The upcoming Digital Services Act and the role of algorithms

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Who shall be deemed responsible for the algorithm's choices? The debate is open.

The e-Commerce Directive

The legal framework for digital services was defined by the adoption of the **e-Commerce Directive** in 2000. Since then, the e-Commerce Directive has been the cornerstone for regulating digital services and their liability regime in the European Union.

Briefly, the e-Commerce Directive introduced a safe harbor regime according to which information society services (which may act as mere conduit, caching or hosting providers as stated by articles 12-14) shall not be deemed liable for the content they manage if they fulfil certain conditions, namely: (i) they remove or disable access to the illegal content they host as fast as possible once they are aware of its illegal nature; and (ii) they play a neutral, merely technical and passive role towards the hosted content.

In such a way, the e-Commerce Directive focuses only on the conditions for exempting from liability those service providers (defined as "any natural or legal person providing an information society service") that do not have any general content-monitoring obligation, without harmonizing the conditions for holding them liable.

The disruptive evolution of online services led the European Commission to decide to review and update the current legal framework for digital services through the **Digital Services Act** package ("DSA").

The DSA will include new law provisions addressed to govern the liability regime of service providers, while increasing users' protection and ensuring that the Digital Single Market remains competitive and open to innovation.

Algorithms as filtering tools

During the **public consultation period** opened by the European Commission on June 2, 2020, and ended on September 8, 2020, stakeholders and scholars have been asked, among other things, whether the current liability regime is still adequate.

Already in 2011, the Court of Justice of the European Union ("CJEU") started to expand the notions set out by the e-Commerce Directive, focusing on the distinction between passive and active online intermediaries on the basis of Recital 42 of the e-Commerce Directive. In particular, in the 2011 **L'Oréal vs eBay case** , the CJEU stated that: "Article 14(1) of Directive 2000/31 must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting them."

Following this distinction, based on the role actually played by service providers, in its 2017 **Communication on Tackling Illegal Content Online**, the European Commission further stated, that: "Online platforms should, in light of their central role and capabilities and their associated responsibilities, adopt effective proactive measures to detect

and remove illegal content online and not only limit themselves to reacting to notices which they receive". In brief: the European Commission encouraged online platforms to do their utmost to proactively detect, identify and remove illegal content stored online.

This proactive approach is being implemented by service providers mainly through the adoption of algorithms. Indeed, algorithms can be used both as a content recognition tool and as a filtering tool; they can easily classify, and consequently delete, illegal user-generated content, thus helping platforms to manage their infrastructure and consequently, among others, parents to protect their children from the dangers of the Internet.

However, in addition to this "positive" use, the use of algorithms can have a "negative" outcome: algorithms can also be trained to profile users, to create rankings among them, and this can lead to the creation of new form of discrimination which, undoubtedly, can have a huge impact on both online and offline life. If, for instance, an algorithm is used to make hiring decisions, and it is trained with the data resulting from human discriminatory behaviour (e.g. man over woman, white over black applicants), the algorithm itself will perpetuate the discrimination. Furthermore, algorithms may lead to the exclusion of valuable content, thus affecting users' freedom of expression and access to information.

Therefore: on one hand, algorithms (and automated filters) play an important role in monitoring the huge amount of materials uploaded online and in detecting (potentially) unlawful content; on the other hand, their use is risky.

Service providers: a new liability regime

A "widespread" liability regime of the actors involved may be adopted during a possible revision of the actual liability framework.

Such a "widespread" liability regime has already been proposed for AI, where there is a multitude of actors intervening in the lifecycle of an AI system (e.g. producers, sellers, internet service providers, users). Indeed, the European Parliament recently stated "[…] that all players throughout the development and supply chains of artificial intelligence products and services should be legally accountable […]" (see the European Parliament resolution of October 20, 2020, with recommendations to the Commission on a framework of ethical aspects of artificial intelligence, robotics and related technologies) and that, "if there is more than one operator of an AI system, they shall be jointly and severally liable" (see the **European Parliament resolution of October 20, 2020, with recommendations to the Commission on a civil liability regime for artificial intelligence**).

The forthcoming DSA may therefore take into account the effective role played by the service providers, as well as the technologies (i.e. the algorithm) used to filter online contents and recognize the illegal ones, so to make sure that algorithms do not strengthen their gatekeepers' role.

That said, any future regulatory framework should not be overly prescriptive, but rather technologically neutral to focus on a risk-based approach and ensure that the decision-making process within an algorithmic system always remains comprehensible and as transparent as possible.

An effective market analysis should also be conducted so as to provide for virtuous accountability and collaboration mechanisms.

Users: more protection

In light of the envisaged consequences, the use of algorithms shall clearly be governable and transparent. Users should have the right to receive a clear and accessible explanation from the platform about the functioning of its algorithm so as to understand the logic of the algorithm adopted.

As recently said by Margrethe Vestager: "[…] One of the main goals of the Digital Services Act that we'll put forward in December will be to protect our democracy, by making sure that platforms are transparent about the way these algorithms work – and make those platforms more accountable for the decisions they make"(**Algorithms and**

democracy - AlgorithmWatch Online Policy Dialogue, October 30, 2020).

It is therefore now up to the regulators to shape a revised form of accountability, also taking into account the increasing importance of algorithms.

Do you have more questions, or do you want to share your thoughts on this article? Contact our Dentons Italy TMT Team at tmtbites.italy@dentons.com, and do not forget to sign up to our TMT Bites Newsletter!

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