub, Snapchat, Stripchat, TikTok, X (formerly Twitter), Wikipedia, XVideos, YouTube, Zalando. Reference: European Commission, "Digital Services Act: Commission designates first set of Very Large Online Platforms and Search Engines" (25 April 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413; European Commission, "Commission designates second set of Very Large Online Platforms under the Digital Services Act" (20 December 2023), https://digital-strategy.ec.europa.eu/en/news/commissiondesignates-second-set-very-large-online-platforms-under-digitalservices-act

protection. Under this framework, the scope and intensity of regulatory obligations vary according to the likelihood and magnitude of potential harm.

As is characteristic of risk-based regulatory frameworks, VLOPs and VLOSEs are required to assess, analyze, and evaluate their own risks (Article 34). While the specifics cannot be addressed in detail here, the DSA employs a sophisticated blend of regulatory instruments, including a system of "regulated self-regulation," various reporting obligations, and traditional mechanisms of administrative intervention. Notably, the European Commission itself is vested with supervisory authority and, in certain cases, may directly intervene in instances of non-compliance by VLOPs or VLOSEs (Article 56(2) — a power not applicable to operators at the middle or lower tiers of the pyramid). This institutional arrangement underscores the EU's heightened concern over the distinct risks associated with these providers.

It is important to note, however, that not all digital platform operators present a significant societal risk. For instance, standard online platform operators — positioned at the second tier of the regulatory pyramid — are subject to obligations such as user complaint mechanisms and transparency reporting requirements, but are not required to conduct formal risk assessments.

Given that only a relatively small number of platforms are capable of posing genuine threats to democratic governance, and that the imposition of disproportionate burdens — particularly on smaller operators — could hinder future innovation and business development, the "pyramid" regulatory model adopted under the DSA can be regarded as a balanced and generally positive approach.

3 Will the Regulation of Giant Platforms Succeed?

Will these giant online platforms – the so-called "new governors" — be kept in check by the DSA, or will the EU lose its grip on the digital space to the platforms themselves?

The DSA is still in its infancy, and its real-world impact remains uncertain. Yet the EU's decision to act collectively, after recognizing the risks posed by VLOPs and VLOSEs, is significant. With 450 million people and roughly 20% of global GDP, the EU wields economic weight that rivals the United States. Its rules often shape global standards through the "Brussels effect," already evident in data protection, and now extending to the digital realm.

Individually, states may be powerless before these behemoths. United under the EU, they may yet tip the balance. The battle to define the rules of the digital age has only just begun.