
Instrat and European Horizons joint consultation for the European Commission's Digital Services Act package (DSA) and the *ex ante* regulatory instrument.

Instrat and European Horizons appreciate the opportunity to comment on the European Commission's Inception Impact Assessment regarding the development of Digital Services Act package (DSA).

Instrat is a progressive think-tank focused on public policy advisory. We provide research and consult on digital economy, energy and environment, sustainable finance, labour market and inequalities. We act in the public interest, in our work we create and adapt open access & open source tools.

European Horizons is a global, student-led policy incubator committed to giving young people a voice in shaping the future of Europe and of transatlantic relations. Through our network of university chapters across the world, and in collaboration with our partner organizations, European Horizons devises, tests, and advocates for innovative policy ideas to advance European integration.

Executive Summary: Digital Services Act

- Based on our argumentation below, we believe that the European Commission should adopt a comprehensive framework with the overarching goal of establishing a fair and competitive digital market environment, thus increasing innovation and securing digital rights for European citizens.
- To level the playing field, it is necessary to rethink the fundamental aspects of the digital space and propose bold policy actions, such as defining the significant digital presence, implementing interoperability through vertical separation of platform utilities (decoupling), listing prohibited and unfair practices, analyzing social and economic impacts of algorithms, and strengthening data sharing.
- Proper enforcement of both GDPR and DSA requires enhanced reporting and intervening powers. Therefore, we propose a new European regulatory body equipped with the mandate to supervise the European Digital Single Market.

- Consequently, Instrat and European Horizons recommend that the European Commission choose Option 3 in conjunction with Option 2: **ex-ante regulation for large online platforms with significant network effects acting as gatekeepers**, which includes a horizontal framework empowering regulators to collect information from those platforms.

Introduction

Twenty years ago the European Union introduced the E-Commerce Directive. Since then, the internet and the broader digital economy have undergone a revolution which dramatically altered market structures, business behaviors, and user vulnerability. In the early 2000s, digital markets were still highly fragmented and subject to dynamic fluxes, underlined by the dot-com bubble. Since then, ICT has become a general purpose technology, affecting all sectors of the economy and also, fundamentally, the fabric of our societies. The growing divide between slow-moving legislative and regulatory bodies and fast-paced technological innovation, combined with disruptive business models of the digital economy, have created an amalgamation of complex and interdependent problems. Of particular concern is the fact that European citizens are increasingly exposed to orchestrated and hostile disinformation campaigns, in addition to being de facto powerless vis-a-vis online platforms and big tech in their claim for fulfillment of their human right to data privacy.

Consequently, the European Digital Strategy is presently foremost, after the European Green Deal, on the European Commission's policy agenda for a more integrated Europe.

To support the existing European Digital Strategy, the above mentioned problems must be addressed through policy solutions and regulatory measures that will facilitate socially and economically beneficial development, both in the common internet and for the broader digital economy, all while deepening European integration. The European Single Market has helped transform the European continent into a global, economic heavyweight. Therefore, the European Commission must implement new regulations to strengthen interoperability between online platforms, data protection, and data privacy, and to counter the anti-democratic phenomena of hate-speech and disinformation, in a fair, robust, and intelligent manner. Only then can we hope to again witness the so-called Brussels effect: causing the world to follow where the European Commission leads.

General remarks on the DSA

The Digital Services Act package is a necessary step to build on the recently introduced General Data Protection Regulation and to help match European legislation with the reality of the

digital economy in the 21st century. The E-Commerce Directive adopted in 2000 has become outdated and is in urgent need of replacement by a more functional and pragmatic legislative package. The Rome I Regulation and the Brussels Regime are directives introduced to govern the choice of law and apply to contractual obligations. Yet they both fall short of fully addressing conflicts related to consumer protection in digital markets. To illustrate, in 2015 only one in ten consumers experiencing problems in the digital market received remedies. The respective losses in welfare are estimated to be in the range of €9-11bn.

Since its inception, the Digital Single Market was expected to facilitate open digital borders, boost e-commerce and retail, and create the conditions for a thriving data economy. Due to the peculiarities of the digital environment, the European Digital Single Market increasingly suffers from market concentration and deterioration of competition. The rise of dominant online platforms, which leverage large network and scale effects to turn themselves into gatekeepers, is economically and socially harmful. The already strong market position of gatekeepers is amplified by SMEs increasingly facing walled gardens. These small and medium enterprises cannot match the sheer scale of data accessible to dominant online platforms and thus risk being pushed out of business. Such structural risks for competition are empirically known to foster decreasing research and development spending and, ultimately, stall innovation in the European Digital Single Market.

Significant digital presence

For the European Commission to effectively implement the new policies collected under the umbrella of the DSA package, it first needs to lay out a precise and robust definition of what constitutes a *significant digital presence*. Due to the characteristics of the digital market, we recommend the European Commission differentiate between the applicable thresholds attributable to the European Digital Single Market: platform revenues; number of users; and number of business contracts.

It is further important to apply a broader scope to the definition of significant digital presence by considering multifaceted online platforms. Only then can regulation consider online platforms which incorporate operating systems, multiple applications, application stores, and marketplaces. Online platforms below a pre-defined qualifying threshold for a significant digital presence will be exempt from remedies aimed at the largest gatekeepers specifically, thus this document uses the term *online platform* when referring to gatekeeper platforms with significant digital presence.

Although the issue of corporate taxation lies clearly outside of the scope of this consultation, we want to emphasize that the concept of a significant digital presence was launched and introduced as a pre-requirement for a subsequent *digital services tax* applied to the European Digital Single Market. Particularly in light of the stalled OECD talks, we identify the need for

the European Commission to pursue the concept of a digital services tax, ideally implemented through the Digital Services Act package.

Interoperability and platform utilities

One of the core features of open and accessible digital markets is the prevalence of interoperable standards and protocols, which allow not just for low market entry barriers but also for improved user friendliness. The importance of interoperability was well-understood since HTTP and e-mail protocols facilitated the rise of first generation online platforms. The new generation of online platforms and hardware operating systems, however, are characterized by reduced interoperability. Unchecked by regulatory authorities these online platforms leverage network effects to build artificial and shielded platform-specific ecosystems. In other words, a lack of interoperability is utilized to decrease competition by heightened entry barriers, effectively boosting market dominance.

Despite its peculiarities, the digital market is not the sole market affected by network effects and large userbases. Other sectors characterized by natural monopolies are transmission system operators, telecommunication, railway, or pharma. In order to avoid monopolization, economic inefficiencies, and welfare losses, regulators need to step in to introduce fair and transparent rules governing the market. For many markets, the European Commission has already wisely established regulatory legislation. Since the three liberalization packages for the (horizontal) integration of European energy markets, competition in the market has thrived and ultimately helped facilitate the emergence of renewable energy. A more recent, though no less impactful, European policy measure is the Payment Services Directive, PSD2, addressing fairness and transparency in the banking and financial system.

In general, most regulatory frameworks which foster infrastructure interoperability entail:

- 1) the decoupling of the underlying network infrastructure from business operations and provisioning of services (i.e. technical hardware and basic operating software); and
- 2) the enforcement of interoperability on infrastructure operators and a broad regulatory regime on service providers.

We recommend implementing the very same remedies in the digital market. Specifically, decoupling of the digital market to establish a digital infrastructure of databases, metadata, standards, and protocols used by online platforms. Secondly, enforcement of interoperability between *platform utility* operators and businesses providing goods and services in an over-the-top manner. Minimum interoperability requirements should be introduced to allow competing applications and SME software solutions to simply plug into larger platform systems via standardized communication protocols and programmable database interfaces. If certain online platforms consequently failed to comply with these new interoperability

requirements, regulatory authorities should apply remedies on the basis of unfair trading practices and violation of European law.

Denylists for unfair trading practices

Because of the slower pace of regulatory legislation, today's gatekeeping online platforms engage in a blurry legal gray zone by relying on unfair market behavior. Therefore, the European Commission's proposal to establish prohibited unfair trading practices should not be perceived as a radical step but as a long-awaited correction of pre-existing legal loopholes. The special characteristic of digital markets requires legislation which addresses structural competition problems *ex ante* and not, as so far, *ex post*. We are convinced that market regulation is more effective when it is not an emergency intervention but is rather of a preventive nature. In order to pursue such a prevention-driven approach several unfair trading practices should be included in new digital market *denylists*:

- Cross-financing and cross-subsidizing of otherwise unprofitable subsidiary companies as a strategy to gain market power in adjacent markets (with Amazon Web Services or Google being good examples of powerful subsidiaries acting as cash cows for other subsidiaries)
- Data transfer or database merging between subsidiary companies without implicit and optional consent of consumers and users (with data transfer between WhatsApp and Facebook being a prime example)
- Self-preferencing in search results of any product or service that is economically connected (e.g. when Apple sells apps through its app-store which compete with third party software sold via the same app-store)
- Forcing users to accept data sharing, disclosure of private data, or downloads of cookies if they aim to access the respective webpage or digital service
- Forcing other platforms and apps into a self-preferred payment method
- Bundling and tying sales of digital services and software and hardware

Enhanced GDPR enforcement

When the European Commission introduced the General Data Protection Regulation, GDPR, it ventured to protect the most fundamental rights of data subjects. The DSA package is not just a further regulation of the digital market but also the chance to correct shortcomings of the GDPR and to double-down on promising provisions. We reiterate the urgent need for users to have access to effective and transparent data management tools which support data portability as outlined in Article 20 GDPR. In addition, users were given the right to request that platform administrators share the stored user data, yet many individual users faced non-

responsive administrators. While users currently have the legal right to demand digital platforms to disclose what personal data has been stored, users cannot require information about how a digital platform has processed personal user data. In addition to merely requiring online platforms to follow requests for disclosure of collected and processed user data, enhanced GDPR enforcement should also lead to disclosure of the economic value of user data as online platforms earn huge profits by applying data processing algorithms. By pursuing this approach, the European Commission would build on the official staff working documents on the *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices* and court rulings lamenting the practice by online platforms of obscuring the true cost of service.

We appreciate that the European Commission pursued a path of increased focus on data protection in recent years. Yet we need to stress the importance of effective policy solutions and regulations requiring third parties to meet European data protection standards. The recent Schrems II verdict demonstrated well that existing agreements, such as the *EU-U.S. Privacy Shield Framework*, cannot guarantee protection of European data subjects at this point in time. Particularly U.S. surveillance programs failed to meet the legal requirements as outlined in Article 52 of the *EU Charter on Fundamental Rights*. This is of particular concern, as more than 5,000 companies contributing to a €6trn transatlantic economic partnership relied on the functioning of the Privacy Shield. We recommend the European Commission fully leverage the effectiveness of the upcoming DSA package and work towards a new agreement to protect European data subjects in order to uphold the principle of effective judicial protection of Community law.

Data sharing and governance

When large online platforms extract data and the vast associated economic value, it weakens the competitiveness in and of the European Digital Single Market and favors commercial interests over social welfare. One could argue that by leaving such practices unchecked, Europe is massively investing abroad by providing (mostly) free data. Thus, we identified an urgent need to build trusted institutions and to strengthen data sharing. Effective data portability requires a competitive end-point to move data to. In order to provide a competitive platform utility infrastructure, a trusted data sharing space is the minimum requirement that the European Commission should encourage. We recommend that the DSA package grants the minimum possibility of moving data to personal *pods* in the European Common Data Space. There, data could be further managed in compliance with GDPR and other data governance needs of any individual or business. Data sharing should be encouraged via trusted intermediaries, which ensure interoperability and may restrict access to subjects violating data sharing terms and conditions. The Common European Data Space is well-positioned to pioneer trusted multi-stakeholder data governance. We recognize that investments in cloud computing

across the European Union, as outlined in the European Digital Strategy, are well-aligned with the presented policy proposal.

Algorithmic Impact Assessments for social and economic issues

Online platforms are obligated to perform Algorithmic Impact Assessment tests for high-impact algorithms on socio-economic activities. This approach extends the high-risk requirements as outlined in the European Commission's *White Paper on Artificial Intelligence*. When online platforms with a significant digital presence change algorithms (such as search engine algorithms), it can lead to unintended consequences on digital markets. Therefore, the European Commission should make AIA tests mandatory for all algorithm changes by gatekeepers. The AIA test should measure the following:

- Purpose and outcomes of the algorithm change
- Key variables and parameters as well as sourcing of data
- Technical parameters (including loss function, fairness, and performance)
- Harm caused to users (individual and SMEs)

AIA tests should be performed under a licensing regime. Auditing and testing by a European regulator and mandated research institutes should be a precondition for a change and release of algorithm changes. The main outcomes of Algorithmic Impact Assessments should be accessible to the wider public via digital leaflets (similar to practices in the pharmaceutical sector) and need to be in accordance with the *explainable AI* principle.

Supervision, data collection, and enforcement

Online platforms should be obliged to report to national authorities and, ideally, a new European regulator, in order to achieve greater digital market transparency. Reported data should include, but not be restricted to, social media usage, advertisement sales, e-commerce, and chosen high-impact sectors of social and economic activity, such as the housing market. Regular reporting should take place via a dedicated *application programming interface*. Due to the digital market's unique characteristics, regular reporting will not require complex bureaucratic procedures and will be almost costless, as online platforms already monitor user activity data. Thus, successful implementation will only be a matter of introducing a proper automatic supervision framework.

We believe that the successful implementation and enforcement of a new regulatory framework for the European Digital Single Market requires the creation of a new regulatory

authority on the supranational level. This regulatory body should oversee, but not be restricted to, the following:

- Supervising the implementation and enforcement of the DSA package and of additional digital market legislation, such as the GDPR or the introduction of a digital services tax.
- Setting common European standards for reporting and interoperability.
- Collecting data and aiding Member States in accessing data for effective national policymaking.
- Monitoring the digital market, competition, and openness of the internet.

Recommendation

Taking the above into account, Instrat and European Horizons recommend that the European Commission choose Option 3 in conjunction with Option 2: **ex-ante regulation for large online platforms with significant network effects acting as gatekeepers, which includes a horizontal framework empowering regulators to collect information from those platforms.**

The current E-Commerce Directive and competition frameworks fell short of addressing changed digital environments effectively. To counter both the existence and the emergence of market concentration and large online platforms acting as gatekeepers, the European Commission should deploy ex ante tools which will prevent market dominance and abusive behaviors. We recommend the European Commission to implement the extended version of Option 3 to include denylists and tailor-made remedies. Option 3 should be combined with the transparency obligations derived from Option 2.

If the DSA package is to achieve the policy objectives presented in the Inception Impact Assessment, the European Commission should introduce a strong regulator equipped with bold *ex ante* instruments countering gatekeepers and unfair competition advantages arising from network effects. The new regulatory body should be additionally empowered to actively monitor the market and to conduct market audits via Algorithmic Impact Assessments. The European Commission would thus safeguard long-term competitiveness and innovation in a fair digital environment respecting our shared democratic, liberal values and the rule of law, all while facilitating social and economic welfare.

We thus believe that the DSA should facilitate the transformation of the internet towards an open, transparent, fair, and interoperable public space, which fosters the freedom of speech, boosts innovation, and minimizes the spread of harmful content.