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Strengthening EU Proposals on Deceptive Platform Design

Ideas on How to Improve the
Draft Digital Services Act



Think Tank at the Intersection of Technology and Society



Executive Summary

The design of digital platforms like social networks, search engines, online shops and video apps shapes billions of people's online experiences every day. Design plays a crucial role in how users view and share content on platforms such as Facebook or YouTube; it also determines how easy it is for users to change privacy settings or delete an account. Corporate design choices can thus affect the online spaces where people form opinions on societal and political issues. Therefore, sensible democratic oversight and independent scrutiny over these company decisions are of critical importance.

Only recently have lawmakers in the European Union (EU) started to incorporate matters of platform design into their deliberations. A case in point is the EU's flagship legislative proposal on platform regulation, the Digital Services Act (DSA): In the original draft, it did not include a dedicated article on platform design and subsequent additions remain ambiguous. The DSA needs to place stronger emphasis on platform design if it is to become a truly progressive piece of European platform legislation. EU lawmakers should seize the opportunity to establish a comprehensive transparency framework for platform design. This policy briefing argues that an article on platform design, as suggested by the European Parliament (Article 13a), should be part of the DSA and proposes improvements to the specific texts under discussion. Most importantly, the DSA should establish a clear definition of deceptive design and the dedicated design article should include both a ban on such practices and reporting obligations for platforms. To ensure strong and consistent enforcement, the DSA should also strengthen interdisciplinary exchange on design matters and introduce quicker evaluation processes.

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1. Why considering design is an important aspect of platform regulation

The design of digital platforms like social networks, search engines and video apps shapes how billions of people experience online information spaces every day. For instance, platforms want to make it easy for users to interact with content, so the buttons to “like” or share a post are always just a click or tap away. This frictionless design can help entertaining content go viral but can also help spread disinformation. To tackle disinformation, some platforms have introduced labels or panels on certain topics such as elections or health content – design decisions meant to give people some context on the post they are viewing. If a platform wants to discourage its users from changing certain settings or deleting their account, it can hide these settings in hard-to-find areas of the online interface, which only people who click or scroll through multiple pages will see. Another well-known example of deceptive design is pressuring customers in online shops with pop-ups about how few items are left (sometimes using made-up numbers). These are all corporate design choices that platforms tamper with almost constantly, often with little transparency and accountability. Because they affect virtually every user of online platforms and help shape not only the spaces where people do their online shopping but also where they form opinions on social and political issues, sensible democratic oversight and independent, public-interest scrutiny over these company decisions are necessary.

Only recently have lawmakers in the European Union (EU) concerned with platform regulation started to incorporate matters of platform design into their deliberations. For a long time, the focus had mostly been on finding specific rules for content moderation/removal. While this is a crucial piece of platform regulation, other important facets received too little attention, among them platform design. A case in point is the EU’s flagship legislative proposal on platform regulation, the Digital Services Act (DSA): In the original draft, the DSA did not include specific rules on platform design and subsequent additions regarding design remain ambiguous (see annex for details on the different versions). This is a major shortcoming. The DSA will create a legal framework that covers different kinds of platforms and addresses various types of risks, ideally not only applying to online platforms that are around today but future digital services as well. Without regarding the issue of how such platforms are designed, this framework will not be stable. The DSA drafts succeed in widening the scope of platform regulation from focusing only on liability issues regarding specific pieces of content to establishing rules around online advertising, recommender systems and researchers’ data access. Yet, a comprehensive view of platforms additionally requires considerations of design issues, which are a consequential part of all the aforementioned issues, ranging from the presentation of content to recommender systems.



Policy Brief
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DSA Proposals on Platform Design

EU policymakers should seize the opportunity of the DSA to introduce guiding principles for platform design, especially after the European Parliament (EP) and the Council of the EU have already made some promising suggestions in this field. Against the backdrop of the DSA negotiations, this policy briefing offers concrete options to improve the texts under discussion. Specifically, EU lawmakers should include a clear definition of deceptive design practices in the DSA, introduce a specific design article (as the EP proposes with Article 13a) with a ban on such practices as well as reporting obligations on platform design, and strengthen interdisciplinary exchange on this topic.



2. What shortcomings on platform design remain in the DSA draft texts

There are long-standing data and consumer protection laws at the national and EU levels that touch upon and counter deceptive design practices.¹ For example, the EU's Unfair Commercial Practices Directive deals with misleading actions and omissions as well as aggressive practices and use of coercion. The General Data Protection Regulation (GDPR) establishes rules against practices that trick or coerce users into giving consent to the use of their data. The Code of Practice on Disinformation sets non-binding rules for tackling potentially misleading content online. In its comprehensive revision², it will include self-regulation on "safe design" on platforms. However, existing rules such as those in the GDPR on consent are too weak³ and a reform of EU consumer law to better address deceptive design online is necessary⁴. With the DSA, the EU suggests many new rules specifically for online platforms. This key legislative proposal should be a place to consider questions of platform design.

Yet, the original draft of the DSA did not contain a specific article on platform design. Subsequently, issues around platform design did make into the DSA discussions (see annex). The topic remains a contentious one, so it is unclear what, if any, rules will be in the final text. In the current drafts, the wording on design questions is at times weak and ambiguous. There are overarching rules against deceptive design, but this term is only defined in the recitals (the explanatory statements for the actual DSA articles), not the text itself. Specific prohibitions narrowly cover mainly matters of consent and some suggestions only apply to online marketplaces and not, for example, video-sharing sites. Guidance on design is not tied to important due diligence rules the DSA proposes.

While it is welcome that design matters are discussed at all in the DSA, the drafts have not taken a progressive stance. They do not acknowledge how wide-ranging

- 1 For an overview, see Mario Martini et al., "Dark Patterns: Phänomenologie und Antworten der Rechtsordnung," *Zeitschrift für Digitalisierung und Recht*, January 2021, 47–74, https://rsw.beck.de/docs/librariesprovider132/default-document-library/zfdr_heft_2021-01.pdf; The European Consumer Organisation, "'Dark Patterns' and the EU Consumer Law Acquis: Recommendations for Better Enforcement and Reform" (Brussels: BEUC, February 7, 2022), https://www.beuc.eu/publications/beuc-x-2022-013_dark_patterns_paper.pdf; Régis Chatellier et al., "Shaping Choices in the Digital World: From Dark Patterns to Data Protection: The Influence of UX/UI Design on User Empowerment" (Paris: Commission Nationale de l'Informatique et des Libertés, January 2019), https://www.cnil.fr/sites/default/files/atoms/files/cnil_ip_report_06_shaping_choices_in_the_digital_world.pdf.
- 2 European Commission, "COM(2021) 262 Final: European Commission Guidance on Strengthening the Code of Practice on Disinformation" (Brussels: European Commission, May 26, 2021), 13–14, also 9, <https://ec.europa.eu/newsroom/dae/redirection/document/76495>.
- 3 Cf. Midas Nouwens et al., "Dark Patterns after the GDPR: Scraping Consent Pop-Ups and Demonstrating Their Influence," in *Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems* (New York, NY: Association for Computing Machinery, 2020), 1–13, <https://doi.org/10.1145/3313831.3376321>; Martini et al., "Dark Patterns: Phänomenologie und Antworten der Rechtsordnung," 61.
- 4 The European Consumer Organisation, "'Dark Patterns' and the EU Consumer Law Acquis: Recommendations for Better Enforcement and Reform."

design choices can be, from deceiving people to incentivizing virality over self-reflection to providing helpful context (see box below).

Case in point: Connections between design and the spread of disinformation

In an experiment⁵, users who were prompted to think about a headline they saw online were less likely to share false information than a control group. In the actual online space, platforms are not usually designed to encourage such a short pause for reflection. On the contrary, platforms most often want to create a fast, frictionless way for people to consume, share and comment on posts to keep them “engaged”. This might make sense from a business perspective, but, as the experiment highlights, it could also contribute to the spread of disinformation. This example (along with other research on this and related issues⁶) shows how design plays a role in both spreading and curbing disinformation. Only recently have platforms started to test their own design interventions to tackle disinformation. For instance, some platforms use labels to alert users to potentially misleading content. Facebook employees have suggested design changes that allows people to better distinguish different types of content (such as ads, news content and content from friends).⁷ Even with these design interventions, the difficult decision of what is labeled as disinformation remains. Therefore, using design to tackle disinformation needs to be transparent and well-researched. The DSA should provide the transparency and accountability framework for these and other corporate design practices.

5 Lisa Fazio, “Pausing to Consider Why a Headline Is True or False Can Help Reduce the Sharing of False News,” *Harvard Kennedy School Misinformation Review* 1, no. 2 (February 10, 2020), <https://doi.org/10.37016/mr-2020-009>.

6 For some examples, see Gordon Pennycook et al., “Shifting Attention to Accuracy Can Reduce Misinformation Online,” *Nature*, March 17, 2021, 1–6, <https://doi.org/10.1038/s41586-021-03344-2>; Philipp Lorenz-Spreen et al., “How Behavioural Sciences Can Promote Truth, Autonomy and Democratic Discourse Online,” *Nature Human Behaviour*, 2020, <https://www.nature.com/articles/s41562-020-0889-7.pdf>; Orestis Papakyriakopoulos and Ellen P. Goodman, “The Impact of Twitter Labels on Misinformation Spread and User Engagement: Lessons from Trump’s Election Tweets,” February 22, 2022, <https://papers.ssrn.com/abstract=4036042>; Jon Roozenbeek and Sander van der Linden, “Fake News Game Confers Psychological Resistance against Online Misinformation,” *Palgrave Communications* 5, no. 1 (June 25, 2019): 1–10, <https://doi.org/10.1057/s41599-019-0279-9>; Philipp Lorenz-Spreen et al., “Boosting People’s Ability to Detect Microtargeted Advertising,” *Scientific Reports* 11, no. 15541 (November 19, 2020), <https://doi.org/10.1038/s41598-021-94796-z>; Ellen P. Goodman, Karen Kornbluh, and Eli Weiner, “The Stakes of User Interface Design for Democracy” (Washington, DC: The German Marshall Fund of the United States, June 30, 2021), <https://www.gmfus.org/sites/default/files/Goodman%2520%2526%2520Kornbluh%2520-%2520User%2520interface%2520design.pdf>; Sahar Massachi, “Driving Test and Speed Bumps: How to Save Our Social Media by Treating It like a City,” *MIT Technology Review*, January 5, 2021, <https://www.technologyreview.com/2021/12/20/1042709/how-to-save-social-media-treat-it-like-a-city/>; Ellen P. Goodman, “Digital Information Fidelity and Friction,” *Knight First Amendment Institute*, February 26, 2020, https://s3.amazonaws.com/kfai-documents/documents/c5cac43fec/2.27.2020_Goodman-FINAL.pdf.

7 The New York Times, “Read the Letter Facebook Employees Sent to Mark Zuckerberg About Political Ads,” *The New York Times*, October 28, 2019, <https://www.nytimes.com/2019/10/28/technology/facebook-mark-zuckerberg-letter.html>.



3. How EU lawmakers could improve rules around platform design in the DSA

3.1 Defining deceptive design practices

Art. 2 The EU should define “deceptive design practices” and refrain from using the term “dark patterns”. The latter has been a useful term to raise awareness on deceptive design but should now be replaced by a clearer definition because deceptive design is often not happening “in the dark”. Importantly, new terminology would avoid the wrong connection of “dark” meaning “evil”.⁸ As with many definitions, finding a fitting one for deceptive design is a point of contention.⁹ Still, the EP’s and Council’s language (recitals 39a and 50a as well as articles 13a and 24b, respectively) can be used as a baseline. A definition should be in the DSA’s Article 2, which offers other definitions areas covered by the DSA, and not just in the recitals. It should define “deceptive design practices” as “practices subverting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof”.¹⁰

A definition should not include the necessity for deceptive design practices to have “negative consequences” for individuals (as the Council recital implicitly suggests) because deceptive design often does not only work at an individual level. Rather, negative consequences might also be felt collectively and at scale, for instance, through an erosion of consumer trust and market competition.¹¹

8 Cf. Kat Zhou in Federal Trade Commission, “Transcript of FTC Dark Patterns Workshop” (Washington, DC: Federal Trade Commission, April 29, 2021), 15, https://www.ftc.gov/system/files/documents/public_events/1586943/ftc_darkpatterns_workshop_transcript.pdf; M. J. Kelly, “What Are Deceptive Design Patterns and How Can You Spot Them?,” *The Mozilla Blog*, May 5, 2021, <https://blog.mozilla.org/en/internet-culture/mozilla-explains/deceptive-design-patterns/>.

9 For an overview of definitions, see Arunesh Mathur, Mihir Kshirsagar, and Jonathan Mayer, “What Makes a Dark Pattern... Dark? Design Attributes, Normative Considerations, and Measurement Methods,” in *CHI Conference on Human Factors in Computing Systems* (Yokohama, Japan: Association for Computing Machinery, 2021), 2–3, <https://doi.org/10.1145/3411764.3445610>; for further discussions, see Quirin Weinzierl, “Dark Patterns als Herausforderung für das Recht. Rechtlicher Schutz vor der Ausnutzung von Verhaltensanomalien,” *Neue Zeitschrift für Verwaltungsrecht* 15 (2020): 1–11, https://rsw.beck.de/rsw/upload/NVwZ/NVwZ-Extra_2020_15.pdf; Sebastian Rieger and Caroline Sinders, “Dark Patterns: Regulating Digital Design” (Berlin: Stiftung Neue Verantwortung, May 13, 2020), 11–17, https://www.stiftung-nv.de/sites/default/files/dark_patterns.english.pdf; Martini et al., “Dark Patterns: Phänomenologie und Antworten der Rechtsordnung,” 55; Federal Trade Commission, “Transcript of FTC Dark Patterns Workshop,” 6–15; Yashasvi Nagda, “What Is Darkness in Dark Patterns?,” *Medium*, March 17, 2020, <https://medium.com/muz.li/what-is-darkness-in-dark-patterns-e981465c0c57>.

10 Many thanks to Quirin Weinzierl and also Miika Blinn for having worked on a definition previously and graciously sharing their insights with me, which greatly shaped this section.

11 Cf. Mathur, Kshirsagar, and Mayer, “What Makes a Dark Pattern... Dark?”

3.2 Putting in place bans on deceptive design practices for all platforms

**Art. 13(a)/
Art. 24b** With a definition for deceptive design practices in place (see 3.1), the DSA should include a dedicated article prohibiting the use of these practices. Both the Council and the EP propose this, albeit in different forms:

- The Council only bans deceptive design for online marketplaces in a new Article 24b(-1) (sic!), while the EP does it for all platforms in a new Article 13a. People are confronted with deceptive design not only when they are shopping for shoes or a plane ticket, but also when they are using automated recommender systems, changing privacy settings or reporting content. For instance, Facebook was fined for their hidden-away and difficult-to-use reporting mechanism for potentially illegal content in Germany.¹² With this in mind, design rules should be in place for all platforms, not just online marketplaces.
- The Council uses rather broad language on a ban, whereas the Parliament additionally includes a list of specific practices to be prohibited and empowers the Commission to update this list with a delegated act. If deceptive design practices are defined well within Article 2 (see 3.1), it may not be necessary to have such a list of specific bans. If lawmakers do opt for including a list of specific banned practices, using a delegated act to update the list is the right approach. This allows for the list to be updated quicker, which is necessary because any specific prohibitions might be outdated fast, due to the dynamic development of platforms, platform policies, services and devices. Lawmakers should ensure that specific banned practices are not too narrow. For instance, the EP's amendment in Article 13a(1)(a) bans platforms from giving more "visual prominence" to any consent option. "Visual" should be dropped to acknowledge that platforms now or in the future might not have visual online interfaces (considering, for example, "smart" speakers).

Art. 13(a) Taken together, the EP's Article 13a should form the baseline of a platform design article in the DSA. A suggestion for this article is provided in the following section.

¹² Thomas Escritt, "Germany Fines Facebook for Under-Reporting Complaints," *Reuters*, July 2, 2019, <https://www.reuters.com/article/us-facebook-germany-fine-idUSKCN1TX1IC>; Torben Klaus, "NetzDG-Verstöße: Facebook zahlt fünf Millionen Euro," *Tagesspiegel Background Digitalisierung & KI*, September 3, 2021, <https://background.tagesspiegel.de/digitalisierung/netzdg-verstoesse-facebook-zahlt-fuenf-millionen-euro>.



3.3 Creating meaningful transparency around platform design

The DSA provides an opportunity to go beyond prohibitions and acknowledge the role of platform design more widely. Deceptive design practices such as coercive consent options can hurt EU citizens, but other design choices, for example, content labels, can give users context for news items. Speaking more generally, platform design is not neutral: Companies make specific decisions on how to structure and present their online interfaces and continuously test new design options. This is normal and desirable, too, considering the possibilities for ethical or prosocial design that user experience (UX)/user interface (UI) design practitioners have explored.¹³ Yet, there is little leeway for researchers, regulators and ultimately users to learn about the effects of corporate design choices. This also makes it hard to identify deceptive design practices. The DSA should build an accountability and transparency framework for platform design, similar to how other industries must test product features and report on these tests. This could be achieved by introducing a transparency reporting obligation on platform design into the DSA, for instance, in the EP's suggestion for Article 13a.¹⁴

- Art. 13(a)** Including considerations from 3.1 and 3.2, the DSA's Article 13a should read:
- “(1) Providers of intermediary services shall not use deceptive design practices.
- (2) The Commission is empowered to adopt a delegated act in accordance with Article 69, after consulting with external experts and the Board, to draw up a non-exhaustive list of prohibited deceptive design practices. This paragraph shall be without prejudice to Regulation (EU) 2016/679.
- (3) Providers of intermediary services shall, at least once a year, publish and transmit to the Digital Services Coordinator of establishment and the Commission clear, easily comprehensible and detailed reports on the online interfaces they use to present options to or interact with recipients. The reports shall include at least information on online interfaces that were used, whether they were intended to be displayed to particular groups of recipients of the service and if so, the main parameters used for that purpose, and whether particular groups of recipients were explicitly excluded from the online interface target group.
- (4) Where applicable, providers of intermediary services shall adapt their design features to ensure a high level of privacy, safety, and security by design for minors.”

(This would also require an editorial change to Article 69 to include Article 13a there.)

13 For example, Prosocial Design Network, “Prosocial Design Network,” 2022, <https://www.prosocialdesign.org/>; Kat Zhou, “Design Ethically,” 2022, <https://www.designethically.com/>; Design Friction, “Design Friction,” 2022, <http://design-friction.com/contents/en/>; Caroline Sindors, “Designing Against Dark Patterns” (Washington, DC: German Marshall Fund of the United States, July 2021), <https://www.gmfus.org/sites/default/files/Sindors%2520-%2520Design%2520and%2520Information%2520Policy%2520Goals.pdf>.

14 I am grateful to Quirin Weinzierl for sharing his idea for transparency obligations. He formulated parts of the suggestion for Article 13a.



It is imperative that EU lawmakers include a special article on design in the DSA such as the one suggested here based on Article 13a. A clear definition and ban of deceptive design practices, combined with obligations for transparency around design, could form the backbone of a progressive approach to regulating platform design. Without it, the DSA would miss the opportunity to set much-needed standards in this field of platform regulation. On a more practical note, it would also mean that every time the DSA addresses online interfaces, the respective article would have to explicitly say that deceptive practices are banned. For instance, the Council article on recommender systems bars deceptive design practices when users are presented with different options for these recommender systems (Article 29(3)).¹⁵ This is because the Council does not foresee a general ban for deceptive design practices. If there was one overarching article on platform design, including a ban on deceptive practices, this would not be necessary.

3.4 Reinforcing accessibility provisions

Art. 19a

Among other things, user interface designers are concerned with how to make online services and platforms accessible for all people, including those with cognitive, visual or auditory impairments. That is why accessibility requirements have a strong design angle. In the EU, there are already rules in place for certain accessibility standards for services and products. The EP still introduces a new DSA article explicitly referencing these rules (Article 19a). This is the right approach and should be part of the DSA. To clarify, the EP's Article 19a(1) should specifically mention "online interfaces": Platforms should design "services and their online interfaces" in accordance with EU accessibility requirements.

3.5 Including design considerations in risk assessments and risk mitigation measures

Art. 26(1)
Art. 27(1)(a)

Two of the DSA's key due diligence proposals for very large online platforms are mandatory risk assessments and risk mitigation measures. However, a requirement for these platforms to consider design in their risk assessments and risk mitigation was not in the original draft. The Parliament's addition to include such language is necessary, especially if transparency reporting obligations as suggested for Article 13a (see 3.2) are not part of the DSA. This way, design questions would also be part of the audits that are mandatory for very large online platforms. The DSA should use the parliamentary amendments on risk assessments (Article 26) and risk mitigation (Article 27). Regarding the parts on design, Article 26(1) and Article 27(1)(a) should

¹⁵ Thank you to Martin Madej for pointing this out.



each make explicit references not only to “design” but also to “online interfaces”. This is because the latter will be defined in the DSA (so far, “online interfaces” are only mentioned in Article 27(1)(a)).

3.6 Including design considerations for reporting and database templates

The DSA requires transparency reports on platforms’ content moderation practices (Articles 13, 23 and 33) and lays down rules for notification mechanisms for illegal content. These proposals touch upon design issues, albeit indirectly: The way the reports and notification mechanisms are designed is a crucial factor in their usability for citizens and researchers and for their comparability across time and platforms. For instance, a German law requiring transparency reports on content moderation (the Network Enforcement Act; “Netzwerkdurchsetzungsgesetz” or “NetzDG” for short) had to be amended because there were no fitting guidelines for the reports. One lesson to learn from this is that templates for reports can be useful. In the case of the NetzDG, the revised law now specifies what deletion statistics must be included and what moderation mechanisms must be explained in the reports.

Art. 13(3)
Art. 23(4)
Art. 33(3)

In the original DSA draft, there are some mentions of templates to be created by the Commission, at times after consulting the Board (a new EU-level advisory committee). Yet, templates for transparency reports are missing. The Council introduced templates for reports mandated for all platforms (Article 13(3)), while the EP foresees them for reports by certain platforms (Article 23(4)). Neither legislator addresses the specific additional transparency reporting obligations for very large online platforms in Article 33. The DSA must include language on this as well, for example, in an added Article 33(3): “The Commission shall adopt implementing acts to lay down templates concerning the form, content and other details of reports pursuant to paragraph 1 of this Article.” This is especially crucial because these transparency reports also include the results of the very large online platforms’ risk assessments.

Art. 8(2)(a)
Art. 9(2)(a)
Art. 15a(5)

In addition, the EP requires templates for other topics, which should be part of the final text. This concerns templates for orders on illegal content (Article 8(2)(a)), information provision (Article 9(2)(a)) and notifications (Article 15a(5)).

The development of templates should be mandatory, not optional (using “shall” instead of “may” in the articles). The corresponding articles should include time frames in which the Commission must draw up these templates. They should also clearly state that templates should be developed using outside expertise.

Beyond reporting templates, the DSA should also be clear as to what information it requires from platforms in databases and explanatory statements and how this information should be presented. For example, the DSA would make databases for online advertising mandatory for very large online platforms. Some companies have already established such databases on a voluntary basis, which was a welcome measure. However, these databases were poorly designed, for instance, regarding their search functions or how easily researchers could download data. Learning from this experience, the DSA should not only state what should be part of the databases (as Article 30 does), but also ensure that repositories are easy to find and use. The EP introduced amendments to that effect, which should be used (Article 30(1), (2a)). Similarly, on explanations for recommender systems from online platforms, the EP suggests more details on their content and presentation (Article 24a). This is useful, but these details could also be included in a delegated act to make the amendment process faster.

Art. 30(1), (2a)
Art. 24a

3.7 Strengthening enforcement and interdisciplinary expertise on platform (design) regulation

The DSA will task EU and national regulators with enforcing and overseeing new, previously untested rules, potentially including those on deceptive design practices. New sets of expertise, skills and cooperative processes are thus necessary. More generally, it will be important to ensure strong and consistent enforcement of the DSA. Otherwise, even progressive rules on design, risk assessments and transparency reporting will be moot. The Council's proposal (especially the new Section 1a in Chapter IV with Article 44a) simplifies enforcement structures, clarifies responsibilities shared between EU and national bodies and places oversight for very large online platforms mostly at the EU level, with the European Commission. Out of the three DSA texts, this is the most suitable idea to ensure strong enforcement. EU lawmakers should therefore back the Council's version on the oversight governance structure. Over the long-term, however, a separate, specialized EU agency for online platforms should be considered.¹⁶

Art. 44a

Art. 49a Moreover, the DSA should include the Council's suggestion for a new Article 49a, which requires regulators to develop "expertise and capabilities" on DSA topics. To clarify that this development requires exchanges with outside experts from diverse fields, a sentence should be added stating "The Commission shall consult with outside experts in developing this expertise." A recital should clarify that outside experts include UX/UI designers, behavioral psychologists and sociologists.

¹⁶ Julian Jaursch, "The DSA Draft: Ambitious Rules, Weak Enforcement Mechanisms" (Berlin: Stiftung Neue Verantwortung, May 25, 2021), https://www.stiftung-nv.de/sites/default/files/snv_dsa_oversight.pdf.

Even if regulators continue to enhance their knowledge and capabilities regarding platform regulation in general and platform design in particular, it will be necessary to receive outside expertise from practitioners, academia and civil society on these issues. This is a need for many tech regulation topics, but especially one for a dynamic field such as design, where tech companies constantly tweak and adapt their online interfaces. While the DSA already includes some mentions of outside experts having to be consulted, these provisions should be clarified and expanded, so that the Commission and regulators have a strong mandate to seek diverse expertise, including on design:

- Art. 26(2)(a)** • On risk assessments and risk mitigation, the Parliament’s amendments for Article 26(2)(a) and Article 27(1)(a) should be used, but the qualifier “where appropriate” should be dropped to make an inclusion of independent experts clearer.
- Art. 27(1)(a)**
- Art. 29/Art. 24a** • Similar language should be added to the article on recommender systems (Article 29; also Article 24a in the EP version).
- Art. 23(4)** • In articles on templates (see 3.6), the term “after consulting with outside experts” should be added. For instance, in Article 23(4), it should read, “The Commission shall adopt implementing acts to establish a set of key performance indicators and, after consulting with outside experts, lay down templates concerning the form, content and other details of reports pursuant to paragraph 1.” Recitals on the respective issues should clarify that outside experts include UX/UI designers, behavioral psychologists, sociologists and others.

Ideally, over time, these exchanges with outside experts could be formalized further, for example, by establishing a dedicated forum.

3.8 Reviewing design rules more frequently

User interfaces can change quickly and new devices, apps and modes of interaction pop up frequently. This requires a dynamic and more fast-paced evaluation process than the original DSA draft envisioned. A potential remedy could be introducing a shorter time frame for reviews than the five years prescribed in the original draft. The EP amendments would reduce the original five-year review period to three years, which is an appropriate suggestion that needs to be followed (Article 73(1)).

Art. 73(1)

- Art. 73(3)** It is welcome that all DSA drafts acknowledge that evaluating the law cannot be left entirely to regulators and lawmakers but needs to take into account “other sources” as well (Article 73(3)). There could, however, be a stronger reference to

outside expertise having to be consulted: Article 73(3) (or at least a recital for it, for instance, recital 102) should specifically mention that “other sources” include outside experts from academia, civil society and businesses.



4. What is next for design rules in the DSA

Rules around platform design might prove to be a sticking point in the DSA negotiations between the Parliament, Council and Commission, which started in late January and will likely last several months¹⁷. As this briefing has highlighted, there are considerable discrepancies between the three institutions' ideas on deceptive design. With the DSA, EU lawmakers have the opportunity to deliberate and put into place guiding principles for platform design. To be the innovative and progressive piece of legislation that the EU has set out to create, the final DSA needs to include a dedicated article on platform design, banning deceptive practices and creating transparency around corporate design decisions. The concrete proposals put forth by European lawmakers and the suggestions for their improvement provided here should serve as ideas for sensible regulation on this important topic.

¹⁷ Foo Yun Chee, "Deal on EU Tech Rules Possible by June, Key Lawmaker Says," *Reuters*, February 14, 2022, <https://www.reuters.com/technology/deal-eu-tech-rules-possible-by-june-key-lawmaker-says-2022-02-14/>.



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Annex: DSA proposals on (deceptive) platform design

Legislative text	European Commission ¹⁸	European Council ¹⁹	European Parliament ²⁰
Date	12/2020	11/2021	01/2022
Definitions			
Online interface	“any software, including a website or a part thereof, and applications, including mobile applications” (Art. 2(k))		“any software, including a website or a part thereof, and applications, including mobile applications which enables the recipients of the service to access and interact with the relevant intermediary service” (Art. 2(k))
“Dark patterns”	n/a	Only in recital (50a): “design techniques that push or deceive consumers into undesired decisions which have negative consequences for them”	Only in recital (39a): “deceiving or nudging recipients of the service”, “distorting or impairing the autonomy, decision-making, or choice of the recipients of the service via the structure, design or functionalities of an online interface or a part thereof”
Prohibition of deceptive design			
General prohibitions	n/a	Only for online marketplaces: Online interface cannot deceive or manipulate people “by subverting or impairing their autonomy, decision-making or choices” (Art. 24b(-1) (sic!))	Intermediary services cannot use online interface “to distort or impair” users’ “ability to make a free, autonomous and informed decision or choice” (Art. 13a)
Specific prohibitions	n/a	When presenting different options for recommender systems, platforms “shall not seek to subvert or impair the autonomy, decision-making, or choice of the recipient of the service through the design, structure, function or manner of operating of their online interface” (Art. 29(3))	Art. 13a (list can be updated via delegated act): <ul style="list-style-type: none"> • “giving more visual prominence to any of the consent options” • Repeated requests for consent, especially with popups • Requesting consent when users object to data use • Urging users to change a setting after they have already made a choice • Making cancelling a service harder than signing up to it • Recommender system design should be “consumer-friendly” and not use “dark patterns” (Recital 62)

18 European Commission, “COM(2020)825/1 - Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC” (2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A825%3AFIN>.

19 Council of the European Union, “Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC - General Approach” (2021), <https://data.consilium.europa.eu/doc/document/ST-13203-2021-INIT/en/pdf>.

20 European Parliament, “Amendments Adopted by the European Parliament on 20 January 2022 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and Amending Directive 2000/31/EC (COM(2020)0825 – C9-0418/2020 – 2020/0361(COD))” (Strasbourg: European Parliament, January 20, 2022), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.pdf.

Legislative text	European Commission	European Council	European Parliament
Design aspects of due diligence rules			
Notification and other orders	"easy to access, user-friendly" notification mechanism for illegal content (Art. 14) and internal complaints (Art. 17)		
	n/a	n/a	Clear, user-friendly terms of service (Art. 12(2a)), possibly with "graphical elements" (Art. 12(2b))
Data access interfaces	n/a	"appropriate interfaces" for data access (Art. 31(3))	"easily accessible and user-friendly mechanism to search for multiple criteria" (Art. 31(3))
Recommender system explanations	When presenting different options for recommender systems, platforms should have "easily accessible functionality on their online interface" for this (Art. 29(3))	<ul style="list-style-type: none"> • Explanations on recommender systems need to be "directly and easily accessible" (Art. 29(1)) • When presenting different options for recommender systems, platforms "shall not seek to subvert or impair the autonomy, decision-making, or choice of the recipient of the service through the design, structure, function or manner of operating of their online interface" (Art. 29(3)) 	<ul style="list-style-type: none"> • Explanations on recommender systems need to be "clear, accessible and easily comprehensible" (Art. 24a(1)) • When presenting different options for recommender systems, platforms should have "easily accessible functionality on their online interface" for this (Art. 24a(3); also Art. 29(1)) • Recommender systems should not be undermined by "dark patterns" (recital 62)
Templates for, e.g., transparency reports	Commission "may" develop templates for transparency reports (Art. 23(4))	Commission "may" develop templates for transparency reports (Art. 13(3); Art. 23(3))	Commission "shall" develop templates for orders on illegal content (Art. 8(2)(a)), on information provision (Art. 9(2)(a)), notifications (Art. 15a, 5), transparency reports (Art. 23(4))
Risk assessments and mitigation	n/a	Risk mitigation can include adapting interfaces "for increased user information" (Art. 27(1)(f))	<ul style="list-style-type: none"> • Risk assessment needs to take into account "design" (Art. 26(1)) • Risk mitigation can include adapting "online interfaces" and "design" (Art. 27(1)(a))
Online advertising (transparency)	Users need to be able to identify ads in "clear and unambiguous manner and in real time" (Art. 24)	"directly and easily accessible" information (Art. 24(1)(c)) on ads; "prominent markings" for ads (Art. 24(2)) to be standardized (Art. 34(1)(g))	<ul style="list-style-type: none"> • Users need to be able to identify ads in "clear, concise and unambiguous manner and in real time" with "prominent" and harmonized marking (Art. 24(1) and (1a)) • Users need to "easily" be able to make consent choices (Art. 24(1)(a)) Ad repositories should be "searchable through easy to access, efficient and reliable tools" (Art. 30(1))

Legislative text	European Commission	European Council	European Parliament
Design aspects of due diligence rules			
Special rules for minors	n/a	Only mentioned in recitals for easy-to-understand terms and conditions (38), risk assessments (57), risk mitigation (58)	<ul style="list-style-type: none"> • Platforms to adapt “design” to ensure privacy, safety of minors
Accessibility	n/a	n/a	Online platform providers shall “design” services in accordance with EU accessibility requirements (Art. 19a(1))
Online marketplaces	Online marketplaces need to make imprint information of traders “available” (Art. 22(6), (7))	Online marketplaces need to make imprint information of traders “easily accessible” (Art. 24a(6); Art. 24b(2))	Online marketplaces need to make imprint information of traders “easily accessible” (Art. 22(6), (7))
Involvement of independent experts	Public consultations for guidelines for risk mitigation (Art. 27(3))		
	Only in recital (59): Independent experts can be included in developing risk assessments and risk mitigation measures		<ul style="list-style-type: none"> • Platforms shall, “where appropriate”, consult with independent experts in developing risk assessments (Art. 26(2)(a)) and risk mitigation measures (Art. 27(1)(a)) • Board shall develop guidelines for ad repositories after consulting with vetted researchers (Art. 30(2a))



About the Stiftung Neue Verantwortung

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