Institut für Europäisches Medienrecht
Institute of European Media Law
Institut du droit européen des médias

Webinar

supported by

Association of Commercial Television in Europe

Tuesday, 20 April 2021, 10.00 – 12.00 CET

The impact of the proposed DSA and DMA on commercial broadcasting

Background

With a **Digital Markets Act (DMA)** and a **Digital Services Act (DSA)**, the European Commission proposed a regulatory package last December that is to form the new horizontal legal framework for online intermediaries. The proposals are meant to update the e-commerce directive, including its liability privileges, and include an **additional layer of obligations** that will affect all or certain categories of platform providers in the future. However, in the media environment of today, the services offered by these providers are also and above all **content intermediaries**, i.e. part of the distribution chain of media, especially audiovisual content. Obligations stemming from the proposed framework affecting the intermediaries – be it for reasons of improving competition, enhancing consumer protection or safeguarding democratic values – are thus also relevant for content creators. As broadcasting still This raises the important question: **What impact will the DMA and DSA proposals have on commercial broadcasting?**

This question about impact on commercial broadcasting was the topic of the webinar on 20 April 2021, organised by the Institute of European Media Law (**EMR**) and sponsored by the Association of Commercial Television in Europe (**ACT**), which is also available as recording and can be replayed as **VoD**. The webinar video and this event report is aimed at sharing with you the fruitful input from the perspective of the EU legislator, academic experts and stakeholders

Keynote: Commissioner Thierry Breton

After a short introduction and welcome to the event by the host ***Prof. Dr. Mark D. Cole***, Director for Academic Affairs at the EMR, and ***Grégoire Polad***, Director General at ACT, the event opened with a keynote by ***Thierry Breton***, European Commissioner for the Internal Market. As responsible Commissioner for the Digital Services Package, Commissioner Breton highlighted the massive changes in the digital environment which **call for a new regulatory framework**. Threats such as hate speech, disinformation and manipulation need to be addressed by a regulation that recognises as guiding principle for platforms: with greater roles comes greater responsibility. In today's digital environment, platforms that have enormous **power over content** and apply their own terms and conditions to content moderation can no longer be considered mere intermediaries. Therefore, according to Commissioner Breton it is time for **Europe to set its own terms and conditions**, fostering innovation, growth and competitiveness by ensuring a level playing for all digital players. **Such a level playing field will also benefit the media sector**, for example by removing unfair practices in the

usage of viewers/user data generated by gatekeepers and/or business users. This needs a harmonised approach across all of Europe, which also includes other regulatory instruments beyond the Digital Services Act Package such as for example the Media and Audiovisual Action Plan.

Panel 1: DMA – The Digital Markets Act

Whether these goals are reflected in the DMA, in particular whether the proposed DMA would succeed in creating a more level playing field, was discussed in the first panel, focussing on three areas of the DMA in particular: the scope of application, procedural elements and specific obligations included therein for gatekeepers.

With regard to the scope of application, the panellists were largely in agreement that the approach of the DMA with a focus on the most powerful providers of platform services is appropriate. Nevertheless, potential for improvement was identified. ***Prof. Dr. Thomas Höppner, LL.M.***, *Professor of business law at the Technical University Wildau*, highlighted room for improvement in particular in the **list** o**f core platform services** which should be extended regarding at least important players with services such as **web browsers** and at the same time narrowed down by precluding other players in light of safeguarding certain structures such as online electronic communications services and services for online transmission of broadcasting. ***Christophe Roy***, *Director of European Affairs Groupe Canal+ and Chairman of ACT Board*, was of a similar opinion, naming not only web browsers but also **voice assistants** as important (central) platform services that have not yet been clearly included in the list. On the other hand, including VSP in the list, should not lead to the assumption that content creators in general – which are targeted by other, stricter rules at EU level – are within the scope of the DMA, meaning that a potential **spill over** should be avoided. Also ***Dr. Andreas Schwab***, *Member of the European Parliament*, saw room for improvement with regard to the list, in particular in connection with the notion of intermediary services, which - although there needs to be a fall-back for an assessment by the Commission – should be specified, as it otherwise could be understood as covering all online services.

With regard to the "second step" of the scope of DMA, the designation of the providers of core platform services as gatekeepers, the panellists agreed that the DMA approach still needs to be improved. On the one hand, this concerns the **criteria** for evaluation by the Commission. *Roy* emphasised that the envisaged quality criteria are formulated too vaguely and therefore open up room for circumvention. *Höppner* also saw possibilities for **finetuning and improvement**. *MEP Schwab* emphasised the importance of the DMA focusing on the **sheer size of gatekeepers**, as this is ultimately the approach to regulation per se. There is therefore little room for considering specificities and he considered the currently envisaged thresholds to be quite low already.

On the other hand, as the panellists pointed out, the criteria and especially their clarity and concreteness are related to **temporal aspects**: The more concrete the criteria, the clearer the classification as gatekeeper and the faster the DMA finds practical application. This also led to another important point of discussion: the procedural design of the DMA, which – as became very evident in the discussion – provides for **many different steps before** its rules then actually come into **effect**.

MEP Schwab underlined that the speeding up of the processes is key in his opinion which includes both the legislation procedure and the implementation. The regulator should not lose too much time with decisions even if the principle of proportionality and the rule of law must be taken into account. He in particular pointed out a need for **strengthening** the Commissions possibilities under **Art. 7** of the DMA Proposal. *Höppner* highlighted that in the proposal some **crucial decisions are not linked to a timeline** (such as the

decision to launch proceedings by the Commission) while some **other timelines appear as being too long** (such as 6 months for compliance of gatekeepers). In his opinion it must be ensured that obvious gatekeepers cannot involve the Commission in **lengthy procedures** in order to escape their designation as gatekeepers. This was also supported by *Roy*, who put this in the context of the needs of the media industry, which is dependent on a **quick application of the rules** against the background that broadcasters (have to) rely more on the services of gatekeepers every day in order to gain visibility in the digital market and thereby experience very imbalanced commercial negotiations with platforms. He also remarked that some of the obligations foreseen have already been discussed at length on EU and stakeholder level and should therefore not present surprises for gatekeepers which they would need time to adapt to. In this context, *Roy* expressed some doubts regarding an **effective and timely enforcement** of the DMA, in particular questioning if the Commission has **sufficient resources** foreseen for this huge task and if the DMA would not profit from a larger **involvement of national regulatory authorities**.

The last point on the agenda of this panel concerned the obligations of the DMA Proposal in Articles 5 and 6. *MEP Schwab* called for a very **clear cutting point** as to what platforms are allowed to do but also highlighted the need for a **certain amount of flexibility** because in some cases maybe certain actions must be allowed or allowed for a certain period of time to enable contestability which is currently ensured by the powers of intervention from the Commission. However, in *MEP Schwab's* opinion this could **not be done without the Parliament** meaning that when the law needs to be adapted to new developments the Parliament must be involved. By highlighting that both Art. 5 und 6 are **directly applicable** independent of the options of a regulatory dialogue, *Höppner* saw room for a broadening in particular with regard to Art**. 6 para. 1 lit. k**, which is at the moment limited to access to app stores, and the provisions on **advertising**, which are currently limited to transparency obligations only. *Roy*, too, saw some **gaps and loopholes**, in particular criticising the absence of a prohibition of **bundling practices**, the narrow design of the prohibition of self-preference only dealing with ranking and not including the preference of certain business partners via exclusive agreements, as well as the partly unclear nature of the concrete implementation of **(algorithmic) transparency** obligations.

Keynote: Guillaume de Posch

***Guillaume de Posch**, ACT President*, made the connection of this discussion on the DMA to the DSA by drawing in his keynote an overall picture of the impact of both proposed instruments on the broadcasting sector. He characterized the impact as being huge in light of the way media is consumed in the EU today. Television is **no longer linear only but also online and on demand**. However, the role of broadcasting to deliver trusted news and invest in creative content has not changed. The actors addressed by the DMA and the DSA play a crucial role as intermediaries of broadcasters' content and in the context of financing their offers. *De Posch* underlined, that although they are both in the same package, the proposed **regulations tackle very different issues** – the DMA competitiveness aspects of fairness and creating a level playing field and the DSA ensuring that what is illegal offline is illegal online – and therefore have to be **assessed clearly distinct from each other**. Nevertheless, both need to ensure an effective and timely implementation to ensure for the creative media ecosystems remaining a driver for employment and GDP in the EU.

Furthermore, they need to be aligned with existing jurisprudence and legislation, in particular in the field of copyright law, and **not contradict**

developments of the industry and successes already achieved in respective fields. In this light, *de Posch* emphasised that if we are talking about content dissemination through intermediaries we need to take into account some specificities in light of the value media and their content have for **media pluralism**, **cultural diversity** and **trusted information**.

Panel 2: DSA – The Digital Services Act

The second panel on the DSA focussed on media and their dissemination in the scope of the DSA, the new (old) liability regime and the new obligations posed on certain intermediaries.

Regarding the scope of the proposal, ***Arba Kokalari**, Member of the European Parliament*, pointed out in an overall approach that the new legal framework needs to balance interests of all actors involved in light of their fundamental rights, meaning that it needs **very clear rules**, **avoid general monitoring** and **overregulation** in particular to ensure competitiveness of smaller companies in the EU. She welcomed that the DSA Proposal is limited to **illegal content** and does not extend to harmful content ensuring that only the legislator and not the platforms are empowered to decide on limiting the freedom of speech online. ***Prof. Dr. Eleonora Rosati**, Professor of Intellectual Property Law at the Stockholm University*, brought forward some concerns regarding the scope of the DSA to be aligned with other rules and called for ensuring **more legal clarity** in this regard. As an example, she mentioned **copyright law**, in particular Art. 17 of the DSM Directive currently being transposed in Member States national law, which has clear intersections with the proposed rules in various places such as the targeting and flagging of content as well as the question of safe harbour liability privileges. *MEP Kokalari* mentioned also the Platform-to-Business Regulation in light of the need for further discussion on clarifying the interrelation with the DSA. ***Daniel Friedlaender**, European Affairs Director and Head of Sky Group EU Office,* added in this regard, that if there is not a very clear overall horizontal framework it will **undermine sectoral legislation** already existing not only in the field of copyright law. Furthermore, he warned from excluding smaller companies from obligations in general because of their nevertheless huge **potential to cause harm** on rights of third parties.

This led to the discussion on the general approach of the DSA maintaining the principles of liability from the e-Commerce Directive but adding further aspects such as an attempted clarification on the '**Good Samaritan approach**', rules on administrative legal orders and an additional layer of obligations for platforms. While the speakers agreed that in principle it is the right approach to retain the approach of the previous liability privilege regime in principle, the need to ensure certain aspects was seen. *MEP Kokalari* emphasised that it is important, as the DSA was aiming at, that platforms take on **more responsibility** and that they are prevented from dealing differently with illegal content, as has been the case up to now, but on the other hand, intermediaries should not be treated like 'publicists'. *Rosati* and *Friedlaender*, however, saw some clear need for clarifications in the current Proposal. *Rosati* in particular brought forward the **lack of clarity** in which cases the **safe harbour principle** is applicable, pointing on Art. 1 addressing only intermediaries while Recital 17 speaks of any type of liability. She also expressed concern about whether the proposal's own statement that the rules are intended to **codify CJEU case** law would really be followed throughout the proposal. Agreeing on these poins, *Friedlaender* emphasised that the DSA should **not lead to shielding platforms** more than is the case now and in this way **contradict successes** already achieved in practice to date, especially in the area of copyright. In his opinion, the DSA must address the change in behaviour of platforms which today have more level of control on the content they intermediate.

Also, with regard to the obligations that the DSA would impose on platforms, the panellists underlined some problematic aspects of the current proposal, in particular around the notice and action mechanisms and the design of the trusted flagger system. *Rosati* very clearly pointed to four points in need of improvement: (1) The action triggering notice being **URL-based** which she regards as not in line with CJEU case law, nor being future proof regarding the many services that are not desktop-based and disseminating illegal content, (2) the **lack of a stay down** obligation which is already foreseen in copyright law, (3) the lack of a clear possibility for the **suspension of providers** that manifestly spread illegal content, and (4) the rules on **advertisement** providing for transparency only where more stricter provisions should be discussed. While *MEP Kokalari* and *Friedlaender* warned regarding the latter on a **general ban from targeted advertising** as indicated in some contributions as a regulatory option, *Friedlaender* particularly emphasised the impracticality of relying on a URL-based system, which would make no sense especially with regard to the significance of, for example, apps, and instead advocated looking in the direction of **dynamic injunctions**. According to him, the stay down mechanism is key for content creators in relation to repeated infringements, for which there are corresponding policies of the platforms and agreements in current practice, but which are not uniform. He also raised concerns about **the system of trusted flaggers**, which must be tightened and ensure that rightsholders who know their content best and act responsible are actually categorized as trusted flaggers. There should be no regression here. *MEP Kokalari* also saw an important point for clarification on who is a trusted flagger and ensuring that the system cannot be abused.

Keynote: Fernanda Ferreira Dias

In light of this rich input from the discussion, the online conference closed with the keynote of ***Fernanda Ferreira Dias***, Director General of the Portuguese Ministry of Economy and Digital Transition, in particular giving an insight what is to be expected from the Portuguese Council Presidency. She highlighted the importance of the development of the digital sector for the EU and with that, the importance of the Digital Service Package, not only for the EU but on a **global** level. The EU has the opportunity to be a **role model** for ensuring safety of online users but also allowing innovation with setting **high and human-centric standards** in the digital environment, which is not only a matter of the DSA and the DMA but also other initiatives dealing with the digital sector on EU level currently being prepared. This, according to Ferreira Dias, is a **priority for the Portuguese Presidency** and therefore already led to the timely finishing of a first full reading in the Council. She announced that a progress report will be presented at the end of May and that the Presidency is aiming to deliver a compromise text at the end of the Portuguese Presidency. Ensuring the timely entry into force of the rules is key. This, Ferreira Dias emphasised, is in particular true for the **media sector**, which is **essential in light of public safety and public information**. This was very clearly illustrated again by the ongoing pandemic situation. In order to solve identified problems in this area, which is the aim of the DMA and the DSA, the two sets of regulations need to be pushed forward swiftly in her view.

You will find this conference report as well as the VoD of the conference also at our website https://emr-sb.de/.