DIRITTI COMPARATI
Comparare i diritti fondamentali in Europa

THE DIGITAL SERVICES ACT: A PARADIGMATIC EXAMPLE OF EUROPEAN DIGITAL CONSTITUTIONALISM

Posted on 17 Maggio 2021 by ***Giovanni De Gregorio***

The adoption of the Digital Services Act constitutes a primary step in the European digital policy which is struggling to adapt the European legal framework to the challenges raised by platform governance. The DSA is just a piece of a broader European strategy reviewing the objectives of the Digital Single Market, in particular consisting of the Communication "Shaping Europe's digital future", the Communication "A European strategy for data" and the White Paper on Artificial Intelligence. The proposal for a regulation on artificial intelligence technologies is another example of this European reactive framework.

This phase of reaction has not always characterised European digital policies. In the last twenty years, the policy of the European Union in the field of digital technologies has shifted from a liberal perspective to a constitutional strategy aimed to protect fundamental rights and democratic values as driven by European digital constitutionalism. This change of heart has not occurred by chance but has been primarily driven by the transformation of the digital environment. Since the end of the last century, digital technologies have provided opportunities for the internal market while fostering individual fundamental rights and democratic

values. Nonetheless, apart from the interferences of public actors, the digital environment is subject to the governance of private actors designing standards and procedures while competing with public authority. Therefore, the connection between law and territory in the digital environment has been complemented by the relationship between norms and spaces.

The case of content moderation is a paradigmatic example of this process characterised by the predominance of platform governance. Content moderation contributes to providing digital spaces which are free from objectionable content like disinformation and hate speech. Online platforms can decide how to show and organise online content according to predictive analysis based on the processing of users' data. However, by organizing and removing content, online platforms privately shape the boundaries of freedom of expression on a global scale, thus, proposing a private standard of protection challenging the rule of law. The organisation or the removal of online content are enforced directly by social media companies relying on a mix of algorithmic technologies and human moderators. This private framework of governance also leads platforms to balance clashing individual rights to decide which right should prevail in each specific case. Therefore, although, at first glance, social media foster constitutional values by empowering users to share their opinion and ideas cross-border in safe digital spaces, however, the way how information is organised online frustrates democratic values due to the high degree of opacity and inconsistency of content moderation.

Although the Union has made some steps forward to deal with this situation, for instance, by adopting the Copyright Directive or the AVMS Directive, the legal fragmentation of guarantees and remedies at supranational level could undermine its attempt to provide a common framework to address the cross-border challenges raised by online platforms with respect to content. Besides, at the domestic level, Member States have introduced their rules to deal with the challenges of content moderation. For instance, Germany introduced the Network Enforcement Act while France adopted a legislation on disinformation in times of election providing transparency obligation to online platforms. Therefore,

even if the Union has introduced significant transparency and accountability safeguards, the mix of supranational and national initiatives could affect the protection of fundamental rights and freedoms while strengthening the power of large online platforms and reducing the competitiveness of the internal market.

Within this framework, the adoption of the DSA will play a critical role in providing a supranational and horizontal regime to mitigate the challenges raised by the power of online platforms in content moderation. This legal package promises to provide a comprehensive approach to increase transparency and accountability in content moderation. The adoption of the DSA can be considered a milestone of the European constitutional strategy. The legal regime of online intermediaries is still subject to a regulatory framework that dates back to 2000 established by the e-Commerce Directive. By looking at the title of the proposal, it is clear how DSA will affect the regulatory framework envisaged by the e-Commerce Directive. Even if the proposal maintains the rules of exemption of liability for online intermediaries, it will introduce some (constitutional) adjustment which aims to increase the level of transparency and accountability of online platform. For instance, the DSA introduces due diligence and transparency requirements while providing users to access redress mechanisms. In other words, without regulating content, it requires platforms to comply with procedural safeguards, thus, making the process of content moderation more transparent and accountable.

However, the DSA does not uniformly apply to all intermediaries. Its scope extends to micro or small enterprises pursuant to the annex to Recommendation 2003/361/EC. Besides, additional obligations only apply to those platforms falling within the notion of “very large online platforms” which is based on a threshold estimated at over 45 million recipients of the service. In this case, the proposal sets a higher standard of transparency and accountability on how the providers of these platforms moderate content, advertising and algorithmic processes. These platforms are required to develop appropriate tools and resources to mitigate the systemic risks associated with their activities. Otherwise, the DSA

introduces sanctions up to 6% of turnover on a global scale in the previous year.

Besides, the DSA will provide a horizontal framework for a series of other measures adopted in recent years which are instead defined as *lex specialis*. For instance, the obligations established by the AVMS Directive on video-sharing platform with regard to audiovisual content and audiovisual commercial communications will continue to apply. Furthermore, the proposal does not affect the application of the GDPR and other Union regulations on the protection of personal data and confidentiality of communications. Likewise, the DSA would not impact on the application of the TERREG when it will be adopted.

This framework shows how the Commission aims to provide a new legal framework for digital services that is capable of strengthening the Digital Single Market while protecting the rights and values of the Union which are increasingly challenged by the governance of online platforms in the information society. According to Vestager, 'here's no doubt, in other words, that platforms—and the algorithms they use—can have an enormous impact on the way we see the world around us. And that's a serious challenge for our democracy. So we can't just leave decisions which affect the future of our democracy to be made in the secrecy of a few corporate boardrooms'. These statements should not surprise but rather underline one of the essential peculiarities of European constitutionalism whose roots based on human dignity do not tolerate the exercise of private power threatening fundamental rights and democratic values while escaping public oversight.

Nonetheless, the constitutional approaches to the rise of digital private powers have increasingly polarized across the Atlantic. From the first period of convergence based on neo-liberal positions at the end of the last century, the US and the Union have taken different paths. On the eastern side of the Atlantic, the Union has slowly abandoned its economic imprinting. While, at the end of the last century, the Union primarily focused on promoting the growth of the internal market, this approach has been complemented (or even overturned) by a constitutional democratic strategy. The adoption of the DSA can be considered a

paradigmatic example of European digital constitutionalism. While the Union framework is at the forefront of a new constitutional phase addressing the challenges raised by the exercise of private powers online, the western side of the Atlantic has not shown the same concerns but followed an opposite path. The US policy is still anchored to a digital liberal approach which considers the First Amendment as the primary beacon. Still, for instance, the Communication Decency Act immunises online intermediaries, including modern online platforms, from liability for moderating online content. Even if the Trump presidency has tried to amend Section 230, there were no effective changes. The executive order on social media has shown the constitutional paradox of the US policy on social media. Nonetheless, it is not possible to predict whether the Biden presidency will lead to a paradigmatic turning point, also considering that the primary role of the First Amendment in US constitutionalism has not changed in this move.

The DSA has shown the resilience of the European constitutional model reacting to the threats of private powers in the information society. This new phase should not be seen merely as a turn towards regulatory intervention or an imperialist extension of European constitutional values. It is more a reaction of European digital constitutionalism to the challenges for fundamental rights and democratic values in the algorithmic society. Therefore, the evolution of European digital constitutionalism would oppose techno-determinist solutions and contribute to promoting the European model as a sustainable constitutional environment in the global context.