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Karoliina
Vuorenmäki,
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EC's DMA+DSA proposal: A revolution in platform competition/regulation?

Petri Rouvinen

Professor of Practice, Sustainable Economy
VTT Technical Research Centre of Finland Ltd
Senior Advisor, Avance Attorneys Ltd

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- Previous sessions:
 - Virtual all presenters referred – in *general* terms – to **competition policy** or **regulation** in curbing the power of platforms.
- This talk:
 - *A specific* policy initiative.
 - Applies to online **labor** platforms but not directly on them.
 - But – as digital platforms penetrate all walks of life & influence fortunes of all businesses – hugely **important for future of work**.

Why new legislation?

- EU legislation covering platforms dates back to year 2000.
- Perceived "enforcement gap", when it comes to digital platforms.
- A series of court cases that have frustrated the EC □ Desire for new tools.
- Europe not in control of "its own data".
- European companies are laggards in digital.
- EU's failure to establish the Digital Single Market (basis: 114 TFEU).
- Complements a dozen or so other legislative & policy efforts.

EC's grand idea:

Instead of arguing that, e.g., *Google* is breaking the law in doing *X* (\approx traditional “ex post” antitrust), let us make *X* illegal for everyone beforehand (\approx new “ex ante” antitrust).

The implementation: **DMA + DSA =**

A proposal for a new legal basis of platform competition & upkeep.

Platform = Everything from a messaging app to a cloud service (but not, e.g., payments).

DMA – Gatekeepers' *dos & don'ts* Intense/fair competition, new entry.

DSA – Content regulation (for almost all) Citizens' data rights & online safety.

EC's twin proposal 15 Dec. 2021...

to be implemented as EU-wide law in 2022/2023

AVANCE

DMA, Digital Markets Act: Gatekeepers.

DSA, Digital Services Act: Content.

Applies only to the largest platforms: *GAFA+ (Spotify, SAP?)*.

Applies to all but the smallest: tiered by platform type & size.

• Gatekeeper:

- Provides a core platform service.
- Significant impact in the EU market (thresholds).
- Important gateway to reach customers (thresholds).
- Enjoys a durable position (assumed with the above).
- [If the criteria not met, EC could use its judgement.]

• Prohibitions:

- Bundling/self-preferencing.
- Combining data from different sources.
- Exploitation of business users' data.
- No "most favored nation" clauses.

Goes deep into prevailing business models.

Clear links to antitrust cases EC has pursued.

• Obligations:

- 3rd party interoperability (w/ GKs' services).
- Data portability (also for business use).
- Search engine data to competitors.
- Data support for ext. evaluation of ads.
- Must inform EC on all acquisitions.

Effort to nurture competition, ease switching & bring transparency to ads-based biz models.

• Enforcement:

- Fines up to 10% global turnover etc. // See also P2B reg. models.

• Obligations for "intermediary services" (incl. hosting etc.):

- Transparent & timely moderation & removal of illegal/inappropriate content.
 - Some exemptions (ineligible if content is touched).
- Documented policies (incl. applicable algorithms & human review).
 - Mechanisms for reporting illegal content.
 - Reasoning for & recourse in removing content.
 - Out-of-court settlement mechanism.
 - Periodic reporting of content moderation.

• For content matters, legal presentation in the EU.

• On trading platforms: Traceability for sellers.

• In ads: What info/algorithm led to me being targeted?

• Additionally, for the largest:

- Assessments of systemic risks. Mitigation efforts.
- Compliance programs & external compliance audits.
- Public transparency reports every 6 months.
- Transparency of targeting/recommending (APIs & repositories for external assessment).
 - Data sharing with authorities & researchers.

• Enforcement:

- National *Digital Service Coordinators*.
- EC: fines up to 6% global turnover etc.

// See also GDPR

What DMA/DSA is...

- In part “...a random selection of past and ongoing cases” (Podszun et al. <https://ssrn.com/abstract=3788571>); argued that
 - (a) lacks evidentiary basis (guiding welfare/harm theories) and
 - (b) is not principled (contestability of markets etc.).
- Attempts to balance conflicting interests & reach multiple goals with one instrument – feasible?
- EC as the key/only actor – national authorities & private parties in investigation/enforcement?
- Note: Similar to, e.g., energy, finance & telecoms regulation Not entirely new (but: do not buy into the utility analog).
- May itself hinder competition: binary approach, barrier to innovation in particular, may favor certain business models (e.g., Apple iOS vs Android).

... is not:

- Does not go into competition of ecosystems, multi-actor business models, intermediary power, or into ads-based “surveillance economy” Does not fundamentally shape markets.
- Although central in 5G, makes no reference to foreign states’ involvement in platforms (defense, surveillance, state-aid etc.).
- Does not make explicit trade-offs or conflicts:
 - Regulatory over-reach?
 - Free speech vs privacy?
 - More open data access tricky due to IPRs & trade secrets and GDPR & other regulation (Public Sector Information Directive 2019: not an issue?).
 - One thing to have Facebook know everything; quite another to have everybody know.

Final remarks

- Yes, I'll be one messy & hard-to-interpret piece of legislation – lawyers & courts will have a ball!
- Yes, there will be many twists & turns and I'll be at least 18 months before any of this bites.
- No, do not assume it goes away or that it would be diluted to non-existence.
- No, do not mistake debates/issues with DMA+DSA as lack of support.
- Engage in the dialog; consider the compatibility your biz model.

- **EU politics.** *In favor:* Netherlands & France. *In doubt:* Ireland. Not so much turf fight on the issue, but *member countries want a piece of the action*; e.g., Germany that has already proceeded along similar lines (ARC & NetzDG).

- **EU-US relations:** Largely targets US multinationals. A tricky transatlantic dimension.
 - GAFA etc. lobby against it, but \$\$\$ buys a little less in Brussels as opposed to Washington DC.
 - Diverging views: a direct attach to *Apple's* tightly walled ecosystem; *Amazon & Google* at odds in many ways but quite ok; *Facebook* sees this as a positive, as it gains relative to its nearest competitors.

- On the possible outcomes:
 - **Negative:** Primary targeting US platforms with the hope of nurturing European rivals, but effectively DMA+DSA place considerable strings to innovative abilities of purely EU-based counterparts.
 - **Positive:** Does curb large platforms market power & limit their abilities to leverage assets across domains. With better data access & visibility to established business models, might support entrepreneurial activity.