EC’s DMA+DSA proposal: A revolution in platform competition/regulation?

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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 $X$ (≈ traditional “ex post” antitrust), let us make $X$ illegal for everyone beforehand (≈ new “ex ante” antitrust).

The implementation: **DMA + DSA =**

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

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

DMA, Digital Markets Act: Gatekeepers.
Applies only to the largest platforms: GAFA+ (Spotify, SAP?).

- 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.

- 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.

- Enforcement:
  - Fines up to 10% global turnover etc.

DSA, Digital Services Act: Content.
Applies to all but the smallest: tiered by platform type & size.

- 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/algorithnim 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.

DMA, Digital Markets Act,
DSA, Digital Services Act.
Discussion

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.