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Susana Coroado

**Leviathan vs Goliath or
States vs Big Tech and
what the digital services
act can do about it**

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Susana Coroado

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Abstract

Big Tech companies have attained unprecedented power and are entrenched in all aspects of public and private lives of individuals and communities in the last few years. Their mounting economic power, geopolitical relevance and outstanding impact on democratic rule and fundamental rights make them rival with the power of sovereign states. Simultaneously, the companies try to replicate rule of law structures in their own governance. Amidst the contestation of Big Tech power, the EU Digital Services Act has emerged as a most advanced regulation aimed at tackling the companies' power. However, it risks legitimizing the self-regulatory instruments and reinforcing the power of the most dominant companies.

Keywords: Big Tech; Platforms; DSA; Sovereign Power; Regulation; Digital Democracy

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Leviathan vs Goliath or States vs Big Tech and what the digital services act can do about it

Susana Coroado¹

Introduction

In his book *The Origins of Political Order*, American philosopher Francis Fukuyama explains how at a given moment in history, the Church was critical to the establishment of the rule of law in Europe. More interestingly, however, the author's proposition of how the Church itself, in the 16th century, "acquired state-like characteristics",² aiming to legitimize itself by creating a single canon law, developing a bureaucracy and a separate well-institutionalized domain of spiritual authority. Although it ruled over a small territory, the Church's power and quasi-state attributes came from that spiritual authority that did not need to materialize within physical borders. It was a cross-border and above-the-state power. This made the relationship between the Church and sovereign states at times tense; at times cosy and at times competitive but not incompatible.

The 21st century may be witnessing the emergence of other quasi-state powers, the largest technology companies, also known as Big Tech. Thanks to the expansion of the internet and the development of new technologies, Big Tech companies have gained unprecedented global power, namely in the domains of industry, commerce, telecommunications, education, entertainment, culture, media and politics.³ Booming in the first decade of the century, these Big Tech companies rapidly went from being regarded as "liberation technologies"⁴ to being accused of playing "digital gangsters."⁵ Both qualifications were justified and, to a certain extent, still co-exist and relate to these companies, platforms and services they offer, depending on the context and the point of view. Social media, for instance, had a key role in the "Arab Spring" popular uprising and were an important tool for both Ukrainian citizens and political elites since 2014 and the subsequent Russian invasions. However, a succession of scandals and

¹ Senior Researcher, University of Antwerp, and Associated Researcher, Institute of Social Sciences, University of Lisbon.

² Fukuyama, F. (2011), *The origins of political order: From prehuman times to the French Revolution*. Farrar, Straus and Giroux. Kindle Edition, chapter 18.

³ See, for instance, Zuboff (2019). *The age of surveillance capitalism: The fight for a human future at the new frontier of power*. London: Profile books.

⁴ Diamond, L., & Plattner, M. F. (Eds.). (2012). *Liberation technology: Social media and the struggle for democracy*. Baltimore: JHU Press.

⁵ Digital, Culture, Media and Sport Committee (2019). *Disinformation and "fake news"* [Report No. 8]. London: House of Commons.

controversies of various kinds, many relating to key democratic issues, such as election integrity, freedom of expression, privacy or incitement to violence have undermined the reputation and the trust in these large tech companies.

The COVID-19 pandemic has left individuals, other companies and sovereign states even more dependent on the services provided by these multinationals because they were able to swiftly respond to their needs during times of lockdown and social distancing.⁶ As their market value and influence have grown, Big Tech companies have conquered more power to intervene in the political, social and economic spheres and are playing increasingly substantial roles in domestic politics and international relations, which some say may rival the authority of traditional sovereign states.⁷ Examples of companies that became so large and powerful that they became 'quasi-states' or that they had a serious impact on human rights abound in history.⁸ Nevertheless, in none of these cases, such as the British Indian companies or Standard Oil, there was a degree of concentration of political, economic, and geopolitical power simultaneously.⁹

The activities of these companies challenge the rule of law in two ways. First, by not complying with democratic principles and laws, and avoiding enforcement. Second, through pseudo instruments and institutions that resemble those of the rule of law, such as 'constitutional-like' terms of service, in an attempt to gain the same legitimacy and avoid regulation. The goal of this working paper is to make sense of this dynamic of tension vs imitation between Big Tech companies and the rule of law. By framing these challenges and dynamics, from the point of view of the rule of law, this study aims to contribute to two debates, one on democracy and another on digital regulation.

Discussion on the power relationships between states and multinational corporations are not new, as the latter became powerful and globalized stakeholders in international relations, but they also captured governments, infringed laws and were responsible for human rights violations.¹⁰ However, with Big Tech companies, these challenges and tensions have reached a new level, as the so-called GAFAM (Alphabet/Google, Amazon, Facebook, Apple, and Microsoft) have been considered the five most valuable privately

⁶ See, for instance, Klein, N. (2020). Naomi Klein: How big tech plans to profit from the pandemic. *The Guardian*.

⁷ See, for instance, Gu, H. (2023). Data, Big Tech, and the New Concept of Sovereignty. *Journal of Chinese Political Science*, 1-22 and Lehdonvirta, V. (2022). *Cloud empires: How digital platforms are overtaking the state and how we can regain control*. Cambridge, Massachusetts: MIT Press.

⁸ Wu, T. (2018). *The curse of bigness*. New York City: Columbia Global Reports, 75.

⁹ Stoller, M. (2019). *Goliath: the 100-year war between monopoly power and democracy*. Simon & Schuster.

¹⁰ See, for instance, Ruggie, J. G. (2013). *Just business: Multinational corporations and human rights* (Norton global ethics series). WW Norton & Company.

owned corporations in the world¹¹ and invested unprecedented sums in lobbying.¹² Their emergence and global expansion were indeed groundbreaking, with positive and negative impacts on several aspects of society.¹³ For instance, social media were critical during the Arab Spring and stimulated the entire innovative environment, while they have also become a synonym of disrespect for fundamental rights¹⁴, of risk to democratic regimes,¹⁵ of abuse of dominant market positions,¹⁶ and tax dodging,¹⁷ among others.

Power is at the core of democracy and the rule of law, but also of the relationship (and tensions) between sovereign states and Big Tech companies. In the context of growing attempts to legislate over and to tame the activities of these companies through regulation lies a question of power. Can sovereign states hold actual power over such large companies? In other words, can public authorities impose their will, i.e., the law or can Big Tech companies be in a position to carry out their own will, despite the resistance of public power?

1. What do we talk about when we talk about Big Tech companies?

First and foremost, it is crucial to distinguish concepts and delineate the focus of the present working paper, as the discussion about the challenges that emerged with the Digital Revolution and Web 2.0 have different layers and dimensions.

The first dimension is the technology, i.e., computer systems, processes, and networks, such as Artificial Intelligence (AI), search engines, data collection and storage, algorithms, and cloud computing, among others. These technologies do not necessarily belong to one company, much less to the so-called Big Tech companies. They can be used by public entities, by smaller tech companies and even by companies that do not operate in the tech sector but use them to collect data from their customers or manage their employees. There is dedicated legislation to rule them. For instance, data

¹¹ Moore, M. (2016). Tech giants and civic power. Centre for the study of Media, Communication & Power, King's College London.

¹² Shaban, H. (2018, January 23). Google for the first time outspent every other company to influence Washington in 2017. Washington Post; LobbyControl & Corporate Europe Observatory (2020). Big Tech Lobbying: Google, Amazon & friends and their hidden influence.

¹³ Gillespie, T. (2018). Regulation of and by platforms. In J. Burgess, A. Marwick & T. Poell (Eds.), *The SAGE Handbook of Social Media*, 254–278. London: SAGE.

¹⁴ Warofka, A. (2018). An independent assessment of the human rights impact of Facebook in Myanmar. Facebook Newsroom, November, 5.

¹⁵ Miller, M. L., & Vaccari, C. (2020). Digital threats to democracy: Comparative lessons and possible remedies. *The International Journal of Press/Politics*, 25(3), 333-356.

¹⁶ Rato, M., & Petit, N. (2013). Abuse of dominance in technology-enabled markets: established standards reconsidered? *European Competition Journal*, 9(1), 1-65.

¹⁷ Karikari, A. G. (2014). International Tax Avoidance Schemes: An Investigation of Multinational Technology Companies. *International Journal of Academic Research in Accounting, Finance and Management Sciences*, 4(1), 365-370.

collection, storage and use have been subject to the GDPR EU Directive,¹⁸ and the AI regulation is under discussion.

The second dimension is service providers, which may be intermediary services (internet access providers, domain name registrars); hosts (cloud and web hosting services) or online platforms (app stores and social media platforms). From a strict point of view, these are technical and governance structures that intermediate relationships and exchange of value between different categories of users.¹⁹ Other common terms for these structures/service providers are intermediaries and gatekeepers. The proliferation of platforms, the number of users and the nature of the activities they make possible have led to a broader meaning of the term “platform” that goes beyond the computational meaning to reach other connotations, namely:

political, a place from which to speak and be heard; figurative, in that the opportunity is an abstract promise as much as a practical one; and architectural [...] egalitarian facilitation of expression, not an elitist gatekeeper with normative and technical restrictions.²⁰

In other words, it is on these online structures that the technologies and the computing systems are used in order to enable a wide range of human activities, such as working; business transactions or entertainment and socializing. The EU recently added a new taxonomy for these gatekeepers, which has proved to be quite useful for the delimitation of the concept of Big Tech in this working paper. The 2022 Digital Services Act (DSA²¹) introduces the terms Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs), which are services with more than 45 million monthly active users in the EU.

Big Tech companies are legal persons, which may be technology developers and platform owners at the same time with their own internal governance structure, ownership and profit orientation. As Martin Kenney and John Zysman explain:

Google and Facebook are digital platforms that offer search and social media, but they also provide an infrastructure on which other platforms are built. Amazon is a marketplace, as are Etsy and eBay. Amazon Web Services provides infrastructure and tools with which others can build yet more platforms.²²

¹⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

¹⁹ Belli, L. (2021), Platform in Belli, L. Zingales, N. & Curzi, Y. (2021). Glossary of platform law and policy terms. Rio de Janeiro: FGV Direito Rio, 239-41.

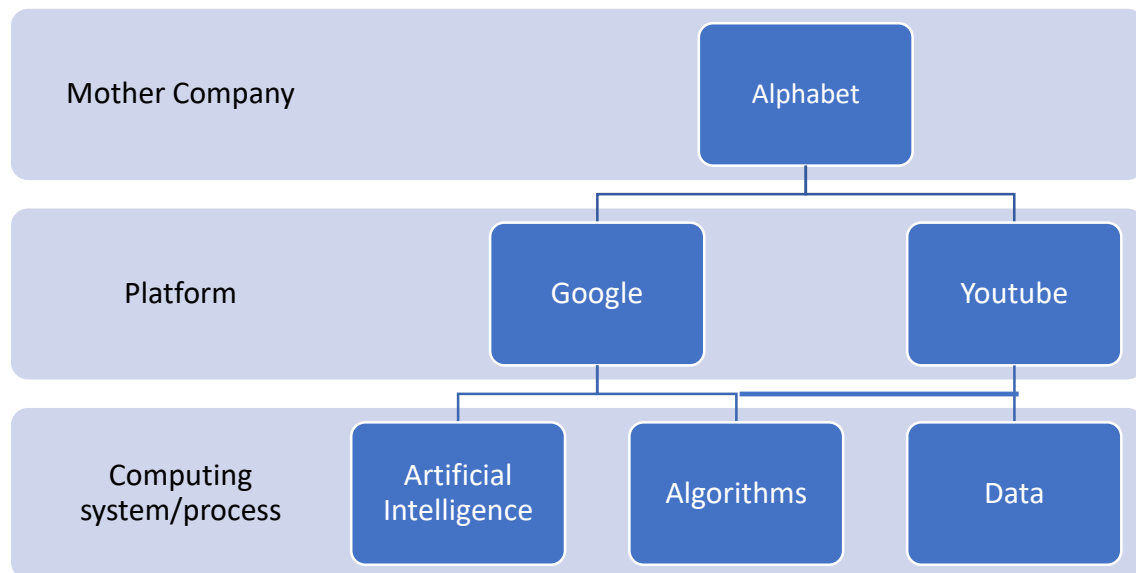
²⁰ Gillespie T. (2010). The politics of “platforms.” *New Media & Society*, 12, 347-364, 352.

²¹ 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).

²² Kenney, M. & Zysman, J. (2016). The Rise of the Platform Economy. *Issues in Science and Technology* 32, no. 3 (Spring 2016).

All of them are companies and/or corporate structures. Figure 1 displays an illustrative example of such structures, by looking at Alphabet, also known as Google's parent company.

Figure 1. Meta platform and service structure



Each of these dimensions represents risks and threats to democracy and the rule of law in its own way. Artificial intelligence, for instance, might create or reinforce unwanted biases and erode citizens' trust in institutions.²³ Platforms may be enablers of privacy violations; hate speech; illegal content and disinformation. Corporations, especially transnational companies, have long been involved in human rights violations or used their economic power over states.²⁴ What Big Tech bring anew is the simultaneous concentration of these three dimensions, as well as the scope and intensity that each of them may have in democracy, human rights, the rule of law and the legitimacy of states.

2. Big Tech and the Sovereign State

Big Techs operate at the intersection of four spheres that feed into each other for making these corporations true Goliaths, challenging the sovereignty of states; the functioning of democracy and the spirit of the rule of law. Digitalization has penetrated almost all dimensions of individuals' public and private lives, including their relationship

²³ Duberry, J. (2022). *Artificial Intelligence and Democracy: Risks and Promises of AI-Mediated Citizen–Government Relations*. Edward Elgar Publishing; Xenidis, R., & Senden, L. (2019). EU non-discrimination law in the era of artificial intelligence: Mapping the challenges of algorithmic discrimination. In Bernitz, U. et al (eds), *General Principles of EU law and the EU Digital Order*. Kluwer Law International, 151-182.

²⁴ See, for instance, Ruggie (2013); Deva, S. (2003). Human rights violations by multinational corporations and international law: where from here. *Conn. J. Int'l L.*, 19, 1 or McNamee, D. (2003). Nestlé's own goal. *The Lancet*, 361(9351), 12.

with the state. Access to public services is facilitated by platforms. Political participation is, to a certain and growing extent, mediated by social media and the enjoyment of fundamental rights may be enhanced or limited by them. These platforms and technologies are widely owned by private legal persons with an extraordinary concentration of economic and political power to the point where it becomes relevant to geopolitics too. In other words, Big Techs have reached ubiquity.

2.1 Power rivalry

Power is at the core of democracy and the rule of law, but also of the relationship (and tensions) between sovereign states and Big Tech companies. Traditionally, the ultimate power used to belong to the sovereign state, which had the monopoly of the legitimate use of force.²⁵ However, it has been recognized that the concept of state has evolved to encompass other functions beyond security.²⁶ Today, with a myriad of different non-state actors operating in the international arena, across or within states, power has been widely diffused and the idea of a world limited to sovereign states is outdated. The digital revolution contributed dramatically to this power diffusion to the point of making some believe that the internet and related platforms would be liberators from oppression and make centralized state authority obsolete.²⁷ On the contrary, the revolution “created some of the most powerful gatekeepers in history” and “instead of making state authority obsolete, they rivalled it.”²⁸

Max Weber defined power as “the probability that an actor in a social relationship will be in a position to carry out his own will despite resistance, regardless of the basis on which this probability rests.”²⁹ Robert Dahl offers a similar definition: “A has power over B to the extent that he can get B to do something that B would not otherwise do.”³⁰ In the face of the rising power of Big Tech in all domains of human and public life, can sovereign states maintain their ability to carry out their own will towards those companies?

Hannah Arendt explains that

the differences between the various forms of government depended on the distribution of power, whether one single man or the most distinguished citizens or the people possessed the power to rule. The good or bad nature of each of

²⁵ Weber, M. (1957), *A Política como Vocação / A Ciência como Vocação*. Lisboa: Book Builders.

²⁶ See, for instance, Gozzi, G. (2004). *Estado contemporâneo*. In Bobbio, N., Matteucci, N. & Pasquino, G. (Eds). *Dicionário de Política*. 5a Edição. Brasília: Editora Universidade de Brasília.

²⁷ Diamond & Plattner (2012).

²⁸ Lehdonvirta (2022), 205.

²⁹ Cited by Lukes, S. (Ed.). (1986). *Power* (Vol. 2). NYU Press, 38.

³⁰ Dahl, R. A. (1957). The concept of power. *Behavioural science*, 2(3), 201-215.

these was judged according to the role played by law in the exercise of power: lawful government was good and lawless bad.³¹

Democracy is thus about power diffusion among different groups and different institutions, balancing them. The concentration of power of different natures in a small group of private entities, which individually already possess a great deal of power, jeopardizes democracy. Thus, many have warned against the perils to democracy of private monopolies and the bigness of some corporations.³² Going back to the first decades of the 20th century, Tim Wu reminds us, for instance, that U.S. President Roosevelt's decision to break the privately owned railway monopoly was not only an economic judgement but also a political one, due to the dangers of private economic power [rivalling with] public power.³³ On other hand, power concentration weakens the rule of law, because the law loses effectiveness and significance if it can be bypassed, disregarded or if it is not enforced by public authorities.

The first sphere in which Big Tech operate is the ordinary business and shareholders' interests, which, paired with their unprecedented power, value and global reach, make them now part of a "platform imperialism".³⁴ The past decade witnessed exponential growth in the economic power of Big Tech companies. Currently, the top-five spots in terms of market capitalization are occupied by those companies. The COVID-19 pandemic only seemed to have made them even bigger and more indispensable, as all of them, in one way or another, offered users ways to overcome some of the professional and personal challenges of lockdowns and social distancing. Such economic growth and power have consequences, namely at the competition level. They tend to acquire their competitors or smaller up-and-coming companies.³⁵ So, besides being big, these companies tend to become monopolies and behave as such.

The second dimension is the role platform companies play in the geopolitics of technology.³⁶ On the one hand, these are national champions, especially in the US and China (e.g. TikTok). Not only do they represent an arm of the global sovereign powers, as they can be themselves sources of power, intel, infrastructure, and pressure on other countries. On the other hand, platforms have been instrumentalized by sovereign powers to spread disinformation and interfere in the internal political processes of other countries, as has been found to happen with Russia in British, American, and French politics. Parallel to the rise of tech giants, the economic nationalism of the world's big powers also seems to be on the rise, with the US and China competing for supremacy

³¹ Arendt, H. (2007). The great tradition: I. Law and power. *Social Research: An International Quarterly*, 74(3), 713-726.

³² Stoller (2019); Wu (2018).

³³ Wu (2018).

³⁴ Jin, D. Y. (2017). Rise of platform imperialism in the Networked Korean Society: A critical analysis of the corporate sphere. *Asiascape: Digital Asia*, 4(3), 209-232.

³⁵ Wu (2018).

³⁶ Burrows, M., Mueller-Kaler, J., Oksanen, K. & Piironen, O. (2021), *Unpacking the geopolitics of technology*. The Atlantic Council.

and using their national tech champions as foreign policy weapons. Even if internally, these companies raise the same concerns as in any other jurisdictions. In a 2021 article in *Foreign Affairs*, Eurasia Group President Ian Bremmer argues we cannot rule that possibility out. In a provocative analysis of the rapidly evolving digital space, Bremmer writes that the major technology firms—Facebook, Apple, Google, Amazon, and foreign counterparts such as Alibaba, Huawei, and Tencent—have become powerful, autonomous actors that are “increasingly shaping geopolitics.”³⁷

The third dimension concerns the digital public sphere.³⁸ Through social media, instant messaging platforms and search engines play a significant role in our social, cultural, and political lives. Their operations in the digital public sphere inevitably have an impact on democratic discourse, institutions, and practices, as well as on the enjoyment of fundamental and human rights. As regards to democracy and politics, platforms have become an unavoidable source of information for citizens, either through direct communications by official institutions, and political actors, or through media outlets that convey the message of primary political sources and through the messages and content shared by fellow citizens. Platforms have also become a forum for activism and the fulfilment of the right of association, indispensable in times of the Covid-19 pandemic and authoritarian regimes. Finally, as platforms that share and spread ideas and information without mediation, they may also serve as vehicles to hate speech, incitement to violence, defamation, and mis- and disinformation. Measures to address these risks and threats may, on the other hand, lead to violations of fundamental rights, such as freedom of speech, information, and association. As such, platforms have consolidated their role of gatekeepers over information globally.

2.2 Raising legitimacy problems

In a complementary approach, regarding the essential role of a state, Fukuyama defines its strength as “the ability of states to plan and execute policies and to enforce laws cleanly and transparently.”³⁹ Following Fukuyama’s institutional approach, Rotberg claims that the weakness or strength of a state is measured “according to the levels of their effective delivery of the most crucial public goods”, which encompass the supply of security, a transparent and equitable political process, medical and health care, schools and education, and utilities.⁴⁰ If, as Holsti posits, the strength of the state is its “capacity to command loyalty - the right to rule”,⁴¹ then a state that fails to deliver public goods is lacking power and legitimacy.

³⁷ Bremmer, I. (2021). The Technopolar Moment: How Digital Powers Will Reshape the Global Order. *Foreign Affairs*.

³⁸ Schäfer, M. S. (2015). Digital public sphere. *The international encyclopedia of political communication*, 15, 1-7.

³⁹ Fukuyama, Francis (2004), *State-Building*. Ithaca: Cornell University Press, 7.

⁴⁰ Rotberg, R. (2003). *State Failure and State Weakness in a Time of Terror* (Washington D.C: Brookings Institution Press, 2.

⁴¹ Holsti, K.J (1996) *The state, war, and the state of war*. Cambridge: Cambridge University Press, 82.

This leads us to the fourth dimension in which Big Tech are displaying their power. The companies are rapidly taking up space in the provision of public services in substitution or cooperation with states, in urban planning, health or education, which could be considered their fourth sphere of operation.⁴² Google has invested in the establishment of smart cities. As part of Google, Sidewalk Labs “bring products to market that give cities and real estate decision makers the tools and information they need to make sustainable choices”,⁴³ from automated vehicles to underground waste management. A Google city was planned to rise in Toronto, Canada, and only failed due to pandemic-led economic uncertainty and lack of privacy protections, given the amount of personal data the project would be able to collect.⁴⁴ Google has also partnered with the U.S. State Department to support education, training, and upskilling in Southeast Asia.⁴⁵ Evidence has been found to suggest that in the developing world, Facebook is a synonym with the internet itself.⁴⁶ Amazon, besides controlling cloud computing services, online trade and distribution, is now massively investing in health services too.⁴⁷

By replacing the state on the provision of certain public goods, offering an alternative or extensively partnering with it, Big Tech companies may be absorbing some of the state’s legitimacy in the eyes of citizens. Not to mention that, with the provision of public goods, Big Tech access and collect even more personal data and reinforce its power over information.

2.3 Regulating and rule enforcing

Another way in which Big Tech appear to be acting like states is through the creation of their own ‘laws’ i.e., their terms of service. Transnational companies have an interest in working with uniform rules to facilitate their internal – yet global – operations. It is an efficient way to overcome variations among different national and regional legal systems, but that immediately questions consolidated notions like sovereignty and territory.⁴⁸ In the context of the digital revolution, public authorities and the existing traditional laws and regulations cannot keep up with new services, technologies and platforms that emerge and evolve at a fast pace on a global scale. Big Tech companies end up being simultaneously the industry, the regulator and the regulatees, as in the

⁴² Klein (2020).

⁴³ See Sidewalk Labs: <https://www.sidewalklabs.com/about> (accessed on 26th July 2023).

⁴⁴ McDonald, J. (2021). What cities can learn from Sidewalk and Toronto's failed city of the future. Emerging Tech Brew.

⁴⁵ US State Department (2022), U.S. Department of State Launches Partnership with Google in Indonesia and Vietnam, Pilots Media Literacy and Google Startup Academy Programs at American Spaces, US State Department.

⁴⁶ Malik, N. (2022). How Facebook took over the internet in Africa – and changed everything. The Guardian; Wallace, S. (2020). In the Developing World, Facebook Is the Internet. Medium.

⁴⁷ See Amazon Clinic: <https://clinic.amazon.com> (accessed on 26th July 2023).

⁴⁸ Barlow, J.P. (1996). A Declaration of Independence of the Cyberspace. Electronic Frontier Foundation.

absence of externally imposed regulations, they were the ones drafting them through their terms of service and self-regulating.

This raises three types of concerns, firstly, the private nature of the laws regulating our daily lives. Given that both companies and users are private persons, it could be argued that the terms of service and similar regulations are private party contracts. The issue is that there is no room to maneuver since – users do not have the ability to negotiate the contracts and the only options left are to accept them or not have access to the service provided. The problem is that, as extensively explained above, Big Tech is permeating all aspects of our daily lives. Therefore, users who need to access certain services are left in practice with no real options. The rules that Big Tech create and impose on users “have become some sort of a digital government.”⁴⁹ This raises serious concerns because the combination of terms of service, enforcement and appeal may lead to consolidation and legitimization of powers, posing threats to the principle of the rule of law by pursuing a private model of protection and users’ governance.⁵⁰

The second problem is the emulation by Big Tech of the traditional judicial structure of sovereign states in order to ensure legitimacy, on the one hand, and avoid regulation, on the other. Facebook probably has the most advanced quasi-judicial structure of all Big Tech companies, as illustrated by figure 2, explained by Klonick.⁵¹ Besides a constitution type of document, the Values of the site, Facebook has developed its Community Standards, as a sort of legal code that regulates the content, enforced by a Massive system of governance for screening, reporting, reviewing and removing content. The Oversight Board functions as a sophisticated appeal mechanism, i.e. Independent Institution to Adjudicate Online Free Expression, which resembles a Supreme Court.⁵²

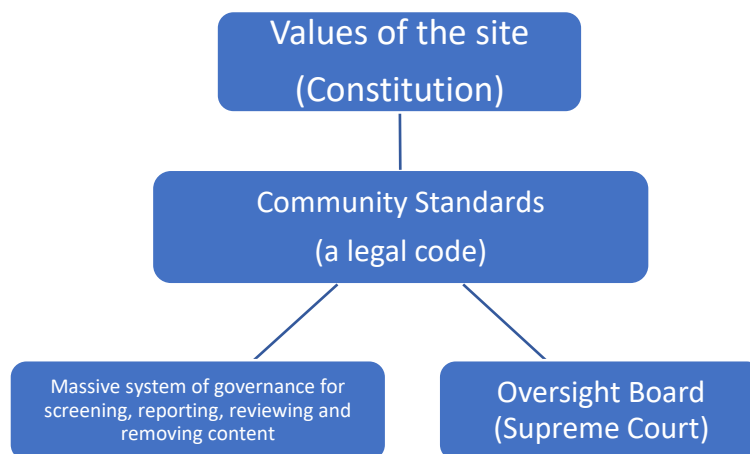
⁴⁹ Lehdonvirta (2022).

⁵⁰ Pollicino, O. (2021), Digital Private Powers Exercising Public Functions: The Constitutional Paradox in the Digital Age and its Possible Solutions. European Court of Human Rights, Strasbourg.

⁵¹ Klonick, K. (2020). The Facebook Oversight Board: Creating an independent institution to adjudicate online free expression. Yale Law Journal, 129(2418).

⁵² Idem.

Figure 2. Facebook Governance Structure



Other tech giants also have more or less complex governance systems on content moderation and up-and-coming platforms are adopting some structures as well. The research programme, Ranking Digital Rights (RDR), evaluates the policies and practices of Big Tech and their effects on people’s fundamental human rights. Their annual Big Tech Scorecard shows that companies, even if many are at a slow pace, are adopting both rules and procedures on content, but also more and more complex systems of governance.⁵³

This evolution is a response to the scandals, mounting criticisms and demands for transparency and accountability that companies have been facing from the public. Companies are indeed responsive to the communities – users and staff – they engage with.⁵⁴ But it also confirms, on the one hand, the relevance Big Tech has in the daily lives of people and their fundamental rights, to the point that they make strong demands from the companies; on the other hand, the adoption of complex governance systems that are similar to states’, showing how Big Tech is emulating public institutions and processes. However, decisions over fundamental rights, including free speech, are made by courts, as the extensive jurisprudence of the European Court of Human Rights and several domestic courts show, not by private actors such as these corporations. In the end, it grants them more public legitimacy.

3. Taming Big Tech? An analysis of the DSA

Recent years witnessed a significant change in paradigm on what concerns the position of governments vis-à-vis Big Tech. The history of the regulation of large platform companies is an evolutionary one, which started with self-regulation and has tried to

⁵³ Ranking Digital Rights (2022), 2022 RRD Big Tech Scorecard.

⁵⁴ Arun, C. (2021, March). Facebook's faces. In Forthcoming Harvard Law Review Forum (Vol. 135).

evolve to command and control regulation, with results yet to be seen. As Gorwa has summarized,

the “platform governance” status quo — understood as the set of legal, political, and economic relationships structuring interactions between users, technology companies, governments, and other key stakeholders in the platform ecosystem (Gorwa, 2019) — is rapidly moving away from an industry self-regulatory model and towards increased government intervention (Helberger, Pierson, & Poell, 2018).⁵⁵

The debate has moved from the ‘too big to regulate’ paradigm to the ‘how to regulate them’. Sensing that externally imposed regulation was inevitable and despite the unprecedented lobbying and public advertisement campaign, Big Tech’s mantra also grew to ‘we should be regulated, but on our own terms’. Or, in the words of Mark Zuckerberg, “I actually am not sure we shouldn’t be regulated. [...] the question is more what the right regulation is rather than yes or no should be regulated.”⁵⁶ To get ahead of unwanted regulations, companies began to adopt stricter self-regulatory measures and governance structures, as described in the previous section.

Despite these self-regulatory moves, several countries, such as Germany, France, and Australia, had been adopting domestic ad-hoc regulation in specific fields and in others, namely the USA, such debate has been initiated.⁵⁷ However, the “most ambitious plan yet to rein in online platforms” is the EU Digital Services Act.⁵⁸ In general, the DSA has been well received by civil society, digital activists and academic researchers, despite some criticism over the lack of transparency and inclusive access during the policy-making process.⁵⁹ Along with the Digital Markets Act⁶⁰, the DSA aims to create a safer digital space where the fundamental rights of users are better protected, by limiting the diffusion of illegal content and establishing rules to govern gatekeeper platforms. More transparency and accountability are asked from the digital companies and enhanced due diligence is imposed on Very Large Online Platforms (VLOPs) and Very Large Online Search Engines (VLOSEs), which correspond to our concept of Big Tech companies, because they pose “the most serious risks” for fundamental rights and have the capacity to absorb additional regulatory burden.⁶¹ Companies/intermediaries will be required,

⁵⁵ Gorwa, R. (2019). The platform governance triangle: Conceptualising the informal regulation of online content. *Internet Policy Review*, 8(2), 1-22, 2.

⁵⁶ Rocha, V. & Ries, B. (2018), Mark Zuckerberg speaks to CNN: The highlights, CNN.

⁵⁷ See, for instance, the German Network Enforcement Act (Netzwerkdurchsetzungsgesetz or “NetzDG”) of 30 June 2017; French “Avia” Law 2020-766 of 24 June 2020 on online hateful content;

⁵⁸ Milo, D., & Kreko, P. (2021). Is the Digital Services Act a watershed moment in Europe’s battle against toxic online content? *New Europe*.

⁵⁹ See, for instance, assessments made by Access Now (2022). The Digital Services Act: your guide to the EU’s new content moderation rules. Access Now and Algorithm Watch (2022). A guide to the Digital Services Act, the EU’s new law to rein in Big Tech. Algorithm Watch.

⁶⁰ European Commission’s Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act).

⁶¹ DSA, (p. 11; section 4).

for instance, to take annual risk assessments (Article 26); explain in their terms of service how content moderation is carried out in a clear and unambiguous way (Article 12); set up “notice-and-action” mechanisms when taking down content (Articles 14 and 15); internal complaint-handling (Article 17) and out-of-court dispute settlement (Article 18).⁶²

3.1 Meta-regulation as *de facto* self-regulation?

It seems that the path from self-regulation to imposed regulation fell short half of the way through the policy-making process. In fact, if as many commentators claim, the DSA is such a groundbreaking victory for civil society and policymakers, then the millionaire lobbying campaign was most probably the biggest flop in history, which is unlikely. In fact, by opting for this meta-regulatory model and avoiding making more blunt stances on certain areas, EU policymakers may have, as some have already warned, granted even more power to these companies and reinforced their *de facto* self-regulatory mechanisms.⁶³ By reinforcing the self-regulatory structures and internal policy options of companies, the DSA risks legitimizing, even more, their rules and governance options, especially those companies that were ahead of the DSA.

By externally imposing standards for self-regulatory instruments, the DSA is a meta-regulatory instrument. The concept of meta-regulation derives from the literature on governance and regulation, holding various, even if somewhat similar meanings. For the purpose of this working paper, the most adequate definition is the one offered by Parker, who states that meta-regulation entails “any form of regulation (whether by tools of state law or other mechanisms) that regulates any other form of regulation”, namely the “legal regulation of self-regulation (e.g., putting an oversight board above a self-regulatory professional association), non-legal methods of ‘regulating’ internal corporate self-regulation or management (e.g., voluntary accreditation to codes of good conduct, etc.)”.⁶⁴ In short, meta-regulation takes place through “the state’s oversight of self-regulatory arrangements”⁶⁵ and is fairly common in the field of corporate social responsibility, given that it is “an approach to legal regulation in which the internal ‘corporate conscience’ is externally regulated.”⁶⁶ Following these definitions, DSA

⁶² Idem. For a more detailed explanation, see for instance Ilaria Buri and Joris van Hoboken, ‘The Digital Services Act (DSA) proposal: a critical overview’ (28 October 2021), https://dsa-observatory.eu/wp-content/uploads/2021/11/Buri-Van-Hoboken-DSA-discussion-paper-Version-28_10_21.pdf. (accessed on 26th July 2023).

⁶³ Ruschemeier, H. (2021). Re-Subjecting State-Like Actors to the State: Potential for improvement in the Digital Services Act, *VerfBlog*.

⁶⁴ Parker, C. (2007). Meta-regulation: legal accountability for corporate social responsibility in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, 2007, 214.

⁶⁵ Hutter, B. (2006), “Risk, Regulation, and Management,” in Peter Taylor-Gooby and Jens Zinn (eds.), *Risk in Social Science*, New York: Oxford University Press, 202-227.

⁶⁶ Parker, C. (2007). Meta-regulation: legal accountability for corporate social responsibility in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*, Cambridge University Press, 2007, 210.

emerges more like a typical instrument of meta-regulation than one of command and control, as it imposes on tech companies, especially the Very Large ones, the adoption of self-regulatory measures, instruments, and governance bodies, based on the framework set out by the EU.

While setting important standards and defining enforcement measures, the question arises: to what extent does the DSA adequately tame the digital Goliaths and re-centre power in public authorities?

3.2 Reinforcing the discretionary power of Big Tech: the case of harmful content

When drafting content moderation provisions, the European Commission followed the principle “what is illegal offline should be illegal online”.⁶⁷ Therefore, in DSA, illegal content appears in the definitions under Article 2, defined as

any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law.

Hence, the provisions regarding the removal of unlawful content, such as child pornography, define straightforward responsibilities.

However, despite stating its objective to protect fundamentals rights and freedoms, the DSA posits that

[t]here is a general agreement among stakeholders that ‘harmful’ (yet not, or at least not necessarily, illegal) content should not be defined in the Digital Services Act and should not be subject to removal obligations, as this is a delicate area with severe implications for the protection of freedom of expression.

In other words, although the DSA addresses the issue of harmful, disinformation or inadequate content, it does not offer a definition, admitting that it is a difficult concept that may jeopardize the freedom of speech.

If, until now, content moderation practices have been governed by platforms’ Community Guidelines and Terms of Use, it seems European lawmakers have decided that it should remain that way. When the DSA does not establish a clear line between illegal and harmful content, it leaves to the companies the discretionary power to define these concepts and decide which content is acceptable and accepted or not on their platforms and search engines. For citizens, it will not be clear or guaranteed that “what is legal offline will be legal online”.⁶⁸ In the end, what is legal offline might not be legal

⁶⁷ Council of Europe (2021). Press Release: What is illegal offline should be illegal online: Council agrees position on the Digital Services Act.

⁶⁸ Idem.

online and it will depend on the interpretation companies make of their Terms and Conditions.

This policy option underpins the power and legitimacy of Big Tech in two ways. First, it confirms the self-regulatory instruments already designed by the major companies, namely Twitter and Facebook, reinforcing their role as leading policy makers. It was not the European Commission that drafted the rules, it just ratified the solutions already set up by Big Tech. Second, it leaves to the companies the role of regulators and defines the limits of freedom of information, namely the right to dignity and hate speech.

The DSA does impose some parameters, for example the terms and conditions should include information concerning the procedures; measures and tools used in content moderation and that this information should be clear and made publicly available in an easily accessible format. Nevertheless, the power to defend and decide on the limits of freedom of expression in their services has been delegated to the companies.

3.2 “Diplomatic” recognition

Parallel to the DSA, the European Commission also seems to be contributing to the legitimization of Big Tech as para-states with its plans to open an office in the U.S. West Coast, including Silicon Valley, with a focus on digital policies and technology.⁶⁹ Operating under the guidance of the EU’s representation office in Washington DC, this Silicon Valley delegation seems to be a “diplomatic” representation as well. Denmark has also created within its Ministry of Foreign Affairs the post of “Tech Ambassador” filled in by an actual career diplomat who is based, along with her team, in Silicon Valley.⁷⁰ The move has been called “TechPlomacy” by the Danish MFA. It seems that Big Tech is being treated by sovereign states and the regional communities they belong to as *de facto* states, worth being treated as almost peers.

Conclusions

Big Tech companies have become true Goliaths, all-pervading in societies around the globe. Their economic and financial power make them, in the eyes of some, monopolies, powerful enough to influence and capture politics and policies. By developing the technology, gathering data, controlling information and being intermediaries between different types of users, Big Tech has gone beyond the realm of economics and markets, having a strong impact on politics, democracy, fundamental rights and the rule of law. With users that outnumber the most populated countries in the world, with a market capitalization that exceeds some of the richest states and gathering more data from individuals than any other entity and emulating the state apparatus and service provision in many aspects, Big Tech also seem to be concentrating a significant degree of legitimacy, that despite the mounting contestation, is reinforcing their power even

⁶⁹ Stolton, S. (2022). EU plans Silicon Valley base as tech crackdown looms. Politico.

⁷⁰ Office of Denmark Tech Ambassador (n/a), Meet the Global team: TechPlomacy Team Members from Silicon Valley, California and Copenhagen, Denmark. Ministry of Foreign Affairs of Denmark.

more. Sovereign or not, Big Tech have achieved status and power that no other non-state actor has ever achieved in recent history. It's a hegemonic power, to a certain extent only comparable to the Church's in the 16th century. This power, legitimacy and ubiquity in the daily lives of citizens end up at times rivalling states.

Much of the discussion around Big Tech revolves around the problems of content moderation and the protection of fundamental rights, some of which are frequently in tension, in social media platforms. The EU Digital Services Act is the latest example of that focus and the attempt to address an issue that, being large and impactful, is only one among many challenges that the digital revolution and the rise of Big Tech companies brought. As Dipayan Ghosh and Ramesh Srinivasan warn, the challenges that our democracies face "lie in profound asymmetries of information and power".⁷¹

The DSA was expected to be a groundbreaking move that would domesticate and discipline the power of Big Tech in order to safeguard a number of fundamental rights and key issues for life in society. While it is still a significant achievement and grants more powers and authority to the European Commission than it previously had, it still delegates much 'public' powers to Big Tech. In the end, they will still be the ones deciding on what is acceptable or not in their services and platforms and who will be the primary levels of appeal. One of the concerns of lawmakers was the regulatory burden imposed on companies, but the DSA directive ended up overlooking the administrative and judicial burden placed on citizens who consider their rights to be disrespected and who need to appeal to judicial instances for impartial and due process. Big Tech will remain 'too Big'. The perception that the latest regulatory instruments tend to reinforce power and legitimacy is not novel. Recalling decisions of the European Court of Justice and the German Network Enforcement Act, Michael Seeman has warned that the state has relinquished its powers of jurisdiction and law enforcement to platforms and consequently further increased the power of the platforms in this way, making itself dependent on its very competitors.⁷²

The DSA is obviously not the only instrument available to public authorities to control the power of Big Tech. Support for stronger antitrust enforcement and fairer tax rules has been growing among experts, regulators and lawmakers. The growing trend of Digital Constitutionalism may gain a momentum and create common and clear rules to which Big Tech will have to abide too, ensure consistency and predictability to users and most importantly, to citizens (both categories frequently but not always coincide).⁷³ Yet, to a certain extent, DSA fulfilled Mark Zuckerberg's wishes to be regulated on its own

⁷¹ Ghosh, D., & Srinivasan, R. (2021). The Future of Platform Power: Reining in Big Tech. *Journal of Democracy*, 32(3), 163-167.

⁷² Seemann, M. (2018). What Is Platform Politics? Foundations of a New Form of Political Power. *Zeitschrift für sozialistische Politik und Wirtschaft* (SPW), 44–49. in December 2017.

⁷³ See, for instance, Celeste, E. (2019). Digital constitutionalism: a new systematic theorisation. *International Review of Law, Computers & Technology*, 33(1), 76-99; De Gregorio, G. (2021). The rise of digital constitutionalism in the European Union. *International Journal of Constitutional Law*, 19(1), 41-70 or Suzor, N. (2018). Digital constitutionalism: Using the rule of law to evaluate the legitimacy of governance by platforms. *Social Media+ Society*, 4(3).

terms, as it translated into law the self-regulatory instruments and mechanisms developed by the largest and most advanced platforms, thus legitimizing them.

It is not expectable that Big Tech companies will eventually replace states, substitute nations for communities, citizens for users, heads of state and governments for CEOs or chairmen. Economic power does not necessarily aim to or can replace political power. Yet, by becoming so powerful and hegemonic, economic power may capture, subdue or, at times, ignore political power, democratic institutions and processes, and the rule of law. On the other hand, at times and especially concerning fundamental rights such as freedom of expression, individuals may become more loyal to their platform communities and values than to the rights and the institutions determined by democratic processes, rendering law enforcement much more difficult.

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Forum Transregionale Studien e.V.
Wallotstraße 14
14193 Berlin
T: +49 (0) 30 89001-430
office@trafo-berlin.de
www.forum-transregionale-studien.de