

REFLECTIONS IN THE PERSPECTIVE OF THE EUROPEAN DIGITAL SERVICES ACT

(EXECUTIVE SUMMARY)

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ISSUE

By the end of 2020, the European Commission will propose a "Digital Services Act" (DSA) with the aim of better regulating the "Big tech". This will be the first bill within the *Europe fit for the Digital age* axis of its 2019-2024 political Guidelines. It may provide an opportunity to recast significantly the current legal arrangements, based on the 2000 e-commerce Directive, adopted 20 years ago. This note outlines a few avenues of thought and offers a written proposal to accompany them.

Finding No. 1

THE COUNTRY OF ORIGIN PRINCIPLE: A SELECTIVE ADVANTAGE

In 2000, the internet was still a new emerging technology, promising more freedom of expression and access to new markets. While it lived up greatly to those expectations, new challenges also emerged. At that time, no one could have suspected the pivotal role that platforms, smartphones and their pre-installed app stores as well as social networks would come to play in the economy and in the public debate. The e-commerce Directive was therefore not designed to apply to these players. Nor could anyone have anticipated that some of these players would acquire a dominant position and leverage it to foreclose effective competition.

It is in this context that the e-commerce Directive has relied on two major pillars. On the one hand, it has exempted digital service providers from any liability for the content they disseminate. On the other, it established a country of origin principle. The latter is tantamount to unconditionally delegating all regulatory powers to the EU Member State in which the service provider's head office or principal establishment is located. While this regime has served its purpose by facilitating the development of SMEs, it has also deprived Member States of strategic sovereign powers and, in the light of changing circumstances, has resulted in granting a selective advantage to the Big tech. For the internet to keep fulfilling all its promises, it is henceforth necessary to offer a safe harbour to start-ups. As effective and vigilant competition law enforcement may be, it does not suffice all and in itself to restore the countervailing power of consumers and user companies to Big tech. It must be supplemented by an *ex ante* European regulation, which allows to act before any damage are done and not only after it has started to materialise, with possible protracting effects.

Proposals 1 and 2

- Unless an agreement is reached on the basis of the proposal for a Regulation on preventing the dissemination of terrorist content on line, which could serve as a model EU law, to allow Member States to set up a duty of care, including proactive measures, toward hate speech and online disinformation strategies in times of elections, within the framework of common EU Guidelines. This initiative would regard only content that manifestly goes beyond the scope of the freedom of expression guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights (referred to as "hate" content: incitement to terrorism, racial hatred, child pornography, condoning crimes against humanity, etc.) or massive online disinformation strategies which, by their mass effect during an election period, threaten the integrity of elections.
- To remove the benefit of the country of origin principle from those digital players that do not meet the criteria of technical and passive service providers and have special responsibilities not to impair effective competition due to their market power. Those which meet the GAFA tax threshold would be presumed to be in that case, but this presumption would remain rebuttable.

Finding No. 2

A NECESSARY SYNERGY BETWEEN COMPETITION ENFORCEMENT AND *EX ANTE* EUROPEAN ECONOMIC REGULATION

Today, a number of major digital platforms have, by the size of their network, the capacity to behave independently from consumers and user companies.

They certainly owe their success to an effort of innovation and investment. But also to the conditions under which they have collected massive amounts of data from consumers in order to improve their algorithms and the relevance of their advertising and service offers, under conditions which, according to guidelines adopted by the G29 (which brings together the European personal data protection authorities) may amount to some invalid consent under the new rules set out by the GDPR.

These platforms now reinforce their position through contractual practices and restrictions that have the purpose or effect of locking in their members into their own ecosystem, independently of merits-based competition. As for certain software operating systems or smartphone manufacturers, they are now, in practice, in a position to decide the access, and therefore the future of their own competitors, whereas this choice should belong only and more directly to the consumer.

Through some of their practices, the major operators also manage to shield themselves from the competition on the merits of "start-ups". If they are unable to absorb them in an external growth project (predatory acquisitions), they lock them into a network of constraints, the purpose or effect of which is to restrict their capacity to switch platforms and commercial independence.

Competition authorities at European and national levels have intervened to investigate complaints and to put an end to such practices and impose heavy fines (see in particular the cases of Google Shopping, Google AdSense, Booking, Android, the opening of an investigation into Amazon and the sanction imposed for misleading information within the context of the Facebook/Whatsapp merger). But that response alone is not enough. Competition law, by nature repressive, only intervenes, even when precautionary measures are boldly taken, after it some foreclosure are *prima facie* established. It must therefore be supplemented by an *ex ante* regulation, in the same way as it was done in the telecom, energy, transport and even financial services sectors. It's all about allowing "start-ups" to stay in the market before it's too late.

Proposal 3: To establish a right to consumer self-determination

The consumer must be able to choose, without constraint, a service provider that provides the service best suited to his/her needs or that can create a customised service. Thus on the one hand, the consumer would be freed from the commercial policy of his/her incumbent operator that selects according to its own and only interests the operating systems and applications available, and on the other, from his/her own initial choices, without being constrained by any hidden or explicit switching costs.

- To strengthen the right to portability and interoperability: the incumbent operator should have the duty to offer consumers a free-of-charge digital preference card and allow any of its competitor to plug an API (Application Program Interface).
- To extend the net neutrality principle to all devices (smartphones, apps), to allow defragmentation and installation of software operating systems and apps independently of the commercial choices of the smartphone manufacturer.

Proposal 4: To restore the ability of user companies to compete across platforms

This reopening of competition would allow companies to better compare the relevance of the platforms' services, the commission rate they receive on their transactions, and the degree of interference in their commercial policy.

- To include digital print (collection and use of data, in particular for advertising purposes) within the criteria for merger control notification, which are currently based only on turnover thresholds.
- To prohibit certain practices or contractual clauses which have the object or effect of hindering the capacity to switch platforms or to restrict the freedom of user companies to set prices and quantities offered on various platforms or through their own distribution channels.

Proposal 5: To target this *ex-ante* economic regulation on the largest operators, identified according to their turnover or their digital presence on the European territory.**Proposal 6: To entrust its implementation to authorities that have already demonstrated their independence from any national interest and expertise, without creating a new European body.**

There is scope for extending the powers of administrative sanctions already vested in national regulatory authorities which have the necessary expertise and a long tradition of reciprocal information and networking, in close liaison with the European Commission. The authorities responsible for competition enforcement, the regulation of electronic communications and the protection of personal data would thus ensure the effective implementation of the new right of consumer self-determination.

With regard to the rights of user undertakings, national courts, which are already responsible for applying the Platform-to-business Regulation and national legislation on unfair commercial practices, could have their powers supplemented by the possibility of declaring certain clauses null and void and of imposing civil fines, following individual or collective actions or actions by Member States' administrations.

These authorities and courts would naturally have jurisdiction only in respect of the effects produced by the digital presence of operators on the territory of their respective Member States, while taking account of decisions taken and investigations in progress in other States, within the framework of a European cooperation mechanism.

Their independence regarding the Member States is already guaranteed by secondary legislation. Through their expertise and experience, they have already long demonstrated their impartiality, both regarding the parties and the States of origin and the States in which the service providers deploy their digital presence.

