

DSA-DMA: A -very- preliminary assessment

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Implications of the *EU Digital Services Act package*

Two legislative initiatives for new rules governing digital services across the EU: the Digital Services Act (DSA) and the Digital Markets Act (DMA)

- DSA 1 November 2022 establishes a list of do's and don'ts that Big Tech companies and their trading partners will need to implement by mid-2023 in their daily operations to ensure *fair and open digital markets*
- DMA 16 November 2022 establishes a list of do's and don'ts that most online intermediation companies and their trading partners will need to implement by mid-2024 in their daily operations to create *a safer digital space and content moderation*.

Motivations of DMA

Open contestable market

- Over 10 000 online platforms operate in Europe's digital economy
- Most of which SMEs
- A small number of large online platforms capture the biggest share of the overall value generated
- Characteristics of the sector strong network effects,
- Key structuring elements of today's digital economy
- Comprehensively tracking and profiling end users.
- *« A few large platforms increasingly act as gateways or gatekeepers between business users and end users and enjoy an entrenched and durable position, often as a result of the creation of conglomerate ecosystems around their core platform services, which reinforces existing entry barriers.*
- *Unfair practices and lack of contestability lead to inefficient outcomes in the digital sector in terms of higher prices, lower quality, as well as less choice and innovation to the detriment of European consumers. »*

Motivation of DSA

Protect
consumers
in the
online
sector

A uniform legal framework initiative focusing on liability of online intermediaries for third party content, safety of users online

- While maintaining the core principles of its liability rules in line with the 2018 [Recommendation on measures to effectively tackle illegal content online](#) as interpreted by the Court of Justice of the European Union

Discussion 1

Structural approach v. Market analysis?

- DMA defines parties of interest by **figures**:
Number of users, valuation (but not exclusively)
 - Lacks current conceptual legal and economic references
 - Refers (back) to structural approach to competition (pre-Bork 1978 *The Anti-trust paradox*)
 - Intended to facilitate ex-ante regulation and save time
 - If boxes pre-defined, no one will admit fitting in
- Market approach
 - **Behaviours and outcomes** assessed case by case
 - UK Code of conduct: business models and markets

Discussion 1

Structural approach v. Market analysis?

- Advertising on the Internet continues to grow worldwide: + 10% expected in 2023 (Insider Intelligence) (to around 500 billion dollars), but...
- **Gatekeepers figures are crumbling: are Heydays over?**
 - Facebook [in decline](#), Twitter [in chaos](#). Mark Zuckerberg's empire has [lost](#) hundreds of billions of dollars in value and [laid off](#) tens of thousands of people ad business in peril and its [metaverse fantasy](#) in shambles. Elon Musk's takeover of Twitter has caused [advertisers](#) to pull spending and power users to shun the platform
 - Plausible that the age of social media might end—and soon

Discussion 1

Structural approach v. Market analysis?

- The Google and Meta advertising duopoly, the vast majority of whose revenue depends lost ground in 2022
- Now represents just under half of the entire market in the United States. A first for almost ten years. this bad dynamic will continue in 2023... and beyond.
- Google is starting to be shaken up on its core business, search (research) and hears the regulator knocking more and more strongly at its door.
- *Structural approach reaches its limits*

Discussion 2

Incentives to innovation in a networks effect context

- Innovation big problem for EU
- Network effects apply to social networks (MySpace, Google +), search, e-commerce
- Size potential dual effects:
 - Innovation
 - Stifling innovation or at least competition
- Natural monopolies mitigated by language and protectionism (China, India, Russia), not in Europe
- NO break-up feasible solution

Discussion3a *Contestability*

is it enough to remedy EU innovation shortcomings

- The EC refers to the “Contestability” of platforms
- Introduced 1982 Baumol, Panzar and Willig
- Originally referred to airlines
- Baumol contestability applied to telecoms ...but failed
- Failure leading to the scorching 1984 Consent decree and the break-up of AT&T

“Contestable” markets: not really a successful record

- In Telecoms Network effects and natural monopolies are still there but most countries have made the choice of competition, at the cost of duplicating networks, considering minor economies of scale and less static efficiency are justified by major dynamic efficiency
- Should we take the risk of impairing the user experience of millions to prevent the potential pain of some?
- Is history to repeat itself? Is break-up the solution?
- The Dems House of representatives Bills June 2021 failed

Discussion3b

Contestability / Disruptive transformation

- Google \$162 billion in advertising revenue thanks to virtual monopoly (about 90% of global searches). That's more than half of its overall revenue, \$282 billion over the last twelve months.
- Microsoft strong argument: new Bing-ChatGPT chatbot, presented in February 2022,
- More relevant than traditional Google search? This remains to be proven of
- AI Tremendous prospects.

Discussion3b

Contestability / Disruptive transformation

- TikTok thinks it has a say in internet search. Its search bar is said to be used by around 40% of young people
- Its advertising revenues, thanks to its short videos, amount to around 11 billion dollars for 2022 (+ 200% over one year). Its new popularity is weakening the advertising revenues of its competitors Meta (-1% in 2022) and YouTube (-7.8% growth in the fourth quarter of 2022).
- The other new online advertising giant is Amazon. Its associated revenues increased by 19% in the last quarter of 2022. The search bars of e-commerce sites are getting better and better. Specialised e-commerce sites also hold a mass of user data that they are gradually learning to value with brands.
- The other potential challengers in the field of online advertising are Netflix, Spotify, or even Apple, in the display of advertising on increasingly popular audio and video streaming services. Expect double-digit growth in advertising revenues in the United States in 2023..

Discussion3b

Is Contestability enough to remedy EU innovation shortcomings/Sanctions

- In 2020, the US Justice Department filed a civil antitrust suit against Google for monopolizing search and search advertising, which are different markets from the digital advertising technology markets at issue in the lawsuit filed January 2023. The Google search litigation is scheduled for trial in September 2023.
- In addition to search, the Mountain View firm has control over many other technological bricks in the sector, such as the ad server. As such, several colossal fines have also been imposed on it by the European Union (EU) in recent years. "State action is the only one to date that can really knock Google off its pedestal,".

Discussion 4 Freedom of speech

- At stake here: How does freedom of speech, as a right, measure with the protection of the individual's privacy and safety, another right?
- Two possible legal implications of liberal individualism
 - Freedom of speech originally very much connected with religious liberty and diversity in 1791 America, and by extension to the political sphere
 - “Modern” liberalism (Benjamin Constant 1819) in Europe, protection of the individual from public powers, the State, and by extension today from private powers which have expanded on an unprecedented scale with digital media and platforms
- “Freedom of speech” exerts a strong fascination, with a libertarian anti power-that-be streak (and some huge business interests in-behind)
- But Constant’ “Modern” liberalism should not be under-rated: it provides the strongest basis today for putting privacy and safety first

Discussion 5a Privacy

- Third-party cookies – which follow Internet users from one site to another and therefore to better identify them - are being phased out.
 - For ethical reasons. "Targeting, the perfect message at the right time, to the right person, without constraint, met a need that in reality no one was ready to experience",
 - from experience. "A pair of shoes consulted only once sometimes followed us for three weeks in our web browsing. Which very quickly bored users", then cookie consent banners which have generated close to a third of refusals.
- The EU is very offensive on the subject. Heavy fine imposed at the end of 2022 on Meta (390 million euros) for this lack of consent to targeted advertising.

Discussion 5b Privacy

- Large companies are called upon to adapt. In its Safari browser, Apple has abandoned these third-party cookies. Its App Tracking Transparency (ATT), introduced two years ago, allows all iPhone users to choose which apps can track them. This program has cut Meta revenue by \$10 billion to \$13 billion in 2022. Google, meanwhile, is showing signs of feverishness: it has twice postponed the abandonment of third-party cookies on Chrome (the company is now aiming mid-2024).
- Observers are dubious about the emergence of equally precise equivalents for advertisers.
- French Criteo has also given up. This French flagship, listed on the Nasdaq, is pivoting its model, which was originally centered on the use of these third-party cookies. Meta and Google retain the right to use the cookies they own (first party cookies).

Discussion 6a

Offline acts directly incited online.

- Renewed attention for some grey areas regarding the accountability of platforms: offline acts directly incited online.
- In the pre-Internet era, it was often said: “Words can kill”. The responsibility or complicity of writers, journalists, politician inciting violence and crimes could and has been at times acknowledged.
- Social networks protected from liability in America by Section 230 of the 1996 Communications Decency Act and in Europe by national laws.
- ***US Supreme Court to Hear Case That Targets a Legal Shield of Tech Giants***
- Challenge to Section 230, that protects Google, Facebook and others from lawsuits over what their users post online.
- Section 230 could be amended and allow for platforms to be held complicit for crimes committed offline when their algorithms tweak or amplify user generated content.

Discussion 6b

Time, Sanctions and Penalties

➤ Time: Ex ante...or post factum

May, in an emergency, take provisional measures against a Gatekeeper (§1Article 22)

- Hate speech Irreversibility: “Fait accompli”
- **No way to put the bad genie back in the bottle**
- *Compensatory damages hard to define*

> Can proportionate sanctions and penalties remedy a destroyed reputation or a ruined life? Or even “compensate” a crime? Leibniz v Beccaria

- Beccaria *Dei delitti e delle pene* 1764

« *Certezza, prontezza, proporzionalità* »

- Leibniz *Doctrina conditionum* 1669

« *Usual v Exceptional (Fortuitous)* »

- Common Law punitive, exemplary damages
- Civil law: Pretium doloris on top of damages

December 2022 US Congress blew its last chance to curb Big Tech's power

- In spite of Congress' regulator failures concerning tech, government agencies like the Federal Trade Commission have launched a series of high-profile lawsuits targeting the market dominance of large firms. Earlier this summer, the FTC filed a complaint to block Meta from acquiring Within, a virtual reality fitness app developer. Just last week, the agency sued Microsoft challenging [its \\$68.7 billion purchase of Activision Blizzard](#).
- The European Union continues to regulate the American tech sector even if Congress' own efforts have failed. *Bloomberg* has reported that [Apple is planning to start allowing users](#) to install third-party app stores on their devices in Europe. The move came in response to the EU's Digital Markets Act (DMA)

Conclusions:

Time (hands-off) v. Regulation (hands-on)?

- Vestager*: "It may be over time that digital monopolies are toppled, but time is not something you have if you want the full potential of innovation to be unlocked. The power of AI to to disrupt monopolies may prove illusory"
- No realistic break-up solution

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Köszönöm a figyelmet!

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