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## **REGULATION OF ONLINE PLATFORMS, INTERMEDIARIES, AND MARKETS IN THE EUROPEAN UNION AND CHINA**

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### **Abstract**

*The EU and the PRC have recently introduced new regulatory standards governing specific online platforms, intermediaries, and markets. As an agenda to enhance digital governance, regulatory initiatives have been made on various frontiers governing digital services and digital markets to enhance both domestic and cross-border online transactions. These developments arguably enhance the relevance of the evolving European and Chinese regulatory frameworks as a stimulating subject for comparative law studies. The present paper examines the evolving key regulatory standards governing digital services and markets in Europe and the PRC and assesses their effectiveness in enhancing digital governance. The paper examines the specific regulations governing online platforms, intermediaries, and digital markets to determine the interests, obligations, and liabilities of key stakeholders. The paper assesses the effectiveness of newly introduced market regulatory standards to protect businesses and end users from the dominance of key online players. The paper argues the need for other key jurisdictions, including China, to*

*rejuvenate their domestic digital regulatory framework with reference to the evolving European regulatory standards. The paper concludes with an analysis based on the key findings of the paper and points out the referential utility of the European experience for prospective legal harmonization needs.*

### **Keywords**

Digital Services, Digital Markets, Online Platforms, Intermediaries, Regulation

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## **1. Introduction**

In recent years, the European Union (EU) has taken a more comprehensive regulatory approach to governing the development of its digital and e-commerce markets and protecting the interest of diverse stakeholders (Leistner, 2021). Among various regulatory initiatives that transcend distinct fields like the use of Artificial Intelligence (AI), emerging standards governing digital services and markets gain particular significance, due to their effective and well-balanced features in regulating intermediaries, online platforms, and markets, which could also serve as a frame of reference for comparative studies with the development of similar regulatory standards in other jurisdictions. Two European regulatory instruments that call for a closer introspection are the Digital Services Act (DSA), which aims to regulate the provision of illegal goods and services and harmful content online, and the Digital Markets Act (DMA), which seeks to address anticompetitive behaviour in digital markets. (Colomo, 2021). These two landmark instruments that took effect in November 2022 and May 2023 respectively are aimed at balancing the interests of various stakeholders like the intermediaries, platform operators, and users and ensuring fair competition in online markets<sup>1</sup>. Following the two EU enactments, efforts to introduce similar domestic legislation in other jurisdictions could also be witnessed.

After two decades of introducing the E-commerce Directive<sup>2</sup>, the EU has proposed a range of pioneering regulatory norms that calls for closer introspection to evaluate their characteristics and effectiveness in addressing various challenges and balancing diverse interests

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<sup>1</sup> The European Commission claims that the new regulatory standards have various balancing features including those that can rebalance the rights and responsibilities of relevant stakeholders according to various European values and goals. See European Commission, The Digital Services Act: Ensuring a Safe and Accountable Online Environment, available online at [https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment\\_en](https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en)

<sup>2</sup> See E-commerce Directive 2000/31/EC.

(Digital Europe, 2020). In addition, the new standards also merit due consideration for comparative studies with regulatory reforms in other jurisdictions. The paper aims to examine the evolving regulatory standards governing European digital services and markets to identify the distinct features and assess their effectiveness. The paper investigates some of the parallel regulatory standards emerging in People's Republic of China (PRC) to determine key differences and assess their potential to create a congenial environment for developing internal and cross-border digital services and markets. In particular, the paper seeks to examine the essential regulatory characteristics of the new DSA and DMA in the EU and compare it with some recent legislative initiatives governing intermediaries, online platforms, and competition in the PRC, with a specific reference to e-commerce intermediaries.

The paper begins with a brief discussion of digital transformation and the need to address the ensuing risks, followed by an exposition of the key characteristics and the scope of the new regulatory instrument governing online platforms in the EU and China. The paper systematically analyses the important legal obligations and liabilities imposed upon various intermediary service providers involved in rendering digital services in the EU and compares them with the relevant intermediary regulatory features in the PRC. The paper also reviews the second EU regulatory instrument, which aims to secure a fair and competitive digital marketplace in Europe, followed by an assessment of recent legislative standards of the PRC aimed at restricting anti-competition and monopoly practices. The paper adopts a primary analysis of the emerging legal standards in relevant jurisdictions and utilizes a doctrinal research method in analysing the fundamental legal issues and presenting the key arguments.

## **2. Scope and Objectives of the Regulatory Instruments in the EU and PRC**

To assess the key characteristics of the specific regulatory standards and understand how the EU and PRC laws balance the interests of diverse stakeholders, it is important to analyse and compare the objectives and the scope of application of relevant regulatory instruments in the two jurisdictions. Firstly, the objectives of the DSA are arguably aimed at benefitting two critical stakeholders in the digital markets, namely the online users and the intermediary services providers. Three specific goals, namely safety, predictability, and trust in the usage of online services with an ultimate motive of protecting fundamental constitutional rights, characterize the objectives aimed at online users. Ensuring the smooth functioning of the digital intermediary

services market is a key goal that will benefit intermediary services providers and other interested parties utilizing the relevant intermediary services (Heldt, 2022). The broader practical purpose of the DSA seeking to help diverse stakeholders is an essential legislative intent to be noted by any comparative study referring to the DSA. To achieve the key objectives, the DSA establishes clear rules prescribing specific obligations mandating due diligence for different categories of intermediary service providers. To enhance the smooth functioning of the market, the DSA also shields intermediary services from liability by granting conditional exemptions under certain circumstances. It can be seen as a delicate balance between attributing responsibility to intermediary service providers when necessary and, at the same time, protecting them from liability risks under deserving circumstances. Such a balanced approach can enhance accountability while facilitating the smooth functioning of the intermediary services market. Detailed implementing rules to secure effective enforcement of the new regulations are prescribed along with relevant cooperative and coordinative measures among enforcing authorities.

The DSA clearly articulates its scope of application based on the criteria of the presence of the recipient of the intermediary digital services within the EU and explicitly excludes services that are not intermediary. In addition to the intermediary services, some other key definitions under the EU DSA are significant to note. Before examining them, it is evident that certain terms are not originally defined under the DSA but are adopted from other legal instruments of the EU. For example, the DSA adopts the definition of the term ‘information society service’ from the EU Information Society Service Directive of 2015, where it is characterized as a service rendered from a distance using electronic means for remuneration, which was initiated upon the request of the recipient of the service in question<sup>3</sup>. The term ‘online platform’ is cautiously defined as a hosting service provider storing and disseminating information to the public unless the underlying activity is of minor and ancillary nature that is part of another essential service (Bertolini et.al., 2021). However, the relevant activity rendered as an integral part of the essential service in question should not constitute an attempt to circumvent the applicability of the DSA. This definition of an online platform accommodates the need to exclude relevant services from the scope of DSA in justifiable circumstances. Still, it ensures that this does not circumvent the underlying regulatory standards. ‘Online interface’ is widely defined. It includes all types of software, websites, and

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<sup>3</sup> See EU Directive 2015/1535, Article 1(1) (b).

general and mobile applications. The definition of ‘advertisement’ and ‘recommender systems’ under the DSA are also worth noting.

Unlike the EU, the regulation of intermediaries, online platforms, and markets in the PRC are governed by different legal instruments. One of the key instruments in this regard is the PRC E-commerce Law of 2019, which primarily aims at safeguarding the rights of all relevant parties in an e-commerce transaction. Seeking to achieve a vibrant and sustainable development of e-commerce in the PRC, the objective of the law also aims at regulating conduct and maintaining order in e-commerce markets. The PRC E-commerce Law primarily applies to online business activities of selling and providing commercial services with a clear exclusion of various other specific products and services<sup>4</sup>. In comparison with the EU DSA, the scope of application of the PRC is more limited. The PRC E-commerce Law defines three pertinent business terms namely e-commerce business, in-platform business, and e-commerce platform businesses. The definition of the e-commerce business mainly characterizes selling or providing services online using the internet or other information networks including in-platform businesses and e-commerce platform businesses. When an e-commerce business sells or provides services using an e-commerce platform it is referred to as an in-platform business. The e-commerce platform business is defined as the provision of services to parties involved in e-commerce trading to enable them to conduct trading activities independently<sup>5</sup>.

The PRC E-commerce Law categorically creates broad obligations not only on certain key stakeholders like the e-commerce business entities and its industry association but also upon the state and the state organs. Interestingly, the state is mandated to encourage the development of new forms of e-commerce businesses and innovative business models and to that extent promote e-commerce technologies and create favourable market conditions. In particular, the state is called upon to advance the development of an ‘honesty system’ in e-commerce and maximize the role of e-commerce in achieving diverse goals. At the same time, the state is required to take a balanced approach in the treatment of online and offline businesses and avoid any discrimination or restriction of market competition. The state is also given the mandate to establish an administrative

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<sup>4</sup> For example, the PRC E-commerce Law does not apply to the online provision of financial services or cultural products or online programs providing news, audio and video or online publications, or information network content services. See Article 2 of the PRC E-commerce Law 2019.

<sup>5</sup> Such services provided by an e-commerce platform business could include different degrees of support to an e-commerce business like matchmaking or providing information or online places of business. See Article 9, PRC E-commerce Law 2019.

system governing e-commerce with congenial collaborative characteristics involving diverse stakeholders including the state authorities, e-commerce businesses, and industry associations as well as consumers. E-commerce businesses have a broad set of general obligations including the obligation to adhere to a broad set of legal principles, laws, and ethics, the obligation to ensure fair competition and protection of various rights, including consumer and intellectual property rights (IPRs), the obligation to protect cyber security and individual information and the obligation to undertake responsibility toward products and services quality. The industry associations of e-commerce businesses are obliged to promote self-discipline and honesty in the industry, establish standards, as well as guide and supervise businesses to ensure fair market competition. After the 2019 regulation of E-commerce platforms and intermediaries, the PRC sought to regulate Internet platforms in general through two draft guidelines published by the State Administration for Market Regulation in 2021, which could be referred to as Internet Platform Categorization and Grading Guidelines (IPCGG 2021) and Internet Platform Responsibility Guideline (IPRG 2021).

### **3. Obligations and Liabilities of Platforms and Intermediary Service Providers**

In the EU, the provisions governing the obligations and responsibilities of the intermediaries are the core regulations emerging from the DSA. In this regard, the obligations and the systematic structure of the regulatory framework enumerating them are worth noting. Firstly, the DSA adopts an impressive design. A cascade of obligations is presented in the order of common obligations to all intermediary service providers, followed by additional obligations prescribed for specific types of intermediary services. The structural formation makes it quite pragmatic for the relevant subjects to discern their respective obligations, which could enhance compliance with the applicable regulatory standards. The provisions about the obligations of the intermediary service providers are presented in five specific parts of the DSA under Chapter 3. The first part prescribes a set of standard provisions governing all intermediary service providers, and these common regulatory standards should be of vital interest for other jurisdictions to note. The provisions mandate four specific obligations for digital intermediary service providers to comply. They include an obligation to add information on usage restrictions in their terms and conditions of service and an obligation to publish annual reports elaborating on the content moderation carried out. It also adds an obligation to establish a single point of contact and disseminate relevant information. Finally, an obligation is imposed on the service providers not

established within the EU to designate a legal representative in a member state where the service is offered.

In addition to the common obligations governing all digital intermediary service providers, the DSA prescribes three specific sets of provisions governing certain categories of intermediaries. The first set of specific provisions pertains to hosting services and online platforms, and the second set applies only to online platforms. The final set of specific provisions applies exclusively to very large online platforms (VLOPs) due to the magnitudes of their operations and the potential impact they may have on the offering of digital services in general. The division of the specific obligations into three different categories governing online platforms evidences the significance the DSA attaches to the role of online platforms in the digital services market.

Concerning the digital services rendered by the hosting entities, the first set of specific provisions mandates them to make available easy-to-access and user-friendly notification mechanisms<sup>6</sup> to enable others to report the presence of any potentially illegal content in those services. Moreover, the mandated mechanism should allow the notifying person or entity to submit clear and substantiated notices to determine the illegality of the reported content. The DSA prescribes a set of elements<sup>7</sup> that would typically be present in any such notification, which the service providers should note in designing the notification mechanism. Upon the receipt of the notification, the service provider is not only required to acknowledge but also take a prompt, diligent, and objective decision regarding the complained content. The service provider must inform the notifying party of such a decision immediately, along with information about the relevant redress mechanisms. In addition to the possibility of general persons or entities using the notification mechanism, the DSA confers special status to certain expert entities called the ‘trusted flaggers’<sup>8</sup> that have special competencies in identifying illegal content in alerting and seeking a response from relevant online platforms (Digital SME, 2020). Online platforms that receive

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<sup>6</sup> The DSA also requires that any such established mechanism should enable the relevant persons or entities to notify using electronic means exclusively.

<sup>7</sup> The relevant elements include the reasons for considering the content illegal, clear information regarding the electronic location of the content considered illegal, the name and electronic contact of the notifying person or entity, and a good faith statement confirming the accuracy and completeness of the content of the notice. See Article 14, para 2 (a-d) of DSA.

<sup>8</sup> The DSA prescribes the qualities required for any entity that could be conferred the status of a trusted flagger and the power to recognize the status of a trusted flagger rests with the public authority coordinating digital services in the relevant EU member states (referred as Digital Services Coordinator). See Article 19, para 2 (a-c) of DSA.

notifications from trusted flaggers are required to provide a priority treatment in promptly processing and deciding the relevant notices.

Any hosting service provider deciding to remove or disable access to the infringing content provided by the recipient of their services is obliged to inform the respective recipient about the removal or access blocking decision along with relevant reasons. The DSA also prescribes a specific set of information<sup>9</sup> that should form part of the statement of reasons furnished by the service provider to the concerned recipient, including information regarding available means of redress. In addition, the service provider is also required to publish its decision and relevant reasons in a prescribed database accessible to the public. Examining the relevant provisions governing the notification of potentially illegal content and the follow-up action to be taken by the hosting services demonstrates a delicate balance the DSA seeks to achieve between the interests of the involved parties. Hosting service providers are required to ensure the availability of a dynamic notification mechanism, promptly decide the matter and inform the notifying party. At the same time, the hosting service providers must also inform the decision and its reasoning to the relevant recipient of the services. In addition to the delicate balance of interests of the notifying party and the recipient of service achieved by the DSA, it has also introduced a pioneering regulatory standard mandating the publication of such decisions and reasoning through databases to enable public scrutiny. Other jurisdictions should note the utility of this enabling measure, which has the potential to enhance the responsibility of the hosting service providers to make justifiable decisions while responding to takedown notices. It can also be an invaluable reference for making consistent decisions in similar cases.

Following the hosting service providers, the DSA prescribes two sets of detailed obligations governing the online platforms and VLOPs, respectively. The specific provisions governing online platforms under the DSA are more extensive than those that are prescribed for hosting service providers. Primarily, the DSA mandates the online platforms to make available an internal system<sup>10</sup> to enable its service recipients to lodge complaints against decisions about the legality of content or its compatibility with the terms and conditions of service. Therefore, service recipients could challenge the online platforms' decisions affecting their content, including content

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<sup>9</sup> See Article 15, para 2 (a-f) of DSA.

<sup>10</sup> Such an internal system to handle complaints should be of certain prescribed characteristics. See Article 17, para 2 of the DSA.



removal or blocking decisions, decisions of suspension or termination of service, and related accounts. Online platforms are required to handle the complaints promptly and, in justifiable circumstances, reverse their impugning decisions immediately.

The decision<sup>11</sup> in response to any complaint received should also be promptly informed to the complainant along with pertinent information relating to the possibility of use of out-of-court settlement (alternative dispute resolution or ADR) or other redress mechanisms if the complainant disagrees with the relevant decision. The DSA recognizes the right of the complainant to challenge the relevant decision before a court of law. But, if he chooses to utilize an ADR, the online service provider must have a good faith engagement with the ADR process and be bound by its outcome. Moreover, if the recipient initiating the ADR proceedings wins the challenge, the online platform is required to reimburse the cost of the proceedings. No such parallel obligation is imposed on the recipient<sup>12</sup>. Although a cursory review of some of the obligations discussed above might seemingly be more onerous upon the online platforms, the crucial role such obligations play in reinforcing the objectivity expected from online platforms cannot be ignored.

Online platforms must create sufficient avenues for illegal content notification and internal complaints that could challenge blocking or suspension actions. At the same time, important safeguards that the service providers could take to prevent misuse of such avenues are prescribed. Online platforms with evidence that any person, entity, or complainant is frequently seeking to submit notices or unfounded complaints could suspend the processing of notices or complaints from such parties for a while. This safeguard provision against misuse is significant to counter false notices and complaints, which should be prevented to ensure that the notification and complaint mechanisms provided by the regulatory framework remain efficient and object-oriented. As an additional measure to prevent misuse, the DSA empowers online platforms to suspend services rendered to any relevant recipient, frequently providing conspicuous illegal content. In addition to providing avenues for notification and complaints and administering them, online platforms are also required to report relevant information regarding the functioning of the relevant mechanisms. In this regard, they are required to report information like the number of suspensions imposed upon different grounds, the number of disputes taken to ADR bodies, the number of active

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<sup>11</sup> It is important to note that online platforms are barred from making any such decision through the sole use of automated means. See Article 17, para 5 of the DSA.

<sup>12</sup> The loss of the challenge by the recipient in the ADR proceedings does not entail an obligation to reimburse the cost of the proceedings to the online platform.

service recipients, and related information on any use of automated means to moderate their content<sup>13</sup>.

Other than the obligations relating to the illegal content, online platforms must notify the relevant state or judicial authorities of their suspicion of any criminal activity arising from the information on their platform. The DSA mandates the online platforms to notify of any such information that arises suspicion of a serious criminal offence<sup>14</sup>. Finally, two specific obligations imposed upon the online platforms deserve close attention, namely those relating to tracing the traders using online platforms to connect to consumers and identifying characteristics of online advertisements by the service recipients. Whenever online platforms enable traders to conclude contracts with consumers, the DSA imposes a fundamental obligation on them (Cauffman & Goanta, 2021). The online platforms must obtain and verify a prescribed set of key information relating to any trader<sup>15</sup> before using their services to offer products or services or send related promotional messages. Online platforms are also required to make some of this information, like the traders' contact information and trade registration information, to the recipient of services.

Defining very large online platforms as those serving forty-five million recipients or more within the EU market, the DSA imposes additional obligations upon them to manage systemic risks. The VLOPs must carry out an annual systemic risk assessment, explicitly assessing a prescribed set of systemic risks related to their services. The systemic risks to be evaluated include the risk of illegal content dissemination and adverse effects upon exercising certain fundamental rights. It also consists of the risk of intentionally manipulating services rendered by VLOPs, causing an actual or potentially harmful impact on certain critical aspects of civil society<sup>16</sup>.

Beyond assessment, the VLOPs are required to adopt appropriate mitigation measures as prescribed by the DSA. It should involve adaptation of the internal measures related to the services offered, targeted measures to limit advertising displays, efforts to enhance the detection

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<sup>13</sup> See Article 23, para 1 (a-c) and para 2 of DSA.

<sup>14</sup> The criminal offence suspected should be of life-threatening nature or threatening the safety of people. This prescription could be seen as qualifying the obligation of the online platforms only to circumstances involving information giving rise to crimes that threaten people's life or safety.

<sup>15</sup> Key information includes a specified set of contact information of the trader and the economic operator, identification documentation and bank account details of the trader, information regarding the trade registration of the trader and related registration number, and undertaking by traders to offer goods and services strictly in compliance with the EU law.

<sup>16</sup> The key aspects, which the DSA seeks to protect against the risk of negative effect, include public health and security, civic discourse, the electoral process, and minors.

of systemic risks, and measures to strengthen cooperation with trusted flaggers and other online platforms. The VLOPs using recommender systems must incorporate relevant information regarding the parameters used in such systems within their terms and conditions of service. In addition, the recipients should also be furnished with the options (including a minimum of one that is free from profiling) available to them to modify or influence those parameters. Because of this obligation, the VLOPs are required to design the system's user interface, enabling the recipient to select and modify their preferred options, ultimately determining the order of the information presented by the recommender system. To enhance transparency in the online advertisement practices of the VLOPs, the DSA requires them to furnish certain prescribed information through public repositories (EGDF & ISFE, 2021). Prescribed information in this regard includes the advertisement content, its display period, and the details of the advertising person. It should also have information on targeted recipients, their numbers, and the relevant parameters used. Moreover, to ensure that the VLOPs effectively discharge various obligations, they are required to provide access to prescribed authorities and necessary data to monitor and assess their compliance with DSA<sup>17</sup>.

Besides the specific set of obligations governing all intermediary service providers, hosting service providers, online platforms, and VLOPs discussed so far, the DSA prescribes some miscellaneous provisions relating to due diligence obligations. Such provisions mandate the supportive role of the European Commission in promoting the development and implementation of various voluntary standards facilitating compliance with certain obligations arising from the DSA<sup>18</sup>. Finally, the DSA prescribes enabling provisions for the European Commission to develop crisis protocols to tackle extraordinary circumstances adversely affecting public security or public health. It foresees the possibility of the Commission involving the VLOPs and other relevant online platforms to develop, test and apply such crisis protocols. The Commission could also involve other relevant stakeholders, including national authorities and organizations, in developing the protocols. Although the Commission will strive to ensure that such protocols will prescribe appropriate procedures and safeguards<sup>19</sup>, it will be able to seek revisions or introduce additional measures if the protocols are ineffective in addressing a crisis.

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<sup>17</sup> Prescribed authorities could also share such furnished data with certain research agencies to identify and understand any systemic risks involved. See Article 31, para 2 of DSA.

<sup>18</sup> See Article 34, para 1 (a-f) of DSA.

<sup>19</sup> See Article 37, para 4 (a-f) of DSA.

In the PRC, the E-commerce Law of 2019 in addition to prescribing the obligations of the E-commerce businesses specifically imposes a range of obligations and responsibilities upon E-commerce platform businesses that could serve as the intermediary in an E-commerce transaction. Such platforms are required to not only demand various information from the businesses that are seeking to use the platform for selling or providing services to ensure their authenticity but also verify such information and make regular updates. In addition, the platforms have obligations to submit the identity of all in-platform businesses to the relevant authorities and remind and facilitate such businesses that have not registered as market participants to achieve the registration as required by the law. The platforms also have similar obligations to submit pertinent information about in-platform businesses to tax authorities and remind e-commerce businesses that are legally exempted from market participation registration to complete tax registration with the tax authorities. Whenever platforms identify that any e-commerce business using their platform has not obtained required administrative licenses or sell or provide services that are prohibited or not safe or environmentally friendly, they are obliged to undertake legally permissible disposition measures and report to the authorities<sup>20</sup>.

Platforms should take measures, technological or otherwise, to guarantee stability and cyber security as well as to prevent illegal and criminal activities online. They should tackle and remedy any cyber security events, have relevant contingency plans, and report to relevant authorities. Platforms have obligations of recording and retain information regarding the sales, services, and transactions carried out on the platform for a prescribed period. The platforms are required to abide by a prescribed set of principles while serving the e-businesses and develop service agreements and rules of transaction for using the platform<sup>21</sup>, which also imposes obligations to assure the quality and protection of consumers and individual information. However, platforms are prohibited from using their service agreements and transaction rules to impose unreasonable restrictions, conditions, or fees adversely affecting the in-platform businesses.

Any warning, suspension, or service termination resulting from the violation of law or regulation by in-platform businesses carried out as per the service agreement and transaction rules

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<sup>20</sup> See Article 29 read together with Article 12 and Article 13 of the PRC E-commerce Law 2019.

<sup>21</sup> Such transaction rules and information about service agreements and their amendments (to be carried out by seeking public comments and providing opportunities to all sides to express opinions) should be published online to ensure easy access to both the e-businesses using the platforms as well as consumers. See Articles 33 and 34 of the PRC E-commerce Law.

should also be published by the platforms. If the platforms carry out any proprietary business of their own in their respective platforms, they are obliged to distinguish them from any in-platform businesses carried out by other e-commerce business entities. While the platforms are imposed with civil responsibility for the proprietary businesses, they also face various liabilities for failure to comply with various obligations arising under the E-commerce Law. For example, joint and several liability is imposed on the platforms for failure to take required measures with real and constructive knowledge of in-platform businesses selling or providing services that are not safe or following conducts violating consumer rights. A corresponding liability is imposed on a platform in instances where the sale or services of an in-platform business affects the life and health of consumers, and the platform has failed to discharge its obligation to review the qualification of the in-platform business in question or guarantee the safety of consumers.

Towards upholding consumer interest and rights, the E-commerce Law requires the platforms to establish a credit rating system with relevant rating rules and means for making comments on the goods sold or the services rendered, with a corresponding prohibition on the platforms from deleting such comments. Moreover, the platforms are obliged to display the results of consumer searches for goods and services based on various criteria like price and categorically notify the search results displayed based on paid advertisements. The PRC E-commerce Law imposes specific obligations and liabilities upon platforms to uphold IPRs. In this regard, the platforms are required to develop their rules for IPRs protection and cooperate with the relevant owners to uphold their respective IPRs as protected by the law. Any IPRs owner sighting infringement has the right to notify the platform with relevant prima facie evidence requesting appropriate measures and the platform is required to take necessary measures in promptly<sup>22</sup> and forward the notice to the concerned in-platform business<sup>23</sup>. In response, the in-platform business could send a declaration to the platform informing the absence of the alleged infringements along with supporting prima facie evidence. Upon receipt of any such declaration, the platform is obliged to forward the same to the notifying IPRs owner informing of the option to pursue the complaint with competent authority or initiate action in the relevant People's Court. If no further notice is received from the owner within a prescribed period, informing of any further action taken from

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<sup>22</sup> Failure to take such measures would entail joint and several liability upon the platform along with the relevant in-platform business for resulting aggravated injury.

<sup>23</sup> It is important to note that any damage resulting from an erroneous notice to the in-platform business, or any such notice given in bad faith would result in civil liability and double compensation liability respectively.

the suggested options, the platform is obliged to terminate any measures it had taken in furtherance of the original infringement notice received from the owner of the IPRs.

Independent of the notice given by an IPRs owner, the PRC E-commerce Law also mandates the platforms to take necessary measures to stop any IPRs infringement by in-platform business, when it is aware of or ought to have been aware of such infringement. Any failure in this context would also attract joint and several liability for the platforms along with the infringer. The PRC E-commerce Law also foresees the possibility of other e-commerce services between businesses being rendered by platforms, like warehousing or logistics services, and mandates the platforms to follow all legal norms governing the rendering of such services and prohibits the platforms from certain conducts while offering those services. The platforms also have specific dispute settlement-related obligations imposed by the PRC E-commerce Law, which also prescribes specific fines that may be imposed upon the platforms for violating the provisions of the E-commerce Law<sup>24</sup>.

In addition to the platforms, the PRC E-commerce law regulates other intermediary service providers in an e-commerce transaction, like the express delivery service providers and electronic payment service providers, by mandating them to follow relevant laws in rendering their respective services and imposing various duties while providing those services (Friedmann, 2020). In this regard, certain obligations and liabilities imposed on such intermediaries are important to note. For example, the PRC E-commerce Law interestingly imposes environmental obligations upon the express delivery service providers mandating them to utilize only environmentally friendly packaging materials and reduce and recycle the use of any packaging materials. The E-commerce law also attaches liability upon electronic payment service providers for any damages caused to the users due to certain acts attributable to the service providers like rendering payment services without compliance to the state-issued payment security measures, failing to expeditiously address errors about payment instructions and causing an unauthorized payment (including the failure to prevent aggravation of damage resulting from unauthorized payment)<sup>25</sup>.

It is important to note that apart from the obligations of the E-commerce businesses, platforms, and other intermediaries, the PRC E-commerce Law also imposes key mandates upon the state and its organs. Some of the notable mandates include promoting innovation in e-

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<sup>24</sup> See Chapter IV and Chapter VI respectively of the PRC E-commerce Law 2019.

<sup>25</sup> See Articles 54, 55(2) and 57(2), and (3) of the PRC E-commerce Law 2019.

commerce, boosting environmentally friendly e-commerce, promoting infrastructure and standards systems for e-commerce, developing rural e-commerce and using e-commerce for poverty alleviation, maintaining security in e-commerce transactions and protecting e-commerce-related data, promoting the development of cross-border e-commerce and related regulatory systems, and promoting bilateral and regional e-commerce co-operation (along with the establishing cross-border e-commerce dispute settlement mechanisms) and partaking in the development of international e-commerce rules<sup>26</sup>.

Other than the obligations of the e-commerce platforms and intermediaries discussed above, the PRC law also prescribes specific obligations on various categories of internet platforms (Huang, 2022). For example, the PRC IPRG 2021 imposes a distinct set of obligations based on the groups of internet platforms graded under the IPCGG 2021. Firstly, for all groups of internet platform operators, the IPRG 2021 imposes a specific set of obligations that includes an obligation to maintain and ensure the integrity of user evaluation without any interference with the evaluation, the obligation to obtain the prior consent from users before using their personal data and use such data only within the legally prescribed limits and obligation to be compliant with tax law and procedures. The IPRG 2021 also regulates the internet platforms with prescribed rules governing issues of fair competition, equality, openness, anti-monopoly behaviour, pricing conducts, and algorithmic rules. However, in regulating SLPs the IPRG 2021 prescribes additional obligations like the prohibition of use of certain categories of non-public data arising from the platform operations and their users. In addition, SLPs are required to strictly follow relevant laws and regulations in collecting, processing, or cross-border transferring of personal data of users with due consideration to the national and public interests as well as establish and develop relevant data security review and internal control measures.

#### **4. Exemption from Liability, Duty to Act on Orders, and Enforcement**

Despite imposing various obligations and liabilities upon the intermediary service providers, the EU DSA grants explicit exemption to such providers in certain circumstances to facilitate the smooth functioning of the digital services market. The exemptions provided do not concern the key obligations or liabilities discussed earlier in this paper but pertain to circumstances

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<sup>26</sup> See Chapter V, Articles 64-73 of the PRC E-commerce Law 2019.

where the role of the intermediary service providers is marginal. Firstly, the DSA exempts service providers from liability when they merely act as a conduit of information provided by a service recipient without initiating such transmission, selecting its receiver, and selecting or modifying the information contained therein. Secondly, exemption of liability is also recognized when such information is stored as a cache exclusively to enhance the efficiency of its onward transmission to other recipients requesting the information subject to the satisfaction of prescribed conditions<sup>27</sup>. Thirdly, the service providers do not incur liability when such information is stored for hosting purposes at the request of a service recipient upon the satisfaction of prescribed conditions<sup>28</sup>.

While recognizing the three exemptions, the DSA does not rule out the possibility of a relevant court or administrative entity ordering the service provider to take measures to terminate or prevent an infringement. When an order to act against illegal content is issued, the service provider must promptly give effect to the same and inform the relevant action implemented. Similarly, when a service provider is ordered to furnish information about specific individual service recipients, the DSA mandates a prompt response. Despite the duty to respond to such orders, the service providers are not imposed with any general monitoring obligation or obligation seeking facts or circumstances relating to illegal activities. To ensure the effective implementation of the various obligations, the DSA prescribes an extensive set of enforcement provisions.

Unlike the EU, exemptions like those recognized under the DSA could not be seen in the PRC E-commerce Law 2019. However, some typical legal exemptions could be noticed in the PRC E-commerce Law. For example, although the e-commerce platforms have the obligation to retain information on the sales, services, and transactions rendered on the platform for a minimum of three years, the same could be extinguished or modified if the relevant law or regulation provides otherwise. Similarly, the liability of an electronic payment service provider to compensate a user suffering damages in instances when payment instructions are affected by mistake, liability is exonerated when it is proved that the mistake is not attributable to that payment service provider.

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<sup>27</sup> See Article 4, para 1 (a-e) of DSA.

<sup>28</sup> See paras 1-3 of Article 5 of DSA.



## **5. Mechanism to Guarantee Free and Fair Digital Services Market**

Beyond the introduction of the DSA, the EU has made specific efforts to enhance competition in the digital services market through its enactment of the Digital Markets Act (DMA) (Bongartz et.al., 2021). The DMA aims to harmonize rules to guarantee contestability and fairness in digital markets, especially when it involves the presence of gatekeepers, which provide core platform services to businesses or end users in the EU (Business Europe, 2021). Interestingly, the DMA seeks to apply its regulations to all gatekeepers offering such services irrespective of their place of residence or establishment or the relevant law governing the service. This provision, aiming to protect the businesses and end users within the EU from the market practices of the gatekeepers located anywhere, demonstrates the determination to guarantee access to the best digital services for all users in the Union (Larouche, 2021). A gatekeeper is defined as a provider of core platform services<sup>29</sup> and is designated as a gatekeeper following the provisions of the DMA. To be designated as a gatekeeper, the service provider should significantly impact the EU market by serving as an essential gateway for businesses to access end-users. In addition, they should hold or will be holding a solid and deep-rooted operating position in the market.

The DMA imposes two significant sets of obligations upon the gatekeepers governing their relationship with businesses and end users of their services. The first set prescribes a list of self-implementation obligations, mainly concerning how gatekeepers conduct their business operations with the users. For example, they include obligations to refrain from combining data from different sources and to permit business users to engage third-party online intermediation services to serve end users (GSMA & ETNO, 2021). Moreover, the gatekeepers should allow business users to promote offers, conclude contracts with end users, refrain from restraining business users from raising service-related issues with public authorities, etc<sup>30</sup>. The second set of obligations concerns the gatekeepers' administration of their service infrastructure, which aims to ensure certain enabling features are available for business users, like system interoperability and certain data access (Digital Europe, 2021). In this context, the Commission could also prescribe additional measures governing specific gatekeepers. The examples in this set include obligations to refrain from using publicly unavailable data to compete with business users and to allow end

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<sup>29</sup> These include various online services like providing intermediation, search engines, social networking, video sharing, cloud computing, advertisement, etc. See Article 2(2) of DMA.

<sup>30</sup> For other obligations in the first set, see Article 5 of DMA.

users to uninstall software preinstalled in the service platform. In addition, the gatekeepers should allow the installation of other third-party software to enhance interoperability and provide business users with fair conditions of access to its app stores without discrimination. They should also refrain from certain activities like providing favourable treatment in rendering ranking services and products or restricting the end users from switching subscriptions to software and services accessed through the gatekeeper's operating system, etc.<sup>31</sup>.

The DMA mandates the gatekeepers to achieve effective compliance with the two sets of obligations without adopting any circumventing measures to ensure that the objectives of the obligations are not defeated. At the same time, it is relevant to note that the DMA recognizes the possibility of suspending the application of any obligation to a specific gatekeeper or providing them exemptions in certain circumstances involving public interest. The DMA empowers the Commission to update any obligations in the two sets based on the needs identified through its market investigation. In addition, the DMA imposes a duty upon the gatekeepers to inform the Commission of any concentration involving other providers of core platform services or digital services, which could have implications for the competition in the market. The gatekeepers are also required to submit an audit report of techniques used for consumer profiling in their services to the Commission.

Concerning the question of market regulation facing platform operators in the PRC, some of the key legislative developments and administrative actions are important to note (Mueller & Farhat, 2022). Firstly, the National People's Congress (NPC) of PRC introduced a range of fundamental amendments to its general Anti-Monopoly Law (AML) in 2021 bringing various emerging fields of monopolistic practices within its purview and enhancing the status and enforcement power of its national Anti-Monopoly Bureau (AMB). Secondly, new sets of anti-monopoly guidelines governing specific sectors were introduced by the Anti-Monopoly Commission (AMC) of the PRC State Council, including the Platform Economy Guidelines (PEG) 2021 (Liu & Vryna, 2022). Finally, the State Administration for Market Regulation (SAMR) in recent years has enhanced its enforcement against certain infractions as well as acts of mergers and acquisitions by large platforms and online firms in the PRC (Smithurst, 2021).

A detailed discussion of the above regulatory initiatives and actions affecting the digital markets in the PRC is beyond the scope of this paper. However, some of the key provisions and

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<sup>31</sup> See Article 6, para 1 (a-k) which prescribes eleven distinct obligations that belong to the second set of obligations.

developments directly pertaining to the Internet intermediaries and platforms could be examined. In this regard, it is important to note that various new features introduced by the 2021 amendments to the AML like the prohibition of the hub and spoke collusive practices, non-prohibition of resale price maintenance practices with no anticompetitive effects and extension of safe harbour treatment to certain vertical and horizontal market arrangements without serious anti-competitive effects would also have implications on the platform operators and online intermediaries (Ng, 2022). However, specific provisions of the PEG 2021 issued in furtherance of the AML will have the most direct impact on the market behaviour of the platforms and intermediaries. Moreover, the introduction of the PEG 2021 will avert the challenges in interpreting the general standards of AML and applying them to the specific conditions and nature of transactions in a platform economy. The PEG 2021 with an aim to develop platform economy in an orderly and healthy manner with innovation reflects the basic objectives of the PRC AML.

On substantive provisions, the PEG 2021 firstly addresses the need for defining a relevant market before carrying out an investigation relating to monopoly pacts and practices as well as mergers in the platform economy. It also prescribes various factors that could be taken into account in determining supply and demand substitution in the platform economy. In addition, the PEG 2021 recognizes different methods of determining product markets prevalent in the platform economy. PEG 2021 guides how collusive behaviour in the collection and processing of data and in the use of algorithms could generally be determined in the platform economy as well as in the specific context of relevant parties entering into vertical or horizontal or hub-and-spoke monopoly pacts. Apart from collusive behaviour, the PEC 2021 defines other types of concerted actions in the platform economy that could have monopolistic effects and prescribes means to determine and prove such actions. The PEG 2021 prohibits any vertical or horizontal hub-and-spoke arrangements and addresses the concerns arising from unlawful restrictive dealing practices in the platform economy that has the effect of restricting or eliminating competition. At the same time, the PEG 2021 recognizes the circumstances under which restrictive dealing practices in the platform economy could be justified.

The PEG 2021 also addresses the concerns regarding platforms refusing to deal with specific parties by restricting or denying access to essential facilities under their control and prescribes factors relevant to determine the essential characteristic of the facility in question<sup>32</sup>. The

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<sup>32</sup> It is relevant to note that the PEG 2021 also recognizes the circumstances in which a refusal to deal could be justified.

PEG 2021 takes cognizance of the discriminatory practices (for example platforms following discrimination in pricing for similar goods or services among parties who are similarly placed) followed by certain entities in the platform economy in abuse of their market dominance through the usage of data and algorithms and prescribes the criteria for determination of whether the parties allegedly discriminated are similarly placed or distinct. Finally, the PEG 2021 also prescribes regulatory standards to address monopolistic concerns arising from the involvement of variable interest entities in the platform economy as well as from different types of mergers and acquisitions of the entities' operation in the platform economy.

## **6. Concluding Remarks**

The above comprehensive analysis of the new EU and PRC regulatory standards governing digital services and markets reveals a range of innovative features. As evidenced, the new standards are generally capable of enhancing effective governance of the digital markets and their intermediary service providers. However, as could be noticed from the specific analysis of the EU and PRC initiatives in recent years, the scope and objectives of the regulatory efforts in the EU are much broader and diverse than in the case of the PRC. As the EU seeks to regulate digital services and markets through a comprehensive approach of consolidating relevant rules in the two key instruments of DSA and DMA, some of its unique features could be attributed to the nature of those Acts as regional instruments regulating its member states (Larouche, 2021). On a similar note, it is important to acknowledge that the distinctive elements in Chinese law should be seen from its national priorities and domestic policy about the governance of online activities and markets. In addition, as the Chinese regime governing digital markets is not consolidated like the EU, the scope and limitation of the relevant rules should be assessed in light of the objectives of the specific regulatory instruments. For example, as evident from the analysis in this paper, some of the fundamental regulations governing online platforms in the PRC manifest in a commercial context because the detailed regulations of online platforms emanate from the governance of e-commerce. However, after the EU initiative, the introduction of specific guidelines governing internet platforms and platform economy indicates the intention to move towards the regulation of the broad spectrum of internet and platform activities instead of a much narrow focus on E-commerce platforms only.

The specific analysis of the recent EU regulatory developments in this paper reveals pioneering regulatory standards balancing the rights and interests of diverse stakeholders and offering an effective model of governance. Although the new standards will improve the digital services and market environment in Europe, whether other jurisdictions should follow suit emulating the European standards depends on the level of development and homogeneity of domestic digital markets in such jurisdictions. Any jurisdiction seeking to gain from the recent European experience should systematically carry out comparative legal studies involving the EU and their domestic regulatory standards. In this regard, different jurisdictions should be wary of potential international and internal concerns. Internationally, regulatory diversity could cause international investors and service traders to perceive the market environment differently. In addition, the implications of the diversity for cross-border electronic transactions with the EU and other jurisdictions that could emulate the new standards should also be noted. Internally, many jurisdictions, after adopting the first generation of specialized laws governing E-commerce and digital services, have not revised or updated their regulatory standards in line with the latest development in technology, especially the significant leaps in social media applications and mobile technology (Mahardika et. al., 2019).

The preparatory debates of the new EU standards reveal an inevitable need for domestic regulators to revamp the applicable regulatory regimes to ensure sustainable digital market development. Significantly, the need to review and revise the regulatory standards governing digital services and markets is particularly relevant for other major digital markets like the USA and China. As China, the EU, and the USA have adopted key strategic plans and policies to achieve leadership in various digital frontiers, including AI, they need to ensure mutual consonance of regulatory standards governing digital services and markets. In this regard, as the EU has taken a significant leap in rejuvenating its digital regulatory regime, China and USA need to assess the scope and potential impact of the specific regulatory standards analyzed in this paper. Although some of the standards are related to the particular regional situation in the EU, relevant parallels or alternative avenues to address the underlying regulatory concerns could be conceived by reviewing the relevant European preparatory debates.

The utility of the reference to the EU experience in updating the regulatory standards would be relevant for international aspects of digital services and enhancing the effective governance of digital services within the domestic market. For example, the recent state action in

China reviewing the market practices of large tech companies and digital platforms exemplifies its determination to make the digital gatekeepers and intermediary service providers accountable. However, the regulatory instruments that are relevant to address the underlying concerns are scattered and some of the emerging standards are mainly in the form of guidelines<sup>33</sup>. The need for a comprehensive regulatory framework specifically addressing digital services and markets, and the elevation of the relevant soft law standards into binding norms in China should be assessed in light of the innovative features of emerging EU regulatory standards identified in this paper. To enhance the governance of digital players that substantially impact the Chinese market, the critical legal characteristics of the new EU regulatory standards examined in this paper and its implementation experience in some relevant EU member states like Germany will be helpful references. In addition, for China's regional economic integration initiatives like the Greater Bay Area (GBA) involving Hong Kong and Macau SARs, the EU regulatory standards developed in a regional context would be a pertinent reference model to explore regional regulatory harmonization involving digital markets in the GBA.

The closer examination of the specific objectives, obligations, liabilities, and market regulation introduced in the DSA, DMA, and PRC regulatory initiatives reveals their respective strengths and limitations. The analysis of specific regulatory standards emerging from the DSA enables a broader conclusion that it has the potential to achieve a delicate balance between the interests of the various stakeholders and is not an instrument promoting a particular interest. In this regard, the role DSA could play in enhancing the business environment and promoting the interest of different-sized players is a significant element of the new regulatory model. Several features of the model are worth noting, including the cascading prescription of a distinct set of obligations for specific types of services like hosting and other intermediary services, as well as the distinguishing obligations between online platforms and VLOPs. Instead of indiscriminately imposing a standard set of obligations across the board, which could become onerous on smaller players, this approach ensures that essential obligations governing various players are distinctively prescribed. Although the PRC has started to make some moves in this direction with the introduction of the IPCGG 2021 and the IPRG 2021, the fact that they are not in the form of hard

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<sup>33</sup> For example, some of the fundamental instruments recently introduced in the PRC are mainly in the form of guidelines including the 'Draft Guidelines for Classification and Grading of Internet Platforms' and 'Draft Guidelines for Implementing Responsibilities on Internet Platforms' released in October 2021. Similar concerns also arise about the 'Anti-Monopoly Guidelines for the Platform Economy' published in February 2021.

law as in the EU, creates concerns about their effectiveness at the enforcement stage. The PRC will certainly gain from continuous comparative studies of the EU enforcement experience of DSA and DMA as well as transforming the standards in its present guidelines into binding regulatory or legislative instruments based on the hindsight gained from the EU experience.

Introducing reforms in response to the innovative regulatory features of the DSA and DMA is inevitable for other jurisdictions to stay among the frontrunners in global and cross-border digital markets. Any comparative regulatory exercise with reference to the EU developments should provide useful insights for other jurisdictions and enable the revitalization of their respective domestic legal framework to address the formidable challenges emerging in digital markets. Especially, jurisdictions with strategic aspirations to lead the global digital markets and AI developments, like China and USA, should review their respective regimes in comparison with the EU regulatory standards and practices and explore possible avenues for harmonization.

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