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The Power of Regulation: The Key to a European Strategy for the Digital Economy?

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Introduction

The fast pace of the digital transformation is not only challenging traditional business models, but also raises a number of public policy challenges. There is a broad consensus that the existing regulatory framework needs to be updated and recalibrated in order to adequately reflect the new market conditions of the digital economy and the new techno-social environment. Establishing a new regulatory framework that is innovation-friendly, ensures fair competition and protects the rights of European citizens is a key challenge for the European Union. It goes without saying that the detailed outline of such a future regulatory framework is a matter of controversial debate. This paper provides a brief overview of the regulatory issues that have been debated at Genshagen in June 2019 and offers some proposals for EU policy makers.

The discussion focused on three selected topics which illustrate the current regulatory challenges. First, the rise of digital platforms has triggered a debate on whether competition law needs an update to ensure fair competition in the emerging "platform economy". Second, there is an intensive debate about the appropriate role of social networks regarding content moderation and how to best remove harmful and extremist content while, at the same time, safeguarding freedom of expression. Third, it is extensively discussed whether and to what extent the growing importance of data as a source of market power and basis for innovation, in particular for AI systems, could require new rules on data sharing.

A. Regulatory challenges in the digital transformation

I. Competition in the platform economy

Digital platforms have become an important driver of innovation and growth in the digital economy. They provide virtual infrastructures for the exchange of goods, services and information. At the same time, platforms occupy a central position between traders and their customers. Increasingly, they take a role as "gatekeepers" who control market access. If a trader generates a large portion of its revenues via a specific platform, the risk of dependency on the platform increases. So far, the political and academic debate about adequate regulatory responses to the rise of the platform economy has mainly focused on competition law.

However, more recently, doubts have been raised as to whether the instruments of competition law are sufficient to ensure fair market conditions. From this perspective, it has been suggested that individual ex post interventions by antitrust authorities should be embedded in a broader regulatory strategy for the platform economy. A first step into this direction is the recently enacted Platform-to-Business Regulation (P2B Regulation). However, the regulation limits itself mainly to imposing transparency requirements for online intermediaries (e.g. digital marketplaces, search engines). It is a matter of debate whether this approach is sufficient or needs to be complemented by stricter rules addressing issues of substantial fairness in the platform economy.

II. Content moderation on social networks

Social networks such as Facebook, YouTube or Twitter have revolutionized communications by offering individuals a direct means of exercising their freedom of expression and obtaining information. At the same time, these new opportunities are being used for spreading toxic content, hate speech and extremism. Against this background, social networks increasingly engage in content moderation by downranking or censoring certain information usually based on the platform's "community standards". Through their content moderation systems platforms have an increasingly essential role in determining the limits of free speech and participation in the democratic debate.

In the past, content moderation was mainly a matter of self-regulation by platforms based on their based on their own sets of principles and rules. However, more recently there have been several initiatives to develop a regulatory framework at the national or international level for tackling harmful content. For example, the German Network Enforcement Act, which came into force in October 2017, obliges social network providers to block manifestly unlawful content within 24 hours of receiving a complaint. Other illegal content must generally be blocked within seven days. A similar approach is taken by the draft EU Terrorist Content Regulation, which was approved by the European Parliament in April 2019. The Regulation, if it becomes law, will require online platforms to remove "terrorist content" within one hour following a removal order from the competent national authorities. It has been criticized that the Regulation could lead to the arbitrary removal of lawful content and it remains to be seen whether the rigid one-hour timeframe will be upheld during the upcoming trilogue negotiations.

In July 2019, the French National Assembly adopted a new law against hate speech ("Loi Avia") which is based on a co-regulation model combining industry self-regulation with regulatory oversight by the "Conseil supérieur de l'audiovisuel". The French law could serve as a blueprint for a European regulatory framework for social media platforms. It might also feed into the international initiatives aimed at eliminating online terrorist and violent extremist content following the Christchurch Call to Action Summit in Paris.

III. Data privacy and data sharing

The General Data Protection Regulation (GDPR), which entered into force in 2018, establishes an EU-wide privacy framework and is a key element of the regulatory framework for the European data economy. While the GDPR is rightly regarded as a milestone in the field of data privacy law, it is a matter of controversy how the GDPR will impact the competitiveness of the EU in the beginning AI race. While some argue that strict privacy rules could be a competitive advantage, more skeptical voices fear that the EU might fall behind in the international competition for data-driven innovations because of its strict data privacy laws. In particular, it has been argued that the principles of purpose specification and data minimization and the limitations on automated decision-making could limit the use of data for developing AI systems and thus create obstacles for the implementation of national and European AI strategies. It remains an open question whether adjustments of the GDPR are necessary and politically feasible (e.g. regarding the repurposing of collected data and automated decision-making).

Looking beyond questions of data privacy, the regulatory framework for the digital economy should also take into account that large pools of data can become a barrier to competitors who want to enter the market. Against this background, it has been suggested that digital platforms and other players with access to large datasets should be obliged to share their data with competitors and public authorities. A possible way forward could be the introduction of a progressive data sharing obligation. Under such a framework, data-rich companies which exceed a certain market share could be required to provide competitors access to data required for the development of AI systems.

Non-personal data could be shared unchanged, personal data only after complete anonymization. Exceptions would apply to data that is subject to statutory confidentiality obligations (e.g. trade secrets).

B. Recommendations

I. Platforms

Several participants in the discussion expressed the view that transparency rules as laid down by the P2B Regulation are not sufficient to prevent platforms from imposing their "rules of the game" on traders and customers. It could be necessary to introduce more substantive fairness standards. Possible amendments to the P2B Regulation that could be envisaged include, for example, a prohibition of exclusivity clauses and best price regimes or a ban on self-preferencing by vertically integrated platforms. Moreover, legal and technical measures to facilitate data portability and switching between platforms may be required to avoid lock-in problems (e.g. data access via application programming interfaces). It was also suggested that the P2B Regulation might be complemented by several sector-specific regulations that address the specific needs of market participants in certain sectors (e.g. online retail, travel industry). In addition, some participants underlined the need for effective algorithmic auditing as the importance of algorithmic decision making (e.g. automated rankings, recommender systems) is growing in the platform economy.

Recommendation N° 1: Self-preferencing by vertically integrated platforms should be prohibited and platform operators should implement technical measures to facilitate data portability for personal and non-personal data generated on the platforms.

II. Content moderation

Regarding the topic of content moderation on social networks, there was a broad consensus that regulatory action is required to fight against the rise of hate speech in social networks. However, the details of a potential future regulatory framework in this area remained controversial. While the call for more transparency regarding opaque content moderation algorithms was generally considered laudable, it was debated whether the regulation of the financial sector offers a good model for social media. In particular, one may have doubts whether risk management systems for financial services can be compared with governance mechanisms for online speech that require a delicate balancing of fundamental rights. On a more general level, the view was shared that that a solution aimed at achieving a balance between the freedom of expression and other fundamental values will require a co-operation between regulatory authorities and platforms as "regulatory intermediaries". Moreover, it was suggested that the civil society should be involved when determining standards for content moderation. In this perspective, the rules applicable to content moderation could be co-designed by platforms, governments and civil society.

Recommendation N° 2: A European agency should monitor the social and economic impact of digital intermediaries in order to ensure that:
- platforms implement fair and transparent standards and processes;
- private actors, when using an algorithmic system at scale, specify the purpose of this algorithm, and the reasons why specific criteria have been selected to fulfil this purpose;
- private and public actors take adequate steps to ensure their system are non-discriminatory;
- platforms identify key people responsible for the systems they put in place.

III. Data sharing

Regarding the issue of data sharing, several participants pointed out that the practical implementation of a data sharing regime raises a number of technical questions that would need to be clarified (e.g. the format in which the data should be made available and whether access should be granted in real time via an API). Moreover, it would be necessary to specify the conditions under which access to data is to be granted and whether any compensation should be paid. In this respect, it would seem appropriate to distinguish between data sets which are based on substantial investments and data sets which have been generated as a by-product of digital services. There was a general consensus that there is no one-fits-all solution for data sharing. It might be necessary to distinguish between different categories of data (e.g. volunteered data, observed data and inferred data) in order to develop a balanced solution. Several participants also stressed the need to define clear rules for data sharing with public authorities in sectors of public interest (e.g. mobility, health). In this context, it was also argued that there could be need for regulating navigation apps like Waze which influence the flow of traffic and thus the use of public infrastructures.

Recommendation N° 3: For sectors of public interest (e.g. mobility, healthcare), as well as for cases where a market participant has a significant market share, a legal framework for a fair and balanced data-sharing regime should be developed that facilitates the development of new data-driven services. Both private and public actors would be subject to this regime.

In summary, it can be concluded that the outgoing European Commission has been working intensively on the issues outlined above. Major achievements include the enactment of the GDPR and, more recently, the P2B Regulation. Important initiatives have been launched regarding the update of European competition law rules and the fight against hate speech and extremist content. During the mandate of the incoming Commission, joint initiatives by France and Germany could provide an important input for necessary adjustments of the regulatory framework at the European level. In addition, Germany and France could take on a pioneering role in modernizing and harmonizing legislation at a bilateral level, as suggested recently in the Treaty of Aachen. The ongoing work towards a “Code européen des affaires” is a good example. It might be worth considering further joint initiatives regarding the three topics outlined above.