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Making European Union digital platform regulation a reality[1]

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Abstract

Over the last twenty years, the digital economy – driven primarily through large digital platforms that have been mostly unregulated to date – has brought enormous economic and societal benefits. The COVID-19 pandemic has accelerated this trend by making digital platforms central to the global economy and society and by highlighting further opportunities, but, importantly too, risks and threats. Digital platforms, representing the increasingly important and maturing online platform economy, are now being described as critical infrastructure and even utilities. Digital platform policy, particularly the future regulation of the large far-reaching dominant platforms, is a major focus of the European Union (EU) as part of its response to the COVID-19 crisis. The literature on platform regulation highlights two major themes that emerge concerning digital platform regulation, and that are consequently the focus of future regulation: competition and online content. This article presents research findings in these areas through a critical analysis of and reflection on emerging digital platform regulatory practices which are being progressed under the groundbreaking EU Digital Services Act and Digital Markets Act package. This includes assessing implications for national implementation, regulatory enforcement, and governance. A particular emphasis is placed on the Digital Services Act where there is less literature, knowledge, and experience on how to best regulate online content. In this context, the paper provides insights into how Ireland, where many of the large

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platforms are established and so is their de-facto regulator, is dealing with regulatory implementation issues driven by the EU.

Keywords: digital platforms, Digital Services Act, Digital Markets Act, multilevel governance, public administration, regulation.

Introduction

The rise of the digital economy and society is one of the defining features of the twenty-first century. While the digital economy refers to an economy that is based on digital computing technologies, it is increasingly perceived as interacting and conducting business through services and digital markets based on the internet and the World Wide Web. The digitalisation of the economy and society creates benefits and efficiencies, as digital technologies drive innovation and fuel job opportunities and economic growth.

Digital technologies affect societies and economies in many ways, including through new means of communication and collaboration; new products that feature a strong service component; the role of data as a driver of economic growth; the automation of tasks and decisions using artificial intelligence; and new business models, particularly online digital platforms. Digitalisation is therefore fundamentally transforming the way we live and work together. It has consequences for the well-being and cohesion of society, as well as deep impacts on businesses in all sectors, through effects on productivity, employment, skills, income distribution, trade, and the environment.

Over the last twenty years, the digital economy, driven primarily through digital platforms, that have been largely unregulated to date, has brought enormous economic and societal benefits. Digital platforms have changed the ways we shop, work, interact, and debate. They have changed the ways we think and perhaps even the ways we perceive ourselves.

Digital platforms are businesses that first and foremost are customer-facing companies the principal activity of which is to pair information gathered from users, both individuals and firms, with targeting sought by advertisers. Over the years, the platforms have widened their scope of activity and now operate in many spheres, including social media, search, and commerce.

These developments have led to the growth and dominance of a small number of digital platforms that are predominantly companies from the United States of America known as 'Big Tech' or the

'Internet Giants'. These terms refer primarily to Google, Apple, Facebook, Amazon, and Microsoft (GAFAM). GAFAM successfully use technology such as the internet, microchips, artificial intelligence, and other disruptive technologies – many of which were developed by others and acquired by GAFAM – as well as innovating their activities and business models.

A crisis often accelerates trends. The COVID-19 pandemic has done this through making digital platforms central to the global economy and society and highlighting further opportunities, but importantly too, risks and threats.

Digital policy is 'horizontal' as digital is increasingly an enabler that touches all policy areas. The COVID-19 crisis brought the effects of digital services/policy into even sharper relief by accentuating the dependence both individuals and businesses have on the digital economy, and particularly on the GAFAM digital platforms. The influence of digital services is permeating all aspects of society, including in areas such as education, online retail and business practices through remote working and online meetings facilitated by this relatively small number of digital online platforms through the services they provide enabled by their disruptive technologies. There is no indication that this dependency is significantly weakening since the pandemic.

Digital platforms, especially GAFAM, representing the increasingly important and maturing online platform economy, are now being described as critical infrastructure and even utilities. Platform policy and particularly the future regulation of these large far-reaching dominant platforms, under the European Union (EU) Digital Services Act and Digital Markets Act is a major focus of the EU as part of its response to the COVID-19 crisis.

Context

In reviewing the literature, two major themes that emerge of key relevance to digital platform policy and regulation are competition and online content, and it is these two themes that align with the regulation addressed in the Digital Services Act and Digital Markets Act package.

Notable authors include Khan (2017), Valetti (Kwoka & Valletti, 2021), Kwoka (Kwoka, 2015; op. cit.), Balkin (2021) and Yar (2018). On platform competition, their work highlights the current focus within competition and antitrust policy and regulation on consumer welfare leading to a loss of focus on market structure – which is amplified in the case of online platforms and has led to the growth of a small number of dominant digital platforms – and options on how this might be addressed. On platform content, the literature sets out the issues involved, including that the goal of content regulation should be to incentivise platforms to take appropriate responsibility for their content, and questions the current legal constructs in place based on the limited liability of digital platforms over the content on their sites, but does not set out theories or options to address this.

The EU Digital Services Act and the Digital Markets Act package aim to modernise the policy framework for online platforms, addressing legal gaps or perceived negative externalities that have arisen as the digital economy has grown across the EU over the last twenty years. As such, the Acts have the potential to address a wide range of issues from digital market competition to consumer protection and criminal law and, broadly, to online content regulation. Therefore, the Acts are likely to have a significant impact on the digital society and economy.

The Digital Services Act (European Commission, 2021a) seeks to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services. The Digital Services Act is a regulation rather than a directive. The policy context for the Digital Services Act is based on the eCommerce Directive (Directive 2000/31/EC), adopted in 2000, that sets the main legal framework for the provision of digital services in the EU (European Commission, 2020a).

There are two key principles contained within the e-Commerce Directive. The first principle is the country-of-origin principle. This, broadly speaking, means that online services established in the EU can only be subject to the legal or regulatory jurisdiction of the Member State(s) (MS) in which they are established. This allows online services established in Ireland, for example, to trade across the European Union in a relatively seamless fashion and has allowed companies to establish, grow and scale across the EU in an efficient and cost-effective way. This has taken on particular significance in digital markets because digital business models are typically large in scale but low margin, and country-of-origin control avoids duplication of regulatory costs which would be inefficient and damaging for such models. This principle has been a key enabler for the success of Ireland in foreign direct investment (FDI) and in attracting the large tech companies to establish their European headquarters in Ireland. The second principle is limited liability, commonly referred to as 'safe harbour'. This means that information society services providers are not responsible for the content on their sites and are purely 'mere conduits'. If, however, issues are brought to the attention of the information society services providers, notice and take-down measures should be in place as a self-regulatory measure.

Much has changed in twenty years. The digital marketplace has rapidly evolved, and rules need to be upgraded reflecting this, while maintaining these principles. Citizens are increasingly exposed to risks and harms online, from the spread of illegal activities, to risks to their fundamental rights, and other societal harms. These issues are widespread across the online ecosystem, but they are most impactful where very large online platforms (VLOPs) are concerned, given their reach. The Digital Services Act through new regulators, Digital Services Coordinators (DSCs), and the European Commission, requires all online platforms to create transparency reports that are publicly available as well as placing additional obligations on the largest online platforms, such as conducting systemic risk assessments, mitigating those risks and ensuring there is a crisis response mechanism in place. These obligations, among others, aim to ensure the platforms exercise greater responsibility for their content, while addressing specific content via associated sector/vertical initiatives such as the revised Audio Visual Media Services Directive (Directive (EU) 2018/1808), the regulation on illegal terrorist content online (Regulation (EU) 2021/784), the Copyright Directive (Directive (EU) 2019/790), etc. This is to ensure that their services contribute to an online environment that protects, empowers, and respects their users.

The Digital Markets Act (European Commission, 2021a) introduces rules for platforms that act as 'gatekeepers' in the digital sector. These are platforms that have a significant impact on the internal market, serve as an important gateway for business users to reach their customers, and that enjoy, or will foreseeably enjoy, an entrenched and durable position. This can grant them the power to act as private rule-makers and to function as bottlenecks between businesses and consumers.

The Digital Markets Act builds on the horizontal EU Platform-to-Business Regulation (European Commission, 2020b). It sets out harmonised rules defining and prohibiting those unfair practices by gatekeepers – the list of dos and don'ts – and provides an enforcement mechanism based on market investigations to ensure that the obligations set out in the regulation are kept up to date in the constantly evolving digital reality. Common rules across the single market, enforced by the European Commission, should foster innovation, growth, and competitiveness, and facilitate the scaling up of smaller platforms, small- and medium-sized enterprises (SMEs), and start-ups that will have a single, clear framework at EU level.

The Digital Markets Act too is a Regulation rather than a Directive. It reflects Ireland's national position that was submitted to the European Commission's public consultation based on the impact assessment for the Act (Department of Enterprise, Trade and Employment, 2021). The Act is applicable only to large platform companies that are identified through a designation process, and according to objective criteria set out in the Act, as 'gatekeepers'. They are companies that play a particularly important role in the internal market because of their size and their importance as gateways for business users to reach their customers. These companies control at least one so-called 'core platform service', such as search engines, social networking services, certain messaging services, operating systems, cloud computing services, online intermediation services, video-sharing platform services, web browsers, voice assistants, and advertising services, and have a lasting, large user base in multiple countries in the EU.

While being horizontal systemic legal instruments, the two Acts are primarily focused on the large digital platforms, particularly GAFAM. Google, Apple, Facebook, Amazon, and Microsoft form a significant component of the Irish economy, between 6 and 12 per cent of the country's gross domestic product on pre-COVID metrics, and presumably this proportion has increased (Ibec, 2021), and they have a significant reach in terms of content delivery. Therefore, future EU digital platform regulation is likely to have a significant effect on Ireland's digital economy, both in terms of the regulatory burden on the platforms that are established here as well as, most significantly, the regulatory role and burden on the state from public administration and governance perspectives. For all these reasons, the EU regulatory measures, and how to implement them well, are important for Ireland and its future socio-economic growth based primarily on FDI.

Research purpose, strategy and methods

The discussion in this article is based on a research study undertaken by the author in 2022/3. Building on the emerging themes from the literature review, the research critically analyses and reflects on the issues involved, from policy, regulatory, and governance points of view, to devise and assess the practical implications. The research is evidence-based and leverages theoretical frameworks from relevant academic sources as well as critical dialogues and effective enquiry with peers and stakeholders to explore their impact on future digital platform regulation.

The purpose of this research is to contribute to the nascent but growing academic and professional literature through a critical analysis of and reflection on emerging practical approaches to digital platform regulation being progressed by the EU under the Digital Services Act and Digital Markets Act package, with a particular focus on GAFAM. This includes assessing the implications for national implementation, regulatory enforcement, and governance, with a particular research emphasis on the Digital Services Act where there is less knowledge and experience on how to best regulate online content. In this context, the author provides a particular insight into how an EU Member State, Ireland, is dealing with regulatory implementation issues driven by the EU.

Given that the objective of the research is to provide a practical understanding of digital platform regulation, the overarching strategic approach chosen for the work is action research, specifically focused on the practical application and implications for Ireland of the Digital Services Act and Digital Markets Act. The approach taken for the action research was to set up an interdepartmental group (IDG) that would drive a practical application but that would also benefit from the research carried out during the process in terms of informing actions developed and taken.

The following two research methods were used for the action research:

- documentary research, underpinned by theoretical frameworks on multilevel governance policy implementation as the basis from which to position the Digital Markets Act and Digital Services Act from an academic/scholarly point of view;
- semistructured elite interviews, as a final important part of the action research design in order to generate further data and

evidence, to test the overall research findings and themes, and to help in formulating the conclusions of the research.

The research strategy and methods are complementary in considering the various aspects of the research, building on the literature review, so that the overall approach provides a rounded picture. The research findings are brought together and analysed in the context of considering the following research questions to formulate conclusions:

- How do the future EU regulatory approaches of the digital economy, as applied to digital platforms, conform to or differ from existing regulatory models, approaches, and practices?
- How do the future EU regulatory approaches to the digital economy, as applied to digital platforms, address the issue of maintaining a balance between the competing priorities of proportionate regulatory control and encouraging innovation and growth within the EU digital economy?
- What are the implications of these future EU regulatory approaches as applied to digital platforms for national regulatory public administration and governance?

Consideration of research questions

Fit with existing regulatory models, approaches and practices

In practice, EU policy-making is taking place in the context of multiple locations where different policy issues are addressed, ranging across levels from the local to the global, and relying on both formal and informal processes. European policy-makers must manage the connections between these different locations, and must sometimes make choices as to which is the most appropriate location from which to address a particular issue. This is particularly the case within digital platform policy and regulation given its global nature. The Digital Services Act and Digital Markets Act package will be a major new component of the multilevel double movement theorised by Karl Polyani (Zysman & Newman, 2006) requiring additional complex multilevel policy and governance implementation.

The increasing use of regulations through the regulatory EU policy mode ensures that EU legislation takes direct effect in all Member States simultaneously thus driving legislative harmonisation and strengthening European integration through the shared regulation between the European Commission and MS governments and so placing the EU in a stronger position on the global stage.

Finck (2017) examines digital data-driven platforms and their impact on contemporary regulatory paradigms with a particular focus on the European Commission's work on trying to make sense of digital economy evolutions to determine how to regulate digital platforms. Finck concludes that as command-and-control regulation as well as self-regulation raise significant problems in their application to the platform economy, coregulation emerges as an appropriate, adequate option to be considered (Finck, 2017). In this context, coregulation means various regulatory phenomena that have the regulatory regime in common, being made up of a complex interaction of general legislation and a self-regulatory body. It thus enables hybrids that do not meet the administrative and statute-based legitimacy of regulation, yet clearly perform some elements of public policy more than self-regulation (Finck, 2017). In essence, this regulatory solution creates collaboration between public authorities and private bodies to regulate private activity, while accounting for its particularities and safeguarding public-policy objectives. Acknowledging the complex interaction between the state, the market, and increasingly also the technology, coregulation reflects the spirit of new governance approaches that recognise the benefits of including a broader pool of stakeholders and decision-makers in the articulation, execution and evolution of policy, law, norm development, oversight and regulation. Coregulation has also been referred to as 'regulated self-regulation' emphasising the interplay between the regulator and the regulated (European Commission, 2016) and has been reflected in the 2022 Code of Practice on Disinformation (European Commission, 2022a).

The Digital Services Act and Digital Markets Act have the characteristics of most of the available regulatory types that have developed and evolved over the years to drive inclusive regulation. These regulatory types include:

- *principles-based regulation*, moving away from reliance on detailed prescriptive rules and relying more on high-level, broadly stated rules or principles to set the standards by which regulated firms must conduct business;
- *meta-regulation*, focusing very much on outside regulators, while also incorporating the insight from self-regulation;
- *self-regulation*, in which the regulatory target imposes commands and consequences on itself;
- (the original) *command-and-control regulation*, involving binding standard-setting, monitoring and sanctioning (Koop & Lodge, 2017).

The Digital Services Act will be a principles-based regulation instrument with some self-regulation along with meta-regulation and coregulation provided through the European Commission and any EU-level advisory body established. There will be major implications for several national regulators through the establishment of DSCs working in coherence with the European Commission and national competent authorities for the associated vertical/sectoral initiatives.

In contrast, for the Digital Markets Act, the proposed regulatory approach in including ex-ante 'blacklisted' practices on specifically named digital platforms will lead to command-and-control regulation along with meta-regulation thus encouraging self-regulation by the platforms, with the European Commission as regulator. Regulations like the Digital Markets Act with management-based commands are typically the most effective forms of meta-regulation, as they explicitly encourage efforts at self-regulation (Braithwaite, 1982; Bardach & Kagan, 1982). Under this approach, a government regulator would identify a problem and command the target to develop plans aimed at solving that problem, and then the target would respond by developing its own internal regulations. This self-regulatory response is often referred to as a process of regulating the regulators (Parker, 2002; Morgan, 2003).

Based on the overviews of the Digital Services Act and Digital Markets Act, it is clear the Acts fall into different paradigms of the four implementation paradigms set out by Matland (1995). The Digital Markets Act represents a low conflict–low ambiguity option with a requirement for administrative implementation with the required resources being made available by the European Commission. The Digital Services Act on the other hand falls into the high conflict–high ambiguity category and represents a symbolic implementation that will only succeed if there is a strength of coalition across the many actors involved at the horizontal and sectoral levels. In terms of Heidbreder's application of Matland's models to EU policy-making (Heidbreder, 2017), and taking that categorisation into account, it appears that the Digital Markets Act falls into category 1, while the Digital Services Act falls into category 4.

In essence, the key characteristic for implementation of the Digital Markets Act is systemic organisational harmonisation through state-building and conferring of implementing powers from the MS level to the EU level. This leads to a command-and-control vertical hierarchy with a high level of shared interest and low level of ambiguity. In this model, at the core of the EU, it is the single market that is predominantly implemented by harmonised EU law, which makes centralisation the most prominent implementation type. Essentially, the European Commission is empowered as the implementing authority and oversees the application of EU competition law.

Implementation of the Digital Services Act on the other hand is via networking and coordination through building a mechanism of intersecting formally independent bodies working very closely with the European Commission. This leads to interface management between administrative units with a high level of diverging interests and high levels of ambiguity. As loosely coupled implementation systems, networks are widely spread across the EU and, in this regard, the specific 'patchworked' and 'networked' character of EU policy-making is obvious.

The literature that speaks directly to the proposed network type of implementation defines networks narrowly as informal or formal loosely coupled actor linkages that lack a centralised organisational core (Heritier, 1996). Interestingly, the European Commission has in more recent years increased its efforts to improve implementation through such networks. It does so by facilitating direct horizontal cooperation between national administrative bodies without making any claims of centralising authority or adapting national implementation. The distinguishing feature of such cooperation is that the Member States or private actors oblige themselves to cooperate, primarily through the exchange of information.

The enforcement of the two Acts will lead to complex multilevel governance (MLG). For the Digital Markets Act, while the European Commission is the primary enforcer by virtue of its accepted competence for competition and antitrust under the Treaty, there is nevertheless a big role for national competent authorities. The enforcement of the Digital Services Act through the European Commission, the DSCs and other national competent authorities will lead to a particularly complex MLG. This aspect of implementation of the Digital Services Act when enacted will be a major challenge to get right at EU and MS levels, particularly for Ireland, reflecting the interaction needed of both the regulatory and intensive trans-governmentalism modes for success. There is some comfort and evidence, however, that this can work in practice based on the success of MLG established in the financial services sector after the global financial crisis and indeed, closer within digital policy, the MLG for the regulation of the telecommunications sector and market.

In addition, as already highlighted, the need for and the development of information and communications technology tools that enable immediate information exchange has been crucial for enabling such direct MLG networking (Heidbreder, 2013). For the Digital Services Act and Digital Markets Act, this is likely to be a new version of the Internal Market Information System (IMI) tool. The IMI is an IT-based network that links public bodies in the European economic area. It was developed by the European Commission together with EU Member States to speed up cross-border administrative cooperation. IMI allows public administrations at national, regional, and local levels to identify their counterparts in other countries and to exchange information with them. Pretranslated questions and answers as well as machine translation make it possible for them to use their own language to communicate (European Commission, 2021b).

In summary, it can be seen that the approaches to digital platform regulation adopt a full mix of tried and trusted models from command-and-control to principles-based regulation underpinned by complex multilevel governance arrangements between the European Commission, MS regulators, national competent authorities and EU-level advisory boards made up of MS representatives, reflecting the far-reaching cross-border nature of digital platform policy and regulation. The multilevel governance requirements of the Digital Services Act and the Digital Markets Act fall into very different categories of Matland's and Heidbreder's theoretical framework categories. For the Digital Services Act, in particular, this represents a very challenging implementation and enforcement scenario both at national and EU levels. It will be interesting to see as the digital platform MLG beds in, as has happened for the financial services sector and the telecommunications sector, if 'agencification' follows for it too.

Balance between proportionate regulatory control and encouraging innovation and growth

It is fair to say that it is a legitimate role of government to protect the public interest. It could be argued that governments to date have failed to establish sufficient independent oversight of digital platforms and in that situation the platforms have created policies that benefit themselves. The introduction of countervailing power and norms to balance the control of these companies is needed and can only be done through government oversight. In this context, it is important to state that the emergence at EU level of the new groundbreaking regulatory object of online platforms must be part of the global effort reflecting a fundamental reassessment of tech power and state sovereignty.

Regarding competition, if it is true that the economics of platform markets can encourage anticompetitive market structures, there are at least two approaches that could be taken. The major questions are to decide whether to govern online platform markets through competition or to accept that they are inherently monopolistic or oligopolistic and regulate them instead (Khan, 2017).

What the Digital Markets Act appears to be doing is a combination of these two approaches. This is achieved through a heavy hand on regulating the powers of gatekeeper digital platforms through its ex-ante approach and a lighter hand on addressing anticompetitive market structures. However, the Digital Markets Act does allow for the option to step up enforcement over time to address structural issues, including breaking down vertical integration within platforms (Khan, 2017; Kwoka & Valletti, 2021).

In essence, the Digital Markets Act is accepting that there are a number of dominant large platforms with significant network effects acting as gatekeepers. The Act sets out quantitative criteria to designate these platforms, which will be almost exclusively GAFAM, certainly initially. The Digital Markets Act will then regulate the practices of these gatekeepers through the list of dos and don'ts. The Digital Markets Act allows for this list only to be augmented over time. The penalties, remedies and enforcement articles of the Digital Markets Act are significant in that the European Commission can impose fines of up to 10 per cent of the company's total worldwide annual turnover and periodic penalty payments of up to 5 per cent of the company's total worldwide annual turnover.

The Digital Markets Act is light in addressing market structure. However, in the case of systematic infringements, the European Commission can impose additional remedies. These can include structural remedies, such as obliging a gatekeeper to sell a business, or parts of it, for example, selling units, assets, intellectual property rights or brands.

On the basis of the research carried out, it seems likely that as the Digital Markets Act is enacted over time, the scope might be increased to address this structural aspect more directly (Khan, 2017; Kwoka & Valletti, 2021; Finck, 2017). This would of course need international cooperation, in particular with the US and the Federal Trade Commission, and be contingent on US antitrust proposals, which on face value are more aggressive than the Digital Markets Act (Schnitzer et al., 2021), being successfully progressed through the US legislature.

Regarding online content, pressure for improved content moderation remains, and the need for more stringent regulation will become more urgent among legislators and policy-makers across the world, not least the EU, who want to have a say in how decisions are made and pursue regulation over online content.

The Digital Services Act has done this by preserving the principles of the eCommerce Directive for all platforms, while also putting more stringent rules in place for the larger platforms that provide greater reach to larger populations of users of their content. This reflects legislators and policy-makers taking into account a balance of the effects on innovation and competition from any regulatory effort on content moderation, as entry and expansion barriers can be created in what are already highly concentrated market structures.

This approach will enable policy-makers in each country to take collective action, whereby increased liability imposed in each jurisdiction may not strengthen the market position of large incumbents operating globally by raising the costs of participating in the market for new rivals. Legislators and policy-makers can thus work collaboratively with competition authorities and experts to take advantage of increased state regulation and market forces to create an adequate mix of incentives to effectively tackle illegal content online, while ensuring innovation continues.

Exempting new entrants from liability based on size appears to be a sensible way to move forward in this regard. This approach is used in the German Network Enforcement Law. It establishes fines of up to €5 million for internet companies with at least 2 million users that fail to remove manifestly unlawful speech within twenty-four hours of reporting (Federal Law Gazette, 2017), and addresses the issue of balancing control and innovation by exempting companies with fewer than 2 million users, while establishing significant fines for companies above that threshold that fail to remove obviously illegal speech. In this way, it takes advantage of both increased regulation on content moderation and competition and innovation policy, tackling online harms by allowing new entrants to face minimum government intervention and therefore less competition and innovation barriers. It remains to be seen, however, whether the German threshold and local regulation allow a new rival to obtain sufficient scale to challenge a major incumbent that is enjoying positive network effects and increasing returns to scale and scope, an incumbency advantage arising from data at a global scale with users in the tens of millions per country.

In essence the Digital Services Act recognises that the general exemption from liability in the eCommerce Directive should remain, while also recognising that such immunity should be subject to some limitations and norms, including enhanced notice and take-down procedures (Balkin, 2021; Yar, 2018).

Moving on then to consider the innovation and growth aspects of a regulated digital platform economy. Innovation is the practical implementation of ideas that result in the introduction of new goods or services or improvement in an offering of goods or services (Schumpeter et al., 1983). A common element of innovation is a focus on newness, improvement, and spread of ideas or technologies. Innovation is more likely to involve the practical implementation of an invention to make a meaningful impact on a market or society, and indeed not all innovations necessarily require a new invention. The growth and diversification of the digital platforms over the past thirty years has been very impressive in these regards.

Regulating competition issues relating to digital platforms raises a number of key challenges in designing optimal regulation. One of the major challenges of the competition aspect is deciding which firms to regulate. This challenge relates to determining which platforms should fall within the scope of the regulation and how to set designation criteria to capture these and only these. There is broad consensus that any regulation should capture the five largest technology platforms – GAFAM – but there is also debate about the next tier of digital platform firms, for example, Twitter/X, Booking.com, Spotify and Uber.

The Digital Markets Act proposal partly solves this problem by specifying a number of core platform services that the regulation will cover, such as online search engines or online social networking services. The Act also includes a quantitative shortcut to designation, whereby firms will be presumed to fulfil the criteria where they are active in providing specified core platform services and have sufficient end users and business users (European Commission, 2021a).

While this presumption is in principle rebuttable, it is expected to provide a simplified route to designation for the very largest digital platforms. There is flexibility within the Act to include additional platforms and services, even if they do not meet the quantitative criteria, but it seems unlikely that this will be an early priority. With this approach there appears to be a good balance achieved between proportionate regulatory control and still encouraging innovation and growth of platforms within the EU digital economy.

The second challenge is how much flexibility to retain in rule-setting. This relates to the extent to which obligations should be predefined in the legislation. The Digital Markets Act sets out a number of specific obligations that will be placed on the designated platforms. These range from relatively precise rules, such as a requirement not to use data received from business users to compete against them to more overarching requirements relating to interoperability and data portability.

The Digital Markets Act has the benefit of providing more clarity upfront and limiting the powers of the regulator. However, it risks being overly prescriptive and insufficiently flexible to deal with issues that may arise over time as the markets, and our understanding of them, develop further. After all, the rules that might have been imposed five years ago would almost certainly have been very different to those that are being imposed today.

Questions have also been raised as to whether complex provisions relating to data portability, data access and interoperability are well-suited to upfront obligations, as is currently intended in the EU. While specific provisions of this sort can be immensely valuable in opening markets, this needs to be done in a careful and targeted way if it is to be effective. For rivals to be able to use such data to innovate and create new services, they need to be provided on a consistent basis and directly transferable to third parties, with consumer consent. There is a risk that the obligations currently proposed by the EU are too wide-ranging and imprecise to be effective (European Commission, 2022b).

Another challenge is how to avoid unintended consequences, that is the challenge to ensure that regulation does not have unintended harmful side effects. The Digital Markets Act framework does not allow any significant role for firms to mount an ‘efficiency defence’ or ‘objective justification’ for breaching an obligation. The only bases on which an obligation may be suspended or exempted are public morality, public health, public security or endangering the economic viability of the relevant service in the EU.

Underpinning these challenges is the question of the right balance to strike between administrability and finding the perfect answer, noting that if ‘finding the perfect answer’ takes a long time, then it is in fact far from ideal. The Digital Markets Act approach could be seen as giving very substantial weight to administrability, in a context where the authorities are dealing with potentially highly litigious firms with deep pockets.

The Digital Services Act maintains the current rule of liability exemption. This liability system dates to the eCommerce Directive of 2000, and online intermediaries can benefit from the exemption if considered as ‘passive’ and not aware of illegal conduct happening on the platform. With the new Digital Services Act rules, more transparency will be provided; users will have the possibility of challenging platforms’ content moderation decisions; and very large online intermediaries will be subject to additional norms, obligations, and the need to provide a systemic risk assessment. These large platforms usually have a wide user base across Member States that, considering their crucial role as intermediaries, can cause harm to society.

The Digital Services Act also aims to improve transparency by introducing new liability obligations and norms on platforms to disclose to regulators how their algorithms work, how decisions to remove content are taken, and the ways in which advertisers target users (Balkin, 2021). Importantly, liability is enhanced for both the content that circulates online, for example, dangerous or harassing videos and posts, and fake news but also for products being sold in marketplaces, such as counterfeit goods and illegal or hazardous products. These products represent quite a big problem for brand owners, as has been recognised by the Organisation for Economic Co-operation and Development (2019).

Introducing liability to platforms is not problem-free, as changing the platform’s incentives might ultimately lead to unintended consequences. For example, online intermediaries might react to more obligations to moderate content and take down illicit products by passing these additional costs onto business users, through higher commission fees, or individual users, for example, with higher privacy costs/data collection (Lefouili & Leonardo, 2021). Further, platforms adopting a ‘hybrid/dual’ role and competing with third parties might become more active in their ecosystem, increasing the number of products that they sell directly. For example, platforms such as Amazon, Apple and Google operate in a dual mode, as they run marketplaces in which they also sell their own products. Whether this active role of a platform is socially desirable is not immediately clear.

Finally, the need for effective international cooperation is a significant final challenge. Since these platforms are global firms, with global systems, there are clearly significant risks associated with inconsistent or incoherent regulatory approaches across jurisdictions. To limit this risk, it is vital that there is as much international coordination and cooperation as possible (Schnitzer et al., 2021). Fortunately, this does appear to be happening, not least with the establishment of the EU–US Trade and Technology Council. This is designed to deepen the existing trade and investment partnership, strengthen joint technological and industrial leadership, develop compatible standards, deepen research collaboration, promote fair competition, and ensure the security of critical supply chains (European Commission, 2019).

In conclusion, it is useful to note that ensuring a modern, coherent, and well-resourced digital regulatory system is a central element in Ireland's competitiveness and overall economic success. The positive impacts of such an approach are relevant both for multinational corporations and for SMEs. Updated and uniform rules will help SMEs operate across the single market, helping scale-ups and innovators.

The Digital Services Act and Digital Markets Act regulations take a phased approach, increasing the number of obligations for the larger internet service providers. Accordingly, SMEs have fewer compliance obligations and are exempt from the requirement to create a compliance function within their own business. The benefits of that approach may be eroded if SMEs have to engage with more than one regulator for compliance with provisions.

In summary, innovation within the digital economy and digital markets is broadly assured through the systemic and horizontal nature of the Digital Services Act and the Digital Markets Act but balanced by the asymmetric focus of the Acts on the VLOPs and the dominant platforms, respectively, within the Acts. This ensures that smaller platforms can have the opportunity to enter digital markets by not being subjected to the dos and don'ts of the Digital Markets Act and are not overburdened by the content regulation aspects of the Digital Services Act. However, negative innovation aspects are also potentially possible due to this asymmetric approach as well as opportunities for large platforms to leverage their market power against their new regulators (Laux et al., 2021; Buiten, 2021; Cabral et al., 2022; Flectcher, 2023; Akman, 2022; Mazzucato et al., 2023; Lemley, 2021).

Implications for national regulatory public administration and governance

There will be a significant number of actors and bodies involved in the horizontal implementation of the Digital Services Act and Digital Markets Act, as well as the associated sectoral networks, nationally and at EU level. This complexity highlights the need for a suitable national coordination policy body to ensure effective collaborative public administration and governance.

The action research approach and associated learnings, driving decisions and actions from the work of the IDG, identified key issues from an MLG perspective that are important for Ireland as well as agreeing and representing these through national negotiating positions on the package and anticipating, planning, and securing government agreement on the major aspects of national implementation.

The direction provided by the IDG, guided from the beginning through critical dialogues and effective communication with stakeholders underpinned by the academic theoretical frameworks, has been key in achieving significant outcomes that met the national strategic principles for the Acts. As a national forum, the IDG has been effective through the active participation of the senior practitioners in identifying important concerns on both packages that framed the national negotiating positions for both the Digital Services Act and Digital Markets Act, but particularly the former, at the respective EU Council working parties and trilogue negotiations as well as influencing and planning their implementation.

In a short period, this enabled Ireland to successfully represent the unique Irish case with the European Commission and to build a group of likeminded Member States at senior official level in successfully influencing the negotiations at working party and ultimately at EU Competitiveness Council political levels.

A most significant principle, which the IDG has been extremely successful in winning at EU level, is the defence of the country-of-origin principle that is so important for Ireland. For the Digital Services Act, this has ensured that the acceptance of the country-of-origin principle, which has been the cornerstone of Ireland's enterprise policy for the attraction of FDI, is being maintained and that Ireland's reputation as the country of establishment for the majority of the major platforms through the systemic regulation by our DSC working in collaboration with the European Commission, following government decision, is not compromised.

Another significant outcome of this effective work on maintaining county-of-origin, is a coherence of approach between the Digital Services Act and the Digital Markets Act in the regulation of the VLOPs with the European Commission having a regulatory role in both Acts.

The administrative burden particularly for the Digital Services Act will be great for Ireland via its new DSC as the de-facto regulator of GAFAM for online content regulation in Europe, despite the collaboration in this regard with the European Commission for the VLOPs. Big challenges arise in terms of the necessary primary legislation being in coherence with the Online Safety and Media Regulation Act, funding requirements, and having the necessary skills and resources in place in the short-term timelines needed and for the longer-term steady state.

The regulatory impact assessment carried out by the IDG concluded that Coimisiún na Meán (Media Commission) is the most suitable of the existing regulators to take on the role of the DSC. This is because it will have a similar remit and functions, require similar skills and expertise for the conduct of those functions, and regulate similar cohorts of digital service providers. The selection of Coimisiún na Meán also meets the policy objectives set out in Ireland's new National Digital Strategy (Government of Ireland, 2022). The regulatory impact assessment's recommendations were instrumental in a government decision to designate Coimisiún na Meán as the DSC, the competent authority for the Digital Services Act. It is a significant achievement of the IDG that Ireland is the first EU MS to designate a national DSC.

For the Digital Markets Act, the work of the IDG enabled Ireland to make the case and get support for the case that, while the regulation aims to regulate competition in digital markets to ensure they are 'fair and contestable', that the implications of the Act cannot be underestimated. It imposes stringent obligations on large internet platforms designated as 'digital gatekeepers', with the ostensible goal of strengthening the EU digital single market by avoiding the internal market fragmentation that would come with a patchwork of national regulations. However, in doing this, the stringent regulations run the risk of deterring innovation for small, medium, and large platforms firms alike.

The initial requirements contained within the Digital Markets Act with its focus on designation of dominant platforms potentially represents a 'thin end of the wedge' approach and could lead over time to a build-up of measures of the Act's articles by addressing possible structural aspects of GAFAM and the threat this poses to FDI in Ireland.

While the European Commission will be the main regulator for the Digital Markets Act, in line with the approach taken for the related Platform-to-Business Regulation, the Competition and Consumer Protection Commission (CCPC Ireland) will be the national competent authority regulator, with a suitable business case for necessary resources at CCPC Ireland developed by the Department of Enterprise, Trade and Employment in collaboration with CCPC Ireland as the basis for work with the Department of Public Expenditure, National Development Plan Delivery and Reform to identify, estimate and negotiate a resource plan for CCPC Ireland.

The semistructured elite interviews carried out with very influential senior stakeholders and practitioners in affected government departments from the IDG, the European Commission and platform company representatives provided views that were very consistent across the interviewee cohort. The reason for holding 'elite' interviews with senior practitioners from both the government implementor perspective and from the digital platform receiver perspective was to ensure rounded and balanced research data and findings in order to provide an inclusive and holistic set of themes. Analysis of the interview content highlighted four themes for reviewing the workings of the IDG and moving forward on active implementation of the Acts. The themes ranged from the overall high-level challenges involved which centred on the major networks to manage and coordinate both at the national and EU levels; national governance, particularly on the workings of the IDG itself and how it should evolve; the need for evolving involvement of the important stakeholders over time, particularly the industry itself and the regulators; and to the role of the central government departments and the political system that have already proved beneficial. The significant challenge of timely resourcing of the regulators with talent having the necessary skills cannot be underestimated.

The findings and themes confirm that the work of the IDG focused and progressed key national strategic principles needed for the Acts, and also echo and anticipate the multilevel policy and governance implementation challenges that lie ahead for the IDG working with the Senior Officials Group on Digital Issues as its work develops with the Department of the Taoiseach, Department of Public Expenditure, National Development Plan Delivery and Reform, and the political system through the Cabinet Committee on Economic Recovery and Investment.

Looking forward

It is recognised and recommended that the IDG, working with the Senior Officials Group on Digital Issues, evolves into a wider national forum involving a wider stakeholder base over time as work moves to active implementation of the Digital Services Act and Digital Markets Act packages. This work, if carried out well, will ensure that the socio-economic opportunities from this increasingly important policy area are captured for Ireland's benefit into the future as well as ensuring that the rights of users of the platforms are protected through effective proportionate regulation and without reputational damage to Ireland.

In summary, there will be a very significant administrative burden, particularly under the Digital Services Act, for Ireland via its new DSC as the de-facto regulator of the GAFAM for online content in Europe, despite the collaboration with the European Commission for the VLOPs.

However, Ireland is well-placed due to the early government decision on designation of its DSC, the first EU MS to do so, demonstrating commitment to the effort ahead. The significant challenge of having the necessary legislation in place and in coherence with the Online Safety and Media Regulation Act has been achieved. However further challenges remain, including the necessary funding requirements; and having the appropriate skilled resources in place both in the short term and for the longer-term implementation.

The initial requirements contained within the Digital Markets Act, with its focus on designation of dominant platforms, potentially represents a thin end of the wedge approach and could lead over time to the build-up of the measures contained within the Digital Markets Act's articles which may affect GAFAM structurally and pose a potential threat to FDI in Ireland.

To conclude, it is useful to refer to the seminal thinking of Shapiro and Varian (1999) as a useful touchstone and insight to contrast with what is emerging at EU level:

> Whilst technology changes, economic laws do not and in that regard their rule of thumb for policy and regulation in the 'information sector' is simple. It is that Government regulation should focus on controlling genuine monopoly power when it

will not be eroded by competitive pressures whilst at the same time ensuring that regulation should also promote innovation and encourage new entrants to markets. (Shapiro & Varian, 1999).

Shapiro and Varian also expected regulation of the internet to increase, for it be an area to watch and that it would likely focus on the prohibition of suspect practices rather than breaking up of monopolies. It appears their thinking has come to pass.

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