Technology and Regulation

Codes of Conduct in the Digital Services Act

Functions, Benefits & Concerns

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Abstract

Articles 45-47 of the Digital Services Act provide for codes of conduct to 'contribute to the proper application' of the Act. Codes could therefore significantly shape the DSA's implementation and its effectiveness. This article provides the most detailed analysis to date of the role of codes in the DSA, making three key contributions. First, it maps the functions and legal status of DSA codes, showing that they create de facto legal obligations for the largest platforms. This underlines the need to consider how they will shape the DSA's interpretation. Second, the article argues that codes could significantly strengthen platform companies' accountability by providing more detailed standards, mandating risk mitigation measures in under-addressed areas, and broadening stakeholder participation. Third, however, it identifies potential disadvantages such as capacity limitations, corporate capture, and legitimacy and accountability issues.

1. Introduction

As our social, political and economic lives shift online, there is increasing public concern about the power of digital platforms. Prominent policy issues range from disinformation to political polarisation, media concentration, and online harassment of women and minorities. In this context, technology regulation has also been a major policy priority for the 2019-24 European Commission.[1] A central element of its legislative programme is the Digital Services Act (DSA), which was passed in 2022 and establishes a new consolidated regime for digital content regulation. Its stated aims are to address policy issues such as the dissemination

1 European Commission, 'A Europe fit for the digital age' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en> accessed 12 April 2023.

of illegal or harmful content; to protect users' fundamental rights, for example to express themselves freely online; and to promote internal market integration via harmonised EU-wide regulation.[2]

The DSA establishes a tiered regulatory regime. Certain obligations apply to all intermediary services; some only to services hosting user-generated content, or 'online platforms' which disseminate such content to the public; and some only to 'very large online platforms' and 'very large online search engines' (hereafter: VLOPs/VLOSEs) with over 45 million monthly users in the EU. While it is not possible to summarise this lengthy and complicated legal text here,[3] it can broadly be said that the obligations applying to all intermediaries and platforms primarily aim to establish procedures for removal of illegal content (e.g. via a 'notice-and-takedown' framework[4]) and safeguards for user rights (e.g. transparency and contestability of content moderation decisions). In contrast, the regulatory regime for VLOPs/VLOSEs goes beyond obligations relating to individual users or pieces of content, and creates 'due diligence' obligations requiring more systemic changes. Central to this regime are Articles 34-35, which require VLOPs/VLOSEs to regularly assess various broadly-defined 'systemic risks' and implement risk mitigation measures.

The DSA became fully operative in February 2024, and attention has turned to the details of its implementation.[5] Many open questions remain about how key provisions like Articles 34-35 will be interpreted, which policy areas the Commission and national regulators (led by agencies designated as digital services coordinators, or DSCs) will prioritise, and how effectively this legislative framework will hold major platforms accountable – an objective which itself is open to many different interpretations.

In this context of uncertainty, the DSA regime provides for the establishment of codes of conduct to 'contribute to the proper application of this Regulation' (Article 45(1) DSA). While scholars disagree on how exactly to define codes of conduct,[6] they are broadly understood as regulatory instruments that 'aim to define standards and principles'[7] to provide 'guidance on correct procedure and behaviour'.[8] In the DSA, codes serve as tools to help translate abstract provisions into concrete actions. As such, they can significantly shape how the DSA is implemented in practice – and, ultimately, how effectively it achieves its stated objectives.

This article offers a systematic analysis of DSA codes of conduct, combining a doctrinal analysis with a normative evaluation.[9] First, Section 2 offers an in-depth doctrinal analysis of the legal framework for DSA codes. The article identifies five key functions: concretising vague provisions, remedying infringements, facilitating regulatory oversight, enabling multistakeholder input, and mandating future action in under-

2 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 (Digital Services Act) [2022] OJ L277.

3 For more comprehensive analyses see Florence G'sell, 'The Digital Services Act (DSA): A General Assessment' in A. von Ungern-Sternberg (ed), *Content Regulation in the European Union – The Digital Services Act* (Trier Institute for Digital Law 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4403433> accessed 12 April 2023.

4 Folkert Wilman, 'The EU's system of knowledge-based liability for hosting service providers in respect of illegal user content – between the e-Commerce Directive and the Digital Services Act' (2021) 12(3) *JIPITEC* 1 <https://www.jipitec.eu/issues/jipitec-12-3-2021/5343> accessed 13 April 2023.

5 J. van Hoboken and others (eds), *Putting the DSA Into Practice: Enforcement, Access to Justice and Global Implications* (Verfassungsbooks 2023) <https://doi.org/10.17176/20230208-093135-0> accessed 13 April 2023.

6 Defining soft law instruments in general proves difficult, due to the conceptual flexibility and differences in implementation.

7 Helen Keller, 'Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy' in R. Wolfrum and R. Volker, *Legitimacy in International Law* (Springer 2008) 220.

8 B.J. Koops and others, 'Should Self-Regulation Be the Starting Point?' in B.J. Koops and others (eds), *Starting Points for ICT Regulation: Deconstructing Prevalent Policy One-liners* (TMC Asser Press 2006) 126.

9 This article is based on research conducted in collaboration with Carl Vander Maelen, and builds on previous co-authored research: see C. Vander Maelen & R. Griffin, 'Twitter's retreat from the Code of Practice on Disinformation raises a crucial question: are DSA codes of conduct really voluntary?' (*DSA Observatory*, 12 June 2023) <https://dsa-observatory.eu/2023/06/12/twitters-retreat-from-the-code-of-practice-on-disinformation-raises-a-crucial-question-are-dsa-codes-of-conduct-really-voluntary/> accessed 19 June 2024; R. Griffin & C. Vander Maelen, 'Codes of Conduct in the Digital Services Act: Exploring the Opportunities and Challenges' (2023) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4463874> accessed 19 June 2024; R. Griffin, 'Codes of Conduct in EU Digital Regulation and AI Policy: The Potential and Risks of Soft Law Tools', in Kostina Prifti and others (eds), *Digital Governance: Confronting the Challenges Posed by Artificial Intelligence* (TMC Asser Press, 2024).

addressed policy areas. It also offers an overview of relevant codes which already exist or are in progress. Finally, it analyses the legal status of DSA codes, situating them within literature on EU soft law and showing that participation and compliance is effectively mandatory for VLOPs/VLOSEs.

Building on this analysis, sections 3 and 4 provide a forward-looking policy analysis of the potential advantages and drawbacks of DSA codes. Section 3 argues that codes could significantly enhance risk mitigation and transparency. They could strengthen accountability by providing more detailed and stringent standards; mandate risk mitigation in areas which the rest of the DSA has not adequately addressed; and enable participation by underrepresented stakeholders. However, Section 4 sounds a note of caution. Realising these benefits may be challenging, due to capacity limitations relating to complex and resource-intensive negotiation processes and lack of adaptability for different platforms, with these negotiation processes likely to be dominated by the interests of VLOPs/VLOSEs. The article also raises questions about the legitimacy of creating *de facto* binding obligations addressing politicised and contested issues through informal soft law instruments. Ultimately, the conclusions are cautiously optimistic. The DSA may be a flawed piece of legislation, but now that it is finalised and in force, attention must turn to how it can best be leveraged and built upon to strengthen accountability. Codes offer one important, albeit imperfect avenue to do this.

2. Codes of Conduct in the DSA

2.1 The Functions of Codes of Conduct

References to codes of conduct appear throughout the DSA. Articles 45-47 are fully dedicated to codes, but they are also mentioned across five other articles and 15 recitals (detailed below in Table 1). This already indicates their significance within the DSA's regulatory framework, since they are envisaged as playing a role in the implementation of numerous provisions addressing different topics. On this basis, the DSA can be characterised as a hybrid regulatory framework: soft law codes are premised on hard law obligations, while these hard law provisions in turn rely on these soft law instruments for practical detail.[10] This approach has become increasingly prevalent in EU policy,[11] including in other areas of technology regulation.[12]

In this context, codes of conduct are not the only relevant type of soft law instrument. In particular, Article 35(3) provides for the Commission (in cooperation with national DSCs) to issue guidance on the interpretation of Article 35(1), which can recommend specific mitigation measures or best practices. Article 44 also encourages the Commission and Board to support the development of technical standards by private standardisation organisations, in particular as regards compliance with specific DSA provisions that involve the design of online interfaces and databases, as well as auditing methodologies and child safety measures.[13]

In EU law, codes of conduct and guidelines are both regarded as types of 'steering instrument' which establish, supplement or give effect to EU objectives and policies.[14] However, there are several important differences between DSA codes and guidelines. First, while it is mandatory that stakeholders are consulted during the drafting of guidelines, it is clear that they are issued and authored by the Commission. The role of the Commission and Board in codes of conduct is very different, namely to 'encourage and facilitate' their drafting. The Act therefore requires that private actors hold the pen to write such codes – although

10 See Julian Jaursch, 'Overview of DSA delegated acts, reports and codes of conduct' (2022) Stiftung Neue Verantwortung <https://www.stiftung-nv.de/en/publication/overview-dsa-delegated-acts-reports-and-codes-conduct> accessed 6 April 2023.

11 Delia Ferri, 'The role of soft law in advancing the rights of persons with disabilities in the EU: A "hybridity" approach to EU disability law' (2023) *European Law Journal* <https://doi.org/10.1111/eulj.12454> accessed 7 April 2023.

12 Carl Vander Maelen, 'Hardly Law or Hard Law? Investigating the Dimensions of Functionality and Legalisation of Codes of Conduct in Recent EU Legislation and the Normative Repercussions Thereof' (2022) 47 *European Law Review* 752; R. Griffin, 'Codes of Conduct in EU Digital Regulation and AI Policy: The Potential and Risks of Soft Law Tools', in Kostina Prifti and others (eds), *Digital Governance: Confronting the Challenges Posed by Artificial Intelligence* (TMC Asser Press, forthcoming).

13 Technical standards will play an even greater role in the interpretation and enforcement of the 2024 AI Act. See M. Veale and F.Z. Borgesius, 'Demystifying the Draft EU Artificial Intelligence Act - Analysing the good, the bad, and the unclear elements of the proposed approach' (2021) 22(4) *Computer Law Review International* 97 <https://doi.org/10.9785/cri-2021-220402> accessed 7 April 2023.

14 Linda Senden, 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9(1) *Electronic Journal of Comparative Law* 1, 24.

the Commission might certainly provide the ink. Second, as this section will show, the potential scope of codes of conduct is far broader than that of guidelines (and standards). Article 35(3) is somewhat broader, but clearly states that guidelines must address 'the application of paragraph 1 in relation to specific risks'. As this section will show, codes will also play an important role in relation to the application of Article 35(1), but they can additionally address a much wider range of topics. Furthermore, they are not only relevant to VLOPs/VLOSEs, but can also involve and apply to a much wider range of actors: Article 45(2) mentions 'other providers…of online platforms and of other intermediary services, as appropriate, as well as relevant competent authorities, civil society organisations and other relevant stakeholders'.

Regarding the topics that will be or could be addressed by codes, Articles 45-47 mention two specific topics and one much broader umbrella category. First, Article 46(1) states that the Commission should 'encourage and facilitate the drawing up' of codes of conduct to 'contribute to further transparency for actors in the online advertising value chain', beyond the basic transparency requirements found in Articles 26 and 39 DSA. In these contexts, Article 46(2) provides that codes should ensure 'effective transmission of information that fully respects the rights and interests of all parties involved'. While this is rather vague, codes are presumably envisaged as enhancing effectiveness by providing more specific guidance on implementation: for example, technical standards for the presentation of disclosures under Article 26(1). However, codes could also expand the scope of these obligations, in particular by including a wider range of stakeholders as signatories, not only platform providers: Article 46(1) provides that 'other relevant service providers, such as providers of online advertising intermediary services, other actors involved in the programmatic advertising value chain, or organisations representing recipients of the service and civil society organisations or relevant authorities' should participate in drawing up such codes. These other actors could also voluntarily commit to publish and/or engage with transparency disclosures.

Second, Article 47(1) mandates the development of codes to improve accessibility and 'full and effective, equal participation' for people with disabilities – in particular to facilitate accessibility of VLOPs/VLOSEs (Recital 105). Other than Article 47(2)(c), which clarifies that the various DSA obligations to provide forms and disclose information should be implemented in a 'user-friendly' manner,[15] the DSA does not include any specific obligations regarding accessibility.[16] Thus, in contrast to Article 46, which envisages codes as further specifying existing hard law obligations, Article 47 uses them to address an area not covered by hard law.[17]

Finally, Article 45 calls, in much more general terms, for the European Commission and the European Board for Digital Services[18] (hereafter: the Board) to 'encourage and facilitate' development of codes 'to contribute to the proper application of this Regulation, taking into account in particular the specific challenges of tackling different types of illegal content and systemic risks'. Illegal content is defined in Article 3(h) as any information that 'in itself or in relation to an activity, including the sale of products or the provision of services' does not comply with EU or national law. 'Systemic risk' is not defined in the DSA, but Article 34(1) provides examples: dissemination of illegal content; negative effects on fundamental rights; negative effects on civic discourse, electoral processes and public security; and negative effects related to gender-based violence, public health, or people's physical or mental wellbeing, especially of minors. Overall, the terms 'illegal content' and 'systemic risks' are both extraordinarily broad – and 'in particular' suggests that they are not the only possible topics. Thus, Article 45 could in principle provide a mandate to develop codes in a vast range of policy areas – although Recital 106 suggests some priority areas, and as section 4(a) will discuss, the capacity to develop new codes will inevitably be limited in practice.

15 These include e.g. Articles 14(1) (transparency of content policies) and 26 (on advertising transparency).

16 Article 34 could reasonably be interpreted as extending to systemic inequalities affecting people with disabilities, since they engage the fundamental right to non-discrimination. However, what fundamental rights require in this context and how they should apply to actions by private companies, as opposed to state authorities, is so ambiguous that it is difficult to regard this as a clear obligation to pursue accessibility improvements: see R. Griffin, 'Rethinking rights in social media governance: human rights, ideology and inequality' (2023) 2(1) *European Law Open* 30.

17 The use of soft law to fill gaps in hard law frameworks and set an agenda for further action is in line with historical trends in EU disability law: see Ferri (n 11).

18 This Board represents Member States' national regulators and essentially acts as the pan-European supervisor for the DSA (see Article 61 DSA).

Article 45(2) further provides that 'where significant systemic risk [sic] within the meaning of Article 34(1) emerge' and this concerns several VLOPs/VLOSEs, the Commission 'may invite the providers [...] as well as relevant competent authorities, civil society organisations and other relevant stakeholders' to draw up codes including 'specific risk mitigation measures, as well as a regular reporting framework'. This provision appears to empower the Commission to request codes addressing specific areas of concern, as opposed to just encouraging code development in general – an 'invitation' which will be difficult for companies to refuse, as section 2(c) discusses.

Overall, across Articles 45-47 and related provisions, codes are envisaged as serving five specific functions, summarised in Table 1:

Table 1. Mapping the functions of codes of conduct in the DSA

Function	Relevant provisions
Concretising	Article 45(2) (codes provide specific commitments regarding risk mitigation) Article 35(1)(h) (complying with codes is itself a mitigation measure) Article 46(2) (codes ensure effective implementation of advertising transparency obligations) Recital 104 (codes may be considered an appropriate mitigation measure) Recital 107 (advertising transparency codes should specify modalities for information sharing) Recital 89 (codes may be appropriate mitigation measures to protect minors)
Oversight	Article 41(3)(f) (compliance officers monitor compliance with codes) Article 37(1)(b) (independent audits evaluate compliance with codes) Article 45(3) (codes set out specific objectives, KPIs and reporting standards) Article 45(4) (Commission and Board monitor and evaluate achievement of code objectives and publish findings) Recital 107 (Commission should include evaluation mechanisms in advertising codes, and may invite Fundamental Rights Agency or European Data Protection Supervisor to express opinions)
Multistakeholder input	Article 45(2) (participation of national authorities, civil society and other stakeholders in drawing up codes) Article 46(1) (advertising transparency codes should include users, civil society, and other actors in advertising value chains) Article 47(1) (participation of users and civil society in accessibility codes) Article 63(1)(e) (Board should promote development and implementation of codes in cooperation with relevant stakeholders) Recital 107 (multistakeholder input should ensure advertising transparency codes are widely-supported, technically sound, effective and user-friendly)
Mandate for future action	Article 45(2) (emerging systemic risks) Article 46 (advertising transparency) Article 47 (accessibility) Recital 104 (illegal content, disinformation, manipulation, minor safety) Recital 105 (accessibility) Recital 107 (advertising transparency)
Remedial	Article 75(2) (measures to terminate or remedy infringement of DSA may include participation in codes) Recital 145 (Commission must consider adherence to codes in action plans to address infringement)

First, codes will concretise, supplement and expand various DSA obligations – most significantly, in relation to the risk mitigation framework for VLOPs/VLOSEs. Codes can include 'commitments' to take specific mitigation measures (Article 45(2) DSA). Additionally, Article 35(1)(h) provides that participation in a relevant code can, in itself, be considered a risk mitigation measure. Thus, while Article 35 only establishes very broad and abstract obligations, codes will provide more specific and concrete commitments and measures to which platforms can be held accountable.

In addition, while this is not explicitly mentioned in the DSA text, it appears that codes will play an important concretising role for research data access under Article 40 DSA. Article 40(4) requires VLOPs/VLOSEs to provide internal data on request to independent researchers vetted by national Digital Services Coordinators (hereafter: DSCs). Article 40(12) further requires them to provide access 'without undue delay [...] where technically possible, to real-time data, provided that the data is publicly accessible in their online interface by researchers'.[19] However, many questions remain about how – and how easily – researchers will be able to access data in practice, and how privacy and data protection risks will be handled.[20] As detailed in section 2(b), a draft code on platform-to-researcher data access is expected to play an important role in facilitating data access, by providing more concrete detail on technical aspects and privacy safeguards.[21]

Second, relatedly, codes have a remedial function. Where the Commission finds a failure of compliance by a VLOP/VLOSE, the provider must set out measures to terminate or remedy the infringement in an 'action plan'; such measures 'may also include, where appropriate, a commitment to participate in a relevant code of conduct' (Article 75(2) DSA). Recital 145 further provides that when the Commission evaluates whether the action plan is sufficient, it should '[take] also into account whether adherence to relevant code of conduct [sic] is included among the measures proposed'. Implicitly, this is a desirable response that should count in favour of the provider, providing further incentives for participation.

Third, codes should facilitate and develop oversight. The DSA has been described as taking a 'meta-regulatory' approach,[22] whereby regulators set broad standards and oversee the development of more specific guidelines and compliance measures by regulated companies, with additional input from auditors, standards bodies and civil society organisations. Of these, regulated companies and auditors are explicitly directed to consider codes. VLOPs/VLOSEs must appoint internal compliance officers, who (among other tasks) monitor compliance with applicable codes (Article 41(3)(f) DSA). These companies are also subject to yearly independent audits of their risk assessments and mitigation measures, as well as compliance with codes of conduct (Article 37(1) DSA). Companies receiving a 'negative' audit report must report to the Commission on how they are responding to its recommendations (Article 37(6) DSA). As well as substantive commitments, Article 45(3) determines that such codes should provide key performance indicators (KPIs) and reporting standards. This should further facilitate internal and external compliance monitoring.

Fourth, code development provides opportunities for multistakeholder input into compliance measures. Articles 46 and 47 both encourage involvement of user groups and other civil society organisations. Article 45(2) mandates the Commission to invite relevant competent authorities, civil society organisations and other relevant stakeholders to participate in developing codes, and Article 63(1)(e) similarly provides that the Board should facilitate stakeholder participation and consultation.

Finally, codes give policymakers a mandate to promise future action in specific areas – notably accessibility and advertising transparency, since codes in these areas are explicitly mandated by Articles 46-47, as well as several other priority areas named in Recital 106: illegal content, disinformation and manipulation, and adverse effects on minors. These provisions serve to set an agenda, and strengthen the Commission's accountability for taking further action in these areas, by providing commitments to which it can be held.[23] More pragmatically, they can be understood as papering over some gaps left by the rather rushed DSA

19 This appears to be an implicit reference to the kinds of application programming interfaces (APIs) that major platforms have historically used to provide streamlined, large-scale researcher access to user-generated content, albeit unreliably and selectively. See M. Vermeulen, 'The Keys to the Kingdom' (2021) *Knight First Amendment Institute Essays & Scholarship* <https://knightcolumbia.org/content/the-keys-to-the-kingdom> accessed 10 April 2023.

20 M. Vermeulen, 'Researcher Access to Platform Data: European Developments' (2022) *Journal of Online Trust and Safety* <https://doi.org/10.54501/jots.v1i4.84> accessed 10 April 2023.

21 Justin Hendrix, 'Working Group Publishes New Draft Code for Researcher Access to Platform Data' (*Tech Policy Press*, 31 May 2022) <https://techpolicy.press/working-group-publishes-new-draft-code-for-researcher-access-to-platform-data/> accessed 7 April 2023.

22 N. Zingales, 'The DSA as a paradigm shift for online intermediaries' due diligence: Hail to meta-regulation' (*Verfassungsblog*, 2 November 2022) <https://verfassungsblog.de/dsa-meta-regulation/> accessed 7 April 2023.

23 Interestingly, this presents a twist on one established function of soft law instruments, which is to commit to further legislative action in future: see Ferri (n 11). Here, conversely, hard law obligations are used to promise further development of soft law commitments and standards – further underscoring the DSA's hybrid nature and the interdependence of hard and soft law measures.

negotiations. Leading European politicians were eager to pass the DSA quickly,[24] since issues like disinformation were regarded as urgent policy priorities[25] and Member States were increasingly taking regulatory action at national level,[26] compromising internal market harmonisation (Recital 2 DSA). In areas where policymakers lacked the time and/or political will to negotiate effective and coherent standards in the legal text itself, promising future codes allowed them to be seen to be taking action, while postponing negotiations to a later date and avoiding legislative delays.

Perhaps related to this hurried process, the interrelationship of the various relevant provisions remains in some ways unclear and arguably reflects poor drafting. For example, Article 45(2) (empowering the Commission to request participation in specific codes by VLOPs/VLOSEs) seems a largely redundant addition to the broader Article 45(1) (empowering the Commission in more general terms to encourage code development). It does add some additional details, for example on civil society participation. However, it is unclear why these aspects would only be relevant where the Commission requests a code addressing a specific issue, and not for other codes developed under Article 45(1).

Further, Article 45(3) provides that codes developed under Articles 45(1) and (2) should contain 'key performance indicators and reporting commitments'. It is unclear why this requirement should not also apply to codes under Articles 46 and 47.[27] Illegal content and systemic risks may be seen as more harmful and thus deserving closer scrutiny. However, opacity in online advertising has also been linked to systemic risks in important policy areas, ranging from privacy to competition and media pluralism.[28] Indeed, Articles 34-35 explicitly mention advertising systems as relevant to the creation and mitigation of systemic risks. It is therefore unclear why clear KPIs and effective oversight would not be considered necessary in governing advertising transparency. Finally, Article 37(1) DSA states that audits must assess compliance with codes under Articles 45-46 but not codes on accessibility under Article 47. It is unclear why accessibility commitments should not be audited. This weaker oversight creates a risk of 'bluewashing', in which corporations benefit reputationally from claiming adherence to a code but take little action in practice.[29]

Finally, it is worth noting that Articles 45-47 DSA only mention 'Union level' codes of conduct – contrasting with previous technology regulations like the Audiovisual Media Services Directive (AVMSD) and GDPR.[30] This appears to reflect a concern for EU-wide consistency – unsurprisingly, since internal market harmonisation has always been a key goal of EU platform regulation.[31] Prioritising EU-wide consistency brings both advantages and drawbacks, as analysed in section 4(b).

24 Table Europe, 'DSA: Confidence determines the start of the trilogue' (*Table Europe*, 1 February 2022) <https://table.media/europe/en/news-en/dsa-confidence-determines-the-start-of-the-trilogy/> accessed 7 April 2023.

25 U. Von der Leyen, 'Speech by President von der Leyen at the Paris Peace Forum' (European Commission, 2021) <https://ec.europa.eu/commission/presscorner/detail/en/speech_21_5977> accessed 7 April 2023.

26 A. Splittberger and C. Walz, 'EU: New hate speech rules for social networks in the European Union' (Reed Smith, 2021) <https://www.technologylawdispatch.com/2021/06/privacy-data-protection/eu-new-hate-speech-rules-for-social-networks-in-the-european-union/> accessed 7 April 2023.

27 Advertising transparency codes 'should include evaluation mechanisms'. See Recital 107 DSA (2022).

28 C. Armitage and others, 'Study on the impact of recent developments in digital advertising on privacy, publishers and advertisers' (2023) Publications Office of the European Union <https://op.europa.eu/en/publication-detail/-/publication/8b950a43-a141-11ed-b508-01aa75ed71a1/language-en> accessed 10 April 2023; S. Becker Castellaro and J. Penfrat, 'The DSA fails to reign in the most harmful digital platform businesses – but it is still useful' (*Verfassungsblog*, 8 November 2022) <https://verfassungsblog.de/dsa-fails/> accessed 5 April 2023.

29 D. Berliner and A. Prakash, '"Bluewashing" the Firm? Voluntary Regulations, Program Design, and Member Compliance with the United Nations Global Compact' (2015) 43 *Policy Studies Journal* 115. The term 'bluewashing' was originally used specifically for compliance with the UN Sustainable Development Goals, but is now increasingly applied more broadly to overblown claims of adhering to corporate social responsibility commitments.

30 The latter in particular provides for the development of codes of conduct which can apply at a national level, across multiple EU Member States, or with 'general validity' to transfer data outside the EU: Articles 40(5)-40(9) GDPR.

31 M. 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> accessed 5 April 2023.

2.2 Existing Codes of Conduct

Multiple codes addressing platform regulation had already been developed before the DSA's passage – formally on a purely voluntary basis by the industry, though with heavy encouragement and involvement by the Commission.[32] With the DSA in force, these can now be 'slotted in' as official codes under Article 45. This will in particular allow them to fulfil the concretising, oversight and remedial functions identified in section 2(a).

First, the 2016 Code of Conduct on Hate Speech addressed a topic that remains a major policy priority in the DSA: ensuring swift removal of illegal content, in this case specifically hate speech relating to race, religion or ethnicity.[33] The Code is fairly short and its commitments primarily involve processes for third-party reporting of illegal hate speech. As such, they are now largely superseded by the more detailed provisions on reporting and moderation of illegal content in Articles 14-21 DSA. However, the Commission's 2022 evaluation of the Code concluded that it should be revisited to 'ensure that the implementation of the Code supports compliance with the DSA [...] This process may lead to a revision of the Code of Conduct in the course of 2023.'[34] Should the Code be revised, it seems likely that it will be officially incorporated under Article 45. In our opinion, there are strong arguments to expand the Code in order to more effectively address hate speech and related forms of abuse and harassment targeting marginalised groups, in particular by mandating more holistic interventions beyond moderation of illegal content. This possibility is discussed in depth in section 3.

A similar process is already underway with the Code of Practice on Disinformation, originally agreed in 2018. Subsequent assessments advocated 'a shift from the current flexible self-regulatory approach to a more co-regulatory one'.[35] The Commission published guidance setting out its vision for a 'Strengthened Code of Practice' in 2021, and after negotiations between platform companies and other industry actors (including for example advertiser associations and adtech companies), the updated code was unveiled in June 2022. Its preamble explicitly states that it 'aims to become a Code of Conduct under Article 35 [Article 45 in the final text] of the DSA'.[36]

Two further codes are in development at the time of writing in spring 2024. First, the European Digital Media Observatory (EDMO)[37] has drafted a Code of Conduct on Platform-to-Researcher Data Access. This Code was originally envisaged as a code of conduct under Article 40 GDPR, to 'responsibly facilitate' GDPR-compliant provision of data to researchers on a voluntary basis.[38] It describes appropriate safeguards

32 T. Quintel and C. Ullrich, 'Self-Regulation of Fundamental Rights? The EU Code of Conduct on Hate Speech, Related Initiatives and Beyond' in B. Petkova and T. Ojanen (eds), *Fundamental Rights Protection Online* (Edward Elgar Publishing 2020).

33 European Commission, 'The EU Code of conduct on countering illegal hate speech online' (2016) European Commission <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en> accessed 10 April 2023. The Code defines hate speech by reference to the Council 2008 Framework Decision on Racism, with the consequence that it does not formally apply to hate speech based on other characteristics such as sexuality, gender or disability. From a policy perspective, this is hard to justify: for a more detailed analysis see B. Botero Arcila and R. Griffin, *Social media platforms and challenges for democracy, rule of law and fundamental rights* (Committee on Civil Liberties, Justice and Home Affairs, European Parliament, 2023) <https://www.europarl.europa.eu/RegData/etudes/STUD/2023/743400/IPOL_STU(2023)743400_EN.pdf> accessed 12 April 2023.

34 European Commission, 'EU Code of Conduct against Online Hate Speech: Latest Evaluation Shows Slowdown in Progress' (24 November 2022) 1 <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_7109/IP_22_7109_EN.pdf>accessed 10 April 2023.

35 European Regulators Group for Audiovisual Media Services, 'ERGA Report on Disinformation: Assessment of the Implementation of the Code of Practice' (2020) ERGA, 52 <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf> accessed 10 April 2023.

36 European Commission, 'The Strengthened Code of Practice on Disinformation 2022' (2022) European Commission, 2 <https://ec.europa.eu/newsroom/dae/redirection/document/87585> accessed 10 April 2023 ('CPD').

37 EDMO is an EU-wide consortium of research institutions, independent from the EU and Commission. It has played an influential role in EU initiatives including the Code of Practice on Disinformation: see European Digital Media Observatory, 'Strengthened Code of Practice on Disinformation (2022) European Digital Media Observatory <https://edmo.eu/2022/06/16/edmo-welcomes-the-2022-strengthened-code-of-practice-on-disinformation/> accessed 7 April 2023.

38 European Digital Media Observatory, 'Report of the European Digital Media Observatory's Working Group on Platform-to-Researcher Data Access' (2022) 1 <https://edmo.eu/wp-content/uploads/2022/02/Report-of-the-European-Digital-Media-Observatorys-Working-Group-on-Platform-to-Researcher-Data-Access-2022.pdf> accessed 10 April 2023.

including ethical and methodological review, data minimisation and anonymisation, access restrictions, and 'clean rooms' with tightly-controlled access for particularly high-risk projects.[39] However, due to the extensive resources needed to further develop the code (e.g. establishing a monitoring body) EDMO has not yet submitted it to GDPR supervisory authorities for approval.[40] Meanwhile, however, for VLOPs/VLOSEs, providing research data is no longer voluntary but mandated by Articles 40(4) and 40(12) DSA – though many questions remain about their implementation in practice.[41] Consequently, the Code could instead be incorporated under Article 45 DSA.

Finally, the Commission has invited applications for committee members to draft a Code of Conduct on Age-Appropriate Design, addressing 'harmful and illegal content, conduct, contacts and consumer risks' that particularly impact minors, as well as 'age-inappropriate content, bullying, grooming, child sexual abuse or radicalisation'.[42] The committee will include civil society, research institutions and companies, as well as individuals who have relevant expertise and/or represent relevant stakeholder groups.[43] The Code should 'build on' the DSA, as well as the Audiovisual Media Services Directive (AVMSD) and GDPR.[44] It is thus presumably intended to fulfil Recital 106 DSA's call for a code addressing 'adverse effects on minors'. It could also potentially be incorporated into the risk mitigation framework via Article 45.

2.3 The legal status of codes

The DSA repeatedly and explicitly describes codes as 'voluntary' tools, in Recitals 98 and 103 and Articles 45(1) and 46(1).[45] Recital 103 provides that 'while the implementation of codes of conduct should be measurable and subject to public oversight, this *should not impair the voluntary nature of such codes and the freedom of interested parties to decide whether to participate. In certain circumstances, it is important that very large online platforms cooperate in the drawing-up and adhere to specific codes of conduct*' (emphasis added). This is paradoxical and arguably disingenuous. Behind the vague mention of 'importance' stands the fact that at least for VLOPs/VLOSEs, given the role of codes in the risk mitigation and auditing framework, participation in codes is all but inescapable as part of DSA compliance.[46]

VLOPs/VLOSEs face both positive and negative legal incentives to participate. On the one hand, it offers perhaps the most straightforward way to demonstrate compliance with risk mitigation obligations – although Recital 104 DSA states that 'the mere fact of participating in and implementing a given code of conduct should not in itself presume compliance.' Where infringement proceedings are underway, Article 75 provides that participation in codes of conduct could be a way to remedy non-compliance. On the other, 'refusal without proper explanations [...] of the Commission's invitation to participate' in a code could indicate an infringement of the DSA (Recital 104), as could a negative audit report which finds that a VLOP/VLOSE is not complying with codes it has signed (Article 37(6)).

Vividly illustrating this point, EU officials announced in May 2023 that X (formerly Twitter) – whose willingness and capacities to comply with relevant EU laws under new owner Elon Musk have been questioned, especially since he fired most of the company's legal and policy staff[47] – was withdrawing

39 European Digital Media Observatory (n 38).
40 European Digital Media Observatory (n 38) 1-2.
41 Vermeulen, 'Researcher Access' (n 20).
42 European Commission, 'Special Group on the EU Code of Conduct on Age-Appropriate Design: Terms Of Reference' (2023) European Commission, 2 <https://digital-strategy.ec.europa.eu/en/policies/group-age-appropriate-design> accessed 7 April 2023.
43 European Commission (n 42) 3.
44 European Commission, 'Special group on the EU Code of conduct on age-appropriate design' (*European Commission*, 2023) <https://digital-strategy.ec.europa.eu/en/policies/group-age-appropriate-design> accessed 7 April 2023.
45 The 2022 Strengthened Code of Practice on Disinformation, which will become an official DSA code under Article 45, also explicitly mentions its voluntary nature: see point (h) of the Preamble.
46 Vander Maelen & Griffin, 'Twitter's Retreat' (n 9); Griffin, 'Codes of Conduct in EU Digital Regulation and AI Policy' (n 9).
47 D. Milmo, '"Unprepared" Twitter among tech firms to face tough new EU digital rules' (*Guardian*, 25 April 2023) <https://www.theguardian.com/technology/2023/apr/25/unprepared-twitter-among-tech-firms-to-face-tough-new-eu-digital-rules> accessed 13 June 2023.

from the Code of Practice on Disinformation.[48] Commenting on the decision, Commission Vice-President for Values and Transparency Věra Jourová stated, 'I know the code is voluntary but make no mistake, by leaving the code, Twitter has attracted a lot of attention, and its actions and compliance with EU law will be scrutinised vigorously and urgently.'[49] The breadth and vagueness of Articles 34-35 gives the Commission significant discretion over their interpretation and enforcement. Jourová's statement confirms that the Commission is open to treating non-compliance with 'voluntary' codes as a violation of Article 35.[50]

Additionally, the Commission and Board can play leading roles in code development. They can identify specific risks that should be addressed and invite stakeholders of their choice to participate in negotiations (Article 45(2) and 63(1)(e)) – as well as ultimately determining whether the resulting commitments are sufficient to comply with Article 35. Since Article 45(2) mentions 'competent authorities' (national regulators) as relevant stakeholders, Member State governments and agencies may also exercise significant influence. This intensifies a dynamic already present in pre-existing self-regulatory codes, which were developed in response to demands from European politicians to take 'voluntary' action or face stricter legal regulation.[51] The 2022 Code of Practice on Disinformation was preceded by detailed 'guidance' from the Commission on what should be included.[52] While the Commission webpage hosting the Code describes it as 'the result of the work carried out by the signatories', it was generally understood throughout the development process that the Commission would not accept a Code which did not meet its 'expectations'.[53]

This aspect of the DSA reflects longer-term trends in EU tech policy. A 2002 report on the implementation of the 1995 Data Protection Directive noted that 'self-regulation increasingly takes place in a legal framework which allows for, or indeed requires, the assessment and/or approval of *soi-disant* "voluntary" codes, while State regulation may involve the drawing up of rules in consultation with (or even by) sectoral organisations... what one may call quasi-self-regulation.'[54] More recently, analyses of the GDPR identify a trend towards 'legalisation', in which soft law instruments create stronger *de facto* obligations, are increasingly precise and prescriptive, and delegate more regulatory authority – making them increasingly akin to hard law.[55] DSA codes are intended to be highly concrete and specific, will be *de facto* binding for VLOPs/VLOSEs, and will delegate significant regulatory power to private auditors, marking a further intensification of this trend.

Legalisation does not only raise theoretical concerns. Punitive consequences like fines are traditionally the domain of hard law, but could now follow from a failure to comply with a nominally-voluntary soft law framework. Developing *de facto* regulatory obligations relating to highly contested and politicised social issues – such as online speech regulation, media freedom, and public health and security – not through legislative processes but through informal negotiations between industry actors, in which the Commission and other unelected regulatory agencies will also exercise significant influence, raises concerns about the legitimacy of such standards and the measures companies will take to comply with them.[56]

Overall, then, this doctrinal analysis has underscored the significance of codes within the DSA framework. They have a strong *de facto* legal force, and – through the five functions identified above – will not only influence how the DSA is interpreted and enforced, but have the potential to redress gaps and flaws in

48 F. Gillett, 'Twitter pulls out of voluntary EU disinformation code' (*BBC News*, 27 May 2023) <https://www.bbc.com/news/world-europe-65733969> accessed 13 June 2023.

49 L. O'Carroll, 'Google and Facebook urged by EU to label AI-generated content' (*Guardian*, 5 June 2023) <https://www.theguardian.com/technology/2023/jun/05/google-and-facebook-urged-by-eu-to-label-ai-generated-content> accessed 13 June 2023.

50 Vander Maelen & Griffin, 'Twitter's Retreat' (n 9).

51 Quintel and Ullrich (n 32).

52 European Commission, 'Guidance on Strengthening the Code of Practice on Disinformation' (*European Commission*, 2021) <https://digital-strategy.ec.europa.eu/en/library/guidance-strengthening-code-practice-disinformation> accessed 7 April 2023.

53 European Commission, 'Signatories of the 2022 Strengthened Code of Practice on Disinformation' (*European Commission*, 2022) <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation> accessed 10 March 2023.

54 D. Korff, 'EC Study on the Implementation of Data Protection Directive - Report on the Findings of the Study: Comparative Summary of National Laws' (2002) European Commission Study Contract ETD/2001/B5-3001/A/49, 185.

55 Vander Maelen (n 12).

56 Griffin, 'Codes of Conduct in EU Digital Regulation and AI Policy' (n 9).

the legal framework. Yet the legal force and practical significance of codes also point to tensions around democratic legitimacy, participation and regulatory capture. The following sections build on this analysis and draw on experiences with already-existing codes to analyse the potential advantages that codes can offer (section 3), while also highlighting practical challenges and normative concerns (section 4).

3. The Potential Advantages of DSA Codes

Through the five functions outlined in section 2(a) – concretising vague provisions, strengthening oversight, remedying non-compliance, facilitating multistakeholder participation, and mandating future policy action – codes of conduct have the potential to significantly enhance the DSA's effectiveness. In particular, they could strengthen accountability and promote effective risk mitigation measures in areas that are not adequately addressed by the DSA's detailed provisions on content moderation and curation. These include for example hate speech, harassment and abuse; algorithmic discrimination; political polarisation and extremism; and negative effects for journalism and media pluralism.[57]

Codes can make important contributions in these areas because they offer a way to regulate systemic decisions about platform design, content curation, and trust and safety measures, as well as issues affecting collective interests and marginalised user groups. This contrasts with the individualistic approach that characterises most of the DSA's detailed provisions on content moderation and curation – which focus on things like ensuring individual illegal posts are deleted,[58] individual moderation decisions can be corrected,[59] and individual users can exercise control over the recommendations they see.[60] This makes them structurally unsuited to addressing systemic harms and representing collective or marginalised interests.[61] Systemic issues are primarily dealt with by the risk mitigation obligations for VLOPs/VLOSEs, but since these provisions remain extremely broad, vague and abstract, companies may interpret them in self-serving ways, making only superficial changes and avoiding (potentially) effective but costly interventions.[62] Compounding this, the systemic risk framework largely delegates regulatory interpretation and oversight to platform companies themselves, as well as private auditors. This enforcement system may be susceptible to corporate capture.[63]

As a way to strengthen this systemic risk framework, codes of conduct offer three advantages.[64] First, their concretising and remedial functions can introduce more specific norms and commitments to which platforms can be held accountable, while retaining flexibility. Second, their oversight and multistakeholder participation functions can develop institutional frameworks to realise accountability in practice. Finally, they can establish risk mitigation measures and commitments in areas which are underemphasised in the DSA, notably in platform design.

3.1 Concrete commitments

One concern about the DSA is that VLOPs/VLOSEs will themselves be primarily responsible for defining and prioritising systemic risks and determining how they should be mitigated. This creates an obvious possibility that they could selectively address only those they find convenient (sometimes called 'regulatory bias'[65]).

57 Botero Arcila and Griffin (n 33).
58 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 (Digital Services Act) [2022] OJ L 277/1, art. 9 & 16.
59 ibid, art. 20-21.
60 ibid, art. 27 & 38.
61 Griffin (n 16).
62 Griffin (n 16).
63 J. 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> accessed 11 April 2023.
64 This discussion builds on the advantages identified in Griffin, 'Codes of Conduct in EU Digital Regulation and AI Policy' (n 9).
65 J. Segal, 'Institutional Self-Regulation: What Should Be the Role of the Regulator? (Address to the National Institute for Governance Twilight Seminar, Canberra)' (*ASIC*, 2021) <https://asic.gov.au/about-asic/news-centre/speeches/institutional-self-regulation-what-should-be-the-role-of-the-regulator/> accessed 11 April 2023.

Various institutional mechanisms exist which could to some extent address this issue, by independently clarifying the interpretation of open-ended provisions. As mentioned in section 2(1), the Commission enjoys significant discretion in enforcing the systemic risk provisions and can also issue guidance on how it will interpret these obligations. In the long run, it is likely that some interpretative issues will be clarified by the courts. However, both of these avenues have important limitations. Given the politically significant and often controversial nature of questions about online media governance, giving too much discretion to an executive agency like the Commission to clarify what open-ended norms mean is problematic from the perspective of freedom of expression and media freedom.[66] Courts can provide more independent and authoritative guidance, but will take far longer to do so – as illustrated by the various long-running lawsuits regarding GDPR interpretation that are still working their way through various levels of European and Member State legal systems.[67] Nor are court decisions immune to regulatory capture and bias: not only does litigation structurally favour the interests of well-resourced corporate litigants (in this case VLOPs/VLOSEs), courts' interpretation of open-ended norms is frequently influenced by the 'best practices' that the industry has already developed, in what Lauren Edelman terms 'legal endogeneity'.[68]

In this context, codes offer an additional mechanism which can limit the possibilities for regulatory bias and enhance accountability, by specifying in detail – with input from civil society organisations and other stakeholders, as well as regulators – what risks companies should address, what mitigation measures they should implement, and how such measures will be evaluated. As discussed above, platforms will face liability risks for failing to respect such commitments. Consequently, they will have less leeway to implement only superficial changes, or put a positive spin on measures they already have in place.

Importantly, codes can combine specificity with flexibility. Implementing and updating codes with many signatories is not a quick and easy process, as section 4 will discuss, but it is much faster than the multiyear intergovernmental negotiations over the DSA itself. Thus, codes allow for more specific and concrete commitments, but can also alleviate the issue that detailed standards quickly become outdated – a particularly important consideration when regulating fast-changing technological industries.[69] Flexibility can also enable detailed commitments that target specific platforms, technical features and/or business models. For example, the Code of Practice on Disinformation has a modular structure, with numerous individual commitments broken down further into individual measures and KPIs, not all of which apply to all signatories. Following this approach for other codes would permit the introduction of more specific and targeted commitments, without creating an overly rigid one-size-fits-all compliance framework.

66 Confirming that these concerns may be well founded, the first major piece of guidance that the Commission published on best practices for risk mitigation focused on the highly-politicised issue of Russian disinformation operations and clearly indicated that, in the Commission's interpretation, platforms should be removing more such content. The use by state authorities of the systemic risk framework to put pressure on platforms to remove content which is not illegal and is legally protected by international human rights law has been strongly criticised: see J. Barata and J. Calvet-Badamunt, 'The European Commission's Approach to DSA Systemic Risk is Concerning for Freedom of Expression' *(Tech Policy Press,* 30 October 2023) <https://www.techpolicy.press/the-european-commissions-approach-to-dsa-systemic-risk-is-concerning-for-freedom-of-expression/> accessed 19 March 2024.

67 For example, five years after GDPR came into force, a series of rulings clarified that Meta was not relying on a valid legal basis for its targeted advertising practices: see Case C-252/21 *Meta Platforms Inc and Others v Bundeskartellamt* [2023] (European Court of Justice, Grand Chamber, 4 July 2023). Meanwhile, leaked information has suggested that Meta has been systematically violating various GDPR requirements, such as those around data minimisation and purpose limitation, since the law came into force: L. Franceschi-Bicchierai, 'Facebook Doesn't Know What It Does With Your Data, Or Where It Goes: Leaked Document' (*VICE,* 26 April 2022) <https://www.vice.com/en/article/akvmke/facebook-doesnt-know-what-it-does-with-your-data-or-where-it-goes> accessed 19 March 2024.

68 L.B. Edelman, *Working Law: Courts, Corporations and Symbolic Civil Rights* (University of Chicago Press 2016) 1-324.

69 M. Fenwick, Erik P.M. Vermeulen and Marcelo Corrales, 'Business and Regulatory Responses to Artificial Intelligence: Dynamic Regulation, Innovation Ecosystems and the Strategic Management of Disruptive Technology', *Robotics, AI and the Future of Law* (Springer 2018) 88.

3.2 Participation and Oversight

Codes can also strengthen accountability by developing institutional structures for oversight and participation. Establishing concrete commitments, KPIs and reporting standards will facilitate structured and effective oversight by regulators, auditors and external stakeholders,[70] including comparisons between platforms and over time. Codes also offer the potential to develop additional oversight structures, as illustrated by the Code of Practice on Disinformation, which establishes a permanent task force chaired by the Commission. Other potential codes could institute similar oversight structures, tailored as appropriate to the particular policy area, for example by involving relevant civil society organisations.

Second, codes facilitating research data access can significantly enhance accountability – both by providing additional information to regulators, and by facilitating independent civil society scrutiny and reputational pressure.[71] While regulators, academics and civil society have high hopes for independent research enabled by Article 40, many have also expressed concerns about whether researcher access will encounter practical issues and delays, as well as privacy and security issues.[72] By committing platforms to providing APIs and other more streamlined and standardised data access processes, as well as establishing privacy and security safeguards, codes can facilitate research and minimise delays. This should in turn enable more informed and timely policy debates.

Third, codes can strengthen oversight by formally involving more stakeholders. For example, as discussed in section 2(a), the DSA's advertising transparency obligations only apply to platform providers, but Article 46(1) provides that relevant codes of conduct should also involve civil society actors and other companies in the 'advertising value chain'. This aligns with scholarship on 'cooperative responsibility', which argues that effective transparency frameworks require institutionalised participation by the various stakeholders shaping digital information environments, not only platforms.[73] For example, advertisers and third-party software providers also exercise significant – and for now, rather opaque – influence over platform governance via 'brand safety' tools and policies which determine where ads can appear, and thus which social media content is monetizable.[74] Transparency commitments by these actors could provide important insights into how advertising practices shape content governance. Equally, formalising the roles and responsibilities of civil society in engaging with transparency disclosures can help ensure that the information provided translates into policy-relevant analysis and insights.[75]

Finally, the DSA envisages multistakeholder participation in shaping the content of codes, as well as overseeing their implementation. Multistakeholder participation has frequently been advocated by scholars and experts as a means of democratising platform governance, incorporating more expert knowledge (including perspectives from underrepresented and/or marginalised groups), and strengthening oversight.[76] However, others have questioned the capacity of consultation and participation to equally represent all stakeholders, and its susceptibility to corporate capture.[77] Codes developed so far have been criticised for failing to ensure inclusive

70 Laux and others (n 63).

71 P. Darius and others, 'Implementing Data Access of the Digital Services Act: Collaboration of European Digital Service Coordinators and Researchers in Building Strong Oversight over Social Media Platforms' (*Hertie School Centre for Digital Governance*, 2023) <https://hertieschool-f4e6.kxcdn.com/fileadmin/2_Research/2_Research_directory/Research_Centres/Centre_for_Digital_Governance/5_Papers/Implementing_Data_Access_Darius_Stockmann_2023.pdf> accessed 14 April 2023.

72 Darius (n 71).

73 P. 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; N. Helberger and others, 'Governing online platforms: From contested to cooperative responsibility' (2018) 34(1) *The Information Society* 1 <https://doi.org/10.1080/01972243.2017.1391913> accessed 10 April 2023.

74 R. Griffin, 'From brand safety to suitability: Advertisers in platform governance' (2023) 12(3) *Internet Policy Review* <https://doi.org/10.14763/2023.3.1716> accessed 10 April 2023.

75 Leerssen (n 73).

76 S. Vergnolle, *Putting collective intelligence to the enforcement of the Digital Services Act* (2023) <https://dsa-enforcement.vergnolle.org/> accessed 3 May 2023.

77 I. Kampourakis, 'The Postmodern Legal Ordering of the Economy' (2021) 28(1) *Indiana Journal of Global Legal Studies* 101, 119-20; B. Dvoskin, 'Representation Without Elections: Civil Society Participation as a Remedy for the Democratic Deficits of Online Speech Governance' (2023) 67(3) *Villanova Law Review* 447.

and diverse stakeholder participation.[78] Even where participation is relatively inclusive, it still tends to reflect existing inequalities in the resources, organisational capacities, and social and political capital of different interest groups. Nonetheless, if the possibility for civil society to participate in drawing up future codes is realised, this can to some extent diversify the range of interests represented and issues addressed. It can also ensure that detailed risk mitigation measures reflect external expertise – including for example professional and/or academic expertise in how platform design impacts systemic risks, and ideally the perspectives of social groups who are underrepresented in the tech industry and in EU policymaking, such as people of colour.

3.3 Filling gaps in the DSA

The third major advantage offered by codes is the possibility to set policy and establish clear commitments in areas which are otherwise under-addressed by the DSA.[79] This could be particularly useful in addressing emerging or evolving risks. For example, less than a year after the DSA was passed, commentators were already pointing out that it had not anticipated the rapidly increasing availability and popularity of generative AI, leaving concerning regulatory gaps and ambiguities,[80] while major platforms raced to implement tools with well-known risks.[81] This is unlikely to be the last time such problems arise. Developing and updating codes of conduct seems a more viable way to address them than regularly updating legislation. As well as technological changes, codes can also be updated to respond to developments in business practices, such as platforms' increasing reliance on e-commerce[82] and subscription revenue.[83]

Furthermore, codes provide a basis for further mitigation measures in areas which were already recognised, but which the DSA does not address in sufficient detail. Perhaps most importantly, codes could provide more detailed guidance on safe and responsible design practices. The design of platform interfaces and other features like recommendation systems is recognised as a crucial factor influencing the prevalence and harms of hate speech and disinformation, as well as more diffuse social problems like media concentration and political polarisation, which cannot be dealt with at the level of moderation of individual items of harmful content.[84] Codes offer a way to strengthen platform companies' accountability for design choices that have important social implications.

Taking hate speech and abuse as a concrete example, these issues evidently cannot be addressed only through content moderation. It is neither possible nor desirable to identify and remove all potentially-harmful speech, given that harms are so context-dependent.[85] Attempts to do so would severely limit freedom of expression and would be open to political abuse.[86] Reactively removing content also fails to adequately protect victims of abuse or prevent harmful behaviour in future.[87] Instead, experts have called for more focus on 'human rights by design' approaches which aim to design user experiences and interfaces

78 Access Now and others, 'Joint Statement on Stakeholder Inclusion in the Code of Practice on Disinformation Revision Process' (*AlgorithmWatch*, 2022) <https://algorithmwatch.org/en/wp-content/uploads/2022/02/Joint_Statement_CoP.pdf> accessed 15 March 2023.

79 Vander Maelen (n 11).

80 P. Hacker and others, 'Understanding and Regulating ChatGPT, and Other Large Generative AI Models' (*Verfassungsblog*, 20 January 2023) <https://verfassungsblog.de/chatgpt/> accessed 10 March 2023.

81 D. Alba and J. Love, 'Google's Rush to Win in AI Led to Ethical Lapses, Employees Say' (*Bloomberg*, 19 April 2023) <https://www.bloomberg.com/news/features/2023-04-19/google-bard-ai-chatbot-raises-ethical-concerns-from-employees> accessed 21 April 2023.

82 C. Goanta, 'The New Social Media: Contracts, Consumers and Chaos' (2023) *Iowa Law Review* (forthcoming).

83 A. Kantrowitz, 'Paying Twitter for a Checkmark Is a Joke. Paying Meta for One Won't Be' (*Slate*, 3 March 2023) <https://slate.com/technology/2023/03/facebook-verification-instagram-meta-twitter.html> accessed 10 March 2023.

84 Botero Arcila and Griffin (n 33).

85 R. Iyer, 'Content Moderation is a Dead End' (*Designing Tomorrow: Psychology, Ethics & Technology*, 7 October 2022) <https://psychoftech.substack.com/p/content-moderation-is-a-dead-end> accessed 13 June 2023.

86 D. Keller, 'The DSA's Industrial Model for Content Moderation' (*Verfassungsblog*, 24 February 2022) <https://verfassungsblog.de/dsa-industrial-model/> accessed 24 December 2022.

87 R. Griffin, 'New school speech regulation as a regulatory strategy against hate speech on social media: The case of Germany's NetzDG' (2022) 46(9) *Telecommunications Policy* 102411 <https://doi.org/10.1016/j.telpol.2022.102411> accessed 2 September 2022; G. Neff and R. Chowdhury, 'Platforms Are Fighting Online Abuse - but Not the Right Kind' (*Wired*, 20 February 2023) <https://www.wired.com/story/platforms-combat-harassment-but-theyre-focusing-on-the-wrong-kind/> accessed 15 March 2023; S. Chemaly, 'Demographics, Design, and Free Speech: How Demographics Have Produced Social Media Optimized for Abuse and the Silencing of Marginalized Voices' in S. J. Brison and K. Gelber (eds) *Free Speech in the Digital Age* (Oxford University Press 2019) <https://doi.org/10.1093/oso/9780190883591.001.0001> accessed 18 January 2023; C. Iglesias Keller, 'Don't Shoot the Message: Regulating Disinformation Beyond Content' (2021) 18(99) *Direito Público* <https://doi.org/10.11117/rdp.v18i99.6057> accessed 18 January 2023.

to proactively prevent harassment and abusive behaviour.[88] For example, proven interventions include prompting users to reconsider when drafting comments flagged as potentially abusive,[89] and altering recommendation systems to discourage divisive or aggressive content.[90] Although platforms have already successfully tested design interventions like the above examples, it is clear that they will not reliably and systematically do so in the absence of clear regulatory incentives. This was recently illustrated by X and Microsoft's decisions to disband their AI ethics teams – both previously leaders in researching such design interventions[91] – amid a wave of layoffs and cost-cutting across the tech industry, which commentators have suggested will significantly compromise safety, transparency and research efforts.[92]

Despite the clear need for regulatory incentives in this area, the DSA barely addresses platform design. Provisions which do address it focus on specific issues, like deceptive practices (Article 25(1)) and consumer protection (Article 31), and generally aim to protect individual choice and agency, rather than safety and equality. Otherwise, design is only regulated at a very general level, through the systemic risk mitigation framework. Articles 34-35 clearly mention recommendation systems and interface design as relevant factors in assessing and mitigating risks. However, these provisions' vagueness and flexibility mean that by themselves they create little pressure to make significant or costly changes. Supplementing these general obligations with codes of conduct which mandate more proactive and effective mitigation measures for issues like hate speech, harassment and disinformation could therefore significantly strengthen accountability for platform design.

This possibility is illustrated by the Code of Practice on Disinformation's provisions on 'safe design practices'. Signatories commit to 'outline how they design their products, policies, or processes, to reduce the impressions and engagement with Disinformation whether through recommender systems or through other systemic approaches, and/or to increase the visibility of authoritative information'.[93] They must also 'invest and/or participate in research efforts on the spread of harmful Disinformation online and related safe design practices'[94] and 'disclose and discuss findings within the permanent Task-force, and explain how they intend to use these findings to improve existing safe design practices and features or develop new ones'.[95] Platforms are only just beginning to implement the Code, and what concrete results these commitments will achieve remains to be seen.[96] However, if they successfully promote ongoing research and exchange of best practices among platforms on how to design safer online environments and discourage the spread of harmful content without censoring it, this could offer a significant improvement on moderation-focused approaches. Similar approaches could be beneficial in other policy areas.

Overall, then, developing further codes of conduct could offer a promising way to strengthen accountability. In areas where the DSA does not establish clear (or any) compliance standards, codes offer a mechanism to supplement and build on the legislation, and to continue adapting it as the business and technological

88 N. Suzor and others, 'Human Rights by Design: The Responsibilities of Social Media Platforms to Address Gender-Based Violence Online' (2019) 11(1) *Policy & Internet* 84 <https://doi.org/10.1002/poi3.185> 15 March 2023; Iyer (n 85).

89 M. Katsaros and others, 'Reconsidering Tweets: Intervening during Tweet Creation Decreases Offensive Content' (2022) 16(1) *Proceedings of the Sixteenth International AAAI Conference on Web and Social Media* 477 <https://doi.org/10.1609/icwsm.v16i1.19308> 15 March 2023.

90 J. B. Merrill & W. 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 3 January 2022.

91 W. Knight, 'Elon Musk Has Fired Twitter's 'Ethical AI' Team' (*Wired*, 4 November 2022) <https://www.wired.com/story/twitter-ethical-ai-team/> accessed 15 March 2023; Z. Schiffer and C. Newton, 'Microsoft just laid off one of its responsible AI teams' (*Platformer*, 14 March 2023) <https://www.platformer.news/p/microsoft-just-laid-off-one-of-its> accessed 15 March 2023.

92 K. Klonick, 'The End of the Golden Age of Tech Accountability' (*The Klonickles*, 3 March 2023) <https://klonick.substack.com/p/the-end-of-the-golden-age-of-tech> accessed 15 March 2023.

93 Qualitative Reporting Element 18.1.3, Code of Practice on Disinformation (n 33).

94 Measure 18.3, Code of Practice on Disinformation (n 33).

95 Measure 18.3, Code of Practice on Disinformation (n 33).

96 European Commission, 'Signatories of the Code of Practice on Disinformation deliver their first baseline reports in the Transparency Centre' (European Commission, 2023) <https://digital-strategy.ec.europa.eu/en/news/signatories-code-practice-disinformation-deliver-their-first-baseline-reports-transparency-centre> accessed 15 March 2023.

landscape evolves. Input from regulators, civil society and other stakeholders in developing these standards and overseeing compliance can reduce the freedom of action of platform companies and the possibility for 'regulatory bias', increasing the chances of effective risk mitigation measures that serve the public interest.

4. The potential disadvantages of DSA codes

At the same time, however, expectations should be realistic. The experience of the Code of Practice on Disinformation shows that developing detailed and effective codes is practically not easy, and regulators' and companies' capacities to do so in multiple areas will be limited. The lack of national-level DSA codes also raises some concerns. Finally, difficult normative questions about transparency, democratic input and legitimacy must be tackled if codes are to fulfil the potential advantages outlined in section 3.

4.1 Capacity limitations

Negotiations on the updated Code of Practice on Disinformation took just over a year (May 2021–June 2022) – a significant delay compared to the Commission's original proposed timeline.[97] This was due partly to the Ukraine war (which significantly impacted anti-disinformation efforts, and took up much of the capacity of the same policymakers and platform staff who were negotiating the Code) but also to the complexity of negotiations among 34 stakeholders.[98] Platforms' policy staff invested significant time and resources in developing the Code. Reporting obligations and participation in the taskforce – if it is to be an effective and meaningful forum for oversight and knowledge exchange – will also be significant ongoing time commitments.

This suggests that if future codes of conduct are to provide specific, detailed and context-sensitive commitments, and companies are to engage with them seriously, it will realistically not be possible to develop them in several policy areas simultaneously. Keeping in mind that the DSA already mandates codes on advertising transparency and accessibility (respectively Articles 46 and 47), and a code on age-appropriate design is underway,[99] regulators, companies and civil society will have limited capacity to develop codes in other areas. Difficult decisions will have to be made about what to prioritise.

It is also doubtful whether the Commission and Board will prioritise addressing issues such as safe design practices, given that these have not been priorities in EU regulation so far. The efforts invested into the disinformation code may reflect the particular regulatory politics of this issue. Disinformation is a prominent, highly securitised subject of political debate, associated with high-profile crises like the pandemic and Ukraine war, and has thus consistently been a policy priority; but expanding formal legal regulation is widely considered problematic due to freedom of expression concerns, hence the importance attached to soft law measures. These considerations are less present in other policy areas like hate speech and harassment, despite their importance, so the political will to develop effective codes of conduct may be lacking.[100] The Commission has indicated that it will primarily rely on internal risk assessments and auditing to address systemic risks, rather than industry-wide codes of conduct.[101] This is the lowest-effort option for

97 European Commission, 'Guidance on Strengthening the Code of Practice on Disinformation' (*European Commission,* 2021) <https://digital-strategy.ec.europa.eu/en/library/guidance-strengthening-code-practice-disinformation> accessed 15 March 2023.

98 M. Killeen, 'Code of Practice on Disinformation revision extended into 2022' (*Euractiv*, 6 December 2021) <https://www.euractiv.com/section/digital/news/code-of-practice-on-disinformation-revision-extended-into-2022/> accessed 15 March 2023.

99 European Commission, 'Special Group on the EU Code of Conduct on Age-Appropriate Design' (n 41).

100 Disinformation is often understood as 'harmful but legal', whereas other types of harmful content, such as hate speech, abuse and threats, are subject to more legal regulation. This could be taken to suggest that soft law standards on design practices were necessary for disinformation, whereas moderating illegal content within the parameters set out in the DSA would be sufficient to address other issues. However, this view is unconvincing. On the one hand, as section 3(c) discussed, removing illegal content is not remotely adequate as a solution to issues like hate speech. On the other, the idea that disinformation is and should remain 'harmful but legal' does not accurately reflect the legal situation in many Member States: R. Ó Fathaigh, N. Helberger and N. Appelman, 'The perils of legally defining disinformation' (2021) 10(4) *Internet Policy Review* <https://doi.org/10.14763/2021.4.1584> accessed 15 March 2023.

101 P. ten Thije, 'European Commission Articulates Priorities for Implementing the DSA' (*DSA Observatory*, 1 November 2022) <https://dsa-observatory.eu/2022/11/01/european-commission-priorities-implementing-delegated-guidelines-acts-dsa-digital-services-act/> accessed 15 March 2023.

regulators, and makes sense given how much of their capacity will already be taken up by other areas of DSA enforcement,[102] but it is also the option that accords most influence to and places fewest constraints on regulated companies.

Finally, assuming further codes are developed, it is important to be realistic about the limits of their concretisation and oversight functions. For example, while the Code of Practice on Disinformation is far more specific than the DSA, and provides more concrete reporting standards and KPIs for evaluation, its commitments and measures still leave plenty of room for interpretation. In particular, even if codes detail expected measures and results, the ability to specify what operational and organisational changes companies should make to achieve these results is inherently limited, since this is so specific to individual companies and dependent on business strategies and priorities. This inevitable indeterminacy means companies which are motivated to maximise profits and minimise compliance costs will always have room to interpret the law in self-serving ways, or avoid investing the necessary resources to follow through on their commitment.[103] Codes which add further detail to the DSA's vague systemic risk provisions can mitigate this problem to some extent, but are no panacea.

4.2 Lack of adaptability

As noted in section 2(a), the DSA only envisages EU-wide codes of conduct, thus sacrificing local adaptability. Many of the five functions identified in section 2 are primarily relevant to VLOPs/VLOSEs, which typically operate across the EU. This means there are advantages to avoiding fragmentation, with different EU Member States promoting different risk mitigation and compliance measures. However, this also raises concerns regarding inclusion and representation of relevant interests. Many local industry and civil society actors may find it practically difficult to participate in EU-wide code negotiations. Issues and stakeholders might also be tied to a single Member State (or a small number of states). For example, many issues related to advertising value chains might be distinctive to a particular national media environment and/or involve local organisations.

While Article 45(2)'s broad reference to relevant stakeholders could in principle allow smaller and local organisations to participate, it is difficult to imagine all actors claiming an equal spot at the negotiating table. Smaller organisations may lack the resources, capacities and even language skills to influence EU-wide code negotiations that will be dominated by some of the world's largest companies. Even if they can dedicate significant resources to participating, it could be difficult to attract attention and support for issues that only affect one or a few Member State(s) rather than the EU as a whole.

Additionally, some studies claim that soft law instruments contribute to more complex regulatory environments that mostly benefit large incumbents.[104] Concerns have already been raised that the DSA's provisions on content moderation procedures will have anticompetitive effects, due to high costs for small and scaling companies.[105] Smaller companies usually have disproportionately high compliance costs, as they lack internal specialisation and administrative capacities.[106] In addition to this potentially disproportionate impact on smaller companies, soft law drafting processes can be leveraged by the largest companies to further entrench their market power. Harbinja and Karagiannopoulos have theorised a 'circular relay of control' in which dominant market actors first resist, then accept, and ultimately call for more regulation to control responsibilities between them in a circular manner.[107] This form of quasi-collusion strengthens the position of such corporations in negotiations with regulators, enabling them to jointly agree to offer lower

102 Vergnolle (n 76), 14.

103 For a detailed sociolegal study of how this has played out in practice in the context of privacy and data protection regulation, see A.E. Waldman, 'Privacy Law's False Promise' (2020) 97(3) *Washington University Law Review* 773.

104 C. Hartog, 'Institutions and Entrepreneurship: The Role of the Rule of Law' (*Panteia*, 7 January 2018) 3 <https://core.ac.uk/download/pdf/6461564.pdf> accessed 10 April 2023.

105 D. Keller, 'The DSA's Industrial Model for Content Moderation' (*Verfassungsblog*, 24 February 2022) <https://verfassungsblog.de/dsa-industrial-model/> accessed 24 December 2022.

106 J. Levie and E. Autio, 'Regulatory Burden, Rule of Law, and Entry of Strategic Entrepreneurs: An International Panel Study' (2011) 48 *Journal of Management Studies* 1392.

107 E. Harbinja and V. Karagiannopoulos, 'Can the DWeb Become Something More?' (BILETA 2019 Conference, Belfast, 16 April 2019) <https://biletabelfast.net/> accessed 10 April 2023.

compliance standards. Additionally, the largest actors can use stringent regulation as a business opportunity to develop compliance tools for complex technical problems, which they can then sell to smaller actors.[108] In the platform regulation context, this has already been observed with the rise of software-as-a-service content moderation tools such as Google's Perspective.

Although these are widespread problems which are not limited to soft law instruments, they are particularly relevant in the context of DSA codes because of the leading role of industry actors in drafting processes. Inevitably, big tech companies' well-resourced legal and policy departments will dominate these discussions. Relatively informal multistakeholder negotiations and drafting processes may also offer a conducive environment for big tech companies to jointly promote their shared interests to the disadvantage of smaller competitors. Although the *de facto* binding force of codes is primarily relevant for VLOPs/VLOSEs, codes could exacerbate compliance burdens for smaller companies if they establish industry-standard technical or policy approaches which are designed by and for the largest companies.

However, as section 3(a) highlighted, codes in principle allow commitments to be tailored for individual signatories – a possibility that should be taken up to minimise anticompetitive effects. Relevant DSA provisions encourage this: Article 45(3) provides that KPIs and reporting commitments should 'take into account differences in size and capacity between different participants', and Article 46(2) states that advertising transparency codes must fully respect 'the rights and interests of all parties involved, as well as a competitive, transparent and fair environment in online advertising'. Codes could thus be flexible and tailored enough to represent smaller stakeholders, address local or regional issues, and avoid disadvantaging small companies. As the main forum for national DSCs to participate in the risk mitigation framework, the Board should play a leading role in ensuring adequate representation of national and local concerns.[109] However, with VLOPs/VLOSEs inevitably playing a dominant role in negotiations, successfully striking this balance may not be easy.

4.3 Democracy, Opacity and Legitimacy

Given these potential issues around representation and corporate capture, questions can also be raised about the legitimacy – actual and perceived – of regulating platforms via soft law codes. In the context of debates around the EU's 'democratic deficiency', Schmidt famously analysed legitimacy in terms of input, throughput and output – respectively referring to democratic participation in governance institutions; transparent, fair and inclusive decision-making processes that represent affected interests; and outcomes which serve the public.[110] This framework points to some relevant questions about the legitimacy of DSA codes.[111] First, will they be shaped and overseen by democratic institutions? Second, will their development, oversight and governance be transparent, inclusive and open? And third, will they produce meaningful changes in corporate practices that serve the public interest?

On the first point, reliance on industry-led codes rather than legislation inherently involves delegating regulatory authority from democratically legitimated institutions to the private sector. This is not inherently negative: delegation allows legal texts to be supplemented with more concrete, detailed and regularly updated standards, which could not reasonably all be agreed by legislative institutions. Some also argue that such a pluralistic approach strengthens the EU's legitimacy.[112] Further, in the context of online speech regulation, direct involvement of state authorities raises its own concerns around freedom of expression and

108 M. Rosemain and G. Barzic, 'Facebook's Zuckerberg Hails French Hate Speech Plan as EU Model' (*Reuters*, 10 May 2019) <https://www.reuters.com/article/idUSL5N22M6EI/> accessed 17 May 2019.

109 I am grateful to Julian Jaursch for highlighting this point.

110 V. Schmidt, 'Democracy and legitimacy in the European Union revisited: Input, output and "throughput"' (2013) 61(1) *Political Studies* 2 <https://doi.org/10.1111/j.1467-9248.2012.00962.x> accessed 10 April 2023; This framework has been applied in the platform governance context by B. Haggart and C. Iglesias Keller, 'Democratic legitimacy in global platform governance' (2021) 45(6) *Telecommunications Policy* 102152 <https://doi.org/10.1016/j.telpol.2021.102152> accessed 10 April 2023; They argue that mainstream debates focus too much on throughput and not enough on input legitimacy.

111 This discussion develops the application of Schmidt's legitimacy framework to DSA codes of conduct in Griffin, 'Codes of Conduct in EU Digital Regulation and AI Policy' (n 9).

112 For an analysis of the importance of pluralism, see: M. Dawson and F. de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817, 820.

media independence. For many scholars and experts, this speaks for polycentric co-regulatory frameworks involving diverse private stakeholders – something codes of conduct can facilitate.[113]

Accordingly, where the broad goals and parameters are established in the legislative text, using codes to provide more detailed standards strikes an appropriate balance between democratic legitimacy, on the one hand, and flexible and independent governance, on the other. Nonetheless, their 'gap-filling' function for issues that are overlooked in the DSA text, like accessibility and safe design, arguably speaks to a lack of democratic input in these important areas, and could suggest they were inadequately considered or represented in the legislative process. Further, the Commission – the least democratically representative of the EU legislative institutions – will, through its power to 'invite' stakeholders to address specific areas and threaten infringement proceedings, be able to exercise significant informal influence over the development of codes by nominally independent stakeholders. In this context, the lack of accountability mechanisms for oversight of the Commission's DSA enforcement strategy by other EU institutions is notable.[114]

DSA codes may therefore be between a rock and a hard place. On the one hand, regulatory bodies – especially the Commission – play an outsized role in developing and overseeing codes, which they could use to shape DSA implementation while bypassing legislative, administrative and public oversight. The line 'a rose by any other name would smell as sweet'[115] famously implies that a name does not affect what something truly is. The same could be said about using the term 'voluntary codes of conduct' to conceal executive authority over highly politicised questions of online speech governance. On the other hand, corporate actors will likely exercise significant influence in code development processes. Their resources and technical expertise could enable them to define the success metrics by which they will be judged, creating significant risks of regulatory capture.[116] Both of these factors compromise the input legitimacy of codes, as well as their ultimate effectiveness.

As regards throughput legitimacy, the existing codes on hate speech and disinformation arguably lacked transparent procedures and inclusive participation, attracting criticism of the 'systematic exclusion' of civil society.[117] In this context, the DSA's haphazard approach – whereby various codes have already been developed and implemented in an *ad hoc way*, to be later 'slotted in' to the DSA under Article 45 – further undermines legal certainty, transparency and inclusive participation. Drafting important soft law instruments before establishing and clarifying the overarching legal framework undermines the possibility for the widest range of stakeholders to meaningfully participate in their development.

Civil society organisations have also criticised the dominant influence of tech industry actors in existing codes.[118] This seems likely to be an ongoing issue. As noted above, the power, resources and expertise of the multinational corporations that own most VLOPs/VLOSEs will likely give them disproportionate input into the demanding, detailed work of code negotiations and ongoing oversight. However, they also exercise significant influence over the other stakeholders providing nominally independent input and scrutiny. Leading platform companies extensively influence civil society activism and academic research in fields

113 R. Gorwa, 'What is platform governance?' (2019) *Information, Communication & Society* 854 <https://doi.org/10.1080/1369118X.2019.1573914> accessed 10 April 2023.

114 DSA interpretation and enforcement will of course ultimately be overseen by the EU courts, which can for example intervene on fundamental rights grounds. However, litigation is not only slow and structurally favours powerful and well-resourced interests, as section 3(a) noted; it is also generally limited to addressing discrete, obvious rights violations, and is not well suited to overseeing the overall direction and priorities of DSA enforcement, or strengthening democratic input therein.

115 W. Shakespeare, 'Romeo and Juliet', Act II Scene II.

116 L. Gordon Crovitz, 'The European Commission's Disinformation Fail' (*Politico*, 13 July 2022) <https://www.politico.eu/article/european-commission-disinformation-fail/> accessed 7 August 2022.

117 B. Bukovská, 'The European Commission's Code of Conduct for Countering Illegal Hate Speech Online: An Analysis of Freedom of Expression Implications' (2019) Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression, 3–4 <https://www.ivir.nl/publicaties/download/Bukovska.pdf> accessed 10 April 2023; N. Alkiviadou, 'Hate Speech on Social Media Networks: Towards a Regulatory Framework?' (2019) 28 *Information & Communications Technology Law* 19, 31; Access Now and others (n 78).

118 L. Gordon Crovitz, 'The European Commission's Disinformation Fail' (*Politico*, 13 July 2022) <https://www.politico.eu/article/european-commission-disinformation-fail/> accessed 7 August 2022.

like AI and platform regulation, through donations, funding programmes and partnerships – shaping the relative resources and power of the very stakeholders meant to provide external accountability.[119]

Finally, it can be questioned to what extent codes will produce legitimate outputs – in the sense of meaningful changes in platforms' policies and business practices that effectively address public-interest issues. Lack of accountability is a well-known issue in soft law regulatory regimes: will meaningful consequences be imposed upon actors who do not respect the agreed rules,[120] if they are largely responsible for developing, monitoring and enforcing those rules themselves?

As section 3 argued, codes could offer an effective way to promote more systemic and holistic measures to address issues like hate speech and harassment. Since these issues systematically deprive marginalised communities of access to the online public sphere,[121] this would be highly desirable from the perspective of democratic legitimacy. Yet as noted in section 4(a), it remains uncertain whether the Commission, Board and dominant companies will actually devote sufficient effort and resources to these issues. Moreover, if further codes are developed, the issues of input and throughput legitimacy discussed above create a risk that they will reflect the perspectives and interests of VLOPs/VLOSEs more than other affected groups. Corporate influence may produce codes which largely restate and legitimise the limited and low-cost measures platform companies already have in place, like automated moderation, rather than promoting more far-reaching, innovative and resource-intensive interventions.

5. Conclusion

This contribution has shown that codes of conduct will play a significant role in DSA implementation and enforcement, through five specific functions: they concretise vague provisions; strengthen oversight; remedy non-compliance; facilitate multistakeholder participation; and mandate future policy action. Despite being nominally voluntary soft law tools, codes will create *de facto* obligations for VLOPs/VLOSEs in particular. Codes could thus decisively shape how these dominant platforms implement the DSA's systemic risk mitigation obligations, which are intended to play a crucial role in addressing policy issues ranging from online safety to non-discrimination and media pluralism.

This article has highlighted concerns relating to the input, throughput and output legitimacy of codes. In particular, relatively opaque and informal code development processes may primarily serve the interests of regulated companies, as well as providing a way for public authorities to influence platform governance while circumventing legal accountability mechanisms. Further, while the DSA in principle provides for inclusive multistakeholder participation in codes, this may not be realised in practice – in particular, due to disparities of resources between stakeholders, and to the exclusion of local or national codes which might better represent smaller and local interest groups. The recent experience of the Code of Practice on Disinformation, where civil society was largely excluded, further fuels these concerns.[122]

Nonetheless, codes of conduct offer a promising way to address lacunae in the DSA and create more robust structures for participation and regulatory oversight. Operationalising the DSA's risk mitigation and transparency framework and achieving meaningful and effective reforms in important areas like platform design, trust and safety, and research data access will require more concrete and specific commitments and guidance. Codes are well placed to provide this. The normative tensions and practical challenges identified in this article should not be overlooked, but it should also be kept in mind that no available regulatory solutions are perfect. The DSA represents a flawed and incomplete response to the social and political issues posed by

119 L. Clarke and others, 'How Google quietly funds Europe's leading tech policy institutes' (*New Statesman*, 30 July 2021) <https://www.newstatesman.com/science-tech/2021/07/how-google-quietly-funds-europe-s-leading-tech-policy-institutes> accessed 18 November 2021; J. Goldenfein and M. Mann, 'Tech money in civil society: whose interests do digital rights organisations represent?' (2022) 37(1) *Cultural Studies* 88 <https://doi.org/10.1080/09502386.2022.2042582> accessed 7 August 2022.

120 J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation & Governance* 137, 141.

121 Botero Arcila and Griffin (n 33).

122 Bukovská (n 117); Alkiviadou (n 117); Access Now and others (n 78).

the platformisation of online media, but with the law now in force, regulators, policymakers and civil society are faced with the task of doing their best to strengthen accountability with the tools that are available.

With this in mind, to realise the potential benefits of DSA codes, it is particularly important for the Commission and Board to ensure robust, inclusive and transparent multistakeholder participation in their drafting processes.[123] All stages of these drafting processes should be organised with a view to maximising transparency (both towards the public and towards independent researchers) and mitigating risks of regulatory capture. For example, negotiations could be overseen by an independent expert (as was the case for the updated disinformation code[124]) with a mandate to ensure that VLOPs/VLOSEs' interests do not dominate the discussions. In exercising their powers to invite stakeholders to participate, the Commission and Board should be particularly attentive to the representation of civil society organisations from outside the 'EU bubble' and the large Western European Member States,[125] as well as organisations representing disadvantaged and underrepresented social groups.[126]

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123 Vander Maelen & Griffin, 'Twitter's retreat' (n 9).

124 A. Costa, 'A New Code of Discipline Against Online Disinformation' *University of Bocconi Knowledge* (28 June 2022) <https://www.knowledge.unibocconi.eu/notizia.php?idArt=24457> accessed 19 March 2024.

125 J. Orlando-Salling & L. Bartolo, 'The Digital Services Act as seen from the European Periphery' (*DSA Observatory*, 5 October 2023) <https://dsa-observatory.eu/2023/10/05/the-digital-services-act-as-seen-from-the-european-periphery/> accessed 19 March 2024.

126 Dvoskin (n 77).