THINKING OF THE WHOLE ECOSYSTEM: EU’S PLANS TO REGULATE THE PLATFORM ECONOMY

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In early December, the EU will unveil ambitious new plans to regulate the platform economy in presenting its landmark Digital Services Act together with new digital competition capacities as part of the Digital Markets Act.

The Digital Services Act will introduce new rules covering a range of areas of the platform economy from content moderation to online advertising and the transparency of algorithms.

As part of the Commission’s Digital Markets Act, the Commission plans to unveil a list of ex-ante prohibited practices by digital gatekeepers, as well as a market investigation tool that could be used to examine how certain markets are prone to failure.

In this event report, EURACTIV brings you the pressing issues driving the debate in Brussels and highlights the concerns of some of those across Europe’s SME community, who feel that too harsh a legal regime in the platform economy could harm future innovation and resilience for smaller startups across the bloc.
Germany weighs in on EU’s bid to regulate digital giants
Platforms should be allowed to take ‘voluntary measures’ in content removal, MEP says
European app makers urge regulators to think outside of the bubble
Germany has given an insight into its forthcoming approach for regulating the platform economy as part of the EU’s Digital Services Act and Digital Markets Act, two landmark packages set to be unveiled by the European Commission on 2 December.

Speaking as part of an expert panel hosted by ACT – The App Association on Wednesday (28 October), Armin Jungbluth, head of the digital services division in the German Economy Ministry, laid out his country’s position on the plans.

As part of the Commission’s Digital Markets Act, the Commission plans to unveil a list of ex-ante prohibited practices by digital gatekeepers, as well as a market investigation tool that could be used to examine how certain markets are prone to failure.

"With regards to these large gatekeepers, we are in favour of a combination of the introduction of clear obligations and prohibitions or restrictions of certain unfair trading practices – the so-called blacklist – and the adoption of tailor-made remedies on a case by case basis," Jungbluth said, adding it is important to have a set of “clearly defined quantitative or qualitative criteria” to assess which platforms will be subject to these obligations and prohibitions.

Jungbluth also revealed that he is regularly contacted by many platforms, concerned that their services may come under the scope of the new rules, and as a result, “the most difficult first step” for the EU

Continued on Page 5
executive will be defining what a ‘gatekeeper platform’ actually is.

Germany also supports the notion of establishing a pan European regulator to oversee enforcement of the bloc’s new competition capacities.

Asked whether Germany would pursue a similar line to France as to advocating for the potential breakup of tech giants, Jungbluth poured cold water on the idea.

“Personally, I’m very reluctant to start with the ‘sharpest sword’ in terms of the breakup or structural separation of companies,” he said, adding that it had been a potential avenue of action pursued in the past by former German Economy Minister Sigmar Gabriel, who ultimately failed in convincing German Parliamentarians of this course.

“However, fines alone do not solve the problem,” Jungbluth added.

In terms of the Digital Services Act, which will introduce new rules covering a range of areas of the platform economy from content moderation to online advertising and the transparency of algorithms, the Germans believe in preserving the core elements of the EU’s current set of rules featured in the 2000 eCommerce Directive.

This includes the ban on a general monitoring obligation for service providers as well as platform liability exemptions. However, Jungbluth also believes that such measures may have to be “complemented” by “incentives to take responsibility” for the platforms.

Berlin also believes that the ‘country of origin principle’ of the 2000 e-Commerce Directive, which states that service providers only have to comply with the laws of the member state that they are legally established in when operating across the bloc, should be “rethought.” For its part, France also believes that this clause needs revision.

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More broadly, Jungbluth believes that the new rules shouldn’t be to the detriment of the small and business-sized business in Europe, and particularly in the app developing community, many of which rely on the larger platforms to deliver their services.

“Small and medium-sized enterprises, especially in Europe, like app developers, should not be subject to excessive obligations and unnecessary administrative burden,” he said.

However, there are those working across Europe’s small and medium-sized business community that still believe certain ‘unintended consequences’ could arise from the recently leaked draft of blacklisted practices that have recently surfaced.

“Small and medium-sized enterprises, especially in Europe, like app developers, should not be subject to excessive obligations and unnecessary administrative burden,” he said.

Prohibitions on certain ‘self-preferencing’ activities, including a ban on preferential ranking in online search engines or online intermediation services, is one particular area that some app developers have highlighted their concerns on.

“Anything that you impose on one platform will have an effect on what small businesses can do,” said Mike Sax, founder of ACT – The App Association. “This can have unintended consequences that are by definition almost impossible to predict.”

“If you restrict, for example, gatekeeping, you also risk reducing the level of trust that people have in the app stores because you restrict the ability for the platforms to keep out bad practices.”

Meanwhile, speaking at Wednesday’s event, Stanislas Dewavrin, Co-Founder of the ‘Oh Bibi’ game app, urged EU policymakers to consider the sustainability of the whole ‘platform ecosystem’ as opposed to focussing too much on the operation of the tech giants.

“The app economy is not just about platforms, but it’s about the whole ecosystem, including the consumers and the people actually designing the apps,” he said.

“It’s a dynamic area. No two platforms are built on the same principles, so everything has to be thought out very carefully.”
The EU should focus on regulating illegal content as part of its upcoming Digital Services Act, which aims to present an ambitious new regulatory framework for online services, but platforms should also be allowed to take ‘voluntary measures’ to remove harmful content, MEP Dita Charanzová says.

Dita Charanzová is a Renew Europe MEP who represented the group as part of the European Parliament’s initiative report on the Digital Services Act for the Internal Market Committee.

EURACTIV’s Samuel Stolton heard about what she had to say on the plans.

**You negotiated for Renew as part of the Internal Market’s initiative report on the Digital Services Act. For you, what were the most important compromises to reach?**

It’s hard to pick what the most important compromise was because the report was so long and we touched on many important things. But for me, the most important thing was that all groups supported that the fundamentals of the E-Commerce Directive should be maintained. These are the country of origin principle, the limited liability regime, and the ban on general monitoring.

In addition, I was very happy to see the support given to a Good Samaritan clause being included in the future DSA. While I believe that there should be no general monitoring requirement, if we want platforms to take more voluntary measures against unwelcome content then we must give them the legal means to do so.

**Reports have recently surfaced that**
the Commission may think about establishing a sanctions regime for platforms that host illegal content online, what are your opinions on this prospect?

I think that as long as we respect the current system and rules of the E-commerce Directive, there is limited need of such a sanctions regime. That said, if a website is blatantly hosting illegal content, and is taking no measures to remove such content, then it is potentially liable and might need to be subject to sanctions. This, however, must be a measure of last resort.

Before then, we must follow the notice and action mechanism. But nothing should weaken the current limited liability protections under the Directive.

In light of the various terrorist attacks in Europe, do you believe that this will have an impact on not only how ‘illegal’ content is regulated, but also ‘harmful’ content, or is it important to maintain a clear distinction between the two?

Clearly, these attacks will put pressure on Brussels to regulate more on this. Nevertheless, we must maintain a distinction between illegal and harmful content. The DSA must only regulate illegal content. Illegal content is clearly set down in law, and there is a judicial process for deciding if something is illegal or not.

When it comes to harmful content though, this is very much in the eye of the beholder. Something that is not harmful in the Netherlands may, for instance, be seen as harmful in Poland. This said websites should take their social responsibility and take voluntary measures to ensure what they think is harmful content is removed from their websites. But this must not endanger their protections under the E-commerce Directive. There is a difference between social responsibility and liability.

With regards to the leaked blacklist of prohibited practices that recently emerged, what’s your take on these?

My take is that any measures that are potentially included in the Digital Markets Act must primarily be applied on a case-by-case basis. The practices of a video streaming platform are nothing like those of a marketplace, or those that allow user-generated content, or those that are closed ecosystems. To apply blanket regulations to everyone may lead to unnecessary and burdensome regulation of platforms without any benefit for consumers or fairness in the marketplace.

The DSA will also be presented alongside the Digital Markets Act, which aims to rebalance fair competition in the platform economy. Under what conditions do you envisage that its market investigation tool will be put to use? In the platform economy, what conditions have to be met in order to determine if a market is close to ‘tipping’?

I believe that the EU should primarily act when there is a market failure and the investigation tools should be used to determine if there is such a failure. Primarily I do not think it is the role of the European Commission or anyone else to go looking for problems that are not apparent. If businesses or consumers do not feel that there is a market failure, then we should primarily let the market continue to function. Any actions against market tipping must be rare and exceptional and be based upon solid evidence.

To how much of an extent do you believe that the EU should reform some of the core provisions of the eCommerce directive, if at all? What are the potential risks or benefits of doing so?

I do not believe that the core provisions should be reformed. I think that they are as valid today as they were 20 years ago. The potential risk of reforming them is that we will break a system that works. Today in Europe we have an open and free internet. Much of the reason for innovation and growth online is because we set some basic rules, and got out of the way. If we regulate too much, we risk that we will create new barriers instead of fixing the limited ones that exist today.

A lot of talk on the Digital Services Act and the Digital Markets Act has centred on the operation of the tech giants, but in what ways could Europe’s SMEs be impacted by the new rules?

A lot of European SMEs rely upon the large platforms for their businesses to help them enable their businesses. European SMEs have been able to grow far more because of the platforms than they would have without them.

The key to any regulation is to ensure that the platforms continue to be useful for our SMEs, but also that any rules that apply to the platforms do not trickle down to SME users. While the large platforms have the money and time to implement regulations, SMEs do not have the lawyers or staff to be implementing transparency reports and many other rules. We, therefore, have to be careful that any regulation of the large platforms is targeted and proportional.
European app makers urge regulators to think outside of the bubble

By Fernando Guerrero, Francesco Ronchi, James Hanson, Kim Baden-Kristensen, László Grad-Gyenge, Peter Deckers, Philip Tudor, Sveatoslav Vizitiu and Vincent Keunen | ACT

As app makers, we may not immediately come to mind when discussing the perils of platform regulation. After all, the new competition rules will only directly apply to large companies acting as ‘gatekeepers’.

This opinion is the result of a collaboration between the following members of the ACT: Francesco Ronchi, Synesthesia (IT), Vincent Keunen, Andaman7 (BE), Peter Deckers, SyndoHealth (BE), Sveatoslav Vizitiu, Wello (RO), Kim Baden-Kristensen, Brain+ (DK), László Grad-Gyenge, Creo (HU), Fernando Guerrero, Lucient & Nouss (ES), James Hanson, Layers Studio (UK), Philip Tudor, Multispectral Limited (UK).

Speaking about the upcoming Digital Markets Act (DMA), European Commission Executive Vice President Margrethe Vestager recently said that “very few small businesses will be touched by the new digital rules”.

Continued on Page 9
However well-intentioned these rules are, they will ultimately impact every part of the app economy. Gatekeepers are part of a broader ecosystem where everything is connected. Larger app makers with access to more financial and human capital can, and often do, fare better than the small businesses these regulations intend to help.

Smaller app companies like ours benefit from built-in services such as developer toolkits, intellectual property protection, and consumer trust. Those benefits let us focus on what we do best — creating products and services that turn your phone into a hub for education, commerce, and more. Simply by being present on the app stores, we can reach a huge global customer base, regardless of our budget or where we’re located. Gatekeepers use a rigorous review process to keep bad actors out of their app store, giving users the confidence to install apps even from unknown companies. This quality check fosters an environment where new and unknown companies can compete with global brands on a level playing field.

As we consider the possible text of the DMA, we are concerned that some policies may alter this level playing field. For example, all developers on the app stores operate under the same terms and conditions. A mandate to allow negotiation of more favourable terms and conditions would only benefit larger app companies with leverage and legal resources. This would put the smaller players at a significant disadvantage.

Some have called for the abolition of the 30 per cent fee on app store purchases. We are very concerned that forcing app stores to change their business models may raise costs for smaller developers. The current system works quite well for us. Other than a low annual participation fee, we only pay the platforms when we make money from the customers they bring to us. Eliminating this option for platforms to recover their investments may cause them to simply pass down these costs to developers in a different way, as happened with the digital tax in France. In the long term, regulating gatekeepers may make the business climate in Europe less attractive for ambitious start-ups and for the investors hoping to finance them.

While a ‘blacklist’ of prohibited practices would be highly problematic, we also see the possibility of a ‘grey list’ of unfair practices as an area of concern. For example, a smartphone’s default camera app is helpful for developers because they don’t have to integrate another service or design a camera app to use it in their app. Such a default app may be categorized as an ‘unfair’ act of self-preferencing on a grey list. Of course, anti-competitive behaviour should be prohibited – but the European Commission already has a range of tools to effectively address antitrust issues. The list of practices must consider and separate by the unique differences between platforms in their respective sectors. Not all platforms behave in the same way, and app stores cannot be put in the same basket as social media or search sectors. Any regulation that doesn’t take these market differences into account risks not being future-proof and creating an additional layer of complexity.

The DMA may not include any rules with which SMEs must directly comply. Nonetheless, it is important to us that any rules targeting gatekeepers preserve the successful app ecosystem on which our businesses rely. As well-intentioned as these new laws maybe, if not thoughtfully drafted and carefully applied they may cause more harm than good. Looking at how much the platforms evolved over the last decade, codifying today’s practices into law may slow the growth of Europe’s app economy, creating a bigger gulf between large and small companies.
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