

# **European Responses to (US) Digital Platform Dominance**

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### Introduction

Europe positions itself as a leader in curtailing harms associated with the dominant digital platforms, yet the European Union's (EU) digital strategy aims to benefit from digital services economically. When European Commission President, Ursula von der Leyen, started her term in 2020, 'a Europe fit for the digital age—empowering people with a new generation of technology' was one of six policy priorities (EC, 2019a). The aim is to ensure that Europe has a choice to 'pursue the digital transformation in its own way' (EC, 2020b, 2). In this chapter, I consider tensions in European moves to govern digital platforms—among them, Google, Amazon and Facebook, using a selection of "the layers of governance relationships structuring interactions between key parties" (Gorwa, 2019, p. 2). My aim is to reflect on whether it is realistic to expect the EU to succeed in governing platforms in a way that is consistent with upholding public values such as privacy and freedom of expression. The question is: can public values "be forced upon the [commercial datafication] ecosystem's architecture" (Van Dijck *et al.*, 2018, p. 138) when this ecosystem is dominated by United States (U.S.) based platforms (de Streel *et al.*, 2019), even in the presence of some 7,000 online platforms in the EU (Fabo *et al.*, 2017)?

The first main section contextualizes the EU's approach, highlighting tensions in its economic and public values priorities. A discussion of contemporary initiatives in Europe to strengthen its governance of the digital economy follows, highlighting the positions of state and business stakeholders and the risk that a 'rush to regulate' will override citizen's rights. In the conclusion, I reflect on whether there are grounds for optimism that a distinctive European response to the dominant commercial datafication business model employed by the digital platforms will successfully avert the platforms' rights threatening practices.

## **Contextualizing EU Platform Governance**

A harmonized approach to the governance of platforms is favored on the global level (United Nations, 2019) and the EU's approach can be characterized as diverging both from neoliberal approaches in the U.S. and China's approach to market capitalism. The European approach typically is depicted as having achieved success in moderating market outcomes to better align with public values including fairness, inclusivity and rights to privacy and freedom of expression, but there is growing concern about harms in relation to digital platforms.

European policy on the digital economy can be traced to the European Commission's (EC) *White Paper on European Growth, Competitiveness and Employment* (EC, 1993). This noted that the EU's economy was challenged by a 'new industrial revolution' in which the U.S. had already taken the lead. The need to mitigate adverse consequences was recognized in view of the potential for "an increase in the isolation of individuals, intrusions into private life, and moral and ethical problems" (EC, 1993, p. 93). Protecting citizens and removing obstacles to the development of the EU's commercial market were to be achieved by opening up the market to competition, promoting universal service, setting common standards, protecting data and privacy and addressing the security of information and communication systems (EC, 1994). A series of e-Europe strategies followed (EC, 2015). Today's Digital Single Market Strategy aims to enable access to digital goods and services and ensure a harmonized regulatory environment that protects citizens and drives investment in digital technologies (EC, 2019c). A recurrent refrain has been that while "Europe has the capabilities to lead in the global digital economy ... we are currently not making the most of them" (EC, 2015, p. 3); and the market power of 'some online platforms' typically is noted (EC, 2015, p. 9).

Whether the digital platforms should be required to exercise ‘greater responsibility and due diligence’—a ‘duty of care’—as the subjects of ongoing policy debate (EC, 2015, p. 12). At the same time, the EU’s competitiveness is said to depend on investments in ‘big data’, cloud services and the Internet-of-Things. Enabling the ‘free flow of data’ (other than personal data) has been central to Europe’s digital strategy which is expected to achieve the “right balance between legitimate business interests and the fundamental rights ensuring the protection of personal data and privacy” (EC, 2016a, p.5). Despite the emphasis on achieving a balance, the policy discourse strongly emphasizes innovation, efficiency gains, competitiveness and consumer choice (EC, 2016c). Concern about the dominance of a small number of largely U.S.-owned digital platforms has been met with measures to remove barriers to the growth of the Digital Single Market so as to develop a leadership position in artificial intelligence applications and in the capacity to monetize data.

Since 2018, European moves to legislate—as in jurisdictions in other Western regions—have had an added sense of urgency, often linked to the widely reported Cambridge Analytica scandal when Facebook platform users’ data was given to third parties. This scandal and other concerns about the dominant digital platforms have led the EU increasingly to favor ‘digital sovereignty’; the idea that European users, as citizens or consumers—as well as companies—must have control over their data. In addition, populist moves in Europe and election interference have triggered a perception of ‘a problem’ around digital platforms with strong momentum towards new forms of platform regulation (Trust Truth and Technology Commission, 2018). Whether described as a problem of misinformation, harms to children or algorithm bias, an ‘information crisis’ has been associated with hyper-globalization, distrust of elite authority and growing economic and social inequality. In this context, the digital platforms are seen as escaping public accountability and threatening older business models, especially those of news producers, and as contributing to a loss of faith in democracy. Policy

and regulatory responses aimed at protecting freedom of expression and individual privacy in Europe are influenced by the ways in which tensions between economic value generation and public values and rights are managed through Europe's governance institutions.

### *Citizen rights – freedom of expression*

Freedom of expression is protected by Article 10 of the European Convention on Human Rights, the European Charter of Fundamental Rights and by the constitutions of the EU member states. Concerns about the spread of mis or disinformation and its impacts on the polarization of public opinion have increased, despite evidence in Europe that the spread of such information is more limited than is typically assumed in the press (Newman *et al.*, 2019). In response, the EC has defined disinformation as 'verifiably false or misleading information created, presented and disseminated for economic gain or to intentionally deceive the public' (EC, 2018e; 2019i: np) and put an action plan in place. The plan addresses online content and behaviour that are legal under EU law, but potentially harmful (EC, 2018a). Any moves to intervene in the market must be informed by a fundamental rights framework with restrictions on speech rights prescribed in law and only in pursuit of a legitimate aim which is "proportional and necessary in a democratic society" (HLG, 2018; Nielsen *et al.*, 2019, p. 10), and a code of practice on disinformation with reporting requirements for the platforms has been introduced (EC, 2018d).

Audiovisual media legislation also has been updated to address the hosting of illegal or harmful content, bringing video sharing platforms within the regulatory framework (EC, 2018c, 2018d). Other measures with a bearing on freedom of expression include those to promote "the availability and accessibility of the broadest possible diversity of media content as well as the representation of the whole diversity of society in the media" (CoE, 2018, p.

II.3). It has been observed, however, that these initiatives may encourage new platform practices of censorship or create incentives to host propaganda (Helberger *et al.*, 2019).

### **Citizen Rights - Privacy Protection**

Measures for data and privacy protection include the General Data Protection Regulation (GDPR) (EC, 2016b) and updated legislation regarding the processing of personal data (EC, 2016d). Despite the global attention received by the GDPR as businesses sought to comply with its provisions when it came into force in 2018, it applies only to certain kinds of sensitive personal data (EC, 2016b). Nevertheless, this legislation does aim to give consumers greater control over personal data by requiring explicit consent for use of their data. An Open Data Directive addresses the ‘free flow’ of non-personal data, encouraging platform self-regulatory codes of practice and there are some data sharing restrictions designed to respond to artificial intelligence and machine learning applications as they come on the market (de Streef *et al.*, 2019; EC, 2019g). Consumer rights legislation has been updated to emphasize data minimization, purpose limitation and protections for special categories of sensitive data (EC, 2019b), there is a new Electronic Communications Code of Practice (EC, 2019f) and, on the security front, the European Union Agency for Cybersecurity operates with a Competency Centre.

Notwithstanding these measures and their implementation at the member state level, evidence is accumulating that methods of obtaining platform user consent are insufficient. Privacy notices still lack clarity and the scale of data sharing has been found (in the U.K.) to be ‘disproportionate, intrusive and unfair’ and, in the case of non-special category data, ‘unlawful’ (ICO, 2019). As the UK Information Commissioner’s Office put it, “individuals have no guarantees about the security of their personal data within the [platform] ecosystem” (ICO, 2019, p. 23). The advertising industry claims, in contrast, that European legislation

designed to protect individual privacy is overly protective (Marotta *et al.*, 2019) and, so far, these platform governance initiatives do not appear to be suppressing the drive towards the growth of the platforms' commercial datafication ambitions.

### ***Competition Policy – Towards a Level Playing Field***

Competition policy plays an important role in the European digital platform governance mix. The Treaty on the Functioning of the European Union prohibits the abuse of a dominant position that may affect trade and prevent or restrict competition in the Single Market (EC, 2012). There is considerable equivocation about whether competition policy interventions are needed to address platform dominance. While it may be acknowledged that multisided platforms make it more likely that a platform owner will price at a level “higher than is socially desirable” (Evans and Schmalensee, 2014, pp. 11-12) and that there may be “room for intervention” (UK, 2015, p. 408), the focus has been mainly on examining potential harms to a representative consumer—there is no citizen and there are no politics in the predominant discourse.

There have been signs, nevertheless, that competition authorities in Europe are starting to take non-price barriers to competition into account especially when they involve privacy and data collection issues (CMA, 2019; Crémer *et al.*, 2019; Digital Competition Expert Panel, 2019; Just, 2018). Policy measures are under consideration to remove barriers to competition to achieve better data access for companies that use it as a resource to generate revenues and profits as well as to ensure that data can be ported from one platform to another so that consumers can switch to a different platform (Crémer *et al.*, 2019).

The EC has moved to strengthen competition policy enforcement and to introduce provisions for interim measures such as fines while lengthy proceedings are ongoing (EC, 2019d). It has used its power to fine Google €2.4 billion for abusing its dominant position, a

measure that is being contested by Google at this writing. In 2019, an antitrust proceeding was opened against Amazon Marketplace and its potentially anticompetitive use of commercially sensitive data (EC, 2019h). Consideration is also being given to whether digital platforms suspected of anti-competitive behavior should be required to demonstrate gains for their users if they expect to avoid punitive measures and concern is growing about the dominant platform role as ‘*de facto* regulator’ (Espinoza and Fleming, 2019). However, evidence of the decline of local and national traditional newspapers in Europe in the face of the dominant content aggregation platforms (Nielsen et al., 2019, p. 1), has yet to result in market intervention measures to secure a level competitive playing field or provide subsidies sufficient to sustain the industry.

### **Towards Improved Platform Governance**

The EC’s new Digital (or data) Economy legislative programme is intended to be ‘fit for the digital age’. It is acknowledged that ‘it may be too late to replicate hyperscalers, but it is not too late to achieve technological sovereignty in some critical technology areas’ (von der Leyen, 2019: np). This means ‘balancing’ investment in data flows and artificial intelligence applications including the Internet of Things and robotics with European privacy, security, safety and ethical standards as well as sustainability goals. A consultation on new legislation, from February 2020, aims to ensure that the EU’s digital strategy benefits all citizens, enables businesses to grow, innovate and compete on fair terms and to develop an open, democratic and sustainable society (EC, 2020a, 2020b, 2020c). A new Data Act to support a ‘data agile’ economy is planned alongside an updated artificial intelligence strategy and regulatory framework (EC, 2018b). The ambition is to ensure that Europe can “act and decide independently and reduce over-reliance on digital solutions created elsewhere” (EC, 2020b, p. 4). The European Commission is confident that since “many countries around the world



have aligned their own legislation with the EU’s strong data protection regime” (EC, 2020b, p. 6), it is well positioned to promote its model of a “safe and open global Internet” (EC, 2020b, p. 6).

The Commission also plans to bring forward a new Digital Services Act towards the end of 2020 as well as plans for a European Democracy Action Plan to address election integrity (EC, 2019e; Kayali *et al.*, 2020). The new legislation may maintain a conditional liability exemption for the platforms, but it also may introduce some modifications to recognize the platforms’ ‘editorial functions’ and market dominance. Provisions for governing algorithms used in automated filtering are likely to be introduced so that obligations to remove illegal content become binding, albeit with safeguards. The aspiration is to introduce a ‘simple’ set of rules for removing harmful content that is not illegal.

Within the existing accountability regime, Germany introduced the NetzDG (network enforcement law) in 2018 with a complaint management infrastructure. Reports indicate that more than 70 percent of complaints did not result in removal of content, but there are concerns about content overblocking (Heldt, 2019; Tworek and Leerssen, 2019). A new digital antitrust law is planned which is expected to emphasize access rights to ‘data relevant for competition’ (EAE, 2019; Schoening and Ritz, 2019). The German government favors the idea of ‘digital sovereignty’ and is promoting a federated European cloud platform to compete with Alphabet/Google Cloud, AWS and Microsoft’s Azure services (BMW, 2019) and to secure European data from reach of US law enforcement under the US CLOUD Act (US, 2018). In France, a new law aims to protect cultural sovereignty, copyright and minors (France, 2019; Mission Facebook, 2019).

By January 2021, the U.K. will no longer be bound by European Union legislation as its post-Brexit future unfolds. The Government’s *Online Harms White Paper* (UK, 2019b) which emerged following intensive debate (UK, 2019a, 2019c), contained a long list of

harmful (not illegal) content, often blurring the boundary between illegal and harmful content. At this writing, there is no clarity about how over or under regulation will be avoided or how independent of the platforms the government's approach to governance will be when it does not need to align with European Union policy. The expectation is that legislation will seek to clarify platform responsibilities to keep users safe online, with new codes of practice for online content management and expectations for balancing freedom of expression and safety, especially for children, with the platforms' economic interests. The media and telecommunications regulator, Ofcom, seems likely to be granted responsibility for any new forms of platform regulation (Hern and Waterson, 2020).

Overall, the predominant approach to European platform policy and regulation is to seek a balance between economic interests and public values using a combination of measures (Afilipoalie *et al.*, 2019), with the German approach gaining in prominence as Germany takes up the EU presidency in mid-2020 (Tambini and Moore, 2019). Some of its policy initiatives are clearly echoed in the 'European Strategy for Data' which was announced in February 2020 (EC, 2020a).

The industry response to EU-wide and member state governance approaches is suggested by the High Level Industrial Roundtable's vision of Industry 2030. This offers a model that aims to anticipate and develop skills, foster social fairness and well-being and to promote competitive and agile business. Claiming that "Europe risks falling behind in this transformation" (ERTI, 2019: 7), privacy and ethical issues are treated as a trade-off with corporate access to data. Some platforms, such as Amazon, argue that new platform regulations are "unnecessary, inappropriate and unworkable impediments to innovation" (UK, 2015, p. 54). Google supports the aims of Europe's digital economy strategy but argues "there is no evidence that specific online services have excessive market power" and that it cannot be open about the technical details of its algorithms for fear of security breaches (UK,

2015, p. 518). Facebook has called for regulation, but on its own terms and relying on its own ‘independent’ Oversight Board (Collins, 2020).

Some academic analysts are cautious about ‘duty of care’ approaches to platform governance arguing, for example, that problems associated with platform power have yet to be thoroughly investigated. Thus, the U.K. should stop moving along the road of a duty of care regime, as this will lead Britain to become what might be called a “Digital Nanny State”, undermining privacy and freedom of expression (Dutton, 2020: np). Instances of harmful (not illegal) online content should be treated as specific problems with multiple potential solutions and it is argued that this is not feasible when the government aims for regulatory simplicity and gives broad discretion to the platforms and to the state with the risk of chilling freedom of expression (Tambini, 2019; UK, 2015, p. 314).

### **Conclusion: Reflections on European Dependency and Grounds for Optimism**

In the 1990s, there were warnings about the harms linked to private sector digital gatekeeping in relation to the development of web-based portal services (Mansell, 1999) and, as McGuigan (2018, p. 6) points out, “the melding of behavioral science and data analytics ... is not a sudden and exogenous disruption”. The commercial logic of today’s digital platforms amplifies long standing concerns about digitally mediated means of linking suppliers with consumers or citizens using their data (Couldry and Mejias, 2019; Mansell and Steinmueller, 2020 in press; Zuboff, 2019). Criticism of the dominant platforms is increasingly visible in European policy discourses. For example, “clearer rules on the transparency, behaviour and accountability of those who act as gatekeepers to information and data flows are needed, as is effective enforcement of existing rules” (EC, 2020b, p. 5). In the domain of competition policy, “based on the single market logic, additional rules may be needed to ensure contestability, fairness and innovation and the possibility of market entry, as well as public

interests that go beyond competition or economic considerations” (EC, 2020b, p. 4). But, can Europe achieve sufficient leverage to achieve protections for public values in the face of its simultaneous support for commercial datafication strategies?

The policy discourse does acknowledge that digital platforms do not operate in a bubble of supply and individualized demand and that public values are not simply the aggregation of individual preferences. At the same time, however, European legislative moves frame harms associated with the platforms in relation to consumers who typically are assumed to be sovereign and free to choose what they do online. Economic and public value considerations in relation to platform governance are treated as distinct, rather than as inextricably intertwined, issues.

There is a distinctive approach to governing the ‘European internet’ and its digital platform ecology and there are world-leading European moves to enhance individuals’ privacy protection. However, as geopolitical relationships change, these measures are unlikely to be sustainable unless the European approach is replicated, or at least respected, by the EU’s trading partners. In addition, many of the remedies under the ‘duty of care’ regime rely on digital literacy training and on burdening individuals with the problems created by digital platforms; they require people (including children) to empower themselves by enhancing their general and data science literacies (EC, 2020a). The EU’s recognition of platform-related harms risks becoming a justification for state control that infringes on people’s rights and freedoms (Kaye, 2019; Rozgonyi, 2018). It is fostering a “spiral of privatized regulation” with a mix of self-regulation with some state oversight (Helberger *et al.*, 2018; Wagner, 2018, p. 223). EU policy does not seek to suppress the advertising-supported drive towards commercial datafication as the dominant platform business model. What can be priced, quantified and calculated in the marketplace is privileged, although there are exceptions. For example, a Dutch court has ruled that the use of artificial intelligence and

automatic surveillance systems to detect welfare fraud violates human rights and has banned the practice (Henley and Booth, 2020).

A more radical approach will be needed if Europe is to safeguard its public values in the face of U.S.—(and Chinese)—owned platform competition. In encouraging EU-wide platform champions as envisaged in the proposals for legislative measures from 2020 onwards, e.g. the federated cloud proposal—the policy framework promotes business models similar to those employed by the now dominant platforms, even if they do comply with data and privacy protection legislation and put ethical codes in place. Many features of the EU’s governance arrangements are complicit in perpetuating exploitative business practices. A more proactive approach to tackling the risks and harms associated with the dominant platforms in a way that respects public values is unlikely unless it emerges from a denaturalization of the norms that legitimize commercial datafication practices (Cammaerts and Mansell, 2020). Achieving this will require a consideration of the limits of commercial data markets and, in turn, the political will to privilege public values above, not just alongside, the EU’s economic goals. This seems unlikely despite a policy discourse that positions Europe as a global role model for the digital economy (EC, 2020b).

There may be scope for optimism, however. If European governance processes are opened to contestation over what European citizens value in their digital platform-mediated lives, the outcomes of consultation may generate opportunities to legitimize a shift towards the supply of platform services using models that do not rely on evermore intensive use of commercial datafication. Platform services have become infrastructural components in the lives of European citizens. This means that responses to their operations are needed before, not after, harms—around which there is an independent consensus—have occurred. A failure in Europe—as elsewhere—to devise alternatives to the commercial datafication model will mean that private (and state), not citizen, interests in the development of the EU’s digital

economy will be normalized as the priority. This will happen notwithstanding a policy discourse that calls for a balancing of these interests. If this process of normalization of commercial datafication strategies is not disrupted, the result will be inconsistent with the values of fairness, solidarity, accountability and democracy that have long distinguished European governance arrangements as compared to the U.S. and other regions.

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