

Reflections in the perspective of the European Digital Services Act

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.

Findings

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.

Propositions

- 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;
- To no longer apply the country of origin principle to the Big tech;
- To empower consumers with full freedom of choice, based on content portability through an interface programming application and on the extension of the net neutrality principle to all devices (smartphones, appstores);
- To include digital presence (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 empower business users, by prohibiting certain practices or clauses imposed by the Big tech which have the object or effect of restricting their capacity to switch platforms or their freedom to set quantities or prices;
- To target this *ex-ante* economic regulation on the players which meet the GAFA tax criteria or dominance criteria and empower authorities that have already demonstrated their independence from any national interest and expertise to implement it, without creating a new European body.