

The French Presidency of the EU Council and the Digital Agenda: please, not “best before”

Annita Larissa Sciacovelli

*Adjunct Professor of International Law, University of Bari Aldo Moro.
Cybersecurity specialist.*

It is well known that the Presidency of the EU Council rotates among the EU member states every six months. As of January 1, until June 30, 2022, the President of the Council is Emmanuel Macron, the French president. In this article I would like to review some of the goals of the French Presidency in light to the main challenges facing the EU digital policy ahead.

According to the speech given on 19 January 2022 to the European Parliament, President Macron has stated his motto for this term: give power (strength), defend, and promote the values and interests of the EU; build and develop a shared European vision through culture, values, and common history to give a sense of belonging, and last but not least, recovery to enable Europe to support the ecological and digital transitions¹.

To prioritize the legislation on Digital technology, in his message as the President, he pushed for the adoption of the European Commission’s two proposals of December 2020: the Digital Markets Act and the Digital Services Act (DMA and DSA). They are part of a regulatory package of the online environment to bring EU to the forefront of the macro-trends that are reshaping the world economy.

Aim of these proposals is to create a coherent normative framework for the different types of digital platforms to deal with the new complex digitalized ecosystem and to promote the European digital sovereignty. We need to remind that these proposals come after the failure to prevent and limit (a) the market concentration, (b) the appropriation of user data on an unprecedented scale, (c) the infringements of protected rights, and (d) the endangerment of the integrity of public discourse².

In this article I would like to focus on the proposed legislation on DSA and DMA also in the international law context of protecting human rights and fair competition in the digital age as online platforms have become a core feature of the digital economy and society.

The UN defines the term ‘Digitization’ as the process of converting physical information into digital formats. It is commonly driven by technologies which focus on

¹ *The EU must focus on climate, tech and security, Macron says as he kicks off French presidency*, www.euronews.com/2022/01/19/macron-to-kick-off-french-eu-presidency-with-speech-to-meps-in-strasbourg; *Recovery, power, belonging: Macron details ambitious plan for France's EU presidency*, www.france24.com/en/europe/20211209-live-emmanuel-macron-presents-france-s-priorities-for-europe.

² *The priorities of the French Presidency of the Council of the European Union, December 9, 2021*; presidence-francaise.consilium.europa.eu/en/news/the-priorities-of-the-french-presidency-of-the-council-of-the-european-union. M. EIFERT, A. METZGER, H. SCHWEITZER, G. WAGNER, *Taming the giants: The DMA/DSA package*, in *Common Market Law Review*, 2021, p. 58 ss.

enhancing efficiency by automation of existing processes. Digitalization is the use of digital technologies to change an organization's business model, including creating new or improved ways of delivering services and the quality of what is delivered³. The UNEP Digital Transformation program provides a clear definition for Digital Transformation as applying data, digital technologies and solutions to activities, products, and services⁴.

The UN plays an important role also in the security and implementation of digital transformation. On the Seventy-third session of the General Assembly on the right to privacy in the digital age, few affirmations were made. Here are some relevant ones calling upon all States: «(a) To respect and protect the right to privacy, including in the context of digital communications; (b) To take measures to put an end to violations of the right to privacy and to create the conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law; (c) To review [...] procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data [...] in line with their obligations under international human rights law; (g) To consider adopting and implementing data protection legislation, regulation and policies, including on digital communication data; (l) To refrain from requiring business enterprises to take steps that interfere with the right to privacy in an arbitrary or unlawful way»⁵.

The UN also stresses importance to prioritize law transformation involving technical experts in the legislative process, updating domestic legal act on cybercrime, and developing legal mechanisms to control transnational crime in the digital domain⁶.

Recently, the UN Secretary-General has published two Reports, the *Roadmap for digital cooperation*⁷ and *Our Common Agenda*⁸, which define the digital world a global challenge in urgent need of specific commitments particularly on: data protection, application of human rights online, accountability criteria for discrimination, misleading content and regulation of Digital commons as a global public good. Aim of the Agenda is to prevent harms in the digital or technology spaces, in relation specifically to freedom of speech, to hate speech and harassment, to privacy including the “right to be forgotten” and the use of neuro-technology.

³ UNDP Digital Strategy, 2019: digitalstrategy.undp.org/assets/UNDP-digital-strategy-2019.pdf.

⁴ UNEP Digital Transformation, 2021 (This was done in the context of Environmental Digital Technologies; however, it applies to all Digital Transformation domains), www.unep.org/explore-topics/technology/what-we-do/digital-transformation.

⁵ UN General Assembly, *Seventy-third session on the right to privacy in the digital age*, 14 November 2018: daccess.ods.un.org/access.nsf/GetFileUndocs?Open&DS=A/C.3/73/L.49/Rev.1&Lang=E&Type=DOC.

⁶ UN General Assembly, *Seventy-fourth session on Countering the use of information and communications technologies for criminal purposes*, 25 November 2019: daccess.ods.un.org/access.nsf/GetFileUndocs?Open&DS=A/74/401&Lang=E&Type=DOC.

⁷ V. <https://www.un.org/en/content/digital-cooperation-roadmap/#>.

⁸ UN Secretary-General, *Our Common Agenda of 2021*, p. 33: www.un.org/en/un75/common-agenda.

A very interesting reference to the impact of the EU DSA has been done also by the UN Human Rights High Commissioner (Regional Office Europe) who stressed some serious concerns⁹. Here are a some: «(a) enhancing platform *transparency* as a pre-condition for improving accountability for individuals and the public at large, such as mandatory transparency reports; (b) avoiding extensive liability on platforms for content shared by users and requiring deletion of content within short deadlines, because obligations for general monitoring, often automatized, would likely lead to overbroad restrictions, while not necessarily catching the most problematic content; (c) refraining from empowering public authorities to demand takedowns (or other restrictions of expression) without prior judicial approval; (d) avoiding costly or complex measures that only large, well-funded companies can afford so as not to enhance the dominant position of large multi-national platforms and, finally, (e) aligning due diligence requirements with the UN Guiding Principles on Business and Human Rights»¹⁰.

The Council of Europe also dealt with some of the aforementioned aspects of digital economy. In its *Study on the impact of digital transformation on democracy and good governance*¹¹, it addresses mainly on the importance of data protection in the light of its large-scale personal data processing, as it may be a threat to freedom of expression, privacy, and human dignity, especially when it comes to profile and target vulnerable groups.

Moreover, in the Strategy paper dealing with *Democracy, human rights, and the rule of law in the digital world*, the Council of Europe, in the chapter *Ensuring online safety and security for all*, stresses the need to (i) promote the accession by a maximum number of countries worldwide to the Budapest Convention and the Convention for the Protection of Individuals about Automatic Processing of Personal Data (CETS No. 108); (ii) develop a strategy to counter violent extremism and radicalization on the Internet which covers all level of government, carried out in synergy with the Council of Europe Convention on the Prevention of Terrorism (CETS No.196) and its additional protocol (CETS No. 217); (iii) monitor action taken to protect everyone, in particular women and children, from online abuse, such as cyber-stalking, sexism and threats of sexual violence¹².

The forecited remarks are ancillary in verifying the respect of online users' fundamental human rights in the DSA proposal, which will modify the E-Commerce Directive 2000/31/EC. This proposal imposes a common regulatory framework to the

⁹ UN (Regional Office Europe) Human Rights High Commissioner, *Anchoring the DSA in Human Rights*: europe.ohchr.org/EN/Stories/Pages/digital-environment.aspx.

¹⁰ UN Regional Office if the Human Rights, Hight Commission, *Anchoring the EU's Digital Services Act (DSA) and the Digital Markets Act (DMA) in human rights*: europe.ohchr.org/EN/Stories/Pages/digital-environment.aspx. A. TURILLAZZI, F. CASOLARI, L. FLORIDI, *The Digital Services Act: an analysis of Its ethical, legal, and social implications*, 2022, ssrn.com/abstract=4007389.

¹¹ Council of Europe, European Committee on Democracy and Governance, *Study on the impact of digital transformation on democracy and good governance*, 2021, CDDG(2021)4 Final, p. 8.

¹² Council of Europe, Internet Governance – Council of Europe Strategy 2016-2019, *Democracy, human rights and the rule of law in the digital world*, 2016, rm.coe.int/internet-governance-strategy-2016-2019-updated-version-06-mar-2018/1680790ebe.

activities of four categories of intermediary services providers (intermediary services, hosting services, online platforms, and very large online platform) in order to harmonize the legislation on intermediary liability illegal contents and solve the problems of the inefficient supervision of online platform services and the inadequate administrative cooperation thanks to the designation of a Digital Services Coordinator by Member States which will be assisted by a European Board for Digital Services.

Nevertheless, the DSA proposal seems to lack a correct balancing of fundamental human rights as the content moderation misses 1) a clear normative definition of what is harmful and what is illegal (as it may be different in Member States' legislations) and 2) which procedures are to be applied depending on the type of content to be removed, also in the light of the misinformation risks. It is undisputed that a European regulation on DSA should be a comprehensive normative tool clear and usable by all the intermediary services providers.

As far as the DMA proposal is concerned, the objectives of the proposal refer to the «important benefits for users and contributed to the internal market by opening new business opportunities and facilitating cross-border trading»¹³. Moreover, it stresses the importance to avoid unfair behaviors by *large* online platforms vis-à-vis or between business users. This may happen because these few platforms act as 'gateways' or 'gatekeepers' having a major impact and substantial control over the access to the digital markets, leading to significant dependencies of many business users on them¹⁴. To avoid unfair behaviors, for example, Article 1 (*Subject-matter and scope*) of the proposal refers to (1) the need to ensure fair markets in the digital sector across the Union where gatekeepers are present, and to (2) apply the regulation to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union¹⁵.

As a matter of fact, the DMA proposal sets competition standards which regulates the way innovative companies can compete in the European market. The impositions of these standards - and the imposition of obligations and prohibitions due to their size and magnitude of operations - may indirectly single out large U.S. technology companies while leaving the European competitors exempt from such obligations¹⁶.

An example would be prohibiting 'gatekeeper' to combine data from its core platform services with personal data from any other services offered by it. Making it impossible for (say) Amazon to be able to combine data from its marketplace and form its (say) Prime Video platform to offer better and more personalized service¹⁷. This can be seen in Article 5 (*Obligations for gatekeepers*), in respect of each of its core platform

¹³ The European Commission, *Proposal for a Regulation of the European Parliament and of the Council, on contestable and fair markets in the digital sector* (Digital Markets Act), December 15, 2020, eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN.

¹⁴ *Ibidem*.

¹⁵ *Ibidem*.

¹⁶ A. PORTUESE, *The DMA and the EU's French Presidency: The Road to Precaution and Tensions*, in *Competition Forum*, 2021, No. 29, [competition-forum.com](https://www.competition-forum.com).

¹⁷ *Ibidem*.

services identified pursuant to Article 3(7), «a gatekeeper shall: (a) refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679»¹⁸.

Actually, the DMA proposal is raising regulatory tension between the EU and the USA, leading them to launch a Technology Competition Policy Dialogue, stating that «through the Joint Dialogue, and other cooperation efforts, the agencies are committed to ensuring and promoting fair competition and vigorous enforcement which benefits consumers, businesses and workers on both sides of the Atlantic»¹⁹.

To summarize, I would like to point out that President Macron has many good intentions and is determined to make the most out of his presidency term. One of the high priorities of his actions is the promotion of legislation on digital services and markets – DSA and DMA – but as it may be seen, the proposals raise concerns both in the fair competition and in keeping human rights in the digital age, especially with our US ally.

It looks like that the time has come for European approach to choose between precaution over innovation, between sovereignty over transatlantic cooperation, and protectionism over free digital trade²⁰. I suggest that before we run to legislate the DMA and DSA as President Macron pushes, we cut the link to the deadline of June 30, when his presidency is over, and request all public and private stakeholders to take a serious second look at the proposals and consider to shape an EU/global interoperable digital architecture fit for the complexity of digital challenges highlighted by the UN. In my view, it would be better to accept the UN Secretary-General invitation to participate to the UN Global Digital Compact, halting the Big Tech Companies to build their own ‘platform law’. Ask President Trump’s affair with Twitter, if you dare.

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¹⁸ *Supra*, fn 13.

¹⁹ Justice Department, *Federal Trade Commission and the European Commission Issue Joint Statement Following the Inaugural EU-U.S. Joint Technology Competition Policy Dialogue*, Press Release, December 7, 2021: <https://www.justice.gov/opa/pr/justice-department-federal-trade-commission-and-european-commission-issue-joint-statement>.

²⁰ *Supra*, fn 12.