Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
Stanford Law School and the University of Vienna School of Law

European Union Law Working Papers

No. 72

An Analysis of New Obligations for Online Content Sharing Platforms in the Media Environment under the DSA and DMA

Mark Nicolas Gruensteidl

2022

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share "works in progress". The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at http://ttlf.stanford.edu.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law's LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at:

Stanford-Vienna Transatlantic Technology Law Forum
http://ttlf.stanford.edu

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria

About the Author

Mark Nicolas Gruensteidl has been studying economics, law, political science, and IT-related subjects interdisciplinary at different institutions. He recently finished a Master of Laws in EU and International Business Law with a focus on digital, intellectual property, privacy, communication, and technology law. In addition, he holds an MA in International Relations, a graduate degree in Industrial Engineering, and a BA in Film, TV, and Media Production with an emphasis on business and law.

General Note about the Content

The opinions expressed in this student paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum, or any of TTLF's partner institutions, or the other sponsors of this research project.

Acknowledgements

I would like to thank my supervisor, Dr. Matthias Traimer, for his continuous guidance and sharing of his expertise throughout the work on this thesis. In addition, I am grateful to my parents, Claudia and Manfred, for their ongoing support during my studies. Finally, a shout-out goes to every professor, friend, or acquaintance who taught me to think interdisciplinary.

Suggested Citation

This European Union Law Working Paper should be cited as:
Mark Nicolas Gruensteidl, An Analysis of New Obligations for Online Content Sharing Platforms in the Media Environment under the DSA and DMA, Stanford-Vienna European Union Law Working Paper No. 72, http://ttlf.stanford.edu.

Copyright

Abstract

This work begins with an introduction that describes the Digital Services Act (DSA) & Digital Markets Act (DMA), the aims as well as regulation targets of these two European Union (EU) legislations, defines what is understood under online content sharing platforms (OCSPs), and elaborates on the freedom of the media in times of rapid digital transformation. Its research objective is best explained by referring to the two central research questions. The first one addresses the DSA's new key obligations for communication platforms compared to previous EU regulation. A second research goal questions how the DMA's gatekeeper and level playing field provisions affect large communication platforms in comparison to preceding EU law. Representing the heart of this work, the analysis starts examining core provisions relevant for communication platforms, important previous EU legislative measures, and ends by discussing them critically. It kicks off with the DSA followed by the DMA. In terms of previous EU law, the e-Commerce (Electronic Commerce) Directive, the Audiovisual Media Services Directive (AVMSD), and the Regulation on Preventing the Dissemination of Terrorist Content Online (TERREG or TCO) are particularly important for the DSA as a comparison. Concerning the DMA, specifically its relationship to EU competition law, is examined. Subsequently, the conclusion answers both research questions as well as shortly delineates what is next by mentioning upcoming EU regulatory challenges and efforts in the form of the 'European Media Freedom Act (EMFA)' proposal. Finally, an outlook focuses on the latter legislative initiative and provides a tentative preview of digital services' evolution in the EU.

TABLE OF CONTENTS

ABBREVIATIONS

et seq.	and the following
Art(s).	Article(s)
AVMSD	Audiovisual Media Services Directive
API	Application programming interface
CFREU	Charter of Fundamental Rights of the EU
CPS(s)	Core platform service(s)
DPA(s)	Data protection authority (authorities)
DMA	Digital Markets Act
DSA	Digital Services Act
Digital Services Act package	DSA and DMA
DSC(s)	Digital services coordinator(s)
DSM Directive	Directive on Copyright in the Digital Single Market
TERREG or TCO	Regulation on Preventing the Dissemination of Terrorist Content Online
NIS Directive	Directive on Security of Network and Information Systems
e-Commerce or e-Communication(s)	Electronic commerce or communication(s)
EDAP	EU Democracy Action Plan
EBDS	European Board for Digital Services
EBMS	European Board for Media Services
EC	European Commission
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EDPB	European Data Protection Board
EECC or The Code	European Electronic Communications Code

EMFA	European Media Freedom Act
EU	European Union
e.g. or i.e. or ie	for example
EU MEDIA program	Funding program for EU media projects
GDPR	General Data Protection Regulation
HOC	Harmful online communication
InfoSoc Directive	Information Society Directive
ISS(s)	Information society service(s)
IT	Information technology
IP	Intellectual property
ICPEN	International Consumer Protection and Enforcement Network
KPI(s)	Key performance indicator(s)
KYBC	Know Your Business Customer (principle)
MP(s) or CP(s)	Media or Communication platform(s)
MNC(s)	Multinational enterprise(s)
NCA(s)	National competition authority (authorities)
NDSC(s)	National digital services coordinator(s)
NIS	Network and information systems
OCP(s)	Online content provider(s)
OCSP(s)	Online content sharing platform(s)
SME(s)	Small and medium enterprise(s)
TFEU and TEU	Treaty of Functioning of the European Union and Treaty of the European Union
VLOP(s) and VLOSE(s)	Very large online platform(s) and search engine(s)
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization

1 Introduction

The reason why these two pieces of legislation on the level of the European Union matter is quite obvious: "Over the last two decades, *digital platforms have become an integral part of our lives* – it's hard to imagine doing anything online without Amazon, Google or Facebook."[1] But with this development many issues, problematic aspects, and challenges came to light which the DSA and DMA are addressing:

> While the benefits of this transformation are evident, the dominant position gained by some of these platforms gives them significant advantages over competitors, but also undue influence over democracy, fundamental rights, societies and the economy. They often determine future innovations or consumer choice and serve as so-called gatekeepers between businesses and internet users.[2]

"The Digital Services Act (DSA) and the Digital Markets Act (DMA) are the EU['s] answer to updating rules for digital services."[3] Important for both legislative acts on the way going forward with them is

> [**to avoid**] any attempt to challenge or water down the **country of origin principle** [that] will [or would] call into question the very foundation of our Internal Market. It will create strong legal uncertainty for many business operators and involve very substantial costs making the legislation even impracticable for SMEs; …

[1] European Parliament, 'EU Digital Markets Act and Digital Services Act Explained' (4 April 2022) <https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained> accessed 13 April 2022 (emphasis added).
[2] ibid.
[3] European Economic and Social Committee, *Digital Services Act and Digital Markets Act: Stepping Stones to a Level Playing Field in Europe* (European Economic and Social Committee 2021) <https://op.europa.eu/en/publication-detail/-/publication/90f2183f-fa4e-11eb-b520-01aa75ed71a1/language-en/format-PDF/source-251324629> accessed 13 April 2022.

> **to ensure consistency of DSA and DMA with the rest of EU digital legislation**, such as the General Data Protection Regulation, the Data Governance Act, the Platform to business Regulation, Copyright in the Digital Single Market and Audiovisual Services;
>
> **to adapt the entire EU legal framework to modern digital challenges**. Working conditions, taxation, customs duties, competition rules, consumers' rights and circular economy legislation – a long list of EU rules have to be adjusted to the new online business models and activities; [and]
>
> **to establish the possibility of an SME Impact assessment** in 2-3 years' time after the adoption of the DMA and DSA in order to evaluate their effects on small and medium-sized companies.[4]

Besides that, the EU as an actor on the global stage "does enjoy [internationally] both *de facto* and *de jure recognition* as an actor in [digital policy] regulatory matters, so much so that the rules have been exported to other jurisdictions or it uses its advantage to advocate for a higher level of data protection."[5] This also counts for the DSA and DMA which both can be seen as a positive step forward and guidance mark for other jurisdictions which face similar issues. Mirela Mărcuț states that

> *the Digital Single Market grants the EU its authority, although the authority is rooted in the political system of the EU.* Digital policy can be performed either as a shared or a support competence. *The foundation of this authority still stems from the regulatory issues that have created different discussions*, both in a multilateral setting, as the *Internet Governance Forum*, or in a bilateral one in *trade agreements with states*. Still, the authority of the EU is tested when it comes to a transition from a regulatory to a technological actor. *Hence, it is limited from within.* Finally, the autonomy of the EU

[4] ibid.
[5] Mirela Mărcuț, 'Evaluating the EU's Role as a Global Actor in the Digital Space' (2020) 20 Romanian journal of European affairs 85 83.

is a reflection of the limited authority in various areas, but *digital issues have been inserted into foreign policy*.[6]

[6] ibid 83 (emphasis added).

2 Research Objective

In this section the research objective is outlined by explaining the research aim and the two research questions.

2.1 Research Aim

The goal of this thesis is to analyze the DSA's and DMA's new key obligations for communication platforms in comparison to the previous regulatory framework of the EU. Core provisions that are relevant for digital communication platforms with a focus on online content sharing platforms (OCSPs) are the objects of analysis. Comparing them to previous EU legislation in context makes a critical discussion of new obligations for OCSPs in the EU's media environment under the DSA and DMA possible. Therefore, the analysis section focuses on specific EU laws that are in the interplay with the DSA and / or DMA such as the e-Commerce Directive, InfoSoc Directive (Information Society Directive), Directive on Copyright in the Digital Single Market (DSM Directive), Audiovisual Media Services Directive (AVMSD), General Data Protection Regulation (GDPR), European Electronic Communications Code (EECC), Directive on Security of Network and Information Systems (NIS Directive), Regulation on Preventing the Dissemination of Terrorist Content Online (TERREG or TCO), and also the EU Democracy Action Plan (EDAP). Special attention is given to OCSPs in the media environment of the EU. A similar approach is applied when it comes to the DMA. However, a particular focus is set on its relation to EU competition law but also e.g. the GDPR if appropriate in context. Overall, this work puts a stronger emphasis on the analysis of the DSA. As a final part, the conclusion presents the key findings by answering the two research questions dealing with new obligations for OCSPs in the EU's media environment under the DSA and the relationship between the DMA & EU competition law as well as its added value in comparison to the prior

situation in regard to gatekeepers. Eventually, an outlook follows analyzing the recent proposal of the European Commission known as 'European Media Freedom Act (EMFA)' and a tentative preview of digital services' evolution in the EU. That – read together with the results of the prior sections – highlights and illuminates problematic aspects or issues that remain to be a challenge in the area of EU communications law considering the current digital media landscape and its rapid development in regard to technological innovations within the sector. This separate outlook provides an anchor point for scholars and their research in the future to tie on.

2.2 Research Questions

The following two research questions represent the research aim described above:

1) What are the DSA's new key obligations for online content sharing platforms compared to the previous regulatory framework of the EU?
2) What is the relationship between the DMA and existing EU competition law as well as what constitutes its added value?

3 The Way to the Digital Services Act Package

This chapter first delineates the regulatory challenges of communications law in the EU shortly, then presents the aims of the Digital Services Act (DSA), and afterwards continues with the regulation targets of the Digital Markets Act (DMA). In addition, the challenge of defining online content providers (OCPs) as well as specifically online content sharing platforms (OCSPs) is highlighted. Eventually, a short description of the freedom of the media in times of digital transformation wraps it up.

3.1 Regulatory Challenges of Communications Law in the EU

Communications law has been influenced comprehensively and rapidly by the digital transformation. In the understanding of this work the following description applies:

> *Digitisation is one of the most important trends of the current century. It will change our economy and society as fundamentally as the industrial revolution did.* Our economy is in a process of transition towards a *'digital economy'*. This term does not mean a separate economy or a specific sector of the overall economy. The changes caused by digitisation will ultimately lead to the entire economy becoming digital.[7]

To keep up with the numerous regulatory challenges in the fast-changing environment of the broadcasting, telecommunication, and information sectors, the EU introduced a new regulatory framework in 2002 to ensure convergence[8] – the Framework Directive being part of it:[9]

[7] Reiner Schulze and Dirk Staudenmayer, *EU Digital Law: Article-by-Article Commentary* (1st edn, Nomos 2020) <https://doi.org/10.5771/9783845291888> 1 citing cf. the fundamental thesis of Brynjolfsson/McAfee, p. 6 et seq. While the invention of the steam engine by James Watt replaced human and animal muscle power, digitisation will multiply exponentially the possibilities of using the human brain and See Lohsse/Schulze/Staudenmayer, p. 13 et seq (emphasis added).

[8] Paul Nihoul and Peter Rodford, *EU Electronic Communications Law: Competition & Regulation in the European Telecommunications Market* (2nd edn, Oxford University Press 2011) 9.

[9] DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] L108/33.

> A new [common] regulatory framework was adopted in 2002, with a view to achieving several objectives. One was to adapt existing regulation to the changing environment. Technologies and industrial structures were changing quickly. The European legislator wanted to assess whether the existing rules were still appropriate. In this regard, the European institutions paid *special attention to convergence*. As stated earlier, *technologies and industries are growing towards each other in the broadcasting, telecommunications, and information sectors*. They wanted to draw regulatory consequences from this phenomenon.[10]

This "new regulatory framework [back then]"[11] contained a "main revision [which] took place in 2009 [DIRECTIVE 2009/140/EC[12]], with the adoption of directives amending all instruments comprising sector-specific regulation."[13] The European Union "has taken up a number of initiatives, such as the enactment of policies, strategies, communications and decisions, all not directly enforceable, something that highlights the fact that it is for the Member States to deal with challenges in cyberspace."[14] Below the EU legislative development in communications law and particularly e-Commerce from 2000 to 2020 is shown (non-exhaustive list):

1. The e-Commerce Directive 2000/31/EC
2. The General Data Protection Regulation (EU) 2016/679 ('GDPR')
3. The Geo Blocking Regulation (EU) 2018/302
4. The Audiovisual Media Services Directive (EU) 2018/1808
5. The Copyright Directive (EU) 2019/790

---

[10] Paul Nihoul and Peter Rodford, *EU Electronic Communications Law: Competition & Regulation in the European Telecommunications Market* (2nd edn, Oxford University Press 2011) 9 (emphasis added).
[11] ibid 9.
[12] DIRECTIVE 2009/140/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] L337/37.
[13] Paul Nihoul and Peter Rodford, *EU Electronic Communications Law: Competition & Regulation in the European Telecommunications Market* (2nd edn, Oxford University Press 2011) 10.
[14] Tatiana-Eleni Synodinou and others, *EU Internet Law: Regulation and Enforcement* (Springer 2017) xvii.

6. The Digital Content Directive (EU) 2019/770
7. Fairness and Transparency of Online Platforms [P2B] Regulation (EU) 2019/1150
8. The Digital Services Act package[15]

Furthermore, the DSM (Copyright) Directive (EU) 2019/790[16], the NIS Directive (EU) 2016/1148[17] (setting up a common network and information systems' security level), and the Code Directive (establishing the European Electronic Communications Code) (EU) 2018/1972[18] should also be mentioned as they are partly important for the DSA because these three – so far not mentioned in particular – contain relevant definitions and provisions that go sometimes hand in hand with obligations introduced by it. Note that not all of those EU laws are addressed in detail in the upcoming chapters though. To continue, for a fundamental understanding of the digital single market and its stakeholders the above mentioned legislative acts are crucial to consider systematically as these *lex specialis* are fulfilling major roles for regulating the digital single market in the EU and they are ensuring key rights in the field of copyright, information security, and infrastructure of electronic communications networks for digital media matters. The DSA and DMA as complementary legislative acts of the EU aim to close regulatory gaps of the digital single market. Remarkable in this regard is that it took a lot of years to introduce the DSA and update the EU legislative package for e-Commerce to the current economic environment finally, despite the fast-changing rapid development in this area

[15] Hans Schulte-Nölke and others, *The Legal Framework for E-Commerce in the Internal Market - State of Play, Remaining Obstacles to the Free Movement of Digital Services and Ways to Improve the Current Situation* (European Parliament 2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf> accessed 28 March 2022 14-20.
[16] DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92.
[17] DIRECTIVE (EU) 2016/1148 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L194/1.
[18] DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36.

of the digital single market and e-Commerce. Concerning the field of internet law and economic fraud, Margarita Papantoniou concluded that:

> The challenges identified in this area of law are numerous. Most of them revolve around *the debate regarding whether existing laws should be re-drafted or new specific legislation should be enacted instead*, the non-reporting of such crimes and the consequent lack of cooperation between the private and public sector, and prosecutorial and evidential issues that appear during criminal procedures. The author concludes that *it is clear and widely acknowledged that all measures taken up to now represent piecemeal regulatory attempts and by no means form a coherent plan to 'annihilate the danger'*.[19]

This is a good example and can be used analogously when referring to disinformation or harmful online communication (HOC) as another example. In EU internet law, *lex specialis* is often used as a way to regulate specific areas and the DSA and DMA happen to find themselves in an interplay with sector-specific rules in other areas (e.g. copyright). For the DMA it is important that it fulfills

> two main desiderata – (i) balanced, effective and more specific co-ordination between the Commission's role in the enforcement of the DMA and competition law based actions of national competition authorities, [and] (ii) provisions on individual private remedies (private enforcement) in the DMA – … [If so, then] the DMA has significant potential to indeed improve effective and undistorted competition in the online intermediaries' markets.[20]

Matthias Leistner on the other hand states that the DSA is a "reasonable reform of provider liability … and a broad penumbra of additional duties for large platforms."[21] The author gives

[19] Tatiana-Eleni Synodinou and others, *EU Internet Law: Regulation and Enforcement* (Springer 2017) xvii (emphasis added).
[20] Matthias Leistner, 'The Commission's Vision for Europe's Digital Future: Proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act—a Critical Primer' (2021) 16 Journal of Intellectual Property Law & Practice 778 <https://doi.org/10.1093/jiplp/jpab054> accessed 13 April 2022 783.
[21] ibid 783.

two short summaries for first, the DMA, and second, the DSA, which are used as anchor points to be analyzed more in detail in the analysis chapter of this work later on:

> The DMA Proposal represents a *hybrid approach to specific regulation of gatekeeper platforms*, which in substance makes perfect sense. The main desiderata concern the delineation from and co-ordination with national and European *competition law* as well as the introduction of further and more differentiated provisions in the area of *enforcement*. In particular, a mechanism to effectively *coordinate* activities of the Commission on the one hand and national competition authorities on the other seems necessary (an area where the *European Competition Network* under Regulation 1/ 2003 inevitably comes to mind).[22]
>
> The DSA Proposal's centrepiece, ie the *considerate reform and detailed amendment* of the EU's rules on provider liability, in general deserves approval. In contrast, the partly byzantine regulatory framework of *additional transparency, compliance and due diligence obligations* (in particular of very large [online] platforms [VLOPs]) … needs some further critical thought in regard to the respective specific functions, necessity and legal character of these very different and detailed obligations and the consequences for their respective justification, proportionality and enforceability.[23]

[22] ibid 784 citing Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, O.J. L 1/1 of 4.1.2003.
[23] ibid 784.

3.2 Aims of the Digital Services Act

The DSA follows the goal to create a safe(r) place for everyone online. Protecting fundamental rights in this environment is essential to achieve that. "Among the core concerns tackled by this law are the trade and exchange of illegal goods, services[,] and content online[,] and algorithmic systems amplifying the spread of disinformation."[24] EU citizens shall have more power over the content they see in the cyberspace. Targeted advertisements and recommender algorithms need to be transparent and the users should have control over whether they want such practices or not. Harmful content or even illegal one should be prohibited in a safe online space. Removing such fast is a key mechanisms that should be common sense for tech giants and their platforms. Disinformation (or false information with the intent to harm) in the political, health, or any other sector needs to be addressed further while making sure freedom of speech is not limited too extensively. Informing users about their complaints or removal requests is another core feature. In regard to online shopping within the EU it is expected to be safe. The products have to be in compliance with EU standards and authentic seller & product information should be accessible straightforward for the buyer.[25]

3.3 The Digital Markets Act's Regulation Targets

"The digital market has already become a reality in the world. Internet platforms, including so-called *gatekeepers*, are becoming the primary managers of both the social, scientific, and political content they deliver and the places where providers of goods and services connect with consumers (including other economic operators)."[26]

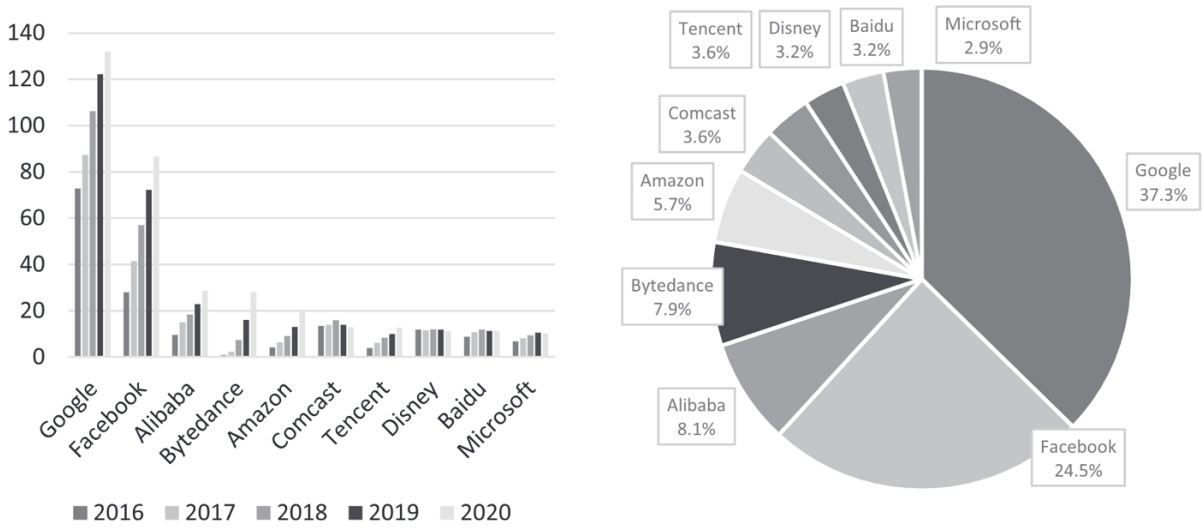
[24] European Parliament (n 1).
[25] ibid.
[26] Lukasz Dawid Dabrowski and Magdalena Suska, *The European Union Digital Single Market: Europe's Digital Transformation* (Taylor & Francis 2022) 5 (emphasis added).

> *Gatekeepers are big tech companies which within an online platform model develop and manage platforms, as well as rules for business partners and consumers, and acquire data, the most valuable component of the digital market. Due to their size, they have an enormous market advantage over their competitors.* Weak contestability and unfair practices in the digital sector are a problem that is more common and more pronounced for some digital services than for others. This applies in particular to widespread and widely used digital services and digital infrastructures, which mostly directly mediate between business users and end users.[27]

The DMA's aim is "to *ensure a level playing field for all digital companies*, regardless of their size."[28] Eliminating unfair practices or conditions like "ranking services and products offered by the gatekeeper itself higher than similar services or products offered by third parties on the gatekeeper's platform or not giving users the possibility of uninstalling any preinstalled software or app"[29] are included in the regulation targets. Another goal is to make interoperability across diverse messaging services easier and more fluent.[30] "The rules should *boost innovation, growth and competitiveness and will help smaller companies and start-ups compete* with very large players."[31] Competition law or rules alone are not sufficient enough in the sector of large online communication platforms when it comes to the big tech players (e.g. Meta – Facebook, Instagram, WhatsApp; ByteDance – TikTok; Amazon; Google – YouTube; Twitter; …). For that, the DMA "will also set out *the criteria for identifying large online platforms as gatekeepers and will give the European Commission the power to carry out market investigations*, allowing for updating the obligations for gatekeepers when necessary and sanctioning bad behaviour."[32]

[27] ibid 5 (emphasis added).
[28] European Parliament (n 1) (emphasis added).
[29] ibid.
[30] ibid.
[31] ibid (emphasis added).
[32] ibid (emphasis added).

The figure below shows (potential) gatekeepers in the online advertising sector:



Source: www.groupm.com/this-year-next-year-global-2021-mid-year-forecast/

Figure 1: Advertising revenue in billion US $ and shares in top ten global media owners[33]

3.4 Defining Online Content Sharing Platforms

For this thesis the initial understanding and definition for *online content providers* (OCPs) is the one by Thomas R. Eisenmann from a historical view point. He describes their business model as following: "Companies that distribute copyright content via the Internet … and hybridizing this business model with others, such as online retailers and portals."[34] Nevertheless, this is a rather 'old' definition of late 2000 and modern digital communication platforms made it necessary to rethink it. Today, the more accurate term for companies like Google, Amazon, or Meta (Facebook, Instagram, WhatsApp, …) is *online content sharing platforms* (OCSPs) with advanced digital hybrid business models active on the Internet.

[33] Dabrowski and Suska (n 26) 14 citing <https://www.groupm.com/this-year-next-year-global-2021-mid-year-forecast/> (2021).
[34] Thomas R Eisenmann and Alastair Brown, 'Online Content Providers' (*Harvard Business School - Publications*, November 2000) <https://www.hbs.edu/faculty/Pages/item.aspx?num=27684> accessed 13 April 2022.

In that regard Art. 2 (6) DSM Directive should be highlighted:

> *'Online content-sharing service provider'* means *a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes*.[35]

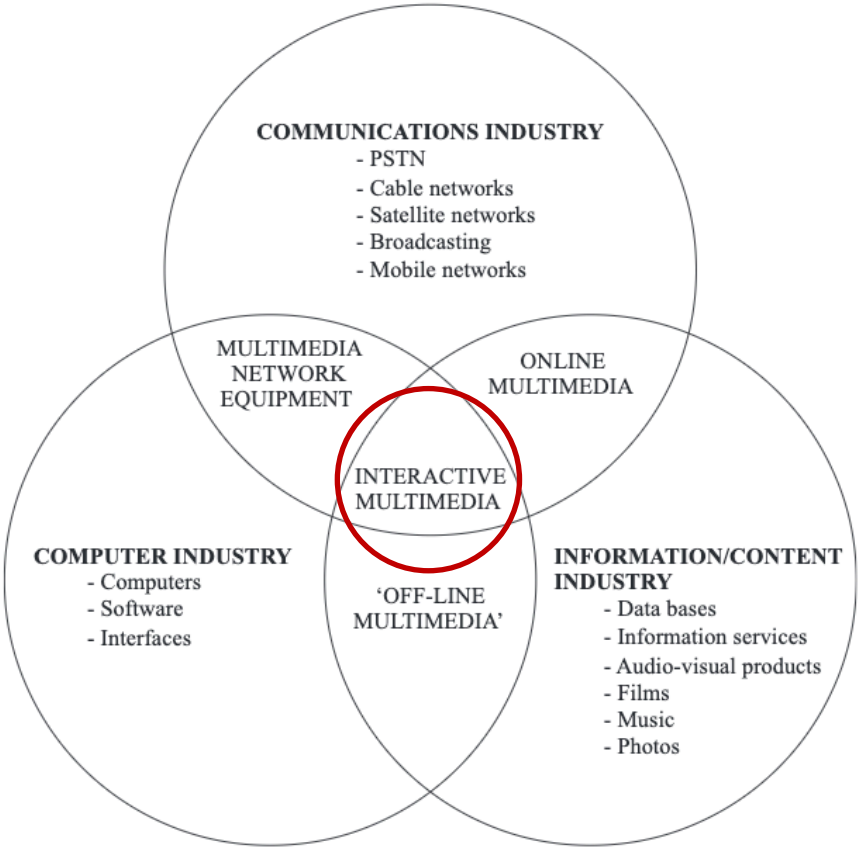
The DSM Directive specifically excludes though

> not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use.[36]

3.5 Evaluation of fast-changing international Communication Platforms

The EU's digital single market develops rapidly as "the digitization of information leads to media convergence: all telecommunications channels and media platforms [including communication platforms] take on a universal nature, enabling them to present all kinds of information in still or moving pictures, text or sound."[37] For communication platforms "in the long run convergence will have substantial effects on production, consumption and regulation."[38]

[35] DIRECTIVE (EU) 2019/790 (n 16) art 2(6) (emphasis added).
[36] ibid.
[37] Oliver Castendyk, 'European Media Law' 1 Online <http://wkldigitalbooks.integra.co.in/Customer/Home/BookDetails?TitleGUID=6187A932-E830-4256-9E87-10AF33530EAA> 15.
[38] ibid 15.



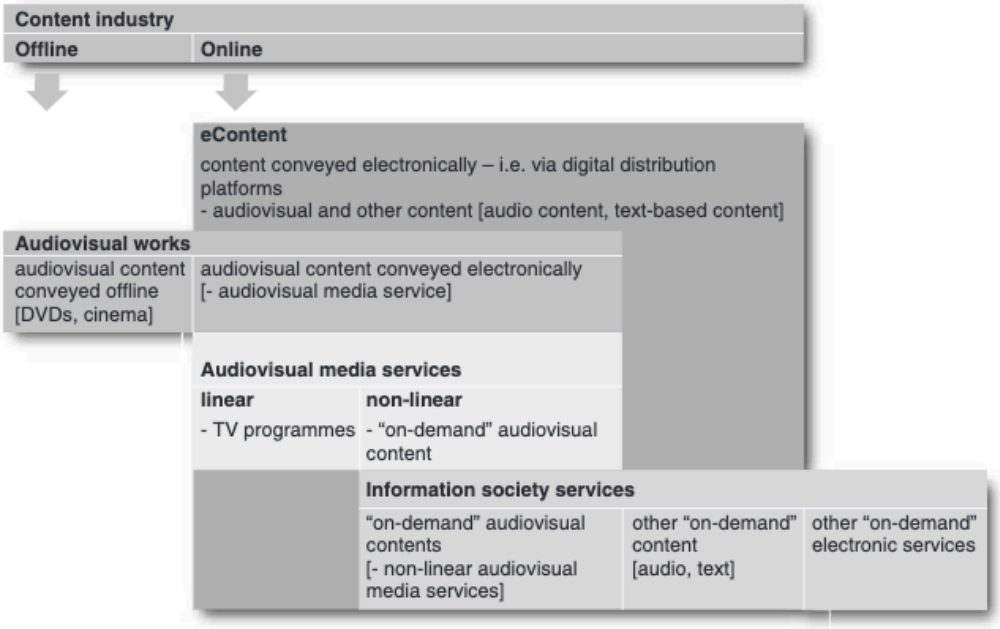
Source: Devotech "Developpement d'un environnement multimedia en Europe"

(Source: OECD, 1979)

Figure 2: The Process of Convergence and overlapping sectors [red circle added][39]

[39] ibid 16 citing OECD Report 1997, Global Information Infrastructure-Global Information Society (GII-GIS).

Therefore, communication platforms and services have changed continually too as Figure 3 shows in detail distinguishing the offline and online content industry.



Source: M. Holoubek/D. Dramjanovic, *European Content Regulation*

Figure 3: Services and platforms of the content industry[40]

EU internet law in the area of digital transformation has been changed many times in the past and led to a new legal framework for e-Commerce[41] which Edwards describes in detail in her book. Similarly, the DSA addresses regulation gaps regarding e-Commerce and other *lex specialis* now. The reason why this is necessary lies in the nature of new 'tech giants' (or so-called *gatekeepers*) such as Google, Amazon, or Meta (Facebook, Instagram, WhatsApp, …) as they operate with fundamentally new business models that led to imbalances in the digital single market.[42] The DSA and DMA are addressing these. However both legislative acts will not be the last ones in the dynamic field of EU communications law.

[40] ibid 21 citing M. Holoubek/D. Dramjanovic (eds), European Content Regulation, A Survey of the Legal Framework (Vienna, Institute for Austrian and European Public Law, 2007).
[41] Lilian Edwards, *The New Legal Framework for E-Commerce in Europe.* (1st ed.., Bloomsbury Publishing Plc, 2005) <https://ebookcentral.proquest.com/lib/univie/detail.action?docID=1772693>.
[42] Matthias Weller and Matthias Wendland, *Digital Single Market: Bausteine Eines Digitalen Binnenmarkts* (Mohr Siebeck 2019) 34.

> ‘Uber, the world’s largest taxi company, owns no vehicles. Facebook, the world‘s most popular media owner, creates no content. Alibaba, the most valuable retailer, has no inventory. And Airbnb, the world’s largest accommodation provider, owns no real estate. Something interesting is happening’ (Tom Goodwin).[43]

For the DSA and DMA as mentioned already cooperation among the enforcement entities seems to be promising and necessary in the European but also international context (the following focuses on the consumers’ perspective, however this is analogous true for businesses):

> *Networks of enforcers, with adequate training to detect unfair practices and scams on social media sites and legislation at their disposal enabling them to act are therefore key ingredients to ensure consumers are protected.* This may require that existing networks (ICPEN [International Consumer Protection and Enforcement Network], for example, as well as regional networks) lend a hand to train and share best practices with countries where there is a need. Consumers associations can also assist consumers in countries where they have some powers to do so, for example, through bad publicity for platforms that allow such practices, as well as enforcement via representative actions.[44]

For example to show the power of OCPs but also OCSPs it is useful to refer to their practice(s) of handling or combating harmful online communication (HOC) which was investigated by Einwiller and Kim who ended up with these conclusions:

> (1) OCPs are not forceful and proactive enough in preventing HOC through communication, because they widely use ‘terms of service’ as the mode of HOC communication, lack in providing case examples of HOC, and have a small proportion of HOC-related policy content in their overall policy documents; (2) deleting HOC without explanation

[43] ibid 34.
[44] Tatiana-Eleni Synodinou and others, *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer 2020) <https://ubdata.univie.ac.at/AC15420185> 342 (emphasis added).

> is most often listed in OCPs' HOC policies as a consequence of HOC violations; (3) flagging a post is most highly adopted by OCPs for user actions, but it is also abused by individuals or OCPs to avoid legal ramifications; (4) manual inspection is universally adopted for HOC identification across OCPs, while big OCPs utilize artificial intelligence machine learning and filtering with 24/7 inspection; finally (5) OCPs observe an increase in HOC frequency and polarization of online opinion.[45]

Their final advice is actually something that is part of the Digital Services Act (DSA). Namely, the DSA tries to achieve the following:

> Organizations should take a more proactive stance in preventing HOC and protecting their users rather than resorting to government regulations or user civility. Importantly, this includes more effective HOC-related policy communication with users, and proactive initiatives to educate users on does and don'ts with regard to HOC.[46]

3.6 Freedom of the Media in Times of Digital Transformation

Besides positive effects of digital innovations such as easier or almost real-time access to information, for example, many problematic or negative outcomes are also visible:

> Authoritarian regimes use digitisation to restrict freedom of speech, failing in their duties to facilitate the exercise of the freedom of speech. *These regimes have gained a new tool to control the society and violate human rights.* Digitisation also facilitates practices that abuse freedom of speech, such as the spread of hate speech and disinformation; both authoritarian regimes and individuals benefit from this.[47]

[45] Sabine A Einwiller and Sora Kim, 'How Online Content Providers Moderate User-Generated Content to Prevent Harmful Online Communication: An Analysis of Policies and Their Implementation' (2020) 12 Policy & Internet 184 <https://doi.org/10.1002/poi3.239> accessed 13 April 2022 202.
[46] ibid 202.
[47] Dabrowski and Suska (n 26) 56 (emphasis added).

For further analysis of the DSA & DMA it is necessary to have also a closer yet delimited look into fundamental rights, EU communications law, and the legal or policy framework of it. Article 10 European Convention on Human Rights (ECHR) is one of the cornerstones of fundamental communications law (rights) that shall be respected besides the *acquis* (legal package for media regulation) of the EU, and Article 11 – read together with Article 52 (3) – of the Charter of Fundamental Rights of the European Union (CFREU) – freedom of expression and information.[48] In this context if countries want to join the EU they have to be in-line with the EU *acquis* of communications law regulation: For example the Audiovisual Media Services Directive (AVMSD) and if so they also become eligible for the EU's MEDIA program funding.[49] The relevant EU legal framework consists of primary law like Art. 2 TEU – "the EU is founded on various basic values and principles that are common to all the Member States in a society in which pluralism, among other things, prevails"[50] – and the EU's fundamental freedoms ensured by Arts. 34 *et seq.* TFEU:[51]

(1) The freedom to provide services

The freedom to provide services was instrumental in liberalising the European broadcasting markets. However, it was the initial point of the ECJ, ruling that broadcasting is protected by the freedom to provide services, in its first major decision (Sacchi).[52]

(2) The freedom of establishment

The freedom of establishment includes the right 'to set up and manage' undertakings, in particular companies or firms. This characteristic is fulfilled, as distinct from the

[48] Alexander Scheuer, Christian M Bron and Shari Kind, 'European Media Law and Policy Framework' <https://library.fes.de/pdf-files/bueros/sofia/08490.pdf> accessed 13 April 2022 41.
[49] ibid 41-42.
[50] ibid 43.
[51] ibid 43.
[52] ibid 44 citing E.g. ECJ, Case 155/73, Sacchi, [1974] ECR 409, para. 6; Since then, the ECJ passed a large number of judgments in the field of audiovisual media, e.g. ECJ, Case 52/79, Debauve, [1980] ECR 833, para. 8; ECJ, Case 62/79, Coditel, [1980] ECR 881, paras. 14 et. seq.; ECJ, Case C-260/89, ERT, [1991] ECR I-2925, paras 20-25; ECJ, Case C-353/89, Commission v. Netherlands (Mediawet II), [1991] ECR I-4069, para 38; ECJ, Case C-211/91, Commission v. Belgium, [1992] ECR I-6757, para. 5; ECJ, Case C-23/93, TV 10, [1994] ECR I-4795, paras. 13 and 16; ECJ, Case C-429/02, Baccardi France, [2004] ECR I-6613.

> provisions of the free movement of capital, where the acquisition of a shareholding of a company in a Member State by an investor/a company '[...] gives (...) definite influence over that company's decisions and allows (...) to determine that company's activities.' The ECJ lays the main focus on the question as to how the influence on a company is exercised. This criterion seems to be a crucial tool for the distinction between the two freedoms. However, the distinction based on this criterion may not be evident in all cases.[53]

Then there are general competition rules – which are not specifically targeting the communication sector – such as Articles 101, 102, 106 TFEU, and the European Community Merger Regulation (ECMR).[54] Moreover, as an additional example, "the fundamental provision of European law governing the evaluation of public funding systems for broadcasting, cinema/film, press or (Internet-)broadband is Art. 107(1) TFEU."[55] It "prohibits aid granted to certain undertakings by a Member State or through State resources which distorts competition and affects trade between Member States."[55] To continue, as another relevant aspect in the context of this section, there is the 'culture-clause' that underlines the cultural aspect of the EU referring to Article 167 TFEU.[56] In terms of harmonization regarding areas of communications law, the EU relies to Articles 53 (1), 62, 114, 115, and 118 TFEU.[57] As a last note, for e-Communications there is the electronic communications regulation.[58]

---

[53] ibid 45 citing ECJ, Case C-284/06, Burda, [2008] ECR I-4571, para. 69; Cf. also Germelmann, Konkurrenz von Grundfreiheiten und Missbrauch von Gemeinschaftsrecht – Zum Verhältnis von Kapitalverkehrs- und Niederlassungsfreiheit in der neueren Rechtsprechung, EuZW 2008, p. 596 et seq.
[54] ibid 48.
[55] ibid 50.
[56] ibid 56.
[57] ibid 57.
[58] ibid 57 citing See Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 108, p. 33; Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 337, p. 37; Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), as amended by Directive 2009/140/EC of 25 November 2009, OJ L 337, p. 37; Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to

> Electronic communication is part of the so called 'Information Society/New Media' policy, which has set the tone for a knowledge economy based on information technology [IT] in a liberalised market. The Transparency Directive on information society services was the first Directive in this field, aiming to extend the notification procedures for technical standards to information society services. The Conditional Access Directive, the e-Commerce Directive and the Electronic Money Directive have expanded the process of harmonising the information society policy up to now.[59]

Communications and media law also deal with consumer and data protection areas. "Especially the AVMSD wants to ensure transparent information by giving a concept of 'audiovisual commercial communication' in Art. 1(h) AVMSD, designed to cover all types of advertising. And besides that, a number of other directives target the issue of consumer protection."[60]

> *Data protection is another important sector in the field of media law.* The protection of personal data has been an area of considerable legislative activity both at the European and at the Member State level in the years before and after the adoption of the European

electronic communications networks and services (Universal Service Directive), as amended by Directive 2009/136/EC of 25 November 2009, OJ L 337, p. 12.

[59] ibid 58 citing Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC, laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 217, p. 18 (as amended); Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, [1998] OJ L 320, p. 54; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] OJ L 178, p. 1; Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, [2009] OJ L 267, p. 7.

[60] ibid 58 citing Cf. R. Chavannes/O. Castendyk, Comments on Art. 1(h) AVMSD, in: Castendyk/Dommering/Scheuer, European Media Law, Alphen a/d Rijn 2008, Art. 1 AVMSD, pp. 837 ff; With regard to Arts. 114 and 115 TFEU, the following Directives are to be mentioned: Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (codified version), [2009] OJ L 110, p. 30; Regulation (EC) No. 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, as last amended by Commission Regulation (EU) No. 116/2010 of 9 February 2010, [2010] OJ L 37, p. 16; Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version), [2006] OJ L 149, p. 22; Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices, [2005] OJ L 149, p. 22; Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in Respect of Distance Contracts, [1997] OJL144, p.19.

> Data Protection Directive 95/46/EC [which was later superseded by Regulation (EU) 2016/679 known as GDPR].[61]

Not to forget the large and economical very important area of intellectual property (IP) rights as an essential part of communications and media law:

> The European Union has adopted a number of horizontal directives on copyright and intellectual property law based on Art. 114 TFEU (sometimes together with Arts. 53, 62 TFEU). One that applies particularly to broadcasting (TV and radio) is the Cable and Satellite Directive from the early 1990s [today Directive (EU) 2019/789]. Its main goal was to facilitate the clearance of rights for satellite broadcasting and cable retransmission. The (Copyright) Directive 2001/29/EC (also known as the Information Society Directive or the InfoSoc Directive) [extended by Directive (EU) 2019/790] is a directive enacted to implement the WIPO [World Intellectual Property Organization] Copyright Treaty [WCT], in order to address the rights of reproduction, communication to the public, distribution, and legal protection of anti-copying and rights management systems. It ensures that films, music and other copyright protected material enjoy adequate protection in the single market. However, copyright and media law went along different historical paths.[62]

---

[61] ibid 58 citing Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [1995] OJ L 281, p. 31 (emphasis added).

[62] ibid 59 citing Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version), [2009] OJ L 111, p. 16; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), [2006] OJ 2006 L 372, p. 12; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), [2006] L 376, p. 28; Directive 2004/48/ EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, [2004] OJ L 195, p. 16; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, [1996] L 77, p. 20; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, [1993] OJ L 248, p. 15; P. B. Hugenholtz, "SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive", IRIS plus 2009-8, pp. 7 ff; Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, [2001] L 167, p. 10.; World Intellectual Property Organisation Copyright Treaty (WCT), adopted in Geneva on 20 December 1996; see N. Helberger,

"The increasing complexity of electronic communications patterns (now) call for an integrated approach of [communications &] media law and copyright in the future."[63] How this can look like shows the AVMSD. As a piece of secondary EU law the AVMSD is a central piece of EU legislation regulating media services.[64] This directive's articles are not presented or discussed in detail at this point but certain ones are given if necessary or meaningful depending on the context in the analysis chapter which is following. To conclude this part, highlighted should be also that "the Audiovisual Media Services Directive (AVMSD) covers all audiovisual media services (Art. 1(1) lit. a) AVMSD): *traditional television (linear services) and video-on-demand (non-linear services)*."[65]

Copyright Treaty Enters into Force, IRIS 2002-1:2/1; The Commission stated in its review report of 2002 that the goals of the Cable and Satellite Directive have only been partially achieved and that the envisaged future of a pan-European satellite broadcasting market has not materialised. Contractual licensing practices reinforced by the application of signal encryption techniques have allowed broadcasters and right holders to continue segmenting markets along national and regional and linguistic borderlines; Report from the European Commission of 26 July 2002 on the Application of Council Directive 93/83/EEC on the Co-ordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(2002) 430 final.

[63] ibid 60.

[64] ibid 60.

[65] ibid 60 citing Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (codified version), [2010] OJ L 95, p. 1; See the various contributions in EAO (ed.), IRIS Special 2009: "Ready, Set...Go? – The Audiovisual Media Service Directive", on information on how national solutions take into account the various interests covered by the AVMSD (emphasis added).

4 Analysis

This section begins analyzing the Digital Services Act's core provisions that are relevant for communication platforms, preceding EU law in its context, and critically evaluates the DSA in a discussion consisting of comparisons or critique. A similar approach applies for the Digital Markets Act in the second sub-chapter. However, for that especially its relationship to EU competition law and the added value of the DMA are analyzed. The conclusion provides answers to both research questions and the final chapter represents an outlook with a special emphasis to legal challenges, points of critique, and open issues left in that regard. Furthermore, the EU Commission's proposal for the 'European Media Freedom Act (EMFA)' is presented and a tentative preview of digital services' evolution in the EU follows. As an introductory overview to begin with, the following figure shows the characteristics of the DMA and DSA:

Key characteristics of the proposed Acts

	Digital Markets Act	Digital Services Act
Objective	• To enable competition by making it easier for new platforms to enter the market	• To enable transparency, user safety, and platform accountability
Addresses	• "Gatekeeper" platforms with turnover of at least EUR6.5bn; activities in at least 3 EU countries; at least 45 million monthly active end users and 10,000 yearly active business users (both in the EU); having met these thresholds in the last three years	• Intermediaries (covering conduit providers, caching providers, hosting providers), online platforms; special rules for "very large" online platforms with more than 45 million monthly active users
Provisions	• Concerns 18 practices (7 prohibited + 11 practices that are problematic for competition)	• Liability rules; transparency reporting obligations; due diligence obligations
Enforcement	• EU level (Directorate-General for Communication Networks, Content and Technology)	• National regulators (advised by the European Board for Digital Services (EBDS))
Sanctions	• Fines of up to 10 per cent of global turnover, structural separation in case of systematic non-compliance	• Fines of up to 6 per cent of global turnover; in extreme cases: restriction of access to platforms

Table 1: The DMA's and DSA's key characteristics[66]

[66] Bahjat El-Darwiche and Alastair Macpherson, 'The Digital Services Acts Package and What It Entails' <https://www.pwc.com/m1/en/publications/documents/the-digital-services-acts-package.pdf> accessed 13 April 2022 5.

4.1 DSA

This part begins with core provisions relevant for OCSPs and gives an overview of the Digital Services Act sheer size as a legislative act in the area of EU communications law. Afterwards, relevant preceding EU legislation that is important for the analysis is mentioned. These are then used for the discussion of DSA provisions in comparison to previous EU law.

4.1.1 Core Provisions relevant for OCSPs

When mentioning digital or online platforms they are *media platforms* (MPs) although this term is much broader as it covers all forms of platforms in the media environment. The focus for this work is intentionally set on OCSPs which are *communication platforms* (CPs) and they are covered by the technical term *information society services* (ISSs) in compliance with Article 1 (1) (b) of Directive (EU) 2015/1535: "'Service' means any Information Society service, that is to say, *any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services*."[67] They offer any of the listed *core platform services* (CPSs) in Art. 2 of the DMA:

> *'Core platform service' means any of the following:*
>
> (a) online intermediation services;
>
> (b) online search engines;
>
> (c) online social networking services;
>
> (d) video-sharing platform services;
>
> (e) number-independent interpersonal communications services;
>
> (f) operating systems;

[67] DIRECTIVE (EU) 2015/1535 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) [2015] L241/1 (emphasis added).

(g) web browsers;

(h) virtual assistants;

(i) cloud computing services;

(j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, … ;

[see also specific referrals to other EU directives which define each more precisely][68]

The structure of the DSA is presented below and this list clearly shows how comprehensive in size that particular legislative act overall is:

I. General provisions

- Subject matter
- Scope
- Definitions

II. Liability of providers of intermediary services

- 'Mere conduit'
- 'Caching'
- Hosting
- Voluntary own-initiative investigations and legal compliance
- No general monitoring or active fact-finding obligations
- Orders to act against illegal content
- Orders to provide information

III. Due diligence obligations for a transparent and safe online environment

- ***SECTION 1: Provisions applicable to all providers of intermediary services***

- Points of contact for Member States' authorities, the Commission and the Board
- Points of contact for recipients of the service
- Legal representatives
- Terms and conditions
- Transparency reporting obligations for providers of intermediary services

- ***SECTION 2: Additional provisions applicable to providers of hosting services, including online platforms***

- Notice and action mechanisms
- Statement of reasons

[68] REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 art 2 (emphasis added).

- Notification of suspicions of criminal offences

- ***SECTION 3: Additional provisions applicable to providers of online platforms***

- Exclusion for micro and small enterprises
- Internal complaint-handling system
- Out-of-court dispute settlement
- Trusted flaggers
- Measures and protection against misuse
- Transparency reporting obligations for providers of online platforms
- Online interface design and organization
- Advertising on online platforms
- Recommender system transparency
- Online protection of minors

- ***SECTION 4: Additional provisions applicable to providers of online platforms allowing consumers to conclude distance contracts with traders***

- Exclusion for micro and small enterprises
- Traceability of traders
- Compliance by design
- Right to information

- ***SECTION 5: Additional obligations for providers of very large online platforms and of very large online search engines to manage systemic risks***

- Very large online platforms and very large online search engines [VLOPs and VLOSEs]
- Risk assessment
- Mitigation of risks
- Crisis response mechanism
- Independent audit
- Recommender systems
- Additional online advertising transparency
- Data access and scrutiny
- Compliance function [compliance officer(s)]
- Transparency reporting obligations
- Supervisory fee

- ***SECTION 6: Other provisions concerning due diligence obligations***

- Standards
- Codes of conduct
- Codes of conduct for online advertising
- Codes of conduct for accessibility
- Crisis protocols

IV. Implementation, cooperation, penalties and enforcement

- ***SECTION 1: Competent authorities and national Digital Services Coordinators [NDSCs]***

- Competent authorities and Digital Services Coordinators
- Requirements for Digital Services Coordinators
- Powers of Digital Services Coordinators
- Penalties
- Right to lodge a complaint
- Compensation
- Activity reports

- ***SECTION 2: Competences, coordinated investigation and consistency mechanisms***

- Competences
- Mutual assistance
- Cross-border cooperation among Digital Services Coordinators
- Referral to the Commission
- Joint investigations

- ***SECTION 3: European Board for Digital Services [EBDS]***

- European Board for Digital Services
- Structure of the Board
- Tasks of the Board

- ***SECTION 4: Supervision, investigation, enforcement and monitoring in respect of providers of very large online platforms and of very large online search engines [VLOPs and VLOSEs]***

- Development of expertise and capabilities
- Enforcement of obligations of providers of very large online platforms and of very large online search engines
- Initiation of proceedings by the Commission and cooperation in investigation
- Request for information
- Power to take interviews and statements
- Power to conduct inspections
- Interim measures
- Commitments
- Monitoring actions
- Non-compliance
- Fines
- Enhanced supervision of remedies to address infringements of obligations laid down in Section 5 of Chapter III
- Periodic penalty payments
- Limitation period for the imposition of penalties
- Limitation period for the enforcement of penalties

- Right to be heard and access to the file
- Publication of decisions
- Review by the Court of Justice of the European Union
- Requests for access restrictions and cooperation with national courts
- Implementing acts relating to Commission intervention

- ***SECTION 5: Common provisions on enforcement***

- Professional secrecy
- Information sharing system [ISS]
- Representation

- ***SECTION 6: Delegated and implementing acts***

- Exercise of the delegation
- Committee procedure

V. Final provisions

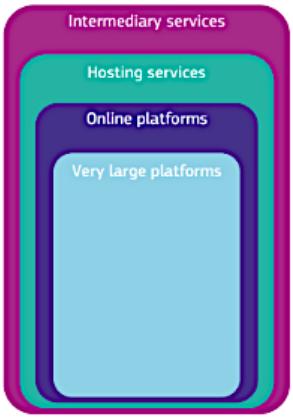
- Amendments to Directive 2000/31/EC
- Amendment to Directive (EU) 2020/1828
- Review
- Anticipated application to providers of very large online platforms and of very large online search engines
- Entry into force and application[69]

[69] REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

Targeted regulation areas relevant for communication platforms are the following ones:

Figure 4: Key goals of the DSA[70]

The DSA covers four different types of services and platforms:



- **Intermediary services** offering network infrastructure: Internet access providers, domain name registrars, including also:
- **Hosting services** such as cloud and webhosting services, including also:
- **Online platforms** bringing together sellers and consumers such as online marketplaces, app stores, collaborative economy platforms and social media platforms.
- **Very large online platforms** pose particular risks in the dissemination of illegal content and societal harms. Specific rules are foreseen for platforms reaching more than 10% of 450 million consumers in Europe.

Figure 5: Types of services and platforms covered by the DSA[71]

[70] European Commission, 'The Digital Services Act: Ensuring a Safe and Accountable Online Environment' (2022) <https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment_en> accessed 13 April 2022.
[71] ibid.

In particular the list below presents the key obligations of the DSA:

	Intermediary services *(cumulative obligations)*	Hosting services *(cumulative obligations)*	Online platforms *(cumulative obligations)*	Very large platforms *(cumulative obligations)*
Transparency reporting	•	•	•	•
Requirements on terms of service due account of fundamental rights	•	•	•	•
Cooperation with national authorities following orders	•	•	•	•
Points of contact and, where necessary, legal representative	•	•	•	•
Notice and action and obligation to provide information to users		•	•	•
Reporting criminal offences		•	•	•
Complaint and redress mechanism and out of court dispute settlement			•	•
Trusted flaggers			•	•
Measures against abusive notices and counter-notices			•	•
Special obligations for marketplaces, e.g. vetting credentials of third party suppliers ("KYBC"), compliance by design, random checks			•	•
Bans on targeted adverts to children and those based on special characteristics of users			•	•
Transparency of recommender systems			•	•
User-facing transparency of online advertising			•	•
Risk management obligations and crisis response				•
External & independent auditing, internal compliance function and public accountability				•
User choice not to have recommendations based on profiling				•
Data sharing with authorities and researchers				•
Codes of conduct				•
Crisis response cooperation				•

Table 2: Key obligations of the DSA[72]

[72] ibid.

4.1.2 Relevant preceding EU Law

Two central preceding pieces of EU law are the e-Commerce Directive[73] which regulates e-Commerce and lays down several provisions for it and the AVMSD[74] that regulates audiovisual media services. However, EU digital services regulatory

> interventions fail to provide horizontal rules (in terms of obligations, responsibilities and regulatory oversight) on the effective and fundamental rights-compliant management of illegal content, which makes the need for new legislation particularly urgent. However, as explained in the explanatory memorandum, *the DSA is not intended to replace, but rather to complement, these sectoral initiatives*, which will continue to apply as *lex specialis* [AVMSD and Platform to Business Regulation].
>
> Sector-specific legislation that will remain in force alongside the DSA includes the 2018 revised *Audiovisual Media Services Directive* [AVMSD], which introduced new rules on video-sharing platforms with regard to audiovisual content and audiovisual commercial communications, as well as the *Platform to Business Regulation*, which imposed transparency obligations on platforms *vis à vis* their business users and required to provide those users with effective complaint mechanisms.[75]

[73] DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178/1.

[74] DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1.

[75] Ilaria Buri and Joris van Hoboken, 'The Digital Services Act (DSA) Proposal: A Critical Overview' (Digital Services Act (DSA) Observatory - Institute for Information Law (IViR), University of Amsterdam 2021) <https://dsa-observatory.eu/wp-content/uploads/2021/11/Buri-Van-Hoboken-DSA-discussion-paper-Version-28_10_21.pdf> accessed 31 March 2022 8 citing Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (emphasis added).

In addition to those two legislative acts also the dissemination of terrorist content online has been the target for regulatory actions of the EU.[76] The Regulation on Preventing the Dissemination of Terrorist Content Online (TERREG or TCO)[77] is the backbone in this policy area. Moreover, there exists a Code of Practice on Disinformation[78] that however "highlighted a series of shortcomings in the current Code, consisting in particular in the lack of precise commitments, meaningful key performance indicators (KPIs) and access to data allowing for an independent monitoring of the signatories' compliance and research on disinformation."[79] Furthermore, the EU Commission published the EU Democracy Action Plan (EDAP)[80] which aims "to achieve three main objectives. These are the protection of the integrity of elections and democratic participation, the promotion of free and independent media and the tackling of disinformation."[81] Interesting in this context is the relationship between the EDAP and the DSA:

> In particular, the Commission foresees an active role for the DSA in contributing to the actions under the first and the third of these goals. As regards the objective of protecting the integrity of elections and fostering democratic participation, the envisaged measures include two proposals by the Commission in 2021. One concerns the transparency of political advertising and is supposed to supplement the rules on online advertising set forth by the DSA [Proposal COM(2021) 731 final], while the other one addresses illegal content online through the extension of the list of EU crimes under art. 83(I) TFEU to comprise hate crime and hate speech (including online) [COM(2021) 777 final].[82]

---

[76] ibid 9.
[77] REGULATION (EU) 2021/784 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79.
[78] Buri and van Hoboken (n 75) 9.
[79] ibid 9.
[80] European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS On the European democracy action plan [2020] COM(2020) 790 final.
[81] Buri and van Hoboken (n 75) 10 citing Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee, and the Committee of the Regions on the European Democracy Action Plan ("European Democracy Action Plan"), 3 December 2020, COM(2020) 790 final.
[82] ibid 10, European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising [2021] COM(2021) 731 final, European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN

"The combination of the European Democracy Action Plan and the DSA proposal is considered a pivotal point in the policy pursued over the last years against disinformation."[83] Important is to demarcate the areas addressed by the DSA from those that are not covered by it. The DSA deals with digital services and online platforms but "the main development in the area of the data economy is represented by the proposal for a Regulation on European Data Governance (the 'Data Governance Act')."[84] The next section analyzes innovative aspects of the DSA in comparison to preceding EU law (specifically e-Commerce Directive[85], AVMSD, TERREG).

PARLIAMENT AND THE COUNCIL A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime [2021] COM(2021) 777 final.

[83] ibid 10 citing Paolo Cesarini, Regulating Big Tech to Counter Online Disinformation: Avoiding Pitfalls while Moving Forward, Media Laws (2021), p. 2, http://www.medialaws.eu/wp-content/uploads/2021/02/Cesarini.pdf.

[84] ibid 12 citing Proposal for a Regulation of the European Parliament and of the Council on European Data Governance ("Data Governance Act"), COM(2020) 767 final.

[85] European Commission, 'E-Commerce Directive' (23 February 2022) <https://digital-strategy.ec.europa.eu/en/policies/e-commerce-directive> accessed 13 April 2022.

4.1.3 Comparison of DSA provisions in comparison to previous EU Law and new Obligations

New or already in EU law established similar key obligations of the DSA for communication platforms compared to previous EU regulation are shown in the following table exemplarily:

Extraterritorial scope in regard to the intermediaries insofar they offer their services within the EU, no matter where the provider actually is established (or its legal representative applies if not based in EU)	Art. 2 (1) DSA and Art. 13 DSA → a similar approach can be seen in other EU laws e.g. such as Art. 3 GDPR, Arts. 4, 17 TERREG, or Art. 2 AVMSD
Broader definition of *illegal content*	Art. 3 (h) DSA → broad definition given
Liability regime and prohibition of general monitoring maintained as contained in the e-Commerce Directive	Art. 15 (1) e-Commerce Directive → Art. 8 DSA; Arts. 12, 13, 14 e-Commerce Directive → Arts. 4, 5, 6 DSA (conditions for liability exemption)
New conditions regarding the liability exemption for platforms intermediating among consumers & traders	Art. 6 (3) DSA → limiting the application of liability outlined in Art. 6 (1) DSA
Removal of illegal content upon obtaining knowledge or awareness	Art. 6 (1) DSA → something like that – however stricter – exists also in Art. 3 TERREG (removal orders with tight time limit) or Arts. 6, 9, 12, 22, 27 AVMSD, the latter is narrower though in scope and the means (way to handle it) up to the Member States
Added to the intermediary liability regime were **voluntary own-initiative investigations**, no automatic exclusion out of safe harbor protection – **incentive** to check content for illegal characteristics voluntarily	Art. 7 DSA → new in regard of EU law but similar to the Communications Decency Act (CDA) Section 230 under U.S. law, however the DSA's scope is more narrow
Strengthening of national authorities in requesting orders to act against illegal content or provide information concerning such	Art. 10 and 11 DSA and referring to the cooperation of the digital services coordinators (DSCs) Art. 68 DSA matters → cooperation

– namely the digital services coordinators (DSCs) – and cooperation of those DSCs	among national authorities is also key in Arts. 29, 30 AVMSD, Arts. 4, 12, 13, 14 TERREG, and partly Art. 19 e-Commerce Directive, but the latter is not very detailed
Involvement of private entities in enforcing actions/initiatives against illegal content, trusted flaggers, and notification of suspicions of criminal offences	Arts. 9, 10, 18, 22 DSA → innovative tool but has to be realized & effective in practice
Exclusion of micro and small enterprises (SMEs)	Art. 19, 29 DSA → reasonable, may lack of an understandable justification in certain cases → can also be found e.g. in Art. 17 (6) DSM, Art. 18 (2) (f) TERREG
Obligation system in stages depending on the size of online platforms/intermediaries	Chapter III DSA – Section I (Arts. 10-15) for all, Section II (Arts. 16-18) for hosting services & online platforms, Section III (Arts. 19-28) addresses online platforms, Section IV (Arts. 29-32) containing provisions for online platforms that allow consumers to conclude distance contracts with traders, then specific obligations for VLOPs in Section V (Arts. 33-43) concerning the management of systemic risks of their services, and Section VI (Arts. 44-48) is about other obligations related to due diligence obligations
Single contact point & legal representative **Terms and conditions** – content moderation and safeguarding fundamental rights **Transparency** – yearly reports on content moderation activities, specific elements	**Chapter III DSA – Section I: all** Arts. 11-13 DSA → similar in Arts. 4, 5, 14, 15, 16, 17 TERREG & Art. 2 AVMSD Art. 14 DSA → a similar way of content moderation also in Art. 5 (2) TERREG Art. 15 DSA and Arts. 24, 42 for VLOPs → Art. 8 TERREG

	Chapter III DSA – Section II: hosting services & online platforms
Notice & action for illegal content warnings and statement of reasons	Art. 16 DSA → similar to Art. 10 TERREG Art. 17 DSA → alike to Art. 11 TERREG
Below are new obligations specifically for (very large) online platforms:	
	Chapter III DSA – Section III: online platforms
Internal complaint-handling mechanism and out-of-court settlement of disputes (authorization of responsible body by DSC)	Art. 20 DSA → similar to Art. 10 TERREG Art. 21 DSA → similar to Art. 17 e-Commerce Directive, Art. 28b (7) AVMSD, Arts. 17 (9) and 21 DSM Directive
Statement of Reasons **Right to revise a Removal of Content**	Art. 17 (1) DSA → if content is restricted Art. 20 (4) DSA → if sufficient grounds
Trusted flaggers category appointed by DSC ('European trusted flagger status' is in particular possible to get from DSCs)	Art. 22 DSA → new provision to empower the work of digital services coordinators (DSCs) with so called 'trusted flaggers'
Measures and protection against misuse – definitions in platforms' terms & conditions	Art. 23 DSA → misuse addressed in Arts. 1, 5 TERREG, however DSA is more specific
Notifications of suspicions of criminal offences – information exchange obligations when it comes to law enforcement	Art. 18 DSA → similar to Art. 28b (1) (c) AVMSD, Art. 3 (4) (i) e-Commerce Directive, Art. 14 (5) TERREG
Transparency reporting obligations for providers of online platforms – information every six months expanding on Art. 15 DSA	Art. 24 DSA, widened for VLOPs in Art. 42 DSA → Arts. 7, 8, 22 TERREG, Arts. 19, 27 DSM Directive, Arts. 4a (1) (c), 28 (3) (d) (i), 30 (2) (5) AVMSD
Online advertising transparency and repository access to certain information via APIs including **recommender system transparency**	Arts. 26-28 DSA, Arts. 38-39 DSA emphasize on VLOPs → transparency obligation e.g. in Art. 11 (3) (d) AVMSD but the specific API access obligation is unique in the DSA
Protection of minors online	Art. 28 DSA → also e.g. in Arts. 3 (4) (a) (i), 9 (1) (e) (g), 12, 22 (a), and 27 AVMSD

	or Arts. 3 (a) (i), 14 (1) (e) e-Commerce Directive
Traceability of traders – 'Know Your Business Customer (KYBC)' principle **Compliance by design** **Right to information**	**Chapter III DSA – Section IV: Provisions for online platforms that allow consumers to conclude distance contracts with traders** Art. 30 DSA → KYBC principle is broader than Art. 5 e-Commerce Directive, trader have to provide information (name, address, phone, email) Art. 31 DSA interface obligations Art. 32 DSA illegal characteristic of product or service, identify of trader, and any relevant means of redress
DSCs have to monitor if active user count equals or is larger than 45 million as only then the platform is considered a VLOP. **Risk governance:** - Risk assessment and mitigation of risks - Crisis response mechanism - Independent audits **Systemic risks:** - Dissemination of illegal content via it - Negative for exercising fundamental rights - Negative effects on civic discourse and elections, including public security - Negative impact on gender-based violence, protecting public health & minors, and concerning physical and mental well-being	**Chapter III DSA – Section V: VLOPs & VLOSEs and addressing systemic risks** Art. 33 DSA → VLOP threshold provision **→ Most of the obligations in this section are innovative and new compared to previous EU law, unless otherwise stated:** Arts. 34 and 35 DSA → one report per year Art. 36 DSA → addressing threat measures Art. 37 DSA → annual and at their own cost Art. 34 DSA → risk assessment has to include the four systemic risks in the list on the left column

Independent audit per annum to see if in compliance with Chapter III DSA and Arts. 35, 36, 37 DSA **Recommender systems** – explanation of main parameters in terms & conditions **Data access and scrutiny** provided by platform to verify compliance with DSA – inquired by DSCs or Commission via 'reasoned request' and access to conduct research on systemic risks based on Art. 34 (1) DSA **Compliance officers** – one or more to monitor and realize compliance with DSA, also to improve cooperation with DSCs & EC **Transparency reporting obligations** – dedicated transparency reports are every six months required (see Art. 42 DSA)	Art. 37 DSA → details about the audit structure and overall workflow as well as requirements to ensure independency Art. 38 DSA → obligations for recommender systems and 'opt-out' option Art. 40 DSA → necessary access to information and data for monitoring purposes to analyze if VLOP is in compliance with DSA Art. 41 DSA → particular person(s) responsible for compliance of platform with DSA and specification of tasks & qualifications Art. 42 DSA → similar to Art. 7 (2) (3), 8 TERREG but narrower (every six months instead of annual reporting obligation)
Other provisions concerning due diligence obligations – standards (European and international standardization bodies), codes of conduct (for ads & key performance indicators (KPIs)), and crisis protocols (addressing public security or public health crises)	**Chapter III DSA – Section VI:** Arts. 44-48 DSA → e.g. Arts. 3 (4) (a) (i) and 11 (3), 23 (c) TERREG are also addressing public security measures; otherwise the use of KPIs is innovative and helps to evaluate the effectiveness of EU legislation in practice after it has been in force
Section 1: Competent authorities and Digital Services Coordinators (DSCs) and **Section 2:** Competences, coordinated investigation and consistency mechanisms	**Chapter IV DSA: Implementation, cooperation, sanctions and enforcement** Arts. 49-55 and 56-60 DSA → DSC is original but assignment to competent authorities not, can be found e.g. in Art. 5 (d) AVMSD, Arts. 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 16, 17, 21 TERREG, the DSA focuses on a specific DSC though and describes it more in detail

Section 3: European Board for Digital Services (EBDS)	Arts. 61-63 DSA → EBDS is new but a contact committee and cooperation is e.g. in Arts. 29, 30 AVMSD also included, cooperation is also in Art. 19 (2) e-Commerce Directive, Art. 14 TERREG → overall these cooperation obligations are not completely new but the DSA outlines them more in detail
Section 4: Supervision, investigation, enforcement and monitoring in respect of very large online platforms and search engines	Arts. 64-83 DSA → Arts. 6 (1) (b), 8 (2) TERREG also addresses these topics but the DSA specifically focuses on VLOPs
Section 5: Common provisions on enforcement	Arts. 84-86 DSA → the latter (Art. 68 DSA) similar to Art. 17 TERREG legal representative, the information sharing system (ISS) (Art. 85 DSA) is unique in the DSA
Section 6: Delegated and implementing acts	Arts. 87-88 DSA → similar to e.g. Arts. 19, 20 TERREG (exercise of delegated acts), exercise of delegation, committee approach
Final provisions, deletion, amendments of other directives in context	**Chapter V DSA: Final provisions** Arts. 89-93 DSA → Arts. 12-15 e-Commerce Directive shall be deleted, references to them point to Arts. 4-6, 8 DSA

Table 3: DSA – Innovative aspects, characteristics, and new key obligations[86]

4.1.4 Discussion of particular Key Provisions and Innovations regarding the DSA

This chapter discusses particular key provisions of the DSA and analyzes innovative characteristics regarding them. Critique is also mentioned where appropriate and meaningful.

[86] Buri and van Hoboken (n 75) 13-43, REGULATION (EU) 2022/2065 (Digital Services Act) (n 69).

4.1.4.1 Horizontal Rules of the DSA

Referring to the relationship between the AVMSD and the DSA, it is worth highlighting that

> the Digital Services Act [DSA] *sets the horizontal rules covering all services and all types of illegal content, including goods or services. It does not replace or amend, but it complements sector-specific legislation* such as the Audiovisual Media Services Directive (AVMSD), the Directive on Copyright in the Digital Single Market, the Consumer Protection Acquis, or the Proposal for a Regulation on preventing the dissemination of terrorist content online [TERREG or TCO].[87]

4.1.4.2 What is (not) an Online Platform?

Critique has remained especially when it comes to defining what an online platform is (not):

> According to DIGITALEUROPE, the organization that represents all the major technology companies (including the so-called "GAFAM"), *the current DSA definition of online platforms is too broad*. The industry organization advocates … to expressly exclude providers such as IT infrastructure services, which typically have no direct visibility over how customers manage their content, and cloud-based hosting services, which store customers' content but do not have dissemination of such content as their main feature. As explained … *their status under the DSA provisions on online platforms and VLOPs is not clear*.[88]

The relevance of the DSA in addition to existing *lex specialis* such as the AVMSD becomes clear when highlighting the development in the audiovisual (online) sector and its shift to more on-demand services. But "in addition to on-demand services, younger audiences increasingly

[87] European Commission, 'Questions and Answers: Digital Services Act' (20 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 8 August 2022 (emphasis added).
[88] ibid 18-19 (emphasis added).

turn to other forms of video provided by video-sharing platforms (VSPs) or social networks."[89] As already mentioned, the DSA has to be seen as a complementary legislative instrument additionally to e.g. the AVMSD and helps that "EU legislations [can] play [and fulfill] a [key] role in harmonizing media transparency rules [across all Member States]."[90]

4.1.4.3 Transparency as the new Status Quo

Innovative about the DSA is definitely its approach towards more transparency (use of specific reports) which nevertheless could also be seen already in TERREG. However, despite the increased transparency obligations or provisions the DSA imposes on online platforms, more transparency not necessarily always brings meaningful benefits to their (end) users eventually:

> *As regards transparency, Prof. van Hoboken stressed that current expectations from regulators and politicians with respect to user-facing transparency are too high. He reported that scientific evidence suggests that more transparency would not provide significant benefits for users.* Furthermore, the lines between content and advertising are becoming increasingly blurred by influencer marketing and *there is currently a transparency and accountability gap that should be addressed*. He recommended regulating tracking and targeting of consumers by limiting the collection of sensitive data, or limiting the level of granularity in which tracking data can be stored. Moreover, consumers should have the choice to opt-out of ad-tracking and personalised advertising when using platform services.

[89] Jenny Weinand, *Implementing the EU Audiovisual Media Services Directive : Selected Issues in the Regulation of AVMS by National Media Authorities of France, Germany and the UK* (1. Auflage 2018., Nomos Verlagsgesellschaft mbH & Co KG 2018) <https://doi.org/10.5771/9783845282473> 31 citing Cabrera Blázquez et al., Yearbook 2015, p. 26.

[90] European Commission and Content and Technology Directorate-General for Communications Networks, *Study on the Implementation of the New Provisions in the Revised Audiovisual Media Services Directive (AVMSD) – Final Report, Part D* (Publications Office 2021) <https://op.europa.eu/en/publication-detail/-/publication/6d536c6f-5c68-11eb-b487-01aa75ed71a1/language-en> accessed 13 April 2022 231.

Finally Prof. van Hoboken *argued in favour of providing more public data to researchers and journalists to turn simple transparency into accountability for Very Large Online Platforms (VLOPs)*. One crucial element in his opinion is additional support for those actors who use this data to hold platforms accountable.[91]

To get a good understanding, the following two tables sum up the (new) profound transparency obligations as well as the gradual categories of services and platforms which the DSA covers:

	INTERMEDIARY SERVICES	HOSTING SERVICES	ONLINE PLATFORMS	VLOPs
Terms of Use	Art. 12	Art. 12 + 15	Art. 12 + 15 + 20 + 22	Art. 12 + 15 + 20 + 22 + 29
Transparency reporting obligations	Art. 13	Art. 13	Art. 13 +19 + 23	Art. 13 + 19 + 23 + 33
Advertising transparency	X	X	Art. 24	Art. 24 + 30
Risk assessment and auditing	X	X	X	Art. 26 + 28
Access to data	X	X	X	Art. 31 + 63

Table 4: Categories of Transparency Obligations[92]

	INTERMEDIARY SERVICES	HOSTING SERVICES	ONLINE PLATFORMS	VLOPs
Terms and conditions (Art. 12)	X	X	X	X
Transparency reporting obligations (Art. 13)	X	X	X	X
Statement of reasons (Art. 15)		X	X	X
Trusted flaggers (Art. 19)			X	X
Measures and protection against misuse (Art. 20)			X	X
Traceability of traders (Art. 22)			X	X
Transparency reporting obligations for providers of online platforms (Art. 23)			X	X
Online advertising transparency (Art. 24)			X	X
Risk assessment (Art. 26)				X
Mitigation of risks (Art. 27)				X
Independent audit (Art. 28)				X
Recommender systems (Art. 29)				X
Additional online advertising transparency (Art. 30)				X
Data access and scrutiny (Art. 31)				X
Transparency reporting obligations for VLOPs (Art. 33)				X
Right to be heard and access to the file (Art. 63)				X

Table 5: Transparency Obligations Grid, Divided by Type of Service[93]

[91] European Parliament and others, *The Digital Services Act and the Digital Markets Act: A Forward-Looking and Consumer-Centred Perspective* (European Parliament 2021) <https://op.europa.eu/en/publication-detail/-/publication/f1a00d54-d7b6-11eb-895a-01aa75ed71a1/language-en/format-PDF/source-251324629> accessed 13 April 2022 11 (emphasis added).
[92] David Nosák, 'Overview of Transparency Obligations for Digital Services in the DSA' <https://cdt.org/wp-content/uploads/2021/06/2021-06-18-CDTEU-Overview-of-transparency-obligations-for-digital-services.pdf and https://cdt.org/insights/overview-of-transparency-obligations-for-digital-services-in-the-dsa/> accessed 10 August 2022 2.
[93] ibid 1.

4.1.4.4 Retention of prohibiting General Monitoring and the Liability Regime

Concerning the prohibition of general monitoring and the liability regime, the DSA maintains that as it is already included in the e-Commerce Directive. Therefore, it transposed Art. 15 (1) e-Commerce Directive into Art. 8 DSA. And similar conditions for liability exemption as in Arts. 12, 13, and 14 e-Commerce Directive can be found in Arts. 4, 5, and 6 DSA. This means the DSA respects and keeps the liability regime as laid out already in the e-Commerce Directive and no changes were made in this area. From an analytical point of view, this approach makes sense as prohibiting general monitoring prevents a potential form of excessive regulation.

4.1.4.5 Complaint Mechanism and the Right to revise a Removal of Content

The DSA also introduces an internal complaint-handling mechanism in Art. 20 DSA which is very similar to what can be found already in Art. 10 TERREG. Furthermore, it gives the option to handle disputes out-of-court. Art. 21 DSA is the provision containing this and something like that is also embodied in Art. 17 e-Commerce Directive, Art. 28b (7) AVMSD, and Arts. 17 (9) & 21 DSM Directive. This means the use of an internal complaint-handling mechanism is not that new but specifically interesting and original is the right to revise a removal of content enshrined in Art. 17 DSA. It deals with the requirement for a statement of reasons (Art. 17 (1) DSA) if content is restricted because either, it does not comply with terms & conditions, or is illegal:

> 1. Providers of hosting services shall provide a clear and *specific statement of reasons to any affected recipients of the service* for any of the following restrictions imposed on the ground that the information provided by the recipient of the service is illegal content or incompatible with their terms and conditions:

(a) any restrictions of the visibility of specific items of information provided by the recipient of the service, including removal of content, disabling access to content, or demoting content;

(b) suspension, termination or other restriction of monetary payments;

(c) suspension or termination of the provision of the service in whole or in part;

(d) suspension or termination of the recipient of the service's account.[94]

What is innovative and new is the right to revise an unjustified removal of content. That provision can be found in Art. 20 (4) DSA which obliges online platform providers to reverse their decision again if there are justified complaints based on meaningful evidence that the prior decision was biased. This means in practice that providers have to bring this content back onto the platform:

4. Providers of online platforms shall handle complaints submitted through their internal complaint-handling system in *a timely, non-discriminatory, diligent and non-arbitrary manner*. Where a complaint contains sufficient grounds for the provider of the online platform to consider that its decision not to act upon the notice is unfounded or that the information to which the complaint relates is not illegal and is not incompatible with its terms and conditions, or contains information indicating that the complainant's conduct does not warrant the measure taken, *it shall reverse its decision* referred to in paragraph 1 without undue delay.[95]

4.1.4.6 Reporting Obligations to judicial Authorities

The DSA strengthens national authorities in requesting orders to act against illegal content or provide information concerning such. Innovative are the new digital services coordinators

[94] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 17(1) (emphasis added).
[95] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 20(4) (emphasis added).

(DSCs) and the close cooperation between them. Relevant in establishing this are Art. 10 and 11 DSA. Moreover, when referring to the cooperation of the DSCs, Art. 68 DSA is important. Compared to previous EU law cooperation among national authorities is also included in Arts. 29, 30 AVMSD, Arts. 4, 12, 13, 14 TERREG, and partly Art. 19 e-Commerce Directive. The latter is not very detailed framed though in scope. Highlighted should be the reporting obligations to judicial authorities enshrined in the DSA. Art. 10 (1) DSA states therefore:

> 1. Upon receipt of an order to provide specific information about one or more specific individual recipients of the service, issued by the relevant national judicial or administrative authorities on the basis of the applicable Union law or national law in compliance with Union law, *providers of intermediary services shall, without undue delay inform the authority issuing the order, or any other authority specified in the order, of its receipt and of the effect given to the order, specifying if and when effect was given to the order*.[96]

Besides that, the DSA foresees an involvement of private entities in enforcing actions or initiatives against illegal content, trusted flaggers, and notification of suspicions of criminal offences. This innovative tool for enforcement has to be realized and made effective in practice. It is embedded in Arts. 9, 10, 18, and 22 DSA. In addition, Art. 11 DSA ensures a single point of contact to ensure the flow of communication with judicial authorities:

> 1. Providers of intermediary services *shall designate a single point of contact to enable them to communicate directly, by electronic means, with Member States' authorities, the Commission and the Board referred to in Article 61* for the application of this Regulation.

[96] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 10(1) (emphasis added).

2. Providers of intermediary services *shall make public the information necessary to easily identify and communicate with their single points of contact*. That information *shall be easily accessible, and shall be kept up to date*.[97]

Finally, Art. 18 DSA does oblige online platform providers to notify judicial authorities regarding suspicions of criminal offences:

1. Where a provider of hosting services becomes aware of any information giving rise to a suspicion that a criminal offence involving a threat to the life or safety of a person or persons has taken place, is taking place or is likely to take place, *it shall promptly inform the law enforcement or judicial authorities of the Member State or Member States concerned of its suspicion and provide all relevant information available*.

2. Where the provider of hosting services cannot identify with reasonable certainty the Member State concerned, *it shall inform the law enforcement authorities of the Member State in which it is established or where its legal representative resides or is established or inform Europol, or both*.

For the purpose of this Article, the Member State concerned shall be the Member State *in which the offence is suspected to have taken place, to be taking place or to be likely to take place, or the Member State where the suspected offender resides or is located, or the Member State where the victim of the suspected offence resides or is located*.[98]

4.1.4.7 VLOPs' Risk Assessment

Chapter III – Section V of the DSA is about VLOPs and addressing systemic risks. The DSCs have to monitor if the active user count equals or is larger than 45 million as only then the platform in question is considered a VLOP – see Art. 33 DSA which sets the VLOP threshold.

[97] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 11(1-2) (emphasis added).
[98] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 18 (emphasis added).

The risk assessment framework explained below is an innovative approach and can be classified as new in the DSA. First, there is the risk governance structure itself which consists of risk assessment and mitigation of risks including e.g. adaptations of user interfaces & a report once a year (Arts. 34 and 35 DSA), a crisis response mechanism referring to measures against certain threats (Art. 36 DSA), and annual independent audits at providers' own cost (Art. 37 DSA). Then Art. 34 DSA is about assessing risks applying a categorization of four systemic risks:

> (a) *the dissemination of illegal content* through their services;
>
> (b) *any actual or foreseeable negative effects for the exercise of fundamental rights*, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including the freedom and pluralism of the media, enshrined in Article 11 of the Charter, to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child enshrined in Article 24 of the Charter and to a high-level of consumer protection enshrined in Article 38 of the Charter;
>
> (c) *any actual or foreseeable negative effects on civic discourse and electoral processes, and public security*; [and]
>
> (d) *any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being*.[99]

Crucial for monitoring the effectiveness is the independent audit per annum to see if a VLOP is in compliance with Chapter III DSA and in particular Arts. 35, 36, and 37 DSA. The latter describes details about the structure of such an audit, overall workflow, and special requirements to ensure independency throughout the process and for the result. Furthermore, Art. 38

[99] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 34(1) (emphasis added).

DSA is about recommender systems and obligations for them. There is a requirement for them to set main parameters in their terms & conditions and the option to 'opt-out' must be available. To continue, also data access and scrutiny provided by the platforms to verify their compliance with the DSA are key. DSCs or the European Commission can inquire that by the use of 'reasoned requests' and the access to conduct research on systemic risks is based on Art. 34 (1) DSA. Art. 40 DSA ensures this necessary access to information and data for monitoring purposes. That gives the authority the power and tools to be able to analyze if VLOPs comply with the regulations laid out in the DSA. Another crucial instrument is included in Art. 41 DSA, which mentions special types of persons that are responsible for compliance of platforms with the regulation. It also describes their specification of tasks and qualifications needed to fulfill the job. These so-called 'compliance officers' assist in monitoring and realizing compliance with the DSA and are also there to improve cooperation among DSCs & the EC. As a last point, dedicated transparency reports are due every six months according to Art. 42 DSA. This article is similar to Art. 7 (2) & (3) and 8 TERREG, however narrower as it obliges the platform provider to hand in such reports at least every six months instead of an annual report only.

4.1.4.8 Delimitation of illegal Content under the DSA

A point of critique and problematic could be the very broad definition of illegal content according to Art. 3 (h) DSA:

> (h) 'illegal content' means *any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law*;[100]

[100] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 3(h) (emphasis added).

The delimitation of illegal content under the DSA is bound to what is considered illegal in Union law or the law of any Member State that complies with Union law. The subject matter or nature does not matter in this context. The execution of authority decisions will show whether this broad definition is good or not. Nevertheless, it could be more precise as the DSA and DMA aim to regulate a very specific sector and issue, so demarcating it in that sense would have been possible or even make sense in order to prevent any over sprawling regulation.

4.1.4.9 Targeting political Advertising and Transparency Challenges for the DSA taking into account the Proposal 'COM(2021) 731 final'

Another recent proposal has been 'COM(2021) 731 final'[101] which addresses political advertising and transparency. Art. 1 of it states as the subject matter and scope:

> 1. This Regulation lays down:
>
> (a) harmonised transparency obligations for providers of political advertising and related services *to retain, disclose and publish information connected to the provision of such services*; [and]
>
> (b) harmonised rules on *the use of targeting and amplification techniques* in the context of the publication, dissemination or promotion of political advertising that involve the use of personal data.
>
> 2. This Regulation *shall apply to political advertising prepared, placed, promoted, published or disseminated in the Union*, or directed to individuals in one or several Member States, irrespective of the place of establishment of the advertising services provider, and irrespective of the means used.

[101] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising [2021] COM(2021) 731 final.

3. The aims of this Regulation are:

(a) *to contribute to the proper functioning of the internal market for political advertising and related services*; [and]

(b) *to protect natural persons with regard to the processing of personal data*.[102]

The justification to have competence in regulating this area is the proper functioning of the internal market as the core regulation aim. However, similar to the proposed 'European Media Freedom Act (EMFA)' there could be the issue of a lack of competence as a major concern eventually. The EU does not have a full competency to regulate the media. This is an area reserved to the competence of Member States normally. Another example is the AVMSD that works differently because as a directive it is not directly applicable on the level of Member States. Transposing it is required on their side – respecting Member States' competence to regulate the media – while a regulation on the other hand is applicable immediately. Another issue is time as the next elections are coming up soon. "It is necessary to put these measures in place in 2023 in order for them to be effective ahead of the 2024 elections to the European Parliament."[103] These facts or conditions are contributing to an overall picture that raises two key questions that should be answered. Namely, the question of competence and also the issue concerning time pressure should be discussed in the ongoing negotiations of it. In light of the DSA, there also seems to be some overlap as already Art. 34 (1) (c) DSA regulates this kind of risk under 'systemic risks': "(c) *any actual or foreseeable negative effects on civic discourse and electoral processes, and public security*."[104] However, the DSA focuses on online platforms in this regard and the proposal 'COM(2021) 731 final' complements it by filling potential regulation gaps. That in mind its regulation targets are reasonable and justified.

[102] ibid 27-28 (emphasis added).
[103] ibid 3.
[104] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 34(1)(c) (emphasis added).

> *It will cover both online and offline activities.* Compared to the DSA, it *expands the categories of information to be disclosed in the context of political advertising*, as well as *the scope of the relevant service providers concerned*. *While the DSA imposes transparency requirements on online platforms, this initiative covers the entire spectrum of political advertising publishers, as well as other relevant service providers involved in the preparation, placement, promotion, publication and dissemination of political advertising.* There is *complementarity and synergies with the requirement under the DSA* to have assessments of systemic risks by very large online platforms stemming from the functioning and use of systems for selecting and displaying advertisement, with actual or foreseeable effects related to electoral processes.[105]

As a guidance or recommendation, the risk of ineffective execution due to parallel enforcement should be kept in mind and reduced to an absolute minimum, if not eliminated.

4.1.4.10 The Role of DSCs

Digital Services Coordinators (DSCs) have the power and competence to appoint trusted flaggers – or more precisely: DSCs have the right to award the 'European trusted flagger status' according to Art. 22 DSA. The intention behind it is to empower DSCs in their work. It is the DSCs' task to monitor regularly whether the active user count equals or is larger than 45 million because only in such a case the platform in question is considered a VLOP (or VLOSE). Concerning risk governance and systemic risks, please see again sub-chapter 4.1.4.7. This section focuses on the implementation, cooperation, sanctions, and enforcement in the context of the role of DSCs. Relevant for that are Arts. 49-55 and 56-60 DSA which establish DSCs and that is new and innovative but the assignment to competent authorities itself is not really original

[105] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising [2021] COM(2021) 731 final 4 (emphasis added).

as something like that can be found already e.g. in Art. 5 (d) AVMSD and Arts. 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 16, 17, and 21 TERREG. However, the DSA focuses on a specific DSC authority and describes it more in detail. So the enforcement is clearer than in other EU laws with similar concepts. The coordinated collaboration of these DSCs is key for the success of enforcing the DSA's provisions. Then, Arts. 61-63 DSA establish the European Board for Digital Services (EBDS) which could be compared to the contact committee and cooperation as contained in e.g. Arts. 29 and 30 AVMSD. The cooperation aspect is also highlighted in Art. 19 (2) e-Commerce Directive and Art. 14 TERREG. Therefore, these cooperation obligations are not completely new in total, but again, the DSA is more detailed in describing how it should be conducted. Supervision, investigation, enforcement, and monitoring in respect of VLOPs (and VLOSEs) are also crucial areas to keep in mind and therefore the Arts. 64-83 DSA address them. Comparing it to existing EU legislation, for example Arts. 6 (1) (b) and 8 (2) TERREG do address these functions but the DSA puts a special emphasis on VLOPs (and VLOSEs). Coming to the common provisions on enforcement, Arts. 84-86 DSA matter. The latter – Art. 68 DSA – shares similarities with Art. 17 TERREG when it comes to a legal representative. Nevertheless, the information sharing system (ISS) mentioned in Art. 85 DSA is unique in the DSA and can be qualified as an innovative new tool for enforcement:

> 1. The Commission shall *establish and maintain a reliable and secure information sharing system supporting communications between Digital Services Coordinators, the Commission and the Board*. Other competent authorities may be granted access to this system where necessary for them to carry out the tasks conferred to them in accordance with this Regulation.
>
> 2. *The Digital Services Coordinators, the Commission and the Board shall use the information sharing system for all communications pursuant to this Regulation.*[106]

[106] REGULATION (EU) 2022/2065 (Digital Services Act) (n 69) art. 85(1-2) (emphasis added).

In regard to the delegated and implementing acts it should be noted that Arts. 87-88 DSA are not so different from what can be already found in e.g. Arts. 19 and 20 TERREG dealing with the exercise of delegated acts. To sum up, the superior role of the DSCs, or the concept as such, is to enable effective enforcement of the DSA and make cooperation between authorities easier.

4.2 DMA

4.2.1 Core Provisions relevant for OCSPs

The DMA is structured as follows and notable is that it is much more compact than the DSA:

I. Subject matter, scope and definitions

- Subject matter and scope
- Definitions

II. Gatekeepers

- Designation of gatekeepers
- Review of the status of gatekeeper

III. Practices of gatekeepers that limit contestability or are unfair

- Obligations for gatekeepers
- Obligations for gatekeepers susceptive of being further specified under Article 8
- Obligation for gatekeepers on interoperability of number-independent interpersonal communications services
- Compliance with obligations for gatekeepers
- Suspension
- Exemption for grounds of public health and public security
- Reporting
- Updating obligations for gatekeepers
- Anti-circumvention
- Obligation to inform about concentrations
- Obligation of an audit

IV. Market investigation

- Opening of a market investigation
- Market investigation for designating gatekeepers
- Market investigation into systematic non-compliance
- Market investigation into new services and new practices

V. Investigative, enforcement and monitoring powers

- Opening of proceedings
- Requests for information
- Power to carry out interviews and take statements
- Powers to conduct inspections
- Interim measures
- Commitments

- Monitoring of obligations and measures
- Information by third parties
- Compliance function [compliance officer(s)]
- Non-compliance
- Fines
- Periodic penalty payments
- Limitation periods for imposition of penalties
- Limitation periods for enforcement of penalties
- Right to be heard and access to the file
- Annual reporting
- Professional secrecy
- Cooperation with national authorities
- Cooperation and coordination with national competent authorities enforcing competition rules
- Cooperation with national courts
- The high-level group
- Request for a market investigation
- Representative actions
- Reporting of breaches and protection of reporting persons

VI. Final provisions

- Publication of decisions
- Review by the Court of Justice
- Implementing provisions
- Guidelines
- Standardisation
- Exercise of the delegation
- Committee procedure [the Digital Market Advisory Committee]
- Amendment to Directive (EU) 2019/1937
- Amendment to Directive (EU) 2020/1828
- Review
- Entry into force and application[107]

[107] REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1 (n 68).

Its regulation target is to establish "a set of narrowly defined objective criteria for qualifying a large online platform as a so-called 'gatekeeper'."[108] This applies if a company

> *has a strong economic position*, significant impact on the internal market and is active in multiple EU countries;
>
> *has a strong intermediation position*, meaning that it links a large user base to a large number of businesses; [and]
>
> *has (or is about to have) an entrenched and durable position in the market*, meaning that it is stable over time.[109]

The benefits of it are a fairer environment for businesses and innovations. In addition, small companies are empowered to compete better in the digital single market. Improved services for consumers are another benefit and while gatekeepers do not lose incentives or opportunities to innovate, they also cannot use unfair business practices to push others out of (technology-heavy digital) markets. Market investigations should help the EC to keep up with the fast development of the digital single market. Non-compliance leads to massive fines (up to 10% [20% in final version – Art. 30 DMA] of total worldwide annual turnover), periodic penalty payments (up to 5% of average daily turnover), and other remedies in case of systematic infringements of DMA obligations.[110]

[108] European Commission, 'The Digital Markets Act: Ensuring Fair and Open Digital Markets' (2022) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 13 April 2022.
[109] ibid (emphasis added).
[110] ibid.

The figure below shows the do's & don'ts for gatekeepers:

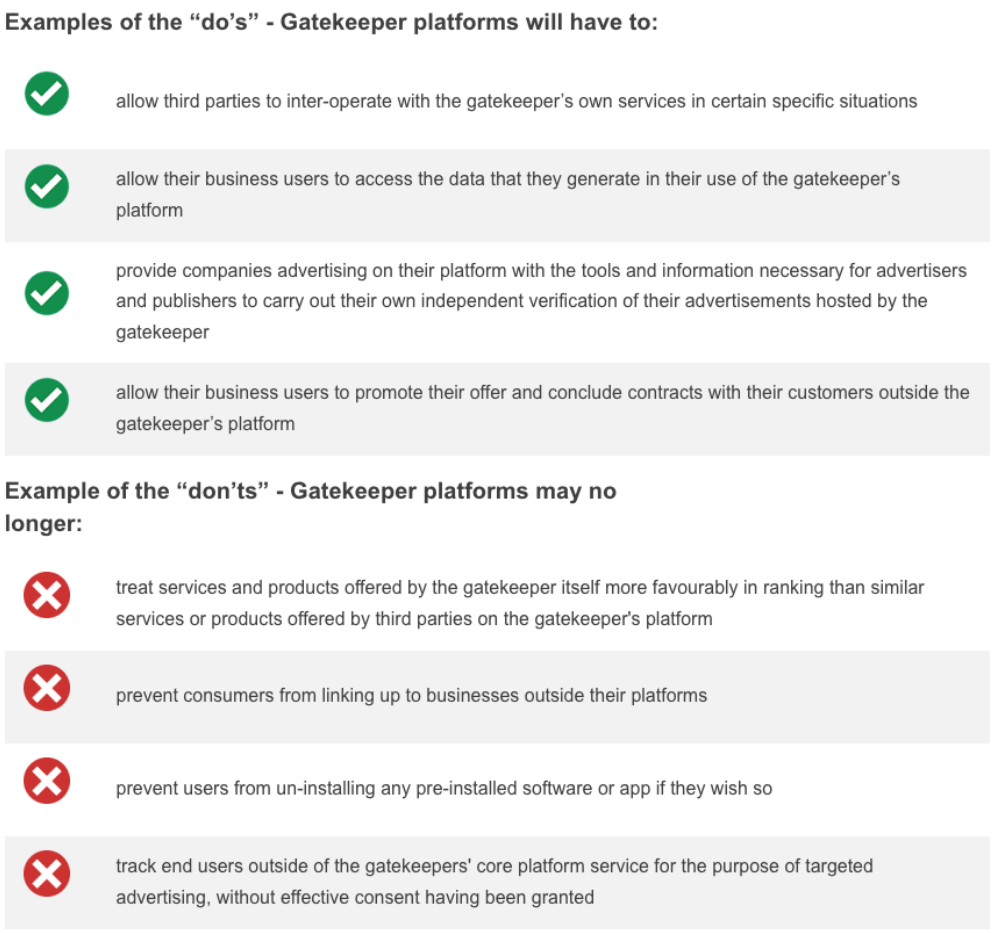


Figure 6: Do's and don'ts for gatekeepers to be in compliance with the DMA[111]

[111] ibid.

4.2.2 The DMA's Relationship to existing EU Competition Law

In particular the DMA's relation to already existing EU competition law and its rules is interesting to investigate. In which sense does it contribute to competition policy within the European Union and how does it help to realize fair competition practices in the digital single market are two points to start the analysis. "Firstly, the DMA *is meant to address issues of competition and the contestability in digital markets which are not sufficiently addressed by EU competition law in its current scope*."[112] Especially the so called ecosystems of digital or technological platforms and their network effects can be mentioned in this context.[113] "Secondly, the DMA aims *to prevent a fragmentation of the EU Single Market in relation to the laws governing the processing and transfer of personal and non-personal data*."[114] And "thirdly, the DMA *picks up the aim of protecting consumers and their privacy in relation to data collected by gatekeepers as a result of consumers' use of their product*s."[115]

> In considering the effects of the DMA on the status quo of data relations in the EU, it should therefore be kept in mind that some of the obligations imposed by the DMA on *gatekeepers* only serve *one* of the three objectives, while others serve two or all three overlapping objectives. It should also be pointed out that the DMA is not meant to single-handedly address *all* of the challenges arising in digital markets, but rather forms part of a wider framework of EU regulatory initiatives creating a 'Digital Strategy for Data' [Digital Markets Act, Digital Services Act, Data Governance Act].[116]

[112] Philipp Bazenov, 'The Digital Markets Act (DMA): A Procompetitive Recalibration of Data Relations?' [2021] Journal of Law, Technology and Policy, Forthcoming <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3970101_code4787537.pdf?abstractid=3970101&mirid=1> accessed 20 April 2022 6 (emphasis added).
[113] ibid 7.
[114] ibid 7 (emphasis added).
[115] ibid 8 (emphasis added).
[116] ibid 8-9.

Agustín Reyna concluded that the DMA is going beyond EU competition law because

> competition law addresses, case-by-case, business conduct that disrupts competition in the internal market by applying the rules laid down in Articles 101 and 102 TEFU *whereas the DMA seeks to pre-empt certain practices or impose specific obligations with a view to increasing market contestability, reducing entry barriers, stimulating innovation from rivals and companies who depend on the gatekeeper to reach consumers and, ultimately, to ensure consumers enjoy a healthy digital environment*. … Whether a company designated as a gatekeeper could have breached Article 102 TFEU, or not, *is simply irrelevant for the DMA* because, by its very essence and nature, *the DMA is not competition law*.[117]

"The DMA is (pre-emptive) regulation under Article 114 TFEU"[118] and there are three good reasons for that:

> First, *the companies to be designated as gatekeepers are providing cross-border services and as such are likely to impact the functioning of the internal market*. Second, *the proposal introduces proxies in the designation of gatekeepers that would exclude purely domestic scenarios (i.e. requiring presence in at least 3 Member States) therefore ensuring to capture cross-border practices*. And third, *all parties concerned namely the gatekeepers, business users and end-users would benefit from a set of common rules regulating the provision of services to consumers in different countries contributing to the well-functioning of the internal market by on one side facilitating cross-border operations and, on the other side, reducing risks of fragmentation*.[119]

[117] Agustín Reyna, 'Why the DMA Is Much More than Competition Law (and Should Not Be Treated as Such)' (*Chillin'Competition*, 16 June 2021) <https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/> accessed 20 April 2022 (emphasis added).
[118] ibid.
[119] ibid (emphasis added).

In fact "the DMA does not replace competition law. It rather complements it by pre-empting certain practices by companies some of which might also be prohibited under Article 101 or 102 TFEU."[120]

> *Competition law will continue to apply in tandem with the DMA.* However, taking into account that competition law cannot provide all the answers (e.g. regarding scope of intervention) in the most optimal timeframe (e.g. the Android case is a good example, the case started in March 2013, the decision was adopted in July 2018 and only last week the remedies were amended in a positive manner), there are good reasons for the legislator to step in. The DMA has the potential to become a blueprint for regulating digital markets, *but its success will depend on its swift and effective application and enforcement*. The very same companies that would be regulated by the DMA have asked for many years for legal certainty about what they can or cannot do. *And this is exactly what the DMA is aiming at.*[121]

For the future it remains interesting "how to combine the enforcement of the DMA and of EU competition law in an optimal way when dealing with dominant gatekeeper platforms."[122] There are two potential ways to go on: The first one would be parallel application of the swift applicable DMA and competition law – especially Art. 102 TFEU. The latter "would then ensure that the potential abuse of dominance does not go unpunished which would make such behavior profitable and at the same time improve the chances of private claimants to be compensated for the harm they may have experienced."[123]

---

[120] ibid.
[121] ibid (emphasis added).
[122] Daniel Mandrescu, 'The DMA and EU Competition Law: Complementing or Cannibalizing Enforcement?' (*Lexxion* > *Competition Blogs*, 3 March 2022) <https://www.lexxion.eu/coreblogpost/the-dma-and-eu-competition-law-complementing-or-cannibalizing-enforcement/> accessed 20 April 2022.
[123] ibid.

But this could also be problematic resource-wise:

> In order for parallel enforcement to be feasible, it is likely that the Commission would require more capacity or that the enforcement of the DMA would have to be done by a separate dedicated authority. To some extent, *there may even be some potential role for NCA's to pick up on such cases provided that there is some well-established coordination across jurisdictions to avoid conflicting outcomes*.[124]

Alternatively to that, it could make sense "*to add more legal and economic analysis to the enforcement process of the DMA* in such cases, which can then be given some evidentiary value in the content of private enforcement claims."[125] In practice, it will also depend on how much value the EC puts on decisions which are based on the DMA and to what extent national courts will value them during proceedings. "It is however clear that national authorities and particularly courts will certainly have to work with the DMA as well."[126]

[124] ibid (emphasis added).
[125] ibid (emphasis added).
[126] ibid.

4.2.3 New Obligations of the DMA for OCSPs and Gatekeepers

This table portrays new obligations for gatekeepers while setting a focus on online content sharing platforms (OCSPs), data handling, processing, and related matters:

Defining *gatekeepers* and *core platform services*, the latter covers this list of services or types of services: (a) online intermediation services; (b) online search engines; (c) online social networking services; (d) video-sharing platform services; (e) number-independent interpersonal communication services; (f) operating systems; (g) web browsers; (h) virtual assistants; (i) cloud computing services; [and] (j) online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i);.[127]	Art. 2 (1) and (2) DMA as well as Art. 3 (1) DMA which states three core requirements that must be fulfilled among a few other conditions (in particular the thresholds contained in Art. 3 (2) DMA) to qualify as a gatekeeper: (a) it has a significant impact on the internal market; (b) it operates a core platform service which serves as an important gateway for business users to reach end users; [and] (c) it enjoys an entrenched and durable position in its operations or it is foreseeable that it will enjoy such a position in the near future.[128]
Definition of *data* (24) *'Data' means any digital representation of acts, facts or information and any compilation of such acts, facts or information, including in the form of sound, visual or audiovisual recording;*[131]	Art. 2 (24), (25), and (26) DMA

[127] REGULATION (EU) 2022/1925 (Digital Markets Act) (n 68) art 2(2).
[128] REGULATION (EU) 2022/1925 (Digital Markets Act) (n 68) art 3(1).

(25) 'personal data' means any information as defined in point 1 of Article 4 of Regulation (EU) 2016/679[129];[131] (26) 'non-personal data' means data other than personal data; (as defined in point 1 of Article 4 of Regulation (EU) 2016/679[130]) [GDPR][131]	
Several different obligations[132] set forth **for gatekeepers** to be in compliance with[133]	Arts 5-7 DMA
Compliance with obligations for gatekeepers: The gatekeeper *shall ensure and demonstrate compliance* with the obligations laid down in Articles 5, 6 and 7 of this Regulation. The measures implemented by the gatekeeper *to ensure compliance with those Articles shall be effective in achieving the objectives of this Regulation and of the relevant obligation*. The gatekeeper shall ensure that the implementation of those measures *complies with applicable law*, in particular Regulation (EU) 2016/679, Directive 2002/58/EC, legislation on cyber security, consumer protection,	Art. 8 DMA Art. 8 (1) DMA

[129] REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.
[130] ibid.
[131] REGULATION (EU) 2022/1925 (Digital Markets Act) (n 68) art 2(24-26) (emphasis added).
[132] ibid 39-40.
[133] Bazenov (n 112) 14 citing To some extent, this mechanism is reminiscent of the notion of "special responsibility of dominant undertakings" in EU competition law under Art. 102 TFEU and CJEU caselaw, whereby dominant companies have "a special responsibility not to allow [their] conduct to impair genuine undistorted competition on the [internal] market" – Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, EU:C:1983:313, para 57; See also Case C-209/10 *Post Danmark A/S v Konkurrenceråd*et, EU:C:2012:172, para 23; Case T-228/97 *Irish Sugar v Commission*, EU:T:1999:246, para 112; Case C-457/10 P *AstraZeneca v Commission*, EU:C:2012:770, para 134 (see also fn 72 of the present paper).

product safety, as well as with the accessibility requirements.[134]	
Exemption for overriding reasons of public interest (public health and security)[135]	Art. 10 DMA
Accessing data, sharing, and portability (for end users) to prevent digital closed ecosystems, this is also highlighted in the right to data portability of Art. 20 GDPR, meaning the DMA does not introduce this right but extends it with "two key additions to the right of data portability in EU law: It widens this right to cover the data of business users [GDPR limited to private users and their personal data] and closes [therefore] a gap which the GDPR left open, namely, *how* access to data for the purposes of portability should be provided."[136]	Art. 6 (9) DMA
The DMA creates a **business users' right to access data generated by end users** which mainly is reasonable due to contractual relations between the gatekeeper and business.[137]	Art. 6 (10) DMA
Creation of an "*ex ante* measure in facilitating the contestability of EU-wide online search markets."[138]	Art. 6 (11) DMA

[134] REGULATION (EU) 2022/1925 (Digital Markets Act) (n 68) art 8(1) (emphasis added).
[135] ibid 42-43.
[136] Bazenov (n 112) 17-18 citing *See* Borgogno and Colangelo, *supra* note 12, at p.6, pointing out (albeit in relation to data portability under Art.20(1) GDPR rather than pure access) that the GDPR merely requires the data to be transmitted in a "structured, commonly used and machine readable" format, but does not "mandate the adoption of interoperable standards". For example, they observe that the simple "encouragement" in Recital 68 GDPR to adopt interoperable standard is not binding. Overall, the authors observe that this lack of standardization "is likely to raise serious concerns on effectiveness and legal certainty", potentially rendering the portability rights at issue ineffective in practice.
[137] ibid 21-22.
[138] ibid 27.

Data processing limits to prevent misuse of dual role of gatekeepers (using data generated by business users for their own advantage to stay the most powerful player)[139] **Refrain to combine personal data from different services and sources.** In addition give the user a proactive 'opt-in' choice.[140]	Art. 6 (2) DMA Art. 5 (2) (b) DMA
Compliance provisions and the EC's investigative, enforcement & monitoring powers: Request information; Submission of independent profiling techniques on consumers description within six months to EC after gatekeeper designation; and other obligations regarding accessibility and compliance[141]	Art. 8 DMA Art. 21 (1) DMA Art. 15 DMA Art. 8 (1) DMA
Non-compliance effects for gatekeepers determined by EC (cease-and-desist order) – fine(s) based on total annual turnover (two categories: Fine(s) up to 1% or up to 20%)[142] **Periodic penalty payments** up to 5% of the average daily worldwide annual turnover	Art. 29 (1) DMA Art. 30 (1), (2), and (3) DMA Art. 31 (1) DMA
Advantages of the DMA for the recalibration of data relations among gatekeepers	Recalibration of data relations between gatekeepers & users "in favor of the latter"[143]

Table 6: The DMA's gatekeeper and level playing field provisions[144]

[139] ibid 27.
[140] ibid 30-32.
[141] ibid 32-35.
[142] ibid 35-36.
[143] ibid 64.
[144] ibid 10-36, 60-66, REGULATION (EU) 2022/1925 (Digital Markets Act) (n 68).

4.2.4 Innovative Aspects and Enforcement Challenges of the DMA

Remarkable is that "the DMA – unlike other data regulations in the EU – is an asymmetric [horizontal] regulation, in the sense that 'different firms in the same industry are subjected to different levels of regulatory restraint'."[145] This can be qualified as innovative as it meets the regulation targets better for big & powerful tech-multinational corporations (MNCs) but is also suitable for SMEs. Another interesting aspect is the regular gatekeeper reviewing mechanism:

> *Where a provider has been designated as a gatekeeper, its status must be reviewed by the European Commission at least biennially by verifying … whether the gatekeeper in question continues to meet the three requirements in Art. 3(1) DMA*.[146]

Regarding the several different obligations set forth in the DMA it can be summed up that

> all of the obligations in the DMA address *at least one of the three categories of objectives* … . However, *the majority of obligations relate to issues of competition and the contestability of digital markets*, in particular, through the creation of data access rights for businesses for the purpose of analysis for the sale or advertising to end consumers, as well as through specific limitations on the collection, processing, sharing and use of data collected in relation to businesses and end consumers by the *gatekeepers*.[147]

However, e.g. Art. 6 (2) DMA is not clear enough regarding the application. As a consequence that will depend on the understanding of the enforcement entity then. This applies for "what exactly is meant by the ambiguous term 'in competition with business users' and just how broad an interpretation of 'in competition' will be adopted by enforcers, since this will determine the scope of the prohibition."[148]

[145] ibid 10-11 citing Thomas P Lyon and Haizou Huang, Asymmetric Regulation and Incentives for Innovation, Industrial and Corporate Change 4(4), 769-776, 769 (1995).
[146] ibid 13 citing *Id.* art. 4(2) (emphasis added).
[147] ibid 14 (emphasis added).
[148] ibid 28.

> It appears that the effectiveness of article 6(1)(a) DMA [Art. 6 (2) DMA in the final version] may be greatly enhanced *through the provision of guidance on the interpretation of the term 'in competition with business users'* and *on the introduction of (updateable) standard requirements for data and the means of their provision*. Otherwise, it cannot be excluded that gatekeepers will make such data public in a format *limiting their usefulness*, or by inefficient means, while avoiding the DMA's prohibition on using such data 'in competition with business users'.[149]

Upcoming EC guidelines, case law, and enforcement decisions will be needed to make the DMA a really well working tool eventually. Keeping that in mind, it "may become an effective tool for the Commission to ensure *a more active contestation of digital markets, and, in some respects, a freer flow of data across the single market*."[150]

> *The DMA will recalibrate data relations between gatekeepers and the users of their services in favor of the latter*, who – due to their dependence on the gatekeepers – would not otherwise have effective recourse against gatekeepers' leveraging of data-derived advantages, and, due to the specific characteristics of digital markets, would lack any reasonable prospect of independently gaining access to data needed for effective competition. However … a closer factual look at the details of the DMA's overlap with existing EU and Member State laws and competition decisions brings to light *significant ambiguities and tensions which may jeopardize the practical utility of many of the DMA's newly designed obligations and undermine legal certainty where it would be needed most*.[151]

[149] ibid 30 (emphasis added).
[150] ibid 66 (emphasis added).
[151] ibid 64 (emphasis added).

As a legislative act and instrument of the EU it can be seen as a clear signal to the MNCs in the market of digital technologies and communications, media, or IT services to ensure a fair level playing field.[152]

> One crucial factor [in a short term perspective] will be whether the Commission will seek *to actively engage with business users, end users and national competition enforcers* [national competition authorities (NCAs), Member State data protection agencies (DPAs), and the European Data Protection Board (EDPB)] in the Member States *in publishing guidelines and enforcing the obligations in the DMA, as well as balancing the competing interests of these different actors*.[153]

"Legislators in the EU [the Council and European Parliament] … [have to find a] *balance between data protection and the free movement of data as a precondition for competitive digital markets* … where a tension between the two exists [in the long term]."[154] It remains interesting how strict and narrow the European Commission will enforce the DMA's obligations "to improve the contestability of digital markets on fair and transparent terms."[155]

[152] ibid 64.
[153] ibid 65 citing The idea of seeking dialogue with members of the industry and the general public has been expressed by Alexandre De Streel in his lecture on the DMA and DSA organized as part of the NYU School of Law Global Data Law class (emphasis added).
[154] ibid 65 (emphasis added).
[155] ibid 66.

5 Conclusion

This chapter first provides answers for the research question concerning the DSA and afterwards continues to do the same regarding the DMA. To begin with, it is necessary to understand how the DSA and DMA are meant to function as regulatory instruments. They are complementary EU legislative acts to specific already existing EU laws in the field of communications & IT law known as *lex specialis*. It is not their purpose to replace any of those but rather they should fill regulation gaps, especially for big tech companies or *gatekeepers* such as Meta (Facebook, Instagram, WhatsApp, …), ByteDance (TikTok), Amazon, Google (YouTube), Twitter, and many more. They can be described as *online content sharing platforms* (OCSPs) with digital hybrid business models. The DSA and DMA both confirm the country of origin principle, enable consistency for EU digital law, adapt EU legislation in the digital field to its current challenges, and make impact assessments possible. Besides that, the EU can be a prime example and role model for digital policy around the world. Whether to create new laws or update existing ones to address the rapid development of digital services and products remains a major challenge.

The DSA's regulation aim is to make the online environment safe(r). Ensuring fundamental rights (freedom of expression and information) while preventing information disorders like disinformation, assuring transparency, and preventing illegal services, products, or actions are necessary steps to achieve this target. Its new key obligations for communication platforms compared to previous EU regulation apply to a diverse set of services that are covered by it (intermediary or hosting services and VLOPs or VLOSEs). Innovative about it is that the obligations increase gradually from intermediary services to VLOPs (few to all obligations must be met). It mainly builds on the e-Commerce Directive and includes provisions to regulate advanced digital hybrid business models which are not addressed by that. In terms of the AVMSD, the DSA also deals with a few areas which are not included in this directive for

audiovisual media services while also sharing similar rules (e.g. strengthening national authorities and promoting cooperation among them). Furthermore, it also shares some similar regulatory efforts with the GDPR (e.g. extraterritorial scope) and TERREG (e.g. removal and handling of illegal content). Jointly with the EDAP, the DSA fulfills an important role in countering disinformation. The latter being a fundamental problem for democratic societies nowadays due to its potential influence on elections.

Innovative aspects of the DSA and new key obligations for communication platforms & OCSPs are the broader definition of *illegal content*, the maintenance of the liability regime as well as prohibition of general monitoring, exemptions for liability, and the way when and how illegal content has to be removed or the right to revise a removal of such (internal complaint-handling system). This also covers informing mechanisms for OCSPs (notice, action, trusted flaggers, misuse-counter, suspicions of criminal offences, trader-traceability, and complaint handling). Additional innovations of the DSA are voluntary own-initiative investigations including incentives for them, the empowerment of national authorities in the form of introducing so called digital services coordinators (DSCs), excluding too small or micro enterprises from its obligations, improved transparency (reporting) obligations, and single contact points & legal representatives for OCSPs to sort out issues more efficiently. Furthermore, concrete reporting duties to judicial authorities and a specific set of obligations against VLOPs & systemic risks (risk governance, assessment, independent audits, recommender system explanation, data access, compliance officers, transparency reporting, and other provisions) should be emphasized. In particular, negative effects on civic discourse & elections as a systemic risk in the context of political advertising and its relation to the proposal 'COMM (2021) 731 final' are worth to mention in that respect. Finally, rules for implementation, cooperation, sanctions, and enforcement consisting of DSCs, the European Board for Digital Services (EBDS), supervising VLOPs, unique tools to enforce (like the information sharing system – ISS), as well as

delegated acts should be highlighted. Despite the innovative regulations and obligations listed above, the DSA's broad definitions of certain terms such as *online platforms* & *illegal content* still cause problems. In addition, issues exist with the comprehensive transparency obligations of the DSA as more transparency does not mean necessarily better (end) user experience. For OCSPs in the media environment, the DSA together with existing *lex specialis* such as the e-Commerce Directive, AVMSD, TERREG, and others improves the harmonization of media transparency rules while it further closes regulatory gaps for digital hybrid business models. Therefore, the DSA is an absolutely necessary and rational step in communications & IT law. It makes the EU's digital single market more robust & fit for developments in the cyberspace.

The DMA on the other hand regulates so called *gatekeepers* of the digital single market. They have tremendous market power over online platform business models and structures, particularly in the media environment. However, a fair level playing field is crucial for a functional digital economy. Therefore, it is a core priority of the EU to regulate gatekeepers in a way that they can operate but not block the digital single market in the future. SMEs especially need support if they want to be or stay competitive. Interoperability, access to certain technologies, and supervision by an authority are key to achieve the policy goals of the DMA. However, note that the DMA cannot be considered EU competition law. It is rather a complementary piece of EU law to solve regulation issues concerning gatekeepers. Specifically, the rapid development of big tech companies made the DMA necessary as only competition law alone is not effective or fast enough to tackle the problems that digital hybrid business models bring to light.

Its gatekeeper and level playing field provisions affect large communication platforms in comparison to preceding EU law in the way that they cannot rely on their powerful digital ecosystems anymore. Besides that, as it is not EU competition law, enforcement works differently as well as prevents a fragmentation of the laws dealing with personal and non-personal data including its handling. The aim of the DMA is to prevent specific practices that go against

competition in the EU's digital single market. In comparison to it, competition law analyzes cases individually or collectively. However, in practice the DMA and competition law potentially could overlap sometimes but that should not be an issue as the regulation target would be still met in such a case, perhaps even faster by applying and enforcing the DMA in applicable cases. The cooperation among enforcement entities of the DMA is an important part to make it functional and really reasonable. More (economic and legal) analyses can be also meaningful in that regard for the DMA's enforcing actions. Interesting are the definitions of *gatekeepers* and *data* according to it as both are precise and up-to-date for the current digital landscape. When it comes to the actual obligations, there are several different ones and compliance to them is mandatory except for an overriding reason of public interest (public morality, health, or security). The DMA clearly prevents digital ecosystems and is a well-made addition to the GDPR's right to data portability. Furthermore, it introduces a business users' right to access data generated by end users and sets limits regarding data processing in order to prevent any misuse of the dual role of gatekeepers. In addition, combining personal data from different services and sources is prohibited. Compliance is ensured via investigative, enforcement, and monitoring powers of the European Commission. Non-compliance can lead to painful penalties as they are based on up to 1-20% of the total worldwide annual turnover of a gatekeeper. Periodic penalty payments up to 5% of the average daily worldwide annual turnover are another sanction. Moreover, the DMA recalibrates data relations and puts the user in a stronger position. However Art. 6 (2) DMA leaves open questions in how to understand phrases like 'in competition with business users' for example. EC guidelines, caselaw, plus enforcement decisions will help the DMA to be an effective regulatory instrument as the relationship between ensuring the free flow of data and its protection will be crucial in the future.

To conclude, the DSA and DMA both are meaningful complementary EU legislative acts in the field of communications & IT law. Together with existing *lex specialis* they close

regulatory gaps for unaddressed digital hybrid business models and unfair practices of big tech companies in the EU's digital single market. Their enforcement will be interesting to investigate in the future. Nevertheless, besides the positive aspects mentioned, it should be noted that EU communications law becomes more and more complex and difficult to grasp. The ongoing strategy to introduce specific EU directives and regulations to address smaller or bigger parts of media regulatory issues has led to a state in which it has been difficult to understand the overall picture. The 'European Media Freedom Act (EMFA)' proposal is a first decisive step in overcoming this pressing challenge and is the subject of discussion in the outlook. In addition, the latter also gives a tentative preview of digital services' evolution in the EU.

6 Outlook

This final chapter analyzes the proposal of the EU Commission for a new legislative act known as 'European Media Freedom Act (EMFA)'[156] and its planned purpose. A special emphasis is put on legal challenges, points of critique, and issues in the context of this thesis. Lastly, a tentative preview of digital services' evolution in the EU is provided.

6.1 The 'European Media Freedom Act' and its planned Purpose

Tying on upcoming EU regulatory efforts in this area, the proposal of the 'European Media Freedom Act (EMFA)' should be highlighted in this context. Vice-President for Values and Transparency, Věra Jourová, stated during the consultations in its context:[157]

> *'Media are a pillar of democracy. But today this pillar is cracking, with attempts by governments and private groups to put pressure on the media. This is why the Commission will propose common rules and safeguards to protect the independence and the pluralism of the media. Journalists should be able to do their work, inform citizens and hold power to account without fear or favour.'*[158]

The 'European Media Freedom Act (EMFA)' is "a novel set of rules to protect media pluralism and independence in the EU."[159] The aim is that it respects and includes regulations for media affected by digital transformation processes. Cross-border operating of media should be easier and more fluent with it.[160]

---

[156] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU [2022] COM(2022) 457 final.
[157] European Commission, 'European Media Freedom Act: Commission Launches Public Consultation' (10 January 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_85> accessed 10 August 2022.
[158] ibid citing Vice-President for Values and Transparency, Věra Jourová.
[159] European Commission, 'European Media Freedom Act: Commission Proposes Rules to Protect Media Pluralism and Independence in the EU' (16 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504> accessed 23 September 2022.
[160] ibid.

Key features of the 'EMFA' are highlighted in the following list:

- Protecting editorial independence and transparent public disclosure of ownership;
- Prohibiting spyware in the space of journalism, media, and close areas (e.g. relatives of journalists);
- Public service media shall receive enough funding to stay independent, provide diverse information, and transparency is required for appointing the head and governing board;
- A so called media pluralism should follow the principle of proportionality (market concentrations of the media branch in a Member States, editorial independence, measures in the field of administration, regulation, and legislation have to be justified);
- Transparency and non-discrimination for state advertisements, in particular online and in regard to audience measurement mechanisms or systems;
- Safeguarding media content online (e.g. removals of content by VLOPs if not concerning systemic risks like strategic disinformation require informing the media content or service provider and complaint handling in a sufficient time frame); and
- Introducing a right of customization (meaning to be able to customize the media content consumed on devices or interfaces and to set preferences of users individually).[161]

In addition to the proposal, recommendations[162] in the form of best practices for editorial independence and how to raise transparency of ownership were released by the EC.[163] Innovative and new is also the proposal of a 'European Board for Media Services (EBMS)' that is consisting of national media authorities. This can be understood as a 'European watchdog' (like independent media services and providers are seen as a 'public watchdog' of the society) to "pro-

[161] ibid.
[162] European Commission, COMMISSION RECOMMENDATION of 16.9.2022 on internal safeguards for editorial independence and ownership transparency in the media sector [2022] C(2022) 6536 final.
[163] European Commission, 'European Media Freedom Act: Commission Proposes Rules to Protect Media Pluralism and Independence in the EU' (n 159).

mote the effective and consistent application of the EU [communications &] media law framework [and therefore media freedom by the use of guidelines as well as opinions on national actions or decisions concerning market concentrations of the media environment]."[164] It is also planned that this board addresses risks coming from non-EU media (public security – e.g. what could be seen by Russia-operated media outlets in recent years) and provides a platform in the form of a dialogue for VLOPs & media stakeholders with the aim to promote diversified media offerings & self-regulation measures (e.g. the EU Code of Practice on Disinformation).[165] The proposal has to be discussed further in the European Parliament and on the national level of EU Member States in the upcoming months. Finally, it is important to underline that the 'EMFA' does not affect other *lex specialis* in the area of EU communications law (see Art. 1 (2) EMFA Proposal COM(2022) 457 final) but it rather can be seen as another part of the overall puzzle to regulate media in the EU effectively and comprehensively. However, the 'EMFA' is meant to amend the AVMSD (Directive 2010/13/EU).[166] As a last note, it can be understood as an 'umbrella' trying to systematically connect other specific laws dealing with communications and media law on the EU level together in order to make the overall enforcement and coordination of it more efficient. It has to be seen how the dialogue and discussions regarding the 'EMFA' continue. For example, the following critique has been brought forward:

- The legal basis of the 'EMFA' can be qualified as rather weak as "media policy is usually regarded as a national competence."[167] Nevertheless, the counter argument is that it is more "a piece of internal market regulation, covering the EU-wide media market rather than a direct media policy [than an intervention in national competences]."[168]

[164] ibid.
[165] ibid.
[166] European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (n 156).
[167] Molly Killeen, 'Commission Releases Media Freedom Act Proposal, to Mixed Reactions' *Euractiv* (16 September 2022) <https://www.euractiv.com/section/media/news/commission-releases-media-freedom-act-proposal-to-mixed-reactions/> accessed 6 November 2022.
[168] ibid.

- In fact it will replace the European Regulators Group for Audiovisual Media Services (ERGA) with the 'EBMS'. News Media Europe brought forward some concerns towards the independence of the latter as it could be a problem for freedom of press.[169]
- "A broad coalition of groups, including the European Federation of Journalists, Reporters Without Borders and the International Press Institute, also welcomed the initiative as breaking new ground in protecting media freedom in Europe."[170]
- Transparency and independency are two core concerns that have remained so far.[171]
- Online platforms need to justify removals more precisely. That has been a critical argument coming from independent media outlets. On the other hand, this could be a weak point when it comes to disinformation spreading via certain (independent) media outlets.[172]
- "Some groups, however, have expressed more fundamental resistance to the regulation's introduction. EMMA/ENPA, an organisation representing press publishers in Europe, has been outspoken in its opposition to the Act, arguing that the regulation risks damaging EU media systems that are working well and harming editorial independence [addressing any interference to freedom of press by media platforms or regulators]."[173]

Regarding the EU's lack of competence in the media sector, the EU Commission had to find a way to justify the 'EMFA' by focusing on the internal market. Tambini summarized the approach in the following way:

> In order to establish a legal basis for EU action, the Commission has had to perform some fancy footwork. Subsidiarity has traditionally maintained decision-making at the level of member states in the sensitive area of media. *The legal basis of the EMFA is*

[169] ibid.
[170] ibid.
[171] ibid citing <https://europeanjournalists.org/blog/2022/09/16/efj-welcomes-european-media-act-but-calls-for-strengthening/> (2022).
[172] ibid.
[173] ibid citing EMMA/ENPA.

located within the treaty articles establishing the Single Market, (particularly article 114 of the TFEU). Because of this limited competence on media matters, *the EU does not claim this as a package of measures with the explicit objective of protecting democracy. Rather, the Commission document points out that media policy reforms are already underway in some member states, resulting in a patchwork of regulatory approaches across the EU which undermine the single market.* They also highlight *a lack of transparency, good market information and effective harmonised regulation that is creating barriers to trade within the EU*. The proposal therefore is *to harmonise a range of rules and institutions across the EU*. The instrument chosen is a regulation (which has direct effect) together with some self-regulatory guidelines, *aiming at harmonising a new range of protections for media pluralism and media freedom*.[174]

Possible barriers in the execution of the 'EMFA' have remained to be the following aspects:

- Defining the 'media' and when do users turn into 'citizen journalists'?;
- Crossings with existing legislation such as the AVMSD, DSA, and DMA or also e.g. the Code of Practice on Disinformation as part of the 2020 EU Democracy Action Plan;
- Frictions in the EU internal media market and skepticism of Member States to regulate the media extensively on the EU level (lack of competence); and
- The justification of the 'EMFA' that it harmonizes the media market inside the EU seems plausible, however there is also EU competition law with which the EU has power to address issues concerning e.g. mergers or market concentrations. Questions have remained open concerning the interplay of different EU legislative instruments.[175]

[174] Damian Tambini, 'The Democratic Fightback Has Begun: The European Commission's New European Media Freedom Act' (*LSE EUROPP - European Politics and Policy*, 16 September 2022) <https://blogs.lse.ac.uk/europpblog/2022/09/16/the-democratic-fightback-has-begun-the-european-commissions-new-european-media-freedom-act/> accessed 6 November 2022 (emphasis added).
[175] Ruairí Harrison, 'The EU's Media Freedom Act – Bolstering Core Union Values through the Narrow Prism of the Internal Market?' (*RENFORCE BLOG - Utrecht Centre for Regulation and Enforcement in Europe*, 19 May 2022) <http://blog.renforce.eu/index.php/nl/2022/05/19/the-eus-media-freedom-act-bolstering-core-union-values-through-the-narrow-prism-of-the-internal-market/> accessed 6 November 2022.

6.2 A tentative Preview of Digital Services' Evolution in the EU

As the area of communications law is developing rapidly trying to keep up with the evolution of digital services in the short-, medium-, and long-term (2021, 2025, and 2030) certain effects or implications can be expected for the DSA (and other legislative EU acts).[176] The figure and table below portray possible future developments to look into. They show three different time periods and provide a glimpse on prospective potential changes in the (near) future (Note: This action plan represents only ideas for the Digital Services Act package and in general for regulating the EU's digital single market. The actual DSA and DMA look different in retrospect!):

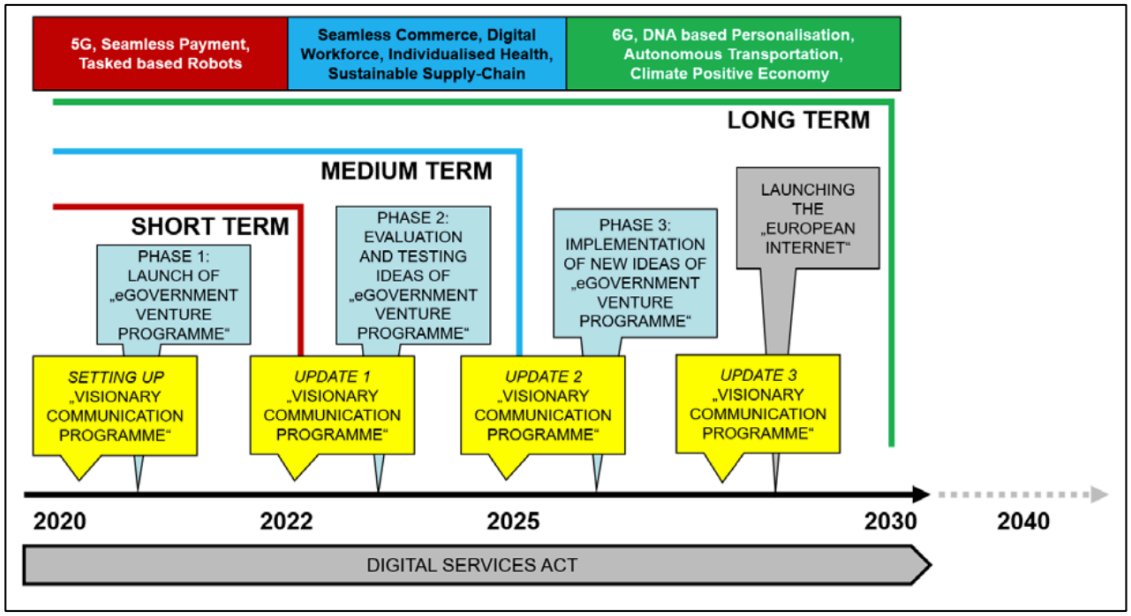


Figure 7: Action plan timeline[177]

"Three concrete action plans to make digital leadership a reality should be considered: [a] European Cloud / European Internet … ; a venture and funding programme for eCovernment [in order to be more independent] … ; and a visionary communication programme [to communicate digital developments]."[178]

[176] European Parliament and others, *New Developments in Digital Services: Short - (2021), Medium - (2025) and Long - Term (2030) Perspective and the Implications for the Digital Services Act* (European Parliament 2020) <https://op.europa.eu/en/publication-detail/-/publication/9ef64262-3f4e-11eb-b27b-01aa75ed71a1/language-en/format-PDF/source-251324629> accessed 13 April 2022 8.
[177] ibid 39.
[178] ibid 37-38.

Some of the above portrayed and below proposed ideas – although partly quite extensive or not precise enough at this moment in time – are worth to look further into in the future – see Table 7 jointly with Figure 7.

Short term 2020 – 2022
Setting up a **Visionary Communication Programme**: task-based robots, 5G, seamless (facial) payment. Starting the communication of the digital agenda within Europe.
Update 1 of the Visionary Communication Programme in 2022. What are the digital trends and topics that Europe should pursue, or that will have an impact on European life? – e.g. individual health, robots in the health sector, sustainable supply chain.
Phase 1: Launch of the eGovernment Venture Programme.
Getting start-ups to sign onto the programme to start developing innovations for the governments within Europe (e.g. possible topics for Phase 1: digital election, smart office applications for all government buildings, cybersecurity for all MEP).
Medium term 2022 – 2025
Update 2 of the Visionary Communication Programme: e.g. crypto, quantum computing. Here it is important to include visionaries, think tanks and influences to communicate the update to the public.
Phase 2 of the eGovernment Venture Programme: Testing and evaluating first technologies and ideas developed in the programme.
Initialising the European Internet: setting up think tanks to creating the cornerstones and possible pitfalls of such a project.
Initialising the European Internet: setting up think tanks to creating the cornerstones and possible pitfalls of such a project.
The Digital Services Act (DSA) is the foundation of such an action plan timeline.
Initialising the European Internet: setting up think tanks to creating the cornerstones and possible pitfalls of such a project.
Long term 2025 – 2030
Update 3 of the Visionary Communication Programme: e.g. 6G, European Internet, DNA products. Further communication within the Europe of the new digital goals.
Phase 3 of the eGovernment Venture Programme: Implementation of innovations developed in the programme. Officially Launching the European Internet: Similar to the Chinese Firewall.
The Digital Services Act (DSA) is the foundation of such an action plan timeline.
Initialising the European Internet: setting up think tanks to creating the cornerstones and possible pitfalls of such a project.

Table 7: Action plan measures[179]

[179] ibid 39-40 (emphasis added).

7 Bibliography

Bazenov P, 'The Digital Markets Act (DMA): A Procompetitive Recalibration of Data Relations?' [2021] Journal of Law, Technology and Policy, Forthcoming <https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3970101_code4787537.pdf?abstractid=3970101&mirid=1> accessed 20 April 2022

Buri I and van Hoboken J, 'The Digital Services Act (DSA) Proposal: A Critical Overview' (Digital Services Act (DSA) Observatory - Institute for Information Law (IViR), University of Amsterdam 2021) <https://dsa-observatory.eu/wp-content/uploads/2021/11/Buri-Van-Hoboken-DSA-discussion-paper-Version-28_10_21.pdf> accessed 31 March 2022

Castendyk O, 'European Media Law' 1 Online <http://wkldigitalbooks.integra.co.in/Customer/Home/BookDetails?TitleGUID=6187A932-E830-4256-9E87-10AF33530EAA>

Dabrowski LD and Suska M, *The European Union Digital Single Market: Europe's Digital Transformation* (Taylor & Francis 2022)

Edwards L, *The New Legal Framework for E-Commerce in Europe.* (1st ed.., Bloomsbury Publishing Plc, 2005) <https://ebookcentral.proquest.com/lib/univie/detail.action?docID=1772693>

Einwiller SA and Kim S, 'How Online Content Providers Moderate User-Generated Content to Prevent Harmful Online Communication: An Analysis of Policies and Their Implementation' (2020) 12 Policy & Internet 184 <https://doi.org/10.1002/poi3.239> accessed 13 April 2022

Eisenmann TR and Brown A, 'Online Content Providers' (*Harvard Business School - Publications*, November 2000) <https://www.hbs.edu/faculty/Pages/item.aspx?num=27684> accessed 13 April 2022

El-Darwiche B and Macpherson A, 'The Digital Services Acts Package and What It Entails' <https://www.pwc.com/m1/en/publications/documents/the-digital-services-acts-package.pdf> accessed 13 April 2022

European Commission, 'The Digital Markets Act: Ensuring Fair and Open Digital Markets' (2022) <https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 13 April 2022

——, 'The Digital Services Act: Ensuring a Safe and Accountable Online Environment' (2022) <https://ec.europa.eu/info/digital-services-act-ensuring-safe-and-accountable-online-environment_en> accessed 13 April 2022

——, 'European Media Freedom Act: Commission Launches Public Consultation' (10 January 2022) <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_85> accessed 10 August 2022

——, 'E-Commerce Directive' (23 February 2022) <https://digital-strategy.ec.europa.eu/en/policies/e-commerce-directive> accessed 13 April 2022

——, ‘Questions and Answers: Digital Services Act’ (20 May 2022) <https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348> accessed 8 August 2022

——, ‘European Media Freedom Act: Commission Proposes Rules to Protect Media Pluralism and Independence in the EU’ (16 September 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5504> accessed 23 September 2022

European Commission and Directorate-General for Communications Networks C and T, *Study on the Implementation of the New Provisions in the Revised Audiovisual Media Services Directive (AVMSD) – Final Report, Part D* (Publications Office 2021) <https://op.europa.eu/en/publication-detail/-/publication/6d536c6f-5c68-11eb-b487-01aa75ed71a1/language-en> accessed 13 April 2022

European Economic and Social Committee, *Digital Services Act and Digital Markets Act: Stepping Stones to a Level Playing Field in Europe* (European Economic and Social Committee 2021) <https://op.europa.eu/en/publication-detail/-/publication/90f2183f-fa4e-11eb-b520-01aa75ed71a1/language-en/format-PDF/source-251324629> accessed 13 April 2022

European Parliament, ‘EU Digital Markets Act and Digital Services Act Explained’ (4 April 2022) <https://www.europarl.europa.eu/news/en/headlines/society/20211209STO19124/eu-digital-markets-act-and-digital-services-act-explained> accessed 13 April 2022

——, *New Developments in Digital Services: Short - (2021), Medium - (2025) and Long - Term (2030) Perspective and the Implications for the Digital Services Act* (European Parliament 2020) <https://op.europa.eu/en/publication-detail/-/publication/9ef64262-3f4e-11eb-b27b-01aa75ed71a1/language-en/format-PDF/source-251324629> accessed 13 April 2022

——, *The Digital Services Act and the Digital Markets Act: A Forward-Looking and Consumer-Centred Perspective* (European Parliament 2021) <https://op.europa.eu/en/publication-detail/-/publication/f1a00d54-d7b6-11eb-895a-01aa75ed71a1/language-en/format-PDF/source-251324629> accessed 13 April 2022

Harrison R, ‘The EU’s Media Freedom Act – Bolstering Core Union Values through the Narrow Prism of the Internal Market?’ (*RENFORCE BLOG - Utrecht Centre for Regulation and Enforcement in Europe*, 19 May 2022) <http://blog.renforce.eu/index.php/nl/2022/05/19/the-eus-media-freedom-act-bolstering-core-union-values-through-the-narrow-prism-of-the-internal-market/> accessed 6 November 2022

Killeen M, ‘Commission Releases Media Freedom Act Proposal, to Mixed Reactions’ *Euractiv* (16 September 2022) <https://www.euractiv.com/section/media/news/commission-releases-media-freedom-act-proposal-to-mixed-reactions/> accessed 6 November 2022

Reyna A, ‘Why the DMA Is Much More than Competition Law (and Should Not Be Treated as Such)’ (*Chillin’Competition*, 16 June 2021) <https://chillingcompetition.com/2021/06/16/why-the-dma-is-much-more-than-competition-law-and-should-not-be-treated-as-such-by-agustin-reyna/> accessed 20 April 2022

Leistner M, ‘The Commission’s Vision for Europe’s Digital Future: Proposals for the Data Governance Act, the Digital Markets Act and the Digital Services Act—a Critical Primer’ (2021) 16 Journal of Intellectual Property Law & Practice 778 <https://doi.org/10.1093/jiplp/jpab054> accessed 13 April 2022

Mandrescu D, 'The DMA and EU Competition Law: Complementing or Cannibalizing Enforcement?' (*Lexxion > Competition Blogs*, 3 March 2022) <https://www.lexxion.eu/coreblogpost/the-dma-and-eu-competition-law-complementing-or-cannibalizing-enforcement/> accessed 20 April 2022

Mărcuț M, 'Evaluating the EU's Role as a Global Actor in the Digital Space' (2020) 20 Romanian journal of European affairs 85

Nihoul P and Rodford P, *EU Electronic Communications Law: Competition & Regulation in the European Telecommunications Market* (2nd edn, Oxford University Press 2011)

Nosák D, 'Overview of Transparency Obligations for Digital Services in the DSA' <https://cdt.org/wp-content/uploads/2021/06/2021-06-18-CDTEU-Overview-of-transparency-obligations-for-digital-services.pdf and https://cdt.org/insights/overview-of-transparency-obligations-for-digital-services-in-the-dsa/> accessed 10 August 2022

Scheuer A, Bron CM and Kind S, 'European Media Law and Policy Framework' <https://library.fes.de/pdf-files/bueros/sofia/08490.pdf> accessed 13 April 2022

Schulte-Nölke H and others, *The Legal Framework for E-Commerce in the Internal Market - State of Play, Remaining Obstacles to the Free Movement of Digital Services and Ways to Improve the Current Situation* (European Parliament 2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652707/IPOL_STU(2020)652707_EN.pdf> accessed 28 March 2022

Schulze R and Staudenmayer D, *EU Digital Law: Article-by-Article Commentary* (1st edn, Nomos 2020) <https://doi.org/10.5771/9783845291888>

Synodinou T-E and others, *EU Internet Law: Regulation and Enforcement* (Springer 2017)

——, *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer 2020) <https://ubdata.univie.ac.at/AC15420185>

Tambini D, 'The Democratic Fightback Has Begun: The European Commission's New European Media Freedom Act' (*LSE EUROPP - European Politics and Policy*, 16 September 2022) <https://blogs.lse.ac.uk/europpblog/2022/09/16/the-democratic-fightback-has-begun-the-european-commissions-new-european-media-freedom-act/> accessed 6 November 2022

Weinand J, *Implementing the EU Audiovisual Media Services Directive : Selected Issues in the Regulation of AVMS by National Media Authorities of France, Germany and the UK* (1. Auflage 2018., Nomos Verlagsgesellschaft mbH & Co KG 2018) <https://doi.org/10.5771/9783845282473>

Weller M and Wendland M, *Digital Single Market: Bausteine Eines Digitalen Binnenmarkts* (Mohr Siebeck 2019)

DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1

DIRECTIVE 2002/21/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [2002] OJ L108/33

DIRECTIVE 2009/140/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services [2009] OJ L337/37

DIRECTIVE 2010/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [2010] OJ L95/1

DIRECTIVE (EU) 2015/1535 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification) [2015] OJ L241/1

DIRECTIVE (EU) 2016/1148 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union [2016] OJ L194/1

DIRECTIVE (EU) 2018/1972 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 December 2018 establishing the European Electronic Communications Code [2018] OJ L321/36

DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L130/92

European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime [2021] COM(2021) 777 final

European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS On the European democracy action plan [2020] COM(2020) 790 final

——, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the transparency and targeting of political advertising [2021] COM(2021) 731 final

——, COMMISSION RECOMMENDATION of 16.9.2022 on internal safeguards for editorial independence and ownership transparency in the media sector [2022] C(2022) 6536 final

——, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU [2022] COM(2022) 457 final

REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1

REGULATION (EU) 2021/784 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79

REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1

REGULATION (EU) 2022/2065 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1

8 Figures

9 Tables