Implementing the EU digital regulations: the Governance Challenge

Conference report

Opening conference of the Dauphine Digital Days 2024

Paris Dauphine-PSL University, November 18, 2024

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Opening conference of the Dauphine Digital Days 2024

November 18, 2024

Synthesis n°94
Paris Dauphine-PSL University

Implementing the EU digital regulations: the Governance Challenge

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Summary

Introduction

Éric Brousseau | Professor of Economics and Management, Director of the Governance and Regulation Chair, Paris Dauphine-PSL University

This year, the Governance and Regulation Chair is pleased to organize a conference on the implementation of the EU digital regulations (DMA, DSA, etc.). Each of these regulations is specific, targets different issues and raises different implementation challenges.

One of these challenges is the coordination among European regulatory authorities. Instead of developing a new or several new agencies in charge of the EU digital legislations, the European Commission, the European Parliament and the member states have decided to share implementation among the large number of existing regulatory authorities in member states. Consequently the oversight of the providers of digital technologies and services, and of users behaviour, is among a large set or agencies with heterogeneous statutes, mandates and competencies.

We are currently clearly in a process of learning by doing, and it is very much possible that this framework will be reorganized during the second mandate of the von der Leyen Commission. This conference aims at contributing to identify the numerous challenges of this distributed implementation.

Implementation challenges

Joëlle Toledano | Professor Emeritus, associated with the Governance and Regulation Chair

The European Union has introduced an extensive framework of digital legislation, including DMA, DSA, DGA, and DA, IA Act.... These measures aim to uphold Europe's political and economic values in the digital age but developed independently, with limited coordination and debate on enforcement, leading to significant challenges in governance and implementation.

The Draghi Report underscores these issues, noting the existence of around 100 digital laws and over 270 regulators across EU Member States. It emphasises the necessity of addressing the effects of these regulations on the growth of European small and medium-sized enterprises (SMEs). These issues has garnered attention from commentators, scholars, and stakeholders, who point to a growing need for a more tailored regulatory approach that specifically addresses the largest companies, This fragmented regulatory landscape creates inconsistencies, uncertainty, and inefficiencies, particularly impacting SMEs and hindering new market entrants.

Better regulation is not no regulation. A differentiated framework, focusing on the largest companies while simplifying processes for others, could address current shortcomings. The EU must maintain its regulatory ambitions to unlock the growth of European technology companies while fostering innovation, securing digital markets for the future (e.g., AI), addressing cyber risks, protecting children from harmful content, and make it easier to share data.

The political context

Andreas Schwab | Member of the European Parliament

The realm of digital legislation is already formidable in its breadth, and it is likely that additional regulations will emerge in the coming year to add to its depth. A key focus will be on safeguarding against dependency risks, particularly for young individuals, through the Digital Fairness Act. However, a commonality among these laws, with all their beneficial aims, is their tendency to diminish the responsibilities of Member States.

It is not uncommon to hear concerns regarding the perceived erosion of national competences and sovereignty due to decisions made in Brussels, along with a pervasive resistance, sometimes ascribed to bureaucratic challenges. Yet the alternative would be a gradual loss of wealth and resources, if Member States do not collaborate effectively. To maintain and protect the wealth and infrastructure that characterize our regions, it is imperative that we each engage in partnerships with our fellow Europeans, adopting a perspective grounded in rationality rather than emotion.

The full harmonisation approach has been crucial in the realm of digital markets, where the process was facilitated by Articles 101 and 102 of the EU Treaty, which empower the European Commission to take action. Fundamental issues were addressed within existing European legislation, which had been hampered by lengthy assessments, complicating the Commission's ability to enforce current policies.

A recent example of the European Commission's newfound might can be seen in its decision against Meta, which came along with a fine of approximately 800 million euros for data misuse, by virtue of Article 102 of the Treaty. Anticipation is building for the first enforcement case under the Digital Markets Act, expected before Christmas, with cases involving Google and Apple on the horizon.

The Digital Markets Act consolidates existing regulations from Articles 101 and 102 of the EU Treaty, introducing an ex-ante framework, and ensures that a select few large companies will have a clear understanding of what constitutes fair competition within the European market. The implementation of this law marks a significant transformation, as companies will be accountable for their actions from the outset of its enforcement, which commenced in March of this year. Initially, these companies sought to challenge the law in court, but ultimately, the law prevailed, and judicial confirmation mandated compliance.

The implications of the Digital Markets Act's enforcement are still being defined. Various methods of compliance exist, and despite the law being in effect since March, the specific requirements of Articles 5 and 5.2 remain ambiguous. The European Commission faces a considerable challenge in determining whether companies adhere to the law, as the courts will ultimately make these determinations. This situation necessitates and is giving rise to ongoing dialogue with gatekeepers to clarify the law's application.

A preliminary decision has already indicated non-compliance with European competition law principles under the DMA, with confirmation of these findings expected before Christmas. The European Commission will nonetheless need substantial resources to address these issues effectively. It is crucial to contribute to the enforcement and applicability of the law, ensuring that its positive impacts extend beyond European businesses. There is currently no established schedule or framework. The European Commission faces significant challenges due to a lack of resources and manpower, which hamper its ability to operate on par with digital gatekeepers.

While some may draw parallels between digital technology and the automotive industry, the complexities of digital data are less visible and require a deeper understanding of data integration and monetization processes. Concerns arise not from opposition to the success of Silicon Valley players, but from the perceived inequity in how data is utilized and profited from without fair compensation to the data providers. The issue of individuals willingly sharing their data with companies for free raises important questions about personal data monetization that have not been adequately addressed in Europe.

This matter transcends mere technicalities and is fundamentally political. We are confident that the Digital Markets Act will fulfil our expectations, promoting fairness in markets, in the recognition that outcomes can vary, with some entities succeeding where others may not. The approach must be grounded in universally accepted principles rather than being limited to a select few companies in specific regions.

A case study

Rishabh Kaushal | Postdoctoral Researcher, Institute of Data Science, Department of Advanced Computer Science, Maastricht University, Netherlands

We regard the Digital Services Act as a landmark piece of legislation aimed at bringing to life the vision of automated transparency. It is intended to create a safer digital space where the fundamental rights of users are protected, and to establish a level playing field for businesses. Achieving transparency is already inherently complex due to the wide variety of stakeholders involved, and the goal of automating this process is notably ambitious.

Our analysis focused on Articles 17 and 24, Clause 5, which require major online social media platforms to report their content moderation decisions. In particular, platforms must document and submit reasons for content removal, not only to the affected user, but also to the DSA Transparency Database maintained by the European Commission. Each statement of reason must include, among other details: the content type (e.g. video), problem category (e.g., pornography or sexualized content), visibility restriction decided, the facts and circumstances relied on in taking the decision, detection/identification content, and grounds for decision.

Our analysis focused on a one-week expanse of time comprising 131 million hours of data, exactly one year ago. Therefore, our findings are based on data of one week and while findings would vary if data is collected in different time period but the nature of analysis would remain similar. The objective was to assess the extent to which the Transparency Database – which has grown from 533 million to 9 billion records over the past year – aligns with the stipulations of Article 17 and to identify compliance issues related to content moderation practices employed by the platforms.

Our findings indicate that the European Commission, as the regulatory body, has largely addressed the provisions of the Act; however, we noted the absence of the redressal mechanism called for in Article 17(3F), which mandates that users should have access to options for redressal. This aspect was notably missing in the submitted Statements of Reasons (SORs).

A second critical question we explored was the authenticity of the submissions made by the platforms regarding their moderation practices, reviewing which parties were reporting, the means by which they filed, the reasons for content moderation and the time at which SoRs were submitted.

- *Who?* Google Shopping is the most active in submitting reports, while other very active platforms exhibit significantly lower levels of submission, raising concerns about their compliance and transparency in reporting.
- *How?* Platforms such as X which predominantly rely on manual curation for content decisions, eschewing automated processes. This raises questions about the effectiveness and efficiency of their moderation strategies.
- *Why?* Most platforms cite violations of their Terms of Service (TOS) as the primary reason for moderation actions, suggesting a potential over-reliance on these criteria for content management. Platforms are also hesitant to classify content as illegal due to potential repercussions that may arise.
- *What?* Each Member State possesses distinct national laws, which may lead to misunderstandings or conflicts regarding content moderation. The introduction of the DSA Transparency Database has prompted platforms to expedite their content moderation processes, as they are obligated to provide reasons for their actions without undue delays.
- *When?* The term «undue delay» continues to lack a precise definition; however, a noticeable decrease in the duration of delays has been observed, from hundreds of days to 50-60 days.

There are concerns regarding the accuracy of information submitted by platforms, with suspicions of underreporting; while the DSA Act mandates clarity, many Statements of Reasons remain vague and lack detailed explanations.

Platforms are mandated to submit transparency reports on a quarterly basis, detailing aggregate figures on their content moderation across various categories. These figures can be cross-referenced with submissions from the same period to assess the consistency of the data.

The challenge of balancing privacy and transparency arises, as it is essential to protect personal data while ensuring that submissions are made in a clear and specific manner. This creates a trade-off between maintaining privacy and enhancing transparency. Researchers are particularly interested in Article 40 of the DSA Act, which is expected to provide access to data for researchers engaged in debates. There is great optimism that this could significantly alter the current landscape, pending its implementation.

In the field of computer science, there is a focus on quantitative metrics to evaluate success, particularly in the context of machine learning models. It is important to establish clear metrics for success regarding EU regulations, including their implementation and effectiveness, to track progress over time. All of these questions must be addressed in the context of a Commission that is often understaffed, a broader issue within the regulatory framework.

The regulatory architecture in France

Thomas Courbe | Directeur général, Direction générale des entreprises, Ministère de l'économie, des finances et de l'industrie

I will discuss two primary issues concerning the implementation of the EU regulations: the regulatory framework we are establishing in France; and the specific challenges we encounter at the EU level regarding the implementation of the AI Act.

The involvement of multiple regulatory bodies can hamper the pace of implementation, however, we are on track with our national legislative agenda for implementing these regulations.

- In May, we enacted a law that "secures and regulates the digital space", defining the national authorities responsible for implementing European regulations such as the Digital Services Act (DSA), Digital Governance Act, and Digital Market Act (DMA).
- We have identified the coordinating national authorities, and in certain instances, additional authorities to assist the primary designated bodies.
- By spring 2025, we will appoint the authority responsible for the implementation of the Data Act.

Specific challenges are nonetheless arising at the EU level regarding the implementation of the AI Act, and looking ahead, we face more formidable obstacles, as the newly established regulatory landscape raises three critical questions.

- With the presence of numerous digital authorities operating in closely related domains, how can we ensure coherence among their actions?
- How can we prevent these authorities from functioning in isolation, which could lead to potential conflicts in their areas of jurisdiction?
- Lastly, how can we cultivate a shared strategic direction in the execution of these regulations?

To address these concerns, the law enacted in May 2024 introduced a national coordination network for the regulation of digital services. Prior to this legislation, national authorities had engaged in dialogue, typically on a bilateral basis. The new framework aims to enhance inter-regulatory cooperation, a recommendation that originated from the French Supreme Court in 2022, thereby establishing a more robust collaborative network to navigate the complexities of these regulations.

The network will integrate independent administrative authorities alongside government bodies responsible for formulating and negotiating regulations, distinguishing it from existing Dutch and British networks. This collaborative framework will encompass various digital authorities, including the Directorate General responsible for Enterprise, Competition, and Cybersecurity, fostering a comprehensive approach to enforcement and policymaking.

The network aims to ensure a coordinated perspective on strategic objectives while maintaining the independence of all involved authorities, effectively managing their roles within this structure. It will address cross-cutting issues such as information economy, advertising models, security concerns, encryption preservation, interoperability, and the digital regulators toolbox, among others.

The initiation of this network's activities is scheduled for January, coinciding with ongoing discussions regarding the implementation of the AI Act and its implications for innovation and regulatory balance in Europe.

A primary focus today is the implementation of the AI Act at the EU level, which will call for clarity, transparency, and predictability so that companies can adapt effectively within a reasonable

timeframe. The AI Act officially came into effect on August 1st, but the obligations outlined within it will be phased in over the next three years, the initial step being the publication of a list of prohibited uses scheduled for February 2nd.

To ensure predictability and facilitate understanding of obligations among economic actors, it is essential to establish a set of guidelines and a delegated act from the Commission that will define AI systems and clarify the relationship between the AI Act and sector-specific regulations, such as those for medical devices. The adoption of harmonized standards will further help in the implementation process, providing clarity for companies regarding their responsibilities under the AI Act and assisting regulatory authorities in their enforcement efforts.

The European Commission, through the AI board, is actively overseeing this implementation process, with key documents, including a code of practice and a detailed summary addressing copyright issues, expected to be drafted, consulted, and published by next April for the benefit of all economic actors.

Europe must prioritize efforts to assist companies in innovating throughout the entire AI value chain. The establishment of a European industrial policy focused on AI chips is a key initiative underway. Collaborative efforts at both European and national levels are being directed towards leveraging high-performance computing resources to support European startups in model training. There is a pressing need to enhance the adoption of AI models and services across all businesses, particularly smaller enterprises, as Europe currently trails behind other regions in this regard. It is essential to advance both innovation and regulation simultaneously, striving for a balanced approach to these two critical pillars.

For each challenge, a prospective solution

Jens Prüfer | Director, Tilburg Law and Economics Center; Professor in Economics, School of Economics, University of East Anglia

Given Europe's challenges in fostering high-tech companies, particularly in the field of artificial intelligence, effective regulation is a must. This is not only a challenge but a scarce opportunity: Europe is a leader in setting standards at which the global community looks, influencing the future trajectory of technological advancements, including AI.

My involvement in research over the past 15 years has contributed to the foundational theories that inform the current Digital Markets Act, particularly regarding the unique characteristics of data-driven markets, which tend to "tip" and get monopolized. The monopolistic nature of these markets presents a significant issue, as the incentives for innovation diminish once a market has tipped, negatively impacting innovation and, hence, consumers.

As we move towards implementing solutions today, one critical step for data-driven markets is to mandate data sharing, a recommendation I made back in 2012. I am pleased to see the progress with the Digital Markets Act, and encourage those interested to explore the accompanying research. Three years ago, we proposed a framework for the implementation of mandatory data sharing within both practical and legal contexts.

Recently, I had the opportunity to engage in a productive discussion with representatives from DuckDuckGo, a small search engine. They highlighted that Google, as a gatekeeper under the Digital Markets Act (DMA), is required to share data with its competitors, according to Article 6(11). Google has put forth a proposal for data sharing, emphasizing the need to protect user anonymity and privacy, which has resulted in them sharing only 1% of user data, according to DuckDuckGo.

Meanwhile, DuckDuckGo asserts that they have developed an alternative methodology that would allow for the sharing of 95% of relevant data while only excluding 5%, thereby enhancing competition in the search engine market. While it remains unclear which approach is more effective, it is imperative that both the Commission and researchers examine these differing proposals to gain an objective understanding of what is necessary and feasible.

In outlining the challenges associated with enforcing digital laws, I would like to identify seven key issues that I believe warrant attention, as they will be relevant to our forthcoming initiatives.

- The first challenge is the speed and dynamic pace of technological advancement, which poses a significant obstacle to the implementation of digital regulations. Given the nature of high-tech markets, it is evident that no regulatory framework can keep pace with the speed of technological development, presenting a considerable implementation dilemma that must be addressed.

- The second challenge presents significant difficulties due to the pervasive information asymmetries within the digital landscape. These disparities are evident between large and small data providers, where larger entities possess a more comprehensive understanding of user behaviour compared to their smaller counterparts. This imbalance not only complicates the relationship between providers and users but also hinders the effectiveness of regulations. The implications of these asymmetries raise critical questions about the nature of information flows and its impact on regulatory practices.

- The third challenge pertains to the approach to digital regulation by public ordering within the European Union, which has introduced new legislative measures. Yet enacting new laws is not the sole or most effective means of influencing behaviour. Alternatives such as economic governance and private ordering warrant thorough examination to determine the most suitable solutions for various scenarios. This includes evaluating the effectiveness of

different enforcement mechanisms in promoting compliance among individuals.

- The fourth challenge stems from the need for a more nuanced regulatory framework, as current regulations tend to be horizontal, applying uniformly across digital markets. A deeper analysis through case studies is necessary to identify the unique characteristics of different digital markets, enabling policymakers to tailor their approaches accordingly.

- Users left behind. The fifth challenge lies in the potential disconnect between an internationally educated elite driving tech regulation and the broader user base, emphasizing the importance of inclusive communication strategies to ensure that all stakeholders feel represented and engaged.

- The sixth challenge arises from the inherently global nature of digital ecosystems, necessitating international monitoring and sometimes cooperation across a variety of political frameworks. A thorough understanding of China and Russia, in particular, is essential for the implementation effectiveness of Europe's regulation initiatives.

- The seventh challenge is that of successfully adopting a long-term perspective. It is crucial to consider not only the current state of technology but also to anticipate its evolution over the next ten to twenty years. Researchers must prepare for potential future challenges, particularly in the realm of artificial intelligence, as these developments will be significant.

In light of these challenges, we are launching a Horizon Europe project, commencing in January 2025 and spanning over three years, aimed at "Using AI to support regulators and policy makers (AI4POL)". This initiative, led by the Tilburg Law and Economics Centre in collaboration with six other partner organizations, seeks to enhance regulatory frameworks by providing technological support to the European Commission and other enforcement bodies at the members state level.

Each of the identified work packages can be associated with one or several of the seven challenges previously outlined.

- The first work package focuses on the future-proofing of governance of and by artificial intelligence. This primarily legal work package addresses enforcement challenges, particularly those concerning the rapid pace of technological advancement and the information asymmetries that arise. Our objective is to analyse existing regulations and explore ways to enhance them, especially in terms of how AI technologies can assist regulators and policymakers in keeping pace with technology firms. It addresses enforcement challenges 1 and 2.

- A second work package is dedicated to ensuring trustworthy AI within the financial services sector. This industry is undergoing substantial transformation due to the integration of AI technologies, including innovations such as robot-advisors and algorithmic trading. As a result, there is an urgent need for new theoretical frameworks that encompass law, economics, and finance. This work package aims to develop appropriate tools and strategies that financial regulators can employ to mitigate the risk of a financial crisis stemming from these technological advancements. It addresses enforcement challenge 4.

- The third work package is largely executed in Munich and attempts to improve AI Enhanced Understanding and Sensitive Feedback for the Informed Regulation of Digital Services. This work package involves the development of a Large Language Model aimed at assisting users in comprehending the often opaque terms and conditions presented in pop-up windows on websites. Users frequently find themselves clicking «accept» without fully understanding the implications of their consent. The large language model will provide concise and straightforward summaries of these terms to enhance user comprehension. Additionally, a browser plugin will be created to track user interactions with the language model, allowing regulators to gather valuable insights into user behaviour and identify prevalent issues, ultimately leading to a more informed user base and improved regulatory oversight. Thereby, this work package addresses enforcement challenge 5.

- Lastly, one work package studies the development of artificial intelligence within autocratic regimes, particularly focusing on the institutional and organizational frameworks that shape AI development in China and Russia. China has emerged as a leader in certain aspects of AI technology. This research will culminate in the creation of an AI Threat Index, which aims to quantify the risks associated with AI advancements in these nations, characterized by distinct political systems, values and institutions, and varying levels of regulatory oversight.

While the project addresses several challenges, it does not encompass the issue of public and private ordering, which is explored in a recent paper by me, titled «Economic Governance and Institutional Design.» It proposes a methodology to identify effective and efficient institutions for various implementation challenges, including those related to digital governance.

Discussion

Joelle Toledano

Do you believe that the new European Parliament will engage in discussions about the challenges of implementation, or is it solely the responsibility of the Commission to demonstrate how these processes function, including matters of justice?

Andreas Schwab

The extent to which lawmakers can participate in implementation appears to hinge on the clarity of the application process. Given the ongoing cases, it seems challenging for us to exert influence. Furthermore, there is risk associated with making imprudent remarks about the Commission's actions. We have established a working group focused on the enforcement of the DMA and the DSA, yet navigating this terrain between sovereign players and the need for regulation is precarious.

Alexandre de Streel

How can the Parliament and Commission balance the necessity for independence with the ambition to adopt a more geopolitical stance, particularly in light of the tensions with the United States and the arrival of the new Trump Administration?

Andreas Schwab

At this juncture, it is premature to speculate on any shifts within the European Commission's advisory role. The legal framework remains definitive, allowing for some interpretation but not substantial alteration.

National competition authorities also provide guidance and oversight, and while we may observe a shift in approaches from countries such as China, Russia, and the United States, the core principles of our European regulations, which are founded on our values, are unlikely to change drastically with different Commissions.

It is fundamentally a matter of resources, common sense, and adherence to the law. Therefore, while we should remain motivated and engaged, there is no cause for undue concern.

Thomas Courbe

I concur that the law will continue to apply, although international coordination, particularly in areas like artificial intelligence, may present more challenges. The ongoing process among the 27 nations has made commendable strides towards fostering a more unified international perspective.

From the floor

I was part of the France Tourisme Tech initiative, which aims to unite emerging unicorns in the tourism sector and foster collaboration between the R&D teams of established companies and start-ups. I appreciate the manner in which this initiative promotes business growth, especially in light of the current regulatory environment that often prioritizes compliance over encouragement. It is concerning that while the United States is moving towards deregulation to stimulate

innovation, we seem to be expending considerable energy on regulatory frameworks that may hinder entrepreneurial efforts.

Andreas Schwab

The regulation we are discussing focuses on a mere 5% of the market, where the issues are most pronounced. The intention is to maintain opportunities for the remaining companies to participate in the market. Consequently, the regulations apply only to a limited number of large corporations, allowing the majority to thrive independently, innovate, and leverage user data more effectively, thereby enhancing their competitive stance.

It is crucial that we shift our focus towards fostering an environment that encourages entrepreneurship and job creation, rather than predominantly concentrating on regulatory measures.

Thomas Courbe

In essence, your desires align with the objectives of the regulations. The Digital Services Act and the Digital Markets Act represent some of the most pro-business initiatives introduced in Europe in recent years. These regulations are crucial for fostering market opportunities for European enterprises.

I attempted to highlight the need for a balanced approach in my previous remarks, particularly concerning the development of businesses and the role of European entities in the context of AI regulations. It is essential to recognise the strong societal demand for such regulations in Europe, which has been more pronounced than in other regions of the world. Stakeholders have expressed significant concerns regarding the potential negative impacts of AI, necessitating a thoughtful regulatory response.

Trust will be a pivotal factor in the adoption of artificial intelligence by businesses. This necessitates the development of reliable solutions: the introduction of regulatory frameworks that ensure these technologies can be utilized confidently, particularly concerning their legal implications for customer interactions. The forthcoming AI Act is anticipated to address these concerns, providing clarity and assurance regarding the trustworthiness of AI applications, while ensuring that Europe's potential for innovation is not inhibited.

Jens Prüfer

The Digital Markets Act safeguards the market from monopolistic practices, which is of paramount importance. Many reputable academics advocate regulatory measures to prevent market monopolization, which can have detrimental effects on consumers and society at large. The establishment of regulatory guardrails is essential to enable smaller firms to compete effectively against larger corporations. While implementing regulations is a significant step, it is clear that a comprehensive approach is necessary to foster a competitive and equitable market environment.

I would add that the under the Biden administration, the United States have also realized the threat from super-dominant big tech firms. The Department of Justice and the Federal Trade Commission have been very active here. However, neither in the United States nor elsewhere is there a regulatory framework in pace which aims to protect users and active competition on markets as much as in the EU. The potential implications of a Trump administration remain uncertain, with many anticipating adverse outcomes.

Eric Brousseau

The prevailing belief that regulation can hinder innovation is not entirely accurate. For instance, where markets are dominated by monopolies, asymmetric regulation is essential to create a conducive environment for new entrants. Furthermore, for investors engaged in long-term research and development, stability is crucial, and regulation plays a vital role in providing that stability.

Thus, the core issue is not merely whether to deregulate or regulate, but rather how to achieve effective regulation that is appropriate for the context. Additionally, once regulations are enacted by parliament, the focus shifts to their effective implementation.

In Europe, a further significant challenge lies in the funding of innovation, as the absence of robust capital markets limits access to venture capital. This situation is of course the outcome of the European social model. Our social safety net and pension system are centralized and managed under the shadow of governments, which constrain the level and governance of savings necessary for funding entrepreneurship and innovation.

From the floor

We have looked at the current regulatory landscape shaped by the five acts, emphasizing the strong inclination towards automated compliance. However, it may be prudent to focus on leveraging artificial intelligence to analyse compliance-generated data, as the erratic application of AI without this foundational step could lead to suboptimal outcomes.

Jens Prüfer

At this broad level of discussion, it is evident that while contemporary AI systems excel at addressing specific queries, their effectiveness is significantly enhanced when combined with human expertise. Numerous studies, spanning fields from medicine to judicial predictions, demonstrate that the integration of AI for fact interpretation, followed by human expert evaluation, tends to yield the highest quality results.

Implementation in practice

Chiara Caccinelli | Deputy Head of the Economic Analysis and Digital Affairs Unit, Arcep & Co-Chair of the Digital Markets Experts Working Group, BEREC

We now have a rich array of European digital regulations, including the Digital Markets Act (DMA), the Digital Services Act (DSA), the Data Act, the Digital Governance Act (DGA), the AI Act and we could also mention the forthcoming Digital Fairness Act (GFA). The introduction of new challenges invariably leads to the establishment of new regulations. In our earlier panel, we touched upon the issue of regulatory fragmentation, and in this session, we aim to explore the practical implementation of some of these legislations.

We can observe that some of these new regulations are already beginning to influence the behaviour of digital players and of the broader digital ecosystem, but some challenges remain.

First of all, implementing new regulations can pose significant hurdles, as it involves new rules, the regulation of previously unregulated actors and the set-up of new interactions between regulators and regulates. The European Commission has assumed a regulatory role that it did not previously hold, which necessitates a process of learning through experience. Secondly, it is crucial to establish a coherent interplay among the various regulations, both among the new ones—such as the DMA and DSA—and between the new and the existing regulations, like the European Electronic Communications Code, which for instance already addresses issues such as the interoperability of messaging services. Thirdly, a new governance must be put in place and it is key to ensure an efficient and effective cooperation among the different entities which are involved in the implementation of the regulations, such as the European Commission, the national competent authorities and their respective European networks.

The scope of the DMA and compliance with its provisions

Antoine Babinet | Deputy Head of Unit in Digital Platform directorate of DG Competition, European Commission

Scope and principles

When it comes to the scope of the DMA, three fundamental principles were incorporated into the legislation.

The DMA is a targeted regulatory tool, specifically designed to address services provided by the largest digital platforms rather than the entire digital landscape. This inclusive approach imposes specific obligations on regulated services, focusing on the core issues of lack of contestability and promoting fair competition for smaller businesses. Concretely, the DMA aims to mitigate unfair practices by large digital entities that leverage their economic power to hinder smaller competitors from achieving fair remuneration.

Currently, seven very large companies, including the GAFAM, TikTok and Booking, have been designated under the DMA, although the regulation does not apply to all their business activities. The regulation applies solely to those services that meet specific quantitative thresholds for designation, indicating that the DMA is a precisely targeted tool activated only under compelling circumstances. This approach is logical, as the rules will be enforced with minimal exceptions, significantly influencing business models and ensuring that only the appropriate entities are

subject to these regulations.

However, the DMA is part of a larger regulatory framework that includes antitrust measures, which will continue to play a complementary and important role in addressing various concerns within the digital landscape.

The second aspect concerning scope relates to the efficiency of the designation process. Legislators have established presumptions to ensure that the designation system is effective, preventing the need to revisit established issues. This approach eliminated the necessity to reassess whether platforms like Google Search or the Apple App Store serve as gatekeepers. In the absence of such presumptions, we might have been compelled to engage in more complex dominance type of analyses. The current framework has facilitated a timely transition from identifying gatekeepers to focusing on compliance and developing practical solutions.

The DMA's mechanism for designating gatekeepers has demonstrated considerable flexibility, enabling the exclusion of certain services that, despite meeting quantitative criteria, did not meet the requirements to be designated as gatekeepers. As a result, several services, including the Samsung operating system, Gmail, and Bing, have been determined not to require designation under the DMA.

Some submissions indicated that, despite fulfilling the criteria, they should not be classified as designated entities. TikTok serves as a pertinent example; however, our assessment led us to a different conclusion. This matter has escalated to the EU courts in Luxembourg, where our stance was upheld, providing reassurance as this framework is relatively new and signalling challenges in defining the DMA's scope.

Additionally, we possess mechanisms to identify false negatives—services that may not initially meet the presumption but, upon further evaluation, are found to significantly impact a large user base and hinder business access to customers. The qualitative procedure has proven effective in bridging enforcement gaps, as demonstrated with iPad OS. It may be employed in the future to expand the DMA's scope in a targeted manner, adapting to emerging services and practices as necessary.

Compliance with the DMA's practices

The Digital Markets Act (DMA) has already provided substantial advantages in a remarkably short timeframe, highlighting the effectiveness of this regulatory tool. In contrast to antitrust proceedings, which often require years of investigation before solutions can be discussed, the DMA mandates compliance within six months of designating the 24 relevant services. The past six months have been marked by intense efforts to ensure that gatekeepers adhere to their obligations, aiming for significant benefits by the compliance deadline of March 7th.

Notable changes have emerged, such as Apple's decision to open its iOS platform to competition, allowing for alternative app stores, which represents a significant shift from its historically closed ecosystem. Additionally, Google devices now feature choice screens for web browsers and search engines, empowering users to select alternatives rather than being limited to Google's offerings, thereby promoting a more competitive environment.

However mere compliance is insufficient if it is not fully effective. Compliance often exists only on paper which is not acceptable. Following the compliance deadline of March 7th, we initiated five new investigations into major companies, reflecting our proactive approach to enforcement. The outcomes of these investigations should serve to establish deterrence which we hope will increase the incentive on gatekeepers to comply without the need for formal proceedings, thus establishing a robust regulatory framework.

While some regulatory dialogues have proven beneficial, certain areas of concern continue to require attention. We may thus need to open more non-compliance proceedings in the future. It is

important to consider the option of initiating specification proceedings without directly indicating to gatekeepers that their current practices are non-compliant. Instead, we can express our belief that their approach to compliance may not be the most effective and that we intend to provide clearer guidance on the expected standards. Our objective will be to offer detailed instructions on what compliance should entail, which can have a significant impact on future practices.

Continuous feedback from the market is essential for ensuring that our initiatives are effective and aligned with actual needs. It is crucial for stakeholders to communicate their experiences regarding the rights granted under the Digital Markets Act (DMA) and to assess whether these rights are being effectively implemented.

Early March, there will be the release of updated compliance reports from gatekeepers, which will provide insights into progress and areas for improvement.

The Digital Markets Act (DMA) also has an impact beyond the compliance with its rules. Regulated companies are now aware of the scrutiny they face from regulatory bodies. The presence of a regulatory team has prompted companies to address issues proactively, often resolving minor concerns to avoid further complications with regulators. We also see that gatekeepers now comply by design, i.e., they make sure that new services they roll out are compliant which prevents harmful effects from even occurring. However, we are at the beginning of a journey and there remains considerable work before achieving full compliance with the DMA.

The private sector's experience with the DMA's implementation

Guillaume Duquesne | Senior Vice President Compass Lexecon

The DMA has been structured to emphasize clarity, efficiency, and administrative ease, suggesting that economic considerations should significantly influence the formulation of its regulations. In practice, the implementation of the DMA raises questions about whether a simplistic, checklist approach suffices or if a more comprehensive engagement is necessary, particularly regarding the designation process and compliance.

The process of identifying and categorizing services provided by platforms is fundamentally straightforward, as it involves recognizing a service, such as a search engine like Google, and determining its core platform service. However, the reality of the designation process is significantly more complex, particularly when considering the economic implications involved.

The Digital Markets Act (DMA) imposes stringent obligations on designated gatekeepers, making the designation process strategically critical for these entities, for three main reasons.

- The determination of whether a service meets the necessary thresholds can be influenced by how the services are defined.
- Gatekeepers must consider their obligations to third parties, including access provisions, as well as internal obligations within their ecosystems, particularly regarding data management and integration.
- Nearly all gatekeepers have contended that their advertising services are an integral component of their social network or intermediary services.

This situation may be associated with various factors, particularly the potential for data integration, leading to a strategic dynamic among gatekeepers aimed at maximizing benefits from the Digital Markets Act (DMA).

Similar discussions arise in the context of merger control, where parties involved carefully consider market definitions to either demonstrate a lack of competition or to highlight their competitive landscape. In the context of designation, there exists a tendency to either narrowly define services to avoid meeting certain thresholds or to adopt a broader definition to ensure compliance and maintain a data-sharing ecosystem.

Throughout these discussions, gatekeepers have presented economic arguments, though their significance appears limited, with three primary areas of economic consideration identified:

service definition or delineation

Here, the situation contrasts with the more established framework for market definition, where there is considerable experience in delineating markets. The DMA, however, does not accommodate discussions of this nature. Instead, it explicitly states its intention to avoid such discussions, opting instead to define services based on their purpose, a concept that lacks a clear economic basis, making practical application somewhat challenging. An examination of various decisions reveals inconsistencies in the application of these concepts, leading to outcomes that may appear somewhat arbitrary in terms of service definition due to the absence of a rigid framework.

the rebuttal or quantitative presumption under Article 3.5

The expectation for a more economic perspective is particularly evident in the context of challenging the quantitative presumption, rather than in the initial determination of whether the threshold is met. The primary concern is not whether the threshold is satisfied, but rather the implications of meeting that threshold in relation to the DMA, particularly regarding contestability and fairness, which are central to the regulation. The Commission's focus has been narrower, concentrating on the quantitative data rather than the broader relationship between services and the core principles of contestability and fairness.

The Commission's analysis appears limited, focusing primarily on the quantitative metrics rather than the essential connections between services, contestability, and fairness central to the Digital Markets Act (DMA). Two principal considerations have been acknowledged by the Commission: the size of the service in comparison to other complex services under the DMA, and the degree to which the service is insulated from competition by its ecosystem.

the designation based on qualitative criteria is outlined in Article 3.8.

Recent discussions regarding TikTok highlight that the court has, to some degree, validated the Commission's perspective on these matters. While my interpretation may not be legally informed, it seems that the court has not entirely aligned with the Commission, emphasizing the necessity of considering all evidence, both quantitative and qualitative, presented by the gatekeeper.

The court concurs with the Commission on the importance of a high standard of proof, indicating that a mere assertion of non-lock-in is insufficient; substantial quantitative data must underpin the economic rationale to effectively challenge the presumption.

It is important to address the compliance process and the compliance report, particularly regarding the economic implications of the measures that gatekeepers are required to implement. The effectiveness of these measures in promoting contestability and fairness is a critical concern. The current report appears to focus primarily on a list of technical compliance measures related to the DMA, lacking a thorough analysis of their potential impact on contestability and fairness in the market.

Understanding the effectiveness of these measures in achieving the DMA's objectives may be challenging from an external perspective. While there have been positive developments, such as Apple's efforts to open its ecosystem, questions remain about whether these actions are sufficient. Feedback from various stakeholders suggests that, despite initial positive impressions, the measures may not adequately address the intended goals of the DMA.

In conclusion, while significant progress has been made in implementing this regulation, it is essential to foster ongoing regulatory dialogue to ensure that stakeholders remain engaged with the Commission and advocate for solutions that prioritize customer interests in balance with their own.

Regulatory complexity and framework

Gabriele Carovano | Case handler - Italian Competition Authority - Digital platforms and communications Unit - Consumer Protection Directorate

The Digital Markets Act (DMA) and the Digital Services Act (DSA) recently came into effect. Since their arrival, the enforcement activities displayed the Commission are remarkable. One just need to look at the amount of designation, non-compliance, and/or specification proceedings that have been carried out. Importantly, it is imperative to acknowledge that ensuring effective enforcement against the challenges presented by digital gatekeepers can only be done seriously at EU level. However, despite such recognition and the significant progress made under the DMA and DSA, due to the variety of ways in which gatekeepers' issues may materialise at national level and the complexity of the multiple legal frameworks and related legal interests that coexists within the EU, it is equally important to recognise the significant role that national authority can play in helping the Commission ensuring that enforcement actions remain effective, sufficiently diversified so as not to leave anyone behind, and up-to-date. Understood that, the issues is then how can we effectively define and implement this collaborative work?

Encouragingly, the text of the law appears to allow a sufficient degree of implementation discretion which might help addressing the inherent legal conflicts that might arise across legal frameworks, the resolution of which require careful balancing. Indeed, while each regulatory act and related enforcement authority is intended to safeguard specific legal interests (such as privacy in the case of the GDPR, fairness and contestability in the case of the DMA, competitiveness in the context of competition law, and the promotion of a trustworthy environment aligned with European values in the case of the DSA), these interests may conflict with one another. Effective enforcement therefore cannot occur in isolation and co-operation among enforcers is crucial to navigate the trade-offs existing between competing legal interests, potentially enhancing deterrence when these interests do not conflict. For instance, one could achieve better "fairness and contestability", as envisioned by the DMA, not solely relying on the execution of its provisions but also through the effective enforcement of consumer protection provisions to empower consumers to make better informed and more meaningful choices. In other words, consumer protection and DMA enforcement are not necessarily conflicting but can be mutually reinforcing. In the absence of ineliminable conflicts, there is no reason why the various regulations and regulators should not converge and co-operate toward a common objective, thus increasing overall deterrence. However, complexities arise when conflicts do exist. For instance, pursuing "fairness and contestability" under the DMA might unintentionally lead to concerning privacy reductions. These scenarios are those where international/cross-regulatory co-operation is needed the most to ensure careful balancing of all the legal interests involved, identifying solutions that maximize outcomes, and establishing priorities among the available solutions.

The practical implementation of this approach presents challenges due to the fact that while recent EU legislative acts commonly envision a centralised enforcement authority vested in the Commission, alongside varying enforcement responsibilities assigned to national competent authorities, the latter may considerably differ from one county to another due to different national distribution of powers and the historically stratified diversified national organisational enforcement-infrastructures (e.g., think at how competition and consumer protection competencies are distributed differently between countries like Italy and France). Consequently, there is need to create a two-layer co-operation framework (one that operates horizontally at the EU level and another that functions horizontally at the National level), where the two-layer talks one another (vertical co-operation between the EU and the National levels). Importantly, due to the trade-offs that exist across multiple legal interests and given the diversification of powers distribution existing at national level, this two-layer co-operation framework needs also to be cross-regulatory differently from existing one.

To conclude, to effectively adapt to the evolving digital landscape, it is crucial to update existing co-operation frameworks, as current networks are based on outdated enforcement systems that no longer reflect market reality.

"Comparing the incomparable": a contrasting look at the UK and the EU

Oles Andriychuk | University of Exeter School of Law, Digital Markets Research Hub YouTube weekly discussions

It is commonly yet erroneously assumed that all supporters of the Digital Markets Act (DMA) share a unified perspective. Yet in reality, there is a multitude of differing viewpoints among these supporters.

Consequently, I propose the necessity of forming a «Dream Team» dedicated to the DMA—not merely a team focused on its implementation, but one that embodies the ideal vision for its application. While there exists a foundational set of axiomatic obligations outlined in Section 5.7 of the DMA, the complexities surrounding strategic prioritization and preference allocation are numerous, and the ability to interpret non-axiomatic obligations can be a powerful asset.

In this context, the role of competition enforcers is evolving. Traditionally viewed as guardians of the market, their focus has been on identifying and deterring various infringements to protect the market from harmful behaviours, whether unilateral, bilateral, or multilateral. However, the responsibilities of DMA enforcers extend beyond mere restoration. While adherence to the letter of obligations remains significant, the broader goal of benefiting business users and potentially end users serves as a vital mechanism through which we aim to foster competition within digital markets across European jurisdictions.

In discussing the various factions among supporters of the Digital Markets Act (DMA), I initially categorized them into four distinct groups: critics, market idealists, opportunists, and those questioning the necessity of the DMA.

- The market idealists believe that the DMA will fundamentally transform digital markets, ensuring justice and accountability for past misconduct.
- Some supporters adopt an opportunistic stance, highlighting systemic issues and non-compliance that align with their business interests. Their contributions are significant in advocating for the DMA and enhancing its effectiveness.
- Conversely, there are supporters who prefer to examine the overarching purpose of the DMA, questioning its ultimate objectives and the benefits it aims to deliver to Europe. This group expresses concern that the ambitious goals of the DMA may be overly idealistic and unattainable.

The challenge lies in the reality that successful digital market ventures are often linked to scale, raising the critical question of how Europe can achieve such scale. During a discussion with a participant at this roundtable, I was met with incredulity regarding the feasibility of this seemingly unattainable goal.

It may be that a robust European tech sector can only be the result of intentional crafting, if such a design is possible.

Useful comparisons can be drawn between the European Union and the United Kingdom. The latter, despite possessing one of the most formidable competition agencies globally, the Competition and Markets Authority (CMA), strategically opted to separate the designation process from the obligations process. This approach presents a duality of outcomes: on the one hand, while the Digital Markets Act (DMA) is fully operational, the Digital Markets Competition and Consumer Act (DMCCA) is still in the process of drafting guidance on several critical issues.

Conversely, if the situation progresses favourably, we may find ourselves in a scenario where discussions surrounding designations—who has been designated, the rationale behind it, and who should be designated—are entirely at the discretion of the CMA. The criteria for designation are notably flexible and easily achievable.

Once designated, the entities referred to as gatekeepers, or «undertakings with strategic market status» under the DMCCA, will receive a customized set of obligations tailored specifically to their circumstances. This approach aligns with a more innovative role for enforcers, who aim to craft obligations based on their insights and experiences rather than merely selecting from a predetermined list established by legislators. The CMA possesses extensive pioneering experience in comprehending the dynamics of digital markets and the sustainable constraints on competition within them. Consequently, the obligations will be designed with specific objectives in mind.

These obligations are thus purpose-driven. While such discretion is formally absent in the DMA, it is essential to acknowledge the necessity for Europe to maintain its competitiveness at the very top of the global digital landscape, particularly for our prominent European tech companies. Therefore, it is insufficient to merely advocate for increased competition or harder work; we require substantial support, including access to capital markets, as previously noted, along with other essential resources that may extend beyond the scope of this discussion.

The overarching aim of this comparative analysis is to highlight that the discretion and flexibility of the enforcing authority should not be viewed as a retrospective approach or as a mere police agency attempting to address every instance of infringement. Instead, it should be seen as a collaborative creator, akin to a demiurge, striving to apply these obligations in an innovative manner, guided by a broader objective, no matter how idealistic it may seem.

Discussion

From the floor

How can European regulators of the Digital Services Act (DSA) ensure the removal, monitoring, or tracking of illegal content on networks, especially considering the prevalence of encrypted applications like WhatsApp and the existence of the dark web?

Gabriele Carovano

Similar to the Digital Markets Act (DMA), the DSA applies in full only to designated firms such as very large online platforms or very large search engines.

Joelle Toledano

As a former regulator on telecom markets, I have observed the developments surrounding the Digital Markets Act (DMA),and find a crucial term to be lacking competitors.

One of the primary objectives of the DMA is to promote fairness and contestability, thus facilitating market entry for new operators. While we have discussed the categorization of stakeholders, I see no mechanisms in place that would enable European tech companies to engage in meaningful dialogue. The telecom regulations were built revolved around entities such as Orange/France Telecom, as well as ARCEP. However, it was the emergence of Free and Neuf—now known as SFR—that was pivotal in opening the telecom market. Without these players, the current competitive landscape would not exist.

Can the DMA's design foster the emergence of new entities akin to Free or SFR? If not, we risk merely reinforcing monopolistic structures.

Antoine Babinet

The potential for competition can also arise in markets adjacent to the core areas dominated by major gatekeepers. A recent collaboration between Quant and Ecosia exemplifies efforts to challenge established players like Google in the search engine domain, indicating the growing interest in this sector.

Alternative app stores are emerging, with at least five or six notable examples, including several European entities, now operational on iOS. They are not yet capturing significant market share, being only in the initial phase of their competition. There are also significant friction points that need to be resolved to achieve fully the DMA's objectives.

Regarding their involvement in discussions about implementation, they are indeed engaged. We maintain close communication with these entities. When we initiate an investigation into market bias, we rely on insights from the market, often after negative experiences or obstacles. One potential challenge lies in the complexity of our environment, where we deal with numerous markets and thousands of stakeholders. We have however developed several channels to obtain stakeholders' input including public and closed workshops, written questionnaires, bilateral meetings, etc.

Alexandre De Streel

There is significant overlap between the antitrust methodology and the DMA in your approach, particularly in the way you engage with gatekeepers and subsequently conduct market testing with business users. However, regulation encompasses a broader scope. It is essential to maintain a tripartite data framework consistently. Our recent series of interviews has revealed a persistent antitrust mindset in your operations. Is this assessment accurate? If so, in what sense?

Antoine Babinet

The situation is highly case-specific, as we are dealing with approximately 20 obligations, each with its own marketing implications. Some obligations involve numerous stakeholders, while others are more clearly defined. We have consistently encouraged gatekeepers to engage with stakeholders.

However, before the implementation deadline, we were limited in our ability to impose collaboration between gatekeepers and beneficiaries. Our strategy has been to communicate that if gatekeepers fail to consult the market regarding the effectiveness and efficiency of their implementations, they risk facing a flurry of complaints, which could lead to us taking issue with their compliance. A lack of market engagement makes less likely that compliance will be effective. We have expressed our scepticism about the possibility of achieving compliance without input from the intended beneficiaries.

This dynamic varies among gatekeepers: some have made genuine efforts, others appear to be making superficial attempts, and some show no inclination to engage at all – all of which we take into account when determining which parties to pursue most actively.

Harmonization or Big Bang ?

Éric Brousseau | Professor of Economics and Management, Director of the Governance and Regulation Chair, Paris Dauphine-PSL University

The first panel was dedicated to the legal framework and its implementation, and the second discussed the DMA. This third panel will consider both the DMA and the DSA.

We will consider the need for coordination to navigate complexity, then discuss the DSA, article by article, and the harmonizing practices of the of the Court of Justice of European Union and present the first case related to digital regulation. Finally, we will discuss why an alternative organization for the implementation of digital regulation in Europe should be considered.

Coordination to navigate complexity

Irène Roche Laguna | Head of Unit "Coordination and Regulatory compliance", DG CONNECT, European Commission

The previous panels primarily concentrated on the DMA, the AI Act, and referenced the Data Governance Act, the Data Act, and the eIDAS regulation; however, the regulatory landscape is significantly more intricate. Relating to the internal market and telecommunications alone, I have identified around 25 regulatory instruments either already in place or under negotiation, all of which influence the DSA.

The DSA is a comprehensive regulation aimed at ensuring safety and trustworthiness in the online environment, providing users with tools to combat illegal content and addressing unjustified content moderation issues. Against this background, it is important to highlight the need for a cohesive governance approach amidst the complexities of enforcement structures.

The current regulatory landscape in Europe is so complex that many companies need to call on legal expertise to navigate the mesh of regulations in areas such as data protection, political advertising, and competition law. A variety of regulatory bodies, including data protection authorities and national competition authorities, oversee compliance with the General Data Protection Regulation (GDPR) and the Digital Markets Act (DMA), among others. The telecommunications sector is also subject to oversight from regulatory authorities concerning electronic communications, net neutrality, and the Digital Services Act (DSA), which further complicates the regulatory framework.

Additionally, consumer protection and market surveillance authorities play crucial roles in enforcing regulations related to online marketplaces, product safety, and unfair commercial practices, highlighting the multifaceted nature of the regulatory system.

- The principle of country of origin – whereby the country where a platform is established as responsible for enforcement – typically governs single market instruments. In many cases, this responsibility falls to Ireland, where numerous large platforms are based. In contrast, the consumer protection framework operates under the country of destination principle, which pertains to the location of the consumer. The DSA is enforced in the country of origin, while the General Product Safety Regulation is enforced in the country of destination.

Many instruments apply to the same entities. To open our recent investigation into TEMU, classified as a very large online platform, we needed to engage in internal coordination within the Commission, particularly with colleagues focused on consumer protection, to meticulously address the various grievances.

- The principle of better regulation suggests that obligations should not be duplicated across different instruments. However, the evolution of regulations has led to instances where similar obligations are repeated.

  A notable example of this phenomenon is the use of dark patterns in user interfaces. Designed to influence consumer decisions in ways that may not align with their original intentions, these patterns are not necessarily restricted by consumer protection regulations. However, while the Digital Services Act (DSA) explicitly prohibits online platforms from employing dark patterns, it exempts those already governed by the General Data Protection Regulation (GDPR) or existing consumer protection laws.

In the realm of consumer protection, the DSA's provisions are without prejudice to consumer protection rules. But some of those consumer protection rules apply only in the absence of more specific regulations outlined in other legal instruments. Plaintiffs need to call on legal professionals to ascertain which regulations take precedence, a situation that platforms' legal teams may exploit to their advantage.

While similar obligations may exist across different regulations, they are overseen by distinct authorities.

- YouTube is regulated under the Audiovisual and Media Services Directive as a video-sharing platform, with media authorities responsible for compliance.
- Under the DSA, certain obligations may be more specific and detailed, yet the oversight may not necessarily fall under the same authority.
- In the Netherlands, the media authority oversees video streaming platform obligations, while the digital services coordinator, which is the competition and consumer protection authority, is responsible for enforcing identical obligations against the same provider.

The provisions related to the country of origin and destination will introduce additional complexity to the system. Snapchat, which has integrated an AI system known as MyAI, has been classified as a very large platform under the Digital Services Act (DSA). Consequently, MyAI falls under the scope of the DSA as well. Additionally, the AI Act will be enforced by market surveillance authorities in the destination country.

We will need to determine the roles and responsibilities regarding enforcement, particularly whether the Commission will have the authority to implement these regulations. If this is the case, we will strongly advocate for the effective enforcement of the DSA.

While the situation is complex, there are feasible solutions to navigate through it. I propose three key solutions, all centred around the concept of coordination.

- The DSA allows for coordinated enforcement through the digital services *coordinator*, which inherently suggests the need for collaboration. Among the 27 Member States, 11 digital services coordinators are responsible for media, alongside 20 telecom regulators and 6 authorities focused on competition or consumer protection.

  When it comes to very large platforms, the Commission exercises caution in its collaboration with Digital Services Coordinators (DSCs) when dealing with major platforms. Communication with the DSC of establishment is essential when addressing those platforms. Initiating an investigation prevents the DSC from addressing the same complaints, as this could violate the principle of non-bis in idem.

- The second layer of coordination involves collaboration among various instruments. Under the Digital Markets Act (DMA), there exists a high-level group that includes data protection authorities, the European Data Protection Board (EDPB), the European Data Protection Supervisor (EDPS), as well as media authorities and national regulatory bodies in telecommunications and competition. Although Digital Services Coordinators (DSCs) are not included in this group, informal cooperation happens already.

  Additionally, the Digital Services Act (DSA) has established the DSA Board. Since commencing its activities in February of this year, it has convened regularly, meeting once a month. It has also formed eight working groups to address various legal matters, facilitating coordination from a legal standpoint, consumer protection issues, and the safeguarding of minors, among other issues. We have already witnessed productive discussions concerning data protection issues, where challenges can be approached from multiple perspectives. Such coordination and ongoing dialogue are essential for reaching solutions that ultimately benefit consumers, as delays in resolution may leave consumers reliant on court decisions.

  - The third layer of coordination pertains to the collaboration among various legal systems, emphasizing the necessity for clarity. The Court of Justice acknowledges the existence of these competing systems but suggests that such competition may yield beneficial outcomes for consumers and enhance the protection of rights. Ultimately, the key takeaway from this discussion is the imperative for collaboration to identify the most effective methods for safeguarding users. Under the Digital Services Act (DSA), we are also tasked by co-legislators to prepare a report examining how the DSA interacts with various instruments. We have until November of next year, providing us with a year to navigate through this complex landscape.

It is hoped that this process will result in clarifications and solutions that may facilitate simplification. In the new mandate of Ursula von der Leyen, there is a clear call for simplification, with a dedicated Commissioner overseeing this portfolio. During the hearings, my prospective Executive Vice President called for a clear overview and mapping of overlapping obligations to enhance simplification and clarity.

The Platform for Business Operations initially adopted a light-touch approach to increase transparency for platforms. However, many of those obligations, if not all, are now encompassed within the DSA, the Digital Markets Act (DMA), or both. This raises the question, in a spirit of simplification, of whether it is necessary to maintain the Platform for Business Regulation or certain provisions within the Advanced Business Management System (ABMS).

The DSA, implementation challenges

Jean-Yves Ollier | Conseiller d'Etat, Former Chairman of the OECD's Economic Regulators Network and Regulators' Club

My contribution to a recent editorial initiative on the DSA (B. Bertrand dir, Règlement DSA 2022/2065, Commentaire article par article, 2024) gave me the opportunity to review the practical implementation challenges of its provisions on very large platforms and search engines (VLOPSE), drawing from my previous regulatory experience.

The DSA entered into force in November 2022, with a general application of its provisions on February 17, 2024, and an anticipated application for very large platforms occurring four months following the notification by the Commission that they fall within this category, i.e. on August 25, 2023 for the initial batch of 19. This implementation led to the immediate enforcement of provisions in certain areas, while others still necessitate the establishment of regulatory frameworks or standards.

A notable aspect of the DSA's significant changes – "big bang" – are the provision granting researchers access to data. As regards publicly available data, the notion of access rights seems tautological. Yet they are they are crucial to address challenges related to restrictions to data scraping and the absence of APIs enabling access to extensive amounts of publicly accessible information.

Pursuant to the last paragraph of Article 40, the Commission swiftly initiated formal proceedings against certain operators, including X, due to issues surrounding data scraping limitations and the prohibitive costs associated with APIs., Meta for the discontinuation of Crowd Tangle, a valuable API for researchers, as well as Ali Express and TikTok. These investigations highlight the reliance of DSA's implementation on researchers, who play a vital role in shaping its conceptual framework.

Regarding access to non-public data for researchers, the effectiveness of this provision will depend on the establishment of procedures involving responsible regulators, as this is the only domain where national regulators (i.e. the Irish regulator in most cases) have powers of enforcement as regards the provisions which are specific to VLOPSEs. The Commission is currently still in the process defining this procedure through a draft Delegated Act, which has recently entered the consultation phase. Researchers will thus not gain access to any data until mid-2025 at the earliest, when the implementation regulation will be in force and the pipeline for the Irish regulator will be in place.

The large platforms are also mandated to establish an online transparency repository. The DSA thus regulates the practice of Ad Libraries, which the main social network platforms has developed following the Cambridge Analytica scandal), and extends their scope from political ads to all ads. The Commission's inquiries on X and AliExpress also cover shortcomings relating to the content or accessibility of these repositories.

As of October 2023, these platforms must submit their initial transparency reports. Although they have been compiling such reports on their answers to governmental requests and on their content moderation practices for a decade, their disparate formats have rendered them largely ineffective. The successful implementation of this requirement hinges on the standardization of reporting frameworks, which was recently addressed in an implementation regulation adopted on November 4.

Platforms are obligated to generate reports evaluating systemic risks, along with the mitigation strategies they employ. While they have submitted these reports to the Commission on two occasions, no public disclosures have been made yet. The process involves a series of implementation triggers that may result in publications by the end of the year, crucial for defining the substance of the DSA.

In terms of authority and jurisdiction, the Commission holds exclusive powers over measures pertaining specifically to very large platforms, while sharing responsibilities for the broader regulatory framework until an inquiry is initiated. Access to data for researchers, however, falls under the jurisdiction of the regulator of the country of establishment: the Irish regulator (which planned to increase its staff from 40 to 160) in 15 out of 25 cases, the Dutch regulator for 4, each of the Czech and Cypriot regulators for 2, and their Luxemburg and German counterparts for 1. Other national regulators, such as Arcom, lack direct authority over major platforms due to the absence of established players in their territory; however, they maintain oversight over numerous smaller platforms, particularly local marketplaces.

The European Commission holds primary competence in these matters, albeit with limited human resources, approximately 100 full-time equivalents for both the DMA and DSA, supplemented by support from the European Centre for Algorithmic Transparency (ECAT) in Seville.

The initiative requires leveraging the resources and expertise established by regulators and national authorities, such as ARCOM, which was in charge of enforcing the French law enacted in 2018 concerning information manipulation. A noteworthy development was the establishment of a centralized expertise resource in France, addressing the challenges posed by the institutional fragmentation of regulators. French authorities have formed a Centre of expertise for digital platform regulation (known as PEReN, its French acronym), comprising approximately 20 experts, particularly in data science. ARCOM and PEReN have entered into agreements with the Commission to offer their expertise on implementation matters.

This collaboration highlights the importance of organizing cooperation and pooling expertise among national regulators, authorities, and the Commission, with Arcom serving as the primary authority (Digital services coordinator, DSC) in France, alongside other key players such as DGCCRF and CNIL, particularly in the context of the regulation of market platforms and data protection.

The European Board for Digital Services – composed of DSCs and chaired by the Commission - is actively engaged in a work program addressing various issues, with Arcom taking the lead on content moderation and data access, aiming to assist the Commission in establishing the implementation regulations and supporting the development codes of conduct and standards. A primary output of this collaboration, as mandated by Article 35 of the regulation, will be the annual reports from the boards concerning risks and risk management, which will articulate the boards' perspectives on the conceptual framework of risk analysis. These reports are essential for supporting the co-regulation system that underpins the DSA, providing a regulatory framework for the so-called "self-regulation" (in which platforms have regulated their users while exempting themselves from direct regulation). The initial report, anticipated to be completed in the coming months, is included in the board's working program and is expected to play a pivotal role in shaping the GSA's conceptual framework.

A regulatory repast

Alexandre Lacresse | Cour de Justice de l'Union Européenne

From the perspective of the EU, particularly the General Court and the Court of Justice, evaluating cases related to EU digital regulations is a routine function, as the Court has been applying EU law across various legal domains for over 70 years. However, it is important to recognize that in the context of the Digital Markets Act (DMA) and the Digital Services Act (DSA), we are still in the early stages of this process. The meal may be new – the utensils used for consuming it remain largely unchanged.

The Court possesses two primary mechanisms to ensure the effective enforcement of EU digital regulations. The first mechanism involves overseeing the legality of decisions made by the Commission. Article 263 of the Treaty on the Functioning of the European Union empowers the Court of Justice to assess the legality of legislative acts and decisions from EU institutions.

This provision grants jurisdiction to the Court in cases initiated by any individual or entity, including major technology firms, who are directly and individually affected by these acts, based on:

- lack of competence,
- infringement of an essential procedural requirement,
- infringement of the treaties or of any rule of law relating to the application,
- the misuse of powers.

Within the framework of the Digital Markets Act (DMA), two key decisions are subject to the Court's examination:

1. *designation decisions*, exemplified by the Bytedance versus Commission case, where the General Court dismissed Bytedance's appeal regarding its classification as a gatekeeper.

The General Court determined that the Commission's standard of proof was appropriate at the outset. Although the Commission did commit certain errors in evaluating Bytedance's arguments, the General Court concluded that these mistakes did not affect the legality of the contested decision.

A significant aspect of this ruling is that the General Court acknowledged Bytedance's right to present qualitative arguments to challenge the presumption established in Article 3 of the DMA. Specifically, paragraph 44 indicates that the language of Article 3, paragraph 5, of the DMA does not permit the Commission to dismiss arguments or evidence from an undertaking as irrelevant, solely because they are not quantified. EU courts are generally sceptical of presumptions that cannot be contested.

An appeal to the General Court also serves as a platform for the introduction of new concepts. In the Bytedance case, the General Court observed that the DMA lacks a definition for the term "ecosystem." Nevertheless, the judges opted to avoid this challenge and rejected Bytedance's assertion that it did not constitute an ecosystem, reasoning that he had not adequately fulfilled his burden of proof to contest the presumption applied by the Commission. For further details, one may refer to paragraph 161. Consequently, this matter, along with the entire case, is currently under review by the Court of Justice on appeal.

Presently, both Apple and Meta have initiated actions before the General Court to contest the designation decisions made under the DMA, with these cases still pending. Notably, in Apple's case, the company argues that Article 6, paragraph 7 of the DMA, which pertains to interoperability

obligations, conflicts with the European Charter of Fundamental Rights and the principle of proportionality.

It is important to recognize that Apple and other major tech firms were unable to challenge the DMA upon its adoption due to not being individually affected by the legislation. Consequently, they are pursuing actions against specific decisions to contest the Act itself. Judgments in these matters are anticipated in 2025.

2. *Regarding obligation and infringement decisions*, while there are currently no pending cases before the General Court, the Commission is expected to investigate gatekeepers whose practices may violate the obligations outlined in Articles 5 to 7 of the DMA. In such instances, a gatekeeper could face fines of up to 10% of their global revenue.

The General Court, along with the Court of Justice on appeal, will oversee the legality of the Commission's evaluations and the imposition of fines, consistent with previous actions taken under EU competition law. Article 45 of the DMA grants the Court of Justice unlimited jurisdiction to review the Commission's decisions regarding fines, allowing it to annul, reduce, or even increase the penalties imposed.

Currently, the General Court is handling multiple cases related to the DSA, including those involving Zalando, Amazon.EU, Halo Freestyle (better known as Pornhub), and the web group Czech Republic (known as X videos).

In the Amazon case, the General Court's President initially suspended the effects of the designation as a very large online platform under the DSA; however, this decision was overturned by the Court of Justice due to procedural issues regarding the Commission's opportunity to respond to Amazon's arguments. The Court of Justice ultimately rejected Amazon's request for interim measures and denied its appeal for an extension to comply with the requirement to create an advertisement repository, while the General Court is still deliberating on the legality of the designation decisions under the DSA.

Preliminary rulings are the second significant mechanism within the legal framework of the European Union.

Article 267 of the TFEU grants the Court of Justice the authority to issue preliminary rulings regarding the interpretation and validity of treaties and institutional acts. The Court's role is to ensure that EU law is interpreted consistently, aligning with the intentions of the EU legislator while upholding fundamental principles such as proportionality and legal certainty.

For recent EU digital regulations, such as the DMA and DSA, it remains uncertain if they will be subject to preliminary rulings in the near future. For this scenario to materialize, it would be necessary for one of the regulations to be invoked in national legal proceedings. Should a case be presented before the national courts, those courts would need to refer a question regarding the interpretation or validity of that regulation to the Court of Justice. Consequently, such a situation is unlikely to occur in the near future.

However, regarding the Data Governance Act, there may be a request for the Court to elucidate the interpretation or scope of certain provisions within the Act. For example, Articles 11 and 12 of the DGA address the notification requirements for data intermediation service providers and the conditions for offering such services. The stipulations for data sharing services may lack clarity, prompting the Court of Justice to provide clarification on these provisions. Article 12 outlines 15 conditions for the provision of data intermediation services, which could pose challenges in an increasingly data-dependent digital environment, necessitating judicial review by the Court of Justice.

Similarly, Article 11 of the Data Act pertains to the use of technical protective measures against unauthorized data use or disclosure. This is particularly applicable in business-to-business contexts, where data holders are required to make data accessible to data recipients. This issue has been highlighted in copyright cases concerning the legality of paywalls and the circumvention of technical protection measures, raising questions about potential copyright infringement. Numerous cases illustrate the intersection of copyright and data usage, which is a complex but understandable relationship. Thus, the Court of Justice could assume a significant role in digital governance, overseeing the lawful use and management of data, similar to its previous involvement in digital copyright matters.

Another pertinent example is the Directive on Copyright and Related Rights in the Digital Single Market (DSMD). Two significant cases have been presented before the Court of Justice:

- The first case involves YouTube and Cyando, where the court examined the liability of platform operators for copyright violations related to public communication rights. The ruling clarified that operators are not liable if they merely provide access to the platform, but they may be held accountable if they knowingly allow users to share infringing content.

- The second case is OMB versus Belgium, focusing on the interpretation of Articles 22 and 23 of the Digital Single Market Directive (DSMD). The Court of Justice has been tasked with interpreting provisions concerning the recuperation of rights for artists and performers, which will undeniably influence the treatment and protection of artistic works across the European Union.

In summary, two critical areas warrant attention regarding the Court of Justice's influence on the EU's digital strategy: the potential "make-or-break" impact of the Commission's decisions on Digital Markets Act (DMA) and Digital Services Act (DSA) practices; and the anticipated clarifications concerning the application of EU law related to data usage and artificial intelligence technologies.

Amidst Keanu and Kafka

Alexandre De Streel | CERRE & Université de Namur

In broaching the Digital Markets Act (DMA) and the Digital Services Act (DSA), we would be well-guided by two prominent pieces of cultural heritage: the film "The Matrix," and Kafka's "The Trial."

The possibility of the surreal

The substantive aim of these regulations is seemingly to prevent our reality from becoming akin to «The Matrix,» where we find ourselves trapped in a singular ecosystem without the awareness or ability to choose alternatives. The effectiveness of the DMA and DSA hinges on the DMA's capacity to diffuse the digital power and the DSA's ability to govern that power.

Currently, there are antitrust proceedings in both the United States and Europe that seek to partially dismantle Google. However, the primary focus of the DMA is to facilitate access to the expansive digital ecosystem, thereby fostering greater choice and innovation. It is my belief that the DMA's role is not to directly boost innovation. Rather, it is anticipated that innovation will flourish as a result of a more open digital ecosystem.

In contrast, the Digital Services Act (DSA) emphasizes obligations related to transparency and societal risks. In evaluating its effectiveness, one could assess whether there has been a shift in the balance of power between product teams and trust and safety teams within major tech companies. To reference Mark Zuckerberg's famous motto, "move fast and break things," the true success of the DMA would be reflected in a shift where major tech companies, particularly Facebook, adopt a more measured approach and refrain from causing disruption.

This leads me to the potential for a Kafkaesque scenario. The concern here is that we may find ourselves ensnared in a convoluted web of processes and procedures, ultimately resulting in minimal or negligible change.

The effectiveness of the Digital Services Act (DSA) can be assessed by examining the shift in power dynamics within major tech companies, particularly between product teams and trust and safety teams, which have historically been undervalued and overlooked. Thus, effective coordination among various authorities is crucial. The importance of collaboration between national authorities and the European Union, as well as the independence of the Commission, remains a contentious topic, with differing opinions on the Commission's autonomy in its operations.

The perception of the Commission's independence is questionable, particularly in relation to national agencies: I hold that true independence from operators is essential to avoid conflicts of interest. While Irene and her colleague Antoine appear to maintain independence from major technology firms, the critical issue remains their autonomy from political influence. Andreas Schwab expresses confidence that the current political landscape will not alter the Commission's operations, particularly under the Trump administration, though I remain sceptical of this assertion. It seems imprudent for the Commission to confront influential figures like Elon Musk directly, given their significant power and influence in the industry.

The love-hate dynamics of the relationship between X and the Commission reveal a deeper issue regarding the delegation of regulatory authority to a political body. Ultimately, I believe we should adopt a model that emphasizes coordination and independence, similar to the framework established for financial supervision following the financial crisis. This model features the European Central Bank at the helm as an independent institution responsible for overseeing the largest banks in Europe, while national authorities play a significant role in supporting the ECB's efforts with major banks and regulating smaller institutions.

I appreciate this system because it combines an independent European institution with effective coordination with national authorities, balancing support and regulation. Historically, with each new mandate, there are promises of simplification and a reduction in legislation, yet we often find ourselves with an increase in regulatory measures.

Remaining true to purpose

I do not intend to suggest that the Digital Markets Act (DMA), the Digital Services Act (DSA), and the complex framework proposed lack justification; rather, my concern lies in the assertion of a deregulatory agenda. I remain sceptical about the motivations of the Commission and the Parliament to pursue deregulation, as their existence is fundamentally tied to regulation.

A more effective regulatory framework may be modelled after the financial supervision system established post-crisis, where the European Central Bank operates as an independent authority overseeing major European banks. The financial supervisor, as the national authority, continues to play a crucial role in supporting the European Central Bank (ECB) in overseeing significant banks while also regulating less significant banks. This system is advantageous due to the presence of an independent European institution at the top, which coordinates effectively with national authorities through a dual mechanism of concurrent support and regulation.

The ongoing discussion about simplification in regulatory frameworks remains, and often leads to the paradox of increased legislation rather than the promised reduction, as seen with initiatives like the Digital Markets Act (DMA) and the Digital Services Act (DSA). While the introduction of new regulations may be justified, the challenge remains in understanding the motivations of the European Commission and Parliament to pursue a deregulatory agenda, given their reliance on regulation for existence.

Are we to enhance governmental efficiency by seeking insights from influential figures, such as Elon Musk, despite our differing views on certain issues, particularly regarding freedom of speech? It will be intriguing to observe his actions in the United States, as they may offer valuable lessons to be learned for all. However, it is crucial to ensure that the focus shifts from legislative creation to effective implementation.

The emphasis should not be on increasing personnel, but rather on reallocating existing resources from law-making to law enforcement. An increase in personnel may lead to continued legislative activity without addressing implementation, which is essential for progress. Strong governance mechanisms are vital alongside regulatory frameworks. The current legal structures may lack sufficient governance to guarantee effective interoperability and data access, which are critical for successful implementation.

While the Commission is promoting various initiatives, such as the data transfer initiative, it is important to recognize that merely establishing rules is insufficient for transforming cyberspace. Changes in technical architecture, market dynamics, and social behaviour are necessary for meaningful progress.

Ultimately, the objective of these efforts is to liberate individuals from being confined to a single ecosystem, often unawares, through continuous improvement and the right priorities. Building from the excellent work already accomplished by the Court and Commission, we must enable improved coordination, independence, simplification, and robust governance mechanisms to ensure effective functioning.

Discussion

Jean-Yves Ollier

What does the concept of independence in regulation bring to this landscape: the notion of independence from Government does not have an obvious rationale in this area, as compared to industries in which States have shareholding interests, or as data protection, which applies to numerous administrative applications? What is its relevance to develop practical rules on banning hate speech, protecting minors, or consumer protection?

Jens Prüfer

The issue with genuinely independent authorities is that, in order to maintain oversight, they must adhere to strict rule-based systems. When they are heavily rule-oriented, they lack the ability to engage closely with other industry experts, resulting in a relatively slow response. While their decisions may be accurate, their pace may not align with the needs of the technology sector and its users.

Therefore, I advocate for a more adaptable and flexible governance approach, despite the inherent risks of regulators becoming too aligned with the entities they oversee, potentially leading to lobbying and regulatory capture.

Joelle Toledano

Is optional coordination an effective governance mechanism?

Eric Brousseau

Excessive coordination could hinder our ability to be agile and effectively accumulate expertise, as numerous specialists may spend more time coordinating than executing tasks. This situation inevitably raises questions about the political dynamics involved in the political logic of the Union.

Irene Roche-Laguna

Coordination should not be viewed as the primary objective of the DSA or DMA, but rather as a means to achieve meaningful outcomes, contrary to previous assertions that suggested a chaotic environment. Existing regulations for online platforms were not entirely absent; rather, they consisted of fragmented, sector-specific rules. The introduction of the Digital Services Act (DSA) enhances this framework by establishing comprehensive obligations and penalties, yielding more effective outcomes compared to earlier, less assertive measures.

To ensure compliance with the pre-existing sector-specific regulations that have proven effective, it is essential to maintain a coordinated approach at the national level. Rather than dismissing these regulations, it is crucial to engage in dialogue to refine the rules and implement actions where they will be most impactful. Coordination serves as a necessary tool rather than an end goal, as the aim is not to create an overly complex regulatory system without purpose. It is important to focus on the effectiveness of the regulatory framework.

The Treaty mandates that Commissioners operate independently, a fundamental principle that must be upheld. The DSA necessitates the presence of independent regulators, particularly as it addresses matters closely related to fundamental rights and freedom of expression. The independence of regulators is vital, especially in combating disinformation. Granting regulatory powers to entities lacking independence from governmental influence poses significant risks, making the case for the necessity of independent oversight under the DSA compelling.

Alexandre De Streel

The discussion on independence highlighted that while the Treaty establishes independence from Member States, it does not ensure this independence with regard to the Parliament, to which the Commission remains accountable. Though the necessity of this independence continues to be the subject of debate, the conversations between Elon Musk and Thierry Breton over the summer suggest that it may be beneficial at least to a degree.

Ultimately, the effectiveness of coordination hinges on both capability and incentive. Achieving coordination is a challenge faced by all institutions, whether public, private, or academic. The key lies in ensuring that all parties are aligned towards a common objective, potentially through financial incentives.

A conversation with a representative from Mastercard revealed the complexities of coordinating various departments, which is often facilitated by financial incentives tied to collaborative projects. In contrast, the Commission operates differently, relying on non-monetary incentives such as promotions. It may be advantageous to consider promoting those within the Commission who demonstrate the highest levels of cooperation, rather than those who engage in conflicts with other directorates-general.

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Oles Andriychuk

Optional coordination is not being considered. It is essential for all parties involved in enforcement to maintain accountability to consumers and citizens.

Part of the assurance you seek is embedded in the procedural framework and ultimately within the judicial system. When constructing these cases, we must return to the complexity I previously mentioned, as these companies are adept at defending their positions. At the same time, our system offers numerous procedural guarantees, ensuring that rights are adequately safeguarded.

Regarding the effectiveness of regulations, one could assess the European market's growth as an indicator of the regulations' success.

The transformation of the European market is fundamentally a collective endeavour. While regulators play a role in simplifying conditions for business growth, it is imperative that businesses and consumers also fulfil their respective responsibilities. We must exercise caution in conveying these messages, as they may inadvertently create a simplistic framework for evaluating the effectiveness of enforcement and regulation.

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