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Quo vadis, European Union's New Digital Regulation Package?

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SUMMARY

Released at the end of 2020 the European Commission's Digital Services Act (DSA) and Digital Market Act (DMA) package captured the attention of experts in Europe and beyond with its comprehensive scope and ambitious goals. The two instruments are expected to radically change EU digital regulation and pave the way to policy solutions that will achieve greater consumer protection, guarantee fair competition in the online environment and structure an effective framework for the protection of human rights. The article presents the essence of the two legal instruments and discusses their pros and cons against the background of the fast-developing digital environment and interrelated problems.

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KEY WORDS

DSA; DMA; Digital Services; Platforms; Competition; Regulation; Gatekeepers

I. Introduction

Twenty years have passed since 8 June 2000, when the Directive on electronic commerce[2] (hereinafter E-comm directive), which regulates digital services to date, was adopted. This amount of time cannot be considered short in such a rapidly changing market, as the regulatory solutions that seemed forward in 2000 have now lost their relevance. All this became apparent in practice when – following the United States' and other countries' attempts – the European Union also took action against the perceived or real dominance of the digital giants. For example, in 2017, a fine of €110 million was imposed on Facebook[3], a record fine of a total of €8.2 billion[4] was imposed on Google between 2017 and 2019 for regular and systemic infringements of competition rules[5], and proceedings against Amazon were launched at the very end of 2020, alleging a breach of antitrust rules[6]. National decisions also came to the fore. In

[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178, 17.7.2000, pp. 1 – 16.

[3] Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover, [online], https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369 [Access 24 April 2021].

[4] For more details see: G. Polyák, G. Pataki. Google Shopping: a 2017-es versenyjogi „gigabí rság" elemzése, avagy milyen tanulságokkal szolgált a keresőmotorra kiszabott rekordbüntetés. *G. Polyák* (ed.). *Algoritmusok, keresők, közösségi oldalak és a jog: A forgalomirányí tó szolgáltatások szabályozása.* Budapest, HVG-ORAC Lap- é és Könyvkiadó Kft. (2020), pp. 273 – 288.

[5] C. G. Weissmann. Google hit with another EU antitrust fine: The grand total now comes to €8.2B. *Fastcompany*, [online] https://www.fastcompany.com /90322678/google-hit-with-another-eu-antitrust-fine-the-grand-total-now-comes-to-e8-2b [Access 24 April 2021].

[6] Amazon Charged with Antitrust Violations by European Regulators, [online] https: //www.nytimes.com/2020/11/10/business/amazon-eu-antitrust.html [Access 24 April 2021].

France, the data protection agency, the CNIL, slapped Google and Amazon with fines for dropping tracking cookies without consent. Google has been hit with a total of €100 million ($120 million) for dropping cookies on Google.fr and Amazon €35 million (~ $42 million) for doing so on the Amazon.fr domain.[7] The fact of these fines either at a European or a national level is a good indication that mammoth companies, previously thought to be untouchable – typically American – have paddled into waters that are no longer considered dangerous not only legally but also politically. Although fines represent only a fraction of the annual revenues of these companies, they are typically appealed to various courts, but the path taken by several countries around (and more have and are to follow them) the world clearly shows the political will that regulation of digital services will not remain in the riverbed, which has been assigned to them for twenty years. Therefore, it has seemed inevitable to change the regulating mechanisms in Europe.

In 2020 the European Parliament adopted the resolution „Digital Services Act: Improving the functioning of the Single Market".[8] The act recognises that the legal certainty brought by the E-Commerce Directive has provided small and medium enterprises (SMEs) with the opportunity to expand their business across borders but on the other hand, it also admits that the rapid transformation and expansion of e-commerce with its multitude of different emerging services, products, providers, challenges and various sector-specific legislations require a new regulatory approach. Issues that are still unsolved represent the unjustified and disproportionate barriers to the provision of digital services, such as complex administrative procedures, costly cross-border disputes settlements and access to information on the relevant regulatory requirements, including on taxation, as well as the need to ensure that no new unjustified and disproportionate impediments are created.

[7] I. Scott. France's CNIL Hands Amazon and Google Heavy Fines for Use of Tracking Cookies without Consent, [online] https://www.cpomagazine.com/data-privacy/frances-cnil-hands-amazon-and-google-heavy-fines-for-use-of-tracking-cookies-without-consent/ [Access 24 April 2021].

[8] European Parliament resolution of 20 October 2020 with recommendations to the Commission on the Digital Services Act: Improving the functioning of the Single Market (2020/2018(INL), [online] https://www.europarl.europa.eu/doceo/document/TA-9-2020-0272_EN.html#title1 [Access 24 April 2021].

The reaction of the media was also indicative for the historical step the EU had undertaken.

On the one hand, the press was filled with headlines similar to the following:

„The bill was introduced, which significantly battered the power of large technology companies in Europe".[9] There were annoying voices, such as „Warning of a mis-directed regulation of the digital market",[10] but cheers appeared, publishing headlines like „European Commission publishes landmark package to regulate digital platforms and services".[11] It is certain that the Digital Services Act (DSA) and the Digital Market Act (DMA), when adopted, will fundamentally change and define the European Union's digital regulatory environment and, in the best-case scenario, will create predictable conditions for competition and digital development in the longer term. In particular these instruments are expected to provide policy solutions to enhance consumer protection, to guarantee fair competition online, an effective framework for the protection of human rights and better enforcement and clarity of rules.[12]

All these new regulatory intentions unfold against the background of the decisions of the European courts confirming the pivotal role the Internet plays in our lives and professional engagements (the public service value of the Internet).

The European Court of Human Rights (ECtHR) highlighted in *Cengiz and Others v. Turkey* that the Internet „has now become

[9] A. Bobák. Bemutatták a törvényjavaslatot, ami jelentősen megtépázhatja a nagy technológiai cégek hatalmát Európában. *Raketa*, [online] https://raketa.hu/digitalis-szolgaltatasok-torveny-europai-bizottsag [Access 24 April 2021].

[10] D. Török. Félrement uniós szabályozásra figyelmeztet a digitális piac. *IAB Hungary Blog*,[online] https://blog.iab.hu/2020/10/14/digital-services-act-iab-europe/ [Access 24 April 2021].

[11] F. Cunningham. European Commission publishes landmark package to regulate digital platforms and services. *Bird & Bird News Centre,* [online] https://www.twobirds.com/en/news/articles/2020/global/european-commission-publishes-landmark-package-to-regulate-digital-platforms-and-services [Access 24 April 2021].

[12] There is a general agreement and the drafts are expected to become laws after voting in the European parliament in January 2021.

the primary means by which individuals exercise their freedom to receive and impart information and ideas".[13] Therefore, this freedom as well as all human rights need to be guaranteed from any arbitrary and capricious behaviour and what is relevant offline remains valid online as well. As a result, in many countries worldwide, regulating the Internet has become one of the top priorities on the political agenda, albeit with different solutions, from Australia[14] through Germany[15] and Canada[16] to Poland[17] and Hungary[18]. The world has become acquainted with 'fake news', 'deepfake', 'dis- and misinformation' in recent years. Digital platforms providing services worldwide have so far not devoted significant resources – for the sake of their well-conceived business interest – to prevent these from spreading. Once again, quoting the ECtHR, we can state that "the Internet plays an important role in promoting public access to news and the dissemination of information in general.[19] The expressive activities generated by users on the Internet are an unprecedented platform for exercising freedom of

[13] *Cengiz and Others v. Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), 49.

[14] B. Stelter. What Australia's new law might mean for the news you see in the future. *CNN*, [online] https://edition.cnn.com/2021/02/27/media/australia-facebook/index.html [Access 24 April 2021].

[15] A. Toor. Germany passes controversial law to fine Facebook over hate speech. *The Verge*, [online] https://www.theverge.com/2017/6/30/15898386/germany-facebook-hate-speech-law-passed [Access 24 April 2021].

[16] C. Meyer. Canada looks at Australia's experience regulating social media Cana*da's National Observer*, [online] https://www.nationalobserver.com/2021/02/01/news/ canada-looking-australias-experience-regulating-social-media [Access 24 April 2021].

[17] A. Easton, Poland proposes social media 'free speech' law. *BBC*, [online] https://www.bbc.com/ news/technology-55678502 [Access 24 April 2021].

[18] D. Huszák, Bejelentették: szabályozza Magyarország a Facebookot és a nagy techcégeket. *Portfolio.hu*, [online] https://www.portfolio.hu/uzlet/20210126/bejelentettek-szabalyozza-magyarorszag-a-facebookot-es-a-nagy-techcegeket-466858 [Access 24 April 2021].

[19] More details: G. Gosztonyi. The European Court of Human Rights and the access to Internet as a means to receive and impart information and ideas. *International Comparative Jurisprudence*, 2 (2020), p. 134 – 140.

expression."[20] Moreover, the changed political climate was also perceived by techies and they took small but significant steps to change the wind: on 6 May 2020, Facebook announced the first members of the Oversight Board of recognised experts to address inappropriate content to help the company. The structure marked a fundamental change in the way some of the most difficult decisions around content on the platform will be made. In early 2021, in four of the first five cases, the Board ruled against Facebook's moderation decision.[21]

At the same time, we must not forget that the basic problems can be seen in determining the levels of responsibility, since in many cases, these huge platforms acted as quasi-states[22] or as quasi-independent legislative powers only based on their own Terms of Services. This situation is further exacerbated by the fact that the case-law of the European Court of Human Rights and the Court of Justice of the European Union is far from being consistent.[23]

Under this complex situation when many actors and factors must be analyzed our study tries to interpret the circumstances that have led to the adoption of the DSA/DMA package, the initiatives that the draft has evoked as well as the future legal and policy repercussions of the laws. In the following pages the two acts of the package – DSA and DMA – will be tackled separately

[20] *Cengiz and Others v. Turkey* App nos 48226/10 and 14027/11 (ECtHR, 1 December 2015), 52.

[21] Excellent analysis about the decisions: T. Szikora. A Facebook Oversight Board első döntései – meglepetések helyett „papí rforma"? *Ludovika Blog,* [online] https://www.ludovika.hu/blogok/itkiblog/2021/02/05/a-facebook-oversight-board-elso-dontesei-meglepetesek-helyett-papirforma/ [Access 24 April 2021].

[22] N. S. Kim, D. A. Telman. Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent, 80. *Missouri Law Review,* 723 (2015).

[23] In support of all this, it is worth following the decision and contradiction of the ECtHR on the issue of liability of content providers: *Delfi AS v. Estonia* App 64569/09 (ECtHR, 16 June 2015), *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* App no. 22947/13 (ECtHR, 2 February 2016), *Pihl v. Sweden* App no. 74742/14 (ECtHR, 9 March 2017), *Tamiz v. United Kingdom* App no. 3877/14 (ECtHR, 19 September 2017), *Magyar Jeti Zrt. v. Hungary* App no. 11257/16 (ECtHR, 4 December 2018), *Høiness v. Norway* App no. 43624/14 (ECtHR, 19 March 2019). For more details, see: A. Tatár, A tárhelyszolgáltatók köré-ben felmerülő felelősségi kérdésekről, *Infokommunikáció és Jog,* XVI. évf. 72, (2019), pp. 8 – 13.

in order for their pros and cons to clearly stand out. These acts will be also related to other EU instruments in the field of media and communication with the view of underlining their harmonization and proper implementation in order for the interests of the European citizens to be effectively protected. The approach we take to investigate the problems is a systematic and comparative legal and economic assessment of the relevant documents within the context of their adoption and the whole EU digital policy.

II. Proposal for a Regulation on Digital Services[24]

With the General Data Protection Regulation (commonly known as the GDPR)[25] set by the European Union as an excellent agenda that is glazed and considered worthy by many parts of the world, it is no wonder that it also wants to set an exemplary approach to regulating tech companies. The first striking legal difference from previous legislation in this area is that, by analogy with the GDPR solution, the European Union intends to implement it not as a directive but as a regulation.[26] The legislator explained this in the proposal (hereinafter DSA) as follows: „The Commission has decided to put forward a proposal for a Regulation to ensure a consistent level of protection throughout the Union and to prevent divergences hampering the free provision of the relevant services

[24] 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/2020/825 final.

[25] 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), OJ L 119, 4.5.2016, pp. 1 – 88.

[26] Regulations are legal acts that, after their entry into force, are applicable uniformly to all EU countries without the need to transpose them into national law. These are binding in their entirety on all EU Member States. See B. de Witte. Legal Instruments and Law-Making in the Lisbon Treaty. *S. Griller, J. Ziller (eds.). The Lisbon Treaty. Schriftenreihe der Österreichischen Gesellschaft für Europaforschung (ECSA Austria). European Community Studies Association of Austria Publication Series, vol. 11.* Springer. Vienna, 2008, p. 79 – 108.

within the internal market, as well as guarantee the uniform protection of rights and uniform obligations for business and consumers across the internal market. This is necessary to provide legal certainty and transparency for economic operators and consumers alike. The proposed Regulation also ensures consistent monitoring of the rights and obligations, and equivalent sanctions in all Member States, as well as effective cooperation between the supervisory authorities of different Member States and at Union level."[27] However, in other paragraphs the draft regulation shows the real intention without stoning: "by its nature cross-border, the legislative efforts at national level referred to above hamper the provision and reception of services throughout the Union"[28] and reveals that its ultimate goal will be directed to „empowering citizens and building more resilient democracies".[29]

It is worth noting that the draft regulation cannot replace the E-comm directive in its entirety, instead of building on its legal solutions. The European Parliament in its cited resolution stresses that the main principles of the E-Commerce Directive, such as the internal market clause, the freedom of establishment, the freedom to deliver services and the prohibition on imposing a general monitoring obligation should be maintained and stresses again that "what is illegal offline is also illegal online". These tenets of the European Union policy should also become guiding principles of the future regulatory framework. With respect to the latter the resolution also recalls the already created self-regulatory and co-regulatory schemes such as the Union's Code of Practice on Disinformation and suggests that online platforms should ensure that they act in a diligent, proportionate and non-discriminatory manner and prevent the unintended removal of content which is not illegal. All these serve as indications that the European Commission continues to pursue both regulatory and self-regulatory measures for the accomplishment of maximum effectiveness and due consideration of the interests of all stakeholders. However, Certain sections of the E-comm directive may be supplemented, as appropriate, by new provisions (such as Articles 12 to 15, including 'mere conduit', 'caching', hosting and the non-obligation to general

[27] DSA, Explanatory Memorandum, 2.

[28] *Ibid.*

[29] DSA, Explanatory Memorandum, 1.

monitoring). It should already be noted here that the new proposal for a regulation, the Directive on electronic commerce and some of the rules of the Media Services Directive[30] (hereinafter AVMSD) do not appear to be harmonized. Another interrelated act is the conclusions on safeguarding a free and pluralistic media system approved by the Council of the EU before the release of the DSA and DMA package.[31] The Media and Action Plan can be a valuable asset to stimulate the adaptation of the media sector to address the digital and the green transformation and foster the availability of diverse and independent media content in a fair and competitive media environment.

The conclusions formulate an approach for the coherent implementation of different European instruments related to online services and the media. One of the outcomes that seems mandatory for policy makers is to refine the responsibilities of online platforms within the Digital Services Act by considering the possible impacts on media pluralism. The general inference is that the new horizontal EU legal acts should be coherent with sector-specific legal instruments in force, such as the Audiovisual Media Services Directive and the Copyright Directive. In this respect standardising and summarising all these acts will also be an important task. This is so, as according to the most optimistic expectations, the proposal for a regulation will not be adopted before the end of 2022 or the beginning of 2023.[32]

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[30] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, pp. 1 – 24.

[31] Council conclusions on safeguarding a free and pluralistic media system (2020/C 422/08), [online] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020XG1207(01)&from=EN [Access 24 April 2021].

[32] Although not a European survey, interestingly, a simultaneous online survey of twelve countries found that 67% of the population said legislators did not understand enough about how the Internet and digital services work to realistically judge the regulatory governance needed. Internet Way of Networking: Two Thirds of People Worldwide Are Not Confident in Politicians Regulating the Internet. *Cfr.* Internet Society, [online] https://www.internetsociety.org/news/press-releases/2020/two-thirds-of-people-worldwide-are-not-confident-in-politicians-regulating-the-internet [Access 24 April 2021].

The communication on the proposal for a regulation on Digital Services briefly presents the main changes below[33]:

1) Benefits for citizens:
   - More choice, lower prices;
   - Less exposure to illegal content;
   - Better protection of fundamental rights;
2) Benefits for providers of digital services:
   - Legal certainty, harmonisation of rules;
   - Easier to start-up and scale-up in Europe;
3) Benefits for business users of digital services:
   - More choice, lower prices;
   - Access to EU-wide markets through platforms;
   - Level-playing field against providers of illegal content;
4) Benefits for society at large:
   - Greater democratic control and oversight over systemic platforms;
   - Mitigation of systemic risks, such as manipulation or disinformation.

All this is expected to lead to the strengthening of human rights, equality, legal certainty, freedom, and democracy; in short, the rule of law, as uniform liability rules, transparency and predictability in the online environment could stifle the false news discussed above and by and large settle the information disorder problems.

II.1. Benefits of the proposed regulation

As we have seen above, the proposal's main advantage is that it seeks to put on a new footing the regulatory environment that has been essentially unchanged for twenty years, over which time and technological development have already taken place. It should be emphasized that it creates a category of so-called trusted flaggers,[34] i.e. it would bring the fight against illegal content online back to the field of reliability and predictability. It would also give

[33]European Commission. *The Digital Services Act: ensuring a safe and accountable online environment*. [online] https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en [Access 24 April 2021].

[34] DSA, Article 19.

users stronger tools, as they would have the opportunity to challenge the moderation decisions of the platforms and appeal against them, contrary to current practice.[35]

To increase transparency, it would also deal with one of the most controversial issues, the algorithms of the platforms, along different lines, as it would also provide access to them for independent auditors and researchers.[36] In order to address systemic risks, the regulation would introduce a new category called very large online platforms,[37] which, unlike at present, would not be subject to a uniform but specifically different liability rules.[38] This category includes those who "provide their services to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million".[39] In this context, Member States must designate one of their competent authorities (digital service coordinator) to carry out all tasks related to the application and enforcement of the Regulation in that Member State.[40] The figure of the digital service coordinator (DSC) is important since it will bridge national with European digital services regulation. DSCs will have far-reaching powers of investigation, including to carry out on-site inspections, interview staff members and require the production of documents and information. DSCs will also have extensive enforcement powers.[41] An independent advisory group of DSCs – the European Board for Digital Services – would advise and provide guidance on issues falling within the scope of the regulation as well as assisting in joint investigations and the supervision of systemic platforms. Therefore, this advisory body will create consistent practice throughout European member states.

[35] DSA, Article 42: „Provider should inform the recipient of its decision, the reasons for its decision and the available redress possibilities to contest the decision."

[36] DSA, Article 31.

[37] DSA, Chapter III, Section 4.

[38] DSA, Chapter II.

[39] DSA, Article 25 (1).

[40] DSA, Article 38 (2).

[41] DSCs will be able to order the cessation of infringements, impose interim measures, levy fines (up to 6% of global annual turnover) as well as periodic penalty payments (up to 5% of average global daily turnover), and accept binding commitments. These powers are similar to the powers that the Commission currently has in competition investigations.

Among the many other innovations in the proposal there are also passages requiring the development of standards, codes of conduct and crisis protocols[42] which serves as evidence that heavy handed state regulation is not the only tool that will be implemented.

Given the real and comprehensible fines of previous years, it is not surprising that if an online giant platform infringes the relevant provisions of the proposed regulation, the Commission may impose a fine of up to 6% of the platform's total turnover in the preceding financial year.[43] However, the use of so-called interim measures (such as temporary suspension of service) has been included in the text as a real method of enforcement, as „where there is an urgency due to the risk of serious damage for the recipients of the service, the Commission may, by decision, order interim measures against the very large online platform concerned on the basis of a prima facie finding of an infringement."[44]

II.2. Disadvantages of the proposed regulation

An analysis of the negatives of the proposed regulation shows that, in terms of liability, it is on the path taken by national regulations (such as the German NetzDG[45], the French „Avia" Act[46] or the Austrian Anti-Hate Speech Act[47]) which force platforms – to avoid fines – constantly police and monitor their user's content.[48] This type of legislation is complicated relying on national and international measures that may not be coherent all the time. Such system could result in excessive – censored – measures, i.e., as the European Court of Human Rights has stated, "the organization will

[42] DSA, Article 34-35, 37.

[43] DSA, Article 59 (1).

[44] DSA, Article 55 (1).

[45] On April 1, 2020, Germany's federal government published a new draft bill to amend the German Hate Speech Act (Netzwerkdurchsetzungsgesetz, NetzDG).

[46] Although it was declared unconstitutional by the French Constitutional Council on 18 June 2020.

[47] Kommunikationsplattformen-Gesetz (KoPl-G).

[48] About the 'new school speech regulation' see J. M. Balkin. Old School/New School Speech Regulation. *Harvard Law Review,* 127 (2014), 2296, 2306.

take action to exclude its own liability (and thus erroneously remove content) instead of protecting freedom of expression."[49] This is further reinforced by the doubts about giant platforms' moderation practices, especially the question of human v. artificial intelligence's moderation, and the competences and situation of human moderators.[50]

The lack of a distinction and definition of illegal and harmful online content is an equally problematic issue, although it can be assumed that this would be replaced by the concepts of the 2018 EU Code of Practice on Disinformation.[51] And although the Code, which applies only to signatories, has been signed by Facebook, Google, Twitter and Mozilla (then Microsoft in 2019 and TikTok in 2020), in legal terms it is not possible to use it as a real regulatory answer.

However, the use of terms in the DSA and the DMA, as well as the two proposals and the definition set of the current e-comm directive and the AVMSD, are not fully harmonized. Some also emphasized that the necessary rules had already been put in place, so the European Union should focus on complying with them rather than adopting new legislation.[52]

[49] *Delfi AS v. Estonia* App no. 64569/09 (ECtHR, 16 June 2015), Joint dissenting opinion of Judges Sajó and Tsotsoria, 19.

[50] C. Newton. The trauma floor. The secret lives of Facebook moderators in America. *The Verge,* Feb 25, 2019, [online] https://www.theverge.com/2019/2/25/18229714/cognizant-facebook-content-moderator-interviews-trauma-working-conditions-arizona [Access 24 April 2021].

[51] Newton (2019).

[52] H. Mussard. Digital Advertising Industry Warns Against Misguided EU Regulation. *IAB Europe*, 29 September 2020, [online] https://iabeurope.eu/all-news/digital-advertising-industry-warns-against-misguided-eu-regulation/ [Access 24 April 2021].

III. Proposal for a Regulation on Digital Markets[53]

The other element of the package (hereinafter DMA) would regulate digital markets, and President of the European Commission Ursula von der Leyen said at the 2020 Web Summit[54] that the European Union would seek to control the power of big technology players much more firmly. In this context, she stressed that these giants were to be regulated not only in terms of content but also in terms of technology and that this was the purpose of the proposal for a regulation on Digital Markets.

The proposed regulation's key concept is the implementation of the notion of gatekeepers,[55] which covers service providers with a significant impact on the internal market, a stable and lasting position, and at least one core platform service. Such core platform services mean any of the following:

- online intermediation services (including, for example, marketplaces, application stores and online intermediation services in other sectors such as mobility, transport or energy);
- online search engines;
- online social networking services;
- video-sharing platform services;
- number-independent interpersonal communication services;
- operating systems;
- cloud computing services;
- advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by the above.[56]

The legislature states that „a small number of large providers of core platform services have emerged with considerable economic power. (...) The combination of those features of gatekeepers is

[53] Proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

[54] European Commission. Web Summit 2020 – *A Europe for everybody with EC president,* [online] https://www.youtube.com/watch?v=jgOBZv2nHjA [Access 24 April 2021].

[55] DMA, Article 3 (1).

[56] DMA, Article 2 (2).

likely to lead in many cases to serious imbalances in bargaining power and, consequently, to unfair practices and conditions for business users as well as end-users of core platform services provided by gatekeepers, to the detriment of prices, quality, choice and innovation therein."[57] Based on all this, in order to ensure the conditions of fair competition, these giant service providers are somewhat distinguished from the others, and a much stricter system of conditions and sanctions is established for them. Moreover, as we have seen above in the case of the DSA, these providers are international in nature, so that individual national regulations can only achieve partial results against them[58]. According to the planned procedure, the European Commission will classify a service provider if it meets three conditions: the number of users reached, the amount of annual turnover and the duration of the operation. It is proposed (examining the three conditions in detail) that compliance be presumed if the service provider:

- achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years;
- has more than 45 million monthly active end-users established or located in the Union and more than 10 000 yearly active business users established in the Union in the last financial year;
- the above thresholds were met in each of the last three financial years.[59]

It is clear from the definition of each of the thresholds that the European Union really wants to limit the distortive practices of the largest and does not aim to unduly terminate smaller and more accessible Internet services. However, control is envisaged to develop as dynamic activity following the market. Below the thresholds, the Commission can still conduct a market investigation and designate a company as a gatekeeper for a specific core platform service even if it does not meet the threshold for the number of users. The latter is intended to catch digital platforms that may enjoy an entrenched and durable position in the near future, i.e. markets that are prone to tipping.

[57] DMA, 3-4.

[58] See: DMA, Explanatory Memorandum, 2: „Almost 24% of total online trade in Europe is cross-border."

[59] DMA, Article 3 (2).

III.1. Benefits of the proposed regulation

The first of the benefits is definitely to start with the most important thing: the regulation of the gatekeepers. Ursula von der Leyen put it at the Web Summit above[60] that with great power comes great responsibility.[61] Concerning all these technological constraints, the key phrase should be found in the explanatory memorandum to the proposed regulation, which states: „the conduct of combining end-user data from different sources or signing in users to different services of gatekeepers gives them potential advantages in terms of accumulation of data, thereby raising barriers to entry.“[62] In other words, the regulation seeks to strengthen the possibility of entering the market for new service providers and services and to protect the data and opportunities of end-users. Such technological restrictions under Article 5 may include, but are not limited to:[63]

- refrain from aggregating personal data from multiple locations;
- refrain from signing in end-users to other services of the gatekeeper;[64]
- allow business users to offer the same products or services to end-users through third party online intermediation services at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper;
- refrain from preventing or restricting business users from raising issues with any relevant public authority relating to any practice of gatekeepers;
- refrain from requiring business users to use, offer or interoperate with an identification service of the gatekeeper in the context

[60] See: footnote 48.

[61] Although Luke 12:48 already uses the term in the Bible (“From everyone who has been given much, much will be demanded; and from the one who has been entrusted with much, much more will be asked.“), and can be found referring to it during the great French Revolution – not to mention the UK and what was said in the U.S. House of Representatives – the renaissance of the term in the 20-21th century stems from pop culture (Spiderman comics and movies).

[62] DMA, Explanatory Memorandum, 36.

[63] DMA, Article 5.

[64] That is, for example, logging in to your Gmail account will not automatically sign into your YouTube account.

of services offered by the business users using the core platform services of that gatekeeper (lock-in);

• refrain from requiring business users or end-users to subscribe to or register with any other core platform services.[65]

In particular, gatekeepers should ensure the effective portability of data generated by business and end-user activities, and in particular, provide end-users with tools that facilitate the exercise of data portability, including through continuous and real-time access.[66] Like the DSA rules, violators of key rules can be severely sanctioned: the Commission can impose fines of up to 10% of its total turnover in the preceding financial year.[67] Of course, the use of so-called interim measures has also been included in this proposal.[68]

III.2. Disadvantages of the proposed regulation

In addition to the conceptual inconsistency already mentioned above (II.2), the most serious criticisms have been made by many regarding the classification as a gatekeeper under Article 3 of the DMA. Based on the regulation, the Commission may declare a service provider to be a gatekeeper even in the absence of the criteria discussed above (III.). The methodological development of this remains to be seen. It is yet also unclear that to what extent the criteria set out in Article 3 (6) should the Commission take into account during an investigation. Similarly, it is not clear whether there is an order of priority between the three main conditions, and according to the procedure, the burden of proof of non-compliance lies with the service provider. Likewise, there is a lack of precise rules for business and end-user data transmission, so it is technically inconceivable in the current context whether it will offer real help and a solution to the practical problems that have arisen.

[65] That is, for example, allow the Apple's App Store to be used from non-Apple devices.

[66] DMA, Article 6 (1) h).

[67] DMA, Article 26 (1).

[68] DMA, Article 22.

IV. Discussion

The novelty of the regulatory approach taken by the European Commission is vivid. As in the case with the GDPR the Commission strives to accomplish a holistic and intersectoral type of regulation and an appropriate balance between European and national regulatory efforts. However, the digital environment which is meant to be regulated encompasses various activities and issues which require legislative attention each one in and by itself. Possible pitfalls became clear during the public consultation.[69] Thus SMEs called for targeted measures to empower SMEs with the purpose to deal effectively with the real concerns related to large platforms, while at the same time allow smaller businesses to thrive without additional burdens. Other organizations stressed due diligence and human rights and increased measures about transparency, proportionate responsibilities and obligations for platforms and increased legal certainty for platforms, special protection of freedom of expression through prohibition of general monitoring of content, limitation in scope of any regulatory framework, to avoid any misunderstanding, the Digital Services Act should "initially focus on content/activity that is already defined as illegal across the EU, extending and strengthening the powers of the national regulatory authorities (NRA) to quote just a few of the proposals. It is obvious that respondents raised themes that were of particular importance for their activities. However, these are also claims that have to be addressed properly and in this respect two solutions deem feasible: either cover the issues by DSA/DMA and provide more details and procedures in these acts or approach them through other EU instruments and synchronize them with DSA/DMA and/or strengthen the codes' practice. These are clear examples that the philosophy behind the package to regulate digital services in their entirety is laden with versatile high expectations that all interrelated problems of the digital society can find a successful solution through the proposed tools. The EC has to decide how to proceed with the digital regulation.

[69] [Online] https://digital-strategy.ec.europa.eu/en/summary-report-open-public-consultation-digital-services-act-package [Access 24 April 2021].

In the section we also wish to refer to the DSA/DMA impact on the regulatory frameworks in the European countries and beyond. After Brexit, the UK government took its own path of regulating the national digital economy which very much resembles the EU perspective. It was announced that a new tech regulator to „curb the dominance of tech giants" in the digital advertising space to „promote dynamic and competitive digital platform markets" for the benefit of online consumers and small businesses would be set up. The newly formed Digital Markets Unit (the DMU) will sit as its own division within the Competition and Markets Authority (the CMA) with a view to creating a „level playing field in digital markets" in the UK. It is the latest step to address the findings that competition is not working well in the digital markets leading to the substantial harm for consumers and society as a whole due to the fact that Google and Facebook were protected by „such strong incumbency advantages" that „potential rivals can no longer compete on equal terms". It is worth recalling that Facebook supported increased regulation but argued that a proper market definition analysis would identify that "competition between user platforms is [already] thriving in the UK".[70]

While the European public becomes aware of the principles and goals of the new legal package France is one of the countries that is possibly going to introduce stricter measures on platforms long before the official adoption of the two regulations. On 21 January 2021, the French National Assembly passed a draft amendment to the draft bill „Consolidating the principles of the Republic" to modify the French Law for Trust in the Digital Economy of 21 June 2004, (the so-called „LCEN") which implemented the E-Commerce Directive (2000/31/EC) and the hosting defence regime. Since the French law to fight online hate speech (the so-called „Avia Law") was stripped of most of its provisions after having been declared unconstitutional if adopted, the new obligations will apply to all platforms, whether established in France or abroad, (i) which list, rank or share content uploaded by third parties (such as social media platforms and search engines) and (ii) whose activity in France exceeds a threshold of user connections (which has not yet

[70] N. Lomas. UK' Digital Markets Unit starts work on pro-competition reforms. *Techcrunch*, [online] https://techcrunch.com/2021/04/07/uks-digital-markets-unit-starts-work-on-pro-competition-reforms/ [Access 24 April 2021].

been set). Under the Proposed Law, platform operators would be under more onerous obligations in relation to online harmful content including apologies of crimes or terrorism, incitement to racial or religious hatred.[71] A number of legislative proposals to amend Section 230 of the 1996 Communications Decency Act ("Section 230") have already been introduced in the new US Congress. Section 230 provides immunity to an owner or user of an „interactive computer service" – generally understood to encompass Internet platforms and websites – from liability for content posted by a third party. In addition similar to a newly passed Australian law that would make social media companies and even search engines pay for their making available content originating with traditional media outlets, a US bill under the name of „The Journalism Competition and Preservation Act of 2021" was introduced both to House and the Senate after having gained support from the National Association of Broadcasters and even the tech company Microsoft.[72]

All these legislative steps around the globe have been undertaken encouraged by the repercussions of the EU ambitious legislation. The time of safe haven for the big tech platforms is apparently over. The great news is that Europe will lay down the world standards of this type of regulation. However, the proper balance between various interests is necessary to be struck. The problem with DSA/DMA is that the draft starts from economic presumptions and not from a freedom of expression premise. State regulation to the public interest of means of communication is one option and not always the best one. A crucial issue is to protect best freedom of expression and fend off censorship since social platforms play a significant role in moderating contemporary democratic debate. Freedom of speech experts discern risks in heavy handed regulation instead of limited government involvement and

[71] Ahead of time, online platforms may have to anticipate the Digital Service Act in France. *Osborne Clarke*, [online] https://www.osborneclarke.com/insights/ahead-time-online-platforms-may-anticipate-digital-service-act-france/ [Access 24 April 2021].

[72] D. Oxenford. Making the Tech Giants pay to use traditional media news content – looking at the legislative issues. *USA*, March 29 2021, [online] https://www.lexology.com/16016/author/David_Oxenford/?start = 16 [Access 21 April 2021].

more moderation and self-regulation from the social media companies themselves. Complicated rules with an economic reason as they read now could imperil freedom of expression through their implementation. Having this is mind, either free speech values are also enshrined in the drafts or closer harmonization between these and other regulatory rules supporting media freedom and pluralism should be accomplished. The practical challenge for the EU will be to maintain sufficiently simple and balanced measures to make platforms and regulators work together effectively. Solutions based on the creation and exchange of good practices at a European level would be particularly useful.

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