NEW EUROPEAN REGULATIONS ON DIGITAL MARKETS AFTER THE PANDEMIC EXPERIENCE

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Abstract:

Digital technology has constantly evolved into an indispensable part of our lives. In recent years in particular, online platforms have gained ground, being increasingly present in our life and business and representing a true economy, distinct from off-line markets.

When referring to the activity of online platforms, we consider that they have both benefits and risks for users. The acceleration of digitalisation, against the background of the global pandemic, has led to a significant increase in the number of users, who have become more comfortable accessing various services online platforms.

The study aims to analyse the legislative approach at EU level so that the benefits of using these platforms for the economy and society as a whole outweigh the risks they could have for users and ensure a level playing field for all providers of such services.

Keywords: *digital services, contestable markets, fair markets, online platforms, users*

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1. General Considerations

We assume that technology must work for the benefit of humanity, and the role of online platforms in facilitating the purchase of goods and services is undeniable. Over the last two years, users of these platforms have gained confidence and have used digital markets for a variety of purposes.

When we refer to online platforms, we will consider a multitude of business models they host: search engines, social media, content-sharing platforms, applications, tourism sites, ticket purchasing sites, reservation of accommodation, online shops or online multiple vendor markets, etc.

Users of online platforms thus have the opportunity to learn, communicate, purchase goods and services from anywhere in the world, and the convenience of doing all of this wherever they want.

On the other hand, for suppliers of goods and services, online platforms offer the opportunity to expand their market, thereby increasing their efficiency, effectiveness and competitiveness

At European level, "the benefits to our economy and society are so significant that the most successful online platforms have attracted hundreds of millions or even billions of users, making them the most frequently visited websites in the world" (https://digital-strategy.ec.europa.eu/en/library/how-do-online-platforms-shape-our-lives-and-businesses-brochure).

According to European Union data, "in 2020, online platforms have continued to grow at unparalleled rates in comparison to traditional business models. The total value of the world's top 100 platforms increased by 40% between January and October 2020 to EUR 10,5 trillion. Although there are over 10.000 EU platforms, most of these are start-ups and account only for 2.7% of the global total value." (https://digital-strategy.ec.europa.eu/en/library/how-do-online-platforms-shape-our-lives-and-businesses-brochure).

In view of these figures and the dramatic increase in the number of online platforms and their business figures, not only their benefits but also the risks they may entail have been analysed.

As the number of users increases, the data that these platforms collect increases considerably, so that they gain a dominant position on the market and are able to control the market, possibly in an abusive manner and influence the information provided to users.

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This concentration of power on certain online platforms may jeopardize fundamental rights of users (e.g. freedom of expression, right to information, right to the protection of personal data and privacy, etc.), may favour online crime (e.g. facilitating money laundering, incitement to violence, terrorism, hatred, violation of intellectual property rights, child pornography, etc.). In relation to service providers, potential abuse of dominant position by platforms could create problems for them by distorting competition (e.g. search engines that generate certain results directed to the potency of the service provider, so smaller providers appear at the bottom of the search results, although they may charge better prices or tariffs).

Potential risks lead to unfair competition, which can harm the rights of both users and users of services.

Analyses at international level have shown a tendency for major international platforms to evade tax and tax payments by outsourcing profits to "tax havens". As a result, worldwide concerns have arisen over the adoption of measures leading to a more uniform charging model for large companies, including those in digital markets.

On 08.10.2021, the Organization for Economic Cooperation and Development (OECD) (https://www.oecd.org/about/) announced an agreement on the taxation of multinational enterprises: "International community strikes a ground-breaking tax deal for the digital age" (https://www.oecd.org/newsroom/international-community-strikes-a-ground-breaking-tax-deal-for-the-digital-age.htm). The reform of the international tax system will ensure that multinational enterprises will be subject to a minimum tax rate of 15% from 2023, with an agreement between 136 countries and jurisdictions "ensuring that these firms pay a fair share of taxes wherever they operate and generate profits".

The two pillars of the agreement are expected to ensure "a fairer distribution of profits and tax entitlements between countries compared to the largest and most profitable multinational enterprises" (pillar one) and to "introduce a minimum overall corporate tax rate set at 15%" (pillar two).

At the G20 Summit in Rome from 30 to 31 October 2021, the leaders of the Member States (https://www.g20.org/about-the-g20.html) signed an agreement on the global tax, which had been agreed by the OECD, It is appreciated that "this is more than just a tax settlement – it is diplomacy that reshapes our global economy and delivers results for our people" and is "a clear signal of justice in times of digitalisation". The agreement reached in Rome "will make our international tax arrangements fairer and will work better in a digitalised and globalized economy". (https://globalnews.ca/news/8338408/g-20-global-corporate-minimum-tax-rome-summit/)

In this way, it seems that the best solution for managing the risks of tax avoidance has been identified, with the aim of promoting a European Directive on minimum tax. (https://www.agerpres.ro/politica-externa/2021/10/30/video-summitul-g20-liderii-tarilor-industrializate-aproba-o-reforma-fiscala-internationala--806041)

The other highlighted risks remain, which users themselves increasingly perceive and need to feel safe in the digital environment. According to the Edelman trust Barometer for 2020, global trust in technology has fallen by 4%, 66% of respondents are worried "hat technology will make it impossible to know if what people see or hear is real" and 61% of respondents believe that governments "do not understand emerging technologies enough to regulate them effectively"(https://www.edelman.com/trust/2020-trust-barometer). The Barometer Edelman trust for 2021 points out that 68% of respondents are concerned about the possibility of cyber-attacks (https://www.edelman.com/trust/2021-trust-barometer).

Legal rules on the protection of personal data have been adopted at EU level (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals 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), published in the Official Journal of the European Union L 119/04.05.2016), as well as rules on audiovisual media services (Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU 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) in view of the changing market realities, published in the Official Journal of the European Union L 303/28.11.2018), on the protection of copyright (Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, published in the Official Journal of the European Union L 130/17.05.2019). A Regulation on addressing the dissemination of terrorist content online is also being worked on (https://data.consilium.europa.eu/doc/document/ST-14308-2020-REV-1/en/pdf).

However, at European level, gaps in the regulation of the functioning of digital platforms are still considered to exist, for which new legislative initiatives, the Digital Services Act and the Digital Markets Act, have been developed, complementing the legal responsibilities of service providers on-line platforms.

2. Regulation of the single market for digital services

On 15.12.2020, the European Commission finalized a proposal (https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package) for a Regulation of the European Parliament and of the Council on a single market for digital services (Digital Services Act[1]) and amending Directive 2000/31/EC (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, p. 1).

The Digital Services Act assumes that "digital services can support the achievement of sustainable development goals by contributing to economic, social and environmental sustainability".

The provisions of the Digital Services Act aim to establish "a targeted set of uniform, effective and proportionate mandatory rules" and to induce intermediary service providers to adopt "responsible and diligent behaviour … essential for a safe, predictable and trusted online environment and for allowing Union citizens and other persons to exercise their fundamental rights guaranteed" (recitals 3 and 4 of the proposal).

As a novelty, the Digital Services Act defines new concepts such as:

1. 'intermediary service' means one of the following services (Article 2(f) of the Digital Services Act):

–a 'mere conduit' service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;

–a 'caching' service that consists of the transmission in a communication network of information provided by a recipient of the service, involving the automatic, intermediate and temporary storage of that information, for the sole purpose of making more efficient the information's onward transmission to other recipients upon their request;

–a 'hosting' service that consists of the storage of information provided by, and at the request of, a recipient of the service.

2. 'illegal content' means any information,, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with

[1]Hereinafter referred to as *the Digital Services Act*

Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law (Article 2(g) of the Digital Services Act);

3. ‘online platform’ means a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation (Article 2(h) of the Digital Services Act);

4. ‘dissemination to the public’ means making information available, at the request of the recipient of the service who provided the information, to a potentially unlimited number of third parties (Article 2(i) of the Digital Services Act):;

5. ‘online interface’ means any software, including a website or a part thereof, and applications, including mobile applications (Article 2(k) of the Digital Services Act);

6. ‘content moderation’ means the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients’ ability to provide that information, such as the termination or suspension of a recipient’s account (Article 2(p) of the Digital Services Act);

Chapter II of the Digital Services Act regulates the ‘liability of intermediary service providers’, namely: ‘Mere conduit’, ‘caching’, hosting, orders to act against illegal content, orders to supply information

Chapter III of the Digital Services Act regulates on “due diligence obligations for a transparent and secure online environment”. A common obligation for all intermediary service providers is transparency reporting (Article 13 of the Digital Services Act), with the effect that the obligation does not apply to intermediary service providers which can be considered to be micro or small enterprises.

“Providers of intermediary services shall publish, at least once a year, clear, easily comprehensible and detailed reports on any content moderation they engaged in during the relevant period. Those reports shall include, in particular, information on the following, as applicable:

(a) the number of orders received from Member States’ authorities, categorised by the type of illegal content concerned, including orders issued in accordance with Articles 8 and 9, and the average time needed for taking the action specified in those orders;

(b) the number of notices submitted in accordance with Article 14, categorised by the type of alleged illegal content concerned, any action taken pursuant to the notices by differentiating whether the action was taken on the basis of the law or the terms and conditions of the provider, and the average time needed for taking the action;

(c) the content moderation engaged in at the providers’ own initiative, including the number and type of measures taken that affect the availability, visibility and accessibility of information provided by the recipients of the service and the recipients’ ability to provide information, categorised by the type of reason and basis for taking those measures;

(d) the number of complaints received through the internal complaint-handling system referred to in Article 17, the basis for those complaints, decisions taken in respect of those complaints, the average time needed for taking those decisions and the number of instances where those decisions were reversed.”

In the same chapter, Section 2 contains ‘additional provisions applicable to providers of hosting services, including online platforms’ and Section 3 covers ‘additional provisions applicable to online platforms’ (which does not apply to online platforms that can be considered micro or small enterprises).

Under Section 3, one of the additional measures is to protect against misuse (Article 20) which confers the right of online platforms to suspend "for a reasonable period of time and after having issued a prior warning, the provision of their services to recipients of the service that frequently provide manifestly illegal content".

Another new element is the establishment of the obligation of "notification of suspicions of criminal offences" (Article 21). The obligation concerns "a serious criminal offence involving a threat to the life or safety of persons", and the platform must "inform the law enforcement or judicial authorities of the Member State or Member States concerned of its suspicion and provide all relevant information available".

Another novelty is the obligation for online platforms to establish the "traceability of traders" (Article 22) by obtaining full data on traders by checking the information provided (in official online databases such as the Trade Register), and, where appropriate, require the trader to provide supporting documents from reliable sources. Where the platform becomes aware that the information obtained from a trader is inaccurate or incomplete, it should require the trader to correct the information and if the trader fails to comply, the online platform should suspend the provision of its services to the trader until the trader has complied with the request.

Still related to the traceability of traders, online platforms must store information about them "in a secure manner during the contractual relationship" and, upon completion of the relationship, the platform is obliged to delete the information. The disclosure of trader data to third parties may only take place subject to a legal obligation.

Section 4 sets out "additional obligations imposed on very large online platforms to manage systemic risk", i.e. platforms with a monthly average number of active recipients of services in the Union equal to or greater than 45 million (Article 25).

With regard to sanctions applicable to infringements of the Digital Services Act, the Commission leaves it up to the Member States to adopt the sanctioning regime, while respecting the principles of effectiveness, proportionality and deterrence and maximum limits on sanctions (Article 42).

The Digital Services Act aims to "contribute to a safe, trustworthy and transparent online environment for consumers, as well as for other interested parties such as competing traders and holders of intellectual property rights, and to deter traders from selling products or services in violation of the applicable rules" (recital 49) and ensure that these platforms behave correctly in the online environment.

3. Regulation of contestable and fair markets in the digital sector

On 15.12.2020, the European Commission completed the proposal for a Regulation of the European Parliament and of the Council on contestable and fair digital markets (Digital Markets Act)[1]based on the idea that "cover a wide range of daily activities including online intermediation services, such as online marketplaces, online social networking services, online search engines, operating systems or software application stores".

The Regulation is to cover "core platform services", which include:

(i) online intermediation services (incl. for example marketplaces, app stores and online intermediation services in other sectors like mobility, transport or energy),

(ii) online search engines,

(iii) social networking,

(iv) video sharing platform services,

(v)number-independent interpersonal electronic communication services,

(vi) operating systems,

[1] Hereinafter referred to as *the Digital Markets Act*

(vii) cloud services,

(viii) advertising services, including advertising networks, advertising exchanges and any other advertising intermediation services, where these advertising services are being related to one or more of the other core platform services mentioned above.

As a novelty, the Digital Markets Act defines new terms, which were not regulated in European legislation, such as:

– 'Online social networking service' means a platform that enables end users to connect, share, discover and communicate with each other across multiple devices and, in particular, via chats, posts, videos and recommendations (Article 2(7));

– 'Operating system' means a system software which controls the basic functions of the hardware or software and enables software applications to run on it (Article 2(10));

– 'Software application stores' means a type of online intermediation services, which is focused on software applications as the intermediated product or service (Article 2 (12));

– 'Software application' means any digital product or service that runs on an operating system (Article 2 (13));

– 'Identification service' means a type of ancillary services that enables any type of verification of the identity of end users or business users, regardless of the technology used (Article 2(15));

– 'End user' means any natural or legal person using core platform services other than as a business user (Article 2(16));

– 'Business user' means any natural or legal person acting in a commercial or professional capacity using core platform services for the purpose of or in the course of providing goods or services to end users (Article 2 (17));

– 'Ranking' means the relative prominence given to goods or services offered through online intermediation services or online social networking services, or the relevance given to search results by online search engines, as presented, organised or communicated by the providers of online intermediation services or of online social networking services or by providers of online search engines, respectively, whatever the technological means used for such presentation, organisation or communication (Article 2 (18));

– 'Data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording (Article 2 (19));

– 'Undertaking' means all linked enterprises or connected undertakings that form a group through the direct or indirect control of an enterprise or undertaking by another and that are engaged in an economic activity, regardless of their legal status and the way in which they are financed (Article 2 (22));

Another novelty is that the Digital markets Act defines the so-called gatekeepers. Article 3 stipulates that:

"A provider of core platform services shall be designated as gatekeeper if:

(a) it has a significant impact on the internal market;

(b) it operates a core platform service which serves as an important gateway for business users to reach end users; and

(c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future."

The Digital Markets Act regulates gatekeeper practices that limit contestability or are unfair and imposes obligations on gatekeepers.

With regard to sanctions for non-compliance with the Digital Markets Act by the gatekeepers, the European Commission has the power to impose "on a gatekeeper fines not exceeding 10% of its total turnover in the preceding financial year where it finds that the gatekeeper, intentionally or negligently, fails to comply". (Article 26 (1))

Undertakings and associations of undertakings not having a gatekeeper status are also subject to sanctions by the European Commission, which "may by decision impose on undertakings and associations of undertakings fines not exceeding 1% of the total turnover in the preceding financial year where they intentionally or negligently". (Article 26 (2))

Another novelty is the possibility for the Commission to "by decision impose on undertakings, including gatekeepers where applicable, periodic penalty payments not exceeding 5 % of the average daily turnover in the preceding financial year per day, calculated from the date set by that decision", in order to compel them to comply with measures adopted under the Digital Markets Act, such as: Commission decisions, on-site inspections, provision of information, etc.

The Digital Markets Act requires the officials involved in its application to observe professional secrecy with regard to the data and information they obtain under the Regulation (Article 31), and the publication of the decisions which the Commission adopts pursuant to the Regulation will be made with an indication of the names of the parties and the main content of the decision, including any penalty imposed, while respecting the legitimate interest of gatekeepers or third parties in protecting their confidential information. (Article 34)

4. Conclusions

As we have analysed, legislative regulations aim to ensure a secure environment for users on the one hand and a competitive market in the digital environment on the other. Everything that is illegal offline is thought to be illegal online as well. The digital environment must respect European values and rules to ensure that the evolution of technology benefits everyone.

The Digital Services Act and the Digital Markets Act are seen as central to the European Digital Strategy and the European Commission will have to ensure that the adopted legal rules keep pace with the rapid evolution of the digital sector, conduct market investigations and take corrective action, where infringements of the provisions of the regulations are detected.

The Commission considers that "the new rules are proportionate, foster innovation, growth and competitiveness, and facilitate the scaling up of smaller platforms, SMEs and start-ups". The rules aim at protecting consumers and their fundamental rights online, establish a strong and clear framework for the transparency and accountability of online platforms, promote innovation, growth and competitiveness in the single market. (https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

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