Regulation of the digital sector

With online platforms and markets enmeshed in our societies and economies, the need to revisit and update existing digital regulations is becoming increasingly apparent. The debate around these reforms in the US, the EU and elsewhere touches on fundamental questions of privacy, transparency and free speech and the dynamic between private firms and governmental oversight is complex. While online platforms play a salient role in daily life, both the US and the EU continue to operate with regulations dating back over a generation. As significant challenges regarding illegal and harmful online content and moderation liability continue to have real world effects today, both the EU and the US are currently considering precedent-setting updates.

Background: Existing EU and US digital regulations

The close trading ties between the US and the EU in the area of digitally enabled services have been key to the growth of the digital economy. With 450 million users, the EU is one of the most profitable markets for US tech firms. This has enabled the US to export information and communications technology (ICT) services worth US$31 billion to the EU, with ICT-enabled services potentially adding another US$196 billion. Digital regulation has proved challenging, however, as the seminal laws governing conduct and liability of online platforms in both the EU and US are over 20 years old, with few updates over the years. In the US, a crucial piece of governing legislation is Section 230 of the Communications Decency Act, passed in 1996. Section 230 consists of two primary elements: the first removing liability for third-party content on platforms and the second encouraging platforms to self-moderate. The regulation currently serves as a shield protecting major social media companies and online retailers from the obligation to moderate harmful or illegal content in a transparent way. The main EU legislative act governing digital services is the e-Commerce Directive adopted in 2000. Crafted to help online platforms expand without undue legal pressure, the main parts include limited liability for hosted content (meaning that companies are not required to remove content unless expressly informed of its illegal or harmful nature) and the prohibition of any obligation to monitor transmitted or stored content. Despite modifications brought about by the Directive on Copyright in the Digital Single Market and the Platform to Business Regulation, the key provisions of the e-Commerce Directive remain in place even as the digital environment rapidly evolves. Heralding a transatlantic ‘values-based global digital transformation’, the EU and US announced the creation of a joint Trade and Technology Council (TTC) on 15 June 2021. Working in parallel with a new Joint Technology Competition Policy Dialogue, the TTC creates high-level working groups on data governance and technology platforms, ICT security and competitiveness, and potentially disruptive emerging technologies, among other issues. The TTC is seen as a vehicle to push back against China’s growing tech dominance.

European Union position

In December 2020, the European Commission tabled two major pieces of legislation for consideration, the Digital Services Act (DSA) and the Digital Markets Act (DMA). Rather than replace the 2000 e-Commerce Directive, the package aims to modernise and homogenise the EU’s digital regulation framework to address its challenges. The DSA principally seeks to limit exposure to harmful or illegal content, such as hate speech, mis- and disinformation, or terrorist messaging. It would also mandate greater transparency on how online platforms moderate content or employ advertisement algorithms. Moreover, the DSA would implement a set of graduated requirements with an increasing scale of cumulative obligations for four categories of digital platforms based on their size and reach. The larger the platform, the more regulations and oversight the DSA imposes. Given their societal and economic impact, platforms with more than 45 million users (labelled as ‘very large online platforms’) must comply with the full range of requirements, including external risk auditing and data sharing with vetted researchers. These rules would complement the initiatives of the December 2020 European democracy action plan, such as the strengthening of the code of practice on disinformation with key online platforms. The DMA, on the other hand, seeks to expand...
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access for new companies to enter digital market spaces by addressing the anti-competitive practices of some of the very largest online retailers, or ‘gatekeeper’ platforms. Categorising these gatekeeper platforms by their financial turnover, number of active end users and business users, as well as scope inside the EU internal market, the DMA enumerates prohibited practices and flags others for further examination. Both the DMA and the DSA could potentially result in significant changes to anti-competitive and online liability requirements, and both impose fines for systemic non-compliance.

European Parliament role and responsibilities

The European Parliament has long called for comprehensive reforms on digital regulations. In 2020, Members adopted three resolutions based on reports from the Committees on the Internal Market and Consumer Protection (IMCO), Legal Affairs (JURI), and Civil Liberties, Justice and Home Affairs (LIBE), arguing that the principles of the e-Commerce Directives be maintained but heavily updated to reflect current realities. Parliament is now analysing the digital services acts to form its own institutional position. Both proposals are being dealt with in the IMCO Committee. In addition, Parliament will also be working on the e-Privacy Regulation on respect for private life and protection of personal data in electronic communications, to replace the 2002 e-Privacy Directive and clarify the General Data Protection Regulation (GDPR). Having been stalled in Council for four years, Member States agreed on a mandate for negotiations with Parliament in February 2021.

United States position

While there is growing bipartisan support for a reform of Section 230, there is a partisan gulf regarding potential solutions. Some Republicans allege that online platforms display political bias and repress conservative voices. Many Democrats on the other hand argue that online platforms do not do enough to moderate and take down harmful content, such as hate speech as well as mis- and disinformation, including on Covid-19 and election security. Without a viable legislative update from Congress and with Supreme Court Justices criticising Section 230’s inadequacies, federal agencies have spearheaded the push against the sway of domestic tech giants by targeting antitrust issues. Under former President Trump, the US Department of Justice (DOJ) and 14 states filed a lawsuit against Google in October 2020 arguing that the tech company utilises anti-competitive tactics to monopolise its search engine. In December 2020, the Federal Trade Commission (FTC) along with 48 states and territories sued Facebook over its earlier purchases of Instagram and WhatsApp, contending that Facebook limited access for competitors and presented artificially few alternatives for consumers. A federal judge dismissed the lawsuits against Facebook in June 2021, though the FTC is currently reviewing additional legal options. President Biden’s decision to name antitrust advocate Lina Khan to head the FTC signals continued regulatory pressure on US tech companies from the watchdog agency. Khan, an outspoken critic of the legal framework’s inability to curtail anti-competitive practices, received bipartisan support during her Senate confirmation process.

US Congress role and responsibilities

Congress remains the primary actor in crafting reforms to Section 230 or any additional digital rules. The disinformation campaigns surrounding the 2016 and 2020 US elections as well as the role of online platforms in the insurrection at the Capitol Building on 6 January 2021 have motivated lawmakers to update current regulations. Most visibly, congressional committees have repeatedly summoned big tech executives for public hearings. In the House, the Subcommittee on Consumer Protection, the Subcommittee on Communications and Technology and the Judiciary Committee lead the way on digital regulations and antitrust matters. In the Senate, most of the relevant hearings and legislation have been in the Committee on the Judiciary and Committee on Commerce, Science, and Transportation. In 2020, the House Judiciary Subcommittee on Antitrust released its report on the concentrated market power of major US tech companies. Building on this investigation, lawmakers in the 117th Congress introduced a bipartisan package of bills to reform anti-trust regulations. On 24 June 2021, these proposals were adopted by their assigned committee on bipartisan votes, despite fierce opposition from companies including Google, Amazon, Facebook, and Apple. If passed, the package would prevent companies from self-preferencing products on their platforms; make it harder for companies to buy out smaller competitors; and, most notably, allow federal regulators to divide large tech companies to prevent a ‘irreconcilable conflict of interest’ if their role as a platform operator overlaps with other business interests. Regarding Section 230, lawmakers have introduced a host of political messaging bills, with few viable bipartisan proposals. The notable exception is the Platform Accountability and Consumer Transparency (PACT) Act reintroduced in March 2021.