

The EU and its bid to regulate digital platforms

Vittorio Nosedà

Nctm, Milan
vittorio.nosedà@nctm.it

Nana Adjoa Asante

Nctm, Milan
nana.asante@nctm.it

The important role of digital platforms necessitates its discussion. As this new phenomenon becomes increasingly sophisticated, the need for laws to govern it becomes more poignant. In consequence, the European Union has taken various actions towards realising this aim of regulating the digital platform horizon. This article focuses on the debate surrounding this bold step of the EU, with particular focus on the arguments of scholars, positions of some EU member states, the position of the EU and its policy plan towards regulation of digital platforms.

Digital platforms play a key role in our day-to-day interaction; be it economic, social or political, they afford patrons the option of much smoother and simpler interaction with the rest of the world. Digital platforms as a technological innovation have injected substantial contributions into the global economy and have generated substantial legal issues resulting from their dynamism.

What is a digital platform?

The definition of digital platforms has not seen much clarity. Indeed, the EU Commission has not come to an agreement on a concise definition of digital platforms.¹ Inasmuch as definitions may be useful, it is important to consider the features attributable to digital platforms to get a fair appreciation of this important technological tool. A digital or online platform is generally considered as a two-sided or multi-sided medium where users are connected by a platform operator in order to facilitate exchange of information or resources. Significant examples are Alibaba, Amazon, eBay, Facebook and Uber.

Current EU regulation of digital platforms and the social landscape of digital platforms

Presently, within the EU, there is not a uniform legal regulatory framework specifically governing digital platforms. In principle, they are presently governed by standard and well-established EU rules relating to data protection, intellectual property, consumer protection, competition and intellectual property, etc.²

Within the EU, there is mutual agreement by stakeholders³ that the advent of digital platforms, despite numerous advantages,

poses myriad issues including actual/potential risks associated with unfair pricing, network effects,⁴ abuse of market dominance, infringement of privacy and display of illegal content.

The seemingly overwhelming question that arises is: how do we regulate these platforms?

'To regulate or not to regulate?'

There are views that digital markets are more regulated than analogue markets. This is based on the argument that, for instance, physical cash transactions are subject to less stringent measures than online transactions,⁵ thus buttressing the position that there is a need for better enforcement of existing rules within the new era of digital platforms. It is further opined⁶ that the digital market offers keen competition and, in addition, the financial and reputational incentives of the market are enough to ensure responsible use of data and creation of customer value, making further legislation obsolete.

On the other hand, there is the argument to 'score platforms before regulating them'.⁷ Thus, there is a need to gather factual evidence on specific concerns relating to digital platforms, which will inform the type of legislation to be adopted. Furthermore, there are suggestions for the need for specific regulation that targets evidence-based harm. This position is based on the risk of

premature intervention, which may harm the innovative character of digital markets. On the ground that digital markets are consistently birthing new business models that are not regulated, the argument is that there is need for tailored regulation for each business model.

Positions of EU member states

Germany

In March 2017, the German Federal Ministry for Economic Affairs and Energy published a white paper⁸ on digital platforms. In the white paper, Germany advocates for a 'made in Europe' approach as opposed to individual regulation by member states. Dissimilar from the EU, Germany advocates for the establishment of an appropriate general regulatory framework,⁹ including revision of existing competition laws to accommodate new antitrust threats.

Sweden and Italy

In a joint communication,¹⁰ Italy and Sweden express that a targeted assessment and response is more beneficial to the regulation of digital platforms. The position is in support of legislation targeted at specific regulatory lapses or legal uncertainties.

The Netherlands

The Netherlands expresses its position in a non-paper on the EU consultation.¹¹ The Dutch government is in favour of a tailor-made regulation to address case-by-case scenarios. The Netherlands is in support of government collaboration with platform operators to reduce the risks associated with the use of these platforms. The Netherlands also encourages the need for a clearly outlined purpose for regulations, giving member states the latitude to achieve these identified objectives in diverse ways.

United Kingdom

The UK's position is for a more flexible market that is regulated to accommodate the dynamism of the digital economy.¹² Principally, the UK, through its Competition and Marketing Authority, argues that the significant diversity of digital platforms makes it almost ineffective to have 'broad-

brush' legislation or economic regulation to govern this wide spectrum.¹³ The country highlights the need for targeted regulation for specific harm as opposed to premature regulation. The primary focus supported is for the enforcement of pre-existing rules governing competition as well as fundamental rights such as privacy, clear standards relating to fair pricing, data protection and consumer protection, improved free trade across borders and possible deregulation to encourage innovation and market penetration by smaller companies.

Brexit and the EU regulation on digital platforms

Digital platforms cannot be discussed without considering the issue of Brexit and its attendant consequences in light of the UK's position on EU regulation of digital platforms. The UK being anti-EU regulation of digital platforms creates a potential challenge for the UK when Brexit finally occurs; a less regulated UK digital platform market risks substantially less access to the EU market.

The EU position

In a bid to assess the role of online platforms, the EU has conducted various stakeholder consultations.¹⁴ The outcome of the assessment gave rise to the EU's issuance of a communication on Online Platforms¹⁵ in May 2016. This Communication, among others, identifies the need to monitor business trading practices, ensure fairness, safeguard innovation and tackle illegal content online. In the Communication, the EU highlights its decision to introduce regulations that are 'future-proof' and flexible, such as principles and guidelines on eID interoperability as well as to admonish EU wide self-regulation and co-regulation, and bolster existing EU regulations. The EU, through the Communication, stated that a targeted assessment will be made on business-to-business practices, made legislative proposals to review the Regulation on Consumer Protection Cooperation and submitted a review of the Unfair Commercial Practices Directive.¹⁶ Additionally, a review of other existing rules such as the EU telecoms rules, ePrivacy Directive and Audio-visual Media Services Directive was forecasted. In the Communication, the EU earmarked spring 2017 as the deadline for commencement of a

majority of these initiatives.

Consequently, on 10 May 2017, the EU, in its midterm review¹⁷ of its Digital Single Market strategy, revealed plans to introduce legislation by the end of 2017 to tackle the problem of unfair trading practices identified through impact assessment and introduce procedural frameworks designed to remove illegal content focusing on principles-based self-regulatory measures.

The EU's aim of principles-based self-regulatory measures is evidenced by recent stakeholder dialogues leading to the birth of the Memorandum of Understanding on the Sale of Counterfeit Goods over the Internet and Code of Conduct on illegal online hate speech.

Nonetheless, the EU posits that it is effectively utilising its enforcement powers regarding existing competition rules to deal with certain threats posed.¹⁸ An example is the EU decision dated 4 May 2017,¹⁹ which adopts commitments from Amazon not to enforce unfair clauses which mandate publishers to offer Amazon similar or better conditions offered to competitors as well as disclose alternative terms offered to Amazon's competitors.

Conclusion

From thorough assessment and stakeholder consultation by the EU, its calculated position is the introduction of new facts-based and targeted regulations combined with the reinforcement of already existing rules. This position is laudable, as it does not belong to any of the extremes of regulation or non-regulation but rather a targeted combination in order to produce effective results.

Notes

- 1 See www.lexology.com/library/detail.aspx?g=86673885-eb5a-443c-ab04-8a5f31c1e060 accessed 21 August 2017.
- 2 See www.kwm.com/en/it/knowledge/insights/online-platforms-and-eu-regulation-20160620 accessed 21 August 2017.
- 3 Reports of various stakeholder consultations by EU, <https://ec.europa.eu/digital-single-market/en/consultations> accessed 21 August 2017.
- 4 Situation where a good or service becomes more valuable due to increased usage.
- 5 See <https://ecommerce.blogactiv.eu/2016/01/22/platform-regulation-new-rules-or-strengthened-existing-ones> accessed 21 August 2017.
- 6 Joe Kennedy, 'Why Internet Platforms Don't Need Special Regulation', Information Technology and Innovation Foundation (ITIF) report, 8, available at www2.itif.org/2015-internet-platforms.pdf accessed 21 August 2017.
- 7 See <https://medium.com/@sorianotech/how-to-regulate-internet-giants-348e44648df74>.
- 8 See www.bmw.de/Redaktion/EN/Publikationen/white-paper.html accessed 21 August 2017.
- 9 See www.insidetechnica.com/2017/04/10/german-ministry-for-economy-publishes-a-white-paper-on-digital-platforms accessed 21 August 2017.
- 10 See www.government.se/opinion-pieces/2016/05/sweden-and-italy-united-for-a-more-competitive-and-digital-europe accessed 21 August 2017.
- 11 See <https://zoek.officielebekendmakingen.nl/blg-661677.pdf> accessed 21 August 2017.
- 12 See <https://engage.number10.gov.uk/digital-single-market> accessed 21 August 2017.
- 13 See www.gov.uk/government/speeches/alex-chisholm-speaks-about-online-platform-regulation accessed 21 August 2017.
- 14 See <https://ec.europa.eu/digital-single-market/en/consultations> accessed 21 August 2017.
- 15 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Online Platforms and the Digital Single Market Opportunities and Challenges for Europe (COM (2016)288).
- 16 *Ibid.*
- 17 Commission Staff Working Document Accompanying the Document Communication from The Commission to The European Parliament, The Council, The European Economic and Social Committee and The Committee of The Regions on The Mid-Term Review on The Implementation of The Digital Single Market Strategy a Connected Digital Single Market for All (SWD/2017/0155 final).
- 18 See www.europa.eu/rapid/press-release_MEMO-17-1233_en.htm accessed 21 August 2017.
- 19 See http://europa.eu/rapid/press-release_IP-17-1223_en.htm accessed 21 August 2017.