

Evidence-Informed Lawmaking and the Use of Evidence by the European Parliament: The Case of Harmful Content in the Digital Services Act

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ABSTRACT: EU evidence-informed lawmaking is criticised as European Parliament and the Council frequently introduce substantial amendments without conducting impact assessments. This criticism overlooks that there is little research on evidence actually used by the European Parliament. An analysis of Parliament's amendments to the provisions on content moderation and recommender systems in the DSA shows that Parliament makes much more use of sources on fundamental rights than the European Commission, and generally lives up to its commitment to evidence-informed lawmaking. Its amendments to Article 14 and 27 DSA may compensate for some of the shortcomings of the Commission impact assessment to the DSA – a superficial human rights impact assessment, lack of attention for the role of private actors and focus on terms and conditions. More generally, the amendments to the DSA demonstrate the difficulty to conduct additional impact assessments for substantial amendments, in line with the Interinstitutional Agreement on Better Lawmaking, and showcase that evidence-informed lawmaking does not take away the need to make political choices. Instead, the drafting process suggests that the use of relevant, authoritative evidence does not necessarily mean that amendments will be adopted, nor has it consistently resulted in amendments that are of high legislative quality. The article concludes with five suggestions for the upcoming reform of better regulation.

KEYWORDS: Better Regulation – evidence – impact assessments – Digital Services Act – harmful content – recommender systems.

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1. Introduction

1.1. Improving evidence-informed lawmaking: the example of the DSA

Evidence-informed lawmaking in the EU remains incomplete, as the European Parliament does not systematically conduct impact assessments for substantial amendments to legislative proposals.¹ The Draghi report, the Letta report, and the OECD recommend that the European Parliament and Council comply with its own commitment to evidence-informed lawmaking, to ensure that EU law is based on the best available evidence.² The Commission has since published a call for evidence to revise the Better Regulation Guidelines, in line with the recommendations in the Draghi report and the Letta Report.³

However, while the European Parliament has committed itself to conduct such assessments for significant amendments, it is not clear which amendments are significant and therefore require impact assessments.⁴ A binding obligation might also be detrimental to institutional balance.⁵ What's more, there is little information on the evidence actually used by the European Parliament, nor does systematic scrutiny exist on what happens with evidence after a Commission legislative proposal is discussed and amended in Parliament.

This Article presents a different perspective on the potential of the European Parliament to support evidence-informed lawmaking. A binding obligation to conduct impact assessment might not only have a chilling effect on proposing such amendments, even if necessary – it would also overlook that it may be difficult to estimate the impact of proposed amendments that may well contradict one another. That does not mean Parliament should not benefit from evidence in its decision-

¹ This Article uses the general definition of evidence used throughout the EU legislative cycle, provided in European Commission, 'Commission Staff Working Document: Better Regulation Guidelines', SWD(2021) 305 final, 5, footnote 10: 'multiple sources of data, information, and knowledge, including quantitative data such as statistics and measurements, qualitative data such as opinions, stakeholder input, conclusions of evaluations, as well as scientific and expert advice'.

² Organisation for Economic Co-operation and Development (OECD), *Better Regulation Practices across the European Union 2025* (OECD Publishing 2025), at www.oecd.org 32-33; E Letta, 'Much More than a Market. Speed, Security, Solidarity. Empowering the Single Market to Deliver a Sustainable Future and Prosperity for all EU Citizens' (April 2024), at www.consilium.europa.eu 124; M Draghi, 'The Future of European Competitiveness. Part B, In-depth Analysis and Recommendations' (September 2024), at commission.europa.eu 314, points out that 'the co-legislators (the European Parliament and Council) have no methodology in place to measure the impact of amendments proposed to draft EU legislation'.

³ See 'Communication on Better Regulation' (European Commission, 2026), at ec.europa.eu.

⁴ CM Radaelli, 'Halfway Through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say?' (2018) 56 *Journal of Common Market Studies* 85, 92.

⁵ E van den Abeele, "'Better Regulation': A Bureaucratic Simplification with a Political Agenda' (ETUI Working Paper 04-2015), at www.etui.org 71.

making. To the contrary, Parliament seems well placed to support evidence-informed legislation.⁶ Indeed, the potential role of Parliament to ensure that lawmaking is informed by relevant, robust evidence is considerable. For example, a poor selection of policy options may be mitigated if the European Parliament and Council critically question the evidence supporting impact assessments and suggest alternative options. An area where such potential becomes apparent is EU consumer law, where the benefits of evidence-informed lawmaking are not fully realized. In this area of law, Commission impact assessments, essential for analysing the future impact of EU legislative proposals, are criticized as incomplete,⁷ their one-sided use of evidence,⁸ or for justifying choices already made.⁹ Shortcomings are also visible in the impact assessment to the Digital Services Act (hereafter: DSA).¹⁰

The European Parliament collected extensive sources of evidence in preparation of the DSA. A considerable number of Parliamentary committees issued opinions and reports on the DSA, and it was preceded by three own-initiative reports,¹¹ building on three external assessments of the legal framework,¹² and various internal and external

⁶ Its research services developed a standard practice to conduct in-house initial and extended appraisals of Commission impact assessments, see European Parliament, 'EPRS Scrutiny Toolbox' (European Sources Online, 2018), at www.europeansources.info, and Parliament has integrated independent experts into the process by which EU law is prepared, see M Blandin and M Maciejewski, 'Digital Services Act: Opportunities and Challenges for the Digital Single Market and Consumer Protection' (Collection of studies for the IMCO committee, June 2020), at www.europarl.europa.eu.

⁷ E van Schagen, 'The Hidden Potential of Regulatory Impact Assessments (RIA's) in the Private Law *Acquis*' (2014) 22 *European Review of Private Law* 69.

⁸ C Riefa, 'The Refit Process in the Area of Consumer Protection: Odds Stacked Against Consumers' in E van Schagen and S Weatherill (eds), *Better Regulation in EU Contract Law – The Fitness Check and the New Deal for Consumers* (Hart Publishing 2019) 13, 29.

⁹ WH Van Boom, 'The Draft Directive on Consumer Rights: Choices Made and Arguments Used' (2009) 5 *Journal of Contemporary European Research* 452.

¹⁰ See further below Section 2 of this Article.

¹¹ See Resolution of the European Parliament of 20 October 2020 on Digital Services Act: Improving the functioning of the Single Market, P9_TA(2020)0272, at www.europarl.europa.eu prepared by the Internal Market and Consumer Protection Committee, 2020/2018(INL), (IMCO) (rapporteur Alex Agius Saliba, S&D, MT) and Resolution of the European Parliament of 20 October 2020 on Digital Services Act: adapting commercial and civil law rules for commercial entities operating online, P9_TA(2020)0273, at www.europarl.europa.eu, by the Legal Affairs Committee (JURI) (rapporteur Tiemo Wölken, S&D, DE), and Resolution of the European Parliament of 20 October 2020 on Digital Services Act and fundamental rights issues posed, P9_TA(2020)0274, at www.europarl.europa.eu by the Civil Liberties, Justice and Home Affairs Committee, 2020/2022(INI), (LIBE) (rapporteur Kris Peeters, EPP, BE).

¹² A de Streel and M Husovec, 'The E-commerce Directive as the Cornerstone of the Internal Market. Assessment and Options for Reform' (Study for the IMCO committee, May 2020), at www.europarl.europa.eu 28, with an overview of existing initiatives against harmful content, H Schulte-Nölke, I Rüffer, C Nobrega and A Wiewórowska-Domagalska, 'The Legal Framework for E-Commerce in the Internal Market' (Study for the IMCO committee, May 2020), at www.europarl.europa.eu, providing an overview of the current state of play, including Directive 2018/1808/EU of the European

studies.¹³ The debate in Parliament further had the possibility to benefit from the appraisal of the Commission impact assessment,¹⁴ the EDPS opinion,¹⁵ as well as studies commissioned by the European Parliament,¹⁶ and a workshop with experts.¹⁷

The Commission's impact assessment showed shortcomings – for example, it did not justify some of the regulatory choices regarding harmful content, and its assessments of impact on fundamental rights is superficial.¹⁸ Parliament was well-placed to mitigate these shortcomings, considering the extensive amount of evidence that was collected prior to and after the adoption of the draft DSA by the Commission. This article examines how the evidence collected by or for the European Parliament, in its amendments to the DSA regarding the dissemination of harmful content could compensate for the shortcomings in the Commission's impact assessment to the DSA, if at all?

Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, which is also applicable to harmful content, JB Nordemann, 'The Functioning of the Internal Market for Digital Services: Responsibilities and Duties of Care of Providers of Digital Services – Challenges and Opportunities – Study in Focus' (Study for the IMCO committee, May 2020), at op.europa.eu, which at 25-26, briefly touched upon national initiatives against hate speech.

¹³ T Madiaga, 'Reform of the EU Liability Regime for Online Intermediaries. Background on the Forthcoming Digital Services Act' (ERPS, May 2020), at www.europarl.europa.eu 10-11 describing various forms of harmful content and existing initiatives and options to address harmful content. C Marsden and T Meyer, 'Regulating Disinformation with Artificial Intelligence' (ERPS, March 2019), at www.europarl.europa.eu; A Collova, T Madiaga, C Morichon and A Väisänen, 'Digital Services Act, Pre-legislative Synthesis of National, Regional and Local Positions on the European Commission's Initiative' (EPRS, November 2020), at www.europarl.europa.eu.

¹⁴ E Kramer, 'Initial Appraisal of a European Commission Impact Assessment. Digital Services Act' (EPRS, March 2021), at www.europarl.europa.eu.

¹⁵ 'EDPS Opinions on the Digital Services Act and the Digital Markets Act' (European Data Protection Supervisor, 10 February 2021), at edps.europa.eu.

¹⁶ F Michaelsen, L Collini, C Jacob, C Goanta, Se Kettner, S Bishop, P Hausemer, C Thorun and S Yesiloglu, 'The Impact of Influencers on Advertising and Consumer Protection in the Single Market' (Study for the IMCO committee, February 2022), at www.europarl.europa.eu; N Fourberg, S Taş, L Wiewiorra, I Godlovitch, A De Streel, H Jacquemin, J Hill, M Nunu, C Bourgiugon, F Jacques, M Ledger and M Lognoul, 'Online Advertising: The Impact of Targeted Advertising on Advertisers, Market Access and Consumer Choice' (Study for the IMCO committee, June 2021), at www.europarl.europa.eu; J Bayer, I Katsirea, O Batura, B Holznagel and S Hartmann, 'The Fight Against Disinformation and the Right to Freedom of Expression' (July 2021), at www.europarl.europa.eu; C Dumbrava, 'Key Social Media Risks to Democracy. Risks from Surveillance, Personalisation, Disinformation, Moderation and Microtargeting' (EPRS, December 2021), at www.europarl.europa.eu.

¹⁷ See for the proceedings L Wiewiorra and I Godlovitch, 'The Digital Services Act and the Digital Markets Act – a Forward-looking and Consumer-centred Perspective' (IMCO Workshop Proceedings, June 2021), at www.europarl.europa.eu.

¹⁸ Section 2.1. of this Article.

1.2. Methodology

This Article will focus on the legislator's choices in addressing harmful yet legal content in the preparation of the DSA as a case study for the potential role of the European Parliament in evidence-informed lawmaking. The DSA is vital for protecting consumers in a digitalized platform economy, even though it aims to address illegal content rather than promote consumer protection.¹⁹ It forms part of an area of law, EU consumer law, where impact assessments have already been criticized repeatedly,²⁰ and the potential of Parliament to mitigate these shortcomings may be considerable. In addition, the DSA was chosen as a case study because it was one of the key political priorities of the European Commission, the European Parliament and the Council,²¹ and therefore likely to generate considerable political interest and evidence to support political debate.

Within the DSA, harmful content presents a particular regulatory challenge for the EU legislator. The European legislator has addressed harmful yet legal content and its dissemination through Article 14 on terms and conditions, and Articles 27 and 38 DSA on recommender systems. However, initially, despite the availability of extensive evidence, there was disagreement within Parliament whether the DSA should also include harmful content.²² For one, harmful content is notoriously difficult to define. What content should be harmful, and why?²³ Harmful content has many forms,²⁴ and is not necessarily illegal, and therefore not subject to the same removal obligations as illegal content.²⁵ Further, limiting individuals' freedom to post content online, even if offensive or ill-informed, may for example be difficult to reconcile with users' freedom of expression, a prerequisite for a democratic society,²⁶ that includes the freedom to

¹⁹ See for example C Busch and V Mak, 'Putting the Digital Services Act in Context' (2021) 10 *Journal of European Consumer and Market Law* 109 and C Cauffman and C Goanta, 'A New Order: The Digital Services Act and Consumer Protection' (2021) 12 *European Journal of Risk Regulation* 758.

²⁰ Van Schagen (n 7), Riefa (n 8) and Van Boom (n 9).

²¹ Joint Declaration of the European Parliament, the Council of the European Union and the European Commission of 12 January 2021, EU Legislative Priorities for 2021, at oeil.europarl.europa.eu.

²² Resolution P9_TA(2020)0273 (n 11) para 3 suggested the DSA only applies to illegal content, while Resolution P9_TA(2020)0272 (n 11) welcomed rules regarding harmful content.

²³ See for example regarding hate speech P Jouglaux, *Facebook and the (EU) Law: How the Social Network Reshaped the Legal Framework* (Springer 2022) 184.

²⁴ Including but not limited to disinformation, forms of hate speech, defamation, harassment, bullying, spam, graphic or violent content, eating disorders, and self-harm.

²⁵ European Commission, 'Commission Staff Working Document: Impact Assessment accompanying the document. Proposal for a Regulation on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC', SWD(2020) 348 final 48.

²⁶ *Lingens v Austria* App no 9815/82 (ECtHR, 8 July 1986). See extensively and with further references D Vese, 'Governing Fake News: The Regulation of Social Media and the Right to Freedom of Expression in the Era of Emergency' (2022) 13 *European Journal of Risk Regulation* 477, 497-502.

‘shock, offend and disturb’,²⁷ which often takes place online.²⁸ Further, harmful content may serve a clear, legitimate, purpose – content that depicts nudity or violence portraying historical events may serve educational purposes, or defamatory statements may attempt to draw attention to racism.²⁹ However, not removing harmful content may inhibit the rights of other users – for example, children’s rights, if they are confronted with graphic or violent content. Not removing harmful content may aggravate discrimination and undermine human dignity, especially if enforcement targets marginalized groups while indulging powerful groups and public figures.³⁰ To meet this regulatory challenge, the European legislator not only has to be sufficiently informed, but also needs to carefully balance rights and interests of different parties. Thus, the European Parliament was well placed to compensate for shortcomings in the impact assessment for the DSA, but did it do so?

As the DSA was a key political priority and generated considerable political interest, the drafting process may differ from other measures that were not as politically significant. Possibly, for other measures, Parliament may collect fewer amount of sources. Taking this into account, the article will reflect on the findings more widely, particularly in paragraphs 4 and 5, drawing from reports on EU impact assessments and the approach of EU Parliament, as well as literature on IAs, not only in EU consumer law but more generally.

Analysing the use of evidence in the European Parliament is difficult, as it is unclear which evidence Parliament has used in support of (proposed) amendments. The justifications to proposed amendments are short and rarely refer to sources.³¹

²⁷ *Handyside v The United Kingdom* App no 5493/72 (ECtHR, 7 December 1976), and *Erbakan v Turkey* App no 59405/00 (ECtHR, 6 July 2006).

²⁸ Recommendation CM/Rec(2018)2 of the Committee of Ministers to Member States of 7 March 2018 on the roles and responsibilities of internet intermediaries, at rm.coe.int, preamble paras 1-2; Case C-401/19 *Republic of Poland v European Parliament and Council of the European Union*, EU:C:2022:297, para 46, following the ECHR ruling in *Cengiz and Others v Turkey* App nos 48226/10 and 14027/1 (ECtHR, 1 December 2015) para 52; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2012); *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015).

²⁹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, at ap.ohchr.org, 11, see for example RJ Singh Chima, ‘Beware: Countering “Violent Extremism” Online Risks Human Rights’ (Accessnow, 2 November 2016), at www.accessnow.org

³⁰ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, (n 29) 10.

³¹ See Draft Report 2020/0361(COD) of the European Parliament of 28 May 2021 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, at www.europarl.europa.eu and the earlier Draft Report A9-0356/2021 of the European Parliament of 20 December 2021 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, at www.europarl.europa.eu. This is in line with ‘Rules of Procedure of the European Parliament of July 2024, Rule 51(3) for the European

Therefore, verifying whether amendments have considered the data and arguments presented in the impact assessment, and compensate for weaknesses therein, is problematic. Furthermore, the discussions preceding amendments within political fractions are not public, but some political parties represented in the lead and associate committees have published their views on the Commission draft DSA,³² and the EFA/Greens even provided a helpful analysis on its influence in drafting the DSA,³³ having previously conducted a survey.³⁴

In order to discover possible sources of amendments, the article will compare proposed amendments and the short justifications to various sources: expert briefings before the European Parliament and sources therein, position papers from stakeholders that have met with the rapporteurs or members of associate committees,³⁵ including representatives of Member States that were in the process

Parliament that stipulates that amendments are accompanied by short justifications ‘if appropriate’, which shall be the responsibility of the author and not be put to the vote.

³² For example the Greens/EFA have published a draft Regulation, see ‘Regulation on procedures for notifying and acting on illegal content and for content moderation under terms and conditions by information society services’ (The Greens/EFA), at www.greens-efa.eu; the EPP has adopted a position, see ‘EPP Group Position on the Digital Services Act (DSA)’ (EPP group, 20 January 2021), at www.eppgroup.eu; Socialists and Democrats published various views, see ‘A Digital Constitution for Europe that’s 20 Years Overdue. People Must Come before Profit!’ (S&D, 15 December 2020), at www.socialistsanddemocrats.eu and ‘S&Ds Ask for Worldwide Protection of Online Consumers’ (S&D, 29 September 2020), at www.socialistsanddemocrats.eu; see ‘Digital Services Act: A Big Step towards a Healthier Online Environment’ (Renew Europe, 20 January 2022), at www.reneweuropengroup.eu; see ‘ECR Group on the Digital Services Act’ (European Conservatives and Reformists, 14 December 2021), at ecrgroup.eu; and see B Leung, ‘Regulating Big Tech & Social Media Platforms: Long Overdue or a Threat to Freedom of Expression?’ (The Left, 10 February 2021), at left.eu. A position paper of Identity & Democracy was not found on the party’s website, or through a Google search.

³³ See A Geese, ‘Digital Services Act: Greens/EFA Successes’ (The Greens/EFA, 14 December 2021), at en.alexandrageese.eu.

³⁴ See Regulation on procedures for notifying and acting on illegal content and for content moderation under terms and conditions by information society services (n 32).

³⁵ This comparison will be limited to published position papers. These have been found with either a search of the stakeholders’ website, or an online search using the name of the stakeholder, combined with ‘position DSA’ or ‘position digital services act’. It might not be a comprehensive overview but will give an impression on stakeholders’ position in English, Dutch or German from, in particular ‘The Digital Services Act Proposal. BEUC Position Paper’ (BEUC, 9 April 2021), at www.beuc.eu; ‘Digital Services Act Position Paper’ (Digital Europe, 31 March 2021), at www.digitaleurope.org; ‘EU: Article 19’s Recommendations for the Digital Services Act Trilogue’ (Article 19, 25 February 2022), at www.article19.org; ‘ISFE Position Paper on Digital Services Act’ (Europe’s Video Games Industry, May 2021), at www.videogameseurope.eu; ‘Digital Services Act’ (Electronic Frontier Foundation), at www.eff.org; see ‘Airbnb and the Digital Services Act’ (Airbnb, June 2021), at news.airbnb.com; Association of European Chambers of Commerce and Industry, ‘Reaction to the Commission’s Proposal for a Regulation on a Single Market for Digital Services (“Digital Services Act”)’ (Eurochambres, Position Paper 12 May 2021), at www.eurochambres.eu; ‘DSA: Platform Regulation Done Right’ (EDRI, 9 April 2020), at edri.org; J Jaurisch, ‘The DSA Draft: Ambitious Rules, Weak Enforcement Mechanisms, Why a European Platform Oversight Agency Is Necessary’ (Interface, May 2021), at www.stiftung-nv.de; K

of drafting, or had adopted various national measures targeting harmful content,³⁶ as well as stakeholders who responded to Article 12 and 29 Commission draft DSA³⁷ and Parliament's position.³⁸ The paper will further compare the content of and evidence used in amendments, if any, with evidence used by the European Commission in preparing the impact assessment, and other potentially relevant sources of evidence, ranging from academic publications, European Union initiatives to regulate harmful content, ECHR case law, Council of Europe Recommendations and positions adopted by relevant enforcement authorities.

Bhatia, 'The Digital Services Act must not Harm Europe's Economic Recovery' (BlogGoogle, 28 October 2020), at blog.google; 'Spotify Comments on the EU Digital Services Act' (Corporate Europe Observatory), at corporateeurope.org; 'How the Digital Services Act (DSA) can Tackle Disinformation' (EU DisinfoLab, 1 April 2021), at www.disinfo.eu; E Pirková, 'Access Now's Position on the Digital Services Act Package' (Access Now Position Paper Series, September 2020), at www.accessnow.org 6; 'Amnesty International Position on the Proposal for a Digital Services Act and Digital Markets Act' (Amnesty International, 30 March 2021), at www.amnesty.eu; 'Avaaz Position Paper on the Digital Services Act, Disinformation and Freedom of Speech', at avaazimages.avaaz.org; D Glowacka and K Iwanska, 'Poprawiamy Project DSA – Czyli Nasze Uwagi Dla Polskiego Rządu' (Fundacja Panoptikon, 1 April 2021), at panoptikon.org; Global Witness at www.globalwitness.org; 'Verbraucherfreundliche Haftungsregeln für Online-Plattformen' (Verbraucherzentrale Bundesverband, 20 September 2020), at www.vzbv.de; 'Position Paper on the Digital Service Act' (European Advertising Standards Alliance, 3 February 2022), at www.easa-alliance.org; 'Digital Service Act' (Dansk Erhverv), at www.danskerhverv.dk; 'Joint Industry Statement on Targeted Advertisement and the DSA' (Eurocommerce, 22 October 2021), at www.eurocommerce.eu; DOT Europe doteurope.eu and doteurope.eu; 'News Media Europe Adopts its Position Paper on the Digital Services Act Proposal' (News Media Europe, 6 May 2021), at www.newsmediaeurope.eu.

³⁶ Including the UK, Germany, Denmark, and France, who, at the time of drafting of the DSA, These national measures were considered by various stakeholders. Particularly, Articles 49 and 50 Loi no 2016-1321 de 7 October 2016, at www.legifrance.gouv.fr (translated by Google translate) and Article 2(2) subs 2, 3, 16 and 17 Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz - NetzDG), and Arts 91(2) and 93(3). Medienstaatvertrag (entry into force 7 November 2011, amended since 1 January 2024), at www.gesetze-bayern.de. Other initiatives have been developed in Denmark: 'Analyse af Justitsministeriets Lovforslag om Blokering af Hjemmesider' (IT-Politisk Forening, 18 January 2017), at tpol.dk, (translated from Danish through Google Translate) (no provisions on standard terms) and (Hoeringsportalen, 12 January 2017), at hoeringsportalen.dk. Sweden also proposed (legislative) action to target harmful content, see N Pramod, 'Sweden Outlines Plans to Legislate against "Harmful" Content Online' (Reclaim, 19 February 2020), at reclaimthenet.org, but its plans and the results thereof, are not accessible online for those who do not speak Swedish, and thus are not included in the comparison.

³⁷ The article will consider the draft as originally adopted by the Commission, referred to as 'Commission draft DSA'. The article includes in its analysis both proposed amendments that were not adopted by the European Parliament (hereafter: proposed amendments) and amendments that were eventually adopted that resulted in draft amended provisions. Not all these amendments were incorporated in the DSA. The article will refer to the provisions incorporating amendments adopted by Parliament as "amended draft" Articles, and specifically indicate whether, and if so where and in what form, these amendments are reflected in the DSA.

³⁸ For an overview see [opp.group](https://www.opp.group).

The provisions on harmful content are linked to Articles 34 (risk assessment) and 35 (mitigation of risks) that expressly require considering the impact of terms and conditions and recommender systems on systemic risk and taking measures to mitigate said risks. It is however beyond the scope of this article to extensively analyse (the drafting of) Articles 34 and 35 DSA.³⁹ It is similarly beyond the scope of this Article to consider the relationship between the EU, the Charter, and the ECHR.⁴⁰

Section 2 will assess the shortcomings in the impact assessment, and Section 3 will explore whether the European Parliament's amendments and the evidence used therein might compensate for these weaknesses. Section 4 will answer the research question and make some general observations on evidence-informed EU lawmaking, especially for EU consumer law. Section 5 will consider implications for the upcoming revision of the Better Regulation Guidelines.

2. Shortcomings in the Commission impact assessment

The impact assessment considered three policy options to address the problem drivers identified in the impact assessment.⁴¹ The impact assessment argues that regulating recommender systems would both help address systemic risks, correct information asymmetries and empower consumers.⁴² Recommender systems may play an important role in, for example, shaping public debate, either by encouraging the inclusion of more diverse perspectives or by narrowing debate and hindering the visibility of, for example, minority views.⁴³ The regulation of terms and conditions is not separately discussed in the impact assessment, which seems more focused on preventing the dissemination of harmful content than addressing individual harmful content, which is left to platforms' terms and conditions.

2.1. Regulating platforms' standard terms

Content moderation had been widely criticized as untransparent, difficult to reconcile with users' fundamental rights, including their freedom of expression⁴⁴ and

³⁹ See further, with references, A Palumbo, 'A Medley of Public and Private Power in DSA Content Moderation for Harmful but Legal Content: An Account of Transparency, Accountability and Redress Challenges' (2024) 15 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 246.

⁴⁰ See further on this topic G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 480.

⁴¹ Commission Staff Working Document SWD (2020) 348 (n 25) 72.

⁴² Ibid 59.

⁴³ J Naudts, N Helberg, M Veale and M Sax, 'A Right to Constructive Optimization: A Public Interest Approach to Recommender Systems in the Digital Services Act' (2025) 48 *Journal of Consumer Policy* 269, 270.

⁴⁴ A Kuczerawy, *Intermediary Liability and Freedom of Expression in the EU: From Concepts to Safeguards* (Intersentia 2018); EJ Llansó, 'No Amount of "AI" in Content Moderation will Solve

access to an independent court.⁴⁵ Accordingly, the impact assessment identified as one of the problem drivers that private actors – platforms – make decisions – for example in moderating content – that have significant impact on users' rights.⁴⁶ Thus, Article 12(1) Commission draft DSA obliged platforms to communicate the restrictions on the use of their services 'in clear and unambiguous language', and to 'act in a diligent, objective and proportionate manner in applying and enforcing' these restrictions. Article 12(2) Commission draft DSA adds that platforms should have 'due regard to the rights and legitimate interests of all parties involved', referring to the Charter. This may also mean that harmful content stays online.

Two weaknesses become apparent within this part of the impact assessment – *i*) the lack of debate on regulatory choices, and *ii*) its superficial analysis of human rights.

2.1.1. *Shortcoming 1: Lack of debate on regulatory choices*

The choice to continue allowing for the removal of harmful content, while providing criteria for the terms on the basis of which harmful content is removed, is to be welcomed, but the discussion whether this should take place through legislation or private regulation is missing. The choice to regulate through private regulation, in the form of terms and conditions, is not illogical. Platforms are, after all, the actors currently making decisions impacting users' fundamental rights, and are best placed to enforce their own contractual terms on removing harmful content. Their role is also in line with the principle of the freedom of contract.⁴⁷ This may mean that platforms' terms go beyond what is required by the DSA,⁴⁸ and even that the competence of platforms to determine their terms and conditions on the basis of Article 12 Commission draft DSA could stand in the way of judicial review of those

Filtering's Prior-restraint Problem' (2020) 7 *Big Data and Society* 1; See CA Kuczerawy, 'Fighting Online Disinformation: Did the EU Code of Practice Forget about Freedom of Expression?' in G Terzis, D Kloza, E Kuzelewska and D Trottier (eds), *Disinformation and Digital Media as a Challenge for Democracy* (Intersentia 2020) 291; M Schellekens, 'Does Regulation of Illegal Content need Reconsideration in Light of Blockchains?' (2019) 27 *International Journal of Law and Information Technology* 292; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (n 29) 14.

⁴⁵ ML Stasi and PL Parcu, 'Disinformation and Misinformation: The EU Response' in PL Parcu and E Brogi (eds), *Research Handbook on EU Media Law and Policy* (Edward Elgar 2021) 407, 423-424; C Goanta and P Ortolani, 'Content Moderation als Digitale Conflictoplossing: Zijn Socialemedia-Platforms de Rechtbanken van het Internet?' in P Wolters, R Hermands, A Janssen, P Ortolani (eds), *Onderneming en Digitalisering en Conflictoplossing* (Kluwer 2021) 171, 1-2.

⁴⁶ Commission Staff Working Document SWD(2020) 348 (n 25) 34.

⁴⁷ M Husovec, 'General Report Topic II – Fide Report on the Digital Services Act and the Digital Markets Act. EU Digital Economy: General Framework (DSA/DMA) and Specialised Regimes' (2025), at www.fide-europe.org 55.

⁴⁸ Critically also M Klos, 'De Digital Services Act: Implicaties Voor het Recht op Vrijheid van Meningsuiting van Gebruikers van Onlineplatforms' (2021) 46 *Nederlands Juristen Comité voor de Mensenrechten Bulletin* 13.

terms.⁴⁹ While Article 12 could indeed have been clearer, it is not evident that it would have stood in the way of judicial screening of platforms standard terms. After all, the Commission underlines that the DSA ‘will be complementary to the consumer protection acquis’, specifically referring to the Unfair Terms Directive.⁵⁰

The use of self-regulation rather than state (or EU) regulation had been defended in order to protect freedom of speech, as targeting harmful content via legislation may result in legal removal obligations for harmful content,⁵¹ which is likely to have a chilling effect on the freedom of speech.⁵²

In the case of the DSA, though, the discussion whether harmful content should be regulated via legislation or private regulation is entirely absent. This is problematic because legislation should at least be considered. The requirement in Article 52(1) Charter that all limitations on the rights recognized in the Charter must take place via law indicates the need for legislation. The development of legislation is also preferable from the perspective of the rule of law – the development of EU legislation is, after all, surrounded by more safeguards, including respect for human rights, than private regulation. For harmful content, concerns over over-removal could have also been a reason to limit platforms’ roles.⁵³ The EU in addition is not unfamiliar with this possibility, as both legislation and alternative regulation have been used for regulating harmful content.⁵⁴

Consequently, the impact assessment does not recognize the impact of leaving the moderation of harmful content largely to online platforms on users’ fundamental rights. Essentially, the definition of ‘harmful’ is left to platforms, who, at the time of

⁴⁹ M Eifert, A Metzger, H Schweitzer and G Wagner, ‘Taming the Giants: The DMA/DSA Package’ (2021) 58 *Common Market Law Review* 987, 1013-1014.

⁵⁰ Proposal for Regulation of the European Parliament and of the Council of 15 December 2020 on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020)825, 5.

⁵¹ Recommendation CM/Rec(2018)2 (n 28) para 1.3.10 encourages the development of self-regulation. Article 19, ‘Watching the Watchmen, Content Moderation, Governance, and Freedom of Expression, Policy Paper 2021, at www.article19.org 43.

⁵² *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* App no 22947/13 (ECtHR, 2 February 2016) para 86.

⁵³ See for example N Elkin-Koen and M Perel, ‘Guarding the Guardians: Content Moderation by Online Intermediaries and the Rule of Law’ in G Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (Oxford University Press 2020) 670, 676-677. See for an overview of empirical research on this question (last updated in 2020) D Keller, ‘Empirical Evidence of Over-Removal by Internet Companies Under Intermediary Liability Laws: AN Updated List’ (CIS, 8 February 2021), at cyberlaw.stanford.edu. See also T Gillespie, P Aufderheide, E Carmi, Y Gerrard, R Gorwa, A Matamoros-Fernández, ST Roberts, A Sinnreich and S Myers West, ‘Expanding the Debate about Content Moderation: Scholarly Research Agendas for the Coming Policy Debates’ (2020) 9 *Internet Policy Review* 1, at policyreview.info.

⁵⁴ See for example the European Commission, ‘Code of Practice on Disinformation’, at digital-strategy.ec.europa.eu but also Art 6(a) of Directive 2018/1808 (n 12).

drafting the DSA, were criticized for their vague terms and conditions.⁵⁵ Consequently, the problem signalled by the impact assessment remains.⁵⁶

2.1.2. Shortcoming 2: Superficial assessment of fundamental rights

State (EU) actors have a positive obligation to ensure that third parties – such as platforms – do not unduly restrict the exercise of fundamental rights such as the freedom of speech.⁵⁷ Therefore, state actors must develop foreseeable rules allowing the use of online information without fear of repercussions, especially for journalists.⁵⁸ The Better Regulation Guidelines acknowledge the obligation to consider the impact of initiatives on fundamental rights and to comply with the Charter.⁵⁹

The impact assessment outlines the ways in which the intervention seeks to mitigate online censorship. For one, the choice of focus should reduce undue limitations to fundamental rights.⁶⁰ Particularly, undue limitations should be avoided by the focus on illegal rather than harmful yet legal content, and the choice to ban prior authorization schemes, as well as general monitoring obligations. Indeed, the ECHR has similarly distinguished between legal and illegal content and especially content that is clearly illegal should be removed, also in view of the interests and rights of others and the general public.⁶¹ Banning prior authorization schemes is also in line with ECHR rulings that emphasized that, while permissible, this option carries significant risk, which requires especially careful scrutiny of the need for such schemes, ‘justified only in exceptional circumstances’.⁶² In addition, the draft DSA

⁵⁵ See for example D Citron, ‘Extremist Speech, Compelled Conformity, and Censorship Creep’ (2018) 93 *Notre Dame Law Review* 1053-1054; B van den Branden, S Davidse and E Smit, ‘In between Illegal and Harmful: A Look at the Community Guidelines and Terms of Use of Online Platforms in the Light of the DSA Proposal and the Fundamental Right to Freedom of Expression (Part 1 of 3)’ (DSA Observatory, 2 August 2021), at dsa-observatory.eu.

⁵⁶ Recently on the unfairness of online terms – including platforms that fall under the DSA – P Palka, A Porębski, R Pałosz and K Wiśniewska, ‘Do Foreign Service Providers Simply Ignore the EU Consumer Law? An Empirical Study of 100 Online Terms of Service’ (2025) 48 *Journal of Consumer Policy* 233-268. Husovec (n 47) 45 points out that it may be much more efficient for platforms to assess content on the basis of their terms and conditions than on the basis of divergent national laws, even though such content may well be illegal.

⁵⁷ This follows from Art 10 ECHR, see *Özgür Gündem v Turkey* App no 23144/93 (ECtHR, 16 March 2000) para 43, see also Human Rights Committee, General Comment no 34 (2011) on the freedoms of opinion and expression, available at documents.un.org para 7.

⁵⁸ *Editorial Board of Pravoye Delo and Shtetel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011) para 64.

⁵⁹ Commission Staff Working Document SWD (2021) 305 (n 1) 35, 36.

⁶⁰ Commission Staff Working Document SWD (2020) 348 (n 25) 61.

⁶¹ *Delfi AS v Estonia* App no 64569/09 (ECtHR, 16 June 2015) para 157; *Sanchez v France* App no 45581/15 (ECtHR, 15 May 2023) para 140.

⁶² *Kablis v Russia* App nos 48310/16 and 59663/17 (ECtHR, 30 April 2019) para 91; *Republic of Poland v European Parliament and Council of the European Union* (n 28) para 98.

would help protect freedom of expression by introducing safeguards in the form of complaint systems and transparency requirements. Lastly, the draft DSA would help reduce an unsafe illegal environment, which may have a chilling effect on the freedom of speech.⁶³

However, the reasoning of the impact assessment fails to explore the conditions for limiting fundamental rights in line with ECHR case law.⁶⁴ Platforms' standard terms that form the basis for removal are vague and do not always provide users with a clear, let alone legitimate reason for removal, contrary to ECHR requirements, that limitations to the freedom of expression are foreseeable, accessible and predictable.⁶⁵ The fundamental rights assessment in the impact assessment also remains superficial in other aspects. For example, while the impact assessment considers illegal content, it does not distinguish between illegal content and clearly or manifestly illegal content that does not require platforms, rather than courts, to determine the legality of content. Additionally, the impact assessment does not clarify if fundamental rights instruments, particularly the Charter, will be directly applicable between private parties, even though the impact assessment considered private parties' impact on other private parties' fundamental rights one of the problem drivers.

The impact assessment also does not consider how parties' rights should be balanced, even though the CJEU and the ECHR have repeatedly recognized the need to balance the freedom to express oneself online with the general interest⁶⁶ and the protection of others' rights, such as privacy, the protection of personal data, the rights of the child, or the right to conduct a business.⁶⁷ Particularly, the CJEU has ruled that protection of personal data may generally prevail over the freedom of information also covered under Article 11 Charter, taking into account the nature

⁶³ Commission Staff Working Document SWD (2020) 348 (n 25) 61-62. As Husovec (n 47) 35-36 points out, these provisions in the DSA hardly result in 'censorship'.

⁶⁴ See, regarding schools, *Costello-Roberts v UK* App no 13134/87 (ECtHR, 25 March 1993) para 27, see *Republic of Poland v European Parliament and Council of the European Union* (n 28) paras 55-56, on which see M Husovec, 'Mandatory Filtering Does Not Always Violate Freedom of Expression: Important Lessons from *Poland v. Council and European Parliament*' (2023) 60 *Common Market Law Review* 183.

⁶⁵ See generally 'Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression' (ECHR, 31 August 2022), at www.echr.coe.int.

⁶⁶ Case C-451/22 *RTL Nederland BV and RTL Nieuws BV v Minister van Infrastructuur en Waterstaat*, EU:C:2024:54, paras 77-78; Case T-125/22 *RT France v Council of the European Union*, EU:T:2022:483, paras 161-166.

⁶⁷ Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances*, EU:C:2015:823, paras 63-68 (with regard to freedom to conduct a business); Case C-136/17 *GC and Others v Commission nationale de l'informatique et des libertés (CNIL)*, EU:C:2019:773, para 66 (privacy and protection of personal data).

and sensitivity of the information, the impact of publication thereof on a person's private life, and the interest of the public in having that information available.⁶⁸

2.2 Regulating recommender systems

The impact assessment identifies the design of platforms and its untransparent use of recommender systems, as relevant for emerging systemic risks.⁶⁹ Generally, concerns over the design of platforms' recommender systems, which aggravated the dissemination of harmful content by prioritizing user-engaging content, were shared among academics and shareholders.⁷⁰ The impact assessment⁷¹ refers to Cobbe and Singh, who argue that rather than regulating harmful content, which, in itself, if viewed by a small audience, is unproblematic, regulators should target recommender systems, which 'can contribute to systemic problems'. Cobbe and Singh note that, by subjecting recommender systems to regulation, regulators can avoid unnecessary infringements of the freedom of expression.⁷² Accordingly, the impact assessment notes that there is a lack of understanding on how content is disseminated and supports informing consumers on how these systems work.

Article 29(1) Commission draft DSA obliges very large online platforms to inform consumers of 'the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters that they may have made available', in their terms and conditions. In addition, very large online platforms shall make available at least one option not based on profiling. This latter obligation should help to limit the dissemination of personalized harmful content and protect users' private autonomy.⁷³ However, the

⁶⁸ *GC and Others v Commission nationale de l'informatique et des libertés (CNIL)* (n 67) para 66 (privacy and protection of personal data); Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, EU:C:2014:317, para 81.

⁶⁹ Commission Staff Working Document SWD(2020) 348 (n 25) 16.

⁷⁰ F Fukuyama, 'Making the Internet Safe for Democracy' (2021) 32 *Journal of Democracy* 38; P Leerssen, 'The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems' (2020) 11 *European Journal of Law and Technology* 6; Ranking Digital Rights, 'It's the Business Model: How Big Tech's Profit Machine is Distorting the Public Sphere and Threatening Democracy' (2020), at rankingdigitalrights.org 22-24; see the 'How the Digital Services Act (DSA) Can Tackle Disinformation' (EU DisinfoLab, 1 April 2021), at www.disinfo.eu, states that 'algorithmic recommender systems have a foreseeable negative effect on the protection of public health and civic discourse by amplifying legal but harmful content'.

⁷¹ Commission Staff Working Document SWD(2020) 348 (n 25) 17.

⁷² J Cobbe and J Singh, 'Regulating Recommending: Motivations, Considerations, and Principles' (2019) 10 *European Journal of Law and Technology* 3.

⁷³ C Dumbrava, 'Key Social Media Risks to Democracy Risks from Surveillance, Personalisation, Disinformation, Moderation and Microtargeting' (December 2021), at www.europarl.europa.eu 6, and references there, as well as the references in N Helberger, M van Drunen, S Vrijenhoek and J Möller, 'Regulation of News Recommenders in the Digital Services Act: Empowering David against the Very

Commission could have imposed more obligations, for example by introducing principles of compliance by design. The Commission's choice to target recommender systems rather than adding these additional obligations can be seen in light of its wider tendency to focus on illegal content rather than expanding consumer rights.⁷⁴

A weakness that becomes apparent, however, is the impact assessment's lack of attention to the question of how to inform consumers. Although the impact assessment notes the need to make 'meaningful information' on recommender systems available, Article 29(1) Commission draft DSA obliges very large online platforms to make information available in their terms and conditions, albeit 'in a clear, accessible and easily comprehensible manner'. This has, rightly so, led to criticism in literature, as including information in standard terms is not likely to actually inform consumers.⁷⁵ After all, it is widely known that consumers typically fail to read standard terms.⁷⁶

Accordingly, other measures such as Article 5(2) P2B, Article 7(4a) Unfair Commercial Practices Directive, and Article 6a(1)(a) Directive 2011/83 on consumer rights include the obligation to include separate, easily available information. Article 3 ELI Model Rules, inspired by both Article 5 P2B Regulation and Articles 5(1) and 6(1) Consumer Rights Directive, also provides that information should be 'clear and presented in a comprehensible manner, and in machine-readable format. Contract terms must be easily available to platform users at all stages of their relationship with the platform operator'.⁷⁷ Although the impact assessment expressly refers to the P2B,⁷⁸ Article 29 Commission draft DSA does not contain a similar obligation, nor does it oblige to explain specifically which search results were shown and why.⁷⁹ In addition, like other impact assessments in EU consumer law, the impact assessment does not consider behavioural research or legal design in

Large Online Goliath' (Internet Policy Review, 26 February 2021), at policyreview.info. Similarly Council of Europe, 'Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States on the Human Rights Impacts of Algorithmic Systems' (April 2020), at rm.coe.int Appendix para 4, p 4, as well as Pirková (n 35) 6.

⁷⁴ Busch and Mak (n 19) 110-114.

⁷⁵ P Leerssen, 'Algorithm Centricism in the DSA's Regulation of Recommender Systems' (Verfassungsblog, 22 March 2022), at verfassungsblog.de.

⁷⁶ Y Bakos, F Marotta-Wurgler and DR Trossen, 'Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts' (2014) 43 *The Journal of Legal Studies* 1-35.

⁷⁷ European Law Institute, 'Model Rules on Online Platforms. Report of the European Law Institute' (Vienna, 2019), at www.europeanlawinstitute.eu 32.

⁷⁸ Commission Staff Working Document SW (2020) 348 (n 25) 71.

⁷⁹ M Grochowski, A Jablonowska, F Lagioia and G Sartor, 'Algorithmic Transparency and Explainability for EU Consumer Protection: Unwrapping the Regulatory Premises' (2021) 8 *Critical Analysis of Law* 2021 52.

designing information obligations, even though this may significantly enhance the chance that consumers read and comprehend information provided to them.⁸⁰

2.3. Evidence, strengths and weaknesses in the impact assessment

The impact assessment used an extensive amount of data. It focused on addressing systemic risks through regulating recommender systems, rather than platforms' terms and conditions. This focus should help prevent violations of freedom of expression, as it shifts the target from individual expressions towards the dissemination of such expressions. Theoretically, the negative effects of this strategy on users whose rights are violated because content is not removed, should be reduced by the limited dissemination of such content.

However, the impact assessment suffers from several serious shortcomings. For one, like other impact assessments,⁸¹ the impact assessment neglected to assess the regulatory choices for regulating standard terms and the impact thereof on the exercise of fundamental rights. Accordingly, Article 12 Commission draft DSA was criticized for its potential detrimental effect on the protection of fundamental rights, and its focus on users who uploaded harmful content rather than the victims.⁸² It is not clear whether the Commission draft DSA would have been detrimental, as the requirements in the Unfair Terms Directive do require fair, clear, and predictable terms.

Further, the impact assessment did not consider how consumers should receive meaningful information on recommender systems. Accordingly, Article 29 Commission draft DSA was criticized for its potential ineffectiveness in empowering consumers.⁸³ This weakness can be contributed to the nature of the impact assessment, which, like other impact assessments, focusses on the problem analysis and the policy options. This focus leaves little room to assess how provisions should be worded – for example, it is beyond the scope of the impact assessment to assess in detail the impact of choices on when or how to inform consumers, or to address changes to the terms and conditions. However, these choices can significantly affect the chance that consumers will actually read and process information.⁸⁴

⁸⁰ EAG van Schagen, CJW Baaij and I Rueda, 'Designing Information Obligations in EU Consumer and Energy Law Behavioural Research and Legal Design as "Best Available Evidence"' (2022) 24 *European Journal of Law Reform* 122

⁸¹ Van Schagen (n 7) 75-76.

⁸² Eifert, Metzger, Schweitzer and Wagner (n 49) 1014, 1012.

⁸³ Leerssen (n 75).

⁸⁴ For example O Bar-Gill, 'Smart Disclosure: Promise and Perils' (2021) 5 *Behavioural Public Policy* 238-251.

3. The European Parliament's amendments

3.1. Amendments to Commission draft Article 12 on platforms' standard terms

Draft Article 12 was subjected to numerous amendments that did however not appear specifically targeted at mitigating the Commission's impact assessment's shortcomings listed in this Article. The Committee on Civil Liberties, Justice and Home Affairs did argue that the DSA should target illegal, rather than legal but harmful content, but did not propose different regulatory choices, or leaving harmful content out of the DSA altogether.⁸⁵ However, Parliament did address the applicability of fundamental rights to content moderation (Section 3.1.1.), and strengthened criteria for the application and enforcement of standard terms (Section 3.1.2.). The scope and timing of information obligations towards users (Section 3.1.3.) are also relevant for the questions whether possible limitations to users' fundamental rights are acceptable.

3.1.1. *Amendments on the direct effect of fundamental rights*

The justification to proposed amendment 964 refers to the freedom of contract as a fundamental right, referring to the Charter.⁸⁶ Proposed amendment 938⁸⁷ inserted that providers of intermediary services act 'in compliance with procedural safeguards and in full respect of the rights and legitimate interests of all parties involved, including the applicable fundamental rights of the recipients of the service as enshrined in the Charter and relevant national law'.⁸⁸ The justification thereto clarifies that this amendment seeks to ensure direct applicability of rights in the Charter between platforms and users of their services. It refers to 'law and jurisprudence', particularly the *Bauer* case, where the Court ruled that Article 31(2) Charter, which limits working hours and guarantees rest periods and paid leave, could be invoked in disputes between employees and employers.⁸⁹ Other amendments stipulated that standard terms must be in conformity with fundamental rights.⁹⁰ While Article 14(4) DSA may aim to ensure

⁸⁵ Opinion of the Committee on Civil Liberties, Justice and Home Affairs, 16 July 2020, PE650.375v02, para 15. Proposed amendment 99, Opinion of the Committee on Civil Liberties, Justice and Home Affairs, 28 July 2021, PE692.898v07-00, 62 would have limited the ability of platforms to refuse to host legal information.

⁸⁶ Draft report 8 July 2021 amendments 758-1011, PE693.594v01-00, 124. Presumably, this refers to Art 16 that protects the right to conduct a business, which should include freedom of contract.

⁸⁷ Ibid 110.

⁸⁸ See the advice of Glowacka and Iwanska (n 35), that moderation policies ought to be in conformity with the Charter.

⁸⁹ Joined Cases C-569/16 and C-570/16 *Stadt Wuppertal v Maria Elisabeth Bauer and Volker Willmeroth v Martina Broßonn*, EU:C:2018:871, paras 80-85.

⁹⁰ Amendment 926, introducing that restrictions must respect 'private and family life, freedom of expression and information, the prohibition of discrimination and the rights of the child, as enshrined

that platforms respects users' fundamental rights, it is still debated whether the Charter can be directly applied in these cases,⁹¹ or affect the interpretation of Article 14 Final DSA. The justifications and the referral to *Bauer* give the impression that this was Parliament's intention, as well as recital 47 to the Final DSA, but the amendments were still criticized as insufficiently clear on the question whether platforms should apply fundamental rights law.⁹²

3.1.2. *Amendments to apply and enforce standard terms*

Whereas the impact assessment only superficially addressed conditions for limiting the freedom of speech, the European Parliament adds these conditions, in line with the ECHR and CJEU case law, human rights reports and recommendations, and surrounding EU legislation. They coincide with stakeholder suggestions and academic criticism of the draft DSA⁹³ and academic research on the problematic use of standard terms by platforms.⁹⁴ The ECHR has repeatedly ruled that a wide discretion for executive bodies to block content, which may result in arbitrarily blocking content that is not illegal, is problematic.⁹⁵ This standard allows for some discretion, if exercised in a predictable, consistent manner.⁹⁶

in Articles 7, 11, 21 and 24 of the Charter', draft report 8 July 2021 amendments 758-1011, Draft report PE693.594v01-00 (n 86)102-103; Draft report PE693.594v01-00 (n 86) 107 refers to fundamental rights enshrined in the Charter, proposed amendments 940 and 943 (p. 111, 113) refer to the freedom of expression and information, proposed amendment 942 (p. 112) proposes that the rights in the Charter shall be applied when limitations thereon are imposed, proposed amendment 946 (p. 114) and 955 (p. 118) insert a new paragraph obliging providers to respect the rights in the applicable fundamental rights protected in the Charter.

⁹¹ See for example Palumbo (n 39) 266, T Mast and Ch Ollig, 'The Lazy Legislature. Incorporating and Horizontalising the Charter of Fundamental Rights through Secondary Union Law' (2023) 19 *European Constitutional Law Review* 462-480; J Pedro Quintais, N Appelman and R Fahy, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation' (2023) 24 *German Law Journal* 896.

⁹² N Appelman, J Pedro Quintais and R Fahy, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation' in H Richter, M Straub and E Tuchtfield (eds), *To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package* (Max Plank Institute for Innovation & Competition Research Papers 2021), at content 33; Husovec (n 47) 59.

⁹³ For example J Barata, O Budzinski, M Cole, M Ledger, T McGonagle, K Pentney, E Rosati and A de Streel, 'Unravelling the Digital Services Act package' (IRIS Special, European Audiovisual Observatory 2021), at IRIS Special 2021-01 DSA 33-34; the Council of Europe, Recommendation CM/Rec(2018)2 (n 28), and Report of the Special Rapporteur (n 29) 15-16.

⁹⁴ MBM Loos and J Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 *Journal of Consumer Policy* 63-90.

⁹⁵ *Vladimir Kharitonov v Russia* App no 10795/14 (ECtHR, 20 November 2020) paras 33, 37-43; *Magyar Kétfarkú Kutya Párt v Hungary* App no 201/17 (ECtHR [GC], 20 January 2020) paras 93-94; *Kablis v Russia* (n 62) paras 81, 95-97; *Cengiz v Turkey* (n 28) paras 61-65; *Ahmet Yildirim v Turkey* App no 3111/10 (ECtHR, 18 December 2011) paras 48, 54, 61-68.

⁹⁶ *Sanchez v France* App no 45581/15 (ECtHR, 15 May 2023) para 125.

The transparency requirement should be interpreted in line with EU case law on unfair terms, which requires that consumers are able, from the terms of the contract, to assess their future position,⁹⁷ as well as the idea, in the P2B Regulation, that plain and intelligible terms ‘give business users a reasonable degree of predictability on the most important aspects of the contractual relationship’.⁹⁸ This standard likely satisfies the requirement of foreseeability developed under the ECHR. The standard of fairness should also help to address concerns over platforms’ unfair terms.⁹⁹

These requirements are reflected in various forms. Amendments 82 and 928 add that ‘[p]roviders of intermediary services shall use fair, non-discriminatory and transparent contract terms’,¹⁰⁰ amendment 932 adds ‘straightforward and understandable’,¹⁰¹ amendment 934 adds the requirements ‘plain, intelligible’,¹⁰² amendment 944 requires that platforms act ‘in a fair, transparent, non-discriminatory’ manner¹⁰³ and amendment 939 requires that platforms act in a non-arbitrary manner.¹⁰⁴

These proposed amendments were partially upheld, reflected in draft amended Article 12(1), (1a), (2), (2d) and (2e).¹⁰⁵ Article 14(3) final DSA requires platforms to ‘act in a diligent, objective and proportionate manner’ in the moderation of content, with respect to the fundamental rights of parties as enshrined in the Charter.

3.1.3. *Amendments to further inform consumers*

Amendments targeted both the timing and the form of the obligation to inform users of content moderation policies in an accessible format.¹⁰⁶

⁹⁷ Case C-472/10 *Invitel*, EU:C:2012:242.

⁹⁸ Consideration 15 in the preamble to Regulation 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

⁹⁹ See D Erhverv, ‘Revision of the E-commerce directive/Digital services act The position of the Nordic Commerce Sector’, at www.danskerhverv.dk.

¹⁰⁰ Amendment 82, IMCO Draft Report 28 May 2021, PE693.594v01-00, 73; Draft report PE693.594v01-00 (n 86) 104.

¹⁰¹ Draft report PE693.594v01-00 (n 86) 107.

¹⁰² *Ibid* 108.

¹⁰³ *Ibid* 113.

¹⁰⁴ *Ibid* 111.

¹⁰⁵ See Amendments adopted by the European Parliament on 20 January 2022 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD)), at europa.eu.

¹⁰⁶ This includes proposed amendments 83 and 935, which provide that platforms should ‘also include information on any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review’, as well as the right to terminate their service, in a directly accessible format, see IMCO Draft Report 28 May 2021 (n 100) 74, Draft report PE693.594v01-00 (n 86) 108. The obligation to provide information on content moderation

The amendments are in line with Article 3(2) P2B Regulation that provides a reasonable and proportionate notice period of at least 15 days, considered in the 2021 study commissioned by the European Parliament,¹⁰⁷ and the progress report of the Expert Group for the Observatory on the Online Platform Economy.¹⁰⁸ The justification to proposed amendment 956,¹⁰⁹ which would have introduced an obligation to notify media providers of proposed changes to their standard terms, as well as their algorithms or parameters, expressly refers to the P2B Regulation. Proposed amendment 960, which suggested a similar notice period, expressly referred to the Council of Europe Recommendation¹¹⁰ and the European Parliament's legislative resolution that also referred to the P2B Regulation and the Unfair Terms Directive.¹¹¹ In comparison, Google's earlier response to the Commission consultation¹¹² referred to the P2B Regulation, noting that '[i]t would be prudent to wait to see its impact before considering any new rules on transparency'. Busch and Mak also noted the need to limit overlap between obligations in Article 29 Commission draft DSA, and corresponding provisions in the P2B, the Unfair Commercial Practices Directive and the Consumer Rights Directive.¹¹³

Proposed amendment 84,¹¹⁴ which did not refer to any sources but was similar to these amendments, was partially upheld by Parliament – amended draft Article 12(1b) provided that platforms 'shall notify expeditiously the recipients of the

policies, algorithmic decision-making and human review is identical to the originally proposed text in Art 12(1) Commission draft, but the amendments suggest a separate paragraph for this obligation. These amendments did not lead to a separate paragraph containing information obligations regarding moderation policies, as Art 14(1) DSA requires that platforms inform users of 'any policies, procedures, measures and tools used for the purpose of content moderation, including algorithmic decision-making and human review'.

¹⁰⁷ N Fourberg, S Taş, L Wiewiorra, I Godlovitch, A De Streel, H Jacquemin, J Hill, M Nunu, C Bourguignon, F Jacques, M Ledger and M Lognoul, 'Online Advertising: The Impact of Targeted Advertising on Advertisers, Market Access and Consumer Choice' (June 2021), at www.europarl.europa.eu 59-60, 62, 131.

¹⁰⁸ 'Expert Group for the EU Observatory on the Online Platform Economy: Final Reports' (European Commission, 26 February 2021), at digital-strategy.ec.europa.eu 32-33, suggesting that the P2B's rules on standard terms could be a source of inspiration.

¹⁰⁹ Draft report PE693.594v01-00 (n 86) 119.

¹¹⁰ Recommendation CM/Rec(2018)2 (n 28) para 2.2.1.

¹¹¹ 'Digital Services Act – Improving the functioning of the Single Market' prepared by the Internal Market and Consumer Protection Committee, 2020/2018(INL), (IMCO) (rapporteur Alex Agius Saliba, S&D, MT), 20 October 2020, A9-0181/2020, at www.europarl.europa.eu.

¹¹² Google Submission, 'Digital Services Act package: open public Consultation. Keeping users Safe Online, Deepening the Internal Market, and Clarifying Responsibilities for Digital Services', at storage.googleapis.com 19.

¹¹³ Busch and Mak (n 19) 109.

¹¹⁴ IMCO Draft Report 28 May 2021 (n 100) 74-75.

service of any significant change to the terms and conditions and provide an explanation thereof'. Most of this amendment is visible in Article 14(2) final DSA that obliges platforms to inform users 'of any significant change to the terms and conditions'. This amendment was welcomed in light of frequent changes to platforms terms and conditions,¹¹⁵ but the DSA does not clarify what changes are 'significant' changes, nor does it determine when and how consumers should be informed of these changes. Possibly, this may mean 15 days, as consideration 10 in the preamble to the DSA and Article 2(4)(e) clarify that the DSA should be 'without prejudice' to the P2B Regulation.

The format of information provided to users also improved in line with Parliament's amendments. Proposed amendment 954 suggested that very large online platforms would be obliged to publish their terms and conditions in all official languages of the EU.¹¹⁶ Amendment 929 adds that the terms and services should be provided to users of the service in the languages in which the service is offered,¹¹⁷ as also suggested by EDRI.¹¹⁸ Accordingly, Article 14(6) final DSA requires that '[v]ery large online platforms and very large online search engines within the meaning of Article 33 shall publish their terms and conditions in the official languages of all the Member States in which they offer their services'.

Amendments 924, 929, 931, 935, 936 and 962 proposed the use of summaries in language that is user-friendly, machine readable and concise.¹¹⁹ The justification to amendment 931 clarifies that requiring machine readability is in conformity with surrounding EU legislation on digital matters.¹²⁰ Proposed amendments 935 and 962 obliged platforms to inform users of available remedies and proposed amendment 964 included an information obligation regarding the available dispute mechanisms in Articles 17 and 18 Commission draft DSA.¹²¹ The use of very short summaries that contained information on remedies and independent alternative dispute resolution, was suggested by proposed amendments 925¹²² and 936,¹²³ and recommended by BEUC¹²⁴

¹¹⁵ Quintais, Appelman and Fahy (n 91) 893.

¹¹⁶ Draft report PE693.594v01-00 (n 86) 117.

¹¹⁷ Ibid 105.

¹¹⁸ 'Platform Regulation Done Right EDRI Position Paper on the EU Digital Services Act' (EDRI, 8 April 2020), at edri.org 29. Particularly, EDRI recommended (among other points) the DSA ensure that 'clear, accessible, intelligible and unambiguous Terms of Service in all languages in which the service is offered' should be provided.

¹¹⁹ Draft report PE693.594v01-00 (n 86) 101, 105, 106, 107-108, 109, 122-123.

¹²⁰ Ibid 106.

¹²¹ Ibid 108-109, 122-124.

¹²² Ibid 102.

¹²³ Ibid 109.

¹²⁴ BEUC (n 35) 19.

and AccessNow.¹²⁵ The amendments are reflected in Article 14(5) final DSA, which stipulates that platforms shall provide ‘a concise, easily-accessible and machine-readable summary of the terms and conditions, including the available remedies and redress mechanisms, in clear and unambiguous language’.

3.2. Amendments to Commission draft Article 29 on recommender systems

The draft DSA aimed to address ‘emerging societal risks’ by imposing additional information obligations regarding recommender systems, which met with support and amendments from Parliament. These amendments aimed to widen the scope of obligations, making them more specific, expanding responsibilities conferred on very large online platforms to online platforms (Section 3.2.1.) and proposed ways to inform consumers beyond terms and conditions (Section 3.2.2.). The improvements to the Commission draft DSA further included proposed amendments that sought to address the dissemination of harmful content through recommender systems (Section 3.2.3.), expanded information obligations (Section 3.2.4.) and provided consumers with the possibility to influence recommender systems (Section 3.2.5.). The justifications to (proposed) amendments to Article 29 Commission draft DSA rarely refer to external sources,¹²⁶ but align with various authoritative sources and prominent stakeholders, such as recommendations from the EDPS, stakeholders, surrounding EU law and a study commissioned by EU Parliament.

3.2.1. *Amendments widening the scope of obligations regarding recommender systems*

Proposed amendments 1687 and 1689 replaced Article 29 Commission draft DSA on recommender systems with draft amended Article 24a, to widen the scope of this provision from very large online platforms to online platforms.¹²⁷ The justification to the amendment does not refer to external sources, but is in line with the suggestions of

¹²⁵ Pírková (n 35) 3, emphasized the need for transparency of platforms’ standard terms, and easy access to remedies and dispute resolution.

¹²⁶ Amendments that do extensively consider external sources concern amendments introducing possibilities for third parties to have access to the operating systems, interface and software of very large online platforms. As these amendments are vital for market access and competition, they were reflected in Art 6(4), (5) and (7) Regulation 2022/1925, Digital Markets Act (‘DMA’). These amendments could also lessen the dissemination of harmful content, see Fukuyama (n 70) 42-43. However, the success of this option depends on the resources and expertise of new players, their access to platforms’ systems, users’ control of their data, algorithmic transparency and audits, D Ghosh and R Srinivasan, ‘The Future of Platform Power: Reining in Big Tech’ (2021) 32 *Journal of Democracy* 165.

¹²⁷ Draft report amendments 1592-1872, 8 July 2021, PE695.159v01-00, at www.europarl.europa.eu 47-49.

the lead committee's Rapporteur,¹²⁸ and criticism of the draft DSA.¹²⁹ The wider applicability of transparency is in line with French law, particularly Article L 117-I which contained a wide definition of platforms, and, in (II)(1) introduced obligations to provide consumers with information that was 'loyale, claire et transparente', including information on ranking and referencing content, without making distinctions based on platforms' size. Article 91(2) Medienstaatsvertrag also had a wider scope than the Commission draft. Article 91(2) Medienstaatsvertrag made an exception for intermediaries averaging less than a million users in Germany in a six month timeframe – this seems a wider exception than Article 16 Commission draft DSA.¹³⁰ Article 4 ELI model rules also impose transparency obligations on all ranking systems.¹³¹ The extension of transparency obligations was supported by BEUC.¹³² Other stakeholders, such as Verbraucherszentrale Bundesverband, suggested separate rules for recommender systems of online marketplaces,¹³³ DigitalEurope asked for possibilities for very large online platforms to contest their status,¹³⁴ and News Media Europe supported further transparency obligations for very large online platforms.¹³⁵ Draft amended Article 24a was adopted by Parliament, and became Article 27 in the final DSA, widening the scope of these obligations beyond platforms facilitating transactions as defined in the Unfair Commercial Practices Directive, the Consumer Rights Directive and the P2B.¹³⁶ This, however, did not address possible overlap with the information obligations in these instruments.¹³⁷

3.2.3. *Amendments on how to inform consumers*

The impact assessment overlooked research that indicates that consumers – who are users of online platforms, but are by no means the only users – do not read standard

¹²⁸ IMCO Draft Report 28 May 2021 (n 100) Explanatory Statement, available at www.europarl.europa.eu 133. Also in support is the short justification, Opinion of the Committee on Culture and Education, 5 October 2021, PE693.943v02-00, at www.europarl.europa.eu 4.

¹²⁹ 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' (2021) 43 *Computer Law & Security Review* 7.

¹³⁰ A small enterprise, according to Art 2(2) in the Annex, a small enterprise is 'an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million'.

¹³¹ See European Law Institute (n 77) 25.

¹³² See BEUC (n 35) 17, 25.

¹³³ See Verbraucherszentrale Bundesverband (n 35) 4-5.

¹³⁴ See 'Digital Services Act Position Paper' (DigitalEurope, 31 March 2021), at www.digitaleurope.org.

¹³⁵ See 'News Media Europe Adopts its Position Paper on the Digital Services Act Proposal' (News Media Europe, 6 May 2021), at www.newsmediaeurope.eu.

¹³⁶ C Busch, 'From Algorithmic Transparency to Algorithmic Choice: European Perspectives' in S Genovesi, K Kaesling and S Robbins (eds), *Recommender Systems: Legal and Ethical Issues* (Springer 2023) 46.

¹³⁷ Busch and Mak (n 19) 109.

terms.¹³⁸ The need to inform consumers in more effective ways than standard terms is reflected in surrounding EU law,¹³⁹ and national law.¹⁴⁰ A 2021 study recommended providing this information ‘with clearly visible, easily accessible information regarding their options, and adjust their settings in regular intervals’.¹⁴¹ The EDPS went further and strongly recommended that information on recommender systems be provided separately, easily accessible, clear for average users and concise’.¹⁴² Helberger et al supported this suggestion.¹⁴³ Likewise, Amnesty International criticized the use of standard terms and conditions and recommended advising users of detailed parameters, ‘in an easily comprehensible and accessible manner’, separately from terms and conditions.¹⁴⁴

Proposed amendment 1518 obliged platforms to inform users in draft Article 24a in their terms and conditions, albeit in a ‘clear, accessible and easily comprehensible format’.¹⁴⁵ Proposed amendments 1691 and 1692 additionally introduced the need to inform consumers via standard terms and conditions, ‘on a designated web page that can be directly reached and easily found from the very large online platforms’ online interface’.¹⁴⁶ In comparison, proposed amendment 130 obliged online platforms to set out main parameters and other relevant information in their terms and conditions, but also when content is recommended, ‘in a clear, accessible and easily comprehensible manner’. The timing of this obligation is also relevant, as according to this draft amended Article, users would have been informed dynamically, at a time relevant for them. DotEurope emphasized ‘explainability’ to users, so that consumers would know why they are being shown content, and

¹³⁸ Bakos, Marotta-Wurgler and Trossen (n 76) 1-35.

¹³⁹ Supra Section 2.2. of this Article.

¹⁴⁰ Art 93(1) Medienstaatsvertrag obliges providers of intermediary services to make information ‘easily visible, directly accessible and permanently available’. The original text provides that ‘Anbieter von Medienintermediären haben zur Sicherung der Meinungsvielfalt nachfolgende Informationen leicht wahrnehmbar, unmittelbar erreichbar und ständig verfügbar zu halten’, (‘Providers of media intermediaries must make the following information easily understandable, directly accessible, and continuously available to ensure diversity of opinion’, author non-official translation derived from www.die-medienanstalten.de).

¹⁴¹ Bayer, Katsirea, Batura, Holznagel and Hartmann (n 16) 87.

¹⁴² See ‘Opinion 1/2021 on the Proposal for a Digital Services Act’ (European Data Protection Supervisor, 10 February 2021), at www.edps.europa.eu 17 point 75.

¹⁴³ Helberger, van Drunen, Vrijenhoek and Möller (n 73).

¹⁴⁴ See Amnesty International (n 35) 12.

¹⁴⁵ Draft report amendments 1302-1591, 8 July 2021, PE695.162v01-00, available at www.europarl.europa.eu, p. 119-120.

¹⁴⁶ Draft report amendments 1592-1872, 8 July 2021, PE695.159v01-00, available at www.europarl.europa.eu, p. 50.

business would understand rankings, but did not consider possibilities to influence the parameters.¹⁴⁷

These amendments are largely reflected in draft amended Article 24a(1), which includes that online platforms ‘set out in their terms and conditions and via a designated online resource that can be directly reached and easily found from the online platform’s online interface when content is recommended, in a clear, accessible and easily comprehensible manner’. In addition, draft amended Article 29 included the obligation for very large online platforms to provide ‘an easily accessible functionality on their online interface’ rather than the standard terms suggested in Commission draft Article 29.¹⁴⁸ These draft amendments constituted a significant improvement, but they are not reflected in Article 27(1) Final DSA, which obliges online platforms to inform users via terms and conditions, albeit in ‘plain and intelligible language’.

3.2.3. *Amendments promoting privacy by default and compliance by design*

In contrast to the Commission’s tendency to target illegal content rather than expand consumers’ remedies or rights in addition to the GDPR, Parliament proposed more expressly added obligations in line with compliance by design and privacy by default,¹⁴⁹ as well as bans on dark patterns.¹⁵⁰

Accordingly, proposed amendment 130 targeting recommender systems prohibits platforms from using profiling without users’ ‘freely given, specific, informed and unambiguous consent’, and recommender systems not based on profiling should be the default option – wording which is reminiscent of Article 2(11) GDPR that defines consent as ‘any freely given, specific, informed and unambiguous indication of the data subject’s wishes’, as also supported by Amnesty International.¹⁵¹ Similarly, proposed amendment 1690 added that online platforms shall ensure that consumers are not profiled by default, unless they ‘genuinely’ opt in, and prohibits using manipulative techniques regarding consumers’ decision-making,¹⁵² in line with the

¹⁴⁷ See ‘DOT Europe Position Paper. Algorithmic Decision-Making: Transparency and Explainability’ (DOT Europe, January 2022), at doteurope.eu 4.

¹⁴⁸ See Amendments (n 105).

¹⁴⁹ In line with Art 25(2) GDPR, see further ‘Opinion 5/2018 Preliminary Opinion on Privacy by Design’ (European Data Protection Supervisor, 31 May 2018), at www.edps.europa.eu 5-8.

¹⁵⁰ See further on dark patterns Ch Bösch, B Erb, F Kargl, H Kopp and S Pfattheicher, ‘Tales from the Dark Side: Privacy Dark Strategies and Privacy Dark Patterns’ (2016) 4 *Proceedings on Privacy Enhancing Technologies* 237-254.

¹⁵¹ See Amnesty International (n 35) 12.

¹⁵² Draft report amendments 1592-1872, 8 July 2021, PE695.159v01-00, available at www.europarl.europa.eu, p. 49-50.

recommendation of the EDPS,¹⁵³ Article 19,¹⁵⁴ BEUC,¹⁵⁵ and Access Now.¹⁵⁶ Zuiderveen Borgesius expressed general doubt on the effect of normal opt-ins, as ‘[p]eople tend to click OK to almost any request they see pop up on their screen. This is all the more true when firms make the use of service conditional on the user’s consent’.¹⁵⁷ Fundacja Pannytykon, instead, suggested further transparency on profiling criteria.¹⁵⁸ Despite these amendments, the obligation to provide a recommender system not based on profiling remains limited to very large online platforms, visible in draft amended Article 29.

Proposed amendment 130 in addition suggested that very large online platforms should ensure that recommender systems are not designed in a way that enables misleading consumers. The justification thereto explains that this is in line with privacy by default and compliance by design, to help prevent ‘nudging into the direction of unscientific propaganda, abusive content or conspiracy theories’.¹⁵⁹ The rapporteur of the Committee on Women’s Rights and Gender Equality additionally proposed a regular review of algorithms ‘with a view to minimize negative effects on the users’.¹⁶⁰ Further, proposed amendment 1525 added an obligation in proposed Article 24c for platforms to act neutrally, prohibiting them from promoting political parties, opinions, or ideas.¹⁶¹ This latter amendment was not adopted by Parliament, or reflected in the DSA.

Proposed Article 24a(6) provides that for search results, reliable information (provided by public authorities or scientific research) shall be prioritized. This is not only in line with the recommendation of the IMCO’s rapporteur,¹⁶² and a 2021 study

¹⁵³ See European Data Protection Supervisor (n 142) 16 point 73.

¹⁵⁴ See ‘EU: Regulation of Recommender Systems in the Digital Services Act’ (Article 19, 14 May 2021), at www.article19.org 2.

¹⁵⁵ See BEUC (n 35) 26.

¹⁵⁶ See Pirková (n 35) 8.

¹⁵⁷ F Zuiderveen Borgesius, ‘Behavioural Sciences and the Regulation of Privacy on the Internet’ in A Alemanno and A-L Sibony (eds), *Nudge and the Law: A European Perspective* (Hart Publishing 2015) 179. See amendment 58, adopted by European Parliament Report of 21 December 2021 on the proposal for a regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, at www.europarl.europa.eu, which obligated online intermediaries to provide ‘other fair and reasonable options to access the service’ to users who had declined to consent to collect and use personal data. N Lomas, ‘European Parliament Backs Big Limits on Tracking Ads’ (Tech Crunch, 20 January 2022), at techcrunch.com claimed it had lobbied for this amendment.

¹⁵⁸ See Glowacka and Iwanska (n 35).

¹⁵⁹ IMCO Draft Report 28 May 2021 (n 100) 102-103.

¹⁶⁰ Short justification, Opinion of the Committee on Women’s Rights and Gender Equality, 13 October 2021, PE693.717v03-00, available at www.europarl.europa.eu 3.

¹⁶¹ Draft report amendments 1302-1591, 8 July 2021, PE695.162v01-00, available at www.europarl.europa.eu 124.

¹⁶² IMCO Draft Report 28 May 2021 (n 100) Explanatory Statement, available at www.europarl.europa.eu 133.

commissioned by Parliament,¹⁶³ but also reminiscent of Article I (Purposes) sub vii 2018 Code of Practice on Disinformation which provides that signatories ‘invest in technological means to prioritize relevant, authentic, and accurate and authoritative information where appropriate in search, feeds, or other automatically ranked distribution channels’.¹⁶⁴ The proposed Article could in addition be seen in light of Article 11(2) Charter and the state’s obligation to ensure media diversity,¹⁶⁵ and corresponding recommendations from the High Level Expert Group on Media Freedom and Pluralism to promote digital and media literacy.¹⁶⁶ The idea of diversity has further been encouraged by the Council of Europe that emphasizes that content should be ‘capable of promoting a critical debate and a wider democratic participation of persons belonging to all communities and generations’.¹⁶⁷ Previously, the EDPS had recognized the potential influence of social media to either encourage or discourage voting, as well as other influence on voting.¹⁶⁸ Notwithstanding widespread support, the amendment could also have had adverse effects. Article 19 pointed out that efforts to prioritize some content may adversely affect diversity, as it is frequently minority voices who are less visible as a result.¹⁶⁹

These amendments were only partially adopted by Parliament and did not amend Article 29 Commission draft DSA. Draft amended Article 13a provided rules for the design of online interfaces for all intermediaries in order to prevent dark patterns.¹⁷⁰ According to the report of the Greens/EFA,¹⁷¹ this draft Article can be traced to amendment 1014 that aimed to prohibit the use of dark patterns,¹⁷² which was also supported by the Tracking-free Ads Coalition.¹⁷³ Article 25 final DSA prohibits providers of online platforms to design their online interfaces in such a way as to deceive, manipulate or otherwise impairs or distorts the decision-making of users, but, in paragraph 2, excludes practices from its scope that fall under the UCPD and

¹⁶³ Bayer, Katsirea, Batura, Holznagel and Hartmann (n 16) 87.

¹⁶⁴ See ‘2018 Code of Practice on Disinformation. Policy and Legislation’ (European Commission, 16 June 2022), at [digital-strategy.ec.europa.eu](https://digital-strategy.ec.europa.eu/en/doc/2018-code-of-practice-on-disinformation-policy-and-legislation) 7.

¹⁶⁵ *Von Hannover v Germany* App nos 40660/08 and 60641/08 (ECtHR, 24 June 2004).

¹⁶⁶ ‘A Free and Pluralistic Media to Sustain European Democracy, Final Report’ (High Level Expert Group on Media Freedom and Pluralism, 2013), at [ec.europa.eu](https://ec.europa.eu/media/freedom-and-pluralism/) 28, 31.

¹⁶⁷ Council of Europe, Recommendation Rec(2007)2 of the Committee of Ministers to member states of 31 January 2007 on media pluralism and diversity of media content, Strasbourg, para II(2)(2)(1).

¹⁶⁸ ‘Opinion 3/2018 on Online Manipulation and Personal Data’ (European Data Protection Supervisor, 19 March 2018), at edps.europa.eu 13.

¹⁶⁹ See Article 19 (n 154).

¹⁷⁰ See Amendments (n 105).

¹⁷¹ See ‘Greens/EFA Successes’ (Digital Services Act, 14 December 2021), at en.alexandrageese.eu.

¹⁷² Draft report 8 July 2021, amendments 1012-1301, PE695.160v01-00, available at [www.europarl.europa.eu](https://www.europarl.europa.eu/doceo/document/a-2021-001012_en.html) 6-7.

¹⁷³ See Lomas (n 157).

the GDPR, rendering the DSA a subsidiarity to these instruments, even though these instruments do not define dark patterns and are ill-suited to address the use of dark patterns.¹⁷⁴ This amendment however coincides with the arguments of Eurocommerce argued the DSA should be complementary to the GDPR and the e-Privacy Directive.¹⁷⁵

3.2.4. *Amendments to further inform consumers on parameters*

Proposed amendment 130 introduced Article 24a(2) which obliged platforms to inform users of parameters used for recommender systems in their standard terms, in line with the GDPR. Proposed Article 24a(3) specified which information to include: the relevant parameters used in the recommender systems, how they are weighed against one another, optimisation goals, and ‘if applicable, an explanation of the role that the behaviour of the recipients of the service plays in how the relevant system produces its outputs’. The EDPS recommended further clarifications on the use of automated systems, to view used profile(s) to curate content, and the possibility to delete any profiles used to curate content.¹⁷⁶ BEUC supported the EDPS’ recommendations, and, like Fundacja Panoptykon,¹⁷⁷ recommended that all parameters, not just the main ones, be provided.¹⁷⁸ Verbraucherszentrale Bundesverband argued for fair recommender systems, with rankings and reviews that should not be influenced by online marketplaces or sponsored ads.¹⁷⁹ The Bundesverband’s view appears to coincide with the prohibition on misleading commercial practices.¹⁸⁰ Prohibiting ranking based on remuneration would go beyond Article 5(3) P2B that indicates that such ranking is permitted, and the possibility to do so should be communicated to business users. Article 4(2) ELI Model rules on online platforms were inspired by both the UCP and the P2B, as well as the CRD.¹⁸¹

The limitations on information obligations imposed by Directive 2016/943 on trade secrets, as suggested by proposed amendments 1695 and 1702¹⁸² were subject

¹⁷⁴ M Sas, ‘The Digital Service Act (DSA): A New Hope Against the Dark Side of Online Interfaces?’ (KU Leuven Blog, 6 September 2022), at www.law.kuleuven.be.

¹⁷⁵ See EuroCommerce (n 35) 3-4.

¹⁷⁶ See European Data Protection Supervisor (n 142) 17 point 77.

¹⁷⁷ See Glowacka and Iwanska (n 35).

¹⁷⁸ See BEUC (n 35) 25.

¹⁷⁹ See Verbraucherzentrale Bundesverband (n 35) 4-5.

¹⁸⁰ See sub 11a in Annex I to Directive 2005/29 on unfair commercial practices that classifies ‘providing search results [...] without clearly disclosing any paid advertisement or payment specifically for achieving higher ranking of products with the search results’ as a misleading commercial practice that is always unfair’.

¹⁸¹ See European Law Institute (n 77) 25-26.

¹⁸² Draft report amendments 1592-1872, 8 July 2021, PE695.159v01-00, available at www.europarl.europa.eu, p. 52-53; 56.

to some controversy. On the one hand, Digital Europe and DotEurope underlined the importance of protecting commercially sensitive information and preventing manipulation resulting in undetected harmful content.¹⁸³ Limitations resulting from the protection of trade secrets have in addition also been considered in the GDPR,¹⁸⁴ the P2B Regulation,¹⁸⁵ and Article 4(1) ELI Model Rules on Online Platforms.¹⁸⁶ On the other hand, MP Geese argued that the testimony of a Facebook whistleblower should have been a reason not to add these exceptions.¹⁸⁷ The Council of Europe explicitly advised that states should establish transparency obligations regarding ‘the public procurement, use, design and basic processing criteria and methods of algorithmic systems’, and not allow legislation on intellectual property or trade secrets to inhibit such transparency.¹⁸⁸

These amendments are largely reflected in draft amended Article 24a, which includes elements from the list in Article 24(3) suggested by proposed amendment 130 and the list in proposed amendment 1696.¹⁸⁹ Draft amended Article 24a(2) adds that these requirements ‘shall be without prejudice to rules on protection of trade secrets and intellectual property rights’. Draft amended Article 24a(2)(a) and (b) resemble the wording of Article 5(2) P2B Regulation that obliges online search engines to provide ‘the main parameters, which individually or collectively are most significant in determining ranking and the relative importance of those main parameters’. Less elaborately, Article 27(1) Final DSA provides that platforms shall inform consumers of the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters, which, according to Article 27(2) shall ‘at least’ include *i*) the criteria which are most significant in determining the information suggested to the recipient of the service; and

¹⁸³ See Digital Europe (n 35), DOT Europe (n 147) 3-4.

¹⁸⁴ See consideration 63 in the preamble to the GDPR.

¹⁸⁵ See Art 1(5) P2B Regulation, stipulating that the Regulation is without prejudice to EU law regarding trade secrets.

¹⁸⁶ See European Law Institute (n 77) 14.

¹⁸⁷ See Digital Services Act (n 171), see for the hearing of Ms Frances Haugen, formerly employed by Facebook, ‘Frances Haugen to MEPs: EU Digital Rules can be a Game Changer for the World’ (European Parliament, 8 November 2021), at www.europarl.europa.eu.

¹⁸⁸ Council of Europe, Recommendation CM/Rec(2020)1 of the Committee of Ministers to member States of April 2020 on the human rights impacts of algorithmic systems, at rm.coe.int Appendix, para 4(1).

¹⁸⁹ Draft report amendments 1592-1872, 8 July 2021, PE695.159v01-00, at www.europarl.europa.eu 53. Draft amended Art 24a(2) lists, under *i*) ‘the main criteria used by the relevant system which individually or collectively are most significant in determining recommendations’, *ii*) ‘the relative importance of these parameters’, *iii*) ‘what objectives the relevant system has been optimised for’ and under *iv*), ‘if applicable’, the influence of users’ behaviour, as suggested by both amendments.

ii) the reasons for the relative importance of those parameters. The amendment regarding trade secrets was not included in the final text of Article 27 DSA.

3.2.5. *Amendments empowering users to influence or modify parameters*

Parliament also discussed possibilities for users to influence the main parameters used in recommender systems, beyond existing rules on recommender systems and ranking.¹⁹⁰

Not all proposed amendments supported this possibility. Thus, proposed Article 24a(2), stipulated that ‘[o]nline platforms shall set out [...] the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters that they have made available’.¹⁹¹ The amendment adds that, ‘[w]here several options are available pursuant to paragraph 1’, users should be able to select their preferred option for each of the recommender system, at any given time.¹⁹² The ability of users to modify parameters or select options appears to depend on the availability of such options. It seems less likely that the wording of draft amended provision refers to the availability of parameters as platforms will necessarily make use of these. Likewise, proposed amendment 1707 introduced this possibility to influence or modify parameters as an option for very large online platforms, by stipulating that ‘very large online platforms may provide the recipients of the service with the options to modify or influence the optimisation goals and rank or select the recommendation criteria of relevant systems’.¹⁹³ The latter proposed amendment is not accompanied by a justification, and the justification to Article 24a does not refer to external sources.

Proposed amendment 1699 suggested that users be able to service or modify the parameters used by recommender systems of very large online platforms, including at least one option not based on profiling, as defined under Article 4(4) GDPR.¹⁹⁴ This option for users is supported by the rapporteur of the associated LIBE Committee, who favoured ‘giving users control over the algorithms prioritizing the information that is presented to them’ with regard to ‘problematic content’.¹⁹⁵ Proposed amendment 1518 similarly introduced draft Article 24a that included options to select or modify parameters used in recommender systems. The proposed amendment is not

¹⁹⁰ Busch (n 136) 48.

¹⁹¹ IMCO draft report 28 May 2021, PE693.594v01-00, at www.europarl.europa.eu 102.

¹⁹² Ibid 102.

¹⁹³ Draft report amendments 1592-1872, 8 July 2021, PE695.159v01-00, at www.europarl.europa.eu 59.

¹⁹⁴ Ibid 54.

¹⁹⁵ Short justification, Opinion of the LIBE Committee, 28 July 2021, PE692.898v07-00, at www.europarl.europa.eu 4.

accompanied by a justification.¹⁹⁶ Both amendments follow the recommendation in the study for the European Parliament on disinformation and free expression that noted the criticism Commission draft Article 29 had been subjected to because of its phrasing, which did not oblige but permit very large online platforms to make these options available, and recommended this be made mandatory.¹⁹⁷ In contrast, the amendments did not follow arguments from stakeholders for more extensive information obligations.¹⁹⁸

As suggested by both amendments, draft amended Article 24a(3) lists, under (c), ‘if applicable’, the influence of users’ behaviour. In addition, draft amended Article 29 included the obligation for very large online platforms to provide ‘an easily accessible functionality on their online interface allowing the recipient of the service to select and to modify at any time their preferred option for each of the recommender systems that determines the relative order of information presented to them’.¹⁹⁹ Article 27(1) final DSA, however, provides that online platforms shall set out the main parameters used in recommender systems, ‘as well as any options for recipients of the service to modify or influence those main parameters’.

3.3. The use of evidence in the European Parliament regarding harmful content in the DSA

The analysis of amendments regarding harmful content in the DSA does not demonstrate that Parliament has a clear answer to the question of whether amendments should expressly or implicitly be supported by evidence, and if so, what amendments, and what evidence. Further, the amendments are not, as such, targeted at mitigating shortcomings in the Commission impact assessment.

In the case of the DSA, Parliament has relied on an extensive amount of sources, obtained independently from the Commission. The justifications to proposed amendments to the draft DSA do not refer to the impact assessment, academic research, or stakeholder positions, but, if they refer to sources, they refer to the Charter and EU (case) law.

¹⁹⁶ Draft report amendments 1302-1591, 8 July 2021, PE695.162v01-00, at www.europarl.europa.eu 119-120

¹⁹⁷ Bayer, Katsirea, Batura, Holznagel and Hartmann (n 16) 51, referring to Helberger, van Drunen, Vrijenhoek and Möller (n 73) 87.

¹⁹⁸ For example, EFF advocated for user-friendly means to choose which content is displayed on social media platforms, and even an option to decline recommendations generated by AI, see S Windwehr, C Schmon, and JC York, ‘Our EU Policy Principles: User Controls’ (EFF, 27 August 2020), at www.eff.org. AccessNow advised that users should be able to exclude content or specific sources of content from their feed, also citing Cobbe & Singh, who were cited in the Commission impact assessment, see Pírková (n 35).

¹⁹⁹ See Amendments (n 105).

Amendments that do not refer to sources are in line with a diverse number of sources that appear to have been considered. As it is not clear how amendments have been negotiated in Parliament, it is not clear how exactly amendments were influenced. Thus, the correlation between these sources and these amendments need not mean that amendments originate from stakeholders. However, some similarities become visible.

Sources that appear to have been considered include not only the Charter and EU (case) law, particularly the P2B and the GDPR, but also reports and recommendations from the EDPB, the Council of Europe, the UN Human Rights Council, national law and the ELI Model Law. For example, the amendments to draft Article 12 DSA clarify the obligations of platforms in the application and enforcement of terms, and considerably improve the format of information to be provided, in line with recommendations from the Council of Europe and the UN Human Rights Council, as well as surrounding EU law. Further, German and French law imposing obligations on platforms and ELI Model law on Online Platforms, as well as stakeholder positions are in line with the widely supported amendments to expand the obligations of very large online platforms regarding recommender systems to online platforms more generally. Other amendments, on the possibility for users to influence recommender's parameters, align with recommendations from commissioned research that considered criticism of the Commission draft DSA.

Some amendments, for example on the obligation to publish terms and conditions in all languages of the Union, were also defended by prominent stakeholders, such as EDRI, BEUC, and AccessNow. Similarly, the limitation in Article 25(2) DSA is in line with arguments of EuroCommerce. For other amendments, disagreements between stakeholders becomes more visible, for example between AccessNow and academic research on the possibility to genuinely opt in to personalized recommender systems.

Especially sources on human rights appear to be underutilized in the Commission's impact assessment, considering the superficial assessment of fundamental rights impact in the impact assessment. In the case of the DSA, Parliament's amendments compensated for this particular shortcoming and improved the Commission draft DSA,²⁰⁰ notwithstanding remaining doubts on the applicability of the Charter in contractual relationships. However, Parliament did not discuss regulatory choices surrounding standard terms. This may not necessarily be

²⁰⁰ M Novovic, 'Article 14: Terms and Conditions' in M Novovic, *The EU Digital Services Act (DSA): A Commentary* (Kluwer 2024) 136. Briefly but very positively also T Kerikmäe and O Hamulák, and M Mesarčik, 'Disinformation Tackling in the Metaverse and the Digital Services Act' (2025) 11 *Cogent Social Sciences* 7, see more neutrally F Wilman, 'The Digital Services Act (DSA): An Overview' (Working Paper, 27 December 2022), at papers.ssrn.com, who emphasizes the importance of platforms' terms and conditions in practice.

reflected in the quality of Article 14 DSA – Husovec, for example, notes that the DSA ‘constrains without taking away all the power of private companies’,²⁰¹ and helps to prevent over-removal by its conditional exemption of liability.²⁰²

It is difficult to establish a link, let alone a causal link, between evidence and amendments if amendments do not directly refer to sources. Although the use of various sources of evidence is visible in Parliaments’ proposed amendments, a causal link between the use of authoritative sources, such as CJEU case law, and the success of amendments cannot be established in general. In some cases, even a correlation between evidence and the success of amendments seems absent. After all, some amendments coincided with authoritative sources, but not all of those amendments were adopted.²⁰³ In contrast, in some cases, amendments regarding notice periods that referred to the P2B Regulation and Council of Europe Recommendations were apparently not upheld, while a similar amendment that did not refer to external sources was upheld.

In addition, evidence does not always lead to provisions that are predictable and consistent – the amended provisions in line with evidence leave room for doubt. For example, the amendments to inform consumers of recommender systems beyond standard terms did not refer to external sources but were in line with widely held views on standard terms. While they were adopted, they were not reflected in the final DSA. Thus, even if amendments are supported by evidence and in conformity with surrounding law, they may still not survive subsequent interinstitutional negotiations.

Consequently, in the case of the DSA, while evidence may have inspired or indeed improved amendments that subsequently improved the DSA, mentioning evidence does not appear to mean that amendments are of better quality and (or) thereby more convincing to fellow Members of Parliament. The similarity of amendments on some points – such as the relevance of fundamental rights – give the impression that this point also enjoyed wide political support.

²⁰¹ M Husovec, ‘Content Moderation: Outline’ in M Husovec, *Principles of the Digital Services Act* (Oxford University Press 2024) 189.

²⁰² Husovec (n 47) 56.

²⁰³ For example the suggestion to use ‘examples’ or specific cases to clarify how the rules are applied and enforced, see Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (n 29) 15-16. Similarly, the advice to use ‘examples of permissible and impermissible content and the guidelines used by reviewers’ was not included, see ‘Santa Clara Principles on Transparency and Accountability in Content Moderation, version 1.0’, at santaclaraprinciples.org sub 2. Regarding possibilities for consumers to influence the parameters used in ranking systems, and the obligation to inform consumers via standard terms, various amendments went against commonly accepted insights on consumer behaviour and recommendations from both stakeholders, academics, and reports commissioned by European Parliament.

Further, the amendments to the DSA demonstrate that the mere availability of evidence does not determine what the outcome of the legislative process will be. Like the impact assessment, Parliament drew inspiration from surrounding EU law such as the P2B, but that does not mean it agreed with the Commission draft DSA. Indeed, Parliament proposed amendments more in line with the P2B that were welcomed in academic debate as well.

4. General observations on evidence-informed EU lawmaking

Theoretically, the European Parliament could compensate for shortcomings in Commission impact assessments by critically screening impact assessments and evidence therein. However, this is not the focus of the European Parliament. This is confirmed by reports from the European Parliamentary Research Service that indicate that Parliament relies on appraisals of Commission impact assessments and appears to take Commission impact assessments as a starting point.²⁰⁴

More generally, it seems unlikely that the European Parliament critically screens impact assessments in other legislative procedures, as the role of Parliament is limited, and it would be inefficient to re-do the Commission's research. The efficient use of resources may also be a reason for Parliament not to re-investigate points on which there is no clear disagreement, and which appear to be well supported. Some shortcomings may also be easier for Parliament to compensate than others. For example, impact assessments should transparently and systematically reflect stakeholder positions, but one may ask whether Parliament is particularly motivated to challenge the presentation of these views in impact assessments, as stakeholders have sufficient opportunity to have their views heard by Parliament. In addition, while this is not visible in the DSA, Parliament may also compensate if a problem analysis shows manifest errors, provided that Members of Parliament consult widely with stakeholders, either through surveys, public hearings, workshops, and meeting with stakeholders,²⁰⁵ or otherwise.

²⁰⁴ W Hillen, 'European Parliament Work in the Fields of Impact Assessment and European Added Value, Activity Report for 2022' (PE 740.221, February 2023), at www.europarl.europa.eu.

²⁰⁵ Although meetings with members of the lead and associated committees in the drafting of the DSA were quite extensive, stakeholders seem to make use of this opportunity – a quick search in other recent procedures in EU consumer law learns – for example, in the revision of Directive 2023/2225 on consumer credit, 2021/0171(COD), reporting a total of 17 meetings between stakeholders and the (shadow) rapporteurs (for opinion) for the lead and associated committees, see oeil.europarl.europa.eu. In the revision of Directive 2024/2853 on product liability, the transparency register reports 96 meetings between stakeholders and the (shadow) rapporteurs (for opinion) for the lead and associated committees. In the still ongoing revision of Directive 2015/2302 on package travel, which, differently than the consumer credit Directive, is not a key priority, 77 stakeholders – from various backgrounds,

Although it is not the focus of the European Parliament to compensate for shortcomings in the impact assessments, its amendments on Articles 14 and 27 DSA compensated some of the shortcomings in therein. Particularly, the amendments improved the chance that fundamental rights of users would be respected by platforms, by directly referring to the Charter, prescribing clearer obligations to inform users of content moderation policies and enforcement thereof, as well as of changes to platforms' terms and conditions. Still, questions on the access to justice in the sense of Article 6 ECHR and freedom of expression in the sense of Article 10 ECHR remain. In addition, Parliament's amendments widened the scope of platforms obligations to inform users of the parameters in recommender systems, strengthened compliance by design and privacy by default. Here as well, improvements remain possible, as the possibility to influence or modify parameters left much discretion to platforms.

Parliament's ability to improve proposed acts also benefits from Parliament's ability to focus on the wording of provisions, while the impact assessment does not have the room to do so, even though the impact of these changes may be significant. For example, informing consumers of recommender systems exclusively through standard terms is likely not very effective. Yet the use of standard terms to inform consumers of recommender systems was maintained despite well-established problems with standard terms.

It is not clear whether Parliament will more widely consider proposals' impact on fundamental rights – Parliament did emphasize ensuring compliance with fundamental rights, but cited the DSA as an example where the proposal's impact on human rights were assessed.²⁰⁶ On the one hand, the Commission impact assessment could be considered more critically, but on the other hand, even if an impact assessment is not perceived as defective, the European Parliament will apparently consider a proposal in light of the fundamental rights of the Charter, which deserves support. In this respect, it is encouraging that the amount of impact assessments that assess fundamental rights are on the rise – the Regulatory Scrutiny Board notes, in its Annual Report, that around 40% of impact assessment addressed the impact of proposals on fundamental rights.²⁰⁷ However, impact assessments have a well-documented tendency to emphasize quantifiable impacts over non-quantifiable

including state representatives and the European Commission – have already met with (shadow) rapporteurs (for opinion) members of the lead and associated committees, see ocil.europarl.europa.eu.

²⁰⁶ S Jones, G Dohler, L Pate and A Renda, 'Better Regulation in the EU, Compilation of Studies Requested by the JURI Committee' (PE 737.058 – October 2023), at www.europarl.europa.eu 67, 58.

²⁰⁷ RSB, Annual Report 2023, available at commission.europa.eu 24. The 2024 Annual Report might not be representative as the RSB only advised on three impact assessments that year, which is explained by the EU's political cycle, particularly the elections during that year.

impacts.²⁰⁸ Furthermore, the amount of impacts that have to be assessed, increases the risk that the assessment of non-monetary impacts, such as impact on fundamental rights, remains superficial,²⁰⁹ as confirmed by the FRA.²¹⁰ Thus, Parliament seems well-placed to consider the impact of proposals on human rights, and non-economic interests such as protection of weaker parties.²¹¹ The LIBE Committee especially has demonstrated attention for human rights in the EU, for example through its annual reports on this topic.²¹² This emphasis may perhaps also be considered in light of the notion of ‘good’ evidence – that is not necessarily neutral but may be linked to political ideas.²¹³ In comparison, the European Commission does not separately consider respect for fundamental rights in its call for evidence to revise the Better Regulation Guidelines, but rather emphasizes the need for ‘simplicity by design’ and swift, as well as evidence-based EU intervention.²¹⁴

The article demonstrates that Parliament made significant amendments to the DSA, both regarding the scope of platforms’ obligations regarding recommender systems, and their obligations regarding their standard terms and moderation policies. Arguably, the amendments could be seen as ‘substantial’ in the meaning of the IIA. While Parliament did not commission a separate impact assessment for these amendments, these amendments were clearly informed by evidence, as it consulted widely and commissioned a significant amount of research.

5. Implications for reform

The analysis on the use of evidence by Parliament in the DSA has some implications for the future of EU evidence-informed lawmaking more generally, in light of the European Commission’s call for evidence to revise the Better Regulation

²⁰⁸ Recently OECD (n 2) 31-32; D-M Danciu, L Martens and W Marneffe, ‘Assessing the Quality of European Impact Assessments’ (2024) 15 *European Journal of Risk Regulation* 709. Previously for example S Garben, ‘An Impact Assessment of EU Better Regulation’ in S Garben and I Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury 2018) 281.

²⁰⁹ J Wouters and M Ovadek, ‘Fundamental Rights in the EU Institutional Landscape’ in J Wouters and M Ovadek, *The European Union and Human Rights: Analysis, Cases, and Materials* (Oxford University Press 2021) 29.

²¹⁰ FRA, ‘Better Legislation – Human Rights Impact Assessments in Lawmaking’ (8 December 2025), at [fra.europa.eu 5-6](https://fra.europa.eu/5-6).

²¹¹ EEAS, ‘EU Action Plan on Human Rights and Democracy 2020-2027’, at [www.eeas.europa.eu 9](https://www.eeas.europa.eu/9).

²¹² See most recently European Parliament Draft Report 2025/2135(INI) of 30 September 2025 on the situation of fundamental rights in the European Union in 2024 and 2025, at www.europarl.europa.eu.

²¹³ Cf SB Princen, ‘The Use of Evidence in Evidence-Based Legislation’ (2022) 24 *European Journal of Law Reform* 149.

²¹⁴ Commission (n 3).

Guidelines,²¹⁵ and the less recent call to renegotiate the Interinstitutional Agreement on Better Lawmaking.²¹⁶ There is potential to strengthen evidence-informed EU legislation, for example by better implementation of the Better Regulation Guidelines within the Commission, and publishing draft Commission impact assessments.²¹⁷ However, evidence-informed legislation is not likely to be strengthened by introducing dynamic impact assessments for the European Parliament.²¹⁸ The analysis of amendments to the DSA indicates that evidence-informed lawmaking may enhance the quality of amendments, but a relation between evidence and politically successful amendments, or amendments of better legislative quality, for example in terms of consistency, cannot be generally established. Consequently, calls to revise better regulation should not only emphasize generating more evidence throughout the legislative process. Imposing obligations to carry out impact assessments should not shift the attention to collecting even more evidence that can only assess the impact of proposed amendments to a limited extent. The extensive use of other forms of expertise by the European Parliament indicates that more targeted assessments than impact assessments may also provide a basis for informed lawmaking.²¹⁹

Rather, firstly, better regulation should distinguish between the quality and relevance of evidence, as well as subsequent use thereof. The impact assessment and the use of justifications already indicate that not all evidence is of equal value. By its broad definition of evidence, the European Commission does not distinguish between, for example, ECHR case law or surveys. While both sources are relevant, they should be weighed differently. The assessment of compliance with human rights forms an integral part of the development of EU legislation, but not as part of evidence-informed legislation. This is not sufficiently acknowledged in better regulation policy. The Better Regulation Guidelines insufficiently distinguish between the relevance and quality of different sources of evidence.²²⁰ The RSB also does not screen human rights impact assessments in a systematical manner. Including an expert on human rights in the RSB seems a step in the right direction.²²¹

²¹⁵ Ibid.

²¹⁶ U von der Leyen, 'Mission letter to Valdis Dombrovskis, Commissioner-designate for Economy and Productivity, Commissioner-designate for Implementation and Simplification' (17 September 2024), at commission.europa.eu 7.

²¹⁷ OECD (n 2) 31-32, 184.

²¹⁸ Letta (n 2).

²¹⁹ For example EDPS Opinions (n 15) and the survey conducted for EFA/the Greens (n 34). More generally, the organization of public hearings and expert workshops, the commissioning of expert research and in-house expertise provide a basis for evidence-informed lawmaking.

²²⁰ Van Schagen, Baaij and Rueda (n 80) 121.

²²¹ See FRA (n 210) 5. This would also be in line with the European Ombudsman, Decision of 13 September 2024 on the composition of the European Commission's Regulatory Scrutiny Board and

However, reform should go further. Future revised Guidelines should distinguish more clearly between sources of evidence, also considering the quality of evidence, and the selection of evidence in Commission impact assessments should be more transparent.²²² Moreover, the Better Regulation Guidelines should not frame complying with the Charter of Fundamental Rights, as well as ECHR case law, as a commitment to evidence-informed lawmaking necessary to achieve better results. Doing so risks downplaying the importance of the requirements in this Charter, which should not merely be considered evidence that can be disregarded.

Secondly, strengthening evidence-informed lawmaking may be difficult to reconcile with speeding up the legislative process. This latter aim has been underlined by the European Commission, but the tension with evidence-informed lawmaking is insufficiently acknowledged.²²³ It is highly doubtful whether obligations on Parliament in a revised IIA to conduct impact assessments – dynamic or otherwise – would speed up the legislative process within Parliament, because it still takes time and expertise to conduct such assessments.

Thirdly, the extent to which evidence can help prevent political disagreement that leads to delay should not be overestimated.²²⁴ The analysis of the proposed amendments to the DSA instead indicates that collection of evidence does not necessarily overcome political disagreements. While evidence may help highlight political choices, it has not, in case of the DSA, completely prevented stakeholders from advocating amendments in their own interests, though evidence-informed legislation should help perhaps diminish the frequency with which this happens.²²⁵ In the case of the DSA, and other cases, better lawmaking initiatives may also be used as an argument to oppose amendments.²²⁶ The choice between proposed amendments, supported by different

how it interacts with interest representatives, Decision of the European Ombudsman of 13 September 2024, Case 439/2023/KR.

²²² G Listorti, E Basyte Ferrari, S Acs, G Munda, E Rosenbaum, P Paruolo and P Smits, ‘The Debate on the EU Better Regulation Agenda: A Literature Review A Contribution to the Stocktaking of the Commission’s Better Regulation Approach’ (JRC Science for Policy Report 2019), at publications.jrc.ec.europa.eu 18, more recently Danciu, Martens and Marneffe (n 208) 709.

²²³ See European Commission, ‘Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. A Simpler, Clearer and Better Enforced EU Rulebook’, COM(2026) 380, for example at 1 announces a strengthened evidence-base and at 3-4 underlines future-proof legislation without considering that strengthening the evidence base takes time and may lead to a longer legislative process.

²²⁴ As for example proposed by Letta (n 2) 124.

²²⁵ Princen (n 213) 149.

²²⁶ For example, in the DSA, Eurocommerce argued that before introducing rules banning or severely restricting targeted advertising, as advised in the special rapporteur’s report, European Parliament should conduct an in-depth impact assessment, in line with the Interinstitutional Agreement on Better Lawmaking, see EuroCommerce (n 35) 2, 4. This has been signalled more widely – see M Elia Antonio and

sources of evidence, indicates that lawmaking, while informed by evidence, may still be the result of a political choice, likely not only for the DSA, but more widely in the European legislative process. Within the European Parliament, amendments frequently contradict one another, probably because they have been founded on different ideas and sources. For instance, sources on trade secrets may well support arguments to limit information obligations that would oblige platforms to reveal business-sensitive information, while sources on surrounding EU consumer support arguments to further extend information obligations. The debate surrounding evidence in Parliament also demonstrates more broadly the possibility that ‘evidence’ – for example stakeholder’s position papers – may point in different directions, and the mere availability of evidence does not, in itself, determine how draft measures must be amended. This involves political choices as well.²²⁷ The potential of better regulation to overcome politicization by rationalizing lawmaking has been questioned before.²²⁸

Fourthly, imposing binding obligations on the European Parliament to conduct systematic impact assessments are problematic, for example if amendments help to ensure that EU law does not facilitate violations of fundamental rights – even if they are substantial amendments. Likewise, it is problematic to require Parliament to produce evidence to support, for example, amendments to full harmonisation even though the Commission has not supported this regulatory choice with robust, if any, evidence.²²⁹ Last but not least, the European Parliament’s position should not be lessened in comparison with stakeholders and experts who are increasingly involved in the drafting of initiatives in an earlier stage.²³⁰ More practically, it may be difficult to pinpoint the exact impact of the amendments in terms of costs and benefits. The level of detail however does not mean that amendments are insignificant – as demonstrated by the potential impact on developing smart information obligations, for example regarding recommender systems. Instead, the European Parliament appears well-placed to more systematically screen Commission impact assessments, particularly regarding human rights impact, which, in turn, may justify further amendments.²³¹ Methodical screening could be facilitated by strengthening the

A Spendzharova, ‘The European Union’s New Better Regulation Agenda: Between Procedures and Politics: Introduction to the Special Issue’ (2017) 18 *European Journal of Law Reform* 5-6.

²²⁷ Cf Princen (n 213) 149.

²²⁸ Eliantonio and Spendzharova (n 226) 6, with further references.

²²⁹ For example for Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance; see Van Boom (n 9) 452-464.

²³⁰ Van den Abeele (n 5) 71.

²³¹ Wouters and Ovadek (n 209) 32.

working relationship between the European Parliament and the EU Agency for Fundamental Rights.

Fifthly, the delegation of rulemaking power in the DSA are symptomatic for the ‘shift in regulatory power’ towards these actors.²³² The European Parliament, in its amendments to the DSA, has proven itself more critical than the European Commission on this point. Further initiatives that delegate yet more power to already powerful private actors deserve more critical and more systematic focus. The position of political parties within Parliament on this point however differs.²³³

These suggestions improve the evidence available for Parliament, in line with the political interests and advantages Parliament appears to have, without imposing an obligation to assess the general impact of proposed amendments.

²³² N Helberger, H-W Micklitz and Ch Twigg-Flesner, ‘Escher’s Relativity – Consumer Law as a Surreal Staircase?’ (2025) 48 *Journal of Consumer Policy* 199. See more generally A Gerbrandy and P Phoa, ‘The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power’ in M Bennett, H Brouwer and R Claassen (eds), *Wealth and Power* (Routledge 2022) 166-188.

²³³ On the one hand, the EPP, with members in the IMCO Committee, has proven critical of platforms such as Shein, see for example the hearing of Shein in January 2026, multimedia.europarl.europa.eu. On the other hand, other parties appear less critical, see for example an overview of very large online platforms position and the digital omnibus act, ‘Article by Article, how Big Tech Shaped the EU’s Roll-Back of Digital Rights’ (Corporate Europe Observatory, 14 January 2026), at corporateeurope.org.