Prospects – Getting the DSA right

These are the main conflict lines in the DSA debate: defining minimum obligations for all platforms which apply regardless of their size – the *de minimis* rule; and defining additional rules for gatekeeping platforms – *ex ante* legislation – that will apply to giant platforms, whose access to data enables them to profile users and to influence opinion information online.

Firstly, there are **concerns about the risks citizens face in their online engagements and the protection of their rights**. Tackling these risks will require measures that increase transparency about how platforms moderate content. Content moderation is a standard practice among platforms and is usually achieved via automated decision-making (ADM) tools because the sheer abundance of information is impossible for human agents alone to process. Using ADM, platforms can identify, filter or remove illegal content that may fall under a certain category (e.g. terrorist, child sexual abuse, racist and xenophobic hate speech).

No matter how beneficial this practice may sound, it poses serious threats to fundamental rights, such as freedom of expression and opinion. ADM tools are unable to understand the highly contextual and delicate nuances of speech. While ADM can potentially identify illegal content, it can also silence groups and individuals whose messages are not illegal. As a result, ADM can reinforce social biases, for example, by targeting the content of minorities and vulnerable social groups.[1] This is why ADM tools must be made sufficiently transparent, so that independent observers can monitor and assess the different platforms' ADM tools and decision-making criteria for content moderation.

Additionally, while limited liability for platforms should, in principle, be preserved, it must be reinforced with a clause that addresses the Good Samaritan paradox, and introduce additional responsibilities for the dominant players.

Secondly, there are **competition concerns** concerning the introduction of new entrants into the market and the level playing field. These measures will likely be the focus of the *ex ante* rules that the Commission has mentioned in its DSA plans. They will be activated retrospectively when certain conditions are fulfilled, to curb the market power of giant platforms which act as gatekeepers for aspiring entrants.

An impact assessment of dominant players in the market will be needed to avoid measures that undermine consumer interests and innovation. Almost a million EU businesses sell their goods and services via major online platforms nowadays, and more than 50% of small and medium-sized enterprises sell their products through online marketplaces. With 4.7 million EU jobs currently linked to businesses active on online platforms, the stakes are high and ineffective measures could exacerbate existing market distortions.[2]

In this spirit, there are three recommendations the Commission should consider when drafting the DSA.

Recommendation 1 – Introduce a double-incentive mechanism

While several major players act as gatekeepers of the industry, there also smaller online intermediaries. Therefore, **the minimum transparency and market obligations of online platforms must be defined according to indexes of annual turnaround, market share, user base and gatekeeping impact.**

Market and algorithmic transparency obligations may be well-processed by market giants like Google, Amazon, Facebook and Apple (GAFA). However, they would require smaller ones to compromise on their capacity for innovation. That is why smaller platforms should not have to offer

[1] Birgit Stark and others, 'Are Algorithms a Threat to Democracy? The Rise of Intermediaries: A Challenge for Public Discourse'

[2] European Commission (2019), Online platforms: New European rules to improve fairness of online platforms trading practices.

exhaustive descriptions of their ADM and other processes, unless they are required on a spot-check basis. This measure could enable smaller players to enjoy considerable incentives for entering the market.

Conversely, **ex-ante rules should disincentivise especially strong players from abusing their dominance in the market and engaging in practices that make it impossible for other players to compete**. Disincentives should involve merging and sharing user data across multiple services that are owned by the same platform (e.g. Facebook and its Instagram and WhatsApp).

Data-merging practices offer dominant platforms crucial insights about purchasing behaviour and content consumption. In turn, these insights translate into 'data power' that gives unfair advantages to dominant players because it allows them to behave as gatekeepers.[3] That is why *ex ante* rules for especially strong players should be introduced, forbidding data-merging practices for players with excessive data power.

An effective sanctioning regime will be necessary in cases of negligence. It should enforce fines proportional to the damage the dominant player has inflicted to the market. The fines should be backdated to account for the entire period of market abuse, and orders to stop abusive market behaviour should be enforced a soon as the threshold for adequate evidence is met – even prior to concluding the examination, which could take years

Recommendation 2 – Establish a central EU agency

A central EU agency that monitors and enforces the DSA is necessary. The agency would have a clear legal mandate to enforce transparency obligations and *ex ante* rules for especially strong players acting as gatekeepers across the EU27.

Equal enforcement of the DSA across the Union will be a daunting task. National enforcement agencies should not engage alone in enforcing the DSA for giant platforms. Besides lacking the necessary resources, this approach would cause fragmentation in the EU Single Market, through inconsistent interpretation of rules and enforcement. This is why a central EU agency would harmonise governance between national and EU-level regulatory authorities by enforcing consistent regulation across the Union.

The agency would increase EU leverage over giant platforms since it would represent the Union as a whole. Additionally, it would be in a unique position to address potential clashes of interest in enforcement between the national and EU-levels of governance. For example, it could monitor the implementation of DSA transparency obligations by national enforcement bodies in member states where rule of law has been an issue.

The agency should also enforce a data access regime in order to increase transparency over giant platforms in the EU27. This approach would enable independent ADM monitoring by stakeholders (e.g. civil society, journalists, regulators, academics) and foster freedom of scientific research in platform governance.

The issues of democratic values and human rights are hugely important. This is why this agency's mandate should be designed with a view to monitoring issues of content governance, algorithmic transparency, and discrimination related to ADM on giant platforms.[4] To minimise the risk of overlaps, tiered regulation should explicitly outline different levels of oversight and how they interact with regulatory authorities in competition, data protection, cybersecurity, etc.

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[3] O. Lynskey "Grappling with 'Data Power': Normative Nudges from Data Protection and Privacy" (2019) 20(1) *Theoretical Inquiries in Law* 189, 207-209.

[4] The Commission is also planning to present its European Democracy Action Plan (EDA) in 2020, which will also target issues of online disinformation and ADM discrimination on the basis of values enshrined in the EU fundamental rights. That is why potential synergies between the DSA and the EDA should be considered in advance.

Recommendation 3 – Enhance the role of national data protection authorities (DPAs)

The role of national DPAs should be enhanced in order to enable them to effectively enforce the implementation of the General Data Protection Regulation (GDPR, 2016/679) at the national level.

There are currently difficulties in implementing the GDPR at the national level due to a lack of resources. A recent report shows that dominant platforms and services can leverage DPAs' lack of resources in individual member states. For example, Ireland and Luxembourg have seen resource increases of 169% and 126% between 2016 and 2019, respectively. However, there are significant disparities elsewhere: Greece and Bulgaria have seen a 15% and 14% decrease in staff, respectively.[5]

Enhancing the capacities of DPAs is crucial if research institutions, civil society and other stakeholders are to safely engage in independent monitoring of ADM practices. Any data access regime that facilitates independent monitoring should come with strong safeguards for personal data, in line with the GDPR. This is especially important when it comes to data access regimes operating at the national level – DPAs should have adequate resources to monitor how personal data is processed in these regimes.

This approach would alleviate the EU agency's administrative burden of processing data access requests from 27 member states. It would also foster harmony between national and supranational levels of governance, as it would maintain a meaningful role for national agencies. Additionally, enhancing the role of DPAs would distribute responsibility across different levels of governance, which would reduce concerns about power grabs at the EU level.

[5] Massé, Estelle (2020), "Two years under the EU GDPR. An implementation progress report: State of play, analysis, and recommendations", Brussels: Access Now.