Technology and Regulation

The Law and Political Economy of Online Visibility
Market Justice in the Digital Services Act

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The paper critically assesses the regulation of social media recommendations in the EU's 2022 Digital Services Act (DSA), drawing on Sarah Banet-Weiser's economies of visibility theory. Banet-Weiser calls attention not only to injustices in the distribution of visibility between users, but also to the political implications of organising online media as an economy, in which individuals compete for visibility in a market structured by corporate platforms. DSA provisions on recommendations focus on enhancing user choice, protecting creators' market access, and encouraging technocratic responses to particular negative externalities, such as promotion of disinformation. Ultimately, then, the DSA aims to enhance the functioning of existing economies of visibility, rather than more fundamentally reforming a social media market in which visibility is allocated based on commercial value.

1. Introduction

David Fincher's Oscar-winning 2010 film *The Social Network*, about the founding of Facebook, is a product of its time. It was made before it became mainstream to worry about the political and economic power of the mercurial billionaires and multinational conglomerates that control dominant tech platforms – so in retrospect, its narrow focus on the interpersonal drama between founder Mark Zuckerberg, his co-founders and his ex-girlfriend seems somewhat shortsighted. But also because 'social network' is not a phrase you hear as much these days. As these platforms have become ubiquitous in our personal, political and cultural lives, their roles and functionalities have changed. This has been analysed as a shift from social *networks*, platforms to communicate with existing contacts, to social *media*, platforms that intermediate consumption of media content from all kinds of sources.[1] A necessary element of this shift is an ever-greater emphasis on personalised algorithmic recommendations, which sort through enormous volumes of available content to predict what will be interesting for a given user.[2]

Algorithmic recommendation systems[3] thus increasingly structure not only individual media diets and interpersonal communication, but also political discourse[4] and 'platformised' media industries, from news to music and gaming.[5] Such systems could never be value-neutral.[6] Deciding what – and who – is interesting or important

'information overload' is less an objective feature of information environments than a 'myth' that those building recommendation systems use to make sense of their work. It also conveniently aligns with their employers' business models. Platform companies can simultaneously promise consumers access to incomprehensibly vast reams of content, and recommendation systems which make this manageable, packaging both as desirable products. See Nick Seaver, *Computing Taste: Algorithms and the Makers of Music Recommendation* (University of Chicago Press, 2022), chapter 1.

3   This paper focuses on recommendations, as the aspect of platform design which most directly allocates visibility. However, they do this in interaction with other features (including e.g. comment functions, resharing buttons, video-editing tools, navigation features) as well as user behaviour and broader media environments. See Arvind Narayanan, 'TikTok's Secret Sauce' (15 December 2022) Knight First Amendment Institute Blog <https://knightcolumbia.org/blog/tiktoks-secret-sauce> accessed 17 May 2023; Paddy Leerssen, 'The Soap Box as a Black Box: Regulating Transparency in Social Media Recommender Systems' (2020) 11(2) *European Journal of Law & Technology* <https://www.ejlt.org/index.php/ejlt/article/view/786/1012> accessed 17 May 2023; Anna-Katharina Meßmer & Martin Degeling, *Auditing Recommender Systems: Putting the DSA into practice with a risk-scenario-based approach* (7 February 2023) Stiftung Neue Verantwortung <https://www.stiftung-nv.de/de/publication/auditing-recommender-systems> accessed 1 June 2023.

4   Theresa Josephine Seipp and others, 'Dealing with Opinion Power in the Platform World: Why We Really Have to Rethink Media Concentration Law' (2023) *Digital Journalism* <https://doi.org/10.1080/21670811.2022.2161924>

5   Thomas Poell, David Nieborg & Brooke Erin Duffy, *Platforms and Cultural Production* (Polity, 2021)

6   Leerssen, 'Soap Box' (n 3); Jennifer Cobbe & Jatinder Singh, 'Regulating

1   Kai Riemer and Sandra Peter, 'Algorithmic audiencing: Why we need to rethink free speech on social media' (2021) 36(4) *Journal of Information Technology* <https://doi.org/10.1177/02683962211013358>

2   Arvind Narayanan, *Understanding Social Media Recommendation Algorithms* (9 March 2023) Knight First Amendment Institute Essays and Scholarship <https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms> accessed 17 May 2023. The idea of personalised recommendations as a necessary solution to information abundance has been problematised by Nick Seaver, who argues that

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is inescapably political. Importantly, these political choices not only shape distribution and consumption of media content, but also its production. Users learn norms about what to post from the content they see.[7] Those seeking online visibility (for professional, political or other reasons) also respond strategically to recommendations,[8] seeking to become 'algorithmically recognisable'.[9]

To critically analyse the regulation of social media recommendations, this paper draws on Sarah Banet-Weiser's theory of economies of visibility,[10] which evokes a productive ambivalence in conceptualising (in)justice in online media. On one level, it raises questions of distributive justice. Visibility is a valuable resource, which brings social capital, status, political influence and material benefits, so we should be concerned that online economies of visibility appear to reproduce familiar racial, gender, class and other inequalities. However, Banet-Weiser also uses the concept to develop a more fundamental critique of online media governance.[11] Focusing on media representations of feminism, she problematises the shift from a 'politics of visibility', in which movements pursued media representation as a means of advocating for structural social change, to an 'economy of visibility' centring individualised competition for recognition and empowerment.[12] Competing for visibility according to criteria set by platform companies ultimately serves those companies' interests more than any particular social group or cause, and is in tension with the collective pursuit of progressive goals. Yet Banet-Weiser suggests that the 'economy' framing – which is prominent in popular understandings of social media as an 'attention economy'[13] – can evoke a fictive neutral space of merito-

cratic competition for visibility, obscuring the ways online media are constructed to serve specific corporate objectives.[14]

In calling for a (re)politicisation of economies of visibility, Banet-Weiser's argument echoes longstanding leftist critiques of how capitalist systems construct a separation between the economic and the political, framing markets as apolitical meritocratic spaces,[15] and associated calls for politicisation and contestation of the norms and institutions that create, structure and delimit markets.[16] This paper thus builds on her theory by connecting it to broader critical political economy literature. In particular, it draws on Margaret Somers' concept of 'market justice', the idea that distributive outcomes produced by efficiently functioning markets are inherently fair.[17] As the paper will show, a law and political economy analysis focused on how law helps to construct and institutionalise marketised economies of visibility offers a useful lens to critique the EU's approach to regulating social media recommendations.

Applying Banet-Weiser's theory to contemporary social media, section 2 shows how recommendation systems reproduce established patterns of social injustice. Importantly, these economies of visibility are constituted by political choices which set the parameters for competition and the criteria for success. These criteria are primarily designed to serve the business interests of platform companies and their main clients, advertisers. Injustice should thus be located not only in distributive outcomes – for example, when male creators are more successful than women[18] – but, more fundamentally, in the design and governance of systems that organise media content according to corporate priorities.

On this basis, section 3 develops a critique of the legal framework for content curation in the EU's 2022 Digital Services Act (DSA).[19] Provisions explicitly regulating recommendations focus on enhancing user choice and protecting creators against arbitrary deviations from platforms' standard criteria for promotion. Users are thus figured as consumers and entrepreneurs who deserve fair access to social media markets, rather than citizens with a stake in how online media are governed. On the other hand, provisions on systemic risks – and their development in the 2022 Code of Practice on Disinformation, which will guide the interpretation of relevant DSA provisions[20] – attempt to

Recommending: Motivations, Considerations, and Principles' (2019) 10(3) *European Journal of Law & Technology* <https://ejlt.org/index.php/ejlt/article/view/686> accessed 17 May 2023.

7   William J. Brady and others, 'Algorithm-Mediated Social Learning in Online Social Networks' (2023) OSF Preprints <https://doi.org/10.31219/osf.io/yw5ah>

8   Kelley Cotter, 'Playing the visibility game: How digital influencers and algorithms negotiate influence on Instagram' (2018) 21(4) *New Media & Society* <https://doi.org/10.1177/1461444818815684>; Zoë Glatt, 'Precarity, discrimination and (in)visibility: An Ethnography of "The Algorithm" in the YouTube Influencer Industry' in Elisabetta Costa and others (eds), *The Routledge Companion to Media Anthropology* (Routledge 2022); Zoë Glatt, '"We're all told not to put our eggs in one basket": Uncertainty, precarity and cross-platform labor in the online video influencer industry' (2022) 16 *International Journal of Communication* 3853 <https://ijoc.org/index.php/ijoc/article/view/15761> accessed 18 April 2023.

9   Tarleton Gillespie, 'Algorithmically recognizable: Santorum's Google problem, and Google's Santorum problem' (2017) 20(1) *Information, Communication & Society* 63 <https://doi.org/10.1080/1369118X.2016.1199721>

10   Sarah Banet-Weiser, 'Keynote Address: Media, Markets, Gender: Economies of Visibility in a Neoliberal Moment' (2015) 18(1) *Communication Review* 53 <https://doi.org/10.1080/10714421.2015.996398>; Sarah Banet-Weiser, *Empowered: Popular Feminism and Popular Misogyny* (Duke University Press, 2018).

11   Banet-Weiser's analysis takes a broader view of the contemporary US media environment, encompassing traditional media and advertising and not only social media. However, she emphasises the influence of platformisation across the media landscape, and suggests that the subsumption of other media forms within 'a technological and economic context devoted to the accumulation of views, clicks, "likes," etcetera' has been an important factor in the development of the contemporary economies of visibility that she critiques. See Banet-Weiser, *Empowered* (n 10), 2.

12   Banet-Weiser, 'Media, Markets, Gender' (n 10); Banet-Weiser, *Empowered* (n 10), 22-25.

13   Oliver Burkeman, '"The attention economy is in hyperdrive": how tech shaped the 2010s' (*Guardian*, 22 November 2019) <https://www.theguardian.com/culture/2019/nov/22/attention-economy-in-hyperdrive-how-tech-shaped-2010s-oliver-burkeman> accessed 17 May 2023.

14   Banet-Weiser, 'Media, Markets, Gender' (n 10); Banet-Weiser, *Empowered* (n 10), 27.

15   Ellen Meiksins Wood, 'The Separation of the Economic and the Political in Capitalism' (1981) I/127 *New Left Review* 66; Margaret Somers, 'Legal Predistribution, Market Justice, and Dedemocratization: Polanyi and Piketty on Law and Political Economy' (2022) 3(2) *Journal of Law & Political Economy* 225 <https://doi.org/10.5070/LP63259631>

16   Jeremiah Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129(6) *Yale Law Journal* 1784 <www.yalelawjournal.org/feature/building-a-law-and-political-economy-framework> accessed 17 May 2023; Angela P. Harris, Amy Kapczynski & Noah Zatz, 'Where is the political economy?' (21 June 2021, *LPE Project*) <https://lpeproject.org/blog/where-is-the-political-economy/> accessed 17 May 2023.

17   Somers (n 15).

18   Sophie Bishop, 'Anxiety, panic and self-optimization: Inequalities and the YouTube algorithm' (2018) 24(1) *Convergence* 69 <https://doi.org/10.1177%2F1354856517736978> accessed 2 September 2022.

19   Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC ('DSA').

20   Rachel Griffin & Carl Vander Maelen, 'Codes of Conduct in the Digital Services Act: Exploring the Opportunities and Challenges' (12 June 2023) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4463874> accessed 15 August 2023.

address recommendation systems' broader social impacts. However, they do so through a technocratic, market-based approach which focuses on managing discrete risks associated with existing business models and strengthening advertiser influence, reinforcing the commercial logic that currently shapes content curation.

As such, both approaches align with the economy of visibility paradigm. Insofar as the DSA attempts to address the inequalities identified, it pursues an ideal of 'market justice' in which individuals are treated fairly, commercial value is accurately assessed, and obvious negative externalities are addressed within the parameters of existing corporate economies of visibility. It thus represents a missed opportunity to engage with the political economy of online visibility, looking beyond existing market structures and business models. Justice in online media would be better served by structural reforms of the social media market, seeking to promote alternative logics of content curation that are not based on the value of content as a vehicle for advertising and e-commerce, and that enable more collective participation in content governance.

2. Injustice in online economies of visibility

As recently argued by political philosopher Seth Lazar, the pervasive influence of algorithmically-curated platforms demands greater critical attention not only to particular harmful phenomena, like disinformation, but to more fundamental normative questions about how online media should be organised. Lazar suggests the guiding ideal should be 'communicative justice' – a term he uses to encompass opportunities not only to express oneself, but also to gain visibility and attention.[21]

So far, however, legal scholarship on social media recommendations has focused largely on specific (potential) harms, like the promotion of disinformation.[22] Questions of justice have been less prominent, even though allocating online visibility – and the social and economic benefits that come with it – obviously has distributive implications. Further, as argued by Iris Marion Young and Nancy Fraser, social justice should not be reduced to distribution of resources, but takes in other basic social structures, notably including cultural and social norms, the organisation of economic production, and social and political participation.[23] All these areas of social life are clearly implicated by recommendation systems that intermediate interpersonal communication, political discourse, and media production and consumption. It is also clear that these systems in their current form are far from any ideal of communicative justice.

2.1 Distribution, representation and exploitation

Considering online visibility simply as an economic resource, it is highly unequally distributed. Followers and views on social media tend towards 'power law' distributions, where a few people have huge visibility and most very little.[24] This pattern has always been common in cultural industries,[25] but may be intensified by the self-fulfilling nature of algorithmic predictions: content recommended to more people gets more engagement, then is recommended more, and so on.[26] Thus, while social media can offer independent creators and minority perspectives opportunities to reach audiences, success is not easy.[27] For individuals hoping to make a living from content creation, 'aspirational labour' is a structural feature: a minority can succeed financially, but their positions remain precarious, and many more contribute labour that is largely uncompensated.[28]

This may not in itself be seen as cause for significant concern: recommendation systems exist to discriminate between content, on the basis of interest, importance and/or relevance for a given user or query. For everyone to be equally visible would defeat the purpose. What is more concerning is that unequal opportunities for online visibility appear to track familiar historical inequalities. Research suggests that recommendation systems often compound the advantages of bigger media organisations[29] and better-resourced political campaigns.[30] Ethnographic studies of the influencer economy suggest that opportunities for success are strongly conditioned by race, class, (dis)ability and appearance.[31] Recommendation algorithms likely exhibit biases against marginalised groups: research suggests that predictions of user engagement generally not only reproduce but intensify users' existing prejudices.[32] There is also accumulating evidence for systemic bias in content moderation.[33] This exacer-

21   Seth Lazar, 'Communicative Justice and the Distribution of Attention' (26 January 2023) Tanner Lectures <https://hai.stanford.edu/events/tanner-lecture-ai-and-human-values-seth-lazar> accessed 17 May 2023.

22   Cobbe & Singh, 'Regulating Recommendations' (n 6); Daphne Keller, 'Amplification and Its Discontents' (June 28 2021) Knight First Amendment Institute Occasional Papers <https://knightcolumbia.org/content/amplification-and-its-discontents> accessed 17 May 2023. Paddy Leerssen's doctoral research addresses broader questions around accountability in the design and operation of recommendation systems, but does not focus specifically on social justice: Paddy Leerssen, 'Seeing what others are seeing: Studies in the regulation of transparency for social media recommender systems' (PhD thesis, University of Amsterdam 2023) <https://hdl.handle.net/11245.1/18c6e9a0-1530-4e70-b9a6-35fb37873d13> accessed 10 April 2023.

23   Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, 1990); Iris Marion Young, 'Taking the Basic Structure Seriously' (2006) 4(1) *Perspectives on Politics* 91 <https://www.jstor.org/stable/3688629>; Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Columbia University Press, 2010).

24   Glatt, 'Uncertainty' (n 8); Mathias Bärtl, 'YouTube channels, uploads and views: A statistical analysis of the past 10 years' (2018) 24(1) *Convergence* <https://doi.org/10.1177/1354856517736979>

25   Poell and others (n 5).

26   Narayanan, *Recommendation Algorithms* (n 2); Mireille Hildebrandt, 'The Issue of Proxies and Choice Architectures. Why EU Law Matters for Recommender Systems' (2022) 5 *Frontiers in Artificial Intelligence* <https://doi.org/10.3389/frai.2022.789076>

27   Glatt, 'Uncertainty' (n 8); Aymar Jean Christian and others, 'Platforming Intersectionality: Networked Solidarity and the Limits of Corporate Social Media' (2020) *Social Media + Society* <https://doi.org/10.1177/2056305120933301>

28   Brooke Erin Duffy, *(Not) Getting Paid to Do What You Love: Gender, Social Media, and Aspirational Work* (Yale University Press, 2017).

29   Efrat Nechushtai, Rodrigo Zamith & Seth C. Lewis, 'More of the Same? Homogenization in News Recommendations When Users Search on Google, YouTube, Facebook, and Twitter' (2023) *Mass Communication & Society* <https://doi.org/10.1080/15205436.2023.2173609>

30   Jen Schradie, *The Revolution That Wasn't: How Digital Activism Favors Conservatives* (Harvard University Press, 2019).

31   Glatt, 'Uncertainty' (n 8); Glatt, 'The Algorithm' (n 8); Jordan Foster, '"It's All About the Look": Making Sense of Appearance, Attractiveness, and Authenticity Online' (2022) *Social Media + Society* <https://doi.org/10.1177/20563051221138762>; Sophie Bishop, 'Influencer Management Tools: Algorithmic Cultures, Brand Safety, and Bias' (2021) *Social Media + Society* <https://doi.org/10.1177/20563051211003066>

32   Bora Edizel and others, 'FaiRecSys: Mitigating Algorithmic Bias in Recommender Systems' (2020) 9 *International Journal of Data Science and Analytics* 197 <https://link.springer.com/article/10.1007/s41060-019-00181-5> accessed 18 May 2023; Arvind Narayanan, 'Social media #algorithms magnify societal biases' (Mastodon, 8 November 2022) <https://mastodon.social/@randomwalker/109308638279298523> accessed 18 May 2023.

33   Beatriz Botero Arcila & Rachel Griffin, *Social media platforms and challenges for democracy, rule of law and fundamental rights* (LIBE Committee, European Parliament, 2023), chapter 3 <https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743400/IPOL_STU(2023)743400_EN.pdf>

bates precarity for marginalised creators, given the constant risk of losing access to their accounts, audiences and income.[34] It likely also reinforces inequalities of visibility, since evaluations of content by moderation software also feed into recommendations. For example, content predicted with low confidence to violate moderation policies may be demoted in recommendations rather than deleted.[35]

Unequal treatment within recommendation systems is further compounded by external factors. Creating high-performing content, like slickly-produced videos, demands time, equipment, expertise and other resources to which more privileged creators have more access.[36] Discrimination by brands sponsoring creators affects their chances of professional success, and abilities to keep investing in content creation.[37] Marginalised users are also more vulnerable to abuse and harassment, which often leads them to self-censor or withdraw from social media, undermining their ability to seek visibility.[38]

Importantly, while research in creator studies is particularly useful in illuminating these dynamics, they by no means only affect professional or aspiring influencers. All kinds of small businesses, artists, writers and craftspeople depend on social media visibility to showcase their work.[39] Building a personal brand online is increasingly necessary for success in many industries, from music to journalism and academia, in what Sophie Bishop terms 'influencer creep'.[40] Social media visibility metrics shape cultural production in the 'real world': entire news outlets have risen and fallen based on what succeeds on Facebook,[41] authors popular on TikTok top bestseller lists,[42] and museums and festivals design 'Instagrammable' visitor experiences.[43] Social media are also now indispensable for most political organis-

ing.[44] Thus, inequalities of online visibility have broader implications for economic and social equality and political participation. This also means unequal treatment is not only unjust as towards individuals, but has broader social implications, for example when unequal media representation shapes cultural norms, stereotypes and hierarchies.[45]

Crucially, as Banet-Weiser argues, drawing on Herman Gray, increased representation of marginalised groups is not unambiguously positive: a more important question is how they are represented and whether it helps achieve social equality.[46] In contemporary social media, the most valuable – and thus visible – representations of minorities are often those which conform to stereotypes and are 'easily brandable and able to merge with market logics'.[47] For example, there is growing evidence for systemic discrimination against LGBTQIA+ people in content moderation,[48] but some studies suggest this is far from indiscriminate homophobia. Platforms and advertisers favour desexualised, depoliticised and 'homonormative' representations of queerness, while suppressing more provocative or unconventional gender and sexual expression, and discriminating in particular against intersectionally marginalised users.[49] This has implications not only for individual users, but for wider community interests – for example, for young LGBTQIA+ people who often rely heavily on social media to find social support and develop their identities[50] – and, ultimately, for broader cultural norms around gender and sexuality.

accessed 12 April 2023.

34 Carolina Are & Pam Briggs, 'The Emotional and Financial Impact of De-Platforming on Creators at the Margins' (2023) Social Media + Society <https://doi.org/10.1177/20563051231155103>

35 Tarleton Gillespie, 'Do Not Recommend? Reduction as a Form of Content Moderation' (2022) Social Media + Society <https://doi.org/10.1177/20563051221117>

36 Schradie (n 30); Glatt, 'Uncertainty' (n 8).

37 Foster (n 31); Angèle Christin & Yingdan Lu, 'The influencer pay gap: Platform labor meets racial capitalism' (2023) New Media & Society <https://doi.org/10.1177/14614448231164995>

38 Gina Masullo Chen and others, '"You really have to have a thick skin": A cross-cultural perspective on how online harassment influences female journalists' (2018) 21(7) Journalism <https://doi.org/10.1177/1464884918768500>; Eugenia Siapera, 'Online Misogyny as Witch Hunt: Primitive Accumulation in the Age of Techno-capitalism' in Debbie Ging & Eugenia Siapera, Gender Hate Online (Wiesbaden, Springer Professional) <https://www.springerprofessional.de/en/online-misogyny-as-witch-hunt-primitive-accumulation-in-the-age-/16925744> accessed 11 July 2023.

39 Sophie Bishop, 'Influencer Creep' (Real Life, 9 June 2022) <https://reallifemag.com/influencer-creep/> accessed 18 May 2023.

40 Bishop, 'Influencer Creep' (n 39); Brooke Erin Duffy, 'Influencer culture is everywhere — even in academia' (Salon, 30 April 2022) <https://www.salon.com/2022/04/30/influencer-culture-is-everywhere-even-in-academia/> accessed 19 May 2023.

41 Kayleigh Barber & Sara Guaglione, 'How the social traffic that gave life to BuzzFeed News ultimately led to its demise' (Digiday, 24 April 2023) <https://digiday.com/media/how-the-social-traffic-that-gave-life-to-buzzfeed-news-ultimately-led-to-its-demise/> accessed 18 May 2023.

42 Tyler McCall, 'BookTok's Racial Bias' (The Cut, 18 November 2022) <https://www.thecut.com/2022/11/booktok-racial-bias-tiktok-algorithm.html> accessed 18 May 2023.

43 Duncan Dick, 'How Instagram Is Changing the Design of Clubs and Festivals' (Mixmag, 6 January 2020) <https://mixmag.net/feature/how-instagram-is-changing-the-design-of-festivals-and-clubs> accessed 18 May 2023; Tama Leaver, Tim Highfield & Crystal Abidin, Instagram: Visual Social Media Cultures (John Wiley & Sons, 2020), 159.

44 Zeynep Tufekci, Twitter and Tear Gas: The Power and Fragility of Networked Protest (Yale University Press, 2017); Andreu Casero-Ripolles & Romina Pepe-Oliva, 'Social Media and Online Political Activism in Protest Communication Strategies: Friends or Foes?' (2021) Communication & Smart Technologies 73 <https://link.springer.com/chapter/10.1007/978-981-16-5792-4_8> accessed 18 May 2023.

45 Young, Politics of Difference (n 23); Young, 'Basic Structure' (n 23).

46 Banet-Weiser, Empowered (n 10); Herman Gray, 'Subject(ed) to Recognition' (2013) 65(4) American Quarterly 771 <https://www.jstor.org/stable/43822990>

47 Zoë Glatt & Sarah Banet-Weiser, 'Productive Ambivalence, Economies of Visibility, and the Political Potential of Feminist YouTubers' in Stuart Cunningham & David Craig, Creator Culture: An Introduction to Global Social Media Entertainment (NYU Press 2021), 49; see also Bishop, 'Anxiety' (n 18).

48 Alexander Monea, The Digital Closet: How the Internet Became Straight (MIT Press 2022); Ari Ezra Waldman, 'Disorderly Content' (2022) 97(4) Washington Law Review 907.

49 Monea (n 48); Clare Southerton and others, 'Restricted modes: Social media, content classification and LGBTQ sexual citizenship' (2021) 23(5) New Media & Society 920 <https://doi.org/10.1177%2F1461444820904362>; Shirley Xue Chen & Akane Kanai, 'Authenticity, uniqueness and talent: Gay male beauty influencers in post-queer, postfeminist Instagram beauty culture' (2021) 25(1) European Journal of Cultural Studies <https://doi.org/10.1177/1367549421988966>. This shows continuities with older media. Historically, to attract advertisers, gay print media focused on well-off urban gay men, who could be framed as a desirable consumer niche, while largely excluding lesbians and working-class LGBTQIA+ people: Fred Fejes, 'Advertising and the Political Economy of Lesbian/Gay Identity' in Eileen R. Meehan & Ellen Riordan, Sex and Money: Feminism and Political Economy in the Media (University of Minnesota Press, 2002).

50 Waldman, 'Disorderly Content' (n 48); Linda Charmaraman, J. Maya Hernandez & Rachel Hodes, 'Marginalized and Understudied Populations Using Digital Media' in Jacqueline Nesi, Eva H. Telzer & Mitchell J. Prinstein (eds), Handbook of Adolescent Digital Media Use and Mental Health: Part II - Digital Media in the Adolescent Developmental Context (Cambridge University Press 2022) <https://doi.org/10.1017/9781108976237.011>

Finally, it would be a mistake to focus only on unequal outcomes. As Young argued, economic systems should not be critiqued merely for distributing resources unequally, but in terms of the underlying institutions, processes and relationships that systematically serve some and disempower others.[51] One aspect of this is labour exploitation. By controlling the allocation of visibility, social media companies incentivise creators to produce more of whatever content best serves their own business incentives. For example, a widely-accepted way to improve YouTube visibility is to post more content, more often – creating valuable content, engagement and ad revenue for YouTube, but also contributing to widespread 'burnout' among creators.[52] Instagram recently adjusted its recommendation systems to prioritise videos over photos – which was widely understood as an attempt to compete against TikTok. This move effectively demanded that established creators – including everyone from restaurant owners to tattoo artists, not only professional influencers – produce more labour-intensive videos in order to maintain their visibility.[53]

Recommendation systems can thus be situated in the broader literature on platform labour:[54] platforms' control over creators' access to audiences enables exploitation and control of their labour, much like 'gig economy' platforms who exercise power via their control of workers' access to customers.[55] Further, as observed in the platform labour literature,[56] the individualised, spatially-dispersed nature of this work facilitates exploitation by undermining worker solidarity.[57] A recent study of a campaign against racial discrimination in influencer brand partnerships suggests that even resistance strategies remain focused on individual success: for example, empowering marginalised creators to negotiate better, and criticising brands for failing to recognise their 'worth' according to established popularity metrics.[58] As Banet-Weiser suggests, online economies of visibility are set up to favour zero-sum competition between individuals to succeed on the terms set by platforms, rather than collective resistance.

2.2 Market construction

Crucially, the criteria for success and the parameters for competition are not part of a neutral or spontaneously-emerging market order: they are carefully designed by companies in accordance with their own commercial objectives.[59] Most social media recommendation algorithms optimise for some version of 'engagement' – user interest that manifests in some observable behaviour, such as liking, commenting or lingering over content.[60] However, engagement is far from a neutral or value-free goal, and can be operationalised in different ways, depending on what behaviours are taken to signal engagement and how much weight is accorded to different signals.[61] The overarching goal of advertising-based platforms is generally to maximise forms of engagement that produce ad revenue and behavioural data.[62] Yet even within these broad parameters, there is plenty of room for interpretation.

For example, Meta in 2018 adjusted Facebook's news feed recommendations to optimise for 'meaningful social interactions' over passive viewing. In 2020, having realised that this encouraged content which provoked arguments, it adjusted the algorithm again to deprioritise 'angry' emojis as an engagement signal.[63] Initiatives like this, aiming to reduce the prevalence and visibility of harmful content, are driven by various commercial incentives beyond pure engagement optimisation:[64] these include creating pleasant user experiences, managing reputational risks, keeping regulators happy, and attracting advertisers who see offensive content as a 'brand safety' risk.[65] Conversely, there have been multiple documented instances where executives rejected similar proposals for commercial reasons, due to concerns that they could reduce ad revenue or antagonise the US Republican Party.[66]

Beyond adjusting generally-applicable recommendation criteria, platforms can also shape visibility at a much more granular level – not only to suppress the visibility of content deemed harmful or risky,[67]

51   Young, *Politics of Difference* (n 23).

52   Glatt, 'The Algorithm' (n 8).

53   Rebecca Jennings, 'Nobody wants more crappy videos on Instagram. Too bad.' (*Vox*, 29 March 2022) <https://www.vox.com/the-goods/23000352/instagram-algorithm-reels-video-following-favorites> accessed 11 July 2023.

54   For a detailed discussion of the relevance of this literature for social media creators see Are & Briggs (n 34).

55   Niels van Doorn, 'Platform labor: on the gendered and racialized exploitation of low-income service work in the 'on-demand' economy' (2016) 20(6) *Information, Communication & Society* 898 <https://doi.org/10.1080/1369118X.2017.1294194>

56   Heiner Heiland, *Workers' Voice in Platform Labour* (July 2020) WSI Study 21 07/2020, Hans-Böckler-Stiftung, chapter 4 <https://www.boeckler.de/de/faust-detail.htm?sync_id=9041> accessed 18 May 2023.

57   Glatt, 'Uncertainty' (n 8); Kaitlyn Tiffany, 'The Influencer Industry Is Having an Existential Crisis' (*The Atlantic*, 31 March 2023) <https://www.theatlantic.com/technology/archive/2023/03/tiktok-instagram-influencers-algorithm-labor-union/673584/> accessed 18 May 2023.

58   Christin & Lu (n 37).

59   Similar points have been made regarding other types of platform: see Elettra Bietti, 'Self-Regulating Platforms and Antitrust Justice' (2022) 101 *Texas Law Review* 165.

60   Priyanjana Bengani, Jonathan Stray & Luke Thorburn, 'What's Right and What's Wrong with Optimizing for Engagement' (*Understanding Recommenders*, 27 April 2022) <https://medium.com/understanding-recommenders/whats-right-and-what-s-wrong-with-optimizing-for-engagement-5abaac021851> accessed 19 May 2023.

61   Narayanan, *Recommendation Algorithms* (n 2).

62   While advertising remains the dominant social media revenue model, major platforms are increasingly experimenting with other revenue streams, notably e-commerce: see Catalina Goanta, 'The New Social Media: Contracts, Consumers and Chaos' (2023) 108 *Iowa Law Review* 118 <https://ilr.law.uiowa.edu/volume-108-response-pieces/2023/05/new-social-media-contracts-consumers-and-chaos> accessed 26 May 2023. If e-commerce becomes important enough to significantly influence recommendations, it will presumably create similar incentives to promote content that maximises engagement and data collection and creates a 'buying mood'.

63   Keach Hagey & Jeff Horwitz, 'Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead.' (*Wall Street Journal,* 15 September 2021) <https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215> accessed 18 May 2023; Jeremy B. Merrill & Will Oremus, 'Five points for anger, one for a 'like': How Facebook's formula fostered rage and misinformation' (*Washington Post*, 26 October 2021) <https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/> accessed 18 May 2023.

64   Leerssen, 'Soap Box' (n 3), 11.

65   Rachel Griffin, 'From brand safety to suitability: Advertisers in platform governance' (2023) 12(3) *Internet Policy Review* <https://doi.org/10.14763/2023.3.1716>

66   Hagey & Horwitz (n 63); Mark Bergen, 'YouTube Executives Ignored Warnings, Letting Toxic Videos Run Rampant' (*Bloomberg*, 2 April 2019) <https://www.bloomberg.com/news/features/2019-04-02/youtube-executives-ignored-warnings-letting-toxic-videos-run-rampant> accessed 19 May 2023; Elizabeth Dwoskin, Craig Timberg & Tony Room, 'Zuckerberg once wanted to sanction Trump. Then Facebook wrote rules that accommodated him.' (*Washington Post,* 28 June 2020) <https://www.washingtonpost.com/technology/2020/06/28/facebook-zuckerberg-trump-hate/> accessed 18 May 2023; Karen Hao, 'How Facebook got addicted to spreading misinformation' (*MIT Technology Review*, 11 March 2021) <https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/> accessed 18 May 2023.

67   Gillespie, 'Do Not Recommend?' (n 35); Paddy Leerssen, 'An end to

but also to actively promote content that serves their commercial interests. TikTok built an internal tool allowing its employees to select individual videos to 'go viral'[68] – for example, to promote specific tracks from major record labels, who are vital commercial partners given the platform's focus on music and dance content.[69] It recently announced that influencers creating content promoting specified 'brand missions' (marketing campaigns) would be rewarded with more views – explicitly offering visibility incentives to produce advertiser-friendly content.[70]

Overall, then, engagement is hardly an objective signal of value. As in other marketised social spheres, social media recommendation systems encode deliberate design choices geared towards constructing a very specific type of 'capitalist, corporate economy of visibility',[71] where the visibility of content primarily reflects its value in driving advertising revenue. This is not only unjust because it allocates visibility unfairly compared to some hypothetical ideal distribution, or because individuals do not have fair chances to compete according to the platforms' criteria. It also shapes on- and offline culture in ways that reinforce social hierarchies and consumerist ideologies, facilitates labour exploitation, and excludes democratic participation in governing online media.[72]

3. Regulating recommendations in the Digital Services Act

Historically, justice and equality were not major themes in EU platform regulation, which has focused primarily on economic objectives (like market integration and intellectual property protection) and security. Indeed, the legal basis for most such regulation – including the DSA – has been Article 114 of the Treaty on the Functioning of the European Union (the EU's competence for harmonisation measures to improve the functioning of the internal market), which some scholars have suggested creates an inherent bias towards economic objectives and free-market policies.[73] However, the DSA – billed as 'a first comprehensive rulebook for the online platforms that we all depend on'[74] – also takes in broader normative questions like those

discussed here. It aspires to protect fundamental rights for all, including non-discrimination;[75] to prevent platforms from treating users arbitrarily or unfairly;[76] and to address 'systemic risks' to social and collective interests,[77] including those associated with algorithmic recommendations.[78] This suggests that the systemic reinforcement by recommendation systems of existing social inequalities should fall within its scope.

However, there is relatively little explicit regulation of recommendations, especially compared to the DSA's detailed regulation of content moderation.[79] Provisions directly addressing recommendations can be grouped in three categories, focused on audience interests, creator interests, and systemic risks. As this section shows, all three align with the economy of visibility model. The first two focus on protecting consumer choice and market access for individuals, while the third takes a technocratic approach to mitigating particular risks associated with platform business models. Ultimately, then, all three assume that these business models will continue to structure online economies of visibility, and pursue a narrow ideal of 'market justice' within these existing structures.

3.1 User rights and market justice
The DSA's approach to recommendations is summed up in Recital 70, which states that recommendations:

> 'play an important role in the amplification of certain messages, the viral dissemination of information and the stimulation of online behaviour. Consequently, online platforms should consistently ensure that recipients of their service are appropriately informed about how recommender systems impact the way information is displayed, and can influence how information is presented to them.'

Counterintuitively, although its references to amplification and dissemination evoke social and collective issues such as the spread of disinformation, the Recital takes as a given that the solutions are more information and choice for individuals. Similarly, the corresponding articles focus on user choice and transparency. First, Article 27(1) requires all online platforms to 'set out in their terms and conditions, in plain and intelligible language, the main parameters used in their recommender systems', including reasons for the relative importance of different parameters. Second, Article 27(c) requires any customisable recommendation settings to be easily accessible. Article 38 further requires very large online platforms (those with over 45 million EU users[80]) to offer at least one setting for each recommendation system which is not based on personalised profiling.[81]

shadow banning? Transparency rights in the Digital Services Act between content moderation and curation' (2023) 48 *Computer Law & Security Review* 105790 <https://doi.org/10.1016/j.clsr.2023.105790>

68 Mitchell Clark, 'TikTok confirms that its own employees can decide what goes viral' (*The Verge*, 20 January 2023) <https://www.theverge.com/2023/1/20/23564242/tiktok-heating-view-boosts-creators-businesses> accessed 18 May 2023.

69 Dan Whateley, 'How TikTok is changing the music industry' (*Business Insider*, 27 April 2023) <https://www.businessinsider.com/how-tiktok-is-changing-the-music-industry-marketing-discovery-2021-7?r=US&IR=T> accessed 18 May 2023.

70 TikTok, 'Introducing TikTok Branded Mission: Inspiring Brand and Creator Collaborations' (18 May 2022) TikTok <https://newsroom.tiktok.com/en-us/introducing-tiktok-branded-mission-inspiring-brand-and-creator-collaborations> accessed 26 September 2022.

71 Banet-Weiser, *Empowered* (n 10), 13.

72 The aspects of injustice identified here draw from Young, *Politics of Difference* and 'Basic structure' (n 23).

73 Miika Hiltunen, 'Social Media Platforms within Internal Market Construction: Patterns of Reproduction in EU Platform Law' (2022) 23(9) *German Law Journal* 1226 <https://doi.org/10.1017/glj.2022.80>; Benjamin Farrand, 'The ordoliberal internet? Continuity and change in the EU's approach to the governance of cyberspace' (2023) 2(1) *European Law Open* 106. <https://doi.org/10.1017/elo.2023.14>; Margot E. Kaminski, 'Regulating the Risks of AI' (2023) 103 *Boston University Law Review* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4195066> accessed 19 May 2023.

74 European Commission, 'Commission welcomes the adoption by the European Parliament of the EU's new rulebook for digital services' (5 July 2022) European Commission Press Corner <https://ec.europa.eu/

commission/presscorner/detail/en/IP_22_4313> accessed 17 May 2023.

75 Recitals 3 and 153, DSA (n 19).

76 Recitals 45 and 47, DSA (n 19).

77 Recitals 80-83, DSA (n 19).

78 Article 35(1)(d) DSA (n 19).

79 Botero Arcila & Griffin (n 32), chapter 2.

80 Article 33(1), DSA (n 19).

81 Profiling is defined by reference to Article 4(4) GDPR as 'use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements'. Article 38 was likely intended to require reverse chronological feeds or similar options where users see content from their friend and follower networks, rather than entirely non-personalised feeds. That said, it is not entirely clear whether reverse chronological feeds should qualify as not based on profiling, since friend and follower networks are personal data, and the

Alongside these provisions aiming to enhance users' control in their role as *audiences* for recommendations, the DSA also provides safeguards for users as content *creators*. It includes several provisions that aim to protect users against arbitrary or unfair content moderation, via procedural safeguards enabling them to understand and contest decisions – for example, requiring platforms to clearly state their policies,[82] explain decisions to users[83] and allow them to appeal.[84] Moderation as defined in Article 3(t) DSA and in the relevant provisions on notice and appeal explicitly includes demotion in recommendations. As interpreted by Paddy Leerssen, these provisions suggest that where platforms intervene to reduce the visibility of specific content for policy reasons – as opposed to making more generally-applicable decisions about ranking criteria – creators must be enabled to challenge decisions they consider inconsistent with platforms' stated policies.[85]

Overall, both groups of provisions focus on individual user interests – to understand and control one's own engagement with recommendations, and to ensure one is not arbitrarily deprived of the visibility one deserves according to platforms' standard criteria. Considering how effectively these provisions might address systemic injustice, it is first relevant to highlight several relevant questions about the practical utility of transparency and individual rights in addressing arbitrariness, systemic discrimination and inequality (in this specific context and in technology governance generally).[86]

First, as regards the utility of strengthening transparency and choice for *audiences*, research on digital literacy should give pause to any policy that is premised on individual consumers exercising more control over their relationships with platforms. Studies show that most people are concerned about how platforms use their data, but also feel deeply confused and disempowered when it comes to challenging these practices, and that digital literacy and confidence track class and race disparities.[87] Even for the most digitally literate, informed and engaged consumers, it is doubtful that platforms could provide information about the 'main parameters' of recommendation systems – which recommend content based on thousands of data points, and interact with user behaviour and broader media environ-

ments to produce unpredictable emergent outcomes[88] – which is meaningfully informative, while also being comprehensible and not creating security risks.[89]

Moreover, while the DSA purports to offer audiences more control over how they engage with recommendation systems, this control is largely illusory and limited by its commitment to a market paradigm. By providing more information and making recommendation settings more accessible, without substantively regulating the design or objectives of recommendation systems, Article 27 effectively aims to facilitate informed consumer choices between different services available on the market. As such, the range of recommendation systems on offer will be limited to those that platform companies find it commercially advantageous to provide. The limited exception in Article 38, requiring the largest platforms to offer one option not based on profiling, essentially gives users a take-it-or-leave-it choice between using the recommendation systems the market offers or opting out of personalised recommendations completely. Freedom to choose from a small selection of recommendation systems that align with platforms' primary goals of maximising engagement and advertising revenue is not a particularly inspiring vision of user empowerment. In any case, there is no reason (other than ideological commitment to the Hayekian belief that letting individuals pursue their own preferences in an efficient market necessarily produces socially optimal outcomes) that greater choice for individuals will prevent the collective harms and externalities that can emerge when complex sociotechnical systems are optimised in line with individual preferences.[90]

Furthermore, Articles 27 and 38 may have little impact in practice, as several factors suggest that uptake by users of alternative recommendation settings might be quite low. Users are generally unlikely to change default settings;[91] even if they consider doing so, many users find engagement-maximising recommendation systems entertaining, useful and/or compelling (even if this does not reflect their considered preferences or values, or has negative impacts for society as a whole[92]); and in some cases – such as TikTok's main For You feed – the entire interface design and user experience has been built with personalised recommendations in mind,[93] so non-personalised feeds

use of an algorithm (albeit a simple one) to collect and arrange posts from these people arguably represents a prediction of the user's interests.

82   Article 14, DSA (n 19).

83   Article 17, DSA (n 19).

84   Articles 20-21, DSA (n 19).

85   Leerssen, 'Shadow banning' (n 67).

86   Anna Lauren Hoffmann, 'Where fairness fails: data, algorithms, and the limits of antidiscrimination discourse' (2019) 22(7) *Information, Communication & Society* 900 <https://doi.org/10.1080/136911 8X.2019.1573912>; Ari Ezra Waldman, 'Privacy Law's False Promise' (2020) 97(3) *Washington University Law Review* 773; Monika Zalnieriute, '"Transparency-Washing" in the Digital Age: A Corporate Agenda of Procedural Fetishism' (2021) 8(1) *Critical Analysis of Law* 39 <https://cal. library.utoronto.ca/index.php/cal/article/view/36284> accessed 18 January 2023; Rachel Griffin, 'Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality' (2023) 2(1) *European Law Open* 30 <https://doi.org/10.1017/elo.2023.7>; Daniel J. Solove, 'The Limitations of Privacy Rights' (2023) 98 *Notre Dame Law Review* (forthcoming) <https:// ssrn.com/abstract=4142568> accessed 19 May 2023.

87   Simeon J. Yates and others, 'Who are the limited users of digital systems and media? An examination of U.K. evidence' (2020) 25(7) *First Monday* <https://doi.org/10.5210/fm.v25i7.10847>; Elinor Carmi & Simeon J. Yates, 'Data Citizenship: Data Literacies to Challenge Power Imbalance Between Society and "Big Tech"' (2023) 17 *International Journal of Communication* 3619 <https://ijoc.org/index.php/ijoc/article/view/18823/4192> accessed 22 May 2023.

88   Luke Thorburn, Priyanjana Bengani & Jonathan Stray, 'How to Measure the Effects of Recommenders' (*Understanding Recommenders*, 20 July 2022) <https://medium.com/understanding-recommenders/how-to-measure-the-causal-effects-of-recommenders-5e89b7363d57> accessed 19 May 2023.

89   Twitter's recent disclosure of some aspects of its recommendation algorithm illustrates some of these tensions and tradeoffs: see Arvind Narayanan, 'Twitter showed us its algorithm. What does it tell us?' (*Algorithmic Amplification & Society*, 10 April 2023) <https://knightcolumbia. org/blog/twitter-showed-us-its-algorithm-what-does-it-tell-us> accessed 19 May 2023.

90   Lazar (n 21). For a more detailed presentation of similar arguments in the data protection context, see Salomé Viljoen, 'A Relational Theory of Data Governance' (2021) 131(2) *Yale Law Journal* 573, <https://www. yalelawjournal.org/feature/a-relational-theory-of-data-governance> accessed 2 September 2022.

91   David Pierce, 'The little search engine that couldn't' (*The Verge*, 26 July 2023) <https://www.theverge.com/23802382/search-engine-google-neeva-android> accessed 15 August 2023.

92   One recent controlled experiment comparing personalised and non-personalised Twitter feeds suggests a discrepancy between users' 'revealed preferences' (content they engage with) and 'stated preferences' (kinds of content they say they would like to see more): Smitha Milli and others, 'Twitter's Algorithm: Amplifying Anger, Animosity, and Affective Polarization' (2023) arXiv <https://arxiv.org/abs/2305.16941> accessed 15 August 2023.

93   Narayanan, 'TikTok's Secret Sauce' (n 3).

will inevitably offer a worse experience.[94] Moreover, since platforms will generally benefit from as many users as possible continuing to use their main engagement-optimised recommendation systems, they may have little incentive to put effort and resources into building alternative systems that are useful and appealing.

Turning to consider the perspective of *creators*, the above considerations also suggest that Articles 27 and 38 will have little impact on the exploitative labour relationships and inequalities of visibility discussed in section 2. If – as expected – the choice of recommendation systems on offer remains limited, and most users continue to use the default settings, these systems will continue to be determinative of visibility and success, so creators will still be under pressure to conform to their criteria. As regards the DSA's safeguards against arbitrary content demotion, such as the notice and appeals procedures set out in Articles 17 and 20, the complexity and opacity of recommendation systems means these provisions will be practically difficult for users to rely on and for regulators to enforce. Since it is rarely obvious to users when content has been demoted,[95] if platforms do not comply with their obligation to notify creators, this will often go unnoticed. In any case, the indeterminacy of content policies and the limitations of under-resourced industrial-scale moderation systems make individual appeals a largely ineffective solution to arbitrary or discriminatory treatment.[96] For example, a biased algorithmic system in which content from LGBTQIA+ creators is on average slightly less likely to become widely popular than content from straight creators cannot be effectively countered by identifying individual pieces of content that did not get some hypothetical correct level of visibility.

These various observations suggest that the DSA's individualistic approach to regulating recommendations cannot effectively address the systemic injustices discussed in section 2. More fundamentally, however, it reflects an underlying ideology of market justice which not only fails to effectively regulate, but actively reinforces and legitimises these corporate economies of visibility. Somers defines market justice as the idea that 'the market's adjudications and distributional outcomes are just and fair because they are impartial, produced by voluntary transactions operating in a morally neutral price system, unimpeded by human capriciousness and untouched by political power'.[97] This is closely linked to 'market naturalism', the idea of markets as apolitical self-organising spaces, rather than contingent social institutions.[98] Both ideas effectively obscure the political choices that shape the design, functioning and limits of markets, and that necessarily involve choosing to benefit some and disempower others.

The DSA reflects these ideals insofar as it leaves the organisation of information and allocation of visibility up to the market. Justice is understood as fair treatment for individuals – understood as consumers of social media services, and entrepreneurs seeking access to those consumers – within existing market structures. Users are

empowered to make informed consumer choices between different market services, and creators to challenge instances where they think they should have attained more visibility under the platform's standard criteria. However, they cannot contest the underlying goals recommendation systems are optimised for, or the criteria they use – the more significant choices that determine who and what 'deserves' to succeed in supposedly-neutral markets. Other than the limited exception of Article 38, platform companies remain free to design recommendation systems in accordance with their commercial objectives.

The DSA's focus on individual agency within the narrow parameters set by corporate media systems therefore reinforces the economy of visibility paradigm that Banet-Weiser describes. It is inherently unsuited to redressing inequalities of visibility that do not result from discrete decisions targeting individuals, but from systemic factors – ranging from algorithmic bias and user prejudices to advertiser influence and broader economic inequalities – that make it easier for some people than others to meet criteria based on commercial value. To the extent that these provisions address the collective social implications of visibility governance, and not only the interests of individual users, it is through the assumption – encapsulated in Recital 70 – that allowing individuals to pursue their preferences within existing market structures will somehow produce better outcomes for society as a whole. Ultimately, by naturalising and institutionalising the construction of online economies of visibility designed to serve corporate interests and sidelining broader questions about how recommendation systems should be governed, this regulatory model will only entrench inequalities of visibility.

3.2 Risk management and market naturalism
That said, the DSA does arguably address these kinds of broader questions via the systemic risk regime in Section 5. These provisions apply only to very large online platforms ('VLOPs'), with over 45 million EU users – creating more stringent obligations for the companies which have not only the most resources, but also the greatest influence on broader media systems. It centres on Articles 34 and 35, which require VLOPs to regularly assess and mitigate 'systemic risks' to fundamental rights and various other broadly-defined public interests. Risk assessments and mitigation measures must be independently audited[99] and are ultimately overseen by the Commission.[100] Recommendations and other aspects of platform design and business models are explicitly mentioned in Articles 34(2) and 35(1) as relevant aspects VLOPs must consider when identifying and addressing risks.

Given the systemic inequalities described in section 2, it is certainly arguable that not only specific design choices, but also the underlying practice of optimising recommendations to maximise advertising revenue, create foreseeable systemic risks to non-discrimination, media pluralism and other fundamental rights (as well as other issues within the scope of Article 34, such as misinformation and its effects on civic discourse[101]). Accordingly, VLOPs could theoretically be obliged to take steps to mitigate these effects: for example, altering recommendation criteria to ensure more visibility for marginalised users and minority perspectives. There is a growing body of literature at the intersection of law, communications studies and computer science exploring how recommendation systems could be designed with

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94 Evelyn Douek & Alex Stamos, 'MC Weekly Update 8/8: 11 Dimensional Free Speech Theory' (8 August 2023) <https://law.stanford.edu/podcasts/mc-weekly-update-8-8-11-dimensional-free-speech-theory/> accessed 8 August 2023.

95 Even if users suspect demotion because their content achieves less visibility than they expected, it will rarely be possible to conclusively determine whether this was due to a targeted demotion or the many other factors that make visibility fluctuate unpredictably: Narayanan, *Recommendation Algorithms* (n 2).

96 Hoffmann (n 86); Griffin, 'Rethinking Rights' (n 86).

97 Somers (n 15), 235.

98 *Id*, 233-34.

99 Article 37, DSA (n 19).

100 Article 56(2), DSA (n 19).

101 Brady and others (n 7).

these kinds of objectives in mind,[102] or with other related public-interest goals such as promoting overall diversity of views[103], or 'bridging' content which attracts support from users across political and ideological divides[104] (though navigating the potential conflicts and tradeoffs between these various objectives, and other goals such as suppressing harmful content, presents its own set of challenges[105]).

However, Articles 34-35 remain extremely broad, vague and abstract, and the primary responsibility for defining risks and deciding how to mitigate them rests with companies themselves.[106] Sociolegal research on regulatory compliance suggests that where companies are responsible for implementing vague regulatory obligations through mechanisms like risk assessments and audits, this often produces box-ticking and symbolic compliance measures rather than substantial changes in business practices.[107] Companies also tend to prioritise risks that arise when things go wrong, and that threaten their own business interests, rather than harmful effects of 'normal' business practices.[108] This suggests it is unlikely, in the absence of strong regulatory incentives, that VLOPs will significantly redesign recommendation systems that are currently optimised for profit maximisation. Providing one early indication of how they will approach Article 35, 2023 saw a wave of layoffs across the tech industry, just before the DSA becomes fully binding in early 2024. Several major platforms wholly or partly scrapped the 'AI ethics' teams responsible for addressing things like bias in recommendation algorithms[109] – suggesting they do not consider this an important element of DSA compliance.

Ultimately, much depends on the enforcement strategy adopted by the Commission, which is responsible for issuing guidance on the interpretation of Articles 34-35[110] and deciding whether mitigation measures are adequate. The 2022 Code of Practice on Disinformation (CoP) illustrates the possibility of using this framework to address systemic and collective harms associated with content curation.[111] Under Article 45 DSA, codes like the CoP can guide the interpretation of Articles 34-35, effectively providing more concrete commitments to which regulators can hold platforms accountable. Section V of the CoP is titled 'empowering users'. Although this title could suggest a focus on individual responsibility, much like the provisions analysed in section 3(a), actually key commitments in this section introduce a rather different and much less individualistic approach. Notably, they place far more emphasis on designing recommendation systems to minimise the visibility of harmful content.

Commitment 18 entails 'adopting safe design practices as [signatories] develop their systems, policies, and features' and specifies that platforms should design recommendation systems to 'improve the prominence of authoritative information and reduce the prominence of Disinformation'.[112] While this remains fairly vague, it is more explicit than Articles 34 and 35 in making clear that design processes should be guided by public-interest objectives. Various other provisions aim to ensure this translates into concrete action: for example, requiring companies to fund research into safe design practices and regularly report to a taskforce overseen by the Commission on how they are implementing these research findings.[113] Ultimately, platforms which fail to satisfy regulators that they are adequately implementing these commitments could face investigations and fines under the DSA.[114] Thus, the CoP provides a model for more active regulatory oversight of recommendation systems and their underlying objectives.

Nonetheless, the CoP is part of a risk management framework which focuses on mitigating particular risks associated with engagement optimisation, rather than questioning the underlying market logics.[115] The DSA's approach is also highly technocratic: risk assessments and evaluation of mitigation measures will be undertaken by companies' internal compliance divisions, then independently audited, and finally scrutinised by regulatory agencies and independent researchers. Internal compliance measures tend to be strongly influenced by business objectives, and easily sidelined where inconvenient.[116] Given the skillsets and business incentives of commercial auditing firms, and the lack of clearly-accepted standards in this area, audits will likely focus on accuracy and other technical issues, rather than the underlying norms and priorities guiding risk assessments.[117] Through this kind of 'regulated self-regulation',[118] the DSA enlists companies to

102 Natali Helberger and others, 'Towards a Normative Perspective on Journalistic AI: Embracing the Messy Reality of Normative Ideals' (2022) 10(10) *Digital Journalism* 1605 <https://doi.org/10.1080/21670811.2022.2152195>

103 Natali Helberger, Kari Karppinen & Lucia D'Acunto, 'Exposure diversity as a design principle for recommender systems' (2016) 21(2) *Information, Communication & Society* 191 <https://doi.org/10.1080/1369118X.2016.1271900>

104 Aviv Ovadya & Luke Thorburn, 'Bridging Systems: Open Problems for Countering Destructive Divisiveness across Ranking, Recommenders, and Governance' (2023) ArXiv Preprints <https://doi.org/10.48550/arXiv.2301.09976>; Jonathan Stray, Ravi Iyer & Helena Puig Larrari, 'The Algorithmic Management of Polarization and Violence on Social Media' (2023) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4429558> accessed 21 July 2023.

105 Leerssen, 'Soap Box' (n 3), 11.

106 While the relevant provisions and recitals are quite long and detailed – providing a list of nine overarching risk areas, five relevant factors that could influence risks, and 15 areas of possible mitigation measures – they remain very abstract. For example, 'negative effects for the exercise of fundamental rights' (Article 34(1)(b)) or on 'civic discourse' (Article 34(1)(c)) are not only broad enough to encompass a vast range of phenomena; they are also essentially contested concepts, where what constitutes a negative effect is inherently open to interpretation. Similarly, the range of possible mitigation measures that could fall within listed areas like 'adapting the design, features or functioning of...services' (Article 35(1)(a)) is vast. Finally, the sheer number of risk areas, relevant factors and types of mitigation measure that platforms are instructed to consider will inevitably accord them significant discretion about what to prioritise.

107 Waldman, 'False Promise' (n 86); Lauren Edelman, *Working Law: Courts, Corporations and Symbolic Civil Rights* (University of Chicago Press, 2016); Ari Ezra Waldman, 'Privacy, Practice and Performance' (2022) 110 *California Law Review* 1221.

108 Waldman, 'False Promise' (n 86); Julie E. Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press, 2019), chapter 6.

109 Gerrit de Vynck & Will Oremus, 'As AI booms, tech firms are laying off their ethicists' (*Washington Post*, 30 March 2023) <https://www.washingtonpost.com/technology/2023/03/30/tech-companies-cut-ai-ethics/> accessed 19 May 2023.

110 Article 35(3), DSA (n 19).

111 European Commission, '2022 Strengthened Code of Practice on Disinformation' (2022) European Commission <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation> accessed 22 February 2023 ('CoP').

112 Measure 18.1, CoP (n 111).

113 Measure 18.3, CoP (n 111).

114 Griffin & Vander Maelen (n 20).

115 This is a feature of risk-based regulation generally: see Cohen (n 108); Kaminski (n 73).

116 Ari Ezra Waldman, *Industry Unbound: The Inside Story of Privacy, Data, and Corporate Power* (Cambridge University Press, 2021).

117 Meßmer & Degeling (n 3); Johann Laux and others, 'Taming the few: Platform regulation, independent audits, and the risks of capture created by the DMA and DSA' (2021) 43 *Computer Law & Security Review* 105613 <https://doi.org/10.1016/j.clsr.2021.105613>

118 Farrand (n 73)

find technocratic solutions to particular problems identified in today's economies of visibility, rather than more significantly rethinking the commercial objectives and criteria according to which visibility is allocated. As such, Section 5 DSA also tends towards market naturalism: it takes current logics of content curation as given, and endeavours only to address some obvious negative externalities.

Indeed, although Section V attempts to address some of the negative effects of recommendation systems optimised for engagement and ad revenue, other CoP commitments embrace and institutionalise marketised content curation. Most notably, Section II is titled 'scrutiny of ad placements' and broadly aims to disincentivise disinformation production by preventing it from being monetised via advertising. To this end, platforms and advertisers commit to expanding the availability and use of 'brand safety' tools which give advertisers more control over what content accompanies their adverts.[119] These are framed as an important measure that already works well, but must be further expanded: 'Avoiding the misplacement of advertising on online Disinformation websites requires further refinement of already widely used brand safety tools to successfully continue to meet this challenge.'[120] The CoP thus aims to utilise advertisers' financial leverage against both disinformation creators and platforms, who will face more pressure to prevent reputationally-damaging ad placements.

Importantly, this will have consequences beyond the disinformation context. Major platforms already offer ad placement controls for advertisers across numerous content areas,[121] typically based on the standards created by advertising industry association GARM.[122] Platforms also explicitly state that these standards influence their moderation policies.[123] Consequently, they will also at least indirectly affect recommendations. Advertisers given expanded tools to track and control ad placements are likely to demand that these tools also cover 'unsafe' content categories other than disinformation. This would also serve platforms' own interests, since improved brand safety controls can be presented as a mitigation measure for other systemic risks mentioned in Article 34.

This has concerning implications for media freedom and freedom of expression. For example, GARM's definition of 'high-risk' political content is 'Depiction or discussion of debated social issues and related acts in negative or partisan context',[124] which would seemingly include large portions of innocuous conversations, cultural and media content, and contributions to political debate. Brand safety tools have previously been shown to demonetise and depress the visibility of much political content, as well as LGBTQIA+-related content, which many advertisers do not consider 'family-friendly'.[125]

These developments echo decades of research in political economy of the media showing that advertiser-funded media have always been incentivised to suppress marginalised perspectives and controversial political opinions, and promote upbeat, pro-consumerist content deemed to have mainstream appeal.[126]

Accordingly, by encouraging development and uptake of tools which give advertisers more control over content governance, the CoP is likely to exacerbate inequalities of visibility. It also institutionalises and legitimises corporate brand safety practices by portraying them as socially beneficial anti-disinformation measures, further naturalising and entrenching the market logic that structures online economies of visibility. Instead of reforming recommendation systems that organise content according to its commercial value as a vehicle for advertising, the CoP in effect aims to perfect them by enabling more accurate assessments of market value.

4. Conclusion

Overall, then, the DSA's regulation of recommendations can best be understood as aiming to correct market failures within existing social media economies of visibility. Consumers should be better informed and have more choices; creators should be able to challenge arbitrary deviations from recommendation systems' standard criteria; and specific risks associated with engagement-based content curation should be mitigated – albeit in a highly technocratic way, which delegates regulatory power to private actors and assumes content curation will still be guided by business objectives.

The DSA's ideal of fair and non-discriminatory treatment in markets for visibility designed by and for corporate platforms is, to say the least, an impoverished understanding of justice. Indeed, by promoting this narrow ideal of market justice within existing corporate economies of visibility, the DSA naturalises and legitimises these systems and the unequal distribution, representation and participation that they inevitably produce. Justice calls not for an equalisation of opportunities to compete in mythically neutral markets, but for a more fundamental rethinking of how online economies of visibility are structured and governed, and for the development of alternative logics of content curation, based on criteria other than commercial value.

It is possible to envisage measures that could move somewhat in this direction within the EU's existing regulatory framework. For example, further codes of conduct could provide clearer guidance on how platforms should test and implement alternative objectives for recommendation systems (like bridging or diversity), and address systemic risks relating to discrimination and social injustice.[127] Ultimately, however, alternative logics of content curation focused on public-in-

119 Commitment 1, CoP (n 111).
120 Section II(h), CoP (n 111).
121 Griffin, 'Brand safety' (n 65).
122 GARM, 'GARM Brand Safety Floor + Suitability Framework' (17 June 2022) World Federation of Advertisers <https://wfanet.org/knowledge/item/2022/06/17/GARM-Brand-Safety-Floor--Suitability-Framework-3> accessed 19 May 2023.
123 Griffin, 'Brand safety' (n 65).
124 GARM (n 122), 5.
125 See e.g. Julia Alexander, 'YouTube moderation bots punish videos tagged as 'gay' or 'lesbian,' study finds' (The Verge, 30 September 2019) <https://www.theverge.com/2019/9/30/20887614/youtube-moderation-lgbtq-demonetization-terms-words-nerd-city-investigation> accessed 25 April 2023; CHEQ, 'Brand Safety's Technological Challenge: How Keyword Blacklists Are Killing Reach and Monetization. A Study by CHEQ's Department of Data Science' (2019) CHEQ <https://info.cheq.ai/hubfs/Research/Brand_Safety_Blocklist_Report.pdf> accessed 22

February 2023; Ben Parker, 'How advertisers defund crisis journalism' (The New Humanitarian, 27 January 2021) <www.thenewhumanitarian.org/analysis/2021/01/27/brand-safety-ad-tech-crisis-news> accessed 22 February 2023; Stuart Cunningham & David Craig, 'Creator Governance in Social Media Entertainment' (2019) 5(4) Social Media + Society <https://doi.org/10.1177/2056305119883428>. For a detailed review of how brand safety concerns affect the visibility of social media content see Griffin, 'Brand safety' (n 65).
126 C. Edwin Baker, 'Advertising and a Democratic Press' (1992) 140 University of Pennsylvania Law Review 2097; Noam Chomsky & Edward S. Herman, Manufacturing Consent: The Political Economy of the Mass Media (Pantheon Books, 1995).
127 Griffin & Vander Maelen (n 20).

terest goals do not seem likely to thrive while social media platforms are predominantly owned and run by a small number of multinational conglomerates whose business models dictate that recommendation systems should be designed to maximise advertising revenue. Given that the DSA (and other EU platform regulations) appear committed to regulating rather than restructuring today's advertising-funded, corporate social media market,[128] it is doubtful whether the issues outlined in this paper can be meaningfully addressed within the existing regulatory framework.

Democracy, pluralism and equality in the media are inherently difficult and contested goals which can never be fully attained. However, they would be far better served by a social media sector that is not wholly governed by market forces. Public funding and other policies to support and promote non-commercial governance models for online media could provide the necessary space to prioritise goals other than profit (an approach that most Europeans already take for granted in older media sectors like news journalism and broadcasting).[129] Accordingly, building a more just online media system demands a reorientation not just towards a politics of visibility, in Banet-Weiser's sense of political projects instrumentalising media visibility to reach their goals,[130] but towards a political economy of visibility – that is, a political project based on the recognition that the current institutional structures of the social media market are the result of contingent political choices, and that it could and should be structured differently.

Acknowledgements

128 Leerssen, 'Soap Box' (n 3), 50; Farrand (n 73).

129 For concrete policy proposals oriented towards creating non-market platform governance institutions, see Ethan Zuckerman, 'The Case for Digital Public Infrastructure' (17 January 2020) Knight First Amendment Institute Essays & Scholarship <https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure> accessed 15 August 2023; James Muldoon, *Platform Socialism: How to Reclaim our Digital Future from Big Tech* (Pluto, 2022); Victor Pickard, 'Can Journalism Survive in the Age of Platform Monopolies? Confronting Facebook's Negative Externalities' in Terry Flew and Fiona R. Martin (eds), *Digital Platform Regulation: Global Perspectives on Platform Governance* (Springer, 2022) 23–41 <https://link.springer.com/chapter/10.1007/978-3-030-95220-4_2> accessed 15 August 2023; Ben Tarnoff, *Internet For the People: The Fight for Our Digital Future* (Verso, 2022); Rachel Griffin, 'Public and private power in social media governance: multistakeholderism, the rule of law and democratic accountability' (2023) 14(1) *Transnational Legal Theory* 46 <https://doi.org/10.1080/20414005.2023.2203538>

130 Banet-Weiser, *Empowered* (n 10), 22.