

Developers Alliance Standpoints On The Digital Services Act And The Digital Markets Act



The digital economy is an intricate ecosystem where many players, large and small, rely on each other to be successful. Rushed and faulty regulations risk to inadvertently damage many small companies, erase consumer value, and depress the EU economy for years to come.

Founded in January 2012, the Developers Alliance is a global industry association that supports software developers as entrepreneurs, innovators, and creators.

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Digital Services Act

The revision of the e-Commerce Directive represents the right moment to ensure an updated harmonized legal framework for online content. It should preserve the core principles that enable the open internet and its history of innovation, while protecting fundamental rights, such as freedom of expression, and limiting illegal and harmful content.

A harmonized and clear EU framework for tackling illegal content

- The fragmentation of the legal landscape represents a huge challenge for online platforms. Content that is legal in one Member State may not be lawful in another. The DSA should provide the appropriate harmonized governance framework at the EU level to tackle this.
- The notice and action mechanism is very important.
- The updated liability regime should be clear about the distinction between universally illegal, locally illegal, and harmful-but-legal content.

Balancing free speech while addressing online harms

- The current prohibition on general monitoring obligations in the e-commerce directive must be maintained and the “notice & action” mechanism should be the norm.
- General monitoring of user-generated content would require widespread use of automated filtering tools. Freedom of expression and privacy would both be damaged.
- Legal obligations should consider technology limitations and be carefully shaped in order to avoid over-reliance on automation or mandated automation. Automated tools can indeed be efficient in detecting and removing known illegal content, but even the most advanced machine learning algorithms are still imperfect. In many cases the context has a determinant role in differentiating the content that should be tackled and human moderation is essential. False positives are inevitable as penalties rise.
- Not all online platforms can afford sophisticated tools and the resources that large platforms have. Their only recourse will be to disallow all user content.
- Besides a clear “notice & action” system, the new legal framework should provide incentives for online intermediaries to take proactive measures in content moderation.

Digital Markets Act

Regulations that target key digital players inevitably impact the entire digital ecosystem. The EU is heading down a path that will significantly impair the ability for EU SMEs to compete globally, while simultaneously forcing digital innovation offshore. The impact will ultimately be felt by all EU citizens, as the EU falls further and further behind the rest of the world.

A flawed approach to online platforms ecosystems

Regulatory coherence

- We don't see any evidence of a significant change within the online platforms ecosystems that would require a second regulatory intervention before evaluating the effects of the P2B Regulation.
- It is essential to correctly identify the problems and then apply measured and appropriate solutions. The EC consultations presented a series of situations specific to certain companies or occurring in certain markets/sectors. Competition policy is better suited to tackle such

issues, addressing anti-competitive behaviour of individual companies with different business models.

- We ask for legal clarity on the scope of ex-ante rules, the new competition tool and the application of art. 101 and 102 TFEU. Proposals for lists of banned behaviours and the scope of intervention of the new competition tools are overlapping. Moreover, the proposals are interfering with current investigations and cases under EU Courts' scrutiny.

Understanding the dynamic competition in digital markets

- Start-ups can succeed without depending on a large online platform (e.g. verticals) - it simply takes more time, money and effort. At the same time, many startups would not have succeeded without the opportunities offered by large platforms.
- Disruptive competition is the key to success, and there's no need for special rules to ensure market entrance and growth in digital markets, only a less burdensome regulatory environment across the EU.
- Imposing rigid standards to a certain category of companies would lead to a disincentive for European ambitious startups and SMEs to grow and extend their businesses (stay under the threshold). At the same time, less restrictive rules outside the EU would encourage EU SMEs to migrate, and inhibit foreign investment in the EU digital sector.
- A regulatory intervention designed on the "essential facilities" model chills investment and is not appropriate for the dynamic digital markets. Another error is to set general rules starting from specific situations and interventions without concrete evidence of competition harm and market failure.
- Blanket bans on different practices will reduce incentives for further investing in innovation/ offers of innovative products and services within the EU jurisdiction. Reducing the footprint of the current online platform ecosystems in the EU will have a negative impact on many developer businesses.
- Extraterritorial regulation is a highly leveraged protectionist tool. Global companies will need to choose between abandoning the EU market to retain control of their existing non-EU business, or burdening their non-EU business with EU regulatory control. Isolating the EU from global networks will be the only way to prevent the cascade of overlapping regulation that will follow as other jurisdictions respond to this over-reach.
- The alleged issues and the proposed lists of principle based obligations and prohibited practices are stemming from a narrow perspective of digital markets specifics.

For example:

- The importance of network effects varies depending on the business models, and network effects can ultimately drive much more efficient outcomes for all participants.
- Self-preferencing, leveraging in adjacent markets, bundling and tying practices: Integration of different activities doesn't necessarily have a negative effect, on the contrary, sometimes it can increase the capacity of online platforms to offer diverse services to their business users (such as app developers), or to compete with each other. Users benefits from integration efficiencies are also to be considered.
- Data related measures: B2B mandatory data sharing and interoperability represent a complex issue. Many factors need to be considered, beyond technical impediments: data protection and privacy, cybersecurity, IP, and, not the least, user needs and preferences.

A wise approach to innovation and entrepreneurship

Strengthening the Single Market by

- cutting the fragmentation and the red tape
and
- creating a vibrant business environment across the EU (not with state aid and rent seeking regulations, but incentivizing entrepreneurship and innovation).

Case by case assessments guided by the basic principles of the competition policy and targeted remedies via codes of conduct with the participation of all players in the respective markets ('participative antitrust').



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