A Legal Framework to Govern Online Harm

Lessons from the EU's DSA

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The DSA Report

- KAS funded Fritz and Limpitlaw to undertake a study trip to Europe to talk to regulators, platforms, civil society orgs, the EU Commission on the EU's Digital Services Act (DSA) – the most ambitious global attempt to regulate social media giants – Meta, Alphabet, X etc..
- The meat of the report is published in hard copy but there are three annexures to the Report that are only published online: A: Existing legal landscape B – Constitutionally Compliant Model for Platform Regulation & C Internationally accepted grounds for regulating online content.
- SA cannot replicate the DSA – the EU has a population of 450m, has regulatory institutions and the collective economic leverage of 27 member states.
- SA has much more limited regulatory, technical and financial capacity
- Q: What might SA learn from the DSA – which mechanisms are valuable, which are problematic. What could we meaningfully do?

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The DSA Model - Controversial

- The US has criticised the DSA:
  - Restricts free expression
  - Discriminatory burdens on US companies
  - Had implemented visa restrictions on officials involved in its implementation.
- The DSA represents a break from platforms “self”-regulating – and choosing in which jurisdictions they would be accountable for harms.
- Platforms are global, their harms are not.
- Some of the DSA mechanisms are elementary and can usefully be borrowed/adapted to ameliorate local harms caused by or over global platforms eg upsurge in xenophobia/March and March recently.

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A South African Regulatory Pyramid

- Base: intermediary services – technology neutral – function: transmission, caching and hosting eg as governed by the ECTA
  - Additional Obligations: online platforms and search engages – disseminating user-provided info to the public
    - Strongest Obligations: Where the Service reaches a defined level of scale or systemic significance in SA.

- SA need not regulate every digital intermediary in the same way to achieve effective regulation of the digital sphere.
- "Safe Harbour" of intermediary liability is necessary to guard against private censorship by risk aversion eg for neutral technical functions.
- Hosting: ECTA includes liability for not "taking down" content upon demand – creates powerful incentives for abuse/censorship and is dangerous to journalism and public interest expression.
- Distinction between notice and knowledge – ie an actual determination of illegality is necessary.
- Active monitoring is generally not necessary – exceptions eg CSAM ie more onerous monitoring obligations are required in relation to certain content.

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Establishing Jurisdiction

- SA must be able to assert regulatory and legal authority over significant global platforms/services intentionally offered in SA.
- Often platforms are “foreign peregrinus” – and resist the jurisdiction of courts/regulators.
- SA Courts have already accepted the principle of “sufficient or real connection” to found jurisdiction over foreign entities doing business in SA.
- DSA applies to services offered in the EU irrespective of the provider’s place of establishment.
- SA legislation could identify such connections: number of recipients of the service, targeting of SA users, providing the service in SA languages eg isiZulu, sale of advertising directed at SA audiences, revenue, use of SA domains, currencies, payment systems etc.. or other conduct demonstrating purposeful participation in the SA digital environment.

Establishing Jurisdiction

- Obligations of a platform with sufficient connection to SA:
  - Local legal rep authorised to:
    - received legal process and regulatory notices
    - respond to info requests
    - engage with compliance authorities
  - The information about the local rep to be publicly available and to include:
    - Website address
    - Email address
    - Physical and Postal Address
    - Telephone number
  - Why? Meta WhatsApp case.

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Accessible Complaint, Notice and Redress Mechanisms

- DSA establishes procedural rules governing how complaints are: received, considered, decided, appealed/reviewed (if necessary).
  - Complaints re: allegedly illegal content – requires an accessible standardized mechanism for the public to use eg on the platform, electronic, user-friendly ie with clear instructions, available in SA languages, disability-accessible, mobile-accessible and require explanation as to alleged illegality.
  - Processes: timely, diligent, not arbitrary and objective, including expedited channels where alleged illegality involves imminent or serious harm ie a triaging complaints mechanism.
    - Acknowledgement of receipt of complaint
    - Status indication
    - Outcome communication
  - Obligation to explain/provide reasons for significant moderation decisions (transparency of decision-making)
  - Internal appeal/review mechanisms ie to right to seek reconsideration/to challenge content moderation decisions and cannot be automated only.

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Accessible Complaint, Notice and Redress Mechanisms

- Note, platforms may moderate content not because it is illegal but because it violates their own terms and conditions which may prohibit lawful content
  - Platforms must be accountable for content they restrict
- Trusted flaggers
  - Complaints by designated trusted flaggers (eg Real 411, Childline, IEC) to be given priority.
  - Note trusted flaggers do not determine legality or illegality of content – the platform does.
- Principle: Complaint systems are not to be mechanisms for private censorship – need to protect against vexatious complainants.

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Accessible Complaint, Notice and Redress Mechanisms

- Escalation of suspected serious criminal conduct
  - Reporting and information-preservation obligations under the Cybercrimes Act
  - Note does not amount to a general obligation to monitor.
  - New law should consider general escalation pathways.
- Independent Review of Unresolved Complaints
  - Courts are too expensive
  - Independent review after exhaustion of platforms' internal remedies and before recourse to the courts by an independent regulatory body eg ICASA

Transparency and Reporting

- Transparency is required re: how platforms exercise their powers and operated their services in SA particularly regarding complaints
- Aim: to reduce information asymmetry between the platforms and the public. Eg:
  - Number of complaints/appeals received from SA users/trusted flaggers and outcomes
  - Info relating to processes eg average time taken to resolve etc.
  - Requests/orders received from courts, regulators, law enforcement
  - Actions taken in response to the above.
  - Content moderation measures initiated by the platforms, and automated decisions taken
  - Number and categories of account suspensions, content removals, visibility restrictions, demonetization decisions
  - Infor re; adequacy of linguistic and contextual capacity in SA

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Transparency and Reporting

- Harmonization of Transparency Reporting is required ie across platforms so that researchers/the public can understand/identify differing approaches and conduct as between platforms. Consequently, the regulator should prescribe:
  - Common definitions, reporting categories, reporting periods, formats
  - Data should be machine readable so regulators, researchers and civil society organisations can analyze outputs without having to extract data from company reports.
  - Does not have to elaborate to be useful.
  - General issues to be reported on: content moderation decisions, advertising, recommender systems, SA-specific capacity eg language, contextual expertise.

Access to Platform Data and Independent Research

- Transparency and reporting obligations have a flaw – the platform remains the source of information.
- DSA requires qualifying platforms to provide access to certain data for regulatory oversight and vetted (by the Regulator) independent research purposes ie beyond the data that is publicly available to contribute to understanding defined systemic risks or to assess measures intended to mitigate them.
- SA could do the same ie criteria for researcher qualification is expertise, institutional affiliation, independence from commercial influence.

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Systemic Risk Assessment Adapted to SA Circumstances

- DSA identifies four categories of systemic risk that the platforms must assess:
  - Dissemination of illegal content
  - Negative effects upon fundamental rights eg freedom of expression/information, privacy, non-discrimination, children's rights and consumer protection.
  - Negative effects upon civic discourse, electoral processes and public security.
  - Negative consequences for physical and mental well-being eg GBV, protection of public health and minors.
- Ie focus is broader than problematic content and includes the platform's own systems: recommender, advertising, content moderations, etc.

Systemic Risk Assessment Adapted to SA Circumstances

- SA-focused risks – including Platform's own contribution to these:
  - Unlawful content
  - Constitutional rights – expression, equality, dignity, privacy
  - Electoral integrity and democratic participation
  - Media freedom/pluralism
  - Public safety and risk of violence
  - Children and other vulnerable users
  - Coordinated manipulation of the information environment
  - Serious forms of online GBV and harassment.
- Not an open-ended justification for government intervention in lawful expression.
- Subject to independent audits.

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Protection of Minors Online

- DSA Objectives – not just to protect children from harmful content but to ensure their digital participation – accessing educational, social, creative and communicative opportunities while ensuring a high level of privacy, safety and security.
- This is a general duty – as different platforms present different risks.
- Essentially, safety by design.
- Account design to secure privacy and unwanted/unsolicited contact.
- Guard against addictive design/recommender systems and harmful exposure
- Age assurance with unnecessary surveillance eg disclosure of IDs etc.
- No commercial exploitation of children's personal data eg profiling-based advertising.

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Funding Effective Oversight

- The regulatory responsibilities to be undertaken in relation to platform regulation cannot simply be added to the mandates of SA's existing institutions without adding corresponding resources.
- DSA principle: the costs associated with specialized supervision need not be borne entirely by the taxpayer – so an annual supervisory fee designed to cover estimated costs incurred in exercising platform supervisory functions – is imposed on qualifying platforms.
- Any such fee should protect institutional independence – so a regulator is not financially dependent on payments from particular platforms or develop incentives to maximize fee revenue.

Effective Enforcement

- Regulator must have the powers to determine if platforms are complying with their obligations and if not, to respond effectively eg
  - Investigatory powers to assess compliance
  - Remedial powers to require correction of deficiencies
  - Meaningful sanctions where platforms deliberately or repeatedly fail to comply – eg linked to global (as opposed to SA only) turnover.
  - Requires the ability to approach the courts to secure compliance.

Institutional Architecture and Co-regulation

- ICASA's guaranteed independence under Chapter 9 of the Constitution means it is best place to serve as the general online content regulator.
- Repository of complaints after internal platform mechanisms have been exhausted.
- ICASA should have MOUs and referral pathways under clear prescribed service-level time limits to existing specialist bodies after an initial determination ie:
  - Hate and discriminatory expression – SAHRC, Equality Courts
  - Privacy and Data Protection – Info Regulator
  - CSAM and prohibited content – FPB, law enforcement
  - Elections related - IEC, Electoral Court or IEC's designated complaints mechanisms
  - Criminal Offences - SAPS, NPA.

Institutional Architecture and Co-regulation

- These suggestions (and others like it) should be contained in an Online Safety Policy
- Find their way into legislation especially ICASA Act and ECTA and ECA to confer on ICASA general platform regulatory authority
- ICASA should be empowered to approve, supervise and enforce platform-related industry codes or, where these are ineffective, to develop its own online content guidelines or codes in the public interest.
- Examples of powers: prescribe platform regulatory codes, due process provisions for complaints, including: time limits, ability to issue take down or put up notices, requiring platforms to provide written reasons, conduct platform audits with or without 3P experts, platform liability for harm and non-compliance with oversight requirements, levying of fees to cover the cost of platform oversight.

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Thank you.

Questions?

