European Law Open (2025), page 1 of 16
doi:10.1017/elo.2024.52

DIALOGUE AND DEBATE: COMMENT

The Digital Services Act in the European periphery: Critical perspectives on EU digital regulation

Jennifer Orlando-Salling

iCourts, Faculty of Laws, University of Copenhagen, Copenhagen, Denmark
Email: jennifer.p.orlando@jur.ku.dk

(Received 13 September 2023; revised 25 October 2024; accepted 25 October 2024)

Abstract

As the EU is positioned, and positions itself, as a global leader in digital regulation, it is more important than ever to challenge narratives that flatten disparities within the bloc. In this paper, I seek to problematise the perception of the European Union as the homogenous bloc sometimes alluded to, and even outwardly projected, in discussions about a 'Brussels Effect' in digital regulation. Using the EU Digital Services Act as a prism, I draw attention to the legal, political, social, and cultural variation within the EU and, crucially, the inter-state power dynamics and disparities that shape the development and implementation of EU digital regulation. Building on scholarship related to core-periphery dependencies within the EU and extending burgeoning critical methods in EU legal studies, leaning on decolonial approaches, I offer a foundational analysis of the DSA's preliminary stages of the implementation of the EU Digital Services Act.

Calling for different comparative counterpoints to those routinely used in EU legal studies and digital regulation, this article presents a rare insight into the process from the perspective of the EU's smallest member state, Malta, a former British colony considered part of the EU's southern periphery that acceded in 2004. In this paper, I argue that, within the EU's borders, the belief that we are moving toward increased harmonisation and standardisation in the realm of digital rights is, in practice, questionable. I underline that any meaningful assessment of the Digital Services Act's overall success must pay close attention to the regulation's tangible impacts (and shortcomings) from the perspective of 'peripheral' EU states.

Keywords: digital regulation; critical methods in EU legal studies; EU law; core-periphery; decolonial perspectives

1. Introduction

> We have an opportunity to create a new global golden standard for tech regulation that will inspire other countries and regions.
>
> *Christel Schaldemose (Danish MEP and lead rapporteur on the Digital Services Act)*

> . . . the problems prioritized in empirical studies of EU law remain overwhelmingly situated within a colonial perspective. This perspective pays little or no attention to those who live their lives at the margins of Europe and European integration . . . [1]

[1] I Solanke, 'Conclusion: Embedding Decoloniality in Empirical EU Studies' in A Vauchez, F Nicola and M Rask Madsen (eds), *Researching the European Court of Justice: Methodological Shifts and Law's Embeddedness* (Cambridge University Press 2022) 345.

As of April 2024, six countries are facing infringement proceedings from the EU Commission over inadequate enforcement of the Digital Services Act (hereafter DSA).[2] Of the six, five Member States acceded to the EU in 2004, with all of these Member States considered periphery countries.[3] This is no coincidence.[4] Within months of the DSA becoming fully applicable, the lines were already drawn between the leaders and the laggard Member States, between users who would benefit from the full potential of the regulation and those who would be left behind.

Despite its ambitious agenda, the DSA has weak points that, unless addressed in the early phases of its implementation and enforcement, will see it fall short – potentially excluding vast swathes of the digital (EU) citizens interacting with the information society (but also European society) it 'sees' and seeks to regulate.[5] Currently, the notion that the EU bloc as a whole is moving toward increased harmonisation and standardisation in the realm of digital rights does not fully hold in practice. Building on scarce scholarship related to regulatory harmonisation from a core-periphery perspective within the EU and applying critical methods, I contend that significant shortcomings in the preliminary stages of the implementation process expose deficiencies in the enforcement of the DSA. In particular, it is at least questionable that the DSA will realise its objectives in Member States with over-burdened and under-resourced enforcement agencies, with laws that exist in tension with a number of EU fundamental rights, and with underdeveloped local digital rights organisations.

As it has grown from its original 6 to 27 Member States, the EU has developed into a 'dualist political economy' consisting of 'a core of highly developed economies forming a golden triangle, and a southern and eastern periphery with a number of countries between core and periphery'.[6] The core-periphery framework emerged in the 1960s and early 1970s. It was initially applied to explain global inequality and the under-development of the so-called 'Third World' that had seemingly been left behind in the global march towards prosperity that modernisation theorists

[2]Poland (PL), Estonia (EE), Portugal (PT), Czechia (CZ), Cyprus (CY), and Slovakia (SK) were sent letters of formal notice on the grounds that PL, EE, SK are yet to designate Digital Services Coordinators (DSC) while PT, CZ and CY are yet to assign the relevant requisite powers. See 'April Infringement Package: Key Decisions' (European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/inf_24_1941> accessed 3 May 2024.

[3]The analysis here builds on work by Kukovec on regulatory harmonisation from a core-periphery perspective. His work focuses on hierarchies (particularly divisions between the West and Central Eastern Europe) and their impact on EU social regulation. Countries of the centre are here taken to be, for example, Germany, France, the Netherlands, Austria, Denmark, Finland, and Belgium, whilst countries of the periphery include Hungary, Portugal, Malta, Greece, Bulgaria, Latvia, Poland, Slovenia and Estonia. The latter are usually those Member States that joined the EU in (and after) 2004. The paper visualises peripheries to encompass liminal spaces beyond the merely geographic (though Malta's geographical location makes it both a peripheral place and liminal space). To note that there are also semi-peripheries, peripheries within peripheries (accounting for regional disparities) and marginalities within peripheries. The analysis herein extends beyond economic variables and explores what Kukovec calls the 'dynamic foreclosure' on 'social Europe' from the perspective of EU digital regulation. The European periphery (encompassing the semi-periphery) will thus be defined along the lines found in D Kukovec, 'Law and the Periphery' 21 (2014) European Law Journal 406. Core-periphery dynamics have been a relatively noteable lens of inquiry within EU studies, one that traverses law and politics, particularly in the wake of the Eurozone crisis. See for example: J Magone, B Laffan and C Schweiger, *Core-Periphery Relations in the European Union: Power and Conflict in a Dualist Political Economy*, vol 32 (Routledge 2016). For reflections on urban and hinterland dynamics in a spatial reading of EU law, see for example: F de Witte, 'Finding Space in EU Law' 15 (4) (2024) Transnational Legal Theory, 1–10. For a short discussion on epistemic peripheries from a more global perspective, see for example: Manuela Boatcă, 'The Periphery Writes Back: Worlding the Colonial Experience' (Global Dialogue, 8 November 2023) <https://globaldialogue.isa-sociology.org/articles/the-periphery-writes-back-worlding-the-colonial-experience> accessed 21 September 2024.

[4]For research on regulatory harmonisation and its limitations, see for example: A McGee and S Weatherill, 'The Evolution of the Single Market – Harmonisation or Liberalisation' 53 (1990) Modern Law Review 578–96; S Weatherill, 'Harmonisation; How Much; How Little' 16 (3) (2005) European Business Law Review, 533–45; S Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' 12 (3) (2011) German Law Journal, 827–64.

[5]See in Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (hereafter Digital Services Act, DSA).

[6]Magone et al (n 3) 298–9.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

had predicted. The theory pushed back against the idea that global economic integration would result in greater political and economic homogeneity among states – asserting that, on the contrary, the global capitalist economic structure was predicated on, and through its functioning exacerbated, regional inequalities. The framework began to be applied to Europe in the late 1970s as theorists considered what the accession of less wealthy, post-dictatorship Southern European states (eg, Portugal, Spain and Greece) would mean for the European Union and its overall trajectory.[7] It was later extended to the Central, Eastern and Southern European (often post-socialist, post-Soviet or post-colonial) states.[8] Earlier scholarship on core-periphery framing has primarily sought to reckon with these economic divergences.[9] The latter pre-supposes that so-called peripheral European states are economically weaker relative to core countries, resulting in various types of dependencies on the core.[10] More recent studies have broadened the scope of analysis to include the political and geopolitical dimensions of the core-periphery divide.[11]

Zooming into the conditions in Europe's Southern periphery, the 'consumption-led and credit-based growth model' of these states makes them particularly dependent on core EU Member States in periods of crisis.[12] Borrowing and nuancing this frame to analyse the DSA, the perception of the European Union (hereafter 'EU') as the homogenous bloc sometimes alluded to, and even outwardly projected, also in discussions about a 'Brussels Effect' in digital regulation, is here problematised.[13] Attention is drawn to the legal, political, social, and cultural variation within the EU and, crucially, the inter-state power dynamics and disparities that shape the development and implementation of EU digital regulation. I do so critically, mindful that the DSA has been positioned as a home-front for the defence of European values in the online space and sets 'high standards for effective intervention' as well as 'a benchmark for a regulatory approach to online intermediaries also at the global level'.[14] These are lofty aims and certainly more comparative data and analysis will be needed to judge how successfully the DSA achieves them.

[7]See H Caraveli, 'Global Imbalances and EU Core-Periphery Division: Institutional Framework and Theoretical Interpretations' 7 (2016) World Review of Political Economy 1–55; B Farkas, 'Quality of Governance and Varieties of Capitalism in the European Union: Core and Periphery Division?' 31 (5) (2019) Post-Communist Economies 563–78.

[8]Ibid.

[9]See C Volintiru et al., 'Re-Evaluating the East-West Divide in the European Union' 31 (2024) Journal of European Public Policy 782–800.

[10]See for example: L Bruszt and V Vukov, 'Core-Periphery Divisions in the EU? East–West and North–South Tensions Compared' 31 (2024) Journal of European Public Policy 850–73. See also S Lehne, *Europe's East-West Divide: Myth or Reality?*, 2019 CEIP: Carnegie Endowment for International Peace. United States of America. In the context of the rule of law, see U Sedelmeier, 'Is There an East–West Divide on Democracy in the European Union? Evidence from Democratic Backsliding and Attitudes towards Rule of Law Interventions' 31 (3) (2024) Journal of European Public Policy.

[11]Volintiru et al. (n 9); The tendency towards flattening both the divide and those Member States within each side of the divide into a whole is cautioned against here. Empirical research on core-periphery faultlines that foregrounds historical context and analyses resultant power dynamics and asymmetries remains sparse. Conscious of sparsity in this regard, and without ignoring national agency, this paper borrows the core-periphery framing to argue for a context-sensitive approach to the study of the EU Digital Services Act and its implementation. In doing so, it attempts to account for the entanglements that yield the material conditions on the ground in Member States. See the debates featured in the special issue entitled The East-West Divide: Assessing Tensions within the European Union', particularly: Bruszt and Vukov (n 10); Volintiru et al. (n 9); Sedelmeier (n 10).

[12]The painful bailout terms that Southern European 'debtor' countries (namely Greece, Portugal and Cyprus) were subjected to because of the 2009 Eurozone crisis both reflected and reinforced Southern Europe's structural disadvantage within the EU economy. See in Bruszt and Vukov (n 10).

[13]The implications of the term 'Brussels effect' from a postcolonial perspective are not explicitly dealt with herein, though it is noted at the outset of this article. Normative power Europe, in the wider digital regulatory sphere, can be likened to what Nicolaidis and Howse deem the setting of 'standards of civilisation' through soft power. See in K Nicolaidis and R Howse, '"This is my EUtopia . . . ": Narrative as Power' 40 (4) (2002) Journal of Common Market Studies 767–92, 788–9. These debates are explored extensively from a digital society perspective by Anu Bradford in A Bradford, *Digital Empires* (Oxford University Press 2023) and, more broadly, from a regulatory perspective in A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

[14]See Questions and Answers on the Digital Services Act (European Commission) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 1 May 2024.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

While the EU is positioned, and positions itself, as a global leader in digital regulation, it is more important than ever to challenge narratives that flatten disparities within the bloc. Article 91 of the DSA sets out a timeline for formally reviewing the implementation of the Regulation with designated entities from each member state (referred to as 'Digital Services Coordinators') expected to report to the Commission about their work. Many of the vital components of the Regulation's implementation are only due to be formally reviewed from 2027 (and every five years thereafter). I seek to pose a more foundational question: whether the implementation process of the DSA can foster a reflexive, inclusive and constructive space to address core-periphery disparities in EU law.[15] The analysis investigates the preparatory phases but focuses on early implementation and enforcement stages, which are crucial to understanding its workability in practice and underway at the time of writing.

2. Not your 'average' citizen: eurocentricity and critical methods in EU (digital) law

Outside of the EU legal sphere, there is a growing body of scholarship that challenges the 'Eurocentricity' of platform governance norms and debates, drawing attention to the specificities and under-representation of non-European 'global majority' countries and voices, especially located within the Asian and African continents.[16] These efforts work to 'provincialize' the European experience, puncture its claims to universality, and de-centre those narratives away from self-perpetuating Western approaches that do not account for a diversity of experiences, perspectives and realities.[17]

As a Maltese scholar from the EU's southernmost periphery, what I contend here is complementary to these efforts: that the idea of 'Europe' that is embedded within Eurocentricity results in the reproduction of Eurocentric, largely 'core' approaches on platform governance, which are inadequate for understanding, accounting for and addressing the challenges faced by several peripheral European countries within the EU bloc.[18] In her writing on EU administrative

[15]Conscious of the breadth of literature available about law and development and extending from it using critical approaches, a core-periphery framing has been adopted in this article (see above Kukovec (n 3)). The viewpoint has shifted away from traditional comparative centres, usually drawn from Western European core Member States (eg, France and Germany). Changing the frame of reference and addressing the debate through the Maltese lens (a post-colonial country) allows us to push against exclusionary epistemologies and root the digital rights debate in the complex web of the material conditions of the EU (semi) periphery (including, for instance, of language barriers in content moderation). On law and development, see MJ Trebilcock and M Mota Prado. *Advanced Introduction to Law and Development* (Elgar 2014). This paper reflects on the work of various scholars on critical approaches to law including, particularly: R Michaels and L Salaymeh, 'Decolonial Comparative Law: A Conceptual Beginning' 86 (1) (2022) Rabels Zeitschrift Für Ausländisches Und Internationales Privatrecht (RabelsZ) 166–88; F Adébísí, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (Bristol University Press 2023). For an example of a political economy approach to digital regulation, see R Griffin, 'The Law and Political Economy of Online Visibility. Market Justice in the Digital Services Act' (2023) Technology and Regulation 69–79. On the need to address the critical approaches blindspot in EU law more generally, see I Isailovic, 'Critical Approaches in EU Law – Still a Blindspot.' (*Transformative Private Law*, 28 September 2023) <https://transformativeprivatelaw.com/critical-approaches-in-eu-law-still-a-blindspot/> accessed 18 June 2024.

[16]See for example: CV Arguelles, 'From Self-Regulation to State Intervention: Shifting Modes of Social Media Regulation in Asia' 13 (2019) International Journal of Communication 5771; G De Gregorio and N Stremlau, 'Platform Governance at the Periphery: Moderation, Shutdowns and Intervention' in J Bayer and others (eds), *Perspectives on Platform Regulation. Concepts and Models of Social Media Governance Across the Globe* (Nomos 2021); Folúké Adébísí, *Decolonisation and Legal Knowledge: Reflections on Power and Possibility* (1st edn, Bristol University Press 2023) <https://www.jstor.org/stable/jj.1011737> accessed 17 January 2024, 'Moderate Globally Impact Locally: The Countries Where Democracy Is Most Fragile Are Test Subjects for Platforms' Content Moderation Policies' (Information Society Project, Yale Law School 2020) <https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/moderate-globally-impact-locally-countries-where-democracy-most-fragile-are-test-subjects-platforms> accessed 9 August 2023. See also Nicolaidis & Howse (n 13).

[17]D Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton University Press 2000).

[18]J Reynolds, 'The Political Economy of States of Emergency Symposium: Third World Approaches to International Law (TWAIL) Conference: Capitalism and the Common Good' 14 (2012) Oregon Review of International Law 85; Kukovec (n 3).

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

law and digital constitutionalism, Ranchordas decries the limited and limiting 'average citizen' invoked in legislative and policy processes.[19] This is a strategy that has, she argues, left many (if not the majority) of EU citizens unaccounted for. Defined and categorised along Western yardsticks and reduced to unrepresentative data points that do not account for various vulnerabilities, many are inevitably left behind.[20] The EU, as the DSA also suggests, prides itself on commonality and inclusivity of diversity.[21] Moreover, the DSA's claim to foster 'a safer digital space where the fundamental rights [and freedom of expression] of users are protected'[22] is confronted, asking which 'users' the legislation appears to refer to and whether this is a more restricted category of citizens – one determined by core-periphery (as well as Western/ non-Western) fault lines – than it assumes.[23]

The question of who is seen in this 'digital space' or society (as the DSA envisages) is not peripheral. The specific developmental, distributive, juridical, and broader structural issues faced across the EU periphery that have only relatively recently emerged from colonial or imperial contexts are variables that continue to be vastly unaccounted for in EU law.[24] An inclusive legislative process that protects the digital rights of all, not just some, European citizens cannot be achieved without reflection on national (mainly historical) context.[25] This is especially the case with regard to the DSA.[26] As with many EU rules in other fields, the DSA's enforcement ultimately relies rather heavily on Member States and their administrative as well as legal structures and capabilities. This means that understanding national laws, regulators, resources (or lack thereof), and infrastructural capacities (or lack thereof) takes on renewed importance in the digital regulatory space. What the DSA looks like in practice and context matters.

The focus is here on the DSA's implementation to make the case for critical approaches that attend to the particularities of core-periphery dynamics in EU law.[27] In considering what the core-

[19]S Ranchordas, 'Inaugural Address: Administrative Blindness: All the Citizens the State Cannot See' (Tilburg University Research Paper 2024) <https://ssrn.com/abstract=4811928> accessed 3 May 2024.

[20]Ibid.

[21]JHH Weiler, 'Federalism and Constitutionalism: Europe's Sonderweg' in K Nicolaidis and R Howse (eds), The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (Oxford University Press 2003) 54–70.

[22]The DSA's pioneering engagement with fundamental rights and the governance structures it replicates in doing so is deliberated within Digital Constitutionalism connecting it to wider debates on the future of European Constitutionalism and the European (digital) society in its imaginary. See G De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' 19 (2021) International Journal of Constitutional Law 41–70; G Frosio and C Geiger, 'Towards a Digital Constitution: How the Digital Services Act Shapes the Future of Online Governance' (Verfassungsblog 2004) <https://verfassungsblog.de/towards-a-digital-constitution/> accessed 7 October 2024. See also The Digital Services Act Package | Shaping Europe's Digital Future (European Commission, 30 April 2024) <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package> accessed 7 October 2024.

[23]S Ranchordas, 'The Invisible Citizen in the Digital State: Administrative Law Meets Digital Constitutionalism' in J De Poorter, C Oirsouw and G der Schyff, (eds), European Yearbook of Constitutional Law (*Forthcoming*) (Tilburg Law School Research Paper 2024), <https://ssrn.com/abstract=4674932> accessed 4 October 2024 >; See also Ranchordas (n 19).

[24]See in V Réveillère, 'Controversies over Methods in EU Law' (Verfassungsblog 2024) <https://verfassungsblog.de/controversies-over-methods-in-eu-law/> accessed 28 March 2024.

[25]Kukovec (n 3) 428.

[26]The work being done by the University of Amsterdam's DSA Observatory which showcases research on the likely implications of the DSA in specific countries, including Hungary, Poland, Italy, Denmark, etc. stands out as a notable and welcome exception. An essay by M Husovec also speaks to some of the challenges of intra-EU divergences and notably the inequality of resources between various countries as a critical concern in DSA implementation. See M Husovec, 'Will the DSA Work?' (Verfassungsblog 2022) <https://verfassungsblog.de/dsa-money-effort/> accessed 2 March 2024. For wider literature about accounting for disparities in EU law see also Kukovec (n 3). On impact of debt and fiscal crisis through the centre-periphery paradigm see Reynolds (n 18).

[27]Adebisi explains that '. . . thinking [and unthinking] ontologically, functionally and teleologically about the law, means considering how law's code is entangled in the legitimation of hierarchisation through micro-regulation and thus the [re] production of coloniality'. In this sense, it provides a step beyond postcolonialism's deconstructive (but crucial) agenda, offering an invitation to decode coloniality in the law, pushing back and disrupting the reproduction of divisive hierarchies

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

periphery divide might mean for the DSA's implementation, the EU's smallest member state – Malta (a post-colonial country that acceded to the bloc in 2004), is spotlighted. By centering Malta, I seek to explore the potential implications of the regulation on 'those who live their lives at the margins of Europe and European integration'.[28] How will the implementation process of the DSA unfold in a country where both academic and public debate about the Regulation have been virtually absent; where archaic (often colonial legacy) laws related to, for example, freedom of expression, disinformation and abortion are on a direct collision course with the protections supposedly ensured by the DSA; where resource constraints and institutional weaknesses mean that court cases can take up to eight times longer than the EU average to be resolved; where a strained Cyber Crime Unit concedes to helping global tech companies with translation into the local language when making data requests; and with a low-resource language that has seen near zero allocation of resources or representation within Very Large Online Platforms' (VLOP) content moderation teams? [29] These hard questions must be asked at the outset instead of dismissed as ancillary.

In calling for the DSA's implementation to be analysed through a core-periphery lens, the aim is not to argue that core-periphery disparities are unique to, or uniquely pronounced in the case of, the DSA as compared to other EU regulatory frameworks. The argument is simply that EU core-periphery dynamics are *also* present in the case of the DSA. There is value in judging the regulation's success in part by taking a critical perspective but also by asking to what extent its implementation increases the digital rights of citizens from peripheral EU states. Employing this framework, extending beyond traditional literature on regulatory harmonisation, the challenges behind harmonisation within the context of the DSA are now explored.

3. The pitfalls of maintaining the harmonisation fiction: uniform rules as a corrective to fragmentation?

The enactment of the DSA seeks to fulfil one of the primary objectives of the internal market as well as a primary objective and justification for European integration, and that is harmonisation.[30] Though the focus of this article is not the successes and failures that positive and/or negative harmonisation has yielded, it is worth noting the role that consumer interests have played in the way the EU and its Member States have interacted throughout market integration remains an important running thread in this discussion. Digital governance and regulation are not just about how Europeans *consume* but also how they engage in business, communicate, interact, and connect. All facets require integrated consideration, engaging various norms and rights that are complex and have far-reaching implications.

towards reconstruction. See F Adebisi, 'Paul Robeson's Legacy on My Thoughts on Decolonisation & Law: Talk Delivered at SLSA 2021 Plenary' <https://folukeafrica.com/talk-delivered-at-slsa-2021-plenary-the-legacy-of-robeson-and-some-thoughts-decolonisation-law/> accessed 27 September 2024. See also N Fisher Onar and K Nicolaïdis, 'The Decentring Agenda: Europe as a Post-Colonial Power' 48 (2013) Cooperation and Conflict 283; Gurminder K Bhambra, 'Postcolonial and Decolonial Dialogues' 17 (2014) Postcolonial Studies 115; B Billa, 'Law as Code: Exploring Information, Communication and Power in Legal Systems' 2 (2023) Journal of Cross-disciplinary Research in Computational Law 1; L Zevounou, 'For a Postcolonial Reading of the EU' (Verfassungsblog 2024) <https://verfassungsblog.de/postcolonial-reading/> accessed 22 March 2024.

[28]Solanke (n 1). The approach used herein also extends from seminal work on decoloniality in comparative legal studies, as presented in Michaels and Salaymeh (n 15). It complements the postcolonial analysis woven through the article, attempting to offer decentred and reconstructive pathways.

[29]'Malta Requested More Facebook Data per Citizen than Any Other Country' (*Malta Today*, 21 November 2017); 'Court Cases Take up to Eight Times Longer than the EU' (*Times of Malta*, 30 October 2020).

[30]Articulated in Art. 114 TFEU, harmonisation is considered key to the advancement of the internal market and market integration. See in: I Maletic, *The Law and Policy of Harmonisation in Europe's Internal Market* (Edward Elgar Publishing 2013).

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

The introductory text of the DSA begins by noting that: 'Member States are increasingly introducing, or are considering introducing, national laws' related to digital services, 'imposing, in particular, diligence requirements for providers of intermediary services as regards the way they should tackle illegal content, online disinformation or other societal risks'.[31] But these 'diverging' national approaches are positioned as a threat to the EU's vision of harmonisation: they 'negatively affect the internal market' as envisaged in Article 26 of the Treaty on the Functioning of the European Union (TFEU), and frustrate efforts to fashion a coherent approach to regulating internet-based activity across the bloc.[32] In response, the DSA promises a 'targeted set of uniform, effective and proportionate mandatory rules . . . at the Union level,' which are described as a 'necessary' corrective to 'fragmentation'.[33] Trying to address individual rights concerns, and diminish societal harms that stem from the dissemination of illegal online content whilst at the same time establishing a level playing field for European-wide growth, innovation and competitiveness will inevitably be a difficult balancing act. This kind of balance is hard enough to strike at a national level (as the UK's fraught experience crafting its Online Safety Act shows) but the issues are compounded in the case of the EU. The DSA ostensibly aims to achieve this balancing act across 27 nation-states which typically have vastly unequal degrees of power in shaping EU Regulation at drafting stages, do not operate with a uniform definition of what constitutes 'illegal content', and have markedly uneven resources at their disposal for implementing the Regulation as intended.

As Kukovec shows in his work on the core-periphery dynamic within regulatory harmonisation, strategies for regulatory implementation have to account for, and contend with, the multiplicity of political and legislative disparities across countries within the bloc.[34] To an extent, this is somewhat belied by the language of harmonisation; the DSA is contingent on *national* judicial, administrative, and regulatory bodies and *national* legal, political, social, and cultural contexts in each Member State.[35] Though this is not necessarily unique compared to other regulatory initiatives, the stakes of the DSA are high, with significant implications for EU citizens' ability to 'exercise their fundamental rights . . . in particular the freedom of expression and information, the freedom to conduct a business, the right to non-discrimination and the attainment of a high level of consumer protection'.[36] The internet, and the platforms that increasingly dominate it, have become public utilities – critical spaces that citizens depend on to a significant degree to earn a living, communicate, build community, and express themselves.[37] Across the EU as a whole, regulators face major challenges reining in Big Tech, frequently 'lack[ing] the institutional expertise resources to match the expertise and skill of private enterprises and their software-engineering staff'.[38] The DSA's ambition to address these gaps is laudable, but its success hinges on individual Member States having the necessary tools for meaningful participation (eg, having well-resourced Digital Services Coordinators, strong digital rights groups, an experienced and legitimate trusted flagger, etc). These cannot just be downloaded in pre-packaged and tailored form. They require long-term planning that is sufficiently flexible to be reactive to changes. At present, it is questionable whether this has been fully accounted for by the Regulation.

[31]Preamble 2 (n 5).

[32]Ibid.

[33]Preamble 4 (n 5).

[34]Kukovec (n 3).

[35]EM Eschborn, 'National Enforcement of the Digital Services Act' (Taylor Wessing 2022) <https://www.taylorwessing.com/en/interface/2022/the-eus-digital-services-act/national-enforcement-of-the-digital-services-act> accessed 9 August 2023; See also in Husovec (n 26).

[36]Preamble 3 (n 5).

[37]See KS Rahman, 'Regulating Informational Infrastructure: Internet Platform as the New Public Utilities' 2 (2017) Georgetown Law Technology Review 234.

[38]J Laux, S Wachter and B Mittelstadt, 'Taming the Few: Platform Regulation, Independent Audits, and the Risks of Capture Created by the DMA and DSA' 43 (2021) Computer Law & Security Review 105613.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

If the harmonisation envisaged by the DSA can only be achieved asymmetrically, there is a real possibility that attempts at harmonisation could have the effect of *compounding* the digital rights gap between the have and have-not Member States and their citizens. In the next section, Malta is used as a case study to explore the limits of the DSA in context. Problematising the resource availability, infrastructure and institutional set-up that the DSA presupposes, the impact of intra-EU disparities is now investigated.

4. Implementing the DSA in Malta: views from the (semi)periphery

At a little over 300 square kilometres and with just under half a million inhabitants, Malta is the smallest EU member state and a productive 'lab' for evaluating the implementation of the DSA outside of the EU's 'core'. Malta joined the EU in 2004, and Maltese citizens report overwhelmingly positive feelings about membership.[39] Located at the southernmost periphery of the EU and firmly in the middle of the Mediterranean Sea with geographic proximity to the Middle East and North Africa, Malta is the only country in the EU with a Semitic language. Its language, which is 'characterised by Semitic Romance linguistic symbiosis, despite the apparent incompatibility of Semitic and Romance linguistic structures', reflects Malta's liminality.[40] To be Maltese is to confront the relational, always constructed nature of what it means to be 'European' and what it means to be the 'Other': 'the debates, uses and effects of Malta's national identity can be seen as part of the construction of Europe's identity in the direct encounter with Europe's oriental Other'.[41] It is far from clear where Malta sits within ostensibly Western 'Eurocentric' perspectives. Europe must be seen as the sum of its constituent parts and, as such, should not be flattened.[42] The issues arguably resulting from this flattening are now explored in turn:

A. Unequal voices at the pre-legislative and drafting stage

Focus on the challenges faced in the DSA's implementation, especially for 'peripheral' EU Member States lacking essential resources, is an important enterprise.[43] However, attending to issues at the implementation stage is already considerably late – it does not account for the disparities in voice that profoundly shaped the drafting process itself: which players set the terms of debate? Which contexts served as frames of reference? And ultimately, who and what determined what it was that countries would have to go on to implement? The intense lobbying from the tech industry is widely known.[44] But less focus has been placed on geographic, or country representation and input throughout the drafting process. To the best of my knowledge, there has been no research explicitly comparing countries' relative power in shaping the drafting of the DSA. This is to say little about the regional and sub-regional disparities, or questions of access, in the liminal spaces or peripheries of the periphery.

In the case of Malta, as Micallef Grimaud has argued, there has been little empirical research done on how the Maltese state (via its political representatives) influences the 'uploading' stage of EU legislation more broadly.[45] Micallef Grimaud's work stands as one of the few pieces of scholarship that does this, and he finds that Malta's capacity to influence the design of EU

[39]European Commission Representation in Malta: Standard Eurobarometer 98 – National Report (20 March 2023).

[40]K Mallette, *European Modernity and the Arab Mediterranean toward a New Philology and a Counter-Orientalism* (University of Pennsylvania Press 2010) 131.

[41]G Gerber, 'Doing Christianity and Europe: An Inquiry into Memory, Boundary, and Truth Practices in Malta' in Bo Strath (ed), *Europe and the other and Europe as the other* (PIE Lang 2000) 245 <http://data.europeana.eu/item/2048441/item_5YLWV42ZVBZNVJ4I7CMPHV4N4LGAAJ2N> accessed 30 July 2023.

[42]See A Lewicki, 'East–West Inequalities and the Ambiguous Racialisation of "Eastern Europeans"' 49 (2023) Journal of Ethnic and Migration Studies 1481.

[43]See Husovec (n 26).

[44]'Lobbyists had 613 meetings with MEPs on digital services act' (EU Observer, 19 January 2022).

[45]J Micallef Grimaud, *Small States and EU Governance: Malta in EU Decision-Making Processes* (Palgrave Macmillan 2017).

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

legislation depends heavily on several variables, including the 'capacity to enter early into EU decision-making processes', 'expert and administrative capacity' and 'the capacity to prioritize' (ie, to establish the policy domain as a priority area for the Maltese government).[46] At present, what is known based on open-source materials is that Maltese MEP Alex Agius Saliba played a role in preparations for the DSA, having served as rapporteur on the file. While in theory, there is potential that his role may have afforded greater access for those representing Malta's interests at least in the institutional setting of the European Parliament, his role as rapporteur will not have been to represent Malta.[47]

Looking only at the representation of Maltese concerns, much will have remained contingent on all the variables that Micallef Grimaud highlights: how much of a priority this was to Maltese authorities and the expert and administrative capacity held by those acting as Malta's representatives in the EU to push Malta's interests, and which specific interests. Without behind-the-scenes access to European institutions and decision-making (as Micallef Grimaud acknowledges he had), there is simply no meaningful or verifiable way of understanding the role Maltese representatives to the EU played in the shaping of the DSA. Moreover, local media coverage of the events leading up to the DSA's introduction has been scant and has not engaged critically with what the Regulation would mean for Maltese citizens in practice. This alone is worrying for a Regulation that has such critical implications for digital rights and claims to be about empowering citizens. If it cannot reach a small population like Malta's, can it feasibly claim to be engaging wider attention?

B. Under-resourced, overburdened implementers

Reflecting on Malta's approach to complying with EU regulation, Professor Ivan Sammut, the Head of the Department of European and Comparative Law at the University of Malta, notes that Malta often absorbs EU regulation without much reflection as to context. He elaborates that it 'seems to have lost the initiative to come up with local legal initiatives', even when it comes to EU directives (in the case of which the EU Commission does not require direct transposition, and there is in theory more flexibility for Malta to localise its approach).[48] Indeed, a case study on consumer protection law corroborates this argument, concluding that: 'Perhaps the worst unintended consequence of EU membership was the complete absence of any further interest or initiative by the Maltese authorities in the consumer protection field in the years following membership up till the present day'.[49] Instead, the approach is to 'cut-and-paste' EU directives while 'purely domestic consumer law and local creative policy initiatives remain in hibernation, seemingly abandoned'.[50] As another Maltese scholar, David Fabri notes, this raises serious concerns considering Malta's weak consumer associations, especially given the vulnerability of consumers in the face of powerful business interests in Malta and elsewhere.[51]

Alluding to the core-periphery dynamic, there is a need to appreciate *why* such an approach has been adopted in Malta: localising EU directives and developing national initiatives to complement them requires institutional support and significant resources. Regulatory and administrative authorities in Malta report the significant increase in workload that EU membership has brought

[46]Ibid.

[47]And this does not mean that the same was reflected, for instance, at the crucial level of the Council of the EU.

[48]I Sammut, 'Introduction – The Maltese Legal System and the EU' in I Sammut and J Agranovska (eds), *The Implementation and Enforcement of European Union Law in Small Member States: A Case Study of Malta* (Palgrave Macmillan 2021) 6.

[49]D Fabri, 'The Transposition of the EU Consumer Protection Directives in Maltese Law: A Study Under Twenty Headings' in Sammut and Agranovska, Ibid., 148.

[50]Ibid., 148, 154.

[51]Ibid.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

on even just to meet these basic standards of compliance, leading scholars to question whether membership has placed 'a burden which time may prove as too great in a country with such limited administrative capacity'.[52] It bears noting that these limited administrative capacities emerge from (and are the legacy of) a particular historical context. This is arguably not unique in post-colonial and post-imperial contexts, which exist under the pressure of the so-called 'imitation imperative' and, also a consensus imperative, that prioritises achieving EU-wide consensus and the strategic deployment of power.[53]

In the case of the DSA, at least three bodies or institutions will be expected to play a critical role in the Regulation's implementation in Malta: the Malta Communications Authority (Malta's designated Digital Services Coordinator), the judicial system, and the national Cyber Crime Unit. All three are under-resourced and overburdened considering the scale of the task.[54] The Malta Communications Authority has historically dealt mainly with e-commerce, competition, and consumer rights, which are of course relevant but only partially considering the DSA's scope. It is at present unclear how the Malta Communications Authority will approach thorny questions related to speech rights and other fundamental rights arising from the DSA's implementation. Given its mandate, however, it would not be far-fetched to infer that resources will focus on policy areas of significant economic benefit to the country leaving rights to the wayside. Questions of accountability also arise given a lack of checks and balances evident in the wider administrative and government structures, which will likely also result in a lack of integrated approach to the task at hand.

Malta's judicial system is hampered by under-resourcing that result in significant court delays, thwarting timely access to justice.[55] In administrative terms, Malta has some of the worst delays in Europe – with recent data showing that cases can take up to eight times as long as the EU average to be resolved.[56] In its current shape, it is virtually unimaginable that the judicial system will be in a position to take on the additional load of determining the legality or illegality of online content in the way envisaged by the DSA. With some prominent legal commentators arguing that the Maltese courts are increasingly evading the hard questions of human rights (and rights-based approaches) altogether – there are real concerns about the courts' capacity (and willingness) to engage with the thorny rights-based issues within the DSA's scope.[57] Another key body is likely to be the national Cyber Crime Unit, which has to date been the main Maltese body interfacing with large online platforms concerning criminal online content. A 2016 EU evaluation highlighted concerns about the Unit's resourcing, and it is unclear whether the current contingent of 17 police officers would be able to handle significant increases in workload.[58] These issues further complicate the infrastructural resilience and responsiveness to the onset of the DSA.

[52]Malta has some of the highest transposition rates of EU law in the EU. See M Harwood, 'Maltese Political Development and the Question of "Europe"' in *Malta in the European Union* (Routledge 2014) 212.

[53]See for example in GA Pirotta and C Sammut, 'Neutralism as a Strategic Culture for a Small State: Malta's Showdown with NATO and Britain, 1971–1972', *The Success of Small States in International Relations* (Routledge 2023). For an expansive discussion on the imitation imperative see I Krastev and S Holmes, 'Imitation and Its Discontents' 29 (2018) Journal of Democracy 117; I Krastev and S Holmes, *The Light That Failed: A Reckoning* (Penguin Books 2020).

[54]Though some positive signs have been registered, specific to dispute settlement under Art 21 of the DSA, these should not be overemphasised or generalised. With cases mounting, potentially in the 'hundreds of thousands' in the coming years, Holznagel argues that 'we should watch out for potential systemic flaws of the new framework.' See in D Holznagel, 'Art 21 DSA Has Come to Life' (verfassungsblog 2024) <https://verfassungsblog.de/art-21-dsa-fundamental-rights-certification/> accessed 8 November 2024.

[55]'Lawyers blame outdated court systems for judicial delays' (*Times of Malta,* 2 February 2023).

[56]'Court Cases Take up to Eight Times Longer than the EU' (*Times of Malta*, 30 October 2020).

[57]'The Courts – How to Screw Human Rights in Ten Gutless Steps' (*Times of Malta,* 10 March 2024).

[58]'Police Cybercrime Unit using old and obsolete equipment, EU assessment finds' (*The Malta Independent*, 10 July 2016); '17 police officers assigned to Cyber Crimes Unit, 93 to Financial Crimes Investigations Department' (*The Malta Independent*, 23 May 2022).

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

C. Protections and the 'trusted flagger'

Another concern relates to the 'trusted flagger' position envisaged by the DSA. According to Article 19, a 'trusted flagger' is an entity within each member state responsible for flagging illegal content on digital platforms. Although any EU citizen can flag such content, flagged content by 'trusted flaggers' is dealt with as a priority by platforms. Trusted flaggers must apply to, and be selected by, the Digital Services Coordinator in their respective country and must meet the conditions of having 'particular expertise and competence for detecting, identifying and notifying illegal content', representing 'collective interests', being 'independent from any online platform' and conduct their work of 'submitting notices in a timely, diligent and objective manner'.[59] Trusted flagging predates the DSA, and as a practice that has long been used by a variety of platforms, raises a host of thorny questions, not least about the legitimacy and inclusivity of the trusted flagging process and its effectiveness in practice.[60] Emerging evidence suggests that even in core countries like France, appointing a trusted flagger under the DSA has proved more difficult than the European Commission envisaged – with lack of resources cited as a key blocker.[61] These issues are further compounded in Malta because it is difficult to imagine which entity could meet the criteria to perform such a function. There are no NGOs that focus on digital rights exclusively or to a significant degree in Malta, and the idea of an entity flagging content with (actual or perceived) 'objectivity' on the island is hard to envisage.

Without essentialising Malta or dismissing recent trends that may indicate things are changing somewhat, party politics and government power permeate Maltese society, and the island's size, history and political culture mean that groups seeking influence are often willingly or unwillingly drawn into the political fray.[62] Partisanship emerged from the colonial context but also as a consequence of it.[63] Its cleavages are still amply felt today. As Vassallo laments following fieldwork with Maltese social, human rights and environmental interest groups, political partisanship runs deep in Malta: 'It seems that every single entity or issue on the island, NGOs not excluded, is understood in terms of partisan politics'.[64] The concentration of power in a 'trusted flagger' in the context of such deep-rooted political partisanship presents a risk of undue political influence and is likely to engender distrust. The tendency for fragmentation and infighting among Maltese NGOs is also likely to undermine efforts to build collective buy-in around a single trusted flagger.[65] The 'trusted flagger' provisions in the DSA exemplify how the regulation is insensitive to these cultural phenomena, with potentially serious consequences.

[59]Art 19 in Digital Services Act (n 5).

[60]N Appelman and P Leerssen, 'On "Trusted" Flaggers' 24 (2023) Yale Journal of Law & Technology 452–75.

[61]See 'En France, Peu D'engouement À Devenir Signaleur Chez Les Associations De Protection Des Consommateurs, Contexte' (*Contexte,* 23 April 2024) <https://www.contexte.com/actualite/tech/en-france-peu-dengouement-a-devenir-signaleur-chez-les-associations-de-protection-des-consommateurs_189297.html?go-back-to-briefitem=189297> accessed 12 May 2024; I. Goldberger, 'Europe's Digital Services Act: Where Are All the Trusted Flaggers?' (Tech Policy Press, 13 May 2024), accessed 6 June 2024.

[62]L Briguglio, M Briguglio, S Bunwaree and C Slatter, *Handbook of Civil Society and Social Movements in Small States* (Taylor & Francis 2023); M Harwood, 'Malta' in A Bitonti and P Harris, *Lobbying in Europe Public Affairs and the Lobbying Industry in 28 EU Countries* (Palgrave Macmillan 2017). See also J Orlando-Salling, 'Constituting Nationhood: Spiritualism, Language and Maltese Constitutionalism' in T Borg and J Stanton (eds), *The Constitution of Malta at Sixty* (Kite Publishers: Malta, September 2024).

[63]Orlando-Salling, ibid.

[64]MT Vassallo, *The Europeanization of Interest Groups in Malta and Ireland: A Small State Perspective* (Palgrave Macmillan 2015) 145.

[65]Ibid.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

D. 'European' fundamental rights and standards of legality

The DSA is premised on the principle that 'what is illegal offline should be illegal online'. In theory, the illegality threshold appears measured, even minimalist. Indeed, the opening position of the Act prioritises the focus on illegal content as a way of limiting regulatory overreach and the undue suppression of legitimate speech and behaviour.[66] This is problematic because the idea of a European standard of free speech and common threshold of 'legality' that is speech- and rights-preserving is deeply questionable. Malta is one of many EU countries that exemplifies the flaws in this thinking, given its laws criminalising 'disinformation', ongoing concerns about its treatment of clearly satirical content and its complete prohibition of abortion, including the procurement of abortion medication, which takes place online for those unable to travel abroad.[67] The tension here is that the DSA is supposed to protect fundamental rights, but several Maltese laws would conflict with such rights. Those subscribing to a particular reading of 'European' fundamental rights are left in the peculiar position of hoping that the DSA will *not* work as intended in Malta, and that human rights will be safeguarded not because of but despite the DSA. Ironically, the under-resourcing of Maltese implementers and the limits that this would impose on their ability to report content that is illegal according to a faithful reading of Maltese law might turn out to be potentially rights-protecting in several instances.

The irony does not stop there. The European Parliament voted to include access to abortion as a fundamental right in the EU Charter of Fundamental Rights just a few months after the DSA came into effect – even though the DSA could theoretically create a double layer of criminal liability for those persons in Malta already navigating in the dark to procure abortion pills.[68] It is not difficult to extend the argument beyond the Maltese context, as draconian laws are passed across the EU (eg, Hungary and LGBTIQ, as well as media freedoms) as the bloc takes an increasingly illiberal turn.[69] Could the DSA aggravate worsening rights standards in illiberal, autocratic, and authoritarian contexts that are a lived reality for many Europeans because of its assumptions of homogeneity?

Turning back to Malta, if the DSA is to work as even partially intended then there is reason to be worried about takedown requests that contradict what many would consider to be legitimate speech or other human rights (eg, to abortion). Determining how online content stacks up against laws on disinformation, satire and abortion is far from straightforward even within Malta. Laws can be exploited by those with the power to silence criticism or block access to reproductive rights. Platforms are, of course, able to push back on illegitimate requests by national regulators; arguably, they are duty-bound to do so. But would they have the capacity and sense of urgency to do so in the case of Malta, a tiny 'market' with a unique language where platforms face little public pressure or scrutiny? In 2017, Malta's Cyber Crime Unit conceded that they sometimes provide social media platforms with translations and 'the necessary local context' when making data requests, raising serious concerns about the capacity of platforms to challenge illegitimate

[66]It is worth noting that in parallel, the UK was engaged in a controversial debate about whether and how it should regulate 'legal but harmful' content and conduct on social media platforms in addition to illegal content – with many free speech advocates pushing for a narrow standard of illegality to guide decision-making.

[67]Art 82 of the Criminal Code, Chapter 9 of the Laws of Malta; N Alkiviadou: 'Prison for Fake News: A Proposal to Criminalize Fake News in Cyprus' (Verfassungsblog 2024) <https://verfassungsblog.de/prison-for-fake-news/> accessed 10 September 2024; 'Truth Is Weirder than Satire . . . ' (*Malta Today,* 12 January 2023). See 'Abortion Statistics | Doctors for Choice Malta' (*Doctors for Choice*) <https://www.doctorsforchoice.mt/abortion-statistics> accessed 19 July 2023; See also RÓ Fathaigh, N Helberger and N Appelman, 'The Perils of Legally Defining Disinformation' 10 (2021) Internet Policy Review 4.

[68]European Parliament, Resolution of 11 April 2024 on including the right to abortion in the EU Fundamental Rights Charter (2024/2655(RSP)) P9 TA (2024)0286.

[69]R Griffin, 'EU Platform Regulation in the Age of Neo-Illiberalism' (2024) <https://ssrn.com/abstract=4777875> accessed 8 June 2024.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

takedown requests based on disputed readings of Maltese law.[70] There is a need for far more scrutiny and transparency about platforms' behaviour in response to takedown requests of illegal content from peripheral countries where large platforms don't necessarily have the in-house resources, nor the impetus, to act as a check on abuses of power. Unfortunately, the DSA does not address, and in some way exacerbates, the risk that platforms will bow to dubious takedown requests in the case of countries like Malta.

5. The EU core-periphery divide and the DSA

> We can't stand up to these big tech giants alone. It would be much more feasible for us to carry out reform and stand our ground at the EU level. We're a big bloc, and the strength of our union is that we can join forces and negotiate collectively.
>
> Alex Agius Saliba (Maltese MEP and rapporteur for the DSA).

The DSA embodies the preferences of a multiplicity of players operating within a hierarchy of power following hard-won negotiations that were themselves contingent on a complex power play.[71] The text implicitly indicates who the big winners were while consciously concealing those who stand to lose the most. Scratching the surface even slightly exposes that tally.[72] For instance, the interests of external players, such as internet platforms and lobby groups are strongly reflected.[73] This has influenced both the direction of the DSA's bargain and, perhaps more perceptibly, its opacity – who it is accessible to and how. And though relevant players account to varying degrees for the existence of power dynamics that are external to them, for instance, tech giants (see above quote), they do not necessarily see (or at least publicly admit to seeing) what is right in front of them: the power disparities within the EU itself.

The idea of a two- (maybe even three-) speed Europe is deeply relevant when considering policy- and law-making in the digital realm, considering just how central digital platforms are to European citizens and their ability to exercise their social, political and consumer rights. Here the divide between the haves and the have-nots is glaring, not least because there is often inadequate representation from post-2004 accession EU Member States in the multi-level processes that eventually lead to pieces of legislation like the DSA.[74] The asymmetries widen when considering the political, social, administrative, judicial, juridical and practical oversight capacities that would need to be put forward to even partially deliver on its lofty aims.[75] This places, conservatively, over half of the EU's Member States (not to mention its citizens) on a direct collision course with Brussels by rubbing salt in the wound of ever-present tensions between the EU and its Member States. And it does so at a time of intense debate on norms and values that underpin the EU legal order more generally.[76] Taking the above subsections into account, I identify the following areas of struggle going forward (though these are not exhaustive):

[70]Malta Today (n 29).

[71]See Kukovec (n 3).

[72]'Agius Saliba: We can't stand up to these big tech giants alone, but we can join forces' (*Malta Today,* 17 March 2021).

[73]EU Observer (n 44); R Gorwa, G Lechowski and D Schneiß. 'Platform lobbying: Policy influence strategies and the EU's Digital Services Act' 13 (2024) Internet Policy Review, 1–26.

[74]See for example: Kukovec (n 3).

[75]Husovec (n 26).

[76]J Scholtes, 'Constitutionalising the End of History? Pitfalls of a Non-Regression Principle for Art 2 TEU' 19 (1) (2023) European Constitutional Law Review 59–87.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

A. Fundamental rights for some, not all, 'Europeans'

Lack of functional plurality in legal and policy considerations leads to marginality in practice. Viewing the DSA as a vital arena of this social struggle is important. Not taking steps to reflect marginality and the enduring legacy of historical context (appropriately accounting for resulting factors) at this critical juncture for the construction of a digital regulatory framework would be a missed opportunity for the future of European integration. Failures are not just perceptible in this area of EU law but are likely to be more extensively felt given the vast reach of the internet to European citizens.[77] These can take on multiple shapes and require a degree of critical interaction that cannot be fully accounted for in this paper. The need for critical approaches to EU law that account for race, gender, and class (the list is non-exhaustive) is only just quietly emerging, with calls to take seriously a variety of variables in law-making that are reflective of the complexity of EU society.[78] Given the DSA's wide-reaching implications for EU citizens' digital rights, there is an urgent need to prioritise an understanding of the critical impact of hierarchies of power and the hegemony(ies) they inspire.[79] This includes an understanding of how inequities shape frames of reference and systems of knowledge and how deeply power and resource imbalances influence the ability of Member States to implement the DSA functionally and structurally. Otherwise, there is a risk of creating (and perpetuating) second and third classes of European citizens.

B. Disenfranchisement at the implementation stage

Attention must be paid to the layers of hegemony interacting in parallel with intersectional effect. This power dynamic does not solely exist between Member States of the EU (ie, the traditional core-periphery dynamic) or even in institutional reach. It transcends it, adding yet another layer of tension. Added to the known agents of power are hegemonies of industry, in this case, internet giants who have faced strong criticism for their tendency to be far more responsive to content moderation concerns emanating from the United States and poorly equipped to deal with the multiplicity of non-English languages used across their platforms.[80] The peripherals are further peripheralised on the grounds of language and lack of critical mass when it comes to linguistic representation. The initial transparency reports released under the DSA by the Very Large Online Platforms (VLOPs) showed that Meta had one human content moderator dedicated to content moderation in Maltese; the rest of the VLOPs had none. The transparency reports do not explain the rationale for the allocation of human resources for each language (eg, based on volume of platform content in that language; based on country risk, etc) – the reports merely provide de-contextualised raw numbers.[81] The reports also showed that platforms overwhelmingly rely on *automated* content moderation – which research has repeatedly demonstrated performs poorly

[77]Solanke (n 1).

[78]A Allen, 'An Intersectional Lens on Online Gender Based Violence and the Digital Services Act.' [2022] Verfassungsblog <https://verfassungsblog.de/dsa-money-effort/> accessed 30 July 2023; See also J Orlando-Salling, 'Reimagining a European Constitution' (Verfassungsblog 2022) <https://verfassungsblog.de/reimagining-a-european-constitution/> accessed 30 July 2023; Scholtes (n 76).

[79]Kukovec (n 3).

[80]R Gorwa, 'What is platform governance?' 22 (2019) Information, Communication & Society 854; J Cummings, 'Labour MEP calls for advertising pledge from all parties' (*Times of Malta,* February 2023); See for example: M Karanicolas, 'Moderate globally, impact locally: A series on content moderation in the Global South'. *Yale Information Society Project*. See <https://law.yale.edu/isp/initiatives/wikimedia-initiative-intermediaries-and-information/wiii-blog/moderate-globally-impact-locally-series-content-moderation-global-south> accessed on 11 October 2024; M Fick and P Dave, 'Facebook's flood of languages leave it struggling to monitor content' (*Reuters*, 23 April 2019); B Perrigo, 'Facebook Says It's Removing More Hate Speech Than Ever Before. But There's a Catch.' (*TIME,* 27 November 2019). See also Bradford (n 13).

[81]See D Dergacheva, 'Platforms Overwhelmingly Use Automated Content Moderation, First DSA Transparency Reports Show – Lab Platform Governance, Media and Technology (PGMT)' (8 November 2023) <https://platform-governance.org/2023/platforms-overwhelmingly-use-automated-content-moderation-first-dsa-transparency-reports-show/> accessed 12 May 2024.

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

for non-English languages, particularly low-resource languages like Maltese.[82] Platforms have long resisted calls for transparency into their content moderation resources for non-English 'peripheral' languages. The DSA's transparency mandates have therefore been welcome. By themselves, however, the reporting requirements have evidently *not* led to platforms seriously investing in content moderation for low-resource languages of peripheral EU states like Maltese (unless it is assumed that the existence of one human content moderator for the Maltese language across all the VLOPs represents an increase on what there was before the reporting mandates came in – which would be a very modest 'win' indeed).

At a country level, the extent to which there are the infrastructural capabilities to meaningfully implement something like the DSA needs to be seriously attended to. In the case of Malta, as has been shown, the decision to appoint the Malta Communications Authority (MCA), which has historically focused its work on e-commerce (and, therefore, a small pool of Maltese consumers) as the Digital Services Communicator (DSC) raises questions about the extent to which issues of free speech and other digital rights may take a back seat.

Of course, in an ideal world, the DSA would have a spill-over effect that would result in positive developments across the board, especially in a small regulatory landscape like Malta's. However, this requires significant reform, investment, and cross-sectoral collaboration including, crucially, with entities that are already proving unable to carry their existing workload (eg, the judiciary). The top-down approach of the Regulation's enactment puts pressure on engaging in box-ticking exercises over encouraging meaningful progress and focussing on domestic buy-in that is inclusive of and sensitised to the Maltese context. The result is disenfranchisement rather than the creation of a protective rights-minded space for *all* citizens as envisaged by Article 3 of the Act. There is also a need to contend with the risk that countries which are unable to implement the DSA's provisions adequately and meaningfully, will become more viable destinations (not just locations) for the perpetration of the very abuses the DSA seeks to prevent. This could perhaps further jeopardise some European citizens more than others and maintain (or even encourage the proliferation of) unsafe spaces.

C. Coloniality and eurocentrism

Narrativisation around the DSA matters; there is meaning to be derived from it.[83] The question of whose legal consciousness is being encapsulated in the normative underpinnings and values explicitly found in the DSA cannot go unanswered at these foundational stages of its enactment. This is a pivotal moment in the constitution of the digital society. Who it sees and who it does not is not a secondary undertaking. These are foundational questions. Perceived universality, constructed on 'core' narratives, does not equal Europe-wide buy-in, nor is it a universality that applies outside Western Europe. The inheritance of intra-European colonialism and imperialism is made more conspicuous here, as are various colonialities (of power, knowledge and space). Lack of (decolonial) engagement with disparities and the multiplicity of liminalities going forward threatens and perpetuates not just double standards but neo-colonialism under the guise of normative or soft power.[84] In turn, the sparsity of contention with the substance and relevance of these norms in a pluralist setting in the EU arguably expands the democratic deficit. It further undermines the chances of buy-in on the ground in a manner that would render the aims of the DSA realistically achievable beyond lofty rhetoric. Yet, the preference for (and automaticity of) recycling without reflection has internalised core value systems, which widen the space between

[82]G Nicholas and A Bhatia, *Lost in Translation: Large Language Models in Non-English Content Analysis* (Center for Democracy & Technology 2023).

[83]Nicolaidis and Howse (n 13).

[84]See in Orlando-Salling (n 78), Scholtes (n 76), Bradford (n 13).

https://doi.org/10.1017/elo.2024.52 Published online by Cambridge University Press

the European core and periphery Member States, making hierarchies of its citizens and exacerbating divisions across the EU.

6. Way forward

Accounting for disparities, liminalities and marginalisation in this flagship regulatory process could have significant implications for positive spill-over into areas that are not just relevant to EU digital governance. This would go a long way towards taking down the silos that have marred academia and practice's ability to view EU law as interconnected and inextricable to the social and political realms rather than as an elitist, exclusive and positivist exercise that draws on legalism and formalism to evade the hard questions of European integration.

This article ends with a call to arms to academia from those of us from the European periphery: engage critical approaches that are intersectional in the analysis of digital regulation; extend beyond traditional case studies that overuse irreplicable examples from the centre; seek out comparative examples in the European periphery and challenge traditional frames of reference to prioritise, but also go beyond, mere inclusivity. Decentering is not a metaphor; it is an essential task towards reconstruction that requires a decolonial perspectives and the disruption of the routine epistemological exclusion of the many lived realities of Europe.[85] Self-reflection beyond solipsism has never been a more pressing – even existential – enterprise. Without it, the EU will only replicate, entrench and perpetuate hegemonies, preserving the 'Other Europe(s)' within the constitution of the European digital space and society.

Acknowledgements. With special thanks to Louisa Bartolo for her significant contributions to this article, as captured in our DSA Observatory Blog written in 2023. I am additionally grateful for feedback from Prof Elaine Fahey and Prof Carl Morch and attendees of the academic workshop entitled 'A "Brussels Effect" for EU Digital Governance? Legal, Political, and Economic Considerations' held in Brussels in April 2023, where an extended version of this piece was presented and discussed. I am also grateful to the 'Young Digital Law Conference' participants held in Paris in June 2024 notably Rachel Griffin, Paddy Leerssen and Ilaria Buri, for their insightful comments on a draft version of this piece. Errors are my own.

Competing interests. None.

[85]Echoing Tuck and Yang's in their path-breaking article: E Tuck and K Waye Yang, 'Decolonization is Not a Metaphor' 1 (1) (2012) Decolonization: Indigeneity, Education & Society 1–40.

Cite this article: J Orlando-Salling, 'The Digital Services Act in the European periphery: Critical perspectives on EU digital regulation' (2025) *European Law Open*. https://doi.org/10.1017/elo.2024.52