DIGITECCS

Position about the EU Digital Services Act (DSA)
(submission to the open public consultation by the European Commission)

by Dalibor Vavruska, Founder, Digiteccs Associates, September 2020

Great societies are built on shared visions as well as on freedoms, which allow members to pursue the visions in the best possible ways. In the 1990s Europe proved its ability to establish global technology leadership in wireless communications through its vision-based decisive policy moves in a carefully selected area (GSM licensing), followed by light-touch regulatory approach in data and digital services.

*Much has changed since the 1990s. The World Economic Forum is now calling for a Great Reset post COVID 19, also due to environmental and other reasons. Data and digital services are now impacting individuals, economies and societies more than most other factors, and will continue to do so. COVID 19 has further accelerated this trend. Europe has meanwhile lagged behind global leaders in building major innovative digital industries. **We suggest the European Union (EU) to consider a more fundamental re-think of its policy on data and digital services, including Artificial Intelligence (AI),** to materially boost Europe's competitiveness in digital industries while addressing some of the most crucial choices that humanity has ever faced.*

*We believe that Europe faces a unique opportunity to show global policy leadership again - in data, digital connectivity, digital services, AI, cybersecurity and protection of society values in context of technological progress. **To achieve this, Europe in our view needs to see data and digital services as central for its future economy and society. It needs to refrain from addressing specific symptoms raised in the DSA open public consultation and other policy initiatives as standalone issues. Instead it should formulate a single comprehensive policy vison across all relevant fields of the digital economy, and follow up with well-thought-trough, practical and decisively implemented regulatory interventions in carefully selected areas.***

*Grounds for any industry regulation are usually based on the notion that different assets, products and services pose different threats to free markets, security, health, environment or society values; hence they require different kinds of policy intervention. We believe that the same logic should apply also in the digital world. **Subsequently, we are proposing a tiered policy framework, in which the level of regulatory interference will differ for different types of data and digital services.***

All-reaching digitalization exposes fundamental choices for humans

Technologies have already caused major economic, environmental and societal disruptions. Yet, the future impact of digital technologies is likely to overshadow anything that we have seen before. Digital services have so far been divided into consumer apps for personal pleasure, convenience and productivity, and business solutions. Humans still enjoy ultimate control over the main gateways to the digital world, i.e. smartphones and computers, for example via the switch off button. In each location, the physical world remains controlled mainly by local natural forces and humans.

All this will change. Increasingly, we are becoming dependent on digital services. They will not only drive our economic growth, societal changes and sustainability, but they will also play a crucial role in protecting humans against variety of existing and newly emerged threats, both exceptional and recurring. As remote machines connect deeply into our mind and learn to know us better than we know ourselves, the dependence of our decisions on them will become less optional. They will also learn to know our world, and enter it via robots, not always controllable by local humans. Different categories of digital services will converge into one all-reaching digitalization, spanning across the entire economy and affecting everyone's life, minds and bodies.

This could annihilate our society or take it to a superior level. The good thing is that our future is not predetermined. As in the past, it continues to depend on our conscious choices of which technologies we develop, deploy, constrain and potentially suppress, how we control them, whom and what we connect, in what way we govern ourselves and balance power with accountability, which society values we protect, and which ones we knowingly forego. EU's legislative initiatives including the DSA will therefore play an important role not only in shaping the European markets, but also in shaping the future of humanity itself.

Key challenges of digitalization

We believe that the future European society must not only be fair, efficient, productive, pleasant and sustainable, but it must also offer a sense of freedom, accountability and purpose to all its citizens. In respect to data and digital services we see the following key challenges, which may warrant fundamental policy interventions.

1. **Trading with data and digital assets often lacks transparency**. Consumers are sometimes under pressure to accept deals that they do not fully understand. The aura of innovation sometimes gives digital companies the ability to define their own markets, for example by determining which transfers of data constitute economic transactions and which do not. This may give them regulatory and tax advantages.

2. Such a lack of transparency together with major scale economies in data and digital services may potentially lead to **excessive market power of the leading digital service companies,** and hence distortion of competition. Interestingly, such scale economies have been driven not only by technologies themselves, but also by

regulations such as net neutrality, along with acquisitive expansion of the leading tech companies.

3. Digital solutions may disrupt local markets for goods and services, as well as the labour markets, **displacing people and concentrating productivity gains in a narrow group of companies and industries.**

4. As digital technologies are gaining scale and alternatives are being phased out, the **use of some digital services and AI may become effectively mandatory**. This may among others take important options away from people, including our ability to deal with human counterparts on certain issues, while enabling potential large-scale surveillance and discrimination.

5. **Digital algorithms and AI can severely interfere with human life and freedoms** by determining our access to data, resources and restraining our options in the physical world, either directly, or via empowered humans. Such powers could also be abused by cyber criminals.

6. The perceived high quality of information and recommendations provided by the **dominant AI algorithms may attract individuals to consciously or subconsciously use AI to drive their personal decisions to an extent when they expose themselves to risks of manipulation, addiction, and ultimately undermine their free will and cognitive abilities, the key prerequisites of liberal democracies.** The reasons for manipulation by AI may range from financial, commercial and political up to criminal, or there may be no specific reason at all. Manipulation would usually involve AI intentionally or excessively promoting false, misleading, misinterpreted, biased, imbalanced or intentionally omitted information, possibly also lending credibility to such information.

7. **Big data may lead to unprecedented concentration of power, often without accountability**, which opens opportunities for potential discrimination, manipulation, data abuse, criminal activities, suppression of freedom and democracy, economic oligarchy, up to changes in geopolitical and military balances. This is further complicated by the fact that digital services are often offered through business models with seemingly 'free' services, which are difficult to regulate due to their popularity and lack of transparency.

8. **Silicon technologies and biotechnologies will ultimately converge**, giving some individuals unique physical and mental powers. This may have major implications for society.

DSA must not attempt to regulate the digital service markets in their historical shape; it should set principles for regulating future markets

Digital services have been historically developed in three distinct categories:

1. **Platforms and applications, which consumers use voluntarily for their pleasure, convenience and productivity**. This includes messaging, social networks, online media, games, digital music, video etc. Key players include Apple, Google, Facebook, Tencent, Netflix etc.

2. Existing companies and governments have also used **digital technologies to innovate and boost the efficiency of their operations, products, services and customer interaction**. Examples range from corporate IT systems, car electronics to call centre robots or e-government. Such solutions are often imposed on employees and customers for the sake of efficiency. They are provided by companies such as Microsoft, Oracle and SAP, other ICT companies or in-house resources.

3. **Consumer digital services have also been developed to organize the physical world more efficiently,** e.g. in delivery of physical products, arranging transportation, accommodation etc. The consumption of such services has been largely voluntary, driven by convenience and price. However, market concentration may later restrict consumer choices by supressing alternatives. Examples include Amazon, Alibaba, Uber, Airbnb and local alternatives.

We believe that the future structure of digital service markets will be much different than their current structure. Therefore, the EU should refrain from focusing on specific issues and specific markets without setting overriding policy principles for the digital space as such. As an analogy, let's consider the smartphone, which integrated multiple consumer services such as calling, messaging, content access, photography etc. The relevance of the legacy services such as landline telephony, post, printed press or film photography has declined. Regulating these markets does not solve today's problems. Meanwhile, we may have underestimated risks in the digital and cyberspace, which may warrant new regulation.

Future technologies such as personal robots are likely to take service integration to a new level by providing consumer services, playing a role in organizing the physical world and cooperating with IT systems of multiple companies at the same time. The old market structure may no longer apply. As technology keeps progressing fast, policy principles designed today need to cover future markets as well.

Recommendation (a tiered approach to data and digital services)

We are concerned that the so called **'light-touch regulatory approach'** to data and digital services, which avoids addressing the underlying roots, causes and substance of the discussed challenges, and mainly focuses on the symptoms (such as illegal or unsafe products, 'fake news', platform gatekeeping, online advertising etc) **may not provide a robust enough framework to prevent possible current and future distortion of key European markets and to fully protect the EU's core values**.

We believe that the common denominator of the most important issues that DSA is aiming to address is linked to data markets, their framework, transparency and efficiency.

We therefore see the solution in designing policies in such way that data markets will be as transparent as possible, as free as possible, but subject to oversight in carefully selected areas, where such oversight is needed to protect health, safety and the EU core society values, including freedom and fairness. Legality and safety of products could for example be addressed through oversight of data about such products, 'fake news' could be addressed through oversight of data about official trustworthiness guidance. **We think that this can be best achieved if the EU pursues a tiered approach to data and digital services**.

Under such approach some data and digital services will be considered as needing special oversight for the sake of functioning of the economies, nation states, the EU and for protecting its core values. Such data and services may be subject to specific regulations and/or licensing. This means that harvesting, transmitting, storing, securing, processing and using such data may be overseen, and in some cases restricted, by regulatory authorities and/or licensed entities. A framework will need to be created in which all entities with lawful need to work with such data will be able to do so as smoothly as possible. The inclusion of specific types of data and digital services into this category would need to be further discussed, but possible examples may include personal identification data (including consumer credentials for the purpose of conducting transactions), data of private entities wishing to use regulatory regime for their own data protection, data linked to AI that is deemed as potentially risky, data linked to e-government, national health, crisis management, sensitive national infrastructures, national security, data linked to systemically important industries, public and product safety, official government guidance on trustworthiness etc.

Data and digital services, which will be considered outside the scope of needing special oversight, will be regulated relatively lightly, although some overriding principles such as GDPR may still apply when appropriate.

We recommend the EU to consider formulating a single comprehensive policy vision relevant across all fields of the digital economy, including the areas currently consulted in relation to the DSA. As part of such a vision we recommend:

a. **To establish a framework that defines at which point data becomes an asset subject to ownership rights (as opposed to public commodity), which data transfers constitute economic transactions (transfer of a valuable asset), and also define institutes of data harvesting, guardianship, disposal etc.** This should set boundaries for and boost the transparency of data markets, opening doors for their fair regulation similar to what is normal in non-digital industries. This is important for assuring that all parts of the European economy can benefit from the digital transformation and that potential adverse effects of market power concentration in big data and digital services can be successfully addressed.

b. **To establish boundaries to protect the EU's core society values in respect to digital technologies able to directly interfere with human biology,** such as digital devices implanted into human bodies.

c. **To establish boundaries to protect the EU's core society values in respect to decisions made solely by AI, mandatory use of digital technologies and use of digital technologies to exercise power over humans.** The EU may, for example, outlaw certain decisions from being made solely by AI and enforce some of the key functions of its member states to be fulfilled by humans as opposed to solely by digital services. The EU may also define new types of human rights enforceable against entities responsible for the operation of digital, AI and robotic systems.

d. **To designate certain data and digital services as needing special oversight provided by the EU, national states or their licensed entities,** to protect the EU, its core society values, citizens, nation states, markets, businesses, economic stability and environment.

e. **To acknowledge that some of the data and digital services needing special oversight may require imposing physical, geographical and technological constraints on their harvesting, transmitting, storing, processing and use.** Since future smart networks are likely to play an essential role in fulfilling a number of such requirements, it may be sensible to recognize a synergy between licensing operators of the European national smart networks and licensing of potential providers of data services needing special oversight.

f. **To establish a framework for AI-based technologies with power to potentially derive private and protected data from public and unprotected data, and the ability to materially and sustainably influence decisions of individuals, companies and other entities.**

g. **To encourage the use of data, digital services and AI in ways that promote the EU's sustainability objectives, and help to heal any divides in the society through promoting mutual respect and other core society values of the EU.**

h. **To assure that the EU's focus on freedom and human centricity linked values in the digital world is well understood by the public,** which can help to drive the popularity of the EU's digital policies.

We are not making any specific recommendations about the division of regulatory powers over data, digital services and AI between the EU and its member states. That said this is an area where a united approach by European countries can be particularly helpful in boosting competitiveness as well as well as promoting the values of Europe and its member states. **We therefore believe that a fundamental re-think of European policies on data, digital services and AI, followed by decisive policy interventions in carefully selected areas, would substantially benefit future coherence, prospects and prosperity of the European Digital Single Market and indeed economic and social prosperity of Europe itself.**