

The DSA/DMA Package and the Conflict of Laws

A couple of weeks ago, I had the pleasure of speaking about the scope of application of the Digital Services Act (DSA) and Digital Markets Act (DMA), which together have been labelled the ‘European constitution for the internet’, at an event at the University of Strasbourg, organized by Etienne Farnoux and Delphine Porcheron. The preprint of my paper, forthcoming at Dalloz IP/IT, can be found on SSRN.

Disappointingly, both instruments only describe their territorial scope of application through a unilateral conflicts rule (following a strict ‘marketplace’ approach; see Art. 2(1) DSA and Art. 1(2) DMA), but neither of them contains any wider conflicts provision. This is despite the many problems of private international law that it raises, e.g. when referring to ‘illegal’ content in Art. 16 DSA, which unavoidably requires a look at the applicable law(s) in order to establish this illegality. I have tried to illustrate some of these problems in the paper linked above and Marion Ho-Dac & Matthias Lehmann have also mentioned some more over at the EAPIL Blog.



Unfortunately, though, this reliance on unilateral conflicts rules that merely define the scope of application of a given instrument but otherwise defer to the general instruments of private international law seems to have become the norm for instruments regulating digital technology. It can be found, most famously, in Art. 3 of the GDPR, but also in Art. 1(2) of the P2B Regulation, Art. 3(1) of the proposed ePrivacy Regulation, and in Art. 1(2) of the proposed Data Act. Instruments that have taken the form of directive (such as the DSM Copyright Directive) even rely entirely on the general instruments of private international law to coordinate the different national implementations.

These general instruments, however, are notoriously ill-equipped to deal with the many cross-border problems raised by digital technology, usually resulting in large overlaps between national laws. These overlaps risk to undermine the

regulatory aims of the instrument in question, as the example of the DSM Copyright Directive aptly demonstrates: With some of the most controversial questions having ultimately been delegated to national law, there is a palpable risk of many of the compromises that have been found at the national level to be undermined by the concurrent application of other national laws pursuant to Art. 8 I Rome II.

The over-reliance on general instruments of PIL despite their well-established limitations also feels like a step back from the e-Commerce Directive, which at least made a valiant attempt to reduce the number of national laws, although arguably not at the level of the conflict of laws (see CJEU, *eDate*, paras. 64-67). The balance struck by, and underlying rationale of, the e-Commerce Directive can certainly be discussed – indeed, given its importance for the EU’s ambition of creating a ‘Digital Single Market’, it should be. The drafting of the DSA/DMA package would arguably have provided the perfect opportunity for this discussion.